PROTECTION OF INDIGENOUS ART FORMS UNDER MODERN IPR REGIMES: ISSUES, LACUNAE AND POSSIBLE ALTERNATIVES

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Abstract

In many countries of the world, traditional arts and crafts, including handicrafts that have been practiced since time immemorial. However, these traditional handicrafts are being threatened by rapid and unchecked plagiarism, and unauthorized reproductions of local artworks are being exported to other countries, hampering the livelihood for communities that practice these forms of art.

Copyright law presents itself as one of the best possible mechanisms to protect these artworks. However, modern-day copyright regimes, based on western conceptions and notions of ownership, are not free from bottlenecks and the inadequacy of national and international copyright had led policy makers to look for possibly alternative frameworks to address and needs and interests of local artisans.

This paper seeks to examine the intersection between copyright law and indigenous art, and critically analyze the various drawbacks in applying current copyright laws to protecting indigenous art. The paper further seeks to explore proposed alternative mechanisms addressing lacunae in current copyright framework. The conclusion drawn by the author is that there is an urgent need for countries to develop alternative or supplemental frameworks to the current intellectual property regimes to protect the interests of the indigenous artists.

Research Methodology: Doctrinal

Keywords: indigenous art, copyright laws, culture, intellectual property rights, human rights.

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INTRODUCTION

The confluence of indigenous arts and crafts and intellectual property law represents issues with multiple layers and perspectives from various stakeholder groups.[1] Indigenous people which represent unique cultural heritage, understandably have legitimate rights to control, including restricting others rights to knowledge or information that derives from unique cultural histories, expressions, practices and contexts.[2] Of all the laws, intellectual property law seemingly is best suited to address the protection of their cultural rights.[3] However, intellectual property law does not necessarily correspond or complement their interests and rights. Indigenous people's interests in intellectual property law raises issues that involve both legal and non-legal components.[4] Issues faced by indigenous people are not only commercial in nature, but also involve ethical, cultural, historical, religious/spiritual and moral dimensions.[5] For example, inappropriate use of sacred cultural artifacts, symbols, or designs may not cause financial loss but can cause considerable offense to the relevant community responsible for the use and circulation of that artifact, symbol or design.[6]

The recent years has seen much debate about the extent that intellectual property law could be utilized to protect indigenous people's knowledge, having also captured the attention of the World Intellectual Property Organization (WIPO).[7] Since 2001, it has hostedthe Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), to discuss these issues.[8]

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[1] Jane Anderson, *Indigenous/Traditional Knowledge & Intellectual Property* : Issues Paper, Duke University School of Law Center for the Study of the Public Domain, released under a Creative Commons Attribution-NonCommericaL-ShareAlike 3.0 Unported License.

[2] *Id.*

[3] *Id.*; See FIRST NATIONS CULTURAL HERITAGE AND LAW: CASE STUDIES, VOICES, AND PERSPECTIVES (Catherine E.Bell& Val Napoleon eds., 2008); TERRI JANKE, OUR CULTURE: OUR FUTURE: REPORT ON AUSTRALIAN INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY RIGHTS (1998)

[4] *Id.*; Several copyright cases in Australia illustrate this. In the US, questions around the use of Native American names and symbols for team names and logos by sports organizations raise similar issues about inappropriate use. For example, see *Harjo v. Pro-Football*, Inc., 30 U.S.P.Q. 2d (BNA) 1828 (TTAB 1994) and *Pro-Football, Inc. v. Harjo*, 565 F.3d 880 (D.C. Cir. 2009).

[5] Anderson, *Supra* note 1; *See* Joseph William Singer, *Publicity Rights and the Conflict of Laws: Tribal Court Jurisdiction in the Crazy Horse Case*, 41 S.D.L REV. 1 (1996). Also *see* Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM.L. REV.2004 (2007).

[6] *Id.*

[7] One example of the increasing focus is the range of regional declarations on indigenous knowledge and intellectual property rights. *See*Declaration of Belem, Brazil, July 1988; Kari-Oca Declaration and Indigenous Peoples Earth Charter, Brazil, May 1992 (reaffirmed in Indonesia, June 2002); Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, New Zealand, June 1993; Julayinbul Statement on Indigenous Intellectual Property Rights, Australia, November 1993; Santa Cruz de la Sierra Statement on Intellectual Property, Bolivia, September 1994; Tambunan Statement on the Protection and Conservation of Indigenous Knowledge, Malaysia, February 1995; Suva Statement on Indigenous Peoples Knowledge and Intellectual Property Rights, Fiji, April 1995; Kimberley Declaration, South Africa, August 2002; *See* Brian Noble, *Justice, Transaction, Translation: Blackfoot Tipi Transfers and WIPO's Search for the Facts of Traditional Knowledge and Exchange*, 109 Am. Anthropologist 338 (2007). The authoritative power of WIPO is also examined as a form of regulatory governance, *See* Christopher May, *The World Intellectual Property Organization: Resurgence and the Development Agenda* (2007).

[8] *Id.*; Anderson, *Supra* note 1, at 34.

However, despite these efforts, international consensus is yet to be reached on indigenous people's rights to the protection of cultural knowledge.[9]Questions around ingenious people's concerns are not limited to one area but can stretch across every part of the intellectual property spectrum.[10] For example, the protection of traditional Inuit amauti clothing, could include legal questions involving copyright, trademarks, designs, and/or confidential information.[11]

Indigenous interests in intellectual property law can affect around 370 million indigenous people located in over 70 countries.[12]Besides, indigenous people's themselves, there are a range of non-indigenous people that are also inextricably involved within the indigenous knowledge and intellectual property matrix. For instance, filmmakers[13] draw upon indigenous people's cultural stories or songs; librarians, archivists, museum professionals and researchers[14] who utilize any material about indigenous people contained in the vast ethnographic collections spread throughout the world's cultural institutions. Besides these, there are government agencies or government-funded research bodies[15]; corporations and other commercial or industrial entities[16]; publishers or designers who utilize indigenous motifs or symbols[17], and non-governmental organizations representing indigenous peoples[18], amongst others.

This paper explores the issues with European/American concept of copyright law and its conflicts with rights and interests of the indigenous people in greater detail, and attempts to suggest possible alternatives within and beyond the current intellectual property framework to address the issues confronted with indigenous people, with special reference to indigenous art forms.

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[9] *Id*., For national initiatives, see, for example: New Zealand, Trade Marks Act 2002; Panama, Law on the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge 2000; Philippines, Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples 1997; Republic of Azerbaijan, On Legal Protection of Azerbaijani Expressions of Folklore 2006; United States of America Database of Native American Insignia, Trademark Law Treaty Implementation Act 1998.

[10] *Id*.; Kaitlin Mara, *"Turning Point" at WIPO Pulls Traditional Knowledge Debate Out at Eleventh Hour*, INTELLECTUAL PROPERTY WATCH, Oct. 3, 2009, http://www.ip-watch.org/ weblog/2009/10/03/"turning-point"-at-wipo-pulls-traditional-knowledge-debate-out-ateleventh-hour/ [last accessed: 23 May 2015].

[11] *Id*.; *See* PROTECTION OF FIRST NATIONS CULTURAL HERITAGE: LAWS, POLICY, AND REFORM (Catherine Bell & Robert K. Paterson eds., 2009).

[12] The Permanent Forum in Indigenous Issues is the central international co-ordinating body on indigenous peoples' issues. *See* http://www.un.org/esa/socdev/unpfii/ [last accessed 20 May 2015].

[13] Anderson, *Supra* note 1.

[14] *Id.;* The problems for museums, libraries and other cultural collections are extensive and, depending on your perspective, fundamental. They involve questions about the origination (and legitimacy therein) of the collections as well as their treatment, and the effects of their archival treatment. *See* Henrietta Fourmile, *Who Owns the Past? Aborigines as Captives of the Archives*, 13 Aboriginal Hist. 1 (1989); Henrietta Fourmile, *Aborigines and Captives of the Archives: A Prison Revisited*, in ARCHIVES IN THE TROPICS: PROCEEDINGS OF THE AUSTRALIAN SOCIETY OF ARCHIVISTS CONFERENCE 1994 (1994); and Rebecca Tsosie, *Contaminated Collections: An Overview of the Legal, Ethical and Regulatory Issues*, 17 Collection Forum (2001) 14.

[15] *Supra* Note 13.

[16] *Id.*

[17] *Id.*

[18] *Id.*

THE INTERSECTION BETWEEN COPYRIGHT LAW AND INDIGENOUS ART

Modern Copyright law remains, till date, the best possible mechanism for protection of artistic works.[19] However, it is equally true that international and domestic copyright regimes are based on western concepts of creation and invention, and ownership of such creations.[20] For instance, as a matter of generality, indigenous art or other forms of traditional cultural expressions are practiced and therefore, "owned" by families, who practice particular art forms through generations.[21] Usually, the techniques and skills utilized for creating indigenous art form, is passed on from one generation to next generation, thus giving the community its own unique identity.[22] Copyright Law, on the other hand, recognizes "ownership" over a single identifiable author, which may be a natural person, entity, a company or an organization.[23]However, this nodal requirement under copyright law creates difficulties for ascertaining "ownership" in indigenous art, as families or generations are involved.[24]Peculiarly, the individual nature of the copyright presents only one of the possible barriers to the protection of indigenous art and other forms of cultural expressions.[25]

INDIVIDUAL NATURE OF THE COPYRIGHT LAW

In the Australian case of *Yumbulbul v. Reserve Bank of Australia*[26], epitomizes the conflict between individualistic inclinations of copyright law, and rights of indigenous peoples and communities, over their traditional expressions. In this case, an aboriginal artist, Terry Yumbulbul, sued the Reserve Bank of Australia because it had used the image of his sculpture on a new Australian ten dollar note issued to commemorate the bicentennial of the European settlement of Australia.[27] The Bank claimed that the artist, who had a valid copyright, licensed the Bank to use the image.[28] The artist claimed that he did not have the authority to grant such a license as approval was required, under traditional customary law, from the elders of the Galpu people, who whom the motif belonged.[29] Thus, under customary law, artworks are subject to layers of rights and many individuals may need to grant permission to use an image.[30]The Federal Court of Darwin dismissed the action. However, the Court also highlighted the inadequacy of Australia's copyright laws to deal with community claims, and the need to recognize customary laws dealing with ancestral designs.[31]

THE REQUIREMENT OF ORIGINALITY

[19] Rajat Rana, *Indigenous Culture and Intellectual Property Rights* 11 JIPR 132 (2006).
[20] *Id.* at 135.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.* at 134.
[26] (1991) 21 IPR 481.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*

Under the tenets of copyright law, originality means and includes work that is a product of original thought, skill, or labour of the artist.[32] Copyright Law does not require absolute novelty, unlike patent laws, where novelty as against prior art is one of the threshold requirements for securing protection under the law.[33] Under copyright law, as along as the work evidences individual skill, and labor of the author, it will satisfy the "originality" requirement.[34] Where a work is based on pre-existing work, it must demonstrate substantial, and not merely trivial variation.[35]

However, when it comes to artworks of indigenous people, there is a mismatch between the originality requirement of copyright law and art forms practiced by the indigenous people. Art forms of indigenous people and communities have been evolved over a period of centuries, or even thousands of years.[36] Thus, innovation, as understood, under modern copyright law, does not find a place under indigenous art. Under indigenous art, faithful reproduction is valued and it functions as historical and sacred text, drawing from experiences borrowed from everyday life, and incorporating local customs and traditions. As a result, the variations in the production of traditional art are often limited, as the subject-matter remains, mostly restricted and transgressing from the themes to be depicted, is generally discouraged by the community practicing the art forms.[37] Indigenous artisans and craftsmen are expected to reproduce faithfully and accurately themes that have been practiced through generations.

In another Australian case of *Milpurrurru v Indofurn Pty Ltd*.[38], also known as the Carpet Case, decided by the Federal Court of Australia, the friction between copyright law's insistence on the originality and the indigenous people's emphasis on accuracy in reproduction was quite evident.[39]In this case, carpets reproducing the works of several prominent indigenous artists were discovered by the National Indigenous Arts Advocacy Association (NIAAA).[40]An action was brought against Indofurn, a Perth-based import company, which imported the carpets from Vietnam.[41]In June 1992, after the production and importation of the carpets had commenced, Indofurn sought advice on copyright permission from the Aboriginal Legal Service of Western Australia.[42] When the information was received and the artists were contacted, they refused to let their work be used in that manner and sought assistance from NIAAA to take action against the illegal importations. NIAAA consequently, commenced action.[43]

[32] *Supra* Note 19; *Alva Studios Inc. v. Winneger*, 177 F. Supp 265, 267 (SDNY 1959).
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] (1994) 130 ALR 659.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*

The main issue before the Court was whether there subsists any copyright in the indigenous artworks? In other words, the issue was whether a work incorporating pre-existing traditional designs and images was original and therefore subject to copyright protection.[44]The Court held that copyright of the aboriginal artists had been infringed.[45] The Court noted that the altered images on the carpets, although not identical to the artworks, were centrally important to that particular artwork. This factor was significant in leading the Court to conclude that copyright had been infringed.[46]

Fixation Requirement

Indigenous authors have also argued that the fixation requirement is a barrier to protection for indigenous art. Copyright law usually requires that an expression be fixed in a tangible medium.[47] Often, alternative forms of indigenous art are not able to fulfill this requirement because art forms may never be fixed. Song and dance, for instance, may be passed down from generation to generation through memorization, but never be recorded in any tangible form.

Duration of Rights

The duration of rights poses a significant problem in the protection of the traditional cultural knowledge such as folklore. In all Berne Convention (as incorporated in the TRIPS Agreement) member states, the term of the protection is the life of the author plus fifty years.[48]

Under Section 22 of the Copyright Act, 1957, the term of the protection lasts for a period of 60 years after the death of the author.[49] However, many indigenous arts date back to thousands of years, thus many indigenous rights advocates argue that perpetual protection should be granted to folklore because "protection of the expression of folklore is not for the benefit of individual creators but a community whose existence is not limited in time".[50]

DEVELOPING REMEDIAL MEASURES TO ADDRESS NEEDS OF LOCAL COMMUNITIES

As seen from the above discussion, national and international copyright law regimes have failed to address the *sui generis* needs and legal grievances of the indigenous people, and thus, they continue to face problems in a myriad of areas, especially while dealing with non-indigenous people and third party interests.[51] In view of the above, there is a glaring need to

[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Canadian Admiral Corp. v. Rediffusion Inc.* (1954) Ex. CR 382 (Can.).
[48] *Overview: the TRIPS Agreement*, available at: https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm (last accessed: July 4, 2015).
[49] Section 22, Copyright Act, 1957
[50] Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (UNESCO-WIPO) 1985, p. 22; Anderson, *Supra* note 1.
[51] Anderson, *Supra* note 1.

develop alternative strategies and mechanisms, within or outside the purview of intellectual property law, which appropriately address the needs of local communities and enable better protection of their creative efforts. The current proposals maybe grouped into five categories, and they reflect the efforts made at policy, local, national, regional and international level of governance.[52]

UTILIZING CURRENT INTELLECTUAL PROPERTY FRAMEWORK

Using Labeling or Trademarks as Protection devices

Labeling has proven to be most useful for indigenous products that are already operating within the marketplace as (cultural goods).[53]The use of labels works and labels function as an indication of the originality and/or authenticity of the products.[54] Labeling systems that denote a product's indigenous origin, either in the context or personhood, enable indigenous works to be more easily identified and differentiated from non-indigenous works and/or copies that may be available.[55]

Certification marks, and marks of origination, can work well for indigenous people when the value of the product is tied to its derivation within a particular context or by a particular group.[56]

For instance, in Australia, many indigenous communities use specific marks on their goods to signal consumers that the works originate from a particular community.[57] This lends specificity and distinct identity that each community has from one another.[58] Labeling, thus, is an effective tool to affirm and re-affirm distinctness to the community and attribute collective identity.[59]

However, labeling cannot stop counterfeiting of indigenous products, it does provide and advantage in the marketplace since labels provide the consumer with the ability to differentiate fake from genuine goods.[60]

Labeling, when reinforced, can affect the aesthetic appeal of the works, and thus, directly denigrate the value of the goods in the market. For instance, following a workshop run by an

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[52] *Id.*
[53] Anderson, *Supra* note 1; In Australia, for example, Aboriginal communities developed the Labels of Authenticity and in New Zealand the 'toiiho' is a registered trademark for products of Maori origin. Unfortunately both of these initiatives are no longer in operation, with the 'toiiho' mark most recently ceasing operation due to high administrative costs. *See* Tangata Whenua, *ToiIho To Be Scrapped* (Māori News & Indigenous Views), Oct. 23, 2009 (available at: http:// Notes 65 news.tangatawhenua.com/archives/1456) (last accessed 13 January 2015). For a further discussion about the reasons leading to the demise of the Labels of Authenticity in Australia, *see* JANE E. ANDERSON, LAW, KNOWLEDGE, CULTURE: THE PRODUCTION OF INDIGENOUS KNOWLEDGE IN INTELLECTUAL PROPERTY LAW (2009).
[54] Anderson, *Supra* note 1.
[55] *Id.*
[56] Anderson, *Supra* note 1.
[57] *Id.* at p. 29.
[58] *Id.*
[59] *Id.*
[60] *Id.*

NGO for labeling in Indonesia, many women collectively started to weave large identifiable labels (with names of the families or communities, to which the design belonged) into their works. This significantly altered the aesthetic value of the works and also affected their market value, and thus, the livelihood of the artists.[61]

Moral Rights

Moral rights address the relationship between the creators/artists/authors and their work. Thus, there have been suggestions that moral rights could offer an effective means for protecting indigenous people's rights that utilize or derive from indigenous knowledge.[62] Moral rights generally involve the right of attribution, and one of the issues of indigenous artists, inter alia, has been limited or false attribution associated with these works.[63] However, there is yet to be a case that utilizes current moral rights attribution. Therefore, it is not yet clear how moral rights could alter, or provide some remedy for this kind of scenario.

Moreover, moral rights are ineffective, for example, if an indigenous work is not recognized as a legitimate copyright subject matter. Also, moral rights only protect the rights of individuals not of communities or collectives.[64]

Nevertheless, moral rights could answer many indigenous people's requests to be named and associated with works in whatever context they appear.[65] In many situations, moral rights could address specific issues about naming and having control over the integrity of a work, although this can only happen when the work meets the criteria for copyright protection.[66]

Confidential Information

Laws protecting confidential information or trade-secrets are varied according to legislations across the world; however, they may be an effective tool for protection indigenous knowledge.

For example, in two cases[67] of 1980s and 1990s, related to publication of the book, *Nomads of the Desert*, by Anthropologist Charles Mountford, which released significant and secret confidential information of the Pitjanjatjara people. While the anthropologist was well-aware about the sensitivity of the information, he refused to withdraw the book from sale. The first case led to an injunction against the sale of the book. The Court recognized the legitimacy of the claim and that the disclosure of the information had serious and potentially damaging consequences for community social structures.

[61] *Id.* at p. 30.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Foster and Others v. Mountford and Rigby Ltd* (1976) 14 ALR 71.

However, this area has not been used very often. Also, there are sometimes difficulties in satisfying the key elements that constitute a breach of confidence of the claim, such as those set out in the TRIPS Agreement. [68]

Limitations and Exceptions to Existing Legislation

One approach could be incorporating limitations and exceptions to existing legislations, such as Copyright law.[69] One exception that could be developed within copyright law is to recognize indigenous people as specific kinds of users of cultural material.[70] Indigenous people often find themselves in the position of not being the 'legal owners' or 'authors' of their works, it is thus, important, that indigenous people are recognized as different kind of user group.[71]

This however, requires precise definitions, regulation and monitoring.[72]

PROPOSALS OUTSIDE THE BOUNDARIES OF INTELLECTUAL PROPERTY LAW

Protocols

Over the last ten years, there has been a steady increase in the development of protocols to deal with the issues of access, control and ownership of indigenous knowledge.[73] In general, protocols can be understood as context-driven policy.[74] They can be developed to address specific problems and provide guidance in relation to appropriate behaviour when it is required. Protocols can incorporate community perspectives and be targeted to particular issues. For example, protocols have been developed for libraries and archives, for visual artists, and for collaboration between filmmakers.[75]Protocols have become an important tool for changing attitudes and behaviour around indigenous knowledge access, use and management.[76]

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[68] Art. 39, TRIPS.
[69] Anderson, *Supra* note 1.
[70] *Id.* at p. 34.
[71] *Id.*
[72] *Id.*
[73] Australia has led the way in the creation of cultural protocols, especially in the context of the arts and media. *In general, see* the work of Teri Janke and the Australia Council. *See also* http://www.abc.net.au/indigenous/education/cultural_protocol/resources.htm (last accessed July 15, 2015). The Hopi Tribe has an established set of protocols for researchers, *see* http://www.nau.edu/~hcpo-p/hcpo/index.html (last accessed: July 15, 2015). *See also* the Protocols for Native American Archival Materials, http://www2.nau.edu/libnap-p/protocols.html (last accessed: July 15, 2015).
[74] Anderson, *Supra* note 1, at 65.
[75] *See, for example,* Australian Library and Information Association, *Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services* (endorsed at the Aboriginal and Torres Strait Islander Library and Information Resources Network (ATSILIRN) conferences, December 1994 and September 1995), *available at* http://www1.aiatsis.gov.au/atsilirn/protocols.atsilirn.asn.au/index0c51.html?option=com_frontpage& Itemid=1 (last accessed July 15, 2015).
[76] Anderson, *Supra* note 1.

They can be used to set community standards around knowledge circulation and use for outsiders as well as help change attitudes and set new standards.[77] Generally, protocols are flexible and can change over time.[78] It is important to see them as tools to help achieve certain goals that other areas of law have been unable to fulfil.[79] As formal or informal guidelines for behaviour, protocols can help build relationships and make new ones possible.[80]

Sui Generis Legislation

Owing to the perceived difficulties of building new mechanisms that directly address indigenous peoples' needs and expectations about knowledge use and control within the current intellectual property law framework, suggestions for an altogether different approach have been made.[81] *Sui generis* law means of its own kind, that is, it is a unique law complete unto itself and often created when current and existing laws are inadequate.[82]

A significant issue in this area is that indigenous peoples must be constantly translating and transplanting their concepts into frameworks of rights that are not necessarily appropriate or that may not address their expressed needs.[83] To the extent that indigenous knowledge can be protected through laws of intellectual property, this is only possible through concepts including property, ownership, works, monopoly privilege, exclusive rights, originality and individual authorship.[84] Proposals for *sui generis* legislation for the protection of indigenous knowledge and indigenous rights are slowly being crafted.[85] Countries like Peru and Panama have been at the forefront of developing national *sui generis* legislation.[86]

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[77] *Id.* at p. 38; The word protocol derives from the Greek *protokollen* – meaning 'table of contents' or 'first sheet.' It is also understood to refer to the first sheet glued into a book to help direct or provide guidance to a reader in interpreting the document. The use of the word protocol in the contexts of indigenous peoples follows these very early understandings of the term – especially as the point of cultural protocols are to provide preliminary directions for conduct and/or behavior for those who might not know or have access to the appropriate rules. A protocol sits somewhere between formal law, regulation and policy. It is mainly informal but can be made formal. It is a very useful device for mediating behavior in and across culturally different contexts.

[78] *Id.*

[79] *Id.*

[80] *Id.*; The success of the Internet Protocol in creating a form of governance for the Internet raises interesting points of similarity and convergence with the interests of indigenous people. Useful parallels can be drawn here. A helpful initial text focusing on protocols in the Internet context is ALEXANDER R. GALLOWAY, PROTOCOL: HOW CONTROL EXISTS AFTER DECENTRALIZATION (2004).

[81] Anderson, *Supra* note 1.

[82] Examples of *sui generis* legislation in relation to traditional/indigenous knowledge include the USA Indian Arts and Crafts Act 1990; Panama Law No. 20 (June 26, 2000) and Executive Decree No. 12 (March 20, 2001). Another example of *sui generis* legislation relating to indigenous peoples' rights is the Australian Native Title Act 1993.

[83] Jane Anderson, *Indigenous/Traditional Knowledge & Intellectual Property* : Issues Paper, Duke University School of Law Center for the Study of the Public Domain, released under a Creative Commons Attribution-NonCommericaL-ShareAlike 3.0 Unported License.

[84] *Id.* at p. 44.

[85] TERRI JANKE, OUR CULTURE: OUR FUTURE: REPORT ON AUSTRALIAN INDIGENOUS CULTURAL AND INTELLECTUAL PROPERTY RIGHTS (1998).

[86] *Id.* at 45.

There is often confusion about *sui generis* legislation, particularly in relation to how it does or does not fit into an intellectual property regime.[87] The benefit of *sui generis l*egislation is that it in no way has to resemble any current law, intellectual property or others.[88] Thus it offers an opportunity for participation by indigenous people and flexibility in developing frameworks that deal with knowledge control, use and sharing.[89]

CONCLUSION: FUTURE POSSIBILITIES, ALTERNATIVES AND SOLUTIONS

Fundamental changes in the political will of the nation states and commercial attitudes are required on how we conceptualize indigenous art, how we share, use and appreciate the various traditional art forms.

There is an urgent need to for development of frameworks that embrace and embolden indigenous people's perspectives and participation in the law and legal systems and their interests in their own works. Not only is the development of these frameworks important for the welfare and protection of the indigenous people's themselves, but also the preservation of the unique identities and personalities of the diverse groups of people that inhabit the nations of the world. The unique culture, heritage expressed through art lends identity to a particular country itself.

One of the possible ways to reconfigure the existent intellectual property framework, which has hitherto excluded their interests, so that there is greater participation, collaboration and partnership of the indigenous people's themselves. Greater participation of the indigenous people themselves could be achieved by facilitating networks between indigenous people and local communities. This would facilitate better understanding of their problems, which are first hand experiencing problems across the spectrum of intellectual property and indigenous knowledge issues.

Moreover, there is a necessity to develop appropriate and practical industry guidelines, codes of conduct and/or ethical guidelines for the use of indigenous information. This complements the development of practical guidelines for institutions, universities, independent researchers and artists in the collection, documentation and archiving of indigenous knowledge.[90]

There is an urgent need for an international alternative dispute resolution body for commercial and non-commercial disputes involving intellectual property and indigenous knowledge.[91] Such a dispute resolution body must include indigenous peoples' involvement from the outset and develop the capacity to respectfully and appropriately engage with indigenous peoples and indigenous concerns, especially as these may involve ethical, political, and/or historical dimensions.[92]

[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] Anderson, *Supra* note 1.
[91] *Id.*
[92] *Id.*

There is currently no dedicated service providing practical advice, information, suggestions and contacts for indigenous peoples and communities across the range of intellectual property issues that are emerging.[93] Priority should be given to establishing an international resource/education centre on indigenous/traditional knowledge and should include regional offices that would provide easier access to its resources.[94]

As one commentator states[95], advancing indigenous peoples' interests in intellectual property should not only be the responsibility of indigenous peoples since the issues are complex and the situation is complicated by history and politics. It is ironic that this is an area where innovation and imagination within intellectual property law must, most critically, emerge.

[93] Jane Anderson, *Indigenous/Traditional Knowledge & Intellectual Property* : Issues Paper, Duke University School of Law Center for the Study of the Public Domain, released under a Creative Commons Attribution-NonCommericaL-ShareAlike 3.0 Unported License.
[94] *Id.*
[95] *Supra* Note 83.

Case Study I

Batik Designs from Indonesia
(Image source: http://www.dreamstime.com/photos-images/indonesian-batik-sarong.html)

What is Indonesian Batik?

Dating back to thousands of years, Indonesian Batik is wax-resist cloth dyeing technique, historically based in Solo, Java. The Indonesian Batik cloth dyeing technique is the most intricate and highly developed art form, in terms of designs and workmanship, and has been practiced through generations among families in Indonesia. Indonesian Batik consists of a variety of techniques and patterns. Moreover, these patterns and techniques are infused with stories and meanings not readily apparent to the outsiders or people who purchase the Batik Cloth.

Recognized as a traditional art form by the Indonesian government, it sought to protect its indigenous art forms, including, Batik by developing a new legislation over the last five years, due to increasing instances of unauthorized reproduction of these designs over the last few years, within Indonesia and other neighbouring countries.

Strategy Adopted by the Government for its protection:

On a local level, the municipal government of Solo developed a system of design patents for the traditional arts. This program entails the registration thousands of batik designs with the local government office. Therefore, if the batik makers or outsiders wish to use these designs, permission needs to be taken from the local government office. To obtain registration, a fee is charged. "Ownership" of the registered design is then assigned to the company or family of producers which has registered the design with the government office.

Efficacy of the Strategy: Advantages and Loopholes

However, this strategy is not free from bottlenecks. Firstly, not all families can afford the registration fee, or the accompanying fee for using the designs. This, in turn, leads to hierarchy of access to the batik practice within the community. Thus, the registration process gives privileges to some producers over others.