

Existing International Intellectual Property Instruments and Traditional Cultural Expressions: Which Gaps Exist and Which, If Any, Should be filled?

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My topic is “gap-filling” in the domain of international legal protection for Traditional Culture Expressions, and I’m indebted to IGC 2008/09 document, entitled “The Protection of Traditional Cultural Expressions: Draft Gap Analysis”, for helping to guide my approach. Even after nearly a decade, I strongly recommend it as a comprehensive introduction to the topic that I will attempt to cover only superficially, and partially, in the next hour.

I should say at the outset that the gaps I will be considering are not to be found in the remedial vision of the IGC’s Draft Articles themselves. As these stood at the conclusion of IGC 33, the alternative definitions of TCE – one long-form and the other short and general – are both extraordinarily comprehensive, sweeping in (at least potentially) almost every imaginable collectively produced and maintained cultural tradition. Consider, for example, the former:

Traditional cultural expression means any form of [artistic and literary], [other creative, and spiritual,] [creative and literary or artistic] expression, tangible or intangible, or a combination thereof, such as actions¹, materials², music and sound³, verbal⁴ and written [and their adaptations], regardless of the form in which it is embodied, expressed or illustrated [which may subsist in written/codified, oral or other forms], that are [created]/[generated], expressed and maintained, in a collective context, by indigenous [peoples] and local communities; that are the unique product of and/or directly linked with and the cultural [and]/[or] social identity and cultural heritage of indigenous [peoples] and local communities; and that are transmitted from generation to generation, whether consecutively or not. Traditional cultural expressions may be dynamic and evolving.

You should note, among other things, that the definition does not cite so-called “secret” expressions, the circulation of which is limited by customary law in custodial communities, even that heightened protection for them is recommended elsewhere in the Draft Articles language. Because it is a portmanteau definition, secret TCE’s are treated there as an assimilated part of the whole. In any understanding, the definition takes in a lot, including a number of things that are (arguably at least) already subject of other more conventional domestic and international IP regimes. If anything, as I’ll try to explain later, the breadth of the definition may be a source of difficulty in its own right. Rather, the gaps I will highlight are ones that characterize the underlying existing state of affairs to which the IGC’s constructive efforts are addressed.

And I should begin by saying that one thing I've learned in 50 years of teaching and practice is the general rule that no every identified "gap" in the law's coverage necessary should be "filled." A gap in Anglo-American real property law, for example, permits access to private property over old easements – those that have a traditional, or historical – character. Landowners aspire to extinguish – whereas the general public of pedestrians seeks to maintain. Caution about gap-filling may be especially well-founded in IP, where the scarcity rationale that justifies property law in general is only weakly applicable, if at all. Thus, for example, nineteenth century champions of expansive copyright believed that term limitations represented a defect in the system would be remedied by introducing a principle of perpetual protection. Since then, however, Western copyright experts generally have embraced the value of term limits (albeit very generous ones) as a way of assuring the existence of a public domain – although they still argue bitterly about exactly what those limits should be.

Another early clarification also is in order: My primary focus will be on the arguable shortcoming of existing international law – although many of the critiques I'll explore have equal application to national legislation; likewise, and pioneering approaches taken in such legislation may be valuable pointers. Still, the adequate protection for TCE's must be addressed multilaterally if at all – since so many of the specific problems raised by demandeurs occur in the global information economy.

Of course, the future of international law and that of national legislation are closely entwined. After all, there are two functions that international IP law plays where any body of subject-matter is concerned – (1) assuring recognition of rights across the national boundaries of states that sign up as parties, and (2) assuring some degree of harmonization among national laws by establishing mandatory minimum standards for national legislation. Thus, when they signed on to a hypothetical future treaty relating to TCE's, many states would be required to add provisions to their laws or significantly modify existing ones.

Of course, the current absence of any international regime IP regime for protecting TCE's might be addressed, in part, under existing international instruments. To give one homely example, the 1996 WIPO WPPT seems adequately to address unauthorized recording and transborder exploitation of traditional culture performances (music, dance, etc). Thus, to choose (as I do below) to focus on the importance of international agreements is not to prejudge the question of whether and to what extent a new instrument that specifically addresses TCE's may be an essential part of the solution.

In what follows, I'll be referring not only to the role that existing neighboring rights agreements, like the WPPT, might play, but also to the question of whether, and to what extent, the just demands for more international recognition of the old arts can be met through copyright law treaties, perhaps with some modest modifications. And I'll also be discussing what lessons the framers of any new international ordering for the protection of TCE's can learn from the existing regimes, such as the 131-year old Berne Convention for the Protection of Literary and Artistic Works (and the national laws of the Berne Union countries).

In what follows, I will review:

- What are the gaps in protection for TCE's in the existing international legal order?
- How (or with what) might they be filled?
- What are the risks (if any) of filling them?

Expert discussion of this topic goes back to the 1950's, and vigorous international discussion to at least 1967. New interest in recent debates, driven by growing general perceptions of the fairness or unfairness of the existing order, as well as specific contemporary national and group aspirations. Since 2001, the work of the IGC has brought a new intensity of scrutiny to the topic.

By those measures, I'm a relative newcomer to all this, preparing to celebrate 25 years of involvement – beginning with my work on the 1993 Bellagio Declaration, devised by an international, crossdisciplinary group of experts. The Declaration offered a critique of the overprotection of various categories of commercially valuable subject-matter (including so-called “technologies of freedom”) under existing IP regimes, and a reaffirmation of the importance of a lively, robust “public domain.” In addition, the Declaration asserted that in the same post-colonial moment when Western commercial culture, supported by the force of international law, was extending its reach, the contributions made by practitioners of the old arts were being systematically undervalued:

Increasingly, traditional knowledge, folklore, genetic material and native medical knowledge flow out of their countries of origin unprotected by intellectual property, while works from developed countries flow in, well protected by international intellectual property agreements...

Intellectual property laws have [been] constructed around a paradigm that is selectively blind to the scientific and artistic contributions of many of the world's cultures and constructed in fora where those who will be most directly affected have no representation....

Contemporary intellectual property law is constructed around a notion of the author as an individual, solitary and original creator, and it is for this figure that its protections are reserved. Those who do not fit this model--custodians of tribal culture and medical knowledge, collectives practicing traditional artistic and musical forms, or peasant cultivators of valuable seed varieties, for example--are denied intellectual property protection....

Specifically, we advocate consideration of special regimes, possibly in the form of "neighboring" or "related" rights regimes, for the following areas:

- Protection of folkloric works.
- Protection of works of cultural heritage.

- Protection of the biological and ecological "know-how" of traditional peoples.

However outdated the rhetoric of the Declaration may seem, I want to use it here as an example of one common kind of gap-spotting exercise – the highest-level one –which focuses on what might be called structural gaps with respect to the international protection of TCE's. These gaps arise as the result of historical conflicts of purpose and ideology, or of economic interest, or both. And they are consequential. Recent commentators, including Madhavi Sunder, have usefully developed the theme that systematically treating the characteristic cultural productions of some communities as naturally occurring raw materials for the use of others may be profoundly subversive of human flourishing in general.

Gaps at the next level – what I will call “functional gaps” relate more specifically to things that law doesn't accomplish – and arguably should – with a stress on arguability, since this is often, in itself, a point of disagreement. Consensus about what constitutes a true functional gap is easier on some points than on others. To illustrate: One afternoon in January 2007, our interviews done for the day, members of our research team found ourselves wandering in Pangururan, on Samosir Island in North Sumatra, Indonesia. We encountered an undeniably upbeat, apparently joyous, and even slightly raucous crowd gathered under a temporary awning—some kind of street party, at first glance—with a mouth-watering spread of food, dancing couples of all ages, and mostly young musicians performing what we could by then recognize as traditional music of the region on a thoroughly eclectic collection of instruments—from unfamiliar local strings and drums to a very recognizable electronic keyboard.

This being Toba country, we had only to stop and gawk in order to be asked to join the party, which we did willingly. Over the next few hours, as the day passed, we found ourselves doing a little on-the-fly fieldwork, learning that the party was a traditional funeral celebrating the life of a long-lived local matriarch, and that the young men in the band were locals, too. The keyboard player noted that he loved the old music, but also enjoyed tweaking it to reflect the musical influences of Western popular music; in any event, he continued, the keyboard was an economic necessity; the cost of hiring a larger group of musicians, with traditional instruments only, would have been prohibitive for the family. Through this kind of hybridization (and streamlining), he explained, the old music continued to live in the community.

Our thoughts went back to the more formal interview we had conducted earlier in the day with elders and other community leaders in another part of the island, who had explained that the “misuse” of the musical tradition through the inclusion of Western instruments in local ensembles was a matter of grave concern to them—so much so that in another, nearby village the leaders had recently banned such performances. Our informants suggested that only the absence of a clear legal basis for such prohibitions was preventing the leaders of other local communities from taking similar action to discipline their own young musicians.

I said earlier that, as a normative matter, not all gaps demand filling – and this may be particularly true of functional gaps. Is the lack of a legal mechanism to regulate the terms on which TCE’s are transmitted for generation to generation a flaw – or should freedom of choice within communities about how to adapt old cultural practices to new circumstances be preserved? That is, as I said, a hard, value-laded choice. Reaching conclusions about what to leave unregulated is a topic that often reveals the most profound differences in values and aspirations.

Nonetheless, and despite the potential for disagreement at the margin, there is a broad general perception of gaps in at least three functional areas -- attribution, remuneration, and control. Let me expand now on the list:

- Attribution: Persons and groups associated with TCE’s, including states in which they are found, aspire broadly to legal guarantees that when these expressions are disseminated, for any purpose, their sources will be fully and appropriately acknowledged. Although legal doctrines applicable to newly created “works” recognize this interest, at least imperfectly, there is no current source of law that provides such assurances where the full range of TCE’s are concerned. This may be the most frequently voiced – if not necessarily the most profound – complaint about the operation of the current legal order.
- Control: In the context of the IGC’s deliberation, *demandeurs* frequently express concern that -- especially where cross-border uses are concerned – TCE’s may be employed without consent in ways that would be offensive or hurtful to the peoples and groups who function are their custodians. Again, this view is widely held, although there is room for healthy dispute about the range of uses to which it should apply. It’s worth noting that, in any case, the concern is aggravated in cases where the TCE’s in question are so-called “secret” ones – intended by custom to circulate only within limit groups, and not for public disclosure.
- Remuneration: For some critics of current doctrine, this is at the very heart of the problem, while for others it is a significant peripheral consideration. Either way, the case is that today there is a widely shared view that TCE’s are sometimes exploited (in a neutral sense of that term) far from their places of origin, and that in a fair international regime there would be some mechanism to prevent (or redress) such “misappropriation.”

This functional level may be the most meaningful part of any gap analysis. Certainly, any new proposal ultimately will be judged by how successfully it addresses these functional considerations. But – for obvious reasons – this is not the level on which most of the discourse around TCE protection takes place. That discourse concentrates instead at the more granular issues posed by technical (or doctrinal gaps). Such an inquiry focuses on problems of fit or adequacy between the details of various existing regimes of protection, on the one hand, and what specific provisions are required to meet the aspirations and demands of groups and nations. The questions associated with this level of inquiry into gaps are:

- Can existing regimes be applied (or modified) to meet those aspirations and demands, and if so, how?
- If not, what lessons can be learned from the existing regimes in constructing a new one, specifically for the recognition of right in TCE's?

There are, potentially, many directions in which such an inquiry might be focused, because, as the 2008 IGC Gap Analysis helpfully points out, there are many forms within in which such aspirations might be realized.

17. IP protection may comprise property rights. Where property rights do exist, such as economic rights under copyright, they enable the rights holder either positively to exercise the rights himself or herself, to authorize others to do so (i.e., the right can be licensed), and/or to prevent others from doing so.

18. IP protection does not necessarily comprise the grant of property rights – for example, moral rights under copyright provide control over how a work is used, rather than whether or not it may be used, in some cases even after the expiry of the economic rights. Compulsory (non-voluntary) licenses in copyright similarly allow regulation of how a work is used and for the payment of an “equitable remuneration” or a “reasonable royalty.”

So, for now, let's look more closely at a doctrinal gap analysis of copyright law, and what lessons it may have for the project of addressing the important functional gaps identified above. Here's a question to get started with: Why wouldn't a few minor tweaks to the Berne Convention solve the problem, bringing TCE's with the scope of the existing international copyright regime?

Article 15.4 was added to the treaty in 1971 with this goal in mind, but in its current form it has not brought about significant change. As noted in the 2008 Gap Analysis, the disadvantages of this Article include that it is optional and most national laws have not enacted it, the term of protection for such works is limited to at least 50 years once the work is “lawfully made available to the public” and that the role of communities is not explicitly mentioned but rather a ‘competent authority’ exercises the rights on behalf of the author. The protection under the Article is also limited by Article 7.3, of the Berne Convention that states that countries are not required to protect anonymous works when it is reasonable to presume that the author has been dead for 50 years.

But why – as a doctrinal if not a political matter -- couldn't these defects simply be repaired? After all, international recognition of TCE's under the copyright rubric would provide access to a range of remedies to address misuse of TCE's, including both injunctive relief and damages, in most countries of the known world. And it would trigger the mandatory application of basic moral rights, which are subsumed under the international copyright regime, as well as economic ones, in at least 172 countries.

The major shortcoming of this approach is not, I want to suggest, with the generally understood scope of copyrightable subject-matter, which is a relatively mutable concept

that has been expanded again and again over generations to accommodate changing needs. According to Article II of the Berne Convention, for example: “the expression ‘literary and artistic works’ shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression.” Most, if not all, of the cultural production that falls within even the broadest definition of TCE’s could be comfortably accommodated here.

Rather, the doctrinal gaps between copyright law’s reach and the protection demanded for TCE’s lie elsewhere, in some of copyright’s most fundamental and immovable assumptions. Copyright evolved around the idea of “authorship” to favor claims of rights in ascertainably *original* and relatively *recent products* of imagination. Over time, we actually have been remarkably flexible about allowing this requirement – that an object protected by copyright should originate with a specific human being (as the case of a novel) or a group of them – even a large group (as where a movie is concerned). International copyright law has allowed the Anglo-Saxon countries to fictionalize this idea by introducing the “work for hire” doctrine, pursuant to which employer is deemed to be the author of the merged contributions of various employees. And we’re just on the threshold, I suspect, of finding another fiction of authorship to justify corporate copyright claims in the outputs of AI agents. But there are limits, and instances in which not even a fictional person can comfortably be assigned responsibility for a cultural tradition – where, by its very nature, the value under consideration has been produced collectively (rather than collaboratively) by a group – may lie beyond the limits of copyright lawyers’ ingenuity. To the extent that they are taken as static re-presentations of old culture, and even when they are recognized as being dynamic and permeable to change, TCE’s often have been understood as lacking in characteristics of individualization, originality, recentness, and fixity.

While many individual TCE’s may satisfy some or all of these requirements, the larger class of cultural objects and processes embraced within typical definitions of TCE’s includes many items that do not. Take for example, a musical tradition that originated 300 years ago in a specific community and continues to be practiced there today. It consists, we’ll assume, of a group of simple melodies, played on a set of specific instruments, and a body of stylistic rules how performances of those melodies on those instruments are to be conducted. This cultural tradition – as just described -- fails comprehensively to fit the grid of copyright. In addition to lacking even hypothetical individual “authors,” it isn’t “original,” precisely because it has been faithfully transmitted over generations. Moreover, it lacks the definiteness of form we require of copyrighted “works.” Here, the fact that it hasn’t been “fixed” in material form is the least of the problems; after all, such a requirement of reduction to physical form isn’t a universal standard of copyrightability. But unless an intangible object has a stable form, so that it is capable of more or less identical repetition from one iteration to the next, it falls short of constituting copyrightable expression, and remains a mere unprotected idea. It is for this reason, incidentally, that we typically deny copyright protection even to many attributes of stable works, including “style.”

So at a formal level, there is a doctrinal gap between copyright and comprehensive protection for TCE's that is simply too wide to be bridged. Just as patent doesn't capture the extent of TK, and plant variety protection can't begin to exhaust the potential field of GR's, so there's a poor fit between copyright and protection for TCE's. It's that lack of fit, more than anything else, that produces the apparent gaps we've been mapping up to now.

So trying to shoehorn the full range of TCE's into copyright is a non-starter, and that brings us to the question of how the various identified gaps might be filled. But before asking about the design choices that confront us when we imagine an alternative new regime, and the ways in which lessons learned from copyright may inform those choices, there is another more immediate and pragmatic question to confront: Is the potential for partial protection of TCE's under copyright (and related rights) being fully exploited, even as the outlines of a new regime continue to be debated.

Earlier on, I mentioned that a specific recurrent complaint about the lack of international (and, for that matter, domestic) protection for TCE's, involving unauthorized recording and exploitation of performances, is already within the reach of a legal regime for the protection of musical performers that originally were conceived with the commercial music and broadcasting industries in mind. Most countries have domestic laws along these lines. Nothing would seem to stand in the way of putting these laws to use in favor of TCE's – and gaining real, albeit incomplete international protection as a result.

Nor should the potential for bending the existing (and ubiquitous) international copyright regime toward the protection of TCE's – at least as an interim measure – be overlooked. As already noted, the working definition of TCE's includes (although it is not limited to) many modes of expression that would fit comfortably within copyright law. As we all recognize, the concept of TCE's is a dynamic one – that is, the new interpretations of and variations on a cultural tradition that arise within the communities that maintain it qualify as much as older ones documented as they existed in the distant past. Indeed, the most at-risk TCE's in today's global information economy may well be those which have been given specific form in recent decades, by living men and women – contemporary variants, that is to say, on ancient musical, choreographic, graphic and other traditions. Notably, these relatively new expressions of old culture are likely to be the most attractive, as well as the most accessible, from the standpoint of would-be exploiters.

Contemporary copyright doctrine actively protects new versions of preexisting works – the modern retelling of a Greek myth for example, or a new performance of a Beethoven symphony – under the heading of “derivative works.” Although such copyright are limited to the new material contributed by the interpreter, the resulting protection is more than sufficient to deal with most cases of piracy, including unauthorized performance and display, whether literal or virtual. Moreover, the remedies associated with the violation of such copyright are useful. And in most jurisdictions, if not the United States, the individual interpreter's moral right of attribution would be protected.

Most important, a contemporary interpretation or rendering of a cultural tradition fits comfortably within the grid of copyright doctrine in a way that TCE's as a whole do not: Such an interpretation is not too old to protect, its immediate creator (or creators) are specific individuals, even if anonymous. It is instructive here to call the Australian Bulun Bulun case, in which a celebrated Galanbingu Aboriginal artist successfully prosecuted a copyright action against a textile manufacturer that had usurped one of his designs, both on his own behalf and as a surrogate for the community from whose tradition his individual artistic practice sprang.

Obviously, this “do it yourself” copyright approach couldn't realize all, or even the most important, aspirations that underlie the movement to protect TCE's. Some of the most sensitive – if not the most commercially valuable – forms in which TCE's are manifested would still be beyond its reach. Specifically, copyright could not readily be a useful vehicle for protecting secret or sacred knowledge, which is likely to maintain its original form over generations of transmission. And there would be other arguable shortcomings as well, if the standard to be applied is the complete fulfillment of the aspirations behind demands for TCE protection is the measuring standard. Here are some of them:

- The attribution interests of the groups or communities from whose practice the contemporary interpretations of TCE's arise would not, under current copyright law, enjoy an attribution right as such. Rather, it would be the responsibility of the individual artist-interpreter to assure that group attribution was provided by means of licensing agreements or other contracts.
- The protection afforded to such contemporary versions of TCE's would be limited in scope, applicable to reproductions, performances, and displays of relatively close imitations, but not by any means to all new work “inspired” or “influenced” by them.
- As copyrightable subject matter, contemporary versions of TCE's would enjoy only a term of protection, although under current modes of calculation, a pretty considerable one. Ultimately, however, these copyrightable versions would be slated to enter the general public domain, just like any other copyrightable work
- Perhaps most significantly, the rights afforded by copyright are subject to a variety of statutory and judge-made exceptions, including not only term limits but also exceptions relating to protected works -- typically including ones for educational use, museum and archival uses, illustrative uses (in teaching, scholarship, journalism, etc.), and more. The scope of these limitations varies from country to country, sometimes significantly, but all nations share, and will continue to share, a commitment to the notion that the copyright monopoly is porous enough to allow some socially and culturally valuable imitations and other uses – including ones that may be, initially, controversial or unpopular.

With the possible exception of the limits on the attribution right, I suspect that these are doctrinal features of copyright law would be difficult to modify very much in order to extend protection of a subset of TCE's.

At this point, I could go on the canvass other existing forms of IP which enjoy international protection, examining what potential they may have to meet some of the aspirations associated with demands for TCE protection, at least until such time as new international norms are enacted. Earlier on, for example, I mentioned the relevance of international arrangements for the recognition of rights in recorded performances. And, in countries from New Zealand to Colombia to Indonesia, we've seen recent successes with the use of branding to provide a degree of market protection for new versions of TCE's produced within the communities associated with them.

Instead, in the limited time I have left, I want to do something a bit different, and speculate a bit about the question of whether there gaps that we should consider leaving unfilled in our efforts to provide meaningful support for the communities that sustain TCE's. Specifically, I want to reflect on what lessons, if any, the structure and doctrine of copyright has to teach. Is it possible, for example, that those contemplating future regimes for TCE protection can learn, from the positive values expressed in the doctrine copyright – however historically bounded the larger IP tradition of which that tradition is a part may be?

Let me, therefore, try to reframe some of the problems of fit that we surfaced in our thought experiment about applying copyright to TCE's:

- We'll begin with term limitations (and the associated concept of a public domain). Are these simply fetishes of a particular approach to intellectual property protection that originated in 18th and 19th century European colonial nations? Are these ideas simply an unwanted intellectual legacy, or do they have claim to universal appeal? At least where the vast bulk of TCE's – those that relate to “public” rather than “secret” traditions – this is not an easy question. There is something to be said, from the standpoint of the common culture, for sunsetting the legal protection of all knowledge. It isn't clear to me that TCE's are profoundly different from individual works of authorship in this respect. The question deserves additional, clear-eyed consideration.
- An argument for allowing protection for the substance of protected TCE's, like all public expressions of culture, find their way into a public domain is that – as is the case for moral rights in copyrighted works in some national systems – attribution rights in TCE's could be made effectively perpetual.
- Whatever the duration of TCE protection, all existing systems of intellectual property protection – including copyright -- feature limits on what can be protected, as well as affirmative carve-outs for certain privileged uses. Because there is no special-purpose international regime for the protection of TCE's, there has been no occasion to address this the question of whether policy-makers should build in certain doctrinal gaps into any such scheme, as a matter of design.
- This leads, in turn, to a final, fundamental inquiry around the phenomenon of gaps. I suggested early on that the deep structures of Western IP law, which lavish protection on some forms of cultural production while treating others as available common heritage, are both deeply unfair and historically contingent on

the rise of so-called “possessive individualism” in early modern times. But is the same true of all the values associated with the European enlightenment project as a whole? Are familiar pronouncements that IP should serve the spread of knowledge among all peoples simply fig-leaves for injustice, or do they have some validity despite the self-serving ways they often are deployed?

- And if they do, can they be accommodated in a regime with perpetual protection, other than through the introduction of limitations and exceptions? To offer just one example, would a model of protection based on concepts of compensation rather than exclusivity be one way of squaring this particular circle?

These question, I would suggest, cannot be avoided in the process of deciding how porous – that is, how “gappy” – a system of TCE protections should be.