

## Protection of Expressions of Folklore/ Traditional Cultural Expressions: To What Extent is Copyright Law the Solution?\*

*Kuek Chee Ying\*\**

### Introduction

Folklore<sup>1</sup> forms an integral part of the cultural heritage of a nation and it is an essential means of social identity, particularly for a developing country or certain communities. In recent decades, there has been an increase in the commercial exploitation or appropriation of expressions of folklore (hereinafter referred to as "EoF") or traditional cultural expressions (hereinafter referred to as "TCEs")<sup>2</sup> by entrepreneurs who have no connection whatsoever with the communities to which the EoF/TCEs belong. In most cases, the communities who were the custodians or preservers of the EoF/TCEs do not enjoy the economic benefit or share the returns from such unauthorised exploitation by persons not belonging to the communities. Sometimes, very little respect or regard was shown to the custodians of the EoF/TCEs in the commercialisation process in that the EoF/TCEs were used in ways

---

\* This paper is adapted from a seminar paper written as part of the coursework requirements for the Copyright course in the Master of Laws programme at the Faculty of Law of the University of Malaya.

\*\* Advocate & Solicitor, High Court of Malaya. The writer expresses her sincere thanks and appreciation to Professor Dr Khaw Lake Tee for having read the earlier drafts and providing helpful comments for improvement. However, the writer is entirely responsible for any errors or omissions.

<sup>1</sup> The word "folklore" is defined in the *Oxford Advanced Learner's Dictionary* to mean "traditions, stories, customs, etc. of a community".

<sup>2</sup> The terms "expressions of folklore" and "traditional cultural expressions" are used as interchangeable synonyms by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore and this is reflected in their working documents, for instance WIPO/GRTKF/IC/5/3, WIPO/GRTKF/IC/6/3 and WIPO/GRTKF/IC/7/4.

that were insulting, degrading, and/or culturally or spiritually offensive.<sup>3</sup> In view of the gravity of this problem, the World Intellectual Property Organisation (WIPO), the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and several countries have attempted to find solutions through a suitable legal mechanism for the protection of the EoF/TCEs. This paper seeks to examine the protection of the EoF/TCEs under the regime of copyright, the efforts expended by WIPO and UNESCO in search for an answer to address the deficiencies of copyright and the position in Malaysia on this issue.

### Meaning of Expressions of Folklore or Traditional Cultural Expressions

The term “folklore” is difficult to define and therefore this term is not used in the Berne Convention for the Protection of Literary and Artistic Works (hereinafter referred to as “Berne Convention”).<sup>4</sup> Likewise, the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions 1982 (hereinafter referred to as “Model Provisions”) do not provide any definition for “folklore”. This is to avoid any possible contradiction with the relevant definitions contained in other legal instruments relating to the protection of folklore.<sup>5</sup> Nevertheless, “expressions of folklore” are defined in section 2 of the Model Provisions as follows:

“Expressions of folklore” means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of

<sup>3</sup> For instance, in *Milpurrurru and Others v Indofurn Pty Ltd and Others* (1995) 30 IPR 209, the Aboriginal artist’s artwork which was based on dreaming themes and incorporating sacred images was reproduced on carpets where people walked on and this had greatly trivialised their religious and spiritual meaning. This case will be discussed in greater detail below.

<sup>4</sup> Stewart, M and Sandison, H, *International Copyright and Neighbouring Rights* (London: Butterworths, 2<sup>nd</sup> ed, 1989) at p 138.

<sup>5</sup> See “Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions with a Commentary” prepared by the Secretariats of the UNESCO and WIPO at p 15, para 31 available at <http://www.wipo.int/tk/en/documents/pdf/1982-folklore-model-provisions.pdf>.

[name of the country] or by individuals reflecting the traditional artistic expectations of such a community, in particular:

- (i) verbal expressions, such as folk tales, folk poetry and riddles;
- (ii) musical expressions, such as folk songs and instrumental music;
- (iii) expressions by actions, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and
- (iv) tangible expressions, such as:
  - (a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes;
  - (b) musical instruments;
  - (c) [architectural forms]

It is observed that the term “expressions of folklore” used in the Model Provisions emphasises traditional artistic heritage and is community orientated. Out of the four types of expressions, the first three types of expressions need not be reduced to material form but the fourth type of expression needs to.

Normally, protection of EoF/TCEs is discussed distinctly from the concept of “traditional knowledge”.<sup>6</sup> The term “traditional knowledge” is sometimes used in a narrow sense as embracing technical know-how such as medical or ecological knowledge. Sometimes, it is interpreted broadly to refer to both technical know-how and traditional

---

<sup>6</sup> “Traditional knowledge” refers to traditional-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creation resulting from intellectual activity in the industrial, scientific literary or artistic fields. Categories of traditional knowledge could include agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medical knowledge, including related medicines and remedies; and biodiversity-related knowledge. See “WIPO, Glossary of Terms” at <http://www.wipo.int/tk/en/glossary/index.html>.

expressions like EoF/TCEs.<sup>7</sup> Nevertheless, separate consideration of the protection of EoF/TCEs is preferred so that such legal protection can be viewed within the context of the cultural policies.<sup>8</sup> Besides, discussion on traditional knowledge is likely to lead to the realm of patent law and biodiversity rights while EoF/TCEs are usually discussed in the environs of copyright.

### **Characteristics of Expressions of Folklore/Traditional Cultural Expressions**

EoF/TCEs usually possess the following characteristics:

- a) generally, they are collectively held by a community;
- b) they are handed down from generation to generation, either by verbal transmission or by imitation;
- c) they are continuously utilised, circulated, evolved and developed within the community for many years;
- d) they reflect a community's cultural and social identity; and
- e) they are made by "author unknown" or by communities or by individuals who have authority within their communities to do so.

As shall be discussed in the later part of this paper, these characteristics of EoF/TCEs have very much influenced the effectiveness of legal mechanisms, in particular copyright, in protecting the EoF/TCEs.

### **Justifications For Legal Protection of Expressions of Folklore/Traditional Cultural Expressions**

The discussion on the adequacy or appropriateness of copyright law as a means of protecting the EoF/TCEs will be rendered meaningless if in the first place, there are no justifications for such legal protection.

---

<sup>7</sup> See "Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions" at the Fifth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO/GRTKF/IC/5/3) at Annex para 59 available at [http://www.wipo.int/documents/en/meetings/2003/igc/pdf/grtkf\\_ic\\_5\\_3.pdf](http://www.wipo.int/documents/en/meetings/2003/igc/pdf/grtkf_ic_5_3.pdf).

<sup>8</sup> *Ibid*, at para 65.

As mentioned earlier, instead of being something that belongs to the past or is “frozen in time”, EoF/TCEs are actually lively, evolving and form part of the lives of Indigenous communities. There are several reasons as to why it is essential or justifiable to protect EoF/TCEs:

**(a) Cultural Integrity**

Indigenous communities are very concerned with the continued distinct existence of their culture which should be free from unnecessary interference. Indeed, their sense of identity and self-respect are bound up with their group cultures.<sup>9</sup> Hence, it is important for the community to have the rights of control over the use of EoF/TCEs so as to maintain their cultural integrity. This is even more significant for those EoF/TCEs which are sacred-secret in nature. The following statement may, to a certain extent, reflect this view point:

We have many particular things which we hold internal to our cultures. These things are spiritual in nature ... They are *ours* and they are *not* for sale ... such matters are our ‘secrets’, the things which bind us together in our identities as distinct peoples. It’s not that we never make outsiders aware of our secrets, but *we* – not *they* – decide what, how much and to what purpose this knowledge is to be put. That’s absolutely essential to our cultural integrity, and thus to our survival as peoples.<sup>10</sup>

It is interesting to note that in the Philippines, the Indigenous Peoples Rights Act of 1997 which is an Act, *inter alia*, to recognise, protect and promote the rights of the Indigenous Cultural Communities or Indigenous Peoples, has explicitly provided the rights of cultural

---

<sup>9</sup> See Weatherall, K, “Culture, Autonomy and *Djulibinyammurr*: Individual and Community in the Construction of Rights to Traditional Designs” (2001) 64 *MLR* 215 at p 224.

<sup>10</sup> *Ibid*, at p 222 quoting from Coombe, R, “The Properties of Culture and the Politics of Possessing Identity” (1993) 6 *Can J L & Juris* 249 at p 279.

integrity.<sup>11</sup> This shows that maintaining cultural integrity of a community has been recognised as a basis for legal protection of EoF/TCEs.

#### **(b) Avoid Unjust Enrichment of the Outsiders**

Another justification for conferring legal protection to the EoF/TCEs is to avoid the unjust enrichment on the part of those non-Indigenous entrepreneurs who profit from the commercial use of the EoF/TCEs whereas the Indigenous or traditional owners are left with no share of the economic returns. This problem, if not properly addressed, could cause injustice since the Indigenous communities have an interest in the EoF/TCEs which have been handed down from their ancestors and become part of their lives.

#### **(c) Prevent Economic Harm on the Communities**

Indigenous arts and crafts, which are invariably part of EoF/TCEs, are important sources of income for Indigenous artists and communities. If such Indigenous artists and communities have no right to control the use and reproduction of their arts and crafts, this may result in undesirable competition from non-Indigenous people who, by cheap imitations, mass-produce similar arts and crafts. This will definitely cause economic harm to indigenous artists and communities in the sense that the market becomes more crowded and their economic opportunities are inevitably reduced. Therefore, legal protection on the EoF/TCEs is justified.

#### **Incidents of Cultural Appropriation and Claims for Infringement of Copyright**

Initially, copyright law appears to be the most suitable solution or a logical option for the protection of the EoF/TCEs as it seeks to prevent, *inter alia*, unauthorised reproduction of the copyright works (where

---

<sup>11</sup> See Indigenous Peoples Rights Act of 1997 (IPRA), Chapter VI. According to s 32 of the IPRA, the State shall preserve, protect and develop the past, present and future manifestations of the cultures of the Indigenous Cultural Communities or Indigenous Peoples. The State is also obliged to restore the cultural, intellectual, religious and spiritual property taken without the free and prior informed consent of the communities.

such EoF/TCEs meet the requirements or can be categorised as copyright works). In Canada, the Copyright Act, R.S.C. 1985 has been widely used by Aboriginal artists, composers and writers to protect their traditional-based creations. These include wood carvings of Pacific coast artists, silver jewelry of Haida artists, songs and sound recordings of Aboriginal artists and sculptures of Inuit artists.<sup>12</sup>

In Australia,<sup>13</sup> the first case ever brought claiming infringement of the copyright of indigenous or aboriginal artworks was the *Bulun Bulun* case<sup>14</sup> ("the T-shirts case"). Johnny Bulun Bulun is an Aboriginal artist who is also amongst the best known bark painters in Australia. In 1987, one of Bulun Bulun's paintings was reproduced on T-shirts by a T-shirt manufacturer without his permission. Subsequently, a revised version of the T-shirt was created and again it drew on another one of Bulun Bulun's paintings as well as the original painting without seeking his permission. This led to an unprecedented legal action for infringement of copyright and breaches of the Trade Practices Act 1974 brought by Johnny Bulun Bulun in 1989, in the Federal Court in Darwin. The manufacturers and two Darwin tourist shops which sold the T-shirts in question gave undertakings to the Court agreeing to cease the manufacture and sale of the T-shirts and to deliver up all remaining stock of the T-shirts. This case and a number of related proceedings were eventually settled. A substantial sum of money (\$150,000.00) was paid to the artists in question and those offending T-shirts were withdrawn and delivered up to the artists. The *Bulun Bulun* case has been described as a landmark case since Aboriginal artists could rely on copyright protection to prevent unauthorised reproduction of their artworks.

---

<sup>12</sup> *Supra*, n 7 at Annex, fn 103.

<sup>13</sup> The four Australian cases are chosen for discussion in this paper as they are the most often quoted decisions in respect of protection of expressions of folklore by way of copyright law.

<sup>14</sup> The *Bulun Bulun* case was unreported as the proceedings were settled out of court. For the facts of the case, see: Golvan, C, "Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun" [1989] 10 *EIPR* 346 and Golvan, C, "Aboriginal Art and the Protection of Indigenous Cultural Rights" [1992] 7 *EIPR* 227. Colin Golvan was the counsel for Johnny Bulun Bulun.

The next major case after the *Bulum Bulum* case was *Yumbulul v Reserve Bank of Australia and Others*.<sup>15</sup> This case involved claims by Terry Yumbulul, an Aboriginal artist from the north-east coast of Arnhem Land, against the Reserve Bank of Australia (hereinafter referred to as "the Bank") for unauthorised reproduction of his artistic work known as "Morning Star Pole"<sup>16</sup> on the commemorative 1988 10 dollar bank note. He also sued the Aboriginal Artists Agency Limited (hereinafter referred to as "the Agency") and Anthony Wallis, the director of the Agency who negotiated the arrangements, contending that he was induced to sign the exclusive licence to the Agency by the misleading or deceptive conduct of Anthony Wallis, which resulted in the reproduction being made under a sub-licence of the copyright of the work granted to the Bank by the Agency. Evidence was tendered which established that "Morning Star Pole" had a central role in Aboriginal ceremonies commemorating the deaths of important persons and in inter-clan relationships. The Bank settled the dispute with Yumbulul by agreement, which involved the payment of a sum of money without admission of liability.<sup>17</sup> The action continued between Yumbulul and the Agency. Yumbulul, who was subject to considerable criticism within the Aboriginal community following the depiction of his "Morning Star Pole" on the commemorative banknote, attempted to raise the issue of the rights of tribal owners or traditional owners and managers of the right to the pole in question and the ceremony.

Evidence revealed that Yumbulul's right to permit the reproduction of the "Morning Star Pole" must be subject to the approval of the tribal owners, being the elders of the Galpu clan in north-east Arnhem Land and that Yumbulul had a cultural obligation to the clan to ensure that

---

<sup>15</sup> (1991) 21 IPR 481.

<sup>16</sup> The pole in question created by Mr Yumbulul was made from cotton wood and surmounted with a crown of lorikeet and white cockatoo feathers, representing the rays of the Morning Star. Painted on the pole was a yam leaf design representing the yam spirit man who climbed up the pole bearing the spirit of the deceased person to the morning star. The Federal Court of Australia found that the pole was no doubt an original artistic work and Mr Yumbulul was its author; *ibid*, at p 484.

<sup>17</sup> See Golvan, C, "Aboriginal Art and the Protection of Indigenous Cultural Rights" [1992] 7 *EIPR* 227 at p 229.



the pole was not used or reproduced in a way that offended their perception of its significance. However, French J, the trial judge, acknowledged that "Australia's copyright law does not provide adequate recognition of Aboriginal community's claims to regulate the reproduction and the use of works which are essentially communal in origin".<sup>18</sup> The action was eventually dismissed by the Federal Court on the ground that there was no basis for finding misleading or deceptive conduct or estoppel or unilateral mistake. During the course of the proceedings, the Agency raised the statutory defence that the reproduction in question was permitted under sections 65 and 68 of the Copyright Act 1968. These sections permit the reproduction of a sculpture which is on permanent public display. While French J did not decide on this question, his Lordship went on to say that if the Agent's line of defence was correct:

... then it may be the case that some Aboriginal artists have laboured under a serious misapprehension as to the effect of public display upon their copyright in certain classes of works. This question and the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators.<sup>19</sup>

Thus, there was a comment that, "while the action was unsuccessful for the Aboriginal artist in question, the proceedings may have the beneficial outcome of stimulating debate about appropriate protection for Aboriginal art in the context of addressing the inadequacies which exist in the law as it stands".<sup>20</sup>

In *Milpurrruru and Others v Indofurn Pty Ltd and Others* ("the Carpet case"),<sup>21</sup> three living Aboriginal artists and the Public Trustee representing the estates of five deceased Aboriginal artists commenced proceedings against the importers into Australia of carpets made in Vietnam which incorporated Aboriginal designs. Each of the artists in

---

<sup>18</sup> *Supra*, n 15 at p 490.

<sup>19</sup> *Ibid*, at p 492.

<sup>20</sup> *Supra*, n 17 at p 229.

<sup>21</sup> (1995) 30 IPR 209.

question had works which were either reproduced in a portfolio of artworks and a calendar published by the Australian National Gallery (ANG) or a portfolio of Aboriginal art published by the Australian Government Printer for the Australian Information Service (AIS), for the purposes of educating members of the white community about Aboriginal culture and all such reproductions were done with the artists' permission. It all began when Mr Bethune, an Australian entrepreneur who imported a number of hand knotted pure wool carpets bearing traditional Oriental designs into Australia failed to find a local market for them and subsequently decided to have Australian Aboriginal designs reproduced on the carpets. During a visit to a carpet factory in Vietnam, Bethune was shown the ANG and AIS portfolios and calendars. He ordered several carpets which reproduced several of the artworks in full and in respect of three other works, he requested the carpet factory to copy the designs, only making them "less busy" or less complicated. As they were favourably received by those to whom they were shown, Bethune placed a larger order. At all material times, the company through which Bethune conducted business did not obtain the consent of the Aboriginal artists whose paintings he copied. It was common ground that among the carpets which were the subject matters of the action, seven of the eight artworks were reproduced in virtually identical form and colour. The final artwork was substantially reproduced, though in a more simplified form. It was found that in each of the ANG and AIS publications, the descriptions of the artworks made it plain that the subject matters of the works concerned creation stories of spiritual and sacred significance to the artists as well as the cultures of the groups to which those artists belong.

Evidence led at the trial explained that the painting techniques and the use of totemic and other images and symbols were in many instances, and invariably in the case of important creation stories, strictly controlled by Aboriginal law and customs. As artworks were important means of recording these stories and for teaching future generations, inaccuracy or error in reproduction of an artwork could cause deep offence. If unauthorised reproduction of a story or imagery occurred, under Aboriginal law, it was the responsibility of the traditional owners

or custodians of the stories or images to take action to preserve the dreaming,<sup>22</sup> and to punish those artist(s) considered responsible for the breach.<sup>23</sup> In the past, the punishments included death sentence but in more recent times, punishments included preclusion from the right to participate in ceremonies, removal of the right to reproduce paintings of that or any other story of the clan, being outcast from the community or being required to make a payment of money or even spearing in serious cases. Von Doussa J found that there was infringement of copyright in each of the eight artworks. However, there was no evidence that any of the applicants had suffered any actual monetary loss. Thus, the Federal Court of Australia awarded an amount of \$1,500.00 in respect of each artwork for the diminution in value of the reputation of the artwork and its "freshness". The Court also noted that damages sustained, particularly in the case of the living artists, extended beyond the commercial potential for monetary return. The infringements had caused personal distress and had the potential to expose the artists to embarrassment and contempt within their communities. This applied particularly to one of the artists as the reproduction of her artwork on carpets where the sacred designs would be walked on was totally opposed to the cultural use of the imagery employed in her artworks. Hence, additional damages in the sum of \$70,000.00 were awarded in the nature of exemplary damages under s 115(4)(b) of the Copyright Act 1967 for the culturally based harm suffered by the living applicants in their cultural environment.<sup>24</sup> The importer company was also ordered to deliver up the unsold carpets to the applicants. It is observed that "*Milpurruru* represents a step forward from *Yumbulul* in the preparedness of the Court to grant some recognition to traditional

---

<sup>22</sup> Dreaming or Dreamtime is the mythical past of Australian Aborigines, the basis of their religious belief and creation stories; see *The Hutchinson Encyclopedia*, 2000 ed, at p 330.

<sup>23</sup> The notion of responsibility under Aboriginal law differs from that of the English common law. If permission has been given by the traditional owners to a particular artist to create a picture of the dreaming, and that artwork is later inappropriately used or reproduced by a third party, the artist is held responsible for the breach which has occurred, even if the artist had no control over, or knowledge of, what occurred. *Supra*, n 21 at p 214.

<sup>24</sup> See also s 37(2) of the Malaysian Copyright Act 1987 where the court may, in assessing damages for infringement of copyright, exercise its discretion to award additional damages.

Aboriginal concerns in the protection of artistic works against unauthorised use".<sup>25</sup>

A few years later, the Federal Court of Australia in *Bulun Bulun v R & T Textiles Pty Ltd*<sup>26</sup> was specifically asked to consider whether the communal title in Aboriginal people's traditional ritual knowledge, and in particular their artwork, could be recognised and protected by the Australian legal system. The proceedings were commenced by Mr Bulun Bulun and the second applicant, Mr George Milpururru, in 1996. Both applicants were leading Aboriginal artists. Mr Bulun Bulun sued as the legal owner of the copyright of the artistic work known as "Magpie Geese and Water Lilies at the Waterhole" because the respondent had imported and sold in Australia printed clothing fabric which infringed his copyright. Mr Milpururru brought the action in his own right and as a representative of the traditional Aboriginal owners of Ganalbingu country which is situated in Arnhem Land, in the Northern Territory of Australia (hereinafter referred to as "the clan group"). He claimed that the clan group was the equitable owner of the copyright subsisting in the artistic work. The respondent admitted infringement of Mr Bulun Bulun's copyright in the artistic work but did not admit the allegations concerning the equitable ownership of the copyright. So, the action brought on behalf of the clan group proceeded as a test case. The Court found that there was no evidence of an express or implied trust created over Mr Bulun Bulun's artwork. Nevertheless, in his *obiter dictum*, Von Doussa J<sup>27</sup> recognised the subsistence of a fiduciary relationship between Mr Bulun Bulun and the clan group whereby their relationship was predicated on the trust and confidence the clan group had in the artist. Mr Bulun Bulun was said to owe fiduciary obligations towards the clan group, which included obligations not to exploit the artistic work in a manner that was contrary to customary law and to take action required to restrain and remedy infringement of copyright in the artistic work. However, the Court pointed out that the existence of those fiduciary obligations did not vest in the clan

<sup>25</sup> See McRae, H (*et al.*), *Indigenous Legal Issues Commentary and Materials* (Australia: Lawbook Co, 3<sup>rd</sup> ed, 2003) at p 392.

<sup>26</sup> (1998) 41 IPR 513.

<sup>27</sup> Note that Von Doussa J was also the trial judge in *Milpururru and Others v Indofurn Pty Ltd and Others*, *supra*, n 21.

group an equitable interest in the ownership of the copyright. Their primary rights were confined to a right *in personam* against Mr Bulun Bulun to enforce the obligations. As Mr Bulun Bulun had fulfilled the fiduciary obligations imposed on him by taking appropriate action to enforce copyright, there was no occasion for the intervention of equity to provide any additional remedy to the clan group as beneficiaries of the fiduciary relationship. Accordingly, the proceedings by Milpururru were dismissed.

### Limitation on the use of Copyright to Protect EoF/TCEs

From the above cases, a question arises as to whether copyright provides adequate protection to EoF/TCEs. Generally, copyright may subsist in a work if all the criteria for protection are fulfilled. However, these criteria and the concept of copyright itself have, to a certain extent, limited the potential of copyright for protecting EoF or TCEs. The following have been suggested as the limitations of copyright law:

#### (a) The Originality Requirement

To be eligible for protection of copyright, a work must be original.<sup>28</sup> "Originality" in copyright is not the same as "novelty" or "newness" as understood in patent law. According to Peterson J in *University of London Press Ltd v University Tutorial Press Ltd*,<sup>29</sup> an original work must not be copied from another work and it should originate

---

<sup>28</sup> Although the Berne Convention does not explicitly say so, Art 2(1) read together with Art 2(5) appear to suggest that protected works must be intellectual creations. *Supra*, n 7, Annex p 37, para 103. Art 2(1) of the Berne Convention defines the expression "literary and artistic works" while Art 2(5) requires collections of literary or artistic works to be intellectual creations by reason of the selection and arrangement of their contents. See also, Ricketson S, *The Berne Convention for the Protection of Literary and Artistic Works: 1886 – 1986* (London: Centre for Commercial Law Studies, 1987) at para 6.3 and para 6.71 where the explicit stipulation of "intellectual creations" in the case of collections in Art 2(5) is said to be necessary as these are a borderline case, it follows that "intellectual creations" is an implicit requirement for the "mainline" works covered by Art 2(1).

<sup>29</sup> [1916] 2 Ch 601.

<sup>30</sup> *Ibid.*, at p 609.

from the author.<sup>30</sup> This requirement may present some problems for EoF/TCEs.<sup>31</sup> Most EoF/TCEs are ancient and draw largely upon pre-existing tradition, custom and belief which have evolved over the passage of time. For instance, certain Aboriginal arts and designs are of sacred, spiritual and religious significance. Therefore, they must be reproduced faithfully and accurately in accordance with the Aboriginal law and custom. Similarly, some of the EoF/TCEs are important means of passing down the community's history from generation to generation, and hence innovation is restricted. However, this may not necessarily rule out a finding of "originality" in all cases. As the threshold for originality is relatively low, it is still possible for contemporary traditional-based EoF/TCEs to be protected as copyright works provided some new elements or expression, as opposed to the mere reproduction of the traditional form or expression, are added.<sup>32</sup> Thus, copyright may attach to derivative works,<sup>33</sup> even to works derived from materials in the public domain because of the presence of an "original result" through the new interpretation, arrangement or adaptation. However, only the new materials of the derivative works or the variations from the pre-existing works can be protected, and not the underlying pre-existing works, whether or not such pre-existing works are in the public

---

<sup>31</sup> The working party set up by the Commonwealth in 1975 to investigate the protection of Aboriginal folklore has, in its 1981 Report, expressed concerns as to the ability of Aboriginal artists to satisfy the originality threshold so as to claim copyright protection. See Golvan, C, "Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun", *supra*, n 14 at pp 347 and 349.

<sup>32</sup> *Supra*, n 7 at para 107.

<sup>33</sup> In Malaysia, there are two categories of "derivative works" under s 8(1) of the Copyright Act 1987: (a) translations, adaptations, arrangements and other transformations of works eligible for copyright; and (b) collection of works or collection of mere data, whether in machine readable or other form, eligible for copyright which, by reason of the selection and arrangement of their contents, constitute intellectual creation. Though consent from the copyright owner of the pre-existing work must be obtained to make a derivative work (if copyright of the pre-existing work has not expired), the derivative work may itself qualify for copyright protection independent from the pre-existing work. See Khaw, LT, *Copyright Law In Malaysia* (Kuala Lumpur: Malayan Law Journal, 2<sup>nd</sup> ed, 2001) at p 82.

domain. This is referred to as a “thin copyright”.<sup>34</sup> It has also been suggested that contemporary cultural expressions made by current generations of society which are inspired by or based on pre-existing designs may qualify for copyright protection, if it is proven that sufficient skill, effort and judgment have been expended in creating the works.<sup>35</sup> In *Milpururru*,<sup>36</sup> the Federal Court of Australia held that although the artworks in question followed traditional Aboriginal form and were based on dreaming themes, each artwork was one of intricate detail and complexity reflecting great skill and originality.<sup>37</sup> Thus the artworks in question were protected by copyright.

---

<sup>34</sup> This phrase is used to refer to “the thin layer of protectable elements in an otherwise unprotectable work, where the remaining elements are dictated by functionality, belong to another author or are in the public domain. The idea is that although an adaptation may be copyrightable, it cannot serve to either take something out of the public domain that was already in the public domain, or diminish an earlier author’s rights”. See “Traditional Cultural Expressions/Expressions Of Folklore Legal And Policy Options” at the Sixth Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO/GRTKF/IC/6/3) at para 74 available at [http://www.wipo.int/documents/en/meetings/2004/igc/pdf/grtkf\\_ic\\_6\\_3.pdf](http://www.wipo.int/documents/en/meetings/2004/igc/pdf/grtkf_ic_6_3.pdf).

<sup>35</sup> Compare with s 7(3)(a) of the Malaysian Copyright Act 1987 where a literary, musical or artistic work will be eligible for copyright if sufficient effort has been expended to make the work original in character. See, however, the case of *Interlego AG v Tyco Industries Inc & Ors* [1989] AC 217 where the drawings in question, which were derived from an early drawing, were held not to be original artistic works as there was no visually significant alterations or modifications to the old drawings. Lord Oliver of Aylmerton further expressed the view that skill, labour or judgment merely in the process of copying were not sufficient to confer originality.

<sup>36</sup> *Supra*, n 21.

<sup>37</sup> *Ibid*, at p 216. However, doubt was raised in respect of the Court’s finding of originality in this case. See Farley, CH, “Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer ?” (1997) 30 *Conn L Rev* 1 at p 23-24 where it was said that “[g]iven the disjunction between the copyright law’s insistence on originality and the indigenous peoples’ emphasis on accuracy in reproduction, one may wonder how the plaintiffs in the *Milpururru* case were able to satisfy the originality requirement”.

### (b) The Fixation Requirement

For copyright to subsist in a work, it must be in writing, recorded or reduced to material form.<sup>38</sup> However, some of the EoF/TCEs are not able to satisfy this requirement. Verbal expressions such as folk tales, Aboriginal legend and indigenous poetry, folk music and dance were not traditionally reduced to material form but very often passed down from generation to generation through memorisation and imitation. Body painting and face painting, too, may not meet the fixation requirement as fixation must have certain degrees of permanence.<sup>39</sup> Ironically, in most cases, the person who first fixes the EoF/TCEs in material or tangible form and who will invariably be the first copyright owner of the relevant works (if such EoF/TCEs meet the requirements of copyright), is an outsider or a non-Indigenous person. For instance, oral Aboriginal legend, indigenous stories or poetry may be written down by a researcher; traditional songs may be written down note for note by a musician; ritualistic performing arts are recorded by a documentary

---

<sup>38</sup> See, however, Art 2(2) of the Berne Convention which explicitly leaves the choice open in respect of the fixation requirement; "It shall be ... a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form". In Malaysia, the fixation requirement is provided under s 7(3)(b) of the Copyright Act 1987. On the other hand, countries that do not require fixation for subsistence of copyright include Africa, Latin America and Europe (including Spain, France and Germany). *Supra*, n 34 at para 68.

<sup>39</sup> See *Merchandising Corporation of America Inc and Others v Harpbond Ltd and Others* [1983] FSR 32 ("Adam Ant" case) where the United Kingdom Court of Appeal held that facial make-up was not a "painting" within the meaning of the Copyright Act 1956. This is because a painting must be on a surface and if the marks were taken off the face, there could be no painting. See also, the Australian case of *Komesaroff v Mickle & Others* [1988] RPC 204 where "works of kinetic art" ("sand pictures") were found to lack sufficient permanence to be qualified as works of artistic craftsmanship since sand pictures would not be static for any length of time. In *Creation Records Ltd and Others v News Group Newspapers Ltd* [1997] EMLR 444, an assembly of objects *trouves* was held not to be collage as it was, *inter alia*, intrinsically ephemeral and lasted for a few hours only. See also the definition of "fixation" in s 3 of the Malaysian Copyright Act 1987, which means "embodiment of sounds, images or both, or the representation thereof, in a material form sufficiently permanent or stable to permit them to be perceived, reproduced or otherwise communicated during a period of more than transitory duration". (Emphasis added).



film maker while photographs are taken on the same followed by reproduction and publication of such photographs on postcards. It follows that the researcher is the author of the literary work,<sup>40</sup> the musician is the author of the musical work namely the music sheet, the film maker is the author of the documentary film and the photographer is the author of the artistic work namely the photographs. All these authors are also the first copyright owners of the relevant works. Assuming that the fixation in such cases is done without permission or authorisation of the relevant community or performers, it would seem that only the performers are able to claim performers' rights to control the first fixation of their performances and the reproduction of such fixation<sup>41</sup> but it will be difficult or impossible for the community in other cases to seek recourse under the copyright law due to lack of material fixation. It would also be morally reprehensible for such outsiders or non-Aboriginal individuals to claim as the authors of, say, those literary works or musical works when the aboriginal legend, indigenous stories or poetry and traditional music are the result of collective effort of a clan, a tribe or a community and are supposed to form part of the indigenous cultural heritage.

---

<sup>40</sup> See *Walter v Lane* [1900] AC 539 where the reporters from *The Times* newspaper who took down speeches made by Lord Rosebery in shorthand were held to be authors of their reports and were entitled to copyright in those reports as skill and labour had been expended in making the reports. In this case, though the reporters were not the originators of the speeches, there were no written speeches, that is, not reduced to material form. Conversely, if Lord Rosebery had written his speeches out and read them or repeated them from memory, shorthand writers would have no copyright in their reports of the speeches. See also, *Express Newspapers plc v News (UK) Ltd* [1990] FSR 359, that is, a case that involved "tit for tat" copying of sensationalist interviews published in two newspapers, including quotations of words used in the interviews. It was held that the law as to copyright in verbatim reports of the spoken words of another was settled by the House of Lords in *Walter v Lane*, namely mere reporting of the words of another gives rise to a reporter's copyright so long as skill and judgment have been employed in the composition of that report.

<sup>41</sup> See Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), art 14(1); WIPO Performances and Phonograms Treaty of 1996 (WPPT), Arts 6-10 ; Malaysian Copyright Act 1987, s 16A(1)(b) and (c).

### (c) Authorship and Ownership

Copyright is author-centric in the sense that it requires identifiable author or joint authors<sup>42</sup> of a work.<sup>43</sup> In the case of contemporary traditional-based cultural expressions, this requirement is generally met as it is relatively easier to identify the author or joint authors. However, for pre-existing cultural expressions which have been communally developed for a long time, it is much more difficult, if not impossible, to trace and identify the authors. Besides, moral rights may not be available where the inappropriate use of the EoF/TCEs has caused communal harm to the community. This is because moral rights are normally "personal" to the author as opposed to communal in nature.

In the meantime, the notion of individual ownership<sup>44</sup> in copyright is incompatible with indigenous customs and traditions that emphasise communal or collective ownership. As pointed out earlier, in *Yumbulul*,<sup>45</sup> the Aboriginal customary law on the right to reproduce works and the concept of communal ownership in sacred image were not matters relevant to the validity of licence or assignment of the copyright in the work by its author. It was held that the Aboriginal artist who had created the pole had disposed of his copyright in the pole through a legally binding agreement or exclusive licence. While lamenting that Australian copyright law did not adequately recognise such communal interests, French J recommended that this matter should be considered by law reformers and legislators.<sup>46</sup> Similarly, in the later case of

---

<sup>42</sup> In Malaysia, the Copyright Act 1987 does not define "joint authors" but s 3 defines "work of joint authorship" as "a work produced by the collaboration of two or more authors in which the contribution of each author is not separable from the contribution of the other author or authors."

<sup>43</sup> Identifiable authorship is important for the purpose of determining subsistence of copyright, computation of duration of copyright, entitlement of moral rights and status as the first copyright owner. *Supra*, n 33 at p 112.

<sup>44</sup> The first owner of copyright in a work is usually the author but the owner of the copyright may not necessarily be the author of the work as this depends on the transactions which may have taken place since the work was first created. *Ibid*, at p 111.

<sup>45</sup> *Supra*, n 15.

<sup>46</sup> *Ibid*, at pp 490 and 492.

*Milpururru*,<sup>47</sup> the Federal Court of Australia awarded damages for breach of copyright to a number of Aboriginal artists whose artistic works were wrongfully reproduced on carpets. However, the claim of the representatives of the Aboriginal group for compensation in respect of the communal harm failed. Von Doussa J pointed out that “the statutory remedies do not recognise the infringement of ownership rights of the kind which reside under Aboriginal law in the traditional owners of the dreaming stories and the imagery such as that used in the artworks of the present applicants”.<sup>48</sup> It would appear that even if the Court found that there had been infringement of copyright, damages could only be awarded to the copyright owner and not to compensate the community whose images were used in culturally inappropriate ways. However, in *Bulun Bulun v R & T Textiles Pty Ltd*,<sup>49</sup> the Federal Court of Australia recognised that the Aboriginal artist owed a fiduciary duty to his community not to act in a manner likely to harm the communal interests of his clan and to take action to protect the artistic work in his capacity as the copyright owner. In his *obiter dictum*, Von Doussa J said that in the event the artist failed to enforce his copyright, equity would intervene where the beneficiaries namely the community, would be allowed to bring actions in their own names against the infringer and the copyright owner, claiming against the former, the interlocutory relief to restrain the infringement, and against the latter, orders necessary to ensure that the copyright owner enforces the copyright.<sup>50</sup> This judgment was said to represent “a novel approach to the protection of interests under copyright principles outside of the conventional bounds, as they are understood, of copyright protection pertaining solely to the rights of authors or assignees”.<sup>51</sup> This is because the community would be able to sue the infringer in such circumstances, though they might not be the copyright owners.

---

<sup>47</sup> *Supra*, n 21.

<sup>48</sup> *Ibid*, at p 239.

<sup>49</sup> *Supra*, n 26.

<sup>50</sup> *Ibid*, at p 531.

<sup>51</sup> Golvan, C, “Aboriginal Art and Copyright : An Overview and Commentary Concerning Recent Developments” [1999] *EIPR* 599.

#### (d) Limited Duration of Copyright

Copyright protection is only limited to a fixed duration after which the work in question will fall into the public domain.<sup>52</sup> The duration of the protection is dependant on the type of copyright work.<sup>53</sup> Generally, it extends to 50 years after the death of the author.<sup>54</sup> In fact, the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) stipulate 50 years as the minimum period of protection and countries of the Berne Union are free to grant a longer term of protection<sup>55</sup> though it is not intended to be indefinite. Problems arise as some of the EoF/TCEs may have originated many centuries ago where the term of protection would have long expired. Very often, this concept of fixed duration of copyright does not meet the need of the Indigenous people or traditional communities who desire perpetual protection for at least some of the aspects of the EoF/TCEs, especially those sacred-secret Indigenous works. Limited duration of copyright means that upon expiry of the term of protection, the Indigenous works will pass into the public domain and therefore be open to all to draw upon. This will inevitably expose such Indigenous works to inappropriate use that may cause cultural harm to the communities.

#### (e) The Idea/Expression Dichotomy

Generally, copyright protects the expression but not the underlying idea or original thought of the author.<sup>56</sup> Unlike patent, copyright is not a monopoly. Thus, mere taking of an idea underlying a work is permitted

---

<sup>52</sup> The law recognises that the interest of the copyright owner must be balanced against those of the public to have access to copyright works. *Supra*, n 33 at p 95.

<sup>53</sup> For instance, see Malaysian Copyright Act 1987, s 17 to s 23. For the duration of performer's rights, see s 23A.

<sup>54</sup> Berne Convention (Paris Act), Art 7(1); Malaysian Copyright Act 1987, s 17(1).

<sup>55</sup> Berne Convention (Paris Act), Arts 7(2), (3) and (6); TRIPS, Art 12.

<sup>56</sup> See, however, the comments of Pritchard J in the New Zealand case of *Pitx Products Limited v Frank M. Winstone (Merchant) and Others* [1986] FSR 63 at p 92 where he said that "[i]t is no longer universally accepted that there is no copyright in ideas".

so long as the expression of the idea is not copied. Similarly, if two precisely similar or identical works were produced independently without any reference to the other, there will be no infringement of copyright.<sup>57</sup> The idea/expression dichotomy is expressly provided in Article 2 of the WIPO Copyright Treaty 1996 (WCT), Article 9(2) of the TRIPS Agreement and also statutorily enshrined in section 7(2A) of the Malaysian Copyright Act 1987 which provides that copyright protection shall not extend to any idea, procedure, method of operation or mathematical concept as such.<sup>58</sup> However, the line distinguishing idea and expression is always vague and hard to determine.<sup>59</sup> There could be cases where the style or method of creating Indigenous productions have been employed by non-Indigenous persons for their own benefit, for instance producing textile goods by imitating the style and methods of creating those EoF/TCEs. It would appear that in such a situation, copyright protection might not be available since it involves idea, that is style or method, but not expression of the idea.<sup>60</sup>

### **Search for Adequate or Appropriate Legal Mechanisms to Protect EoF/TCEs**

Various attempts have been made over recent decades to provide better solutions and legal mechanisms to protect EoF/TCEs, ranging from the means of copyright to the response to the call for the establishment of a stand-alone *sui generis* system.<sup>61</sup>

---

<sup>57</sup> See *Francis Day & Hunter Ltd v Bron & Anor* [1963] 1 Ch 587.

<sup>58</sup> In fact, s 7(2A) of the Malaysian Copyright Act 1987 was taken from Art 2 of the WCT. *Supra*, n 33 at p 16.

<sup>59</sup> See *LB (Plastics) Limited v Swish Products Limited* [1979] FLR 145 at p 160 where Lord Hailsham said that "... it all depends on what you mean by 'ideas'".

<sup>60</sup> See, however *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [1998] FSR 803 (Ch D), [2000] FSR 121 (CA), [2000] 1 WLR 2416 (HL) which concerned the copying of fabric designs, in which the copying involved was not exact but the style, technique and ideas behind the plaintiff's work were copied. The plaintiff succeeded at first instance, lost in the Court of Appeal and finally had the trial judge's order restored in the House of Lords.

<sup>61</sup> "*Sui generis*" is a Latin phrase meaning "of its own kind". A *sui generis* system is a system specifically designed to address the needs and concerns of a particular issue. In the context here, it could mean a system entirely distinct from the current intellectual property (IP) system or alternatively a system with new IP, or IP-like, rights. *Supra*, n 6.

**(a) Attempts to Protect EoF /TCEs By Means of Copyright:  
Stockholm (1967) and Paris (1971) Acts of the Berne Convention**

The inadequacy of the Berne Convention in offering international protection for EoF/ TCEs was only recognised in the Stockholm Diplomatic Conference of 1967 for Revision of the Berne Convention when a proposal was made by the Indian delegation to include works of folklore in the enumeration of “literary and artistic works” in Article 2(1). Due to the difficulty of defining “folklore” and determining the way in which these works were to be protected in the absence of an identifiable author or authors, Article 15(4) was introduced into the Berne Convention.<sup>62</sup> This provision speaks of “unpublished work 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”. In such cases, the legislation of the country in question can designate a competent authority to represent the unidentified author and the authority shall be entitled to protect and enforce the rights of the author in all the countries of the Union.<sup>63</sup> Where such an authority is designated, the country in question shall notify the Director General of WIPO by a written declaration, giving full information concerning the new authority. The Director General of WIPO, in turn, will communicate this declaration to all other Union countries.<sup>64</sup> This reflected, albeit in a limited way, the aspiration to protect EoF or TCEs at that time. However, the effectiveness of this provision remains questionable because as at 2003, only one country, namely India, has made the designation referred to in this provision.<sup>65</sup>

---

<sup>62</sup> Ricketson, *supra*, n 28 at para 6.83. Note that in response to this revision of the Berne Convention, the United Kingdom has made provisions vide s 169 of the Copyright, Designs and Patents Act 1988 (“CDPA”) for the same purpose (there was no such provision in the United Kingdom Copyright Act 1956). Malaysia, too, has similar provision in s 26(4)(c) of the Copyright Act 1987.

<sup>63</sup> Berne Convention, Art 15(4)(a).

<sup>64</sup> Berne Convention, Art 15(4)(b).

<sup>65</sup> *Supra*, n 7 at Annex, fn 36.

### (b) Indirect Protection By Means of Neighbouring/Related Rights

Another indirect way of protecting EoF/TCEs is to resort to laws relating to neighbouring or related rights.<sup>66</sup>

#### (i) International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organisations 1961 (the "Rome Convention")

The Rome Convention requires contracting states to afford protection, *inter alia*, to performers which shall include the possibility of preventing unauthorised broadcasting and communication to the public of their performance, except in the case of rebroadcasting or use of a fixation;<sup>67</sup> unauthorised fixation of their live performance<sup>68</sup> and unauthorised reproduction of a fixation of their performance.<sup>69</sup> It has been suggested that where such performances, broadcasting, communication to the public and fixation involve EoF/TCEs, then it is possible to indirectly protect the EoF/TCEs themselves and adherence to the Rome Convention can achieve this purpose.<sup>70</sup> However, under Article 3(a) of the Rome Convention, the word "performers" means "actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic work". As the concept of literary or artistic works is incompatible with the concept of EoF/TCEs, the somewhat rigid definition of "performers" in the Rome Convention does not appear to cover performers of EoF/TCEs and thus may not be adequate to provide indirect protection for EoF/TCEs.

---

<sup>66</sup> These are rights given to producers of films, sound recordings, broadcasters, publishers and performers. *Supra*, n 33 at p 2.

<sup>67</sup> Rome Convention 1961, Art 7(1)(a). This means in effect that the performer is only protected for the broadcasting or public communication of the performance given live. See Sterling, JAL, *World Copyright Law* (London: Sweet & Maxwell, 1998) at p 515.

<sup>68</sup> Rome Convention 1961, Art 7(1)(b).

<sup>69</sup> Rome Convention 1961, Art 7(1)(c).

<sup>70</sup> *Supra*, n 5 at pp 5 - 6, para 11-12.

**(ii) Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 (TRIPS Agreement)**

Article 14(1) of the TRIPS Agreement provides that the performers shall, in respect of their performance on a phonogram, have the possibility of preventing the following acts when undertaken without their authorisation: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorisation: the broadcasting by wireless means and the communication to the public of their live performance. Since there is no definition for the word “performers”, this provision can be construed as wide enough to cover performers of EoF/TCEs and therefore capable of protecting EoF/TCEs indirectly.

**(iii) WIPO Performances and Phonograms Treaty 1996 (WPPT)**

Unlike the Rome Convention, Article 2 of the WPPT specifically provides that for the purpose of the Treaty, “performers” are defined as “actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or *expressions of folklore*” (emphasis added). Besides, the WPPT contains more comprehensive provisions relating to the rights of performers. Under the WPPT, performers enjoy a wide range of exclusive rights, that is, the right to authorise the broadcasting, communication to the public and fixation of their unfixed performance,<sup>71</sup> reproduction right,<sup>72</sup> distribution right,<sup>73</sup> commercial rental right<sup>74</sup> and right of making available of fixed performances.<sup>75</sup> Furthermore, the performers also enjoy the right to remuneration for broadcasting and communication to the public.<sup>76</sup> Independently of the performer’s economic rights and even after the transfer of those rights, the per-

---

<sup>71</sup> WPPT, Art 6.

<sup>72</sup> WPPT, Art 7.

<sup>73</sup> WPPT, Art 8.

<sup>74</sup> WPPT, Art 9.

<sup>75</sup> WPPT, Art 10.

<sup>76</sup> WPPT, Art 15.



former still retains his moral rights of identity and integrity as provided in Article 5 of the WPPT. Since EoF/TCEs are normally performed by the performers of the community of the country where those expressions have been developed, this provides an indirect protection to the EoF/TCEs. It follows that apart from having moral rights, a traditional or Indigenous performer has the right to determine whether his performance should be fixed (for example recorded) and if so, how the fixation of the performance should be used, even if the EoF/TCEs were not themselves eligible for copyright protection. Being an international system of protection for performances of expressions of folklore, WPPT enables a performer of EoF/TCEs of a contracting state to receive protection in the other contracting states.

However, it is to be noted that the performers' rights under the TRIPS Agreement and the WPPT do not extend to the visual aspects of performances of EoF/TCEs. This has limited the scope of indirect protection of EoF/TCEs by means of neighbouring or related rights.

#### **(c) Protection By Means of *Sui Generis* System**

Apparently, attempts to protect the EoF/TCEs within the regimes of copyright and neighbouring or related rights do not produce satisfactory result or do not achieve the goal of an effective legal mechanism that adequately protects EoF/TCEs. Therefore, there are repeated calls for establishing a *sui generis* system for protection of EoF/TCEs.

#### **(i) Tunis Model Law on Copyright for Developing Countries (1976)**

In 1976, with the joint effort of WIPO and UNESCO, the Tunis Model Law on Copyright for Developing Countries (hereinafter referred to as "Tunis Model Law") was drawn up to serve as a reference for developing countries to employ when drafting their copyright legislation. The Tunis Model Law established a special protective regime for national

folklore.<sup>77</sup> There is no requirement for material fixation<sup>78</sup> or originality. Works of national folklore are protected “without limitation in time”.<sup>79</sup> Besides that, works of national folklore enjoy economic rights<sup>80</sup> as well as moral rights<sup>81</sup> and these rights are to be exercised by a competent authority.<sup>82</sup> It is to be noted that under the Tunis Model Law, works of national folklore are accorded a *sui generis* type of protection as they are not protected by copyright whereas works derived from national folklore are treated as copyright works.<sup>83</sup> The Tunis Model Law was subsequently adopted by Mali (1977), Burundi (1978), Ivory Coast (1978) and Guinea (1980).<sup>84</sup> In short, the Tunis Model Law seeks to resolve the inadequacies of copyright by widening its conventional ambit so as to accommodate the special characteristics of the EoF/TCEs. However, it was said that the Tunis Model Law is “not widely adopted due to the over-broad nature of the availability and scope of protection”.<sup>85</sup>

---

<sup>77</sup> Section 18 of the Tunis Model Law defines “folklore” as “all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage”.

<sup>78</sup> Tunis Model Law, s 1<sup>(3)(a)</sup>.

<sup>79</sup> Tunis Model Law, s 6(2).

<sup>80</sup> Tunis Model Law, s 4: the economic rights are exclusive rights to reproduce, make translation, adaptation, arrangement, transformation, communicate work to public either through performance or broadcasting.

<sup>81</sup> Tunis Model Law, s 5(1): the moral rights are rights to claim authorship, to object to and seek relief in connection with distortion, mutilation, modification or any other action which would be prejudicial to his honour or reputation.

<sup>82</sup> Tunis Model Law, s 6.

<sup>83</sup> See “The Protection of Traditional Cultural Expressions/Expressions Of Folklore: Outline of Policy Options and Legal Mechanisms” at Seventh Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO/GRTKF/IC/7/4) at para 107(a). Available at [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtk\\_ic\\_7/wipo\\_grtf\\_ic\\_7\\_4.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtk_ic_7/wipo_grtf_ic_7_4.pdf).

<sup>84</sup> Blakeney, M, “Human Rights and Indigenous Australians – Cultural and Intellectual Property Rights” at <http://www.austlii.edu.au/au/other/IndigLRes/car/1997/4/blakeney.html>.

<sup>85</sup> “Traditional Knowledge, Genetic Resources, Folklore and Biodiversity” at [http://www.law.unimelb.edu.au/ipra/research/trad\\_know.html](http://www.law.unimelb.edu.au/ipra/research/trad_know.html).

**(ii) The Model Provisions for National Laws on the Protection of Expression of Folklore Against Illicit Exploitation and Other Prejudicial Actions (Model Provisions 1982)**

In 1973, at the request of the Government of Bolivia vide a memorandum to examine the opportunity of drafting an international instrument on the protection of folklore, UNESCO began to explore the legal issues implicated in the protection of EoF/TCEs on an international scale. Subsequently, UNESCO and WIPO agreed to collaborate and they convened a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore. The Committee adopted the Model Provisions in 1982.<sup>86</sup>

The Model Provisions protect expressions of folklore<sup>87</sup> from unauthorised use with gainful intent and utilisations outside the relevant community's traditional or customary context<sup>88</sup> and also prohibit misrepresentation of the source of expression of folklore.<sup>89</sup> The rightholder of expressions of folklore is either a competent authority or the community concerned, according to the choice of each country. As such, authorisation for commercial use of expressions of folklore shall be obtained from the competent authority established by the State or community concerned.<sup>90</sup> This means that there is no requirement for an identifiable author or authors. Where the competent authority or community concerned grants authorisation, it may fix the amount of fees and collect fees, which shall be used for the purpose of promoting or safeguarding national culture or folklore.<sup>91</sup> The Model Provisions

---

<sup>86</sup> *Supra*, n 5 at p 8, para 24.

<sup>87</sup> For the definition of "expressions of folklore", see section 2 of the Model Provisions.

<sup>88</sup> Model Provisions, s 3. However, exceptions are provided under s 4 where there is no infringement of the provisions if the expressions of folklore are (i) utilised for purposes of education; (ii) utilised by way of illustration in the original work of an author, provided that the extent of such utilisation is compatible with fair practice and (iii) borrowing of expressions of folklore for creating an original work of an author or authors. It is to be noted that exception (iii) allows creation and subsequent protection of original works based on expressions of folklore.

<sup>89</sup> Model Provisions, s 5, that is, provision on acknowledgement of source.

<sup>90</sup> Model Provisions, s 10(1).

<sup>91</sup> Model Provisions, s 10(2).

also grant perpetual protection since there is no time limit for protection and there is no requirement for material fixation. This seems to suggest that the protection is for a community whose existence may not be limited in time rather than for individual authors. Further, the Model Provisions do not create any binding international obligations but merely serve as a model upon which countries can legislate their national laws on protection of EoF/TCEs. Among the instances of national legislation and regional instruments that were enacted based on or incorporating the provisions of the Model Provisions are the Nigerian Copyright Act 1988,<sup>92</sup> Bangui Agreement on the Creation of an African Intellectual Property Organization (OAPI), as revised in 1999 (hereinafter referred to as "Bangui Agreement")<sup>93</sup> and the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge of Panama 2002 and the related Executive Decree of 2001 (hereinafter referred to as "the Panama law").<sup>94</sup>

There have also been attempts to extend the protection of EoF/TCEs to an international level. It all began following the suggestions of a number of the participants in the meeting of the Committee of Governmental Experts which adopted the Model Provisions in 1982. Following such suggestions, WIPO and UNESCO jointly convened a Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property which met in Paris from 10 to 14 December 1984.<sup>95</sup> A draft treaty based on the Model Provisions<sup>96</sup> was prepared and there was a general recognition of the need for international protection of EoF/TCEs. However, the attempts were unsuccessful as

---

<sup>92</sup> It was said that folklore provisions of the Nigerian Copyright Act 1988 are based extensively on the WIPO-UNESCO Model Provisions. See Blakeney, M, "The Protection of Traditional Knowledge under Intellectual Property Law" [2000] *EIPR* 251 at p 257.

<sup>93</sup> Under the Bangui Agreement, the definition of "expression of folklore" appears rather similar with the one in the Model Provisions. Fixation is not a requirement.

<sup>94</sup> The Panama Law provides for the protection of the "collective rights of the indigenous communities" and the rights are indefinite (Art 7). In addition, fixation is not required.

<sup>95</sup> *Supra*, n 7 at Annex p 25, para 77.

<sup>96</sup> A copy of the "Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions" is available at <http://www.copyrightnote.org/statute/cc0014.html>.

“the great majority of the participants considered it premature to establish an international treaty since there was insufficient experience available as regards the protection of expressions of folklore at the national level, in particular, concerning the implementation of the Model Provisions”.<sup>97</sup>

Nevertheless, efforts to seek suitable solutions for protecting EoF/TCEs continue.

**(a) WIPO-UNESCO World Forum on the Protection of Folklore (1997) and WIPO-UNESCO Regional Consultations on the Protection of Expressions of Folklore (1999)**

In April 1997, a joint WIPO-UNESCO World Forum on the Protection of Folklore was held in Phuket, Thailand where many issues relating to intellectual property and folklore were discussed. At the end of the Forum, a Plan of Action was adopted which expressed concerns over the adequacy of copyright law to protect EoF/TCEs and the need for a new international agreement on the *sui generis* protection of EoF/TCEs.<sup>98</sup> Following the suggestion in the Plan of Action, WIPO and UNESCO organised four Regional Consultations on the Protection of Expressions of Folklore in 1999,<sup>99</sup> each of which had adopted recommendations that identify the needs and issues of intellectual property as well as proposals relating to EoF/TCEs.<sup>100</sup>

---

<sup>97</sup> *Ibid*, para 78. Two main problems that arose were (i) the lack of appropriate sources for the identification of the EoF to be protected and (ii) the lack of workable mechanisms for settling the questions of EoF that can be found in several countries of a region, ie the problem of regional folklore. For more details, see “The Protection of Expressions of Folklore: The Attempts at International Level” (Paper prepared by the International Bureau of WIPO) available at <http://itt.nissat.tripod.com/itt9903/folklore.htm>.

<sup>98</sup> *Supra*, n 92 at p 260.

<sup>99</sup> The regional consultations were held for (i) African countries in Pretoria, South Africa (March 1999); (ii) countries of Asia and the Pacific region in Hanoi, Vietnam (April 1999); (iii) Arab countries in Tunis, Tunisia (May 1999) and (iv) Latin America and the Caribbean in Quito, Ecuador (June 1999).

<sup>100</sup> *Supra*, n 7, Annex, p 27, para 86.

### **(b) WIPO Fact-finding Missions (1998-99)**

From May 1998 to November 1999, WIPO conducted fact-finding missions in 28 countries to identify the needs and expectations of traditional knowledge holders. For the purposes of the missions, “traditional knowledge” included TCEs as a sub-set.<sup>101</sup>

### **(c) WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore**

In late 2000, the Member States of WIPO established the Inter-governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore for discussing issues relating to, *inter alia*, EoF/TCEs and developing policy as well as practical responses to them. This Committee comprises Member States of WIPO, non-governmental organisations (NGOs) and the representatives of Indigenous and local communities. A series of practical study<sup>102</sup> and detailed analysis of the legal mechanisms and policy options on the protection of EoF/TCEs were done by the WIPO Secretariat and the same were considered by the Committee. In short, the working documents of the Intergovernmental Committee serve as a useful guide to the development of EoF/TCEs protection.<sup>103</sup>

### **Protection of EoF/TCEs: Malaysian Position**

Malaysia, with her multi-racial population, is a country with rich and diverse cultural heritage. The Indigenous people, in particular, contribute

---

<sup>101</sup> *Ibid*, pp 26-27, para 84-85.

<sup>102</sup> For instance, study on cases of the Indigenous Australians seeking recourse from intellectual property law to protect their EoF/TCEs. See Janke, T, “Minding Culture – Case Studies on Intellectual Property and Traditional Cultural Expressions” prepared for WIPO, available at

<http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html>. Practical study was also conducted on selected countries. See Kutty, PV, “National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and The Philippines” prepared for WIPO, available at <http://www.wipo.int/tk/en/studies/cultural/expressions/study/kutty.pdf>.

<sup>103</sup> The working documents of the Intergovernmental Committee are available on WIPO’s website at <http://www.wipo.int/globalissues/igc/documents/index.html>.

greatly to the cultural richness of this country. They include the Malays, the *Orang Asli* or "original people" in Peninsular Malaysia and the indigenous people in Sabah and Sarawak. Among the major tribes of the *Orang Asli* are the Negritos,<sup>104</sup> the Senoi<sup>105</sup> and the Proto-Malay. The Indigenous people in Sabah include ethnic groups such as the Dusun,<sup>106</sup> Murut and Bajau. In Sarawak, the Indigenous people include ethnics groups like the Iban,<sup>107</sup> Bidayuh, Melanau and *Orang Ulu*.

Perhaps the best known traditional Malay theatrical performance in Malaysia is the *Wayang Kulit* or shadow puppet play, prominent in the state of Kelantan. It was said that in Malaysia, especially in Kelantan, the roots of *wayang kulit* can be traced back to 250 years.<sup>108</sup> *Wayang Kulit* involves a puppeteer or *Tok Dalang*, an array of intricately carved puppets made of buffalo hide or goatskin and several musicians playing the traditional musical instruments. It depicts scenes from the Hindu epics such as *Ramayana* and the *Mahabhrata* but adapted to the local scene. The puppeteer will manipulate many different voices to suit the various characters in the *wayang kulit*. Unfortunately, this traditional Malay art form is on the decline and it was reported that currently there are only about five active puppeteers left in Kelantan.<sup>109</sup>

The Malay traditional dances as well as the Indigenous dances are equally important aspects of the expressions of folklore in Malaysia. For instance, *Zapin* is the oldest form of syncretic folk dance that has

---

<sup>104</sup> The name "Negrito" suggests that the people came from Papua New Guinea or East Africa. It is thought that the Negrito arrived in Malaya 8,000 years ago. See Ben van Wijnen, "Orang Asli" at <http://www.malaysiasite.nl/orangeng.htm>.

<sup>105</sup> It was believed that the Senoi came from the hills in Vietnam, Cambodia or Northern Thailand, about 6000 - 8000 years ago. *Ibid.*

<sup>106</sup> Dusunic family includes the Kadazans, Kujau, Lotud and Rungus. See "Indigenous People" at [http://www.windowstomalaysia.com.my/nation/12\\_1\\_2\\_4.htm](http://www.windowstomalaysia.com.my/nation/12_1_2_4.htm).

<sup>107</sup> The Ibans were originally from the Kalimantan region of Borneo. By the 19<sup>th</sup> century, they had settled throughout the inland areas of Sarawak, *Ibid.*

<sup>108</sup> See "Wayang Kulit" at <http://www.kwikxs.com/wayangkulit.html>.

<sup>109</sup> *Ibid.* See also "Drama and Theatre" at [http://www.windowstomalaysia.com.my/nation/13\\_1\\_2.htm](http://www.windowstomalaysia.com.my/nation/13_1_2.htm).

survived until today in Malaysia. It developed from the music and dance traditions of the Hadhramis (the Arabs of Hadhramaut or present day Yemen) who came to the region before the 14<sup>th</sup> century and it was adapted and assimilated by the Malay communities in Peninsular Malaysia.<sup>110</sup> Hence, *Zapin* combines both Middle Eastern and Malay elements and it is most popular in Johor. Meantime, *Kuda Kepang*, a dance where the dancers use hobby-horses made of leather, is popular in Johor. It is influenced by Islam and the stories depicted by *Kuda Kepang* are mainly stories of wars fought by Prophet Muhammad (peace be upon him) and his followers.<sup>111</sup> *Mak Yong*, on the other hand, is a traditional Malay dance drama that combines rituals, songs, dance, drama and music. It was the favourite entertainment of the Kelantan and Patani palaces for more than three centuries. Its stories, music and songs have been handed down verbally and have not been reduced to written form.<sup>112</sup> Traditional dances of the Indigenous people of East Malaysia include the *Sumazu*, that is, the most well-known dance of the Kadazandusun communities in Sabah and the *Ngajat* dance of the Iban and Bidayuh in Sarawak.<sup>113</sup>

Another major element of EoF/TCEs can be found in Malaysian handicrafts such as the Malaysian *Batik* cloth,<sup>114</sup> *kain songket*<sup>115</sup> and the famous *pua kumbu* (hand-woven textile)<sup>116</sup> by the Iban of Sarawak,

---

<sup>110</sup> See Ghulam-Sarwar Yousof, *The Encyclopedia of Malaysia : Performing Arts* (Archipelago Press, 2004) at p 46 and p 102.

<sup>111</sup> See "Malay Traditional Dances" at [http://www.windowstomalaysia.com.my/nation/13\\_1\\_1b.htm](http://www.windowstomalaysia.com.my/nation/13_1_1b.htm).

<sup>112</sup> See "Mak Yong" at <http://www.kwikxs.com/makyong.html>.

<sup>113</sup> *Supra*, n 110 at pp 44–45.

<sup>114</sup> Batik is a traditional technique for dyeing fabric, using wax to make designs. The designs are either hand-painted or printed with carved wooden blocks. See "Arts and Literature" at <http://www.settlement.org/cp/english/malaysia/arts.html>.

<sup>115</sup> "Kain songket" is a hand-woven traditional Malay fabric with gold and silver threads through the material. See "Malaysian Handicrafts" at [http://www.abcmalaysia.com/tour\\_malaysia/handicrafts.htm](http://www.abcmalaysia.com/tour_malaysia/handicrafts.htm).

<sup>116</sup> Weavers of "pua kumbu" use dye made from roots, bark leaves and other vegetations. Dying often takes months while the weaving is complicated and intricate in nature. See "Pua Kumbu" at [http://www.abcmalaysia.com/tour\\_malaysia/p\\_kumbu.htm](http://www.abcmalaysia.com/tour_malaysia/p_kumbu.htm).



to name a few. The Sarawak native, the Penan, are skilled at basketry and rattan mats. The Bidayuh, too, make a variety of baskets and the most popular is *tambok*.<sup>117</sup> Among the indigenous people of Peninsular Malaysia, two tribes are noted for their wood sculptures, namely the Mah Meri who live in Carey Island in the state of Selangor and the Jah Hut in central Pahang.<sup>118</sup> The wood sculptures carved by the two tribes are chiefly figures depicting forest and household spirits.<sup>119</sup>

As music is an integral part of the Indigenous communities, Sabah and Sarawak naturally have a rich instrumental music tradition. Among the famous musical instruments in East Malaysia are *tongkungon*<sup>120</sup> and *sundatang*,<sup>121</sup> both played mainly among Dusunic communities, the *sapeh*<sup>122</sup> of the Kenyah people in Sarawak, *turali* or *selengut*,<sup>123</sup> *sompoton*<sup>124</sup> in Sabah and *engkerurai*<sup>125</sup> in Sarawak.<sup>126</sup>

There is however, no specific law to prevent any unauthorised commercial exploitation of the rich store of EoF/TCEs in Malaysia. There is also no specific provision relating to protection of EoF/TCEs in the Copyright Act 1987 (hereinafter referred to as "the Act"), bearing in mind that EoF/TCEs do not correspond to the concept of literary, musical and artistic works proper. This is because the Act stipulates

<sup>117</sup> "Tambok" is cylindrical in shape and supported by four vertical sticks. The Bidayuh carry their jungle produce to the market in this type of basket on their backs.

<sup>118</sup> See "Aboriginal Wood Sculptures" at <http://www.caroun.com/Countries/Asia/Malaysia/Craft/CraftWoodSculptures.html>.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Tongkungon* is a plucked zither that imitates gong music. It is made from a single node of bamboo with strips cut in its surface to form its strings, and a hole cut in the back or top for resonance. *Supra*, n 110 at p 76.

<sup>121</sup> *Sundatang* is a long-necked strummed lute. *Ibid* at p 77.

<sup>122</sup> *Sapeh* is the most popular stringed instrument in Sarawak. It has an elongated body which is hollowed out and functions as a resonator. *Ibid.*

<sup>123</sup> Nose flute is known as *turali* in Sabah and *selengut* in Sarawak. *Ibid.*

<sup>124</sup> *Sompoton* is mouth organ consists of a double raft of eight bamboo pipes with palmwood reeds embedded in a gourd windchamber. *Ibid.*

<sup>125</sup> *Engkerurai* is also a mouth organ with a circular bundle of seven pipes embedded in a gourd windchamber. *Ibid.*

<sup>126</sup> *Supra*, n 110 at p 76-77.

the following basic concepts as well as criteria for protection of copyright in respect of a literary, musical or artistic work:<sup>127</sup>

- a) Originality; in that sufficient effort has been expended to make the work original in character [s 7(3)(a)];
- b) Fixation; in that the work has been written down, recorded or otherwise reduced to material form [s 7(3)(b)];
- c) Authorship and Ownership; in that an identifiable author is needed to determine subsistence of copyright [s 10(1)], computation of duration of copyright [s 17], entitlement of moral rights [s 25] and status as the first copyright owner [s 26(1)]. Copyright is vested in the owner and it is regarded as a private property or proprietary interest that can be transferred [s 27] and not communal right;
- d) Limited duration; in that the copyright subsists during the life of author and continue to subsist until expiry of fifty years after his death [s 17(1)] and;
- e) Idea/Expression dichotomy; in that the copyright protection shall not extend to any idea, procedure, method of operation or mathematical concept as such [s 7(2A)]

Having said that, it is still possible for certain forms of expressions of folklore to be protected by the Act so long as they fulfil the requirements of copyright under the Act. For instance, the wood sculptures made by the contemporary Indigenous people in Malaysia may fall within the meaning of “artistic works” if sufficient effort has been expended to make the works original in character.<sup>128</sup>

On the other hand, it is interesting to note that the only provision that mentions the phrase “expressions of folklore” is to be found in section 2 of the Act, under the definition of “live performance” in

---

<sup>127</sup> Note that the criteria of copyright has limited its potential in affording adequate protection to expressions of folklore or traditional cultural expressions. See the discussion earlier in this paper, under the subheading “Limitation on the use of Copyright to Protect EoF/TCEs”.

<sup>128</sup> See s 2 of the Copyright Act 1987 on the definition of “artistic work” where paragraph (a) includes, *inter alia*, sculpture.

paragraph (a)(vi) which reads: "live performance includes a performance in relation to *expressions of folklore* which is given live by one or more persons in Malaysia, whether in the presence of an audience or otherwise ..." (emphasis added). Meanwhile, a "performer" is defined as a person who performs a live performance under the Act.<sup>129</sup> Theoretically, it seems that expressions of folklore may possibly be protected in an indirect manner in Malaysia. This would mean that a performer of expressions of folklore in Malaysia shall have the exclusive rights to control the doing of various acts set out in section 16A(1), namely the communication to the public of a live performance of the EoF/TCEs,<sup>130</sup> fixation of an unfixed performance of the EoF/TCEs,<sup>131</sup> reproduction of the fixation of a live performance of the EoF/TCEs,<sup>132</sup> the first making available to the public of a fixation of a live performance or copies of the EoF/TCEs through sale or other transfer of ownership<sup>133</sup> and rental to the public of a fixation of a live performance or copies of the EoF/TCEs, irrespective of the ownership of the copy rented.<sup>134</sup> However, all the exclusive rights stated above shall cease once the performer of expressions of folklore has given consent to the fixation of his live performance.<sup>135</sup> In addition to that, a performer of expressions of folklore in Malaysia shall also enjoy moral rights under the Act.<sup>136</sup> Hence, a puppeteer of *wayang kulit* can restrict any third party from recording his live performance of the shadow puppet play without his consent.<sup>137</sup> However, in the absence of the definition of "expressions of folklore" in the Act, it is practically difficult to determine what type of expressions fall within the ambit of the Act and it

---

<sup>129</sup> Copyright Act 1987, s 2.

<sup>130</sup> Para (a).

<sup>131</sup> Para (b).

<sup>132</sup> Para (c).

<sup>133</sup> Para (d).

<sup>134</sup> Para (e).

<sup>135</sup> Copyright Act 1987, s 16A(2).

<sup>136</sup> Copyright Act 1987, s 25A.

<sup>137</sup> Arguably, the performance of *wayang kulit* may also be considered as "a performance of dramatic work given with the use of puppets" and thus falls within the meaning of "live performance" where the puppeteer enjoys the performer's rights. See the definition of "live performance" under the Act, para (a)(i).

appears that the construction of the provision is left to the courts. Since there is yet any reported case on live performance of expressions of folklore in Malaysia, ambiguity as to the ambit and extent of the indirect protection provided by the Act in relation to EoF/TCEs remains.

Apart from the performer's rights, the other nearest provision which can possibly be relied upon to protect EoF/TCEs in Malaysia is section 26(4)(c) of the Act. This provision stipulates that in the case of unpublished work where the identity of the author is unknown, but where there is every reason to presume that he is a Malaysian citizen, copyright in the work shall be deemed to vest in the Minister charged with the responsibility for culture. It appears that if an EoF/TCE is qualified as a literary, musical or artistic work within the meaning of the Act, copyright in such work shall be vested in the Minister and the Minister shall be entitled to protect and enforce the rights of the unknown Malaysian author of such work in Malaysia as well as the Berne Union countries. However, this provision is silent as to how the Minister is to discharge his function and responsibilities, including the manner of application and distribution of the royalties.<sup>138</sup> Besides, the provision shall cease to apply when the identity of the author becomes known.<sup>139</sup>

From the above discussion, it is obvious that the Act does not adequately protect the EoF/TCEs. Apart from the limited protection conferred on the performers of EoF/TCEs as well as the vesting of copyright in unpublished work on the Minister, the Act does not appear to extend protection and remedies to cases like:

- a) The accompanying music of "borea"<sup>140</sup> and "dikir barat"<sup>141</sup> which involves repetitious patterns of melody and "[does] not

---

<sup>138</sup> *Supra*, n 62 at para 6.84.

<sup>139</sup> Copyright Act 1987, s 26(5).

<sup>140</sup> "Borea" is a theatre style which originally incorporated chanting, processions and self-flagellations and were subsequently adapted to create a form of secular theatre with secular solo and chorus singing style. *Supra*, n 110 at p 104.

<sup>141</sup> "Dikir Barat" is a form of verse debate involving two teams of participants which possibly evolved from Islamic religious chanting (zikir) and it is found principally in Kelantan. *Ibid*, at p 21.

- vary very much from one piece to another”, may not qualify as original musical work.<sup>142</sup>
- b) The act of writing down and publication of oral Indigenous folk tales or folk poetry by non-Indigenous persons. Issue arises about the rights and interests of the Indigenous communities who supply the folk tales or folk poetry as against copyright enjoyed by such non-Indigenous “authors” who reduce them to material form.
  - c) Unauthorised reproduction of traditional musical instruments and handicrafts in replica form as souvenir items, unless we can say that traditional musical instruments and handicrafts are protected as “artistic work”, that is, “artistic craftsmanship”, and all other criteria of copyright are met.<sup>143</sup>

<sup>142</sup> *Supra*, n 33 at p 81.

<sup>143</sup> Prior to the Copyright (Amendment) Act 1996, “artistic works” as defined in the Copyright Act 1987 included “works of artistic craftsmanship” which in turn included “pictorial woven tissues, tapestry and articles of applied handicraft”. This definition could possibly cover *pua kumbu* and the baskets made by the indigenous people in Malaysia, moreover these handicrafts usually possess artistic quality and involve craftsmanship; see *George Hensher Ltd v Restavile Upholstery (Lancs) Ltd* [1975] RPC 31 at 56. After the Copyright (Amendment) Act 1996, “works of artistic craftsmanship” are no longer defined. However, it is unlikely that such items in former definition would no longer be considered as “works of artistic craftsmanship” as the items were merely intended to be illustrations of the definition. See Khaw, LT, “Recent Amendments to Malaysian Copyright Law” [1997] 2 *EIPR* 81, 83. Therefore, handicrafts like *pua kumbu* and baskets produced by indigenous people could arguably be regarded as “works of artistic craftsmanship”. However, it is doubtful whether the traditional musical instruments can be considered as “works of artistic craftsmanship” as they are not handicrafts. In any event, there is no satisfactory definition of “works of artistic craftsmanship” according to Garnett, K, James, JR & Davies, G, *Copinger and Skone James on Copyright* (London: Sweet & Maxwell, 14<sup>th</sup> ed, 1999) at p 84, para 3-46. It remains to be seen whether a case will put this issue in court in future to provide judicial guidance on what actually constitutes works of artistic craftsmanship. On the other hand, under the Industrial Designs Act 1996 (“the IDA”), the word “article” included “handicraft”. Thus, designs applied to handicrafts can be registered under the IDA if it is new (s 12(1)) and appeals to the eye. It appears that traditional musical instruments would not qualify for registration under the IDA as there is no novelty in the industrial design. Meantime, if the handicrafts are registered under the IDA or capable of being registered but not registered, the impact of s 7(5) and s 7(6) of the Copyright Act 1987 have to be considered. In the former situation, no copyright shall subsist in the design registered under the IDA. In the latter case, copyright shall cease as soon as any article to which the design has been applied has been reproduced more than 50 times by industrial process by the owner of the copyright.

## Conclusion

It is possible to protect contemporary traditional-based EoF/TCEs within the regime of copyright. The originality and identifiable author requirements do not seem to affect contemporary traditional-based EoF/TCEs which are tangible in nature (reduced to material form) and fall within the meaning of copyright work. However, the fixation requirement, limited term of protection, emphasis on individual ownership as opposed to communal ownership and the idea/expression dichotomy have not only limited the potential of copyright protection of EoF/TCEs but also do not meet the needs of the Indigenous people or communities who are the custodians or who have been developing the EoF/TCEs. Indeed, copyright law is an inadequate solution in view of the significant differences between its concepts and the very nature of the EoF/TCEs. Protection of performances of EoF/TCEs, too, is limited because copyright law merely protects certain types of EoF/TCEs in an indirect manner but it does not cover some other forms of EoF/TCEs, especially the tangible expressions such as traditional musical instruments and production of folk arts as understood in the Model Provision. This is also the situation faced in Malaysia.

It appears that a *sui generis* system for the EoF/TCEs should be preferred so as to resolve the fundamental divergences between the rights of the copyright owner and the concept of communal ownership of the Indigenous or traditional communities as well as the customary responsibilities of the Indigenous creators. Further, a *sui generis* system can help to avoid any undesirable major overhaul of the current copyright regime.

Of course, to make such a *sui generis* system meaningful and effective, the Malaysian government must have strong political will to protect the EoF/TCEs and to adopt the *sui generis* system. Otherwise, the existence of the EoF/TCEs in Malaysia will be endangered in the long run. Although there is no reported case law in Malaysia relating to misappropriation of the EoF/TCEs, this does not mean that such incidents never occurred. The community from whom the EoF/TCEs originated may simply be unaware of the possible remedies available

to them, including those under copyright law. Another possible reason is that such incidents or legal actions (if they ever existed) have not gotten sufficient publicity. Unfortunately, it seems that currently there is no organisation or group of persons to lobby for this *sui generis* system in Malaysia. Instead, the issue of protection of EoF/TCEs has always taken a back seat as compared to more pressing issues such as protection of indigenous genetic resources against "biopiracy".<sup>144</sup> Nevertheless, the time has come for us to consider adopting the *sui generis* system to protect the EoF/TCEs in Malaysia before the situation turns worse. It is also pertinent to carry out educational campaigns to create public awareness of the need to protect the EoF/TCEs and to assist the Indigenous people in Malaysia so that they will become fully acquainted with their rights and remedies in respect of the EoF/TCEs.

In framing the new national legislation for EoF/TCEs, it is proposed that the Model Provisions can be used as the starting point of reference and wherever necessary, modifications should be made to reflect our cultural and legal policies. For instance, EoF/TCEs should be exempted from the requirements of originality and material fixation and the duration of protection should be perpetual or at least longer than the current position of "fifty years after the death of the author" (for example the lifespan of the relevant community). Besides, communal ownership of the EoF/TCEs should be recognised or at least the rights should be vested, managed and exercised by a statutory body or a competent authority established by the government or Minister charged with the responsibility for culture. Non-indigenous persons or corporations should be prohibited from using the EoF/TCEs for commercial

---

<sup>144</sup> See "Survey of Laws on Traditional Knowledge in South East Asia", available at <http://cyber.law.harvard.edu/openeconomies/okn/asiatk.html>. In Malaysia, a draft Access and Benefit Sharing Bill has been prepared and it is being reviewed. It is expected that the Bill will "promote local scientific research and development, encourage bioprospecting by the private sector and multinational companies and enforce sharing of benefits from the use of bio resources and traditional knowledge"; see "Tackling Biopiracy Through Legislation and Cooperation" at <http://www.bernama.com.my/bernama/v3/news.php> on 22 May 2005. Meantime, it is also noted that the growth of biotechnology in Malaysia has led to the enactment of the Protection of New Plant Varieties Act 2004, although it is not yet in force.

purposes without the prior informed consent of the community concerned, the competent authority or the Minister. If the authorisation of the use of EoF/TCEs is subject to payment of fees and in the event a competent authority or the Minister is designated, it is proposed that a certain percentage of the fees collected should go to the community from which the EoF/TCEs originated. The balance of the fees collected may be retained by the competent authority or the relevant Ministry for administration expenses and costs for enforcement of the rights. Where there is no competent authority or Minister designated for this purpose and where the rights (including the right to collect fees) are exercised by the community itself, the usage and manner of distribution of the fees should be decided by the community.<sup>145</sup> There should also be provisions on moral rights vesting in the custodians of the EoF/TCEs. Last but not least, it must be borne in mind that this new regime of protection should neither be too broad such as to stifle creativity nor overly rigid or narrow that it fails to achieve the intended objective.

---

<sup>145</sup> *Supra*, n 5 at p 26, para 85.



## After *Adong*: The Emerging Doctrine of Native Title in Malaysia

*Peter Crook\**

### I. Introduction

*Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor*<sup>1</sup> established the concept of native title in Malaysian law. The decision was quickly followed by two High Court decisions; *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors*,<sup>2</sup> a case involving the logging of Iban forest land in Bintulu, Sarawak, and *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors*,<sup>3</sup> a case involving the taking of Temuan land in Sepang in conjunction with the building of the Kuala Lumpur International Airport. In both cases the High Court firmly embraced the doctrine of native title and took significant steps to extend its boundaries. In *Nor Anak Nyawai*, the High Court recognised the indigenous community's control over its communal forest land and enjoined further logging by the defendant timber company. In *Sagong bin Tasi*, the High Court extended the native title of the plaintiff Temuans to include not only usufructory rights described in *Adong*, but also ownership of at least a portion of the plaintiffs' traditional lands. The cases were also significant because they served to illustrate the markedly different legal obstacles facing the *Orang Asli* of the Peninsula and the indigenous peoples of Sarawak and Sabah. In *Nor Anak Nyawai*, the decision rested on the High Court's assessment of Sarawak's extensive history of regulations on land use and whether they served to extinguish the plaintiffs' claim to native title.

---

\* BA (UC, Berkeley), MA (UC, Davis), JD (UC, Davis), LLM (Harvard); Visiting Associate Professor, Faculty of Law of the University Malaya, Kuala Lumpur, Malaysia.

<sup>1</sup> [1997] 1 MLJ 418.

<sup>2</sup> [2001] 6 MLJ 241.

<sup>3</sup> [2002] 2 MLJ 591.