

The Legitimacy of Indigenous Intellectual Property Rights' claims

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Abstract

The notions of indigenous peoples, indigenous knowledge, and heritage and culture have acquired wide usage in international debates on sustainable development and intellectual property protection since the turn of the 20th century.

This paper, through an examination of the concept of intellectual property and its intersection with culture and heritage, elucidates the nature and scope of indigenous intellectual property rights as represented by traditional knowledge, traditional cultural expressions and genetic resources.

This paper, through a review of the interface between indigenous knowledge systems and the intellectual property law regime, illustrates the limitations of conventional intellectual property rights systems i.e.: copyright, patent, trade secrets and trademark in providing adequate recognition and protection for indigenous intellectual property rights. It also posits that the establishment of a sui generis system of protection offers a plausible solution to the inadequacy of the existing regimes of protection.

This paper ultimately seeks to illustrate indigenous people's legitimate rights to control, access and utilize in any way, including restricting others' access to, knowledge or information that derives from their unique cultural histories, expressions, practices and contexts, towards the creation of a better society.

I. Introduction

Intellectual property as a legal concept involves the protection of the legal rights that result from creations of the mind such as: inventions, literary and artistic works, symbols, names as well as images and designs that are used in

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commerce.¹ It is generally thought to comprise the following regimes: copyright, trademark, patent, industrial designs and trade secrets.²

The principles that encompass intellectual property have evolved over the centuries. It is documented that in 500 BC, the government of the Greek state of Sybaris offered a patent that would subsist for a period of a year to ‘all who should discover any new refinement in luxury’.³ Jewish law includes principles whose effects are similar to those of modern intellectual property law such as the principle of *Hasagat Ge’vul*, which was used to justify limited term publisher copyright in the 16th century.⁴

Modern usage of the term intellectual property can, however, be traced back to the 19th century with the founding of the North German Confederation in 1867, whose constitution granted the confederation legislative power over the protection of intellectual property. It later became the United International Bureau for the Protection of Intellectual Property with the merging of the Paris Convention for the Protection of Industrial Property (1883)⁵ and the Berne Convention for the Protection of Literary and Artistic Works (1886).⁶ The United International Bureau for the Protection of Intellectual Property was the forerunner of the present day World Intellectual Property Organisation (WIPO) that was established by treaty as an agency of the United Nations in 1967.⁷ WIPO’s mandate is to lead the development of a balanced and effective international intellectual property system that fosters innovation and creativity as well as to provide a forum for intellectual property services, policy, information and cooperation.

Intellectual property rights allow the creators, owners or proprietors of patents, trademarks or copyrighted works to benefit from their own work or creation. Article 27 of the Universal Declaration of Human Rights provides for

¹ WIPO, ‘What is Intellectual Property?’ <http://www.wipo.int/about-ip/en/> on 24 November 2015.

² Bouchoux D, *Intellectual Property: The law of trademarks, copyrights, patents and trade secrets*, Delmar Cengage Learning, 2012, 2.

³ Anthon C, *A Classical Dictionary: Containing an Account of the Principal Proper Names Mentioned in Ancient Authors, and Intended to Elucidate All the Important Points Connected with the Geography, History, Biography, Mythology, and Fine Arts of the Greek and Romans. Together with an Account of Coins, Weights, and Measures, with Tabular Values of the Same*, Harper & Brothers, 1869, 30.

⁴ Shneider I, ‘Jewish Law and Copyright. Examining Halacha,’ *Jewish Issues and Secular Law*, 1997-2010, 2.

⁵ *Paris Convention for the Protection of Industrial Property*, 20 March, 1883. http://www.wipo.int/treaties/en/text.jsp?file_id=288514 on 1 October, 2015.

⁶ *Berne Convention for the Protection of Literary and Artistic Works*, 9 September, 1886 http://www.wipo.int/treaties/en/text.jsp?file_id=283698 on 1 October, 2015.

⁷ WIPO, ‘What is Intellectual Property?’ 3.

the right to benefit from the protection of moral and material interests resulting from authorship of scientific, literary or artistic productions.⁸ Kenya's intellectual property law regime is encompassed in the: *Constitution of Kenya* (2010),⁹ *Trademarks Act*,¹⁰ *Copyright Act*,¹¹ *Industrial Property Act*,¹² *The Seeds and Plant Varieties Act*¹³ and international intellectual property treaties, conventions or instruments to which Kenya is a party.¹⁴

In the current age of globalisation, there have emerged certain contemporary issues in the field of intellectual property law. Globalisation in the context of intellectual property law refers to the rapid integration of goods, services and information over borders; both real and virtual.¹⁵ It has catalysed the harmonisation of intellectual property law¹⁶ as seen in the introduction of intellectual property rules into the multilateral trading system¹⁷ by the World Trade Organisation's (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) negotiated in the 1986-94 Uruguay Round.¹⁸

One issue that emerged was of the interaction between intellectual property law and culture. What is often considered as the earliest definition of culture was written in 1871 by British anthropologist Sir Edward Burnett Tylor who described it as: "that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man as a member of society".¹⁹ Culture is therefore the response of a particular community to its interaction with its environment. It is transmitted from generation to generation and its custodian is the community itself.²⁰

⁸ Article 27, *The Universal Declaration of Human Rights* 10 December 1948, G.A. Res. 217 A (III), U.N.Doc A/810 at 71.

⁹ *Constitution of Kenya* (2010) available eKLR.

¹⁰ *Trademarks Act* (Act 51 of 1955).

¹¹ *Copyright Act* (Act 12 of 2001).

¹² *Industrial Property Act* (Act No. 7 of 2007).

¹³ *The Seeds and Plant Varieties Act* (Cap 326, 1991).

¹⁴ Article 2(6), *Constitution of Kenya* (2010): "Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution".

¹⁵ Keshavjee O, 'Globalization and Intellectual Property: How does the TRIPS agreement affect developing nations' Unpublished MDiv thesis, Stellen Bosch University, 29 August 2011, 4.

¹⁶ Anderson J, *Law, Knowledge, Culture: The production of indigenous knowledge in intellectual property law*, Edward Elgar Publishing Limited, 2009, 176.

¹⁷ https://www.wto.org/english/tratop_e/tratop_e/trips_e/trips_issues_e.htm on 25 November 2015.

¹⁸ It was the 8th round of multilateral trade negotiations conducted within the framework of the General Agreement on Tariffs and Trade (GATT). It is the largest trade negotiation in history with the participation of 123 countries and led to the creation of the WTO. https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm on 25 November 2015.

¹⁹ Tylor E, *Primitive Culture*, New York J. P. Putnam's Sons, 1920.

²⁰ 'Steiner C: Intellectual Property and the Rights to Culture' <http://www.wipo.int/tk/en/hr/>

The Doha Declaration of 2001²¹ brought the protection of indigenous people's knowledge and culture to the forefront as a contemporary intellectual property issue²² when it stated that the TRIPS Council should look at the relationship between the TRIPS Agreement and the United Nations (UN) Convention on Biological Diversity (CBD) and the protection of traditional knowledge and folklore.²³

The point of convergence between intellectual property law and culture is represented by the concept of indigenous intellectual property.

II. Indigenous Intellectual Property

Indigenous intellectual property is an umbrella legal term used to identify the special rights of indigenous groups to claim (from within their own laws)²⁴ all their cultural knowledge and heritage²⁵ together with their right to maintain, control, protect and develop their intellectual property over such cultural heritage and knowledge.²⁶

The heritage of indigenous peoples is comprised of "all objects, sites and knowledge the nature or use of which has been transmitted from generation to generation, and which is regarded as pertaining to a particular people or its territory".²⁷ Indigenous knowledge, which refers to the large body of information and skills that are unique to a particular indigenous group,²⁸ is embedded in the group's culture and facilitates communication and decision-making within

paneldiscussion/papers/pdf/steiner.pdf on 24 November 2015

²¹ The Doha Declaration arose out of the Doha Development Round commenced in November 2001 whose objective is to lower global trade barriers and thus facilitate increased global trade. WTO "The Doha Declaration Explained". https://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm on 25 November 2015.

²² Von Lewinski S, *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore*, 38.

²³ Article 19, *Doha Declaration*, 20 November 2001, WT/MIN(01)/DEC/2.

²⁴ Article 1.1, *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, 12 June 1993.

²⁵ Rainforest Aboriginal Network, *Julayinbul: Aboriginal Intellectual and Cultural Property Definitions, Ownership and Strategies for Protection*, Cairns, 1993, 65.

²⁶ Article 31.1, *United Nations Declaration on the Rights of Indigenous Peoples*.

²⁷ Daes E, *Discrimination Against Indigenous Peoples: Protection of the Heritage of Indigenous People, Final Report*, *United Nations Economic and Social Council, E/CN.4/Sub.2/1995/26*, 21 June 1995, 10, para. 11 & 12.

²⁸ Brokensha D, Warren D, Werner O, *Indigenous knowledge systems and development*, University Press of America, Washington, DC, 1998, 4.

the community. Indigenous knowledge systems are dynamic and adapt to the community's needs and environment over time.²⁹

Based on this, indigenous intellectual property rights are rights over:

i. *Traditional Knowledge (TK)*³⁰

The term is 'traditional knowledge', derived from a longer term 'traditional knowledge, innovations and practices' that was used in early international discussions in the Convention on Biological Diversity in the early 1990s³¹ where it was defined as the knowledge, innovations and practices of indigenous and local communities that embody traditional lifestyles relevant for the conservation and sustainable use of biological diversity.³² WIPO in its fact-finding missions on traditional knowledge in 1999³³ expressed it as referring to the 'tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields.'³⁴

It can therefore be said to refer to knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including 'know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another.'³⁵

The 'traditional' aspect of traditional knowledge is due to the manner in which it has been preserved and transmitted within a community, from one generation to another, rather than its object, subject or antiquity.³⁶

²⁹ Flavier J, 'The regional program for the promotion of indigenous knowledge in Asia', 1995, 479-487.

³⁰ The Kenyan National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, 2009.

³¹ <https://www.cbd.int/traditional/what.shtml> on 26 November 2015.

³² Article 8(j); *Convention on Biological Diversity*, 1992.

³³ In 1998 and 1999, WIPO conducted fact-finding missions to 28 countries to identify intellectual property needs and expectations of TK/TCEs holders. WIPO, *Customary Law, Traditional Knowledge And Intellectual Property: An Outline Of The Issues*, 2013, 8.

³⁴ WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders*, WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge, 1998-1999.

³⁵ Section 2, *Snapekpmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore*, 2010.

³⁶ 'Traditional Knowledge: From Theory to Practice In Protection', 76. http://shodhganga.inflibnet.ac.in/bitstream/10603/12824/9/09_chapter%203.pdf on 26 November 2015.

*ii. Traditional Cultural Expressions/Folklore (TCEs)*³⁷

These are a product of the inter-generational social and communal creative processes that are reflective of a community's history, culture and social identity and values.³⁸ They are also referred to as 'expressions of folklore'³⁹ and may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives among any other artistic or cultural expressions.⁴⁰

Examples of forms of expressions that may comprise TCEs include, but are not limited to: verbal expressions such as stories, epics, legends, riddles and other narratives, words, signs, names and symbols, musical expressions, expressions by movement such as dances, rituals and other performances; whether or not reduced to a material form, and tangible expressions, including productions of art, carvings, jewelry, basketry, glassware, carpets, musical instruments; and architectural forms.⁴¹

Relationship between traditional knowledge and traditional cultural expressions

While it is recognised that indigenous groups perceive traditional knowledge and traditional cultural expressions as integral parts of a holistic cultural identity subject to the same body of customary law, WIPO considers the legal protection of traditional knowledge and cultural expressions as distinct.⁴² WIPO had originally included TCEs as a subset of traditional knowledge in its report; 'Intellectual Property Needs and Expectations of Traditional Knowledge Holders'⁴³ but eventually distinguished⁴⁴ the two due to the fact that their protection

³⁷ WIPO, 'Intellectual Property and Traditional Cultural Expressions/Folklore: booklet No.2, Publication No. 913(E), 6.

³⁸ Hoffmann B, *Art and Cultural Heritage: Law, Policy and Practice*, Cambridge University Press, 2006, 328.

³⁹ Some communities have expressed reservations about the negative connotations associated with the word "folklore." WIPO nowadays uses the term "traditional cultural expressions"(or simply "TCEs"). Where it is used, "expressions of folklore" is understood as a synonym of TCEs. WIPO, 'Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions, Publication No. 933E, 2015, 16.

⁴⁰ <http://www.wipo.int/tk/en/folklore/> on 26 November 2015

⁴¹ Section 2; ARIPO Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the framework of ARIPO (2010)

⁴² Hoffmann B, *Art and Cultural Heritage: Law, Policy and Practice*, 2006, 328.

⁴³ WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders – WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge*, 1999, 25-26.

⁴⁴ WIPO, *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*, WIPO/GRTKF/IC/6/4, 2006, Article 1.

raises distinct legal issues, involves different stakeholders and they are, individually, subject to different forms of exploitation.⁴⁵

Further, WIPO's work contemplates a means of legal protection beyond the customary context and does not seek to impose definitions on indigenous people's customary laws and protocols.⁴⁶ WIPO's approach in this respect is compatible with and respectful of the traditional context in which traditional knowledge and cultural expressions are viewed as a part of an inseparable whole.⁴⁷

iii. Genetic Resources (GRs)

This refers to genetic material of actual or potential value⁴⁸ and includes material of plant, animal, microbial or other origin containing functional units of heredity.⁴⁹ Traditional knowledge often provides hints as to which organisms are of potential commercial interest, especially with regard to medicine. Genetic resources in this respect are regarded as an indigenous resource.⁵⁰

Indigenous peoples represent a broad range of cultural groups spanning over different continents such as the Nordic Sami and the Maa-speaking people of East Africa. Indigenous peoples have unique traditions, beliefs and cultural practices, which have been shaped over centuries by specific social and environmental factors. These practices in turn shape their respective indigenous knowledge systems.

There is no universally accepted definition of the term 'indigenous persons' but it can be described as a body of persons united by a common culture, tradition or sense of kinship. They have a common language and institutions and often constitute a politically organised group.⁵¹ During the deliberations of the Declaration on the Rights of Indigenous Peoples, most Latin American states argued that no definition of 'indigenous peoples' was needed and they thus advocated the right to self-definition while African and Asian states were of the

⁴⁵ Anderson J, *Law, Knowledge, Culture: The production of indigenous knowledge in intellectual property law*, Edward Elgar Publishing Limited, 2009, 188.

⁴⁶ Antons C, *Traditional Knowledge, Traditional Cultural Expressions, and Intellectual Property Law in the Asia-Pacific Region*, Kulwer Law International, 2009, 2-3.

⁴⁷ Hoffmann B, *Art and Cultural Heritage: Law, Policy and Practice*, 2006, 329.

⁴⁸ Article 1, *Convention on Biological Diversity* (1992).

⁴⁹ Article 2, *Convention on Biological Diversity* (1992).

⁵⁰ Von Lewinski S, *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore*, Kluwer Law International, 2008, 182.

⁵¹ Von Lewinski S, *Indigenous Heritage and Intellectual Property*, 130-131.

opinion that a definition was necessary.⁵² The term ‘local communities’ was thus adopted in the Convention on Biological Diversity (CBD)⁵³ at the United Nations Conference on Environment and Development (1992)⁵⁴ that took place at Rio de Janeiro, to refer to communities that are not indigenous but maintain a traditional lifestyle as seen in many African countries.

One of the most cited descriptions of the concept of ‘indigenous people’ was given by Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his study on the Problem of Discrimination against Indigenous Populations, where he stated:

‘Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system... On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group). This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference.’⁵⁵

Indigenous peoples constitute approximately 5% of the total world population and approximately 15% of the world’s poor.⁵⁶ They possess unique cultural assets, such as knowledge on plants with healing properties curated over millennia. In traditional systems, a system of customs and taboos protected the indigenous group’s knowledge, and ensured the preservation of their culture as well as the proper utilization of their resources. Unfortunately, these systems have been eroded by the modernisation of many of these communities.⁵⁷ Some scholars argue that modernisation is incidental to the colonisation of indigenous commu-

⁵² Von Lewinski S, *Indigenous Heritage and Intellectual Property*, 10-11.

⁵³ Preamble, *Convention on Biological Diversity*, 1992.

⁵⁴ *United Nations Conference on Environment and Development (1992)*.

⁵⁵ *Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* U.N. Doc. E/CN.4/Sub. 2/1986/7/Add. 4, paras 379-380.

⁵⁶ ‘Indigenous people and rural poverty’ <http://www.ruralpovertyportal.org/topic/home/tags/indigenouspeoples> on 1 September 2015.

⁵⁷ Modernization in this respect means to remold a cultural system into a new mode. Naufusa H, *Traditional Cultures and Modernization: Several Problems In The Case Of Japan*. <http://www2.kokugakuin.ac.jp/ijcc/wp/cimac/hirai.html> on 27 November 2015.

nities.⁵⁸ As a result, it transformed the political, economic and social dimensions of these communities⁵⁹ resulting in the erosion of their customs and traditional structures to varying degrees.⁶⁰

The interaction between the West and Indigenous Peoples has been fraught with tension shaped mainly by the dynamics of colonialism and its resultant legacy. In the early colonial period Western perspectives interpreted Indigenous Nations through the lens of 'Social Darwinism'⁶¹ as primitive and subhuman. Consequently, despite its immense universal value, traditional knowledge was also seen to be of little or no value.⁶² Further, the derogatory use of the word 'folklore' by Western stakeholders when referring to traditional knowledge is evidence of this limited view.⁶³ The 20th and 21st centuries saw a shift in this paradigm with the emergence of indigenous knowledge as a major trade issue as seen in the rise of bio-piracy⁶⁴ as triggered by the advent of biotechnology.⁶⁵

The commercial value and viability as well as the intrinsic value of indigenous peoples' knowledge and resources became apparent in the development of a lucrative trade in indigenous culture and heritage with most economic benefits diverting to non-indigenous parties. For example the Maasai community of Kenya and Tanzania are a casualty as seen by the derivation of profit by several

⁵⁸ Ahmad A, *The politics of literary post-coloniality. Race & Class*, 1995, 7.

⁵⁹ Naidu V, *Modernisation and Development In The South Pacific*, 2006, 1.

⁶⁰ Rai D, 'The impacts of modernization on the traditional Sakawa Sili festival in the Rai Kirat community of Nepal: A case study of the Rai community', Mphil Thesis, University of Tromso Norway, 2012.

⁶¹ Social Darwinism, a term coined in the late 19th century to describe the idea that humans, like animals and plants, compete in a struggle for existence in which natural selection results in "survival of the fittest." It is an application of the theory of natural selection to social, political, and economic issues and was used by some to promote the idea that the white European race was superior to others, and therefore, destined to rule over them. Kevles D, 'In the Name of Darwin', <http://www.pbs.org/wgbh/evolution/darwin/nameof/> on 25 November 2015.

⁶² WIPO, *Intergovernmental Committee on Intellectual Property and Genetic Resources Traditional Knowledge and Folklore Seventeenth Session Geneva, December 6-10, 2010*, WIPO/GTRKF/IC/17/INF/5(A), 2010, 7.

⁶³ Young-Ing G, 'Intellectual property rights, legislated protection, sui generis models and ethical access in the transformation of indigenous traditional knowledge, PHD Thesis, The University of British Columbia October, 2006.

⁶⁴ Bio-piracy in the context of biogenetic resources refers to the unauthorised commercialization of indigenous people's knowledge, seeds and plants without their informed consent. Posey D, Dutfield G, *Beyond Intellectual Property: Towards Traditional Resource rights for indigenous peoples and local communities*, International Development Research Centre, Ottawa, 1996, 44.

⁶⁵ Chaturverdi S, 'Biodiversity, intellectual property rights regime and indigenous knowledge system at WTO: revisiting the unresolved issues' in Gallagher K, *Handbook on Trade and the Environment*, Edward Elgar Publishing, 2010, 267.

large multinationals such as Land Rover⁶⁶ and large fashion houses such as: Luis Vuitton,⁶⁷ Ralph Lauren, Calvin Klein and Diane von Furstenberg. This has resulted in the creation of Maasai Intellectual Property Initiative (MIPI) which was founded and supported by the Washington DC based non-profit organisation, Light Years IP. This initiative works across Kenya and Tanzania and is dedicated to reclaiming the Maasai ownership of its iconic cultural brand.⁶⁸

Further, the incorporation of 'TRIPS'⁶⁹ into the General Agreement on Tariffs and Trade (GATT) in 1994 has,⁷⁰ in some critics' views, provided the impetus for further commercialization by predominantly affluent industrialized countries of the knowledge and products of indigenous and local communities.⁷¹

Up until the mid-1990s, the WIPO held the position that it did not have the mandate to deal with issues relating to indigenous peoples. This position shifted as the organisation was inundated with problems relating to the application of intellectual property to indigenous knowledge.⁷² The clamour by indigenous peoples for the recognition of their intellectual property rights by the organisation could no longer be ignored, culminating in the formation of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) in the year 2000.⁷³ This committee

⁶⁶ Faris S, 'Can a Tribe Sue for Copyright? The Maasai Want Royalties for Use of Their Name' *Bloomberg Business*, (October 24, 2013) <http://www.bloomberg.com/bw/Articles/2013-10-24/africas-maasai-tribe-royalties-for-commercial-use-of-their-name> on 1 October, 2015.

⁶⁷ Faris S, 'Can a Tribe Sue for Copyright? The Maasai Want Royalties for Use of Their Name' <http://www.bloomberg.com/bw/Articles/2013-10-24/africas-maasai-tribe-royalties-for-commercial-use-of-their-name> on 1 October, 2015.

⁶⁸ Brindle M and Layton R, 'The Maasai Intellectual Property Initiative: Reclaiming the Maasai IP for Kenyan and Tanzanian Maasai' <http://lightyearsip.net/files/maasai-workbook.pdf> on 1 October 2015.

⁶⁹ *Trade-Related Aspects of Intellectual Property Rights*, Morocco, 15 April 1994 https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm on 1 October.

⁷⁰ General Agreement on Tariffs and Trade, Geneva, July 1986 https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf on 1 October, 2015.

⁷¹ Davis M, '*Indigenous Peoples and Intellectual Property Rights*' 1996, , 16. http://www.aph.gov.au/About-Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697/97rp20 on 24 November 2015

⁷² Young-Ing G, 'Intellectual property rights, legislated protection, sui generis models and ethical access in the transformation of indigenous traditional knowledge, PHD Thesis, The University of British Columbia October, 2006, 12.

⁷³ WIPO, *WIPO General Assembly Twenty-Sixth (12th Extraordinary) Session Geneva, September 25 to October 3, 2000: Matters concerning intellectual property and genetic resources, traditional knowledge and folklore*, WO/GA/26/6, 2002, 2.

Matters concerning intellectual property and genetic resources, traditional knowledge and folklore WO/GA/26/6

has since then undertaken text-based negotiations with the objective of reaching agreements on a text of international legal instrument that will effectively protect indigenous intellectual property rights.⁷⁴ Efforts have been made to increase indigenous representation in international policy-making contexts such as through the WIPO Indigenous Fellowship Program.⁷⁵

Fortunately, the self-organisation and the activities of indigenous peoples' representatives have resulted in the issue of indigenous intellectual property rights being put under a spotlight. Numerous non-governmental organisations that represent indigenous peoples' issues liaise with WIPO, with the number of such ad hoc organisations admitted into WIPO reaching more than 130 by the year 2007.⁷⁶ This has resulted in developments through the work of the Intergovernmental Committee IGC that has allowed WIPO to formulate draft principles and substantive provisions for legal norms on the protection of traditional knowledge.

Indigenous intellectual property as a concept has been brought about by the right of indigenous people to self-determination,⁷⁷ in exercise of which they must be recognised as the exclusive owners of their cultural and intellectual property.⁷⁸ It is the recognition of the commonality of indigenous peoples' experiences relating to the exploitation of their cultural property as well as the insufficiency of the existing protection mechanisms in the protection of indigenous peoples' intellectual and cultural property rights.⁷⁹

It further presents unique issues that transcend legal or commercial questions, i.e., ethical, cultural, historical, political, religious/spiritual and moral dimensions.⁸⁰ For example, inappropriate use of sacred cultural artefacts, symbols

⁷⁴ WIPO, 'The WIPO intergovernmental committee on intellectual property and genetic resources, traditional knowledge and folklore: background brief No.2', 2.

⁷⁵ It was launched in 2009 and members of indigenous and local communities have worked with it in response to the rapidly growing domain of indigenous intellectual property. <http://www.wipo.int/tk/en/indigenous/fellowship/> on 1 September 2015.

⁷⁶ Von Lewinski S, *Indigenous Heritage and Intellectual Property*, 2.

⁷⁷ "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". Article 3 *United Nations Declaration on the Rights of Indigenous Peoples*, 2007 G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013.

⁷⁸ Preamble, *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, 12 June 1993.

⁷⁹ Preamble, *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, 12 June 1993.

⁸⁰ Von Lewinski S, *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore*, 19.

or designs may not only cause financial loss but also cause considerable offense to the relevant community that is the custodian of such artefacts.

An understanding of the genesis of this complex issue is gleaned from an analysis of the interaction between the intellectual property law regime and indigenous knowledge systems.

III. Interaction between the Intellectual Property Law Regime and Indigenous Knowledge Systems (IKS)

A marked feature of the discourse concerning the protection of indigenous intellectual property rights is the inadequacy of the conventional intellectual property law regime in the protection of indigenous knowledge.

The *status quo* in the intellectual property legal regime with relation to intellectual property rights is the intellectual property rights system. Liberal Eurocentric conceptions, upon which modern intellectual property rights laws are based, maintain that individuals have a right to private property, in order to facilitate economic exploitation by the holder of the rights.⁸¹ In response, Intellectual Property Rights (IPRs) were created to enable the individual to gain monetarily from the proceeds of his intellect. According to Adam Moore, ‘at the most practical level the subject matter of intellectual property is largely codified in Anglo-American copyright, patent, and trade secrets law, as well as moral rights granted to authors and inventors within the continental Europe doctrine.’⁸² Moore argues that, although these systems of property encompass much of what is thought to count as intellectual property, they do not in reality take cognizance of the entire landscape of what intellectual property truly signifies, which includes indigenous knowledge.⁸³ Halewood reiterates this view by expressing that: “the indigenous view differs radically from the Western conceptualization...For local communities, rights are a means of maintaining and developing group identity rather than pursuing private economic benefit...”⁸⁴

⁸¹ Ezeanya C, ‘Contending Issues of Intellectual Property Rights Protection and Indigenous Knowledge of Pharmacology in Africa South of the Sahara’ *Journal of Pan African Studies*, vol 6 (2003), 27.

⁸² Moore A, *Intellectual Property; Moral, Legal, and International Dilemmas*, Rowman & Littlefield Publishers, Oxford, 1997, 21.

⁸³ Moore A, *Intellectual Property; Moral, Legal, and International Dilemmas*, Rowman & Littlefield Publishers, Oxford, 1997, 21-22.

⁸⁴ Halewood M, Indigenous Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection, 44 *McGill Law Journal*, 155-171.

Furthermore, indigenous knowledge systems are regulated by customary law which holds that indigenous knowledge is connected to political, social, spiritual, and environmental facets of the indigenous community⁸⁵ and as such that knowledge cannot be viewed as a separate entity.⁸⁶ Collective rights rather than individual rights are therefore given precedence in most indigenous communities, as the group identity is an integral part of the identity of the community's individual members.⁸⁷

The IPR system as under the intellectual property law regime is premised on the following principles:

i. Copyright

Copyright is a type of IPR that regulates the fair use and reproduction of original creations. Under intellectual property law, anything that is printed, written or recorded in any format is subject to copyright law from the moment of its creation. It exists to give legal protection to creators and publishers of works such as: books (fiction and non-fiction), films, sound recordings, newspaper and journal articles, dramatic works, photographs, computer programs etc.⁸⁸

The development of this principle can be traced back to the recognition of the concept of 'individual self' or 'self-concept,' i.e. an individual's assessment of his or her status on a single trait or on many human dimensions using societal or personal norms as criteria.⁸⁹ This concept is vital to the principle of copyright as it distinguishes the creativity of an individual as seen in their works, distinct from that of the society.⁹⁰

Copyright law acts as a safeguard to originality.⁹¹ It protects the development of writing, performing and creating whilst enabling access to original copyright material. In this way copyright is essential in ensuring the development and continuation of writing, performing and creating and the existence of economic gain and financial reward for original creators.⁹²

⁸⁵ Hoppers C, *Indigenous Knowledge and the Integration of Knowledge System: Towards a Philosophy of Articulation*, New Africa Books (Pty) Ltd., 2002, 24.

⁸⁶ Young-Ing G, 'Intellectual property rights, legislated protection, sui generis models and ethical access in the transformation of indigenous traditional knowledge, 2006, 32.

⁸⁷ Kuprecht K, *Indigenous Peoples' Cultural Property Claims: Repatriation and Beyond*. Springer Science & Business Media, 2013,

⁸⁸ Bouchoux D, *Intellectual Property: The law of trademarks, copyrights, patents and trade secrets*, 185.

⁸⁹ <http://dictionary.referenve.com/browse/self-concept> on 1 September 2015.

⁹⁰ Bouchoux D, *Intellectual Property: The law of trademarks, copyrights, patents and trade secrets*, 185.

⁹¹ <https://www.hud.ac.uk/library/help/copyright/> on 26 November 2015.

⁹² Rothenberg S, *Copyright and Public Performance of Music*, Springer Netherlands, 1954, 88.

ii. Droit d'auteur and droit moral

The *droit d'auteur* is based on the 'right of the author' (*droit d'auteur*) and instead of on 'copyright' its philosophy and terminology are different from those used in copyright law.⁹³ The term 'author' is used to designate the original creator(s) of any type of protected work or the original publisher in the event that the original author cannot be identified. *Droit d'auteur* has been instrumental in the development of international copyright law as seen in the Berne Convention,⁹⁴ which forms a part of the very framework that resulted in the establishment of WIPO.⁹⁵

Droit moral is a French term for Moral Rights. It refers to the personal rights a creator has in his work.⁹⁶ It protects artistic integrity and prevents others from altering the work of artists, or taking the artist's name off work, without the artist's permission. While copyright protects property rights, which entitles authors to publish and economically benefit from their published works, moral rights safeguard personal and reputational rights, which permit authors to defend both the integrity of their works and the use of their names.⁹⁷ Moral rights are often described as 'inalienable'⁹⁸ as they are independent of the author's economic rights, and remain with the author even after he has transferred his economic rights

Section 32(1) of the Kenyan Copyright Act (2009)⁹⁹ also recognizes the moral right of an author to claim ownership of his work or object to any distortion of his work that would be prejudicial to his reputation. The United Nations Declaration of Human Rights states that: 'everyone has the right to the production of moral and material interests resulting from scientific, literary or artistic production of which he is the author.'¹⁰⁰

⁹³ Hofman J, *Introducing Copyright_ A plain language guide to copyright in the 21st century*, Commonwealth of Learning, 2009, 7.

⁹⁴ Article 6b, *Berne Convention* requires Member countries to grant to authors: "the right to claim authorship of the work (sometimes called the right of paternity); and the right to object to any distortion or modification of the work, or other derogatory action in relation to the work, which would be prejudicial to the author's honour or reputation (sometimes called the right of integrity)."

⁹⁵ Hofman J, *Introducing Copyright_ A plain language guide to copyright in the 21st century*, 8.

⁹⁶ Moore A, *Intellectual Property & Information Control: Philosophic Foundations and Contemporary Issues*, Transaction Publishers, 2001, 41.

⁹⁷ Young-Ing G, 'Intellectual property rights, legislated protection, sui generis models and ethical access in the transformation of indigenous traditional knowledge, 45.

⁹⁸ "Moral Rights for Authors and Artists In light of the Tasini ruling, is the next step to advocate for legislation", Stephanie C. Ardito. <http://www.infotoday.com/it/jan02/ardito.htm> on 3 September 2015.

⁹⁹ Act No. 12 of 2001.

¹⁰⁰ Article 27(2), *United Nations Declaration of Human Rights* (1948).

III. Originality

An original work is that which is not received from others nor copied from or based upon the work of others.¹⁰¹

In *University of London Press Ltd v University Tutorial Press Ltd*,¹⁰² J. Peterson stated that: 'The word 'original' does not mean that the work must be the expression of original or inventive thought, and, in the case of 'literary work', with the expression of thought in print or writing. The originality which is required relates to the expression of thought.'¹⁰³

The originality required by the law is therefore not that of revolutionary or new ideas but of the way that the thought is expressed. Thus, in order for a work to qualify for copyright protection, the ideas expressed within the work do not themselves have to be new, but the way in which they are 'put across' to the audience does.¹⁰⁴

Indigenous knowledge by its nature cannot meet the copyright test of originality. Its author¹⁰⁵ is unknown; it is not possible for the appropriate and required evidence to be adduced in order to justify a conclusion that the work is 'original.' Copyright protects the material expression of ideas. Indigenous knowledge, which has been in existence for generations, is more often than not in a non-material form and as such cannot qualify as 'original' in the strict sense of copyright law.¹⁰⁶

IV. Public Domain

The IPR system's concept of the Public Domain is based on the premise that the author/creator deserves recognition and compensation for his/her work because it is the product of his/her genius, but all of society must eventually be able to benefit from that genius.¹⁰⁷ As indigenous knowledge does not generally

¹⁰¹ Hofman J, *Introducing Copyright_ A plain language guide to copyright in the 21st century*, 29.

¹⁰² *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601.

¹⁰³ *University of London Press Ltd v University Tutorial Press Ltd*, 608

¹⁰⁴ Zemer L, *The idea of Authorship in Copyright*, Ashgate, 2007, 54.

¹⁰⁵ The author of in this context is the person who clothes ideas or information in a material form. https://en-au.oxbridgenotes.com/revision_notes/law-university-of-new-south-wales-intellectual-property-2-trade-marks/samples/subsistence-and-literary-works on 27 November 2015

¹⁰⁶ Mazonde I, Thoma P, *Indigenous Knowledge Systems and Intellectual Property in the 21st Century: Perspectives from South Africa*, Council for the Development of Social Science Research in Africa, 2007, 54.

¹⁰⁷ Young-Ing G, 'Intellectual property rights, legislated protection, sui generis models and ethical access in the transformation of indigenous traditional knowledge, 51.

qualify for protection under the intellectual property law regime, it falls into the realm of public domain. This presents a problem due to the fact that indigenous peoples for centuries have not used conventional intellectual property law to protect their knowledge, and the treatment of this knowledge as if it is in the public domain is in total disregard of their customary law and opens it up for exploitation.¹⁰⁸

Furthermore, some aspects of traditional knowledge and cultural expressions are not intended for external access and use in any form.¹⁰⁹ Examples of these include: sacred ceremonial masks, songs and dances, various forms of shamanic art, ceremonies and art objects with strong spiritual significance such as petroglyphs among others.¹¹⁰

Ultimately, the basis of intellectual property law in discourse which maintains that every individual has the right to own private property and as such the purpose of recognizing such rights is to enable their economic exploitation by the holder of the proprietary rights; this conflicts with the general indigenous world view that property rights are merely a means used in maintaining and developing the 'group identity' rather than a means of furthering individual economic pursuits.¹¹¹

V. Protection of Indigenous Intellectual Property Rights

i. Conventional Intellectual Property System

While international conventions such as the Convention Establishing the World Intellectual Property Organisation (WIPO) do not explicitly provide for indigenous intellectual property rights in their definition of intellectual property rights,¹¹² some uses of traditional knowledge and TCEs can be protected through the existing IP system.

¹⁰⁸ WIPO, *Customary Law, Traditional Knowledge And Intellectual Property: An Outline Of The Issues*, 2013, 6-8.

¹⁰⁹ Young-Ing G, 'Intellectual property rights, legislated protection, sui generis models and ethical access in the transformation of indigenous traditional knowledge, 90.

¹¹⁰ Young-Ing G, 'Intellectual property rights, legislated protection, sui generis models and ethical access in the transformation of indigenous traditional knowledge, 91-92.

¹¹¹ Githaiga J, 'Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge' *Murdoch University Electronic Journal of Law* (1998), 4.

¹¹² Article 2(viii), *Convention Establishing the World Intellectual Property Organisation (WIPO)* (1968), states: "intellectual property shall include rights relating to: literary, artistic and scientific works, performances of performing artists, phonograms and broadcasts, inventions in all fields of human endeavour, scientific discoveries, industrial designs, trademarks, service marks and commercial names and designations, protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields."

Performances of TCEs for example fall under international related rights protection, such as that provided under the WIPO Performances and Phonograms Treaty, 1996, and the Beijing Treaty on Audiovisual Performances (2012), which grant performers of folklore the right to authorize recordings of their performances, and the right to authorize certain dealings with those recordings.¹¹³

Article 15(4) of the Berne Convention for the Protection of Literary and Artistic Works (1886) further provides a mechanism for the international protection of unpublished and anonymous works, including TCEs.¹¹⁴

There has also been compelling application of copyright law in the protection of Aboriginal artwork in the decided cases of; *Milpurrurru v Indofurn Pty Ltd* (The “Carpets” Case) and a folk song *Mbube* in the *Mbube* Case in South Africa. This is against the common view that copyright through its protection of the perceived author’s interest often fails to take into account the indigenous origin of the creation.

ii. *Milpurrurru and Others v Indofurn Pty Ltd* (The ‘Carpets’ case)¹¹⁵

This is a landmark case involving the legal protection of Aboriginal art that occurred in 1994. There were four applicants, three Aboriginal artists; George Milpurrurru, Banduk Marika and Tim Payunka Tjapangati, and the public trustee for the Northern Territory representing the estates of five deceased Aboriginal artists.

After a 14-day trial, three Aboriginal artists and the estates of five other deceased Aboriginal artists were awarded damages totaling AU\$188, 640 for copyright infringement.

The action was taken in response to the activities of the Perth-based Indofurn (known as Beechrow at the time of the infringement), which imported carpets from Vietnam that depicted the artwork of prominent Aboriginal artists. This artwork was copied from an educational portfolio of Aboriginal artworks

¹¹³ Wong T, Dutfield G: *Intellectual Property and Human Development: Current Trends and Future Scenarios*, 2006, 188.

¹¹⁴ “In the case of 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, it shall be a matter for legislation in that country to designate the competent authority who shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union”.

¹¹⁵ (1994) 30 IPR 209.

produced by the Australian National Gallery and a calendar produced by the Australian Information Service and sold in Australia. Both of these publications indicated that the artwork depicted creation stories of spiritual significance to the artists.

Permission to reproduce the artworks was not sought prior to the production of the carpets although Beechrow after producing the carpets, wrote to the Aboriginal Arts Management Association¹¹⁶ to seek the artists' permission. This letter was unfortunately misdirected.

In response to the suit, the carpet importers raised the issue of the originality of the works represented, as a criterion for copyright protection. This argument was, however, rejected by the court, on the ground that the artwork exhibited intricate detail and complexity reflecting great skill and originality.¹¹⁷

In order to establish infringement, it was necessary to satisfy the court that the carpets had reproduced substantial parts of the source artworks. The court established that substantial copying of the artwork had occurred and that the company knew or ought to have known that copyright would have been breached if the carpets that were exact reproductions had been made in Australia.¹¹⁸

Breaches of the Trade Practices Act (1974) were also identified.¹¹⁹ Labels on the carpets indicated that Aboriginal artists had designed the carpets and, further, that these artists were paid royalties out of sale proceeds. These labels were found to amount to false advertising, as they were likely to lead consumers to believe that the carpets were made with the Aboriginal artists' consent.¹²⁰

Further, the court found that the inaccuracy of some of the reproductions was potentially offensive to the traditional owners of a particular design. This is because some of the artwork included elements that were only known and understood by those who have close knowledge of the cultural significance of the story.¹²¹

In awarding the record sum, the trial judge included special punitive damages. This recognized a number of factors - in particular, the cultural hurt suffered

¹¹⁶ <http://anaka.org.au/> on 26 November 2015.

¹¹⁷ *Milpurruru & Others v Indofurn Pty Ltd*, 215.

¹¹⁸ *Milpurruru & Others v Indofurn Pty Ltd*, 246.

¹¹⁹ Sections 52, 53(c) and (d) and 55.

¹²⁰ Anderson J, *Law, Knowledge, Culture: The production of indigenous knowledge in intellectual property law*, 131.

¹²¹ Von Lewinski S, *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore*, 81

by the artists as a result of the company's persistent denial of their copyright.¹²² The damages were allocated to the artists as a group. The court also ordered that any unsold carpets be handed over to the artists.¹²³

The court's recognition of the concept of cultural harm and the aggregated damages awarded established a precedent for consideration of the cultural specificity of the harm caused to indigenous groups.¹²⁴ J. Von Doussa when developing this notion, stated that:

'Under copyright law damages can only be awarded insofar as the 'pirating' causes a *loss* to the copyright owner resulting from infringement of copyright. Nevertheless, in the cultural environment of the artists the infringement of those rights has, or is likely to have, far-reaching effects on the copyright owner. Anger and distress suffered by those around the copyright owner constitute part of that person's injury and suffering.'¹²⁵

iii. The Mbube Case

In 1939, a Zulu entertainer called Solomon Linda recorded a song with his band 'Evening Birds', which he called 'Mbube', Zulu for Lion. Mbube was a hit throughout Southern Africa selling nearly 100, 000 units.¹²⁶ In 1950 Pete Seeger transcribed the music from the record to make his own song, which he called *Wimoweh*.¹²⁷ *Wimoweh* was later reworked into another version in the 1960s by songwriters George Weiss, Hugo Peretti and Luigi Creatore, as 'The Lion Sleeps Tonight', which was incorporated into the Disney musical 'The Lion King'.¹²⁸ Neither the origins of the song, in *Mbube*, nor the role played by Solomon Linda were acknowledged, as the song was presented as being of American origin.¹²⁹

¹²² Von Lewinski S, *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore*, 81.

¹²³ Anderson J, *Law, Knowledge, Culture: The production of indigenous knowledge in intellectual property law*, 132.

¹²⁴ Anderson J, *Law, Knowledge, Culture: The production of indigenous knowledge in intellectual property law*, 138.

¹²⁵ *Milpurrurnu & Others v Indofurn Pty Ltd* (1994), 244.

¹²⁶ "The development of Music in South Africa timeline 1600-2004"
<http://www.sahistory.org.za/topic/development-music-south-africa-timeline-1600-2004> on 25 November 2015

¹²⁷ 'Wimoweh' is a corruption of the Zulu lyrics, *Uyimbube*, or 'he is the lion',
Owen D, Copyright in the Courts: The Return of the Lion, *Wipo Magazine*, April 2006, 4. http://www.wipo.int/wipo_magazine/en/2006/02/Article_0006.html on 25 November 2015

¹²⁸ Owen D, Copyright in the Courts: The Return of the Lion, *Wipo Magazine*, April 2006, 6. http://www.wipo.int/wipo_magazine/en/2006/02/Article_0006.html on 25 November 2015

¹²⁹ WIPO, Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore Tenth Session Geneva, WIPO/GTRKF/IC/10/INF/5(c), 2006, 9.

Solomon Linda had assigned his worldwide copyright in *Mbube* to the Gallo Record Company for a consideration of 10 shillings.¹³⁰ After his death in 1962, the American music publishing company, Folkways, which had gained control of '*Wimoweb*', exacted for a consideration of one dollar an assignment of his widow's rights to the renewal term of '*Wimoweb*' under copyright law.¹³¹

In the late 1990s, journalist Rian Malan wrote an Article for Rolling Stone magazine exposing the injustice that had taken place. He particularly highlighted the fact that while the derivatives of *Mbube* had made millions of dollars, the Linda daughters were living in abject poverty in South Africa.¹³²

Due to the outcry caused by Malan's article, Spoor and Fisher¹³³ brought an action on the part of the family relying on the revisionary copyright provision of Section 5(2), United Kingdom Copyright Act.¹³⁴ This Act was a British statute of general application in countries of British Commonwealth as of 1911 including South Africa at the time of the recording of *Mbube*.

This 'reversionary copyright' provides that where an author assigns his copyright during his lifetime the copyright reverts to their executor 25 years after his death notwithstanding any other assignments of the copyright. This provision therefore applied despite the fact that both Linda's widow, Regina, and daughters had already assigned their claim to copyright in *Mbube* to Folkways.¹³⁵ It was reasoned that the reversionary copyright had been vested in the executor since 1987 (i.e. 25 years after Solomon Linda's death) and did not become the property of either Regina or her daughters unless and until such time as the executor transferred it to them. As such a transfer had never happened, and the assignments made by Regina and the daughters in favour of Folkways accordingly had no force or effect.¹³⁶

Shortly before the commencement of the trial in 2006 a settlement was reached between the parties to the litigation, as well as Abilene Music which had

¹³⁰ Owen D, *Stalking the Sleeping Lion*, 2006, 17.

¹³¹ Owen D, Copyright in the Courts: The Return of the Lion, *Wipo Magazine*, 5. http://www.wipo.int/wipo_magazine/en/2006/02/Article_0006.html on 25 November 2015

¹³² Malan R, In the Jungle: How American music legends made millions off the work of a Zulu tribesman who died a pauper, *Rolling Stone*, May 2000.

¹³³ <http://www.spoor.com/en/home/> on 25 November 2015.

¹³⁴ (1911) 'where an author assigned his copyright during his lifetime, 25 years after his death the copyright reverted to the executor of his estate, as an asset in that estate, notwithstanding any other assignments of copyright which might have taken place in the meantime.'

¹³⁵ Owen D, Copyright in the Courts: The Return of the Lion, *Wipo Magazine*, April 2006, 5.

¹³⁶ Owen D, *Stalking the Sleeping Lion*, 2006, 19.

licensed to Disney the use of 'The Lion Sleeps Tonight'.¹³⁷ The terms of this settlement were that: 'The Lion Sleeps Tonight' was acknowledged as having been derived from Mbube. Solomon Linda was also acknowledged as a co-composer of 'The Lion Sleeps Tonight'. The settlement also provided that Linda's heirs would receive payment for past uses of 'The Lion Sleeps Tonight' as well as future royalties from its worldwide use. It also established a trust to administer the heirs' copyright in Mbube and to receive on their behalf the payments due from the use of 'The Lion Sleeps Tonight'.¹³⁸

This settlement demonstrated that the reversionary interest under the Imperial Copyright Act (1911) is enforceable not only by heirs in South Africa, but in all countries of the former British Empire in which the Imperial Copyright Act (1911) was a statute of general application.¹³⁹

This case has profound legal implications primarily due to compelling application of copyright law in the protection of *Mbube*, a folk song.¹⁴⁰

ii. *Development of a 'sui generis' protection regime*

In most cases, conventional IP systems and their adaptations are not considered sufficient to cater to the unique character of indigenous knowledge.¹⁴¹ This has prompted a number of countries and regions to develop their own distinct sui generis systems.

The term *sui generis* (of its own kind) is used to describe a form of legal protection that exists outside typical legal framework. It is a regime especially tailored to meet a certain need.¹⁴² It does not derive its legitimacy from the existing intellectual property protection regime.¹⁴³

¹³⁷ Owen D, Copyright in the Courts: The Return of the Lion, *Wipo Magazine*, 12.

¹³⁸ Owen D, Copyright in the Courts: The Return of the Lion, *Wipo Magazine*, 12. http://www.wipo.int/wipo_magazine/en/2006/02/Article_0006.html on 25 November 2015

¹³⁹ Owen D, *Tafelberg Short: Awakening the Lion: The case of The Lion Sleeps Tonight*, 9.

¹⁴⁰ Owen D, *Tafelberg Short: Awakening the Lion: The case of The Lion Sleeps Tonight*, 12.

¹⁴¹ WIPO, 'Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions, Publication No. 933E, 2015, 36.

¹⁴² Young-Ing G, 'Intellectual property rights, legislated protection, sui generis models and ethical access in the transformation of indigenous traditional knowledge, PHD Thesis, 3.

¹⁴³ Noble B, *Justice, transaction, translation: Blackfoot tipi transfers and WIPO's Search for the facts of traditional knowledge and exchange*, *American Anthropologist*, 2007, 339.

In the indigenous context, this regime is necessary as traditional knowledge and traditional cultural expressions do not neatly lend themselves to protection under the conventional intellectual property law regime.¹⁴⁴ For example, on realizing the difficulties associated with plant protection in relation to TK, the negotiators of TRIPS inserted Article 27(3b)¹⁴⁵ allowing member states of the World Trade Organisation to use a *sui generis* protection system.

The aim of this system is the positive protection of indigenous knowledge through the creation of positive rights over their use. This is together with the defensive protection of such knowledge through the institution of protective measures over the knowledge.

This regime would provide means for indigenous and local communities to control access to and use of indigenous knowledge, exercise their prior informed consent as well as ensure that they derive fair and equitable benefits from the use of their traditional knowledge.¹⁴⁶

This system would also recognise indigenous knowledge as collective property and provide safeguards against claims of third parties.¹⁴⁷ This safeguard against claims from third parties could extend to protection against unauthorized disclosure or use of indigenous knowledge.¹⁴⁸ Any exceptions to this general protection would be clearly defined. Furthermore, any consent to use would follow principles of prior informed consent and other principles of the indigenous group's customary law.

Sustainable development and poverty alleviation are objectives of such systems. Their aim would be to increase access to capital for indigenous and local communities, while promoting sustainable development.¹⁴⁹

¹⁴⁴ Honds J, *The protection of traditional knowledge by intellectual property law*, GRIN Verlag, 2013, 22.

¹⁴⁵ "Members may also exclude from patentability: plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement." Article 27(3b); *TRIPS Agreement*.

¹⁴⁶ Von Lewinski S, *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore*, 518.

¹⁴⁷ *Sui Generis Systems for the Protection of Traditional Knowledge Information for the Secretariat of the Convention on Biological Diversity*, 31 October 2015, 1.

¹⁴⁸ *Sui Generis Systems for the Protection of Traditional Knowledge Information for the Secretariat of the Convention on Biological Diversity*, 3.

¹⁴⁹ Ad Hoc Open-Ended Inter-Sessional Working Group On Article 8(J) And Related Provisions Of The Convention On Biological Diversity Fifth Meeting Montreal, 15-19 October 2007, *Development*

Sui generis systems should consider the collective nature of indigenous and local communities and their holistic approach to resource use and management.¹⁵⁰ They must recognise and protect all dimensions encompassed by indigenous knowledge, namely their cultural, temporal and spatial dimensions.¹⁵¹

Moreover, measures should be implemented at local, national and international levels.¹⁵² This is because it is unlikely that a single overarching international, regional or national system, can be developed to protect indigenous knowledge while recognising the cultural and legal diversity of the world's indigenous and local communities.

Local measures should be based on the relevant customary laws of indigenous and local communities. The adoption of the Nagoya Protocol on Access to Genetic Resources and Sharing of Benefits Arising from their Utilization in 2001 illustrated international recognition of the inextricable link between customary law and indigenous people's rights over their traditional knowledge.¹⁵³ Article 7 of this Protocol creates a system in which customary law governs the point of access, where prior informed consent of indigenous peoples is a condition for access and where states are obligated to ensure that any access and use of indigenous knowledge has been made subject to prior informed consent.¹⁵⁴ State recognition and support is therefore vital in ensuring the system's effectiveness.

National and international measures should provide best-practice guidelines, or encompass framework that supplement local measures.¹⁵⁵ So far, ten national laws for the protection of traditional knowledge have been enacted by the:

of Elements of Sui Generis Systems for the Protection of traditional Knowledge, Innovations and Practices to Identify Priority Elements, UNEP/CBD/WG8J/5/6, 3.

¹⁵⁰ UNEP, *Development of Elements of Sui Generis Systems for the Protection of traditional Knowledge, Innovations And Practices To Identify Priority Elements*, 3.

¹⁵¹ Temporal aspect as they're passed on through the generations, and adapt to changing realities and spatial aspect as related to the relationship a community has with the land it occupies. UNEP, *Development of Elements of Sui Generis Systems for the Protection of traditional Knowledge, Innovations and Practices to Identify Priority Elements*, 4.

¹⁵² Tobin B, *Indigenous Peoples, Customary Law and Human Rights – Why Living Law Matters*, Routledge, 2014, 159.

¹⁵³ Tobin B, *Indigenous Peoples, Customary Law and Human Rights – Why Living Law Matters*, Routledge, 2014, 159.

¹⁵⁴ Article 7, *Nagoya Protocol on Access to Genetic Resources and Sharing of Benefits Arising from their Utilization*, CBD, 2001.

¹⁵⁵ UNEP, *Development of Elements of Sui Generis Systems for the Protection of traditional Knowledge, Innovations and Practices to Identify Priority Elements*, 3.

African Union,¹⁵⁶ Brazil,¹⁵⁷ Peru,¹⁵⁸ Philippines,¹⁵⁹ China,¹⁶⁰ Costa Rica,¹⁶¹ India,¹⁶² Portugal,¹⁶³ Thailand¹⁶⁴ and the United States.¹⁶⁵

Sui generis legislation should therefore stipulate that indigenous intellectual property is to be defined in accordance with indigenous customary law, recognise the perpetual duration of indigenous knowledge, provide for the establishment of a collecting agency for fees charged for commercial uses of indigenous knowledge as well as contain a provision for the establishment of a judicial entity to facilitate the right of civil action against infringers.¹⁶⁶

The implementation of this system of protection should be supplemented by the creation of databases for the purpose of documenting traditional knowledge and traditional cultural expressions. These databases may be useful for the protection of indigenous knowledge provided that such documentation is provided for under the relevant national law.¹⁶⁷ The consequences of such documentation should be made known to indigenous peoples who wish to document their traditional knowledge or cultural expressions.¹⁶⁸

Access to these databases should be restricted to outsiders in the case of 'sensitive' traditional knowledge such as that of great spiritual significance to the community. Such knowledge should be documented in closed access databases that are open only to those who have obtained consent from the indigenous

¹⁵⁶ *African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources* (2000)

¹⁵⁷ *Provisional Measure No. 2186-16 of 2001: Regulating Access to the Genetic Heritage, Protection of and Access to Associated Traditional Knowledge* (2001)

¹⁵⁸ *Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources Law No. 27, 811* (2002)

¹⁵⁹ *Indigenous Peoples Rights Act* (1997);

¹⁶⁰ *The Patent Law of 2000 and the Regulations on the Protection of Varieties of Chinese Traditional Medicine*

¹⁶¹ *Biodiversity Act Law No. 7788* (1998)

¹⁶² *Biological Diversity Act* (2002)

¹⁶³ *Decree Law No.118 Establishing a Legal Regime of Registration, Conservation, Legal Custody and Transfer of Plant Endogenous Material* (2002)

¹⁶⁴ *Protection and Promotion of Traditional Thai Medicinal Intelligence Act*, B.E. 2542;

¹⁶⁵ *Indian Arts and Crafts Act* (1990)

¹⁶⁶ Githaiga J, 'Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge' *Murdoch University Electronic Journal of Law* (1998), 101.

¹⁶⁷ Von Lewinski S, *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore*, 525.

¹⁶⁸ WIPO, *Documentation Of Traditional Knowledge And Traditional Cultural Expressions: background brief No.2*, 3.

community.¹⁶⁹ India's 'Traditional Knowledge Digital Library'¹⁷⁰ as well as the 2011 United States Patent and Trademark Office Database of Official Insignia of Native American 'Tribes'¹⁷¹ are important examples of documentation initiatives that aim at defensive protection of traditional knowledge and cultural expressions.¹⁷²

Lastly, education and awareness campaigns on indigenous intellectual property rights should play a significant role in this unique system of protection. The protection of indigenous heritage must be accompanied by public awareness and education campaigns, which promote a greater public understanding of indigenous culture.¹⁷³ Such campaigns may take the form of incorporation in school curricula and textbooks, films on indigenous issues, labels on indigenous books and music, and so on.¹⁷⁴ Education programs should also be directed at indigenous people and local communities themselves to acquaint them with the rights and remedies available to them *vis-à-vis* the protection of their heritage under intellectual property law.¹⁷⁵

V. Conclusion

The legitimacy of indigenous and local communities' intellectual property rights over their culture and heritage is rooted in the same fundamental concern i.e. their right to self-determination. They strive for the acknowledgment of their sovereignty, control over the disposition and interpretation of their cultural heritage as well as respect for their own laws and institutions. The law as an in-

¹⁶⁹ Von Lewinski S, *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore*, 524.

¹⁷⁰ This is a database containing 34 million pages of information on 2, 260, 000 medicinal formulations in multiple languages. It is a unique repository of India's traditional medical wisdom and is designed as a tool to assist selected patent examiners carrying out art searches. http://www.wipo.int/wipo_magazine/en/2011/03/Article_0002.html on 27 November 2015

¹⁷¹ It is a database established to record the official insignia of federally and state-recognized Native American tribes in the United States of America. <http://www.uspto.gov/trademark/laws-regulations/native-american-tribal-insignia> on 27 November 2015.

¹⁷² WIPO, *Documentation Of Traditional Knowledge And Traditional Cultural Expressions: background brief No.2*, 2.

¹⁷³ Stamatopoulou E, *Cultural Rights in International Law: Article 27 of the Universal Declaration of Human Rights and Beyond*, Martinus Nijhoff Publishers, Boston, 2007, 303.

¹⁷⁴ Githaiga J, 'Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge' *Murdoch University Electronic Journal of Law* (1998), 107.

¹⁷⁵ Janke T, Principal Consultant, Michael Frankel & Company Solicitors, *Our Culture, Our Future: Proposals for the Recognition and Protection of Indigenous Cultural and Intellectual Property*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Sydney, 1997, 91.

strument for the protection of a person's rights and social change is the forum through which this indigenous view should find expression. Article 31 of the UN Declaration on the Rights of Indigenous Peoples states that:

'Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions... They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.'¹⁷⁶

Article 11 of the Constitution of Kenya¹⁷⁷ recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. It also provides the state with the responsibility of promoting the intellectual property rights of the people of Kenya.¹⁷⁸ The law's role in the protection of indigenous intellectual property rights has therefore been entrenched in the highest law in the land the Constitution. It has unfortunately been unable to effectively perform this role primarily due to the nature of the intellectual property law regime, which leaves little room for the expression of indigenous and local communities' intellectual property rights.

With the turn of the 21st century came a wave of recognition of indigenous people's rights through the formulation of mechanisms such as the United Nations Declaration on the Rights of Indigenous Peoples (2007), with which came an expansion of the discourse on the recognition and protection of indigenous intellectual property rights. It became increasingly apparent that these rights play a vital role in enabling these communities to play a crucial role in the development of their communities and countries.

Indigenous intellectual property rights are therefore vital for the achievement of the Millennium Development Goals by developing countries. If protected they can play a fundamental role in bringing to life Kenya's Vision 2030 to create a globally competitive and prosperous nation.

¹⁷⁶ *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), 46 I.L.M. 1013 (2007).

¹⁷⁷ Article 11, *Constitution of Kenya* (2010).

¹⁷⁸ Article 11(2c), *Constitution of Kenya* (2010).