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# **Geographical indications, authenticity and protection of traditional cultural expressions**

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## Introduction

What is community without culture? Culture – including its heritage, its expressions, its knowledge, traditions and way of life – defines communities. It tells their history, it shapes their identity. In it rests the shared experiences of a people across generations. Traditional cultural expressions, then, are culture made real. Art, performance, language and knowledge manifest the cultural heritage of a community.

Where once traditional cultural expressions would be accessed by only the cultural group concerned, this age of globalization means culture is now seen, experienced and consumed by a much wider audience. In the process, it is adapted, repurposed and exported to other parts of the world. As the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions notes, “While the processes of globalization, which have been facilitated by the rapid development of information and communication technologies, afford unprecedented conditions for enhanced interaction between cultures, they also represent a challenge for cultural diversity, namely in view of risks of imbalances between rich and poor countries.”<sup>1</sup>

At an international level, we see various attempts in the latter half of the last century to develop appropriate legal instruments for the protection of traditional cultural heritage, both tangible and intangible. The discourse on cultural heritage traces its way through the 1954 UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict (“Hague Convention”); the 1983 Vienna Convention; the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property; the 1995 Unidroit Convention on Stolen or Illegally Exported Cultural Objects; UNESCO’s 2003 Convention for the Safeguarding of Intangible Cultural Heritage; and UNESCO’s 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

But it was perhaps 1995’s Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”) that offered the most appropriate and rigorous protection for traditional cultural expressions – namely, geographical indications. The provisions relating to geographical indications establish a framework for the protection of goods originating in a specific area, using specific modes of production. Its primary application may have been for protecting wines, spirits and foodstuffs

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<sup>1</sup> UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Preamble (2005).

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produced in these areas; but, at a conceptual level, it is a system well adapted to the protection of traditional cultural expressions.

First we will discuss the essential role traditional cultural expressions play in the formation of community culture. Second we will discuss how, conceptually, geographical indications are well suited to the protection of traditional cultural expressions. Finally we will explore the application of geographical indications protection – via trade mark law and sui generis regimes – concluding that sui generis regimes purpose-built for the protection of geographical indications offer the strong protection required for the ongoing health of traditional cultural expressions.

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## Part 1

### Traditional cultural expressions, identity and risks of appropriation

This section will consider the nature of cultural heritage, in particular, traditional cultural expressions, and their relationship to identity formation for individuals and communities. Given the primacy of this link, it is essential to also consider the risks assailing traditional cultural expressions and the appropriateness of current legal frameworks for their protection.

#### 1.1 Traditional cultural expressions are an essential part of identity formation for individuals and communities.

Cultural heritage is a wide-ranging term for the “cultural ecology”<sup>2</sup> in which we locate cultural production, both tangible and intangible, that derives from traditional communities. The UN Working Group on cultural heritage usefully divides cultural heritage into three areas: folklore and crafts, biodiversity and indigenous knowledge.<sup>3</sup> Examples of cultural heritage include performance, artistic works, languages, religious and spiritual knowledge, and movable cultural heritage.<sup>4</sup> This work will focus on two of those subsets: traditional knowledge and traditional cultural expressions.

Traditional cultural expressions are the tangible productions of communities. The World Intellectual Property Organization (WIPO) identifies some of the key characteristics: “Traditional cultural expressions, often the product of inter-generational and fluid social and communal creative processes, reflect and identify a community’s history, cultural and social identity, and values.”<sup>5</sup> This idea of inter-generational and community-based expression is central to the concept. WIPO’s four-part definition picks up on similar ideas, proposing traditional cultural expressions as natural derivatives from communal processes: “(i) the preservation and safeguarding of tangible and intangible cultural heritage; (ii) the promotion of cultural diversity; (iii) the respect for cultural rights; and (iv) the promotion of creativity and innovation – including that which is tradition-based – as ingredients of sustainable economic

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<sup>2</sup> Marion Panizzon, “Traditional knowledge and geographical indications: Foundations, interests and negotiating positions,” working paper 2005/01, Swiss National Centre of Competence in Research (2005), 2.

<sup>3</sup> Manuela Carneiro da Cunha, “Notions of intangible cultural heritage: Towards a UNESCO working definition,” paper presented at Intangible Cultural Heritage international round table, Piedmont, Italy, 14–17 March 2001, 8.

<sup>4</sup> Mariaan de Beer, “Protecting echoes of the past: Intellectual property and expressions of culture,” *Canterbury Law Review*, Vol. 12 (2006), 100.

<sup>5</sup> World Intellectual Property Organization, “Intellectual property and traditional cultural expression/folklore,” booklet, No. 913, 7.

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development.”<sup>6</sup> Examples of traditional cultural expressions include art, painting and designs; weaving, pottery and handicrafts; tools and domestic goods; jewellery and decorative goods; textiles and costumes; musical instruments; architectural forms; folk tales, dances, songs and plays.<sup>7,8,9</sup> This is in no way an exhaustive list. De Beer notes that the diversity of production covered by traditional cultural expressions spans both long-held traditions and patterns that have evolved more recently as indigenous communities continue to evolve.<sup>10</sup>

A second subset of cultural heritage is traditional knowledge, an equally broad catalogue of areas. “Traditional knowledge mainly expresses the exploitation by individuals or communities of plant genetic material resourceful for humans and the processes of extracting from nature the genetic resources, as well as the skill and practices of preserving this knowledge for future generations,” Panizzon suggests.<sup>11</sup> This is the most common application for the term: specific knowledge about the natural environment, plant material in particular, passed down through generations of communities. There are other examples – belief systems, use of natural methods for navigation, and meteorological interpretation.<sup>12</sup> Traditional knowledge is not the primary focus of this work, but the concept is still relevant to much of the discussion.

As noted earlier, one of the key challenges here is the array of terminology within the field of cultural heritage, and their accompanying inferences and connotations. Folklore and handicrafts are other commonly used terms for describing cultural production, but both are perceived to have somewhat derogatory connotations related to mythology and fairytales.<sup>13</sup> The Commission on Intellectual Property Rights (CIPR) also notes that these sorts of terms infer something stuck in the past and no longer developing, which is inconsistent with the nature of culture.<sup>14</sup>

Despite their individual differences, there are distinct themes that thread through the definitions of cultural heritage, traditional cultural expressions and traditional

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<sup>6</sup> Panizzon, “Traditional knowledge and geographical indications,” 10.

<sup>7</sup> Daphne Zografos, “Geographical Indications & Socio-Economic Development,” working paper, IQsensato (2008), 6.

<sup>8</sup> Panizzon, “Traditional knowledge and geographical indications,” 10.

<sup>9</sup> De Beer, “Protecting echoes of the past,” 100.

<sup>10</sup> Ibid., 111.

<sup>11</sup> Panizzon, “Traditional knowledge and geographical indications,” 3.

<sup>12</sup> Ibid., 3.

<sup>13</sup> De Beer, “Protecting echoes of the past,” 99.

<sup>14</sup> Commission on Intellectual Property Rights (CIPR), “Traditional Knowledge and Geographical Indications” in *Integrating Intellectual Property Rights and Development Policy* (London: CIPR, 2002), 74.

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knowledge – they are productions that are traditional, culturally attached, passed down through generations and thus bear some significance for the community involved. The CIPR summarises:

Human communities have always generated, refined and passed on knowledge from generation to generation. Such “traditional” knowledge” is often an important part of their cultural identities. Traditional knowledge has played, and still plays, a vital role in the daily lives of the vast majority of people. Traditional knowledge is essential to the food security and health of millions of people in the developing world.<sup>15</sup>

This sharing of cultural heritage across generations makes traditional cultural expressions an important factor in how communities form their identity. For individuals, cultural heritage connects them to the beliefs, practices and knowledge of their community – it plays an essential role in shaping a sense of identity both as an individual and as party of a cultural group. “Contact with the cultural heritage allows individuals to locate themselves in their own historical, social and cultural environment. This applies to the cultural heritage in its widest sense, including the cultural landscape, the movable heritage and the intangible heritage, as well as the architectural and archaeological heritage,” Carneiro da Cunha explains,<sup>16</sup> linking to the diversity of factors within this conceptual framework that shape identity. “Heritage is understood to be a form of inheritance, which is to be kept in safekeeping, and handed down to future generations,” Ganjee notes. “Thus such objects serve both as symbols of a cultural or group identity and as an essential element in inter-generationally constructing that very group identity.”<sup>17</sup>

Central to this idea of communal knowledge<sup>18</sup> and its ability to shape identity is a clear connection to place. Bérard and Marchenay refer to the “historical memory” embedded in cultural expressions,<sup>19</sup> delineating the link between local culture, its cultural production and the territory from which it derives. “Traditionally, the concept of heritage has been closely tied to the nation state,” Dagbjerg and Fibiger observe, noting the shared etymological roots in Latin of the French word *patrimoine*

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<sup>15</sup> Ibid, 74.

<sup>16</sup> Carneiro da Cunha, “Notions of intangible cultural heritage,” 6.

<sup>17</sup> Dev Saif Ganjee, “Geographical protections indication for handicrafts under TRIPS,” MPhil thesis, University of Oxford (2002), 39.

<sup>18</sup> De Beer, “Protecting echoes of the past,” 100.

<sup>19</sup> Bérard and Marchenay quoted in Cerkia Bramley, Estelle Biénabe and Johann Kirsten, “The economics of geographical indications: Towards a conceptual framework for geographical indication research in developing countries” in *The Economics of Intellectual Property* research papers (Geneva: WIPO, 2009), 118.

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("heritage") and terms related to homeland.<sup>20</sup> Cultural expressions are inscribed in place, Bérard and Marchenay continue, by the collective practice, knowledge and history that produced them.<sup>21</sup> Heritage, then, also embodies the interactions of a community with those around it – it captures both the cultural group's living practice and production as well as its identity in relation to other communities and cultures.<sup>22</sup>

Tunbridge, Jones and Shaw take these elements – people, production and place – and position them as the jostling and often conflicting actors in the formation of cultural identity:

Heritage is contested, above all, because human identity is fragmented; heritage cannot be identified without the implied questions 'whose?', and 'by and for whom?' The answer is likely to be expressed in terms of ethnicity, religion, ideology or class, and, of late, gender attributes and other bases of supposed group identification. There ensue a bewildering diversity of heritage identifications and of conflict potential over heritage, particularly when the widespread acceptance of any heritage place or object is seen as the legitimization of status and power.<sup>23</sup>

In this light, traditional cultural expressions are characterized as constantly evolving, shifting and reforming as the very culture itself does. What is "traditional" about traditional cultural expressions is that their methods of production derive from cultural traditions, rather than "traditional" being a signifier of age or of a static nature.<sup>24, 25</sup> "It is constantly recreated as traditional artists and practitioners bring fresh perspectives to their work. Tradition is not only about imitation and reproduction; it is also about innovation and creation within the traditional framework," WIPO confirms.<sup>26</sup>

## **1.2 Without proper legal protection traditional cultural expressions are at risk of appropriation, resulting in homogenized global culture.**

There is little doubt about the importance of traditional cultural expressions for communities. They are an essential element in how communities – and the individuals

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<sup>20</sup> Mads Dagbjerg and Thomas Fibiger, "Introduction: Heritage gone global. Investigating the production and problematics of globalized pasts," *History and Anthropology*, Vol. 22, No. 2 (2011), 135.

<sup>21</sup> Laurence Bérard and Philippe Marchenay, "Local products and geographical indications: Taking account of local knowledge and biodiversity," *International Social Science Journal*, No. 187 (2006), 109.

<sup>22</sup> Manuela Carneiro da Cunha, "Notions of intangible cultural heritage," 5.

<sup>23</sup> John Tunbridge, Roy Jones & Brian Shaw, "Editorial: Contested heritage," *International Journal of Heritage Studies*, Vol. 2, No. 1–2 (1996), 5.

<sup>24</sup> Panizzon, "Traditional indications and geographical indications," 8.

<sup>25</sup> World Intellectual Property Organization, "Intellectual property and traditional cultural expression/folklore," 20.

<sup>26</sup> *Ibid.*, 5.



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within them – form their sense of identity. They are the product of knowledge and practice passed down through generations of shared experience. They are constantly evolving and adapting as the community's culture does.

The importance of traditional cultural expressions for communities is a strong argument in favour of effective legal instruments for their protection. There are three key benefits for communities that derive from protection of traditional cultural expressions. First, protecting traditional cultural expressions reduces the risk of misappropriation and ensures cultural groups can maintain access to their own cultural heritage. Second, protecting traditional cultural expressions can provide significant economic benefit for the communities concerned. And finally, protecting traditional cultural expressions can legitimize and consolidate the culture itself, encouraging both innovation and cohesion. We will consider each of these ideas in turn.

Without effective legal protection, traditional cultural expressions are at significant risk of being misappropriated. "Indigenous peoples are increasingly faced with the challenge of protecting their intellectual property rights, and, more specifically, their traditional knowledge and resources, against outside exploitation, generic imitations, and unfair patent challenges," Lit and Tano observe.<sup>27</sup> In a globalized world where information flows rapidly, expressions of culture originally held closely by a given community are now much more readily accessed, consumed and adapted by a wider audience. And these "permeable boundaries" of culture make it particularly susceptible to exchange and adaptation.<sup>28</sup> Further, the global reach of the market means communities may find it difficult to monitor and control exploitation of their traditional cultural expressions. The risk is perhaps most pronounced in the instance of traditional knowledge, where long-held knowledge about natural resources discovered by a community and refined over time is harvested by commercial enterprises. "Genetic resources and the related TK [traditional knowledge] are being increasingly tapped on, and appropriated, by biotechnological and pharmaceutical

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<sup>27</sup> Kyra Lit and Mervyn L Tano, "Geographical indications and the protection of indigenous resources: An examination of how geographical indications can be utilized as a tool to protect indigenous resources from outside exploitation and generic imitations," research paper, International Institute for Indigenous Resource Management (2002), 1.

<sup>28</sup> Ganjee, "Geographical protections indication for handicrafts," 8.

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companies in search of cures for globally important disease and ways and means to enhance food security," Panizzon observes.<sup>29</sup>

The intertwined nature of cultural expression and the community within which it originated is a compelling justification for why traditional cultural expressions should be protected. Besides their symbolic value for the community, some cultural production suitable for trade may also offer significant economic benefits for the producers. For many indigenous cultural groups, there is the potential to "stimulate tradition-based creativity"<sup>30</sup> for financial gain. Making the most from the global market may require a substantial shift in thinking for communities to comfortably commodify their traditional cultural expressions – "holistic notions of knowledge and indigenous expressions often sit uneasy with the liberties that modern business takes with what indigenous people perceive to be sacred," Sanders comments.<sup>31</sup> Nevertheless, a 2002 report by the Aboriginal and Torres Strait Islander Commission estimated the value of the Indigenous arts and crafts market at A\$200 million per year.<sup>32</sup> In this light, there is the potential for substantial economic gains.

While there may be the potential for economic gain in protecting traditional cultural expressions, these benefits must be weighed against how legal potential could benefit the culture itself.<sup>33</sup> "The most likely candidate as a justification is the argument that such symbolic products are important for the preservation of the cultural integrity of the community, which relies on such symbols of heritage to maintain a distinct identity," Ganjee notes. This is consistent with Sanders's observation that the process of interrogating traditional cultural expressions in the name of protection can in fact encourage self-discovery and consolidation of those very practices and traditions.<sup>34</sup> This legitimizing effect on culture through the implementation of legal protection encourages communities to define their culture and where that culture "lives" in their traditional cultural expressions.<sup>35</sup>

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<sup>29</sup> Panizzon, "Traditional indications and geographical indications," 4.

<sup>30</sup> World Intellectual Property Organization, "Intellectual property and traditional cultural expression/folklore," 2.

<sup>31</sup> Anselm Kamperman Sanders, "Incentives for protection of cultural expression: Art, trade and geographical indications," *Journal of World Intellectual Property*, Vol. 13, No. 2 (2010), 88.

<sup>32</sup> Rupert Myer, "Report of the Contemporary Visual Arts and Craft Inquiry," (2002).

<sup>33</sup> De Beer, "Protecting echoes of the past," 102.

<sup>34</sup> Sanders, "Incentives for protection of cultural expression," 82.

<sup>35</sup> Ken Worpole, "Licensed and unlicensed culture: State regulation and cultural forms," *Screen*, Vol. 27, Issues 3–4 (1986), 63.

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There is one further justification for legal protection of cultural production. Without appropriate legal protection for traditional cultural expressions, the global community faces the prospect of a distinct loss of culture, where distinct, specific and unique cultural production is eroded by undifferentiated mass culture. “Acculturation couples with free trade to cause local customs, products, and production methods to be vanquished by foreign, globally available alternatives. The global proliferation of standardized products of mass culture thus threatens to stifle national and local modes of cultural expression,” Broude predicts,<sup>36</sup> characterizing this scenario as the “apocalypse of a ‘McWorld’”<sup>37</sup> where the culture and tradition embedded in traditional cultural expressions is gradually diluted.

In sum, there are obvious justifications for legal protection of traditional cultural expressions – to avoid misappropriation by those outside the community, to allow the community to enjoy the economic benefit that may be derived from its traditional cultural expressions, and to strengthen the very culture itself – for the benefit of those within it and a receptive global audience.

### **1.3 But the form and character of traditional cultural expressions poses some challenges for the development of appropriate legal instruments for their protection.**

While traditional cultural expressions may be essential to the identity of cultural groups, and while there are compelling arguments in favour of their protection, envisaging legal protection for traditional cultural expressions does encounter some particular challenges, related to the form and character of the cultural production. First, as discussed in section 1.1 traditional cultural expressions are many and varied in form. Second, indigenous communities often conceive of “ownership” and “intellectual property” in quite different ways to Western traditions. And finally, there is an ongoing tension about where to locate traditional cultural expressions between private ownership and the public domain.

Spanning art and design, handicrafts, traditional stories and performances, and decorative goods, traditional cultural expressions are as varied in character as they are in origin. “The groups that hold traditional knowledge are very diverse:

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<sup>36</sup> Tomer Broude, “Taking ‘trade and culture’ seriously: Geographical indications and cultural protection in WTO law,” *University of Pennsylvania Journal of International Law*, Vol. 26, No. 4 (2005), 634.

<sup>37</sup> Tomer Broude, “Culture, trade and additional protection for geographical indications,” *Bridges: Trade and Sustainable Development Review*, No. 9 (2005), 20.

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individuals, groups or groups of communities may all be custodians. Such communities might be indigenous to the land or descendants of later settlers. The nature of the knowledge is also diverse,” Bérard and Marchenay assert.<sup>38</sup> The challenge for any kind of legal protection, then, is to adequately address these myriad distinctions.

Conceptions of intellectual property are also problematic in formulating legal protection of traditional cultural expressions. “The ‘public domain’ is often characterized by indigenous and other stakeholders as having been created by the IP system and does not therefore respect the protection of TCEs [traditional cultural expressions] that customary and indigenous laws require,” WIPO notes,<sup>39</sup> alluding to the philosophical complexities that frame laws to protect cultural output. And this is an important point – there is, it seems, little consensus on concepts of intellectual property, ownership and the public domain. This is perhaps most evident in negotiations around what can and should be protected, where Western separations of “useful” and “artistic” may seem arbitrary and unnatural.<sup>40,41</sup> As Carneiro da Cunha notes, “both emanate from a single belief system which is expressed in daily life and ritual.”<sup>42</sup> This holistic approach and the “deeply personal and spiritual”<sup>43</sup> nature of much cultural production means that what appear to a Western audience as knick-knacks, oddities and souvenirs may be the product of specific and long-standing traditions for a cultural group.

Without adequate legal protection, many traditional cultural expressions – undocumented stories, songs and performances, for example – has been conceptualized as part of the public domain. Ganjee notes the practical difficulties and ideological differences that can lead to this situation:

Often works of “folklore,” which include handicrafts, would find themselves excluded from mainstream IPR protection and almost by default shunted into the intellectual commons. Thus social groups having different normative structures regarding control over knowledge often find that application of the concept trumps their claims to indigenous knowledge and expressions.<sup>44</sup>

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<sup>38</sup> Bérard and Marchenay, “Local products and geographical indications,” 111.

<sup>39</sup> World Intellectual Property Organization, “Intellectual property and traditional cultural expression/folklore,” 13.

<sup>40</sup> Carneiro da Cunha, “Notions of intangible cultural heritage,” 15.

<sup>41</sup> De Beer, “Protecting echoes of the past,” 98.

<sup>42</sup> Carneiro da Cunha, “Notions of intangible cultural heritage,” 15.

<sup>43</sup> Sanders, “Incentives for protection of cultural expression,” 85.

<sup>44</sup> Ganjee, “Geographical protections indication for handicrafts,” 37.

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The Western view is that the sharing of this sort of communally produced material can stimulate innovation and creative industries through a thriving public domain – but this is not necessarily the view held by particular indigenous groups, who may perceive certain knowledge or traditions as sacred and private.

The amorphous, changing nature of culture and its expressions can also complicate the development of an appropriate framework for legal protection. Traditional cultural expressions have been characterized as being dynamic, living production that changes and evolves as its traditions and practices are passed through generations. Daes notes, “This should not be used to deny legal protection as cultures change and develop over time, and new motifs, which are distinctive, and represent collective expressions of an indigenous people, are just as valid as pre-colonial ones.”<sup>45</sup> Thus, as noted with the diversity of expressions and origins that must be considered, effective legal protection must accommodate the shifting character of traditional cultural expressions.

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<sup>45</sup> Daes quoted in Ganjee, “Geographical protections indication for handicrafts,” 30.  
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## Part 2

### Geographic indications and protection of traditional cultural expressions

Having discussed the primacy of the connection between traditional cultural expressions and communities, and the risks faced without adequate legal instruments to protect important cultural production, our discussion now turns to the possibility of geographic indications as a source of protection within international economic law.

This section will explore the nature of geographic indications and how the geographic indications framework under the TRIPS Agreement is well adapted to the protection for traditional cultural expressions, because of the strong link created between the product, its producer and the place of origin, its application as a communal property right, and its ability to encourage regional and community development.

#### **2.1 There is a distinct cultural element underlying the geographical indications framework.**

Private international law has long sought to navigate the protection of cultural heritage. The enactment of various treaties and conventions over the last sixty years has shaped the discussion of what cultural heritage is, its value, and how it might be protected. The contested character of traditional cultural expressions has been just one element that has complicated the process of establishing effective legal instruments for cultural heritage. Sanders identifies some of the challenges:

“Protection of cultural expressions calls for different measures, a private property IP regime that is shaped by local mores, endorsed by the state, recognized internationally, and one which provides incentives for innovative approaches to preservation and marketing of traditional knowledge and culture.”<sup>46</sup>

The establishment of the TRIPS Agreement in 1995 saw it become perhaps the most successful multilateral agreement on intellectual property. Besides provisions covering copyright, trade marks, industrial design and patents, the TRIPS Agreement also provides provisions on geographical indications. In the agreement, geographical indications are defined as “indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality,

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<sup>46</sup> Sanders, “Incentives for protection of cultural expression,” 87.

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reputation or other characteristic of the good is essentially attributable to its geographical origin.<sup>47</sup>

Article 22 prevents the use of geographical indications that might mislead the consumer or constitute an act of unfair competition. It also instructs member states to refuse trade mark registrations that include geographical indications that do not relate to where the product is produced. This section also prevents the use of geographical indications that, while technically correct, may mislead consumers.

Article 23 provides a higher level of protection for wine and spirits, preventing the use of “type,” “style” and “kind” modifiers on geographical indications. It prevents the registration of trade marks containing geographical indications that don’t relate to the origin of the product. It prevents the use of homonyms for geographical indications that may mislead the consumer. And it also commits member states to further negotiations on establishing a multilateral register of geographical indications for wine and spirits.

Though geographical indications have been used primarily for wine, spirits and foodstuffs, there is, many commentators note, a cultural element to the concept. “To assert the necessity of GI [geographical indications] protection is, in part, to assert the importance of local culture and tradition in the face of ever-encroaching globalization,” Raustiala and Munzer note.<sup>48</sup> Besides the private interest and public welfare benefits, Broude adds, geographical indications possess an underlying interest in preserving traditions and cultural diversity.<sup>49</sup>

The cultural foundation means geographical indications can be perceived to spring from quite a different motivation than conventional intellectual property measures – as Panizzon comments, “Linking the origin of product with the quality of the product is a well-established objective of intellectual property protection, namely of GIs. The protection of the traditional values as opposed to the novelty of an invention has been a yet unseen objective for an IPR.”<sup>50</sup> Broude considers this a “justificatory deficiency” of geographical indications that must be offset by their potential as “cultural

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<sup>47</sup> World Trade Organization, Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 22 (1) (1995).

<sup>48</sup> Kal Raustiala and Stephen R Munzer, “The global struggle over geographic indications,” *European Journal of International Law*, Vol. 18, No. 2 (2007), 339.

<sup>49</sup> Broude, “Culture, trade and additional protection,” 21.

<sup>50</sup> Panizzon, “Traditional knowledge and geographical indications,” 11.

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guardians.”<sup>51</sup> This suggestion that geographical indications cannot encourage innovation is an interesting criticism that perhaps ignores the benefits geographical indications can provide for communities.

With this cultural foundation, geographical indications seem well adapted to the protection of traditional cultural expressions. As Sanders observes, “The capacity of a geographical indication of origin to create a global market with local control over brand, quality and methods of production seems to make it immensely suitable for preservation of cultural diversity.”<sup>52</sup>

## **2.2 Geographical indications emphasise the connection of producer, product and place.**

Geographical indications establish a clear and essential connection between the producer, the place of origin, and the essential qualities of the product. It is this connection that makes geographical indications suitable for the protection of traditional cultural expressions. Broude draws the link between food and wine products and traditional cultural expressions and their relationship to culture and place:

Culture is embedded in the widget by its very existence – and through its content – in a way that somehow makes it representative of a cultural value that is associated with the relevant individual or group identity, such as a flag or ceremonial dress. This dimension appears in food and wine products that are national ‘champions’ closely associated with national or regional perceptions of identity (e.g., Champagne in France).<sup>53</sup>

The connection of a cultural product – whether food, wine or traditional cultural expression – to place of origin is bound together by social, economic, cultural and ecological threads that are manifested in geographical indications.<sup>54</sup>

Geographical indications recognize the qualities, reputation or other distinctive character in a product that is essentially attributable to its place of origin.<sup>55</sup> But rather than just being about a one-dimensional physical link – “this good was produced in this location” – this concept is more closely aligned with the French idea of *terroir*. It is

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<sup>51</sup> Broude, “Taking ‘trade and culture’ seriously,” 631.

<sup>52</sup> Sanders, “Incentives for protection of cultural expression,” 81.

<sup>53</sup> Broude, “Culture, trade and additional protection,” 20.

<sup>54</sup> Sarah Bowen, “Embedding local places in global spaces: Geographical indications as a territorial development strategy,” *Rural Sociology*, Vol. 75, No. 2 (2010), 213.

<sup>55</sup> José Manuel Cortés Martín, “A critical appraisal of WTO negotiations to establish a multilateral register for geographical indications,” *Revista de Estudios Regionales*, No. 90 (2011), 98.



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a multilayered concept, Broude notes: “the so-called ‘old world’ concept of *terroir*, which sees such products as non-industrial expressions of their specific natural and human environment, so that the place of production itself becomes a cultural value.”<sup>56</sup> The concept of *terroir* then closely aligns with the range of factors influencing traditional cultural expressions. Bowen emphasizes the human element in *terroir*: “Although the French word *terroir* is literally translated as ‘terrain, soil, land, ground, or earth,’ the cultural concept of *terroir*, as it relates to food and wine, is understood as the product of interacting natural and human factors.”<sup>57</sup> Barham refers to the “interplay of human ingenuity and curiosity with the natural givens of place” that shapes cultural production:

Figuratively, *terroir* can also designate a rural or provincial region that is considered to have a marked influence on its inhabitants. It is said in French, for example, that certain customs or idioms are rooted in their *terroir*, or that a person strongly conveys a sense of the *terroir* of their birth and upbringing.<sup>58</sup>

We have, then, an underlying concept in geographical indications that recognizes the essential qualities and character drawn from both natural and human influences on its production. These influences accord closely with the way culture and community shape traditional cultural expressions.

### **2.3 Geographical indications acknowledge communal ownership of traditional cultural expressions.**

The concept of communal ownership is embedded in cultural heritage – the idea that cultural production emerges from shared knowledge and tradition that are passed through generations and thus involves a number of “actors” in the creative process. De Beer suggests that the idea of individual ownership is a foreign concept in many indigenous communities:

The indigenous worldview seldom thinks in terms of individual ownership of cultural property. The idea of an individual artist ‘owning’ the artwork they created using indigenous themes, is incomprehensible to many groups including the Australian Aborigines and Torres Strait Islanders. Conferring intellectual property rights on an individual artist in order for them to be able to reap

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<sup>56</sup> Broude, “Culture, trade and additional protection,” 20.

<sup>57</sup> Bowen, “Embedding local places in global spaces,” 226.

<sup>58</sup> Elizabeth Barham, “Translating *terroir*: the global challenge of French AOC labeling,” *Journal of Rural Studies*, Vol. 19 (2003), 131.

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financial rewards to the exclusion of others of their community is not acceptable to many indigenous communities.<sup>59</sup>

This philosophical stance has often meant conventional intellectual property regimes – which focus on the idea of an individual or identifiable author<sup>60</sup> – are an ill fit for indigenous perceptions of traditional cultural expressions and how they should be protected.

Unlike other intellectual property rights, geographical indications are sympathetic to this approach, comfortably accommodating the communal authorship in much cultural production. “Geographical indications are geared towards community rights,” Lit and Tano comment. “Protection is not based on a single inventor, but rather on the region in which the product or plant was produced or grown. For this reason, geographical indications are much more community-oriented.”<sup>61</sup>

The “communal ethos”<sup>62</sup> that acts as the starting point for traditional cultural expressions plays an important part in geographical indications as the source of standards and requirements that determine the authenticity of the cultural output. As agricultural producers might set and audit the farming methods and quality standards for foodstuffs bearing a geographical indication, cultural groups define the essential character of the traditional cultural expression and the practices and traditions that are essential to its authenticity. Bramley, Biénabe and Kirsten explain: “One such collective activity is the need of the relevant group of producers and/or processors to define the relevant product by achieving consensus as to its characteristics and the delimitation of the production area.”<sup>63</sup>

Charging the community concerned with defining the essential quality standards and production methods – for example, market pricing, standards and agreed moral and ethical standards<sup>64</sup> – makes the community accountable for the quality of products bearing the geographical indication. As Raustiala and Munzer explain it, “Typically, national rules limit the use of a given GI to producers who, in addition to residing in the designated region, follow specified manufacturing practices and use particular

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<sup>59</sup> De Beer, “Protecting echoes of the past,” 96.

<sup>60</sup> Ibid., 97.

<sup>61</sup> Lit and Tano, “Geographical indications and the protection of indigenous resources,” 16.

<sup>62</sup> Ganjee, “Geographical protections indication for handicrafts,” 15.

<sup>63</sup> Bramley, Biénabe and Kirsten, “The economics of geographical indications,” 113.

<sup>64</sup> Malcolm Voyce, “Geographical indications, the EU and Australia: A case study on ‘Government at a distance’ through intellectual property rights,” *Macquarie Law Journal*, Vol. 7 (2007), 160.

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ingredients. These rules aim to ensure that the authentic and special quality claimed for the protected good is present in all products that carry the GI.”<sup>65</sup>

But there is another benefit for communities in the use of geographical indications to protect traditional cultural expressions. The process of defining standards, of interrogating the essential qualities of traditional cultural expressions, can strengthen the community’s ownership of the cultural production and, indeed, its sense of identity. “A community’s intangible assets, its social cohesion, can be fostered through [geographical indications’] use since by definition they can be owned collectively by a given community, reinforcing the characteristics of a cluster or community initiative,” Ghafele notes.<sup>66</sup>

Thus, where conventional intellectual property systems emphasise the idea of the individual, identifiable author, geographical indications are more sympathetic to the idea of ownership as a communal, shared concept, which is central to the protection of traditional cultural expressions.

## **2.4 Geographical indications can assist consumers to identify authentic products.**

Though many commentators acknowledge the cultural aspect of geographical indications, there is also a directly commercial counterpart: the ability of geographical indications to help consumers identify authentic cultural products. As Broude asserts: “The primary goal of GIs is not cultural diversity but consumer protection – preventing the ‘passing off’ of a good as the ‘genuine article’ even when it has been sourced from another locale, thus diluting a geographical production area’s reputation.”<sup>67</sup> This also introduces the idea of reputation and how cultural products come to represent their place of origin and its unique character.

A geographical indication can communicate a lot to a consumer – beyond merely identifying the inherent qualities of a product (its ingredients or place of manufacture, for example), a geographical indication can communicate a detailed picture of the product’s origins, production methods and unique character.<sup>68</sup> In reference to foodstuffs, Menapace, Colson, Grebitus and Facendola say that consumer preference is

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<sup>65</sup> Raustiala and Munzer, “The global struggle over geographic indications,” 342.

<sup>66</sup> Roy Ghafele, “Creating the missing link: Applying collective marks to create clusters,” *Journal of Intellectual Property Law & Practice*, Vol. 4, No. 1 (2009), 58.

<sup>67</sup> Broude, “Culture, trade and additional protection,” 21.

<sup>68</sup> Barham, “Translating terroir,” 129.

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often heavily based on perceptions about the product's place of origin: "Informing consumers of the origin of food products via labeling is motivated by the recognition that geography is often correlated with a product's overall quality or, in the stronger case, geography may even be a determinant of a product's ultimate realized quality (i.e., the concept of *terroir*)."<sup>69</sup> This same reasoning could be applied to traditional cultural expressions – the anticipated quality of a cultural product is closely linked to the authenticity of its production and, by extension, its place of origin.

Articles 22 and 23 of the TRIPS Agreement, pertaining to geographical indications, focus on ensuring consumers are not misled about the origins of products. Article 22 (1) seeks to "prevent the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good." Article 22 (2) instructs member states to "refuse or invalidate" trademarks that might mislead the public. Article 23 goes further, refusing the use of homonyms for places of origin related to wines and spirits if they might mislead the public.

The value of these provisions for traditional cultural expressions is about the building of reputation and authenticity. "A key feature of GIs for those consumers sensitive to these indications [is] the fact that the product they are considering buying comes from a specific area and also can often be considered as genuinely part of, and even emblematic of, the local culture," Zografos contends. This is supported by a 1999 survey that found 40 percent of consumers in the European Union would pay a 10 percent premium for products with certified origins.<sup>70</sup>

In this light, geographical indications can "brand" traditional cultural expressions to attract consumers seeking authentic products. "Labels of origin ... hold the potential of re-linking production to the social, cultural and environmental aspects of particular places, further distinguishing them from anonymous mass produced goods, and opening the possibility of increased responsibility to place," Barham suggests.<sup>71</sup> The

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<sup>69</sup> Luisa Menapace, Gregory Colson, Carola Grebitus, Maria Facendola, "Consumer preferences for country-of-origin, geographical indication, and protected designation of origin labels," working paper no. 09021, Iowa State University (2009), 4.

<sup>70</sup> Daphne Zografos, "Geographical Indications & Socio-Economic Development," IQsensato working paper 3 (2008), 11.

<sup>71</sup> Barham, "Translating *terroir*," 129.

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fear of an undifferentiated, homogenized “McWorld” was identified earlier as one of the risks of inadequate legal protection for traditional cultural expressions.

As a response, geographical indications are well placed to ensure consumers can seek out authentic traditional cultural expressions. As Raustiala and Munzer conclude, “Given the focus of GIs on heritage, locality and ‘placeness,’ it is unsurprising that GIs are championed by those who oppose aspects of contemporary globalization, especially its despatializing and homogenizing characteristics.”<sup>72</sup>

## **2.5 Geographical indications can provide economic benefits for cultural groups and aid regional development.**

The discussion so far has focused on the potential for geographic indications to support communities by protecting the practices and traditions that produce their traditional cultural expressions. But geographical indications provide another benefit for communities – by protecting traditional cultural expressions, communities may be able to develop further. This is in part an economic argument – that cultural groups are entitled to benefit from any revenue resulting from their traditional cultural expressions. But it is also an argument about communities developing markets externally for their cultural products and strengthening their community culture internally to continue this development.

The granting of geographical indications for traditional cultural expressions may assist communities to develop a wider market for their cultural production. The inextricable connection of producer, place and the qualities of the product – once protected by a geographical indication – enable communities to engage with foreign markets. Bramley, Biénabe and Kirsten explain:

The resources of the region (landscape, cultural and historical resources and local *savoir faire*) become embedded in the origin-labeled product, thereby synthesizing the territorial attributes in the product name. It is this characteristic of territory as an attribute that translates into improved market access for products bearing a geographical indication, through the development of a sustainable competitive advantage.<sup>73</sup>

Lit and Tano give the example of rural producers throughout the European Union, who, with the protection of geographical indications for their cultural production, have developed greater recognition of the quality of their goods, building a reputation

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<sup>72</sup> Raustiala and Munzer, “The global struggle over geographic indications,” 347.

<sup>73</sup> Bramley, Biénabe and Kirsten, “The economics of geographical indications,” 114.

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for the locality, and greater participation in regional, national and international markets.<sup>74</sup> The success of geographical indications as a marketing tool for regionally specific wine, spirits and food suggests the system is equally applicable to traditional cultural expressions.

Traditional cultural expressions enter a complex and competitive global market, Raustiala and Munzer propose: Falling trade barriers see prices on goods bearing geographical indications decrease outside domestic markets. In addition, increasing immigration sees expat groups transferring traditional production methods to new locations. Increasing wealth sees niche and regionally specific goods gaining in popularity, while improving transport and technology means products move across borders more quickly and to farther destinations.<sup>75</sup>

Within this landscape, protecting geographical indications for traditional cultural expressions may contribute substantial economic benefits for communities. Bramley, Biénabe and Kirsten comment: “The collective monopolies which result from the institutionalization process provide producers within origin-labeled niche markets the opportunity to protect and enhance their market and to transform the value added into an economic rent.”<sup>76</sup>

Besides direct economic gain, being able to commodify traditional cultural expressions may contribute to communities in other ways. Looking internally, there is, for example, the potential for geographical indications to help cultural groups to build relationships with regional, national and international partners.<sup>77</sup> Legal protection of traditional cultural expressions may also encourage government recognition of the value of indigenous culture and communities as “a rare resource that can in the long term create value-added on the market.”<sup>78</sup>

Bramley, Biénabe and Kirsten propose that protection of traditional cultural expressions with geographical indications may alleviate problems of marginalisation that have plagued some indigenous groups: “The legal recognition of geographical indications provides an institutional tool through which to address these problems and consequently provide rural communities with the opportunity to valorize their

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<sup>74</sup> Lit and Tano, “Geographical indications and the protection of indigenous resources,” 16.

<sup>75</sup> Raustiala and Munzer, “The global struggle over geographic indications,” 347.

<sup>76</sup> Bramley, Biénabe and Kirsten, “The economics of geographical indications,” 114.

<sup>77</sup> Hélène Ilbert and Michel Petit, “Are geographical indications a valid property right? Global trends and challenges,” *Development Policy Review*, Vol. 27, No. 5 (2009), 515.

<sup>78</sup> Ibid.,

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local production and extract rents based on local *savoir faire*.”<sup>79</sup> Where a commercial value can be derived from cultural heritage, Barham notes, parties outside the cultural group may support the development of distinct and authentic cultural production for tourism and regional development.<sup>80</sup> Though this may seem an unsavoury commercialisation of sacred culture, where appropriately managed, it may provide further community development opportunities.

As a final note, Bowen comments that the potential for geographical indications to aid the development of cultural groups is closely connected to the conditions of its application: “The degree to which GI protection spurs development and protects local environmental and cultural resources depends on the structure of the GI legislation and on the territorial context in which protection is embedded.”<sup>81</sup>

In considering the provisions laid out in the TRIPS Agreement, we see that geographical indications are well adapted to the protection of cultural heritage. The cultural foundation of the geographical indications concept emphasises the connection between the producer, the place and the qualities inherent in the product. As demonstrated in Part 1, for many cultural groups, these three elements are intimately connected. Likewise geographical indications can act as a kind of communal property right, acknowledging that traditional cultural expressions are, for the most part, the product of many different authors over many generations. For consumers of traditional cultural expressions, geographical indications provide benefits too – they ensure consumers can confidently access authentic cultural products. With consumers assured of the authenticity of the traditional cultural expressions they purchase, there is the possibility for communities to access wider markets and build equity in their cultural output, resulting in economic gain and the chance for community and regional development. These qualities of geographical indications propose it is an ideal legal instrument for the protection of traditional cultural expressions – but, as will be discussed in the next part, the regime’s practical success is closely tied to its application in national legal frameworks.

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<sup>79</sup> Bramley, Biénabe and Kirsten, “The economics of geographical indications,” 110.

<sup>80</sup> Barham, “Translating terroir,” 134.

<sup>81</sup> Bowen, “Embedding local places in global spaces,” 209.

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## Part 3

### Application of sui generis geographical indications laws – and challenges to their success

The flexibility provided by the TRIPS Agreement means member states are free to envisage their own way to provide the “legal means” to protect cultural heritage – it is not prescriptive. What we encounter is a divide in philosophies and approaches, with some countries adapting existing intellectual property laws while others elect new or existing sui generis systems.

This section will discuss the application of geographical indications laws, the adaptation of trade mark laws for the purpose, and the success of sui generis regimes in providing more rigorous and sympathetic protection for traditional cultural expressions.

#### 3.1 Geographical indications laws have been applied differently by Old World and New World producers.

The inclusion of geographical indications in the TRIPS Agreement was a contentious topic, it seems – reports of the negotiations suggest a distinct divide gaped open about whether geographical indications should be included at all and, if included, the level of protection they should require. The United States was staunchly opposed<sup>82</sup> while the European Union was adamant about the provisions’ importance. The alliances that formed were unusual: “The GI debate ... chiefly exhibits not the North–South division so familiar to international lawyers, but rather a less common and more interesting split: that between the New World and the Old World,” Raustiala and Munzer explain.<sup>83</sup> Cortés Martin goes further:

The dispute created a dichotomy of states, with ‘emigrant’ nations on one side and ‘immigrant’ nations on the other. The ‘emigrant nations’ – the European Union, Switzerland and former Eastern bloc countries – support extensive GI protection, while countries like Australia, New Zealand and the United States ally with Latin American nations and other ‘immigrant’ countries oppose this protection.<sup>84</sup>

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<sup>82</sup> Tunisia L Staten, “Geographical indications protection under the TRIPS Agreement: Uniformity not extension,” *Journal of the Patent and Trademark Office Society*, Vol. 87 (2005), 224.

<sup>83</sup> Raustiala and Munzer, “The global struggle over geographic indications,” 339.

<sup>84</sup> Cortés Martin, “A critical appraisal of WTO negotiations,” 103.



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For the United States, with its traditionally liberal economic theory, geographical indications as a form of intellectual property presented a challenge to legal, economic and cultural logic.<sup>85</sup> From the New World viewpoint, geographical indications were “nothing but a protectionist tool to prevent immigrants from using the ‘original’ recipes and methods of production of their forefathers.”<sup>86</sup>

For the Old World nations, geographical indications are an essential tool for the protection of cultural heritage and competitive markets. Within Europe, for example, there are over 700 registered geographical indications, as well as a well-articulated framework to deal with their administration and protection.<sup>87</sup> We can look, for example, to France’s “energetic and incessant efforts”<sup>88</sup> to protect Champagne as a regional specialty, in the face of imminent “genericide.”

What emerged from the TRIPS negotiations was a compromise: a two-tiered system that offered a base level of protection, based on whether the public would be misled, and a higher level of protection for the European Union’s valuable wine and spirit industries. Ilbert and Petit note the success of the TRIPS Agreement in synthesizing these opposing viewpoints: “Coherence and compatibility of views were negotiated through the wording of the TRIPs Agreement. A single term (‘geographical indication’) or a single acronym (‘GI’) covering various situations is used to designate a set of complex legal situations and to ensure consistency between them.”<sup>89</sup>

The importance of this background to geographical indications under the TRIPS Agreement relates to the way geographical indications have been protected under national legal systems. Thus supporters of geographical indications have made inroads in the development of sui generis geographical indications laws, while some opponents have preferred the application of existing consumer protection and intellectual property laws to fulfill their obligations. In the context of cultural heritage, existing intellectual property laws are ill suited to the protection of traditional cultural heritage. A sui generis geographical indications regime is better matched – philosophically and practically – to the protection of traditional cultural expressions.

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<sup>85</sup> Barham, “Translating terroir.”

<sup>86</sup> Panizzon, “Traditional knowledge and geographical indications,” 27.

<sup>87</sup> GE Evans and Michael Blakeney, “The protection of geographical indications after Doha: Quo vadis?” *Journal of International Economic Law*, Vol. 9, No. 3 (2006), 579.

<sup>88</sup> Ganjee, “Geographical protections indication for handicrafts,” 73.

<sup>89</sup> Ilbert and Petit, “Are geographical indications a valid property right?” 509.

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### **3.2 Some countries have adapted existing intellectual property laws to protect geographical indications – but they are an imperfect fit.**

As the TRIPS Agreement is not prescriptive in its approach to the protection of geographical indications,<sup>90</sup> member countries are left to decide what sort of “legal means” are appropriate. In response, some have relied upon existing laws to protect geographical indications, while others have implemented sui generis regimes.

Member states have employed three broad types of laws to fulfill their TRIPS obligations: laws focusing on business practice; existing trade mark laws; and special means of protection.<sup>91</sup> The countries that have many geographical indications to protect have favoured sui generis regimes; while countries opposed to the inclusion of geographical indications in TRIPS have tended to opt for protection under existing laws.<sup>92</sup> “The national laws of the Old School and New School are significantly different and thereby produce different results concerning important issues such as generics and infringement,” Staten comments.<sup>93</sup>

The United States, Australia and New Zealand have all favoured trade mark-style protection for geographical indications.

The United States protects geographical indications via its existing trade mark system, as a certification mark.<sup>94</sup> As certification marks work within the same doctrinal framework as trademarks, they offer some protection for geographical indications. Like sui generis geographical indications laws, certification marks can be registered by an association of producers, based on a specified set of qualities that define the product. But collective marks face the same risk as any trade mark – an inexorable slide into becoming a generic name for a product category rather than a regionally specific cultural product.

In Australia, a national certification has been created by the National Indigenous Arts Advocacy Association for Aboriginal and Torres Strait Islander artists. It operates in much the same way as any trade mark, its intention to “help promote the marketing of their art and cultural products and deter the sale of products falsely claiming to be of

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<sup>90</sup> Bramley, Biénabe and Kirsten, “The economics of geographical indications,” 111.

<sup>91</sup> Ganjee, “Geographical protections indication for handicrafts,” 87.

<sup>92</sup> Ilbert and Petit, “Are geographical indications a valid property right?” 515.

<sup>93</sup> Staten, “Geographical indications protection under the TRIPS Agreement,” 241.

<sup>94</sup> Ibid., 242.

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Aboriginal origin.”<sup>95</sup> In New Zealand, the Maori Arts Board Te Waka Toi has successfully used the Toi Iho Maori Made Mark.<sup>96</sup>

Despite the use of trade mark-style protection for geographical indications in the United States, New Zealand and Australia, Ganjee notes a key flaw of this approach: “[Trade marks] may be nationally effective at protecting GIs but cannot address the international effective and heightened levels of protection sought by GI owners.”<sup>97</sup> The need to register trade marks in multiple territories could result in unfeasible costs for indigenous groups, costs that may prove prohibitive to managing trade in their traditional cultural expressions in foreign markets. There is the difficulty too of being able to register a geographical indication if an existing trade mark already exists. Successful applications – based on a connection to culture and place – are by no means certain.<sup>98</sup>

There is also some uncertainty about the philosophical base for trade marks and how well geared they are toward the protection of geographical indications: “[Trade marks] are predominantly geared towards preventing deceptive or misleading use and have not quite accepted GIs as the valuable property that they are,” Ganjee notes. This is perhaps the key argument that undermines the protection of geographical indications via trade marks – in essence, they are a different beast. As Ayu and Adriansyah explain:

Traditional knowledge and cultural expressions can come up against basic problems which can prevent them from benefiting from the protection provided by the modern Intellectual Property Rights (IPR) legal system. This is due to the difference in scope of the objects, the precise meaning of originality, questions of ownership, the duration of protection, and the numerous ways in which people believe spiritual values should be respected and protected.<sup>99</sup>

While trade mark laws fulfil the obligations TRIPS lays out for member states, the protection they provide for geographical indications appears to miss the essential connection between producer, place and the inherent qualities of the product – key elements in traditional cultural expressions. As will be discussed in the next section,

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<sup>95</sup> Commission on Intellectual Property Rights (CIPR), “Traditional Knowledge and Geographical Indications,” 79.

<sup>96</sup> World Intellectual Property Organization, “Intellectual property and traditional cultural expression/folklore,” 18.

<sup>97</sup> Ganjee, “Geographical protections indication for handicrafts,” 74.

<sup>98</sup> Ilbert and Petit, “Are geographical indications a valid property right?” 524.

<sup>99</sup> Miranda Risang Ayu and Yasmi Adriansyah, “The role of customary laws and protocols to protect traditional knowledge cultural expressions in the intellectual property rights system,” *Intellectual Property Forum: Journal of the Intellectual Property Society of Australia and New Zealand*, Issue 83 (2010), 28.

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sui generis geographical indications regimes may be better equipped to cope with complexities of protecting geographical indications.

### **3.3 Sui generis geographical indications schemes are better suited to the protection of traditional cultural expressions.**

Existing intellectual property laws appear a somewhat imperfect fit for the protection of geographical indications relating to traditional cultural expressions. Trade marks, for example, seem to miss the intimate link between product and place that is central to geographical indications. “Although it may be true that GIs are similar to trademarks in that they function as source indicators,” Cortés Martin notes, “these two different types of IPR are governed by very divergent systems of laws and bodies of beliefs.”<sup>100</sup>

Europe has been the leader in implementing special – and strong – legal instruments to protect geographical indications. France’s Appellation d’origine contrôlée (AOC) system, established in 1824,<sup>101</sup> is perhaps the most well known and the most complex. This complexity, though, has seen it become a model for successful sui generis protection of geographical indications: “The regulatory regime in Europe, based on a strong institutional framework and structure, has been rather successful in granting protection to a great number of agricultural and foodstuff goods, that is, goods deemed to ‘have a history’ within the European Union,” explain Lit and Tano.<sup>102</sup>

More recently the Philippines and India have enacted specific geographical indications laws. The Filipino system is geared toward giving indigenous communities control of their traditional culture and knowledge through access to ancestral land and genetic resources.<sup>103</sup> India’s Geographical Indications of Goods (Registration & Protection) Act 1999 plays a similar role and is overseen by the Controller General of Patents, Designs and Trade Marks of India.<sup>104</sup> These are just two examples.

One of the chief criticisms aimed at sui generis protection of geographical indications is that its implementation poses an untenable administrative and cost burden on developing nations. “Given the cost of establishing and maintaining the institutions

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<sup>100</sup> Cortés Martin, “A critical appraisal of WTO negotiations,” 101.

<sup>101</sup> Staten, “Geographical indications protection under the TRIPS Agreement,” 231.

<sup>102</sup> Lit and Tano, “Geographical indications and the protection of indigenous resources,” 5.

<sup>103</sup> Commission on Intellectual Property Rights (CIPR), “Traditional Knowledge and Geographical Indications,” 79.

<sup>104</sup> Zografos, “Geographical Indications & Socio-Economic Development,” 8.

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necessary to intellectual property protection, serious doubts remain over the ability of those countries less advanced or less advantageously situated to benefit from additional GI protection,” Evans and Blakeney propose.<sup>105</sup> The argument here is that if developing nations are intended to benefit from the increased protection that geographical indications can provide for traditional cultural expressions, they may in fact be hamstrung by the costs of implementing Western-style intellectual property administration.<sup>106</sup> But the benefits outweigh this financial impact: “Even if protection instruments involve legal or administrative costs, they can block the arrival of new competitors and facilitate access to export market,” Ilbert and Petit counter.<sup>107</sup>

A further argument is that protection of geographical indications may unfairly impact on producers in other markets whose livelihood rests on producing similar products to those being protected. Migrant communities, for example, who may have legitimately transported traditional culture, methods and knowledge to another territory, might be prevented from employing their name of their home region or culture. Raustiala and Munzer note the difficulty this can pose, particularly with TRIPS’s Article 23 protection preventing the use of “style,” “kind” and “type”: “Consider madeira, a fortified wine traditionally made in the Portuguese islands off the west coast of Africa. Unless a Chilean winemaker can use a phrase such as ‘Madeira-style’ or ‘tastes like Madeira’, or ‘Chilean Madeira wine’, the consumer will not know what to expect.”<sup>108</sup> Still, *sui generis* protection of geographical indications is supported by two counter-arguments. First, the inability of migrant communities to utilise geographical indications from the *émigré* state may foster innovation and encourage the production of new geographically specific products and expressions. Second, though consumers may experience a period of disorientation while inauthentic uses of geographical indications are phased out, the end result is increased certainty for consumer selecting products marked with a place of origin.

Some commentators raise the possibility that geographical indications impair cultural groups by imposing a false fixity on their culture: that formally documenting techniques, knowledge, practices and other elements of cultural heritage petrifies that which it seeks to protect. Barham refers to the fear of “Disneyfication,” where regions become “living museums for visitors from the city, a kind of ‘rurality under glass’ for

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<sup>105</sup> Evans and Blakeney, “The protection of geographical indications after Doha: Quo vadis?” 579.

<sup>106</sup> Ilbert and Petit, “Are geographical indications a valid property right?” 513.

<sup>107</sup> *Ibid.*, 517.

<sup>108</sup> Raustiala and Munzer, “The global struggle over geographic indications,” 362.

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the consumption of privileged consumers.”<sup>109</sup> To alleviate this potential, some sui generis regimes, such as France’s AOC enable the producers controlling the specified geographical indication to evolve its requirements in parallel with changing culture and practice.<sup>110</sup> This flexibility aligns with the ever-evolving nature of cultural heritage.

Perhaps a more difficult critique of sui generis geographical indications protection concerns its suitability at a conceptual level – that is, can a legal instrument born of the Western intellectual property regime adequately protect – understand, even – traditional cultural expressions and their importance to indigenous communities?

Although there seems to be growing consensus about the necessity for sui generis intellectual rights for traditional knowledge, there is still much debate on whether privatizing traditional knowledge through intellectual property rights will not impair its creativity by altering its form of production and ultimately destroy what it aims to protect.<sup>111</sup>

Shoehorning traditional cultural expressions and knowledge into the intellectual property framework can have other unintended consequences for the developing world, Raustiala and Munzer add: elevated costs of medical care and disproportionate benefit for industrial democracies, the holders of trade marks, copyrights and patents.<sup>112</sup> There is not a clear rebuttal of this argument – and no certainty that the interests of indigenous groups will be protected adequately. But the inbuilt flexibility of the TRIPS Agreement allows members to develop the appropriate “legal means” to enforce protection of geographical indications and, if thoughtfully and collaboratively conceived, gives willing governments the opportunity to satisfy the philosophical concerns of cultural groups.

What allows these sui generis regimes to protect geographical indications and traditional cultural expressions?

First, sui generis protection privileges the connection with place inherent to geographical indications in a way that trade mark laws cannot. “GIs formally protect the shared knowledge and practices of a specific region by controlling the right to use the name of the geographical source. Collective marks, in contrast, say nothing about

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<sup>109</sup> Barham, “Translating terroir,” 132.

<sup>110</sup> Ibid., 136.

<sup>111</sup> Carneiro da Cunha, “Notions of intangible cultural heritage,” 9.

<sup>112</sup> Raustiala and Munzer, “The global struggle over geographic indications,” 341.

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the territorial origin of a given product, but inform the consumer of their ownership structure,” observes Ghafele.<sup>113</sup>

Second, this connection to place prevents the geographical indication from being transferred to another location<sup>114</sup> – this ensures the region and its cultural groups can continue to benefit from their traditional cultural expressions, without the spectre of off-shore manufacturing or sale to a corporate entity. “Unlike a trademark, which can be transferred freely, irrespective of the locality in which production takes place, the link between the product and its geographical origin furthermore ensures that the geographical indication is tied to a locality and controlled locally,” Sanders explains.<sup>115</sup> This aspect of local control is important too – it feeds into the idea that geographical indications can have a positive influence on regional development and helping cultural groups to realize economic gain from their traditional cultural expressions.

Finally, the philosophy that underlies geographical indications can be better served by a sui generis regime than by existing intellectual property laws. “A GI is also not reliant on concepts such as novelty or originality, like patent or copyright systems are. As such a GI would seem ideally suited as an example for the protection of traditional knowledge and cultural expressions,” Sanders concludes.<sup>116</sup> A sui generis regime can also emphasise the collective aspect of geographical indications in a way that traditional intellectual property laws are ill equipped to.<sup>117</sup>

Ganjee suggests: “On the basis of normative as well as pragmatic arguments, such a regime is found equal to the task of protecting the value located in the labels of ‘authentic origin’ of such products without unduly obstructing the free flow of cultural exchange.”<sup>118</sup> The flexibility and specificity offered by a specially developed law for the protection of geographical indications, equipped with a doctrinal basis to prevent misappropriation,<sup>119</sup> can ensure strong, effective protection for traditional cultural expressions.

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<sup>113</sup> Ghafele, “Creating the missing link,” 60.

<sup>114</sup> Zografos, “Geographical Indications & Socio-Economic Development,” 9.

<sup>115</sup> Sanders, “Incentives for protection of cultural expression,” 83.

<sup>116</sup> Ibid., 87.

<sup>117</sup> Raustiala and Munzer, “The global struggle over geographic indications,” 360.

<sup>118</sup> Ganjee, “Geographical protections indication for handicrafts,” 2.

<sup>119</sup> Sanders, “Incentives for protection of cultural expression,” 89.

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## Conclusion

Traditional cultural expressions are at the core of culture and community. They embody the ideas, history and ways of life practised by a cultural group across generations. By their nature, traditional cultural expressions are “authored” by many different members of a community – both previous generations and the current. In this way, they shift and evolve as the cultural group responds to changes in the wider world.

Protection of traditional cultural expressions is essential for cultural diversity. Their fluidity and responsiveness to outside influence makes them difficult to define and even more difficult to contain. In the face of globalization, where the risk of a homogenized “McWorld” is increasingly likely, cultural production is in need of toothy legal instruments that can adequately protect it.

Sui generis geographical indications laws, emerging from the provisions of the TRIPS Agreement, offer a viable solution for the protection of traditional cultural heritage. Geographical indications are based upon the inextricable link between a community of producers, a place of origin, and the essential character that place imbues in the products originating from it – ideas central to cultural heritage. Unlike other intellectual property mechanisms, geographical indications recognise the input of a community of producers. A well-administered geographical indications framework can offer further benefits – regional development, economic gain for community members, and a strengthening of the very culture that it seeks to protect.

Established intellectual property systems, such as trade mark, can offer some protection to traditional cultural expressions, but it is an awkward fit. A sui generis scheme, on the other hand, can better match the philosophy underlying traditional cultural expressions and their importance to indigenous and cultural groups. The success of sui generis regimes for the protection of geographical indications offers the promise of appropriate, rigorous and conceptually appropriate protection for the cultural production of communities.



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