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Antons, Christoph. "Epistemic communities and the "people without history": the contribution of intellectual property law to the safeguarding of intangible cultural heritage" Published in Diversity in Intellectual Property: Identities, Interests, and Intersections, p. 453-471 (2015).

Available from: <https://doi.org/10.1017/CBO9781107588479.023>

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Accessed from: <http://hdl.handle.net/1959.13/1356572>

Epistemic communities and the “people without history”: the contribution of intellectual property law to the ‘safeguarding’ of intangible cultural heritage

By Christoph Antons¹

1. Introduction

The contributions in this book examine how the intellectual property framework can be adapted to protect and promote the many aspects and facets of diversity and whether new rules should be identified for this purpose within the intellectual property system. In this chapter, I will discuss the possibilities for and limitations of intellectual property concepts in attempts at national and international level to safeguard and protect intangible cultural heritage. This is a “classical topic” and has a long history in any discussion about diversity and intellectual property rights. It touches upon most, if not all forms of diversity discussed in this volume. However, it touches not only upon cultural and biodiversity, but also upon the diversity in discourses about diversity within various ‘epistemic communities’ in different academic disciplines, national ministries, NGOs and international organisations. As a concern for policy makers and the negotiators of intellectual property and other conventions, it goes back to UNESCO initiatives that began shortly after World War II and to the revision of the Berne Convention at the Diplomatic Conference in Stockholm in 1967.² Thus, the discussion

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² Christoph Antons, ‘Intellectual property rights in indigenous cultural heritage: basic concepts and continuing controversies’, in: Christoph B. Graber, Karolina Kuprecht and Jessica C. Lai (eds) *International Trade in Indigenous Cultural Heritage* (Edward Elgar, Cheltenham, UK – Northampton, MA, USA, 2012), 146. Samantha Sherkin ‘A Historical Study of the Preparation of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore’, and quoting her Lucas Lixinski, *Intangible Cultural Heritage in International Law* (Oxford University Press, Oxford, 2013), p. 30 see the 1952 UNESCO Copyright Convention as starting point for the debate. However, the text of the Convention does not mention ‘folklore’ or any other form of intangible cultural heritage and these two sources do not indicate in how far the issue was recognised and discussed during the drafting process. Lourdes Arizpe, ‘The Cultural Politics of Intangible Cultural Heritage’, in: *Art Antiquity and Law*, Vol. XII, Issue 4, 2007, mentions the promotion of ‘folk’ arts as part of UNESCO’s ‘Culture Programme’ of 1948. Laurajane Smith, *The Uses of Heritage* (Routledge, London and

began during the decolonisation processes of the 1950s, 1960s and 1970s, when the people whom Eric Wolf ironically referred to as the ‘people without history’³ came into view. His ‘people without history’ included not only tribal people as the classical object of ethnographic study, but also ‘peasantries, laborers, immigrants, and besieged minorities’.⁴ Meanwhile, a younger generation of anthropologists,⁵ historians,⁶ cultural geographers⁷ and political scientists⁸ has followed the call to include a history ‘from below’, one that no longer exclusively focuses on dynastic lines and national elites and connects the global with the local.⁹

With their professional focus on national laws, intellectual property lawyers are not normally coming into contact with marginalised minorities at the grassroots level of society, but are required to be ‘seeing like a state’.¹⁰ This can be problematic in the debate about traditional knowledge (TK), traditional cultural expressions (TCE) and the link to genetic resources (GR) and to intangible cultural heritage more generally. This debate involves interested parties and stakeholders at local, national and international level. It is, therefore, not simply a matter for diplomatic conferences or a North-South issue between developed and developing countries, although it is often understood in this way. It has proven difficult, to overcome this and the many other paralysing dichotomies in this field, such as culture versus nature; intellectual versus cultural property; property versus human rights; holistic/ecological perceptions versus outcome driven policy solutions; cosmopolitan interpretations of heritage versus national and

New York, 2006), p. 106, also speaks of UNESCO concerns for ‘folklore’ expressed in terms of copyright since the 1950s. As far as ‘normative and operational activities’ in relation to intangible cultural heritage are concerned, Janet Blake, *Commentary on the UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage* (Institute of Art and Law, Leicester, 2006), p. 2, sees UNESCO involved since the 1970s.

³ Eric R. Wolf, *Europe and the People Without History* (University of California Press, Berkeley – Los Angeles – London, 1982)

⁴ See the Preface to the 1982 edition, p. xxvi.

⁵ See, for example, Anna Lowenhaupt Tsing, *Friction: An Ethnography of Global Connection* (Princeton University Press, Princeton, New Jersey, 2005); Michael R. Dove, *The Banana Tree at the Gate: A History of Marginal Peoples and Global Markets in Borneo* (NUS Press, Singapore, 2013).

⁶ See, for example, Leonard Y. Andaya, *Leaves of the Same Tree: Trade and Ethnicity in the Straits of Melaka* (NUS Press, Singapore, 2010).

⁷ See, for example, Peter Vandergeest and Nancy L. Peluso, *Territorialization and State Power in Thailand*, in: Nicholas Blomley, David Delaney and Richard T. Ford (eds), *The Legal Geographies Reader* (Blackwell Publishers, Oxford and Malden, Massachusetts, 2001), pp. 177-186.

⁸ James C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (Yale University Press, New Haven and London, 2009)

⁹ On the importance of such a ‘glocal’ analysis, see Thomas Hylland Eriksen foreword to the 2010 edition of Wolf, *Europe*, p. x.

¹⁰ James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, New Haven, Conn., 1998)

national versus local ones. In this contribution, I will focus on the dichotomy between intellectual and cultural property and the relationship of TK/TCE to the wider heritage complex. I will argue that international lawyers¹¹ and socio-legal scholars¹² have begun to analyse this relationship, but that it is still important to pay closer attention to the multi-faceted environment in developing countries and to the context of economic development to understand the prospects and limitations for international law making. I will show how overlaps between IP and cultural property are now leading to disputes that create in fact serious frictions between neighbouring countries. I will further argue that such claims are based on a misunderstanding of the limitations of both intellectual and cultural property, but that these concepts develop their own life in the policy environment of developing nations.¹³

2. Epistemic communities and their perceptions of TK/TCE in the context of intangible cultural heritage

The protection of TK/TCE and intangible cultural heritage is discussed in various specialised fields of law and in various other disciplines, such as anthropology, environmental studies, archaeology and heritage studies.¹⁴ However, these debates examine the subject matter from many different disciplinary angles and are not linked up very well. It is common to ask who the ‘stakeholders’ in this debate are.¹⁵ This

¹¹ Fiona Macmillan, ‘Human rights, cultural property and intellectual property: three concepts in search of a relationship’, in: Christoph Beat Graber and Mira Burri-Nenova (eds), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (Edward Elgar, Cheltenham, UK and Northampton, MA, 2008), pp. 73-95; Lixinski, above note 2; Craig Forrest, *International Law and the Protection of Cultural Heritage* (Routledge, London and New York, 2012).

¹² Rosemary Coombe, ‘The Expanding Purview of Cultural Properties and Their Politics’ *Annual Review of Law and Social Science*, Vol. 5, 2009, pp. 393-412

¹³ It is this misunderstanding of the concepts that forms the basis of the ‘broader movement to enclose localized ethnic or cultural expressions as national property’, analysed by Lorraine V. Aragon, ‘Copyright Culture for the Nation? Intangible Property Nationalism and the Regional Arts of Indonesia’, *International Journal of Cultural Property* (2012) 19: 270. The misunderstanding is strategic, however, and for political purposes and can hardly be seen as ‘a response to the global expansion of intellectual property claims’, *ibid.* Nationalist rhetoric simply makes selective use of legal concepts here that are not designed for such purposes.

¹⁴ For an overview of relevant literature see Christoph Antons, ‘At the Crossroads: The Relationship Between Heritage and Intellectual Property in Traditional Knowledge Protection in Southeast Asia’, in: *Law in Context*, Vol. 29(1), 2013, p. 75.

¹⁵ See, for example, Antons, ‘At the Crossroads’, above note 14, p. 78. For an examination of the problematic nature of the ‘stakeholder’ concept, see Darrell Whitman, ‘“Stakeholders” and the politics of environmental policymaking’, in: Jacob Park, Ken Conca and Matthias Finger (eds), *The Crisis of Global Environmental Governance: Towards a new political economy of sustainability* (Routledge, London and New York, 2008), pp. 163-192.

usually leads to the difficult question to identify the beneficiaries of any form of protection at the local level. In addition to this, I would like to suggest that it is also interesting to ask which epistemic communities are driving the debate and how they understand the subject matter. ‘Epistemic communities’ is a term originally used by political scientists to refer to ‘a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area’. They are influential and are said to share a set of normative and principled beliefs as well as causal beliefs and notions of validity and aim at a common policy enterprise.¹⁶ Intellectual property lawyers believing in the need for ‘protection’ of traditional knowledge and traditional cultural expressions can be regarded as an epistemic community with certain shared values and policy instruments. However, they are by no means alone in international policy making in this field. They share it, for example, with human rights lawyers, for whom the protection of TK/TCE is an indirect reflection of their concern for the protection of the individuals holding and producing the material.¹⁷ They also share it with environmental lawyers and policy makers, for whom traditional knowledge is merely one of several policy instruments to achieve broader objectives of biodiversity management.¹⁸ Last but not least, they share the field with experts in international law related to cultural heritage and with heritage experts and practitioners and academics concerned with broader notions of the ‘safeguarding’ of heritage.¹⁹

The relationship with human rights and environmental protection has been discussed at length elsewhere.²⁰ Authors using a human rights angle often approach the question of traditional knowledge protection from a view point of indigenous peoples’ rights.²¹

¹⁶ Peter M. Haas, ‘Introduction: epistemic communities and international policy coordination’, in: *International Organization*, Vol. 46, Issue 1, 1992, p. 3

¹⁷ On the interface of intellectual property and human rights, see Laurence R. Helfer and Graeme W. Austin, *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, Cambridge and New York, 2010)

¹⁸ See, for example, Fikret Berkes, *Sacred Ecology: Traditional Ecological Knowledge and Resource Management* (Taylor & Francis, Philadelphia and London, 1999)

¹⁹ See, for example, Lucas Lixinski, above note 2; Aragon, above note 13

²⁰ See Helfer and Austin, above note 17; Christoph Antons, ‘The role of traditional knowledge and access to genetic resources in biodiversity conservation in Southeast Asia’, in: *Biodiversity and Conservation*, Vol. 19, 2010, pp. 1189-1204

²¹ Helfer and Austin, above note 17, Chapter 7; and the contributions in Christoph B. Graber, Karolina Kuprecht and Jessica C. Lai (eds), *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues* (Edward Elgar, Cheltenham, UK and Northampton, MA, 2012); Kristen A. Carpenter, Sonial K. Katyal and Angela R. Riley, ‘In Defense of Property’, in: 118 *Yale Law Journal*, 2009, p. 1022.

This view point, however, will not be accepted in many developing countries. There is a widespread reluctance of many governments in the developing world to accept the concept of 'indigenous peoples' as relevant for their country.²² In addition, such governments have, in my view convincingly, argued that not all forms of TK/TCE can be linked to indigenous groups, but that much of it is still alive in the tradition of mainstream society. This is particularly true for medicinal knowledge in societies, which have a long tradition of transmitting this knowledge in writing, such as China, India, Thailand and Indonesia.²³ The oral transmission and relatively tight control within smaller circles that is often seen as typical for indigenous communities, does not apply to such mainstream knowledge. Hence, traditional knowledge must be regarded as a wider term than indigenous knowledge.²⁴ In developing countries, traditional knowledge can of course be held by communities similar to indigenous peoples in North America, Australia and New Zealand,²⁵ but it can also be the 'folk knowledge' of local communities that are not necessarily indigenous and often recent migrants displaced

²² See Benedict Kingsbury, 'The Applicability of the International Legal Concept of "Indigenous Peoples" in Asia', in: Joanne R. Bauer and Daniel A. Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press, Cambridge, 1999), pp. 336-377. For the positions of India and Indonesia in explaining their votes regarding the UN Declaration on the Rights of Indigenous Peoples, see Christoph Antons, 'Traditional knowledge in Asia: Global agendas and local subjects', in: John Gillespie and Randall Peerenboom (eds), *Regulation in Asia: Pushing back on globalization* (Routledge, London and New York, 2009), pp. 71-72.

²³ 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 Overprotection* (Hart Publishing, Oxford and Portland, Oregon, 2005), pp. 37-51. For the role of the Chinese government in the protection of Traditional Chinese Medicine, see Bryan Bachner, 'Back to the Future: Intellectual Property Rights and the Modernisation of Traditional Chinese Medicine', in: Christopher Heath and Anselm Kamperman Sanders, pp. 1-36. For Thailand, see Daniel Robinson and Jakkrit Kuanpoth, 'The Traditional Medicines Predicament: A Case Study of Thailand' in: *The Journal of World Intellectual Property* (2009) Vo. 11, Nos. 5/6, pp. 375-403. For Indonesia, see Christoph Antons and Rosy Antons-Sutanto, 'Traditional Medicine and Intellectual Property Rights: A Case Study of the Indonesian *jamu* Industry', in: Christoph Antons (ed), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region* (Kluwer Law International, Alphen aan den Rijn, 2009), pp. 363-384.

²⁴ Equally, intangible cultural heritage is not confined to that of indigenous communities, see Forrest, above note 11.

²⁵ The recognition of indigenous peoples is perhaps clearest in the Philippines, where the US American colonial administration had introduced policies adapted from their policies towards American Indians back in the United States, see James F. Eder and Thomas M. McKenna, 'Minorities in the Philippines: Ancestral Lands and Autonomy in Theory and Practice', in: Christopher R. Duncan, *Civilizing the Margins: Southeast Asian Government Policies for the Development of Minorities* (Cornell University Press, Ithaca and London, 2004), pp. 56-85. There is some legal recognition of the so-called *Orang Asli* in Malaysia, see Robert Know Denton, Kirk Endicott, Alberto G. Gomes and M.B. Hooker, *Malaysia and the Original People: A Case Study of the Impact of Development on Indigenous Peoples* (Allyn and Bacon, Boston, MA, 1997) and the Indian Constitution recognises 'scheduled tribes', see Pariyaram M. Chacko, 'Introduction', in: Pariyaram M. Chacko (ed), *Tribal Communities and Social Change* (Sage Publications, New Delhi, 2005), 17.

because of warfare or economic hardship.²⁶ Finally, it can be ‘royal’ knowledge held originally within circles of the nobility or elite. Both of the latter mentioned forms of knowledge can become mainstream knowledge, if the knowledge is made more accessible or appropriated and, thus, becomes a basis for forms of ‘national culture’.²⁷ To add to these complexities, ‘folk knowledge’ of local communities is mostly transmitted orally, but can also be transmitted in writing.²⁸

There are similar complexities in attempts to integrate traditional knowledge into environmental policies. Proposals to use ‘classical’ intellectual property rights to foster the aims of Article 8(j) of the Convention on Biological Diversity²⁹ often find it difficult to deal with wider and holistic forms of ‘indigenous cultural and intellectual property rights’ that do not distinguish between ‘culture’ and ‘nature’ and between real and intangible property.³⁰ This has been a recurring theme in the deliberations of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).³¹ Holistic forms of indigenous knowledge have also been influential in academic writings that have in turn been influential in environmental policy making. The environmentalist Darrell Posey, for example, writes: ‘For indigenous peoples, *cultural expression* extends to ‘nature’ and the ‘environment’, since both are extensions (or manifestations) of society. For many groups, nature quite frankly *is* society; or, concomitantly, society is inextricable from nature.’³²

²⁶ See for the example of the “hill tribes” of Northern Thailand, Charles F. Keyes, ‘Cultural Diversity and National Identity in Thailand’, in: Michael E. Brown and Sumit Ganguly (eds), *Government Policies and Ethnic Relations in Asia and the Pacific* (MIT Press, Cambridge, MA and London, 1997), pp. 197-231.

²⁷ For Indonesian traditional medicine, see Antons and Antons-Sutanto, above note 23; for Thai traditional medicine see Robinson and Kuanpoth, above note 23.

²⁸ On ‘folk’ manuals in Thailand and other Asian countries, see Craig J. Reynolds, *Seditious Histories: Contesting Thai and Southeast Asian Pasts* (University of Washington Press, Seattle and London, 2006), pp. 214-242. On the Indonesian *primbon* manual, see Antons and Antons-Sutanto, above note 23.

²⁹ Rio Convention on Biological Diversity (CBD), 1760 UNTS 79; 31 ILM 818 (opened for signature 5 June 1992, entered into force 29 December 1993)

³⁰ See, for example, Draft Guideline 12 of the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People of the UN Sub-Commission on the Promotion and Protection of Human Rights that includes in the concept of indigenous heritage ‘all objects, sites and knowledge including languages, the nature or use of which is regarded as pertaining to a particular people or its territory of traditional use’. For details see Antons, ‘At the Crossroads’, above note 14, pp. 80-82.

³¹ Christoph Antons, ‘Intellectual property rights in indigenous cultural heritage’, above note 2, pp. 159-160.

³² Darrell A. Posey, ‘Can Cultural Rights Protect Traditional Cultural Knowledge and Biodiversity?’, in: H. Nieć (ed), *Cultural Rights and Wrongs* (UNESCO/Institute of Art and Law, Paris and Leicester, 1998), p. 43. For a summary of criticism of Posey’s work see Michael R. Dove and Carol Carpenter, ‘Major Historical Currents in Environmental Anthropology’, in: Michael R. Dove and Carol Carpenter (eds), *Environmental Anthropology: A Historical Reader* (Blackwell Publishing, Malden, MA – Oxford – Carlton, Vic., 2008), p. 4.

International lawyers advocating various forms of ‘soft law’ find it easier to accommodate such holistic perceptions of traditional knowledge than intellectual property lawyers. Curci sums up the position held by most intellectual property lawyers, when he excludes the ‘holistic’ association with heritage discussed in the *Report of the UN Economic and Social Council on the Cultural and Intellectual Property of Indigenous Peoples*: ‘...these aspects of the concept of TK are neither directly protectable nor enforceable through internationally agreed upon IPRs’ and ‘[t]he compatibility of the maximalist or holistic approach to TK, through *sui generis* IP systems, is fraught with intricate and difficult questions of basic definitions and enforcement that will largely lie outside the scope of this research.’³³

The dilemmas for legal policy making are obvious. There is such a diversity of forms of knowledge that the holders of such knowledge are equally diverse and represent a multitude of interests. Thus, the more inclusive the definition of traditional knowledge, the less likely is it that all ‘stakeholder’ interests are sufficiently represented. Concepts that work for particular communities, on the other hand, may not be recognised by others or may be outside of the scope of what a particular national government wants to recognise or protect. The problem further seems to be that the proponents of intellectual property protection for this subject matter seek to protect knowledge that is local and diverse via laws that are national and unifying. Equally, however, there have been warnings not to accept each and every representation of ‘tradition’ and ‘customary law’ at community level at face value³⁴, but to take notice of the ‘strategic essentialism’ in such ‘rights discourses’.³⁵

3. Intellectual property and cultural property in discourses about intangible cultural heritage

³³ Jonathan Curzi, *The Protection of Biodiversity and Traditional Knowledge in International Law of Intellectual Property* (Cambridge University Press, Cambridge, 2010), p. 94.

³⁴ Martin Chanock, ‘Branding Identity and Copyrighting Culture: Orientations towards the Customary in Traditional Knowledge Discourse’, in: Christoph Antons (ed), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region* (Kluwer Law International, Alphen aan den Rijn, 2009), pp. 177-193; Anna Lowenhaupt Tsing, ‘Becoming a Tribal Elder and Other Green Development Fantasies’, in: Michael R. Dove and Carol Carpenter (eds), *Environmental Anthropology: A Historical Reader* (Blackwell Publishing, Malden, MA – Oxford – Carlton, Vic, 2008), pp. 393-422

³⁵ See for example 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 University Press, Cambridge, 2001), pp. 1-26

International lawyers have concluded that ‘[f]orms of intangible cultural heritage fall within the scope of an overlapping and multifaceted international regime’ and that the overlap between IP rights and intangible cultural property in particular requires ‘close collaboration between the two regimes in order to endure consistency’ and to address the overlaps ‘in a way that does not undermine either one.’³⁶ How the overlaps have come about has been described elsewhere in great detail and only a short sketch will be possible here.³⁷ The long tradition of UNESCO in working on intangible cultural heritage was mentioned earlier.³⁸ Nevertheless, there were other pressing issues after the end of World War II, such as the repatriation of much heritage and artwork that had been taken from occupied countries during the war. Concerns of this nature led to the 1954 Hague Convention for Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention).³⁹ While the Hague Convention was the first international treaty on ‘cultural property’, the history of this concept is considerably longer. Ana Vrdoljak traces its origins to the Vienna Congress of 1815 and the restitution of art works plundered by the Napoleonic forces in various parts of Europe.⁴⁰ The definition of ‘cultural property’ in Article 1 makes it clear that the focus is on tangible objects, movable or immovable property ‘of great importance to the cultural heritage of every people’, buildings ‘whose main and effective purpose is to preserve or exhibit the movable cultural property’ and centers ‘containing a large amount of cultural property’. The proprietarian language developed here reached its high point in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970 UNESCO Convention). Article 1 of the 1970 UNESCO Convention defines cultural property as ‘property which, on religious or secular grounds, is specifically designated by each state as being of importance for archaeology, prehistory, history, literature, art or science.’ The state-centred character of this convention has been noted by various commentators.⁴¹

³⁶ Forrest, above note 11, pp. 363-364. See also Blake, above note 2, p. 10

³⁷ See Forrest, above note 11; Barbara T. Hoffman, ‘Exploring and Establishing Links for a Balanced Art and Cultural Heritage Policy’, in: Barbara T. Hoffman (ed), *Art and Cultural Heritage: Law, Policy and Practice* (Cambridge University Press, Cambridge, 2006), pp. 1-18; Laurajane Smith, above note 2; Lixinski, above note 2.

³⁸ See p. 1, note 2.

³⁹ Hoffman, above note 37, p. 11

⁴⁰ Ana Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge University Press, Cambridge, 2008), pp.

⁴¹ Vrdoljak, above note 40, pp. 209-211; Hoffman, above note 37, p. 11; John Henry Merryman, ‘Cultural Property Internationalism’, in: *International Journal of Cultural Property* (2005) 12:11-39, p. 22; Francesco Francioni, ‘The 1972 World Heritage Convention: An Introduction’, in: Francesco Francioni (ed), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press, Oxford, 2008), p. 3

The following decades, however, brought significant changes to the understanding of cultural heritage. An increasingly international indigenous movement⁴² began to challenge state-centred notions of heritage as well as the focus of UNESCO instruments on masterpieces and what Laurajane Smith calls the ‘discourse of monumentality’.⁴³ Increasingly, intangible cultural heritage became included in ‘safeguarding’ programs. It was also hoped that this would restore the balance between developed and developing nations in international heritage protection, because developing countries were regarded as having few physical manifestations of their culture, but rich intangible heritage.⁴⁴ All of this coincided with a general shift in development policies from ‘top down’ to ‘bottom up’ approaches.⁴⁵

During these years of changing perceptions of heritage, WIPO and UNESCO began to cooperate on various projects aiming at the protection of expressions of folklore. In fact, folklore also turned up on the agenda of the revision conference of the Berne Convention resulting in an amendment in 1967 enabling countries to designate a ‘competent authority’ to represent, protect and enforce rights to ‘unpublished works where the identity of the author is not known.’⁴⁶ This approach as well as the provisions of the subsequent Tunis Model Law on Copyright for developing countries became very influential in the first national copyright laws that many newly independent countries were drafting at the time.⁴⁷ Not dissimilar to the state-centric approach of the 1970 UNESCO Convention, the 1976 Tunis Model Law, drafted by a committee of Tunisian government experts with assistance from UNESCO and WIPO, spoke

⁴² See Ronald Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (University of California Press, Berkeley and Los Angeles, 2003)

⁴³ Smith, above note 2, p. 109. See also Abdulqawi A. Yusuf, ‘Article 1 Definition of Cultural Heritage’, in: Franceso Francioni (ed), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press, Oxford, 2008), p. 33

⁴⁴ Forrest, above note, p. 365

⁴⁵ For details, see Peter Ørebech, Fred Bosselman, Jes Bjarup, David Callies, Martin Chanock and Hanne Petersen, *The Role of Customary Law in Sustainable Development* (Cambridge University Press, Cambridge and New York, 2005)

⁴⁶ Antons, ‘Intellectual Property Rights in Indigenous Cultural Heritage’, above note 2, p. 145. The uptake of this option must have been disappointing, because WIPO documents of 2002 indicate that up to that point only India had notified WIPO about its designated competent authority, see WIPO, IGC, ‘Final Report on National Experiences with the Legal Protection of Expressions of Folklore’, WIPO Doc. WIPO/GRTKF/IC/3/10, 25 March 2012, p. 9

⁴⁷ See Antons, ‘Intellectual Property Rights in Indigenous Cultural Heritage’, above note 2, p. 146, note 12, quoting the UNESCO/WIPO model provisions of 1985 with a list of countries protecting folklore as part of their Copyright Acts, mostly using the ‘authors of unknown identity’ formula of the revised Berne Convention, UNESCO/WIPO, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (UNESCO/WIPO, Geneva, 1985) at para. 5.

of ‘works of national folklore’ and left it to national governments to form a ‘competent authority’ to administer and exercise the rights.

A gradual change in perception of the material and the relevant rights holders becomes visible during the next collaborative project of UNESCO and WIPO, the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions (the Model Provisions), drafted in 1982 and published in 1985.⁴⁸ The Model Provisions abandon the copyright focus in favour of *sui generis* protection against illicit exploitation and other prejudicial actions. They acknowledge the communities and individuals actually producing the material. Apart from ‘competent authorities’ at the national level, authorisation to use protected material can also be granted by communities, although it requires that ‘aboriginal or other traditional communities are recognized as owners fully entitled to dispose of their folklore’ and are ‘sufficiently organized to administer the utilization of the expression of their folklore.’⁴⁹ Although the Model Provisions with their strengthened community focus appear more progressive than the Tunis Model Law, they failed to gain the support of national governments.⁵⁰ Given the concerns of many developing countries about national unity and the strong tradition of centralised development policies, this should perhaps not surprise.

Francesco Francioni and others have explained, how the 1972 World Heritage Convention became a watershed in breaking with the notion of ‘cultural property’ of the earlier conventions⁵¹ and in taking the first steps in bringing together the separate spheres of cultural and natural heritage at a time, when contemporaneous environment conventions supported such developments.⁵² This led to the inclusion, in the subsequent Operational Guidelines for the Implementation of the World Heritage Convention, of ‘cultural landscapes’ in the concept of ‘cultural heritage’.⁵³ The Guidelines and the Convention itself show also, however, that the older proprietary language has not disappeared and both documents make extensive reference to ‘cultural properties’. Ben Boer notes the interchangeable use of the terms finding that ‘[t]his

⁴⁸ See the UNESCO/WIPO, *Model Provisions*, above note 47.

⁴⁹ UNESCO/WIPO, *Model Provisions*, above note 47, para. 49

⁵⁰ Michael Halewood, ‘Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection’, (1999) *McGill Law Journal*, 44, pp. 953-958

⁵¹ Yusuf, above note 43, p. 27

⁵² Francioni, above note 41, pp. 3-5

⁵³ Kathryn Whitby-Last, ‘Article 1 Cultural Landscapes’, in: Francesco Francioni (ed), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press, Oxford, 2008), p. 51

usage lends itself to the cultural and natural heritage being commodified to an extent, but serves also to emphasize one of the features of the Convention, namely that cultural and natural heritage is seen as being firmly under the control of sovereign states'. In a footnote, he acknowledges further that '[t]here can of course be difficulties in the case of transboundary properties, especially where territorial boundaries are in dispute'.⁵⁴ A recent case proving this point is the military confrontation between Thailand and Cambodia after the temple complex of Preah Vihear on the border between the two countries was heritage listed by Cambodia.⁵⁵ However, as the case studies below show, this potential for conflict is by no means confined to monuments and tangible heritage, but now also spreading with regards to forms of intangible cultural heritage.

UNESCO followed up on its folklore related activities in 1989 with the Recommendation on the Safeguarding of Traditional Culture and Folklore. The holistic understanding of the material is visible from its definition with folklore being defined as 'the totality of tradition-based creations of a cultural community', including 'language, literature, music, dance, games, mythology, rituals, handicrafts, architecture and other arts'. There is an equally broad definition of the 'group whose identity it expresses', as including 'familial, occupational, national, regional, religious, ethnic etc.' groups. However, the document does not follow up on the promises to empower communities, which was expressed in the 1982 WIPO/UNESCO Model provisions. They play only a secondary role in efforts of the state to carry out research on, register, preserve and archive the material. They retain the 'right of access to their own folklore'. With regards to the 'intellectual property' aspects, a 'transmitter of tradition' is protected as an 'informant', whereby the protection of privacy and confidentiality is specifically mentioned. However, the protection of the 'transmitter/informant' stands alongside that of the 'interest of the collector' in archiving in 'good condition and in a methodological manner'. Blake⁵⁶ regards the 1989 Recommendation as a 'major step forward' in providing formal recognition of intangible cultural heritage, but criticised it elsewhere for its design 'with the needs of scientific research and government officials in mind' and as a document that does

⁵⁴ Ben Boer, 'Article 3 Identification and Delineation of World Heritage Properties', in: Francesco Francioni (ed), *The 1972 World Heritage Convention: A Commentary* (Oxford University Press, Oxford, 2008), pp. 86-87 and footnote 2.

⁵⁵ Seth Mydans, 'Cambodians Are Evacuated in Temple Feud with Thais', *The New York Times*, February 7, 2011

⁵⁶ Above note 2, p. 2

not meet the aspirations of Indigenous peoples or provides for informed consent and consultation.⁵⁷

These criticisms were heeded to a considerable extent during the drafting of the UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage. The preamble now explicitly recognises that ‘communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and recreation of the intangible cultural heritage’. Among the purposes of the convention is ‘to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned’.⁵⁸ ‘Ensuring access’ is dependent on respect for ‘customary practices governing access to specific aspects of such heritage.’⁵⁹ More generally, a state party to the Convention ‘shall endeavour to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management.’⁶⁰ Blake, however, points to the considerable discussion that the phrase ‘communities, groups and individuals’ generated during the drafting of the Convention.⁶¹ A similar discussion is now being held in the WIPO IGC in trying to define the beneficiaries of TK/TCE protection. There is also some overlap between the definition of ‘intangible cultural heritage’ in Article 2 of the Convention and what is now discussed in the WIPO IGC for potential protection via intellectual property rights. The definition includes also ‘knowledge’ and ‘skills’ and, in a list of examples, ‘oral traditions and expressions’, ‘performing arts’, ‘knowledge and practices concerning nature and the universe’ and ‘traditional craftsmanship. To avoid potential conflicts with either a future WIPO treaty or the traditional knowledge provisions of the CBD, Article 3 clarified that the rights and obligations from these treaties were not affected by the 2003 UNESCO Convention.

When WIPO renewed its activities in this field in the late 1990s, it was in a very different environment from that of its earlier collaboration with UNESCO during the 1970s and 1980s. An increasingly international movement of indigenous peoples and their perceptions of heritage was making its presence felt. Ecologists had promoted the importance of traditional knowledge in biodiversity management and the CBD was providing incentives for ‘indigenous

⁵⁷ Blake, as quoted in Smith, above note 2, p. 107

⁵⁸ Article 1 (b).

⁵⁹ Article 13 (d) (ii)

⁶⁰ Article 15

⁶¹ Blake, above note 2, p. 29

and local communities’ to provide access with prior informed consent and benefit sharing.⁶² However, while the trend was moving away from property based approaches and towards ‘bottom up’ approaches involving communities, the CBD also had a strong centralising aspect in Article 3, according to which ‘ the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.’

The progress in the WIPO IGC is well documented⁶³ and has been discussed elsewhere.⁶⁴ Although WIPO had apparently been unwilling to assume any responsibilities relating to the influential Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples promulgated by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1995,⁶⁵ the holistic perceptions of indigenous heritage expressed in the Principles and Guidelines, in reports from indigenous organisations⁶⁶ and in the academic writings of ecologists⁶⁷ were influential in the initial working definition of ‘traditional knowledge’ resulting from fact-finding missions to 28 countries. This definition saw expressions of folklore as a mere sub-set of TK, acknowledging the intimate link between knowledge and the way it is transmitted in most indigenous cultures.⁶⁸ Importantly, WIPO showed the various relationships in a picture of overlapping circles, in which heritage as the widest circle included traditional knowledge, which in turn included expressions of folklore and indigenous knowledge. However, the difficulties to align these very wide definitions with the relatively narrowly defined categories of intellectual property soon led to a distinction between TK *stricto sensu*, which focused on the more technical forms of traditional knowledge relevant for medicine, agriculture and biodiversity (and potentially related to industrial property rights), TCEs with their potential link to copyright and genetic resources (GR) associated with traditional knowledge and relevant in the field of patents in particular.

⁶² Article 8(j)

⁶³ See the weblink of the IGC at <http://www.wipo.int/tk/en/igc/> (accessed 11 December 2013)

⁶⁴ Antons, ‘Intellectual property rights in indigenous cultural heritage’, above note 2; Antons, ‘At the crossroads’, above note 14

⁶⁵ See Helfer and Austin, p. 450, fn. 81.

⁶⁶ Terri Janke, *Our Culture, Our Future*, Report on Australian Indigenous Cultural and Intellectual Property Rights (Michael Frankel & Co, Sydney, 1998)

⁶⁷ Fikret Berkes, *Sacred Ecology*, above note 18

⁶⁸ The definition considered as TK all: tradition based literary, artistic and scientific works, performances, inventions, scientific discoveries, designs, marks, names and symbols, undisclosed information and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, literary and artistic field. See WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders – WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge* (WIPO, Geneva, 2001), p. 13

Since 2007, the IGC is engaged in text-based negotiations for an international instrument or instruments in these fields. In July 2013, the IGC presented the drafts to the WIPO General Assembly, suggesting various options for a renewal of the mandate.

4. Cultural and intellectual property in cross-border disputes about intangible cultural heritage

Legal academics⁶⁹ and social scientists⁷⁰ have meanwhile pointed to the potential for cultural property claims loosely based on UNESCO conventions and extended to intangible cultural heritage and intellectual property claims to material derived from heritage to become combined in cross-border claims involving intangible cultural heritage. Recent cross-border disputes between neighbouring countries in Southeast Asia are evidence for this potential. They concerned, for example, a Balinese dance,⁷¹ traditional folk songs popular in Indonesia and Malaysia⁷² and dance gestures used in classical ballet in both Thailand and Cambodia.⁷³ There are two main reasons for this development. The first reason is the implementation of the UNESCO 2003 Convention with more and more items of intangible cultural heritage now being inscribed by nation states in one of the two intangible heritage lists maintained by the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage.⁷⁴ The second reason is that in the wake of the biopiracy debate there have been for quite some time media reports in developing countries about the claiming of intellectual property rights over local cultural or natural resources by foreigners. The Indonesian press, for example, has for years carried many of these stories. They concern the patenting of a process for traditional medicines in Japan and for craft using cane (*kerajinan rotan*) in the United States;⁷⁵ the

⁶⁹ Coombe, above note 12; Christoph Antons, 'What is "Traditional Cultural Expression"? International Definitions and Their Application in Developing Asia', in: *WIPO Journal* 2009, Issue 1, pp. 103-116; Christoph Antons, 'Geographies of Knowledge: Cultural Diffusion and the Regulation of Heritage/Cultural Expressions in Southeast Asia', in: *WIPO Journal* 2012, Volume 4, Issue 1, pp. 83-91; Christoph Antons, 'Asian Borderlands and the Legal Protection of Traditional Knowledge and Traditional Cultural Expressions', in: *Modern Asian Studies*, Volume 47, Issue 4, 2013, pp. 1403-1433

⁷⁰ Lorraine V. Aragon and James Leach, 'Arts and Owners: Intellectual property law and the politics of scale in Indonesian arts', in: *American Ethnologist*, Vol. 35 No. 4, 2008, pp. 607-631; Aragon, above note 13; Jinn Winn Chong, "'Mine, Yours or Ours?': The Indonesia-Malaysia Disputes over Shared Cultural Heritage", in: *SOJOURN: Journal of Social Issues in Southeast Asia*, Vol. 27 No. 1, 2012, pp. 1-53.

⁷¹ 'Indonesian Outrage over a Dance', *Asia Sentinel*, 25 August 2009; Chong, above note.

⁷² 'Malaysia Urges Indonesia to Drop Plans to Sue over Folk Song', *Jakarta Post*, October 8, 2007

⁷³ Lindsay Murdoch, 'Thais lay claim to lord of the dance gesture', *The Age*, 15 August 2011

⁷⁴ These lists are the List of Intangible Cultural Heritage in Need of Urgent Safeguarding and the Representative List of the Intangible Cultural Heritage of Humanity.

⁷⁵ 'Lemah, Perlindungan Negara pada Pengetahuan Tradisional', *Kompas*, 17 March 2006

patenting of (presumably the production process) of *tahu* (the Indonesian version of *tofu*), *tempe* (a kind of cake made from soya beans), *angklung* (a music instrument made from bamboo), the attempt by Japanese manufacturer Shiseido to patent Indonesian cosmetics and a patent application of the Massachusetts Institute of Technology together with the Malaysian government to patent a bioactive fraction of *pasak bumi*, a plant used in traditional medicine in both countries and known in Malaysia as '*tongkat Ali*';⁷⁶ the patenting of local breeds of corn by a Thai backed company and the copyright registration of Indonesian designs in the United States.⁷⁷ Although the legal details of cases were not always reported correctly – the agricultural case, for example, was decided on the basis of a seed certification law rather than an intellectual property law⁷⁸ - they certainly helped to build up a groundswell of emotions against intellectual property laws.

One problem with the traditional knowledge discourse in Indonesia is, however, that forms of traditional knowledge are understood as intellectual and cultural property simultaneously. This confusion is visible in the country's Copyright Act which mixes in the same provision the copyright to folklore and 'products of popular culture which become common property' with a 'copyright' to prehistorical and historical works and 'other national cultural objects'.⁷⁹ It is, therefore, hard to avoid the impression that during the drafting of the provision in the early 1980s,⁸⁰ the 'national folklore' approach of the Tunis Model Law was influencing the lawmakers together with the 'cultural property' approach of the 1970 UNESCO Convention.

However, the merging of the two concepts is by no means peculiar to Indonesia, as the same chemistry of different UN discourses has been at work elsewhere, too. The Law on National Heritage of 2005 of the Lao People's Democratic Republic,⁸¹ for example, provides in Article 28 that '[n]ational heritage [items] at national level which have high value, are rare and are of unique national character shall be considered and proposed for registration of ownership and copyright in the name of the nations with international organisations.' Further,

⁷⁶ Catharina Ria Budiningsih, 'Menyoal Paten Pengetahuan Tradisional', *Pikiran Rakyat*, 30 July 2007

⁷⁷ Andra Wisnu, 'Copyright law fails artisans: Experts', *Jakarta Post*, September 24, 2008

⁷⁸ 'Case documentation: Indonesian farmers prosecuted for breeding their own seeds', at <http://www.asianfarmers.org/?p=208> (Accessed 9 December 2013)

⁷⁹ For details of the 'folklore' provision of the Indonesian Copyright Act, see Christoph Antons, *Intellectual Property Law in Indonesia* (Kluwer Law International, London – Cambridge, MA – Dordrecht, 2000), pp. 84-90; Antons, 'What is Traditional Cultural Expression', above note 69, pp. 108-110

⁸⁰ Indonesia's first national Copyright Act, replacing Dutch colonial law, was promulgated in 1982, see Antons, 'Intellectual Property Law in Indonesia', above note 79, pp.53-54

⁸¹ Law No. 08/NA of 9 November 2005

according to Article 27 '[t]he state protects the property [and] copyright [subsisting in items of] Lao national cultural and historical heritage which are outside the territory of the Lao PDR, which are in the illegitimate possession of other countries, or [in respect of which foreign countries have illegitimately asserted] copyright.'⁸²

It seems also that UNESCO's subtle shift away from the cultural property terminology of earlier conventions has been missed by national law makers. This should perhaps also not surprise, because the older conventions are still referenced in the more recent ones and the terminology continues to be used in the more recent guidelines to the 1972 World Heritage Convention. At the national level, therefore, the term 'cultural property' often extends to intangible cultural heritage, as, for example, in the Philippines' National Cultural Heritage Act of 2009.⁸³

5. Conclusion: a role for intellectual property in intangible cultural heritage protection?

The confusion about the limits of cultural and intellectual property and the merging of the two into forms of 'national cultural and intellectual property' is of concern in view of the aim of the 2003 UNESCO Convention to safeguard intangible cultural heritage 'as a mainspring of cultural diversity' and 'in a spirit of cooperation and mutual assistance.'⁸⁴ In the academic discourse in this field, intellectual property is often regarded as unsuitable in view of the holistic nature of the material and the collectivist spirit in which it is assumed to be created. Heritage and human rights discourses seem more suitable, because they are not departing from a 'property' perspective. However, the collectivism of international law is that of the nation state and not that of the 'local' and indigenous communities from which the material originates. Richard Falk has noted 'growing disparities between institutional arrangements that retain an exclusive state membership, most notably the United Nations, and the multifaceted realities of international life, with grassroots and imperial empowerment both

⁸² Both provisions in the translation endorsed by the Law Committee of the National Assembly of the Lao PDR are to be found at <http://www.wipo.int/wipolex/en/profile.jsp?code=LA> (accessed 11 December 2013)

⁸³ See Section 3 (o): "Cultural Property" shall refer to all products of human creativity... whether public or privately-owned, movable or immovable, and tangible or intangible.

⁸⁴ See the Preamble of the 2003 Convention.

greatly facilitated by new technologies of resistance and control.’⁸⁵ In the 2003 UNESCO Convention, ‘communities’ ‘play an important role’ in the production and safeguarding of heritage and are ‘helping to enrich cultural diversity and human creativity.’ The ‘cultural property’, however, is owned and has to be defended by the nation state.

If this approach is transferred to intellectual property laws, communities may find that there is little to gain from traditional knowledge protection. Indonesia’s Plant Variety Protection Law provides, for example, in Article 7 that a ‘local variety owned by the community shall be controlled by the state.’⁸⁶ As a consequence, the registration list on the website of the Plant Variety Protection Centre of the Ministry of Agriculture⁸⁷ shows that 362 local varieties were registered between 2005 and August 2012 by mayors, officers in charge of a regency (*Bupati*) and by the governors of provinces. In India, farmers receive recognition and reward, determined by the authorities, from a National Gene Fund for their contribution in accordance with the Protection of Plant Varieties and Farmers’ Rights Act of 2001.⁸⁸ There is an overlap with an equally centralised approach in the Biological Diversity Act of 2002, prompting one commentator to conclude that the Act was ‘heavily biased against the interests of tribal and local communities who are the guardians of associated knowledge.’⁸⁹

As an instrument to provide incentives for environment and heritage conservation, intellectual property remains, therefore, an odd choice. But then again, as stated at the beginning of this chapter, the interests of the ‘communities’ and ‘stakeholders’ involved are as diverse as the heritage they are supposed to guard. If there is agreement among some of them to seek commercialisation of aspects of their heritage, then carefully selected intellectual property tools, as, for example, trade marks or geographical indications, might help.⁹⁰ Finally, whether it concerns cultural or intellectual property related to cultural objects,

⁸⁵ Richard Falk, ‘International Law and the Future’, in: Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge-Cavendish, London and New York, 2008), pp. 31-32

⁸⁶ Translated by Yasmon Rangkyo Sati, *Indonesian Intellectual Property Directory* (2nd ed., ShortCUT Gagas Imaji, Jakarta, 2008), p. 183

⁸⁷ Pusat Perlindungan Varietas Tanaman dan Perizinan Pertanian, *kementerian Pertanian Republik Indonesia*, <http://ppvt.setjen.deptan.go.id> (accessed 30 June 2012)

⁸⁸ S.K. Verma, ‘Protection of Traditional Knowledge in the SAARC Region and India’s Efforts’, in: Christoph Antons (ed), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region*, pp. 330-331

⁸⁹ Rajes Sagar, ‘Intellectual Property, Benefit-Sharing and Traditional Knowledge: How Effective is the Indian Biological Diversity Act, 2002?’, *Journal of World Intellectual Property*, 2005, pp. 383, 387-388

⁹⁰ On the necessity to carefully distinguish between different intellectual property instruments and their usefulness in this regard, see Christoph Antons, ‘Traditional cultural expressions and their significance for

it is important to bear in mind that the people bearing a culture move and migrate across borders. The borders of the realms, in which cultures are practised, are difficult if not impossible to fix and they will rarely be in accordance with the borders of the nation state that attempts to regulate them.⁹¹

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* (Edward Elgar, Cheltenham, UK and Northampton, MA, 2008), pp. 287-301

⁹¹ Antons, 'Asian Borderlands', above note 69.