SUI GENERIS LAWS FOR THE PROTECTION OF INDIGENOUS EXPRESSIONS OF CULTURE AND TRADITIONAL KNOWLEDGE

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I. INTRODUCTION

'The struggle over these designs is nothing less than the struggle over cultural meaning . . . Indigenous peoples see their identity as depending on the survival of their art.'[1]

There are a number of reasons attributable to the rising international concern of the protection of indigenous expressions of culture and traditional knowledge (ECTK). The environmental movement has drawn attention to the importance of preserving traditional knowledge as part of traditional cultural environments, while the international human rights movement has also played a part in the preservation effort when the destruction of indigenous cultural property is akin to a 'gradualist form of ethnocide'.[2]

II. WHAT IS INDIGENOUS INTELLECTUAL PROPERTY?

It is commonly acknowledged that terminology is an issue when defining the parameters of indigenous ECTK.[3] While it is not this article's intention to clarify terminology and debate classification of ECTK, the article does proceed from the assumption that ECTK includes all rights in relation to indigenous works under conventional intellectual property laws such as copyright, designs, patent and trade mark laws, together with rights vested in products arising from traditional knowledge. This category spans a broad range: it can include all cultural expressions such as reproduction of traditional motifs in paintings, biotechnology and traditional medicine knowledge. Authority generally accepts that expressions of culture and traditional knowledge have an interwoven relationship.[4]

III. WHY DO INDIGENOUS GROUPS NEED SUI GENERIS PROTECTION FOR ECTK?

Proof that indigenous ECTK deserves the full gamut of protection is the increasing exploitation, inappropriate commercialisation and commodification of ECTK by non-indigenous people. Due to the increase in worldwide demand for genuine indigenous artefacts, ECTK has become a commodity soaring in value, especially in areas of tourism, advertising and marketing.[5] Despite the high commercial value of sales, indigenous peoples often derive little or no benefit from the market consumption of their traditions,

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1 Christine Farley, 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?' (1997) 30(1) *Connecticut Law Review* 1, 11.

2 Tom Greaves (ed), *Intellectual Property Rights for Indigenous Peoples — A Sourcebook* (1994) 5.

3 World Intellectual Property Organisation, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore — Final Report on National Experiences with the Legal Protection of Expressions of Folklore (hereafter Final Report) (2002) 91.

4 See further World Intellectual Property Organisation, above n 3, [92]–[96] for discussion of this point.

5 Shelley Wright, 'Aboriginal Cultural Heritage in Australia' (1995) *University of British Columbia Law Review (Special Issue)*. In particular, Wright notes at 58 by way of example that the imagery used by the Northern Territory Government Tourist Bureau in their tourism advertising incorporates pictures of the land and wildlife associated with the indigenous groups of the area. One particularly famous landmark is Uluru. Although Uluru was

knowledge and artworks. A 1998 study by the Australian government indicated that the Australian Aboriginal arts and craft industry had an estimated retail sales figure of AUD $18.5 million in 1988, with indigenous artists receiving less than one half of the retail value of their work.[6] This figure grew to an estimate of a least AUD$100 million in 2000[7] and to USD $130 million in 2002.[8] However, by comparison, at the same time in 2002, traditional owners received only $30 million of this turnover.[9]

Damage caused by cultural misappropriation can be so devastating that traditional owners often lose all interest in reclaiming debased ECTK. For example, the Navajo Native Americans currently believe that part of their ECTK has now become linked to evil due to misappropriation by a car manufacturer[10] and consequently have no desire to claim the return of misappropriated ECTK.[11]

The main problem of enforcing rights for contemporary indigenous groups stems from the dichotomy between the value systems of Western and indigenous culture. The values of indigenous culture do not fit within the European concept of the egocentric individual that is the current focus of the legal regime today. Current Eurocentric intellectual property laws such as copyright, patent and trade mark laws provide protection for ECTK that is either insufficient, ad-hoc, or uncertain. For example, under copyright laws, a work must be the work of the author, and not copied from another's work, to qualify for protection.[12] At one stage the originality requirement presented the largest hurdle for indigenous authors, given the relative age of the works in the public domain. Ancient ancient rock paintings are an example. However, since the late 1980s and the development of the case law, Australian indigenous artworks now qualify as original with ease relative to their international counterparts.[13] In the case *Milpurrurru v Indofurn Pty Ltd* (Milpurrurru),[14] the issue was whether originality subsisted in the artworks in question. Mr Justice Von Doussa succinctly held that:

> Although the artworks follow traditional Indigenous form and are based on dreaming themes, each artwork is one of intricate detail and complexity, reflecting great skill and originality.[15]

This statement is now generally cited by Australian courts in terms of the originality requirement for indigenous copyright works.[16] However, other difficulties for protection of ECTK include the desire for perpetual protection, which is not available given the limited terms of Western intellectual property laws; and the notion of communal ownership of ECTK, which has not been recognised as an acceptable equivalent of the European legal concept of individual rights.

In sum, ECTK are fundamental to indigenous people's cultural identity. Rights vested

formally returned to the indigenous people as a sacred site in 1985, it continues to be administered by the Australian Federal government as a lucrative tourist attraction. While areas around Uluru designated as sacred men's or women's places have been signed and fenced off, tourists do not refrain from taking photographs of such areas and attempt to enter them. The indigenous owners have complained repeatedly about these infringements of cultural property, but there is no enforcement of the ban.

6 Ibid 61.

7 Christine Nicholls, 'Aboriginal art: what is authorship?' (2000) 25 *Alternative Law Journal* at 188.

8 Department of Communications, Information Technology and the Arts (Australia), *Report of the Contemporary Visual Arts and Crafts Inquiry* (2002) 116.

9 Ibid 135.

10 Jack Guggenheim, 'Renaming the Redskins (and the Florida State Seminoles?): The Trademark Registration Decision and Alternative Remedies' (1999) 27 *Florida State University Law Review* 287, 292.

11 Lucy Moran, 'Intellectual Property Protection for Traditional and Sacred "Folklife Expressions" — Will Remedies Become Available to Cultural Authors and Communities?' (1998) 6 *University of Baltimore Intellectual Property Journal*, 111–2.

12 *University of London Press Ltd v University Tutorial Press Ltd* [1912] 2 Ch 601.

13 Farley, above n 1.

14 *Milpurrurru v Indofurn Pty Ltd* (1994) 30 IPR 209.

15 Ibid 248.

16 Kamal Puri, 'Copyright for a Legal Protection of Folklore?' (1998) 22(4) *Copyright Bulletin* at 16–17; Australian Copyright Council, *Protecting Indigenous Intellectual Property: A Copyright Perspective* (1997) at 39–40.

in ECTK are more than mere property rights, and accordingly, require specific sui generis protection. Intellectual property-type solutions may meet some objectives but at the same time, frustrate others.[17] This is why sui generis laws based on indigenous customary laws are a more appropriate form of protection, given the unique elements of ECTK.

IV. What Efforts Have Been Made to Date?

The possibility of specific sui generis protection for indigenous ECTK was subject to early consideration at the Berne Convention for the Protection of Literary and Artistic Works. The Convention provided for the protection of unpublished works, and possibly encompassed unfixed indigenous ECTK.[18] Such protection was revised in the Tunis Model Law on Copyright for Developing Countries in 1976 to specifically recognise that indigenous people deserve to reap the benefits from commercialisation of ECTK and preserve their cultural legacy. The Tunis Model Law provided some specific protection for indigenous ECTK in that it did not require such works to be fixed in material form, and gave perpetual protection to ECTK that was already in the public domain.[19]

Further attempts at sui generis protection were made in 1982 with the introduction of the Model Provisions adopted by WIPO. However, for various reasons, the Model Provisions have not had an extensive impact on the legislation of Member States to date.[20]

Since 1971, various national and international government investigations and reports have been produced in an attempt to identify the relevant issues and consolidate the real needs of indigenous groups regarding protection of ECTK.[21] Creative interpretation by the judiciary has also been vital to the progress of recognition and protection of indigenous ECTK at a national level.[22] In addition, various countries have either adopted their own forms of ECTK protection[23] or implemented the Tunis Model Laws or part thereof into their respective copyright laws in an attempt to create sui generis protection.[24]

Recent developments in the international forum saw the Third and Fourth Sessions of the WIPO *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, occurring in June 2002 and December 2002 respectively.[25] During the Third Session invitations were issued to member countries to submit presentations of their national experiences regarding problems encountered in the protection of indigenous intellectual property and ECTK. The synthesis of these submissions formed the basis of a WIPO report entitled *Final Report on National Experiences with the*

[17] World Intellectual Property Organisation, above n 3, [101].

[18] Article 15(4) Berne Convention for the Protection of Literary and Artistic Works, 1971; World Intellectual Property Organisation, above n 3, [13].

[19] World Intellectual Property Organisation, above n 3, [14]–[16].

[20] World Intellectual Property Organisation, above n 3, [21].

[21] For example, in Australia alone, reports produced over the last two decades include Commonwealth Department of Home Affairs and Environment, *Report of the Working Party on the Protection of Aboriginal Folklore* (1981); Australian Copyright Council, *Protecting Indigenous Intellectual Property: A Copyright Perspective* (1997); Aboriginal and Torres Strait Islander Commission, *Our Culture:Our Future* (1997) and from consultation with a National Indigenous Reference Group, individuals, communities and organisations, the issues paper *Stopping the Rip-Off: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* (1994); amongst others.

[22] See, eg, *Foster v Mountford* (1976) 29 FLR 233; *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141; *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481; *Mabo v State of Queensland* (No 2) (1992) 175 CLR 1; *Milpurrurru v Indorfurn Pty Ltd* (1995) 30 IPR 209.

[23] To date the Philippines, Panama, Croatia and Viet Nam each boast their own sui generis protection for indigenous ECTK. See World Intellectual Property Organisation, above n 3, para 121. See also World Intellectual Property Organisation, 'Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore — Comparative Summary of Sui Generis Legislation for the Protection of Traditional Cultural Expressions' (Fifth Session, Geneva, 28 April 2003).

[24] K Puri, 'Cultural Ownership and Intellectual Property Rights Post Mabo: Putting Ideas into Action' (1995) 9 *Australian Intellectual Property Journal* 295, [5.2]

[25] The Fifth Session of the World Intellectual Property Organisation's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, was held in Geneva from 7 July to 15 July 2003.

Legal Protection of Expressions of Folklore (*Final Report*),[26] containing analysis of responses to surveys of current mechanisms in various countries. The Report subsequently led to formal calls for the enactment of sui generis protection for indigenous intellectual property and ECTK.

As a result of this dialogue and *Final Report*, the Secretariat of the Pacific Community, in conjunction with the Pacific Islands Forum Secretariat, released the *Regional Framework of the Protection of Traditional Knowledge and Expressions of Culture*, commonly known as the *Model Law for the Protection of Traditional Knowledge and Expressions of Culture for the Pacific Peoples* (model law).[27] The model law was developed in response to calls from Pacific Rim countries facing increased exploitation, inappropriate commercialisation, and commodification of indigenous ECTK. Accordingly, the model law has been designed with the specific protection requirements of indigenous ECTK at the foremost, such requirements having been neglected or considered ineligible for protection under Western intellectual property laws.

V. What is a Model Law?

A model law is a text for States to incorporate into national law.[28] A model law is inherently flexible because the text can be modified to suit the enacting state, but conversely, modification can also mean less harmonisation on an international level.

VI. Overview of the Model Law

There are several policy objectives behind the model law. It is intended to protect the rights of traditional owners and vest ownership of their ECTK in their community on the premise that tradition-based creativity and innovation is permissible and that traditional owners should be entitled to commercialise their ECTK. The model law effectively creates new rights in ECTK previously regarded under intellectual property laws as knowledge already within the public domain. The focus is on presenting a sui generis law that, while tailored to the specific and unique needs of protecting ECTK, has been designed to complement existing intellectual property laws and co-exist with intellectual property rights already created before enactment of the model law.[29]

Under the model law, two distinct rights attach to ECTK. The first is a right known as a traditional cultural right whereby indigenous owners are entitled to exclusive use of ECTK, be it commercial or non-commercial, and including derivative works.[30] The second bundle of rights are moral rights, akin to those underlying recent amendments to the *Copyright Act 1968* (Cth), being the right of attribution, the right against false attribution, and the right against derogatory treatment of the works in question.

The model law applies to all ECTK created after the commencement of the model law.[31] Although the model law does not apply to rights created before commencement, it does not prevent the subsequent transfer of those rights, even if that transfer applies retrospectively. It will be the responsibility of the enacting country as to whether an act based on the model law is retrospective. Regardless of whether or not the relevant act is retrospective, contracts or licences entered into by the traditional owners before the enactment of the model law are not affected by the model law but continue on foot.

[26] World Intellectual Property Organisation, above n 3.

[27] World Intellectual Property Organisation, above n 3, [80].

[28] This is the definition used by the World Intellectual Property Organisation, taken from United Nations Commission on International Trade Law, *Model Law on Electronic Commerce*, <http://r0.unctad.org/ecommerce/event_docs/estrategies/sorieul.html> at 10 May 2003.

[29] World Intellectual Property Organisation, *Explanatory Memorandum for the Model Law for the Protection of Traditional Knowledge and Expressions of Culture* (2002) 1 ('*Explanatory Memorandum*').

[30] *Model Law for the Protection of Traditional Knowledge and Expressions of Culture for the Pacific Peoples 2002*, cl 6 ('*Model Law*').

[31] Ibid cl 3.

The model law confers traditional cultural rights on the owners of traditional knowledge or expressions of culture.[32] Traditional owners are defined as either the relevant group, clan or community, or may be an individual recognised as a representative of the group, clan or community. Traditional cultural rights encompass the right to use of traditional knowledge or expressions of culture in accordance with types of use set out in the model law, and the right to give prior and informed consent to such use by a third party.

Traditional knowledge is defined as knowledge that has been created, acquired, or inspired for traditional economic, spiritual, ritual, narrative, decorative or recreational purposes. It is knowledge that has been passed down from generation to generation and is unique to a particular group, clan or community. Traditional knowledge is owned collectively and must originate from the particular group, clan or community.

An expression of culture is non-exhaustively defined as any way in which traditional knowledge appears or is manifested, whether it be tangible or intangible. Examples of expressions of culture include songs, stories, dances, paintings, ritual ceremonies, art and craftworks.

Importantly, the model law addresses the contentious issues of defining and using secret-sacred material. Secret-sacred material is defined as any traditional knowledge or expressions of culture that have a secret or sacred significance under customary law or traditional practices of the indigenous owners.

VII. Use of ECTK

As stated, there are two types of permitted use of ECTK; customary and non-customary. Customary use is use of ECTK that accords with customary laws and traditional practices, and is expressly excluded from governance by the model law provisions. Therefore, customary use of ECTK is not an offence.[33]

Non-customary use is defined as use of ECTK that requires the prior and informed consent of traditional owners.[34] In a non-exhaustive list, the model law provides examples of use such as reproduction, publication, performance or display, broadcasting, translation or adaptation of a work, or fixing the of work in a material form. Non-customary use may also be the digital transmission of the work, or the creation of derivative works. An unauthorised customary user may not make, use, sell, import or export the work, nor use it in any other material form, except with the prior and informed consent of traditional owners. Importantly, non-customary use attracts the obligation to acknowledge the source from which the work is derived.[35]

A prospective user of ECTK may seek prior and informed consent from the traditional owners in two ways. Firstly, they have the option to deal directly with traditional owners. Alternatively, they can apply to a 'Cultural Authority', which represents the interests of the traditional owners regarding the consensual use of their ECTK.[36]

Importantly, the model law governs the manner in which derivative works are produced and exploited by third parties.[37] Derivative works are produced where ECTK is used to create a new work. Consent can be obtained to create the derivative work, with the subsequent intellectual property rights arising in the work vesting in the creator in accordance with the usual intellectual property laws. If the derivative work is used for commercial purposes, the user must share the benefit gained with the traditional owners, acknowledge the source of the work, and respect the traditional owners' moral rights.[38]

[32] Ibid cl 6.
[33] Ibid cl 5.
[34] Ibid cl 7(2).
[35] Ibid cl 7(5).
[36] Ibid pt 4.
[37] Ibid cl 12.
[38] Ibid cl 12(2).

VIII. Cultural Authority

One option available to a prospective user of ECTK in seeking authority from traditional owners is to apply to a Cultural Authority for a grant of prior and informed consent to use the ECTK.

Under the model law, the Cultural Authority has been conceived as a body to represent traditional owners, liaising between prospective users and the owners of ECTK.[39] While the model law sets out the anticipated functions of Cultural Authorities,[40] it makes no provision for their creation, simply empowering the relevant Minister to designate such a body.[41] This approach is explained on the reasoning that enacting countries will have appropriate existing legislation for the formation of a Cultural Authority.[42]

The model law sets forth a general procedure by which a Cultural Authority may identify and acknowledge traditional owners of ECTK which is the subject of an application for non-customary use. Once received, the Cultural Authority must finalise the application within a designated time before conducting a public notification process, during which traditional owners have the opportunity to submit ownership claims.[43] Once the traditional owners have been identified, the Cultural Authority is obliged to publish a nationwide determination of this identification.[44]

In the event of an ownership or identification dispute, or where the Cultural Authority is not satisfied as to whether the claimants are the true traditional owners, the model law proposes that determination occur in accordance with the relevant customary laws and traditional practices, or any other means resolved upon by the parties to the dispute. The model law requires that once the traditional owners have been established in this way, they will inform the Cultural Authority. The Authority may then publish the determination of identity and ownership.[45]

Where no traditional owners can be identified, or where no agreement can be reached as to ownership claims within the specified period, the Cultural Authority is empowered to make a decision regarding ownership of the ECTK, following consultation with the relevant Minister.[46] The effect of the decision is that ownership of the ECTK vests in the Cultural Authority, who may then choose to enter into an agreement with the prospective user. The policy position whereby ownership of ECTK vests in the government may not be appropriate for the purposes of all Member States. In that case, the enacting country may choose its preferred method for identifying and establishing the traditional owners of the ECTK under dispute.[47]

From this process, it can be seen that an important role of the Cultural Authority is the validation of traditional ownership claims. In cases where a prospective user may not be able to identify the traditional owners, or where there may be several groups or individual representatives claiming traditional ownership, it will be the Cultural Authority's responsibility to locate traditional owners, authenticating and mediating between claims if necessary. It is submitted that any findings will therefore result from the enquiries of an independent third party, whose interest arguably lies on the side of the traditional owners, but also in being responsible to prospective users who may have a genuine commercial intention to benefit from, and acknowledge the source of, the ECTK.

[39] World Intellectual Property Organisation, above n 29, 2.
[40] Above n 30, cl 37.
[41] Above n 30, cl 36.
[42] World Intellectual Property Organisation, above n 29, 15.
[43] Above n 30, cl 16.
[44] Above n 30, cl 17.
[45] Above n 30, cl 18.
[46] Above n 30, cl 19(1).
[47] World Intellectual Property Organisation, above n 29, 10.

IX. Authorised User Agreement

Once the Cultural Authority has identified the rightful traditional owners, the model law provides for an authorised user agreement to document the proposed use of ECTK between the prospective user and the traditional owners. The model law requires that the authorised user agreement set out the terms and conditions of use of the ECTK and includes specific criteria that must be addressed in the agreement.[48] Such terms include the fees payable to the traditional owners for the use of the ECTK, the duration of use allowed, any rights of renewal, access arrangements for traditional owners, controls on publication, and affirmation of respect for the moral rights of the traditional owners.

To ensure traditional owners do not enter into an agreement without proper understanding of its terms, the model law provides that owners must refer the intended agreement to the Cultural Authority for review and recommendation.[49] The Cultural Authority may request a meeting of the parties if it considers that the traditional owners have not been supplied with sufficient information so as to make an informed decision regarding consent, or if the Cultural Authority is of the view that the agreement does not adequately provide for the protection of the ECTK in question. However the traditional owners may accept the terms of the agreement despite advice of the Cultural Authority to the contrary.[50]

Once an authorised user agreement is entered into, the traditional owners are presumed to have given their prior and informed consent to the non-customary use and a copy of the agreement must be sent to the Cultural Authority for registration.[51] Although a prospective user may apply directly to the traditional owners and is not obliged to apply to the Cultural Authority,[52] a copy of the agreement must still be registered with the Authority.[53] In the event that the parties cannot agree on the terms of use, the Cultural Authority must inform the prospective user that the proposed authorised use application has been rejected by the traditional owners.[54]

X. Offences, Defences and Remedies

The model law creates offences for contraventions of traditional cultural rights and moral rights, and is also capable of supporting a civil claim by traditional owners. All offences are punishable by fines or a term of imprisonment, the exact details of which are to be decided by the enacting country.[55]

In relation to traditional cultural rights, it is an offence if a person makes a non-customary use of traditional knowledge or expressions of culture without the prior and informed consent of the traditional owners, whether or not the non-customary use is for commercial benefit.[56] It is an offence in relation to moral rights if a person does an act or makes an omission inconsistent with the moral rights of the traditional owners, and the traditional owners have not provided prior and informed consent.[57]

If an article related to indigenous ECTK has been created in an enacting country, the importation or exportation of the article is an offence where the person responsible knew, or ought to have known, that such an act would infringe the traditional cultural rights and/or the moral rights of the traditional owners.[58] It is also an offence to use secret-sacred

48 Above n 30, cl 22.
49 Above n 30, cl 21.
50 Above n 30, cl 23(3).
51 Above n 30, cl 23.
52 Above n 30, cl 25.
53 Above n 30, cl 25(3); World Intellectual Property Organisation, above n 29, 11.
54 Above n 30, cl 24.
55 World Intellectual Property Organisation, above n 29, 12.
56 Above n 30, cl 26.
57 Above n 30, cl 27.
58 Above n 30, cl 29.

traditional knowledge or expressions of culture in a non-customary way, irrespective of consent issues.[59]

To defend an allegation of infringing use under the model law, a defendant must prove that prior and informed consent was obtained from the traditional owners for the use of the traditional knowledge or expressions of culture.[60] Non-customary use of ECTK may also fall within certain exemptions under the model law, which appear to operate in a similar manner to the fair dealing defences commonly found in copyright laws. Where, for example, use of ECTK occurs through face-to-face teaching, for the purposes of criticism or review, reporting news or current events, in the course of judicial proceedings, or any other incidental use, such use is an exemption to infringement.[61] Incidental use of ECTK may occur where, for example, a photograph is taken of a main subject that incidentally includes ECTK by including parts of a sculpture in the background.[62]

As for remedies, traditional owners may seek various forms of redress.[63] Injunctions may be sought, for example, to prevent continued unauthorised use. Traditional owners may seek damages for loss caused by use without prior and informed consent, and a declaration that traditional owners' rights have been infringed. The court may make an order for a public apology to be issued by the infringing party, and require the defendant to reverse any false attribution and/or derogatory treatment caused by the unauthorised use of the ECTK. The claimant can also seek an account of profits and seizure and/or delivery up of infringing imports or exports. The court has the discretion to make any other order as it deems appropriate in the circumstances.

The model law sets forth a number of factors that the court must consider when determining appropriate remedies. These include consideration of whether the defendant was aware or ought reasonably to have been aware of the traditional cultural rights and moral rights of the traditional owners; the effect of the infringing use on the honour and reputation of the traditional owners; any mitigating factors or problems with identification of traditional owners; the potential cost of reversing the damage; and whether the parties have attempted alternative action to resolve the dispute before commencing formal proceedings.[64]

XI. How does the Model Law Address Current Deficiencies in the Protection of ECTK?

The ECTK of indigenous groups requires positive protection, rather than the negative rights available under western intellectual property laws. The implementation of positive protection would validate and empower indigenous groups, and affirm the value and worth of indigenous ECTK. From a review of indigenous issues in the Australian context alone, it can be seen that ECTK protection cannot be separated from other indigenous issues such as land rights and self-determination, all of which impact upon indigenous cultural identity.[65] The implementation of sui generis laws contributes positively towards these social and policy conflicts that continue to concern indigenous people as their role in contemporary society evolves beside the dominant Western societal paradigm.

Consequently, it must be acknowledged as an established fact that current, Eurocentric intellectual property laws provide protection for ECTK that is either insufficient or ad hoc, depending on the facts of the case. It can be seen from the weight of literature and authority on the topic that such protection has been acknowledged as undesirable due to its uncertain application. Indigenous people need reliable and uniform protection to achieve their goals.

[59] Above n 30, cl 28.
[60] Above n 30, cl 33.
[61] Above n 30, cl 7(4).
[62] World Intellectual Property Organisation, above n 29, 6.
[63] Above n 30, cl 31.
[64] Above n 30, cl 31(2).
[65] Australian Copyright Council, above n 21, 2.

The model law can provide certain protection because it is sui generis in its scope and application to the protection of indigenous ECTK. It establishes a new property right in ECTK that was previously regarded under western intellectual property laws as property within the public domain. The real effect is that traditional owners wishing to protect ECTK no longer need to rely on intellectual property laws as a temporary solution. Rather, the real solution is the creation and implementation of a sui generis law that has been specifically tailored to protect all elements of ECTK, particularly those that are unique to ECTK as opposed to western intellectual property rights. By virtue of their uniqueness, such elements often render ECTK ineligible for protection under western intellectual property laws. The tailoring of the model law to suit ECTK needs is illustrated by the inclusion of clauses that address other aspects of intellectual property protection that caused problems for ECTK in the past, such as the requirements for material form[66] and perpetual protection.[67]

The desired objectives of indigenous groups regarding protection of their ECTK can be loosely grouped into two main categories of concern. Firstly, indigenous groups and traditional owners of knowledge wish to benefit directly from commercialisation of their ECTK. Secondly, traditional owners are concerned about the cultural and social harm caused by unauthorised reproduction of their ECTK.[68] The model law addresses both of these concerns within a framework based on the customary law of the relevant indigenous group by vesting exclusive rights in the traditional owners of ECTK. Traditional cultural rights are inalienable (ie as set out in Clause 10 of the model law) but various non-customary uses are available to the traditional owners so that they can benefit from the commercialisation of ECTK. Non-customary use includes the creation of derivative works based on ECTK. This is an acknowledgment that tradition is not static, but rather a constant evolution of a cultural legacy.[69]

Regarding non-customary use of ECTK and the creation of derivative works, the real concern of indigenous groups is the cultural harm caused by unauthorised reproduction of ECTK.[70] The model law addresses this concern in two ways. A prospective user of ECTK must seek the prior and informed consent of the traditional owners before using the ECTK, and document the agreement under an Authorised User Agreement that must be registered with the Cultural Authority. Therefore, traditional owners have the right to refuse consent should they deem the proposed use inappropriate. Secondly, a creator of a derivative work is obliged to acknowledge the source of ECTK from which it is derived, respect the work's inherent moral rights, and give a proportion of any commercial benefits resulting from the use of the derivative work to the traditional owners of the ECTK. The derivative work is also protected as the original work of the author in accordance with general intellectual property laws, and the model law does not affect any existing rights under current intellectual property laws such as copyright. In this way, the model law achieves its goal of providing specific indigenous rights tailored to the protection of ECTK supplementary to valid intellectual property rights.

The indigenous concept of communal authorship is addressed by the model laws in the provision for traditional owners of ECTK to be either the relevant group, clan or community, or an individual recognised as representative of the group, clan or community. This sense of communal ownership is foreign to Western intellectual property laws. For example, while copyright law recognises an exclusive private property right for one or two individuals, traditional owners and creators of ECTK are subject to complicated rules, regulations and

66 Above n 30, cl 8.
67 Above n 30, cl 9.
68 World Intellectual Property Organisation, *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore — Preliminary Systematic Analysis of National Experiences with the Legal Protection of Expressions of Folklore*, (2002) [42].
69 K Puri, 'Copyright for a Legal Protection of Folklore?' (1998) 22(4) *Copyright Bulletin* at 8.
70 World Intellectual Property Organisation, above n 3, [34].

responsibilities.[71] Under indigenous customary law, the nature of such rules is related more to communal usufructuary rights than a formal sense of ownership. The comparison and divergence between these concepts of ownership is significant for licensing issues.[72] For example, under copyright laws, it is possible to licence or assign rights in a work, but the relevant indigenous customary law may not permit such use. The model laws accordingly provide for the prior and informed consent for such licensing as a non-customary use.[73] This does not mean that licensing of ECTK is not permitted, but it allows the traditional owners to control the ECTK that is the subject of the licence in accordance with its status under customary law.[74]

Finally, the model law establishes a framework for the identification and location of tradition owners in the event that none are readily identifiable or available, by providing for a government body, the Cultural Authority, to administer the process of obtaining the prior and informed consent of the traditional owners.

The points discussed above are just some of the ways in which the model law addresses the many problems facing protection of indigenous ECTK under conventional intellectual property laws. Of fundamental significance is that the model law employs the concept of customary use as the lynchpin of the framework. It is submitted that this is a direct acknowledgement of the appropriate application of indigenous customary law to the protection of ECTK, and an important step towards empowerment and self-determination for indigenous groups.

XII. CRITICISMS

The model law has been designed for national protection, but indigenous groups have called for international protection. It is hoped that the Fifth Session of the Intergovernmental Committee held in July 2003 will open a forum to address this issue. In the interim, the World Intellectual Property Organisation's official view is that if a country wishes to adopt the law, it can adapt the provisions as it deems fit.[75] The disadvantage of this is that member states may amend the laws to suit their own agendas, and such modification may lead to a watering down of, or inconsistencies in, the approach and application of the model law between nations. It is submitted that this would be highly undesirable as the global protection of indigenous ECTK protection should be harmonious. It must also be noted that to this date, several member states have continued to oppose the implementation of international model laws for various reasons.[76] Therefore, it is submitted that any international model law must also necessarily be the subject of an international treaty requiring ratification by signatory countries within a certain timeframe so as to give real effect to the laws and allow indigenous groups to benefit.

There has been some argument advanced that extending special protection to indigenous groups and ECTK is prejudicial since ECTK gains dual protection under both systems. While the ECTK protection system has been resolved at law as not discriminatory,[77] the fact remains that in order to redress the massive injustices of the past against indigenous groups, some pro-active legislative measures are necessary.[78]

71 World Intellectual Property Organisation, above n 68, [47]. See also Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (2002) <http:www.wipo.int/globalissues/studies/cultural/minding-culture/index.html> at 10 May 2003.

72 World Intellectual Property Organisation, above n 68, [47].

73 Above n 30, cl 7(2).

74 For a discussion of when the traditional owners consent to provide a licence for use of ECTK is necessary under customary law, see the decision of Justice French in *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481.

75 World Intellectual Property Organisation, above n 29.

76 For example, the Member States of Australia and Canada submitted that there was no need for international legal protection of indigenous ECTK — see World Intellectual Property Organisation, above n 3, [129].

77 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Gerhardy v Brown* (1985) 159 CLR 70.

78 Australian Copyright Council, *Protecting Indigenous Intellectual Property: A Copyright Perspective* (1997) 69.

Despite the emphasis on the need for self-determination for indigenous groups as a fundamental part of empowerment, the model law establishes a government authority (i.e. the Cultural Authority) to administer claims of traditional ownership and mediate between prospective users and traditional owners. This paternalistic approach persists in the face of numerous report findings that an important part of the process in the establishment of sui generis protection is the consultation with indigenous groups, and the provision of funding to assist indigenous groups to determine claims of ownership in accordance with their customary law.[79] Further, ownership of ECTK may vest in the State in the event that agreement cannot be reached on the identity of the traditional owners of ECTK. If the control of protection of indigenous material is still beyond the reach of its traditional owners, is there any reason for indigenous groups to endorse the implementation of sui generis protection?

A further point in relation to financial difficulties is that there is a distinct lack of funding and support for traditional owners to protect their ECTK, particularly in Australia, where priority funding is designated to combating indigenous criminal and drug abuse issues. It would seem that in some cases, art is simply not important enough to attract the necessary funding, which explains why so few cases have come to court over the last two decades. It is vital that funding be given to traditional owners to enforce their traditional rights in ECTK.[80] Otherwise, any legislative action will be virtually useless.

Finally, evidentiary issues regarding proof of traditional ownership and the genuine customary practices may be difficult to resolve should more than one traditional owner claim the traditional knowledge subject to the proposed non-customary use. Despite the possibility of mediation, this is a potentially difficult situation, especially where customary laws may differ and therefore be of little use in resolving this type of dispute. However, one possibility is the adaptation and application of the principles enunciated for determination of native title in the case *Mabo v State of Queensland (No 2)*,[81] whereby traditional owners can be identified in accordance with customary laws for ECTK in the same way as for native title.[82]

XIII. Conclusion

Viewed holistically, the enactment of the model laws for the Pacific peoples is a positive response to an overwhelming call for action by indigenous groups. These sui generis laws, drafted specifically to address the unique aspects of ECTK that require protection, herald the beginning of change in attitudes and approach to protection of indigenous ECTK.

The real effectiveness of the model law in the protection of ECTK remains to be seen. Should other member states of the WIPO choose to draw upon the model laws as an example (eg Australia), positive protection arguably could — and hopefully will in the case of the Pacific peoples — enable and facilitate use and access to ECTK as a basis for further innovation and creation, consolidating, developing and extending indigenous cultural tradition.[83] The resulting ECTK arising from such innovation and creation would be respected as belonging to both the creator and their community where relevant, and ensure that any commercial use of ECTK also attracts the obligation to acknowledge and respect the source of the ECTK. It would also ensure that all traditional owners are able to share in the benefits resulting from such use, and to maintain the integrity of the ECTK during such use. In addition, sacred and secret ECTK would be protected from commercial use, commodification, and cultural harm by the restrictions imposed by the model law.

79 Ibid.
80 Ibid.
81 (1992) 175 CLR 1.
82 Puri, above n 24, [4.2].
83 World Intellectual Property Organisation, 'Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore — Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions' (2003) [22].