

Volume 6, Issue 3, August 2009

Protecting the Traditions of the Maroons and Rastafari: An Analysis of the Adequacy of the Intellectual Property Laws of Jamaica and Proposals for Reform

Marcus Goffe *

Abstract

The Maroon and Rastafari peoples, two communities with significant similarities and differences, are increasingly making demands for recognition of cultural and intellectual property rights from the Government of Jamaica (GOJ). In doing so, they seek to effectively manage and control the commercialisation and commodification of their respective cultures by members and non-members of their communities, both nationally and internationally. The GOJ and some citizens as well as non-Jamaicans view the respective cultural heritages of these communities as a part of the wider cultural diversity and heritage of Jamaica, to be controlled and managed by the GOJ.

Part I of this Article attempts to define 'indigenous people'. It asks in particular whether Maroons and Rastafari are indigenous peoples and/or entitled to the rights of indigenous people.

Part II of the Article seeks to identify the traditional knowledge (TK) and traditional cultural expressions (TCEs) possessed by the Maroons and Rastafari and asks who owns them. Secondly, it asks whether and on what basis those resources need to be protected. Why is protection necessary and against what?

Part III of the Article assesses whether TK and TCEs can be adequately protected by existing Jamaican intellectual property laws. It also examines whether the amendment of those laws and/or policies of the GOJ is necessary in order to achieve adequate protection of the cultural resources of the Maroons and Rastafari.

The Article concludes with a look at ongoing deliberations within the World Intellectual Property Organization (WIPO) Intergovernmental Committee on

* PhD Researcher, Queen Mary, University of London.

Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), and suggests international treaty provisions for the adequate protection of TK and TCEs.

DOI: 10.2966/scrip.060309.575



© Marcus Goffe 2009. This work is licensed under a [Creative Commons Licence](#). Please click on the link to read the terms and conditions.

1. Part I: Law and Community

Community is the foundation of all law: the fundamental aim [*objet d'être*] and purpose [*raison d'être*] of law. Fundamentally, law provides rules and regulations that balance the rights and obligations of individuals in relation to one another and vis-à-vis the community as a whole, which may be local or municipal, national, regional or international. International and regional communities include, for example, the United Nations, European Community, Andean Community, African Union, and the Caribbean Community (CARICOM), all of which are comprised of smaller nation states or communities.

The general principle is that law is made by the community, for the community. The community may elect or select government representatives (whether by monarchical, autocratic, democratic, socialist or communist means) and the government asserts its authority on behalf of all of the people. Where smaller or submissive communities are contained within or subsumed by greater communities, however, the laws of the greater community will, in cases of conflict, prevail. In cases of colonies, the smaller community may be totally subject to the laws of the greater.

*Traditional and Indigenous communities must nevertheless be understood as distinct from other "communities," which are drawn together as a "collective" in response to a feature in common. In contrast, traditional communities inhere in the prior stability of ancestral tradition, and the responsibility to narrate tradition and therefore the "self"-expression of community according to shared "values."*¹

1.1. Customary Law

Custom has long been a recognised source of law in both national and international legal systems. In contrast to systems based largely on express statutory or treaty law, customary law is predominant - often the only source of law - in indigenous and traditional communities. As the fundamental legal basis for these communities, custom often serves to define rights and obligations of its members regarding life, land, family, religion, culture and traditions. Maintenance and respect for customary law is therefore vital to the preservation and development of the cultural and spiritual life and heritage of such communities; indeed it is vital to their very identity. Key to the protection of community traditions, therefore, is continuity of and compliance with customary law, protocols and practices of the community, both within the community and external to it.

¹ J Gibson, *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge* (Aldershot: Ashgate Publishing, 2005), at 32.

1.2. Can IP adequately protect TK and TCEs?

Two bases for justification of intellectual property (IP) are (1) ethical and moral arguments – that intellectual property rights (IPR) protect natural or human rights over the fruits of one’s labour; and (2) incentive arguments – that IPR provide incentives to creativity, labour, public-interest disclosure of inventions, investment and quality of goods/services, through competition. The protection of Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs) shares with IP the ethical and moral rationale, but in other ways is distinctly different: it includes the preservation and safeguarding of culture against misappropriation, including unauthorised commercial or derogatory use, and may prevent others from acquiring IP rights over knowledge and culture. In contrast to the incentive-exchange rationale for limiting the term of IPR protection, the inter-generational nature and purpose of TK and TCEs renders limited protection insufficient. Although IP and TK/TCEs are similar in that they are both intangible creations of the mind, they nonetheless present a clash of cultures. The question is whether, while deserving of protection, TK and TCEs can be adequately protected by IPR.

1.3. Indigenous vs Traditional (Non-Indigenous)

It is conventionally understood that “while Indigenous knowledge may be traditional knowledge, traditional knowledge is not necessarily Indigenous”.² In other words, indigenous communities may be traditional communities, but not all traditional communities are indigenous. This is because the term “indigenous peoples” has been defined to relate to the original people of the land before colonisation.

A working definition of “indigenous communities, peoples and nations” that is generally accepted at the United Nations level is:

[T]hose which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct³ from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.⁴

This definition emphasises pre-invasion continuity and self-identification, recognising that while indigenous peoples share in common certain characteristics or features, they also represent a variety of realities and idiosyncrasies that may differ

² *Ibid*, 22.

³ Emphasis added.

⁴ Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities in the *Study on the Problem of Discrimination against Indigenous Populations* (1986) (UN Doc. E/CN.4/Sub.2/1986/7/Add 4).

significantly from each other.⁵ There is no universally accepted definition that incorporates all possible criteria,⁶ and the international preference is therefore to accommodate “the distinctive idiosyncrasy of each community concerned”.⁷ Thus, “[c]ommunity in any one instance will be established on a ‘case by case’ basis.”⁸

Individual self-identification as a member of an indigenous community⁹ is as important as the recognition and acceptance of that person as a member of the community.¹⁰ The principle of self-identification - the right of indigenous peoples to define what and who is indigenous - is also recognised in the ILO Convention on Indigenous and Tribal Peoples in Independent Countries¹¹ as fundamental to determining “indigenous and tribal peoples”. Self-identification is the only definitive criterion for indigeneity, because “[t]o presuppose knowledge of the particular ‘community’ or even appropriate criteria would be fundamentally unjust.”¹²

Nonetheless, it has been argued that, for practical purposes, a general definition of “indigenous peoples” is “necessary and opportune, as it attracts certain essential prerogatives and rights under international law and...a concept of great normative power for many relatively powerless groups that have suffered grievous abuses”.¹³ The test of indigeneity, therefore, comprises both subjective and objective criteria, including the following (objective) indices: occupation of ancestral lands since before invasion by colonial powers; common ancestry with original occupants of such lands; historical continuity of land occupation; preservation of a peculiar culture, religion and/or language; preservation of a distinctive system of government and social institutions based on customary law; and the intent to develop and transmit ancestral lands and cultural identity as distinctive peoples, to future generations.¹⁴ This list itself contemplates that the criterion of historical continuity in the occupation of ancestral lands is met if “the community concerned was forced to leave its ancestral lands as the result of forcible imposition by foreign occupants and continued to claim its property of them”.¹⁵

Inherent in international law is the entitlement of displaced persons to the continuity of pre-displacement tradition that is not to be lost “through loss of place due to

⁵ F Lenzerini, “The Status of Indigenous Peoples in International Law” in F Lenzerini (ed), *Reparations for Indigenous Peoples* (Oxford: OUP, 2008), at 75.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ J Gibson, see note 1 above, at 42.

⁹ Report of the Special Rapporteur, see note 4 above, at para 379, cited in Lenzerini, see note 5 above, at 75.

¹⁰ Report of the Special Rapporteur, see note 4 above, at para 369.

¹¹ International Labour Organization (ILO), *Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries*, Art 1 (in force since 5 September 1991).

¹² J Gibson, see note 1 above, at 42.

¹³ F Lenzerini, see note 5 above, at 75.

¹⁴ *Ibid.*, 76.

¹⁵ *Ibid.*

processes of colonialism, dispersal, and alienation”,¹⁶ or due to the “processes” of slavery. The forced displacement of Africans to the West, for example, does not prevent them and their descendants from claiming to be “indigenous” Africans,¹⁷ as a physical connection to the original land is not a pre-condition for community.¹⁸ In a very real sense, displaced Africans and their descendants are therefore entitled to claim indigeneity, and the benefit of evolving international law regarding the rights of indigenous peoples.

1.4. The Commonalities of Indigenous Peoples in Africa, Asia, America, Australia and Europe

The history of oppression, genocide, colonialism, ethnocide and “econocide” is similar for all indigenous peoples - whether African, Asian, Australian, European or American (“First Nations”). It is characterised by “doctrines of discovery, conquest and *terra nullius*, as well as by the idea that such ‘barbarous communities’ had to be moved from the darkness of savagery and pagan beliefs, to the enlightenment of civilization and Christian religion.”¹⁹ Historically, Western nations accepted white supremacy and used it to legitimise barbarity toward exotic dark skinned peoples during the European expansionism that engulfed North, Central and South America, Australia and Africa. The pretext of a “civilizing mission” was commonly used to pillage, plunder, claim and steal the traditional lands, resources, knowledge, beliefs and cultures of the invaded. “This genocidal approach led to the physical annihilation of many indigenous communities, while others were drastically reduced in size and power, facing their own cultural extinction.”²⁰

Given the similarities between 15th century European invasions and conquests of traditional Amerindian and African communities, and the displacement of both types of communities by colonialism, it is difficult to understand the machinations of 400 years of European expansionism that resulted in the Triangular Trade in African slaves. Following Columbus’ “discovery” of the “New World”, the European powers invaded, slaughtered and exploited the so-called native Amerindians to claim and clear this “new” world for themselves.²¹ They then invaded communities in Africa, captured and enslaved Africans, exported them as human chattels to this “new” world to “develop” industry on the basis of slave labour and, in the process, accumulated great wealth to sustain their European economies for centuries thereafter. The

¹⁶ J Gibson, see note 1 above, at 24.

¹⁷ “All Black Africans regard themselves as ‘indigenous’”: R Barsh, “Who is ‘Indigenous’? A Survey of State Practice” in D Dorey and J Magnet (eds), *Aboriginal Rights Litigation* (Markham, Ontario: LexisNexis Butterworths, 2003), 93-119, at 107.

¹⁸ *Ibid*, 22.

¹⁹ F Lenzerini, see note 5 above, at 78.

²⁰ *Ibid*, 79.

²¹ G Torres, “Indigenous Peoples, Afro-Indigenous Peoples and Reparations”, in F Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford: OUP, 2008) 117-142, at 118.

consequences for the indigenous communities on opposite sides of the Atlantic were horrific, characterised by attempted genocide and loss of community resources, including land, culture and identity.²²

1.5. Misappropriation and Exploitation

The result is that today, many such communities are dependent on governments, having been robbed of their traditional lands and resources, way of life and dignity, and denied basic human rights to equal opportunities for individual and community development. “Governments...rather than working to recreate the requisite conditions to allow indigenous peoples to pursue and realize their expectations, prefer to increase the dependency of such communities on the way in which state institutions manage their affairs.”²³ This approach has been criticised as relegating indigenous and traditional communities to “an element of folklore” used by national governments to attract tourists and income.²⁴

Over time, indigenous knowledge and culture have moved from being looked down upon as uncivilised and uncultured to being revered and copied as culturally rich and exotic. The increase in awareness and appreciation of cultural diversity over the past century has witnessed an increase in value attached to traditional knowledge and cultural expressions by persons outside of these communities. Increasingly clashes have occurred between tradition or customary law of these communities and the national laws of the post-colonial states in which they are situated.

Such clashes, which have been numerous and problematic, focus on issues that range from language, cultural appearances, practices and religion, to ownership of land and its resources. They have often resulted in discrimination against indigenous and “minority communities” and prejudice in schools, employment, development and in society in general. During the 20th century, indigenous and minority communities became a subject of scrutiny by international organisations such as the United Nations, resulting in a number of international consultations and initiatives aimed at protecting individuality, freedoms and the right to self-determination of such communities.

The shift from international paternalism to self-determination was a major step for indigenous and traditional communities. In 2007, the United Nations *Declaration on the Rights of Indigenous Peoples* became a landmark in international law and a welcome instrument in the fight against inequality, racism and injustice for those communities recognised or self-identified as indigenous, and thus entitled to enjoy the benefits of its protection.

²² *Ibid*, 118.

²³ F Lenzerini, see note 5 above, at 81.

²⁴ *Ibid*, 82.

1.6. Rights of Displaced Persons and Rights of Minorities

The issue with respect to the rights of displaced persons is the extent to which they are entitled to claim and protect their traditional cultural heritage. There are several bases on which displaced Africans and their descendants, for example, can claim a right to protect their cultural heritage, traditional knowledge and traditional cultural expressions against misappropriation. These are (1) rights of indigenous peoples (discussed above), (2) rights of traditional communities (also discussed above), (3) rights of displaced persons and (4) rights of minorities (both to be discussed below).

The rights of displaced persons are clearly recognised in international law and include rights to nationality, to return to their homes, to life, freedom of expression, opinion and religion and of non-discrimination.²⁵ Although these rights apply to displacement in three main situations: (1) tensions and disturbances, (2) non-international armed conflict, and (3) inter-state wars,²⁶ there is no reason why they ought not to apply to forcible displacement by slavery, which could properly be characterised as displacement during armed conflict or war in Africa. Further, “displacement is prohibited when based on apartheid, ethnic cleansing or similar practices aimed at or resulting in altering the ethnic, religious or racial composition of the affected population”,²⁷ a prohibition into which slavery fits squarely. The rights of displaced Africans would therefore include the right to reclaim and protect their traditional cultural heritage.

In most countries outside of Africa, the descendants of Africans are minorities. Despite considerable effort to interpret the rights of minorities synonymously with those of indigenous peoples, there are distinct differences, according to customary international law, between them.²⁸ Although indigenous peoples are usually minorities, minorities are not always indigenous.²⁹ Definitions of “indigenous” can

²⁵ AF Bayefsky and J Fitzpatrick (eds), *Human Rights and Forced Displacement*, (The Hague: Martinus Nijhoff Publishers, 2000), at 14.

²⁶ *Ibid.*, 79.

²⁷ *Ibid.*

²⁸ The 1992 UN *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* affirms the rights of minorities, individually and in community with other members of their group, to enjoy their own culture and practise their own religion without discrimination, but is not as extensive as either the 1989 ILO *Convention concerning Indigenous and Tribal peoples in Independent Countries*, nor the 2007 UN *Declaration on the Rights of Indigenous Peoples*, regarding the right to retain their own customs and institutions, right to traditional lands and resources, right to self-determination and right to control and protect cultural heritage, traditional knowledge and traditional cultural expressions. Furthermore, whereas the rights of minorities are subject to national law and sovereignty, the right to self-determination of indigenous peoples is subject only to limitations “strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society”, a seemingly higher standard.

²⁹ P Justino and J Litchfield, *Economic Exclusion and Discrimination: The Experiences of Minorities and Indigenous Peoples*, Minority Rights Group International, UK, 2003, at 4 available at www.mrg.webbler.co.uk (accessed 18 November 2009).

nonetheless be fluid,³⁰ especially as self-identification is determinative of indigeneity in international law.³¹

Since the 1919 Paris Peace Conference, there have been “repeated attempts to define ‘peoples’ and ‘minorities’ as two separate and distinct concepts...because only ‘peoples’ are entitled to self-determination.”³² This approach is evident in the *International Covenant on Civil and Political Rights 1966* and the *International Covenant on Economic, Social and Cultural Rights 1966*.³³ In relation to culture and cultural expression there is no such distinction, as both “peoples” and “minorities” have the right to “pursue” or “enjoy” their culture. This has led to the view that minorities too might have a right to internal self-determination, particularly in respect of cultural and economic development, and that “the UN Minorities Declaration arguably lends support’ for this argument.³⁴ The right to self-determination, although in practice interpreted mainly in political terms,³⁵ may therefore provide minorities with a right to own, control and protect their TK and TCEs against use by others. A right to external (political) self-determination of minorities in certain circumstances was also recognised by the UN Working Group on Minorities in its 2005 Commentary.³⁶

Despite the absence of an internationally accepted definition of “minorities”, there are several that do not differ significantly from those of “nation” or “nationality”.³⁷ The Permanent Court of Justice in the *Greco-Bulgarian Communities* case³⁸ defined a “community” as a minority group “having a race, religion, language and traditions in a sentiment of solidarity, with a view to preserving the traditions” of the group.³⁹ The Sub-Commission on the Prevention of Discrimination and protection of Minorities defined “minorities” as “non-dominant groups in the population which possess and wish to preserve ethnic, religious or linguistic traditions or characteristics markedly

³⁰ G Torres, see note 21 above, at 125.

³¹ *Ibid*, 126. Also 1989 *ILO Convention*, see note 28 above, Article 1.

³² T Musgrave, *Self Determination and National Minorities* (Oxford: Oxford University Press, 2002), at 167. The classification of “minorities” was “an attempt by the Allies to prevent those ethnic groups which had been separated from their respective nation-states as a result of the Conference from claiming a right to self-determination by categorizing them as minorities”, at 167.

³³ *ICCPR*, Art 1 and *ICESCR*, Art 1 grant peoples the right of self-determination to “freely determine their political status and freely pursue their economic, social and cultural development” but *ICCPR*, Art 27 merely protects the right of minorities “to enjoy their own culture, to profess and practise their own religion, or to use their own language” and *ICESCR*, Art 25 “the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources”.

³⁴ A Vrdoljak, “Self-Determination and Cultural Rights”, in F Francioni and M Scheinin (eds), *Cultural Human Rights* (The Hague: Martinus Nijhoff Publishers, 2008) 41-78, at 66.

³⁵ Meaning right to determine political status. Musgrave, see note 31 above, at 168.

³⁶ A Vrdoljak, see note 34 above, at 67.

³⁷ T Musgrave, see note 32 above, at 168.

³⁸ (1930) PCIJ Reports, Series B, No 17, 4.

³⁹ T Musgrave, see note 32 above, at 52.

different from those of the rest of the population.”⁴⁰ The meaning of the term has come to be based not necessarily on race, but on “ethnic, religious or linguistic traditions”.

It has however been long recognized that, substantially and ultimately:

*These features of the definition of a minority are precisely those which define a nation. The definitions of both a minority and a nation enumerate objective criteria to identify and define the respective groups. Both definitions likewise require that the respective group possess a subjective awareness of, and a desire to maintain, its separate identity. The two definitions are therefore essentially consistent with each other.*⁴¹

The Director of the Minorities Questions Section of the League of Nations reportedly stated that the terms “nationality” and “minority” were “one and the same”, with the primary distinguishing characteristics of language and culture.⁴² Renowned international law scholar Professor Ian Brownlie also concluded that “the heterogeneous terminology... ‘nationalities’, ‘peoples’, ‘minorities’, and ‘indigenous peoples’ involves essentially the same idea”.⁴³ Felix Ermacora writes that both minorities and people occupy specific territory and have distinct cultural or religious characteristics and therefore minorities are peoples, entitled to self-determination.⁴⁴

Although the distinctions between “indigenous peoples”, “nations”, “minorities” and “traditional communities” may be insignificant, the semantic debate is important, because “[i]f Afro-descendants were treated as indigenous peoples they would have claims to resources based on their pre-colonial political existence, rather than basing their claims on differential treatment by the state: i.e. discrimination.”⁴⁵ Nevertheless, international maintenance of the legitimacy of lesser rights for minorities and traditional communities will continue to be an additional legal hurdle for Afro-descendants to overcome in order to access justice, and may force them to legitimate their claims in the face of prevailing narrow definitions.

Recognition of the homogeneity of treatment of “minorities” and “indigenous” peoples in history, present-day circumstances and psychology, and the absence of any basis for distinction between them, is found in the jurisprudence of the Inter-American Court of Human Rights, particularly in respect of the Maroons in Suriname.⁴⁶ The Court clearly established that, even though not indigenous to Suriname (applying the pre-colonial contextual definition), the Maroons in Suriname are entitled to the application of the rights of indigenous peoples, because the

⁴⁰ *Ibid*, 169.

⁴¹ *Ibid*.

⁴² *Ibid*.

⁴³ *Ibid*.

⁴⁴ *Ibid*.

⁴⁵ G Torres, see note 21 above, at 123.

⁴⁶ *Ibid*, 125.

Maroons exhibit ‘distinct social, cultural, and economic characteristics including a special relationship’ with their ancestral or communal territories, which ‘they have traditionally used and occupied, derived from their longstanding use and occupation of the land and resources necessary for their physical and cultural survival. Thus, international classifications and definitions can, rightly, be liberally and fundamentally interpreted, recognising that it is tradition, and the narration of community identity, that ultimately inform the legitimacy of claims for protection for community resources, including TK and TCEs.⁴⁷

2. Part II: Indigenous/Traditional Communities in Jamaica

2.1. The Tainos

It has for centuries been taught that in 1494 Jamaica was discovered by Christopher Columbus on behalf of the Spanish Government, who had sponsored him as an explorer to make conquests in the New World for the Spanish Empire. The Tainos, however, discovered Jamaica before Columbus. The Tainos community was one of several related tribes (including the Ciboneys, Igueri, Ciguayes, and Caribs) that originated in Asia before moving westward to North America and south to Central America, the Caribbean and South America.⁴⁸ Columbus referred to the natives he saw as “Indians” as he had set out to find the Asian East Indies, and erroneously thought that he had achieved this goal. The history of the Tainos raises the question of indigeneity, for these and other “native” American Indians are generally considered indigenous to the Americas, yet even they did not originate there. Little is known of the inhabitants, if any, of the “Americas”.

The Spanish Government of Jamaica instituted the Repartimiento system, giving full control of the Tainos to the Spanish settlers, who subjected the Tainos to enslavement⁴⁹ on Spanish ranches to produce cassava and other crops.⁵⁰ By 1655, when the British “invaded” and claimed Jamaica, it is said that the Tainos had been decimated⁵¹ by exploitation, malnutrition and disease and the Spanish had begun importing Africans to work their plantations. In 1655, after the Spanish had abandoned Jamaica, the British laid claim to the country, and shortly thereafter instituted slavery and established the sugar plantation economy and society.

2.2. The Maroons as Displaced African communities

The question of ethnicity and distinctiveness of Afro-descendants has been no less applied to the Maroons. Beverly Carey writes that the term “Maroon” was first

⁴⁷ J Gibson, see note 1 above, at 28.

⁴⁸ B Carey, *The Maroon Story: The Authentic and Original History of the Maroons in the History of Jamaica, 1490 – 1880* (Agouti Press: Gordon Town, Jamaica, 1997), at 1.

⁴⁹ *Ibid*, 35.

⁵⁰ *Ibid*, 32.

⁵¹ See M Campbell, *The Maroons of Jamaica: 1655-1796* (New Jersey: Africa World Press, 1990), at 9. According to a 1611 census, there were only 74 Arawaks on the island at the time.

applied to the Jamaican Maroons, but that since the 1970s, the term has been adopted “as a generic term to apply to the groups of persons resisting plantation slavery in the Caribbean and on the American continent.”⁵² The term has been used repeatedly to refer to “runaway slaves” from the plantations, but the Maroons have asserted consistently that the first Maroons in Jamaica were free Africans.

The main influences on traditional Maroon societies are unequivocally African. All Maroon communities were based on African socio-political and military formations, with creative adaptations to suit conditions in the New World. This is not to imply that each was built on a homogeneous African culture block, but they were not European based.⁵³ Maroon leaders were predominantly from the Akan (present-day Ghana) communities of western Africa,⁵⁴ who were enslaved by the British and forcefully displaced into Jamaica during the 18th century, at the height of British activity on the Gold Coast.⁵⁵ While the “rank-and-file members” may not have been Akan, “there appears to have existed a kind of Africanness that transcended regionalism, ethnic or linguistic affinities, on which these Maroons based their existence.”⁵⁶

Carey states that “[t]he Maroons are a society with a government, a tradition and a culture.”⁵⁷ The question is whose government, whose tradition and whose culture is it? Who owns the community resources of the Maroons? The question may thus be posed, “who owns and thus has the right to represent, the Maroon past”⁵⁸ and present? Increasingly over the years, it has been opined that “the strength and spirit of the Maroons are no longer the[ir] exclusive property; they belong to all Jamaica.”⁵⁹ “Some Jamaicans believe that Maroons hold this cultural wealth in trust for the larger Jamaican nation”,⁶⁰ while others express the view that “all of ‘us’ (Jamaicans) are Maroons”,⁶¹ implying that Maroons are no different from other Jamaicans of African descent.⁶² To assess the legitimacy of this perspective, one must look at Maroon traditions.

2.2.1. *Maroon Traditional Herbal Medicine*

Regarding the traditional herbal medicine of “First Time” Maroons, Colonel Wallace G. Sterling, Leader of the Windward Maroons explains:

⁵² B Carey, see note 48 above, at vii.

⁵³ M Campbell, see note 51 above, at 3.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, 16.

⁵⁶ *Ibid.*, 3.

⁵⁷ *Ibid.*, vii.

⁵⁸ KM Bilby, *True Born Maroons* (Gainesville: University Press of Florida, 2005), at 40.

⁵⁹ C Robinson, *The Fighting Maroons of Jamaica* (Kingston: Collins and Sangster, 1969), at 156.

⁶⁰ KM Bilby, see note 58 above, at 34.

⁶¹ *Ibid.*, 46.

⁶² Jamaicans of African descent account for approximately 99% of the Jamaican population. See Carey, note 48 above, at ix.

*The African slaves who w(h)ere taken from their African homeland arrived in Jamaica with only the traditional knowledge that they had acquired through the ages. They were very familiar with the medicinal usage of herbs, plants and fruits that grew in motherland Africa. When they arrived to the West Indies, they found the same kinds of herbs, plants and fruit useful for medicine growing in abundance...During the days of slavery and for sometime thereafter, the traditional knowledge of how to use these herbs played a vital role in the life of the Maroon communities. At that time in history, there was not easy access to medical doctors, therefore the medicine man or “bush doctor” was the person who continued African traditions.*⁶³

Traditionally, herbal medicine was practised by all Maroon families, who through oral training and custom learned the different bushes for various ailments including fever, sleeplessness, stomach problems, back ache, inflammation, coughs, eye infections and infertility.⁶⁴

Although the Maroons today continue to use herbal remedies inherited from their forefathers, Colonel Sterling notes that “much of the traditional knowledge we possess is now common shared knowledge to others”. This raises the issue as to whether the knowledge is now part of the public domain; it seems that the Colonel has accepted that it is. Whether or not it was previously public, a collaborative project resulting in development of a database in the form of an e-book, firmly places some aspects of Maroon traditional knowledge in the public domain. The “collaborative project between the Windward Maroon Community, the Portland Environmental Protection Association (PEPA) and Centre for International Ethnomedicinal Education and Research (CIEER)” was “funded by [USAID](#), [PEPA](#), [CIEER](#), and the [US Peace Corps](#)”. Although publicising only “a small fraction” of the traditional herbal knowledge of the Windward Maroons, the publication details names of 85 plant species traditionally used by Maroon healers in Portland, Jamaica. There are reported to be about 3,300 species of flowering plants alone, 923 (28%) of which are endemic to Jamaica.⁶⁵

According to the website of the project⁶⁶, with its motto of “archiving traditional knowledge worldwide”,⁶⁷ the indigenous population of Jamaica is 10,830 sq km

⁶³ WG Sterling, “Preface”, in S Austin and MB Thomas, *Common Medicinal Plants for Portland, Jamaica* (2003, available at http://www.cieer.org/geirs/regions/carib/jam/p_antonio/preface.pdf; <http://www.maroonmedicine.com> (accessed 17 August 2008).

⁶⁴ B Carey, see note 48 above, at 178, 180.

⁶⁵ WG Sterling, “Introduction”, in S Austin and MB Thomas, see note 63 above, available at http://www.cieer.org/geirs/regions/carib/jam/p_antonio/preface_forward.pdf (accessed 18 November 2009).

⁶⁶ Website developed under the Global Ethnomedicinal Information Retrieval System (GEIRS) established by the CIEER.

⁶⁷ <http://www.cieer.org/geirs> (accessed 17 August 2008).

(4,181 sq mi.),⁶⁸ expressed, unusually, not in terms of numbers of people, but size of land. The “number of indigenous groups” is, in keeping with the existence of ambiguity and contention regarding such classifications, left blank. As long as such ambiguity continues unresolved, the rights of Maroons will be rendered equally ambiguous and therefore negligible and vulnerable.

The primary purpose of the CIEER⁶⁹ publication was to assist ethno-medicinal research, to preserve the knowledge for future Maroons, and to extend knowledge to the wider Jamaican and global communities. The stated aims and objectives of the project do not include the assisting of indigenous and traditional knowledge holders and communities to protect their knowledge against misappropriation or to ensure that future economic benefits of the research are shared with such communities.⁷⁰ While the importance of research and the sharing of knowledge are not to be ignored, especially in relation to health, there is an urgent need for legal safeguards regarding that knowledge, so that future medicinal or pharmaceutical formulas or products derived from such knowledge are not patented, to the financial and exclusive use of the patent owner and/or without any benefit accruing to the donor community.

Many Maroon healers collect herbs, not only for the healing of their families and communities, but also to produce tonics and other herbal products for the open market. Many ill people, both Jamaican and non-Jamaican, attend Maroon communities in Jamaica from far and wide specifically to partake of their healing powers.⁷¹ Should the publication of this knowledge substantially impair the legitimate market of the Maroons,⁷² it would certainly be a disservice to that community of traditional knowledge holders.

Other knowledge, such as the traditional spiritual medicine of the Maroons, cannot however be written down, but must be experienced in order to be understood sufficiently to be misappropriated. At its highest, Maroon healing does not involve merely herbal remedies, but the interaction of the sick and healers with the spirits of Maroon ancestors.

2.2.2. *Maroon Traditional Spiritual Medicine, Language and Kromanti Play*

Ancient Maroons were reputed to be able to access the memory of the ancestors in order to learn of ancient rituals and herbs used for a variety of illnesses.⁷³ This practise is still evident today. Persons seeking Maroon healing powers must be “tried

⁶⁸ <http://www.maroonmedicine.com> (accessed 17 August 2008).

⁶⁹ CIEER, based in Gainesville, Florida, USA.

⁷⁰ One of the researchers, Summer Austin, is credited however as saying that the proceeds of sale of the publication “Common Medicinal Plants of Portland” will go directly back to the healers. See T Hein, “Safeguarding health and culture: Traditional healers collaborate with scientists to catalogue Maroon medicinal plant use”, *New Agriculturist*, January 2007, <http://www.new-ag.info/07/01/focuson/focuson4.php> (accessed 17 August 2008).

⁷¹ KM Bilby, see note 58 above, at 16.

⁷² Borrowing and adapting the approach to balancing intellectual property rights and limitations and exceptions, as employed in the ‘three step test’, adopted in the TRIPS Agreement.

⁷³ B Carey, see note 49 above, at 179.

and tested” by Maroon spirits possessing living Maroons who wield machetes and burning sticks and curse in the Maroon language of Kromanti, accompanied by chanting and incessant drumming.⁷⁴ Only after this frightening ordeal has been unflinchingly endured for an extended period, during which the spirit of the sick person is tested, can the healing take place, aided by the administration of various herbs.⁷⁵ “As in many African ceremonies, the spirit enters” the dancer to give instructions about the “solution to the problem...Under possession, the nature of the malady and the correct antidote will be revealed to the dancer.”⁷⁶

These rites of passage are but one aspect or use of the ceremony called “Kromanti Play”, which is “the most powerful symbolic expression in Maroon life of the cosmological principle that divides inside from outside, and Yenkunkun (Maroon) from Obroni (non-Maroon).”⁷⁷ During times of slavery and colonialism, the Kromanti Play was used to gather Maroons together to celebrate victories over oppressors, or simply as an exclusive social event. It is also “the main ritual for summoning Maroon ancestral spirits to intercede with the Supreme Being ‘Nyangkipong’, or ‘Onyangkopong’, on behalf of living individuals who seek solutions for personal and social problems.”⁷⁸ The ceremony is said to be derived from Myalism, an older form of healing by spirit possession that is not unique to the Maroons, but inherited from African ancestors and practised by other “cults” in Jamaica: the Gumbay, Revivalists and Kumina groups.⁷⁹

In addition to the use of Kromanti referred to above, there are many other uses of the language that are kept secret from outsiders and even from some young Maroons.⁸⁰ It has been said that the Maroons are the most secretive of all the communities in Jamaica.⁸¹

2.2.3. *Maroon Traditional Instruments, Song and Dance*

The Maroons have traditionally used their drums and a horn known as the “abeng”⁸² to send and receive messages between their communities in different parts of the hills. The abeng was used to signal approaching British soldiers during the years of guerrilla war, as well as to announce deaths and accidents, and for celebration during ceremonial occasions. “The signals reproduce the pitch and rhythmic patterns of a fairly small vocabulary of Twi words from their mother language, in most cases called

⁷⁴ KM Bilby, see note 58 above, at 16.

⁷⁵ *Ibid*, at 17.

⁷⁶ O Lewin, *Rock It Come Over: the Folk Music of Jamaica* (Kingston: University of the West Indies Press, 2000), at 156.

⁷⁷ KM Bilby, see note 58 above, at 17.

⁷⁸ O Lewin, see note 76 above, at 156.

⁷⁹ W Logan and M Whyllie, “Some Aspects of Religious Cult Music in Jamaica” (1982) 10 *The Black Perspective in Music* 85-94, at 85.

⁸⁰ O Lewin, see note 76 above, at 158.

⁸¹ *Ibid*, 157.

⁸² Defined as a cow’s horn with the tip sawn off and blown through a square hole at the concave side (O Lewin, see note 76 above, at 158).

Kromantin (Maroon spelling) after the Ghanaian port from which many slave ancestors were shipped. Older Maroons can decode the signals, but they are not teaching the codes or the language to their descendants whom they dismiss as being ‘too modern’ and therefore ‘don’t care about the old ways.’”⁸³

Lewin, herself an invested Maroon, explains further, “[r]hythmic patterns are effected by tonguing, and variations in pitch are made by altering the position of the thumb on the hole at the small end of the horn.”⁸⁴ She notes further that Maroon drum language is also kept secret from non-Maroons, as to disclose it “would be a serious offence against all living Maroons, and their ancestors whom that language served.”⁸⁵

Maroon drums include the “prenting” and the “goombeh” which, in addition to relaying messages across frontiers, induce trances during which certain Maroons go into a state of Myal and warn of impending attacks.⁸⁶ Both drums are used on religious and secular occasions, complemented by dancing and singing in Kromanti language. The prenting is usually played with sticks called “aboso”, accompanied by the “kwat”, a piece of bamboo that is hit with two sticks, and the “adawo”, a machete beaten with a piece of metal.⁸⁷ The goombeh is a square shaped drum, with a second wooden frame used to tune the drum, under the goat skin. “Goombeh rhythms are quick and sharp, in keeping with the darting, angular dances that they accompany.”⁸⁸ They are augmented by heavy-pulsed patterns played on two cylindrical drums measuring fourteen and sixteen inches respectively in diameter.

In different Maroon communities, the drums may have different names. In Charles Town, the “grandy” drum is used, which is similar to the prenting in Moore Town and the goombeh in Accompong. “These drums are also used in Scott’s Hall though sometimes called “monkey” and “saliman” respectively. In both places the goombeh/saliman is considered male, and the grandy/monkey, female.”⁸⁹ Despite the different names, the rhythms are similar in pattern. There is however a difference in timbre between the prenting and goombeh drums.

How the drums are played varies, depending on the occasion. During festivals, the rhythms are quick and decisive, as are the accompanying dance moves and vocals. Songs and music for secular, social occasions are lighter and are called “salo”, which include Ja-bone, Saleone, Tambu and Ambush. The Maroons also have hundreds of songs for inviting their ancestral spirits to commune. They also have different songs and drum rhythms to be used with each type of medicinal weed for healing.

The Maroons have long complained of misappropriation of their knowledge. During the WIPO Fact Finding Mission to Jamaica in 1999, the Accompong Maroons

⁸³ O Lewin, see note 76 above, at 158.

⁸⁴ *Ibid.*, 159.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, 160.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

complained that researchers from North America had gathered information and samples of Maroon plant genetic resources and subsequently published a book without providing any share of the benefits to the community.⁹⁰ Cultural exploitation is also increasing, as government initiatives claim the Maroons as a national cultural and tourist attraction, and appropriate Maroon culture by various means, such as the filming of music videos in Accompong.⁹¹

2.3. Rastafari as Displaced African communities

Rastafari has been described as “[t]he most modern manifestation of African thought in Jamaica.”⁹² The Rastafari emerged in Jamaica after the November 1930 coronation of Ras Tafari Makonnen as Haile Selassie I, Emperor of Ethiopia, which fulfilled the prophecy of Jamaican prophet and national hero, Marcus Garvey, convenor of the pan-African Universal Negro Improvement Association.⁹³ As African descendants in Jamaica, having endured a century of post-slavery oppression involving cultural, social, political and economic domination, the Rastafari movement was the culmination of a growing yearning for dignity and reconnection with African identity. “As a cultural nationalist movement, Rastafari is an authentic affirmation of the redemptive power at the well-spring of the traditional Africa way of life, in which self-hood/self-reliance, ethno-cultural identity and emancipation from Eurocentric modes of consciousness form the primary focus.”⁹⁴

From inception, the Rastafari adopted the colours of the Imperial Ethiopian flag⁹⁵ and the flag itself, with the Lion of Judah as its centre piece. These are represented on clothing, accessories and home decorations, on drums, walls, paintings and “wherever an opportunity for their use presented itself.”⁹⁶ “The symbols, the drums, herbs, reasoning, singing, chanting, costuming in all its splendour, dance movements, locks and, most of all, the colours of red, green and gold, along with pictures of the Emperor Haile Selassie” have made Rastafari a strong socio-cultural influence in Jamaica from the 1970s.⁹⁷

⁹⁰ WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge: WIPO Report on fact-finding Missions on Intellectual Property and Traditional Knowledge* (1998-1999), at 317.

⁹¹ KM Bilby, see note 58 above, at 40, 432, 433.

⁹² O Lewin, see note 76 above, at 197.

⁹³ The Universal Negro Improvement Association (UNIA) was founded in 1914 and has been referred to as the greatest pan-African organisation the world has ever seen. See <http://www.bbc.co.uk/religion/religions/rastafari/people/marcusgarvey.shtml> (accessed 17 August 2008).

⁹⁴ I Tafari, *Rastafari in Transition: The Politics of Cultural Confrontation in Africa and the Caribbean (1966-1988)* (London/Chicago: Research Associates School Times Publications/Frontline Distribution Int’l, Miguel Lorne Publishers, 2001), at 277. (In July 2008, Dr Ikael Tafari of the University of the West Indies, Barbados, sadly made his transition.)

⁹⁵ O Lewin, see note 76 above, at 197.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, 199.

Largely shunning “Babylon”, the formal Rastafarian economy and society, the cultural contribution of the Rastafari has been “producing art, sculpture, handicrafts, poetry, music and a philosophy which reached well beyond Jamaica’s shores. Even Jamaican speech styles and vocabulary have been affected by Rastafarians in many ways.”⁹⁸ In contrast to the Maroons, who from outward appearances are often indistinguishable from other Jamaicans, “[m]ost Rastafarians are very visible, often wearing the colours red, green and gold, having long matted or braided locks and beards”.⁹⁹

2.3.1. *Rastafari Traditional Music, Instruments and Dance*

Rastafari traditional music or “nyahbinghi” involves the playing of three main types of drums known as “harps” - the Biblical term used throughout the Psalms referring to the instrument of choice of King David - the “bass drum”, the “fundeh” and the “kete” (or “repeater”).¹⁰⁰ The bass drum is the largest of the three and is double-ended, made of “barrel staves, twenty to thirty inches in diameter, and approximately twenty inches long. The goatskin heads at each end are held in place and tuned by means of metal braces and pegs.”¹⁰¹ The bass is balanced on its side, on one thigh or on a stool in front of the drummer, and struck at one end with a single, heavily padded stick, called a “toka”,¹⁰² producing “a deep sonorous tone”.¹⁰³ It keeps time and provides rhythm and depth.¹⁰⁴ The basic rhythm is 4/4.¹⁰⁵

In contrast, the fundeh is much smaller, usually about eight inches in diameter,¹⁰⁶ with a single goatskin head on top. It is either held between the calves of the drummer, barely touching the ground,¹⁰⁷ or is tilted off the ground. It is played with the bare hands by cupping the fingers together to produce a mid-range sound and rhythm.¹⁰⁸ The kete drum, which is the smallest of the three types, is a shorter version of the fundeh, having a single goatskin head and being held in a similar position off the ground.¹⁰⁹ However, unlike the bass and the fundeh, which are played in the centre of the head, the kete is played nearer the rim with open fingertips,¹¹⁰ to produce a wide

⁹⁸ *Ibid*, 200.

⁹⁹ *Ibid*, 200.

¹⁰⁰ W Logan and M Whyllie, see note 79 above, at 85-94; O Lewin, see note 76 above, at 203; K Anbessa-Ebanks, *Rastafari Livity: A Basic Information Text* (London: Kwemara Publications, 2003), at 68.

¹⁰¹ O Lewin, see note 76 above, at 203.

¹⁰² K Anbessa-Ebanks, see note 100 above, at 68.

¹⁰³ O Lewin, see note 76 above, at 203.

¹⁰⁴ K Anbessa-Ebanks, see note 100 above, at 68.

¹⁰⁵ O Lewin, see note 76 above, at 204.

¹⁰⁶ *Ibid*, 204.

¹⁰⁷ *Ibid*, 204.

¹⁰⁸ K Anbessa-Ebanks, see note 100 above, at 68.

¹⁰⁹ O Lewin, see note 76 above, at 204.

¹¹⁰ *Ibid*, 204.

variety of high-range sounds and melody.¹¹¹ These drums are accompanied by other basic instruments including the “shaker” or “shak-shak”,¹¹² which provides percussion that coincides with the rhythm and timing of the fundeh. The tempo or speed of Nyahbinghi drumming is usually medium and regular, in the pattern of the one-two beats of the human heart, inducing calmness and oneness of spirit.¹¹³

Nyahbinghi music is spiritual music, food for the soul,¹¹⁴ usually played at “grounations”, now commonly called Nyahbinghi ceremonies. “The words of Rastafarian songs are always meaningful in terms of doctrine, whether original or based on Western hymns, Negro spirituals or other songs. Tunes are sometimes borrowed, but the Rasta repertoire is full of melodies created by devotees, and improvised chants which take root”,¹¹⁵ many of which are adapted from popular folk, Revival or Anglican tunes. The incorporation of drums into ritual worship is said to have been adapted from Burru,¹¹⁶ another Afro-indigenous cult in Jamaica, and the style of drumming has been referred to as “a decelerated version of Kumina.”¹¹⁷ Nyahbinghi music is nevertheless distinct, with recognizably original elements,¹¹⁸ being “strictly prayer music, inspiring Ivotion to the Most High, Ras Tafari and to the righteous Livivity of I and I.”¹¹⁹

This style of Rastafari music should not be surprising, considering the fused histories and experiences of displaced Africans in Jamaica, searching for space between Africa and Europe on foreign soil.¹²⁰ “The proof that the shape of many of the cultures of the region owes much to its African heritage does not negate the fact that Caribbean civilization is the result of the vigour of the people now calling that space home...continuity and creativity should not be opposed to each other.”¹²¹

Rastafari also “use music and movement as therapy to keep spirits buoyant and cleanse their minds.”¹²² By this is not meant spirits in the spirit world, as in the case of the Maroons, but the human spirit uplifted through drumming and chanting with

¹¹¹ K Anbessa-Ebanks, see note 100 above, at 68.

¹¹² *Ibid*, 69.

¹¹³ *Ibid*.

¹¹⁴ *Ibid*.

¹¹⁵ O Lewin, see note 76 above, at 205.

¹¹⁶ W Logan and M Whyllie, see note 79 above, at 88; O Lewin, see note 76 above, at 201.

¹¹⁷ W Logan and M Whyllie, see note 79 above, at 89.

¹¹⁸ *Ibid*, 90; O Lewin, see note 76 above, at 201.

¹¹⁹ K Anbessa-Ebanks, see note 100 above, at 69. “Ivotion” means “Devotion” and “I and I” means “us all”.

¹²⁰ B Chevannes, *Betwixt and Between: Explorations in an African Caribbean Mindscape* (Kingston: Ian Randle Publishers, 2006), at 29.

¹²¹ *Ibid*, 27. Of this “creativity vs continuity controversy”, Dr Ikael Tafari, see note 94 above, at 92 states, “[t]he Rastaman, as Pan-Caribbean man, mirrors in himself the West Indian mastery of the art of creative co-existence, of living between the frontiers, primarily of the world of Europe and the world of Africa, and still holding his integrity.”

¹²² O Lewin, see note 76 above, at 207.

herbs, for as has been correctly noted, Rastafari do not deal with spirit possession, but oneness with Jah.¹²³ Dr. Lewin recounts her personal experience of a colleague being cured of laryngitis after sipping a Rastafari herbal remedy and less than thirty minutes of Rastafari drumming, chanting and praying.¹²⁴

2.3.2. *Rastafari Traditional Dance*

Of Rastafari dance, Marjorie Whyllie had this to say: “Rastafarian dance is very interesting; I have watched its progress over the years. It started first of all as a sort of improvisatory thing, but it has grown and taken shape and form so that there are steps which are done that can be identified as Rastafarian steps.”¹²⁵ Traditionally, to “dance nyahbinghi” against an oppressor is to invoke the power of God to destroy that person.¹²⁶ On the whole, “Rasta art, and art influenced by Rasta, and Rasta influence on Jamaican popular as well as Jamaica creative dance is nowhere in doubt.”¹²⁷

2.3.3. *Rastafari Language*

Although there is a close relationship between Jamaica Creole and Rastafari language, also known as “Iyoric”,¹²⁸ Rastafari language is “a comparatively recent adjustment of the lexicon of Jamaica Creole to reflect the religious, political and philosophical positions of the believers in Rastafari.”¹²⁹ In 1976, Professor Rex Nettleford of the University of the West Indies, wrote that “[t]he Rastafarians are inventing a language, using existing elements to be sure, but creating a means of communication that would faithfully reflect the specificities of their experience and perception of self, life and the world.”¹³⁰ So popular is Rastafari language in Jamaica, that it has been said that “Jamaica Talk is slowly being colonized by Dread Talk.”¹³¹

Rastafari language stems from Rastafari traditional knowledge that word and sound is power.¹³² The “I” word-sound power, pronounced /ai/, is fundamental to Rastafari language. Many common English and Jamaican “patois” (pronounced /patwa/) words, have the word-sound “I” placed before them, in Rastafari language. There are endless such combinations possible. The more well-known of these include “I-man” meaning “I” or “me”; “I and I” meaning “I” singular or “I” plural; “Incient” meaning

¹²³ W Logan and M Whyllie, see note 79 above, at 91.

¹²⁴ O Lewin, see note 76 above, at 208.

¹²⁵ W Logan and MWhyllie, see note 79 above, at 90.

¹²⁶ B Chevannes, “New Approach to Rastafari” in B Chevannes (ed), *Rastafari and Other African-Caribbean Worldviews*, (Basingstoke/The Hague: Palgrave Macmillan/Institute of Social Studies, 1995) 20-42, at 34.

¹²⁷ V Pollard, *Dread Talk: The Language of Rastafari* (Jamaica: Canoe Press 2000), at 50.

¹²⁸ A term popularised by Farika Birhan.

¹²⁹ V Pollard, see note 127 above, at 18.

¹³⁰ Quoted in *Ibid*, 6.

¹³¹ *Ibid*, 40.

¹³² *Ibid*, 101.

“Ancient”; “Iditate” meaning “meditate”; “Idren” meaning “Bredren”.¹³³ Other more popular Rastafari words are “Ila” meaning “Holy” or “Blessed”, “Iya” meaning “Brother Man”, “Ivine” meaning “Divine”, “I-Majesty” meaning “His Majesty”, “Ras Tafari-I”, and of course “/Ai/-le Selassie I”.

One of the most widely disseminated and commercialised Rastafari words however is even more original – “Irie” meaning “alright”, “feeling good”, or a Rastafari greeting. “Irie” along with Rastafari Reggae music has been used extensively in the media and by the Jamaica Government and others in the tourist industry in the Caribbean, to attract tourists with the feeling of relaxed enjoyment, if not euphoria, to the tropical tourist destinations of the Caribbean. Another Rastafari “I” word which has filtered into wide usage, is “Ital” meaning “vegetarian” or “pure”.

A second category of Rastafari words identified by Pollard includes those before which the sound “Y” is put. These include “Yude” meaning “food”; “Yod” meaning “Trod”. A third category is based on the altering of word-sound to effect different power. Words such as “Downpress” meaning “Oppress” are used, as the English word makes the meaning of the word appear “up”lifting.¹³⁴ Rebuking the “hate” and “death” word-sound powers, the Rastafari “Apprecilove” corresponds to the English “Appreciate” and “Livicate” means “Dedicate”.¹³⁵ Other more distinctive and innovative Rastafari words which do not fit into any of the Pollard categories include: “Livity” meaning “Way of Life”, “Satta” meaning “Relax” or “Keep Calm”, and “Deadahs” meaning “Meat”.¹³⁶

2.3.4. *Dreadlocks*

Professor Chevannes notes that the most outstanding symbol or imagery of the Rastafari is the dreadlocks, “a sacred and inalienable part of his identity.”¹³⁷ The tendency to wear Rastafari-style dreadlocks or “designer Dreads” in popular culture is very apparent in connection with (though by no means limited to) the global reggae industry. The locks image is also used to sell the Caribbean as a tourist destination and to sell trinkets and sometimes derogatory depictions of the Rastaman.

2.3.5. *Reggae*

“Rastafarianism was to become the dominant ideology of Jamaican music in the mid-1970s”.¹³⁸ “The heavy Rasta beat, as much as their philosophy and style of social commentary in the lyrics, led Jamaican pop music from Rock Steady to reggae.”¹³⁹ As Pollard notes, “[r]eggae music...is music written essentially by Rastafari and contains

¹³³ *Ibid.*

¹³⁴ *Ibid.*, 101.

¹³⁵ *Ibid.*, 103.

¹³⁶ *Ibid.*, 49.

¹³⁷ B Chevannes, see note 120 above, at 145.

¹³⁸ S Barrow and P Dalton, *The Rough Guide to Reggae* (London: Rough Guides, 2004), at 79.

¹³⁹ O Lewin, see note 76 above, at 201.

lyrics that, for them, are serious ‘messages’.”¹⁴⁰ “The Rastafarian shamanizes his cultural values in music and Arts” incorporating within them his message from and to his God and King.¹⁴¹ Rastafari singers and players of instruments view their roles as a social and religious responsibility. “For the Jamaican culture, and perhaps the Diasporan, this is a new way of perceiving the song.”¹⁴²

Reggae is and has been primarily Rastafari message music, which accounts for its incredible global appeal. “By the time the lyrics of Reggae music reached the airwaves of the world, the language of Rastafari had become an integral part of its culture.”¹⁴³ “In the last 70 years or so, Rastafari, a new world 20th century sacrilegious movement that spoke first to the Jamaican poor, has spread not only to the rest of the Caribbean, but outside of the region to North and South America, Europe, Africa, Asia and the Pacific.”¹⁴⁴ Recognising the unique symbiotic relationship between Rastafari and Reggae, Neil Savishinsky has remarked that “what is perhaps most interesting and unique about Rastafarianism is that it may represent the only contemporary socio-religious movement whose diffusion is directly linked to various mediums of transnational popular culture, most notably reggae music.”¹⁴⁵

“The combined effect of Rastafari and reggae music is powerful”¹⁴⁶ – spiritually, symbolically, culturally and economically. As anyone who has experienced the roots of Reggae music would attest, “in many ways, to feel the reggae beat is to think Rasta.”¹⁴⁷ However, by virtue of the fact that international identification with Rastafari has come more through Reggae than through Rastafari mansions and organisations, “reggae’s travel abroad has also succeeded in clearing space for readings that find artists and fans incorporating Rastafari symbols into their lives and music without necessarily subscribing to the spiritual dimensions of Rastafari ideology.”¹⁴⁸

Unauthorised copying and reproduction of Rastafari style of dress, language, symbols and imagery, raises issues about the right of Rastafari as a community to safeguard the use and misuse of its culture, without regard or respect for it and for those who suffered and died to establish, nurture and develop it. The issue is compounded by the fact that, despite immense national and international popularity and exploitation of its traditional cultural expressions, the Rastafari have remained at the lowest

¹⁴⁰ V Pollard, see note 127 above, at 15.

¹⁴¹ *Ibid*, 33.

¹⁴² E Brodber and JE Greene, *Reggae and Cultural Identity in Jamaica* (Jamaica: Institute of Social and Economic Research, University of the West Indies, 1988), at 14.

¹⁴³ V Pollard, see note 127 above, at 97.

¹⁴⁴ *Ibid*, 96.

¹⁴⁵ Quoted in T Rommen, “Protestant vibrations? Reggae, Rastafari, and Conscious Evangelicals” (2006) 25 *Popular Music* 235-263, at 240.

¹⁴⁶ *Ibid*, 240.

¹⁴⁷ Nathaniel Samuel Murrell, quoted in *Ibid*, 240.

¹⁴⁸ T Rommen, see note 145 above, at 240.

socioeconomic levels of Jamaican society,¹⁴⁹ a feature that is common worldwide in societies with indigenous and minority communities.

2.3.6. Exploitation of Rastafari for Tourism

Since the 1980s there has been distinct and purposive use of Rastafari Reggae products in hotels, especially in the tourist capitals on the north coast of Jamaica. Tourist packages almost invariably include a Rastafari-look-a-like or Rastafari-themed reggae band and weekly show to portray authentic “Jamaican” culture to “entertain” tourists. The Rastafari theme is exemplified by extensive use of locks (real and fake) and red, gold and green, both by persons on stage as well as in the use of stage and entertainment motifs and decoration. This is supplemented by in-hotel craft and souvenir shops with t-shirts, tote bags, cups, caps, key rings, slippers, towels, posters etc depicting Rastafari imagery and symbolism. While this is a positive recognition of the fact that most tourists, in contrast to many Jamaicans, appreciate and want to experience Rastafari in a variety of ways, there has been no move by the hotel/tourist industry or government to ensure that part of the profits or any material benefit from commercialisation of Rastafari culture accrues to the Jamaican Rastafari community.

By Rastafari custom, or customary law, individual artists and reggae artistes are entitled to use Rastafari ideology, imagery and symbolism in producing their works. They operate independently, and their wholesale or retail sales of items of Rastafari art and craft do not benefit the Rastafari community as a whole. The sustainability of the Rastafari community has been attributed to the fact that for most of its existence it has been very diffuse and without centralisation, and therefore able to adapt ideology and remain open and attractive to adherents in growing numbers worldwide. The underlying ideology, imagery and symbolism are, however, collectively owned by Rastafari, so that while artists are entitled to remuneration for their individual expressions, the Rastafari community as a collective is entitled to remuneration for the commercial use of its ideology, imagery and symbolism.

Due to the creative and intangible nature of TK and TCEs and their similarity in this regard to intellectual property, the international protection of TK and TCEs has been explored and analysed largely through the elements of IP law. Existing IP rights, it has been said, can offer both defensive and positive protection for TK and TCEs.

3. Part III: Intellectual Property Law of Jamaica

Jamaica received the English common law upon British conquest in 1655. This part will consider the intellectual property laws of Jamaica under both common law and statute.

3.1. Passing Off

The common law tort of passing off, developed from the tort of deceit, is the misrepresentation of the goods or services of one trader as that of another. To

¹⁴⁹ V Pollard, see note 127 above, at 21, 51.

establish passing off, the claimant must prove that (1) it has goodwill, through distinctiveness in the market place; (2) the defendant has, in presenting its goods and services, misrepresented them as those of the claimant by using the name, logo, advertising image or get-up (trade dress) of the claimant, and (3) the misrepresentation has resulted in the likelihood of confusion in the minds of consumers as to the true origin of the defendant's goods or services, and therefore actual or likely damage to the claimant.

Although trade in the market place is important for establishing goodwill and thus the action is usually commenced by traders and businesses, the tort is also actionable by a non-profit body, if it is a legally recognised entity capable of sustaining a claim for damages. For the Maroon and Rastafari communities to bring a claim in passing off, therefore, they would have to register themselves as a co-operative, charity, benevolent association, trust, or company (if they wish to maintain profits) according to Jamaican law. It would also be possible for each community to register several such legal entities, which could proceed in court and otherwise in a cohesive manner, while maintaining the individuality of the different entities within each community. Alternatively, the communities could make use of representative actions now allowed under the *Civil Procedure Rules 2002*, Part 21, Rule 21.1.

As elaborated earlier, the distinctive historical and cultural traditions of the Maroon and Rastafari communities have resulted in appreciable goodwill. Outsiders to both groups have identified the culture of the community with goods and services of their own, thereby misrepresenting the culture and causing moral and economic harm to the community. Passing off is therefore a remedy available to both communities, within the confines of the substantive and procedural limitations explained above.

3.2. The Copyright Act 1993

Jamaica has long had copyright legislation, as the UK *Copyright Act 1911* came into force in 1913 while Jamaica was still a British colony, and remained in effect upon her independence from Britain in 1962. The modern *Copyright Act* is however that of 1993, which repealed the 1911 Act, and subsequent amendments.¹⁵⁰ Under the Act, original literary, dramatic, musical and artistic works, as well as sound recordings, films, broadcasts, cable programmes and typographical arrangements of published editions are all entitled to copyright protection.¹⁵¹ It is possible therefore to protect by copyright original words including words of songs and chants (as literary works), original dances (as dramatic works), original music including rhythms of songs and chants (as musical works), original art and designs (as artistic works), as well as sound recordings and films of performances of traditional chants, drumming and dancing.

Copyright protection includes the “economic” rights of the copyright owner to restrict copying, performing, broadcasting and adaptations of works,¹⁵² as well as the “moral”

¹⁵⁰ *Copyright Act 1993*, s 151

¹⁵¹ *Ibid*, s 6(1).

¹⁵² *Ibid*, s 9.

rights to be identified as author¹⁵³ and to object to derogatory treatment¹⁵⁴ of the work and to false attribution of others' works.¹⁵⁵ Copyright owners of literary, dramatic and musical works also have the benefit of border control measures that allow them to request that Customs officials seize and detain infringing copies of works as prohibited goods.¹⁵⁶

There are several features of copyright, however, that make it not only unsuitable to provide adequate protection, but which may actually harm TCEs and the rights of communities. First, expressions such as literary, dramatic or musical works are only protected by the Copyright Act if they have been "recorded in writing or otherwise".¹⁵⁷ Oral expressions are not, therefore, copyrightable, and it has been argued that to make their protection contingent on written expression might stifle or actually kill the oral, intangible and evolutionary nature and continuing innovativeness of such traditions.

Secondly, under the Act, copyright protection expires 50 years from the end of the calendar year in which the author dies (literary, dramatic, musical or artistic works)¹⁵⁸ or the year in which they were created or made public (sound recordings and films),¹⁵⁹ after which the work enters the public domain. This is wholly incompatible with the concept of TCEs, the fundamental purpose of which is not to make money for a limited period of time, but to continue to pass distinctive ancestral traditions down to future generations in perpetuity. This creates a serious dilemma when considering the utility of copyright to protect TCEs. Copyright may be a step toward protecting TCEs against misappropriation by outsiders, but it is of limited effect.

Further, authorship and ownership, as defined by the Act and common law principles of copyright, do not fit comfortably within concepts of ownership as defined by the traditions and customary laws of the communities. As with passing off discussed above, the communities would have to register themselves as legal entities, or claim a beneficial interest through the use of representative actions under Part 21, Rule 21.1 of the *Civil Procedure Rules 2002*. In the absence of this, any court would likely recognise copyright as subsisting in the physical work of the individual, rather than in the underlying traditional expression of the community.

Indeed, it may sometimes be difficult to determine which aspects of a work are the underlying traditional expressions of a community, and which aspects are the personal creative expressions or interpretations of the individual artist.¹⁶⁰ In intellectual

¹⁵³ *Ibid*, s 14.

¹⁵⁴ *Ibid*, s 15.

¹⁵⁵ *Ibid*, s 16.

¹⁵⁶ *Ibid*, s 50.

¹⁵⁷ *Ibid*, s 6(2).

¹⁵⁸ *Ibid*, s 10(1).

¹⁵⁹ *Ibid*, s 11(1).

¹⁶⁰ T Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (2003), at 64, available at <http://www.wipo.int/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf> (accessed 18 November 2009).

property law terms, the individual artists and artistes are entitled to copyright and payment for the rent, purchase, licensing of copyright and related rights, but the Rastafari community is entitled to moral rights, including the right to be credited for the ideology, imagery and symbolism and to remuneration for the licensing of aspects of its moral rights.

Copyright law is however inappropriate to the task of addressing the issue of joint individual and community ownership. In the Australian case of *Bulun Bulun & George M v R&T Textiles*, Bulun Bulun, an aboriginal artist, and Mr M, an elder from and on behalf the Ganalbingu people, sued the defendant pursuant to the *Copyright Act* (Australia) for copying a depiction by the artist of some aspect of the cultural heritage of Ganalbingu and reproducing it on fabric for sale. The defendant settled with the artists, but when the matter went to trial over the rights of the community, the Court found, in keeping with established jurisprudence,¹⁶¹ that the Ganalbingu people were not joint authors because, although they may have provided the underlying artistic idea, they had not contributed skill and labour to the creation of the actual work. Mr. Bulun Bulun was therefore the only author of the work protected by the law of copyright.¹⁶²

Mr M also claimed that the Ganalbingu people were the equitable owners of the copyright in trust; that the artist was either trustee of the copyright for the beneficiary community, or that he had a fiduciary responsibility to the Ganalbingu people. The Court held that there was no express trust evinced by the artist, nor could any be inferred and made binding by customary law, especially as the artist had licensed the artistic work previously and under customary law was permitted to retain profits for himself.

The Court did, however, find that a fiduciary relationship existed between the artist and the clan, in that he was required under customary law not to exploit the artistic work in any way which would harm the communal interests of the clan in the artwork or otherwise be contrary to the laws and customs of the clan, and to take reasonable steps to restrain and remedy any infringement of the copyright in the work.¹⁶³ The remedy of the clan was therefore against the artist for breach of fiduciary responsibility, rather than the defendant (the textile company) for an equitable interest in copyright. Ultimately, the Court found that the artist had not breached his fiduciary responsibility, as he had in fact taken reasonable action in filing suit against the company to remedy the infringement. Interestingly, however, the Australian Courts have been prepared to factor into the damage award the fact that the award is in practice shared by the artist with the community.¹⁶⁴ While this is commendable, and certainly possible under the common law and rules of equity in Jamaica,¹⁶⁵ such

¹⁶¹ The idea-expression dichotomy : Copyright protects the expression, not the idea. This is codified in the *Copyright Act* (Jamaica), s 6(8) and enshrined internationally by *TRIPS* Art 9(2).

¹⁶² T Janke, see note 160 above, at 57.

¹⁶³ T Janke, see note 160 above, at 60.

¹⁶⁴ This was done in *M* v Indofurn* 30 IPR 209 (The Carpets Case); T Janke, see note 160 above, at 18.

¹⁶⁵ The *Copyright Act* (Jamaica), s 152 expressly states that “[n]othing in this Act shall affect the operation of any rule of equity relating to breaches of trust or confidence.”

jurisprudence is far from sufficient to protect community rights over their traditional community cultural expressions.

The tenuousness of reliance on copyright for protection of community rights is evident in cases such as *M v Indofurn (the Carpets Case)*.¹⁶⁶ There, the defendants had clearly reproduced substantial parts of the artist's depiction of ritual aboriginal Rirratjingu clan dreams or mythology, and if the period of copyright had been expired, the community would have been helpless to stop the misappropriation and subsequent misuses resulting from work being cast into the public domain. The prospect that copyright protection expires is something that the community will have to face, but is a thoroughly dissatisfactory position in which to place traditional communities whose culture has been passed down through generations for maintenance by the community.

As with artistic works, the underlying community creativity and expression in musical and dramatic works are not generally protectable by copyright. Collective rights can only be claimed by the Maroon and Rastafari if the communities are organised as legal entities and they make recordings of their traditional music and dance. This is of particular relevance to the Rastafarians, who are known for their evolution of Reggae and successive generations of Reggae artistes. So far, solutions to the inequities occasioned by mass commercialisation of Reggae have been sought through public diplomacy involving *ad hoc* donations to community projects and joint ventures (usually Reggae concerts) with Rastafari Reggae artistes, in aid of the community. More recently, consideration has been given to the establishment of a Trust Fund to which members of the Rastafari Reggae fraternity can make contributions (encouraged by community assertion of the moral rights of the community and of the individual responsibility of members of the community to the community). The Fund would also be able to receive proceeds from royalties and other economic development initiatives for the benefit the community as a collective.

Another major weakness of the *Copyright Act* is that it has not been updated to implement the World Intellectual Property Organization (WIPO) *Copyright Treaty 1996* and the WIPO *Performances and Phonograms Treaty 1996* (the Internet treaties). It accordingly does not protect authors, performers or phonogram producers against unauthorised uses of works on the Internet (the "making available" right). Neither does it protect technical protection measures or digital rights management and prohibit their circumvention.¹⁶⁷

Most importantly, for defending against misappropriation, is that the *Copyright Act* does not protect traditional oral expressions and folklore, such as Maroon Kromanti Play and Rastafari Nyahbinghi, which have been recorded by persons without the consent of the community, from being copyrighted by those persons. The *Copyright Act* makes no provision to exclude these from protection, and requires no prior informed consent of the communities to copyright over their indigenous and traditional literary, dramatic, musical and artistic works, or performances,

¹⁶⁶ *M* v Indofurn*, see note 164 above.

¹⁶⁷ D Daley and N Foga, "Jamaica: Beyond the TRIPs Agreement", available at <http://www.managingip.com/Article.aspx?ArticleID=1450368> (accessed 17 August 2008).

photographs, sound and video recordings. The first party to satisfy the requirements of the *Copyright Act* will therefore be entitled to protection, which could, in cases of conflict before the Courts, result in an outsider prevailing against the community.

3.3. The Trade Marks Act 2001

In contrast to the common law tort of passing off, which applies to *unregistered* trade marks, the *Trade Marks Act* provides for the registration of signs - including words, names, designs, letters, numerals, symbols and/or colours¹⁶⁸ - as property. They are thereby entitled to *prima facie* protection against unauthorised use of the identical or a similar sign, in relation to identical or similar goods or services, in the course of trade.¹⁶⁹ *Well-known* registered trade marks receive extended protection by prohibition of unauthorised use of identical or similar marks in relation to *dissimilar* goods or services, in the course of trade.¹⁷⁰

Infringement of a registered trade mark gives rise to civil remedies including injunctions, accounts and damages,¹⁷¹ as well as erasure of the infringing mark from goods,¹⁷² delivery up,¹⁷³ forfeiture or destruction of the infringing goods.¹⁷⁴ The Act enables the owner of the trade mark to invoke intervention by the Commissioner of Customs, who may seize infringing goods, pending importation into Jamaica, as goods prohibited by the *Customs Act*.¹⁷⁵ It is also a criminal offence under the *Act* to apply to goods a sign identical with, or likely to be mistaken for, a registered or well-known trade mark, or to possess, distribute, sell, hire, or offer to sell or hire, such infringing goods, which offences are punishable on summary conviction to a maximum one million dollar fine and/or twelve months imprisonment, and on conviction before the Circuit Court to a fine and/or five years imprisonment.¹⁷⁶ As property, a registered trade mark is also a valuable commercial asset that can be used as security for loans, and formally licensed or assigned. A registered trade mark is therefore more securely protected than an unregistered trade mark.

While a trade mark registered under the Act is valid for only ten years,¹⁷⁷ it is renewable indefinitely, in sequential periods of ten years.¹⁷⁸ The Act is thus capable

¹⁶⁸ *Trade Marks Act 2001*, s 2.

¹⁶⁹ *Ibid*, ss 9(2), 9(3).

¹⁷⁰ *Ibid*, ss 9(4), 9(5).

¹⁷¹ *Ibid*, s 31.

¹⁷² *Ibid*, s 35.

¹⁷³ *Ibid*, s 36.

¹⁷⁴ *Ibid*, s 38.

¹⁷⁵ *Ibid*, s 66(1).

¹⁷⁶ *Ibid*, s 69.

¹⁷⁷ *Ibid*, s 8.

¹⁷⁸ *Ibid*, s 40(1).

of providing continuous protection for registered trade marks, provided the requisite fees are paid for initial registration in each class,¹⁷⁹ for each renewal, and for any opposition, revocation, or invalidity proceedings, if necessary. The Act, as it presently exists, may however be inadequate to protect Maroon and Rastafari words and symbols, not only because the fees may be prohibitive for the communities, but because registration offers only limited protection for the marks in relation to selected classes of goods and services.¹⁸⁰ Protection of registered marks may also be lost for failure to renew within the allotted time,¹⁸¹ or if they are not used in relation to the goods or services for which they are registered within three years of registration.¹⁸² Further, registration, and hence protection under the Act, may also be denied if the Maroon or Rastafari community marks are identical or confusingly similar to an earlier registered mark.¹⁸³

The fact that the registration of a trade mark is conditional upon an intention to trade may also be problematic. If there is no intention by the Maroon and Rastafari communities to trade in goods or services using their traditional words or symbols, the trade criterion would prevent them from registration of a mark and hence deny them protection against problems such as derogatory use. Assuming that it intends to trade, a non-profit collective might be able to register a trademark under the Act because the definition of “trade” extends to “any business or profession”,¹⁸⁴ including non-profit enterprise. Trademark protection, however, like passing off, is based on fair trade, so unless the community is formally established as a legal entity capable of trading it would not - as an informal collective - be able to register its words and symbols under the Act.

Lastly, the *Trade Mark Act 2001* is most unsatisfactory, in regard to the priority accorded to earlier registered marks, in that it fails to protect Maroon and Rastafari symbols that have been previously registered without community consent, either by individual or corporate outsiders, or by individuals from within the community. A major weakness of the Act is that there is no general exclusion from registration or any requirement of informed consent prior to the registration of indigenous and traditional words and symbols by non-members or individual members of a community. Although a trademark will be denied if it is likely to deceive the public as to the nature or quality of the goods or services,¹⁸⁵ or to disparage or falsely suggest a connection with persons, institutions or beliefs,¹⁸⁶ greater protection would be afforded by an explicit provision requiring the prior informed consent of the community. This would prevent registration of the mark, rather than requiring the

¹⁷⁹ There are at present 50 different classes. See *Trade Mark Rules 2001*, Sch 3.

¹⁸⁰ *Trade Marks Act 2001*, ss 9, 10, 16(2)(c) and 18(1).

¹⁸¹ *Ibid*, s 40(3).

¹⁸² *Ibid*, s 43(1)(a).

¹⁸³ *Ibid*, ss 13, 45.

¹⁸⁴ *Ibid*, s 2(1).

¹⁸⁵ *Ibid*, s 11(4)(b).

¹⁸⁶ *Ibid*, s 11(4)(f).

community to apply for a declaration of invalidity post-registration¹⁸⁷ which, even if successful, would be “without prejudice to any transaction past and closed.”¹⁸⁸

3.3.1. Imperial Ethiopian Lion of Judah Flag

Despite being the most identifiable mark of the Rastafari, the legal status of the symbol of the Imperial Ethiopian “Lion of Judah”¹⁸⁹ is far from clear cut. Although it was the original state flag of Ethiopia adopted by HIM Emperor Haile Selassie I¹⁹⁰ in 1941, the Rastafari have identified with and used the flag since the inception of the community in 1930. After Haile Selassie I was dethroned in 1974, the national flag was changed to temporarily alter and then omit the Lion from its centre, which is how it remains to this day.¹⁹¹ Use of the Lion of Judah flag is not therefore likely to be prohibited by Article 6ter of the *Paris Convention for the Protection of Industrial Property*,¹⁹² or by section 50 of the *Trade Marks Act 2001* which implements that article of the Convention.

The flag is legitimately used today only by the Crown Council of Ethiopia (representing the Solomonic Throne of David), the Ethiopian Royal family in exile and the Rastafari community. It can however be seen regularly applied to non-Rastafari goods and services ranging from imitation-Rastafari jewellery and handicraft items, clothing and shoes, to toilet paper, towels, door mats, and is used by a host of private companies neither owned nor endorsed by Rastafari.¹⁹³ The Rastafari community has repeatedly objected to such uses, especially those on products such as toilet paper and doormats, which in effect deface the symbolic flag. With a view to protection, the Rastafari community recently wrote to the Crown Council of Ethiopia, seeking a joint solution to the problem.

One possibility would be to create a new Rastafari flag, which would be protectable by not only trade mark but also copyright law.¹⁹⁴ This is not, however, very likely, bearing in mind the central and fundamental identification of Rastafari with Imperial Ethiopia and the Living Lion of Judah (HIM), and would not, in any event, address the prolific misappropriation of the original flag. In contrast to this, the Accompong Maroon community recently¹⁹⁵ displayed an original flag - said to symbolise ancestral Captain Cudjoe and the community – that is protectable by copyright and possibly trade mark law as a result of its originality.

¹⁸⁷ *Ibid*, s 46(1).

¹⁸⁸ *Ibid*, s 46(5).

¹⁸⁹ See http://en.wikipedia.org/wiki/Lion_of_Judah (accessed 18 August 2008).

¹⁹⁰ See <http://www.worldstatesmen.org/Ethiopia.html> (accessed 18 August 2008); <http://www.angelfire.com/ny/ethiocrown/flags.html> (accessed 18 August 2008).

¹⁹¹ See http://en.wikipedia.org/wiki/Flag_of_Ethiopia (accessed 18 August 2008).

¹⁹² http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html#P155_22332 (accessed 17 August 2008).

¹⁹³ A quick search on Google will reveal many of these usages.

¹⁹⁴ See <http://www.crwflags.com/fotw/flags/xf-copy.html> (accessed 18 August 2008).

¹⁹⁵ 6 January 2008.

3.3.2. *Collective and Certification Marks*

A collective mark is a trade mark distinguishing the goods or services of members of an association, which is the proprietor of the mark, from those of other undertakings.¹⁹⁶ The main purpose of the mark is to indicate that those using it belong to a specific association, supported by a registration requirement that the proprietor shall file regulations governing use of the mark.¹⁹⁷ A certification mark distinguishes goods or services that are certified according to certain characteristics and standards, from those which are not so certified.¹⁹⁸ Characteristics that may be certified include origin, material, mode of manufacture of goods or performance services, quality and accuracy.¹⁹⁹

Like the collective mark, registration of a certification mark requires the filing of regulations that identify characteristics to be certified, the certifying body that is to test those characteristics, and the methods to be used for testing and supervision.²⁰⁰ Although the Government Bureau of Standards would be the usual certifying body, it is possible to establish a specialised body, such as a Maroon Certification Authority or Rastafari Certification Authority, to supervise the regulations and test and certify that the goods to which the mark is applied comply with the standards.²⁰¹ Certification marks such as “Genuine Maroon Product” or “Authentic Rastafari Product” could therefore be used to distinguish and thereby protect authentic goods and services from the imitations. Additionally, a certification mark could be used to indicate origin, as well as authenticity, such as “Authentic Rastafari/Maroon product, Made in Jamaica”.

Both collective and certification marks may be used to indicate geographical origin. However, geographical indications are specifically provided for in the *Protection of Geographical Indications Act 2004*.

3.4. **The Protection of Geographical Indications Act 2004**

The *Protection of Geographical Indications Act 2004 Act* defines a geographical indication (GI) as “an indication which identifies a good as originating in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”²⁰² Protection of a GI under the Act does not require registration.²⁰³ Any producer or group of producers carrying on an activity in the specified geographical

¹⁹⁶ *Trade Marks Act 2001*, Sch 1, para 1.

¹⁹⁷ *Ibid*, Sch 1, para 4.

¹⁹⁸ *Ibid*, Sch 2, para 1.

¹⁹⁹ <http://www.jipo.gov.jm/pages/trademarks.htm> (accessed 17 August 2008).

²⁰⁰ *Trade Marks Act 2001*, Sch 1, para 4.

²⁰¹ Personal communication with Ms Carol Simpson, Executive Director, JIPO, 15 August 2008.

²⁰² *Protection of Geographical Indications Act 2004*, s 2.

²⁰³ *Ibid*, s 4(1)(a).

area may apply for registration²⁰⁴ by submitting an application detailing the good(s), geographical area and indication, and the quality, characteristic or reputation of the good attributable to the geographical area.²⁰⁵ Protection includes the right to apply to the Court to prevent the use of any designation or presentation of a good that indicates or suggests that the good originates in a geographical area other than the true place of origin, in a manner which misleads the public as to the geographical origin of the good.²⁰⁶ The Act also makes it a criminal offence to so mislead the public, punishable on summary conviction to a one million dollar fine and/or twelve months imprisonment or, on conviction before a Circuit Court, to a fine and/or five years imprisonment.²⁰⁷

Another positive provision of the Act is that the Registrar may refuse to register or may revoke a *trademark* that contains or consists of a GI relating to a good that does not originate in the indicated territory, if the use of the indication in the trademark is likely to mislead the public as to the true place of origin.²⁰⁸ The GI is not however a totally exclusive property right: any producer active in the specified geographical area, whether or not a member of the group that registered the indication, has the right to use it in the course of trade, provided he does so in relation to goods that possess the quality, reputation or other characteristics designated by the indication.²⁰⁹

The GI may therefore be more suited for use by Maroon communities such as Accompong, Moore Town, Charles Town, or Scott's Hall, which function within clearly identified geographical areas in Jamaica, as compared to most Rastafari communities which tend to be dispersed across different Jamaican geographical areas. Despite the use of a GI by the Maroon community living in a particular geographical area, there may be others living there, or persons who have relocated to produce there, who although they are not members of the community would nevertheless be entitled to use the GI, provided that some quality, characteristic or reputation of the goods produced there is attributable to the geographical area.

This discussion of the *Protection of Geographical Indications Act 2004* is at present somewhat moot, as the Act has not yet been brought into operation by the Government of Jamaica, which is awaiting the conclusion of procedural regulations.²¹⁰

²⁰⁴ *Ibid*, s 9(2)(a).

²⁰⁵ *Ibid*, s 9(3).

²⁰⁶ *Ibid*, s 3(1)(a).

²⁰⁷ *Ibid*, s 7(1).

²⁰⁸ *Ibid*, s 17.

²⁰⁹ *Ibid*, s 11.

²¹⁰ D Daley and N Foga, see note 167 above.

3.5. *The Designs Act 1937*

The *Designs Act 1937* provides for registration and thereby copyright protection²¹¹ of designs, which are the ornamental or aesthetic aspects of an article. The design may consist of three-dimensional features, such as the shape or configuration of an article, or of two-dimensional features, such as patterns or colours, applied by any means, “whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical or chemical, separate or combined”.²¹² Like the *Trade Marks Act*, the design must be registered in respect of specified classes. Design registration provides protection against the design “or any fraudulent or obvious imitation thereof, in the class or classes of goods in which such design is registered,” being applied to articles of manufacture or substances offered or exposed for sale, by giving the proprietor a right to recover damages.²¹³

The *Designs Act* could therefore be used to protect traditional Maroon and Rastafari handicraft, such as jewellery, art and craft, house wares, sculpture, textile designs and other designs of traditional dress and shoes, as well as the designs of traditional drums. The Maroon and Rastafari communities might also benefit from an exemption from all fees under the Act, if they are approved by the Minister²¹⁴ as societies, institutions or organisations of a public, philanthropic, or self-help character.²¹⁵ The requirement that the design be “new and original”²¹⁶ may however effectively preclude registration of many traditional designs. A registered design may be subject to cancellation, upon application of any person, if it has been published in Jamaica prior to registration.²¹⁷ Further, if a registered design is used in manufacture in any foreign country and is not used in Jamaica within six months of registration, copyright in the design shall cease.²¹⁸ Perhaps worst of all, from a traditional community perspective, is that copyright protection expires after only fifteen years.²¹⁹

3.6. *The Merchandise Marks Act*

The *Merchandise Marks Act* provides for criminal prosecution of persons for forged, fraudulent, or deceptive use of trade marks and trade descriptions, and for the sale of

²¹¹ Defined in s 2 as the exclusive right to apply a design to any article of manufacture or to any substance, artificial or natural or partly artificial and partly natural, in the class or classes in which the design is registered.

²¹² *Designs Act 1937* s 2.

²¹³ *Ibid*, s 12.

²¹⁴ *Ibid*, s 2.

²¹⁵ *Ibid*, s 28.

²¹⁶ *Ibid*, s 4.

²¹⁷ *Ibid*, s 11(2).

²¹⁸ *Ibid*, s 11(1).

²¹⁹ *Ibid*, s 7(1).

goods with forged trade marks or false trade descriptions.²²⁰ Offences also include making or having in one's possession any instrument for the forgery of a trade mark, and specific provision is made for aiders and abettors to be prosecuted as principals.²²¹ Offences are punishable by sentences of up to two years and forfeiture of the goods.²²² Provision is also made for interim measures including search and seizure of goods suspected of having forged trade marks or false trade descriptions,²²³ as well as the prohibition of importation of such goods.²²⁴ Limitations on prosecution under the Act apply three years after commission of the offence, or one year after discovery of the offence, whichever is earlier.²²⁵

The *Merchandise Marks Regulations*, dating back to 1908, provide for border control measures. Customs officers are required to act upon allegations that prohibited goods have landed, are in transshipment, or are about to be imported or exported,²²⁶ and to detain such goods.²²⁷ Informants are required to deposit with Customs a sum to cover the cost of detention,²²⁸ and may be required to pay a security deposit of 20% of the value of the goods, as well as a bond for double the value of the goods, with two sureties²²⁹ if, upon examination, the Customs officer considers that the goods are not *prima facie* detainable.²³⁰ Despite the age of the Regulations, the sums are still considerable and would therefore deter the Maroon and Rastafari communities from utilising its provisions.

3.7. The Patent Act 1857

The *Patent Act 1857* is the oldest intellectual property statute in Jamaica. A grant of Letters Patent gives the proprietor exclusive right to use his invention for fourteen years, with possible extension by the Governor General for a further term of seven years. To obtain a grant of Letters Patent, the applicant must prove novelty and public utility. New and useful processes, machines, manufactures or compositions of matter, are all patentable.²³¹

²²⁰ *Merchandise Marks Act*, s 3.

²²¹ *Ibid*, s 10.

²²² *Ibid*, s 3.

²²³ *Ibid*, s 11.

²²⁴ *Ibid*, s 14.

²²⁵ *Ibid*, s 13.

²²⁶ *Merchandise Marks Regulations*, Reg 9.

²²⁷ *Ibid*, Regs 2(a), 3.

²²⁸ *Ibid*, Reg 3(2).

²²⁹ *Ibid*, Reg 5.

²³⁰ *Ibid*, Reg 4.

²³¹ JIPO website: <http://www.jipo.gov.jm/pages/patents.htm> (accessed 17 August 2008).

The Maroon and Rastafari communities could in theory apply for Letters Patent in respect of traditional herbal medicines and remedies, traditional roots drinks and tonics and the like. While it would not be impossible to obtain a patent over this type of knowledge, much traditional knowledge is common in Jamaica, and a grant of Letters Patent is more likely in respect of an element of secret knowledge that is not yet in the public domain, or an improvement on existing knowledge, herbal composition or processes.

Given that the period of protection is limited, that it takes on average 3 years from the time of filing to obtain a grant, and that there exists no provision for community ownership, the *Patent Act* does not provide effective protection of traditional knowledge as a community resource. It may be more apt to protect an invention or advancement in knowledge by an individual herbal doctor, than to vest proprietary rights in the community in respect of that knowledge.

The reality is that the Act is used mainly by foreign enterprises to register pharmaceutical and other chemical inventions.²³² Of some importance to the Maroons and Rastafari is the fact that the Act does not include any requirement for prior informed consent, disclosure of origin or benefit sharing - as is currently accepted as equitable by the *Convention on Biological Diversity* (CBD) - where inventions are based on indigenous or traditional knowledge. To implement and enforce such principles would require specific and efficient systems to inform the Jamaica Intellectual Property Office (JIPO) of the existence of forms of TK. The use of databases has been advanced as a possible solution, but the effect of prior disclosure in the public domain would be devastating. Another proposed alternative, the institution of private databases accessible only by patent examiners, would prevent the TK from being classified as prior art, in the public domain, creating a “catch 22” problem. The debate is sure to continue in the WIPO Inter-Governmental Committee on IP, Folklore, TK and Genetic Resources (IGC) and elsewhere, demonstrating the inherent incompatibility of patent law and TK.

3.8. Summary of efficacy of IP laws

While IP may be appropriate for short term protection of aspects of community TK and TCEs, there are several limitations of the IP system for this purpose, including:

- (1) a limited period of exclusive rights;
- (2) non-recognition of traditional, customary and collective unregistered ownership;
- (3) requirement for reputation/goodwill, misrepresentation and confusion for passing off;
- (4) requirement of distinctiveness and use in the course of trade for trademark registration and infringement;
- (5) requirement of originality and fixation for copyright protection;

²³² D Daley and N Foga, see note 167 above.

- (6) no provision for exclusion or informed consent prior to registration by non-members of indigenous and traditional words, designs and symbols, as designs, trade marks or internet domain names;
- (7) no provision for exclusion from copyright protection or requirement of informed consent for protection of literary, dramatic, musical and artistic works of indigenous and traditional communities, or performances, photographs, sound and video recordings of such works;
- (8) no hard law enforcing CBD and *Bonn Guidelines* regarding prior informed consent, disclosure of origin, and benefit sharing for patent protection;

The potential for continuous protection of a trade mark, including collective and certification marks, may provide the greatest protection for indigenous and traditional words, designs and symbols, compared to the other IPRs of copyright and patent, which have limited terms of protection, after which the knowledge or expression would fall into the public domain.²³³ A drawback to the trade mark system, though, is that considerable fees would be payable by a community in order to obtain full coverage through registration of its traditional words and symbols in each of several classes. Non-community members would otherwise be able to use and register the traditional word or symbol in all the classes for which the community had not obtained registration.²³⁴

IP is therefore limited in its ability, as it presently exists, to adequately protect indigenous and traditional community resources and secure to such communities “the fruits of their knowledge and cultural labour”.

3.9. National & Regional Solutions to Protect TK & TCEs

Recognising the inherent shortcomings of IP for protection of TK and TCEs, several initiatives have been developed at national, regional and international levels to address its deficiencies relevant to TK and TCEs.

From as early as 1976, the *Tunis Model Law on Copyright for Developing Countries* suggested express protection of folklore under copyright law for an indefinite period of time. In 1982 *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* were adopted by WIPO and the United Nations Educational, Scientific and Cultural Organization (UNESCO). Andean Community Decision 486 prohibits the trademark registration of any indigenous names, words or signs.

Several states have amended their IP laws to better protect TK and TCEs. The *Trade Mark Act* of New Zealand specifically protects Maori signs and marks from registration if it would be offensive to the community. Similarly, the US *Trade Marks Act* expressly protects Native American signs and symbols from registration if offensive or suggesting a false association with a Native American community. Panama has a *sui generis* law prohibiting the unauthorised use of any indigenous

²³³ T Janke, see note 160 above, at 30.

²³⁴ *Ibid*, 44.

name, word or design and actually details the various TK and TCEs of the several communities which are protected.

Despite incessant objection by a minority of states, an international *sui generis* treaty is seen as the most appropriate means of achieving effective protection of TK and TCEs against international misappropriation.²³⁵ This development is being facilitated mostly by the WIPO IGC which meets on average twice annually to discuss and debate various policy options and concerns. The IGC has been exceptional within the UN organisations in remaining open and accessible to indigenous and traditional communities that are invited to participate and to share concerns and recommendations. Due to the variety of national policy approaches, it has been suggested that such a treaty would be outlined broadly to allow individual states discretion to customise their national laws in accordance with domestic situations and objectives. Nonetheless, it is recognised that an international instrument is essential to ensure uniformity of protection against exploitation of a trans-boundary character.²³⁶

3.10. Towards International Solutions to Protect TK & TCEs

As the problem of adequate protection of TK and TCEs came gradually to international attention, a number of states began to assert the necessity of an international treaty. As a result, WIPO and UNESCO, in December 1984, jointly convened a Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property. Although the need for international protection was generally recognised, the majority of participants thought that they had insufficient experience and knowledge to protect folklore at the national level. It was not until the WIPO-UNESCO World Forum on the Protection of Folklore in 1997 that a Plan of Action was agreed for the progressive development of “a new international standard” for the legal protection of folklore.

In October 2000, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established by the WIPO General Assembly to discuss, shape and develop international protection for TK, TCEs and genetic resources. Since then the IGC has been the leading international forum for addressing these issues and has undertaken detailed studies, surveys and fact-finding missions regarding many national and regional legal systems for protection of TK, TCEs and genetic resources. The WIPO Secretariat has itself produced many substantial volumes of ground-breaking research and analysis, examining the interests, issues and options to be addressed by the Committee.

The IGC is significant because, in contrast to international trade fora, in which their participation is not allowed, the IGC permits participation, albeit only as observers, by inter-governmental as well as international and regional non-governmental organisations. Indigenous and local communities are thereby able to intervene from the floor during plenary discussions and debates on the work of the Committee. The

²³⁵ F Lenzerini, “Indigenous Peoples’ Cultural Rights and the Controversy over Commercial Use of Their TK” in F Francioni and M Scheinin (eds), *Cultural Human Rights* (The Hague: Martinus Nijhoff Publishers, 2008) 119-149, at 144.

²³⁶ *Ibid*, 145.

IGC also has a Voluntary Fund which finances the participation of indigenous and local communities. In contrast with the *Convention on Biological Diversity*, which also has an entrenched system for facilitating participation of such communities in deliberations, and is concerned more narrowly with protection of resources in relation to the use of the environment and its biodiversity, the focus of the IGC is more generally the broad range of protection of TK, TCEs and genetic resources.

Nevertheless, twenty-five years have passed since the earliest expressions, circa 1984, of the need for international protection of such resources, and there is still no system in place. As recently as its 14th Session (29 June to 3 July 2009), it was apparent that progress within the IGC has been stalled by internal processes as well as the external geopolitics of intellectual property power. The African Group of States, in an attempt to initiate text-based negotiations for the conclusion of an international instrument, and faced with the fast-approaching expiry of the current mandate of the IGC, has presented a proposal that deliberations to this end be sped up. The Group has been the most proactive within the IGC in the last few sessions, having compiled a Gap Analysis which highlights points of convergence and non-convergence in the member-state deliberations.

The African Group proposal has been widely supported by the vast majority of member states, due in part to the fact that there has been no other proposal for progressing the work of the IGC, and in part to the extensive lobbying and inter-regional consultations that the African Group has initiated. Despite overwhelming agreement to work expeditiously towards an international instrument, a few member states continue to argue that the goal of the IGC should not necessarily be an international instrument and that no outcome should be excluded. In particular, they suggest that a declaration, policy, guidelines or some other “soft” law is more desirable at this time. This is largely the same group of IGC states that has been asking for more time to review the various studies and WIPO reports before committing to anything, and includes those states that voted against the *2007 United Nations Declaration on the Rights of Indigenous Peoples*.

Given that the IGC as a WIPO Committee cannot entertain voting and must achieve unanimity, deliberations have been stalled over this fundamental divergence of objective and approach. As a result it is uncertain if and when international protection for TK, TCEs and genetic resources will be achieved. It therefore behoves communities and states to assess their own situations and take necessary steps to protect TK, TCEs and genetic resources as best they can within their respective jurisdictions.

3.11. Suggested Solutions for Jamaica

In light of the foregoing analysis, suggested national solutions for Jamaica include:

- (1) The subject matter need not meet criteria of originality, fixation or intention for trade, as a condition for its protection. It should however be traditional, that is, have been created for traditional purposes, be inter-generational, pertain to a particular traditional community and be collectively held. Such “traditionality”

criterion should be determined by the Maroon and Rastafari communities themselves according to their respective traditional authorities and customary law.

- (2) The Maroon and Rastafari communities shall own and exercise the TK/TCE/IP rights. The community may however authorise (license) individuals or other legal entities, whether members of the community or not, to exploit some or all rights in any of the TK/TCE/IP. In addition, individual creators from within the community may, with authorisation from the community, may be allowed to own and/or exercise rights in trust for the community or enter into benefit sharing agreements with the community.
- (3) The rights should not be lost nor expire. Protection should be indefinite.
- (4) As regards previous unauthorised registration of community TCEs, community rights should be retroactive, with a possible grace period to allow registered proprietors to enter into benefit-sharing agreements with the communities.
- (5) In the absence of an international treaty, the national law should provide for protection of TK and TCEs, wherever possible, by legislating that the Maroon and Rastafari communities may seek protection and enforcement of their TK/TCE/IP rights in Jamaica, regardless of where the TCEs are being misappropriated.
- (6) The communities must be able to prevent and/or challenge the protection afforded to others in regard to copyright of their traditional words, and trade mark registration in respect of their traditional signs, symbols, emblems and logos.
- (7) The administration and enforcement of the rights should vest in the communities themselves, with the requisite government and international (WIPO, UNESCO) assistance being given to the communities to train personnel and staff and fund their community Authority. The Authority would be responsible for the administration and enforcement of their TK/TCE/IP, including establishing and administering the regime for full disclosure, prior informed consent and benefit sharing in relation to TK.

The JIPO would play a very important role in the implementation of any new or amended laws, as well as in awareness-raising and training programmes for Governmental officials and the public, including the Maroon and Rastafari communities and the private sector.

4. Conclusion

One of the major hurdles facing the Maroon and Rastafari communities in the protection of their TK and TCEs is that the communities themselves are not *a priori* entities recognised by law with legally enforceable rights. Throughout this paper, the incompatibility of legal rights with an absence of formal legal organisation of the community has been demonstrated. Thus, it has been succinctly stated that “[i]f a particular community is to have effective *sui generis* rights to protect, manage, and control its traditional knowledge within an international juridical order that gives effect to community resources, then it must be a source of identity to which other

‘identities’ in a civilised society owe obligations.’²³⁷ Communities must be vested with legal authority and originality, instead of being the subject of merely external preservation, whether by nation states or the international legal order.²³⁸

Likewise, if any national or international system is to be truly inclusive and thereby respect and protect the diversity of communities²³⁹ in relation to protection of TK and TCEs, it must abandon the notion or practice of according differential rights distinguishing indigenous from non-indigenous, which only serves to disenfranchise some communities and in effect defeat the principle of self-identification and cultural self-determination. Such a regime and its participants, including the communities themselves, must recognise and emphasise the commonalities of communities in relation to the global scourge of cultural misappropriation²⁴⁰ and, in so doing, eliminate the barriers to co-operation and mutual collective progress.

In keeping with these principles, an internationally binding treaty must ensure that:

- (1) customary law, protocols and practices in relation to TK and TCEs are respected and not eroded;
- (2) self-identification by a community, as a community, and its entitlement to identified resources, is accepted, subject to evidence that would rebut that presumption;²⁴¹
- (3) free, prior and fully informed consent of the community (as opposed to the Government of the day) is a fundamental prerequisite to every instance of exploitation of community resources;²⁴²
- (4) the community has the right to establish terms and limits on access, or to refuse access, to its TK and TCEs, and to revoke consent at any time²⁴³ (subject to reasonable limitations and exceptions for medicinal/plant TK);
- (5) each community benefits from any commercial exploitation of its TK and TCEs²⁴⁴ and that it benefits fairly on terms to be negotiated and agreed with the community upon independent legal advice; and
- (6) prior disclosure of the origin of plant or genetic material and/or TK is compulsory, and that in the absence of such disclosure the community has a right to have the patent revoked.

²³⁷ J Gibson, see note 1 above, at 12.

²³⁸ *Ibid*, 18.

²³⁹ *Ibid*, 286.

²⁴⁰ *Ibid*, 16.

²⁴¹ *Ibid*, 287.

²⁴² *Ibid*, 290.

²⁴³ F Lenzerini, see note 235 above, at 145.

²⁴⁴ *Ibid*.

In this way, a more satisfactory system of legal protection may be instituted at an international level and implemented by nation states in their domestic laws, rather than requiring their reliance on *ad hoc* minimally adapted IP laws. Such a system may be able to deliver some semblance of justice, at least in the cultural sphere, to indigenous and traditional communities globally.