

## **The Protection of Expressions of Folklore in Sri Lanka**

### **I Introduction:**

For the first time in Sri Lanka an attempt was made to protect folklore<sup>1</sup> under copyright in the Code of Intellectual Property Act, No.52 of 1979<sup>2</sup> (hereafter it will be referred to as the Code). Before the Code was enacted, copyright law in Sri Lanka was governed by the English law of copyright and there was no provision to protect folklore. Sri Lanka was a colony under the British Empire for about 150 years, a fact which strongly influenced its legal system. Before 1979, the Copyright Act of 1911 of the UK was operative in Sri Lanka even after its revision in the UK in 1956. The Code, enacted by the parliament of Sri Lanka, was based on model drafts prepared by the World Intellectual Property Organization. The copyright section was influenced by the Tunis Model Law<sup>3</sup> on copyright for developing countries.

### **II Protection of Folklore under the Code of Intellectual Property Act, No. 52 of 1979**

Section 12 of the Code which provided that folklore is protected without a time limitation was a particular feature of the Sri Lankan copyright law. According to the Code, "folklore" referred to all literary and artistic works created in Sri Lanka by various communities, passed on from generation to generation, and constituting one of the basic elements of the country's traditional cultural heritage.<sup>4</sup> According to this definition it seems that folklore was treated as a work. However, in addition, folklore was deemed to have significant characteristics of its own in accordance with the Code: there was no author required since it was fostered by constant usage in the community, it was protected without limitation in time, and economic and moral rights were exercised by the Minister of Cultural Affairs.<sup>5</sup> Furthermore, copies of works of Sri Lankan folklore made abroad, and copies of translations, adaptations, arrangements or other transformations of works of Sri Lankan

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<sup>1</sup> In the Code of Intellectual Property Act, No.52 of 1979, the term 'folklore' was used instead of 'expressions of folklore'.

<sup>2</sup> Certified on 8 August 1979. Printed on the orders of the Government. Published as a supplement to Part 11 of the Gazette of the Democratic Socialist Republic of Sri Lanka of 10 August 1979.

<sup>3</sup> Committee of government experts to prepare a model law on copyright for developing countries, Tunis, 23 February – 2 March 1976. Final Report WIPO/ UNESCO, Copyright 1976, 165 et seq.

<sup>4</sup> Section 6 of the Code of 1979.

<sup>5</sup> Section 12(1) of the Code of 1979.

folklore made abroad, could be neither imported nor distributed without the permission of the Minister of Cultural Affairs.<sup>6</sup>

Folklore evolves in daily life by way of performing, singing, etc. Therefore, to keep folklore alive, the reproduction, performance and adaptation of it is necessary, without any major restrictions. The requirement for authorization from the Minister of Cultural Affairs to adapt, arrange, reproduce or perform such creations laid down in Section 12(1) might have placed a barrier in the way of the natural evolution of folklore, since it seems that even the very communities involved with folklore are bound by the requirement of authorization.

### **III Protection of Expressions of Folklore under the Intellectual Property Act, No.36 of 2003**

The Code of Intellectual Property Act, No.52 of 1979 was repealed by the Intellectual Property Act, No.36 of 2003,<sup>7</sup> hereinafter referred to as the Act. Section 24 of the Act provides that expressions of folklore will be protected against reproduction, communication to the public by performance, broadcasting, distribution by cable or other means, and adaptation, translation and other transformation when such expressions are made either for commercial purposes or outside their traditional or customary context. The right to authorize the above acts will be subject to the payment of a prescribed fee, and vests in a competent authority to be determined by the Minister.<sup>8</sup> The money collected will be used for cultural development.<sup>9</sup>

Section 24(1) states that, "Subject to the provision of subsection (4) of this section expressions of folklore shall be protected against – (a) reproduction; (b) communication to the public..." and Section 24(4) states that, "The right to authorize acts referred to in subsection (1) of this section shall subject to the payment of a prescribed fee, vest in a competent authority to be determined by the Minister".

If Section 24(1) is construed in context with 24(4), it is not clear whether exclusive rights are provided with regard to expressions of folklore. When interpreting Section 24(4), it seems that at least the right to authorize is provided. However, the rest of the wording of Section 24(4) is quite ambiguous. If that Section is literally interpreted, the competent authority has the right to authorize the acts referred to in Section 24(1) only subject to the payment of a prescribed fee. But, it does not refer to any kind of implications if a fee is not paid. It means that in this case, the right would not vest at all in the competent authority. One would have to read it as follows, if it is to make

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<sup>6</sup> Section 12(3) of the Code of 1979.

<sup>7</sup> Certified on 12 November 2003. Printed on the orders of Government. Published as a supplement to Part II of the Gazette of the Democratic Socialist Republic of Sri Lanka of 14 November, 2003.

<sup>8</sup> Section 24(4) of the Act of 2003.

<sup>9</sup> Section 24(5) of the Act of 2003.

sense; "The right to authorize acts referred... shall be subject to... fee, and vest in ...authority...".

Furthermore, Section 24(6) provides that, "Any person who, without the permission of the competent authority referred to in subsection (4), uses an expression of folklore in a manner not permitted by this section shall be in contravention of the provisions of this section ...,". Upon examination, the meaning of the wording in Section 24(6) seems to be dubious; it does not clearly show the connection between the act of authorization and the payment of a fee. Accordingly, the wording of these sections should be more precise.<sup>10</sup>

Another question which arises in this context concerns the right owner of expressions of folklore. It is not clear whether the right owner is the competent authority or the indigenous communities. There is no specification in Section 24 of the Act in this regard. In the context of Sri Lanka the indigenous communities are not sufficiently organized to be able to collect the fees charged for the exploitation of their expressions of folklore themselves or to prevent uses that impair their non-economic interests. Consequently, it appears necessary to appoint an authority to administer the system. Even though the indigenous communities need assistance from the competent authority, it does not mean that they are not the right owners. It is submitted that in order to be more specific about the right holders, a definition be added to the Interpretation section of the Sri Lankan Act. This definition could be similar as in the Model Law of the Secretariat of the Pacific Community<sup>11</sup> where it states that "the traditional owners of traditional knowledge or expressions of culture are the holders of the traditional cultural rights in the traditional knowledge or expressions of cultures".<sup>12</sup> Section 24 of the Act does provide for a competent authority. However, it must be specifically stated in the Act that the competent authority must take measures for the protection of expressions of folklore which will be for the benefit of the indigenous communities and other cultural communities<sup>13</sup> rather than the general clause that the money will be used for cultural development.<sup>14</sup>

Section 24(2) provides that the rights in Section 24(1) do not apply to uses such as personal use, reporting current events, face to face teaching, criticism, comment and research. In addition, the protection of expressions of folklore should not prevent communities themselves from using, exchanging and transmitting amongst themselves expressions of their cultural heritage in traditional and customary ways and in developing them by continuous reaction and imitation. In order to emphasise this aspect, it is proposed to include a provision as in Article 5 of the WIPO revised draft provisions for the protection

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<sup>10</sup> The amendments to the 2003 Act will be discussed in detail in the next sections of this article.

<sup>11</sup> Model law for the Protection of Traditional Knowledge and Expressions of Culture 2002: it is part of the Regional Framework for the protection of traditional knowledge and expressions of culture of the secretariat of the Pacific Community, 2002.

<sup>12</sup> Article 6.

<sup>13</sup> See under IVA, Financial Interests.

<sup>14</sup> Section 24(5) of the 2003 Act.

of traditional cultural expressions/ expressions of folklore: policy objectives and core principles.<sup>15</sup>

As opposed to the previous Code, in the present Act indirect protection of expressions of folklore is established by means of neighbouring rights of performers, defined by Section 5 as “singers, musicians, and other persons who sing, deliver, declaim, play in, or otherwise perform, literary or artistic works or expressions of folklore”. However, only certain expressions of folklore are intended, namely those that are capable of being sung, delivered, declaimed, played or performed in any other manner, that is to say mainly traditional songs, tales and dances.

The term “expression of folklore” is defined in the Act as a group oriented and tradition based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means, including: folktales, folk poetry, and folk riddles, folk songs and instrumental folk music; folk dances and folk plays, and productions of folk arts in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, wood work, metalware, jewellery, handicrafts, costumes and indigenous textiles.<sup>16</sup> This definition is more detailed than the definition in the 1979 Code, but it does not consider expressions of folklore as works. However, Section 6 of the 2003 Act does so, yet only in those instances that are apt for dramatic, dramatic – musical works, pantomimes, choreographic works and other works created for stage productions.<sup>17</sup>

As a result, within the 2003 Act itself, there is no consistency on expressions of folklore. Accordingly, some of the expressions of folklore are considered under copyright principles whereas the others are not. This situation is not logical and it could create an ambiguous situation within the Act. Apart from this inconsistency, it must be examined whether expressions of folklore could be really considered as works under copyright law. The arguments put forward against protection of expressions of folklore by means of copyright concern essentially the fixation of the work, originality, the identification of the author and the term of protection.

With regard to the fixation requirement the Sri Lankan Act is silent and accordingly it could be inferred that even if a work is unfixed, it will be protected. The condition that the work be original to benefit from the protection of copyright raises difficulties with respect to expressions of folklore. However, one may observe that the level of creativity required by the majority of copyright legislations, specifically those of the common law countries, to which Sri Lanka belongs, is not particularly high. In S. Wijesinghe Mahanamahewa and Another v Austin Canter<sup>18</sup> the Court of Appeal in Sri

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<sup>15</sup> WIPO/GRTKF/IG/8/4, of 8 April 2005.

<sup>16</sup> Section 5 of the Act of 2003.

<sup>17</sup> Section 6(C) and (d) of the Act of 2003.

<sup>18</sup> Colombo Appellate Law Rep., Vol.1, Part V, p.620.

Lanka held that originality relates to expression of thought, and the expression does not need to be in original or novel form, but the work must not be copied from another work and it must in that sense originate from the author. In conclusion on the problem of originality, it can thus be maintained that, although many expressions of folklore do not represent a high level of originality, they are capable of being protected under the copyright law regime in Sri Lanka.

However, a problem arises with regard to ownership and the term of protection for expressions of folklore. Assuming that the expressions of folklore are original, its author must be determined. "The evolutionary process of creation which is inherent in expressions of folklore make it impossible, in most cases, to attribute the results to a specific person or group of persons".<sup>19</sup> Given the impossibility of attributing authorship of an expression of folklore to a specific person, and given the very specific process of a collective nature of the creation of expressions of folklore, the question arises whether recourse could not be had to the provisions laid down in the Sri Lankan Act for the case of plurality of authors, namely, collective work and work of joint authorship. Work of joint authorship means a work to the creation of which two or more authors have contributed, provided the work does not qualify as a collective work.<sup>20</sup> Collective work is defined "as a work created by two or more physical persons at the initiative and under the direction of a physical person or legal entity, with the understanding that it will be disclosed by the latter person or entity under his or its own name and that the identity of the contributing physical persons will not be indicated".<sup>21</sup>

However, the status of joint authorship does not appear appropriate where different generations have been involved in transmitting their cultural heritage across the centuries.<sup>22</sup> Joint ownership under the copyright legislation only applies where two or more authors can be said to have contributed to a work.<sup>23</sup> Similar arguments are valid for collective works too and, as a result, none of these specific provisions set up in the Sri Lankan Act for the above mentioned categories of works is finally adapted to apply to expressions of folklore. It shows that the main difficulty arises from both the collective and anonymous nature of most of the expressions of folklore, a characteristic that is difficult to reconcile with the individualist nature of copyright.

One of the other main problems raised by the protection of expressions of folklore by means of copyright concerns the term of protection. In principle, copyright is limited in time, for example in Sri Lanka, the economic and moral rights shall be protected during the life time of the author and for a further period of seventy years from the date of his death. However, with regard to

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<sup>19</sup> Agnes Lucas-Schloetter, *Folklore*, in Silke von Lewinski(ed.), *Indigenous Heritage and Intellectual Property*, at p.294.

<sup>20</sup> Section 5 of the Sri Lankan Act.

<sup>21</sup> *Ibid.*

<sup>22</sup> Agnes Lucas-Schloetter, see *supra* note 19, at 296.

<sup>23</sup> Vann, "Copyright by Way of Fiduciary Obligation, Finding a Way to Protect Aboriginal Art Works", (2000) *Media and Arts Law Review*, Vol.,5, No.1, 18.

expressions of folklore, this provision cannot be exercised, as most of it date back for so long that the term of protection has generally expired long ago. It is clear that the expressions of folklore should be protected without time limit.

After examining the basic principles of copyright it is clear that the obstacle to protecting expressions of folklore under copyright is not merely of a technical nature, but derives from the very concept of copyright.<sup>24</sup> Accordingly, copyright in the strict sense proves to be inappropriate for the protection of expressions of folklore. Moreover, in the Sri Lankan Act there is an inconsistency; some of the expressions of folklore are considered as works and the others are not.

In order to overcome all the above difficulties, or at least most of them, it is proposed not to include expressions of folklore in the list of the works protected by copyright in the Sri Lankan Act.

#### **IV How to Improve the Protection of Expressions of Folklore in Sri Lanka**

It is suggested that in order to have a comprehensive protection model for expressions of folklore, the financial interests, interest in authenticity, the integrity of the folklore - specifically the control of certain uses of sacred or secret objects -, application of customary law, and principles of equity must be taken into consideration.

##### **A Financial Interests**

With regard to protecting the financial interests of the communities, generally there are two ways: one way is to provide for exclusive rights for the communities which are the creators of expressions of folklore or which act on behalf of them, based upon the model of intellectual property protection. The other way, is to establish a statutory remuneration right which does not give the communities the right to prohibit the use of expressions of folklore. As stated above,<sup>25</sup> Section 24(4) of Act, No.36 of 2003 provides for the right to authorize acts referred to in Section 24(1) subject to the payment of a prescribed fee, vested in a competent authority to be determined by the Minister. This is a combination of both ways, which are mentioned above even though it is not completely clear.<sup>26</sup> Furthermore, Section 24(5) states that the money collected under 24(4) will be used for purposes of cultural development. When examining Section 24(4) and 24(5) together it seems that the relevant communities do not have any participation in authorizing the acts referred to in Section 24(1) and moreover they cannot decide on how the

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<sup>24</sup> Agnes Lucas-Schloetter, see supra note 19, at 298.

<sup>25</sup> Refer to the discussion under Part III Protection of Expressions of Folklore under the Intellectual Property Act, No.36 of 2003.

<sup>26</sup> Ibid.

money collected is to be used. This means that they might sometimes not benefit from it at all. In order to improve the said provisions, it is suggested that the indigenous communities be given the right to be consulted and that the competent authority take their opinions into consideration when making decisions with regard to the acts referred in Section 24(1) of the Act. Since Section 24(5) states that the money collected will be used for purposes of cultural development, which in reality does not provide direct benefit for the relevant communities, an alternative system would be preferable whereby the communities derive substantial benefit.

In this respect some ideas could be gathered from the Model Law of the Secretariat of the Pacific Community. The Model Law provides two avenues by which a prospective user of traditional knowledge or expressions of culture for non-customary purposes can seek the prior and informed consent of the traditional owners. The user may apply to the Cultural Authority which then identifies the relevant traditional owners, or deal directly with the traditional owners. In both cases, the prior and informed consent of the traditional owners is to be evidenced in the form of an "authorized user agreement", and in both cases, the cultural authority has a role in providing advice to traditional owners about the terms and conditions of authorized user agreements and maintaining a record of finalized authorized user agreements. According to Section 24(4) of the 2003 Act there is already a competent authority, and the identification of traditional owners would be an important aspect. This could be one of the difficult tasks. However, since Sri Lanka is quite a small country, one could establish a list of names of traditional owners. For example, Sri Lanka is divided into several provinces and the competent authority could specify the traditional owners who are in each province. Officials in each provincial council<sup>27</sup> could assist in this task. A link could be established with the provincial councils and the competent authority, and whenever a matter with regard to expressions of folklore relating to traditional owners arises, it could be resolved by contacting the traditional owners in that respective provincial council. Of course, sometimes a specific expression of folklore could be attached to communities in more than one provincial council. Then, the competent authority would need to consult the relevant provincial councils. At this stage, if a relevant expression of folklore is to be used, as in Section 24(1) of the 2003 Act, the relevant communities could be approached directly with the help of the competent authority and the provincial councils, and then the persons wanting to use the expression of folklore could negotiate with the relevant community and come to an agreement. In order to ensure that traditional owners do not enter into an agreement that may not be in their interest it is suggested, as in clause 21 of the Model Law of the Secretariat of the Pacific Community, that the traditional owners refer the proposed agreement – its terms and conditions - to the competent authority for its comments. In order to facilitate this procedure it is suggested that each

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<sup>27</sup> A provincial council is an autonomous body which derives its authority and power from the Sri Lankan Constitution and Acts of Parliament. At present there are seven provincial councils in Sri Lanka. The provincial councils are competent for certain listed subjects, such as, planning, education, local government, etc, subject to the national policy.

provincial council be provided with some guidelines on how to deal with such kinds of situations. In the instances where there are difficulties in identifying the relevant traditional owners, or in distributing the benefits among disputing communities, the competent authority could enter into an agreement with the user of the expressions of folklore. Should the traditional owners not be identifiable, or the benefits not divisible, any benefit that results from the agreement could be utilised for the purposes of traditional cultural development purposes.

Moreover, with regard to obtaining consent from the traditional owners and benefit sharing, the working document of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore<sup>28</sup> illustrates a similar approach as in the Pacific Model. Article 4 (Management of Rights) of the document envisages the exercise of rights by the relevant communities themselves. However, in cases where the relevant communities are not able or do not wish to exercise the rights directly, it suggests a role for an "agency", acting at all times at the request of and on behalf of relevant communities.<sup>29</sup> Article 4(b) specifies some important functions of the agency such as awareness-raising, education, advice and guidance. These functions could be quite useful since one of the biggest hurdles with regard to protection of expressions of folklore is non-awareness. This applies to both parties, the users and the indigenous communities. On the one hand, most of the users are not aware of the procedure in order to use the expressions of folklore and, on the other hand, often the indigenous communities have no clue about their rights. Therefore, awareness-raising and educating the users and the communities is a fundamental function of an agency. Furthermore, Article 4(b)(i) states that "the Agency should also, where so requested by a community, monitor uses of traditional cultural expressions/expressions of folklore for purposes of ensuring fair and appropriate use ...", which is also useful in order to maintain a fair and appropriate use for expressions of folklore. The provision for a competent authority under Section 24(4) of the 2003 Act would serve the purpose. As discussed above, it would be even more useful if the functions of the competent authority be detailed more in the Act so as to include raising the level of awareness and education as part of its duties. Then, at least when there is a need, the relevant communities or community could consult the authority. However, it must not be obligatory to obtain its services. Furthermore, the indigenous communities could guide the competent authority in regard to a number of issues, namely: how royalties could be collected with respect to collective ownership, how to facilitate payments to traditional custodians and relevant communities, and what to list as expressions of folklore suitable for reproduction for commercial purposes - , as

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<sup>28</sup> WIPO/GRTKF/IG/8/4, of 8 April 2005.

<sup>29</sup> Ibid.



well as those that are not suitable and those only to be reproduced in certain culturally appropriate ways and, finally, advise on policy issues.<sup>30</sup>

Another way of protecting the rights of the communities is application of *domaine public payant* (paying public domain) system. The idea of the *domaine public payant* in its original, strict sense designates the free use of non- or no longer protected works of literature and art, which benefit living authors and their dependants, subject to a legal obligation to pay a remuneration for the professional exploitation of these works. When this principle is applied to expressions of folklore, whenever a third party uses the expressions of folklore it will be subject to a payment to the relevant communities. This means that anyone is free to use the expressions of folklore provided that they pay the remuneration. This could be facilitated in different ways: either through societies or through a public authority.

Section 25(1)(b) of the 2003 Act already allows any body of persons corporate - or unincorporated - which fulfils such conditions as may be prescribed to apply to the Director-General for permission to register a society. However, the Director-General will not ordinarily register more than one such society to do business in respect of the same class of rights.<sup>31</sup> Composers and authors benefit from a third party collecting and administering various rights on their behalf, as it is often difficult for individuals to protect and maximise the economic value of their rights.<sup>32</sup> Also, copyright users also benefit from collecting administration systems because they thus have access to a single organization to ensure they have the necessary clearance to use copyright works for an agreed fee. This reduces the difficulty of locating all relevant copyright owners, which is a problem with respect to clearance of copyright in works.

It might then be possible to establish a collecting society for the indigenous communities, which meets similar criteria under Section 25 of the 2003 Act. If a collecting society is established for the indigenous communities it would collect payment for use of expressions of folklore on behalf of their indigenous members. Anyone using an expression of folklore for which the collecting society is responsible could be required to complete a records notice for each use. This could form the basis for any remuneration paid to the society, and through the society, to the owner. According to Section 25 of the 2003 Act, the Director-General may declare a body to be a collecting society if the body complies with the criteria set out in the relevant Section. These criteria are clearly aimed principally at the protection of the persons on behalf of whom the relevant collecting society administers the relevant statutory licensing scheme. However, in order to be cost effective in the context of collecting societies, there is no need to divide the interests of the indigenous

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<sup>30</sup> Terri Janke, "The Application of Copyright and other Intellectual Property Laws to Aboriginal and Torres Strait Islander Culture and Intellectual Property", (1997) vol.2(1) *Art Antiquity and the Law*, pp13-26, at 25.

<sup>31</sup> Section 25(1)(c).

<sup>32</sup> Shane Simpson, *Review of Australian Copyright Collecting Societies, A Report to the Minister for Communications and the Arts and the Minister of Justice*, p.10.

communities and non indigenous artists. Both could be ensured that their respective interests are taken into consideration through a structure that enables the interests of the relevant rights owners to be represented.<sup>33</sup> Therefore it could be more feasible to make use of existing collecting societies to represent the indigenous communities and not create a special collecting society.

An alternative would be to make any collective administration voluntary, in that community owners could decide whether or not to join. They would also need to specify the particular uses the body would be given responsibility for. They might wish to retain complete control over certain uses. Further consideration would need to be given as to whether such safeguards stated in Section 25 of the 2003 Act, such as the control by the Director-General, are appropriate in relation to voluntary collective administration.

However, in the Sri Lankan context, it is submitted that even in the case of voluntary collective administration it would be appropriate to provide for a mechanism where the members of the societies are responsible to some authority. The emphasis is not so much on control as assistance to the members of the societies with regard to their work. There could be instances where such communities are unable to carry on work with the relevant parties due to communication problems, different languages, different systems, etc.

Having reviewed here various alternatives with respect to financial interests of the communities, it is proposed that within the context of Sri Lanka the most appropriate way to protect the financial interests of the indigenous communities is to amend Section 24 of the 2003 Act by providing that the indigenous communities participate in the procedures of the competent authority. In order to facilitate this procedure invariably the assistance of the provincial councils will be useful. Section 24 of the 2003 Act should be amended by providing a section stating that the prospective user of expressions folklore for a non-customary use may apply to the competent authority to obtain the prior and informed consent of the traditional owners to use the expressions of folklore. The current ambiguous wording in the Section should be changed by specifically stating that the competent authority must prescribe the fee in accordance with the consent of the traditional owners. That is, the right owners have the power to decide which kind of fee should be demanded from the prospective user. Moreover, the Section should specify that the competent authority is satisfied that it has identified all of the traditional owners with the assistance of the relevant provincial councils. If the competent authority is not satisfied that it has identified all of the traditional owners or that there is a dispute about ownership, the competent authority must refer the matter to the persons concerned to be resolved according to customary law and practice or such other means as are agreed to by the parties. Moreover, if the competent authority is satisfied that no traditional owner can be identified it may enter into an authorised user agreement, any

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<sup>33</sup> Tony Davies, "Aboriginal Cultural Property?", (1997) *Law in Context*, p.266.

monetary or non-monetary benefits arising under the agreement to be used for traditional cultural development purposes.

## **B Interests of Authenticity**

For indigenous communities, expressions of folklore constitute the basis of their cultural identity, and the first justification put forward by them in favour of the protection of expressions of folklore is consequently the maintenance of their collective identity. In this context the interests of authenticity are also important. Mainly, these interests are crucial when non-indigenous artistic works are being passed off as if they were authentic indigenous works. For instance, in Australia, the National Indigenous Arts Advocacy Association has recently estimated that the Aboriginal and Torres Strait Islander arts and culture industry generates around \$200 million a year.<sup>34</sup> With the growing international interest in Aboriginal and Torres Strait Islander art, it is likely that this figure will increase in the coming years. As with many other successful art industries, the Australian Indigenous arts and culture industry is under threat from a growing number of fakes and rip-offs.<sup>35</sup>

The interests of authenticity may be met by encouraging the application of certification and other collective marks, accompanied by special rules which would remedy the current disadvantages of those rights, namely the registration fees, other costs and lack of technical assistance.<sup>36</sup> To register traditional names, indigenous names, tribe names or any other word or pictorial element etc., applying certification or collective marks is certainly one of the most adequate and easiest ways for traditional communities to profit from the intellectual property system as it presently stands.<sup>37</sup> The reason for this effect can be found in the specific features of trade mark law and the manner in which it is distinguished from all other areas of IP law. Unlike copyright, patent or design law, trade mark law does not - or at least not primarily - protect an achievement as such. Instead, it serves to indicate the identity and genuineness of the achievement as coming from a certain commercial source, which will be in this instance, the indigenous communities. This means that even when the manufacturing and proliferation of a product or achievement as such cannot be prohibited, as is frequently the case with items of traditional knowledge falling short of the requirements of patent or copyright law, the registration and use of collective or certification marks can help to maintain at least a certain degree of exclusivity in the sense that the proprietor retains the exclusive right to control and authorize the use of the

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<sup>34</sup> Aboriginal Torres Strait Islander Commission(ATSIC), NT News, December 1998, p.23.

<sup>35</sup> L. Wiseman, "The Protection of Indigenous Art and Culture in Australia: The Labels of Authenticity", EIPR 2001, 23(1)14.

<sup>36</sup> Silke von Lewinski, The Protection of Folklore, Cardozo Journal of International and Comparative Law, Summer 2003, Vol.II, p.767.

<sup>37</sup> Annas, "The Label of Authenticity: A Certification Mark for Goods and Services of Indigenous Origin", (1997) Aboriginal Law Bulletin, Vol.3, No. 90,4.

mark for those articles it deems fit.<sup>38</sup> Certification marks are a special form of collective marks which guarantee to the public that the products bearing them fulfil certain quality standards, which are specified and controlled by the association for which the mark has been registered. The concept of a certification mark dates back to the use of hallmarks by gold and silversmiths in the Middle Ages. Most trades or industries were supervised by a guild. Each guild was a federation of master craftsmen, frequently established by some form of charter and had two main aims: to monopolise its trade in a particular town or city; and to promote the interests of the guild as a whole. Often, but not necessarily, the trade mark acts distinguish between both types of marks and stipulate even stronger public control measures for certification marks than for "ordinary" collective marks.<sup>39</sup>

However, according to the WIPO Fact Finding Mission Report (FFM),<sup>40</sup> a major disadvantage of trade mark protection lies in the fact that registration is costly. The financial aspects become even more onerous when taking into account not only the registration fees as such, but also possible costs arising in the larger context of trade mark management, such as monitoring and litigation. A scheme for reduced fees in favour of indigenous collective marks, as has been proposed in the FFM reports, would be of some help, although it would only be effective with regard to the fees, and would not alleviate the financial burden with respect to other costs incurred in connection with trade mark maintenance. However, it is possible that those other expenses be borne to some extent by public sources, as will typically be the case when the organization registering the mark is wholly or partly funded by the state, or is entitled to claim subsidies. For example, in Australia the National Indigenous Arts Advocacy Association (NIAA) registered a national indigenous label of authenticity as a certification mark. The label of authenticity is applied to goods and services that are of Aboriginal or Torres Strait Islander origin, making it more difficult for non-aboriginal people to pass their works off as if they were authentically aboriginal. This label of authenticity will be applied to products or services that are derived from a work of art created by, and reproduced or manufactured by Aboriginal and Torres Strait Islander people who satisfy the definition of "authenticity", and an artist who has successfully applied for use of the label of authenticity will be referred to as a certified indigenous creator.<sup>41</sup> Furthermore, another certification mark has been introduced as a collaboration mark. This mark differs from the first, in that it recognises that products and services are often reproduced, produced and manufactured under licensing arrangements with non-indigenous persons.<sup>42</sup> In some situations, the idea of a collaboration mark could be even more useful

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<sup>38</sup> Annette Kur, Trade Marks, Public Certification Systems and Geographical Indications, in Silke von Lewinski (ed.), *Indigenous Heritage and Intellectual Property*, at p.86.

<sup>39</sup> *Ibid.*, at p.87.

<sup>40</sup> WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders*, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), Geneva 2001.

<sup>41</sup> L. Wiseman, "The Protection of Indigenous Art and Culture in Australia: The Labels of Authenticity", (2001) EIPR15.

<sup>42</sup> *Ibid.*, at p.15.

than the first type because it could open up opportunities to put the indigenous products on the market when there are instances which hinder the production by the indigenous persons. It has been revealed in Australia that the collaboration mark was more successful than the label of authenticity.<sup>43</sup> Indigenous communities could enter into licensing arrangements with the non-indigenous people in the production of the goods. However, this should be subject to fair and legitimate licensing arrangements.

At this point it is interesting to consider a concept which to some extent is related to certification marks, although its legal foundations are totally different: certification stamps and hallmarks administered and granted solely by public authorities. Although they fulfil largely the same function as private certification marks, namely to promote the orientation of consumers towards products having a certain quality or other certified characteristics, they do not fall under the trade mark law regimes proper, but the regulations on which they are founded form part of administrative law.<sup>44</sup> It has been argued that the best solution would probably be to provide the legal and administrative framework for a coexistence between all possible forms of certification marks, ranging from collective marks used by associations established on a private basis with a clearly commercial orientation to mixed structures (certification marks used by associations which are partly or wholly funded by the state) to a scheme of one or several public certification stamps.<sup>45</sup> An example in this respect is the "igloo" sign which has been registered by the Canadian Government as a trade mark. Only the legitimate Inuit artists and their agencies are entitled to attach the "igloo" sign to their products.

In the context of Sri Lanka, it could be argued that one possibility is to utilise the existing legal framework which already provides provisions to register collective and certification marks.<sup>46</sup> However, due to registration fees, other costs and lack of technical assistance, the indigenous communities might not be able to utilise the system. Therefore, similar to the NIAA of Australia, in Sri Lanka, the Sri Lanka Handicraft Board<sup>47</sup> could assist the indigenous communities in registering marks. Like NIAA, the Sri Lanka Handicraft Board could register the marks on behalf of the communities. In order to facilitate the Board's work in connection with the indigenous communities, provincial councils could play a major role, such as identifying the communities with their specific products in each provincial council. Thereafter, the communities could establish a link with the Sri Lanka Handicraft Board through provincial councils and use the mark(s) which has been registered by the Sri Lanka Handicraft Board. Moreover, in order to facilitate the tasks of the communities, the provincial councils could collect the goods and deliver those

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<sup>43</sup> Janke, "Minding Culture, Case Studies on Intellectual Property and Traditional Cultural Expressions", (WIPO publication), at p.145.

<sup>44</sup> Annette Kur, see supra note 38, at 89.

<sup>45</sup> Ibid., at 89,90.

<sup>46</sup> Chapters XXVIII and XXIX of the Act, No.36 of 2003.

<sup>47</sup> A government owned enterprise, the mission of the Board is to promote handicrafts productions, to upgrade handicrafts producers and to promote the sale and marketing of handicrafts of Sri Lanka in both Sri Lanka and abroad.

to the Board. Since the communities are in isolated places the Board could make the necessary arrangements for the goods to be sold. Within the same legal framework, when the indigenous communities cannot produce the goods by themselves, then the Board could register a mark similar to the collaboration mark which would allow the indigenous communities to enter into licensing arrangements with the non-indigenous people in the production of the goods. However, the Board will have to assist the indigenous communities by advising them with regard to licensing agreements.

Moreover, similar to the use of the Canadian "igloo" sign, the Sri Lanka Handicraft Board could register a trade mark which could give the public an idea that it represents the products of indigenous communities. If there is more than one community involved, the Handicraft Board could register more than one trade mark which relates to each community.

Even though there are possibilities as discussed above, there will be a financial burden on the Sri Lanka Handicraft Board, in order to maintain the trade marks.

In order to avoid such a financial encumbrance, one could look into other possibilities within the system. Referring to the situation in Australia, Janke comments that marks are not the only means of identifying authentic indigenous artistic and cultural expressions of folklore. For instance, there is production of artistic works from aboriginal arts centres. These centres adopt logos of their own to denote authenticity of origin.<sup>48</sup> In Sri Lanka too, a similar procedure could be followed which is outside the trademark system. Since the Sri Lankan Handicraft Board already promotes handicrafts, it could make the public aware of the products of the indigenous communities by specifically providing a separate section in each sales outlet for such products. Moreover, in order to reveal the indigenous nature of the product a kind of label (not a trade mark) could be put on the products. In order to guarantee that the products are from indigenous communities, the provincial councils could play a major role by having direct contact with the indigenous communities. The indigenous communities could bring their products to the relevant provincial councils and the provincial councils could bring those to the Board to be sold in the sales outlets. Accordingly, this will make the procedure of putting the goods on the market less difficult with minimum expenditure. This process could alleviate the problem of registration fees and other costs with regard to trade mark management. However, there could be some disadvantages, mainly, there would be no legal remedies if someone acts against the procedure and, moreover, when it comes to international marketing one cannot have any control over the acts done by people who live outside Sri Lanka.

Finally, with regard to the protection of interests of authenticity of indigenous communities in Sri Lanka, the Sri Lanka Handicraft Board could play a vital role in the possibilities that were discussed above: whether it is within the

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<sup>48</sup> Janke, see supra note 43, at 146.

legal framework of trade marks or outside it. All the possibilities could be exercised, as the Act stands presently, but rules should be provided for the role of the Handicraft Board.

### **C Interests in the Integrity of Expressions of Folklore**

Interests of a non-economic nature, related to interests in the integrity of expressions of folklore, are also put forward as support for the establishment of a system for their protection. If the only interests to be considered are of a purely economic nature, one would not do justice to expressions of folklore, whose very essence is of non-economic significance. In order for indigenous peoples not to lose their power to protect their cultural heritage<sup>49</sup> and their ability to supervise the commercial by-products of their culture, it is necessary to have a mechanism which helps retain the integrity of expressions of folklore. If there is no such legal protection, it would inhibit the creative evolution of that folklore.<sup>50</sup> This means that folklore should be protected from debasement, distortion and consequent loss of cultural integrity due to inappropriate uses offensive to the community from which it originates or which would be prejudicial to the artist's or community's honour or reputation. Moral rights in the field of copyright generally comprise at least three types of rights<sup>51</sup> which are also useful in protecting expressions of folklore. These rights are the power to control the publication or dissemination of a work, the right to have the artist's (or community's) name associated with the work, and the right to prevent misuse, mutilation or distortion of a work.

According to Section 10 of the 2003 Act, the author of a work shall, independently of his economic rights, have the following rights: to have his name indicated prominently on the copies in connection with any public use of his work, as far as practicable, the right to use a pseudonym and not have his name indicated on the copies in connection with any public use of his work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, his work which would be prejudicial to his honour or reputation.

Within the context of the 2003 Act, works specified in Section 6( c) which are dramatic, dramatic-musical works, pantomimes, choreographic works and other works created for stage productions and expressions of folklore that are apt for such productions are protected as works.<sup>52</sup> Therefore, only the authors of such expressions of folklore will - independently of their economic rights, and even where they are no longer the owners of those economic rights - ,

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<sup>49</sup> R.A.I Bell, "Protection of Folklore: The Australian Experience", (1985) Copyright Bulletin, Vol. XIX, No.2, at 11.

<sup>50</sup> A. Jabbour, "Folklore Protection and National Patrimony: Developments and Dilemmas in the Legal Protection of Folklore", (1983) Copyright Bulletin, Vol.XVII,No.1, at 12.

<sup>51</sup> S.P. Ladas,(1938), International Protection of Literary and Artistic Property, Macmillan, New York, at 576.

<sup>52</sup> Section 6(d).

have the rights which are mentioned in Section 10 of the Act. Accordingly, since the majority of expressions of folklore are not considered as works, most of the creators of them would not have moral rights under the 2003 Act.

Many expressions of folklore are even of a secret nature and are only transmitted from generation to generation through certain members of the community by virtue of their age, their sex, or their status, *i.e.*, the position that they occupy within the community.<sup>53</sup> Moreover, some of them are of a sacred nature, particularly those that concern rituals. Thus, their function is not to be disclosed outside the community concerned, and the damage caused by their exploitation against the will of the members of this community is, if not economic, mainly of a moral nature.<sup>54</sup> It could be argued that the protection of the non-economic interests of the community affected is thus at least as important, if not more important, than that of its economic interests.

The non-economic interests of the community at the origin of folklore should be recognised, so it is clear that the legal protection of folklore cannot be of only economic nature. Mainly, there is a need to adapt the principles of moral rights to the specific nature of expressions of folklore, *i.e.* applying the right to authorship and the right to the integrity of the work, and establishing the obligation to identify the source when exploiting expressions of folklore, on the one hand, and respecting the integrity of the expressions of folklore by forbidding its deformation, on the other. However, the legislature should not ignore the fact that the expressions of folklore that it intends to protect is not that of an individual but rather the attributes of an entire community, which implies that the requirements of a moral nature to be defined must be in the interests of the community.<sup>55</sup> Often under community customary laws, the responsibility for ensuring that important cultural images, themes and stories are used appropriately rests with the community custodians of a particular item. This means under moral rights, as conceived in the field of copyright, traditional custodians would not be able to prevent culturally inappropriate use of their arts and cultural material without relying on the moral rights of an individual artist.

In the context of moral rights in connection with the communities, the law should give recognition to the communal nature of works of folklore by allowing for the establishment of associated "communal moral rights". It should be personal as well as tribal in nature and should not be transferable. This would enable indigenous artists and communities to ensure that the vital theme or essence of a work is retained in the future. With regard to moral

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<sup>53</sup> Kuruk, "Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States", (1999) *Am. University L. Rev.*, Vol.48,784; Pinel and Evans, "Tribal Sovereignty and the Control of Knowledge", in Greaves (ed.) *Intellectual Property Rights for Indigenous Peoples* (Oklahoma City, Society for Applied Anthropology,1994), p.44.

<sup>54</sup> Janke, "Protecting Australian indigenous arts and cultural expression: A matter of legislative reform or cultural policy?", (1996) *Culture and Policy*, Vol.7, No.3,15).

<sup>55</sup> Nikiema, *La Protection des expressions du folklore par la propriete intellectuelle* (Paris II thesis, 1988)p.206.



rights of indigenous communities, the following aspects which are different as conceived in the field of copyright have to be taken into consideration: the creator of the material may not necessarily be the same person as the indigenous custodian, and moral rights vest in the community whether they are the author or not; there cannot be a limitation in time to protect moral rights; and the usage of protected material contrary to indigenous customary law should be considered as an infringement of the right of integrity. Moral rights can also relate to different ideas of value or subjective appreciation<sup>56</sup> associated with a creative work, and which are dependent upon differences in cultural needs, so that these differences are indirectly recognised in law.

One way of overcoming the problem of authorship in relation to indigenous works is designating by law the indigenous community as the author of the work, and accordingly the moral rights are vested in the community. This might be done by characterising an indigenous work as collaborative in a broader sense, created by an indigenous communal personality, entitling the community as a whole to be classed as an author.

The expressed need to prevent uses of secret or sacred traditional knowledge or expressions of folklore contrary to customs or to prevent any mutilation, destruction, or other use contrary to customs, for example, is, to some extent, comparable to the need of an individual author to have the integrity of his work respected.<sup>57</sup>

Since often expressions of folklore are associated with communal moral rights, the Act should provide for allowing indigenous authors to acknowledge their community affiliations. For example, in Australia it has become the practice in the indigenous arts industry for artists to be identified with their clan names so that the rights of the clans are asserted.<sup>58</sup> Another moral right, the right of integrity, which is stated in Section 10 of the 2003 Act, is important for protecting the integrity of indigenous works. For example, with regard to artistic works, the artist may be able to object to the manner or place in which his or her work is exhibited, or where a work is altered in a derogatory manner. In the case of Banduk Marikar & Others v Indofurn<sup>59</sup>, the artist whose art work Kangaroo and Shield People Dreaming was altered significantly and reproduced on a carpet, observed: "an important part of the story being told in the painting concerns the main creation story of my tribe... it is not right for my painting to be copied for commercial purposes onto carpets. It is also not right for my painting to be copied in a way where part of it has been altered and part of the painting left out. I am happy for people to learn about my culture and heritage, and the accurate reproduction of the painting for the purposes of education and cultural exchange is appropriate. I

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<sup>56</sup> R. Firth,(1959), *Economics of the New Zealand Maori*, 2<sup>nd</sup> ed., A.R. Shearer Government Printer, Wellington, at 393.

<sup>57</sup> Silke von Lewinski, *Final Considerations*, in Silke von Lewinski (ed.), *Indigenous Heritage and Intellectual Property*, at p.388.

<sup>58</sup> Terri Janke, *Berne, Baby, Berne: The Berne Convention, Moral Rights and Indigenous Peoples' Cultural Rights*, at p.2.

<sup>59</sup> (1994) 130 ALR 659.

wish the court to know that I am very upset about the copying of my painting on carpets...".<sup>60</sup> Accordingly, it is apparent that providing moral rights is important for the communities so that they will be able to identify themselves in direct connection with their expressions of folklore.

As discussed above, arguments have been put forward against protection of the expressions of folklore by means of copyright.<sup>61</sup> Moreover, moral rights with regard to indigenous communities have a nature of "communal moral rights". The Model Law of the Secretariat of the Pacific Community has developed a law taking into consideration the nature of the indigenous people. Article 3 of the Model Law has defined the meaning of moral rights with respect to indigenous people. It states that, meaning of moral rights is: "The traditional owners of traditional knowledge or expressions of culture are the holders of the moral rights in the traditional knowledge or expressions of culture." Furthermore, it specifies the kinds of moral rights as follows:

"The moral rights of the traditional owners of traditional knowledge and expressions of culture are:

- (a) the right of attribution of ownership in relation to their traditional knowledge and expressions of culture; and
- (b) the right to have ownership of traditional knowledge or expressions of culture falsely attributed to them; and
- (c) the right not to have their traditional knowledge and expressions of culture subject to derogatory treatment".

It goes on to say that the moral rights of traditional owners in their traditional knowledge and expressions of culture exist independently of their traditional cultural rights. Finally moral rights continue in force in perpetuity and are inalienable, and cannot be waived or transferred.

It is submitted that to incorporate a similar provision as above to Section 24 of the Sri Lankan Act with regard to the moral rights of the indigenous communities. In order to be consistent in the Sri Lankan Act it is proposed to use the word "expressions of folklore" instead of the words "traditional knowledge or expressions of culture".

## **D Application of Customary Law**

If one is serious about protecting the rights of indigenous peoples one must also recognise the importance of customary law. When talking especially about moral rights, the relevance of customary law could be an important aspect since it is central to the very identity of many communities. Where indigenous communities are concerned, any dealing with any indigenous

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<sup>60</sup> Ibid., 678.

<sup>61</sup> Refer to the discussion under III Protection of Expressions of Folklore under the Intellectual Property Act, No.36 of 2003.

intellectual and cultural material is within the bounds determined by customary law.<sup>62</sup> The rights recognised by customary law depend mainly on social criteria such as the degree of kinship, age, gender or the role of the individual in society: "Customary law results from the accretion and sedimentation of repeated practices. Because of constant repetition, it is assumed that those practices have been accepted by the community. These informal regimes are often monitored and enforced by elders, specialized experts and religious leaders within the community. Customary law is frequently enforceable only within communities; customary practices will not generally be recognised as binding rules by authorities and courts outside the communities."<sup>63</sup>

In Sri Lanka there is in many matters a statutory regime that exists in juxtaposition with the customary laws. There are the Kandyan, Thesavalamy and Muslim laws that regulate matters such as marriage customs, rights of succession and rights in respect of land. These are all matters that are regulated by customary legal systems that apply to different sections of the population. There are also national statutory provisions which can be invoked by any section of the community. For example, a Kandyan or a person subject to Thesavalamy law can marry under the General Marriages Ordinance. Any person who may be subject to a principle, to a regime of customary law, can repudiate that law, and choose instead to be governed by the provisions of a statute that has general application. So there really is a choice of law for the respective parties who are in a conflict. There is, as it were, an internal conflict of laws within the national legal system. It is necessary to protect and to preserve these spheres of operation of customary laws and to ensure that statutory law does not make unwarranted inroads into the customary systems that are applicable. For a clear understanding of the nature of customary laws in connection with expressions of folklore, it is necessary to examine more closely the nature and significance of the social structure in indigenous communities.

In Sri Lanka one of the best examples with regard to indigenous communities is the community of the "Wanniya-laeto". Their social structure is a matrilineal exogamous clan organization based on the female line of descent. Modern notions of real estate belonging to individuals are not recognised, but it is believed that the Wanni people and their ancestral spirits belong to the forests of the Wanni which they inhabit and protect. These systems play down as much as possible the cohesive element of law. They believe very much in methods of conciliation and arbitration. At the lowest level, the elders will get together and people who are respected in the community will endeavour to resolve these problems in a speedy and amicable manner that is acceptable to both parties to the dispute. If one examines the character of the indigenous legal system, the principles are very simple, unsophisticated and lacking in

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<sup>62</sup> Australian Copyright Council, Submission to Our Culture: Our Future, October, 1997.

<sup>63</sup> Owens & Odibo, "Presentation on Global Intellectual Property Issues and the LDCs", in WIPO(ed.), The New Millennium, Intellectual Property and the Least Developed Countries (LDCs), Geneva, 30 September 1999, p.48.

complexity. Furthermore, in these systems the basis of the law of contract is simply the principle that your word is sacred. If you give the other person your word, you enter into a transaction on that footing and then you are liable if there is any infraction, violation or infringement of your promise. The intention to be bound by the promise that you have offered to the other contracting party is sufficient to make a contract enforceable. This is quite a contrast to English common law which adopts the criteria of consideration. That is, if I give you a promise, you can sue me for that promise only if you have given me something of value in return for my promise to you. That is the passing of consideration.

According to some of the research done on the Wannani communities, it has been revealed that their lullaby is probably the oldest known lullaby of the world.<sup>64</sup> This lullaby is artistically designed and its three parts are recognisable when the Wannaniya-laeto women sing it to lull their babies asleep. The parts are sung to three varying tunes and rhythms. The first is highly sonorous inducing the baby to fall asleep. Once it falls asleep, the tune and rhythm change to produce a soft music enveloping the baby in calmness. The final part of the lullaby is sung in a more aesthetically pleasing tune and rhythm enabling the baby to continue sleeping comfortably. From the perspective of customary law, this traditional lullaby, which forms an integral part of the Wannani culture, would be deserving of protection. For these communities, the conduct of spiritual life, maintenance of cultural heritage and knowledge systems are vital factors. Maintaining customary laws can be crucial for the continuing vitality of the intellectual, cultural and spiritual life and heritage of this community. Therefore, in this context if someone wants to use anything connected with the above mentioned community, such as the Wannani traditional lullaby, then it could be determined in accordance with its customary laws that regulate many aspects of the life of communities. Often, customary practice may effectively govern or guide many situations in a community's life, but it may be so engrained within the community and embedded in the way it lives and works, that it may not be perceived as codified law. The binding effect of customary practice may only be fully apparent when the practice is contravened. This could occur when expressions of folklore are used by third parties in a way that conflicts with the customary laws that determine how they are used and transmitted within the community: this situation calls for the respect of customary laws by third parties, mainly as an ethical obligation. However, the customary law of the „Wannaniya-laeto“ is not legally recognised in the same way as Kandyan, Thesavalamy and Muslim laws.

Since Sri Lanka is a common law country, it might be of interest to look at the way another common law country dealt with a traditional culture. A celebrated case was decided by the High Court of Australia in Mabo v State of Queensland (No.2),<sup>65</sup> where the traditional property law of the aborigines was legally recognised and established. The Court had to consider the question

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<sup>64</sup> [http:// vedda.org/lullaby.htm](http://vedda.org/lullaby.htm)

<sup>65</sup> CLR 1992, Vol. 175,1.

whether, when the European settlers came to Australia, the land that they found was *res nullius*, that is, a land that did not belong to anybody at all and therefore available for occupation and acquisition, and whether that constituted a fresh point of departure in the acquisition of title to the land. This decision has precipitated demands for legislation to acknowledge the validity of other aspects of traditional aboriginal law.<sup>66</sup>

There have been similar developments which are reflected in pronouncements by international tribunals. An example is the judgment concerning Nauru arbitration by Justice Weeramanthy, of the International Court of Justice. Nauru is a small Pacific island. The people of that country sought legal redress for the massive mismanagement of their resources and the actions of colonial powers in exploiting the natural resources of that country to the detriment of the indigenous population in Nauru. It was held that they were entitled to substantial compensation by way of legal redress for the wrongs that had been inflicted upon them. These examples show that developments have occurred both at the national level and at the international level.

Further, in the case of Milpurrurru and Others v Indofurn Pty and Others,<sup>67</sup> the principle was admitted that Aboriginal customary law could be taken into account to determine the damage suffered in the case of an unauthorized reproduction of a work. Also, in the case of Bulun Bulun and Another v R & T Textiles Pty Ltd. and Another, the court held that "Australian courts cannot treat as irrelevant the rights, interests and obligations of Aboriginal people embodied within customary law. Evidence of customary law may be used as a basis for the foundation of rights recognized within the Australian legal system."<sup>68</sup> However, even if the Sri Lankan courts were to recognize, for example, the traditional laws of Wanniya-laeto, on the basis of common law there could be many practical problems such as: very little information is available on the valid customary law, in some instances communities might not be able to disclose some aspects of their customary laws to the outside world and often documentation concerning customary laws are rare.<sup>69</sup> Furthermore, often many of the individuals engaged in unauthorized use of folklore are outsiders to the said community, and the judges cannot evaluate the customary laws of the community whose norms and sanctions seem to make sense only to the members of the community. Mainly the customary laws are an important aspect inside the community but when it comes to the applicability outside the community, there is not so much weight given to them. Since the establishment of rules is a question of power and influence, in particular as regards the recognition of rules outside the jurisdiction of the traditional culture, the solution of customary law seems at this stage, to be a rather theoretical one.<sup>70</sup>

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<sup>66</sup> Blakeney, "Communal Intellectual Property Rights of Indigenous Peoples in Cultural Expressions", (1998) *Journal of World Intellectual Property*, 987.

<sup>67</sup> IPR 1995, Vol.30, 209.

<sup>68</sup> IPR 1998, Vol.41, 517.

<sup>69</sup> Cooter & Fikentscher, "Indian Common Law: The Role of Custom in American Indian Tribal Courts", (1998) *American Journal of Comparative Law*, Vol.46, No.3, at 561.

<sup>70</sup> Silke von Lewinski, see supra note 57, at 386.

On the other hand, it has been argued that by taking customary law into account in the field of conflicts of laws in the broad sense, and by integrating some of the elements of customary law into *sui generis* or other protection systems to be established by written laws, more room could be made for indigenous customary laws.<sup>71</sup> Furthermore, it has been said that the integration of customary law into laws on *sui generis* protection and the like seems the most appropriate in regard to relevant customary law. For example, instead of determining in concrete terms who should be the holder of a certain right in traditional knowledge or folklore, one may refer to customary law by simply using any notion such as "traditional owner" defined by a reference to customary law, as in Article 4 of the Model of the Secretariat of the Pacific Community and Article 2 of the WIPO revised draft provisions for the protection of traditional cultural expressions /expressions of folklore: policy objectives and core principles.<sup>72</sup> Article 2 of the WIPO draft states: "Measures for the protection of traditional cultural expressions/ expressions of folklore should be for the benefit of the indigenous peoples and traditional and other cultural communities:

- (i) in whom the custody, care and safe guarding of the TCEs/EoF are entrusted in accordance with their customary law and practice; and
- (ii) who maintain, use or develop the traditional cultural expressions/ expressions of folklore as being characteristic of their cultural and social identity and cultural heritage."

This method could be used in the Sri Lankan context too in order to integrate customary law into the common law. This could be done by incorporating a similar provision to Section 5 (Interpretation) of the Sri Lankan Act of 2003 as in Article 2 of the WIPO revised draft or Article 4 of the Model of the Secretariat of the Pacific Community.

## **E Principles of Equity**

At this point it is worthwhile looking at the equitable principles developed by the chancery courts in the United Kingdom, which are part of the common law. It could be argued that the means of ensuring indigenous customary law a certain effectiveness in the common law system is probably by taking into consideration the principles of equity when a dispute occurs between two parties.<sup>73</sup> Thus, the Canadian courts have been the first to take recourse to the equitable concept for indigenous affairs and they have developed the notion of a fiduciary relationship between the Canadian State and its indigenous population. The creation of a fiduciary relationship creates a legally

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<sup>71</sup> Ibid., p.387.

<sup>72</sup> WIPO/GRTKF/IG/8/4, of 8 April 2005.

<sup>73</sup> Dambiec, "Indigenous Peoples Folklore and Copyright Law", LLM Essay, University of Queensland, 1994, p.5.

enforceable mechanism through which someone in a position of trust has rights and powers which he is bound to exercise for the benefit of another. Similarly, it was conceded in Bulun Bulun and Another that the application of the principles of equity in this situation is not unknown to the common law as it has been applied outside of this country. Among tribal communities of African countries, tribal property is regarded as being held on "trust" by the customary head of a tribal group. In Sri Lanka the judiciary tend to refer to equitable principles from time to time when resolving cases. For example, in the cases with regard to trust law many equity principles which are used in the Chancery Courts in the United Kingdom are being referred to. Therefore, in the cases which are connected with expressions of folklore, the judges could utilise the equitable principles; if not, at least to consider it as a persuasive component.

## **CONCLUSION**

This article focuses on how the protection of expressions of folklore can be improved under Sri Lankan law. At the same time, examples have been given showing the way other common law countries have dealt with the issue of protecting traditional cultures (Australia and Canada). In addition references have been made to international model law proposals on the subject (the South Pacific), and WIPO Intergovernmental Committee findings on the issue of traditional knowledge and expressions of folklore.

The subject of the financial interests involved in the exploitation of expressions of folklore is explored, as well as the issue of protection of integrity of such traditional expressions to be considered under the aspect of moral rights. In addition, proposals have been made for involving provincial councils in assisting the administration of the financial interests of the traditional communities. Particular relevance for the protection of expressions of folklore is derived from the vantage point and role of customary law, which is explored at length in this paper. Another departure point for protection of folklore expressions is the concern for preserving their authenticity. This aim leads to an examination of possible protection under trade mark law in Sri Lanka. Examples are also provided for solutions that have been already found in some countries outside Sri Lanka. Additional solutions, outside the trade mark system, which involve a logo and centralised selling system with the help of the provincial councils and the Sri Lankan Handicraft Board, have also been suggested.

It can be concluded from this analysis that the current legal system in Sri Lanka can offer means for protecting the expressions of folklore if a number of amendments, as proposed in this article, will be made to the 2003 Act. In any case in this context, special attention should be directed towards recognition of legitimacy and the binding force of customary law in order to determine the persons entitled to act and also to determine the authorized forms for exploitation of folklore.