Article

Copyright Law and the Ruse of Culture: 'Traditional Cultural Expressions and Expressions of Folklore' as a Conception of Racial Difference

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Abstract

'Traditional Cultural Expressions' and 'Expressions of folklore' (TCEs/folklore) have received very little critical attention within intellectual property (IP) jurisprudence. Where TCEs/folklore have been treated, it has only been to the extent that international IP does not offer sufficient protection over them as an analogous class of IP or to the extent that TCEs/folklore themselves are philosophically incompatible with IP, and accordingly fail to adequately capture the cultural expressions of indigenous peoples. This article offers a different argument regarding TCEs/folklore which neither seeks their further protection nor their legislative and policy development. Instead, this article traces the genealogy of TCEs/folklore within the imperialist foundations of international law, arguing that TCEs/folklore are the function of an already existing discursive arrangement of power that is consistent with colonial valuations of knowledge and culture.

Keywords: intellectual property; international law; anthropology; imperialism; white supremacy

> Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin.[1]

> If a great people does not believe that the truth is to be found in itself alone … if it does not believe that it alone is fit and destined to raise up and save all the rest by its truth, it

1 Wheaton, H. 1866. *Elements of International Law*. Boston: Little, Brown and Company 17.

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> would at once sink into being ethnographic material and not a great people…A nation which loses this belief ceases to be a nation.[2]

Introduction

The critique of copyright's application over creative forms of expression which are non-Western is practically a part of intellectual property (IP) orthodoxy today (WIPO 2003, 11). To borrow from Boatema Boateng (2011, 166), scholars and legal practitioners across the globe have been demonstrating for the last 50 years that "the copyright thing doesn't work here". The World Intellectual Property Organisation (WIPO) has for that same period been at the forefront of developing international instruments for the protection of 'traditional cultural expressions'/ 'expressions of folklore' (TCEs/folklore)—a genre of protectable subject matter analogous to IP (particularly copyright) which has purportedly been formulated to 'protect the cultural heritage of developing countries' (WIPO/UNESCO, 1982, 3). However, there is some consensus both amongst the doctrinal and critical schools of IP, that there exists a definitional vagueness to these rights (made possible through the conflation of "tradition", "folklore" and "culture") which renders them a conceptual and analytical problem for IP's international systematisation (Hughes 2013, 2).[3]

This article seeks to explain this vagueness by historicising the development of TCEs/folklore within the context of the racial schema underpinning IP. What we hope to show is (1) IP's historic investments in imperialism as well as (2) the operation of a conception of racial difference disguised within the definitional vagueness of TCEs/folklore. This, we believe may assist in understanding both their technical and ideological function, and the necessity of their very definitional vagueness as a means of obfuscating IP's immanent structure of white supremacy (Mills 1997, 99–100).[4]

Our view is that these 'new' rights (TCEs/folklore) are hardly new at all but rather the function of an already existing discursive arrangement of power inherited from international law that is consistent with colonial valuations of knowledge and culture.

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2 Dostoevsky, F. 1916. *The Possessed or, The Devils*. Translated by Constance Garnett. London: Global Grey, 256.

3 See also WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 2008. The Secretariat noted that "there was a view that the meaning of the expression TCEs/EoF could be made clear if requirements for protecting TCEs/EoF were clearly established, even if the meaning of the expression TCEs/EoF itself was vague."

4 We use the term white supremacy instead of racism, to denote the systemic and political dimensions of racial domination. This follows from Charles Mills' use of the term, who cautions that racism has "acquired such a semantic penumbra of unwelcome associations that unless a formal definition is given, no clear reference can be attached to it." (Mills 1997, 99–100) We refer to white supremacy as an immanent (naturalised) structure to better recall the manner in which race is rendered invisible through the exercise of institutional power. This follows from Cedric Robinson's observation that "Racial regimes do possess a history, that is, discernible origins and mechanisms of assembly. But they are unrelentingly hostile to their exhibition. This antipathy exists because a discoverable history is incompatible with a racial regime." (Robinson 2007, xii)

Further, that this discursive manoeuvre within the international IP regime extends the *long durée* devaluation of African art and thought under the auspices of IP as an international human right.

The Problem of Creative Expression as Property

The production of discourse about creative expression, including the means through which the law governs that expression, is a possibility condition for the very production of creative expression itself (Bourdieu 1993, 30). In other words, we cannot talk about the production of creative expression without recognising the ways in which the law is responsible for shaping its meaning including the production of its value and legitimation. Copyright today is widely viewed through the prism of human rights as inferred by Article 27(2) of the Universal Declaration of Human Rights (1948), which states that "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

On the surface, the assimilation of creative expression into the framework of International Human Rights Law appears to be an innocuous step toward preserving human beings' creative potential. In fact, African States have largely been complicit in this development, calling for a truly universal intellectual property regime.[5] But what does it mean to create a right in creative expression? This procedure it seems, would have to presume a set of social and historical facts about the human being as both a legal and creative subject. To create an ownership interest in creative expression, creativity itself would have to be configured as the expression of a particular kind of legal subjectivity. One which understands ownership to vest in authorship and authorship to vest in the labour of the individual.

Famously drawing on Locke and Pufendor, George Ticknor Curtis' seminal A Treatise on The Law of Copyright (1848, 12) would argue that creative works were an ideal form of private property, writing:

> The author, then, has in his possession a valuable invention, which he may withhold or impart to others at his pleasure. His dominion over his written composition is perfect,

5 The Swakopmund Protocol for the Protection of Traditional Knowledge and Expressions of Culture was adopted by the African Regional Intellectual Property Organization (ARIPO) and signed by 9 member states (Botswana, Ghana, Kenya, Lesotho, Liberia, Mozambique, Namibia, Zambia and Zimbabwe) in August 2010. ARIPO Director General Gift Sibanda would state that "this historic development provides the necessary tools to prevent the ongoing misappropriation of traditional knowledge and traditional cultural expressions in Africa. The custodians of this knowledge are now empowered to exercise rights over it." See WIPO Magazine. 2010. "A New Dawn for Custodians of TK in Africa." Accessed January 16, 2024. https://www.wipo.int/wipo_magazine/en/2010/06/article_0008.html

> since it is founded both in occupancy or possession, and in invention or creation. No title can be more complete than this.[6]

In other words, creative expression cannot exist as a right without creating the corresponding moral and legal claim to substantiate it in the form of private property. This link between private property and the right to creative expression has marred copyright from its very inception with the introduction of the printing press.[7] As early as the 18th century, literate slaves were consigned to operate this machinery as "pressmen," and elsewhere they were rendered as copyrightable subject matter in the form of fugitive slave advertisements (Murray 2022, 547).[8] Of course, no international IP treaty speaks of copyright's historical complicity in the furtherance of racial slavery. In fact, IP today, under the auspices of international human rights (and as we will come to show through the language of TCEs/folklore) attempts to efface its own articulation in the "expanding universe of property" (Best 2004, 14).

The moral logic of creative expression as a right was first tested publicly through the art discourse which emerged during the years of the Cold War. In the Soviet Union and the United States of America, there emerged two competing visions of the representative powers of creative expression in law and politics (de Hart Mathews 1976, 702). For the Soviets, creative expression could only manifest itself through its social utility, what in 1932 was inaugurated as "socialist realism" (Stalin 1946, 49).

The First Congress of Soviet Writers would call this an "artistic method" which exposits a "true, historically concrete depiction of reality in its revolutionary development" (Reid 2001, 154). "Free creativity" as Stalin (1946, 49) asserted, or art for art's sake was deemed a consequence of bourgeois indulgences. He would go on to say:

> Let them be convinced of the meaning of 'free creativity' in the notorious bourgeois society, where everything can be bought and sold, and the creative intelligentsia is completely dependent on the monetary support of the financial magnates in their creative endeavours. (Stalin 1946, 49)

6 See also von Pufendorf, S. 1991. *On the Duty of Man and Citizen According to Natural Law*. Cambridge: Cambridge University Press; Locke, J. 1946. *The Second Treatise of Civil Government and A Letter Concerning Toleration*. Oxford: Basil Blackwell.

7 See WIPO. 2003. "Intellectual Property: A Power Tool for Economic Growth." Accessed January 16, 2024. https://www.wipo.int/pressroom/en/prdocs/2003/wipo_pr_2003_337.html 3. The Director General of the World Intellectual Property Organization. Dr. Kamil Idris explains that the birth of the copyright system was established through Johannes Gutenberg's invention of the printing press.

8 Kali Murray goes on to explore IP's investments in slavery through the relationship between trademark and the branding of slaves as well as The Ku Klux Klan copyrighting its Constitution and Laws in 1921.

For the Soviets, creative expression was a revolutionary enterprise that had to supplant the enterprise of commerce. In the Soviet Union, creative expression belonged to the public and not the individual.

On the other hand, the Museum of Modern Art (MOMA) under the backing of some of America's wealthiest families (most notably the Rockefellers) would become the propaganda apparatus of the United States of America (Cockroft 2000, 126). The museum with the assistance of the CIA. would help defend the liberal and individualistic underpinnings of American democracy by championing Abstract Expressionism across Europe (Cockroft 2000, 127). John Hay Whitney would famously state that MOMA could serve "as a weapon for national defense to educate, inspire, and strengthen the hearts and wills of free men in defense of their own freedom" (Cockroft 2000, 127).

The Cold War would demonstrate that the ownership of creative expression had the potential to expand the West's imperialist interests. For this reason, the Soviets first rejected the prevailing global IP regime, believing that the commercialisation of creative work was antithetical to Soviet policy which aimed to transform private property into a public commodity (Eugster 2010, 139). In fact, the Soviets went as far as to develop their own IP laws which recognised creative expression as an effect of the public domain (Eugster 2010, 139). For the Soviets however, the disavowal of IP as an individual right was rooted in the ideological commitment to abolish private property rather than a belief that Russian creative expression was putatively different to the kinds of works which IP already recognised as property (Burrus 1962, 711).

In other words, Russian creative expression still remained a thing within the typology of *res*, as some variation of *res communes*, *res publicae*, and *res universitatis*. The Soviets still recognised the material value of their creative works (Russian Literature in particular) which drew inspiration from the same canon as their Western counterparts and sought to transform that value and heritage into a public good. This Soviet resistance would be short-lived and by the time Gorbachev's Perestroika had taken hold, the Soviet's IP laws were no different to their Western adversaries (Pitta 1992, 499). The Soviet's brief experiment is instructive however because it demonstrated that creative expression could be established through a system of protection which positively repudiated IP as private property.

The Soviet's re-examination of IP would foreshadow international IP's mobilisation of 'culture' as a direct response to the cultural politics of the anti-colonialist movement of the 20th century. During the period of decolonisation, African nationalist movements would reconstruct the continent's intellectual, political, and cultural interests as a means for liberating themselves from international law's hegemony (von Bernstorff and Dann 2019, 8). This challenge would have a causal effect on the development of IP which would subsequently reconstitute itself as the legitimate instrument for realising these interests.

Origins of TCEs/Folklore: Decolonisation, Development and IP

The period of decolonisation, which marked the formal dissolution of empire in Africa between the period 1945–1975, was incited by a series of historical and political imperatives for liberation (von Bernstorff and Dann 2019, 8). Among those imperatives was the restoration of the cultural life of the former colonies, occasioned by the evolution of anti-colonial movements in the 20th century which had come to understand Europe's mutilation of African culture as a means of conquest (Cabral 1971, 13). Speaking on the relationship between liberation and culture, Amilcar Cabral (1974, 12) would state:

> to take up arms to dominate a people is, above all, to take up arms to destroy, or at least to neutralize, to paralyze, its cultural life. For, as long as there continues to exist a part of these people retaining their own cultural life, foreign domination cannot be sure of its perpetuation. At any moment, depending on internal and external factors determining the evolution of the society in question, cultural resistance (indestructible) may take on new forms (political, economic, armed) in order fully to contest foreign domination.

Considering this, the development of TCEs/folklore ought to be appreciated within the context of the decolonisation movements, following the Second World War (Antons 2012, 144). As a result of the intensification of the liberation struggles and their attendant interest in the repatriation of 'cultural property', the United Nations (UN) would respond by directing its various agencies to address these demands. From the United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970 to the Convention concerning the African Intellectual Property Organization (OAPI Convention of 1977), "the first regional treaty to make reference to folklore protection" (Antons 2012, 144).

The UN's activity during this period reveals a concerted attempt to reconstitute international law and international IP as institutions of conscience, willing and capable of repudiating their colonial and imperialist foundations. With Amadou-Mahtar M'Bow at the helm of UNESCO, the former director's Plea for the Restitution of An Irreplaceable Cultural Heritage to Those Who Created It would signal the importance of international law recognising and protecting the 'cultural property' of the Third World, stating:

> I solemnly call upon the governments of the Organization's Member States to conclude bi-lateral agreements for the return of cultural property to the countries from which it has been taken; to promote long-term loans, deposits, sales and donations between institutions concerned in order to encourage a fairer international exchange of cultural property, and, if they have not already done so, to ratify and rigorously enforce the Convention giving them effective means to prevent illicit trading in artistic and archaeological objects. (M'Bow 1978, 4)

Indeed, Antony Anghie (2005, 201) draws our attention to the fact that:

> it was hardly possible to dispute that international law had in fact subordinated the Third World. Further, international lawyers intent on ensuring the continuing relevance of the discipline, sought to develop an international law that was sensitive to the new social reality of an expanded international community which now comprised largely 'new states.'

M' Bow's plea to the international community spoke directly to the recognition of the artistic and scientific endeavour of the Third World, of which international IP laid claim to, having already long-established IP laws in the former colonies.

These newly independent States, however, would not evince the level of suspicion that international IP was rightly deserving of for its silent participation in the modern piracy of Third World resources. On the contrary, the Third World would look to IP through the same developmental prism (radical or otherwise) which precipitated the formation of projects such as the United Nations Conference on Trade and Development (UNCTAD) and the New International Economic Order (NIEO) (Getachew 2019, 153–160). By seeking the preservation of 'cultural property' through international law, newly independent States would underestimate the proprietary expansionist ideals which motivated the proliferation of IP in the first place.

Sundhya Pahuja (2011, 57) draws our attention to the fact that "in international legal terms the only way to decolonise was through self-determination as a nation State." The lack of suspicion regarding IP's operation was consistent with an underlying desire to transform international law through the realisation of universal sovereignty.

Reflecting on this period, Pahuja recasts decolonisation as a historical process which did not disavow international law so much as it unwittingly authorised its reconstitution. For Pahuja (2011, 17–18), decolonisation was deradicalised by the prevailing nationalism of the anticolonial movements which sought national liberation through the formation of the (developmental) nation State, necessarily rendering decolonisation's emancipatory aims susceptible to the enclosures of international law. By seeking the nation State as the appropriate form of social organisation to 'develop' the Third World out of the history of exploitation imposed on it by colonial rule, Pahuja explains that:

> international law could provide a structure by which the heterogeneous movements for decolonisation could be smoothed into a coherent story and 'be contained within the broader frameworks set by Western interests. Thus, on one hand whilst international law did provide a language in which claims for decolonisation could gain a certain audibility, on the other it locked in nation statehood as the only way to claim legal personality. (Pahuja 2011, 45)

As instructive as Cabral is on the relationship between liberation and culture, his views on the UN reveal aspirations that were generally characteristic of the Third World's investment in legitimating decolonisation through the *de* jure international order:

> The UN resolution on decolonialisation has created a new situation for our struggle. Having been condemned, the colonial system, whose immediate and total elimination is demanded by this resolution, is now an international crime. We have thus obtained a legal basis for demanding the elimination of the colonial yoke in our country and for using all necessary means to destroy that yoke. (Cabral 1974, 1)

Third World Approaches to International Law (TWAIL) scholars have demonstrated that the recognition of sovereignty as the teleological endpoint of liberation, could very well conceal the 'predatory system' which international law engenders (Mutua 2000, 31). The history of the NIEO for example and the motives which underscored its formation (to accelerate decolonisation and overcome the deteriorating effects of neo-colonialism by instituting policies which would regulate trade, investment, and "the transfer of financial resources to developing countries.") exposed the emancipatory and ethical limits of the Third World's desire to embrace international law's developmental project as a means for decolonisation (Anghie 2015, 147).

For Anghie (2015, 153), the NIEO was unsuccessful partly because it underestimated the extent to which international law was "structurally immune from attempts to change its character", such that the Third World's ambitions to reconstitute the private dimensions of international law lacked the requisite economic and political power to shift the (imperialist) juridico-political foundations of international law.

Examining the jurisprudence of key figures of 'the right to development', which culminated in the demands of the NIEO, James Gathii (2020, 44–45) has argued that the right to development had radical jurisprudential and political roots which were ultimately displaced and appropriated by the concomitant role of donor agencies in international law, which systematically aimed to shift the object of critique away from international law's imperialist function to the more domestic and internal development issues facing the Third World.

International law, through the universalisation of sovereignty as the modern concept of development, had reconstituted itself as the legitimate vehicle for realising the Third World's economic and cultural interests. This inevitably led to the domestication of the structural and economic critique of international law, which precipitated the formation of the NIEO and the posture of UNESCO under the leadership of M'Bow.

The extent to which the formation of modern IP was instrumental to the evolution of development cannot be understated. The very same overhaul of the rules of international trade and finance that M'Bow and the NIEO called for to resist economic hierarchies and strengthen the development of the Third World are today bound in the international IP infrastructure (in the form of WTO, WIPO, Paris and Berne Convention, UCC and UNO), which collectively constitute the 'knowledge imperium' wielded by the West

(Thomas and Nyamnjoh 2007, 23).[9] IP's relationship to development is perhaps best expressed by WIPO secretary general, Francis Gurrys (WIPO 2021, 5):

> Intellectual property as a policy exists to create an enabling environment for –and to stimulate investment in –innovation; to create a framework in which new technologies can be traded around the world and shared. The economic imperative at the heart of innovation is fundamental to the process of societal transformation that the Sustainable Development Goals aim to achieve.

Although IP ought to have been anticipated as a node in the very international order which was responsible for colonialism's system of domination, it is precisely because IP exists as 'a *sine qua non* for development' that very little would be done by 'new States' to alter IP's operation in the Third World (Chidede 2022, 169). The liberation movement of the Third World which had attended to the quest for independence by critically re-evaluating international law within the precepts of their revolutionary struggle, would ultimately be stunted by the very same investment in international law and international IP's developmental promise as a means for national liberation.

John Kiggundu (2007, 27) reminds us that:

> When the colonial powers such as Britain, France, Italy and Germany colonised the developing countries, they transplanted their Intellectual Property law to these countries with the sole intention of protecting the intellectual property that they brought with them to facilitate exploitation and any intellectual property that their nationals might develop while in the colonies.

Regrettably, newly independent States would barely make any strides toward reconceptualising international IP. Most African countries continued to apply IP laws that were inherited during colonialism and any interventions therein were largely cosmetic changes (Kongolo 2013, 21). In the intervening years, the international IP regime would introduce a new rights language born from development discourse which sought to address the decolonisation movement's cultural and economic demands. TCEs/folklore as a category of protectable subject matter would be introduced to

9 See TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994; Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994); Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Stockholm on July 14, 1967 828 U.N.T.S. 221; Paris Convention for the Protection of Industrial Property, as last revised at the Stockholm Revision Conference, Mar. 20, 1883 21 U.S.T. 1583; 828 U.N.T.S. 305; Universal Copyright Convention, September 6, 1952 6 U.S.T. 2731; T.I.A.S. 3324; 216 U.N.T.S. 132; WIPO Copyright Treaty, Dec. 20, 1996 S. Treaty Doc. No. 105-17 (1997); 2186 U.N.T.S. 121; 36 I.L.M. 65 (1997); WIPO Performances and Phonograms Treaty, Dec. 20, 1996 S. Treaty Doc. No. 105–17 (1997); 2186 U.N.T.S. 203; 36 I.L.M. 76 (1997).

purportedly correspond with Africa and the Third World's desire for cultural liberation and economic development (WIPO/UNESCO, 1982).

International law's discursive elaboration through IP, largely facilitated through the 'faith in development', has seen Africa's attempts to define its own knowledge firmly enclosed within IP's colonial substructure, reproducing the rights language of TCEs/folklore within many of the continent's own national legislations (Pahuja 2011, 71).[10] International law required, as Pahuja (2011, 46) observes, containing "the Third World States 'within', and managing the disruptive potential they brought to the 'international community.'"

More recently, the African Group has been engaged with challenging IP standards that would harm Africa's 'developmental interests' (Ncube 2016, 37). Some scholars in IP today regrettably cite this as evidence of "decolonising" IP as opposed to evidence of IP's naturalisation (Ncube 2016, 37). Perhaps more troubling, is the fact that such "decolonial" arguments have been summoned by WIPO and international IP more generally as signs of IP's emancipatory potential (Ncube 2016, 37).

Timeline of TCEs/Folklore Development in IP

In 1967, an amendment to the Berne Convention for the Protection of Literary and Artistic Works was made in article 15.4 which states:

> In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority who shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.

This has been widely accepted as the first instance where protectable subject matter was extended to non-Western forms of expression in international IP, though the words "folklore", "indigenous knowledge" or "traditional cultural expression" did not yet appear (Graber 2010, 12).

These provisions were subsequently deemed inadequate by the international community (mainly African States, many of which had provided for statutory copyright protection in their respective nations).[11] In 1976, UNESCO and WIPO convened to form the Tunis Model Law on Copyright for Developing Countries (The Tunis Model), which would seek to prevent "any improper exploitation and to permit adequate protection of the cultural heritage known as folklore which constitutes not only a potential for economic expansion but also a cultural legacy intimately bound up with the individual character of the community" (The Tunis Model 1976, 9).

10 Pahuja (2011, 71) describes this 'faith' as the relatedly "theological character of economics."

11 WIPO. 2003. National Seminar on Copyright, Related Rights, and Collective Management, 2.

The Tunis Model (1976, 19) would go on to define 'folklore' as "all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage."

This would be the first time the terms 'folklore' and 'traditional culture' would appear in international IP policy, together with 'ethnicity' being introduced as a formal aspect of creative expression. Curiously the Tunis Model would not go on to define what constituted 'ethnic communities.' That omission can only be explained as the effect of a prevailing attitude within the international IP order, which understood 'ethnicity' as a new category of identification 'intimately bound up' with the supposed inclusion of the Third World.

In 1982, WIPO and UNESCO convened an expert group for the further development of the protection of expressions of folklore, this time establishing a *sui-generis* model of protection. This would be called the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Forms of Prejudicial Action, 1982 (The Model provisions). The Model Provisions (1982, 9) would go on to define 'folklore' as "consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of (name of the country) or by individuals reflecting the traditional artistic expectations of such a community." The apparent excising of 'ethnicity' from the definitional elements would come to be substituted by *insert* 'name of the country.' In our view, this casuistic modification would recalibrate the traces of the Model Law's 'ethnicity' requirement by producing non-descriptness in its place, as a signifier for the Third World.

The Model Provisions (1982, 16) would further go on to explain that "artistic heritage is understood in the widest sense of the term and covers any traditional heritage appealing to the aesthetic sense of man". On the other hand, copyright proper limits artistic works to "every production in the literary, scientific and artistic domain."[12] The 'sense of man,' be it aesthetic or otherwise is not a formal requirement for subsistence in copyright.

In 1984, WIPO and UNESCO would once again convene a group of experts to consider a draft treaty for the international protection of expressions of folklore based on the Model Provisions established in 1982. This was rejected by what the chairman of that committee (UNESCO/WIPO Committee of Governmental Expert meeting), Dr. Mihály Ficsor termed "industrialised nations" on the grounds that it was impossible to identify any reliable source of folklore creations in many countries; and that it was also

12 The Berne Convention for the Protection of Literary and Artistic Works in 1886; WIPO Convention, 1967.

impossible to identify folklore shared by more than one, or in some cases many countries.[13]

This rejection hinted at the definitional instability of the term 'folklore.' Although the legitimacy of the term was not called into question, the basis of the rejections suggested that 'folklore' was too imprecise a category. The ideological importance of who made these rejections cannot be understated either. The principal foundations which had established the Berne Convention and propelled the development of 'industrialised nations' were suddenly being tested by the introduction of a genre of knowledge which existed outside of the intellectual and terminological precepts of IP. Rejecting the inclusion of 'folklore,' in our view, on the basis of doctrine successfully masked an early (and explicit) ideological denunciation of 'folklore' as non-Western knowledge.

Since the adoption of the Model Provisions, the term 'expressions of folklore' has been modified by other international legal instruments in other fields, adopting the use of the terms "traditional knowledge, innovations and practices" or "indigenous knowledge, cultures and traditional practices."[14] During WIPO's roundtable on Intellectual Property and Traditional Knowledge held in November 1999, the term "traditional knowledge" would be used to include all "tradition-based creativity and innovation of human beings."[15]

During 1998 and 1999, WIPO would conduct fact finding missions in the South Pacific, South Asia, Southern and Eastern Africa, North America, West Africa, the Middle East, South America, Central America and the Caribbean. A detailed study of these missions was published by the International Bureau of WIPO on Intellectual Property Needs and Expectations of Traditional Knowledge Holders, 2001. The study documented different legal means of protection for the 'expression of folklore' which would extend beyond copyright *sui-generis* protection and into the territory of industrial property protection. What also emerged from these missions was the recommendation that WIPO and UNESCO should not only intensify their efforts to protect 'folklore' and 'traditional cultural expressions' but that an effective international regime for the protection of 'folklore' should also be advanced. By this point, 'folklore' and 'traditional cultural expressions' had become established discursive terms within international IP met with very little resistance or suspicion from the Third World.

In 2000, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (The IGC) was established. The IGC

13 WIPO, 2003. National Seminar on Copyright, Related Rights, and Collective Management, 3.

14 See The Convention on Biodiversity 1992; Proulx, M. J. 2021. "Indigenous Traditional Ecological Knowledge and Ocean Observing: A Review of Successful Partnerships." *Canadian Integrated Ocean Observing System* 8(2021): 1.

15 WIPO. Roundtable on Intellectual Property and Traditional Knowledge. November 1999, 2.

would be tasked with elaborating the existing working definitions of TCEs/folklore.[16] In their own findings, the IGC would conclude that "there is no internationally settled or accepted definition of a "traditional cultural expression" or "expression of folklore."[17] The IGC would elect to use both terms interchangeably under the abbreviation "TCE."[18] Though the IGC recognised that there were different interpretations of 'TCEs' in national, regional and international instruments, it would nonetheless take on the task of defining the essential characteristics of 'TCEs.'[19]

In 2008, several countries represented in the IGC would raise the issue of the vagueness of TCEs/folklore.[20] During its 47 and most recent session held in Geneva, 2023, (As of writing) the IGC would state that 'TCEs':

> are the products of creative intellectual activity; have been handed down from one generation to another, either orally or by imitation; reflect a community's cultural and social identity; consist of characteristic elements of a community's heritage; are often made by authors unknown and/or unlocatable and/or by communities; are often primarily created for spiritual and religious purposes; often make use of natural resources in their creation and reproduction, and are constantly evolving, developing and being recreated within the community.[21]

The IGC would also go on to define 'community' in line with past international practices "to refer broadly to indigenous peoples and traditional, local and other cultural communities."[22]

Anthropology and the Concept of Racial Difference in TCEs/Folklore

This cursory history of the development of the use of TCEs/folklore in international IP reveals particular "racial scripts" underpinning the term's usage and interpretation (Vats 2020, 191). It is important to note that in the IGC's Seventh Session held in 2004, the Secretariat documented "that some communities have expressed concerning negative connotations of the term 'folklore.'"[23] Despite this, the term was insisted upon by the IGC because 'folklore' "is widely used in many national laws and in various international instruments."[24]

16 WIPO. 2007. Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.
17 WIPO. 2004. Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 6.
18 ibid.
19 WIPO, IGC, 2004.
20 WIPO, IGC, 2008.
21 WIPO, IGC, 2023, 4.
22 WIPO, IGC, 2022, 4.
23 WIPO, IGC, 2004, 6.
24 WIPO, IGC, 2004, 6.

Though the Secretariat did not elaborate on who constituted these communities or what some of those negative connotations to the term 'folklore' were, we hope to show what those connotations presumably were given the context of the term's development within the international IP regime. Doing so may reveal the identity of this unnamed community as well as the historical and ethical grounds that may have raised their suspicion regarding TCEs/folklore.

For Anjali Vats (2020, 5), IP is a "set of rhetorics that governs knowledge production. These rhetorics interface with larger cultural narratives about national identity, citizenship, personhood, and economic production." These rhetorics cannot be disentangled from IP's hereditation of international law, having been established as an international system through the Paris Convention for the Protection of Industrial Property in 1883 and the Berne Convention for the Protection of Literary and Artistic Works in 1886.[25] A century later, WIPO would be established by the UN as a specialised agency to promote IP across the world.

Accordingly, IP's animus would find itself developing in tandem with international law's authorisation of European imperialism and colonialism. Questions of creatorship would be directly tied to questions of citizenship, and consequently underscored by the racial co-ordinates of personhood.

IP's consummate role in the project of empire-building has largely been overlooked through the rhetorical attempts in IP to delink race from knowledge production and creatorship from citizenship. Explaining the role of citizenship and IP, Vats (2020, 7) continues to write that:

> thinking about citizenship as an ordering discursive formation through which intellectual property law is constructed reveals that race continues to be not just a superficial issue that determines the outcome of legal cases but an a priori racial ordering of the structures of knowledge production … the coalescence of intellectual property and citizenship produced doctrinal language that continues to systematically privilege whiteness even today.

From 1967 to the present day, the international IP regime has reproduced racial difference as doctrine through the ambiguous application of 'folklore,' 'culture' and 'tradition.' In the Tunis Model Law, 'ethnicity' is written explicitly as a pre-condition for the production of a special type of thought and art belonging to 'traditional communities.' By the 80s, the category of 'ethnicity' is erased and in its place—emerges a set of modified notions of culture tied to some amorphous community.

What are we to make of 'ethnicity's conspicuous disappearance and the emergence of a community that can only be identified by exhibiting signs of 'traditional culture'?

25 Paris Convention for the Protection of Industrial Property, 1883; Berne Convention for the Protection of Literary and Artistic Works in 1886; WIPO Convention, 1967.

UNESCO's *Statement on Race* issued in 1950, of which several prominent anthropologists were a part of establishing the ideological basis for a new rights language in international law, found that "race" was an unstable scientific category—a social myth which had contributed to "untold suffering" (UNESCO, 1950, 8). Accordingly, UNESCO proceeded with 'ethnicity' as the more appropriate designation for cultural difference (Shilliam 2013, 153–155).

The emergence of 'ethnicity' as 'a preferable classificatory regime to that of race' ought not to be understood as race's ideological refutation (Shilliam 2013, 153). In fact, ethnicity is no more a social myth than race since it re-animates the 'social myth' through the 'signs, strategies and codes' of the European imaginary—the classificatory regime of cultural difference (Pierre 2006, 39). The discursive construction of race as culture and vice versa, what is explained away in TCEs/folklore as 'vagueness,' speaks to an underlying machination in international law which operates through what Chris Mullard (1986, 11) refers to as ethnism—"the cultural representation of the ideological form of racism."

This ethnism, what Robbie Shilliam (2013, 153) refers to as "the episteme of race announced by UNESCO":

> allowed no place for the ongoing story of the sufferers and their epistemic and practical strategies for meaningful re-humanization and reclamation of personhoods. Instead, the UNESCO research agenda on race and racism promoted a science that enabled the master to sweep away his rubbish and redeem his humanity.

It is our view that 'the episteme of race announced by UNESCO' hardly begins with the issuing of the *Statement on Race*. Tracing the professionalisation of international law in the 19th century, Martii Koskenniemi (2001, 103) reveals that the civilising doctrine of international law expressed itself through a language of cultural difference central to constructing modern European identity. Koskenniemi (2001, 103) draws our attention to the work of Hayden White (1978, 151–152), who refers to this discursion as the 'ostensive self-definition by negation'—"a reflex action pointing towards the practices of others and affirming that whatever we as Europeans are, at least we are not like that." International law would exposit this "gentle civilizing" (self-definition), through its various juridical means as the mediation of international progress from the primitive 'Other' to the civilized European, establishing the legal and moral basis for "colonial imperialism to flower" (Du Bois 1943, 721).

Anghie (2005, 204) reminds us that during the decolonisation years, the juridical distinction between civilised and uncivilised central to international law's positivist foundations would ultimately be transformed through the manufacturing of a new "dynamic of difference"—one which would mobilise economic difference under the aegis of "developed" and "undeveloped." This 'dynamic of difference,' for Koskenniemi (2001, 130) could already be deciphered "in terms of a cultural argument about the otherness of the non-European that made it impossible to extend European

rights to the native." For both Koskeniemi and Anghie, this difference and its re-iteration, whether in economic or cultural terms, is responsible for structuring international law.

In our view, The Tunis Model for Copyright in Developing Countries went further into elaborating upon this difference by introducing 'folklore' as a category of knowledge belonging uniquely to the Third World. Subsequent attempts to elaborate its meaning would see the occlusion of 'ethnicity' from its definitional parameters and the emergence of a vague and tautologous reduction of 'folklore' as 'traditional cultural expression' and vice versa.

According to WIPO, this interchangeability is doctrinal (as outlined in the discussion of the various IGC reports). Accordingly, we understand the 'vagueness' of TCEs/folklore to be a particular stylisation of racialised knowledge. The 'vagueness' of knowledge from the Third World has become a differential mode of classification in IP, repeated and crystalised through the adoption of TCEs/folklore internationally. 'Vagueness' is institutionalised as a constitutive feature of knowledge from the Third World, only to be understood in terms of a cultural essence distinct from Europe or as the IGC explained "by authors unknown and/or unlocatable, often primarily created for spiritual and religious purposes; often make use of natural resources in their creation and reproduction, and are constantly evolving, developing and being recreated within the community."[26]

The IGC may very well have used the term "natives" to better recall the racial animus which would have us apprehend knowledge from the Third World as the product of some unknowable and unlocatable force explained only through the "spirit"—reminiscent of Hegel's theory of race (Eze 1997, 142).[27] One possible explanation for this development is through the recruitment of anthropologists by UNESCO, which continues to play an active role in shaping the development of modern IP rights language.

As a result of UNESCO/ WIPO activity, the influence of anthropologists would introduce 'culture' as a conceptual paradigm for re-interpreting the rights discourse within IP notwithstanding the fact that the meaning of 'culture' was highly contested within the discipline of anthropology during the intervening periods—and certainly different conceptualisations offered different frameworks for arraigning the ethical deficiencies of human rights discourse (Wright 1998,7). Despite these developments

26 WIPO, IGC, 2023, 4.

27 Eze, E. 1997. *Race and Enlightenment*. Blackwell Publishers Ltd, citing. Hegel states that "from all these various traits we have enumerated, it can be seen that intractability is the distinguishing feature of the Negro character. The condition in which they live is incapable of any development or culture, and their present existence is the same as it has always been. In face of the enormous energy of sensuous arbitrariness which dominates their lives, morality has no determinate influence upon them."

within the discipline of anthropology itself, the fact remained that a particular conception of 'culture' entered IP rights discourse.[28]

As early as 1947, UNESCO would enlist the assistance of the American Anthropological Association (AAA) to assist the UN Commission on Human Rights draft version of what would later become the Universal Declaration of Human Rights (UDHR) (Goodale 2006, 485). The AAA ultimately rejected the draft based on the imperialist implications of universality which the UDHR prescribed. The critical refusal to rejoin human rights with anthropology would be performed through the AAA's anti-racist cultural relativism (Goodale 2006, 487). Following this, UNESCO would enlist the help of Claude Levi Strauss in 1949 with the drafting of the first UNESCO declaration on race and at the request of UNESCO in 1952 Levi-Strauss would write 'Race and History' (Stoczkowski 2008, 5). Strauss advanced the idea that:

> the ability to make cultural progress was not linked to the superiority of one society compared to others, but rather to the aptitude of everyone to establish mutual exchanges with others. Thus, by making exchanges the fundamental condition for progress. (Stoczkowski 2008, 6)

The persistence of this view can be seen in its ratification four decades later in the introductory passages of the UNESCO Report on Cultural Diversity (1995, 21) which quotes Marshall Sahlins definition of culture as "the total and distinctive way of life of a people or a society." For Susan Wright (1998, 13), UNESCO's indoctrination of this view ignored "the dimension of culture as a process of contestation over the power to define organising concepts—including the meaning of culture itself." In other words, the concept of 'culture' was itself fixed to the very same historical relations of power that had produced 'culture' within anthropology's (colonial) disciplinarity.

Jemima Pierre (2006, 40) draws our attention to the fact that the notion of 'culture' can very well expand upon anthropology's colonial subtexts. Pierre (2006, 41) writes that racialisation is reproduced in ethnographic practice:

> through the deployment of an ambiguous notion of culture that continues to have racial underpinnings ... In other words, the seeming acceptance of cultural difference as given without the acknowledgement of the subtleties of race implied in this difference, authorises ethnographic practice that reinforces Africa's (global) marking as the site of racial otherness.

The introductory observations made in the Model Provisions (1982, 1) state that:

> it is of particular importance to developing countries which more and more recognise folklore as a basis of their cultural identity and as a most important means of self-

28 We limit the focus of our critique to the concept of 'culture' in IP and the extent to which it was instrumental in concealing the construction of racial difference, as opposed to dealing with the contested meanings of 'culture' within anthropology.

> expression of their peoples both within their own communities and in their relationship to the world around them.

If we accept Anghie's hypothesis that "developing" was the reconfiguration of racial civilisation in economic terms, then it follows that "cultural identity" can be apprehended as the racial identity of "developing" cultures.

Commenting more explicitly on the relationship between anthropological language and international law, Sally Engle Merry (2006, 12) has observed that the use of the term 'culture' in international law and human rights discourse more generally is responsible for reproducing the evolutionary model exemplified by 'classical' anthropology which views the development of civilisation on a sliding scale between primitive and modern forms of social organisation. Engle Merry (2006, 12) writes that under this framework:

> all cultures are positioned on a continuum from primitive to modern. Variations are exclusively temporal. So called traditional societies are at an earlier evolutionary stage than modern ones, which are more evolved and more civilised. Culture in this sense is not used to describe the affluent countries of the global North but the poor countries of the global south. When it does appear in discussions of European or North American countries, it refers to the ways of life of immigrant communities and or racial minorities.

Copyright is understood by the international IP regime to be the most appropriate mechanism to protect TCEs/folklore since it does not extend to ideas, procedures, methods of operation or mathematical concepts.[29] Subsistence in copyrightable subject matter is founded upon originality, authorship and the fixation of creative subject matter in a material form.[30] The Western intellectual foundations of these principles have been enumerated through various academic articles and international IP policy which we have already briefly canvassed.

IP scholars who are critical of these foundations have lamented copyright's applicability to TCEs/folklore, highlighting the philosophical incompatibility of rights discourse with forms of creative expression (to which TCEs/folklore belong) which do not generate ownership entitlements (Morolong 2007, 51). These criticisms are in our view partially responsible for naturalising the legitimacy of TCEs/folklore.

It is our view that TCEs/folklore are not another form of creative expression. Rather, they are modern signifying devices which perform the task of instituting the racial subject in IP. TCEs/folklore exist as copyright's racial mirror image, as copyright's 'ostensive self-definition by negation' in that they can only be rendered legible in

29 The Berne Convention. See also The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

30 The Berne Convention.

contradistinction to copyright, as a racialised species of knowledge (White 1985, 151–152).[31]

Copyright is expressed as the rights of individual creative authorship, but this construction necessarily relies on the framing of TCEs/folklore as copyright's moral and legal negation. Indeed, one can read "civilised" where copyright appears in order to better apprehend the racial significations which TCEs/folklore conjure. TCEs/folklore not only emanate from the increasing relevance of anthropology in international IP but also from anthropology's disciplinary relevance to international law. The "thematic field" (Trouillot 2021, 72) which produced the legitimation of anthropology itself is equally as indebted to the history which informed Francisco Vitoria's encounters with the Indians, which was less about establishing order among sovereign states so much as it was about the creation of a "system of law to account for relations between societies which he understood to belong to two very different cultural orders, each with its own ideas of propriety and governance" (Anghie 2005, 16).

This understanding, the constitution of the 'Other' through cultural difference in the form of TCEs/folklore, represents international law's discursive elaboration through IP. International law, under the auspices of IP can name, classify and organise the meaning of the 'Other' by invoking the textual construction of TCEs/folklore (anthropology). However, as Michel-Rolph Trouilott (2021, 65) reminds us, this very construction is derived from an already existing construction of 'Otherness' upon which international law and anthropology's historical coalescence is founded.

Both anthropology and international law 'thematically correspond' in IP in the form of TCEs /folklore (Trouillot 2021, 65). Rather than dislodging the historical and epistemological foundations upon which the racial subject is apprehended, the discursive construction of the racial subject (through the concept of 'culture' as a progressive turn from 'race') is reified and legitimated in TCEs/folklore (Webster 2018, 408). It is our view that the relationship between copyright and TCEs/folklore generates "a gap between two cultures, demarcating one as "universal" and civilised and the other as 'particular' and uncivilised" (Anghie 2005, 4).

Conclusion

The IGC together with other international agencies continues to work on developing the protection of TCEs/folklore internationally. The last 50 years have seen the growing hegemony of IP in the Third World and the reconstitution of the political, ethical and historical motives which tied the 'liberation of culture' to decolonisation in the Third World. Some scholars have regrettably advanced the idea that WIPO and UNESCO's more recent activity can be characterised as decolonial (Ncube 2016, 37).

31 White H. 1978. *Tropics of Discourse: Essays in Cultural Criticism.* Baltimore: Johns Hopkins University Press 151–152.

Today, many African and Third World nations have adopted the use of TCEs/folklore within their national legislations, following the Model Provisions established by WIPO and UNESCO. Many others have supported the continued development of a *sui generis* system into the protection of TCEs/folklore. Very few, if any have traced the genealogy of these terms to the imperialist and colonial foundations of international law which produced IP as a technological mode of proprietary expansion. In South Africa, the language of TCEs/folklore has not only been reproduced through the amendment to the Copyright Act, it has also been advanced through national policy as an "affirmation of African cultural values in the face of globalisation."[32]

This article has attempted to show that TCEs/folklore function as a discursive ordering of knowledge, which renews the civilisational status of copyright in particular and IP more generally by mobilising 'culture' in IP's apprehension of knowledge from the Third World. Furthermore, that this 'Other' type of knowledge works to legitimate IP and international law as the means through which Africa and the Third World more generally can realise their 'developmental' interests.

It is our view that the struggle for the liberation of culture cannot be expressed through the integration of (Third World) national interests within IP. Calls for a *sui generis* system of protection or alternative regimes such as a public domain, droite de suite, contract laws, human rights and even the so-called "decolonisation of IP" only function to recalibrate IP as a legitimate proprietary rights system. This system cannot in our view operate outside of IP's immanent structure of white supremacy constituted by international law's colonial and imperialist origins.

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