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Part I, Introduction

1.1. Background

“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions”.

Article 31 United Nations Declaration on the Rights of Indigenous Peoples.

The rights of indigenous peoples to their Traditional Cultural Expressions\(^1\) are proclaimed in this article of the declaration, which was adopted by the UN General Assembly September 13 2007.

The protection of these rights has, however, not been an issue easily resolved and has been discussed over the last decades by scholars, interest groups as well as in international forums. Especially the development of recording and broadcasting technologies has, over the years, led to a commercialization of TCEs on a global scale without due respect being given to the cultural and economic interests of the communities from which the TCEs originate, and without any of the revenue from such exploitations benefitting the peoples or groups from which the TCEs originate. The commercial exploitation of TCEs is extremely varied. Among the more obvious examples are the productions of indigenous handicraft objects, imitations of indigenous works of art on T-shirts, and indigenous names and words trademarked and used commercially. Other more complicated cases include the exploitation of ethnic music and the appropriation of legends or beliefs of certain tribes or communities.

Discussions on the protection of TCEs have since the beginning revolved around the relationship between intellectual property rights and TCEs. Indigenous and other traditional and cultural communities have from the beginning claimed that traditional creativity and cultural expressions require a wider protection than what is offered through the existing intellectual property regimes. The basis of this claim can be said to be two-fold. For one, the traditional and cultural communities call for a wider protection in relation to the economic exploitation of TCEs, both in terms of involvement in the revenues drawn from such an exploitation as well as being able to control the uses that are made of

\(^1\) TCEs
their TCEs and thereby exclude outsiders to the relevant community from the market. Secondly, interests of non-economic nature are put forward in support for a wider protection of TCEs. This latter argument is based on notions concerning the respect for their culture and in the need for protection against distorting use of their TCEs.

Thus, the relationship between TCEs and intellectual property is surrounded by complex and challenging issues. Generally, a balance must be struck between the protection and preservation of TCEs and the free exchange of cultural experiences in a multicultural and diverse reality. Furthermore, a number of problematic issues have been revealed when attributing TCEs to intellectual property law. This has often been explained as trying to fit a square peg into a round hole\(^2\).

Some progress has been made during the last decades. In 1967, an amendment to the Berne Convention for the Protection of Literary and Artistic Works provided a mechanism for the international protection of unpublished and anonymous works. In 1976, the Tunis Model Law on Copyright for Developing Countries was adopted. It included sui generis protection for expressions of folklore. Later on, in 1982, the third attempt was seen with the adoption of the WIPO\(^3\)-UNESCO\(^4\) Model Provisions. The model was developed by an expert group convened in community between the two organizations as a sui generis model for the intellectual property-type protection of TCEs. It should already at this stage be recalled, that a model does not have binding legal effects. In December 1996, WIPO Member States adopted the WIPO Performances and Phonograms Treaty\(^5\), which provided protection also for a performer of an expression of folklore. During 1998 and 1999, WIPO conducted fact-finding missions in 28 countries in order to identify the intellectual property-related needs and expectations of traditional knowledge holders. TCEs were included as a sub-set in these missions. In 2000, the establishment of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore\(^6\) marked a step towards actually achieving a protective scheme specifically directed at the rights of indigenous peoples. The IGC’s work is divided into three categories: Genetic Resources, Traditional Knowledge and TCEs, the latter being the subject of this assignment. At the moment the IGC is working on resolving a number of problems concerning the Draft Provisions for the Protection of TCEs.

\(^3\) World Intellectual Property Organization
\(^4\) United Nations Educational, Scientific and Cultural Organization
\(^5\) WPPT
\(^6\) IGC
1.2. Thesis Statement

In a parallel analysis of relevant intellectual property law and the Draft Provisions of the IGC, this assignment seeks to shed light on the protection of TCEs. For this purpose, three different forms of TCEs will be analyzed in the context of intellectual property law and in the context of the Draft Provisions currently under development at WIPO\(^7\). The objective is to identify the protection available under intellectual property law and establish the subject matter of protection under the Draft Provisions. An assessment of these findings will be applied as a base on which the legal status of TCEs will be disclosed and in this, a brief overview of the present political issues on the subject will be offered.

1.3. Methodology of the Assignment

This assignment is divided into six main parts:

- **Part I** contains background, thesis statement, method of the assignment, and a statement of the IGC.
- **Part II** contains a definition of TCEs, a statement of the relevant intellectual property regimes, being trademark law and copyright law.
- **Part III** contains an account of the sui generis protection, including the Policy Objectives and Article 1 of the Draft Provisions.
- **Part IV** Contains the analyzes of the Deep Forest case, the case of the Inukshuk and the case of the Twilight series.
- **Part V** Contains the conclusion, including final remarks and a statement of the intermediate progress at the IGC.
- **Part VI** Contains abstract, bibliography and annexes.

\(^7\) It is important to point out that this assignment will assess the version of the Draft Provisions governing the work of WIPO up until, but not including, the twenty-second session held in July 2012. An account of the progress made at the twenty-second session will be offered in the concluding section of the assignment.
1.4. Method

Initially, the term TCE will be defined. Hereafter, an overview of the relevant intellectual property regimes and the Draft Provisions will be offered. The three different forms of TCEs will then subsequently be applied to the relevant intellectual property disciplines and the relevant article in the Draft Provisions in order to analyze the protection potentially available. The three forms of TCEs will be identified in the Deep Forest case, the case of the Inukshuk and the case of the myths and legends of the Quileute tribe used in the Twilight series. The purpose is to offer a coherent overview of the possible forms of protection, substantiated in the analytical sections concerning the three forms of TCEs and hereby assess the current legal status of TCEs.

The purpose of this assignment is, as mentioned above, to analyze the protection of TCEs under relevant intellectual property law and under the sui generis protection found in a potential legal instrument comprising the Draft Provisions under development in the IGC. It is important to highlight that the two different points of analysis are inherently different. The intellectual property regime is relatively old and rooted in internationally adopted treaties and conventions. The different articles in both international and national intellectual property law have been subject to voluminous case law and in this the interpretation of the different laws has been increasingly defined and clarified. This does of course not mean that intellectual property law is fully clarified. It is a regime under constant regulation and it seems that intellectual property law will always be struggling to keep up with technical evolution and development. It is, however, a working regime and thus one that can offer help on the interpretation when analyzing the application of substantial articles. This is not the case with the Draft Provisions of the IGC. The Draft Provisions are currently still a work in progress. As such, the application of the provisions take form of a more uncertain and unfounded analysis. The sui generis protection provided for in the Draft Provisions has not been adopted as of yet, and thus no case law can be found to support the analysis of the protection and the substance of the provisions found in them.

When turning to the analytical part of this assignment, this fact will become evidently clear. The different examples of TCEs will be taken through the protection under the relevant intellectual property law and afterwards the protection under the Draft Provisions. The relevant protection under intellectual property law will presumably prove to be more easily substantiated and justified. Analyzing the protection under the Draft Provisions will likely take the form of a more theoretical approach. Put in simple words, it will presumably be easier to prove or reject protection under the relevant intellectual property law than under the Draft Provisions. This fact does not undermine the
relevance of this assignment. It is a fact that needs to be taken into consideration when assessing the
analysis, but the resulting conclusion can well prove to be at least as interesting as the alternative.

Furthermore, it must again be emphasized that the Draft Provisions are a work in progress under the
IGC. This means that the provisions are likely to be further amended during the work of the IGC as
they were during the twenty-second session concerning TCEs held in July 2012. This assignment will
assess the draft provisions up until this session. These provisions are the ones addressed below under
the section: The Draft Provisions. A relatively simple account concerning the changes made at the
twenty-second session will be given in the concluding section of the assignment.

The above mentioned challenges and prerequisites are likely to affect the level of conclusion expected
to be reached in the final and summarizing part of the assignment. It is not up to the author of this
assignment to pass judgment on the work of the IGC and disclose the way forward for TCEs. It is,
however, relevant to offer an analysis of the available protection under intellectual property law and
the Draft Provision so as to highlight the possible shortcomings when viewing the objects and subjects
of protection from a broader perspective.

1.5. The IGC

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional
Knowledge and Folklore (IGC) was established by the WIPO General Assembly in October 2000\(^8\).
The IGC is comprised of states, non-governmental organizations and representatives of indigenous
and local communities. The IGC’s objective is to reach agreement on the text of an international legal
instrument or instruments, which will ensure efficient protection of Traditional Knowledge\(^9\), TCEs and
Genetic Resources\(^10\). As such, the work of the IGC can be divided into these three categories although
they remain inter-connected. The subject of this assignment is restricted to TCEs, but a quick
overview of the other two categories will be offered below.

1.5.1. Traditional Knowledge
Traditional knowledge is in the strict sense technical know-how, practices, skills and innovations
related mostly to biodiversity, agriculture and health. It is a living body of knowledge that has been
developed, sustained and passed on from generation to generation within a community, forming part
of its cultural identity and heritage. Defining TK more precisely than this, is not an easy task. The term

\(^8\) WI/GA/26/6 establishing the IGC
\(^9\) TK
\(^10\) GRs
covers a wide variety of knowledge-based treatments, usages and skills. A few examples can be given to offer a description of what TK can be¹¹.

- Thai traditional healers use the plao-noi plant to treat ulcers;
- The San people¹² use hoodia cactus to stave off hunger while out hunting;
- Sustainable irrigation is maintained through traditional water systems such as the aflaj in Oman and Yemen, and the qanat in Iran;
- Cree and Inuit maintain unique bodies of knowledge of seasonal migration patterns of particular species in the Hudson Bay region;
- Indigenous healers on the western Amazon use Ayahuasca vine to prepare various medicines, imbued with sacred properties.

These examples offer a view of what TK can be, it is, however, beyond the scope of this assignment to fully account for the diverse forms of knowledge held by traditional communities. The fact that the intellectual property system typically grants protection for a limited period of time to inventions and original works by named individuals or companies, challenges the protection of TK under this regime. As mentioned, TK is a living body of knowledge and as such not easily defined. Thus, assigning it to the intellectual property disciplines has proven difficult and inadequate. Due to this fact, many countries and communities have called for an international legal instrument providing sui generis protection for TK. This is also what has propelled the developing work of the IGC, starting with the fact-finding missions undertaken in 1998 and 1999 and later on the establishment of the IGC in 2000.

While the policy issues concerning TK are broad and diverse, the intellectual property perspective of the issue breaks down into two different key themes. These are respectively defensive and positive protection of TK.

The defensive protection is aimed at preventing people outside the community from acquiring intellectual property rights over TK.

The positive protection is the granting of rights that empower communities to promote their TK, control the use of it and reap the benefits from its commercial exploitation. Protection under the intellectual property system would grant a similar positive protection. However, any specific protection afforded under national law may not hold for other countries. This is one of the reasons why indigenous and local communities are calling for an international instrument.

¹¹ WIPO Booklet nr. 2: Intellectual Property and Traditional Knowledge, page 5
¹² The San people is an indigenous people of Southern Africa
Different stakeholders voicing their opinions in WIPO have stressed that the two approaches should be assessed and undertaken in a complementary way, the argument being that the interests of TK holders are unlikely to be sufficiently protected if only one approach is taken.

TK is to a certain degree relevant when shifting the focus to TCEs, cf. further below. The relationship between TK and TCEs is in any case present at the level of indigenous and traditional communities. The communities often see expressions of their traditional culture/folklore as inseparable from systems of TK. For example, a traditional tool may embody TK but may also be seen as a TCE in itself due to its design and ornamentation. Thus, many communities view TK and its form of expression in a holistic perspective where they are seen as an inseparable whole. When turning to the discussion from an intellectual property point of view, the two are generally discussed distinctly from one another. This is due to the fact that, while sharing common ground, TK and TCEs raise a number of different legal and policy questions. Common ground can be found in policy issues such as economic development, trading opportunities and wealth creation. The protection of TCEs is, however, also rooted in a number of other issues not found when discussing TK. These are promotion of respect for traditional cultures and the communities that preserve them, safeguarding of the cultural identity and values of communities and promotion of cultural diversity. The preservation and safeguarding of cultural heritage generally refers to the identification, revitalization and promotion of cultural heritage in order to insure its maintenance or viability, objectives which are key in several international conventions and programs.

1.5.2 Genetic Resources
GRs are species, subspecies, or genetic varieties of plants, animals, and microorganisms that currently provide important goods and services or may be capable of providing them at some time in the future. GRs themselves are not intellectual property due to the fact that they are not creations of the human mind. Inventions based on or developed using GRs can, however, be patentable or protectable under plant breeders’ right. This regardless of whether it is associated with TK or not.

The IGC has been working on a broad spectrum of issues concerning this interplay between intellectual property and GRs. This is done with careful coordination and responsiveness to the work of the Convention on Biological Diversity (CBD), the Food and Agricultural Organization of the United Nations (FAO) and the United Nations Environment Programme (UNEP). The work of the

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13 E.g. UNESCO, Convention Concerning Protection of the World Cultural and Natural Heritage, 1972
14 Definition from www.ecoagriculture.org
15 The CBD entered into force on December 29th 1993
16 Established October 16th 1945
17 Founded June 1972 as a result of the United Nations Conference on the Human Environment
IGC on GRs basically covers three main themes. These are defensive protection, intellectual property aspects and disclosure requirements.

The work on defensive protection has been aimed at preventing patents being granted over GRs and associated TK, which do not fulfill the existing requirements of novelty and inventive step.

The intellectual property aspects cover access to GRs and equitable benefit-sharing arrangements that govern use of GRs. To this end, the IGC commissioned a database to serve as a capacity-building tool and to help inform policy debate. The database is meant to provide examples of mutually agreed terms concerning access and benefit-sharing. The IGC has also set up broad principles and draft materials on guidelines for intellectual property aspects of equitable benefit-sharing arrangements.

Disclosure agreements in patent applications relate to GRs and associated TK used in claimed inventions. This work is partly fueled by the invitations from the Conference of Parties (COP) of the CBD to WIPO to prepare technical studies on the matter.

1.5.3. The Working Process in the IGC

The IGC meets at least three times per year. The three annual sessions serve as forums for the negotiations aiming at the adoption of international legal instrument(s) on TK, TCEs and GRs. The IGC mandate was renewed for a two year period in 2011 with the decision\textsuperscript{18} made at the Fortieth session for the Assemblies of Member States of WIPO held from September 26 to October 5, 2011. In general terms, the mandate was given for the IGC to expedite text-based negotiations with the objective of reaching agreement on a text of an international legal instrument(s) which will ensure the effective protection of TK, TCEs and GRs. The 2012-2013 mandate further sets out a clearly defined work program for the IGC.

The IGC held its twenty-second and latest session from July 9 to July 13 2012\textsuperscript{19}, the primary subject of this session being TCEs. During the one-week session, delegates of the IGC concluded the latest draft of the text of an international legal instrument on the protection of TCEs. Progress was particularly made on the definition of protectable TCEs, the identification of beneficiaries and on exceptions and limitations to the scope of protection. The text of the Draft Provisions was transmitted to the WIPO General Assembly, which met from October 1 to 9, 2012, as a “work in progress”. The IGC, in February 2012 and April 2012 respectively, similarly transmitted texts on GRs and TK to the General Assembly.

\textsuperscript{18} Decision, Agenda Item 31. Matters Concerning the Intergovernmental Committee on intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Assemblies of Member States of WIPO, Fortieth Session, September 26 to October 5, 2011

\textsuperscript{19} WIPO/GRTKF/IC/22
1.5.4. Capacity-Building concerning TCEs

Upon request, WIPO provides legal-technical assistance to states, regional organizations and communities with regard to a variety of initiatives.

- Developing and strengthening national and regional systems for the protection of TCEs;
- Through the Creative Heritage Project, the strategic management of IP rights and interests in specific practical contexts such as: IP and the Documentation and Digitization of Intangible Cultural Heritage, IP Management by Museums, Libraries and Archives, Community Cultural documentation, IP and Handicrafts and IP Management related to Arts Festivals. These initiatives aim at developing best practices and guidelines for managing IP issues when recording, digitalizing and disseminating intangible cultural heritage. More simply put, the Creative Heritage Project comprises information and advice on IP management during digitalization project, technical support for the recording and digitalization of TCEs and the establishment of digital collections and web sites as well as the creation of the WIPO Creative Heritage Digital Gateway, a portal on WIPO’s web site through which access to the sites of indigenous communities and cultural institutions can be obtained20.

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20 See, wipo.int/folklore
Part II, Definitions and Relevant Intellectual Property Law

2.1. Defining TCEs

With regard to the subject matter of this paper, different terms and definitions are used in the international discussions and in the literature. Terms used include “folklore”, “traditional cultural expressions”, “expressions of folklore”, “expressions of traditional culture”, “cultural expressions” and “traditional creativity”\textsuperscript{21}. This assignment will apply the term TCE as a natural working term. It is, however, important to point out that no international definition of TCEs has been agreed upon.

The word “folklore” means in its literal sense “the wisdom of the people”\textsuperscript{22}. The notion of folklore is not easily defined and definitions offered differ greatly depending on the entity or community offering them. Some basic concept can, however, be identified, namely that folklore is: (a) tradition-based; (b) related to culture; (c) transgenerational; and (d) shared by a group or community\textsuperscript{23}. These basic concepts result in folklore potentially encompassing an enormous variety of customs, traditions, knowledge and beliefs.

For the purpose of clarity, a distinction has to be made from the outset between traditional culture/folklore and expressions of traditional culture/folklore. This distinction differentiates the informational elements in traditional culture/folklore from the manifestations thereof. The subject of this assignment is the protection of TCEs. The traditional culture/folklore is the underlying term, whereas the object for protection is the reproduction of it. As will be explained at a later stage, the reproduction, being the TCEs, can either be tangible or intangible. A piece of folkloric artwork is an example of a tangible TCE. The traditional culture/folklore is the story or legend the artwork depicts or the traditional design or style used in its depiction, whereas the TCE is the piece of artwork itself. Moreover, folkloric tales, songs or dances are examples of intangible TCEs. The traditional knowledge or culture is the story, legend or tale that the song or dance portrays as well as the traditional style used in its portrayal\textsuperscript{24}. Even though the actual outcome in terms of protection might not be far from each other, the distinction is important when addressing the substantial discussions as well as when applying intellectual property law and the Draft Provisions of the IGC.

\textsuperscript{21} Intellectual Property and Traditional Cultural Expressions in a Digital Environment, Christoph Beat Graber and Mira Burri-Nenova, page 126
\textsuperscript{22} The term “folklore” was used for the first time in 1846 by the British archeologist W.J. Thomson, editor of the review, Notes and Queries. To him it had the strict meaning of ‘knowledge of the people’. It was adopted thereafter in practically all languages.
\textsuperscript{24}ibid.
As mentioned, no internationally agreed terminology or definition of TCEs exists. For this reason it is important to find common ground, on which to base an analysis of TCEs. It is possible to identify a number of common characteristics of TCEs. In general TCEs:

- are handed down from one generation to the next, either orally or by imitation, but rarely in writing;
- reflect the cultural and social identity of a community or group;
- consist of characteristic elements of the heritage of this community or group;
- are constantly evolving, developing and being recreated within this community or group;
- are made by unknown authors, artists or artisans; by communities and groups; and/or by individual members of these communities and groups communally recognized as having the right, responsibility or permission to make the TCEs; and
- are often not created for commercial purposes, but rather as vehicles for religious and cultural expression.

Due to their past and present efforts and their legal and technical competence, WIPO and UNESCO and their respective instruments are in the forefront with regard to the topic of this paper. The definitions adopted by said organizations can therefore be used to shed further light on the definition of TCEs:

The UNESCO-WIPO Model Provisions of 1982 defines “expressions of folklore” as:

productions 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, in particular:

(i) verbal expressions, such as folk tales, folk poetry and riddles;
(ii) musical expressions, such as folk songs and instrumental music;
(iii) expressions by action, such as folk dances, plays and artistic forms or rituals whether or not reduced to a material form; and
(iv) tangible expressions, such as: (a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes: (b) musical instruments: (c) architectural forms.

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25 WIPO Booklet nr. 1: Intellectual Property and Traditional Cultural Expressions/Folklore, page 5
26 Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Forms of Prejudicial Action, 1982
The IGC has put forth a definition in Article 1 (a) of the Draft Provisions for the protection of TCEs defining the subject matter for protection as follows:

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

(i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
(ii) musical expressions, such as songs and instrumental music;
(iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances;
(iv) whether or not reduced to a material form; and
(v) tangible expressions, such as productions or art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms; which are:

(aa) the product of creative intellectual activity, including individual and communal creativity;

(bb) characteristic of a community’s cultural and social identity and cultural heritage; and

(cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

One other distinction must be made when defining TCEs. A line can be drawn between pre-existing TCEs (referred to as stricto sensu\(^\text{27}\)) and tradition-based TCEs. Pre-existing TCEs are TCEs in their original form. These would be TCEs developed in a community and in a form that does not fall under the definition of tradition-based TCEs. Tradition-based TCEs would be new adaptations or arrangements based on tradition, such as new arrangements of songs, stories etc. The distinction is inherently important when protection under intellectual property law and the Draft Provisions are to be analyzed, and the distinction will prove especially relevant when analyzing copyright protection of the chosen TCEs and in this mapping out protectable TCEs and the public domain. TCEs stricto sensu will most likely fall under the public domain and thus not be protectable under copyright law. The opposite is the case with tradition-based TCEs, which will, at the outset, seem to fit the concept of copyright protection.

\(^{27}\text{TCEs in the strict sense}\)
2.2. Relevant Intellectual Property Law

As mentioned earlier, this paper, amongst other things, seeks to shed light on whether TCEs can find protection under the intellectual property regimes. In order to open this discussion, the relevant intellectual property law must be identified and explained. Due to the scope of the assignment and the limited space available, only copyright law and trademark law will be given attention. Copyright and trademark law are by far the most relevant disciplines when discussing protection of TCEs under intellectual property law. It is essential to point out that the explanation given below will focus on international copyright and trademark law. As the scope of this assignment is on international protection of TCEs, an account of specific national laws is not relevant even though national laws are in general inspired by and based on the international rules pertaining to the given area. Furthermore, most national copyright and trademark laws share common general rules, some of which will be explained below.

In our part of the world, it goes without saying that country borders do not limit cultural life and technological sharing. Both culture and technology flows freely between countries and are consumed by the population. Keeping this fact in mind, it is clear that an international system is needed to regulate the flow of culture and technology, the reason being that the original authors and inventors should not bear the cost of this reality. This fact was acknowledged at an early stage. Thus, the two most important global conventions were already agreed upon in the late 19th century. In trademarks the Paris Convention for the Protection of Industrial Property was adopted in 1883 with several later amendments. In 1886 the Berne Convention for the Protection of Literary and Artistic Works was adopted, again with several later amendments. Countries that have ratified the two conventions form a union for the protection of industrial rights, being patents, designs and trademarks and copyrights. The conventions are now administrated by WIPO under the Convention Establishing the World Intellectual Property Organization from 1967, amended in 1979.

Intellectual property refers to creations of the mind such as inventions, designs, literary and artistic works, and symbols, names, images, and performances. Intellectual property is typically protected by laws that establish private property rights in creations and innovations in order to grant control over their exploitation, particularly commercial exploitation, and to provide incentives for further creativity. The protection under intellectual property law is thus aimed at a commercial goal. By obtaining a private property right a person or a legal entity will be able to use this right and, particularly, prevent others from using the same right.
2.2.1. Objectives Underlying Intellectual Property Law
The stated objective of most intellectual property law is to promote progress. The exception to this is trademark law, which will be described just below. The other intellectual property disciplines share the common goal of promoting progress. This is to be obtained by exchanging limited exclusive rights for disclosure of inventions, designs and other creative works. With this mechanism, society and the patentee/designer/copyright owner mutually benefit, and an incentive is created for inventors and authors to create and disclose their work. A range of incentives are part of this objective of promoting progress. These are incentives such as financial and economic growth, moral growth and the spreading of groundbreaking inventions or works.

2.3. Trademark Law
Trademark law concerns the protection of trademarks. A trademark is a sign capable of distinguishing the goods or services produced or provided by one enterprise from those of other enterprises. At the outset, trademarks are any distinctive words, letters, numerals, drawings, pictures, shapes, colors, logotypes, labels or combinations used to distinguish goods or services. A number of countries allow for the registration of more untraditional forms of trademarks, such as single colors, sound marks and olfactory signs. Trademarks fill a very specific and important function, which is to enable consumers to identify a product or service of a particular company so as to distinguish them from other identical or similar products or services, cf. above. One needs only to turn to trademarks such as Coca Cola or Apple to get a picture of how valuable trademarks can be (both trademarks are estimated to a value above 50 billion dollars). The value stems from the fact that consumers value trademarks, their reputation, their image and a set of desired qualities they associate with the mark and are willing to pay more for a product bearing a trademark they recognize and which meets their expectations.

A trademark is in principle a purely national or regional affair. Separate trademark registrations must be made in all the countries in which trademark protection is desired. To ease this situation somewhat, various international treaties have been established with which trademark protection in multiple countries can be obtained through a single procedure. In the European Union one finds the Community Trademark, which makes it possible to obtain a trademark right in all European Union member states with only one registration. The registration is obtained through The Office of Harmonization for the Internal Market (OHIM). Also, the Netherlands, Belgium and Luxembourg have a single trademark

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28 Of or pertaining to the sense of smell
law. Any registrations under this law automatically results in a trademark registration valid in all three countries, the so-called Benelux.

The Paris Convention is the most important international treaty on the protection of intellectual property and thereby also in relation to trademarks. Nationals of any country that is a member of the Paris Convention are afforded the same advantages with respect to intellectual property that the national law grants its own citizens. The Convention contains various important provisions for trademarks. One of the most important ones is the principle of priority. This means that one can apply for a trademark in a country that is a member of the Paris Convention, and then within six months file subsequent applications in other member countries and claim the priority date. The later registrations will then receive the application date of the first application. This can be of great benefit if in the meantime someone else has filed for the same or similar trademark in those other countries. Further, trademarks duly registered in the country of origin shall be accepted for filing and protected as is in the other countries of the Union. The only reasons under which the trademark offices of those other countries may refuse the registration is when the trademark infringes rights acquired by third parties in those countries, where the trademark is devoid of any distinctive character, or when the trademark is contrary to morality or public order or may deceive the public.

The Madrid Agreement and the Madrid Protocol constitute the "Madrid System" and provide for the international registration of trademarks.

The Madrid Agreement was adopted in 1891 and entered into force in 1892. The agreement has been revised several times in 1900, 1911, 1925, 1934, 1957 and 1967, and amended again in 1979. Any country that is a party to the Paris Convention may join the Madrid Agreement. A national of any signatory country holding a basic registration in his country of origin may secure protection of his trademark through an international registration. The applicant can file an application directly with his national or regional trademark office, which in turn will forward the application to the International Bureau of WIPO.

The Madrid Protocol was adopted in 1989 and entered into force on December 1, 1995. The Madrid Protocol makes the Madrid System more flexible. For instance, it allows an application for international registration to be based upon a pending trademark application filed in the applicant’s country of origin. Also, if the national application on which the international registration is based is

29 Six months for trademarks and designs and 12 months for patents
30 Madrid Agreement concerning the International Registration of Marks, 1891
31 Protocol relating to the Madrid Agreement, 1989
refused, withdrawn or cancelled, the international registration may be converted into national applications without losing the original filing date or priority date. These options are not available to registrations governed solely by the Madrid Agreement, under which the life on the international registration is dependent on the basis registration for five years.

Another important international agreement is the TRIPS agreement\textsuperscript{32} under the World Trade Organization\textsuperscript{33}. The TRIPS agreement is a comprehensive agreement on intellectual property with three main features. The first is the concept of minimum standards. This means that each member to the agreement must provide, at least, protection coherent with the minimum standard set out in the agreement. The main elements of protection are defined and include the subject matter of protection, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. The second main set of provisions deals with domestic procedures and remedies for the enforcement of intellectual property rights. Thirdly, the agreement makes disputes between WTO Member States concerning TRIPS obligations subject to the WTO dispute settlement procedures. Thus, the TRIPS Agreement is a minimum standards agreement, allowing Members to provide more extensive protection of intellectual property if they so wish and members are left free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice.

The Trademark Law Treaty was adopted in Geneva on October 27, 1994. It restricts the use of formalistic administrative requirements of the national offices of signatory countries by establishing standards for registration, changes after registration and the renewal of trademarks, in an attempt to simplify and harmonize procedures.

The Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks\textsuperscript{34}, 1957 was concluded by states attending the Nice Diplomatic Conference on June 15, 1957. The classification entered into force on April 8, 1961, was revised in Stockholm in 1967 and in Geneva in 1977, and was amended in 1979. The classification system set up by the Nice Agreement comprises a List of Classes (34 classes for goods and 11 classes for services) and an Alphabetical List of Goods and Services, and is now in its tenth version. The Nice Agreement classification is also recognized and used by organizations such as OHIM, OAPI.

\textsuperscript{32} Trade-Related Aspects of Intellectual Property Rights, 1994
\textsuperscript{33} WTO
\textsuperscript{34} The Nice Agreement
and Benelux, as well as by the majority of national jurisdictions worldwide. One notable exception is Canada.

As shown above, trademark law is subject to a large number of international agreements. These agreements regulate the relationship between different states and their legal entities and leave a smaller and smaller room for national regulation.

2.3.1. The Conditions for Obtaining Trademarks
The trademark regime sets out different conditions to be met when trying to acquire a trademark.

The ability of a trademark to be eligible for registration is governed by the concept of trademark distinctiveness. The concept covers the discussion of distinctiveness at one end of the scale and descriptiveness at the other. Distinctiveness is a marks ability to separate the product/service of one company from those of other companies. At the other end, a mark is not eligible if it is descriptive of the product/service for which it is sought registered.

The protection in trademark law is based on the concept of likelihood of confusion. The concept is designed to prevent competitors from confusing customers into thinking that they are buying products and services from a trusted, known source when, in reality, this is not the case. A competitor who uses a trademark that is confusingly similar to an existing trademark can be prevented from doing so by the application of trademark law. This usually occurs when the holder of the trademark raises a claim or sues the alleged infringer. The concept is twofold when dealing with regular trademarks (as opposed to well-known trademarks, cf. below). First, the similarity between the marks is assessed. A mark is confusingly similar if it is either identical or can be confused with the other mark. If this is established, the focus changes to product/service similarity. Here it is to be determined whether the marks are used for the same or similar product/service. If both questions can be answered in the affirmative it is very likely, that the later mark is infringing the prior. As a general rule, the likelihood of confusion diminishes with the level of product/service similarity. The lower the product/service similarity, the less the likelihood of confusion, when assessing the similarity between the marks.

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35 See e.g. Danish Trademark Act Articles 2 and 13 as well as Council Regulation (EC) No 207/2009 Article 7
36 See e.g. Danish Trademark Act Articles 4 and 15 as well as Council Regulation (EC) No 207/2009 Article 8
37 See primarily C-39/97, Canon v. Cannon paragraph 17 concerning the inter-independency between similarity of product and of mark.
2.3.2. Well-known Trademarks
The most important exception to the above rule is found when dealing with well-known trademarks. Well-known marks are protected by various international treaties. For example, both the Paris Convention and TRIPS require member states to protect a well-known mark even if the mark is not registered or used in that country. Protection for well-known, unregistered marks under the Paris Convention is usually limited to goods and services that are identical or similar to those goods or services for which the trademark is known and in situations where use is likely to cause confusion. Under the TRIPS Agreement, protection may be extended to different goods or services if the use suggests a connection to the owner of a well-known registered mark, and if the owner is likely to be damaged by such use. This principle, the so-called Kodak-rule, is also implemented in various national or regional legislations. However, the implementation of protection under these treaties is not uniform in all jurisdictions.

Trademark law is evidently an important area when addressing TCEs. Many tangible TCEs would seem to fit the trademark regime. This issue will be analyzed under the section analyzing the Inukshuk and conclusive remarks will be offered under the concluding section.

2.4. Copyright Law
2.4.1. Authors’ Rights
Copyright law is at the outset the regime governing creators’ exclusive rights to original works. Copyright law started with early privileges and monopolies granted to printers of books. The British Statute of Anne from 1710 was the first copyright statute. When copyright started it was – as the name suggests – a law governing the rights to make copies, and initially covering only books. Now, copyright is available for “literary and artistic works” as referred to in the Berne Convention.

Copyright law is today a broad and comprehensive discipline, including a wide range of works, such as paintings, maps, performances, photographs, sound recordings, motion pictures and computer programs. Although the scope of protection has been considerably widened, the core of copyright law is still the protection of literary and artistic works. As such, it is the term literary and artistic work that has been broadened through time in order to cope with development and new technological media.

38 Danish Trademark Act, Article 15 (4)
39 Berne Convention for the Protection of Literary and Artistic Works, 1971
Copyright is, unlike other intellectual properties, not subject to any formal requirements. Thus, the right is obtained without registration, and is established when the work is created (for example when the book is written or the painting is painted). It should be mentioned, that if the work is created in stages, the author can claim copyright to each stage, if the condition of originality is met with each stage. This principle is rooted in the above mentioned Berne Convention. In theory, the lack of any formal requirements could result in problems when having to prove the time of creation and thus the time of obtaining the right. In practice, however, the problem is relatively rare. First off, because the occurrence of identical creations is not often seen. Secondly, copyright only protects against imitation – it is not a right of priority. Therefore, copyright does not protect against other people’s independent creation of similar or identical works. From this it can be concluded that the exact time of creation does in fact not carry great importance. Determining the author of a work is a point that does not normally create problems as the work will usually have a strong individual touch. It is however practically sane to tie the work to the author at as early a stage as possible. Most often this can be done with a signature on the work. The lack of formal requirement seems to be linked naturally to the form of protection and is, when understood correctly, not an abnormal solution.

As mentioned above, copyright is obtained when two conditions are met. First the work must fall under the characterization of a literary or artistic work. Second, the work has to meet the minimal standard of originality. In the context of copyright, original does not mean having never occurred or existed before. Rather, it refers to coming from someone, being the originator/author. Although an exact definition is difficult to display, it is largely agreed that there has to be some kind of reflection of the author in the work. The standard of originality can be divided into two different conditions. First off, the work must be created by the originator/author. Copyright cannot be claimed to a raw reproduction of something that is part of the public domain. After this, the work must be an expression of some kind of creativity on behalf of the originator/author. This condition refuses copyright to works of pure craftsmanship or routine. This said, the standard of originality is not one of insurmountable proportions and in present day, copyright is vested in works that are far from what was intended at the beginning of copyright law.

Copyright is based on the principle of territoriality. Thus as a starting point, Danish copyright law is used on actions taken on Danish territory, Canadian copyright law is used on actions taken on Canadian territory etc. The national rules govern actions on its territory. One could imagine a world,

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40 Some jurisdictions such as the U.S and China offer the possibility of registration of copyrights
41 E.g. Danish Copyright Act, Article 1 and Berne Convention Article 2
42 Which is considered to be implied in the Danish Copyright Act Article 1, as well as in the Berne Convention Article 2
43 Works in the public domain are those whose intellectual property rights have expired, been forfeited or are inapplicable
where national governments only acknowledged and protected works created by their nationals or on its territory. However, large international agreements have been put in place on the subject of intellectual property.

The most important on copyright is the above mentioned Berne Convention, which was first established in 1886, and was subsequently re-negotiated in 1896 (Paris), 1908 (Berlin), 1928 (Rome), 1948 (Brussels), 1967 (Stockholm) and 1971 (Paris). The convention relates to literary and artistic works, and the convention requires its member states to provide protection for every production in the literary, scientific and artistic domain. The Berne Convention has a number of core features, including the principle of national treatment, which holds that each member state to the Convention shall give citizens of other member states the same rights of copyright that it gives to its own citizens. Another core feature is the establishment of minimum standards of national copyright legislation in that each member state agrees to certain basic rules which their national laws must contain, although member states can, if they wish, increase the amount of protection given to copyright owners. One important minimum rule is that the term of copyright is to be a minimum of the author's lifetime plus 50 years. Another important minimum rule established by the Berne Convention is that copyright arises with the creation of a work and does not depend upon any formality such as a system of public registration. The principle of national treatment is still the ground rule in international copyright law. The exceptions hereto are the cases, where protection is only afforded under the doctrine of material reciprocity. This doctrine says that a country only offers protection to foreign works, if corresponding national works are given the same protection in the foreign country.

As many TCEs such as songs, paintings etc. seem to fit the subject matter of author’s rights, it will be essential for the purpose of this assignment to analyze the protection of TCEs under this regime. This task will be undertaken under the two analytical sections concerning the Deep Forest case and the Twilight case.

2.4.2. Neighboring Rights

Neighboring rights are similar to the rights protected under author’s rights and are applied to protect the rights of producers of phonograms, performers and broadcasters. Protection is found in a number of international treaties including the Rome Convention and the WPPT.

Producers of phonograms are protected in the Rome Convention Article 3 (c) and the WPPT Article 2 (d). Here, producers of phonograms enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms, cf. Article 10 of the Rome Convention and Article 11 in the WPPT.

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44 The Danish Copyright Act has lengthened the duration to 75 years
45 Rome Convention for the Protection of Performers, producers, of Phonograms and Broadcasting Organizations, 1961
Performers’ rights are protected by the Rome Convention in Article 3 (a), and the international protection of performers of folklore was recently introduced in Article 2 (a) of the WPPT. Under the Rome Convention Article 7, performers have the right to prevent the broadcast or communication to the public of their performance, unless this is made from a legally published recording of the performance, the fixation (recording) of their performance, the reproduction of a recording of their performance. The WPPT extends these rights to include the right to license the distribution of recordings of their performance, for sale or other transfer of ownership (Art. 8), the rental of recordings of their performances, unless there is a compulsory license scheme in operation (Art. 9) and the “making available to the public” of their performances (Art. 10), in effect their publication on the internet.

The rights of broadcasting organizations are provided for in Article 13 of the Rome Convention. In accordance with this provision, broadcasting organizations have the right to prohibit or license the rebroadcasting of their broadcasts, the fixation (recording) of their broadcasts, and the reproduction of fixations (recordings) of their broadcasts and the communication of their broadcasts to the public in places where an entrance fee is charged.

The concept of neighboring rights will be applied at a later stage of this paper when assessing the application of copyright to different forms of TCEs, namely the section analyzing the Deep Forest case, which will offer an analysis of the relationship between neighboring rights and TCEs.

Copyright law is perhaps the most important intellectual property discipline when it comes to TCEs. As mentioned above, many TCEs such as paintings, songs, performances etc are, at the outset, in the subject matter of copyright. The distinction of what is covered by copyright law and what is not, will be key to the discussion and inherently important when addressing the legal status of TCEs.
Part III, the Draft Provisions

3.1. Sui Generis Protection

Before describing the protection offered by the IGC’s Draft Provisions, it is necessary to explain the exact nature of this kind of protection. The Draft Provisions are a model for a sui generis law. Sui generis is a Latin phrase describing a law that is “of its own kind”. It is used in intellectual property law to describe a regime designed to protect rights that fall outside the traditional copyright, trademark, patent, and trade secret doctrines, and the Draft Provisions aim at exactly this goal – to protect TCEs that falls outside the traditional intellectual property regimes.

3.2. Objectives Underlying the Protection of TCEs

The way in which a protection system is shaped and defined will depend to a large extent on the objectives it is intended to serve. Thus, the objectives underlying the protections of TCEs in the Draft Provisions will be accounted for, before moving on to the actual subject matter of protection. The objectives put forward in the Draft Provisions reads as follows:

I. OBJECTIVES⁴⁶

The protection of traditional cultural expressions, or expressions of folklore, should aim to:

Recognize value

(i) recognize that indigenous peoples and traditional and other cultural communities consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values, and acknowledge that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as all humanity;

Promote respect

(ii) promote respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the peoples and communities that preserve and maintain expressions of these cultures and folklore;

Meet the actual needs of communities

⁴⁶WIPO/GTKF/IC/9/4, page 9
(iii) be guided by the aspirations and expectations expressed directly by indigenous peoples and by traditional and other cultural communities, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such peoples and communities;

Prevent the misappropriation of TCEs

(iv) provide indigenous peoples and traditional and other cultural communities with the legal and practical means, including effective enforcement measures, to prevent the misappropriation of their cultural expressions and derivatives therefrom, control ways in which they are used beyond the customary and traditional context and promote the equitable sharing of benefits arising from their use;

Empower communities

(v) be achieved in a manner that is balanced and equitable but yet effectively empowers indigenous peoples and traditional and other cultural communities to exercise rights and authority over their own TCEs;

Support customary practices and community cooperation

(vi) respect the continuing customary use, development, exchange and transmission of TCEs by, within and between communities;

Contribute to safeguarding traditional cultures

(vii) contribute to the preservation and safeguarding of the environment in which TCEs are generated and maintained, for the direct benefit of indigenous peoples and traditional and other cultural communities, and for the benefit of humanity in general;

Encourage community innovation and creativity

(viii) reward and protect tradition-based creativity and innovation especially by indigenous peoples and traditional and other cultural communities;

Promote intellectual and artistic freedom, research and cultural exchange on equitable terms

(ix) promote intellectual and artistic freedom, research practices and cultural exchange on terms which are equitable to indigenous peoples and traditional and other cultural communities;

Contribute to cultural diversity

(x) contribute to the promotion and protection of the diversity of cultural expressions;

Promote community development and legitimate trading activities

(xi) where so desired by communities and their members, promote the use of TCEs for community-based development, recognizing them as an asset of the communities that identify with them, such as through the development and expansion of marketing opportunities for tradition-based creations and
innovations;

Preclude unauthorized IP rights

(xii) preclude the grant, exercise and enforcement of intellectual property rights acquired by unauthorized parties over TCEs and derivatives thereof;

Enhance certainty, transparency and mutual confidence

(xiii) enhance certainty, transparency, mutual respect and understanding in relations between indigenous peoples and traditional and cultural communities, on the one hand, and academic, commercial, governmental, educational and other users of TCEs/EoF, on the other.

The objectives listed above describe the policy context in which the protection of TCEs should be considered. First of all, it is established that traditional music, designs, rituals, performances, oral narratives, names, symbols, and signs communicate a community’s beliefs and values, embody skills and know-how, reflect a community’s history and define its cultural identity. Thus, TCEs are valuable cultural assets of the communities who maintain, practice and develop them. TCEs can, however, also be economic assets. As creations and innovations they can be traded or licensed for income generation and economic development. Thus, TCEs carry with them a dual nature. They are both cultural and economic assets. The protection of TCEs does, however, also touch upon other important policy areas. These include the safeguarding and preservation of cultural heritage, freedom of expression, respect for the rights, interests and claims of indigenous and other traditional communities, recognition of customary laws, protocols and practices, access to knowledge and the scope of the public domain, addressing the challenges of multiculturalism and promoting cultural diversity, including linguistic diversity, and access to a diversity of cultural expressions.

TCEs can be protected in many complementary ways. Protection may include safeguarding against loss through archiving, documenting and recording, building capacity to support traditional creativity and the bearers and the social structures that sustain and express them, acknowledging the broader range of collective and individual rights that are linked to TCEs and their cultural and legal environment, and protecting TCEs against unauthorized or illegitimate use by third parties, including commercial misappropriation and misuse that is derogatory or offensive. The Draft Provisions concern most directly the protection of TCEs in a legal sense, which is the protection of the creativity and distinctiveness inherent in TCEs against illicit uses or misappropriations, while taking into account the particular nature and characteristics of TCEs.
3.3. The Protection of TCEs in the Draft Provisions

When assessing the Draft Provisions it should first and foremost be highlighted that they do not hold any formal status. They illustrate the perspectives and approaches that are guiding the work on the area, but have not, as of yet, been adopted.

Article 1 of the Draft Provisions sets out the subject matter intended for protection. It reads as follows:

**ARTICLE 1**

**SUBJECT MATTER OF PROTECTION**

(a) “Traditional cultural expressions” or “expressions of folklore” are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

(i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;

(ii) musical expressions, such as songs and instrumental music;

(iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances, whether or not reduced to a material form; and,

(iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms; which are:

_ (aa) the products of creative intellectual activity, including individual and communal creativity;_

_ (bb) characteristic of a community’s cultural and social identity and cultural heritage; and_

_ (cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

(b) The specific choice of terms to denote the protected subject matter should be determined at the national and regional levels.
Article 1 of the Draft Provisions sets out the subject matter sought to be protected and lists the conditions to be met for a TCE to be eligible for protection. The subject matter of protection is “traditional cultural expressions” or “expressions of folklore”, two terms which are intended to be used interchangeably in view of the different practice internationally. TCEs include tangible and intangible forms in which traditional culture and knowledge is expressed, communicated, appear or are manifested. They may be e.g. verbal expressions or symbols, musical expressions, expressions by action etc. etc.

To be eligible for specific protection, TCEs would need to meet three conditions. They should be (aa) the products of creative intellectual activity, including individual and communal creativity; (bb) characteristic of a community’s cultural and social identity and cultural heritage; and (cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community. These three criteria are cumulative. This means that if a TCE does not meet each of the three criteria, the TCE may not be protectable under the proposed regime of protection.

The first criterion makes it a condition that TCEs should be intellectual creations and therefore “intellectual property” including both individual and communal creativity. Differing versions, variations or adaptations of the same expression could qualify as distinct TCEs if they are sufficiently creative; here a parallel could be made to copyright, where different versions of a work can qualify as copyright works if they each are sufficiently original cf. above.

Secondly the TCEs should have some linkage with a community’s cultural and social identity and cultural heritage. This linkage is embodied by the term “characteristic” which is used to denote that the expressions must be generally recognized as representing a communal identity and heritage. The term “characteristic” is intended to convey notions of “authenticity” or that the protected expressions are “genuine”, “pertain to” or are an “attribute of” a particular people or community. Lastly TCEs should still be maintained, developed or used by the community or by its individual members.

As shown above, article 1 of the Draft Provisions sets out the scope of protection. First TCEs are defined and secondly three criteria conditional of protection are laid down. This system, which is build after an intellectual property law model, can then be applied to TCEs to assess whether they are likely to fall under the protection or not. This scheme will be applied later on when the three different forms of TCEs are analyzed in order to shed light on the protections offered to TCEs under the sui generis protection found in the Draft Provisions.

\[\text{WIPO/GRTKF/IC/9/4, page 17}\]
Part IV, Analysis

4.1. Analytical Approach

In the above sections, the relevant intellectual property law as well as the Draft Provisions have been accounted for, in order to establish the frame to which the three chosen forms of TCEs are to be applied. We now turn to the analytical section, subsequently addressing the three different forms of TCEs in order to explore the potential protection of TCEs under intellectual property law and under the Draft Provisions. Separately, background information on each of the TCEs will be offered before moving on to analyzing the possible protection under intellectual property law and subsequently the potential protection under the Draft Provisions.

The three examples of TCEs have been chosen for the specific purpose of addressing the protection of TCEs from the widest possible angle. The Deep Forest case concerns a TCE in the form of a song. This choice is based on the wish to examine an intangible TCE that, at the outset, would seem to fit under copyright law. Secondly, the Inukshuk figure will be applied in order to analyze the potential protection of a tangible TCE, which is presumed to bring trademark law into the discussion. Lastly, the myths and legends of the Quileute tribe used in the Twilight Series will be assessed. This TCE was chosen in order to open the discussion on TCEs presumably not directly eligible for protection under copyright. Furthermore, each of the three TCEs falls under different categories when applying the Draft Provisions. This widens the focus from which the potential protection under the Draft Provisions can be addressed.

4.2. The Deep Forest Case

World music is a category containing different styles of music from around the world. At the starting point, world music was classified simply as “local music from out there”49. In more recent years, the definition is more and more used to describe the genre, where ethnic music is fused with western styles of music. This notion of world music has enjoyed immense success throughout the western music market and is still today a genre that generates huge profits. The rise of world music can be highly accredited to the notion of globalization. To this end, globalization is the factor that has brought music from the third world into the music players of western society.

The merging of music from third world countries with the western music industry was bound to create both legal and policy questions. Initially, the spreading of ethnic music can be seen as a positive tendency, in that it should carry with it the natural effects of heightened knowledge and respect for third world artists and thus third world culture. The evolution of world music has indeed brought with it positive consequences. It has however, and more relevantly under the heading of this assignment, also uncovered a wide range of legal problems and questions. Simply put, it has proven highly difficult to determine where the original ethnic artist or community stands when his/her music is used in a piece of music marketed in the western market place. This fact is amongst the examples cited by indigenous and other traditional and cultural communities when arguing that TCEs require wider protection in relation to intellectual property\textsuperscript{50}.

To illustrate this problem and discuss the legal issues involved, this analysis will, as mentioned, take starting point in the Deep Forest case. It is the hope of the author that the practical angle will add relevance and ease the illustration of the legal issues.

4.2.1. Background

In 1973 the UNESCO Musical Sources collection released an album titled \textit{Solomon Islands: Fateleka and Baegu Music from Malaita}. The album was recorded in 1969/70 by Hugo Zemp of the Ethnomusicology Department of the Musèe de l’Homme and Centre National de la Recherche Scientifique. One of the songs on the album was a Baegu lullaby from Northern Malaita\textsuperscript{51} titled “Rorogwela”, sung a capella by a woman called Afunakwa. In 1992, the song “Rorogwela” emerged as a popular hit on the world music scene, when the recording made by Hugo Zemp was digitally mastered and fused with western style rhythms by the two French musicians Eric Moquet and Michel Sanchez. The song appeared on the album “Deep Forest” under the title “Sweet Lullaby”. Later on in 1996, Norwegian saxophonist Jan Garbarek recorded an adaption of the “Rorogwela”, credited as “a traditional African melody, arranged by Jan Garbarek”. The aftermath of the two different recordings was a widely expressed need for some kind of justice and/or compensation flowing from the western artists to the original singer and/or the community from which the song originated.

The case raises immediate legal issues such as musical works, performance, moral rights, economic rights, as well as broader issues of preservation vs. protection, enforcement of legal rights, recognition of traditional works, communal ownership and customary law. In the light of the objective of this assignment, the case will be applied to analyze the potential protection under the relevant intellectual property discipline, being copyright law, and thereafter the potential protection under the sui generis protection found in the Draft Provisions of the IGC.

\textsuperscript{50} WIPO Booklet nr. 1: Intellectual Property and Traditional Cultural Expressions/Folklore, page 3

\textsuperscript{51} Malaita is the largest island of the Malaita Province in the Solomon Islands
Defining the “Rorogwela” as a TCE must be approached in accordance with the definitions identified in the explanatory section cf. above. The “Rorogwela” is a traditional lullaby belonging to the Beagu people of the Fataleka region from the northern part of the Island of Malaita, which is part of the Solomon Islands. The Rorogwela lullabies are often sung to a child by its eldest sister. The words in the lullaby refer to a situation where the elder sister asks the baby not to cry because its parents are dead and there is no one else there to hear it. The content of the song is an example of traditional culture, whereas the song is the TCE in which the traditional culture is manifested and expressed. Herein, the “Rorogwela” can be identified as a TCE.

4.2.2. Copyright
In line with the analytical method explained above, we now turn to the possible protection of the “Rorogwela” under the relevant intellectual property law, being copyright.

The conditions for obtaining copyright and the subject matter for protection was outlined above in the section addressing the relevant intellectual property law. In short, copyright is obtainable when two conditions are met. First, the work must fall under the characterization under its kind as a literary or artistic work. Second, the work must be original. This section will assess whether the “Rorogwela” could find some kind of protection under the copyright regime. The obtainable rights under copyright can be divided into two categories. These are “Author’s rights” and “neighboring rights”. The term “Author’s right” covers what is conceived as the normal copyright explained under the relevant section, cf. above. This form of copyright is the creators’ rights to a protectable literary or artistic work. The “neighboring rights” or “related rights” are the rights of performers, phonogram producers and broadcasting organizations protected internationally by the Rome Convention and the WPPT. In accordance with this, both forms of copyright will be assessed in reference to the case. First off, it will be analyzed whether any authors rights to the “Rorogwela” can be identified and secondly, whether the performer, Ms. Afunakwa, and the phonogram producer, Hugo Zemp were entitled to neighboring rights.

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52 Traditional Knowledge, Traditional Creativity and Cultural Expressions: What role for IP?, Anthony Taubman
54 WIPO Performances and Phonograms Treaty, 1996
4.2.2.1. Authors’ Rights
In the above paragraph, the “Rorogwela” was defined as a TCE. Thus, the characteristics of the “Rorogwela” can now be taken through the issues that might prove problematic when assessing copyright protection.

First off, copyright is based on an individualistic concept as opposed to a collective one. In this concept one finds the intention of copyright to recognize an individual author or a group of individual authors as such and protect their creations. This concept stems from the common goal of furthering creation and the disclosure of creations. When applying this concept to TCEs the problem reveals itself. TCEs are defined as expressions handed down from one generation to the next and as constantly evolved, developed and recreated within a community or group. The concept found in copyright law and the definition of TCEs are contradictory. Even if the “Rorogwela” was at the outset the creation of an individual author, the “Rorogwela” only becomes a TCE after having been submitted to the changes and the continuous developments by the community or group. Simply put, if the “Rorogwela” is defined as a TCE, the attribution to an individual author or a group of authors is not possible.

Secondly, the concept of originality can prove to be an obstacle when assigning a TCE to copyright law. If the “Rorogwela” is to be placed under the protection of copyright law, it has to meet the conditional requirement of originality. As outlined above, the classification of the “Rorogwela” as a TCE requires that it is an expression handed down from generation to generation and is constantly evolved, developed and recreated. Starting from the hypothesis, that the “Rorogwela”, even if it at one point in time was protectable by copyright, has fallen into the public domain, the concept of originality can only be applied to the small changes it is bound to undergo through the constant evolution, development and recreation in the community. It is at least questionable whether these small changes would meet the requirement of originality, and it is important to distinguish this line of argument from original creations made on the basis of TCE, which in principle are protectable under copyright law.

Thirdly, the requirement of fixation should be given some thought. In most countries, fixation of the creation in a material form is a condition for protection under the copyright regime. When turning to the definition of TCEs, it was established that they are handed down from one generation to the next, either orally or by imitation, but rarely in writing. It is likely that the “Rorogwela” fits this description as it is song sung from sister to siblings etc. Even if it was assumed that the “Rorogwela” was fixated in writing, the requirement of fixation can still prove problematic. As described above, TCEs will in their nature be constantly changing through the use by the community. Thus, a fixation of a TCE such
as the “Rorogwela” will not meet the requirements when trying to protect a further developed version of it – only the version in the fixation will be protectable.

Lastly, one of the main obstacles to the application of authors’ rights is the limited duration of protection. As described above, the contradiction between the individualistic concept in copyright and the definition of TCEs prevents the identification of an individual author or group of authors attributable to a TCE. This is also the case with the “Rorogwela”. Since no individual authorship can be identified, the main rule according to which the duration is calculated after the author’s death cannot be applied.

An important point must be made when addressing the author’s rights in copyright. As explained in the section defining TCEs, a distinction must be made between TCEs stricto sensu and tradition-based TCEs. The analysis above concerns the “Rorogwela” stricto sensu. When turning to the tradition-based TCEs, the picture concerning author’s rights change. In this case, the obstacles indentified above would not pose problems concerning protection under author’s rights. A tradition-based TCE would be created by and individual as opposed to the collective concept governing TCEs stricto sensu. As a direct result, the limited duration of protection would be possible to define in that an author could be identified. Moreover the concept of originality is more likely to be surmounted in the case of a tradition-based TCE, and lastly, the concept of fixation found in some jurisdictions is presumably not an obstacle as the tradition-based TCE would be manifested in one way or the other.

In the above, it has been identified that authors’ rights is only a possible form of protection in regard to tradition-based TCEs. TCEs stricto sensu cannot find any protection under author’s rights and are thus forced to seek protection under the neighboring rights.

4.2.2.2 Neighboring Rights
As explained above, the international world music hit “Sweet Lullaby” came to pass through a rather complicated number of events. The “Rorogwela” recording from 1969/70 was performed by a woman named Afunakwa. The recording or fixation was made by Hugo Zemp of the Ethnomusicology Department of the Musée de l’Homme and Centre National de la Recherche Scientifique. From this recording, the two French artists made “Sweet Lullaby” and later on Jan Garbarek recorded his version of the song. These facts raise the issue of neighboring rights, both in regard to the performer, Ms. Afunakwa, and the person or entity responsible for the fixation of the song, in this case, Hugo Zemp.
Neighboring rights are addressed by a number of international treaties. These are: the Rome Convention\textsuperscript{55}, the Geneva Phonograms Convention\textsuperscript{56}, the Brussels Convention\textsuperscript{57}, the IPIC Treaty\textsuperscript{58}, TRIPS\textsuperscript{59} and the WPPT\textsuperscript{60}.

The case in hand concerns the rights of the person or entity responsible for the fixation as well as the rights of the performer of the song.

As mentioned earlier, the song was recorded by Hugo Zemp. The song was originally released in 1973 on an album titled Solomon Islands: Fateleka and Beagu Music from Malaita. The contractual relations concerning the recording between Hugo Zemp and UNESCO are very blurry and were indeed challenged by Hugo Zemp in an article in the Yearbook for Traditional Music\textsuperscript{61}. However, the exact legal and moral circumstances concerning the contractual relationship between Hugo Zemp and UNESCO are not of great interest in the context of the analysis. What is important is the fact that Hugo Zemp is likely to be protected as a producer of phonograms. In international copyright, a producer of a phonogram is protected in The Rome Convention Article 3 (c) and WPPT Article 2 (d). Under the Rome Convention Article 10, producers of phonograms enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms. This rule is repeated in WPPT Article 11 with the conferral that the right is applicable in regard to reproductions in any manner or form. Thus, Hugo Zemp would be vested with the rights of a producer of phonograms and in this fitted with the right to authorize or prohibit a reproduction of his recording of “Rorogwela”.

The rights of performers are also protected in the Rome Convention and in the WPPT. Article 3 (a) in the Rome Convention obliges contracting parties to provide protection for performers of literary or artistic works, and the international protection of performers of folklore was more recently introduced through Article 2 (a) of the WPPT. The latter Article makes the protection of performers of folklore obligatory with an explicit addition of this protection in the article. Protection under The Rome Convention and the WPPT is conditional to the respective articles governing the beneficiaries of protection. Article 4 of the Rome Convention concerns the protected performances. Thus, each contracting state shall grant national treatment to performers if any of the following conditions is met

\textsuperscript{55} Rome Convention for the Protection of Performers, producers, of Phonograms and Broadcasting Organizations, 1961
\textsuperscript{56} Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, 1971
\textsuperscript{57} Convention Relating to the Distribution of Programme–Carrying Signals Transmitted by Satellite, 1974
\textsuperscript{58} Treaty on Intellectual Property in Respect of Integrated Circuits, 1989
\textsuperscript{59} Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994
\textsuperscript{60} WIPO Performances and Phonograms Treaty, 1996
\textsuperscript{61} Published by Ethnomusicology, 1996
(a) the performance takes place in another contracting party, (b) the performance is incorporated in a phonogram which is protected under Article 5 of the Convention and (c) the performance, not being fixed on a phonogram, is carried by a broadcast which is protected by Article 6 of the Convention. The recording and thus the performance of “Rorogwela” took place in the Solomon Islands, which is not a contracting party to the Rome Convention\(^62\). The performance is, however, incorporated on a phonogram which is protected under Article 5 of the Convention, which determines the conditions for protection of phonograms. Protection is offered if one of the following conditions is met: (a) The producer of the phonogram is a national of another contracting state (criterion of nationality), (b) the first fixation of the sound was made in another contracting state (criterion of fixation) or (c) the phonogram was first published in another contracting state (criterion of publication). Hugo Zemp, the producer of the phonogram is a Swiss citizen, and thus a national of a contracting party\(^63\). Due to this fact, the performance falls under the protection of the Rome convention in terms of territoriality.

As mentioned above, The Rome Convention only protects performers of literary or artistic works. Fitting the “Rorogwela” into this description could prove difficult and thus protection difficult to secure. Performers of folklore are, however, protected under the WPPT which, as stated above, extends the protection to expressions of folklore. Thus protection can be secured under the WPPT if the performer, in this case Ms. Afunakwa, can be placed under Article 3 of the WPPT concerning beneficiaries of protection under the Treaty. According to Article 3 (2), the nationals of other Contracting Parties shall be understood to be those performers or producers of phonograms who would meet the criteria for eligibility for protection provided under the Rome Convention. Given the conclusion just above, Ms. Afunakwa is protected as a performer under the WPPT and thus eligible for the rights conferred in Articles 5 to 10.

The author is aware that the recording of the “Rorogwela” was made in 1969/70 and that the WPPT was adopted only in 1996. Thus, the latter was not in force at the time of the performance by Ms. Afunakwa. This fact is inherently important when assessing the case as an isolated problem. In the context of this assignment, however, the WPPT was applied so as to explore the possible protection presently available. To this end, the case fitted the purpose and must be seen in this context.

In the above section, the possible protection of the “Rorogwela” under copyright has been analyzed. As explained, author’s rights to the “Rorogwela” seem to be out of reach. The contradictory nature of the individualistic concept of copyright and the definition of TCEs has proven to be problematic. Secondly, surmounting the concept of originality when addressing TCEs is a task not easily solved.

\(^62\) List of Contracting Parties available at www.wipo.int
\(^63\) Accession on June 24, 1993. Entered into force September 24th, 1993
Thirdly, the requirement of fixation can prove to be a problem in countries adhering to the copyright system. Lastly, the duration of protection is a considerable obstacle as no individual author or authors can be identified. These four discussions taken into account, any author’s rights to the “Rorogwela” seem unlikely and hard to base on solid legal ground. The picture changes to a certain degree, when focus is shifted to the neighboring rights. Here it has been established that both phonogram producers’ rights and performers’ rights are relevant in the case of the “Rorogwela”. Hugo Zemp has rights as phonogram producers and Ms. Afunakwa is entitled to the performer’s rights found in the WPPT. When put into a larger perspective, the established rights might not prove as advantageous to the indigenous community as first assumed. The indirect protection found in the neighboring rights is dependent on the following conditions. Firstly, the performer and phonogram producer would have to be members of the relevant community. In this case, Ms. Afunakwa is a member of the community, but Hugo Zemp or UNESCO is not. Secondly, they would have to be subject to an internal mechanism which would ensure that the protection would eventually benefit the community in question. In the worst case scenario, rights would be vested in people outside the relevant community, leading to a possible situation where the community would have to take into account these rights and might face claims to pay statutory remuneration to the rights holders.

4.2.3. The Draft Provisions

We now turn to the potential protection under the Draft Provisions of the IGC. The protected objects and the conditions for protection were outlined in the above section addressing the Draft Provisions. At this point, the task will be to analyze whether the “Rorogwela” could find protection under the sui generis regime set out in the Draft Provisions. As explained under the introductory section concerning the method of the assignment, the Draft Provisions are a work in progress. Thus, no precedents or jurisprudence can be found to offer support, when assessing a potential protection under the provisions. The Policy Objectives and Core Principles of the Draft Provisions\textsuperscript{64} can, however, offer some help in determining the intended scope of protection. Additionally, as the suggested article in the Draft Provisions draw upon the WIPO-UNESCO Model Provisions\textsuperscript{65}, the commentary to these provisions might offer valuable insight into the intended protection.

Firstly, it must be assessed whether the “Rorogwela” falls under the subject matter of protection laid out in Article 1 of the Draft Provisions. In Article 1 (a) TCEs are defined as any forms, whether

\textsuperscript{64} WIPO/GRTKF/IC/9/4, page 9 and 10
\textsuperscript{65} Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Forms of Prejudicial Action, 1982
tangible or intangible, in which traditional knowledge and culture are expressed, appear or manifested. In the context of the “Rorogwela”, it is an important point that oral (non-fixed) expressions would also be protectable. Article 1 (a) is to be understood as a description of the subject matter at hand. The substantive criteria are found in the following list of forms of expressions in Article 1 (a) (i) to (iv) and the three conditions set out in Article 1 (a) (aa), (bb) and (cc). Article 1 (a) (ii) states that musical expressions, in which traditional culture is expressed or manifested, such as songs and instrumental music fall under the subject matter of protection. This should include the “Rorogwela” in the subject matter of protection. Whether or not the “Rorogwela” would receive protection is then to be decided by the three conditions in article 1 (a) (aa), (bb) and (cc). The criteria set out in Article 1 (a) (aa), (bb) and (cc) delimits TCEs eligible for protection. Thus, TCEs would be protected if they are intellectual creations, have some linkage with a community’s cultural and social identity and cultural heritage and are still maintained, developed or used by the community or its individual members.

The first criterion of intellectual creations is linked to the term intellectual property and includes both individual and communal creativity. The “Rorogwela” would seem to fit the description of an intellectual creation in its form of a song, which by nature are creations of the human mind. The exact nature of the requirement seems to be a point of discussion at the IGC and thus hard to base on any solid ground. Nevertheless, it seems unlikely that a TCE in the form of a song would not surmount the condition. The second part of the criterion states that no establishment of individual or shared authorship is required. As previously explained, this is exactly the case concerning the “Rorogwela”. As a part of oral tradition of the Beagu community it cannot be attributed to an individual author or a group of authors.

The second criterion of Article 1 (a) (bb) is worded as the condition that a TCE be characteristic of a community’s cultural and social identity and cultural heritage. The term “characteristic” is intended to convey notions of “authenticity” or that the protected expressions are “genuine”, “pertain to” or are an “attribute of” a particular people or community. The notion “heritage” is used to denote materials, intangible or tangible, that have been passed down from generation to generation, capturing the inter-generational quality of TCEs; an expression must be “characteristic” of such heritage to be protected. It is generally considered by experts that material which have been maintained and passed between three, or perhaps even only two, generations form part of a “heritage”, whereas expressions which may characterize more recently established communities or identities would not be covered. Applying the condition to the “Rorogwela” can prove difficult due to the fact that the song is difficult to define.

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66 WIPO/GRTKF/IC/9/4, page 9 and 10
67 See relevant paragraph above as well as WIPO/GRTKF/IC/9/4, page 9 and 10
68 WIPO/GRTKF/IC/9/4, page 9 and 10
69 WIPO/GRTKF/IC/9/4, page 13
70 Ibid.
because of the lack of information about it. It can be noted that the “Rorogwela” is a traditional lullaby belonging to the Beagu community and is a part of this community’s oral tradition. The lyrics of the song translate to: Young brother, young brother, be quiet. You are crying, but our father has left us. He has gone to the place of the dead. To protect the living, to protect the orphan child. The text of the song could refer to the brutal recruitments and kidnappings of laborers for the western sugar plantations and the following reprisals and massacres in the mid-19th century. If this is the case, the song would be connected to and characteristic of the community and its heritage.

The “Rorogwela” is sung by the mother or older child to the younger child as a lullaby and as a way of maintaining oral tradition. This would speak in favor of defining the song as characteristic of the Beagu community and thus in accordance with the condition set out in Article 1 (a) (bb).

The last criterion is worded in Article 1 (a) (cc) setting out that the TCE must still be maintained, developed or used by the community or its individual member. The condition is not of great importance to the case in point as it is designed to rule out TCEs not in use in the particular community. In the case of the “Rorogwela” it must be assumed that the song is still maintained and developed by either the Beagu community or its individual members.

In light of the characterization of the “Rorogwela” as falling under the defined subject matter of protection in Article 1 (a) as well as the findings of the “Rorogwela” surmounting the three criteria in Article 1 (a) (aa) to (cc) it can be concluded that protection under the Draft Provisions is likely to be possible concerning the “Rorogwela”.

4.2.4. Interim Conclusion

In the above, the case of the “Rorogwela” has been analyzed in a copyright context and in the context of the Draft Provisions of the IGC. The aim of the analysis was to examine whether the song could find protection under either of the two regimes, the objective being to disclose whether protection under the intellectual property regime is sufficient when addressing this type of TCE. In the copyright analysis, it was shown that authors’ rights to the “Rorogwela” were unlikely due to several obstacles, making this type of copyright unfit for this type of TCEs. Afterwards it was established that neighboring rights under the WPPT were highly relevant in the case of the “Rorogwela”. Under the WPPT, performers of folklore have the right to prevent, in all countries that have ratified the WPPT, the unauthorized fixation of sound recordings of their performances and certain dealings with those fixations. This would be the case with Ms. Afunakwa, the performer of the song. Further, it was disclosed that the phonogram producer of the recording, Hugo Zemp, was entitled to authorize or prohibit the use of the recordings in the rights under the Rome Convention. Lastly, the protection

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71 Steven Feld “A Sweet Lullaby for World Music”, page 161
72 http://www.triposo.com/loc/Solomon_Islands
73 Ibid.
under the Draft Provisions was analyzed, with the result that the “Rorogwela” is likely to be covered by the subject matter of protection and able to surmount the three conditions for protection.

Given the analysis above, it seems that four different themes have disclosed themselves. In terms of Author’s rights to TCEs, the definition between TCEs stricto sensu and tradition-based TCEs is highly relevant. TCEs stricto sensu refer to “underlying” or “pre-existing” TCEs that has been handed down from generation to generation, reflects a community’s cultural and social identity, consists of characteristic elements of a community’s heritage, is made by “authors unknown” and/or by communities and/or by individuals communally recognized as having the right, responsibility or permission to do so, and are constantly evolving, developing and being recreated within the community\textsuperscript{74}. It is the “Rorogwela” stricto sensu that was concluded as not being eligible for copyright. In contrast to the TCEs stricto sensu we find the tradition-based TCEs. These are expressions based of TCEs stricto sensu, but arranged or adapted in a new form, in other words, original creations made on the basis of TCE. Tradition-based TCEs are at the starting point eligible for protection under author’s rights in copyright. In the case of the “Rorogwela”, nothing was found to include this form of protection in the analysis. It is, however, highly relevant with regard to many other types of TCEs. The protection of TCEs stricto sensu, not available under copyright law must then be sought out in the context of the sui generis protection offered in the Draft Provisions. Here, no originality or identification of individual authorship is required. As the author’s rights under copyright law only protect tradition-based TCEs, and the neighboring rights only protect the right of the performer and the phonogram producer, it seems that a gap is left in the shape of the TCEs stricto sensu. Protection of the TCEs stricto sensu would be possible under the sui generis system of the Draft Provisions, but whether the specific protection should be created by adopting the sui generis regime of the Draft Provisions is a question of politics. Some commentators\textsuperscript{75} are of the opinion that the protection of tradition-based TCEs and the protection under neighboring rights are sufficient in guarding the rights and interests of indigenous communities. Others\textsuperscript{76} voice the opposite, arguing that the rights should be vested in the community in question and challenge the principle of public domain and the fact that all TCEs stricto sensu are by default placed here and thus available for appropriation from third parties.

\textsuperscript{74}WIPO/GRTKF/IC/6/3, paragraph 50

\textsuperscript{75} WIPO Booklet no. 1, Intellectual Property and Traditional Cultural Expressions/folklore, page 15-17

\textsuperscript{76} Ibid.
4.3. The Olympic Inukshuk

In line with the explained method of the analytical section, the potential protection of a TCE in the form of the Inukshuk is now to be analyzed in order to assess the protection of TCEs under trademark law as well as the protection of tangible TCEs under the Draft Provisions. First the background of the Inukshuk will be outlined before turning to the potential protection under trademark law and under the Draft Provisions.

4.3.1. Background

Originally, the Inukshuk is a man-made stone monument, composed and built of different size stones and rocks and shaped like a man. Inuksuit have been used by the Inuit people for 4000 years and are still used in the Arctic today as guides and markers for Inuit people concerning information on hunting grounds, shelter, trails and food caches.

In 2010, the Canadian city of Vancouver hosted the Olympic and Paralympic Winter Games. As the official emblem of the games, VANOC chose a contemporary interpretation of the Inukshuk. The emblem was called Ilanaaq and features five stone-like objects, each in a different color, configured to represent a person. The different colors chosen represent different regions of the country: the green and the light and dark blue colors symbolize coastal forests, mountain ranges and islands. The red color represents Canada’s Maple Leaf and yellow depicts brilliant sunrises. As the official emblem of the 2010 Winter Games, the figure was used throughout the Games and depicted on goods ranging from everything from T-shirts to fridge magnets. The unveiling of the Vancouver 2010 emblem resulted in both praise and criticism from the native peoples in Canada. Some saw it as an honor to have the symbol used for such a high profile event as the Winter Olympics. Others viewed the usage of the Inukshuk as offensive and as a misappropriation of Inuit intellectual property. In spite of the differing views, the First Nations of Canada approved the use by VANOC of the Inukshuk figure and entered into an agreement concerning this use.

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77 See Annex 1
78 Inukshuk in plural
79 In common language and in literature in general, the term Inuit is often used to describe the native peoples of Canada. It should be pointed out that the correct term for the majority of native peoples in Canada is First Nations Peoples
80 Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games
81 CBS Sports, “Vancouver 2010 logo unveiled” April 24, 2005
83 WIPO/GRTKF/11/15, page 42
84 The so-called Olympic Legacy Agreements: Shared Legacies, November 2002
In the context of this assignment, the case of the Inukshuk will be applied as an example to explore trademark protection of TCEs and possible protection of symbols under the Draft Provisions of the IGC. The Inukshuk is a tangible TCE in which traditional knowledge is manifested. As mentioned above, the traditional knowledge concerns the usage of the Inukshuk as a guiding symbol for the use of the land.

4.3.2. Trademark Protection of the Inukshuk
The conditions for obtaining trademark protection have been outlined in the relevant section cf. above. These conditions will now be applied to the Inukshuk figure in order to analyze the trademark perspective of protecting TCEs under intellectual property law.

Trademark concerns at the outset the protection of names, words, phrases, logos, symbols, designs, images and combinations of these elements. As described just above, the Inukshuk is a figure and thus falls under the definition of a logo, symbol or design in terms of the protected forms of trademarks. Thus, this condition does not give rise to a deeper discussion in the case of the Inukshuk.

As previously explained, the eligibility of a sign for trademark protection is ruled by the concept of trademark distinctiveness. The concept is two-fold. For one, the mark must be distinctive. This means that a mark must be able to distinguish the products/services of one company from those of other companies. Secondly, the mark should not be descriptive, i.e. it should not describe e.g. the nature, characteristic or use of the product/service for which the mark is sought registered.

The concept of distinctiveness is based on the logical fact that if every provider of products used the same common, descriptive symbol in the marketing of their products, distinguishing between the different providers would be near impossible. Thus, it required that a trademark has some uniqueness to it. The Inukshuk is a unique figure and is in its nature distinctive. The discussion of descriptiveness is hard to take to a real and practical level, due to the fact that it was originally not sought registered by the Inuit and thus no products/services have been disclosed. In theory though, it would seem that the Inukshuk would only be descriptive if it was used for marketing of the figure itself. This is not likely to be the case. In general, although there are exceptions, the discussion of the concept of trademark distinctiveness is more relevant when applied to word marks than to a figurative mark which is the case here. Thus, the condition that follows with the concept of trademark distinctiveness should not pose a problem for a trademark registration of the Inukshuk as a figurative mark.
In light of the discussion above, it can be concluded, that the Inukshuk meets the formal requirements for trademark protection and would be eligible for trademark registration as a figurative mark. This conclusion is also supported by the fact that VANOC obtained several registrations of the figurative mark in Canada. As the Inukshuk is found to be eligible for trademark registration, we now turn to the discussion of the protection offered under trademark law. It is inherently important to analyze the possible protection in the context of TCEs and the objectives underlying them.

Trademark law is based on a different set of policy objectives than the other intellectual property disciplines. Whereas copyright law and patent law share the common goal of promoting progress, trademark law is aimed at vesting businesses with an important marketing tool, which enables them to distinguish their goods or services from those of other businesses. The attainment of a trademark gives the owner of the trademark an exclusive right, which basically gives the owner of the trademark the right to prohibit the use of trademarks by others, which are identical or confusingly similar, in relation to products or services which are identical or similar to the products or services covered by the registered trademark – i.e. when there is a risk of confusion. The concept is furthermore underlined by the notion of commercial use. This means that a trademark is, at the outset, only infringed, if the opposing trademark is used commercially.

To analyze the possible protection of the Inukshuk as a trademark, this line of argument must be applied to the actual needs of the Inuit concerning the Inukshuk. Provided that the Inuit had obtained trademark protection for the Inukshuk, they would be able to move on infringing actions as explained just above. This would mean that they could prevent the commercial use of the Inukshuk for the products or services for which it was protected. Indeed, this could mean an actual protection of a TCE, in the form of the Inukshuk, under trademark law. The actual protection obtained must, however, be assessed in the context of the needs and expectations of the group or community in question. Firstly, the offered protection would only be relevant concerning the goods and services covered by the trademark registration. This would mean that the Inuit would not be able to take action concerning goods or services not covered, cf. below regarding use-based rights, however. Secondly, the territorial limitations of trademark law must be taken into consideration. As a main rule, trademark registrations are national, which means that a registration of a trademark in one country is valid only in that country. The main rule is exempted by the regional possibilities of trademark registration, cf. above.

85 For examples, see Annex 2
Concerning the case in point, this fact gives rise to both positive and negative consequences. Some countries, mainly those adhering to common law, accept the notion of use-based rights as an alternative to the main rule of registration. This means that use of a mark may result in the establishment of a trademark right. Thus, commercial use by the Inuit of the Inukshuk in say, Canada, Great Britain or Denmark, would result in a trademark right. Use-based rights are, however, valid only as long as the mark is actually used, cf. also below, and may be more difficult to prove.

Also, most jurisdictions provide for compulsory use. This means that trademark registrations can be challenged at the national or regional level, if the mark has not been used for a period of – in most cases - five years. If challenged, the registration may be maintained only for the goods/services for which the mark has actually been used during said period. Consequently, a trademark registration could prove to be treacherous due to the requirement of compulsory use. The needs and objectives of TCEs taken into consideration, there is indeed a risk that the Inuit, if challenged in the national jurisdictions, would lose ground on the basis of the rule of compulsory use.

One other point may prove to be an obstacle when assigning the Inukshuk to trademark law. As the main rule, trademarks are conferred to the person or business entity that has registered the trademark. If this was the only option, the trademark of the Inukshuk would be conferred to a single person or business entity. This would be, to say the least, very unsatisfactory considering the definition of TCEs and their connection to the relevant community or group and although trademark rights may be licensed to third parties, this solution would hardly be a viable one for the relevant communities. Help can be found through the institution of collective marks. Collective marks are trademarks owned by an organization, whose members may use them to identify themselves, their goods and services with a level of quality or accuracy, geographical origin, or other characteristics set by the organization.

Using this institution, the Inuit would be able to hold the rights to the Inukshuk centrally, while putting it to use both defensively as well as offensively. This could be achieved by establishing an organization that would police the rights to the Inukshuk, while traders and users belonging to the organization would be vested with the rights of the collective mark.

Another obstacle in regards to trademarks is the necessary registration. Whereas copyright is obtained at the creation of the work, trademark is, in most cases, conditional of registration, cf. above though regarding the countries allowing also for use-based rights. The registration process includes stages such as searching, filing for registration as well as paying the official fees. Concerning collective

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86 Such as the United States of America, Great Britain, Canada and Denmark
87 E.g. the “CA” device used by the Institute of Chartered Accountants, the mark “CPA”, used to indicate members of the Society of Certified Public Accountants
88 Jeremy Phillips & Alison Firth, Introduction to Intellectual Property Law, page 330
marks, it would also be necessary to establish the relevant organization so as to establish the framework for the management of the collective mark, although for the Inukshuk this could probably be under the auspices of the Canadian First Nations Council or similar. The ongoing management of a trademark, once obtained, also involves financial investments that might constitute and obstacle for indigenous peoples such as the Inuit.

As outlined in the above paragraph, certain types of tangible TCEs can indeed find some form of protection under the trademark regime. It is, however, important to keep in mind that trademark protection does not protect the TCE itself. It gives the relevant indigenous group or community the possibility to secure the use of the mark and to prohibit the commercial use by others. This is, however, only the case when navigating inside the limits of trademark law. Thus, the protection is limited by the restrictions of the concept of likelihood of confusion, the requirement of commercial use and the territorial limits in trademark law. In the case of the Inukshuk, trademark protection of the figure mark in Canada seems fairly easy obtained. This would not be the case in other examples. One could imagine the use of the Inukshuk e.g. in Denmark or Germany. Prohibiting such use would be a task not easily solved by the Inuit. First off, they would need to have a valid trademark in Denmark or Germany, respectively. Secondly, the practical hurdles of taking action against a trademark infringement in another country are not few and simple.

In conclusion it can be stated that TCEs can indeed find some protection under trademark law. This protection is, however, subject to a number of limitations, which confines the actual protection of TCEs under trademark law to a relatively small field.

### 4.3.3. The Draft Provisions

In accordance with the method of the assignment, we now turn to the possible protection under the sui generis regime offered in the Draft Provisions of the IGC. It is to be analyzed whether the Inukshuk could find protection under this regime. This will be assessed in applying the Inukshuk to the requirements listed in Article 1 of the Draft Provisions. It should be remembered that the Inukshuk must be distinguished from the traditional knowledge that is manifested in it. The Draft provisions concern the protection of TCEs, which means the protection of the expression in question. The Inukshuk is a manifestation of traditional knowledge concerning geographical information on hunting grounds, shelters etc. In accordance with this, it is the actual symbol to which the Draft Provisions must be applied.
Symbols are expressly included in the general subject matter of protection worded in Article 1 (a) of the Draft Provisions. The Inukshuk is a symbol manifesting and expressing traditional knowledge and thus included in the subject matter. Whether or not it is protectable is to be decided in the context of the three substantive criteria set out in Article 1 (a) (aa), (bb) and (cc).

The first criterion in Article 1 (a) (aa) is as previously explained the requirement of intellectual creation. It is linked to the term intellectual property and includes both individual and communal creativity. In contrast to the “Rorogwela” case, which was analyzed above, the criterion of intellectual creation would initially seem harder to surmount in the case at hand. The “Rorogwela” was a song with a set of lyrics and a certain rhythm and thus by nature something created by the human intellect. Furthermore, it can be adhered to the notion of “intellectual property” worded in the commentary to the Draft Provisions. This notion links the field of TCEs intended for protection, with the sphere of intellectual property rights and their underlying base of intellectual creations. The Inukshuk was defined in the introductory paragraph of this section as man-made stone monuments used as guiding marks in the arctic regions. This fact links the Inukshuk with the notion of “intellectual property” as it is a creative man-made monument taking the form of a figure. Due to these facts, the Inukshuk must be characterized as an intellectual creation in accordance with the criterion in Article 1 (a) (aa).

The second criterion in Article 1 (a) (bb) sets out that TCEs must be characteristic of a community’s cultural and social identity and cultural heritage. The term “characteristic” is intended to convey notions of “authenticity” or that the protected expressions are “genuine”, “pertain to” or are “an attribute of” a particular people or community. As previously stated, the Inukshuk have been used for centuries by the Inuit people. The figure is indeed “genuine” and “pertain to” or is “an attribute of” the Inuit people. It has been used by them over a larger period of time than demanded and its “authenticity” is unquestionable as the Inuksuit still stand in Northern America as guiding symbols for the Inuit people. The applicable notions are not easy to assess due to the lack of comments found in the WIPO material. The Inukshuk does, however, seem to meet the obtainable certainty available in light of the limited analytical information in the criterion.

The third and last criterion is worded in Article 1 (a) (cc). It states that a TCE must still be maintained, developed or used by the community or its individual members. The Inukshuk is used today as landmarks and can be found scattered across the Northern parts of Canada. Originally, the Inukshuk was as guidance symbols for the above mentioned purposes. Due to the fact that the Inuit have

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89 WIPO/GRTKF/IC/9/4, page 12
90 Ibid., page 13
changed over time from being nomads to being settlers, the use of the Inukshuk has changed as well. The erections of Inuksuit are now more used as symbols of the North and of leadership, communication and the human spirit\(^91\). Concerning the criterion in Article 1 (a) (cc), it can be said with certainty, that the Inukshuk is still maintained and used in the Arctic regions as guidance markers and as symbols.

### 4.3.4. Interim Conclusion

In the above it was analyzed whether the Inukshuk could find protection under trademark law and thereafter whether it could find cover under the potential protection of the Draft Provisions of the IGC.

Concerning trademark law, it was established, that the Inukshuk is indeed protectable as a trademark figure and able to surmount the condition of distinctiveness. This means the identification of a case where intellectual property law can indeed protect a TCE. This protection was, however, found to be limited in a number of ways. First off, trademark law governs the commercial use of marks. This means that the protection is only present when the misappropriation of the trademark can be categorized as commercial. Secondly, a trademark is at the outset limited to the goods and/or services for which it is registered or used. Thirdly, trademark law is restricted by territorial limitations. A trademark registration is, due to these limitations, national at the outset and regional at the most. Fourthly, the rule of compulsory use is likely to pose a problem for a potential protection of the Inukshuk under trademark law. According to this rule, a trademark is subject to cancellation if not used for a period of normally five years. Lastly, the trademark regime is inherently different from the copyright regime, the other important intellectual property regime regarding TCEs. Where copyright is obtained with the creation of the work without any formal registration required, trademark is governed by rules of registration. The process of registration includes searching, filing for registration as well as paying the official fees. Likewise, the maintenance of trademarks and filing for misappropriation are not actions without economic relevance as well as practical challenges. Summarized, trademark law can indeed offer some protection to TCEs. This protection is, however, limited and seems unfit in regard to the needs and capabilities of traditional groups and communities.

When applying the Inukshuk to the Draft Provisions of the IGC, it was discovered that protection was likely to be attainable. The criteria set out in Article 1 of the Draft Provisions are however not overly commentated and the analysis of the potential protection must be seen in this regard. Thus, no high level of certainty can be offered when assessing the potential protection under the Draft Provisions. This being said, the Inukshuk seems to fit the description of the subject matter of protection and the criteria of protection as well as possible under the given circumstances. Any conclusive decision

would have to wait until a potential final version of the Draft Provisions as well as more substantiated commentaries on the relevant provisions are available.

4.4. The Twilight Series

In the last section of the analytical part of the assignment we turn to the potential protection of the myths and legends of the Quileute tribe used in the Twilight Series. This form of TCE was chosen in order to extend the analysis to cover a form of TCE not a priori conform to the relevant intellectual property regime being copyright law. Furthermore, myths and legends can be applied in order to assess the potential protection in the Draft Provisions from the point of a third form of TCE.

4.4.1. Background

The Twilight Series has become one of the most successful international bestsellers. The combined revenue from book sales, DVD and movie ticket sales, as well as profits from merchandise amounts to more than 1 billion dollars. The story revolves around a romantic relationship between a vampire and a human. While the world, in which the story takes place, is highly fictional and imaginary, the story does apply certain themes taken from the real world. Amongst these the Indian shape shifters are playing a considerable role in the plot. One of the main characters of the Twilight books, Jacob Black, is described as a member of the Quileute tribe of north Washington. Jacob Black and his fellow Quileute Indians are attributed with the ability to shift shape, an ability taken directly from the folklore of the Quileute tribe. According to this folklore, the Quileute tribe descended from wolves in that the first Quileute was created from a wolf. It is sufficient to say that the Twilight series use the folklore of the Quileute tribe continuously in the books. This use, however highly fictionalized, is a clear example of traditional folklore applied for commercial use by entities outside the relevant group or community, as the myths and legends belong to the Quileute tribe. It is, however, questionable whether this ownership holds any actual legal status.

To assess this problem, the use of Quileute folklore in the Twilight series will now be applied so as to analyze the potential protection of myths and legends under the relevant intellectual property regime, being copyright law, and under the possible sui generis protection found in the Draft Provisions of the

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92 The Quileute are a native American people in Western Washington state in the United States of America
93 Angela R. Riley, Sucking the Quileute Dry, Op-Ed, NY TIMES, February 7, 2010
94 A shape shifter is according to Indian tribal mythology, a person with the ability to change their physical form from human to animal and back.
95 www.quileutes.com
IGC. First and foremost, myths and legends must be defined in order to assess the potential protection under the two different regimes.

Myths and legends are two terms used interchangeably. They cover “a traditional, typically ancient story dealing with supernatural beings, ancestors or heroes that serves as a fundamental type in the worldview of a people, as by explaining aspects of the natural world or delineating the psychology, customs, or ideals of society.”

In the case of the Quileute tribe, the stories of their creation can thus be categorized as being myths and legends pertaining to the tribe and as a starting point belonging to the tribe. It is now to be analyzed whether the Quileute tribe has any actual entitlement to the myths and legends.

4.4.2. Copyright Protection of Myth and Legends

When assessing intellectual property protection of myths and legends, copyright seems the only discipline which might offer protection. The relevant conditions for obtaining copyright was outlined in the above section containing the relevant intellectual property law and applied in the analyses of the “Rorogwela”. When turning to myths and legends, the application of copyright law will touch upon some of the same problems discovered in the analysis of the “Rorogwela”. Myths and legends do, however, also disclose one or two issues not addressed in the section concerning the “Rorogwela”.

As earlier described, copyright is subject to a number of conditions and limitations. These will also prove problematic in the context of myths and legends. Firstly, copyright is based on an individualistic concept and not a collective one. This means that in order to vest a copyright in someone, an individual author needs to be identified. This rule is exempted by the notion of collective authorship. This notion does, however, not have any merits in the discussion in question, as myths and legends are by definition authorless. They are created inside the community or group in question and are as such not the creation of an author. In contrast to myths and legends one finds fairytales such as those of Hans Christian Andersen. Fairytales are creations of the relevant author and therefore falls under the scope of copyright protection, and the distinction between the two is inherently important and highly relevant in the context of copyright law. It would seem that the notion of myths and legends simply does not match the underlying motives governing copyright.

This seems also to be the case when turning to the second problematic issue concerning the object of copyright protection. Copyright law protects literary and artistic works that are original. While many if not all myths and legends could be deemed original if created by an author, they cannot be characterized as literary or artistic works. This is due to the fact that myths and legends are by default

96 Definition of www.thefreedictionary.com
97 Collective authorship refers to the collaborative creation by a plurality of authors to a copyrightable work
not created in the mind of one author, but rather a storyline evolved over a great period of time as explanatory stories concerning nature, costumes and ideals of society cf. above. Thirdly, myths and legends are in most cases delivered orally from generation to generation. This would prove problematic in some jurisdictions adhering to the copyright system where fixation is a requirement for obtaining copyright. Lastly, copyright is subject to a limited duration of protection. This means that all copyrighted material will eventually fall out of protection. Thus, even if the above mentioned issues concerning copyright were to be surmounted, a potential copyright would not stand as a long lasting guard against misappropriation.

The result of the discussion above seems to be that myths and legends belong to the public domain. The term “public domain” refers at the outset to creative materials that are not protected by intellectual property laws such as copyright law. The Quileute tribe does not have any copyright to the myths and legends belonging to their folklore and, thus, no help seems to be available under intellectual property law.

It should be mentioned that copyright is at the outset available for literary or artistic works based on matter that is part of the public domain. These works would fall under the categorization of tradition-based TCEs. Thus, if someone arranges photos belonging to the public domain in an original way, this arrangement would be copyrightable. Likewise, an original work containing or based on the relevant myths and legends would at the outset be copyrightable if proven to be adequately original. This form of protection does not offer any actual protection of the myths and legends themselves, but could serve as some form of protection if the work in question was provided by an individual belonging to the Quileute tribe. It must, however, be recalled that vesting rights in individuals is not a desirable solution concerning TCEs. The potential rights holder should be the relevant community or group to which the relevant TCE belongs to.

4.4.3. The Draft Provisions
In the above section, it was established that myths and legends are highly unlikely to find sufficient protection under copyright law. This fact discloses that myths and legends seem to be a theme unprotected by intellectual property law and are, thus, at the outset vulnerable to misappropriation by outside entities. We now turn to the Draft Provisions of the IGC. It is to be analyzed whether myths and legends would be offered protection under the sui generis regime found in the Draft Provisions. The importance of the potential protection can prove highly relevant due to the fact that myths and legends were found ineligible for protection under copyright law.

In line with the method and established notions, it should be remembered that the potential protection under the Draft Provisions is not aimed at the myths and legends themselves. They are the traditional
culture/folklore embodied in the relevant TCE. In the case at hand, this means that the object of protection is the form in which the traditional culture is reproduced, being the verbal expression of the myths and legends. Thus, the object which must be applied to the criteria that follows just below is the verbal expression of the myths and legends. In order to follow this line of argument, it must be assumed that the myths and legends have been told and thus meet the criteria of the subject matter of protection. The assumption seems evident in that a myth or legend would not be present if not told. When this assumption is laid to ground, the criteria can be applied and analyzed so as to conclude whether protection would be possible or not.

Article 1 (a) establishes the fact that the scope of protection includes both tangible and intangible forms of TCEs. Furthermore it is made clear that oral (non-fixed) expressions would also be protectable. This responds well to the often oral nature of TCEs. Article 1 (a) (i) words the forms of verbal expressions entitled to protection, and amongst these, legends are directly submitted as a protectable form of verbal expressions. As established earlier, the notions of myths and legends are used interchangeable. This would mean that the myths and legends in question, when assumed that they have been verbally expressed, can be placed in the subject matter of protection as an intangible TCE.

In accordance with the previous sections analyzing the potential protection under the Draft Provisions, we now turn to the criteria set out in Article 1 (aa), (bb) and (cc).

The first criterion establishes the condition that TCEs must be “the products of creative intellectual activity, including individual and communal creativity”. The verbal expression of the myths and legends in question would seem to meet the criterion. The criterion explicitly set out that expressions of both individual and communal creativity are included in the subject matter of protection. Myths and legends must be categorized as being the product of communal creativity. They are not the creation of an individual, but rather the result of the communal creativity of the Quileute tribe over a long period of time, resulting in the verbal expression of the myth and legend. It should be noted at this point, that individual creativity can become an issue when discussing this criterion and applying it to a myth or legend. This becomes evident when applying the notion of tradition-based TCEs to the discussion. A contemporary individual interpretation of the verbal expression of the myth and legend can also be protected as a TCE, provided it is characteristic of a community’s cultural and social identity and heritage and was made by the individual having the right or responsibility to do so in accordance with the customary law and practices of the community. I should be highlighted that as far as beneficiaries of protection are concerned, the primary focus of the Draft Provisions is on communal beneficiaries.
rather than on individuals. Concerning the case at hand, it can be concluded that the verbal expression of the myth and legend can be categorized as a product of communal creative and thus in accordance with the criterion set out in Article 1 (a) (aa).

The second criterion is worded in Article 1 (a) (bb) stating that TCEs should be “characteristic of a community’s cultural and social identity and cultural heritage”. As previously established, the term “characteristic” confers that the TCE in question should have some linkage with the relevant community’s cultural and social identity and cultural heritage. The TCE in question, being the verbal expression of the Quileute myth and legend, is strongly linked to the Quileute’s cultural and social identity and cultural heritage. This is self evident and does not merit further discussion.

The last criterion states that TCEs should “still be maintained, developed or used by the community or its individual members”. An online search on the Quileute tribe reveals that the myths and legends of the tribe are indeed still verbally expressed, and that the myth and legend of the Quileute tribe and their creation is maintained within the tribe. The criterion aims at excluding TCEs no longer in use by the relevant community or group, so as not to extend protection to subject matter no longer relevant for the community or group in question. This is evidently not the case with the creation story of the Quileute tribe.

In line with the analytical findings above it can be deemed likely that the verbal expression of the myths and legends of the Quileute tribe would find protection under the Draft Provisions as intangible TCEs as well as being in accordance with the conditions set up in the three subsequent criteria in Article 1 (a) (aa), (bb) and (cc).

4.4.4. Interim Conclusion
In the above section, the use of myths and legends of the Quileute tribe in the Twilight series have been applied in order to assess how this category of TCEs fit the relevant intellectual property regime, being copyright law, as well as the potential protection under the Draft Provisions.

Firstly, it was established that the creation myths and legends belonging to the Quileute tribe are highly unlikely to find protection under the copyright regime. This was demonstrated by applying the myths and legends to the different conditions that govern copyright law. It was established that the myths and legends cannot surmount the condition of individual authorship as no individual author can be identified concerning a myth and legend. Furthermore, myths and legends can at the outset not be defined as a literary or artistic work in that they are not created in the mind of one author, but rather trans-generationally in the communal creativity of the relevant group or community. Also, myths and

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100 WIPO/GRTKF/IC/9/4 page 13
101 See www.quileutenation.org, www.quileutes.com
legends are most often delivered verbally from generation to generation. This means, that the requirement of fixation relevant in some jurisdictions might prove problematic. Lastly, copyright is confined by its limited duration of protection. This essentially means that even if a copyright was granted, it would expire within a few years. Due to the above summarized arguments, copyright law seems unfit to protect myths and legends belonging to a traditional group or community.

It should be remembered that copyright can play a role when turning to tradition-based TCE created by an individual author. These would at the outset be protectable if deemed original. Although this means that copyright does indeed apply concerning some TCEs, the possible protection is not desirable concerning the essential protection of TCEs. The copyright would in this case be vested in an individual and not in the relevant group or community to whom the myths and legends belong.

In accordance with the method of this assignment, the potential protection under the Draft Provisions was subsequently analyzed. Firstly the distinction between traditional culture/folklore and TCEs was outlined. The point was made that concerning the Draft Provisions, the subject matter of protection is not the actual myths and legends, but rather the reproduction or manifestation of them – being the TCEs. In the case at hand, the subject matter of protection is the verbal expression of the myths and legends, found to meet the requirements in Article 1 (a) (i). In line with the order of Article 1, the established TCE was then subsequently analyzed in the context of the three criteria set out in Article 1 (a) (aa), (bb) and (cc). It was concluded with the attainable certainty that the verbal expression of the myths and legends are indeed intellectual creations in the form of communal creations, characteristic of the community in question and still maintained, developed and used in the community. It should be emphasized that the level of conclusion concerning the criteria for protectable TCEs must be seen in light of the current status of the Draft Provisions. The criteria are not well substantiated and thus subject to uncertainty in terms of interpretation. The category of myths and legends does, however, seem to fit the subject matter of protection. This is underpinned by the fact that the category does not find much support in intellectual property law and is therefore, at the outset, vulnerable for misappropriation if not protected elsewhere. Moreover, TCEs reproducing traditional culture such as myths and legends seem to fit the underlying principles and policy objectives well102.

102 WIPO/GRTKF/IC/9/4, page 3
Part V, Conclusion and Final Remarks

5.1. Method in Relation to Conclusion

In the above sections the protection of three different forms of TCEs has been analyzed in the context of intellectual property law and under the Draft Provisions of the IGC. In line with the method of the assignment, each of the three forms of TCEs has been applied to the relevant intellectual property regime and subsequently to the Draft Provisions, so as to disclose the possible protection under the two different regimes. The three forms of TCEs were chosen in order to highlight the potential protections of TCEs from as broad an angle as possible. Firstly, a TCE in the form of the song “Rorogwela” was analyzed under application of copyright law and thereafter the Draft Provisions. Secondly, the Inukshuk figure was applied to trademark law and the Draft provisions and, lastly, the myths and legends of the Quileute tribe was assessed from a copyright perspective before being applied to the Draft Provisions. In each of the sections of the assignment, an interim conclusion has been reached. These conclusions were drawn at the level of protection potentially reached for each form of TCEs. In the following section, the focus will shift to a broader perspective, to offer a coherent overview of the current legal status of TCEs. Firstly, the three different forms of TCEs and the respective interim conclusions will be put into the broader context so as to identify the findings in the three different analyzes. These findings will subsequently be assessed in order to make a qualified evaluation of the legal status of TCEs and in this addressing the underlying policy questions and political issues. Lastly, the latest work of the IGC concerning TCEs will be accounted for and assessed in order to offer an updated account on the work of the IGC.

5.2. The Interim Conclusions

5.2.1. The Deep Forest Case

In this section of the analysis, a TCE in the form of a song was analyzed in the context of copyright law and the Draft Provisions. The “Rorogwela” was chosen in order to open the discussion on intangible TCEs and their potential protection under the two different regimes. The case was first applied to copyright law, where first author’s rights and subsequently neighboring rights were analyzed. It was established first that author’s right were unlikely to be available concerning the “Rorogwela” striceto sensu. This conclusion was based on the identification of a number of problematic issues contradicting the nature of the “Rorogwela” and author’s rights. It was, however, found that author’s rights would be relevant in the case of tradition-based TCEs. Hereafter, it was established that
neighboring rights could apply in the case of the “Rorogwela”, both in terms of the phonogram producer and the performer of the song.

After the explanation of the copyright aspect, the “Rorogwela” was taken through the criteria for protection found in Article 1 of the Draft Provisions. Firstly, it was established that the “Rorogwela” would likely be covered by the subject matter of protection set out in Article 1 (a) (i). The song reproduces and expresses the underlying traditional culture/folklore, through the content of the song. In other words, the traditional culture/folklore is manifested in the song, making the “Rorogwela” a TCE. In line with the methodology of Article 1 of the Draft Provisions, the song was then applied to the three criteria set out in Article 1 (a) (aa), (bb) and (cc). It was established that the “Rorogwela” was likely to meet the three criteria and would thus be eligible for the potential protection under Article 1 of the Draft Provisions.

In light of the conclusions listed above, a number of findings can be identified. Firstly, copyright law is identified as having a role to play concerning this form of TCEs as e.g. the neighboring rights can offer protection to phonogram producers and performers concerning TCEs. A distinction between TCEs stricto sensu and tradition-based TCEs was identified and found to be highly relevant in relation to copyright law. Tradition-based TCEs were concluded as being, at the outset, eligible for protection under author’s rights, whereas TCEs stricto sensu seems to be referred to the limited indirect protection under the neighboring rights. This means that author’s rights can potentially be vested in an individual author of a tradition-based TCE and that neighboring rights can offer protection to e.g. phonogram producers and performers of TCEs.

When putting these findings into a larger perspective, a range of problematic issues seem to be revealed. Firstly, no protection of TCEs stricto sensu could be identified under the copyright regime. Secondly, author’s rights vested in individual authors of tradition-based TCEs do not seem to fit the notion that TCEs are seen as belonging to the relevant group or community. Thirdly, the identified protection under neighboring rights seems only relevant when the phonogram producer or performer is found inside the relevant community and even so, this is still a right vested in an individual, not in the relevant community or group.

The potential protection under the Draft Provision is found at the other end of the scale. It was established, that the “Rorogwela” would likely be protectable as a TCE cf. Article 1 (a). This would mean that the “Rorogwela” could be protected as a TCE stricto sensu under the Draft Provisions.
5.2.2. The Case of the Inukshuk
In the next section of the analysis, the Inukshuk was applied as a means to explore the possible protection of a tangible TCE under trademark law and under the Draft Provisions. In the analysis of trademark protection it was established that the Inukshuk is indeed eligible for this protection. Hereafter, a number of limitations concerning trademark protection of the Inukshuk were identified. Thus, trademark protection is limited by the notions of commercial use, the relevant goods and services, the rule of compulsory use, particularly the territorial restrictions as well as practical complications such as the requirement of registration in some jurisdictions, the process of registration and the issue of the legal subject of protection.

When applied to the Draft Provisions, it was established, with the achievable certainty, that the Inukshuk fits the subject matter of protection stated in Article 1 (a) as well as being in accordance with the three criteria set out in Article 1 (a) (aa), (bb) and (cc).

From these conclusions it can be established, that a TCE in the form of a figure can indeed find some protection under the trademark regime. Considering the before mentioned limitations, the offered protection seems, however present, insufficient considering the needs and capabilities of traditional groups and communities. On the other hand, the potential protection under the Draft Provisions seems to be more fitting, but brings with it a much more comprehensive scope of protection.

5.2.3. The Myths and Legends of the Quileute Tribe
Lastly, the possible protection of the myths and legends of the Quileute tribe was analyzed under copyright law and the Draft Provisions in order to assess the possible protection of a different kind of intangible TCE. It was established that myths and legends does not warrant protection under the copyright regime. This conclusion was substantiated in an assessment of myths and legends in the context of the fundamental principles and conditions for obtaining a copyright. As mentioned in the section concerning the “Rorogwela”, it should be kept in mind that copyright is possible when dealing with tradition-based TCEs. The result of this is, however, that the right would be vested in an individual and not in the relevant community or group.

Subsequently, the protection under the Draft Provisions was analyzed. Here it was shown that, with the attainable certainty, the TCE, being the verbal expression of the myths or legends, could find protection under the Draft Provisions.

From the above conclusion it has been established that copyright law does not at the outset cover this form of TCE. Myths and legends are as a main rule placed in the public domain by default. Thus, a gap has been identified, where the relevant intellectual property regime does not offer any help to
traditional groups or communities in the protection of this form of TCE. Considering the conclusion that the myths and legends would find protection under the Draft Provisions, they seem to be, if adopted, able to fill this gap left in intellectual property law.

5.3. Findings

Immediately above, the interim conclusions have been assessed in order to identify the findings made in the three different sections of the analytical part of this assignment. The three different forms of TCEs were chosen in order to assess the possible protection of TCEs in intellectual property law as broadly as possible. It has been shown that the potential protection ranges from being present to a certain degree to being non-existent. Even where intellectual property protection was identified as being available for the TCE in question, it was established that the different forms of protection are subject to a wide variety of limitations and restrictions. This is the case both in the form of outright restrictions found in the relevant intellectual property regimes and well as through the more practical and underlying limitations concerning the relevant traditional group or community.

Concerning copyright law, it has been shown that protection is possible to a certain degree. Firstly, it was established that author’s rights are relevant concerning tradition-based TCEs. On the other hand, author’s rights were dismissed when dealing with TCEs stricto sensu, as these are seen as belonging to the public domain due to the identified problematic issues. The concept of neighboring rights is the exception to this statement. It was noted that e.g. performers and phonogram producers of TCEs could find protection under this regime.

In the field of trademark law, the statement was made that the analyzed form of TCEs could indeed find protection under this regime. The potential permanent duration of trademark protection and the use of collective marks must be highlighted as advantageous concerning TCEs. Under this heading, the problems seem to be found in the practical conflict between the nature of trademark law and the needs and capabilities of traditional groups or communities.

Concerning the Draft Provisions, it has been established that all the three TCEs analyzed were likely to be eligible for protection. All three forms of TCEs were categorized as TCEs coherent with the wording of Article 1 (a) of the Draft Provisions as well as being in accordance with the three criteria set out in Article 1 (a) (aa), (bb) and (cc). This conclusion must be seen in the light of the present status of the Draft Provisions; as mentioned, they are a work in progress and thus the certainty of application is bound to be limited.
5.4. Legal Status of TCEs

The legal status of TCEs can be based on the findings explained just above concerning the three analyzed TCEs. The scope of this conclusion is of course proportional with the number of analyzed TCEs as well as the level of application of intellectual property law. Thus analyzing more forms of TCEs and integrating other intellectual property regimes would make for a more solid foundation on which to base the conclusion on the legal status of TCEs.

The problems identified in the findings above paint the picture of a rather limited protection of TCEs in general under intellectual property law\(^\text{103}\). Some of the analyzed TCEs can find protection under the relevant intellectual property regimes, but this protection is, however, limited due to the, in some aspects, contradictory nature of the applied intellectual property law and the analyzed forms of TCEs.

The three analyzed forms of TCEs were all concluded to fall under the subject matter of protection in Article 1 (a) of the Draft Provisions. Furthermore, the analyses found that the three TCEs were all in conformity with the three criteria set out in Article 1 (a) (aa), (bb) and (cc). This establishes the presumption of an increased protection of TCEs if the Draft Provisions are eventually adopted.

On the basis of this notion, the discussion will naturally change from a legal framework to one of policy and politics.

5.5. A Question of Policy

In the above, the legal status of TCEs was established inside the scope of this assignment. It was found that protection under the Draft Provisions would likely grant a broader protection of TCEs than the protection identified under the relevant intellectual property regimes. This notion reaches into the political discussions concerning the protection of TCEs, namely whether the present protection under intellectual property law is sufficient or whether further protection is required and desirable. This question is to be answered at the political and, subsequently, the legislative level. The opinions on the topic are multiple and diverse. Simplified it can be submitted that most of the developing countries support the adaption of a binding international treaty and the increased protection of TCEs that would follow with it. On the other hand, a large number of developed countries endorse non-binding instruments concerning TCEs or even the argument that the established protections in intellectual

\(^{103}\) See figure in Annex 3, CM01 Session, Protection of indigenous rights an Increased Need, Annual INTA meeting 2012
property law are sufficient\textsuperscript{104}. In other words, there is a lack of international consensus when choosing the appropriate way forward concerning the protection of TCEs.

This notion is also valid when turning to the work of the IGC under the auspices of WIPO. As mentioned in the introductory section, the IGC is comprised of states, non-governmental organizations and representatives of indigenous and local communities, which entail a high level of diverse opinions and agendas concerning the protection of TCEs. This fact is evidently one of the main hurdles when trying to reach international agreement on the topic. Whether sufficient international consensus will be reached is a question that can only find its answer in the future.

\textbf{5.6. Intermediate Work of the IGC}

As mentioned in the introductory section of this assignment, the Draft Provisions are a work in progress and thus, at least for the time being, under constant modification. The Draft Provisions used in the above analysis are from the 9\textsuperscript{th} session of the IGC\textsuperscript{105}. These provisions were chosen as they were, up until after the commencement of this assignment, the version of the Draft Provisions leading the work of the IGC on TCEs. As changes have been made, however, a brief statement should be made concerning the development culminating in the most recent version of the Draft Provisions. An account will be given of Article 1, as the subject matter of protection is the subject addressed in the assignment.

At the twenty-second session of the IGC held from July 9 to 13 2012, the agenda was the Draft Provisions for the Protection of TCEs\textsuperscript{106}. The Draft Provisions were modified, but are primarily built on the same skeleton as the Draft Provisions applied in this assignment. In order to outline the Draft Provisions from the twenty-second session, starting point will be taken in the facilitator’s comments to the newest version\textsuperscript{107}. The facilitator indicated six changes found in the new version of Article 1 in the Draft Provisions. Firstly, two subheadings – definition of TCEs and criteria of eligibility - have been added to achieve some structural consistency with the draft text concerning TK. Secondly, disagreement concerning the indication of examples in the definition of TCEs and the wording of the criteria for eligibility has been shown by placing these in square brackets. Thirdly, the concept of passing TCEs from generation to generation has been included in the proposed definition of TCEs.

\textsuperscript{104} Tshimanga Kongolo, Unsettled International Intellectual Property Issues, page 58
\textsuperscript{105} WIPO/GRTKF/IC/9/4
\textsuperscript{106} WIPO/GRTKF/IC/22/4
\textsuperscript{107} Ibid., page 18
Fourthly, a number of matters have been added to the definition of TCEs due to submissions during the twenty-second session. These additions include added examples to the subject matter and clarification of the concept of “generation to generation”. Fifthly, a delegation proposed the referral of adaptations in relation to each category of TCEs. This is reflected in the new sub-paragraph in Article 1 (e). Lastly, changes have been made to paragraph 3 concerning the determination of the subject matter in the context of national and, when applicable, regional law. Outside these changes, the facilitator identified a number of outstanding issues on which the IGC was not able to reach agreement. These include substantive issues such as the definition of TCEs and the level of referral to TK in this definition.

The changes do alter the analytical findings concerning the applicability of the three analyzed TCEs to the Draft Provisions. The subject matter of protection has not been modified in a way that could cause the omission of the TCEs analyzed in this assignment. Furthermore, the changes made to the criteria denoting TCEs eligible for protection seem unlikely to exclude the three TCEs applied here from protection.

The above issues highlight the fact that the Draft Provisions are indeed a work in progress. Many of the changes are set in square brackets to indicate that they are proposals and thus under consideration and discussion. Moreover, a number of issues are identified as being unsolved due to disagreement in the IGC. A tendency can be identified in the fact that assimilation with the draft text for TK is sought in order to streamline the different legal instruments under work at the IGC. This tendency is in conformity with the fact that many traditional groups and communities view TCEs, TK and GR as part of a single integrated heritage and thus inter-connected. When comparing the version of the Draft Provisions utilized in this assignment to the most recent version accounted for in the above, it becomes evident that much ground has to be covered before reaching agreement of a definitive version of the Draft Provisions that could be passed on to the WIPO General Assembly for adoption. Whether the result will amount to a legally binding international treaty is up to the parties to WIPO.

Part VI, Abstract, Bibliography and Annexes

6.1. Abstract
This assignment seeks to shed light on the protection of Traditional Cultural Expressions (TCEs). This is done through a parallel analysis of intellectual property law and the Draft Provisions of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). A definition of TCs is offered followed by a statement of the relevant intellectual property law, being copyright and trademark law. Thereafter, three different forms of TCEs are analyzed in the context of the relevant intellectual property regime and in the context of the Draft Provisions. The three different forms of TCEs were chosen in order to assess the protection of TCEs from as wide an angle as possible.

First a TCE in the form of the song “Rorogwela” is analyzed. It is established that authors’ rights are only available for tradition-based TCEs, whereas TCEs stricto sensu are ineligible for protection. Furthermore, neighboring rights’ are found to be applicable concerning the phonogram producer and the performer of the song.

Secondly, the Inukshuk figure is applied to trademark law and the Draft Provisions. It is established that the Inukshuk is indeed eligible for trademark protection. This protection is, however, limited due to a number of problematic issues indentified in the analysis.

Lastly, the myths and legends of the Quileute tribe are analyzed in order to assess the potential protection of TCEs from a third and different point of view. The conclusion is reached that the myths and legends cannot find protection under copyright law.

Each of the three analyzed forms of TCEs is found to be protectable under the subject matter of protection set out in article 1(a) of the Draft provisions, as well as being in compliance with the criteria denoting TCEs eligible for protection in Article 1 (a) (aa), (bb) and (cc).

On the basis of the findings in the analytical section of the assignment, the legal status of TCs is assessed. The level of conclusion to be reached is proportional to the number of analyzed TCEs as well as the level of intellectual property law applied. It has been established that TCEs can indeed find some protection under intellectual property law. This protection is, however, limited due to the contradictory nature of the applied intellectual property law and the analyzed forms of TCEs.

The identification of an increased protection under the Draft Provisions leads to the conclusion that the choice of increasing the protection of TCEs is to be found at the political and subsequently the legislative level.
6.2. Bibliography

Books:


Jens Schovsbo: Immaterialret, 2011

Knud Wallberg, Varemærkeret, 2008

Peter Schønning, Ophavsretsloven med Kommentarer, 2008


Articles etc:

WIPO: Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of folklore

Steven Palethorpe and Stefaan Verhulst: Report on the International Protection of Expressions of Folklore under Intellectual Property Law

Dr. Silke von Lewinski: The Protection of Folklore

Steven Feld: “A sweet Lullaby for World Music”

Anthony Taubman: Traditional Knowledge, Traditional Creativity and Cultural Expressions: What role for IP?

WIPO booklet nr 1: Intellectual Property and Traditional Cultural Expressions/Folklore

WIPO booklet nr 2: Intellectual Property and Traditional Knowledge

Websites:

www.wipo.int

www.nir.nu

www.eur-lex.europe.eu

www.jipitec.eu
The “Rorogwela” https://www.youtube.com/watch?v=Vjw3ArRn2ck

The “Sweet Lullaby” https://www.youtube.com/watch?v=tPPsS4-Dsxg
6.3. Annexes 1 -3

Annex 1:
Annex 2:

CANADIAN TRADE-MARK DATA: 0916711 - Canadian Trade-marks Database - C... Side 1 of 2

Canadian Intellectual Property Office
An Agency of Industry Canada

Canadian Trade-marks Database

CANADIAN TRADE-MARK DATA

Search Page

*** Note Data on trademarks is shown in the official language in which it was submitted.

The database was last updated on: 2012-12-18

APPLICATION NUMBER:
0916711
Subparagraph 9(1)(n)(iii)

STATUS:
ADVERTISED
FILED:
2005-04-25
FORMALIZED:
2005-07-18
ADVERTISED:
2005-09-07

APPLICANT:
VANCOUVER ORGANIZING COMMITTEE FOR THE 2010 OLYMPIC AND PARALYMPIC WINTER GAMES - COMITE D'ORGANISATION DES JEUX OLYMPIQUES ET PARALYMPIQUES D'HIVER DE 2010 À VANCOUVER
Suite 400 - 1095 West Pender Street
Vancouver
V6E 2M6
BRITISH COLUMBIA

REPRESENTATIVE FOR SERVICE:
CANADIAN OLYMPIC COMMITTEE
21 ST. CLAIR AVE. E., SUITE 900
TORONTO
ONTARIO M4T 1L9

PROHIBITED MARK: OFFICIAL MARK:

Mark Descriptive Reference:
Inukshuk and Rings & Design

VIENNA INFORMATION:

VIENNA INFORMATION

Code Description
22.5.105 Sculptures representing human beings
22.5.135 Sculptures representing a man
7.5.51 Inukshuk
7.5.25 Other monuments
2.1.25 Other men
2.1.23 Men stylized
2.9.6 Lips, mouths, tongues
6.1.1 Crags, rocks, walls of rocks -- Note: Not including reeds (6.3.1).
26.1.1 Circles
26.1.6 Several circles or ellipses, juxtaposed, tangential or intersecting
29.1.3 Green
29.1.4 Blue
29.1.1 Red, pink, orange
29.1.2 Yellow, gold
29.1.8 Black

COLOUR CLAIM:
Colour is claimed a feature of the official mark. The picture depicts a drawing of an inukshuk. The top square with a triangular opening on the right hand side of the square that forms the head of the inukshuk is green. The log shape that forms the shoulders of the inukshuk is navy blue. The centerpiece that forms the torso of the inukshuk is dusty blue. The quadrilateral that forms the left leg of the inukshuk is red. The quadrilateral that forms the right leg of the inukshuk is yellow. The rings on the top row from the left to right are in dusty blue, black and red. The rings on the bottom row from left to right are yellow and green.

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Canadian Intellectual Property Office  
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Canadian Trade-marks Database  

CANADIAN TRADE-MARK DATA  

Search Page  

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2005-09-07  

APPLICANT:  
VANCOUVER ORGANIZING COMMITTEE FOR THE 2010 OLYMPIC AND PARALYMPIC WINTER GAMES - COMITE D'ORGANISATION DES JEUX OLYMPIQUES ET PARALYMPIQUES D'HIVER DE 2010 A VANCOUVER  
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REPRESENTATIVE FOR SERVICE:  
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21 ST. CLAIR AVE. E., SUITE 900  
TORONTO  
ONTARIO  
M4T 1L9  

PROHIBITED MARK; OFFICIAL MARK:  

vancouver 2010  

MARK DESCRIPTIVE REFERENCE:  
Inuksuk VANCOUVER 2010 & Design  

http://www.cipo.ic.gc.ca/app/opic-cipo/trdmarkInfo/setvwTmInfo.do?lang=eng&status...  
20-12-2012
INDEX HEADINGS:
VANCOUVER 2010

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Annex 3: