

# CHAPTER 4

# Cultural Heritage and Intellectual Property: Convergence, Divergence, and Interface

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## SOME DEFINITIONS

### What Is Cultural Heritage?

Cultural heritage is the legacy of physical artifacts and intangible attributes of a group or society that are inherited from past generations, maintained in the present and bestowed for the benefit of future generations. It is those things and traditions that express the way of life and thought of a particular society, and which are evidence of its intellectual and spiritual achievements. The term “heritage” embodies the notion of inheritance and handing on, and the duty to preserve and protect. Having at one time referred exclusively to the monumental remains of cultures, heritage as a concept has gradually come to include new categories such as intangible, ethnographic, or industrial heritage (Protz and O’Keefe 1992: 307). There are three types of heritage: tangible, intangible, and natural. The first two are clearly recognized as cultural, although some heritage people argue that seeing some parts of nature as “heritage” is a cultural process.

### Tangible Heritage

Tangible cultural heritage includes buildings and historic places, monuments, books, works of art, and artifacts that are considered worthy of preservation for the future. The emphasis is on the pre-eminence of the thing or object. For example, the

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Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), commonly known as the Hague Convention, refers to “movable and immovable property of great importance to the cultural heritage of every people.”<sup>1</sup> The UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970) emphasizes property “specifically designated by each State as being of importance.”<sup>2</sup> The UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1972) mentions things, objects and natural sites “of outstanding universal value.”<sup>3</sup> Natural heritage includes landscapes, the natural environment, and flora and fauna.

### **Between Tangible and Intangible Heritage**

Intangible cultural heritage is the opposite of tangible cultural heritage. It is non-physical and therefore not touchable except in its tangible expressions. “A basket is a song made visible”, as a Native American saying has it. Intangible cultural heritage includes traditions, folklore, language, rituals, songs, music, social practices, and drama. The three conventions already mentioned of 1954, 1970, and 1972 are all concerned with tangible heritage. But the neglect of intangible heritage could not last. In 1982, UNESCO adopted the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Forms of Prejudicial Action (UNESCO 1982). This was followed seven years later by UNESCO’s adoption of the Recommendation on the Safeguarding of Traditional Culture and Folklore (UNESCO 1989). And in 2003, the Convention for the Safeguarding of the Intangible Cultural Heritage was adopted.

### **What Is Intellectual Property?**

There are three kinds of property: (a) property consisting of movable things, such as a wristwatch or an automobile; (b) immovable property, namely, land and things permanently fixed on it, such as houses; and (c) intellectual property, such as creations of the human mind and human intellect. Because it is a product of the human intellect, this kind of property is called “intellectual” property (WIPO 1988: 3).

As with cultural heritage, there are various types of intellectual property. Intellectual property is usually divided into two branches, namely “industrial” property and “copyright.” Patents, registered designs, and trademarks are referred to as industrial property rights, because they are associated with industry and commerce. Copyright relates to artistic creations, such as poems, novels, music, paintings, and cinematographic works. It is the addition of copyright and related rights to industrial property that constitutes the modern scope of intellectual property.

## **CONVERGENCE**

Both cultural heritage and intellectual property are creations of the mind that have economic value, being species of property. Since the end of World War II, UNESCO has taken the initiative through its standard-setting instruments (that is, conventions) to highlight the convergence and interface between cultural heritage and intellectual property. In Article 1 of the Universal Copyright Convention (1952), each contracting

state undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific, and artistic works, including written, musical, dramatic, and cinematographic works, and paintings, engravings, and sculpture. In spite of this early foray into the symbiotic relationship between cultural heritage and intellectual property, the early UNESCO conventions on cultural heritage focused on tangible heritage.

The divorce between tangible and intangible was bound to end sooner or later, for as Dawson Munjeri aptly put it, “Intangible heritage provided the larger framework within which tangible heritage could take its shape and significance” (Munjeri 2004: 18). Or as the International Council on Monuments and Sites (ICOMOS) elegantly put it, “intangible heritage must be made incarnate in tangible manifestations” (Munjeri 2004: 18).

Joint work on the matter by the World Intellectual Property Organization (WIPO) and UNESCO resulted in the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (UNESCO 1982). In 1993, UNESCO launched the Living Human Treasures program. Meanwhile, concern for the recognition of the similarity between folklore and copyright was the inspiration for UNESCO’s Guidelines for Establishment of the National “Living Human Treasures” System (UNESCO 2002). In 1998, UNESCO furthered the profile of intangible heritage by establishing the biennial Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity. In addition, WIPO has now established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore as an international forum for debate and dialogue concerning the interplay between intellectual property, traditional knowledge, traditional cultural expressions (folklore), and genetic resources.

The Convention Establishing the World Intellectual Property Organization (1968), concluded in Stockholm, states that “intellectual property shall include rights relating to, inter alia, ‘literary, artistic and scientific works,’ and ‘performances of performing artists’.”<sup>4</sup> We see here the recognition of intellectual property as cultural property, with the inclusion of literary and artistic works, and performances of performing artists. Likewise, the UNESCO Intangible Heritage Convention (2003) accepts intangible heritage as intellectual property with the provision that “intangible cultural heritage,” as defined in Article 1, “is manifested inter alia in the following domains: oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; performing arts; social practices, rituals and festive events.”<sup>5</sup>

The overlap between cultural heritage and intellectual property is also evident in their both being regarded as a human right. Cultural rights and intellectual property rights are recognized as human rights in the Universal Declaration of Human Rights (1948), which provides that:

Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits ... [and] [e]veryone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. (United Nations 1948: art. 27)

These rights are further emphasized by Article 15 of the International Covenant on Economic, Social and Cultural Rights (1966), Article 19 of the International Covenant on Civil and Political Rights (1966), the Vienna Declaration and Program of Action (WCHR 1993), and other international and regional instruments.

In 1998, both UNESCO and WIPO marked the fiftieth anniversary of the UDHR. WIPO in collaboration with the United Nations Office of the High Commissioner for Human Rights (OHCHR) organized a panel discussion in Geneva on intellectual property and human rights. UNESCO for its part published the book *Cultural Rights and Wrongs* (Niec 1998). Intellectual property rights have in recent years become identified with human rights and cultural heritage rights. In the same year, Michael Brown published his seminal paper on the relationship between culture and copyright (Brown 1998). This was followed a few years later by another excellent article concerned with copyrighting the past by George Nicholas and Kelly Bannister (2004). This was soon followed by the publication of an Oxford Legal Studies Research Paper on cultural heritage and human rights (Ziegler 2007), an article by Peter Yu on intellectual property and human rights (Yu 2007), and a discussion of the legal aspects of cultural heritage and intellectual property rights by Reno Hilty (2009), managing director of the Max Planck Institute for Intellectual Property and Competition Law in Munich. Hilty admits that there is inadequate legal protection of cultural heritage, an issue to which we shall return.

Some cultural heritage, like folklore and traditional knowledge, can be copied, patented, and trademarked. Owners of intellectual property rights are conferred with exclusive rights to their property. Indigenous and traditional communities are now also claiming exclusive rights to their symbols and marks, though this trend has been influenced by the misuse and abuse of their culture. They are also of course influenced by the desire to get adequate compensation for the commercial use of their brands and brand names. After a long drawn-out struggle with Starbucks, Ethiopia succeeded in getting Starbucks to acknowledge Ethiopian ownership of popular coffee designations such as Yirgacheffe, Harrar, and Sidamo, regardless of whether or not they are registered (ICTSD 2007).

Both cultural property and intellectual property in their artistic expressions are susceptible to being “passed off.” The forgeries of works of art of “great masters” are well known. The same practice can be seen at least with regard to the Benin bronzes and other artifacts plundered in 1897 by the British. Fakes of these objects are now appearing on the international art market. What makes this a veritable enterprise is that the various guilds that had been producing these artifacts since the fifteenth century are still in place today in Benin. With regard to trademarks, another Benin example can be cited. In 1977, when it hosted the second Festival of Black and African Arts and Civilization (FESTAC ’77), Nigeria asked the British Museum for the loan of the Queen Idia mask, which the British Museum declined. The Nigerian authorities simply asked a member of the particular guild to produce a replica, which became the symbol – trademark – of FESTAC ’77.

In one respect, intellectual property – specifically copyright – reinforces cultural heritage. As WIPO has convincingly argued, copyright protection is above all one of the means of promoting, enriching, and disseminating national cultural heritage. A country’s development depends to a very great extent on the creativity of its people, and the encouragement of individual creativity and its dissemination is a sine qua non of progress (WIPO 2004: 41). The two systems are related and compatible. Enforcing the two concepts, however, can lead to some tension. Cultural heritage in the form of traditional knowledge is often criticized by Western commentators opposed to the idea of its legal protection because of the secrecy aspect that is often involved. Indeed, Brown (1998: 195) asserts that secrecy and the strict control of knowledge contradict the political ideal of liberal democracies. Rosemary Coombe (1998: 208), in her

pungent comment on this aspect of Brown's article, has reminded us that trade secrets, corporate confidentiality arrangements, and the fiduciary obligations of employees have long been important means of maintaining the value of intangibles in industries and family firms in capitalist democracies. On the contrary, therefore, rather than being a source of divergence, the secrecy aspect of some traditional knowledge is in accord with the industrial world's requirements. Coombe went on to highlight the fact that by using the idiom of "property," many indigenous people may simply be taking the initial and necessary step of insisting upon a leveling of the playing field before working out the details of particular contractual arrangements. And as Willow Powers (1998: 212) suggested, there is no reason why traditional communities should not argue these issues in the same courts and in the same manner as all other parties to this dialogue.

## DIVERGENCE

The economic and commercial motivation for enforcing intellectual property rights cannot be denied. While it is right to state that economic considerations form the main bedrock upon which intellectual property rights rest, it is equally true that cultural objects and cultural property sometimes have economic value, and sometimes very considerable value. Nonetheless, in terms of UNESCO conventions, cultural objects and property could be "the cultural heritage of all mankind." Thus whereas cultural heritage is universal, intellectual property is not. Cultural heritage has universal beneficiaries, whereas intellectual property has an individual beneficiary, or, in the case of joint authors or intellectual property rights owned by a company or collective, group beneficiaries.

Intellectual property rights are territorial in character and of limited duration.<sup>6</sup> The grant of an exclusive right to the owner of an intellectual property confers a monopoly to utilize the grant during the term of the patent, copyright or design right in the country where the grant is issued. Cultural heritage is eternal and everlasting. Even though copyright has expired with regards to the symphonies of Beethoven and novels of Dickens, they remain part of the cultural heritage not only of Germany and Britain, but of humanity. It also means that the same creation of the human intellect may be copyright material today, while tomorrow it is cultural heritage.

Whereas intellectual property is subject to national treatment which is discriminatory, cultural heritage has no boundary. Items on the World Heritage List or on the International Memory of the World Register have no boundary, and belong to humanity. Indeed, the various definitions of cultural heritage emphasize age, longevity, and universality. To cite just one example, the Hague Convention (1954) provides that for the purpose of the convention, "cultural property shall cover, irrespective of origin or ownership: (a) movable or immovable property of great importance to the cultural heritage of every people."<sup>7</sup>

## INTERFACE

Both intellectual property and cultural heritage are property, sometimes of the same species and sometimes not. Objects of intellectual property are creations of the human mind, the human intellect. Since real property is the combination of land and any improvement to or on the land (through the creation of the human intellect), it means that it can

also in part or by extension be intellectual property. For example, the creator of a painting on the wall of a building is the copyright owner of that painting. If the building is in London, and has one of the famous blue plaques on it, such as “Charles Dickens once lived here,” it may be a cultural monument. An author who has written a work has personal property in it as well as copyright. Property is also classified into tangible (such as monuments, that is, cultural heritage) and intangible (copyright, patents and trademarks, that is, intellectual property). The latter is controlled by intellectual property laws.

The interface between intellectual property and cultural heritage can be pushed further. The authors of visual arts are protected by national copyright laws as a branch of intellectual property. These national laws were not made to protect the art work (cultural property, objects, and heritage) itself; rather, they seek to protect the moral and economic rights of the author by conferring exclusive rights on the owners of those rights. Cultural objects (heritage) are more than simple goods; indeed, many states now classify their cultural property and heritage (antiquities) as non-tradable goods (*res extra commercium*), which cannot be sold and are not subject to acquisitive prescription.

## TWO HUNDRED YEARS LATE: EMERGING FROM IMPERIAL SHADOWS

Although the two concepts of intellectual property and cultural heritage are related as we have demonstrated, the linkage did not manifest itself in treaty-making discourse until well into the second half of the twentieth century. They seemed to develop along parallel routes, as was the case with tangible and intangible heritage highlighted earlier. This led Hilty to conclude, “It is not accidental – but characteristic – that this desideratum [the campaign to protect traditional knowledge via intellectual property rights] originated with an enormous delay of more than two centuries compared to the establishment of intellectual property rights” (Hilty 2009: 768).

There are reasons for this delay. Between the fifteenth and nineteenth century, European powers like Britain, France, Germany, Italy, Portugal, Spain, and the Netherlands ruled the world. Western norms, rules, and laws prevailed. By the eighteenth century, with the slave trade in full swing, followed by colonial subjugation, African and Asian countries could not mount any challenge to the predominant rules and laws of European powers. In any event, in the nineteenth and twentieth centuries, the European colonial powers simply made their laws applicable to their subjugated territories (Kunz-Hallstein 1982: 690). The Paris Convention for the Protection of Industrial Property of 1883 was concluded on the eve of the 1884/85 Berlin Conference, which was convened by Otto von Bismarck, first chancellor of Germany, at the request of Portugal. The Berlin Conference regulated colonization and trade in Africa until the 1960s. Elsewhere in the world, the Age of Empire held sway. It may therefore not be accidental that the partitioning of Africa occurred on the very eve of the first international treaty concerning intellectual property. As soon as the wind of change brought independence to Africa, and Africans, like other Third World peoples, had a voice and vote in the community of nations, no time was lost in seeking redress and restitution. In this connection, and while not digressing, it should be recalled that on the issue of cultural objects and property expropriated during the colonial era, the twelve states that sponsored the first United Nations General Assembly resolution on cultural property – the Restitution of Works of Art to Countries Victims of Expropriation (UNGA 1973) – were all African.

Another reason for the long delay has been captured by Ralph Oman (1997). As long as indigenous and traditional communities were shielded from the prying eyes of the outside world, their expressions of folklore remained safe. But once technology and communication made easy access possible, the traditional knowledge of once isolated communities was copied and extensively exploited outside of their communities and countries of origin, without any remuneration or other advantages flowing back to those countries. Meanwhile, Oman observed, “the interpretive performers, the village bards, the travelling troubadours, and the wandering minstrels, who have created these original variations of works derived from traditions with deep roots in the culture, get neither credit, nor money, nor protection for their creative expression” (Oman 1997: 3–4).

Oman’s point can be illustrated with the case of the Maasai of Kenya and Tanzania.<sup>8</sup> As a BBC news article recently pointed out, “a Maasai warrior or a Maasai woman adorned with beads [is] one of the most powerful images of tribal Africa.” According to Light Years IP, a US NGO which specializes in securing intellectual property rights for developing countries, over 80 companies around the world are currently using either the Maasai image or name. These include: a range of accessories called Maasai made for Land Rover; Maasai Barefoot Technology, which makes specialty trainers; the Maasai line of the high-end fashion house Louis Vuitton, which includes beach towels, hats, and scarves. Echoing Oman, Isaac ole Tialolo, a Maasai elder and chairman of the Maasai Intellectual Property Initiative, told the BBC, “We all know that we have been exploited by people who just come around, take our pictures and benefit from it.” If the Maasai brand were owned by a corporation, it is estimated that it would be worth more than \$10m a year (Anon. 2013).

Specifically, in the area of intellectual property, in 1976 the Tunis model law on copyright for developing countries was adopted by a committee of governmental experts, convened by the Tunisian government in Tunis with the assistance of WIPO and UNESCO. The Tunis model law provides specific protection for works of national folklore. Such works need not be fixed in material form in order to receive protection, which is without limitation in time. It was followed by UNESCO’s Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Forms of Prejudicial Action (UNESCO 1982).

A number of participants at the meeting that adopted the model provisions stressed that international measures would be indispensable for extending the protection of expressions of folklore of a given country beyond the borders of the country concerned. WIPO and UNESCO acted accordingly when they jointly convened a group of experts on the international protection of expressions of folklore by intellectual property law, which met in December 1984. While there was a general recognition of the need for international protection of expressions of folklore, the great majority of the participants considered it premature to establish an international treaty in view of insufficient national experience, particularly in the implementation of the model provisions (WIPO 2004: 60).

## CULTURAL HERITAGE AND COLLECTIVE INTELLECTUAL PROPERTY RIGHTS

Reno Hilty has argued, “we cannot regard the legal protection of indigenous resources or traditional knowledge just as a further branch of intellectual property rights, so to speak, as an example of the general trend of a permanent broadening field of law” (Hilty 2009: 768). But the trend is for the legal protection of cultural heritage as

intellectual property. The broadening of traditional intellectual property concepts has been going apace in recent years – witness the protection of computer software.

Be that as it may, several states already provide specific legal protection of traditional cultural expressions as intellectual property in their national laws or regulations, usually within their copyright legislation. What also makes Hilty's argument untenable is that a number of companies have already acquired trademarks for use of the Maasai name or image. Is it therefore fair and proper to deny the Maasai the possibility of trademarking their identity when free loaders, so to speak, are availing themselves? "Brand Maasai" is therefore not a really outlandish idea. As Carlo Severi has pointed out, in a response to Brown's article, everybody is committed, at least in Europe, to the preservation of the cultural heritage of a nation:

If the Italian or French governments have the right to prevent, for instance, a Michelangelo or a Chardin from being commercialized on the international market, one does not see why the American Indians should not be keen to protect their own techniques, religious beliefs, traditional narratives, and works of art. (Severi 1998: 215)

In 1992, a Coca-Cola advertisement published first in an Italian newspaper caused uproar in Greece because it included a manipulated photograph of the Parthenon with its columns refashioned as Coca-Cola bottles. Much of the Greek press and several public commentators and politicians condemned the "sacrilege" committed on the country's national symbol, the ownership rights of which are seen belonging firmly to Greece (Hamilakis and Yalouri 1996: 120). Archeological artifacts and sites have long served as symbols of national identity. When Rhodesia gained independence in 1980 and became Zimbabwe, it took its new name from an archeological site and chose as its national symbol a carved soapstone bird from the site. Thus archeological sites, assert Nicholas and Bannister (2004: 332), constitute the major physical manifestation of cultural heritage of all human societies – they are not only cultural heritage but intellectual creations.

Even the World Bank appears interested in the idea of cultural heritage and collective intellectual property rights. Juliana Santilli has convincingly argued for the emergence of a legal regime for "collective intellectual property rights":

The creation of such a legal regime adequate for the protection of collective traditional knowledge has to be based on the concept of legal pluralism and the recognition of the legal diversity existing in traditional societies. In order to understand the essential elements of such a regime, it is necessary to accept a plurality of legal systems, recognizing that our society is pluralistic and has parallel legal systems manifest in the customary laws of local communities. (Santilli 2006: 2, paragraph breaks elided)

One might also note the Intellectual Property Issues in Cultural Heritage Project (IPinCH). This is an international, multidisciplinary research project examining intellectual-property-related issues that are emerging within the realm of heritage, especially those affecting indigenous peoples. There are also two exciting initiatives promoting the idea of cultural heritage as intellectual property in Africa. They are Light Years IP and the African IP Trust, and both have achieved modest gains from their efforts. Light Years IP was the first NGO in this field, and in fact the midwife of African IP Trust. Light Years IP specializes in a niche – but growing – area of development policy and strategy, known as intellectual property value capture. It has been involved in two high profile cases of struggling to secure for Africans intellectual property rights

for their products and traditional cultural practices. In the case of Ethiopia, Starbucks believed they could obtain a trademark for Sidamo, an old Ethiopian strain of coffee (from the Sidamo area of Ethiopia) simply because Starbucks were the first to file an application for it under trademark law. Light Years IP, alongside Ethiopian intellectual property office, challenged Starbucks and worked hard to secure Ethiopian ownership of the named coffee. One outcome of this struggle is the Ethiopian Coffee Trademarking and Licensing Initiative. This has helped Ethiopia to differentiate Ethiopian coffee from coffees from other countries, which strengthened the confidence and bargaining position of the country's coffee growers and exporters (see ECTLI 2004; LYIP n.d.).

Light Years IP has also teamed up with Maasai elders and designed a project called the Maasai Intellectual Property Initiative, which seeks redress for the Maasai. It is aimed at helping the Maasai secure licenses and trademarks, reduce the offensive use of their name and image, and return income to the Maasai for the benefit of the community. The recently founded African IP Trust has taken on the Maasai Intellectual Property Initiative as one of its first causes. Santilli (2006) suggests that sharing benefits from traditional cultural resources can be in the form of, among others, profit-sharing, royalty payments, access to and transfer of technologies, the licensing of products and processes, the capacity-building of human resources, the payment of collection and bio-prospecting fees for samples of biological and genetic material, and the payment of fees for research.<sup>9</sup>

All this shows that the policy of cultural heritage protection through intellectual property law is now widespread. Moreover, it is now too late to worry that "attempts to legally protect intangible goods as such ... risk conflicting with common intellectual property principles" (Hilty 2009: 776). Besides, this is what has been happening, at least lately. An example is the legal protection of computer software, even when there is no unanimity about whether to protect it as a copyright or patent. As acts of national sovereignty, countries have protected these intangible goods. Brown is not in favor of "a radical expansion of intellectual property laws" (Brown 1998: 205). If what has happened with regard to software is not a radical expansion of intellectual property laws, then what is? What Light Years IP is doing is using the West's intellectual property rights and asking for their radical expansion, as this is the best way to prevent and preempt outsiders using the same laws to the disadvantage of traditional communities.

The legal and non-legal protection of traditional knowledge and cultural heritage has started and is gathering momentum. This should be so. The appropriation and commoditization of traditional knowledge without financial and technological benefits accruing to indigenous communities have gone on long enough. After all, computer technology and biogenetic engineering have led to the gradual broadening and expansion of traditional intellectual property law to accommodate these forms of knowledge (Nicholas and Bannister 2004: 328).

## HUMAN RIGHTS FOR CULTURAL HERITAGE AND INTELLECTUAL PROPERTY

The treatment of cultural heritage and intellectual property as members of the human rights family has increased over the last thirty years. The menu is now three-dimensional. Three powerful concepts or perhaps ideologies are conflated and interfaced. There are those who advocate the primacy of human rights over intellectual property rights. They therefore urge the legal protection of traditional cultural resources (TCRs) and traditional knowledge (TK). On the other hand, purists have frowned at the dilution of traditional intellectual property rights. But the dilution has been going on almost from the

beginning. Once authors of joint works are recognized, group rights were recognized in order to enforce the individual rights of the authors in a group. Furthermore, anonymous authors have copyright. Again this appears to be a recognition of group rights. One of the great objections to granting intellectual property rights to traditional cultural resources is its anonymity.

This reluctance or opposition appears to be based on the fear of dilution – the nightmare of warping Western ideas of law. But warping is what has been happening lately, with computer software being accommodated as copyright or patent, or both. The lack of unanimity as to the vehicle of protection has not prevented a ring fence being erected. Intellectual property rights have thus been continuously expanding, and the protection of TCRs should therefore be included in this expansion (Yu 2007: 1149). Why is it that TCRs cannot be accommodated if it has happened in the case of joint and anonymous authors, and computer software?

When someone takes a picture of a Maasai in their regalia to use in the promotion of their goods, they are, one would say in response to Brown (2008), copyrighting culture. The article about the Maasai mentioned earlier tells how a Maasai some 20 years ago smashed the camera of a tourist who took their picture without asking for permission. The Maasai person certainly did not accept that they were in the public domain (see Anon. 2013). This single incident illustrates the human rights aspect of cultural heritage and intellectual property, and the intertwining of the concepts. Had their camera not been broken, the photographer of the Maasai would be the copyright owner of the photograph, but without due regard being taken to the feeling of the subject of the photograph, since the copyright owner of the photograph is the photographer and not the subject. The individual who smashed the camera is now the chair of Maasai Intellectual Property Initiative and is determined to trademark brand Maasai.

An expert in international intellectual property law told the BBC that the Maasai will have a difficult time establishing their “cultural property mark”: “They are on a sticky wicket with the law.” Why? This is due to the fact that “a number of companies have already got trademarks for use of the Maasai name or image” (Anon. 2013). Here we come face to face with the double standards of the debate. The Maasai individual is expropriated from intellectual property rights inherent to them. Their cultural identity means nothing in the international intellectual property regime. You cannot approbate, that is, use the Maasai as a trademark because she is in the public domain, in one instance, and reprobate in another that she is not in the public domain and therefore cannot have trademark in her being. This is why, as Frantzeska Papadopoulou (2011: 307) has observed, a skeptical to fully negative view prevails regarding the World Trade Organization (WTO) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (1994). The report of the UN Commission on Human Rights went so far as to state that the WTO is “a veritable nightmare” for certain sectors of humanity, in that TRIPS in some ways encourages, or has the side effect of, human rights violations. As the Draft Declaration on the Rights of Indigenous Peoples asserted:

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property. They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral tradition, literatures, designs and visual and performing arts. (UNCHR 1994: art. 29)

Helfer (2003: 47–48) has accurately identified the two approaches to human rights and intellectual property interface. The first approach views human rights and intellectual property as being in fundamental conflict. This is exemplified in the idea that the Maasai cannot have a “cultural property mark.” The second approach sees both areas of law as concerned with the same fundamental question: defining the appropriate scope of private monopoly power that gives authors and inventors a sufficient incentive to create and innovate, while ensuring that the consuming public has adequate access to the fruits of their efforts. This is exemplified in initiatives like *Light Years IP*. Helfer (2003: 47–48) urges the WTO and WIPO to promote the integration of legal rules governing the same broad subject matter. Such integration will also allow national and international lawmakers and NGOs to turn to the more pressing task of defining the interface of human rights and intellectual property with coherent, consistent, and balanced legal norms that enhance both individual rights and global economic welfare. Likewise, Peter Yu (2007: 1149) is in no doubt that the successful development of a human rights framework for intellectual property will not only offer individuals the well-deserved protection of their moral and material interests in intellectual creations, but also will allow states to harness the intellectual property system to protect human dignity and respect, as well as to promote the full realization of their important human rights. Paterson and Karjala conclude that, “traditional concepts of Western law – contract, privacy, trade secret, and trademarks – can take us a long way in the desired direction” (Paterson and Karjala 2003/4: 669). Ziegler has also concluded that there is plenty of “soft law” reflecting the tendency of cultural heritage protection to move towards the rights of people as a new generation of cultural rights (Ziegler 2007: 15).

Enshrining human rights as aspects of cultural heritage and intellectual property is emerging; indeed, in some respects one can say that it has emerged. Definitions can take care of the grey areas: what to include and what to exclude. All multilateral treaties are compromises, the outcome of balancing processes. Accommodation should replace resistance, and compromise should take the place of conflict. It is not all or nothing, and by the same token it should not be nothing at all.

## NOTES

- 1 Hague Convention (1954), art. 1a.
- 2 UNESCO Convention (1970), art.1.
- 3 World Heritage Convention (1972), art. 1.
- 4 WIPO Convention (1968), art. 2.viii.
- 5 Intangible Heritage Convention (2003), art. 1.2.
- 6 The territorial aspect of intellectual property rights is, however, ameliorated through treaties like the Paris Convention for the Protection of Industrial Property (1883) and the Berne Convention for the Protection of Literary and Artistic Works (1886), whereby through the doctrine of national treatment, each country grants the same protection to nationals of other member states that it grants to its own nationals.
- 7 Hague Convention (1954), art. 1.
- 8 The Maasai are an indigenous people, numbering approximately 2 to 3 million across present-day Kenya and Tanzania. They are also one of the most familiar of African peoples on account of their dress and physical appearance.
- 9 Hilty similarly advocated the licensing option. He also advocated factual means to help the countries concerned learn how to utilize, exploit, trade, and market their own resources and

knowledge, and also to learn how to behave in the global market, in particular to learn how to deal with industries in developed countries (Hilty 2009: 770). This is precisely what Light Years IP has been doing. To cite one example, it has held workshops on intellectual property value capture in numerous locations in Africa.

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