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Traditional Culture: A Step Forward for Protection in Indonesia

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LAPORAN PENELITIAN



Kebudayaan Tradisional

Suatu Langkah Maju untuk Perlindungan di Indonesia

disusun oleh:

Prof. Peter Jaszi (American University), dkk.

I. INDONESIAN TRADITIONAL ARTS – ISSUES ARTICULATED BY ARTISTS AND COMMUNITY LEADERS AND POSSIBLE RESPONSES

A. Background of the project

The question of whether law can intervene usefully in support of the traditional arts is not a new one. In fact, it is fundamental to the post-colonial legal discourse, which emerged in its own right in the 1970's, in response to more and more new states taking account of their national resources—including intangible ones. The international discussion that was launched more than 40 years ago continues to this day, with the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) of the World Intellectual Property Organization providing much of the leadership. And over the last four decades, various nations have made efforts to promote the interests of the traditional arts and arts communities through local legislation, usually under the general rubric of intellectual property (IP).¹ In Indonesia, the 1982 law on Copyrights included provisions declaring state ownership of traditional cultural artifacts including stories, songs, handicrafts, and dances, and these were carried forward into (most recently) Article 10 of the Copyright law of 2002 (Law No.19/2002). However, this Article has never been implemented through specific regulations or additional legislation. As a result, it has had no appreciable influence on the actual functioning of Indonesian traditional arts systems.

This project described in this report was originally conceived, in early 2005, as a contribution to the discussion of possible ways to implement Article 10. Although the focus of debate has shifted somewhat in the last several years toward an emphasis on the prospects for new, *sui generis* legislation relating to the traditional arts (along with other aspects of the country's intangible cultural heritage),² the general philosophical approach of the project has remained the same throughout. That approach can be summarized as follows:

¹ A brief review of the issue's history can be found in Monika Donman, *Lost in tradition? Reconsidering the history of folklore and its legal protection since 1800*, in INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS IN A DIGITAL ENVIRONMENT (Christoph Beat Graber & Mir Buui-Nenova eds., 2008). A more exhaustive treatment by Agnes Lucas-Schlotter appears as *Part III, Section 4 – Folklore*, in INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE (Silke von Lewinski, ed., 2d ed. 2008). A useful list of legislative initiatives in national law can be found in Daniel J. Gervais, *Spiritual But Not Intellectual: The Protection of Sacred Intangible Traditional Knowledge*, 11 CARDOZO J. INT'L & COMP. L. 467, 490-91 (2003). Additionally, WIPO has collected relevant legislative texts at <http://www.wipo.int/tk/en/laws/folklore.html#special>.

² This new focus is apparent in the new draft law for Intellectual Assets Protection and Utilization of Traditional Knowledge and Traditional Cultural Expression (TK-TCE) that was developed by the Directorate General of Laws and Human Rights with inputs from the Department of Culture and Tourism and others, and unveiled in July 2008.

Any legal intervention to support the traditional arts should be focused on the artists who practice those arts and the communities in which such practices occur. Specifically, IP initiatives in this area should help assure that artists enjoy the economic and cultural conditions that make it possible for them to continue producing new work within the traditions in which they practice, and to pass those traditions along to succeeding generations. Any new IP or IP-like provisions for the traditional arts must be carefully balanced, since contemporary artists working within established traditions needed both protections from unfair exploitation by others and a reasonable amount of freedom to innovate. Other, less intrusive legal mechanisms exist to assure that outstanding examples of particular traditional artistic genres are preserved for future enjoyment and study. Such preservation is not the function of IP.

To restate and localize this premise in a single sentence: If there is a role for IP in support of the traditional arts in Indonesia, it is to contribute to the conditions that sustain the everyday processes by which those arts have flourished in the past, and continue to thrive today.

The team of experts assembled for the project also was guided by the statement of goals announced by the WIPO IGC in its 2006 draft of “The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles” (WIPO/GRTKF/IC/9/4). In particular, this document includes mandates to “*recognize value, promote respect; meet the actual needs of communities; prevent misappropriation of traditional cultural expressions/expressions of folklore; empower communities; support customary practices and community cooperation; contribute to safeguarding traditional cultures; encourage community innovation and creativity; promote intellectual and artistic freedom, research and cultural exchanges on equitable terms; contribute to cultural diversity; promote community development and legitimate trading activities; preclude unauthorized IP rights; and enhance certainty, transparency and mutual confidence.*” Consequently, the project team emphasized the importance of recognition and support to the dynamic communities in which the traditional arts are practiced.

The individuals who made up the project team include Indonesian and foreign experts with a variety of relevant specialties, including performing arts, music and musicology, human rights, law, anthropology, media studies, and journalism. They include Jane Anderson (New York University), Lorraine Aragon (University of North Carolina), Ignatius

Haryanto (Lembaga Studi Pers dan Pembangunan (LSPP)), Peter Jaszi (American University), Abdon Nababan (Aliansi Masyarakat Adat Nusantara -- AMAN), Hinca Panjaitan (Indonesia Law and Policy Centre (IMPLC)), Agus Sardjono (University of Indonesia), Ranggalawe Suryasadin (University of Indonesia), and Rizaldi Siagian (Yayasan Karya Cipta Indonesia- (YCKI)).³ Sponsored by the LSPP and the Washington College of Law, American University, Washington, D.C., with support from the Ford Foundation-Indonesia, team members made series of extended site visits to communities where the Indonesian traditional arts are practiced: in Central Java and Bali during July 2005;⁴ South Sulawesi, West Kalimantan, Timor, Flores during August and September 2006; and North and West Sumatra in January and February 2007. The team members brought various kinds of expertise to the project, but they did not rely primarily on their prior knowledge as they tried to assess the legal needs of Indonesian traditional artists and arts communities. Instead, in keeping with their shared philosophical approach and the WIPO guidance outlined above, the team members took advantage of their many field visits to learn from the people with the most practical knowledge of actual conditions: working artists and the leaders of communities in which the traditional arts are practiced. In interviews, the team sought to elicit information about the state of the traditional arts in general, and about the problems faced by traditional artists in particular. Team members did not ask the artists and community leaders (all non-lawyers!) who were so generous in speaking with us about their specific preferences for new legislation, as such. Instead, we tried to get their help in assessing the strengths and weaknesses of traditional arts systems as they currently function. Where possible, team members also interviewed various secondary participants in traditional arts systems (government officials, businesspeople, lawyers, curators, journalists, broadcasters, etc.), to ascertain their attitudes. But the primary emphasis was always on the primary participants—the artists and community leaders themselves. In this report, we summarize the project team’s findings and—based upon them—make some suggestions about the form that new legislation in this area might take in order to build constructively on what already exists.⁵

³ Team members Aragon and Leach have recently published an article that draws substantially on the work of the project. Lorraine V. Aragon & James Leach, *Arts and owners: Intellectual property law and the politics of scale in Indonesian arts*, 35 AM. ETHNOLOGIST 607 (2008).

⁴ The Social Science Research Council (New York) and its Program Director, Joe Karaganis, were instrumental in coordinating the initial phases of the project.

⁵Members of the project team assured individuals with whom they spoke that their private views would be held in strictest confidence. Therefore, this Report will describe these interviews in general terms only, without identifying specific informants either by name or otherwise. By contrast, where the project team observed traditional arts activities that are open to the public (such as exhibits or performances), or where traditional arts practitioners have written or spoken publicly about the issues with which the Report is concerned, identifying information or details will be provided.

On June 19, 2007, the project team convened a public workshop in Jakarta to discuss its findings and recommendations, as summarized below, with artists and community leaders, government officials, scholars and other stakeholders or interested persons. This report is a revised version of those findings and recommendations

B. Methodology and research questions

As already noted, the project team set itself a simple, although demanding, two-part task. The first step was to interview as wide a range of Indonesian traditional artists (and arts community leaders) as possible, in order to determine what present or emergent problems they identified in the country's traditional arts systems – a term used here to encompass the production, distribution and consumption of art works, performances, crafts item, etc. The second step was to reflect and report on what role positive law (i.e., rules of national application announced by legislators and judges), especially IP law, might play in addressing those problems.

In taking that second step, and in summarizing its conclusions in this Report, the project team was mindful of the fact that positive law is a two-edged sword, especially when it is inserted into an area of practice like the traditional arts, which has historically been free of regulation under positive law (i.e. statutory provisions and judicial decisions), although it has been and continues to be subject to local regulation under *adat* (or customary) law. The public law of the statute books and judicial reports can, of course, be enormously helpful in solving some social and cultural problems. But positive law, especially IP law, also can be enormously disruptive. The history of IP offers various examples (some of which will be detailed later in this Report) of how well-intentioned interventions ended up harming the very systems of cultural production that they were intended to promote. Thus, the project team adopted as its watchword a version of the Hippocratic principle: “First, do no harm.”

This Report suggests some new initiatives in Indonesian law that might lend useful support to the traditional arts without interfering unnecessarily with the good functioning of Indonesian traditional arts systems. In other words, this Report aims for proposals that will maximize the contributions that law can make while avoiding, insofar as possible, the potential negative consequences of excessive legalization.

C. Basic findings (I): The diversity and vitality of traditional artistic practices in Indonesia

Before summarizing the concerns expressed by the traditional artists and community leaders who spoke with the project team, it is appropriate to review some general conclusions concerning the state of traditional artistic practice in Indonesia. The project team made an attempt to visit practitioners of an extremely wide range of different traditional art forms (including various kinds of painting and wood carving, dance, *wayang gamelan* and other musical genres, and textile arts ranging from *batik* to both mechanical and backstrap loom weaving. As a result of these visits, it concluded most of the Indonesian traditional arts appear to be holding their own in a challenging cultural environment, while some are doing far better than that. This is a tribute to the various Indonesian traditional arts communities, and to the strong shared values they bring to their practice.

The overall vitality of the traditional arts in Indonesia is a complex phenomenon, reflecting a number of different processes. In some places, the arts practices of the present day are direct continuations of old modes of work, reflecting ideas about techniques and themes that had been handed down over generations in local communities that exist in relative isolation from the pressures of contemporary society – an outstanding example would be the backstrap loom weavings of Kefamenanu, Timor, about which more will be said later in this Report. In other traditional arts practice settings, like those of decorative wood-carving in Tana Toraja, South Sulewesi, and the *gringseng* weaving traditions of Tenganan, Bali, for example, intergenerational transmission of artistic tradition is taking place *despite* the potentially distorting influences of high-volume tourism. In Tana Toraja, for example (as in many other places in Indonesia), the current generation of artists appeared comfortable producing work for both ritual purposes and for the market.

Elsewhere, other forces were at work. Thus, for example, some of the traditional arts survive (at least in part) because of the efforts of academic institutions to both preserve old practices and train a new generation of practitioners – one such specialized arts university visited by the project team was the Sekolah Tinggi Seni Indonesia (STSI) Surakarta. Other traditions prosper because they are practiced today in commercial settings – a good example here would be batik production in Central Java, which is sustained by the activities of numerous small and some large commercial houses that engage in production and design; in effect, business enterprises are the custodians of batik tradition. The project team also observed examples of fruitful interaction between traditional arts communities, on the one hand, and commercial designers; thus, for example, the work of Jakarta-based fashion designer Merdi Sihombing with Badui village weavers and other local artists, has

helped to provide economic support for the continuation of traditional artistic practices.

Other artistic practices are thriving today—or show signs of doing so—for still more complicated reasons. In recent decades, the old art forms of some Indonesian communities—especially those related to textile production—have been in decline as a result of external pressures and demands—namely the transition to a cash-based economy. Old incentives for artistic production have declined, and knowledge about techniques and themes has been at risk of being lost. In many such locales, active revitalization programs designed to provide new incentives while preserving old knowledge have played a central part in maintaining and reinvigorating the traditional arts. Much credit for these successes belongs to outside organizations, such as The Threads of Life Gallery (in Ubud, Bali) which have encouraged revitalization on a national scale by helping local weavers to build a knowledge base and gain market access. Equally impressive, however, are the efforts of projects organized and managed by local people – such as the Tafean Pah cooperative based in Kefamenanu, Timor, whose activities are overseen by Yovita Meta, or the Yayasan Komunikasi Budaya Seni in Sintang, West Kalimantan, organized by Jac Maessen.⁶ Another, and perhaps more radical, example is the work of the Erika Rianti Studio in Padang (along with Swiss collector Bernhard Bart) to revive *songket* traditions of Minangkabau which had, for all effects and purposes, passed out of practice.

For all their diversity, these instances and examples of the successful survival of Indonesian traditional arts reveal several common themes. The traditional artists interviewed for this Report demonstrate an acute and sophisticated awareness of their custodial responsibilities to maintain and promote the old forms in which they work. Again and again, they expressed to us a desire to assure that the arts they practice will remain alive, both in the sense that they are embraced by the next generation of creators, and in the sense that they continue to attract audiences from within their own communities and even beyond.

D. Basic findings (2): The traditional arts and social life

It is in and around those local communities, through artists' engagement with them, that most activities in the Indonesian traditional arts are structured. Throughout Indonesia, the arts are an integral part of social life. Important occasions in the lives of individuals and groups are marked by artistic expression, and both religious and secular observances are rooted in artistic practice. Unlike the contemporary

⁶ The Ford Foundation, which funded this project, has been an active supporter of such “revitalization” projects in Indonesia.

West, where the arts typically are conceptualized as a desirable add-on or supplement to ordinary civic and economic life, traditional Indonesian communities understand the arts as integral to social and spiritual existence. Distinctions that make intuitive sense in a Western context—such as the division between artistic production and the milieu from which it arises—are largely absent from the thinking of Indonesian traditional artists. These musicians, dancers, performers, painters, weavers, and carvers regard their activities as reflections of social relationships. No matter how exquisite, their cultural productions are not viewed as worthy of protection or even preservation in and of themselves. For participants in the system, the survival of the traditional arts is not an end in itself, but a goal that reflects a larger objective – that of sustaining and reinforcing meaningful patterns of social life. It is impossible to overstate the importance of this consideration for thinking about appropriate legal interventions in the domain of traditional arts. As will be seen below, it is this characteristic of the Indonesian arts, more than any other, that calls into question the usefulness of attempts to apply Western-style IP rights.

E. Basic findings (III): Artists’ beliefs about the vitality of the Indonesian traditional arts

Indonesian traditional artists expressed the belief that three components were essential to the continued vitality of traditional arts in a community. *First*, they are actively concerned about documenting tradition, not as an end in itself, but so that knowledge of the old ways is not lost to the community. Such documentation can take a multitude of different forms, but it is critical. *Second*, they understand that contemporary youth represent a problematic link in the chain along which such knowledge can be transmitted. Because today’s young women and men are distracted by a multitude of cultural signals (from popular entertainment to the content of formal education), there is a risk that they will disengage from the traditional arts. *Third*, on a closely related point, artists and their communities recognize that the continued health of their practices will depend, to a significant extent, on their ability to satisfy audiences who live in new social circumstances.

The project team’s observations were replete with examples of adaptation, from the continued innovation in *batik* patterns, through the introduction of modern instruments (such as the electronic “single keyboard”) into ensembles playing traditional music on social and ritual occasions, and on to the successful revitalization of the once-defunct North Sumatran “Opera Batak” through the infusion of contemporary stagecraft. Even in locales where the apparent emphasis on continuity of tradition was the greatest, such as weaving communities, adaptive innovation plays an important role. Today’s textile patterns and motifs

are not identical to those preserved in cloths from 50 or 100 years ago. Old designs are modified to suit the abilities of contemporary artists, to accommodate new materials and technologies, to meet the needs of today's audiences, or to reflect changes in patterns of social organization. In other words, only through change can the traditional arts continue to function as a meaningful and integrated part of social life.

Another example can be seen in how the emphasis in Javanese *wayang* performance has shifted over time from the images projected on the screen to the spectacle that is visible only "behind" that screen, so to speak. Likewise, the subject-matter of the *dalang's* interpolated satirical comments has shifted (in part) from local matters to more general topics appropriate to the age of the "global village." These shifts, in turn, have enabled *wayang* to engage and reflect the life of contemporary communities. The artists understand that openness to innovation and even to outside influence has played an important and sustaining role throughout the history of the arts they practice. They are committed to maintaining such openness in their own activities. It is crucial to emphasize that, like other artists, the *dalangs* do not value adaptiveness simply as a way of preserving "market share" in the increasingly competitive world of the arts. Rather, their commitment to change in harmony with continuity is rooted in a widely shared understanding of the social function and connections of artistic production. This understanding animates the thinking of most practitioners of the traditional arts in Indonesia. This generalization does not apply only to those whose knowledge of old ways has been passed down within families or stable communities. Significantly, younger artists who have chosen to work in traditional modes also share this integrated vision of cultural and social practice.

One further example may serve to illustrate the complexity of the situation just described. The dance company, Çudamani, is based in a family compound in the village of Pengosekan, Ubud, Bali, across the street from the local temple. Although it is a relatively young institution, it is deeply rooted in the community; its goals are not to preserve and present traditional music and dance for their own sake, but to ensure that these arts continue to support long-established ways of social life. The group was organized in 1997 as a space for traditional dance that is not tied to serving the demands of the increasingly omnipresent (and intrusive) Balinese tourist industry—and therefore it can avoid the artistic and cultural dangers that the excessive commercialization of the traditional arts entails. The organizers of Çudamani describe themselves as a "professional company and performing arts school with a working philosophy much like a family temple or *sanggar*," going on to say that

We are a community of artists who, through our music and dance, hope to positively contribute to the artistic, cultural and spiritual life of our world. We are dedicated to *ngayah*, or devotional service, contributing performances of artistic excellence at temple ceremonies and other religious festivals. These bring little or no money, but reconnect artists to the community and temples in which music and dance have played an integral role for centuries. As part of our work in the community, senior members teach *gamelan* and dance to more than 100 youth and children ranging in age from 5-18 in afternoon and weekend classes offered at no cost.

Another important aspect of Çudamani's work is the documentation of old dances that are at risk of disappearing, often accomplished through study with retired dancers and other elders. In this way, old dances are revived and dances at risk are preserved.

To support this ambitious program, without relying on the local tourist industry for income, Çudamani attracts support from outside donors, including the Ford Foundation. In addition, the company performs for audiences throughout Indonesia, and as far beyond as Europe and the United States. These performances combine faithful renditions of traditional music and dance (including classic *Legong* and rare pieces in the *Kebyar* genre) with new compositions and choreography created by the group's members but drawing on tradition. These include (for example) a signature piece, "Odalan Bali," which evokes the daily cycle of life in a Balinese village temple, incorporating many old elements in a new narrative framework. In other words, rather than performing a diminished or even debased version of the supposedly "traditional," the company has chosen to blend deeply authentic accounts of artistic tradition with new pieces which are explicitly contemporary in their overall character.

Çudamani was one of the first arts communities visited by the project team. One of the team's last visits was in Padang, West Sumatra, to an evening of *Randai*, one of the most important traditional outdoor performing arts in Minangkabau – in this case a rendition of three short versions of traditional episodes from the well-known folk story: *Kaba Anggun Nan Tungga Mageg Jabang*. The Palito Nyalo ensemble (led by Mr. Jamaludin Umar), functions both as a performance group and as a training institute for young artists, many of whom took major roles in the piece. Clearly, the group's products have appeal across the generations. On the evening the project team attended the performance, an enthusiastic audience of local young people watched and listened with rapt attention. Leaders of the ensemble explained that that their group

functions democratically, that all members are encouraged to suggest new performance elements, and that their pieces are constantly being revised. The performance the project team observed employed traditional rhyming stanzas, call and response singing, *galombang* dancing, and the local form of the Indonesian martial arts known as *silat*. However, the performance also reflected innovations that drew on a range of sources from beyond the community: it used a heptatonic (seven-tone) scale as well as the original pentatonic one; in addition to the classical gongs, *saluang* flute, and double-headed drums, the ensemble also used a stringed instrument, the *kecapi cina*, and two non-typical kinds of drums (the bass drum or *tambur*, and a Melayu frame drum called *pak-pun*). In addition, non-indigenous martial arts traditions were represented along with the *silat*.

F. Basic findings (IV): Indonesian traditional arts and the ethic of sharing

As the foregoing examples may illustrate, the vitality of the Indonesian traditional arts is based on many different kinds of contributions. Moreover, these contributions involve not only fidelity to the past, but also a willingness and ability to innovate within tradition. Despite their diversity, however, all individuals and communities who make these contributions have some strong values in common. *One of these values deserves special emphasis here: the almost universal acknowledgement of an ethic of “sharing” by traditional artists.* It goes without saying that within traditional arts practice communities, imitation is a valued activity, rather than one that is disapproved or discouraged (as it is in some Western cultural contexts). As in any traditional arts context, new practitioners learn by copying and then adapting the work of their teachers and other seniors.⁷ Significantly, however, the ethic of sharing appears to be equally strong when borrowing by those from outside the community – whether Indonesians or foreigners – is concerned. Again and again, in a wide range of settings, members of the project team were told that for the artists with whom they were speaking, imitation was a natural and positive part of the process of artistic production. The project team repeatedly asked whether the artists would object to others’ borrowing of musical figures, graphic elements, production or

⁷ This phenomenon has been usefully described by Professor Edi Setyawati of the University of Indonesia, in a paper prepared for the Asian African Forum on Intellectual Property and Traditional Cultural Expressions, Traditional Knowledge and Genetic Resources, Bandung, 18-20 June 2007 (Doc. No. NCI-NAASP/06/GD2/VI/07): “Within an ethnic group that developed a traditional culture, the sharing of creations is a common practice. To copy a work of art from a maestro, within the society itself, is generally not considered as a transgression of rights, but to the contrary, considered as sharing, which is in turn, considered as beneficial. The Javanese use the term ‘*mutrani*’ (to make a ‘child’ of an excellent work of art) which in practice means ‘to copy’ In those cases the copy actually gives regards to the moral right of the creator, though in silence.” (p. 2).

performance methods, and other aspects of the traditional arts they practiced. Consistently, the artists responded that they would view such imitative practices favorably, both because of the compliment that such imitation implied, and because no imitation could fully capture the special characteristics of their own work. Despite efforts of members of the study to shake the artists from this position by elaborating various hypothetical cases, they remained committed to the proposition that their arts exist not only to be admired but to be built upon by others. (It is noteworthy however, that artists did voice concerns, which are summarized later in this Report, about the manner in which imitation might occur, especially where attribution is concerned.)

Indonesian traditional artists' commitment to the value of sharing appears to have at least three sources. At the highest level, they believe that generosity is an ethical good, just as they disapprove of hoarding. If, as suggested above, the deep significance of the traditional arts is in the way that they reflect and reinforce social relationships, it is easy to see how a preference for sharing would be the "default" setting in traditional artists' thinking. In many cases, this general ethical commitment is reinforced by a particular understanding of the sources and destinations of artistic traditions. Thus, many artists explained that because their work had its origins outside themselves (with their ancestors, for example), it would be inappropriate to keep it only for themselves.

At a more particular level, an aesthetic component of the artists' common commitment to the value of sharing was evident. In other words, they believed that sharing of motifs and techniques could help to produce better, stronger, and more meaningful art. Many of the artists recognized the strength that borrowing from other artistic traditions lent to their own work or that of their practice communities – whether the borrowing in question was from the next village, or from another region of Indonesia, or even from a foreign source. In other words, while the artists were committed to furthering the particular traditions in which they practiced, they saw some degree of hybridization as source of strength rather than contamination or degradation in the Indonesian traditional arts.

Finally, and most concretely, this commitment to the value of sharing reflected eminently practical considerations. Thus, for example, a discussion with a group of small *batik* producers quickly revealed that within the community, copying of motifs (both new and old) was widespread. The producers explained that everyone benefited from the practice. If the cost of preventing copying of motifs by others would be to limit the range of source material that was available to themselves, the trade-off did not make sense. As a pragmatic matter, everyone stood to gain more from the availability of a common fund of source material.

H. Common concerns of Indonesian traditional artists and arts community leaders

Although Indonesian traditional artists and the leaders of arts communities share positive ethical values, they are also very practical-minded about the challenges they face. They recognize that strong social, cultural and economic foundations will be necessary conditions for the continued flourishing of the Indonesian traditional arts. As the previous description of the project team's methods suggests, team members visited many artists and communities throughout Indonesia not only to observe their practices, but to ask a series of questions. The team wanted to know about how participants in traditional arts systems thought about their activities, and some of their answers have already been summarized. On every visit, however, the project team also asked about problems: What issues did our hosts see as facing the Indonesian traditional arts, and even potentially threatening their healthy survival, in years to come? The answers given were largely consistent across all the communities visited, although there were differences in emphasis from place to place – depending largely on the kinds of traditional arts practiced in each. These answers were concrete and down-to-earth, but they reflected more than immediate concerns. In addition, they mirrored a fundamental and general anxiety, rooted in a truth already mentioned above: i.e. that the traditional arts are a living, embedded part of everyday existence, drawing meaning from and infusing meaning into, social life. Given this shared understanding of the context of traditional arts, the individuals with whom the study team spoke were concerned, first and foremost, about the survival of the social institutions and activities in which the arts are rooted. This concern was localized in various ways:

1. The difficulty of connecting with audiences. The issue identified most frequently by Indonesian traditional artists and arts community leaders is the problem of audience: how to maintain and even increase the number of people who are interested in seeing, hearing or using the work that artists produce. In fact, this concern can be unpacked to reveal several more specific components. Of these, the most immediate relates to local interest in the traditional arts. Again and again, artists expressed anxiety that their practices were at risk of becoming detached from day-to-day community life. Thus, weavers who have successfully maintained or even revived old textile arts traditions told the team that fewer and fewer local people actually wore these labor-intensive locally-produced cloths, either because of shifts in taste, or for the more straightforward reason that mass-produced textiles are far less expensive; although handwoven garments might still be sought after for certain formal ritual occasions (weddings, funerals, etc.), their use was less and less a part of daily routine. Likewise, musicians reported that

they were in less demand than formerly for local ceremonial and social occasions; on occasions when, in the past, a full traditional ensemble would have been expected to perform, recorded music or a small ensemble playing electronic instruments might be employed. Even popular forms like *wayang* were under some pressure—on festive occasions when it formerly would have been essential to employ a *dalang* and invite the neighborhood, household heads may now sometimes find other ways to express hospitality.

Artists generally did not over-dramatize this problem with maintaining local audience support. In very few cases did they express the opinion that their arts were “dying” as a result, or that they were the “last of their kind.”⁸ Instead, they faced the dilemma with a mixture of fatalism and guarded optimism. It was inevitable, they thought, that the pressure from widely available commercial mass culture would draw some people away from less convenient traditional ways of dress or slower-moving traditional performance modes. But many artists were convinced that a core local audience could be maintained, and they were eager to consider strategies for building or connection with that audience. As has already been suggested, those strategies often involve making changes in the way traditional arts are presented, so as to take account of new tastes and new needs. Among the kinds of adaptations involved are the use of new subject matter in the graphic arts, the introduction of new instruments into musical ensembles, and the development of new venues for the performing arts in general.

The problem of audience has another dimension as well. Some traditional artists believe that in order to survive as working practitioners in their own local communities, they would benefit from greater access to national and international publics, and better mechanisms for identifying who would be interested in the arts they practice. First and foremost, these artists foresee that the benefits of making such connections would be economic ones. In addition, they would like to experience broader recognition for, and appreciation of, their accomplishments. In general, and with good reason, Indonesian traditional artists feel cut off from these larger audiences, and unsure about what forms of self-help would be effective in reaching them. To an extent, they view increased tourism as part of the solution. But they are cautious and concerned – even skeptical -- about how great an economic benefit tourism actually can yield, and what non-economic costs may be the price of claiming that limited benefit. Many traditional artists and arts community leaders told the project team that although they were willing to cooperate in tourism promotion efforts, they suspect that meeting the perceived demands of tourism could involve simplifying and even vulgarizing their artistic

⁸ Moreover, in some instances where they did, this clearly was not the case!

practices. Textile artists, for example, worry about adapting their designs to employ the brighter colors and bolder patterns that tourists are believed to favor, while musicians and dancers fear that once their performance tradition has been revised into an abbreviated form to appeal to short-term visitors, it may be impossible to restore its complexity.

As an alternative, some traditional artists told the project team they would like to find ways to serve local communities and, at the same time, connect with relatively discriminating high-income consumers who would prefer to purchase art (whether in the form of crafts goods, recorded music, or even live performances) that was truly “authentic.” Such an audience, however desirable, is difficult to reach. In particular, Indonesian traditional artists want to be able to make contact with these consumers without going through layers of commercial intermediaries, who they fear will retain an excessive share of any possible profits.

2. The struggle to maintain inter-generational transfer of knowledge. This was the next issue commonly identified by the artists and community leaders who spoke with members of the project team. Regular recruitment of new artists, musicians, and performers is a necessary condition for the continued health of Indonesian traditional arts, and the recruitment process now is threatened in several ways. Obviously, one threat is the decline in the local popularity of the arts, a concern that already has been discussed. But there are other threats to recruitment as well. First, many young people in communities where traditional arts are practiced see limited local opportunities for personal advancement and tend to take advantage of the opportunities offered by education (and increased mobility) to pursue careers elsewhere: factory work, business, the professions, etc. Second, talented young people are often drawn to the arts of the increasingly ubiquitous mainstream culture (from pop music to videography), and away from traditional arts which receive less recognition and exposure, and thus enjoy lesser prestige.⁹ Third, among young men and (especially) women who remain in their communities and might be available to receive training from the current generation of mature practitioners, traditional arts practice too often is seen as a difficult or uncertain way to earn a livelihood (or supplement income from other sources). As will be discussed later in this Report, formal training programs have begun to fill the recruitment gap that looms for some of the Indonesian traditional arts. Nevertheless, this remains high on the list of pressing concerns.

⁹ Accessible technology also plays a role in this process, as Professor Edi Setyawati observed: “It is only unfortunate that the preferences of the people at large have been ‘hi-jacked’ by popular mass-art products from, or imitation, those produced by certain strong industrial countries” *Supra* note 7, at 5.

3. Lack of appropriate recognition. This is the last of the “big three” issues that came up, at least to some extent, in practically every conversation the project team had with traditional artists and community leaders. Again, it is actually a set of distinct but related issues that deserve to be examined separately. First, and most generally, many artists regret the fact that, on the whole, Indonesian traditional arts receive relatively little general public attention, and that the contributions of the traditional arts to mainstream Indonesian culture sometimes go unnoted. Objectively, there are some clear exceptions to the generalization that the traditional arts receive insufficient publicity and respect. In parts of the country, certain arts (and certain outstanding artists) are celebrated; moreover, the traditional arts receive respectful treatment in museums and other cultural repositories. The artists, however, complain of an overall lack of recognition for traditional artistic practices as a living heritage.

Second, many arts communities believe that their particular local practices and products receive insufficient recognition. Artists say that when local traditional artistic productions enter the national or international market, little or no credit is given to the community in which these traditions have been maintained, nor is any information provided about the stories or other meanings that lie behind the material expressions. As will be explained in more detail later in this Report, members of the project team encountered a number of arts communities, especially communities of traditional weavers, who were experimenting with various kinds of “branding” to identify their hand-made productions in the marketplace. But members of these communities expressed anxieties about whether their efforts at branding would prove to be sufficiently robust and persistent.

Artists also see issues around acknowledgment when local visual motifs or musical figures are used as source material for mass-produced decorative products or new works of popular culture. If any source acknowledgment is given, it tends to be a generalized and uninformative one, such as “traditional design” or “traditional song.” Here, it should be stressed that the concern being expressed is not primarily—or at least not directly—an economic one. In the main, artists’ reservations are morally based. As already noted, Indonesian traditional artists are deeply committed to an ethic of sharing, and they do not necessarily desire compensation for the kind of cultural quotations just described. But they do desire specific acknowledgment, both because they regard it as being due to them and their communities, and because they believe that acknowledgement may work to the indirect benefit of the communities that act as culture-bearers by making more people aware of the living sources of Indonesian traditional arts,.

Third, and finally, no discussion of the problem of insufficient acknowledgement would be complete without emphasizing that individual artists also feel the slight of non-attribution or misattribution of their personal contributions to, or variations on, artistic traditions. The project team first encountered this version of the problem in its discussions with Javanese *dalang* (puppeteers), who lamented that when their own creative variations on the traditional *wayang* were imitated by others, credit was not often (if ever) forthcoming. Thereafter, versions of the same concern were articulated by many other individual artists working within traditional forms. Again, the concern is not primarily (or at least not explicitly) an economic one. Instead, it is rooted in artists' desire to receive recognition and to build (or maintain) their reputations. The presence of this concern in the mix is important, because it serves as a reminder that artists who practice in traditional forms have some important things in common with those who work in the mainstream, contemporary, fine, and commercial arts.

4. Risks of counterfeiting. As already noted, the three issues just described came up recurrently in the project team's conversations with artists and community leaders. Others, like this one, arose only sporadically. In a sense, this concern is simply another face of insufficient attribution. But there is an important difference. Whereas artists could cite various concrete examples of insufficient credit being given when genuine traditional material was shown, sold or adapted, they identified relatively few instances in which imitations actually were "passed off" as authentic expressions of the traditional arts. But there were some, including imitations of the unique double-*ikat* textiles of Tenganan, Bali, produced by semi-mechanized weaving operations elsewhere in Indonesia. More generally, a number of weavers at several sites were concerned that reasonable facsimiles of cloths that require weeks or months of their time might be produced in hours in factories using semi-mechanized looms, to compete unfairly in the marketplace with textiles made using traditional materials and techniques. Again, this was not a consistent theme in conversations with the project team, but it arose frequently enough to be worthy of an independent mention here. When it came up, incidentally, the concern was most frequently articulated with respect to "knock-offs" that might potentially be made and sold within Indonesia itself.

5. Misappropriation by unauthorized reproduction or distribution. Some artists, especially musicians and dancers, had significant concerns about this issue, even though they pointed to relatively few specific examples. They worried that the new technologies that make high-quality audio and video recording easy, inexpensive and inconspicuous might lead to an increase in cases of unscrupulous individuals attending traditional performances and later commercializing recordings they had made. The

emphasis on commercialization is important. As far as the project team could determine, Indonesian performance artists are not concerned that their work might be documented through informal recordings (even of high quality) for private use; nor do they object to recordings made for scientific or academic purposes.

A related (and as yet largely hypothetical) concern was articulated by some traditional visual artists, who were concerned that exact or close copies of their works might be captured by technological means and then applied as decorative detail to mass-produced consumer goods (such as household furnishings). Here, the artists' stated concern was not so much with the risk of misattribution or non-attribution as it was with the wholesale commercial misappropriation of traditional design. Although imitation by contemporary artists was perceived by most traditional artists as a form of flattery or an inevitable concomitant of the artistic process, this sort of commercial behavior was often disapproved on both moral and economic grounds.

6. Foreign IP claims to Indonesian cultural heritage. This is a set of concerns that came up only infrequently in conversations with traditional artists and arts community leaders. However, it is important to acknowledge here because it arose so often in talks with opinion leaders (such as journalists) and policy-makers. Briefly, the issue arises from a belief that Indonesian cultural heritage (including, but not limited to, the traditional arts) is at risk of being “captured” through patent and copyright claims by non-Indonesians. Of course, such claims would be made under foreign law, and as such would not operate within Indonesia itself. Nevertheless, the specter of material from the Indonesian “commons” becoming someone else’s IP—whether in Malaysia, Japan, the United States, or Europe—was a genuinely alarming one. In various conversations, for example, the project team heard second-hand reports of a Japanese patent relating to *tempe* (a high protein food product made of cultured soybeans) and Malaysian patents on batik and *rendang* (a food specialty of Minangkabau). We did not attempt to verify these reports, but (depending on their exact nature) such claims obviously could conflict with widely-held notions of basic commercial fairness. However, the actual facts behind these examples are less important, at least in the context of this discussion of concerns, than the anxiety they reveal: that misuse of IP laws could inappropriately convert Indonesian tradition into a kind of naturally-occurring raw material for foreign nations or their entrepreneurs.

J. Issues not identified by traditional artists and arts community leaders

There were several sets of concerns that the project team expected to hear articulated during its interviews, but which did not, in fact, come up. Before summarizing these, it is important to note that the failure of artists and community leaders to raise these concerns was not due to any lack of opportunity to do so. In conversation after conversation, members of the project team took the lead in raising these issues, both through general questioning, and through the use of pointed hypothetical examples. These techniques, however, did not succeed in eliciting statements of concern from artists and others. By the conclusion of its visits, the team was satisfied that, in fact, these issues simply were not of present or prospective concern to the individuals interviewed.

The existence (or non-existence) of two “non-issues,” in particular, is a central finding of the study, with important implications for the legal analysis that follows later in this Report:

1. Stylistic and thematic imitation. The project team was unsuccessful in eliciting any expressions of concern about this potential issue. Although, as already described, Indonesian traditional artists do worry about the wholesale commercial reproduction and distribution of their productions, they do not appear to disapprove of partial copying, creative adaptations, or the selective borrowing of specific motifs or elements, so long as—a crucial qualification—appropriate credit is given to the traditional source community and/or the individual traditional artist or artists involved. One can only speculate as to the reasons for this lack of concern. The best explanation would appear to be Indonesian traditional artists’ commitment to the “culture of sharing” described earlier in this Report. A related secondary reason is that Indonesian traditional artists are acutely aware of the degree to which their own artistic practice is founded on a history of imitation and borrowing. This is true historically, in the sense that the “indigenous” traditions of many Indonesian regions reflect elements (visual motifs, musical instrumentation, etc.) that were borrowed at some past time from other local cultures in and beyond the archipelago. It is also true in contemporary practice that in their efforts to maintain the vitality of the traditional arts, many of today’s practitioners self-consciously blend and combine materials from various domestic and foreign sources with elements of their own communities’ cultural heritage.

For example, many Indonesian graphic designs, including those found on widespread jewelry or textile forms, can be matched with identical prehistoric Austronesian artifact patterns that are distributed from mainland Southeast Asia throughout the modern Philippines and Indonesia. Numerous Javanese and Balinese *wayang* story lines are adapted from Indian epics such as the Ramayana and Mahabharata. Several of the most prized eastern Indonesian textile forms also adapt

motifs drawn from ancient Indian trade textiles called *patola* cloths. Additionally, Arab musical influences are found in many regions, including both instrumentation (lutes, zithers) and rhythmic figures.

Many foreign and local musical instruments have been adopted across local cultures of Indonesian traditional music, by practitioners who consciously aware that these instruments do not belong to their local culture. The *randai* traditional theater of Minangkabau has adapting the Melayu drum as well as an African drum, the *jembe*, for their musical ensemble. The Western violin is given a local name, *rabab pasisia*, in Minangkabau, where it functions as an accompanying instrument for storytellers and in the *dendang* singing tradition. The term *rabab* itself, in fact, is originally Arabic for the two-stringed bowed instrument (spike fiddle), and the term now used in many areas of Indonesia for instruments used in both rural and court traditions (such as the Javanese and Balinese *rebab*).

The *ronggeng* (an entertaining social dance) of the Melayu people who live in the eastern coast of Sumatra, also uses a Western violin as a leading instrument, describing it as a *biola* (an apparent borrowing from *viola*). This particular *ronggeng* tradition also uses an *akordion* (the Western accordion) to replace an older free reed instrument, the *harmonium*. The single- or double-reed flutes (*seruna* and *sarune*) that have become important melodic instruments in Sumatra and some other islands are closely related to similarly named instruments (such as the *nai*, *shantai*, and *zurna*) found in the Middle East, India, and Eastern Europe.

The recent development of instrumentation includes the adoption and adaptation of new technologies (also originating outside Indonesia) for use in traditional settings and occasions. The *gendang kibod* of the Karonese people in North Sumatra, for example, uses an electronic keyboard for social as well as sacred ceremonial occasions, and the project team witnessed a performance using similar instrumentation at a funeral ceremony of the Toba people (*saurmatua*), in Pangururan, Samosir. This development is more than a simple substitution of one instrument for others. Instead, it involves the evolution of new modes of performance. Thus, the creativity of traditional musicians allows them to program their keyboards so as to blend in with traditional ensembles while still taking advantage of the new instruments' special sound quality.

2. Misuse of sacred or secret material. The project team was surprised to find that there was effectively no concern among traditional artists or community leaders about disparaging, demeaning or disrespectful third party uses of traditional arts that had important ritual or religious significance within their communities of origin. On one occasion, for

example, a woodcarver in Tana Toraja, whose family long had produced carvings conventionally used to signal the status of families occupying traditional houses, also was making some of these available for purchase by people from outside the community. Asked about the possibility that purchasers might use these objects (as in fact they had) to decorate a lobby or function room in a tourist hotel, he explained whether they did so was of no concern to him. Nor was a Sumatran community leader upset that traditionally-crafted and decorated garments whose use within the community is specifically reserved for royal ceremonial purposes might end up being worn as fashion statements on the streets of Jakarta or New York. These individuals' reasoning was echoed by others with whom the project team spoke at various places in Indonesia: Once the object has entered the market, they explained, it has been fully decontextualized—that is, it has lost whatever social meaning (including ritual meaning) it once possessed. At that point, it is no more than a thing, the use of which is the choice of whoever possesses it. While the use of this object by a member of the community would be regulated by *adat* law, those principles had no application outside the community. Nor did any of those who spoke with the team believe that *adat* law could or should have such application. Incidentally, their reasoning was not affected when they were asked their opinion about examples in which the artistic production that was being used out of context was an intangible manifestation of tradition rather than a tangible one (a song with ritual significance, for example, rather than a ceremonially significant textile). The logic of decontextualization just described appears to apply with equal force in such circumstances.

The project team also had expected to hear instances or examples of a special version of the general problem of disrespectful use: the inappropriate or undesired public disclosure of traditions that are private and internal to the communities that have fostered and supported them over generations and centuries. But it did not.¹⁰ Moreover, despite the team's best efforts, it was impossible to elicit significant concern from traditional artists and community leaders about hypothetical examples designed to raise this concern. Nor (for obvious reasons) would those interviewed offer examples of local "secret" traditions that they would be upset to have revealed. The reasons for this are unclear, but in the absence of any direct evidence, the simplest explanation is to be preferred: Within traditional communities, the local customary (or *adat*) structures of social control appear to have been effective in keeping

¹⁰ Even the policymakers with whom the project team spoke, who referred more frequently to the risk of disrespectful uses of secret or sacred arts, confined themselves to generalized or hypothetical illustrations of the issue. The issue was discussed at the June 2007 Jakarta workshop at which this Report was presented in draft. Again, members of the audience expressed concern, but presented no concrete, actual examples.

secrets truly secret, and that no one foresees any imminent breakdown of those *adat* principles—although some worry that economic pressures could undermine their effectiveness.

K. A final area of concern: preserving the freedom to innovate

As already noted, the project team’s conversations did not focus on law as such; instead, the team sought information about the strengths and weaknesses of the traditional arts system itself. Inevitably, however, the topic of law did come up, as team members explained the background of the study and the purpose of their questions. As a result, the team had a chance to hear the artists and community leaders articulate one additional concern. Strictly speaking, a discussion of this issue may not belong at this point in the Report, since it does not relate directly to the current state of the traditional arts. But because it relates to the possible effects of future legal regulation on those arts, it may be useful to summarize it here.

The artists and community leaders with whom the project team spoke were not legal experts, but most had a sound basic understanding of the function of IP law: to regulate new uses of existing information resources. Just as a patent may restrict new innovation in technology, or a copyright may circumscribe a new author’s creative choices, so IP rights in or around traditional arts have the potential to impinge not only on third party users but on participants in the traditional arts system itself. In other words, the individuals with whom the team spoke understood that an IP regime for traditional arts had the potential to confine and restrict, as well as potentially to support, their own practices.

This insight, in turn, helped to inform the thinking of the project team. In interview after interview, artists reaffirmed the importance of innovation within the practice of traditional arts, as well as the important role that hybridization plays in maintaining the vitality of those arts. This suggested a biological analogy to members of the project team: the way in which, by introducing genetic diversity, cross-breeding may contribute to a plant or animal species’ chances of long-term survival. Indonesian traditional artists certainly are not immune to the promise of IP and the enhanced levels of control over their own cultural productions that it might bring—however elusive that promise may be in practice. But they also are aware of the creative costs associated with excessive IP regulation. Thus, to the extent that they express views about IP as such, the custodians of the Indonesian traditional arts generally have a preference for a balanced system—one that will provide some level of protection against real risks of serious economic and moral harm, while at the same time allowing everyone (including participants in traditional

arts systems) a significant amount of access to culture and a meaningful space for innovation.¹¹ One might say that their preference is for a system that would provide for “cultural sustainability” by avoiding the risks associated with both under-protection and over-protection.¹² They recognize, as the project team came to understand, that the maintenance of systems for the transmission of knowledge and practice within living communities should be the first-order goal of any new legal initiatives to safeguard traditional artistic culture.

L. The place of IP law in an overall strategy to support Indonesian traditional arts

Returning to the major recurrent concerns expressed by the Indonesian traditional artists and community leaders with whom the project team spoke, it is clear that, first and foremost, they desired greater respect for their practices in their own communities and in the society at large. *These recurrent concerns they expressed could be resolved, in substantial part, if policymakers, educators and business people were to recognize more fully the importance of efforts to transmit, document, and celebrate traditional culture.* If traditional arts, and the work of the culture-bearers who maintain them, received more recognition, arts communities would have fewer problems finding audiences (local or national) and less difficulty passing along their knowledge to subsequent generations. Additionally, higher levels of respect for traditional arts and artists in the general society would do much to mitigate the expressed concerns about attribution and related career issues.

If businesspeople or mainstream artists recognized the importance of traditional arts and the complexity of the traditional arts system, they would be less likely to take them for granted. It is impossible, however, to legislate respect. A failure to afford recognition where it is due is primarily a matter of ethical, rather than legal, dimensions. Some ways in which respect for traditional arts can be engendered at the local and national levels, without resort to further legal regulation of cultural practice, are considered in the next heading of this Report.

¹¹ In this, their attitudes mirrored the notion of balance that is coded into Article 27 of the 1948 Universal Declaration, which is discussed in part D.2 of this Report, below.

¹² The concept of “cultural sustainability” derives from the March 11, 1993 “Bellagio Declaration,”—more formally, the Statement of the Bellagio Conference on Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post-Colonial Era, *available at* <http://www.cwru.edu/affil/sce/BellagioDec.html>. The concept is explored in Peter Jaszi & Martha Woodmansee, *Beyond Authorship: Refiguring Rights in Traditional Culture and Bioknowledge*, in SCIENTIFIC AUTHORSHIP: CREDIT AND INTELLECTUAL PROPERTY IN SCIENCE (Mario Biagioli and Peter Galison eds., 2003).

Arguably, however, some of the concerns expressed by artists and community leaders cannot be addressed simply by promoting greater respect for traditional arts. So there may be ways in which positive law—specifically, a national IP regime—can support the flourishing of traditional arts in Indonesia. But there are also limits on what such law reasonably can be expected to accomplish, even at best. Conventional IP rights (such as copyright and patent) are designed to promote cultural and scientific innovation by providing a more reliable source of economic return to authors and inventors. In addition, such IP rights also may protect the moral interests of creators, by giving them the ability to insist on proper attribution when their creations are used by others, or to veto inappropriate uses of those creations. However, IP rights are not a panacea. Indeed, the project team has serious questions about how much IP actually has to offer the individuals and communities who work to maintain and expand the traditional arts of Indonesia.

To begin, many of the theoretical assumptions that are invoked to justify systems of IP rights in general remain untested. Even in the most developed countries there are persistent doubts about how effectively those rights actually function to promote innovation and protect knowledge resources. Critics of IP argue forcefully that these legal regimes actually are better designed to create and safeguard the wealth of firms that invest in marketing knowledge products than they are in facilitating the process by which knowledge is produced.¹³ These critics further suggest that, to a great extent, functioning systems of knowledge production will run by themselves, irrespective of legal support. If this generalization is true of the production of literature or computer software, for example, it also may apply to traditional arts systems.

Moreover, IP systems are complex and expensive to administer. Because of the costs involved, direct state enforcement of IP rights is the exception throughout the world; private enforcement is (and is likely to remain) the general norm. In other words, IP systems rely for their effectiveness on a relatively high level of participation from the private sector. For the good functioning of such legal regimes, there must be organizations or individuals with the motivation and the economic means to engage in both informal enforcement activities (policing uses through monitoring and correspondence) and formal ones (administrative and judicial proceedings).¹⁴ Likewise, there must be practical opportunities through

¹³ One highly readable example of such critiques is DEBORA J. HALBERT, *INTELLECTUAL PROPERTY IN THE INFORMATION AGE: THE POLITICS OF EXPANDING OWNERSHIP RIGHTS* (1999). Another is DAVID L. LANGE & H. JEFFERSON POWELL, *NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT* 65-85 (2009).

¹⁴ Thus, for example, the success of enforcement on behalf of a nation's musical composers depends on the existence in its territory of a high-functioning "collective administration organization" that

which those who are targeted for enforcement can defend their challenged activities. Otherwise, the boundaries of the IP rights in question—what they prohibit and what they permit—will remain unclear. Unless an IP regime is actively tested, there is a real risk that it will be more effective in stifling and limiting cultural activity than in protecting or promoting it.¹⁵ Thus, maintaining a balanced IP system can be a socially (as well as individually) costly proposition.

The foregoing points are not an argument against considering some new IP provisions relating to Indonesian traditional arts. They are, however, part of an argument for considering a diversified approach. Such an approach would recognize other public policy strategies—perhaps more powerful and almost certainly more cost-effective—that deserve consideration along with (or as alternatives to) additional legal protection. The suggestions that follow, it should be emphasized, grow directly out of the concerns expressed to the project team in discussions with traditional artists and arts community leaders.

M. Other policy initiatives to support the traditional arts

If an important goal of policies in support of the traditional arts is to promote public respect for (and interest in) this set of cultural practices, there are a number of initiatives that can be taken, either at various levels of government or within the civil society, to achieve that end. These include:

1. Greater media exposure for traditional arts. Considering the richness and diversity of the Indonesian traditional arts, it is somewhat surprising that they receive very little in the way of mainstream media attention. Browsing in a well-stocked music store in Jakarta, it is difficult to locate recordings of traditional music, apart from a few tourist-oriented compilation CD's. Likewise, the authentic traditional arts have little presence on national television. Such failures of media attention can be consequential. Indeed, the project team was told that the end of late-night television broadcasts of authentic *wayang* has adversely affected public interest in this medium. By contrast, the project team discovered that in West Sumatra, the popularity of the, the popularity of the traditional Minangkabau narrative genre *kaba* has been sustained by regular weekly broadcasts over local government radio which have been taking place for the past 13 years! Although these shows lack some of the intimacy and interactivity of the live *kaba* performances, they have

can act on behalf of copyright owners both generally and individually. For more detail, see WORLDWIDE COLLECTIVE MANAGEMENT OF COPYRIGHT AND NEIGHBORING RIGHTS (Daniel Gervais ed., 2006).

¹⁵ The United States Supreme Court discussed the importance of policing the boundaries of copyright through active defense of infringement claims in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1993).

been effective in maintaining public awareness of, and interest in, this art form. Performers credit this regular media exposure with helping to assure the survival of *kaba* as a living artistic tradition. Likewise, in other areas, the availability of recorded performances in local traditional musical genres has helped to sustain public interest.

Obviously, much more could be done along the same lines at the local level, and new initiatives could be undertaken to disseminate knowledge about the traditional arts to national audiences. Initiatives like the 2005 *Megalithikum Kuantum* production (organized by project team member Rizaldi Siangian), blending authentic performances by traditional performing artists with contributions from popular contemporary musicians, also hold promise for promoting respect and understanding of the Indonesian traditional arts. The 1990-1991 Festival of Indonesia in the U.S. produced several art books that were distributed as a benefit-sharing initiative to participating Indonesian institutions. Future overseas Indonesian arts exhibits might be usefully paired with local versions and venues, which could contribute further to domestic education and awareness. Additionally, it would help to sponsor contests for documentary film or video projects that take traditional arts and artists as their themes.

2. Strengthening and integrating curricula in arts education.

Among the experts with whom members of the project team had the opportunity to meet was Professor Endo Suanda, a noted performer, teacher and ethnomusicologist who directs the non-profit Foundation for Arts Education of the Archipelago (*Pendidikan Seni Nusantara*). On the subject of arts education, he has written that

In Indonesia, as elsewhere in the world, elementary school classes are taught by general teachers, not by specialists; teachers teach all subjects: including mathematics, language and art. In high schools expert teachers are employed. Art is generally taught by specialized art teachers, who studied art to become art teachers. These art teachers are generally skilled in one discipline, be it visual art, music, etc. Most schools only have one art teacher, with the result that generally only one type of art is taught. This is problematic, because students need to be made aware of the whole range of arts.

Almost all “art” that is taught is based on a western art system. The colours in the visual arts, the tuning in the music, the plots, staging and design in theatre, all are based on western (classical and modern) norms. This is problematic in a multicultural country such as Indonesia, which is so rich in its

own art forms with a wide range of concepts of colours and space, and as much variety in art as there is in cultures—from the Javanese to the Sumatran. If the concept of “art” is taught as one, singular, western based concept, the Indonesian students will not appreciate their own art-forms or even recognize them as arts.

There is a gap between concepts taught at school and the social reality. In reality we have complexity but we are not taught to appreciate it. Also, the art taught in school does not teach the students to understand complex phenomena. Students are taught to see things in a neat and orderly way. Subjects are divided and the interconnections are ignored. Because of this, subjects such as music and theatre are taught separately.¹⁶

If the goal is to promote respect for, and interest in, the traditional arts, the approach just described is a sure recipe for failure. On the other hand, adoption of an integrated approach to arts education that emphasized the value of traditional Indonesian forms along with their Western counterparts would be among the most powerful steps that could taken to support the traditional arts. As Professor Suanda has put it, “At the current time, living traditional culture is not brought into schools [and] curricula do not reflect the realities of community life. We therefore need tools and means of bridging the gap between communities and school students to learn about and appreciate their own cultures and heritage.”

Museums also have a potentially important role to play in support of arts education. To cite one example, during its visit to the regional museum in Kupang, Timor, the project team was impressed with the part that institution (under the direction of Mr. Leo Nahak) was taking in introducing schoolchildren to the traditional arts, through a variety of highly accessible programs and activities.

Higher education has a significant role to play, as well. In Minangkabau, at the STSI Padang Pajang, a visit with faculty and students demonstrated the range of programs that an academic institution can undertake to encourage interest in and respect for traditional arts. Students from this institution, and others like it across Indonesia, learn both the theory and practice of old forms of music, dance and graphic arts. They, in turn, transmit this knowledge after graduation, through

¹⁶ Professor Suanda’s paper, from which these quotations are drawn, is available at http://www.unescobkk.org/fileadmin/user_upload/culture/Arts_Education/HK_Presentations/Art_Education_in_Indonesia_-_Endo_Suanda.pdf.

their work as teachers, cultural and tourism workers, etc. Moreover, some of these students become lifelong practitioners of the local traditional arts in which they have been schooled. In this sense, institutions like the STSIs not only play an educational role, but also contribute to the process of “cultural revitalization.”

3. The promise of “revitalization projects”

Throughout its travels in Indonesia, the project team encountered successful and inspiring examples of revitalization projects aimed at promoting the traditional arts. In the main, these involved locally focused education efforts that are designed to inspire new interest in old forms of music, dance, graphic arts or storytelling. Two previously mentioned weaving cooperatives, in Kefamenanu, Timor, and Sintang, West Kalimantan, are outstanding examples, as are two projects observed in Flores: the STILL cooperative in Nita village and the Sanggar Bliiran Sina organized by Daniel David, in Watublapi. All these efforts exhibit a self-conscious commitment to reviving the interest of local people (especially young women) in old and important arts traditions that are at risk of dying out, or have been compromised by the introduction of modern materials and techniques, or both. Although these projects have received outside support (from sources including the Ford Foundation), they are locally initiated and locally managed. By demonstrating to the next generation that participation in old-style textile arts can bring not only satisfaction but also needed additional income, these projects are truly revitalizing the traditional arts in the areas where they operate. The Threads of Life Gallery, mentioned previously, has played an instrumental role in helping to revive knowledge of old ways in textile production by bringing local weavers together to share information.¹⁷ Notably, the positive effects of these revitalization efforts are not limited to the textile arts that are their immediate focus. In addition, they have stimulated new interest in old music forms associated with the weaving process and in other traditional arts.

The project team encountered other striking examples of successful local cultural revitalization in South Sulawesi. Funding and technical assistance had been provided through the Ford Foundation-supported La Galigo Research Center, overseen by Professor Nurhayati Rahman of Hasanuddin University in Makassar. Young people in Pangkep village were learning to sing and play traditional songs, and in Bulo'e, where children were being taught to chant the verses of *I La Galigo* and other Bugis pieces. In Tana Toraja, in the village of Suloara' (on Mt. Sesean), local teachers and university students from Makassar were helping local

¹⁷ Its programs, including marketing assistance for weavers and workshops to promote traditional weaving techniques, are more fully described at <http://www.threadssoflife.com/>.

children to learn old dances and traditional instruments, with the goal of eventually reviving the *mabua* ritual.

In North Sumatra, the project team witnessed other impressive instances of cultural revitalization. One example is the revitalization of Opera Batak as a performance tradition in Siantar through the efforts of Thompson Hs and his studio. This initiative brings together older performers who were “stars” of the Opera Batak before its decline, young people who aspire to carrying the tradition forward, and a director with extensive contemporary theater experience. In turn, its success is influencing the arts curricula of local schools and capturing public attention through a new series of television broadcasts. Also notable was a revitalization program with official backing on Samosir Island, where the local government has various programs to support and encourage local *ulos* weavers and help them to identify markets for their productions. In general, the revitalization approach appears to be a targeted and efficient way of supporting traditional arts.

4. Various additional innovative initiatives in support of traditional arts.

Clearly, there is room for more practical efforts to promote interest in and respect for the Indonesian traditional arts – both within the communities with which particular traditions are associated and more generally. In its conversations with artists and community leaders, the project team heard a good deal about the advantages and disadvantages of using local and regional competitions as a vehicle for arts promotion. In general, the individuals with whom the team members spoke had strong reservations about the competition model, at least as it currently is being practiced in many places. They were concerned that the objective of competitions in that model was to identify or reward the most “typical” or simply the “best” new work within a given tradition, and that this approach might have the unintended consequence of encouraging artists to modify (and perhaps simplify) their work in order to gain money or recognition. By requiring participants to compete head-to-head, this sort of contest tends to promote individualism rather than community spirit, and might actually be counterproductive for the goal of promoting the traditional arts. For similar reasons, artists were concerned about regional competitions that pitted artists from one local community against another to determine whose work or performance was most suitable to represent the area. The project team believes that there would be advantages in considering a “festival” or “celebration” model, rather than a competition model. In that way, Indonesia’s artistic *diversity* and *multiplicity* could be honored at all levels from the local to the national.

Artists were affirmatively interested in models for providing recognition through special awards while avoiding the pitfalls of competition—models

that would be suited to the goal of encouraging the practice of traditional arts in the context of community. At the Yayasan Komunikasi Budaya Seni in Sintang, West Kalimantan, for example, the project team had the opportunity to observe the cooperative's annual judging (overseen by a group of visiting foreign museum officials!) and the prize-giving that followed. These were events which gave recognition to women of the community for their accomplishments, but did not inevitably put them into head-on competition with one another. Because there were many prize categories (one for large and small *ikat* weavings, one for experienced weavers, and one for novices, etc.), there were also many winners. In the end, the effect of the ceremony was to honor the community as a whole, and exhibit the range of its creativity, as well as to single out some individuals for excellence.

Weavers also expressed interest in what would represent another small but significant step to promote traditional textile arts: an initiative to encourage (or even require) local officials to incorporate locally made materials into their official uniforms, or (alternatively) to wear garments employing local motifs at least one day during the week. Efforts to introduce (or revive) this approach to showcasing local traditional arts have run into resistance, however, from officials who state that public servants cannot afford to purchase relatively expensive hand-woven garments. At one site visited by the project team, a possible solution was suggested: that the local weaving cooperative should (in effect) license a local textile mill to produce inexpensive versions of their traditional cloths on semi-mechanized looms!

Another worthwhile institutional initiative would be to encourage the development of additional *sanggars* on the model of Bliran Sina, in Watublapi, Flores, where the project team visited. The term *sanggar* has several meanings—an artists' workshop, typically centered around one artist-teacher; or, as in Watublapi, a village collective that (among other things) represents the local arts to tourists. As evidenced in Bliran Sina, the village collective model of the *sanggar* has tremendous potential. Over time, such organizations should be able to focus not simply on developing a single "cultural package" to present to tourists, also on their role as training organizations for youth who are preparing to take over their elders' roles in traditional arts.

Finally, at a national and regional level, there is a real need for institutional development to provide public support for traditional arts initiatives based on impartial and transparent evaluation of the quality of proposals submitted by localities and communities. This suggests the

desirability of exploring structures in the United States, such as the state Arts Councils and the National Endowment for the Arts.¹⁸

5. Other efforts to connect traditional artists with audiences

In many traditional arts communities visited by the project team, there was awareness that a large potential market for their productions exists beyond the locality, the region or even Indonesia itself. Although traditional artists are committed, first and foremost, to working within their own communities to develop their skills, preserve their heritage, and transmit their knowledge to others, these activities require material and financial support that may not be forthcoming locally. Thus, for example, more local performing arts groups could benefit from opportunities to tour and present their repertoires to audiences throughout Indonesia and beyond. Even relatively close to home, such arts groups may currently lack opportunities to perform for audiences larger or more diverse than those in their own home communities. Regional governments could contribute significantly to the vitality of traditional performing arts by creating dedicated performance spaces in important population centers that could be used throughout the year by various different troupes and companies from nearby towns and villages.

The situation is similar in the context of textile arts. One goal of revitalization projects in villages with strong weaving traditions is to make sure that local people themselves can own a few good textiles for use on special occasions. In practice, however, locals often cannot afford to purchase more than a small part of the output produced by community artists. Nor, in most cases, can tourists be relied upon as purchasers. Thus, efforts to connect those artists with potential purchasers far away take on great practical significance. Although some organizations, like the Threads of Life Gallery in Ubud, Bali, play a responsible role as market intermediaries, there is a need for more of them, and for efforts to connect the artists with potential purchasers even more directly. In Kefamenanu, Timor, for example, the Tafean Pah group has used funds from its 2004 Prince Klaus prize award to build a cooperative center which includes an attractive shop, staffed by local women, where weavings from more than a dozen surrounding villages are sold to visitors. The cooperative also has developed a mail order catalogue. But in Kefa, and elsewhere in Indonesia, local craftspeople wonder whether additional outreach may be possible, making use of new technologies like digital photography and the World Wide Web to contact collectors in Europe, Japan and the United States who might be willing to invest substantially (for example) in high-end textiles made by

¹⁸ Information about the NEA grant process, with its emphasis on professional internal and external review of proposals, is available at <http://www.nea.gov/grants/apply/Folk.html>.

traditional methods, using natural dyes and hand-spun thread. A relatively modest technical assistance initiative might make a large difference in the success of various revitalization projects.

6. Capacity building within *adat* institutions. As already has been noted, *adat* institutions have a crucial role to play in the development and sustainability of the Indonesian traditional arts. It is through these customary structures of local regulation, which command profound respect from local citizens across Indonesia, that ideas about proper behavior in many aspects of daily life are publicized and—where necessary—enforced. This is as true for rules about the conduct of traditional arts as it is for those concerning land ownership, resource use, or family formation. As already noted, the *adat* laws administered by local councils have been remarkably successful in limiting the disclosure of private or secret arts traditions beyond the communities to which those traditions belong. *Adat* institutions also are in a position to mediate effectively between parties in disputes that may arise within the community about the appropriate use of traditional materials. These institutions, however, could play an even more active and positive role in the promotion of traditional arts. By virtue of their authority, *adat* leaders have the potential to become active supporters of efforts to maintain or revitalize local traditions. Enlisting the active support of *adat* leaders, and assuring that they have the means to engage with the issues, could be a crucial step in protecting and promoting local arts practices.

N. Non-IP legal initiatives: protection of cultural heritage

Finally, before turning to the roles that conventional and innovative IP laws might have to play in promoting the Indonesian traditional arts, it is important to note an alternative that provides a separate and distinct source of legal support for tradition—legislation for the protection and preservation of tangible cultural heritage. By definition, such laws are distinguishable from conventional IP, which deals primarily (if not exclusively) with intangible products of the mind. Thus, legal issues ranging from the safeguarding of archeological sites to the regulation of the antiquities trade fall outside the scope of IP, although they may be addressed by tangible cultural heritage legislation at the national level, and by international treaties on the subject. Although tangible cultural heritage laws and IP have a high-level relationship, in that both deal with aspects of national cultural policy, the areas of overlap between them are otherwise relatively few.

In Indonesia, the relevant legislation is Law No. 5/1992, “Regarding Cultural Heritage,” and during its visits around Indonesia the project

team occasionally heard that more could and should be done to provide meaningful enforcement for this law's provisions. These concerns about enforcement were voiced, incidentally, not by traditional artists but by museum officials and government officers who encounter problems relating to the physical record of traditional culture on a daily basis. Although revisions to law or practice around tangible cultural heritage (ICH) in Indonesia fall outside the scope of this Report, it is important to note that some of most real and pressing anxieties about the survival of traditional culture in Indonesia involve tangible materials rather than intangible objects. The universe of authentic, significant physical materials representing the past of the traditional arts is limited, and undoubtedly at risk. By contrast, the living practice of the traditional arts is (as has already been suggested) relatively healthy and even (in general) robust. It is important to avoid any risk that energy that could and should be invested in invigorating protection for ICH might be diverted to the arguably less urgent topic of IP protection for traditional arts.

II. TRADITIONAL ARTS AND INTELLECTUAL PROPERTY: POSSIBILITIES AND CONCERNS

A. Law and traditional arts in context – how U.N. agencies help shape discourse

The current international discussion about new legal regimes to regulate old forms of knowledge has evolved significantly since the early 1990's, thanks in large part to the efforts of several United Nations agencies that have engaged with the topic. The approach taken by UNESCO, as expressed in its 2003 Convention for the Safeguarding of Intangible Cultural Heritage¹⁹, is broad in some respects and narrow in others. Thus, the agency's definition of ICH is an encompassing one (including oral traditions, language, performing arts, social practices including rituals and festivals, knowledge and practices concerning nature and the universe, and craftsmanship). By contrast, however, the scope of the obligations foreseen by the treaty is narrow; by becoming parties, countries commit themselves to engage in documentation and promotion of their domestic ICH, and (among other things) to participate in generating an internationally-recognized Representative List of the Intangible Cultural Heritage of Humanity. (This list carries forward the existing UNESCO program of Masterpieces of the Oral and Intangible Heritage of Humanity, under which on Indonesia's nomination, the

¹⁹ See <http://www.unesco.org/culture/ich/index.php>. For an excellent critical review of this approach, see Naomi Mezey, *The Paradoxes of Cultural Property*, 107 COLUM. L. REV. 2004 (2007). For an in-depth look at the issue from UNESCO's perspective, see SAFEGUARDING TRADITIONAL CULTURES: A GLOBAL ASSESSMENT (Peter Seitel ed., Smithsonian Center for Folklife and Cultural Heritage 2001).

organization designated *wayang* in 2003; this list, in turn, complements the agency's well-established international listing of physical World Heritage Sites;) What the UNESCO approach does not anticipate is any systematic effort to define rights of ownership or legal control with respect to the use of various items of ICH.

WIPO (the World Intellectual Property Organization) has taken a very different approach in its consideration of the issue. As the agency's website reports, "the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established by the WIPO General Assembly in October 2000 (document WO/GA/26/6) as an international forum for debate and dialogue concerning the interplay between intellectual property (IP), and traditional knowledge, genetic resources, and traditional cultural expressions (folklore)."²⁰ In other words, WIPO's focus has been specifically on the IP dimensions of the larger intangible cultural heritage issue, and it has attempted to organize its deliberations around three kinds or categories of information resources. This tripartite classification has become conventional in many discussions of issues at the national level, including the one that currently is taking place in Indonesia. Nevertheless, the project team had some reservations about the WIPO terminology.

B. Definitions and overlaps

The WIPO classification of subject matter is as follows:

1. "Traditional knowledge." In a recent document (WIPO/GRTKF/IC/9/5), WIPO has defined this category of subject-matter, often reduced to the acronym TK, as the "content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources." In other words, the main thrust is toward what might be termed indigenous scientific know-how. Significantly, this is an open-ended description that does not necessarily exclude skills and practices related to cultural production. For example, a reasonable argument can be made, for example, that techniques for producing music from a bamboo flute, as well as the "know-how" for constructing the instrument itself, would constitute TK. Clearly, however, one of the main policy thrusts

²⁰ See <http://www.wipo.int/tk/en/igc/>.

behind WIPO's articulation of this category is burgeoning international concern about "biopiracy" and the misappropriation of "bioknowledge."²¹

2. "Genetic resources." The 1992 Convention on Biological Diversity (CBD)²² specifically identified so-called "genetic resources" (GR's) as a category of knowledge assets worthy of recognition and protection – a development which, in turn, reflects the increasing international trend toward the patenting of life forms themselves or inventions that incorporate them. Although it has not received an official definition from WIPO, the common sense meaning of the term is plain: the "genetic resources" of a geographic area are the specific information sets encoded in the DNA of plants and animals (as well as human beings) found there. The work of the WIPO Intergovernmental Committee on this issue reflects the assumption that sovereign states should be in a position to license commercial exploitation of their own genetic resources. The specific mechanism envisioned is one in which outsiders' access to local life forms could be conditioned on prior agreements to engage in "benefit sharing." Obviously, the line between "traditional knowledge" and "genetic resources" is a somewhat blurry one. So, too, may be the line between "genetic resources" and the elements that make up systems of artistic production. Thus, for example, the genetic make-up of a plant that yields a red dye traditionally used in body painting may be a thing of value in itself, since the information might be used to create synthetic cosmetics (or other products). By the same token, however, the knowledge of how to extract color from the plant itself would be an element of traditional knowledge (in the WIPO classification). Meanwhile, a particular community's knowledge of how to work with this dye may be integral to the way they practice the arts of personal ornamentation.

3. "Traditional cultural expressions." When the issue of protection for the imaginative productions of indigenous and local communities arose in the 1970's (having been glossed over in the 1971 Paris Act of the Berne Convention on the Protection of Literary and Artistic Works), the conventional designation then in use for the subject matter at issue was "expressions of folklore" (the term "expression" having been borrowed from the standard vocabulary of copyright law, where it refers to the protectable content of an artist's work). In 1985, WIPO and UNESCO took a first stab at the problem, promulgating what were called "Model Provisions for National Laws on the Protection of Expressions of Folklore

²¹ A good discussion of this category is Peter-Tobias Stoll and Anja von Hahn, *Part III, Section 1: Traditional Knowledge*, in *INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE* (Silke von Lewinski, ed., 2d ed. 2008).

²² See <http://www.cdb.int>.

Against Illicit Exploitation and Other Prejudicial Actions.”²³ Over the next two decades, however, the use of “folklore” was increasingly criticized as representing a patronizing colonial mentality toward the cultural productions of indigenous and/or local people. The problem, critics said, was that the very terminology communicated hierarchical assumption about the relative value of the mainstream Western arts, on the one hand, and creative practices that occur in more localized traditional contexts on the other. As a result, WIPO has now developed the alternative terminology of “traditional cultural expressions” (TCE’s). The recent WIPO document referenced above defines TCE’s as:

any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof

This includes “verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;” “musical expressions,” and “expressions by action such as dances, plays ceremonies and rituals.” For good measure, the definition also sweeps in “tangible expressions, such as productions of art, in particular, drawings, designs, painting (including body painting),” along with a wide range of crafts items, musical instruments, and architectural forms. For an expression to qualify as a TCE, it must be one that displays individual or collective intellectual activity, is characteristic of a community’s identity and heritage, and has been maintained, used or developed “by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.”

A number of questions remain about what may be considered TCE’s. One has to do with the just-quoted reference to “tangible expressions” The inclusion of this category in the list of potential TCE’s could be intended merely to make clear that the kinds of creativity that typically are expressed in tangible form (like drawings and painting) should be no less eligible for protection as TCE’s than those (like dances or songs) that often may not be fixed in any physical medium; certainly, the inclusion of “body painting” in the list would support this reading of the language.

²³ The document can be found at http://portal.unesco.org/culture/en/ev.php-URL_ID=30978&URL_DO=DO_TOPIC&URL_SECTION=201.html. The Model Provisions derived not from a broad participatory process but on the efforts of a “Working Group [of] 16 experts from different countries invited in a personal capacity by the Directors of UNESCO and WIPO.” However, the text and accompanying commentary are well worth study today, since they clearly identify most of the conceptual issues associated with legal protection for traditional culture, and suggest solutions that are the pattern for most contemporary proposals almost 25 years later! Likewise, a careful reading of these provisions brings into strong relief the inherent limitations of any approach to the protection and promotion of cultural tradition that is based primarily on a Western IP rights model

However, the WIPO commentary suggests that more may have been intended: “The protection for ‘architectural forms’ could contribute towards the protection of sacred sites (such as sanctuaries, tombs and memorials) to the extent they are the object of misappropriation and misuse as covered by these provisions.” In that case, TCE law would be functioning to protect historically or culturally significant physical structures as such, and thus doing the work ordinarily associated with the “tangible cultural heritage” protection laws described above. Another anomaly has to do with the drafters’ decision to include creative work that is done by individuals, but only so long as they are “individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.” In Indonesia, we see many examples of artists whose work is rooted in community practice but who are making their own – sometimes controversial -- personal contributions to tradition. These might include dances that meld both ancient and modern choreography, textile patterns that incorporate contemporary symbolism, and so forth. It is unclear whether such work would fall within WIPO’s concept of TCE’s. The position of the individual artist in to the community and its tradition cannot always be determined with exactitude, and it is questionable whether the existence of legal protection should depend on the existence of a particular kind of relationship, described in abstract terms. As this Report will articulate in more detail, the practices of Indonesian traditional arts do not always map easily onto the definitions that have been supplied by WIPO.

C. This Report’s preferred terminology—the “traditional arts”

As already will be apparent, this is the term the project team has chosen to describe the possible subject of a new Indonesian legal initiative. Although the WIPO definitions have many advantages, the project team found them unnecessarily complex as well as potentially limiting for the purposes of its study—and at times even somewhat confusing. Thus, for example, weaving techniques might be considered as an aspect of “traditional knowledge,” or a “traditional cultural expression” or both. Clearly, however, this is a body of knowledge that matters greatly in communities where weaving is practiced, as well as to the individuals who practice it, and therefore it is one that may require some form of legal support. It seems more straightforward simply to designate weaving techniques (along with specific textile motifs and patterns) as parts of a unified field of “traditional arts.”

The term “traditional arts” comes with some important limits, when contrasted with WIPO’s preferred “TCE”’s, it actually. For example, the traditional arts of textile definitely do not include physical historic sites located in or near contemporary weaving communities. Instead, in this

context, the term refers primarily to the ways in which weaving is carried on in those communities.

The project team believes that its chosen terminology—“traditional arts”—focuses attention where it rightly belongs: on the actual contemporary practice of the working artists who are keeping the old ways alive through their collective efforts. These artists were the team’s primary sources of information, and the recommendations of this Report are designed to address the concerns that they expressed. The chosen terminology shines its spotlight primarily on people rather than on things, and on the living practice of the old arts rather than the specific outcomes of that practice.²⁴

By contrast, the phrase “traditional cultural expressions” puts the emphasis squarely on products,²⁵ rather than on the processes by which those products are made and circulated and the social relations that define those processes—which is where we believe that emphasis rightly belongs. We emphasize that if the goal of maintaining the vitality of traditional arts is to be accomplished, attention must be distributed across all the process elements of the traditional arts system. Practices of production are part of that system, but so are practices of consumption; ultimately, the role of audiences is as important as that of artists. Old material (information or techniques handed down over time) is an important input into the system, but so are the imaginative contributions of contemporary individuals. Although specific tangible or intangible outcomes (a woodcarving produced for a particular ceremonial purpose, or a dance performed on a particular occasion) certainly are components of overall traditional arts systems, they may ultimately be the least important ones, as far as overall policy goals are concerned. “Protecting” such products will be useless if it does not contribute to

²⁴ In some cases, of course, safeguarding these living practices may mean putting limitations on how their material products (e.g., textiles) can be dealt with in the market. Later in this Report, for example, we suggest that legal regulation of how products of the traditional arts are labeled for sale may be in order. However, we emphasize that this is not because these products are a focus of protection in themselves, but because such regulation may be important to maintaining the vitality of the process (e.g., the practices of a living community of textile makers) from which they arise.

²⁵ This objectified, product-focused WIPO approach is a specific inheritance from the 1985 Model Provisions, which stated (at Section 2) that “[f]or purposes of this [law], ‘expressions of folklore’ means *productions* consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of the country] or individuals reflecting the traditional artistic expectations of such a community” In its interviews, the project team found this objective or “museological” approach to thinking about the potential subject matter of legal protection to be prevalent among many “secondary” participants in Indonesian traditional arts systems (officials, academics and others), but not among artists or community leaders themselves, who consistently stressed the importance of maintaining the processes of production.

strengthening the ways that arts are lived and appreciated within communities.

Finally, the terminology used in this Report aims to be as non-judgmental as possible. Consider, for example, the difficult question: What should be considered “traditional”? Here, the team took a view that may be more inclusive than the one embraced by WIPO. For purposes of this Report, traditional arts include all forms of expression that contemporary practitioners self-consciously locate by reference to a community’s collective cultural inheritance—even if these are forms to which some members of the community might object. The traditional arts would embrace, for example, the performance of contemporary musical ensemble playing old songs on a combination of ancient and modern instruments, even though this practice may be considered controversial. There is more to the traditional arts than the faithful repetition of material handed down over generations, no matter how important such careful intergenerational knowledge transfers may be. Respectful innovation continues to play a critical role in traditional arts systems today, just as it has in every past era. If law can contribute anything to the support of the traditional arts, it must endeavor both to safeguard the old and to enable the new.

D. Why legislate for the traditional arts?

Before looking specifically at what extensions of existing law or innovative new legal approaches may have to offer the traditional arts systems of Indonesia, it will be useful to review the several general rationales that are offered, from time to time, in justification of providing some new protection for the traditional arts. Helpful as these statements of purpose may be in framing a general discussion, however, they provide useful concrete guidance in themselves as to how Indonesia should proceed in approaching this issue. Considering these objectives in light of the information received by the project team from artists and community leaders, however, may produce some important insights.

1. Preventing “misappropriation and misuse.” This theme emerges strongly from the WIPO Intergovernmental Committee’s inquiry into possible IP-style protection for TK, GR’s and TCE’s. However, the basic concepts that are invoked here suffer from a high level of indeterminacy. Certain practices are designated as wrongful not because they possess specific, objectively discernable characteristics, but because, on balance, society disapproves of them. Other, structurally similar practices are approved and even celebrated. Take, for example, the concept of “misappropriation,” a term used in conventional IP discourse to designate a range of situations in which a user of intangible knowledge resources is found to be in the wrong because he has “reaped where he

has not sown.” The difficulty, of course, is that in some situations this may be exactly the sort of information use that society should encourage for the general good. Thus, we actively want technology innovators to build on past discoveries, within limits, rather than to waste time and money repeating foundational research. Likewise, most societies steer clear of protecting basic factual information (even when it has been amassed through the expenditure of time and effort) because lawmakers recognize the collective benefits that flow from making data free for all to use.²⁶ And societies from ancient China to the modern West have embraced new artists’ “quotations” of the classics in their work, rather than disavowing them. In other words, using others’ research or data or creative expression in societally acceptable ways will not be considered “misappropriation” because, as a matter of policy, courts and legislatures have chosen not to define it as such.

Turning attention to the traditional arts, most would acknowledge that there are some uses of old cultural resources that are economically unfair, in the sense that the benefit derived by the user is not shared (or sufficiently shared) with the individuals or communities who have invested in maintaining the resource. But it may be difficult to agree about what those situations are, or about when, by contrast, it is appropriate to conclude that leaving a particular body of knowledge free for use may be, on balance, more socially desirable than restricting it. Musical instruments provide an example. Clearly, there are defined communities who have passed down over time the techniques for making and/or playing a particular kind of drum or flute. It would be entirely possible to designate the unauthorized use of such an instrument by others as a kind of “misappropriation.” But many would agree that, on balance, permitting the free use of old instruments in new contexts will, on the whole, provide a greater cultural benefit than any that would flow from attempting to limit such use. Thus, it is easy to acknowledge the existence of a theoretical category of “misappropriation,” but difficult to decide what should be comprehended under it. This project has sought to defer to the views of traditional artists and arts communities on what constitutes legitimate use and what, on the other hand, should be considered an unfair taking.

The concept of “misuse” presents similar difficulties. If “misappropriation” is, at base, a concept of economic fairness, “misuse” is grounded in ethical considerations of good and bad behavior. It is

²⁶ In a famous early decision, for example, the United States Supreme Court determined that, in general, it was not misappropriation for one news organization to copy information that already had been published in another. Underlying the decision is the recognition that the spread of information is a social good that generally is promoted by allowing the free reuse of facts in the press. *See Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918).

easy to acknowledge that some uses of traditional material do cross an invisible line by showing damaging disrespect for their sources. Legal regulation, however, must necessarily be a matter of visible lines. Difficulties remain in distinguishing acceptable use from “misuse” with reasonable clarity. In fact, the “misuse” concept has an even less well-developed legal pedigree than does “misappropriation.” As is true of “misappropriation,” it is difficult to find ways of assessing “misuse” that do not collapse into contextual questions of individual or group subjectivity. Nor can the problem be avoided merely by preferring the tastes or opinions of some social groups within traditional communities over those of others. Thus, for example, practically every generation of mature adults, all around the world, disapproves of the musical tastes and practices of the young. But surely not all youthful improvisations on musical themes drawn from the traditional arts should be prohibited or penalized. In this Report, once again, the study team has attempted to avoid this difficulty (or, at least, to understand it better) by consulting a wide range of traditional arts practitioners and listening to their ideas about which uses of the old material they care about (and care for) would be considered seriously disrespectful.

2. Protecting human rights. The connection between intellectual property and human rights is a relatively new, and not altogether straightforward, one. On its website, WIPO sums up the relationship succinctly:

Intellectual property rights are recognized as human rights in the [Universal Declaration of Human Rights](#), 1948, and in other international and regional human rights treaties and instruments. However, the relationship between intellectual property systems and human rights is complex and calls for a full understanding of the nature and purposes of the intellectual property system. It is suggested by some that conflicts may exist between the respect for and implementation of current intellectual property systems and other human rights, such as the rights to adequate health care, to education, to share in the benefits of scientific progress, and to participation in cultural life.

In particular, Article 27 of the Universal Declaration states that

- (1) 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.
- (2) Everyone 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.

When this formulation is applied to the traditional arts, there are two distinct sets of problems. The first difficulty is that paragraph (2) (particularly through its invocation of “authorship”) suggests that the drafters had in mind not the rights of traditional communities but those of individual technical or artistic innovators. Classically, of course, human rights theory has been focused on individual rights rather than group (or community) entitlements; at the intersection of IP and traditional culture, these two conceptions of rights-bearing may be in significant tension. The second difficulty is that if the notion of a human rights-based entitlement to IP protection were extended to the traditional arts, the potential for serious conflict between the two clauses of Article 27 itself would be (as noted by WIPO) considerable. In many cases, full participation in cultural life can entail making use of preexisting traditional material!²⁷

Here, the obvious harmonizing principle is that of “balance.” But the discourse of human rights, in and of itself, has little to teach us about precisely where or how such a balance should be struck. Once again, the project team looked to the artists and community leaders for guidance about how to resolve the tension between the two sides of human rights/IP equation – one favoring access and the other favoring control.

3. Providing for benefit sharing. This objective is the more concrete correlate of the goal of preventing misappropriation, discussed above. Clearly, there are circumstances in which, when a third party user of material derived from traditional arts profits significantly, the persons or community responsible for maintaining the tradition in question should be able to share in whatever new wealth is generated. Superficially straightforward though this principle may be, however, it conceals complications. Some are practical problems: How best to organize and manage a benefit-sharing scheme for traditional arts, so that whatever funds are generated go to those who most deserve them; these are addressed later in the Report.²⁸ Others are conceptual: How to define the threshold at which benefit sharing becomes applicable, and, specifically, how to deal with cases in which a third party’s use has added significant value to whatever traditionally-derived material he or

²⁷ For more on the complex relationship between IP and human rights, see David Weissbrodt & Kell Schoff, *Human Rights Approach to Intellectual Property Protection: The Genesis and Application of Sub-Commission Resolution 2000/7*, 5 MINN. INTELL. PROP. REV. 1 (2003).

²⁸ For a suggestion of the profound practical difficulties associated with benefit sharing in favor of traditional or indigenous communities, in a different context, see CORI HAYDEN, *WHEN NATURE GOES PUBLIC: THE MAKING AND UNMAKING OF BIOPROSPECTING IN MEXICO* (2003)

she has employed? Obviously, there will be some cases in which the traditionally-derived material will account for only a small part of the appeal of the new work in which that material is employed. Is it reasonable—or even fair—to require benefit sharing in such a case? If so, how would a rule of proportionality be applied? Again, as this Report will make clear, the project team has looked to the views and opinions expressed by artists and community leaders themselves for guidance in answering these important questions.

4. Participating in community economic development. There are other economic considerations that may bear on IP protection for the Indonesian traditional arts. As has already been suggested, the health of traditional arts cannot be separated from the well-being of the communities within which the old practices are nourished. Just as local communities support the traditional arts, the arts ideally should help to support these communities. Obviously, a benefit sharing regime for some third party uses might advance this goal, at least marginally. It is questionable, however, how substantial the returns from occasional profitable third party uses would be; providing for some form of benefit sharing might promote fairness, but it might not provide, in itself, a major source of funding for community economic development. According to the artists and leaders with whom the project team spoke, there may be other, more effective ways of giving economic sustenance to communities that stand in a custodial relationship to the traditional arts. Of these, one approach that already has been noted (and will be discussed in more detail later in this Report) would be through promoting more effective “branding” or labeling of local productions by, and in the name of, such communities.

5. Promoting national interest. The most common, and most compelling, justifications for extending the coverage of IP to traditional arts and other related knowledge are ones framed in terms of the interests of the culture-bearers and custodial communities themselves. Ultimately, the project team believes that taking care of artists and their communities will be the best way to promote the interests of audiences, contemporary creators, and other stakeholders in traditional arts systems. Indirectly, at least, this approach also should contribute something to the economic well-being of the society at large, by providing sources of income to some of its vulnerable members.

On occasion, however, one hears other justifications for the protection tradition—couched primarily in terms of interests other than the immediate needs of artists and their communities. For instance, the UNESCO initiative to safeguard “intangible cultural heritage,” although it is not insensitive to artists’ interests, appear to place greater emphasis on the needs of audiences—or on the imagined requirements of the

collective “culture” considered in the abstract (however this may be defined). Moreover, it occasionally is suggested that the protection of traditional knowledge systems should be understood as a way of directly advancing state interests, including economic ones. The argument runs as follows: Legal protection for the traditional arts can contribute to national pride and identity, and even to the nation’s gross domestic product or balance of payments.

So we should be clear: the project team does not endorse this dubious rationale for protection. In fact, justifying legal regulation of traditional arts in terms of national interest appears to be putting the cart before the horse. If a country focuses its attention on taking care of those who practice the traditional arts, the initiative may yield many secondary benefits, even if they cannot be easily predicted or precisely measured. By contrast, an approach to legal support for traditional arts that makes the national interest a first-order goal is at risk of overlooking the needs and preferences of the artists and communities without whom the continued flourishing of tradition-based national culture is impossible.

E. A brief survey of existing forms of IP law as they relate to the traditional arts

Having reviewed some recurrent arguments about why the traditional arts should receive legal coverage, this Report now turns to the question of what form that coverage might take, beginning with a review of existing IP doctrines. It is a truism that the fit between existing IP regimes and traditional culture is imperfect at best.²⁹ Bodies of law that developed to provide a measure of protection for Western commercial enterprise, technological innovation, and artistic originality can hardly be expected to adequately address the characteristic practices and productions of traditional communities that value continuity as much as they do change. However,

- It is crucial not to throw out the baby with the bath water. Despite its limitations, conventional IP may have more to offer traditional artists and arts communities than generally is recognized.
- Likewise, one should avoid reinventing the wheel. Even where conventional IP doctrines fail to reach the traditional arts, they may illustrate approaches that could be borrowed for use in new laws specifically adapted to this unconventional subject-matter.

²⁹ For a useful review of these problems of “fit,” see Molly Torsen, *Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues*, in 3 INTERCULTURAL HUMAN RIGHTS L. REV. 201 (2008).

- Failure is sometimes a better teacher than success. The structural shortcomings of existing IP doctrines can help to pinpoint problems that should be avoided in developing new legal rules related to the traditional arts.

Thus, there may be useful positive and negative lessons for a consideration of law and traditional arts in a brief review of conventional IP categories.

1. Patent. Of all the categories of conventional IP, patent law probably has the least to offer the Indonesian traditional arts, or the traditional arts in general. Patents exist to promote science and technology, rather than artistic, literary or musical culture. Even where cultural expression has a technological dimension, patent protection is available only for truly “novel” inventions, and not for modest or incremental improvements to the base of existing knowledge. Thus, for example, no one could patent either the design of an ancient bamboo flute in its original form or a modern variant in which some plastic parts are used. Also, patent protection is severely limited in duration; in Indonesia, for example, the limitation is 20 years, pursuant to Law No. 14 of 2001, *On Patent*.

What, then, does patent law have to teach? For present purposes, it serves primarily as a warning against over-reliance on formalities to support IP regimes. In many parts of the world, the fact that patents are granted affirmatively only after the submission and approval of a satisfactory application by a government agency continues to be a problem for individual inventors. Because the patent application process is complex, it typically cannot be accomplished without expert assistance. And because such assistance is required, the costs of patenting tend to be high. To a very real extent, the patent system creates IP “haves” and “have nots”: Large companies and institutions can successfully prosecute patent applications, but in many cases individual “small inventors” cannot. Moreover, registration-based IP schemes tend toward bureaucratic delay. These shortcomings may be inevitable where patents for inventions are concerned, but (if possible) they should be avoided in the conceptualization of new IP rights related to traditional arts.

2. Trade secrets and confidential information. The trade secret is, in some respects, a “poor man’s patent.” It affords legal protection to various kinds of valuable knowledge which may not measure up to the threshold standard for patentability, and it does so without any prerequisite formalities, such as registration, and for an indefinite period of time. But there are several problems with applying trade secrecy in

the domain of the traditional arts. Thus, for example, Indonesian Law No. 30 of 2000, *On Trade Secret*, states that

The scope of protection on Trade Secret shall include methods of production, methods of processing (preparation), methods of selling, or other information in the field of technology and/or business that has economic value and is not known by the public in general.

As this passage makes clear, the reach of trade secret protection, in Indonesia and elsewhere, typically is limited to knowledge in the domain of commerce, rather than that of the arts. This may work well enough for a secret recipe or manufacturing technique, but it cannot easily be applied (for example) to a musical or visual motif. Another limitation, of course, is that protection endures only so long as the proprietor of the secret makes concerted, affirmative efforts to keep the information private, whereas at least some aspects of the traditional arts are very public indeed. Moreover, trade secret law may give better remedies against a faithless employee or business partner than against a third party who benefits from wrongful disclosure.

Notwithstanding these limitations, the basic concepts underlying the law of trade secrecy have something to offer. In some jurisdictions (such as the United Kingdom and Australia—although not currently in Indonesia) trade secrets are regarded as part of a larger category of protected knowledge, referred to as “confidential information,” a category that includes a broader range of private knowledge. Although the law of confidential information other than trade secrets is not particularly well-developed even in jurisdictions where such protection is available, there are some examples of interest in which secret cultural knowledge has been legal protection. For example, in Australia, the law of confidential information has been successfully utilized by Aboriginal communities since 1976. In the first case, the Pitjantjatjara Council on behalf of three Aboriginal communities won an injunction to prohibit the publication of a book that contained material of a secret or private nature. The argument was that disclosure of the material would undermine the social and religious stability of the community. Other successful cases involved the restriction on the sale or display of certain lantern slides that depicted secret information and the award of an injunction against the publication of a newspaper story that would have revealed certain secret information about a significant Aboriginal religious site in Central Australia.³⁰

³⁰ More information is provided by Agnes Lucas-Schlotter, *Part III, Section 4 – Folklore*, in *INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE* 408-09 (Silke von Lewinski ed., 2d ed. 2008).

As has already been indicated, the traditional artists and community leaders with whom the project team spoke did not indicate that wrongful disclosure of secret knowledge was a particular problem in Indonesian traditional arts systems. Should it be revealed to be one, invigorated protection for confidential information might represent a well-tailored solution to it.

3. Trademarks. Among theorists, a debate rages as to whether trademark law should be included under that general heading of “intellectual property.” Certainly, trademarks are conceptually different from patents and copyrights; historically, they served more to protect the interests of consumers than to reward the ingenuity of innovators. In practice, however, they are like other kinds of IP in that they provide individuals or firms with portable, assignable rights in intangible signs and symbols. The owner of a protected mark (like the owner of a copyright) can prevent its use by others and also can trade on its value by selling or licensing the trademark interest. Moreover, it is noteworthy that trademark protection (unlike protection for patents and copyrights) is not time-limited; in theory and in practice, protection lasts as long as the mark is in use and continues to function as a brand.

Most national trademark laws are registration-based, although some (like that of the United States) also provide protection for brand indicators that are actually used to identify a company’s products and services, even though they have not been registered. Indonesia’s long experience with the law of trademarks begins in 1961, when the first law regulating this field was passed. Today, the governing statute is Law No. 15 of 2001, *On Marks*, which establishes a scheme by which words and images used by businesses to identify their lines of products or services can be registered with the Directorate General of Intellectual Property. After registration, a competitor who uses the same (or a deceptively similar) mark can be enjoined and/or compelled to pay damages. Indonesian law, unlike that of some other countries, currently does not allow owners of registered trademarks to prevent non-competitive uses of their brands when those uses “dilute” or damage the reputation of the mark – an example might be the use of a popular soft drink’s name on another manufacturer’s agricultural pesticide.³¹

In most countries, including Indonesia, trademark registration is a relatively straightforward, if sometimes protracted, process. By comparison with the patent application process, for example, the

³¹ For more information about this relatively new development in trademark doctrine, see Christine Haight Farley, *Why We Are Confused About the Trademark Dilution Law*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1175 (2006).

requirements for trademark registration are relatively few and relatively clear. However, because some examination of the application is necessary, trademark systems often are plagued by bureaucratic delay in both the processing of applications and the issuance of registration certificates. In fact, it is not uncommon for this process to take many months. A number of jurisdictions, such as the United States, have tried to address this problem through the use of technology, by moving a large part of the trademark registration process online.³²

Like other intellectual property rights, trademark protection is territorial—that is, it applies only within the borders of the country where exclusivity in a mark has been established. In general, the first person or firm to register a mark in a given country is entitled to its exclusive use for the trade purposes indicated in the application. However, attempts to register so-called “famous marks,” which are well-known outside the country although not yet in use within it, may be rejected. Thus, just because an international brand for tobacco products has not yet been registered in Indonesia, a local company is not free to select it as their own mark for cigarettes.³³

As is typical throughout the world, the scope of the marks that are potentially subject to registration in Indonesia is relatively broad, including a “picture, name, word, letters, figures, color composition, or combination of those elements.”³⁴ Like other modern trademark laws, the Indonesian statute recognizes the possibility of a so-called “collective mark”: i.e. “a Mark used on goods and/or services having the same characteristics traded collectively by several persons or legal entities to distinguish them from other identical goods or services.” The project team was not successful in learning anything more about situations in which collective marks actually have been registered in Indonesia. But the mechanism has real potential in the field of traditional arts.

The same is true for so-called “certification marks,” which, however, are not currently recognized in Indonesian law. Certification marks are those registered to organizations that test or evaluate the products of others for compliance with various kinds of standards. Historically, certification marks (where recognized) have been used primarily by bodies that test consumer products for safety. Recently, however, the use of such marks has been extended to other fields. To give one

³² See, for example, the information about on-line registration at <http://www.uspto.gov/teas/index.html>.

³³ The limited “famous marks” exception to the principle of territoriality is contained in Article 6bis of the Paris Convention (1967) and Article 16(2) of the 1994 Agreement on Trade Related Aspects of Intellectual Property (which is part of the larger World Trade Organization Agreement).

³⁴ Unlike some other jurisdictions, Indonesia apparently has not extended trademark protection to odors.

example, the Fairtrade Labelling Organizations International (FLO) has registered a Fairtrade certification mark in more than 20 countries around the world.

The use of certification marks in the context of traditional arts presents real conceptual and practical problems. Here, the Australian experience may be instructive. In 2000, after lengthy discussion, the Australian National Indigenous Arts Advocacy Association (NIAAA), a representative body for indigenous aboriginal artists, introduced an Australian indigenous arts certification program. It included two registered certification marks—one for use on the productions of indigenous artists themselves, and another for use by firms selling products that had been licensed by indigenous communities.³⁵ The goal was to stem the flood of imitation Indigenous artworks into the Australian market, and despite some concerns about the relatively high costs to participate in the scheme, it appeared to have some early success. Nevertheless there were several problems that eventually undermined the success of the labels. Firstly, the labels could not account for the diversity of Aboriginal communities. In this sense, many communities did not want their unique identities obscured by the use of a single pan-Aboriginal label. The second problem related to quality control. Specifically, it was not clear how decisions about who was Aboriginal and who was not, and therefore who could participate in the system, were being made. In 2002, funding for NIAA was discontinued, and operation of the national Indigenous arts certification system was effectively suspended.

While the effort to establish a single national certification mark for indigenous arts ran into difficulties, regional Australian arts organizations such as the Association of Central Australian Aboriginal Art and Craft Centres (Desart) and the Association of Northern Kimberley and Arnhem Aboriginal Artists (ANKAAA) have had success in developing their own systems for validating authenticity through trademarks. In addition, local arts groups, such as the Elcho Island center, as well as community organizations like the Pitjantjatjara women's co-operative, also have distinctive labeling systems, and in some cases have registered marks of their own. These marks are designed to help consumers determine authentic products within the market. Notably, however, these are not certification marks, as such. Instead, they are examples of "collective marks" being used to promote the common interests of defined communities of traditional artists.

The lesson from the Australian experience is that in certain instances, labels or marks provide an effective way of specifying the origin of a

³⁵ The rules and regulations for the former program can be found at <http://www.ipaustralia.gov.au/pdfs/trademarks/certrules/772565.pdf>.

unique group of cultural products. Further, the experience suggests that decisions about what form a label or mark may best be vested in individual communities. Nevertheless, a recent WIPO case study has noted that other countries have had more positive experiences with national labeling schemes:

The [Australian Label of Authenticity] has at least been an inspiration to other Indigenous groups in the Pacific region. In 2002, the New Zealand Toi Iho™ Maori Made Mark, which is based on the Label of Authenticity, was launched. The registered trademark was developed by Te Waka Toi, Creative New Zealand's Māori Arts Board, in consultation with Māori artists. The Mark is currently being used with reported success. Whilst modeled on the Australian model, a different feature for the Maori Made mark is that artists who apply for it must also meet criteria of quality. This has raised concerns from artists whether "quality" can be judged objectively. Despite this the mark appears to be in use and is sought after by Maori artists to use on their arts and craft products. Among the first 38 Māori artists to be awarded the "toi iho™" Maori Made Mark are carvers, sculptors, a fashion designer, a furniture designer, weavers, jewelers and multimedia artists.

And in Canada, since at least 1958, the federal Department of Indian Affairs and Northern Development (DIAND), has maintained and administered the "Igloo" certification mark to support the traditional arts of the Dene, Métis and Inuvialuit (Inuit of the western Arctic) peoples of Northern Canada. Artists and artistic communities must apply to DIAND for a license to use the trade mark and there are stipulated terms of use. It is instructive to contrast this successful approach with that of the United States. Although it does not involve a certification mark as such, the U.S. does have a system (under the 1990 Indian Arts and Crafts Act) to protect makers of Indigenous art against outright fakes and imitations that pretend to be authentic. The act has been called "a truth-in-advertising law that provides criminal and civil penalties for marketing products as "Indian-made" when such products are not made by Indians." Experience with this system has been variable and mixed. One of its main shortcomings is that instead of providing affirmatively for a mark of authenticity, it merely prohibits false claims.³⁶

The implications of these various experiments in legally supported labels signifying authenticity in the traditional arts will be discussed at greater length later in this Report, as will the potential usefulness of "collective"

³⁶ More information is available at <http://www.doi.gov/iacb/act.html>.

marks as a means of support for traditional arts and artists. First, however, it is important to note another mechanism that may be used to achieve similar ends.

4. Geographical indications of origin.

In general, national trademark laws bar or severely limit protection for brands that employ actual place names – on the sensible ground that no one should have exclusive rights to sell “Jakarta shoes” or “New York coffee.” In classical trademark thinking, such designations are “generic” by definition, and thus incapable of acquiring “secondary meaning” as source identifiers for goods or services. This rule, however, creates an arguable gap in the system of protection for place names on which groups of producers (rather than individuals) actually do rely to inform consumers that certain goods actually have a special character or quality associated with their actual place of origin. Increasingly, lawmakers have moved to fill that gap by creating a supplementary category of so called “GI’s”³⁷: The WIPO website provides the following definition:

A geographical indication is a sign used on goods that have a specific geographical origin and possess qualities or a reputation that are due to that place of origin. Most commonly, a geographical indication consists of the name of the place of origin of the goods. Agricultural products typically have qualities that derive from their place of production and are influenced by specific local factors, such as climate and soil. Whether a sign functions as a geographical indication is a matter of national law and consumer perception. Geographical indications may be used for a wide variety of agricultural products, such as, for example, "Tuscany" for olive oil produced in a specific area of Italy (protected, for example, in Italy by Law No. 169 of February 5, 1992), or "Roquefort" for cheese produced in France (protected, for example, in the European Union under Regulation [EC] No. 2081/92)

Theoretical quarrels over whether GI’s are a variant category of trademarks (in the nature of “collective” or “certification” marks), or a distinct and different type of regulation, are of no great importance here. But it is important to note a different kind of controversy: In many

³⁷ For a discussion of GI’s in the context of international intellectual property law, see Irene Calboli, *The First Ten Years of the TRIPS Agreement: Expanding the Protection of Geographical Indications of Origin Under TRIPS: Old Debate or New Opportunity?*, [10 MARQ. INTELL. PROP. L. REV. 181 \(2006\)](#).

developing countries, including Indonesia, the international push for greater recognition of GI's has been criticized as a device by which historically dominant economic powers (especially those of Europe) artificially maintain market share. At the same time, GI's are defended by those who point out that GI's could (for example) help poor farmers gain greater recognition and market access around the world for their regions' own characteristic products. Controversy notwithstanding, GI's have gained a foothold in Indonesian law, Art. 56(1) of the 2001 trademark statute:

Geographical Indication shall be protected as a sign which indicates the place of origin of goods, which due to its geographical environment factors, including the factor of the nature, the people or the combination of the two factors, gives a specific characteristics and quality on the goods produced therein.

In themselves, GI's (with their emphasis on protection of designations for agricultural and food products) may not have much direct bearing on the traditional arts. Nevertheless, the general approach they represent is worthy of further consideration, as a model for how to apply collective protection to productions associated with particular places and their populations. Potentially, the GI approach could be expanded to reach physical arts and crafts goods, as well as to non-material knowledge (such as music or dance)

5. Copyright. Among the categories of conventional IP, copyright is one that initially seems to hold out a promise for protection of traditional arts and artists. On closer examination, however, some of that early promise appears to fade. Modern copyright laws, like those found in Indonesia, cover a full range of artistic products in all media. Moreover, where copyright applies, it gives rights holders access to relatively swift and effective remedies against unauthorized use of protected material by third parties. Copyright protects not only against the exact duplication of a protected work, but also against unauthorized adaptation (making a movie from a book, or adding lyrics to a melody, for example). On the other hand, copyright has the advantage of a built-in "safety valve" in the form of various limitations on rights designed to promote the public interest and allow reasonable levels of access. Thus, for example, an unauthorized use of copyrighted material for entertainment purposes might be prohibited, while a similar use in a news program would be allowed.

Among the other obvious attractions of copyright is that the protection it offers is automatic and independent of registration, taking effect as soon as an eligible work is created. Some national copyright statutes do

require “fixation” (the embodiment of an intangible artistic conception to physical form, like a text written down on paper, or a recording of music).³⁸ Moreover, the standard for protection of a new work—“originality”—is a relatively easy one to satisfy; even new works that involve only modest variations on existing ones can qualify.

In Indonesia, as elsewhere, the protection afforded by copyright has two dimensions, which sometimes are referred to as “economic” and “moral” rights. The economic rights include the authority of the copyright owner to insist that anyone who wishes to sell, or perform or otherwise exploit the work should first negotiate for a license. The moral rights persist even after a license has been granted, and (subject to some limitations) they secure the author’s interests in getting proper credit when the work is given commercial exposure, and in assuring that it is not distorted or mutilated (literally or figuratively) along the way.

Why, then, isn’t copyright the obvious choice for IP protection of traditional arts? Typically, four related objections are raised:

- Productions of the traditional arts may be made by groups, not individuals. Western-derived copyright doctrine, with its strong individualistic bias, cannot adequately take account of this circumstance.
- No one knows the specific identities of the long-ago people who first devised the forms and motifs that now make up the traditional arts heritage. Copyright is designed to protect the work of known creators, not anonymous ones.
- The traditional arts, by their nature, need protection in perpetuity. But the duration of copyright is limited, usually to the life of the individual author and 50 or 70 years beyond that person’s death.

The traditional arts in their purest form are conservative, not innovative. The mission of traditional artists is to repeat what has gone before, not to change it. Therefore, many of their productions will fall outside the scope of copyright since they will not qualify as “original.”

These points have some real merit, but separately and together they display an incomplete understanding of copyright, the traditional arts, or both. Thus, they fail to tell the whole story about the possible utility of copyright to traditional artists. Although copyright has an undoubted individualistic bias, it also is flexible enough to take in the phenomenon

³⁸ No such fixation requirement is present in Indonesian Law No.19 of 2002, on *Copyrights*.

of collective creativity. In contexts other than the traditional arts, copyright law has embraced creative work produced by large teams rather than individuals; motion pictures and large computer programs are two obvious examples. Moreover, copyright has always coped, more or less successfully, with the problem of anonymity; in effect, copyright protection requires that works should have creators (singular or plural)—not that they always must be specifically identifiable. Moreover, as has already been suggested, living traditional arts systems generally accept new creativity so long as it is within the established idiom and makes use of a familiar vocabulary of elements. Any contemporary performance or production within an arts tradition will, inevitably, involve elements that are attributable to the contemporary individual or individuals immediately responsible for it. These contributions are typically ones which copyright would recognize as original – and that recognition is enough to protect against substantial copying of that performance or production by others, as (for example) in the form of commercial “knockoffs.” This may literally be “thin” protection, since it applies only to the new creative contributions of the contemporary interpreter of tradition, but it is of considerable practical value. The Australian cases extending protection to paintings by contemporary Aboriginal artists against commercial exploitation by outsiders (discussed later in this Report), illustrates how copyright law can effectively address significant issues relating to traditional arts protection. Likewise, there may be somewhat less than meets the eye to the claim that copyrights cannot protect the traditional arts because they are of limited duration. Every time a contemporary artist working within an old arts tradition creates a new variation on existing themes, the copyright “clock” is reset and begins to run again as far as that performance or production is concerned. Copyright can give artists some legal authority to safeguard tradition (as well as their contributions to it), even though that authority is subject to real limits.

Conventional copyright law, of the kind that already exists in Indonesia and elsewhere, is not a panacea for the problems facing traditional arts systems. But neither is it an altogether empty promise. Below, this Report will consider how existing copyright law might be activated and aligned for the benefit of new stakeholders: traditional artists and their communities.

6. Related (or neighboring) rights.

This category of IP is a relatively recent development on the international scene, and represents, in effect, an offshoot of copyright. The impetus for its recognition has come primarily from the introduction into the cultural marketplace of new forms of creative expression that do not fit comfortably within the conventional copyright paradigm. As the term

itself suggests, “related” or “neighboring” rights have been devised to deal with new kinds of subject matter that are adjacent to familiar copyrightable cultural forms and products, sharing some of their characteristics but not others.

The most familiar example of related rights is the protection for phonograms (also known as sound recordings)—works created by the performance and/or mechanical registration of music or other sounds. When recording piracy emerged as a major problem on national and international stages, some countries (like the United States) responded by placing phonograms under copyright protection. Clearly, however, the fit was imperfect. The conceptual problem was simple to state but difficult to resolve: Much, though not all, of the value added by the makers of sound recordings is a function of technical skill (whether that of a musician or that of an engineer) rather than “creativity” as that term conventionally has been understood in copyright. The solution adopted in most national laws, and recognized in international agreements ranging from the 1980 Rome Convention to the 1996 WIPO Performances and Phonograms Treaty, was to create a new kind of IP, specially tailored to the circumstances of stakeholders in the recording industry.

These laws are related to conventional copyright, and sometimes even codified along with it—an example is the Indonesian copyright statute of 2002, where “related rights” are dealt with in Articles 49-51. But there are significant differences. In Indonesia, for example, the rights of recording producers are valid for only 50 years from the time a recording is made, a significantly shorter period than that provided for conventional copyright. But it is also important to note that, as they have developed, related rights protect not only producers, but also other people and entities which have not conventionally been recognized as entitled to copyright protection for their activities. Article 49 (which has equivalents in most similar national laws) extends protection to sound recording producers (giving them “the exclusive right to “authorize or prohibit” the reproduction or rental of the recordings they make), and to performers, who are given legal leverage over the making of recordings in the first place. Specifically, a performer has the exclusive right to authorize or prohibit others “from making, reproducing, or broadcasting a sound recording and/or picture of his performance. In other words, anyone who wants to record and commercialize a live performance must first have the permission of the actor, singer or musician involved. And unlike producers’ rights, performers’ rights to authorize or prohibit recording are not subject to specific time limits.

The history of related rights legislation has two lessons to teach anyone exploring the relationship between law and traditional arts. First, the

usefulness of existing related rights legislation should not be overlooked: Specifically, Article 49 has the capacity to address concerns expressed by practitioners of traditional performance-based arts about the unauthorized recording of performances for commercial purposes. The second lesson is more general. Related rights legislation demonstrates that the reach of IP is not necessarily restricted to the conventional subject matter of patent, trademark, and copyright. If states can develop supplementary IP schemes for new subject matter, they also could make special provisions for old modes of creativity. The potential for such *sui generis* legislation in the field of traditional arts is discussed below.

7. Resale royalties (or *droit de suite*). Before addressing the potential for *sui generis* legislation, however, there is another, somewhat anomalous category of conventional IP that deserves brief discussion. This is the so-called artists resale royalties or (to use the French term which often appears in discussions of this approach) *droit de suite*. This offshoot of copyright addresses a recurrent problem experienced by graphic artists, who often sell their paintings, prints or sculptures for low prices early in their careers; later, when the artists' reputations have risen, those same objects may be resold at much higher prices. Nevertheless, under conventional copyright law, the reseller will enjoy the full economic benefit of this appreciation of value. Resale royalty legislation gives artists (or their heirs) the right to a share in the new resale price. Depending on the formula used in a particular country's law, an artist or successor may be entitled either to a fixed percentage of the full price at resale, or to a somewhat larger percentage of the difference between the resale price and the original sale price.

The story goes that *droit de suite* first arose in France in the early twentieth century, in response to a controversy over the resale of [Millet's](#) 1858 painting, the *Angélus*. Apparently, the owner of the painting had made a large profit from this sale, whereas the family of the deceased artist still lived in poverty. Be that as it may, implementation of the concept has sometimes been slow and partial. For instance, in 2005 after a lengthy inquiry, the Australian government rejected the proposal for resale royalties. This was despite evidence that suggested that resale royalties would make a significant difference to the income of many Aboriginal artists who still live in conditions of extreme poverty but whose work now commands amounts in the hundreds of thousands of dollars in the art market. Even in countries that have embraced artists' resale royalties, enforcement of the right is a problem. While public sales (at auction, for example) are relatively easy to monitor, tracking private sales (through dealers or between individuals) is difficult. Moreover, the absence of any international agreement on resale rights means that even to the extent that they are effective, these regimes operate only within individual countries. In the European Union today, a new effort is being

made to create a uniform and comprehensive approach, pursuant to Directive 2001/84/EC, *on the resale right for the benefit of the author of an original work of art*. Indonesia currently does not recognize the resale right.

The lesson for the legal regulation of traditional arts is clear: Legislatures should proceed cautiously in devising new forms of IP, or new variants of old forms. Sometime, as in the case of related rights, innovations of this kind are successful. But on other occasions, of which resale rights are a good example, these experiments consume time and energy without necessarily yielding valuable results.

Sui generis protection: a fashionable term in discussions of law and tradition

The first and most important point about this increasingly popular term is that it has no precisely fixed meaning. According to the WIPO Intergovernmental Committee:

Sui generis is a Latin phrase meaning “of its own kind.” A *sui generis* system, for example, is a system specifically designed to address the needs and concerns of a particular issue. Calls for a “*sui generis system*” for TK protection are sometimes heard. This could mean a system entirely distinct from the current intellectual property (IP) system, or alternatively a system with new IP, or IP-like, rights.

There are already several examples of *sui generis* IP rights, such as plant breeders’ rights (as reflected in the International Convention on the Protection of New Varieties of Plants, 1991, and the IP protection of integrated circuits (as reflected in the Treaty on Intellectual Property in respect of Integrated circuits, 1989 (“The Washington Treaty”).

Obviously, the problem of definition remains. “*Sui generis*” is not so much a legal term of art as a general designation for a range of distinct and different approaches to legislating about the ownership and use of unconventional subject matter. As is apparent from the definition just quoted, there is real potential for conceptual overlap between *sui generis* protection and related (or neighboring) rights.

Despite (or perhaps because of) its lack of fixity, the *sui generis* terminology has acquired a special place in international discourse about law and old or traditional knowledge, especially in the WIPO Intergovernmental Committee process. Thus, according to document WIPO/GRTKF/IC/3/8, of 2002:

At the second session of the Committee, a number of delegations emphasized the relevance of examining possible modalities of intellectual property (“IP”) *sui generis* systems for the protection of traditional knowledge. For example, the Delegation of Algeria, speaking on behalf of the African Group, said that “[...] WIPO should determine which categories of traditional knowledge could be protected under existing legislation. For the other categories, WIPO should develop new *sui generis* mechanisms in order to ensure adequate protection.” The Delegation of South Africa recommended that the work of the Committee “should also take into account possible *sui generis* systems in respect of genetic resources, traditional knowledge and folklore.” The Delegation of New Zealand noted that it “considered that the examination of *sui generis* modes for the protection of traditional knowledge was both necessary and important.” The Delegation of Peru emphasized that discussions in the Committee “should not distract the Committee from its main work which was to propose a *sui generis* system of protection for traditional knowledge of international scope.” Similar views were voiced by the delegations of Thailand and India.

What all of these interventions share is a sense that, in and of themselves, conventional IP laws aren’t sufficient or even appropriate to tackle the problems posed by TK, GR’s and (to revert, for a moment, to the WIPO’s preferred categorization) TCE’s. But the widespread use of the *sui generis* terminology should not be permitted to obscure that fact that the phrase has no single conventionally accepted meaning. It means dramatically different things to different people in different countries and in different contexts.

For some, it signifies the project of developing a new, comprehensive set of IP rules to regulate ownership and use of knowledge resources related to cultural heritage. Such a set of rules would be derived from the models of the core IP disciplines: patent and copyright.³⁹ In this understanding, a system for *sui generis* protection for the traditional arts would:

- Define the kinds of cultural content subject to protection, including old stories, motifs, musical themes, etc., as well as contemporary interpretations of those inherited traditions;

³⁹ This was the aspiration of the 1985 UNESCO/WIPO Model Provisions, discussed above. See the discussion in Silke von Lewinski, *Symposium on Traditional Knowledge, Intellectual Property and Indigenous Culture: The Protection of Folklore*, 11 CARDOZO J. OF INT’L & COMP. L. 747 (2003).

- Specify the minimum conditions for protection and the duration of that protection;
- Prescribe rules on the “ownership” of this protected content, including principles to deal with control over uses of traditions held in common.
- Confer a comprehensive set of exclusive use rights on owners, including the rights to copy, adapt, perform, and broadcast the protected material in whole or in part;
- Provide owners with access to courts or administrative bodies to proceed against persons using protected material without authorization, as well as penalties for such unauthorized use; and
- Identify a set of limitations and exceptions (for private or educational uses, for example) that would qualify the exclusive rights otherwise conferred on owners.

In other words, such an ambitious law would attempt to do for traditional cultural materials what patent does for qualifying inventions and copyright for new works of art. This is what might be called the “related rights” vision of *sui generis* protection—that is, the implementation of familiar IP rights, modeled on conventional doctrines, in a new and unfamiliar context.

Others use the term *sui generis* in referring to what might be called a “toolkit approach.”⁴⁰ Rather than mimicking conventional IP doctrine

⁴⁰ An example of a specific (and relatively limited) implementation of this approach may be found in the legal regime adopted by Panama in 2000 under the “Law on the special intellectual property regime upon collective rights of indigenous communities, for the protection of their cultural identities and traditional knowledge,” which provides a simplified form of registration for manifestations of traditional culture. With respect to protected traditions, the law provides, among other things:

Article 10. The arts, the craftsmanship, the dresses and other forms of cultural expression of the indigenous community, will be the object of promotion and development by General Office for the Registry of the Industrial Property of the Ministry of the Commerce and Industry.

Article 11. The Ministry of Commerce and Industry shall do what is necessary to assure the participation of indigenous craftsmen in national and international fairs and to expose their handicrafts. The General Directorate of National Craftsmanship will do what is required to carry out the celebration of the indigenous artisan’s day with the sponsor of this Ministry.

Article 12. In national and international presentations of Panamanian indigenous culture, the exhibition of their dresses, dances and traditions will be mandatory.

Articles 13. The Ministry of Education shall include in the school curriculum contents related to the indigenous artistic expressions, as integral part of the national culture.

by attempting to make all manifestations of traditional arts into objects of ownership under a comprehensive new protective regime, this alternative approach to legal regulation of the traditional arts might involve, among other things:

- Creative application of conventional IP doctrines, including patent and copyright but also extending to trademark, GI's, etc.;
- Modification (as required) of conventional IP doctrine to better address problems of tradition artists and communities;
- Selective introduction of new ownership and use rules tailored to the traditional arts;
- Importation of legal concepts from outside IP (including contract law);
- Development of benefit sharing frameworks; and
- And (potentially) much more, since responsiveness to real social and cultural needs is the hallmark of this approach.

Unlike the approach just described, this alternative vision of *sui generis* protection is essentially problem-driven rather than concept-driven. It operates (so to speak) from the bottom up rather than from the top down, focusing on practical responses to expressed concerns, instead of overall solutions that anticipate hypothetical problems. The utility of this approach to the development of a *sui generis* system of protection is that it recognizes that each country has different problems and different resources. Issues with protecting the traditional arts are experienced differently in Indonesia, as compared to (for example) Australia or Panama. This approach allows for innovation in the development of a new legal approach that responds to real problems *in situ* rather than importing a concept-driven form of protection that may fail to account for the shape of underlying local issues.

Lawmakers interested in supporting the traditional arts through *sui generis* legislation will need to choose between the two conflicting

....

Article 15. The rights of use and commercialization of the art, crafts and other cultural expressions based on the tradition of indigenous communities, must be governed by the regulation of each indigenous community, approved and registered in DIGERPI or in the National Copyright Office of the Ministry of Education, according to the case.

Clearly, this is not a conventional intellectual property law, although it uses that terminology. Among the notable provisions of the Panamanian statute, the choice of local customary law as a source of norms stands out.

approaches just outlined. It will be an important and consequential choice. The choice is even more complicated because advocates for strong comprehensive new IP laws to protect traditional arts—that is, for the first of the two *sui generis* approaches—sometimes rely on questionable premises—specifically, the kinds of misunderstandings outlined below.

F. IP and traditional arts: some common misunderstandings

A closer examination of these premises may be helpful in clarifying the choice between the two contrasting visions of *sui generis* protection.

1. First misunderstanding: strong domestic IP protection will deter or punish foreign misappropriation of the traditional arts. In Indonesia, as elsewhere in the developing world, there is an understandable anxiety that foreign individuals and businesses may profit unfairly from the exploitation of local artistic heritage. Although there are few, if any, documented examples of such windfalls having been realized by outsiders, this concern persists. In conversations with the project team, some opinion leaders and officials suggested that this risk of foreign misappropriation provides a compelling justification for the creation of a comprehensive new IP regime for Indonesian tradition. The realities of the international intellectual property system, however, suggest otherwise.

As already has been noted, national intellectual property laws are rigorously territorial – that is, they apply only within the borders of the country in question. Were an Indonesian design to be copied in the decorative details of a Parisian fashion house’s collection, for example, French law would govern on the question of whether or not the use was permissible. Whatever Indonesian law had to say about the legality (or illegality) of such a use would be literally irrelevant to the resolution of the conflict.

Even if there were to be a new Indonesian law that implemented a comprehensive vision of *sui generis* protection, and treated ancient dance patterns as objects of IP, there still would be no basis for redress in a German court against a performing group there that had incorporated routines from Bali into one of its performance pieces. Closer to home, many Australian Aboriginal artists complain about the copying of their artwork and artistic styles in places like Bali, but they have no legal recourse. In Australia there have been many successful copyright cases protecting the rights of Aboriginal artists, but Australian copyright jurisdiction does not extend into Indonesia.

At WIPO and elsewhere, experts continue to discuss the possibility of creating a new international agreement that would provide a legal basis for the recognition of rights in old knowledge across national borders.⁴¹ It sometimes is suggested that progress on enacting *sui generis* protection at the national level may help to hasten to day when such a new agreement becomes a reality. Even if this hoped-for outcome were to occur, however, the fundamental situation outlined in the preceding paragraphs would not necessarily change. In its basic provisions, , an agreement could guarantee that the owners of the Indonesian traditional motif in question (however such ownership might be defined in Indonesian law) would be entitled in France to the same protection – as much or as little – that a French national with a similar ownership claim would receive. This is the so-called principle of “national treatment,” which is universally observed in international IP agreements.

Of course, international agreements also can provide for certain “minima” – base levels of protection for certain kinds of copyrightable subject matter that all countries undertake to provide when they agree to a treaty. An international treaty on old knowledge (TK, GR, and TCE’s) might also provide for such minima, but—in practice—nations would be likely to be granted considerable latitude in choosing how to implement the new international agreement. Consistency of practice from one country to another would be unlikely.

By contrast, because the rules of conventional copyright law are relatively uniform from one country to another around the world, claims with respect to cross-border uses of traditional arts that can be framed in terms of standard copyright doctrine stand a reasonable chance of success today! Thus, for example, if a German company were to distribute in Europe a film showing dances performed by a contemporary Indonesian group that employs traditional elements in its choreography, the dance company would have a good chance of getting relief in a German court.

The observation that, in itself, even the strongest Indonesian *sui generis* law providing comprehensive IP protection for traditional rights would not be effective to regulate the behavior of foreign individuals (or companies) outside Indonesia has an important corollary. Such an Indonesian law would apply with full force to domestic Indonesian artists and businesses. In other words, the greatest impact of Indonesian legal regulation will, inevitably, be felt by Indonesians themselves. If comprehensive IP protection for traditional arts could have an inhibiting

⁴¹ This is one of the functions that (by way of illustrative analogy) the Berne Convention for the Protection of Literary and Artistic Works performs with respect to the recognition of copyrights among countries that have ratified the treaty.

effect on artistic creativity and economic activity (as will be suggested below), it is the Indonesian cultural sector that will feel the chill.

The challenge, then, is to find a way to influence the behavior of foreign and Indonesian third party users of material derived from the traditional arts without damaging the dynamism of the Indonesian arts practice or foreclosing opportunities for Indonesian economic development. An Indonesian *sui generis* law that focused on safeguarding the processes of traditional arts practices by regulating relationships, rather than reframing traditional arts productions as static objects of ownership, might have some real chance of success toward this end.

2. Second misunderstanding: strong domestic IP rights are necessary in order to defeat false foreign IP claims to Indonesian heritage.

As already has been noted, the study team heard various concerns about foreign IP claims relating to items of Indonesian intangible culture (the widely rumored *tempe* and *rendang* patents, for example). Many individuals with whom the team spoke believed that implementing strong new domestic legal protection for traditional culture, on a par with the copyright and patent laws that the foreign claimants themselves may be abusing, is necessary to prevent (or to defeat after the fact) such overreaching practices. This belief, however, reflects a basic misconception about how national IP laws work and, in particular, about the circumstances in which particular IP claims may be disqualified by administrative agencies and/or courts.

IP protection is strictly a function of the national law in the country where that protection is claimed. National patent and copyright laws demand that some level of innovation be reflected in the object (be it an invention or a work of imagination) for which protection is claimed. In the case of patent, the threshold standard, usually expressed through the term “novelty,” is relatively exacting; where copyright is concerned, the threshold standard of “originality” demands less in the way of new . But in each case, some amount of “value added” is required for a claim to be upheld. Exact (or near-exact) copies of existing content (whether an invention or a recipe or a design) are ineligible for protection under IP laws everywhere, if those laws are properly applied. All countries have procedures in place for challenging inappropriate assertions of IP in non-novel or non-original content, either before protection is recognized or after it has been asserted.

For example, suppose that a sculptor in Japan claimed copyright for a statue that, in fact, merely reproduced a figure from the temple of Borobudur. That claim could be defeated, under Japanese law, by a demonstration that the sculpture was wholly derivative and therefore not

an original work. That demonstration would involve bringing forth documentation of the appearance of the related temple figure; crucially, it could be made with equal success whether or not Indonesian law itself provided affirmative IP protection for the décor of the classic Buddhist *stupa*. Likewise, if a Canadian manufacturer claimed a patent on a particular form of a boat hull, the claim could be defeated by showing that the asserted invention actually was merely a restatement of old Sulawesi Bugis boat-building tradition. This would be regardless of whether or not Indonesian law itself had conferred IP protection on the design. In each case, the key to defeating an overreaching foreign claim would lie in assembling the documentation that demonstrates the content of Indonesian tradition, and thus showing that the claimed Japanese “creation” or Canadian “invention” simply repeated existing tradition. And, to repeat: *This strategy would operate independently of whether that tradition was itself an object of IP protection in Indonesia.* In other words, this is a field in which one cannot usefully fight fire with fire. On the other hand, a so-called “negative (or defensive)” protection approach can be highly effective in these cases.⁴²

There are a number of instructive recent examples in which challenges to such false or ill-founded claims of IP rights have been successful. Recently, for example, the United States Patent Office revoked Patent No. 5,401,504 on the use of turmeric in promoting healing. In addition, on March 8, 2005, the Technical Board of Appeals of the European Patent Office revoked a patent on a fungicide made from the seeds of the *neem* tree, which (like turmeric) is indigenous to India. What was common to the two cases is that both patents were based on traditional medicinal uses of naturally-occurring products that were widely practiced and well documented in India. Thus, both patents were revoked for lack of novelty (and—a related concept—the lack of a so-called “inventive step”). Based on information presented to them, the various patent authorities involved concluded that the claims were based on existing knowledge rather than on new discoveries. These challenges were successful not because any IP rights in applications of turmeric or *neem* exist under Indian law—because, in fact, they do not—but because of documentation efforts by a coalition of Indian governmental agencies and NGO’s (including the Green Group of the European Parliament and the Indian Research Foundation for Science, Technology and Natural Resource Policy, and the Indian Council of Scientific and Industrial Research).

⁴² The concept of negative (or defensive) protection has not been widely explored with reference to the traditional arts. For a discussion in the context of traditional knowledge, see John Tustin, *Traditional Knowledge and Intellectual Property in Brazilian Biodiversity Law*, 14 TEXAS INTELL. PROP..L.J. 131 (2006).

These organizations succeeded by presenting evidence of what patent law calls “prior art” to debunk the claims that were being challenged.

These examples illustrate the importance of documentation. Indeed, documentation is the key to successful after-the-fact challenges of this kind – and, ultimately, to frustrating efforts to preempt traditional heritage at even earlier stages. Centralized documentation efforts can, of course, be time-consuming and expensive. However, widely distributing responsibilities for producing documentation of tradition, among experts and traditional communities alike, would increase the feasibility of such a project. Later in this Report, a suggestion is made about how, by employing so-called “wiki technology,” it would be possible to compile a database of Indonesian traditional culture rapidly and relatively inexpensively, so that it could be available for such “negative (or protective)” applications (among others).

Finally, it should be noted that the actual severity of the problem of false foreign IP claims to Indonesian cultural heritage may be overstated. As already noted, national IP regimes (including patent laws) are territorial in operation and limited in scope. Thus, for example, a Japanese patent or copyright relating to Indonesian heritage would not operate outside Japan. In addition, all national IP law regimes are designed to acknowledge rights for those who add value to existing material without necessarily compromising the legal position of the knowledge on which they build. Reverting to the hypothetical examples given earlier, a modern sculptor anywhere in the world would be entitled to a copyright in his or her personal reinterpretation of a figure from Borobudur; significantly, however, the sculptor’s rights would be limited to his or her own creative value added. Ownership of a copyright in such a modern sculpture, or in a photograph of the ancient carving, or in any other “derivative” work based on it, would not entail any monopoly control over the traditional design itself. Likewise, a patent for a particular new method of preparing a traditional food specialty would extend only to that particular technique, and not to either the dish itself or any of the traditional (or other alternative) ways of cooking it. Concerns about overreaching foreign IP claims certainly are justified, but some such claims may have more real practical consequences than others.

3. Third misunderstanding: the only alternative to enacting strong, comprehensive IP rights for traditional arts is to have no meaningful protection at all. Of the misconceptions that prevail around the issue of legal protection for and regulation of the traditional arts, this is the one that has the greatest potential to distort discussion and obscure rational evaluation of available policy options. In Indonesia, as elsewhere, there is a widely-shared belief that the traditional arts and artists currently enjoy no meaningful legal safeguards against “misappropriation and

misuse.” It then follows that to counter this (apparent) shortcoming, there is an urgent need to legislate a comprehensive new set of protective measures. In other words, some policy makers have a tendency to view the protection of traditional arts as a “zero-sum game.” In this vision, the vacuum of legal recognition around the “traditional” is so complete that it pulls in any and all work that is related to old forms and motifs. Thus, the legal position of work produced by individual contemporary artists practicing in traditional modes is perceived as being undermined by their very association with the old ways. In this erroneous view, such artists lack any legal tools to protect themselves or, by extension, to protect the traditions on which they depend. If this were so, the argument for immediately instituting comprehensive new IP protection for traditional arts would be compelling. In fact, however, it is not the case.

As already suggested, conventional copyright law affords a significant measure of protection to contemporary artists working in the framework of tradition and, thus, indirectly, has a great deal to offer communities of culture-bearers as well. The presence in new work of a significant, or even dominant, amount of old material does not bar a copyright claim. Because the threshold requirement of added value (or “original authorship”) that will qualify new work for protection is relatively low, even faithful contemporary reinterpretations of traditional themes and motifs are likely to be covered. In Indonesia, this was the theory behind the much-discussed “Lagu No Name” case in the late 1980’s and early 1990’s, where a 60-year old ethnic Batak tribal member from North Sumatra sued a well-known singer and a music producer, claiming that a recorded set of supposed *Tapanuli* folk songs were in fact the plaintiff’s own traditionally-based compositions. The problem in winning such cases is not that any work with identifiable traditional components is therefore somehow unprotectible in its entirety. Rather, as in any other legal action, it is one of proof. To repeat: individual traditional artists need to show what new creativity they added to old material in order to claim copyright in the result. This obstacle should not be insuperable.

Legal developments in other jurisdictions illustrate the availability of copyright protection for new works incorporating traditional elements. In Australia in 1981, the “Report of the Working Party on the Protection of Aboriginal Folklore,” from the Australian Ministry of Internal Affairs, produced by several Australian government departments, decried what it perceived as the total absence of legal protection for the work of Aboriginal artists. The report’s argument was that because contemporary Aboriginal art was derived from cultural traditions, IP and copyright in particular were inappropriate to protect the interests of Aboriginal artists. As a response to this apparent dilemma, it recommended the development of a new bureaucracy and a

comprehensive new *sui generis* law. Such legislation has not been forthcoming. Instead, and contrary to the 1981 government report's conclusion that copyright was inappropriate and ineffective, subsequent developments in the Australian courts demonstrated that a significant part of the problem of protection for Aboriginal art could be remedied under the existing law. Thus, in *John Bulun Bulun & Anor v R & T Textiles Pty Ltd.*, a 1998 case which was the culmination of a series of decisions vindicating the IP rights of Aboriginal artists (the first of which was the case of *Yanggarny Wunungmurra v Peter Stipes*, heard in 1983), Judge Von Doussa of the Australian Federal Court confirmed the existence of copyright in the work of the Aboriginal painter John Bulun Bulun. What was notable about this case was that Judge Von Doussa recognized copyright in the work even though it derived directly from a body of ritual knowledge and artistic practice that belonged collectively, according to customary law, to the Ganalbingu people (of which the individual artist was a member). While the judge was unable to find for community ownership in the work (which is not provided for in the Australian copyright statute), he determined that by bringing a copyright infringement action against the defendant textile company, the artist had fulfilled the requirements of a fiduciary duty to the community: Bulun Bulun had acted in the ways in which he was "required to act in relation to the artwork in the interests of the Ganalbingu people to preserve the integrity of their culture, and ritual knowledge." In other words, the artist's copyright had been successfully deployed to vindicate not only his personal interests, but also the community's stake in its traditions.⁴³

It also is worth remembering that copyright is not the only existing legal tool available to vindicate the interests of traditional artists and communities. As has been noted, most national IP laws (including Indonesia's) already include "related rights" provisions that require the consent of musicians, dancers and others before their live concerts or other performances can be lawfully recorded. This existing IP right, properly implemented, could give traditional performing artists considerable leverage in their efforts both to share in the benefits, and to control the quality of audio and video recordings representing their work. Yet in the conversations the project team had with artists throughout Indonesia, we found none who had taken advantage—or even were aware—of these provisions. Nor were government officials who advocate for traditional artists generally familiar with them.

As already has been suggested in the discussion of trademarks (including collective marks and certification marks), this body of law also

⁴³ An excellent account of these cases is found in [JANE E. ANDERSON](#), *LAW, KNOWLEDGE, CULTURE: THE PRODUCTION OF INDIGENOUS KNOWLEDGE IN INTELLECTUAL PROPERTY LAW* (2009).

has much to offer traditional artists and their communities. Trademarks function to protect commercial reputation, and in many arts communities concern runs high about how best to protect the hard-won positions they have established in the cultural marketplace by combining the revitalization of traditional arts practices with new initiatives in promotion and marketing. Collective marks identifying the products of particular local cooperatives (for example) could go far to safeguard those gains. Community leaders also express concerns about how to make fidelity to tradition a greater selling point in the future, allowing discerning consumers to express their preferences for authenticity. Properly managed (as in the example of New Zealand) a certification mark could help to play this role.

Finally, and crucially, unlike a new comprehensive *sui generis regime*, all these applications of conventional IP doctrine have the potential advantage of having a significant international reach. Most countries of the world have well-developed, and relatively consistent, national laws of copyright, related rights, and trademarks. International instruments, including the Agreement on Trade-Related Aspects of International Treatment (TRIPS), a part of the 1994 World Trade Organization Agreement, reinforce the general principle that claims under these conventional IP headings, even ones that concern relatively unfamiliar subject matter, can be recognized across national boundaries.⁴⁴ In some cases, like copyright and related rights, foreign protection will be automatic, on the basis of the “national treatment” principle; in others, like trademark, registration in the country where protection is to be claimed will be necessary, but the right to make such registrations is guaranteed by international law. Somewhat paradoxically, IP claims under conventional IP law categories have a greater chance of influencing behavior outside Indonesia, by foreign individuals and firms, than would claims based on a new, comprehensive IP-style *sui generis* regime.

None of this perhaps overlong section is intended to suggest that existing legal arrangements provide all the support that the Indonesian traditional arts require. Rather, it is designed to emphasize that the amount of protection already available is considerable, and that decisions about how to modify the legal framework should be taken deliberately, based on a full inventory of all the existing modes of regulation.

⁴⁴ For an extended discussion, see DANIEL J. GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* (3d ed. 2008).

To this end, it is important to reiterate that the power of existing law to support Indonesian traditional arts lies not only with national IP legislation, but also with the system of *adat* (or customary) law as it functions throughout the country today. The role of *adat* law and institutions may be a limited one, but it is of critical importance.

Adat law, which is by nature communally focused, is primarily concerned with issues relating to maintaining harmonious inter-personal relationships. It concentrates attention primarily on regulating conduct within local communities, not beyond them. Its application may extend, in some cases, to questions about individual and collective interests in material things. Thus, for example, *adat* law sometimes will regulate ownership of land or other concrete property within and among local families and clans, or the use of local common resources (such as fishing waters). And its influence may be increasing. As Professor David Linnan has pointed out, “[A]*dat* law’s importance was underplayed for many years, although those working in land title law could attest to its continuing application. However, *adat* law elements are reemerging in the governance system of distinct ethnic groups on the local level due to post-1998 political decentralization.”⁴⁵ However, in its conversations with local leaders knowledgeable about customary regulation, the project team did not find that the influence of *adat* law currently extended to the regulation of intangible information, at least where relationships between community members and outsiders were concerned. Nor did local leaders aspire to extend the influence of *adat* law into that domain. Put differently, the team heard no indication that *adat* law is a source of general customary IP principles.

In one important respect, however, *adat* institutions do function to supplement, or even to preempt, IP principles that are codified in positive (or statutory) law. As previously discussed, the project team did not encounter stories about the wrongful disclosure and/or commercialization of secret or sacred traditional arts material. The hypothesis that best explains this striking gap in the evidence is that *adat* law and related institutions continue to function effectively to control such misuse. The team saw concrete examples of this in places such as the Balinese weaving village of Tenganan. In conversations there, local artists and leaders made it clear that although part of their collective commercial strategy was to disclose freely some aspects of their unique double *ikat* techniques (by inviting outsiders to attend

⁴⁵ Professor Linnan’s quote is from his materials on *Contracts Law in Asia* (Asian Law Center, University of Washington), available at <http://www.lfip.org/lawe506/link1.htm>. For a more theoretical discussion of the position of *adat* law today, see PETER J. BURNS, *THE LEIDEN LEGACY: CONCEPTS OF LAW IN INDONESIA* (Pt Pradnya Paramita 1999), especially Chapter 11 (“Conclusion and Continuity”).

weaving workshops in the village, for example), there were other aspects of their traditional practices (including those related to dying methods) that they had no intention of sharing widely. This position was not only a matter of business judgment, but also one with profound spiritual overtones. As far as the project team was able to determine, the *adat* institutions of the village have been strikingly effective in implementing the non-disclosure policy. Over coming years, with the revival of interest in *adat* law and institutions, and the general trend toward decentralization, *adat* systems could play this role even more effectively in traditional arts communities around Indonesia.

These observations lead, in turn, to one more. An undeniably appealing aspect of comprehensive IP solutions (whether for mainstream arts or traditional ones) is that, in theory, they can give culture workers the ability to have it both ways—to disclose their work (and profit from doing so) while still retaining a significant degree of control over it. But, as will be suggested in the next section of this Report, this is seldom how things actually work out. Today, as a practical matter, perhaps the greatest source of authority that Indonesian artists and arts communities have to safeguard their sensitive heritage is the power of refusal. Few significant projects that might result in the misappropriation or misuse of tradition can be initiated by outsiders without the active cooperation of Indonesian culture-bearers themselves. Such cooperation can be—and often is—refused when outsiders appear untrustworthy. Even when cooperation is forthcoming, it can be conditioned in ways specifically designed to safeguard tradition. In considering policy options for Indonesia’s regulation of the traditional arts, it is important not to lose sight of this potential for “leveraging” consent to achieve ongoing control. This potential will be further addressed below, in the discussion of the project team’s proposal for an informed consent and benefit sharing system for some commercial uses of the traditional arts.

4. Fourth misunderstanding: IP ownership translates naturally into increased economic well-being. This final misconception, common throughout the world, can be briefly described. In countries at all levels of economic, cultural and technological development, individuals and policy-makers share a mistaken belief that IP protection is closely linked with commercial success—that, for example, the best way for an inventor to secure financial gains is to obtain a patent, or that copyright ownership is the key to earning a return in the cultural marketplace. This fundamental error has, of course, been reinforced by recent pro-IP propaganda directed by the United States and Europe toward countries that are in the process of modernizing their legal regimes, insisting that strong IP is a key to national economic development. But the equation (IP = Economic Success) simply does not hold up, at either the individual or the societal level. The world is full of inventors who have obtained a

patent but failed to find customers; by contrast many companies have built fortunes on the exploitation of unpatentable technologies. Meanwhile, a firm like Microsoft flourishes in the international market place despite the fact that its IP rights are effectively unenforceable in many countries. Most authors fail to find publishers, let alone readers, for their copyrighted manuscripts. But some publishing companies do good business by reprinting material in the public domain, just as certain performers and performing groups everywhere continue to enjoy success as a result from their interpretations of traditional music and dance. As successful business people everywhere will freely admit, the real challenge is finding and presenting attractive products to the public—not protecting those products against unauthorized third party uses. Good business models can matter more than IP protection.

As noted above, the first concern of Indonesian traditional artists and community leaders is with the issue of audience: how to find new spectators, listeners, readers, and purchasers for contemporary productions that represent or draw upon traditional materials. IP is not helpful in addressing this concern, as there is no necessary linkage between IP and audience building.

G. *Framing the choice facing Indonesia*

As outlined above, Indonesia faces a choice between two alternative ways of improving its legal provisions relating to traditional arts. Confusingly, both are sometimes referred to as *sui generis* approaches. This terminological confusion should not conceal the profound differences between these two ways of going forward. One would entail the creation of a comprehensive new IP regime, distinct from but in some respects modeled upon Western-derived principles of conventional copyright. This “interventionist” approach, which envisions converting virtually the entire heritage of the traditional arts into a new form of private property, could disrupt the practice of traditional arts in Indonesia without yielding any certain benefits to artists or to the nation. The other way would involve mobilizing existing provisions in the country’s law (IP and otherwise), and supplementing these, as may be necessary, with new legislation targeted toward solving particular problems identified by Indonesian traditional artists and their supporters. In doing so, it would respect the fact that many Indonesian traditional artists do not view their practices in possessive, proprietary ways. As will be suggested below, where the interventionist approach to *sui generis* protection would risk unnecessary conflict; on the other hand, what might be called the “respectful” approach should operate to promote social consensus.

In the current moment of globalization, the countries of the West promote strong new IP protection as the best solution to a wide range of

social and cultural problems.⁴⁶ In its proper place, IP does have something important to offer. However, an old proverb states that one can have too much of a good thing,” and this sums up the project team’s considered conclusion where the interventionist approach is concerned. In the team’s view, the predictable pitfalls associated with implementing an interventionist *sui generis* regime for traditional culture, along with the many unintended consequences that choosing such an approach would entail, weigh strongly against taking such a dramatic—and probably irreversible—step at this time. Instead, the team believes that most, if not all, of the expressed concerns of Indonesian traditional artists and arts community leaders can be addressed successfully through the alternative, respectful *sui generis* approach. On balance, the team has concluded, this is the approach best calculated to promote the continued flourishing of traditional arts and traditional arts communities in Indonesia.

Later in this Report, details about some of the elements that might go into such a respectful *sui generis* approach will be provided. It should be noted that in the project team’s view, this alternative is not simply the better of the two available choices, but one that has enormous affirmative potential to improve the position of the traditional arts in Indonesia. Before turning to those potential benefits, however, it is important to detail further some of the potential costs associated with the interventionist alternative.

This assessment of risks is not based primarily on an evaluation of other nations’ experiences with comprehensive new IP protection for traditional arts and culture. In fact, relatively few countries have yet undertaken such experiments, and from those few there are even fewer reports of how artists have actually experienced the new laws. Instead, the project team has turned to historical and comparative experiences with conventional Western IP law, especially copyright, as a way of trying to foresee problems likely to arise under an interventionist *sui generis* regime.

H. IP and the problem of fair resource distribution

Some of those problems are easily foreseen. Interventionist *sui generis* regulation of the traditional arts inevitably will benefit some groups within society, while imposing new costs on others. Some of the negative distributional effects associated with conventional IP approaches are widely known. IP rights are monopolies, and the economic behavior of monopolists, who seek to maximize rents from their exclusive assets, is

⁴⁶ For examples, see the website of the “International Intellectual Property Institute,” an NGO funded by the U.S. government and IP industries, at <http://www.iipi.org/index.asp>.

well understood. Today, IP rights make medicines more expensive than many sick people can afford, and put the cost of textbooks beyond the reach of many students. In addition to these problems of access, costs associated with meeting international demands for IP enforcement also put exceptional burdens on the state sector of many developing economies.

As already has been suggested, reliance on the comprehensive IP model, implemented through interventionist *sui generis* legislation, also would have another distributional implication: In practice, not everyone who is theoretically entitled to protection actually would receive it. IP laws are complicated, and both formal protection and effective relief under them may be difficult and expensive to claim. Attempts to solve complex social problems by reliance on conventional IP models will tend to create two classes within society—the privileged “haves” and the disadvantaged “have-nots,” who will never be able to realize the benefits promised by the law because they are unable to obtain legal advice and representation. For this reason, laws that are intended to empower artists easily can have the opposite effect. Too often, they actually increase the power of those who already have it at the artists’ expense. Communities or individuals who “own” their cultural productions often can be prevailed upon to give up their rights in unequal exchanges. The history of traditional music in the United States, for example, offers many examples of how relatively naïve musicians in genres like blues and country music, never were able to benefit from their theoretical entitlements under copyright—even though recording companies made fortunes from their work.⁴⁷

This is not, however, the only—or even the principal—problem with conventional IP models of protection for culture. With considerable care, effort, and social expense, it might be possible to mitigate distributional inequities when designing a new interventionist *sui generis* IP regime for traditional arts. However, there are other structural problems with the interventionist approach that go deeper and may be even more difficult to eliminate.

I. *The history and philosophy of IP for cultural objects*

The greatest problem with an interventionist *sui generis* approach, based on conventional Western IP principles, is that it would reflect fundamental assumptions that do not apply comfortably where the Indonesian traditional arts (or those of other societies) are concerned. The most direct way to demonstrate this is by briefly reviewing the

⁴⁷ For an illustration, see Olufunmilayo B. Arewa, *Borrowing the Blues: Copyright and the Contexts of Robert Johnson*, at http://works.bepress.com/o_arewa/12.

background of Western IP law. First and foremost, IP was and is about making markets. Wherever it intervenes, IP represents an artificial effort to carve up a unitary common culture into many separate parcels that can be owned and (in particular) bought and sold—a process of “commodification” and “monetization.” Thus, the underlying function of conventional IP law is in significant tension with the shared values of the traditional arts sector in Indonesia. As has been explained, Indonesian traditional culture is much more than a market phenomenon. Rather, it relies for its survival and success on other, older and more powerful social structures. Proposals for extending comprehensive IP regulation based on Western models on the traditional arts should be assessed in light of what we know about those models’ relative insensitivity to the social dimension of cultural production, consumption, and reproduction.

It cannot be emphasized strongly enough that IP is a modern Western invention which was tailored specifically to promote particular forms of commerce in new, mass-marketed information products. Creating new monopolies through comprehensive IP rights may have been a good choice for organizing markets in everything from industrial machinery to printed books and DVD’s. However, it does not follow that this model is the best way to intervene in an ancient, balanced system of cultural production such as the Indonesian traditional arts.

IP rights do not have a long history. There is no evidence of IP concepts among early societies anywhere in the world, or in the great civilizations of Greece, Rome, Mesopotamia, Egypt, Byzantium, China, etc. Until the colonial period, when it began to be imposed as an aspect of European rule, IP was not a feature of legal ordering in most parts of the world (including Africa and Asia). Various IP rights were manufactured, so to speak, at particular moments in modern European and colonial history. IP protection for literature, arts, and other forms of intangible culture got its start in Europe in the early 18th century. As the century progressed, it blossomed in England, France, and Germany as an expression of what C.B. MacPherson has described as the philosophy of “possessive individualism,”—a world-view that played a critical role in the rise of early capitalism. Meyer Weinberg recently has described this philosophy as follows:

Protection of individually-accumulated capital was the most fundamental function of government, a function said to be required not by common decision but by the very nature of man . . . "I own, therefore I am" is the paradigm of possessive individualism. Possession and possessing make the man; they also make him free. Such a person cannot conceive of existence apart from possession or the striving

after it. Because ownership is the core of self, the person is not himself but what he owns.⁴⁸

The groundwork for this way of thinking can be found in the seventeenth century writings of John Locke and Thomas Hobbes, who (among other things) sought to justify legal property relations where property in land and physical things was concerned. The extension of this approach into the realm of intangible property was not long in coming. Indeed, the proposition that “possession and possessing make the man” actually has special appeal where the things possessed are the content of a person’s thoughts or the creative work of that person’s hands.

Of course, as a philosophy grounded in the powerful ideology of individuals’ “natural rights” gave birth to IP, the emerging legal regime continued to reflect older European class, race and gender relationships. Simply put, certain kinds of creativity always were privileged over others. This helps, in part, to explain the “invisibility” of traditional cultural production in Western IP systems. In eighteenth and early nineteenth century Europe, possessive individualism blended with another strand of thought: the Romantic movement in the field of arts and letters, which tended to celebrate the accomplishments of solitary, individual, visionary genius-creators.⁴⁹ Romanticism’s devotion to these genius-creators meant, however, that it denigrated the cultural contributions of more ordinary artists and writers, of groups, and (necessarily) of anonymous individuals and communities (whose productions were viewed simply as raw materials for the “authorship” of others. More than anything else, it is the early (and continuing) association of IP law with this complex of ideologies that has come into conflict with attempts to gain legal recognition for the “traditional.”

Recognizing this, one might still try to make revise or recast conventional IP models so that they work for traditional arts and traditional artists—devising a scheme driven by a concept of “possessive collectivism” (expressed through group rights), in place of possessive individualism. This is, in effect, the project of interventionist *sui generis* legal protection for traditional culture. The members of the project team, however, believe that such an approach still may come with too much baggage. Historically, IP laws based on the philosophy of possessive ownership have been effective tools for securing and promoting individual and even small group control over culture; they have been notoriously ineffective

⁴⁸ *A Short History of American Capitalism* (2002), available at <http://www.allshookdown.com/newhistory/CH01.htm>.

⁴⁹ For information about this aspect of IP history, see *THE CONSTRUCTION OF AUTHORSHIP: TEXTUAL APPROPRIATION IN LAW AND LITERATURE* (Martha Woodmansee & Peter Jaszi eds., Duke U. P. 1994).

in providing a reasonable balance between the interests of owners and the equally compelling interests of society at large. Indonesia should be aware of this history as it confronts the choice now before it.⁵⁰

Under an interventionist *sui generis* approach, the new rights-bearers would be responsible for policing the artistic practices of others, rather than for maintaining and improving their own. As will be suggested below, the real extent of the control that rights-bearers would exercise is in doubt; in fact, there is reason to think that much of the real authority in an interventionist legal regime would belong to other actors, such as courts and government agencies, and not to the communities that foster traditional arts. Nevertheless, in their role as “owners” of tradition, the new rights-bearers would find themselves in conflict with other artists, with members of the public, and even with one another. The Western IP model necessarily implies a strong and potentially destructive tension between IP owners, who it is expected will exercise maximum control over their “property,” and other members of society (both creators and consumers) for whom access to cultural material is critical. This tension is not merely a matter of economics. If the logic of possessiveness emphasizes how ownership of intangible cultural objects could help defend the identities of certain individuals or groups, it overlooks the fact that these are not the only identities at stake. A Sumatran urbanite’s ability to share in the Javanese traditions of *batik* or *wayang*, for example, may be crucial in helping to cement his or her sense of personal identity as a citizen of the Indonesian nation.

In today’s Indonesia, as this Report has demonstrated, traditional artists are acutely aware of the collective nature of their enterprise, and of the values associated with the sharing of their arts. To a great extent, they live those values in their everyday practice. Over time, however, Indonesia’s adoption of an interventionist *sui generis* approach rooted in Western IP paradigms would reshape the attitudes of artists and their communities. Inevitably, IP ownership enforces possessiveness as a way of being on those who are its nominal beneficiaries. The project team believes that this profound shift in outlook would not necessarily be healthy for the traditional arts or for Indonesian society in general. It

⁵⁰ In offering this warning, the project team does not associate itself with “The Romance of the Public Domain,” that has been so pointedly criticized by recent commentators, including Anupam Chander and Madhavi Sunder in their important article of that title, published in 92 CAL. L. REV. 1331 (2004). If the romance of “authorship” has supported the enclosure of genuinely important common cultural resources, a naive or uncritical view of the “commons” also runs the risk of enabling corporate commercialization of the heritages of groups and nations. On this issue, as throughout this Report, we strive to assert balance—including balance between the entitlements of traditional arts communities, on the one hand, and the social value of cultural access, on the other.

would seem unwise to impose the tensions that belong to conventional IP approaches on the field of traditional arts practice—unless the theory and practice of possessiveness has something unambiguously and significantly positive to offer.

J. *The claimed advantages of conventional IP approaches*

On balance, the project team has concluded that the arguable or potential benefits of an interventionist *sui generis* approach do not justify the likely costs. This is both because the benefits are so uncertain, and because the costs are so great. Turning first to benefits, several advantages may be claimed for such an approach derived from the rights-based model that creates a system of ownership in cultural objects and allocates them to particular rights-holders. Each such claim must be evaluated separately, in light of historical and comparative experience, in connection with possible use of this model to regulate the Indonesian traditional arts.

1. Providing financial incentives. The most important, and most frequently invoked, justification for conventional IP does not appear to lend much support to interventionist *sui generis* legislation for traditional arts and culture. This justification asserts that by giving innovators proprietary rights (and thus, the ability to license uses of their productions by third parties) the system promotes desired cultural activities. In copyright, for example, the argument runs that the “author” who can expect an economic benefit from the exploitation of his or her productions will be relatively more likely to engage in creative work than one who cannot. This incentive, in turn, will ultimately operate to the benefit of the society at large. Transposed into the area of traditional arts, the argument would be that economic incentives will encourage both creative activity and the conservation of existing cultural heritage.

The problem with this argument, in its original IP context or as it might be claimed to justify interventionist *sui generis* legislation, is that it is almost impossible to prove with concrete evidence. In an environment where most owners of conventional IP (such as copyrights) do not earn substantial amounts from licensing, it is hard to assess how the bare possibility of such earnings may affect their decisions about whether and what to create. Clearly, non-economic motivations also play a strong role here. No good measures exist to demonstrate the actual incentive effect of IP on cultural production. Some anecdotal evidence suggests the existence of such an effect, but it tends to be richly contradicted by reports suggesting that many creative people will produce valuable cultural objects without regard to the likelihood of direct economic

reward.⁵¹ The phenomenon of Free and Open Source Software is only the most recent example that tends to undercut the incentive rationale, at least as a universal proposition.⁵²

Likewise, it is unclear whether creating a comprehensive new system of ownership rights in the Indonesian traditional arts would generate meaningful incentives. As already noted, the project team was impressed by how well, in general, the existing system of economic and non-economic incentives for cultural production and conservation in the traditional arts sector seemed to be functioning. No artists with whom the team spoke suggested that they would abandon their activities in the absence of new legal protections. Of course, these artists had significant economic needs, and meeting these would improve their condition of life. It was not clear that enhancing intangible property rights would achieve this result.

2. Facilitating commerce. There is more positive evidence for a different, and less frequently discussed, incentive effect from conventional IP—that it provides incentives for the purchase and subsequent exploitation of creative work by commercial middlemen. On closer examination, however, this rationale affords little support for interventionist *sui generis* legislation for the traditional arts in Indonesia. As already has been suggested, the basic function of IP laws is to facilitate the commodification of culture. By transforming fluid cultural practices (such as storytelling and music-making) into fixed stable commodities (novels, popular songs, etc.), IP facilitates the development of new commercial markets. By definition, the objects of IP property protection are things that can be bought, sold, assigned, licensed, and so forth. By providing legal guarantees, copyright law, for example, has the effect of drawing capital into particular fields of cultural practice. As a result, it promotes the reallocation of ownership and control over cultural objects from those who have less access to capital (such as creative individuals and small communities of creators) to those with more access (such as entertainment industry conglomerates).

This reallocation is not always—or not entirely—a social harm, especially in the contemporary mainstream media/entertainment environment. Without book publishers, movie studios, recording companies, etc., it is arguable that the public would have less access to the products of

⁵¹ The indeterminacy of arguments about the incentive effect are well illustrated in John Shepard Wiley, Jr.'s, classic article, *Copyright at the School of Patent*, 58 U. CHI. L. REV. 119 (1991). Evidence is marshaled against the reality of the incentive effect in Western Classical music is found in F.M. SCHERER, *QUARTER NOTES AND BANK NOTES* (Princeton U. P. 2004)

⁵² Others include the popularity of Creative Commons and the general success of the “open access” movement, as documented in Professor Peter Suber’s *Guide to the Open Access Movement*, available at <http://www.earlham.edu/~peters/fos/guide.htm>.

contemporary creativity than they currently enjoy. But where the traditional arts are concerned, it is reasonable to ask whether the commodification would be likely to produce any beneficial effects for Indonesian audiences or artists. For one thing, the project team did not have any reason to believe that under-investment by media companies or other business firms was responsible for the problems traditional artists experience in establishing and maintaining connections to contemporary audiences; as has been suggested earlier in this Report, however, those problems are likely to be amenable to a range of non-legal solutions.

For another thing, it seems likely that additional corporate investment in acquiring rights to traditional artistic productions, were it to occur, would lead to disrespectful or distorted representations of tradition. Mainstream commercial renditions of the traditional arts inevitably tend to shorten, simplify and otherwise vulgarize the material they incorporate. It is important that in an effort to promote and protect the traditional arts, law should not offer perverse incentives to debase them.

3. Maintaining artists' control and/or recognition.

IP sometimes is justified in non-economic terms, as a way of safeguarding the integrity of culture. The project team is not convinced, however, that this rationale supports a move to interventionist *sui generis* legislation for the Indonesian traditional arts. As just has been suggested, such legislation actually could encourage commercial users to take questionable liberties with Indonesian arts traditions to which they had purchased, or licensed, the rights. If it were enacted, therefore, interventionist *sui generis* legislation necessarily would have to address the problems of misuse and misattribution (or non-attribution) of material drawn from the traditional arts. By analogy, conventional copyright typically concerns itself with non-economic as well as economic interests: As noted above, so-called “moral rights,” are an important feature of most contemporary copyright laws, including that of Indonesia. In practice, however, moral rights protection often is subordinated to the aspects of the law that are designed to promote commercial exploitation of cultural objects. Even a country like France, where moral rights generally are taken quite seriously, often treats these subject personal interests as having been “waived” when the authors has licensed economic rights of exploitation to (for example) a movie producer.⁵³ The question of how to design truly effective moral rights provisions for the

⁵³ For example, *Rachmaninoff v. Ste. Gaumont* (Cour D’Appel de Paris, 4^e Chambre’ June 12, 2002), 197 R.I.D.A. 459, where a composer’s heirs are found to have no moral rights claim against the distributor of a dramatic film to which they have licensed musical compositions.

traditional arts is a complex and controversial one, as the recent struggle in Australia over Aboriginal moral rights legislation suggests.⁵⁴

The problem is all the more severe because poorly calibrated moral rights provisions can easily become charters for private censorship which actually discourage *responsible creative practice rather than enabling it*. Throughout this Report, emphasis has been placed on the dynamism and flexibility of the Indonesian traditional arts, and it should be noted that a miscalculation about the moral rights provisions of interventionist *sui generis* legislation could threaten those indispensable attributes of practice in the field. Of course, Indonesia might be able to “square the circle” of moral rights protection in new interventionist *sui generis* legislation. But that good outcome would be far from certain. Short of making this attempt, there are better ways to address Indonesian traditional artist’s actual concerns.

As this Report already has suggested, concerns about misuse did not feature prominently (if at all) in traditional artists’ own descriptions of problems they face (or expect to face) in their practice. The project team’s discussions with traditional artists and community leaders revealed that they did, indeed, have concerns about attribution issues. As will be described below, there are targeted legal interventions other than the development of interventionist *sui generis* legislation that may be effective to address the attribution issue.

K. The disadvantages of IP regulation

At this stage in the debate, no one is suggesting that comprehensive protection for the Indonesian traditional arts should be based literally and directly on conventional, Western-derived copyright principles. However, there are serious proposals to subject those arts to a new interventionist *sui generis* regime which is closely modeled on copyright. It may be useful, then, to examine the world’s experience with copyright over its nearly 300 year history and, especially, to review recent experiences with the copyright systems of the United States and Europe. On this basis, the project team has concluded that the benefits, however concrete or speculative, that Indonesian traditional artists and communities might derive from comprehensive new interventionist *sui generis* regulation (based on conventional copyright) are associated with significant costs. Some of these costs already have been suggested, and their nature will emerge even more clearly below. Although nominally intended to stimulate creativity and safeguard artists’ subjective

⁵⁴ Jane Anderson, *The Politics of Indigenous Knowledge: Australia's Proposed Communal Moral Rights Bill*, 27 U. NEW SOUTH WALES L.J. 585 (2004).

interests, modern copyright laws actually have generated another, very different, set of effects. Underlying these effects is the fact that IP (including copyright) celebrates possessiveness and operates by means of commodification. An interventionist *sui generis* legal regime for traditional knowledge might avoid the taint of Western individualism, but it would nevertheless be based on notions of possessiveness and private entitlement; the beneficiaries of this new IP might be groups rather than individuals, but they still would be “owners.” By its very nature, conventional IP transforms dynamic cultural processes into fixed property relations, and interventionist *sui generis* protection would do likewise.

This tendency has become more and more pronounced as IP law has developed, in national courts and legislatures as well as international forums, over the last 25 years. Taking copyright as an example, this time period has seen extension of the duration of protection, widening of the scope of protection, and strengthening of the rights conferred upon owners. This last development has been perhaps the most dramatic. Today, copyright laws everywhere in the world are no longer just about copying. They provide owners not only with the right to control the reproduction and sale of their works, but also with a broad power over the making of adaptations based on those works. Any new interventionist *sui generis* law for the traditional arts presumably would confer rights of similar breadth. In the domain of copyright, the intensification of protection has had unhealthy effects on cultural production and innovation. The same effects might be expected where the traditional arts are concerned.

Back in 1967, the late Professor Benjamin Kaplan deplored “copyright’s sanctimonious pretensions about the iniquities of imitation,” concluding that he was “more worried about excessive than insufficient protection.” In the last 15 years, a strong critique of IP (and especially of contemporary copyright) has arisen in countries that have the longest and most intense engagement with these forms of legal regulation. In essence, critics suggest that rather than promoting creativity, IP law is having the opposite effect. Here how Professor Lawrence Lessig, in his book Free Culture,⁵⁵ summarizes the argument:

Some things remain free for the taking within a free culture, and that freedom is good It's the same with a thousand examples that appear everywhere once you begin to look. Scientists build upon the work of other scientists without asking or paying for the privilege. (“Excuse me,

⁵⁵ LAWRENCE LESSIG, *FREE CULTURE: THE NATURE AND FUTURE OF CREATIVITY* (2004).

Professor Einstein, but may I have permission to use your theory of relativity to show that you were wrong about quantum physics?") Acting companies perform adaptations of the works of Shakespeare without securing permission from anyone. (Does anyone believe Shakespeare would be better spread within our culture if there were a central Shakespeare rights clearinghouse that all productions of Shakespeare must appeal to first?) And Hollywood goes through cycles with a certain kind of movie: five asteroid films in the late 1990s; two volcano disaster films in 1997.

Creators here and everywhere are always and at all times building upon the creativity that went before and that surrounds them now. That building is always and everywhere at least partially done without permission and without compensating the original creator. No society, free or controlled, has ever demanded that every use be paid for or that permission . . . must always be sought. Instead, every society has left a certain bit of its culture free for the taking—free societies more fully than unfree, perhaps, but all societies to some degree.

The hard question is therefore not whether a culture is free. All cultures are free to some degree. The hard question instead is “How free is this culture?” How much, and how broadly, is the culture free for others to take and build upon? [I]s that freedom spread broadly?

Free cultures are cultures that leave a great deal open for others to build upon; unfree, or permission, cultures leave much less. Ours was a free culture. It is becoming much less so.

Lessig, and other critics of the copyright system, fear that the intensification of a global “permission culture,” enabled by intellectual property law, will shut down sources of inspiration for new creativity. IP also can have another pernicious effect—that of diverting the energies of individuals from creative effort into controversies about ownership or infringement. Seen in this way, IP law runs the risk of being less a force for promoting innovation in the future than an engine for generating expensive and distracting arguments about the past.

Given the developments in contemporary IP just summarized, these disputes tend to focus recurrently on several doctrinal “fault lines,” where the rapid expansion of protection has left the structure weakened or its contours unclear. The major issue areas are:

1. Ownership. The process by which culture is produced is complex, and in the arts, all children have many ancestors. **Any “new” cultural production necessarily reflects inputs from multiple sources, old and new. In order to function, however, copyright law (and new IP regimes modeled on copyright) must deny this complex reality.** Instead, it is imperative to allocate the rights in each cultural object to some particular person or entity. Thus, for example, the writing of a corporate employee must belong either to him or her or to the company—even though a system for the sharing of such rights might be the fairest and most realistic solution. Every modern copyright law has developed elaborate rules to resolve the many competing claims that arise—rules that are complicated precisely because they deny the relativity and specificity of the underlying situation. Unsatisfactory concepts such as “joint authorship,” “employed authorship,” and “commissioned authorship” figure prominently in the discourse of copyright, and courts spend considerable time and resources sorting out their application. Unfortunately, because the concepts fit so poorly with the realities of cultural production, the uncertainties surrounding them cannot be banished.

Moreover, because the alienability of intangible property is a touchstone of all conventional IP law, another complex set of ownership questions arises around the effectiveness (or ineffectiveness) of purported transfers of rights. Enormous energy is expended on deciding whether particular written instruments are capable of conveying rights, on ascertaining the precise scope of rights conveyed, and (sometimes) on determining whether private deals should be rejected as being against public policy.

The lesson of these experiences with copyright for the choice facing Indonesia is clear: Under an interventionist *sui generis* law for the Indonesian traditional arts, similar controversies about ownership, including issues about the relationship between the individual artists and their communities, could be expected to arise. Rather than promoting the solidarity of the traditional arts sector in Indonesia, such controversies would have the effect of producing unnecessary and unproductive rivalries between individuals and groups, and among groups who share common cultural heritages.

2. Infringement.

As has already been noted, IP laws today give rights-holders wide authority over the use of their works by others. Historically, for example, copyright laws prohibited unauthorized reproduction and sale of copies, but permitted the making of new versions that added value to the originals—it was an infringement to print copies of a popular book in the

original language, for example, but permissible to translate the text into a minority language. Those days are gone. **Currently, the so-called “adaptation right” (or “right to prepare derivative works”) is one of the exclusive rights guaranteed in every up-to-date national law. The long reach of this right, in turn, continues to expand as a result of judicial interpretation, sweeping in more and more kinds of non-literal similarity.** Even new works that would not immediately be recognized as off-shoots of existing ones may be subject to plausible allegations of copyright infringement if they have not been authorized. Once such accusations are made, the person or company against whom they are directed faces a difficult set of alternatives: to contest the allegation (which certainly will be expensive and may not produce a good result); to buy peace by purchasing a license from the rights-holder (even if such a license is not actually required); or to abandon the use (to the detriment of both the user and the public at large). When users of copyrighted material choose to defend their activities, courts find themselves embroiled in complicated and unprofitable discussions of how one work draws from another and how much similarity is acceptable. Because their reasoning generally is specific to facts before them, the courts’ decisions in such cases offer relatively little useful guidance to third parties in future controversies.

In the field of the traditional arts, where close imitation of old models and borrowing from common sources is an integral feature of contemporary practice, the opportunity for unproductive controversies about issues of similarity and difference is particularly strong. Worse still, in an effort to avoid allegations of excessive similarity, contemporary artists working within the traditional arts might choose to deviate further from tradition or modify traditional motifs more extensively than they otherwise would, merely in order to reduce the risk of liability. In other words, interventionist *sui generis* legislation could well encourage meaningless innovation for the sake of innovation.

3. Limitations and exceptions.

This was once a relatively unimportant area of IP controversy, but today it is intensely contested territory in copyright law. **Indeed, limitations and exceptions are an area of growing significance and complexity in litigation.** All national IP laws have built-in “safety valves” designed to relieve some of the pressure generated by the expansion of propriety rights, and to provide some recognition of the public interest in having reasonable levels of access to protected works. Today, as never before, these so-called “limitations and exceptions” differ substantially from

country to country, in both form and content.⁵⁶ U.S. copyright law, for example, recognizes the so-called “fair use” doctrine, while other common law countries (such as Canada, South Africa and Australia) work with the somewhat narrower concept of “fair dealing.” In many civil law countries, including Indonesia, there is no general exception of this kind; instead, these copyright laws incorporate a list of specific exemptions (for educational use, charitable use, etc.). Whatever formula a national law has adopted to deal with the spill-over effect of increasing copyright protection, however, the problems of interpretation are much the same. By their very nature, IP limitations and exceptions deal with unusual or at least atypical situations. As a result, they tend to be both hotly contested and inherently indeterminate. Their application depends critically on the particular facts and circumstance of the specific case presented. Thus, these provisions are especially fertile fields for controversy and litigation, and the number of such disputes is likely to increase with time.

The same tendency could be expected in connection with interventionist *sui generis* legislation relating to the traditional arts. Necessarily, such a law would need to recognize multiple limitations for cultural, educational and other important public uses. Around such statutory limitations, a secondary jurisprudence would collect and crystallize, adding further to the complexity of the overall scheme.

Z. A hidden cost of IP regulation: reallocation of authority to courts and agencies

As the preceding discussion makes clear, one effect of the growing strength and complexity of contemporary IP legislation has been to vest greater and greater authority over cultural policy in the hands of courts and other agencies involved in IP enforcement and related decision-making. In modern Western copyright systems, for example, government bodies with no special cultural expertise regularly make determinations that structure creative practice—telling artists what sources they can and cannot use, what degree of similarity to existing work is permissible, and so forth. Filmmakers, musicians, and even writers must consult lawyers before they undertake major creative projects, to assure that their inspiration doesn’t run afoul of someone else’s real or imagined rights.

The same risk would be present in connection with interventionist *sui generis* regulation of traditional arts in Indonesia. Although such an

⁵⁶ Peter Jaszi, *Public Interest Exceptions in Copyright: a Comparative and International Perspective* (2005), http://correctingcourse.columbia.edu/paper_jaszi.

initiative might be justified in terms of promoting the interests of artists, the real effect could well be to shift authority over their day-to-day practice away from themselves and their communities, into courts and specialized agencies. Up to the present day, traditional artists and their communities, guided by relevant *adat* principles, have shown considerable resourcefulness in managing their own practices. Policy-makers should be wary of displacing their largely successful systems of self-regulation with unproven mechanisms of judicial or bureaucratic governance.

Some examples of contemporary IP controversies

The preceding paragraphs explain, in general terms, the kinds of controversies that are generated by interventionist IP legislation, which seeks to protect a given body of cultural material a wide range of different kinds of unauthorized use. They also highlight the ways in which the existence of these controversies injects state authority into creativity practice. Most of the quarrels that IP generates are unproductive at best, and at worst they actively discourage new creativity or prevent its benefits from reaching an audience. But when there is money at stake, no claim may be too far-fetched or too speculative for individuals and (especially) companies who claim rights and can afford the costs of asserting them. Conventional IP laws are machines for generating controversy, and there is no reason to suppose that an interventionist *sui generis* law in Indonesia would be any different. One can only speculate about the kinds of disputes that might arise under such a comprehensive new IP regime for the traditional arts. But one clue to the directions such controversies might take can be found in recent experience with copyright in the United States, where this form of IP protection for new creative productions is particularly well developed.

To cite a few examples:

- Professors and their universities are involved in various long-running disputes about the ownership of course materials, scholarly writings and even books. The institutions claim rights because, they assert, producing such materials is part of teachers' job duties; the professors argue, just as loudly, that these are their own individual works, not the property of the whole academic community.
- A movie director recently was sued by a consultant who made various creative contributions to the production of a Hollywood film—devising at least two entire scenes, editing parts of the film, reading voice-overs, and more. After a protracted and expensive litigation, a federal appellate court

in California found that the consultant was not a joint “author.”

- In contrast, where a community organization hired a sculptor to create a statue according to the detailed instructions of the organization’s leader, the Supreme Court of the United States determined that the sculptor nevertheless should be considered the sole author of the piece.
- In 2001, an African-American author was prohibited from distributing her book, “The Wind Done Gone,” a retelling of a famous novel about the Old South, “Gone With the Wind,” from the point of view (and in the voice) of a black slave character; only the intervention of a federal court of appeals, relying in its decision on the constitutional First Amendment to the United States Constitution, saved this work for the public.
- Media giants such as Walt Disney routinely threaten nursery schools and day-care centers that decorate their walls with hand-painted versions of Mickey Mouse and other cartoon characters; they also have threatened childrens’ performers who make balloon animals that resemble those characters too closely.
- Ric Silver, the “creator” of a ‘70’s social dance fad, “The Electric Slide,” has asserted copyright in this series of steps and is attempting to prohibit unlicensed representations of it. This episode, along with many other examples of extreme overreaching by copyright owners and their lawyers, are documented at www.chillingeffects.org. Notably, no mechanism exists in the law to discourage cease-and-desist letters based on such claims.
- In 2002, the British composer John Batt paid an undisclosed six-figure settlement to the John Cage Trust, which owns the copyrights of the late American musical experimentalist. Batt had been sued for including the song, “A One Minute Silence,” on an album for his classical rock band, The Planets. Specifically, he had been accused of copying his song from Cage’s 1952 composition “4’33,” which consists of four minutes and 33 seconds of total silence.
- To the surprise of many, a federal appeals court decided that so-called “nose masks” (wearable representations of the noses of pigs, parrots, etc.) were copyrightable subject-

matter, and that unlicensed imitations of such whimsical products were prohibited.

- In 2005, a tattoo artist brought a suit alleging that professional basketball star Rasheed Wallace's appearances in a TV ad campaign infringed the artist's claimed copyright in a design he previously had been paid \$450 to tattoo onto Wallace's upper arm. The dissatisfied, artist sought a share of the TV revenue, an injunction, court costs, and more. In 2006, the case was dismissed, presumably because the defendant had agreed to pay again (and probably much more).
- In the widely-publicized (and criticized) *Bridgeport Music* case, a federal appeals court ruled that any digital "sample" from an existing sound recording could be an infringement if it had not been licensed – even if the sample was so short that its source could not be recognized. Only if a particular sample was considered a "fair use" could liability be avoided. This decision has thrown the world of "hip-hop" music into legal chaos.
- Fair use did not save a businessman whose service involved providing short video streams (under two minutes each) from popular motion pictures to websites where copies of those movies were available for sale or rent. The appeals court was not swayed by the fact that the businessman's activities actually tended to enhance the value of the films in question.
- An artist who produced a larger-than-life size, three-dimensional sculpture based on a photograph of two people and a group of puppies, was successfully sued for copyright infringement by the photographer. Despite the creative nature of the sculptor's project, the court pointedly declined to recognize his "fair use" defense.
- Thereafter, the same artist was excused from liability because a court found although one of his paintings copied from magazine photographs, it was nevertheless a "transformative" (and therefore a "fair") use.
- Courts in the United States are increasingly willing to extend copyright discipline even to those who are not directly involved in any even arguably infringing activity. Thus, for example, the federal appeals court in California has found that a landlord who rents space to a business dealing in pirated copies may be liable for damages along with the pirate itself.

- Thom Anderson’s 2003 motion picture, “LA Plays Itself,” an intensely political documentary that uses numerous short film clips to show how Los Angeles has been used and depicted in the Hollywood movies, cannot be seen in the United States, either in theatres or through home video, because of concerns over copyright infringement.

Indeed, many documentary filmmakers in the United States today report that they have been forced to give up on promising projects, or to modify their projects substantially, in order to avoid concerns about copyright infringement.⁵⁷ More generally, throughout creative communities in the United States, anxiety is growing about the overreaching nature of IP rights, and the chill over new creative undertakings that they produce. As documented in a recent report by Harvard University’s Berkman Center on the Internet and Society, U.S. educators also are feeling the chill. Many of them cannot—or believe they cannot—take advantage of the opportunities offered by new technology because they fear liability for copyright infringement.⁵⁸

To be clear, however, the problem of overreaching IP and its negative effects on creativity is not only a function of the “economic” rights that dominate copyright in the United States. “Moral” rights (which are a more prominent part of the IP mix in European and other civil law jurisdictions) can and do have the same effect.

The problem here is not with the moral right of attribution, but with the so-called “integrity” right that gives authors (and their successors in interest) a continuing veto power over new uses of material derived from their original creation. Some examples follow:

- The British singer George Michael successfully enjoined the release of a medley of short selections from various songs by the band “Wham,” on the ground that the new release was a distortion or mutilation, amounting to derogatory treatment, of the originals.
- French courts have been particularly aggressive in allowing the use of moral rights to achieve effective private censorship. More than fifty years ago, they prohibited use of a score by Dmitri Shostakovich in a U.S.-made anti-Soviet

⁵⁷ Center for Social Media, *Untold Stories: Creative Consequences of the Rights Clearance Culture for Documentary Filmmakers* (2005), http://www.centerforsocialmedia.org/files/pdf/UNTOLDSTORIES_Report.pdf.

⁵⁸ Digital Media Project, *The Digital Learning Challenge: Obstacles to Educational Uses of Copyrighted Material in the Digital: A Foundational White Paper* (2006), <http://cyber.law.harvard.edu/media/files/copyrightandeducation.html>.

film. In 1959, a French court found for Charlie Chaplin on his claim that his moral rights were breached through addition of musical accompaniment to his silent film *The Kid*. In 1992, it was decided that a theatre director had violated the late playwright Samuel Beckett's right of integrity (administered by his estate) staging *Waiting for Godot* with the two lead roles played by women instead of men, contrary to Beckett's stated preferences.

- Reminding us that moral rights (and their chilling effect on new creativity) are perpetual, a French court in 2004 imposed a symbolic fine on the publisher of a sequel of *Les Misérables*, ruling that the work infringed the moral rights of Victor Hugo (who died in 1885), who would not have permitted such a continuation of his novel.
- In 1982, a Canadian artist whose animal sculptures had been purchased and installed in a shopping center won a judgment for breach of the integrity right after complaining that the management had draped decorative ribbons over the necks of his sculpted geese, as part of a seasonal display.
- Recently, the Google website, which sometimes decorates its homepage logo to recognize public holidays and other events, was forced to remove figures that imitated the characteristic style (though none of the specific works) of Jean Miro. Google had intended the figures to be a birthday tribute to the late Spanish artist.
- Two Swedish movie directors won a large judgment against a television network that had inserted advertisements into broadcasts of their films that had been appropriately licensed by the owners of economic rights.
- The Israeli Supreme Court recently upheld a substantial award of damages against a biblical scholar who had reprinted a rival's controversial reconstruction and transliteration of one of the Dead Sea Scrolls in a critical scholarly publication. This award was based, in part, on the Court's conclusion that moral rights had been violated.
- In 2006 a German court decided in favor of architect Maynard von Gerkan, endorsing his claim that modifications to his commissioned design for the new central station in Berlin, made in the course of constructing the building, were like "ripping pages out of a novel."

To be clear, all the decisions cited in these illustrations are not necessarily ill-advised ones, although some of them almost certainly go too far. They are cited here for another purpose—to show the typical patterns of conflict that come along with comprehensive IP protection, for whatever kind of subject matter. Were Indonesia to follow the interventionist approach to instituting *sui generis* protection for the traditional arts, similar quarrels could be expected to arise here. This, in turn, could threaten—rather than promote—the health of the Indonesian traditional arts.

Summing up the implications of applying conventional IP paradigms to Indonesian traditional arts

What are some of the particular ways in which over-reliance on models of protection based on conventional IP paradigms might threaten the continued flourishing of the traditional arts in Indonesia? The most obvious and tangible is that installing a comprehensive *sui generis* system based on conventional IP models would divert important state resources away from the affirmative promotion of traditional culture, and into the resolution of disputes between parties (primarily Indonesian groups and individuals) through the courts, administrative agencies, etc. IP laws are essentially reactive; rather than actively promoting cultural goals, they operate as subsidies to the winners in private controversies. As has been suggested above, comprehensive IP regimes are expensive to maintain and operate, and it is important to ask whether, in this instance, such expenses would be worthwhile. The answer to that question will be affected, in turn, by a consideration of the other, non-monetary costs associated with the interventionist approach to *sui generis* protection—the “unintended consequences” of the commodification of Indonesian traditional artistic culture, so to speak.

1. IP rights and “exclusivity”: the burden of commodification

One set of such costs arises from the concepts of “ownership” in ideas that an approach based on conventional IP law, which has its roots in concepts of “possessive individualism,” would bring with it. Concepts of IP ownership necessarily imply both inclusion and exclusion. This is as true if the governing concept of ownership in a given IP system is based on “group rights” rather than individual ones. As has been suggested earlier in the Report, the themes, motifs, techniques and style of Indonesian traditional arts are widely distributed across the country; whatever their points of origin (in the archipelago or beyond it), they are now, to a great extent, a part of the living culture of the nation. Any attempt to “carve up” this body of culture into bounded elements to which title can be assigned to various communities will be a difficult

and, in some respects, an artificial exercise that could threaten regional or national harmony.

To say that a particular geographically-defined community is the “owner” of a specific artistic tradition is, of necessity, to deny the claims of others who may have direct stakes in it. Thus, for example, a decision to vest ownership of a musical tradition with a community in which that tradition “originates” means that the contributions and interests of others who practice that tradition today, perhaps in far-flung parts of the archipelago, will not be taken into account. Just as conventional Western IP promotes an exaggerated emphasis on the entitlements of specific individuals, to the detriment of the public, so an approach to *sui generis* protection for traditional arts that draws on conventional IP would have the effect of emphasizing the claims of some groups within Indonesia at the expense of shared national culture. For example, *batik* makers from North Java might engage in disputes with those from South Sumatra over common designs that they both consider “theirs.” Similarly, South and Central *Sulawesi ikat* weavers might contest the “ownership” of common designs that were spread by coastal traders. Hostilities could arise—with the possible result that fewer Indonesian textiles would be produced!

Another way of making this point is to suggest that over-reliance on conventional IP concepts for the protection of the traditional arts will have the unintended consequence of encouraging Western-style proprietary thinking about the fluid cultural practices that are part of the Indonesian cultural heritage. It would be no easier, nor more satisfactory, to say that the people of a particular region of Indonesia own a tradition, to the exclusion of others who practice it, than it would be to say that an individual Western modern artist (or group of artists) owns a particular style of painting (expressionism or photorealism, for example). In both cases, the drive to divide up complex artistic and cultural phenomena into manageable pieces of IP would come into conflict with the realities of how the arts actually are practiced.

By way of further illustration, consider that one explanation for the existence of different forms of *gamelan* instruments, *gamelan* music, and the *wayang kulit* shadow-play, in Central Java on the one hand and Bali or Banjarmasin on the other, is that Central Javanese *gamelan* instruments, music, and puppetry were brought hundreds of years ago from Java to other regions where they took root and began to develop on their own. Does this mean that Central Javanese “own” *gamelan* and *wayang* and should therefore be able to evaluate whether the Balinese or Banjarese forms of it are acceptable or not? Should Bali and Banjarmasin pay Java for the right to “use” *gamelan* and *wayang*? If we

reject this idea in the case of *gamelan* and *wayang*, how can we accept it for other more recent instances of cultural borrowing?

2. IP rights and the loss of creativity: more chilling effects

As illustrated earlier in this section, conventional IP regimes spend enormous time and resources on asking questions about sameness and difference: Are two “works” so much alike that one should be considered an infringement of the other, or sufficiently distinct so that it should not? As Western jurists candidly acknowledge, these are never easy or comfortable determinations. Inevitably, they are based as much in the decision-maker’s subjectivity as in any body of objective evidence that can be brought to bear on the question. Because of their inherent subjectivity, such determinations are hard to predict before the fact of a controversy and its formal resolution. As a result, creative people working with conventional IP regimes often lack meaningful guidance on how to conform their activities to the stipulations of the law. This uncertainty limits the creativity of individuals whose work is regulated by conventional IP laws, as examples from across the globe highlight. There is no reason to believe that the case would be otherwise under an interventionist Indonesian *sui generis* law on traditional arts.

Moreover, as this Report already has detailed, the traditional arts of Indonesia have developed, and continue to develop, through an unbroken pattern of intergenerational transmission. Contemporary practitioners of the traditional arts see themselves as both culture-bearers and as innovators. They view their arts as processes, not as stable, bounded things. Any attempt to reduce the corpus of the Indonesian traditional arts to a pattern of fixed knowledge objects, each “belonging” to some specific “owner,” inevitably will erect a series of artificial and entirely unnecessary barriers: between “tradition” and the practice of the living arts, between the old and the young, between rural areas and cities, etc. As the continuing vitality of the Indonesian traditional arts is dependent, to some extent, on the process of hybridization, an interventionist *sui generis* legal approach based on conventional IP models is likely to complicate rather than to facilitate collaboration, cooperation and the dissemination of influence.

3. IP and alienation: further implications of a property regime

As has been suggested above, the strength of the IP paradigm lies in the reduction to property status of ideas, theme, styles and social relationships that conventionally have been seen as being beyond ownership. However, over-reliance on property concepts in conceptualizing the legal status of mental productions has another

consequence—intended or unintended, as the case may be. Because knowledge objects subject to IP are just intangible things, they are also comprehensively alienable. The inevitable consequence of designating something as a form of property is that it then can be bought and sold—either outright or by means of partial assignments and exclusive licenses. Indeed, as explained above, one rationale or justification for IP is that it creates necessary conditions for the development of markets in certain intangibles. In turn, such markets operate to shift authority over knowledge objects away from those who produced them and toward those who have the capital to acquire them.

Under an interventionist IP-based *sui generis* regime, control over the economic exploitation of traditional arts will pass—gradually or rapidly—from the groups and individuals who practice those arts into the hands of domestic and foreign companies who believe that they can exploit them successfully. Whether such transfers are made in exchange for one-time payments or ongoing royalties, and even without regard to their economic fairness, the effect will be to separate practice communities from their cultural legacies. It is even possible to imagine situations in which those practice communities would be targeted as infringers in legal actions brought by companies that claim exclusive legal ownership of their traditions.⁵⁹

Commodification may actually put the survival of the traditional arts at risk. The landscape of conventional IP law is littered with examples of important knowledge objects (from out-of-print books to “orphan drugs”) that have languished because firms have acquired rights to them and then lost their economic motivation to exploit those rights. In effect, implementation of an interventionist *sui generis* regime would risk handing the fate of the Indonesian traditional arts over to entities that are profoundly indifferent to their cultural significance, since they are motivated only by the drive for profit. Through “moral rights,” the original “owners” of particular arts traditions might retain some authority over uses made after exploitation rights have been transferred. However, that authority is (by its nature) limited in scope and negative in its thrust. It is, in other words, a right to prevent certain uses, but not to promote others.

Toward an alternative approach

⁵⁹ This possibility is not as far-fetched as it may seem. In the different, but related, area of seed patents, farmers who have grown certain crops for long periods of time find themselves threatened with legal action by companies that have acquired seed patents on “improved” versions. An example can be found at <http://www1.american.edu/TED/enola-bean.htm>, where a case study begins, “The Enola Bean is an alleged case of biopiracy, where Larry Procter, a Colorado executive in the bean industry cultivated yellow beans he bought in Mexico on vacation for which he received a US patent two years later on all yellow beans of this variety.”

The formula of conventional IP is a recipe for overly strong medicine. Legal regimes based on those paradigms may sometimes cure, but they also too easily can sicken or kill. In some situations, the severity of the problems to be addressed, along with the absence of any good alternative, may justify a decision to take an interventionist approach, even when the risks are well understood. The project team responsible for this Report, however, does not believe that such justification exists, at this time, where the Indonesian traditional arts are concerned. As detailed above, those arts are varied, vital, vibrant and socially beneficial in contemporary Indonesian culture. Their condition does not call for heavy-handed and high-risk legal interventions. A variety of other, less drastic and better targeted approaches are available to cautiously and respectfully address the real problems of the Indonesian traditional arts sector. Some of those approaches involve social action to promote traditional arts, rather than legal regulation of them. To the extent that additional regulation is required, however, a respectful approach to *sui generis* legislation itself has much to recommend it as an alternative. In its final sections, this Report will address some of the components that might be included in a uniquely Indonesian implementation of *sui generis* protection, which would take specific account of the nature and condition of this nation's traditional arts.

Goals for an Indonesian sui generis approach to protecting the traditional arts

As already will be clear, the project team has serious reservations about the potential of a new *sui generis* law based on the conventional IP model of comprehensive protection for a particular class of intangible knowledge objects. Many of the promised benefits of such an approach appear to be either uncertain or illusory, while the potential costs are significant. Some of these costs are relatively straightforward, including the expense of participation in such a system to both the public treasury and to private individuals. Others, like the damage that interventionist *sui generis* protection might do to the functioning ecology of the Indonesian traditional arts, are harder to quantify but, ultimately, even more significant.

Nevertheless, the traditional artists and community leaders with whom the project team spoke made it clear that they did encounter problems to which positive law might offer at least partial solutions. Consistent with the methodology outlined at the beginning of this Report, the project team believes that these self-identified problems in traditional arts practice should be the focus of any law reform effort in the area. Therefore, the project team recommends a selective, low-impact *sui*

generis approach to law reform in support of the traditional arts. In the sections that follow, the specific elements of this recommendation are discussed. Some involve the mobilization of existing Indonesian law for new purposes, while others would require some limited new legislation.

A successful legal intervention, of course, involves more than identifying relevant existing laws or bringing about the passage of new ones. It also involves ensuring that those who need to use the law have access to it. The project team found that traditional artists believed that they had little connection to the national legal system. Those who had considered the relevance of law to their own situations generally felt that accessing the system would be difficult or impossible for them. The complexity of legal rules was one problem, and another was the artists' perception that taking advantage of legal protection is an expensive and time-consuming process. No amount of law, old or new, will be effective in supporting the Indonesian traditional arts unless those who might benefit from it are aware of its existence and able to take advantage.

First, however, it will be appropriate to state (or restate) the objectives by which efforts to construct this *sui generis* approach should be guided. Of the five objectives that follow, the first three describe ultimate goals of regulation, and the final pair is instrumental in nature—that is, they represent consensus views about how *sui generis* rules should function, rather than what it might accomplish:

1. Assuring that traditional artists and arts communities receive appropriate recognition. As noted earlier in the Report, the problem of recognition was the foremost concern of the traditional artists with whom the project team spoke, from urban *dalang* to village weavers. As also noted, some aspects of this problem are effectively beyond the power of the legal system to address, and would be dealt with more effectively by other elements of the civil society (the media or the schools, for example). But clearly, law does have a role to play in assuring that artists and communities who wish to mark their work can do so in confidence that their choices will be honored and enforced.

2. Providing protection against misappropriation. Defining and then combating “misappropriation” is another useful role for law. As has already been suggested, however, the term has no fixed meaning, in and of itself. Distinguishing between “good” and “bad” cultural borrowing necessarily involves a subjective determination, and the term “misappropriation” can be used to refer to any set of information use practices that, in anyone’s opinion, is unfair and therefore objectionable. Where the traditional arts are concerned, the opinion that matters is the one held by the artists and arts communities. In conversations with the project team, they provided their own clear consensus definition of

misappropriation. As already has been noted, they expressed concern about the unfairness of extensive, literal commercial reproduction of material derived directly from traditional sources (especially painting, carving, and textile arts). Although this sort of “mass market” misappropriation did not appear to be a widespread problem in practice, opposition to it was a point about which there was broad agreement in theory. This consensus, it should be noted, was the other face of the widely shared lack of concern that artists displayed about imitation or reinterpretation of the traditions in which they practice.

3. Empowering traditional arts communities to prevent “misuse”. The meaning of “misuse” is almost as elusive as that of “misappropriation.” What constitutes misuse will necessarily be a function of the attitudes and values of the community in which a particular traditional art form is practiced and conserved. Moreover, as this Report has detailed, the study team found no indication that disrespectful or degrading use of traditional arts was among the actual concerns of artists and their communities. In part, this lack of concern results from a shared view of how the embedded arts acquire and maintain special spiritual or communal meaning. In the artists’ view, imitations of a traditional artistic practice generally lose their power to offend when they occur outside that practice’s original social context, and the same is true of outsiders’ uses of traditional art objects. In addition, it was hypothesized that the failure of this issue to emerge in interviews may have been related to the fact that existing mechanisms of social control, including *adat* institutions, had been effective in preventing the disclosure and reuse of the most sensitive aspects of traditional arts systems. Law has a role to play in helping to assure that this remains the case.

4. Assuring that relevant legal institutions are decentralized and transparent. As is suggested above, operation of a *sui generis* legal approach to support the traditional arts will depend on answers to questions (like the definitions of “misappropriation” and “misuse”) that may be answered differently in different traditional arts communities around Indonesia. Thus, it will be preferable to implement a *sui generis* approach in ways that empower those various communities (and the individual artists within them) as fully as possible. Regional and national authorities have important contributions to make, but their role is secondary to that of the communities themselves. In addition, traditional artists’ shared perception is that high-level legal institutions are difficult and expensive to access. For this reason, as well, a *sui generis* approach that favors localism and retains as much informality as possible is to be preferred. Finally, as with any other system of legal regulation, it is important that that this one exhibit clarity in its

functioning. This will provide a strong basis for the system to be trusted and relied upon by those for whose benefit it operates

5. Avoiding unnecessary disruption of cultural practice. This Report demonstrates that the traditional arts in Indonesia are fluid and dynamic in character. In addition, it documents the prevalence of an ethic of sharing among Indonesian traditional artists, as well as some of the concrete benefits that adherence to this ethic has brought with it. The continued health of the Indonesian traditional arts depends, in large part, on the ability of traditional artists to adapt their practices to new demands, to meet the tastes of new audiences, and to engage in new kinds of collaboration with one another and with contemporary artists. Thus, it will be important that a *sui generis* approach to the promotion of Indonesian traditional arts retains as much porosity as possible. The goal must be to regulate effectively those activities that are truly problematic, while leaving others free to flourish. In other words, the less comprehensive the protection offered, the better it may be.

In closing this discussion of objectives, it is worth reemphasizing the way of implementing *sui generis* protection that is suggested here, which might be termed a “context sensitive” approach, is not only conservative but also (at least potentially) incremental. If an initial minimal legal intervention in support of the traditional arts fails to adequately address the identified concerns of artists and their communities, or if additional concerns emerge, further measures remain a possibility in the future. Whether such measures are required will be easier to assess after a first round of reforms has been put in place. If history teaches anything about the process of change in IP law, however, it is that once a new set of entitlements has been created, it is nearly impossible to dismantle. So, for now, caution is the watchword!

A preliminary question: Who should be subject to legal rules supporting the traditional arts?

It sometimes has been suggested that the problems of the Indonesian traditional arts sector are primarily the result of actions taken by outsiders, i.e., foreign individuals, companies and (occasionally) even governments. In that case, there would be certain logic to focusing new laws and regulations on—and only on—the activities of such outsiders. Thus, for example, the official commentary on Article 10 of Law No. 19 of 2002, *Copyrights*, states (in part) that the provision vesting ownership of “folklore” in the State was intended “to prevent any attempt made by a foreign party to destroy its cultural value.”

After considerable deliberation, however, the project team has rejected the notion that Indonesian law in support of traditional culture can be

outward-looking only. As will appear below, all the Report's suggestions for mobilizing existing laws and supplementing them with new ones involve rules and regulations that would apply with equal force to the activities of foreigners and Indonesians alike. Behind the decision to proceed in this way are two considerations.

First, and most important, is the fact that artists and community leaders who spoke with the project team did not themselves focus concern exclusively on foreigners' actual or potential incursions into the Indonesian traditional arts sector. In fact, most of their concrete problems, and the anecdotes used to illustrate them, involved perceived bad behavior by other Indonesians. Thus, for example, some concerns were expressed about the duplication of Indonesian textile patterns in Malaysian factories, but more often the focus was on unfair competition with local hand-weavers from (for example) semi-mechanized textile producers located in more industrialized regions of Indonesia itself. Likewise, some traditional musicians' grievances about the unauthorized commercial use of their recorded performances were directed not against the activities of foreign visitors, but those of local Indonesian recording companies. Thus, a new legal intervention in support of traditional arts that limited its scope to regulating the activities of foreigners would, by definition, fall well short of meeting artists' stated concerns.

Second, were Indonesia to develop its *sui generis* approach to supporting the traditional arts in a way that focused exclusively (or even primarily) on the activities of foreigners, it would risk substantial international criticism and jeopardize the possibilities for international cooperation on the issue. Although there are no existing treaties in the field of *sui generis* protection for traditional or Indigenous culture, the general norm in international intellectual property agreements is that of "national treatment." Among other things, this rubric implies a principle of non-discrimination where the interests of foreigners are concerned. In addition, the provisions of the World Trade Organization Agreement of 1994, to which Indonesia is party, would appear to prohibit trade-related legislation that creates a stricter general regulatory regime for foreigners than that which is applied domestically.⁶⁰ The most straightforward

⁶⁰ The relevant provisions are Article 3 of the 1994 General Agreement on Tariffs and Trade, Article 17 of the General Agreement on Trade in Services, and Article 17 of the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), which reads as follows:

Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection (3) of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement.

interpretation of the WTO Agreement would apply literally to domestic legislation or enforcement activities relating to the traditional arts, though the point is not free from dispute. Finally, new initiatives focused strictly on the activities of foreigners in Indonesia would not be conducive to the objective of encouraging other nations to provide protection for Indonesian tradition in their own territories under their own national laws.

Mobilizing existing law

Earlier in this Report, a review of existing conventional intellectual property doctrines suggested in some detail the ways in which Indonesian traditional artists could better take advantage of the protections that Indonesian law already affords significant protection for the practices of the traditional arts sector. Here, therefore, that potential will be summarized only briefly. To begin, it is important to note that in one important respect, existing Indonesian law already provides meaningful and (potentially) effective protection for traditional content. This is where the traditional performing arts are concerned.

1. Related rights. Arts. 49-51 of the 2002 law on *Copyrights* give performers an exclusive right to authorize or prohibit the making of recordings of their performances, as well as the reproduction, distribution, and broadcasting of such recordings. Recognition of this right, incidentally, is provided through national laws throughout the world, and is mandated by the 1996 WIPO Performances and Phonograms Treaty (WPPT) and Article 14.1 of the 1994 Agreement on Trade-Related Aspects of Intellectual Property (TRIPS). In practice, it is a right that has been exercised primarily by contemporary popular musicians; no one, for example, can lawfully bring a recording device to a pop concert and afterwards issue CD's of the performance. But the right also belongs, in equal measure, to individuals and groups who perform old music, dance, drama or ritual. It exists, moreover, without regard to whether the performance in question is in whole or part an innovative one, or whether (on the other hand) it represents an absolutely faithful recreation of tradition. In either case, the performer or performers possess legal authority to prevent (or permit) recording. Moreover, it follows that when recordings are permitted, this should be on the performers' terms (as to what uses will be made of them, what royalties will be paid, and so forth).

The project team believes that, fairly understood, the provisions of Arts. 49-51 apply not only to conventional sound recordings, but also to audiovisual ones. Thus, no change is needed in the existing legislation to make it an effective source of legal protection for most traditional musicians, dancers, actors and puppeteers. However, it may be useful to

clarify the official commentary on these articles, to make absolutely clear that the full range of recordings (including audiovisual ones) falls within their coverage.

As already has been indicated, the project team found that traditional performing artists in Indonesia were concerned about the capture and subsequent commercialization of their work by means of unauthorized recording. Article 49 gives such artists a tool against this form of misappropriation.⁶¹ However, it is not a tool of which most (if any) traditional artists are aware. Making the so-called “related rights” provisions of Arts. 49-51⁶² truly useful to traditional performing artists will require outreach to inform individuals and communities about their rights, and (especially) to advise them about how to exercise those rights in a responsible and effective way. In particular, the project team suggests the development of a “model agreement” that traditional performance artists could use to grant consent for recording, incorporating a series of possible conditions that they might wish to impose in connection with their consent. Such a model agreement also should specifically acknowledge that one alternative for performers may be to impose no conditions; if they consider that the proposed recording is consistent with their own values and goals

In cases of unauthorized recording, Indonesian performers could, at least in theory, enforce their “related rights” against foreign users in most parts of the world, because of international treaties, such as the WPPT and TRIPS, by means of which most nations mutually agree to such enforcement. Were a foreign user first to agree to conditions in connection with a proposed recording, and then later violate the agreement, enforcement would be even more straightforward. Such agreements would be valid and enforceable not only within Indonesia, but throughout the world, because contractual obligations apply beyond the territorial limits of the countries in which they originate. Courts in the rest of Asia, Europe, and the United States routinely and regularly honor foreign contracts. For example, a Dutch company that recorded a traditional Indonesian performance after signing an agreement that it would be used for educational purposes only, and then proceeded to use the material in a commercial feature film, could be sued in the Netherlands for breach of a contractual obligation!

None of this is to minimize the practical difficulties involved in making the rights granted in Arts. 49-51, or of contracts through which those

⁶¹ Article 49(1) reads as follows: “A Performer shall have the exclusive right to give consent to or prevent another person who without his consent makes, reproduces or broadcasts a phonogram and/or a visual picture of his performance.”

⁶² Articles 50 and 51 deal with the duration and enforcement of this right, among other things.

rights are implemented, useful to Indonesian traditional performing artists. As is true of the core provisions of the law on *Copyrights*, these related rights provisions will be meaningful only if information about them can be spread effectively to traditional artists and arts communities, and only if technical and (where necessary) legal assistance is available to them. Later in this Report, the project team will offer specific suggestions about how such assistance might be delivered. One element is the creation of a new National Commission on the Traditional Arts responsible for connecting traditional arts communities with information and services that could help them take advantage of whatever rights that they (and their members) possess.

2. Trademark. Trademark law has the potential to help traditional arts communities distinguish their own unique productions more effectively in the marketplace. Although trademark cannot regulate the practice of imitation as such, it can help communities inform consumers about when material offered for sale is genuine—and when it is not. In its visits around the country, the project team saw many examples of traditional arts communities experimenting with the use of labels to differentiate their own goods from outright “knock-offs” and other non-authentic products offered without their endorsement. Frequently, leaders expressed concern that such unfair competition might extend to copying these labels themselves, so as to “pass off” fakes as genuine articles. Although the individuals responsible for these “branding” initiatives seldom described their activities in terms of trademark law, they do (in fact) fall potentially within the scope of Law No. 15 of 2001, *On Marks*. When, for example, a local or regional weaving cooperative adopts a common label to distinguish the textiles produced by its members from other goods of the same general kind, that cooperative is (in effect) adopting a form of “collective mark,” as that term is defined generally and in Indonesian law.⁶³

However, the legal protection against counterfeiting, duplication or confusing imitation of marks that the statute provides is not automatically available. Rather, the statute makes registration an *absolute prerequisite* for the enforcement of all trademarks, including collective ones. Trademark protection has a great deal to offer Indonesian traditional arts communities that are struggling to develop economic models to support the work of individual artists and to ensure the faithful transmission of old cultural values across generations. But,

⁶³ Article 1(4) states: “Collective Mark shall mean a Mark that is used on goods and/or services having the same characteristics that are traded jointly by several persons or legal entities to distinguish the goods and/or services from others of the same kind.”

once again, the full realization of that potential will depend on technical and legal assistance being available to those communities.

If that assistance is forthcoming, Indonesian trademark law could operate beneficially for traditional arts communities without any modification to the statute itself. That would be true, in particular if the schedule of fees for trademark registration could be modified to provide a special concessional rate for collective mark registrations by traditional arts communities.

Another possible approach to opening up the protection of trademark law to traditional arts communities would require a statutory change to allow suits for infringement to be brought based on unregistered marks used by traditional arts communities to distinguish their goods in the marketplace. Various countries, although not Indonesia, already extend protection in their national laws for unregistered marks. In the United States, for example, § 43(a) of the Lanham Act allows the proprietor of any mark to sue a competitor for trademark infringement; if it can prove that its mark is known by the public, and that the defendant's mark is "confusingly" similar, it can succeed even without having made a prior registration. In general, this provision has been successful in giving small businesses and other entities, for whom registration may be too difficult or expensive, a real measure of protection within the trademark system. Were this approach to be implemented, however, it would be important to require that only unregistered marks that clearly refer to a particular source of cultural goods (a specific community or sub-region, for example) would receive this new protection. Extending it further, to include more generic or descriptive marks, would run the risk of generating conflict among independent communities engaged in parallel, similar sets of traditional arts practices.

In 2007, Indonesia took an important step toward exploring this approach when the "Batikmark" was introduced by Ministerial Decree (Peraturan Menteri Perindustrian RI) No. 74/MIND/ PER/9/2007. As described in a recent commentary,

Under the Indonesian Ministerial Decree, only batik manufacturers who already sell their products under a registered trademark can obtain a "Batikmark" certification. The manufacturer's products also must pass a series of tests conducted by the National Standardization Agency (Badan Standardisasi Nasional). Products that pass their tests are considered to conform to the "Indonesian National Standard" (Standar Nasional Indonesia). The manufacturer receives a certification upon passing the tests. If the manufacturer is eligible, they can then file a written request, attached with its

company profile, to the head of the Yogyakarta Grand Handicraft and Batik House (Balai Besar Kerajinan dan Batik). Yogyakarta Grand Handicraft and Batik House is an institution authorized by the Ministerial Decree to perform additional tests on the batik-patterned textile. The Batik Institution will then perform tests in their laboratories. The aim of the tests is to assure that the textile meets the certification standards of the batik-patterned textile. The qualifications include reviewing: the materials applied to the textile, the pattern, the dyeing technique, and the textile quality. If the batik-patterned textiles pass the tests then the manufacturer will be eligible to obtain a numbered “Batikmark” certification. This certification is valid for three years and can be renewed. The certification is in the form of a label printed “Batik Indonesia” that is placed in every single product of batik-patterned textile that has been certified. This label has been copyrighted in the Indonesian Copyright Office.⁶⁴

This innovation is, in effect, a hybrid of a collective mark and a certification mark, as those specialized kinds of trademark have been described earlier in this report. It will be important to watch Indonesia’s experience with this innovation closely.

Finally, the project team recommends that, at an appropriate time, Indonesia should consider amending the 2001 law *On Marks* to provide specifically and affirmatively for the registration of “certification marks” by non-profit organizations that will act as guarantors of products’ authenticity. Although other nations’ experience with certification marks for products of the traditional arts has been mixed, the option is one which should be investigated further. As part of that investigation, it would be useful for policy-makers to look closely at the reasons why (for example) the Australian experiment with a national certification mark for

⁶⁴ Charles Knobloch & Dewi Savitri Reni, *Using Batikmark as a First Step to Extend Protection of Indonesian Javanese-batik Patterned Textile in Foreign Countries*, <http://www.hg.org/article.asp?id=6113>. The authors note that in order for Indonesian marks to have extra-territorial legal reach, it will be necessary to register them in foreign countries. However, collective and certification marks may have practical merchandising value beyond a country’s borders even if they have not achieved formal legal protection abroad. At a 2005 *batik* seminar in Tokyo, designer Iwan Tirta put it this way: “Many printed batiks are sold as if they are real ones. If there is such an Indonesian batik mark, even people who don’t know about real Indonesian batik can recognize what a real one is.” The JAPAN TIMES report is at <http://search.japantimes.co.jp/cgi-bin/nn20050721a9.htm>.

Aboriginal arts products failed, while regional and local schemes appear to be succeeding.

3. Copyright. Earlier in this Report, examples drawn from contemporary Western copyright law are used to illustrate some of the risks and pitfalls associated with interventionist IP policies. Clearly, there are reasons to be cautious about injecting either copyright-like protection, or copyright itself, into the domain of the Indonesian traditional arts. Nevertheless, there are two specific circumstances in which existing copyright law may have something of value to offer artists and their communities.

One of these involves the situation of contemporary artists who identify themselves as innovators working within traditional forms. This self-identification is not the norm among practitioners of the Indonesian traditional arts, who frequently do not distinguish between their individual artistic identities and their ancestral/cultural personae as embodied in tradition. For this majority, the concept of the “authorship” of performances, texts or objects is problematic: Their “artistic creations are often regarded as expressions of their deepest selves, and their permanence is connected to ideas about immortality.

On the other hand, some artists with whom the project team spoke did voice concerns about the misappropriation of the new value that they personally have added to the traditional forms in which they work – and expressed anxieties about whether the current law offered them any meaningful relief. Without question, the “original” work such artists produce is subject to copyright protection. Indonesian law has no copyright formalities or fixation requirement, and registration under Art. 35 of the 2002 law on *Copyrights* is optional rather than mandatory. Therefore, the original work of a living artist working in a traditional mode is instantly and immediately protected from the moment of its creation, and retains protection for his or her lifetime and a period of 50 years following his or her death. The protection thus afforded extends (literally) only to the new value added by the individual living artist, and not to any underlying content that derives directly from the tradition itself.

Copyright also may be useful in other special circumstances, as suggested by the previously-referenced example of successful copyright litigation brought by Australian traditional artists, acting for themselves and on behalf of their communities. In some situations, the unauthorized commercialization of traditional themes and motifs may occur when outsiders to the community copy the work of individual artists. Thus, for example, a commercial misappropriation of old textile traditions might be accomplished by a third party who manufactures cheap imitations of cloths produced by an individual contemporary

weaver associated with the community. The resulting copies would include many elements derived from long-standing practice, and others that are original to the particular weaver. In such a case, if the community and the individual artist working within its tradition were united in their opposition to the outsiders' conduct, a copyright action brought by the individual, on her own behalf and as the fiduciary representative of the community, might prove to be a useful tool. This is because even though copyright literally attaches only to the individual's value added, the practical effect of such protection is to bar the unauthorized copying, sale or other exploitation of the new work as a whole, including its traditional elements.

Copyright is not a panacea for the problems of traditional artists and arts communities in Indonesia. Practically, as well as conceptually, its potential utility is real but limited. Domestic enforcement of copyrights is expensive and time-consuming, and foreign enforcement even more so. In addition, for the limited potential of copyright as a tool in support of traditional arts to be realized, educational, technical and legal assistance to artists and their communities would be essential.

The project team is not recommending any modifications to the core provisions of the 2002 law on *Copyrights* at this time. In particular, the team notes that the list of protected creations provided in Art. 12 of that law is sufficiently broad to encompass the full range of individual productions that may occur within the traditional arts. However, it would be useful to expand the commentary on Art. 10 of that law to make it absolutely clear that, whatever legal claim the Indonesian state may have in "folklore" as such, living artists working in traditional modes are entitled to enjoy copyright to the same extent as those who work in other non-traditional artistic forms. Also, the project team observes that although copyright registration under Art. 35 is not mandatory, it is a useful tool for perfecting and publicizing rights. Therefore, the team recommends that the regulations under Art. 50 of the law be modified to establish special reduced fees for registrations undertaken by or on behalf of traditional artists and arts communities.

The study team notes that there are dimensions of the misappropriation problem that cannot be reached by existing copyright law. Copyright cannot protect, for example, the elements of a living traditional artist's work that are attributable not to him or her, but to the cultural heritage. Nor can it protect the content of old works that are exemplary of that heritage. Thus, for example, ancient visual motifs that have been passed down over generations remain free for the taking insofar as copyright is concerned. Below, some suggestions will be offered about new legislation to fill this gap in Indonesian IP.

Supplementing existing law

The suggestions and recommendations offered so far have focused primarily on initiatives to help traditional artists and arts communities to take fuller advantage of the considerable protection that already is available to them under well-established Indonesian IP law principles. Even if initiatives supporting the traditional arts involved nothing more than mobilizing (and coordinating) these existing protective rules, they could have a major, positive influence on the lives of artists and their communities, and on the practice of the traditional arts. The project team recognizes, however, that when mainstream IP is viewed through the lens of the concerns expressed by traditional practitioners, some important gaps in coverage are apparent. The Report already has suggested some modest changes in mainstream IP law (with respect to trademark registration and certification marks, for example) that could make a significant contribution to filling those gaps. Some additional recommendations follow:

1. Trade secrecy and confidential information. At various points in this Report, it has been noted that the artists and community leaders with whom the project team spoke did not express any particular anxiety or concern about “secret” or otherwise privileged information about the traditional arts moving into more general circulation. Various hypotheses were advanced to account for this, of which one was that *adat* laws and institutions apparently were effective in preventing the disclosure of such information in the first instance. Nevertheless, the project team acknowledges that, however powerful this local (and in part customary) protection against the wrongful disclosure of secret knowledge may be, it probably is not a perfect solution—and its efficacy is likely to be tested further in coming years. In other words, a time may come when support from national positive law is required to support and reinforce *adat* principles. In that case, policy-makers may wish to consider modest changes to the provisions of the existing Law No. 30 of 2000, *On Trade Secret*, which currently applies only to activities in the realms of business or commerce. One advantage of trade secrecy is that it does not require registration or other official disclosure of confidential information in order to be effective. With some modifications, this provision could become a meaningful instrument for deterring and punishing both the unauthorized disclosure and the subsequent use of secret or private information related to the traditional arts.

2. A general attribution requirement for uses of traditional arts material. The mobilization of existing trademark law recommended above would go a long way toward addressing the concern about proper attribution that the project team found to be so pervasive among many traditional artists and arts communities. But it would not, in itself, be sufficient. Thus,

the project team also recommends the introduction into Indonesian law of an affirmative requirement of attribution whenever traditional arts material is used commercially, or made available publicly by display or distribution. The closest analogy to such a requirement in existing law is to be found in Art. 24 of the 2002 law *On Copyrights*, which provides for a perpetual moral right of attribution, stating that “the Author or his heir shall be entitled to require [a user] to attach the name of the Author to his work.” This provision, however, is literally not applicable to all manifestations of the traditional arts; it would not apply, for example, to a reproduction of an old traditional textile or painting. Moreover, even where it is applicable the provision would require acknowledgement only of the individual directly responsible for the particular new expression of tradition in question; it would not mandate credit to the community of the culture-bearers who are the collective source of the tradition. Finally, the obligation as phrased appears to be optional with the author or the author’s heirs, rather than representing an invariable affirmative duty on the part of the user.

For these reasons, the project team does not recommend the modification of existing Art. 24. Instead, it suggests that, as part of a new law on *Promotion and Protection of Traditional Arts*, Indonesia enact a specific, free-standing legal provision creating a duty on the part of any user of traditional arts material to:

- Make reasonable efforts to investigate the origins of that material, and to identify the community from which it is derived;
- Having made that determination, to attach the information on source identification prominently to the material when it is made public.
- To indicate affirmatively when it has been impossible, with reasonable effort, to any source for a particular tradition, or to reach a firm conclusion about competing claims to it.

The last of these points is critical: If such a requirement is to be effective, it must be designed so as not to penalize individuals or firms that make serious, albeit unsuccessful efforts to resolve complex questions of attribution.

Failure to comply in good faith with this requirement would make the user vulnerable to legal action by either (1) a representative of the community of culture-bearers who were entitled to, but failed to receive, acknowledgement, or (2) the new National Commission on the Traditional Arts. In addition, the Commission would have the authority to issue regulations implementing the obligation, including

recommendations as to “best practices for facilitating proper attribution.” Through such regulations traditional arts communities might be encouraged to designate in advance the particular form that acknowledgement of their practices should take. The Commission might also take a role in establishing standards to govern how and where the acknowledgement should be placed in connection with uses of various kinds (museum displays, motion pictures, published books, etc.). The expectation of the project team is that levels of voluntary compliance with such a requirement would be relatively high, and that coercive measures seldom would have to be applied. Nevertheless, the threat of sanctions (including a mandatory order for the withdrawal of the unacknowledged material) would be an important factor in assuring the success of the scheme. It is anticipated that the requirement would be phased in over a period of 3 to 5 years to allow users of traditional material to adjust their practices accordingly.

To the knowledge of the project team, no similar requirement exists anywhere in the world in national legislation relating to traditional arts or TCE’s. Given the concerns expressed by traditional artists and community leaders, however, such a requirement would be a crucial part of a specifically Indonesian, context sensitive approach to implementing *sui generis* protection.

3. Prior informed consent and benefit sharing. The project team’s final recommendation for substantive change in Indonesian law concerns, once again, the issue of misappropriation of traditional arts. As already noted, some artists and community leaders explained to the project team their concerns that old material had been, or might be, copied literally and commercialized by third parties. Because the material in question is old (the pattern of an antique textile, or the carvings decorating an ancient building, or a melody handed down intact over generations), the mobilization of conventional copyright law discussed above would not be sufficient. Further details of a new legal initiative to fill this identified gap are provided below.

The concept of prior informed consent and benefit sharing

The project team believes that a new, narrowly targeted statutory provision is required to meet the artists’ and community leaders’ expressed concerns in this instance. Specifically, the team favors an approach that would employ the “prior informed consent and benefit sharing” model that has become generally familiar through discussions of the status of TK (i.e. traditional scientific and technical knowledge) under the regime of the Convention on Biological Diversity. The team suggests that this provision should be included, along with the

affirmative requirement of attribution discussed above, in a new law on *Promotion and Protection of Traditional Arts*.

The particular virtue of the “informed consent and benefit sharing” model is that it avoids the conceptual and practical pitfalls of commodification that are entailed whenever a body of knowledge and practice (such as the content of traditional arts) is recast as the subject matter of intellectual property in the conventional sense. The model creates and enforces various personal obligations of good practice, without designating the material to which those obligations relate as anyone’s “property,” or facilitating the transfer of such new property interests. Thus, it provides meaningful protection for manifestations of the traditional arts without reducing them to the status of things that can be hoarded, bought, and sold. Likewise, because it rejects the terms and assumptions of conventional intellectual property law, the “prior informed consent and benefit sharing” model avoids the risk that disputes under it will devolve into sterile discussions of contested ownership claims, or hyper technical analyses of similarity and difference.

In broad outline, the project team’s proposal for new legislative language is as follows:

Subject only to exemptions specifically provided herein, any person who engages in profit-oriented commercial activities involving the direct copying or close and substantial imitation of traditional arts material must first make a reasonable good-faith effort to obtain affirmative and specific consent from an appropriate person representing the community from which the material derives; as a condition for such consent, that representative may demand one or more kinds of benefit sharing in connection with the profits of the use. If prior consent is not obtained, the use is prohibited. If consent is obtained, the use shall be lawful unless the provisions of the agreement on benefit sharing are not fulfilled, or are found to have been unfair in the first instance.

Like the preceding proposal on an affirmative obligation of attribution, this one has no specific precedent in laws of other nations. Nor is it derived from any proposals now pending at the international level.⁶⁵

⁶⁵ There is a notable difference between this Report’s recommendations on prior informed consent and those contained in the 2005 Revised Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore from the WIPO Intergovernmental Committee on Intellectual Property

Instead, it puts forward a specifically Indonesian solution to the specific problems of the Indonesian traditional arts sector. As is true of any proposal of this kind, “the devil is in the details.” The aim here is to provide meaningful protection for the traditional arts while avoiding the kind of disincentives to new creativity and knowledge production that is associated with conventional Western-style IP. Whether this goal is accomplished, and (more generally) whether the suggested approach is considered suitable overall, depends on how the critical operative terms are specified. These terms include:

- The “**exemptions specifically provided herein,**” which is used to refer to a series of provisions exempting meaningful educational, scientific, scholarly and other culturally positive activities from the requirement of prior informed consent and benefit sharing. The exact configuration of these exceptions would be a matter for future discussion, but the project team considers the point so important that this element has been included in the core proposal. It seems desirable, for example, that scholarly books, articles or recordings intended primarily to document the Indonesian traditional arts should be unambiguously exempted from the requirement of prior informed consent and benefit sharing. In the interests of promoting the traditional arts, these activities (and others like them) should be encouraged rather than burdened. Likewise, projects destined for use in schools might well be considered important and positive enough to deserve exemption. (It is worth noting, moreover, that none of these privileged uses would be exempt from the affirmative requirement of attribution which already has been proposed.)
- “**Profit-oriented commercial exploitation,**” used here to refer to the full range of business purposes, in any and all media, for which traditional arts material might be employed. This includes but is not limited to performance, publication, manufacturing, broadcasting and advertising. The intention of this formulation is to sweep in many of the uses that would typically be understood as commercial activities, while

and Genetic Resources, Traditional Knowledge and Folklore, and presented as an appendix to document WIPO/GRTKF/IC/9/4, on “Cultural Expressions/Expressions Of Folklore: Policy Objectives and Core Principles” (January 9, 2006). Whereas the WIPO approach would require prior informed consent only for third-party use of certain kinds of material (those of “of particular cultural or spiritual value to a community”), where other uses of traditional culture are concerned, the user would be required to share the benefits of his use, to the extent “to be determined by a competent authority.” By contrast, this Report suggests that the informed consent requirement should be triggered by the nature of the proposed use, so that the extent and kind of benefit sharing would be negotiated between the prospective user and the communities in all instances of direct commercialization.

excluding some others; thus, for example, the fact that a non-profit museum sold reproductions of articles in its collection in order to support its institutional operations would not trigger the obligation of prior informed consent and benefit sharing, even though the sales in question could be considered “commercial.”

- **“Direct copying or close and substantial imitation,”** a formulation which is at the heart of the proposal. It is intended to exclude from the reach of the consent requirement the kinds of uses to which traditional artists do not object, while focusing attention on those uses that are matters of real concern to them. Thus, for example, the literal commercial reproduction of a traditional decorative carving would fall under the requirement, regardless of whether a copy was made in wood or the pattern was applied to fabric. By contrast, the incorporation of the overall pattern and color scheme of the same carving into a contemporary painting, where it was further interpreted through the artist’s personal sensibility, would not. Clearly, there would be room for disagreement about how certain marginal cases should be resolved, but the project team believes that those disagreements should not be difficult to resolve in light of the objectives of the proposal.
- The requirement of **“a reasonable good-faith effort to obtain affirmative and specific consent,”** which is intended to empower traditional arts practice communities. It expresses clearly that the representative of such a practice community, when consulted by a potential user of traditional arts material, has the option of refusing permission outright, or granting permission subject to conditions. Thus, for example, if a film producer were to seek consent to include a piece of traditional music in the sound track of a new movie, the representative of the practice community could review the plans for the project to determine whether the proposed use might be a culturally appropriate one under any circumstances. If the project were generally acceptable, but contained some offensive elements, the representative would be in a position to insist on their modification as a condition of consent. The proposal also acknowledges that there may be rare situations in which a would-be user’s good-faith effort to identify the representative who is authorized to give the sought-after consent does not produce a clear answer. This issue is dealt with below. Finally, there may also be cases in which it simply is impossible to negotiate an agreement. In such circumstances the use must be foregone.

- The statement that consent should be sought from “**an appropriate person representing the community from which the material derives.**” Like other terms employed in the proposal, this one is best understood in terms of the goal that lies behind it: the empowerment of the actual culture bearers whose material is to be used to make decisions about informed consent and benefit sharing wherever and whenever feasible. Traditional artists and community leaders with whom the project team spoke expressed a strong preference for retaining decision-making authority over their own practices and productions, and this language is intended to implement that preference. *The project team strongly favors the devolution of control over uses of various traditional arts to individuals and groups who are actively engaged with those arts today.* Even though scholars can trace the historical roots of a particular traditional art form within the Indonesian archipelago to a place remote from where it now is being practiced, the authority to give or refuse consent for use by third parties should be vested with the actual contemporary practice community—the so-called *in situ* approach that will be discussed more fully below—along with other, more technical points concerning the interpretation of this aspect of the proposal. As will appear below, many of the uncertainties that surround it can be resolved, as a practical matter, by putting the burden on the would-be user to identify an appropriate person or persons to represent the practice community, and putting the consequences of error squarely on that user.
- The provision that a community “**representative may demand one or more kinds of benefit sharing in connection with the profits of the use,**” which is intended to convey an important point: Although benefit sharing arrangements sometimes may involve cash payments (either on a one-time basis or through an ongoing royalty arrangement), these are not the only forms that a fair benefit-sharing arrangement can take. In many cases, non-cash benefits may be preferred to cash compensation: Thus, for example, a weaving community may be satisfied by a would-be user’s promise to provide them with needed materials, or to help secure better market access for the community’s own productions. Moreover, many artists and community leaders told the project team that one thing they desired in these situations was that the products derived from the use of traditional arts material should be returned and made available to the practice community itself. Thus, for example,

consent to use traditional music in a motion picture sound track could be conditioned on the film producer's agreement to arrange screenings of the completed film for the members of the practice community, among other things.⁶⁶

- **Finally, the statement that once an agreement has been struck, “the use shall be lawful unless the provisions of the agreement on benefit sharing are not fulfilled, or are found to have been unfair,”** which is largely self-explanatory. The watchword here is “fairness.” In order for the system described to function, would-be commercial users of traditional arts material must negotiate the conditions of use in good faith, and must fulfill those conditions once they have been agreed upon. In a subsequent section of this report, relating to the proposed new Commission on Traditional Arts, a suggestion is made about how the fairness of such use agreements could be monitored.

Locating the representative with authority to consent to use

As already noted, one objective of the proposal is to encourage the devolution of decision-making to the actual practice communities that have assumed responsibility for maintaining a living arts tradition and transmitting that tradition to future generations. In the view of the project team, these communities are the great hope for the future of Indonesian traditional arts. If law can help to support and strengthen these communities, the overall cultural and social benefits may be considerable. This said, a particular would-be commercial user of traditional arts material might still be in doubt about where, or from whom, consent should be sought. Suppose, for example, that a particular art form is being practiced similarly in several different communities, each of which claims a connection to the tradition, or that it is generally known that a tradition now is being practiced at a location remote from its historical point of origin. In such situations, the project team believes that the answer is clear: It would be fruitless to require a would-be user to evaluate the competing claims of the different practice communities to determine which claim is stronger or more technically accurate. Instead, an *in situ* approach to obtaining consent is preferable. That is, if a film company plans to use transcribed traditional music in a movie score, it is in the community where that transcription was made that consent should be sought. Likewise, if very similar textile motifs are found in several different practice communities, consent should be

⁶⁶ Some of the varieties of benefit-sharing, and the difficulties associated with it, are described by Cory Hayden, *Benefit-sharing: Experiments in Governance*, in CODE : COLLABORATIVE OWNERSHIP AND THE DIGITAL ECONOMY 113-26 ([Rishab Aiyer Ghosh](#) ed., 2005).

sought in the place where the actual textiles that the would-be user intends to copy were produced , and only in that place.

Once the relevant practice community has been determined, it would be possible to seek consent from various kinds of individuals, ranging from *adat* leaders to individual working artists. The identity of the appropriate “representative” will depend on the values of the community, and on surrounding circumstances. Here, it is worth emphasizing again that the approach to the problem of uncertainty recommended here is one that puts the burden of identifying a community representative—and, with it, the risk of mistake—squarely on the would-be user. The role of government agencies such as a new Commission on Traditional Arts (described later in this section) would be limited to assisting would-be users by facilitating their discussions with members of arts communities, based on the earlier-stated *in situ* approach. The project team believes that this allocation of responsibility will help to promote two different and equally desirable outcomes. On the one hand, putting the burden on the user will encourage conscientious investigation. If users have no choice except to engage with traditional arts practice communities, they will (in general) do so. On the other hand, this approach should effectively limit the administrative transaction costs related to the process of obtaining consent. Conscientious would-be users generally would be successful in finding an appropriate representative of the community in question, and in both negotiating and fulfilling the terms of the consent agreement. Therefore, in most instances, no appeal to any government body or other outside authority would be required. In general, this approach would strengthen the decision-making capacities of communities themselves while helping to reduce the burden on already stretched bureaucratic structure

What, then, might be some elements of the kind of good-faith investigation that a would-be commercial user would be required to undertake? One possible starting point would be with the individual artist (if any) whose expression of tradition the user wishes to employ. He or she may have strong views about the subject, and may be a reliable source of information about others in the community who should be consulted. If no individual artist is available to be consulted (because, for example, the user’s interest is focused on older embodiments of the arts in question), an alternative for the would-be user would be to begin by seeking advice from senior members of the practice community, including master artists to whose judgment others defer. However the inquiry begins, it likely will lead the user to consult the appropriate local *adat* institutions and authorities for information about whom, within the practice community, can give effective consent. This issue of representational capacity is one about which *adat* law frequently will have something to say. Consultation with outside experts (academic and

otherwise), who have knowledge of the community, although they do not belong to it, sometimes may be appropriate. Over time, were the proposal made here to be implemented, a body of knowledge about “best practices” in identifying appropriate community representatives would develop based (at least in part) on existing *adat* principles.

Finally, the study team recognizes that there may be situations in which no clear consensus currently exists within the relevant practice community about what group or individual can give consent for third parties’ commercial uses. If a reasonable good-faith effort to locate an authorized community representative (making use of the resources like those identified in the preceding paragraph) produces no clear result, the user should proceed to seek consent from the individual artists whose work will be copied or reproduced if the proposed use goes forward. In the absence of other information, these individuals should be considered suitable proxies for the community of which they are a part. In effect, the assumption here is the same as that underlying the Australian *Bulun Bulun* decision, described earlier in this Report: In a community where members are united by, among other things, shared participation in the practice and stewardship of traditional arts, it is reasonable to assume that artist-members of the community will act not only for their own benefit, but with the interests of the community in mind. To the extent that this assumption is not applicable to the circumstances of a particular practice community, the very existence of this default approach to obtaining informed consent should encourage that community to develop and publicize alternative rules about who has authority to consent. In the meantime, the default approach also will assure that worthy commercial projects will not be delayed (or even frustrated) unnecessarily.

Mechanics of a consent and benefit sharing scheme

Obviously, the proposed informed consent and benefit sharing approach cannot function without meaningful and constructive sanctions against users who ignore its requirements, who prevail on representatives of arts communities to accept one-sided and unfair conditions, or who otherwise act in bad faith. Therefore, Legislation creating a consent and benefit-sharing system could provide (among other things) for. Possible sanctions would include fines or damages assessed in favor of the traditional arts community whose interests have been neglected, general publication of the details of users’ wrongful conduct, and orders barring offenders from future negotiations for the use of Indonesian traditional arts materials. Although provisions for monetary relief might prove difficult to enforce against foreign users who do not have assets in Indonesia, the other potential sanctions mentioned should be effective to punish and deter misconduct by domestic and foreign users alike.

The project team suggests that new Commission on Traditional Arts proposed in this Report would be an appropriate body to investigate and resolve complaints from traditional arts communities about misconduct by commercial users, and (where appropriate) to impose administrative sanctions (such as publication) or propose judicial ones (such as fines). The Commission's determinations might appropriately be made subject to review in the Commercial Court (or elsewhere in the judicial system). But in order for such a procedure to function effectively, a simple, transparent, inexpensive and efficient way to register complaints would be an absolute necessity. Arts communities (and individuals representing them) should be able to bring complaints using a straightforward form that can be completed without legal assistance and without formal attestation of any kind. Obviously, no fees should be charged for the submission of such a document. In addition, the procedure should provide for various alternatives ways of submitting complaints, including in-person office visits, regular mail and electronic means. The recent practice of various regional human rights tribunals, including the Inter-American Commission on Human Rights,⁶⁷ provides a successful example of such informal complaint processes.

Upon receiving a complaint, the Commission on Traditional Arts would be required to make a prompt preliminary investigation to determine if the grievances expressed may have merit. In that case, an administrative hearing would follow, at which each party was afforded opportunities to be heard and to present evidence. An important goal of this administrative dispute-resolution procedure would be to mediate between the parties in an attempt to repair their relationship. But where this proved impossible, decision-making authority on complaints (including the authority to impose at least some sanctions) would rest with the Commission. In turn, the Commission would be encouraged to involve representatives of relevant *adat* institutions in its deliberations.

The procedure employed would need to be designed for maximum efficiency, informality and transparency, so that representatives of traditional communities could participate effectively. Where necessary, the Commission would help ensure that technical and legal assistance was available without charge to complaining parties. In the event that a commercial user was found to be in violation, the Commission would have the authority to impose charges to defray the costs of the proceeding,⁶⁸ including those of the community that initiated the complaint. Moreover, it is expected that relevant non-governmental

⁶⁷ Described at https://www.cidh.oas.org/cidh_apps/manual_pdf/MANUAL2002_E.pdf.

⁶⁸ These charges for costs would be separate from and independent of any monetary sanctions that might be imposed on a violator.

organizations working on behalf of traditional and indigenous groups in Indonesia would provide resources to the process.

The Commission on Traditional Arts

As outlined above, the major elements of the project team's proposal for a context-sensitive Indonesian *sui generis* approach to legal support of the traditional arts include:

- The mobilization of existing intellectual property laws (trademark, and related rights, and—to a certain extent—copyright);
- The creation, through new legislation, of a general attribution requirement for uses of traditional arts material; and
- The development of a new system for the authorization of certain uses of traditional arts material, based on a prior informed consent and benefit sharing model.

In order to achieve its objectives, this initiative will require ongoing governmental support. Traditional artists and arts communities are more likely to make use of legal protection if there is a responsible body charged with encouraging and assisting them to do so. In particular, a general attribution requirement will require implementing regulations relating to the form and placement of the credits that traditional arts communities are entitled to receive. And, as has just been suggested, government has a critical role to play in making sure that a system of prior informed consent and benefit sharing actually functions as intended. For these purposes, as well as others related to the support of traditional arts in Indonesia, the project team proposes that provisions to create a new, independent Commission on Traditional Arts be included in any legislative proposals to implement its various recommendations. Specifically, the recommendation is for a new national appointed body of nine to twelve members, drawn from appropriate fields of expertise (law, musicology, anthropology, the arts and media, museum practice, the *adat* community and others), with an appropriate budget and support staff.

Such a body could be charged with a variety of functions related to the promotion of the traditional arts, including the coordination of non-legal initiatives: encouraging new directions in arts education, assisting in obtaining greater media exposure for traditional arts activities, supporting various cultural revitalization activities throughout Indonesia, providing relevant and accessible information for artists and arts communities, and more. This Report, however, will confine itself to

discussing the various roles that the Commission could play in ensuring that the Indonesian traditional arts receive appropriate legal support. An itemization of these roles follows.

1. Educating traditional artists about their rights. As has already been suggested, the promise of law for the support of Indonesian traditional arts is likely to go unrealized unless traditional artists and arts communities are made aware of their rights, and have access to assistance in claiming them. This is true with respect to rights under existing IP laws, and equally so where the new legislative initiatives recommended in this Report are concerned. Thus, a primary task of the Commission would be to coordinate the dissemination of information about legal resources throughout the world of traditional arts practice. Its activities would include:

- Preparing and distributing written materials.
- Organizing national and regional workshops for traditional artists and communities.
- Developing a web-based compendium of background information.
- Maintaining a roster of lawyers and other experts (drawn from academia, NGO's, etc.), who would be available to assist traditional artists and arts communities in understanding and claiming their rights.

2. Involvement with the new attribution requirement. The proposed new general requirement of attribution in connection with uses of traditional arts will not implement itself. The Commission would have several critical roles in ensuring its success.

- As already has been suggested, the Commission would have a formal role in developing regulations concerning the form that such attribution should take.
- It also might play an informal one in advising users who are in doubt about how to proceed in fulfilling the requirement, and in developing "best practices" guidelines to supplement formal regulations.
- Most critically, the Commission would be charged with monitoring compliance with the requirement, and (where necessary) initiating enforcement proceedings against non-compliant users.

3. Oversight of prior informed consent and benefit sharing agreements. In connection with this proposed new statutory requirement, the commission would play the roles of facilitator, watchdog, and (where necessary) decision-maker. Specifically, it would serve as:

- A source of guidance, in the form of “best practices” guidelines and otherwise, to would-be commercial users of traditional arts material about how to identify appropriate community representatives when seeking consent for use.
- A source of guidance to would-be users and community representatives about various techniques for accomplishing fair and meaningful benefit sharing.
- A repository of information about successful use agreements, which in turn could serve as models for others.
- A dispute resolution body reviewing complaints of unfair practice or other misconduct filed by representatives of traditional arts communities against commercial users (as outlined in greater detail earlier in this Report).

4. Monitoring misuse of Indonesian traditional culture. As has been indicated earlier in this report, the problem of misuse did not emerge as a focus of concern in the project team’s conversations with artists and community leaders. Nevertheless, it is an issue on which many policy-makers have focused attention. The project team believes that the Commission would be the appropriate body to accumulate additional information concerning the real extent of the problem, if any, and to take or recommend action accordingly. The project team also believes that if the problem is an isolated rather than a systemic one, non-legal solutions that call upon the power of social sanctioning may be the best alternative. Specifically, the Commission could take responsibility for:

- Investigating misuse complaints;
- Publicizing factually-supported instances of misuse, in order to discourage repetition;
- Conducting studies of the issue based on actual complaints and ensuing investigations;
- Initiating investigations where possible patterns and practices of misuse are detected; and
- Making recommendations for additional legislation, as it may be required.

5. Leading the defense of Indonesian culture against foreign IP claims. Earlier in this Report, it was noted that the best way to prevent or defeat

foreign IP claims to Indonesian cultural heritage is not necessarily to create new domestic IP rights in that material. There are other more direct (and more effective) ways to ensure that such foreign claims will not succeed. What is called for, instead, is a “negative (or protective) protection” strategy, according to which:

- Inappropriate foreign claims are challenged in the countries where they have been registered or otherwise asserted, on the ground that the content to which they relate is neither novel nor original, but rather represents a documented aspect of long-standing Indonesian tradition; and
- Over time, as Indonesia’s commitment to this strategy becomes more widely known, foreign individuals and firms are deterred from even attempting to assert such claims.

Although private parties and NGO’s obviously have important roles to play in implementing such a strategy, especially where the issue of documentation (discussed immediately below) is concerned, coordination and support at a national level obviously will be required if the effort is to succeed. Providing such oversight would be another, critical role, for the new Commission on Traditional Arts.

Finally, the project team notes that in order to fulfill the range of objectives just described, the national Commission on Traditional Arts may wish to delegate some functions to other bodies (either already in existence or to be established by legislation). In particular, some of the work involved in informing artists and arts communities of their legal rights might best be performed by regional and local traditional arts commissions (or their equivalent). By the same token, however, the project team believes that it is important that at every level, the promotion of traditional arts should be treated as an independent responsibility of government, rather than a subsidiary task of agencies with other primary duties (such as the promotion of economic development or tourism).

To the best knowledge of the project team, no equivalent or counterpart to the proposed Commission on Traditional Arts now exists in any nation. The suggestion, in other words, is for a specifically Indonesian institutional innovation in support of an important Indonesian collective resource: the traditional arts of the archipelago. Funding for this new structure could be derived from various sources, including (in the short term) grants from international development agencies and philanthropies. In the longer term, significant revenue also would be derived from fines or other changes levied against those who abuse the rules that the Commission would be charged with helping to enforce, as

well as service fees charged to would-be users of traditional arts materials who seek guidance and advice. The project team believes strongly that the Commission's operating expenses should not be defrayed by charges to traditional artists or arts communities making use of its services.

An opportunity for documentation

The chances of success for a negative protection strategy, as it has just been described, obviously depend on the availability of data about Indonesian cultural heritage. Although it sometimes may be possible to turn back a particular foreign IP claim by gathering information specifically for that purpose, after the claim has been discovered, the overall negative protection strategy will work better and more reliably if the necessary documentation of traditional arts practice already is available, preferably in the form of an open, transparent, dynamic electronic database of national scope. Other proposals made in the Report for a context-sensitive *sui generis* legal approach to supporting the traditional arts also would be advanced by the existence of such a database. Thus, for example, the entries in such a database could be important points of reference in informed consent and benefit-sharing agreements between representatives of traditional communities and commercial users, helping to clarify precisely what elements of tradition (which textile patterns, which melodies, etc.) were the subject of a particular consent.

More generally, it is through the development of such a database that traditional artists and arts communities could take the lead in documenting their own heritage and their own practices. The project team regards this development as another important step in empowering Indonesian culture-bearers by giving them tools to represent their own practices to the nation and the world. Of course, to be meaningful and effective, such a database would need to be as complete as possible, and to be organized according to objective principles. A mere subjective selection of examples of the "best" or "most typical" examples of the Indonesian traditional arts from various regions, whatever other values it might further, would not contribute substantially to the effectiveness of a new context-sensitive *sui generis* legal regime. Instead, the goal must be to represent the entirety of the Indonesian traditional arts, at least to the extent that artists and their communities wish their practices to be included. Obviously, the challenges of assembling and maintaining such a comprehensive database are formidable. Expense is one obvious difficulty, but uncertainty is another. The nature of the traditional arts is such that particular entries in a database necessarily will be subject to dispute and even controversy. Inevitably, issues will arise about the region or population group with which a particular tradition should be

associated, as well as about the precise characteristics of the tradition itself, its cultural history, and so forth.

Were responsibility for collecting, organizing, verifying and indexing a database to be centralized in a single institution or agency, it is difficult to see how it could grow to become the comprehensive resource that is required within a reasonable period of time, even given very substantial funding. Nor would subdividing the project into a series of regional databases do much to advance it; indeed, it is arguable that regionalization would complicate rather than simplify the task

Recognizing the importance of documentation, the project team proposes an alternative, distributed approach to developing a database of the Indonesian traditional arts, which could be launched without delay at relatively low expense, and could grow quickly into an invaluable common resource for purposes including, but certainly not limited to, supporting context-sensitive *sui generis* legal protection.

The specific proposal would make use of so-called “wiki” technology on the World Wide Web. A wiki has been defined as

A website that allows visitors to add, remove, edit and change content, typically without the need for registration. It also allows for linking among any number of pages. This ease of interaction and operation makes a wiki an effective tool for mass collaborative authoring. The term wiki can also refer to the collaborative software itself (i.e., wiki engine) that facilitates the operation of such a site, or to specific wiki sites, such as the computer science site, WikiWikiWeb (the original wiki) and online encyclopedias such as Wikipedia.⁶⁹

On a wiki, anyone with Internet access can contribute information to a collaborative project, or comment on (and even dispute) information that has been contributed by others. Of course, the designers and hosts of any particular wiki can set the specific ground rules for its use. They can choose to limit the ability of visitors to modify content previously posted by others, while continuing to permit them to comment on that content and propose modifications. Alternatively, the wiki may allow changes to existing content as well as new postings, while retaining a “Recent Changes” log, and a “Revision History” for each page. This makes it possible to track modifications and restore previous content as required. Finally, although wikis are designed to be largely self-executing, many are monitored by individuals (either paid professionals

⁶⁹ Appropriately, this definition is found at <http://ig.wikipedia.org/wiki/Wiki>.

or volunteers) who check the appropriateness of recent changes, guard against vandalism, and exercise general quality control.

The proposed wiki would be open to all who have information to share: practitioners, experts, and others. However, the project team recognizes that the proposal for a wiki-driven database carries with it a serious risk. Because the creation of the database depends on new technology, there is a possibility that the very traditional artists and arts communities on whose contributions its success would turn might be disabled or discouraged from participating. If contributors to the database turned out to be predominantly those who have easy access to (and sophistication in the use of) technology, without direct experience of traditional arts practice, the exercise would be doomed to failure on its own terms. For the project to succeed, then, it would be necessary to assure that practitioners of traditional culture received encouragement and support for their participation. However, the Indonesian NGO sector, with support from international agencies and philanthropies (WIPO, the World Bank, private foundations) could take on this crucial facilitating.

The wiki is a tool for harnessing the energy and knowledge of dispersed individuals to drive knowledge-building projects that are too extensive or challenging for any one individual or institution to undertake successfully. The technology is straightforward and largely intuitive—most people quickly learn to make wiki entries without any special training (other than instructions provided on the wiki site itself). Because wikis are web-based, they can be accessed from any place with an Internet connection, including offices, private homes, Internet cafes, and other commercial access providers.

Although there are many examples of successful general and specialized wiki projects (the international Wikipedia initiative being the most prominent), the project team is not aware of other instances in which the technology has been used to build a database of traditional cultural heritage.⁷⁰ However, it seems ideally adapted for the purpose. The requirements for launching a traditional arts wiki in Indonesia would be:

⁷⁰ Early in 2009, the Brookings Institution published Professor Beth Noveck's *Wiki Government*, which discusses which position of wiki technology to open many areas of rule-making to wider public scrutiny and participation. The book is of special interest here because it draws on experience with the successful Peer-to-Patent program, launched by the United States government in 2007, which

connects patent examiners to volunteer scientists and technologists via the web. These dedicated but overtaxed officials decide which of the million-plus patent applications currently in the pipeline to approve. Their decisions help determine which start-up pioneers a new industry and which disappears without a trace. Patent examiners have traditionally worked in secret, cut off from essential information and racing against the clock to rule on lengthy,

- Adequate server space and an appropriate web address;
- A basic format or template that visitors to the wiki site could use to record information about examples of the traditional arts, with tools for attaching digital photographs, videos, and sound recordings;
- A small staff (which could include volunteers) to monitor postings; and
- Extensive publicity (within traditional arts communities, relevant government agencies, universities and NGO's, as well as to the general public) announcing the availability of the wiki and describing its use.

All of these requirements could be supplied quickly and inexpensively by the proposed Commission on Traditional Arts. Alternatively, the management of the wiki could be delegated to an existing academic or government institution, or an NGO with a relevant mission. The location is not of the first importance, but the overall project design is! Early decisions about the basic format for data entry will determine the ultimate success of the project. It will be crucial to provide data fields for every kind of information that can be anticipated as being relevant to the description of any example of practice in the traditional arts. Of course, individuals making contributions to the wiki should be encouraged to provide as much information as they have, while leaving other data fields open. Missing or previously unknown information could be supplied by other, later contributors. Over time, the wiki database would become increasingly accurate and reliable with respect to the content of individual pages, and increasingly comprehensive as far as the overall compilation is concerned.

In addition, the wiki will provide a safe space where questions and arguments about the Indonesian traditional arts can be raised and (perhaps) resolved. As this takes place, the database would become increasingly robust and increasingly valuable. But the wiki need not be perfect in order to serve its intended purposes. The goal of any wiki is to provide information that is good enough for the anticipated uses, not the

technical claims. Peer-to-Patent broke this mold by creating online networks of self-selecting citizen experts and channeling their knowledge and enthusiasm.

The relevance of this example is apparent. In U.S. patent law, the greatest challenge for examiners is often that of determining so-called "prior art"—i.e., existing knowledge that deprived the claimed invention of "novelty." In other words, the Peer-to-Patent program is depending on citizen volunteers to contribute knowledge to a database that may be used to invalidate patent claims, just as the proposed dynamic database on the Indonesian traditional arts could be used to defeat foreign IP claims to Indonesian cultural heritage.

best information that is theoretically possible. Given its particular goals, this wiki need not aspire (at least initially) to the level of accuracy and completeness that might characterize academic scholarship of the highest quality. In the context of *sui generis* legal protection, it will always be desirable to have relatively more information about the Indonesian traditional arts, even if not all of it is ultimately authoritative. And because no contributor to a wiki can claim to be the ultimate “authority” on the topic of an entry, the structure of this powerful tool should encourage participation from individuals in all stations and positions. Experience with institutions such as Wikipedia suggests that the technology itself encourages broad participation, and empowers knowledgeable individuals to make contributions even when they do not have formal credentials or claims to special expertise. At its best, the wiki can be a profoundly democratizing influence in the sphere of knowledge creation.

In closing, the project team wishes to note one advantage of the wiki-based approach to building knowledge of the traditional arts. Because it is a web-based resource resident on one server (or network), a wiki is fully searchable using queries of the user’s own design, or by means of the information fields established by the wiki’s designers, or both. Moreover, the ease with which wiki pages can be linked to one another makes it easy to supply electronic cross-references that suggest relationships, comparisons or contrasts among entries. In these ways, the problem of appropriate indexing, which plagues so many conventional database projects, is substantially obviated where this new technology is employed.

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