

## **iWorld Forum:**

### **How Current Intellectual Property Laws Fail to Protect Traditional Cultural Expressions**

Lecture by Jonathan Franklin, University of Washington School of Law

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Notes by Lara Johnson, iWorld Secretary

Franklin opened with discussion of the tension between traditional expressions and personal autonomy. He highlighted one example of such a tension: a Maori dance that a New Zealand football team performs at matches. The Maori people object to non-Maori people performing this dance and find it offensive that the footballers do so. But the dance has been around for hundreds of years and the footballers have been performing it for decades. Should they stop performing it because the Maoris find it objectionable? Does the fact that the dance is now part of the footballers' tradition mean they should continue to perform the dance?

Franklin highlighted that in the information field, the real questions are: How do you do the right thing when comes to culturally sensitive information? Furthermore, how do you know what the right thing is?

Franklin discussed the issue of copyright and that to many cultural groups, the public domain is an enemy, not a friend. Franklin then introduced the scope of his talk, which was about intangible cultural heritage, not tangible cultural heritage items. He mentioned that the topic is frequently important to discuss because of economic factors (often when copyright is infringed some individual or group of people could demand payment).

Franklin defined intangible cultural heritage as:

- Traditional knowledge
- Know-how (patent)
- Genetic resources
- Traditional Cultural Expressions (TCE)

He asked if intellectual property (IP) law works for these kinds of expressions.

The following is content in the realm of copyright:

- Oral traditions
- Customs
- Languages

- Music
- Dance
- Rituals
- Festivities

He mentioned the organizations that are supposed to regulate the free dispersion of this kind of material: the World Intellectual Property Organization (WIPO) (Development Agenda), Convention on Biological Diversity (CBD), and the World Trade Organization (WTO).

Franklin went on to define Traditional Cultural Expressions (TCE) (Africans often prefer use of “folklore” term instead of TCE) and highlighted problems of defining what “Indigenous” people are. Should it be defined based on self-perception or group perception? How does one determine limits of Indigenous-ness? For example, Native Americans would universally be recognized as Indigenous people, but they also belong to sovereign nations within the United States so does intellectual property law apply to them? Franklin also pointed out some cynicism attached to TCE protection in that countries typically just want to protect what is most valuable to them economically.

It is currently very easy to take one group’s traditional knowledge and misapply it and it is very hard to enforce regulation of TCE. There is also the challenge of including Indigenous people in decision-making processes (often due to mistrust on the part of Indigenous peoples towards the government of the country they reside in).

Franklin mentioned many concerns of TCE such as the secularization of the sacred and misrepresentation of origin and culture. He also mentioned the issue of communal ownership, such as the use of a symbol from Aboriginal culture in a commercially available rug. If this is a copyright infringement, who would the designers of the rug pay for use of the work?

Franklin discussed many problems in applying copyright law to Indigenous works such as the problem of authorship, originality (because culture is living and not static), fixation (problem with oral traditions in general, because oral works are not fixed like written language is), term of protection (should the term be longer for culture? Lifetime of artist plus 70 years doesn’t make sense for a living cultural artifact), derivative works, fair use (because some groups may feel fair use is theft of their culture and they often see it as loss of control). Franklin also brought up the problem of how fair use interacts with secret communal knowledge.

The library's role on this topic is that we need appropriate ways to interact with Indigenous populations and need to understand the perspective of traditional groups. Few traditional groups trust their own governments to archive their material; we need Indigenous databases and should facilitate groups in creating their own databases of cultural information.

Intangible cultural heritage is ultimately more than just intellectual property – the way to balance competing concerns starts with education and communication between groups. Many Indigenous groups want an internationally binding document regarding TCE, but this is an unfunded mandate currently. Franklin closed by saying that this ultimately may be more of a human rights issue than an intellectual property issue.