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SELF-REGULATION IN PROTECTION OF ANCESTRAL PATTERNS AND ORNAMENTS

Master's Thesis

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I hereby declare that I am the sole author
of this Master Thesis and it has
not been presented to any other
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Terminology

AIATSIS Act - Australian Institute of Aboriginal and Torres Strait Islander Studies Act

ATSIC Act – Aboriginal and Strait Torres Islander Commission Act

ATSIHP Act – Aboriginal and Strait Torres Islander Heritage Protection Act

EC – European Commission

ECHR – European Convention of Human Rights

EU – European Union

Modus operandi - a usual way of doing something

UNDRIP – The United Nations Declaration on the Rights of Indigenous Peoples

USPTO – The United States Patent and Trademark Office

WIPO – World Intellectual Property Organization

Introduction

As consumerism became the dominant cultural norm of the West, the types of products sold to consumers have had to continuously evolve and diversify, in spite of the sometimes unjustifiable consequences and implications of that commercialization. And, as consumerism replaces erstwhile national, ethnic and religious conceptions of culture and itself becomes culture, the infinite growth paradigm underpinning the entire system needs unsustainable perpetual increase in yields, sales, profits, interest, returns in excess of index benchmarks et cetera.

The nihilistic and uncompassionate logic and motives buttressing the consumer cultural norm, not surprisingly, leave a destructive wake of extinctive proportions: deforestation has deprived many species of the only environment to which they could adapt for survival; industrial runoff has permanently and irreparably contaminated the same fresh water aquifers from which our drinking and household water is pumped; carcinogenic chemical compounds from petroleum derived plastics and pesticides have made themselves at home in the average person's bloodstream; perpetual interventionist wars in the middle east and other commodity rich portions of the third world have killed millions of civilians in collateral damage; pharmaceutical companies make massive profits mass-producing anti-depressant drugs which often cause suicidal ideations; the Church, the ethnically homogeneous nation-state, the heteronormative nuclear family and any other institution pointing to a higher ideal than that of consumptive reckless abandon are systematically destroyed—in short, every facet of life is necessarily desacralized. This desacralization is, unfortunately, seldom ever resisted. However, in what follows, the legal and regulatory means whereby the most culturally threatened and endangered portions of humanity might be able to begin resisting this desacralizing onslaught are explored.

As the pool of new ideas for mass-marketable goods dries up, many marketers have instead turned their attentions to some of the oldest and most timeless expressions of human creativity that exist; in the search of profitable novelty, ancestral art and knowledge has been commoditized. This brazen cultural cut and paste manifests itself most egregiously in the manner whereby unique textiles are brought to market. Different patterns and ornaments are being used in several business sectors, starting with advertising and expanding broadly throughout the fashion industry. Although it may seem harmless and thoughtful to add a quaint ethnic or indigenous touch to the items, but what often is forgotten is the origin and meaning of what has been used. Such usage causes understandable distress

among indigenous peoples; they are no longer the ones who hold the tradition flowing. Their identity is thereby expropriated by other people and usually all the profit earned in this process doesn't make it back to the roots where it should, but ends up in the pockets of businesses and entrepreneurs.[1]

Therefore, the widespread inconsiderate rip-off of their cultures weakens their position altogether by undermining the importance of traditional crafts, not to mention the ritualized and spiritualized aspects of such crafts. Further, the communities with the richest ancestral legacies are often financially deprived, lacking the means to sustain even their most viable infrastructure or even buildings. Schools are closing because the majority of kids is concentrated into bigger cities, all because there is no work for their parents in rural areas anymore. This vicious circle is a very blazing problem within the regional politics of any country, especially in small countries. Therefore, it is crucial for ethnic and indigenous micro-economies that any profit generated from traditional cultural expressions is reinvested back into the development of these communities where it is needed; they should be able to decide over the usage themselves, because outsiders could not possibly adhere to the principles and customs of the local setting. In the late 1980s, people began acknowledging the issue. Thereafter, it has been frequently discussed and the proper solutions have been sought.[2] The concerns were taken further in the year 2002 when the Rockefeller Foundation raised the question again with experts from indigenous peoples and discussed defense strategies for their intellectual property.[3]

However, it is argued by some legal scholars that indigenous culture should be left to the intellectual commons, so everybody can further the knowledge as they please because it is not a competition. Both viewpoints are justified and it is always important to listen to all the arguments, especially today, when human rights merge with all sectors of law, therefore balancing parties' rights is emphasized. People who advocate against indigenous peoples' heritage rights would prefer to see it rendered commercially and universally accessible by lawful means.[4]

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[1] Bank, K. Rahvusmustrid täidavad ettevõtlike rahataskuid. Äripäev 06.07.2009, cache attainable at http://webcache.googleusercontent.com/search?q=cache:zu0O40gnVeIJ:leht.aripaev.ee/%3FPublicationId%3D464dc490-fb94-4024-9b75258ddc8543a9%26articleid%3D24812%26paperid%3DBD8F3D1E-CCEE-48E7-B9C7-F438970DDAE6+&cd=1&hl=et&ct=clnk (04.01.2015)

[2] Brown, M. F. Who owns native culture? *Harvard University Press*. 2003, page IX (preface)

[3] Rockefeller Foundation Initiative to Promote Intellectual Property (IP) Policies Fairer to Poor People. Grain press release. 04.11.2002, attainable at http://www.grain.org/es/article/entries/2032-rf-launches-3-yr-initiative-to-promote-ipr-for-the-poor (08.01.2015)

[4] Lessig, L. The Future of Ideas: The Fate of the Commons in a Connected World. *New York: Random House* 2001, page 21.

Therefore, we have indigenous peoples fighting for their work's authenticity and sacredness against everybody else asserting their right to information, exchange of ideas and usage of work that does not seemingly belong to any individual. Intellectual property protection doesn't seem to do much to grant the aspired protection and fair use. Protection is limited by the time limit and lacks the ability to offer absolute control over work that is meant to be protected.[5]

If one thing cannot provide security and satisfaction in line with necessary protection and preservation, then it is time to move towards something that could be a solution for both sides. Setting too strict legal power over such a sensitive matter as ancestral property may begin to work against the preferred outcome, which is providing everyone access to traditional cultural expressions while also striking a good balance between abuse and reasonable informed management. There is however a serious risk to leaving everything in the hands of a copyright, but it is a totalizing measure to a relatively complex social dispute.[6] Copyright is part of strict positive law framework that, one assumes is never going to be flexible and bendable enough to grant such protection and terms of preservation as aspired by the indigenous peoples themselves.

History proves that there have been some alternative solutions. Solutions much different from the traditional approaches. Even if considered imperfect, they have still shown a significant change to the targeted problem. For example, voluntary regulation has been applied to the climbing of the Devils Tower which is a sacred site for American Indian people.[7] The voluntary ban lasts only for the month of June, because it is the high time for Indians' religious rituals during which they require peace and quiet for themselves. Since the year 1995, when the ban was put into force, the reduction in climbing has been a magnificent 85%.[8] If as an alternative to conventional lawmaking, the voluntary and self-regulatory system shows positive feedback with such a great percentage of success, then it could be possible to apply similar approaches to the whole ancestral property area or at least some parts of it.

The hypothesis for this research paper will be that self-regulation for the protection of ancestral patterns and ornaments is feasible. In order for self-regulation to be successful, it has to meet conditions which prove the legitimacy of the entity, it needs to meet the interests of both parties and

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[5] *Supra note* 2. Brown, M. F. 2003, page 72

[6] Conquest, R. Reflections on a Ravaged Century. *New York: Norton*. 2000, page 18.

[7] *Supra note* 2. Brown, M. F. 2003, page 154

[8] U.S. National Park Service, attainable at www.nps.gov/deto/parknews/voluntary-climbing-ban-at-devils-tower-in-june.htm (31.01.15)

also take the burden of 'mission impossible' off the shoulders of law, by protecting something held in community rather than in the hands of individuals for period of time longer than any intellectual property right could ever grant. The purpose of this paper is to reason the need for an alternative approach towards the protection of traditional cultural expressions, as well as identify possible shortfalls of such an approach. This thesis could be a basis for a new innovative way of tackling the issue of protection and possibly be a beginning of a new school of thought about this topic. Results can be materialized in a special platform such as a program the author has already began to develop. Such a functional program could put Estonia into a leading role for these matters and take the concept of ancestral intellectual property conception to a whole new level. The next step could indubitably be a doctoral thesis, whereby the whole self-regulatory framework would be created.

To reach the goal of this thesis some research questions are going to be analyzed throughout the paper: (1) what are the underlining reasons which make indigenous heritage protection necessary, and are there any legal instruments supporting it; (2) can copyright prove itself as a sustainable protective measure; (3) what, if anything, can be learned from Australian protective measures for indigenous traditional cultural expressions; (4) what are the conditions to self-regulation and can these be applied in the context of protection of traditional cultural expressions.

In the first chapter of this paper, there is an overview of the most relevant aspects of indigenous customs which influence the need for protection. Firstly, the call for respect of their identity is discussed, secondly the sensitive matters which derive from the communities' religion and beliefs will be looked at and thirdly the socio-economic models and their complicated relationship with indigenous society will be be explained. Additionally, human rights and the collective aspects of it in the protection of indigenous groups, along with the customary laws of communities are researched. In this chapter the first research question will be answered.

In the second chapter of this paper copyright protection and its shortfalls in the protection of indigenous traditional cultural expressions will be analyzed. The copyright protection principles will be mainly sourced from the Estonian Copyright Act, but necessary parallels with other Copyright protection measures from other States will be brought to comparison. Since the whole reasearch will be conducted taking into account different measures from different countries, in this chapter only one particular context will be looked at. The author found that the Australian system is one that has proven itself to be the most structured and, therefore, will get utmost attention and its framework for

protection will be opened up for discussion. The two following research questions will also find their answers in the chapter at hand.

In the third chapter of this paper, all self-regulatory measures for protection which have not been discussed in previous research will be brought into dicussion with argumentation on their functionality in the purpose of the program prototype. Namely, self-regulation and its categories relevant to the scope of this thesis, quality signs and different policies sorrounding it, the principles and rationale of the already existing and functioning framework. Author will analyze all these measures through the prism of six conditions which need to be met for the self-regulatory system to be succesful. Protoype is a complementary part of the research links to the purpose of this paper. The final research question will be answered in this chapter as well.

In this research paper, case law and precedents deriving therefrom, in relation to the field of interest are being used. Academic and scientific literature, covering several noted writers on this topic (Comaroffs, Janke, Raz, Newman, Brown, Golvan, Lessig et alia) will be used throughout the thesis as well as different normative materials from relevant jurisdictions. WIPO documents and literature on the topic of indigenous culture consitute a profound part of this research paper. The author uses the qualitative research method in this thesis and the information gathering is dwelling from the deductive approach. The analysis of the material is of its information and content.

A. Protection of cultural heritage

1. Urgency of protection

Cultural heritage or cultural legacy is a collection of both tangible and intangible assets that are significant to some specific region, society or just a small group of people who are left to keep their culture alive as it has been for centuries by their ancestors. The importance of such heritage lies in a fact that it has been inherited from numerous generations until today and the present generation is trying to maintain it in the best possible way so it could be bequeathed to the future. Tangible heritage comprises everything that can be physically perceptible, with all senses, and is usually something that archeology, science, technology or architecture value highly about a culture and which can speak a lot about the environment from which it originates. Anything from buildings to handicrafts are counted on the list of tangible assets. [9] Intangible assets are respectively everything which does not take a physical form - songs, knowledge, rituals, dances etc.

When we refer to cultural heritage, one can never separate one thing from the rest of a particular culture. Very often, indigenous peoples have it all merged, a sacred place or other tangible asset laced with the stories, religious customs, songs and other forms of intangible heritage. In the *Bulun Bulun* v R & T Textiles case, was a dispute about a painting named *At the Waterhole.* This work of art is a perfect example of the way things work in the indigenous societies - the painting carries not only a profound meaning for them, but is related to everything they do and everything they are.[10] Therefore, it is extremely hard to separate one from another and draw the line between tangible and intangible assets. Unfortunately, it has been the case that intangible assets have not been paid enough attention and have been so seriously threatened as to jeopardize the whole ancestral legacy. For example, some Egyptian festivals are so rich with all the aspects of both tangible and intangible culture that losing such an immense source of legitimate cultural information and experience would be a tremendous setback to preserving the nature of one's culture.[11]

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[9] UNESCO | www.unesco.org/new/en/cairo/culture/tangible-cultural-heritage/ (19.11.2015)
[10] Bulun Bulun v R & T Textiles Pty Ltd., [1998] 41 IPR 513
[11] *Supra note 9.* Unesco.org

1.1 Cultural identity and respect

An extremely profound, if not the most important angle of the issue at hand for indigenous peoples themselves, based on the literature, is respect from outsiders toward their culture and a dedicated understanding of their need to protect and preserve their identity, alongside its heritage. In some research papers, the principle of "cultural privacy" is mentioned and discussed under the same topic.[12] Even if it's just a spontaneous attempt to introduce the concept and the term to the literature of policy-making, it entails a noble vision of a shield against unwanted usurpation of someone's culture – be it indigenous community or just a stand-alone individual. The term makes sense in today's world more than ever. With the info-technological breakthrough, people are severely exposed and therefore more vulnerable. The latter does twist the wording of this concept a little bit in a favor of "right to be let alone" or "right to privacy" but the connotation stays close. If an individual holds such rights, it cannot be so immensely unthinkable to exercise it on indigenous peoples' communities and their aspiration to be let alone, to remain as possessors of their own culture.

Coming back to the *Bulun Bulun* case sheds light on the question why the author has chosen to talk about this and why it matters in general. Indigenous peoples are not always against the production itself, but against the way it is conducted and how it draws attention where attention does not belong. *Bulun Bulun* has claimed that without the lawful observance of production, the importance of artwork will be diminished and the relationship between the owners of their legacy and the work itself will be distorted, and as well as its sacredness.[13] At the same time, it isn't predicted to get any better, because of the information society we live in and the widespread access to everything. In addition to the rise of ignorance, lack of dedication and incapability of concentration is unfortunately becoming a norm among youth,[14] which results in the desacralization of the culture, held sacred theretofore.

Offensive and disrespectful treatment is something indigenous people face towards their heritage all the time. At the Public Hearings on Official Insignia of Native American Tribes by USPTO, it was suggested by the indigenous insider that they would like to have a list of their symbols whose usage might be offensive one way or another. That would not only prevent the commercial usage of insignia

[12] *Supra note* 2. Brown, M. F. 2003, page 27-28
[13] *Ibid*, page 54
[14] Kiirgusinfo.ee | http://www.kiirgusinfo.ee/lugemisvara/aju-mandumisest (14.04.2016)

but also raise awareness. It is important for the indigenous peoples that they are understood and that their symbols are explained to others who are unaware, perhaps even unintentionally so.[15] A similar idea is also communicated by the anthropologist David Howes, who emphasizes that the only way to resolve these issues is through moral education.[16] The best collections of ancestral patterns today in Estonia are held in the National Library and Estonian National Museum, but that is usually as far as they get. Museum exhibits or files in the archives only showcase cultural heritage, they don't explain where they should be used or not used, nor do they in any way benefit their traditional creators, in terms of compensation.

Image 1

Image 2

Image 3

Browsing Estonian market, one can find a list of several different categories of items decorated with the traditional cultural patterns which have been sold in the past or are currently purchasable: pillows, keychains and phone cases (Image 1);[17] bags, umbrellas and rubber boots;[18] wallpaper and other home décor (Image 2);[19] mattresses[20] etc., not to mention numerous designers who use traditional patterns as their source of inspiration whether it be for clothing or any type of packaging. It goes even as far as prints on chocolates (Image 3)[21] and even to such extremes as coffin décor.[22] All of these prints are used only in order to add a traditional ethnic

[15] USPTO Public Hearings on Official Insignia of Native American Tribes, 12.07.1999 Attainable at: http://www.uspto.gov/trademarks/law/tribal/nahear1.jsp (02.03.2015)

[16] Howes, D. (ed.) Cultural Appropriation and Resistance in the American Southwest: Decommodifying 'Indianness', in Cross-Cultural Consumption: Global Markets, Local Realities. *London: Routledge*. 1996, page 138–160.

[17] Misu | http://misu.ee/et/blogi/900-etnolandi-rahvusmustritega-tooted-misus (14.04.2016), as well at: http://misu.ee/et/blogi/5177-valik-rahvuslikke-nutitelefoni-kotte-misus (14.04.2016)

[18] Rahvusmustrid.ee | rahvusmustrid.ee (14.04.2016)

[19] Sisustusweb.ee | http://www.sisustusweb.ee/ee/uudis/1271/rahvusmustritega-sisekujundustooted-printstone-trukistuudiost.html (14.04.2016)

[20] Sleepwell | sleepwellbed.com/laulupeo-eel-saabuvad-muugile-rahvusmustriga-madratsid/ (14.04.2016)

[21] Chocolala | http://www.chocolala.ee/product/xxl-rahvusmustritega-assortii/ (14.04.2016)

[22] Eesti Päevaleht | http://epl.delfi.ee/news/eesti/etnomoe-voidukaik-nuud-saab-osta-ka-rahvusmustriga-puusarke?id=51281280 (14.04.2016)

touch, simply because they are pretty and sell well during high times of patriotism among nationals (especially during the famous song and dance festivals). However, it is questionable that the users of those patterns know the real meanings and stories behind particular patterns they place on their products. Therefore, they might end up using it in a very wrong context. Estonians might not be very religiously sensitive, but anywhere else among indigenous cultures such uncontrolled production would create distress and would be considered extremely humiliating and offensive towards their ancestors' legacy and religious beliefs.

1.2 Religion and customs

Indigenous peoples' reluctance toward the usage and especially the reproduction of their heritage without permission is based seemingly on very religious reasons. For all the believers in the world, religion is something they want to decide for themselves and the world has seen enough of what happens when somebody thinks otherwise – riots, rebellion and wars. In contrast to what large religious groups are demanding, indigenous peoples are looking for respect and understanding. Many things and places that hold sacred meaning for their clans have nothing discernibly special for anybody else. In this simplicity, it is easy to think that the usage of their heritage couldn't possibly harm anybody. Incomprehension of the importance of this heritage and not showing enough respect to the indigenous legacy leads these groups to close in and causes the loss of potential positive negotiations in the future.[23] In her book, B. Hoffmann refers to a case study from Canada in which the Snuneymuxw First Nation of Canada did get the protection of their petroglyphs in 1999, alongside a related educational campaign. The outcome was positive - merchants stopped commoditizing their rock art successfully.[24] People more easily accept all sorts of bans and restrictions when they are accompanied by an explanation; outsiders don't usually comprehend the sacredness which something might hold for indigenous communities. Once they are made aware of such matters, the outcome might be unexpectedly positive and those who have taken advantage of the indigenous art can thereafter become its most ardent advocates instead.

Indigenous peoples have a spirituality which is strongly connected to nature, whether that'd be trees, rocks or water, and in this context it means that they believe in spirits who animate their territories,

[23] *Supra note* 2. Brown, M. F. 2003, page 24
[24] Hoffmann, B. T. Art and Cultural Heritage: Law, Policy and Practice. *Cambridge University Press*. 2006, pg 333.

including all the aforementioned elements of natural scenery. Unauthorized reproduction sets the relationship between the clan and the spirits who bring life to their lands in danger.[25] Even taking photographs might not be allowed, because in some communities it is believed that taking a picture of a person is equal to capturing their spirits.[26] Something so sacred must be handled with extreme caution and care. This issue should not be taken lightly and must be dealt with in complete seriousness, because it is serious for the indigenous communities.

Religious reasoning has a very strong connection to human rights and with such cases major collisions between the adversarially opposed rights of different groups is expected. Article 9 of the European Convention of Human Rights (ECHR) advocates for the right to religious liberty along with religious practices. This right grants the freedom to exercise religion either alone or in a community and both publically or privately, encompassing everything from worshipping to manifestation. According to the Article 9 point 2 of ECHR, this right can only be limited when it is necessary in the democratic society, in the interests of public safety and order, health or moral and protection of rights and freedoms of others.[27]

Bulun Bulun's painting can be considered as a manifestation of a religion which is practiced in the community and carries a sacred meaning for every member of this community. Therefore, it is the communities' right to prevent this object from being reproduced, because it would undermine its religious value and importance for the community and thereby infringe upon their religious liberty. Based on the human rights, reproduction would represent the freedom of expression advocated for in Article 10 of the ECHR.[28] However, the meaning of this article is relatively vague and allows for different interpretations of the precedents. Therefore, disputes arising between the rights of the two abovementioned parties, when taken to court, if serious enough, can be settled differently every time and the factor that may play the prevalent role might be the smallest detail or just good faith.

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[25] Golvan, C. Aboriginal Art and Copyright: The Case for Johnny Bulun Bulun. *European Intellectual Property Review* 1989/11 (10), page 346–354

[26] Janke, T. Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions. *WIPO*. 2003, page 97.

[27] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: http://www.echr.coe.int/Documents/Convention_ENG.pdf (20.02.2015)

[28] *Ibid.*

A court case which dates back to the Third Great Awakening speaks in favor of good faith being a strong force for swaying judgment.[29] The Australian Pitjantjatjara indigenous group's sacred iconography and other religious heritage was featured in a book by Charles Mountford. That book turned out to be his masterpiece and quickly received a lot of readers. The Pitjantjatjaras requested it not be resold and distributed in the area which they inhabited. The information gathered by Mountford about the Pitjantjatjaras' religious customs while travelling with them some decades earlier was to be held in secret and not to be revealed to women, children or even other aboriginal men who are inexperienced in those particular matters according to the customary law of their community. The lawyers of the indigenous group argued that the case was a breach of confidence. It was ruled that the circulation of the book be stopped in the region. The author did not consider the sensitive nature of the information he was spreading and how it would not have been exposed to the public by any other means to such extent as was done by Mountford, with facts in detail, illustrated with pictures, graphs and drawings.[30] Unfortunately, the legal scope of the latter decision is not elaborate, much less to say even sufficient in the scope of the particular case. Eventually, it is not only about the question of who has the legal right to the heritage, but how its respectful treatment can be promoted.

Similar reasoning arises from the case of Rirratingu artists versus Indofurn Inc. Ltd, a company which produced the carpets looking like exact copies of the artists' work. The pictures for the carpets had been taken from the educational portfolio in a National Gallery of Australia. One artist, Banduk Marika, states that her work represents both "inside" and "outside" knowledge of a story about Wagilag Sisters. However, only the "outside" story should be disclosed to women and children, according to their community's customary law. The right to reproduction of the ceremonial art can only stem from membership of the land owning group.[31]

1.3 Socio – economic

The combination of social and economic factors needs attention as well. One of the triggers of writing this thesis was exactly the concern over the circumstances which dictate the financial flow of communities with rich cultural heritage. The author of this research paper wants to place the voice of

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[29] Reference to the essay by Wolfe, T. The 'Me' Decade and the Third Great Awakening. *The New York Magazine.* 1976 Attainable at: http://nymag.com/news/features/45938/ (15.09.2015)

[30] Antons, C. Foster v Mountford: cultural confidentiality in a changing Australia. In A. T. Kenyon, M. Richardson & S. Ricketson (Eds.), Landmarks in Australian Intellectual Property Law. *Melbourne: Cambridge University Press*. 2009, page 110-125

[31] *Supra note 26.* Janke, T. 2003, page 9-11

indigenous peoples and the practical issues of community maintenance against the common understanding of ancestral assets belonging to everyone. The struggle between marketing authentic things or not marketing at all is in focus for many communities and some choose the first option just to keep their traditional cultural expressions all for themselves. Sometimes it may be the only way to pursue authenticity in commoditizing culture.[32] Ethnic groups assimilate and open businesses to market their 'commodities' which include rites, artifacts or even trespassing onto their lands. This is a natural continual definition of the age we live in, the age of profits, privatization and consumerism.[33] The International Network on Cultural Policy, which is representing numerous governments, alliances, workers' associations and local cultural industries, have expressed that the treatment of culture as an international trade agreement case, makes sense in every way, and they are suggesting that such a legal instrument is needed which would better promote access to cultural forms either by a market or non-market mechanism for production and distribution. In that way it would represent the national public interest in an even beneficial manner.[34] The emphasis must be placed on the need for a legal instrument, however if it cannot be legal then it should at least bear the features of a controlled regulatory framework which could be trusted.

Surrendering to the provocative nature of marketing and social expectations doesn't always mean that indigenous peoples are content with it. Desperate methods for showing that culture belongs to tribes undermines the integrity of aboriginal society as tradition. The market pressures have turned several tribes to generate income from their traditional heritage themselves to avoid the unethical usage by others. That way it is possible for them to also control where the profit is channeled, turnover can be used to benefit locals, whether it be building schools or boosting infrastructure.[35] The latter is rather important, especially today, because the stagnating communities suffer from the lack of the necessary means and financing to provide it. Money is concentrated in the bigger settlements and rural areas are left behind in development that way. Since most of the indigenous communities are located outside of large urban areas they also face financial difficulties. Their leading option to solve this is to get involved in tourism. Good examples here come two resorts in South Africa, which are spreading

[32] Comaroff, J.L, Comaroff, J. Ethnicity, Inc. *The University of Chicago Press*, 2009, page 2-14

[33] Comaroff, J.L, Comaroff, J. Policing Culture, Cultural Policing: Law and Social Order in the Postcolonial South Africa. *Law & Soc. Inquiry*, Vol.29: 513. 2004, page 513-545, at page 537

[34] Coombe, R.J. Legal Claims to Culture in and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference. *Law, Culture and the Humanities*. Vol. 1 (35), 2005, page 32-55, at page 40-41

[35] *Ibid.*

dissatisfaction among members from older generations because it detaches them from their lands. The existence and functionality of these resorts are tolerated despite the pathology, because they create jobs and help the community financially. [36]

According to the research by M. F. Brown, some critics express that the aboriginal cultures should continuously be undergoing changes, so they can put up with the world dictating to them should be done. In other words, it means they need to keep changing to survive, even if it is done under pressure, even if the changing means that the communities are drifting further away from what they truly are.[37] As understood, it mostly means the modernized production of their own culture, not less importantly openness to the outside world. This, however, goes against indigenous communities' four basic principles on how their societies work.[38] Their view is rather opposite. They look for unity between people and nature. They let themselves be guided by the ways their natural habitat works. Making thousands of T-shirts by means of mass production to enrich or to make someone in particular in their society wealthy is not how they run their community models. Some statistics even prove how traditional indigenous ways of living help in the extreme to preserve nature. The necessity of protecting their ecologically sustainable and effective community model is underscored by the fact that "indigenous territories constitute 20% of the earth's land mass, but that land harbors 80% of the world's remaining biodiversity".[39]

It's important to note that indigenous peoples are not necessarily against sharing their insignia. They don't mind anyone to go and see it in a national park for example, but they are strongly against the copying and exploitation of their intellectual property for material gain. Non-indigenous people don't have emotional attachment to the insignia, so all they really care about is profit. Giving back to the tribes, however, is not usually under negotiation.[40] Similar concern was raised when a non-native woman Frances Densmore recorded and collected native songs and stored them in a museum. The preserving itself has nothing wrong with it, but indigenous peoples perceive it, again, as taking rather

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[36] *Ibid.*

[37] *Supra note 2.* Brown, M.F. 2003, page 52

[38] First peoples worldwide | wwwfirstpeoples.org/who-are-indigenous-peoples/how-our-societies-work (10.03.2016)

[39] *Ibid.*

[40] USPTO Public Hearings on Official Insignia of Native American Tribes, 08.07.1999, attainable at: http://www.uspto.gov/trademarks/law/tribal/nahear3.jsp (02.03.2016)

than giving back; outsiders seem to want to keep the culture alive, but it should be done by supporting and providing aid to the communities not just placing their heritage into archives of museums.[41]

As noted earlier, indigenous peoples are willing to share and they are open to collaboration as long as it is not harmful to their society. In 1998 a case was brought to court in the United States about the usage of tribal leader's name Crazy Horse on a liquor bottle. Crazy Horse, with the real name Tasunke Witko, was a leader of Oglala Sioux, being a beloved member and in the same time a respected advocate for spiritual and political matters, so much so that the United States Postal Service even issued a stamp to honor his name and there is a Memorial for him in South Dakota. Additionally, he had been a strong opponent to the use of alcohol amongst his people. Crazy Horse's Estate brought this matter to a Rosebud Sioux Tribal Court and accused the brewing company of defamation, negligent and intentional infliction of emotional distress and violation of the Estate's right of publicity. Unfortunately, it was held that the Estate lacks adjudicatory authority outside of the Rosebud Sioux Reservation and therefore the manufacturing of this liquor was continued, with the only restriction of distribution and sale being on the Reservation area. The Estate tried to argue that it is also purchasable and accessible via the Internet by members of the tribe and therefore had a direct effect on the members, but this accusation didn't hold up in court.[42] Such exploitation should be considered poor judgment even by even the most capitalist of standards, however, the brewery enjoys their liberty to prove their point that indigenous people don't have authority over them. This case, unfortunately, is not an anomaly, but instead typifies institutionalized lack of respect toward indigenous culture and customs.

Revitalizing culture by turning it into a business can be conducted in much more ethical ways than the one described above. Southwest Airlines sets a positive example by consulting with Zia Pueblo people when they wanted to use the tribe's sacred sun symbol on their new aircraft. To get it right and in accordance with the Zia traditions the airline designers asked for guidance from the Zias. The tribal administrator commented that the situation was a very pleasant and welcomed collaboration, because the symbol means a lot to the Zias. The Pueblo were also guests of honor at the inauguration of the plane.[43] Since the state of New Mexico, where the tribe is located, put the sun symbol onto the state's

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[41] *Supra note 2*. Brown, M.F. 2003, page 25

[42] Hornell Brewing Co. v. Rosebud Sioux Tribal Ct, United States Court of Appeals, Eighth Circuit.1998

[43] Southwest airlines | www.swamedia.com/releases/Southwest-Airlines-Unveils-High-Flying-Tribute-To-New-Mexico?l=en-US (10.03.2016)

flag, the Zia people don't have enough legal authority to prevent the dissemination of their symbol. What makes it far bitterer is that the sun symbol was only present on the tribe's ceremonial pottery which under no circumstances should have left the Pueblo, but some pottery was stolen from them. Ever since the flag was made, it has been impossible for the Zias to benefit from the symbol as well.[44] It mattered even more when Southwest Airlines allotted the tribe's scholarship fund with a lump sum, whose size remained undisclosed. The symbol has become so ubiquitous that the tribe is now happy if it can accumulate even the smallest benefit for the Zias. The only difficulty is how someone can establish a suitable monetary value to such important religious symbol.[45] This clearly indicates once more, that when approached in the right manner, many tribes are willing to cooperate on the usage of their insignia, because they would much less want to see it being used in disgraceful and profaning ways than sharing it.

2. Legal instruments

2.1 Human Rights as collective rights

In the beginning of 90-s Civil Rights activist Barbara Jordan defined human rights as „that which is due to anyone by tradition, law or nature".[46] It is also believed to be applicable to everyone „simply because one is a human being. They are thus moral rights of the highest order".[47] Therefore even a superseding concept of „trumping"[48] by Ronald Dworkin, has been accepted by the advocates. Trumping means that one particular right or set of rights is always stronger than some other right or set of rights. According to the theory, human rights always tend to have a right hand when put against some other right.

Conceptually human rights are perceived and based on a liberal tradition of the protection of the individual and do not aim to have a collective effect. Even though, in some instances, rights appear to be collective already in their nature, even if the final beneficiary is an individual. Similarly, human rights also present a relationship between individual and collective rights. However, the concept is

[44] Turner, S.B. The Case of the Zia: Looking Beyond Trademark Law to Protect Sacred Symbols. *Chicago Kent Journal of Intellectual Property*, Vol.11 (2), 2012, page 116-145.
[45] *Supra note 2*. Brown, M.J. 2003, page 92
[46] Felice, W.F. Taking Suffering Seriously: The Importance of Collective Human Rights. *SUNY Press*. 1993, page 17
[47] *Ibid.*
[48] *Ibid.*

more focused on the rights of individuals in those social groups rather than each particular group in the whole. It is found faulty as far as humans naturally are social beings and they interact with each other in groups, be it among same sex, race, interests etc.,[49] hence it is rather natural that people form groups which represent an interest one way or another.

The connection between human rights and indigenous peoples was already mentioned in the former paragraph where religious freedom was discussed, however since those communities would rather enjoy their rights as a group, then the concept has to be tackled differently within the current paragraph. Collective human rights present the possibility for groups of which they could benefit from. In order to expand on the topic of collective rights, author finds it necessary to open the term itself, which is paramount to the scope of this paper.

Sometimes collective rights can be confused with group rights, however the latter does also entail corporate rights which are not to be a main subject concerned. The eminent difference between the two conceptions under group rights is the perception of the word 'group' as such. Collective rights can only be exercised in cooperation with each individual of a whole group, in other words the individuals are related to each other by a common interest which is also dependent on others. Hence, collective right can be understood as one which provides the justification for that right only by those combined interests. This interest can, but does not have to, therefore be the only thing that joins these particular individuals into a group and that is in a strict sense enough for the collective right to arise. In the meaning of the discussed conception, an interest might also be a common identity, such as race, sexual orientation or the like. [50]

A corporate conception requires the group to hold a „morally significant identity", because the right is held separately from the individuals who are the members of such a group. Therefore, the group is perceived as a single indispensable entity and the right would be only on the group, not on the individuals who form a group. [51] Here, a 'nation' could be also considered as a corporate right, simply because it is a group *per se* and no member of this group has to have anything else in common, neither do they need to have a shared interest. One might now ask why indigenous communities cannot be under the corporate conception. Indigenous peoples consider themselves as a group in the meaning of

[49] Jones, P. Human Rights, Group Rights, and Peoples' Rights. *The Johns Hopkins University Press. Human Rights Quarterly*, Vol. 21 (1), 1999, pp. 80-107.
[50] *Ibid.*
[51] *Ibid.*

corporate conception, but also all of the members taken separately stand for same ideology and rights, therefore the necessary 'shared interest' condition for collective right is met. However, which right is then more prevalent? Such need is well communicated in the famous *Bulun Bulun* case again, where the artist stands for the rights of the sacred painting, as well as the whole clan stands for the same values which that painting entails[52], therefore it can be concluded that every individual in this clan is separately activated and they are hence categorized rather under the collective right, than corporate.

There is generally a lot of controversy around the recognition of indigenous rights as collective rights, also on the states' level. It most often derives from the fear of collective rights potentially undermining individual rights. This calls for the theoretical clarification. Some provisions have referred to some rights of indigenous peoples as the ones held collectively, for example from the United Nations' International Covenant on Civil and Political Rights (such as self-determination which is defined in the first Article of UNICCPR)[53] and also from the American Convention on Human Rights, especially Article 16 for the right of association and also Article 29 which is about restrictions, but the wording can be interpreted in a way whereby group rights are relevant as well.[54] It must also be mentioned that even some courts, which are playing a considerable part in shaping the creation of law, especially in common law countries, have recognized the collective rights. One of the major concerns of political theorists, which is related to the topic, is that individuals themselves within a group will be left without necessary protection, because group rights would prevail. The latter is again argued by some authors because any right can be countered with another competitive countervailing right. Therefore, there is a question of balancing rights rather than focusing on limiting the boundaries, scope and nature thereof.[55]

A theory that many previously discussed authors seem to be following is the one of Joseph Raz. His analysis states in order to ground a duty of moral right upon someone then the interest has to be

[52] *Supra note 10.* 41 IPR 513

[53] International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966. URL: https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf

[54] American Convention on Human Rights. Signed at the Inter-American Specialized Conference on Human Rights, San Jose, Costa Rica, 22 November 1969. URL: http://www.hrcr.org/docs/American_Convention/oashr.html (14.04.2016)

[55] Newman, D. G. Theorizing Collective Indigenous Rights. *American Indian Law Review*, Vol. 31(2), 2006, pp. 273–289.

sufficient to grant that.[56] In other words, if someone has an interest, which has an aspect that makes someone's life better, and this is sufficient enough to justify the duty imposed on another then the necessary moment is met and interest is proven to have a reason. It does suggest thus, whether the interest is collective or individual, the one with more justification prevails (again this is about balancing the rights). The principle of collective rights is very much related to the individual rights anyway, because as one precondition to have collective rights in a first place, is that the rights should serve the interests of the members of a particular group. Therefore collective interests are always derived from individual interests which could amount in a right, whether through a simple way or not.[57] Collective right could then also be explained as individual rights which are backed up by a group or individuals, they are based on the same values after all.

One of the most important values of human rights is that it protects minorities from the majorities[58] that being said, one minority may form a group of individuals with the same underlying interest, which lets them to enjoy collective rights as well as individual. Indigenous peoples should also be considered a minority, thus a collective entity, and the collective rights' umbrella is expected to cover at least some of their interests, if not anything else, then United Nations majority members' recognized right to self-determination must indubitably fall under the scope.[59] A better and vaguer definition would be that human rights are "whatever the relevant international authority says they are."[60] The latter is supporting the act of balancing and is not inclined towards either side and should thus favor one to another based only on the severity of the interest, not on the volume of the group or amount of members.

Despite the discussion above, in its text, the Universal Declaration of Human Rights[61] does not mention any group or collective rights, thus all its Articles are left open for interpretation only and cannot provide guaranteed protection for groups. The United Nations has taken a huge step to stand up for indigenous people' rights and the resulting United Nations Declaration on the Rights of

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[56] Raz, J. The Morality of Freedom. *Clarendon Press*, 1986, pp. 166
[57] *Supra note 55.* Newman, D.G. 2006
[58] Burgers, J.H. The Function of Human Rights as Individual and Collective Rights, in Human Rights in a Pluralist World: Individuals and Collectivities, ed. Jan Berting et al. 1990, page 63-74, at page 67
[59] *Ibid.,*page 73
[60] *Supra note 49*. Jones, P. 1999, at page 83
[61] The United Nations. Universal Declaration of Human Rights. 1948

Indigenous Peoples (hereinafter the UNDRIP)[62] was adopted in 2007 with only 4 votes against it.[63] It looked good in numbers, but those four countries who didn't want to join were Canada, United States, Australia and New Zealand; it was an unexpected result, because these are countries which have the biggest indigenous communities in the world and should therefore be most interested in the UNDRIP, to remedy the weaknesses and insufficiencies of the existing human rights law.[64] Further, Canada had even been closely related with the creation process and also endorsed the draft.[65] Although the UNDRIP is non-binding, it does offer a decent outline of indigenous rights and it calls on nations to develop their domestic policies and govern by the same principles. The importance of it cannot be underestimated because it is also a major step towards a better legal framework of human rights for everyone.[66] The first sentence from Article 1 of the UNDRIP already clearly illustrates the support for human rights to be applicable to indigenous peoples both as individuals and as collectives.[67] At the same time, UNDRIP does not overriding the treaties or agreements which indigenous peoples may have with individual countries. It also does not undermine The Declaration of Human Rights either, but, rather, works as a complementary part of it, enshrining the rights not addressed in any other human rights context.[68]

Canada, the United States, Australia and New Zealand did later declare their support towards UNDRIP, over the years of 2009 to 2010. However, after the issuance of the statements some people began to doubt in their motives. It was argued that they only ostensibly offered support, but intentionally did not take any action to enforce the provisions of UNDRIP. All four countries call this declaration an "aspirational" document and have not added anything of it to their national laws.[69] Therefore, if "key" countries don't really support UNDRIP, but only fake the emotional bond for better relations with indigenous communities, then it fails to provide much needed balance to the

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[62] UN General Assembly. United Nations Declaration on the Rights of Indigenous Peoples : resolution adopted by the General Assembly, 2 October 2007, A/RES/61/295, available at: http://www.refwotrld.org/docid/471355a82.html

[63] UN News Centre | http://www.un.org/apps/news/story.asp?NewsID=23794#.VuV2Afl96M8 (13.03.2016)

[64] Wiessner, S. The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges. *European Journal of International Law*, Vol. 22 (1), 2011, page 121-140, at 130

[65] The University of British Columbia | http://indigenousfoundations.arts.ubc.ca/home/global-indigenous-issues/un-declaration-on-the-rights-of-indigenous-peoples.html (14.04.2016)

[66] *Supra note 64.* Wiessner, S. 2011

[67] *Supra note 62.* United Nations Declaration on the Rights of Indigenous Peoples

[68] *Supra note 65.* The University of British Columbia

[69] *Ibid.*

conflicts between collective and individual human rights disputes, especially relating to the topic of indigenous rights.[70]

2.2 Customary Law

In the scope of this research paper, "customary law" does not refer to "customary international law", which governs the international obligations on relations between States, especially referring to those of customs and practices[71]; but "customary law", on the functioning of indigenous peoples and local communities, where "custom" is defined as a "rule of conduct, obligatory to those within its scope, established by long usage" and "has the force of law."[72]

Customary law can serve in several possible roles: as a source of law, a means of determining remedies and sanctions for the breach of rights, a guide to the transmission of rights et cetera.[73] Customary law can also relate to any aspect of life in indigenous communities, be it a conduct of spiritual life or maintenance of cultural heritage.[74] The binding effect of customary law can only happen when the set of rules put down inside the community have been infringed upon by the outsiders.[75]

The collection of case law studies by Terri Janke[76] allows the reader to assume the core of customary laws independent of the clan attached to it. There are some underlying values that each case presents and those have also been taken into consideration at the court hearings, not always as successfully though, because it's hard for outsiders to decide on matters truly intrinsic only to the clan itself. The traditional owners of the images and stories have the collective authority to decide who can create artwork from it, if at all, under which circumstances it may be published and the terms of reproduction, if the latter is allowed. Artwork which limns the stories of creation or dreaming have much stricter rules for maintenance than the ones of public ceremonies. For an artist, it is of the utmost importance to follow all the rules set down by traditional owners and make sure permission given is properly understood. Upon the situation wherein artist has breached the customary law of a particular

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[70] Badger, A. Collective v. Individual Human Rights in Membership Governance for Indigenous Peoples. *American University International Law Review*, Vol.26 (2), 2011, page 485-514

[71] Cornell University Law School | https://www.law.cornell.edu/wex/customary_international_law (13.03.2016)

[72] Osborn, P. G. Concise Law Dictionary. *London: Sweet & Maxwell*, 9th ed. 2001

[73] WIPO. Customary Law, Traditional Knowledge and Intellectual Property: An Outline of the Issues. 2013, page 4

[74] *Ibid.*

[75] *Ibid.,* page 6

[76] *Supra note 26.* Janke, T. 2003

indigenous community, the "punishment" can differ from simpler monetary obligations to serious bans from the ceremonies, reproduction of designs or outcast from the community. These are more civilized means, historically physical punishments and even the death penalty has been used. After the judgment for the *Bulun Bulun* case in 1998, courts have been more open to recognizing the necessity of legal protection for the clans' heritage protection. Artists usually hold a fiduciary relationship with the clan and therefore are bound by any terms set upon them deriving from the clan's customary law. Taking into account the case law at hand, communities are mostly open to the artist taking responsibility for the artwork, even with its distribution to museums (or any other educational purposes), some even allowing artists to keep the financial gain from licensing it. Based on that, it is evident that indigenous communities are open to collaboration when it doesn't harm their inner balance, doesn't undermine the sacredness of their work and doesn't question their ways of maintaining their own society.

Indigenous customary laws set the practices, roles and responsibilities within a community, as well as the maintenance and dissemination of their cultural knowledge. These rules may be hard to sustain because of the changes inside of and outside of the community, social shifts or relocation. In reality, the customary law can most effectively regulate only the behavior of the members of the community itself and not that of outsiders.[77] That being said, it is apparent that there is not a full lawlessness in those communities, it's just necessary to find a way to attach them to Western models as well.[78] For these reasons, it is extremely critical to get support and recognition from further-reaching policies to promote the appropriate ways of using and preserving the merits originating from indigenous communities.[79] However, it might sometimes be hard to distinguish which of the community rules are to be counted as 'laws' and which of them are just social rules accepted by the community itself, unless they have developed a way of recognition for the set of 'laws'.[80]

The famous case of *Bulun Bulun* provides a good example of the customary law viewpoint as well as many others in this research paper. One strong argument brought up to the court during proceedings

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[77] Shubha, G. Globalization, patents, and traditional knowledge. *Columbia Journal of Asian Law*, Vol. 17(1). 2003, page 73-120.

[78] Ogwezzy, M.C. Protection of Indigenous or Traditional Knowledge under Intellectual Property Laws: An examination of the efficacy of copyright law, trade secret and sui generis rights. *International and Comparative Law Review*. Vol. 12 (1), 2012, page 5-34, at page 7.

[79] *Supra note 73*. WIPO 2013, page 9-10

[80] Dworkin, R. Taking Rights Seriously. *Harvard University Press: Cambridge*. 1977, page 20-21

was one of “native title”. Pursuant to section 224 of the Native Title Act[81] the *Ganalbingu* people were to be considered as “native title holders” of their land and the authors’ ancestors were also members of the clan. Therefore, the production of the painting was the incident of native title which is only passed down through the bloodline of the clan. Justice Von Doussa denied this matter, explaining that Aboriginal laws cannot create obligations on people who are outside of this community and be binding.[82]

Considering all the aspects aforedescribed, neither human rights nor customary law can protect indigenous communities unless there are people around them who are willing to contribute. Every legal framework, whether more or less binding, needs support from different levels. For indigenous communities the national as well as international recognition means everything. The creation of rules may start from the customs of a small tribe, but ultimately serves its real purpose when the State, wherein this community is located, is promoting the binding effect in its legislation. At the moment, it seems as though States often step out of that supportive role for different reasons, many of them discussed above. The biggest hindering element, however, expressed by States themselves, is fear that collective rights overrule individual rights, fear that one small entity may usurp too much power and fear that the balance in the legal system will be distorted and swayed.

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[81] Native Title Act 1993 No. 110, 1993
[82] *Supra note 10.* 41 IPR 513

B. Current scope of protection

To get any system to function on all levels and to be capable for adjustment into different jurisdictions, a comparison has to be drawn and an example must be set. The author has chosen to look more closely into the Australian indigenous traditional cultural expressions' protective measures. Before looking into a concrete example of how the protection of indigenous communities is tackled in the mentioned area, it's important to establish the means and scope of legal protection, because the best protection in the eyes of the general public one can get, without a question, is such that it is covered by any positive law act, convention or directive. For that matter, intellectual property agreements, mainly copyright laws must be consulted. Since there is a significant amount of uniformity between copyright agreements, on both the global and European Union levels, there is no ineluctable reason to bring out provisions from all of the governing acts, conventions or directives in parallel. Within the context of this thesis, it is assumed that such changes would first functionally be introduced in Estonia, therefore what follows in this chapter about copyrights is based putatively upon the Estonian Copyright Act and some international agreements on copyright which are binding in an Estonian context.

1. Copyright

The sentence which determines the purpose of the Estonian Copyright Act[83] (hereinafter referred to as Copyright Act), begins with the words "to ensure the consistent development of culture…" whereby it is understood and interpreted that this is the main goal and purpose of our national copyright law. However, from the standpoint of indigenous peoples and ethnic communities there is nothing consistent in that kind of development which is communicated in the Copyright Act.

According to paragraph 5 point 2 it is clearly stated that folklore is not subject to protection.[84] 'Folklore', as a term, means "traditional beliefs, myths, tales, and practices of a people, transmitted orally."[85] It is slightly different from the concept of indigenous heritage because of the oral transmission, however the undergirding idea behind both concepts are similar. Both of them are passed on from generation to generation and neither can be attached to only one person, but rather to an entire community. Both may also take different forms like folk music and tales, handicrafts, painting and so forth. Further, it might even all be interwoven, because both are carriers of national identity and

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[83] Copyright Act. RT I 1992, 49, 615
[84] *Ibid.*
[85] Definition from thefreedictionary.com

distinguishable cultural history. A prevalent misconception of indigenous heritage might lead to the destruction thereof. The *Bulun Bulun* case from Australia sets a really good precedent from which to take examples, because it links well between many terms of copyright. Connection among different aspects of indigenous heritage was an important part of these proceedings. The bark-painting authored by Mr. Bulun Bulun was not just a painting, but a whole storytelling of the *Ganalbingu* people's heritage.[86] Folklore was also considered one of the sources of inspiration and therefore is an inseparable part of this painting. The indigenous peoples' spokesman made it quite clear during proceedings that one part of their culture cannot be treated any differently than everything else, inasmuch as, if one derivative of the bark-painting is not reserved for protection then it is not really fully protected.

Another paragraph that does challenge the cornerstone of communal arts is §11 point 2 in which the moral rights of an author are inseparable from the author's person and non-transferable.[87] Attaching certain person(s) to a work which is subject to protection ignores an important nuance of indigenous art. Indigenous peoples work in communities and the *modus operandi* of their clans is much different than what is perceptible to outsiders. Under the circumstances of the paragraph in question, only one person can be a legal 'owner' of an artistic work, unless it is a joint authorship in the meaning of paragraph 30 or collective work in the meaning of paragraph 31 of the Copyright Act. The latter still technically entitles rights only to one person or refers to co-authorship.[88] The *Ganalbingu* people are confident that they have as much right to the traditional ownership of the body of ritual knowledge from which the artistic work is derived, as much as the artist, including the artistic work itself and its subject matter. It is also noted that if Mr. Bulun Bulun wanted to license the commercial use of the painting "At the Waterhole" then he would have had to consult within the clan with other aboriginal traditional owners to do so, because the aboriginal perspective of ownership lies within the clan as much as with the artist. [89] Justice Von Doussa has commented on this matter also in another case law by saying: "A person who supplies an artistic idea to an artist who then executes the work is not, on that ground alone, a joint author with the artist." [90] There needs to be a physical contribution to the production of the work itself. Based on the previous discussion it is clear how joint authorship is too

[86] *Supra note 10.* 41 IPR 513
[87] *Supra note 83.* Copyright Act
[88] *Ibid.*
[89] *Supra note 10.* 41 IPR 513
[90] Kenrick & Co v Lawrence & Co [1890] 25 QBD 99 in 41 IR 513 at 525

narrow a conception from the community standpoint. It may be argued that the painting represents a fiduciary relationship between an artist and the clan, but the latter has not proven to constitute grounds for protection according to the *Bulun Bulun* case either.

This proceeding didn't lessen the feeling of community and it was especially evident when, after *Bulun Bulun*'s case, fourteen other similar infringements were found and brought into the court. The amount of 150 000 Australian dollars was to be paid in damages. However, the significance of this lies in a fact that the artists whose work was reproduced without permission decided to share that amount equally, because the extent to which their work was reproduced was less important than the fact that it was reproduced at all; it harmed the whole community and was equally morally wrong for every artist concerned.[91]

Paragraph 27 from the Copyright Act is not widely mentioned in the discussions of copyright protection involved with indigenous heritage. However, it is of interest to the purposes of this research paper. The abovementioned paragraph sets the rules for orphan works to be used freely[92], but traditional cultural expressions made as a communal work, even when the author is unknown, cannot be considered orphan work. The grounds for such speculations are derived from the tribes' patterns' significant visual resemblance to the rest of the community's ancestral work. Any traditional cultural expression that follows the pattern of some distinguishable work of the related community should, indisputably, eliminate any doubt as to its appertaining people. Further, if there was someone who felt the need to challenge the fact that the artistic work is not under any circumstances attached to any such community then paragraph 29 of the Copyright Act holds that the burden of proof lies with the person who challenges the authorship. Therefore, should a traditional cultural expression ever be found amongst orphan works then the fiduciary of a clan should be able to claim the ownership with ease.

[91] Golvan, C. Aboriginal art and copyright and the Protection of Indigenous Cultural Rights. *European Intellectual Property Review*, 1992 (7), page 227–232.

[92] *Supra note 83*. Copyright Act

2. Where copyright falls short

The second part of the sentence of determination of the purpose of the Estonian Copyright Act reads "the development of copyright-based industries and international trade"[93] and that is something which justifies a bit more the essential nature of copyright law than the first part for many reasons.

Firstly, copyrights have temporal limits. These differs among states but there is some uniformity of rules. International law which is established by the Berne Convention requires 50 years after the author's death for most works,[94] for the Member States of the European Union it is 70 years[95]. Aboriginal traditional heritage or any sort of ancestral legacy already carries the foundation of it in its name – legacy from ancestors. Therefore, it is evident that the term cannot be so limited. Extending the amount of years granted by the copyright has been discussed,[96] but even doubling the current standard copyright term does not suffice to provide the coverage ancestral legacies require. Some of the traditional arts or patterns are hundreds or even thousands of years old. The way Marvin Ammori has reasoned his views in his article from the Harvard Journal of Law and Technology is a good illustration of what could be achieved to aid indigenous work. If term extensions were made available consonantly with the intent of the framers, persons possessing creative talent would thereby be incentivized to continue innovating; indubitably, further progress in the practical and social sciences, as well as the arts, could be achieved by preventing works from entering the public domain prematurely, where their overuse and exploitation too often diminish upon the cultural or intellectual value of the contribution, in addition to depriving the creator of compensation to which he is the only rightful claimant.[97]

Elaboration on this idea is not a topic of this research paper, however it does reflect a similar aspiration – to find a suitable and sustainable working solution for copyrightable things which have not yet lost their value and which can be still used by later generations in a very specific niche. The year 2018 is

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[93] *Ibid.*
[94] Paris Act of July 24, 1971, of the Berne Convention for the Protection of Literary and Artistic Works
[95] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights
[96] Ammori, M. The Uneasy Case for Copyright Extension. *Harvard Journal of Law & Technology*, Vol 16 (1), 2002, pages 288-325.
[97] Bernaski, K R, Saving Mickey Mouse: The Upcoming Fight FOR Copyright Term Extension in 2018. *Law School Student Scholarship*, Paper 439, 2014 attainable at: http://scholarship.shu.edu/student_scholarship/439

considered a year when Walt Disney Company is hoping for the extension of a copyright term, by not extending it perpetually, but by granting this separate unit another term by law. Reason is not far to be found, rights granted upon creation of Mickey Mouse are expiring in the named year.[98] The Disney family is also well known as a community, and there is a parallel to be seen with indigenous communities. A whole big business model is created around the Disney characters and traditions have been handed down to another generation, including Disney theme parks which are right now located only in certain places, but could appear anywhere upon the event of Disney characters released into the public domain. Taking into account the popularity of Disney, it will be estimated to be passed on to yet another and then another generation. Characters from Walt Disney's drawings are as important to the community of Disney as indigenous heritage is to its respective communities and clans. One must, however, contradistinguish between commercial heritage and the religious importance often inhering in traditional cultural expressions. Hence, for indigenous peoples, it's not only about licensing for monetary reasons, but licensing because the ownership revolves around the fundamental right of dignity. The depth of cultural significance carried by the artworks is immeasurable; portrayal of ancestral symbols and patterns are manifestations of how they relate to their lands, religions, customs and traditions, and these are undoubtedly indivisible segments of indigenous identity.

The second reason is the practically formulated idea of 'material form' and 'originality'. Traditional knowledge cannot be protected unless it is in a form which attracts copyright in the meaning of paragraph 4 of the Copyright Act[99]. Indigenous peoples' current creation can be theoretically protected, but only as an original work of the author's and not for the knowhow and traditions which it embodies. However traditional customs and the 'spirit' of the works is what aboriginal people cherish more than the material form it might have taken.[100] Also, since copyrights do not protect the content but the form the knowhow has taken in the meaning of the Copyright Law, then the content can easily be used for the benefit of third parties.[101] And since third parties are not always aware of the proper treatment of such content, therein lies a danger of misuse.[102] Originality might also be hard

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[98] *Ibid.*
[99] *Supra note 83*. Copyright Act
[100] Halbert, D. J. Resisting Intellectual Property. *Routledge*. 2005, page 154.
[101] WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Gap Analysis on the protection of traditional knowledge. 2008, paragraph 51. Attainable at: http://www.wipo.int/tk/en/igc/gapanalyses.html (13.03.2016)
[102] Cottier, T., Panizzon, M. Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection. *Journal of International Economic Law*. Vol. 7 (2), 2004, page 371-399, at page 372

to prove in some cases, because it is said that there are too many already existing traditional works which the new artistic work resembles; there is a general assumption that these works are based on traditional creation designs and passed on through the generations and there is little to no independent creative effort of the individual artist involved at all.[103]

There is certain uniformity in the realm of copyright internationally and therefore there are no strict rules set that the work has to be in 'material form' instead, as also written in the Estonian Copyright Act, it has to be in 'objective form'.[104] Within the meaning that it must be in some perceptible form and also be reproducible. Maybe it would give a little more room for argument if the wording was different, as in the French Intellectual Property Code. According to their Code "all works of the mind, whatever the kind, form of expression, merit or purpose" shall be protected.[105] Within this sentence it is easy to aver that it is protecting also intangible forms of creative work and therein lies the key for the protection of indigenous heritage. If it is possible to protect intangible forms of creation, then there are grounds from which to make other supportive decisions upon the protection of ancestral legacy.

Another very conscious step towards protecting national folklore has been done in the Seychelles. Their Copyright Act states explicitly that folklore is to be protected without the expression in material form, also subsisting without limitation in time.[106] Even bearing in mind that this is applicable only in the Seychelles, it sets a good example for all countries in the world to follow in understanding and respecting their local traditional customs and creative expressions. Coming back again to the *Bulun Bulun* case, it can be seen that for indigenous peoples it is not important to protect the painting itself but the idea behind the painting. Therefore, it is noble of some countries to also take that into consideration when writing their intellectual property laws and regulations.

Some other aspects which don't make copyright a good solution for indigenous peoples include the point of moral rights, communicated in Chapter III, paragraph 12 of the Estonian Copyright Act.[107] Moral rights are unfortunately only granted for the individuals. Therefore, it is impossible to achieve such protection as a community. Moral rights are, however, really important in the context of cultural

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[103] Hadley, M. The Double Movements That Define Copyright Law and Indigenous Art in Australia. *Indigenous Law Journal*, Vol.9 (1). 2010, page 47-75, at 58-63
[104] *Supra note 83.* Copyright Act
[105] Code de la propriété intellectuelle Version consolidée au 8 novembre 2015. Legifrance
[106] Copyright Law, consolidated to 1 December 2014. eGray Book of Seychelles
[107] *Supra note 83.* Copyright Act

integrity for indigenous peoples. There have been attempts to speak up for their moral rights and bring that issue to the table,[108] but, thus far, Australia has made the biggest strides in expanding the concept of intellectual property. An Indigenous Communal Moral Rights Bill was proposed to the senate in the year 2003, but was not amended.[109] Several countries have supported it and are considering implementing it with their own jurisdictions.[110] The reason why moral rights matter so much for indigenous peoples is because a great deal of their traditional cultural expressions are laced with sacred knowledge. The availability of the latter is regulated by the customary laws of the clan and these laws usually state exclusively who is allowed to know certain things and how such knowledge is passed on to others.[111]

Mostly for these two abovementioned reasons, but not exhaustively, copyright does support well the development of copyright-based industries and international trade, but it doesn't really offer the sustainable form of protection to creative works which are beyond copyright limits, in the context of this research paper indigenous traditional cultural expressions. These flamboyant one-size-fits-all solutions like copyright hinder rather than encourage relations between local or native peoples and the states of their residency. Luckily, the past has proven that with technological changes there will be changes in copyright laws as well. With the vast development taking place in the info-technological world at the moment, copyright laws cannot remain the same. Whatever legislation used to work before might soon only be worth something on a domestic scale; access to everything via the Internet with almost non-existent means has taken over the world and copies of some original works may be downloaded in another part of the world with quality that rivals the original. It is nearly impossible to trace such a shift in authorization and new legislation has to bear in mind already the need for protection that transcends the historical constraints imposed by state borders.[112]

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[108] Intellectual Property Watch | http://www.ip-watch.org/2006/12/04/inside-views-indigenous-communal-moral-rights/#note8 (19.04.2016)

[109] Janke, T. Writing up indigenous research: authorship, copyright and Indigenous knowledge systems. *Terri Janke and Company Pty Ltd.* 2009, page 7

[110] *Supra note 108.* Intellectual Property Watch

[111] *Supra note 109.* Janke, T. 2009, page 7

[112] Barbosa, R.G. International Copyright Law and Litigation: A Mechanism for Improvement. *Marquette Intellectual Property Law Review*. Vol. 11 (1), Art. 2, 2007, page 78-147, at page 78-79

3. Framework for protection of indigenous traditional cultural expressions in Australia

Throughout the thesis there have been examples of Australian case law and that is partly the reason why the author has chosen to look deeper into the Australian context. This particular country has therefore proven to have best outlined a working framework compared to other States with big indigenous communities (based on their case law). The examples derived from Australia may be set to any country, but it must be borne in mind that not all countries have indigenous communities as such (including Estonia), rather just ancestral cultural expressions in more general understanding and therefore the context can only be taken as a guiding tool. Indigenous heritage protection is a broad topic and to stay in the lines of the purpose of this research paper, only relevant topics will be examined.

Australian aboriginal cultures are the oldest living traditional cultures in the world and date back more than 50,000 years. By virtue of their ability to adapt, they have survived for that long a time. It is admirable how members in their communities still pass on their knowledge, cultural and religious customs, rituals and language from generation to generation.[113] There are about 669,900 Aboriginals in Australia according to the statistical reports by the Bureau of Statistics from 2011[114], which is roughly 3% of the whole population. The biggest concentrations of them are in New South Wales and Queensland, smaller amounts inhabit the Australian Capital Territory. Since 2006 there has been a significant growth in their population. Speculating based off these statistics, these numbers might be continuously escalating, which on the other hand means, there will be more people living in the indigenous communities who are standing behind the heightened need for protection. Modern opportunities don’t help along the way and place only bigger obstacles before the aspirations of protection and preservation with the openness and accessibility of the Internet. There are no location based constraints, good quality data travels with elusive speed and makes any effort towards reproduction minimal.[115]

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[113] Australian Government, Australian Indigenous Cultural Heritage | http://www.australia.gov.au/about-australia/australian-story/austn-indigenous-cultural-heritage (14.03.2016)

[114] Australian Bureau of Statistics. Estimates of Aboriginal and Torres Strait Islander Australians. 2011. Attainable at: http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001 (14.03.2016)

[115] Burri, M. Digital Technologies and Traditional Cultural Expressions: A Positive Look at a Difficult Relationship. *International Journal of Cultural Property*, Vol. 17 (1), 2009, page 33-63, at page 33

Australia has concluded some legally binding heritage protection frameworks for different regions and every state separately, like in New South Wales there is a Heritage Act 1977 No 136,[116] in Victoria there is a Victorian Aboriginal Heritage Act 2006[117] and so forth. These Acts provide local people safety, inasmuch as that their culture has hope for sustainability and their diversity is acknowledged on the State level. Trust and confidence in the legal system, which reflects the needs of peoples, is extremely important for aboriginals.[118] Especially because some aboriginals describe their customary law as a complete and holistic reflection of who they are.[119] Unfortunately, many aboriginal people have lost trust in their government, because they are weary of constant battle over the legislation, they are disappointed and they don't have trust anymore that their rights won't be taken away with yet another amendment to the rights already granted to them.[120]

Besides regional protection, the Australian Commonwealth has some very powerful national protective measures, which definitely have more weight in the decision making process on the protection of traditional cultural expressions than any regional legislation could possibly have, mostly because of all of the previous reasoning. However, it doesn't necessarily mean that Commonwealth legislation is better than regional – an Australian indigenous rights activist, Henrietta Fourmile, has said that she recognizes South Australian legislation having the greatest recognition towards ownership among the cultural heritage laws.[121] From an aboriginal point of view, the best definition to their folklore is found only in the Victorian region legislation, where there is focus equally on both tangible and intangible cultural heritage.[122]

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[116] NSW Heritage Act 1977 No 136, attainable at: http://www.legislation.nsw.gov.au/maintop/view/inforce/act+136+1977+cd+0+N (14.03.2016)

[117] Victorian Aboriginal Heritage Act 2006, attainable at: http://www.legislation.vic.gov.au/ (14.03.2016)

[118] Calma, T. Speech on the Integration of Customary Law into the Australian Legal System. National Indigenous Legal Conference. 2006 Attainable at: https://www.humanrights.gov.au/news/speeches/integration-customary-law-australian-legal-system-calma (12.03.2016)

[119] *Ibid.*

[120] Janke, T. Our culture: our future. Report on Australian Indigenous Cultural and Intellectual Property Rights. *WIPO.* 1999, page 42

[121] Fourmile, H. Aboriginal Heritage Legislation and Self-Determination. *Australian-Canadian Studies*, Vol 7 (1-2), 1989, pages 45 - 61, at page 48, attainable at: http://www.acsanz.org.au/archives/71-24fourmilearticlepp45-62.pdf (21.04.2016)

[122] *Supra note 120.* Janke, T. 1999, page 80

3.1 Commonwealth legislation

Aboriginals and Torres Strait Islanders establish their presence particularly through the land they inhabit and it has dictated how some particular clan has developed, which knowledge is collected and passed on during this evolution. Next to that, land, for aboriginals has a very profound relationship with their beliefs and Dreaming stories, whereby their ancestors' spirits have changed into a shape of a natural object (tree, rock etc); those places where these objects are located are sacred. Dependent of the land areas, they have a system of kinship which is simply something similar to a code of conduct, but also refers to obligations that one has inside of one's clan.[123]

The Aboriginal and Torres Strait Islander Heritage Protection Act[124] (hereinafter referred to as ATSIHP Act) provides a nationwide coverage and for that reason is present in most of the court cases on the conflicts about Aboriginal heritage. The purpose of the ATSIHP Act is found in Part I, section 4 and it expressly states that "preservation and protection from injury or desecration of areas and objects in Australia and in Australian waters, being areas and objects that are of particular significance to Aboriginals in accordance with Aboriginal tradition."[125] The meaning of it is vague and broad enough to provide protection to all necessary traditional cultural expressions which Aboriginals themselves consider important at any point in time. Since it has been previously communicated that indigenous peoples don't find material form of their traditional cultural expressions important then in the meaning of the ATSIHP Act the aboriginal tradition means "the body of traditions, observances, customs and beliefs of Aboriginals generally or of a particular community or group of Aboriginals, and includes any such traditions, observances, customs or beliefs relating to particular persons, areas, objects or relationships."[126]

To conclude, the ATSIHP Act is a strong player on the landscape of indigenous intellectual property protection, especially because it leaves room for interpretation and is definitely a leading legal act to draw inspiration from in any other State. For better functionality of ATSIHP Act, there are two other acts in addition to it - Aboriginal and Torres Strait Islander Commission Act from the year 1989 (hereinafter ATSIC Act) and Australian Institute of Aboriginal and Torres Strait Islander Studies Act

[123] *Supra note 103.* Hadley, M. 2010
[124] Aboriginal and Torres Strait Islander Heritage Protection Act 1984, Act. No 70 of 1984 as amended
[125] *Ibid.*
[126] *Ibid.*

also from 1989 (hereinafter AIATSIS Act).[127] They all complement each other, inasmuch as ATSIC and AIATSIS are important to ensure improved scope and provisions in ATSIHP. If the studies on aboriginal culture and their needs and concerns are conducted properly and thereafter the results of it formed into a meaningful political statement then this definitely leads to more valuable governance of the issues at hand.

The purpose of the ATSIC Act is to regulate the commissioning of indigenous peoples in the Parliament of Australia, in order to "promote good governance and improve accountability in Australia's peak indigenous body"[128] In other words the ATSIC Act supports the indigenous peoples' participation in the government's policymaking process, stimulates indigenous self-management whereby the development of the economic, social and cultural sectors is getting better and the co-operation between all the relevant bodies is safeguarded. Advocating for indigenous rights is a top priority whether it be regionally, nationally or internationally. It is achieved by constantly informing the government about indigenous issues and overseeing the programs which government proposes for indigenous peoples. The recognition of indigenous peoples however is not as roseate as it seems – there is tension included in the fight for it, especially when the ATSIC Act becomes too active in the government and puts sensitive topics into focus. [129]

The AIATSIS Act is written to serve as a legal guide to the Australian Institute of the Aboriginal and Torres Strait Islander Studies. AIATSIS is an ethically functioning research organ whereby the Act is to keep their foundation in place. The objectives of the AIATSIS are to promote the research within other organs as well as conduct it themselves. After research, it is also important to take care of the publication of the results and to hold trainings for additional people who would be doing the studies about the particular region. The ultimate goal is to collect the information and build a resource collection about aboriginals and Torres Strait Islanders, as well as stimulate and buoy the understanding of their society.[130] Among other things, AIATSIS also conducts research and gathers information on native title.

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[127] *Supra note 120.* Janke, T. 1999, page 77

[128] Parliament of Australia | aph.gov.au attainable at: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/cib0203/03cib29 (20.04.2016)

[129] *Ibid.*

[130] AIATSIS | http://aiatsis.gov.au/about-us (20.04.2016)

Native title is yet another very important element that has been widely used and mentioned in Australian case law on indigenous heritage matters and is regulated with the Native Title Act of 1993 which is an important legislative measure for indigenous peoples. The Native Title Act establishes the procedure for claiming the traditional ownership of land or waters. This land must be the actual place where aboriginal people practice their customs and traditional laws. If land has been extinguished or in other words lost, then the Native Title Act may help to claim back the rights through sufficient reasoning.[131]

3.2 Steps towards and away from better legislation

Being the first country to pass legislation through their senate on indigenous peoples' moral rights on intellectual property,[132] Australia has proven to be strongly concentrated on working towards better protection. Moral rights legislation embodies four main assets which have been communicated to be very important by indigenous communities. At its strongest, it can entail: 1) the right of publication on the terms of the author; 2) attribution rights with the exclusive right for the author's name to be attached to the work; 3) prevention of modification, thereby securing integrity and respect; 4) the possibility to seize the production, distribution and representation.[133] Only a few years later these same ideas were taken further and put into a Copyright Amendment Bill which was supposed to be the foundation for Indigenous Communal Moral Rights.[134] Even if the latter has not been amended, it has yet given a great incentive for other states to look into their own national legislation and find a way to insert such traditional cultural expressions' governance into it. Tackling issues of minorities (which indigenous peoples certainly are) is definitely a responsibility, but also a priority for the majority of states. Therefore, this question of moral rights even bears a profound role from a human rights viewpoint.

Many indigenous peoples' concerns pivot around commercialization of their traditional cultural heritage, therefore what we are dealing with is also strongly related to marketing. Maintaining an ethical and honest mentality on the market is an important element when proposing a solution for these concerns. Fair trading is not a new concept for any country and every respectful state has a legislation for keeping it in line with everything else. Misleading or deceiving more or less credulous

[131] The Aurora Project | http://www.auroraproject.com.au/what_is_native_title (21.04.2016)
[132] *Supra note 108.* Intellectual Property Watch
[133] *Ibid.*
[134] *Ibid.*

customers is widely disapproved throughout legislations and Australia is no different. The reason to bring out Australia among others is the fact that they have had some provisions from their Trade Practices Act 1974 under consideration in case law related to the indigenous peoples traditional cultural expressions' commercial exploitation.[135] To elaborate on the idea, then deceit can also be conducted when, for an example, an ancestral pattern is claimed to be originating from some particular community, but in reality is from somewhere else and the difference might only lie in small details of the pattern. To go even further and suggest that even a wrong interpretation of a pattern is deceit, then putting a pattern on, say, baby clothing which traditionally is used only during burial ceremonies, does make a big difference to a customer once he/she is made aware of such meaning. Granted that there is a serious breach of indigenous customs about a pattern and that Australia has already connected indigenous heritage with the Trade Practices Act, then it would be justified to try and interpret those particular articles from the Act (Art. 52 and 53) in broader meaning than it has done so far.

Whilst previous steps are a good initiative by the Australian government and legal system, there are also steps that yet need to be taken also in Australia for the protection of indigenous peoples. Damaging personal rights inasmuch as invading an individual's personal life and disclosure of incorrect information which leads to economic loss and damage are unlawful. [136] Indigenous peoples might easily become a target of libel or get some defamatory comments as can any other minority in our society. If not on a personal level, they might consider some interpretation and representation of their cultural customs defaming. Inferring that the laws governing defamation are targeting the protection of individual, suing for defamation is harder than initially thought. In case of defamation in an indigenous community, one person in the group cannot take a stand against the defamation addressed towards the group, even if each individual in this particular group is affected by it directly.[137] Such a separate case is reasoned only when the defamation specifically addresses a particular member of the group.

In conclusion, Australia, with all its regional policies and nationwide legislation for indigenous communities, with all the case law with relatively positive results for indigenous representatives, with respect towards the indigenous customary law and efforts to better their legislation and even with some minor setbacks such as the initial vote against UNDRIP (later still showing its support) has a

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[135] Milpurrurru and Others v Indofurn Pty Ltd and Others (1993) 130 ALR 659
[136] Võlaõigusseadus. RT I 2001, 81, 487
[137] David Syme and Co v Canavan [1918] HCA 50, 25 CLR 234

serious potential to be the best example to be set to other countries when it comes to indigenous rights governance. Why it still has to be referred to as only having a potential though, is mainly related to the scope and gravity of their legislation. Some regional policies might be named as the best framework by some scholars but they remain regional and only one small community can enjoy those rights. Customary law, similarly, bears issue of being limited to the land where the particular customs are practiced and, last but not least, national legislation could be magnified with the power of international law, but it is chosen not to be used,[138] despite ratifications. Many different international measures may be interpreted out of their original scope and in favor of indigenous rights.[139]

[138] *Supra note 120.* Janke, T. 1999, page 99
[139] *Ibid.,* pages 99-101

C. Self-regulation

According to the preamble of the constitution of the Republic of Estonia, assurance of the preservation of the culture through the ages to come, is the highest duty of the country[140] By the Constitution, which is the highest order of law in a republic state, it is determined that culture must be preserved. Preservation also entails protection, therefore there is little room for interpretation, and the preamble should be understood in the same way among different people or entities. Folklore is a distinguishable and important part of a nation's culture, carrying a profound traditional value. Cultural expressions as a part of culture could not be counted out of such overarching legal concept. As it can be concluded from part B of this research paper, positive law, such as intellectual property law, doesn't offer solutions which would work satisfyingly for protection or preservation. The conflict between positive law and the nature and characteristics of traditional cultural expression cannot be resolved with the adjustment of intellectual property law, as it was established in previous discussion, neither can this conflict be ignored. In order to truly abide the highest law of a Republic of Estonia, it is a duty to establish some other possible ways of protection and preservation. As positive law has not proven itself very useful regarding the matter, it is an obligation to also look into negative law, sometimes also referred to as soft-law, and analyze its suitability for tackling the matter at hand.

To aid protection of indigenous traditional cultural expressions, respectively ancestral traditional cultural expressions in the context of Estonia, the author of this thesis finds that self-regulation should also be considered as an alternative, next to the traditionally analyzed measures such as intellectual property protection, customary laws and all legally binding and non-binding texts. A particular program prototype will be considered as an activation measure throughout this paragraph, therefore, self-regulation and its scope is looked at through the prism of the application of the program.

The idea of the program is creation of some registrational platform which serves a purpose of a database for ancestral patterns, at the same time being linked to alternative protection measures and functioning rather out of people's good faith than of any legally binding framework. The possibilities could encompass the quality sign application upon the registration and through a very positive outcome even some reasonable percentage of the profit van get channeled to the originating community. Such extra source of income would mitigate and remedy injustice between rural and urban

[140] Eesti Vabariigi põhiseadus. RT 1992, 26, 349

areas and help the communities to prosper and sustain their local development. In the future, a possible development could be even the attachment of that program to some new norm, which dictates the preferred usage of ancestral patterns.

1. Self-regulation explained

Self-regulation is defined as a "possibility for economic operators, the social partners, non-governmental organizations or associations to adopt amongst themselves and for themselves common guidelines […] particularly codes of practice or sectoral agreements"[141] Lately, also the EU is putting more and more emphasis on alternative measures for enrichment and expansion of the legal environment. Creating new legislative culture with soft law, self-regulation and co-regulation can add transparency, influence and validity while making legal environment simpler and enhanced.[142] Enhancing legitimacy is seen partly as citizen participation[143] and self-regulatory codes are controlled in majority by private sector. Self-regulatory practices are much investigated and studied as part of the European Commission's (hereinafter EC) responsibilities. If the observation fails then a proposal for a legislative act will be put forward.[144] Right now EC Treaty Article 138 is promoting the facilitation of a social dialogue, and Article 139 enables the conclusion of agreements (therein codes of conduct).[145]

While there are many variables to the self-regulation: originating from a public or a private body, the kind of nature it has, and what is its extent, there is still one common distinguishing feature to self-regulation and it is the fact that any entity who is using self-regulation, declares its own regulation, to which it is also a subject itself at the same time.[146] Setting up a self-regulatory system is therefore a controlled way of meeting the terms and expectations of one entity or industry by making the involvement voluntary, but in the same time necessary for thriving. The industry or entity decides what are their highest standards and morals which dictate the regulation. Abiding the regulation is a

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[141] Interinstitutional agreement on better law-making 2003/C 321/01, 16 December 2003, at point 22

[142] Senden, L. Soft law, self-regulation and co-regulation in European law: Where do they meet? *Electronic Journal of Comparative Law*. Vol. 9 (1), 2005, page 1-5

[143] *Ibid.* At page 9-10

[144] *Supra note 141.* Interinstitutional agreement on better law-making, at point 22-23

[145] European Union consolidated versions on the Treaty on European Union and of the Treaty establishing the European Community, 2002/C 325/01, 24 December 2002

[146] De Minico, G. A Hard Look at Self-Regulation in the UK. *European Business Law Review*, Vol. 17 (1), 2006, page 183-211, at 183-184

sign of keeping the quality among themselves, but also it is an important aspect for outsiders and the latter is also a reason why it is desired to follow the rules among self-regulatory framework.

The concept of self-regulation has not always historically proven itself to be effective. Therefore, there are two countering experiences following the concept. On one side, self-regulation can be a potentially effective tool for controlling people socially, however, on the other side, there is a fear that it could, vice versa, be the tool for being excused from the social responsibility.[147] All in all, it has to be consistent with the Community Law, in order to ensure the added value by self-regulatory framework, as well as unity on the market without harming fair competition.[148]

In order to establish functional self-regulation six conditions should be taken into consideration according to the research by Blumrosen:[149] (1) standards must be set down and preferably not by public but by private organizations. That controls the professional reasons in the industry and begins to dictate the best practices to set higher goals. Sometimes it is still good though when government steps in so the pressure from both directions provides the voluntary compliance with the highest motivation involved; (2) a powerful utilization has to be present, because community needs to perceive that there will be consequences behind regulation; (3) the motive for working towards the goal can only be effective when the expected results are clearly communicated, otherwise the compliance with regulation will be less likely to happen; (4) even if institution is in full compliance with the regulation it is never wholly protected from the individual lawsuits, so there will always be a risk of residual liability; (5) the institution’s choice to engage itself with the self-regulation must be justified as far as the cost efficiency goes relative to the standard methods of conducting business; (6) public has to have a sufficient interest in the voluntary compliance in order to encourage the conduct, only this will prove the sustainability of the self-regulatory choice. After all the ultimate goal is to benefit the public while being compatible with business needs.

2. Meeting the conditions

Six aforementioned conditions for self-regulatory framework are an excellent basis for analysis and discussion and elaboration on the author’s ideas of the self-regulatory program of the preservation of

[147] Blumrosen, A.W. Six Conditions for Meaningful Self-regulation. *American Bar Association Journal*. Vol.69, 1983, page 1264-1269, at 1264
[148] *Supra note 142*. Senden,L. 2005, at page 18
[149] *Supra note 147*. Blumrosen, A.W. 1983, at 1268-1269

traditional patterns and ornaments. Since all of these should be taken into consideration in order to establish successful self-regulation for any entity, then this is a clear indicator, whether the program will be functional and the hypothesis of the current research holds true.

2.1 Public vs private

Private body can often serve as an executor of public interests which cannot be conducted only by public means. One such thing is the protection and preservation of the traditional cultural expressions. When public sector endorses a particular social need, then private sector may take the conducting role. Public sector on its own could not enforce anything without positive law holding it together, however when private entities are involved then the framework can be different and measures such as self-regulation brought into the game.

When self-regulation is in place then State has two quite extreme ways to go about it. Firstly, State could take the role of a side player, rather observing than interfering. Taking action only when absolutely necessary, assuming in the same time that regulatory system works, and there is no need to get involved in the negotiations. Secondly, State might take rather the guiding role or leading task. From the very beginning of the creation of a self-regulatory framework, State sets down ways of conduct which are in conformity with its views and a particular social problem and which are most likely to succeed and guarantee, that private body is doing the necessary things for the regulation to be successful.[150]

Both approaches work, but taking into account the Estonian general ways of conducting its business, especially after the occupations which lasted for several decades, where after the government has taken an approach towards free market economy, then the first way of State's involvement sounds more like a suitable solution for this country. However, since the topic of protection and preservation of traditional cultural expressions is rather sensitive, the government might still want to have a say in ways of conducting the regulation. Therefore, a mix of those two extreme approaches might even be better when consideration legislation. In Estonian context it seems rather logical if such self-regulatory conduct would be supported by state actors and non-profit organizations, such as Ministry of Cultural Affairs, Estonian Folk Art and Craft Union, Estonian National Museum, but also the funding from the Cultural Endowment of Estonia.

[150] *Supra note 146.* De Minico, G. 2006, at page 184

One of the biggest advantages which private bodies have in front of the public sector is that all the rules do not go out of date as easily, or at least those rules can be updated much more easily than any public rules could. The latter is mostly because of the bureaucratic chain.[151] Without these restrictions, the decision processes are much faster. Such advantage in front of the positive law speaks for the application of self-regulation. It is important to note, in the light of the program for protection and preservation, since rules for regulation come from entities involved in the industry, they reflect the needs of this particular industry in the best possible way. Meaning, that the less public gets intrinsically involved, the more realistic the regulation is going to be. Considering a very superficial and hypothetical construction of the program and its expected share in Estonia (Chart 1), it can be seen that private entities would be on both ends of the process, therefore realistic needs of the industry are represented. The fact that private is prevailing in the hierarchy, also proves that a first condition (see above, Blumrosen 1983) for self-regulation is met and the standards will set by the private entities' rules. This ensures that the program for protection and preservation meets necessary interests of that sector as well. Public sector's involvement in this particular case aids with motivation and helps to aim towards right goals.

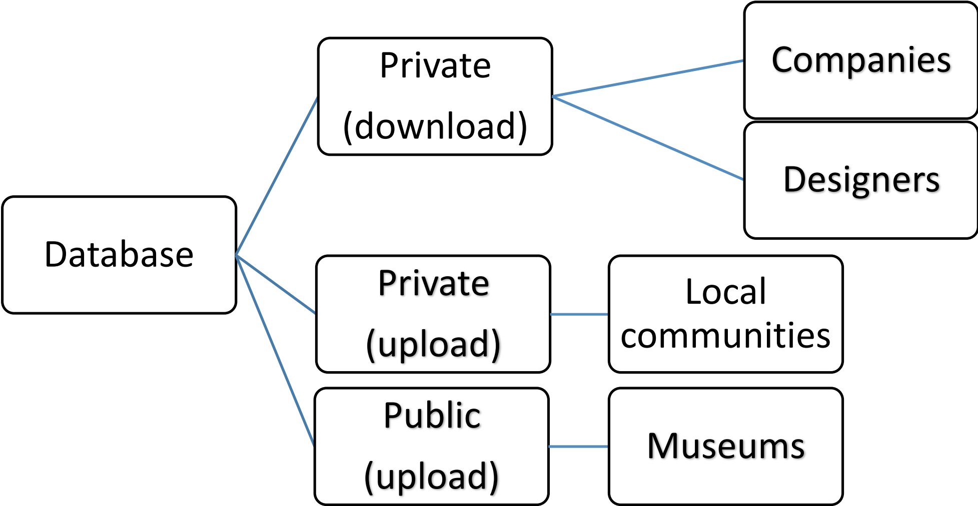

Chart 1

[151] *Ibid.,* at page 185.

Expected standards for the industry are without a doubt ones, which meet the interests of the parties on both sides. Firstly, correct and consensus definitions must be established, which eliminates the possibility of misinterpretation and confusion in later stages. If necessary, even a list of particular traditional cultural expressions may be provided. Private sector should, no matter what, have an upper hand here, because they are most knowledgeable of the specifics of the industry. Next, the objective of a particular regulation has to be clear and executable and responsible bodies established for the execution. Here, public should also have a say, because ultimately this regulation benefits them as well. Not any less important is to settle on conditions which have to be met for the usage of the database, and also on the consequences and measures for dispute settlement, if there is a no compliance issued.

Every self-regulatory system or program needs concrete do's and don'ts, otherwise there is no real incentive to follow the rules of conduct. A legislator should always keep an eye on the creation of self-regulatory body, especially when it is serving the social interests, because it "may be representative only when all the interests of the people involved are fairly represented."[152] The author takes the liberty of suggesting the broadening of the definition of an 'environment' in order to fit the protection of indigenous heritage under the term, because the latter is interpreted differently in different sectors. Accordingly so, the EC Treaty Article 174 sets down rules for conducting community policy on environment. Under the general environmental questions, the social development, as well as regional development are mentioned.[153] As discussed earlier, there is an underlining regional policy issue at hand, along with the protection and preservation of ancestral patterns. Therefore, in a broad sense, the self-regulatory framework for ancestral patterns and ornaments might as well be implicitly regulated on the EU level.

2.2 Compliance and non-compliance

In case there will be non-compliance with the established regulation, measures for settlement have to be clearly communicated in the rules of self-regulation and the selection of consequences, exercised on an offender, must be reasoned.

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[152] *Supra note 146.* De Minico, G. 2006, at page 190

[153] *Supra note 145.* European Union consolidated versions on the Treaty on European Union and of the Treaty establishing the European Community, at article 174

One way to take on the matter is Court of Honor. It is an authorized event for dispute settlement and solving questions upon breach of regulation, etiquette or social protocol.[154] It often functions as a tribunal for investigation of military disputes (e.g. between army officers).[155] In Estonia the Court of Honor is a standard practice for different codes of ethic, for example in the bar association[156] where private or public sector actors can file a complaint against an advocate and after the process, when the member of an association is found guilty, the punishment will follow. Punishment can be a letter of reprimand or a monetary fine upon some occasions. If no non-compliance is discovered then head of the Court of Honor can simply just forward a remainder to members of an association calling upon better abidance to the rules of the code. Judges for the Court of Honor are usually chosen amongst people from the same industry or area of practice. The Courts of Honor are also used for many other professions like notaries,[157] real estate agents,[158] political parties,[159] brewers association[160] and more.

At the event of breach of self-regulatory conduct of the program for ancestral patterns and ornaments, the Court of Honor is a viable solution, especially when financial matters are involved. Some interlocutory entity is necessary for the decision making process, especially for assessing the wrongdoing. For the assessment there must be certain standards to be put in place first. All these standards need to be communicated in the regulation. Keeping indigenous peoples interests in mind, the foundation of the standards must be built on respect. If all the parties involved have drafted the regulation they agreed upon, then keeping a straight game should be easy, because complaints which have no reasoning will not be taken into consideration. Sanctions should be in the style of traditional code of ethics - upon smaller non-compliances just a public apology is enough, for bigger and graver wrongdoings a certain amount of money should be paid for the association which maintains the database (program) and takes care of the dispute settlement. Also some advertising impediment can be set, and last but not least, if the wrongdoing is unforgiveable then that entity should not to be able

[154] Definition from thefreedictionary.com
[155] Definition from thelawdictionary.org
[156] Eesti advokatuur | www.advokatuur.ee/est/advokatuur/aukohtu-lahendite-ulevaade/2015 (22.04.2016)
[157] Notarite koda | https://www.notar.ee/5948 (22.04.2016)
[158] Eesti kinnisvaramaaklerite koda | http://www.maakleritekoda.ee/kinnisvarajutud/aukohus/3 (22.04.2016)
[159] Reformierakond | https://www.reform.ee/aukohus?language=et (22.04.2016)
[160] Eesti Õlletootjate Liit | http://eestiolu.ee/code-of-ethics-in-english/ (23.04.2016)

to use the database ever again. On top of that, an exclusion from the quality sign usage (the latter is discussed later under the paragraph 2).[161]

2.3 Meeting the goals

In order to establish the best possible framework and know what is expected of the involved parties, it is necessary to listen to the people and their communicated needs directly. A list of such proposed rights by indigenous peoples is in the report by Terry Janke.[162] While using the recommendations originating from Australia, author is trying to customize these needs into Estonian context and suitable for the program in mind. Suggested rights are communicated in three parts in the mentioned report – initial rights, responses to the initial rights and updated list of rights. In the following all these three levels will be interwoven and analyzed jointly.

1) Ownership and control – has gained general support, but is often misinterpreted to be rather as a responsibility of taking care of the culture (as in museums). This also includes the right to define the heritage and to be recognized as the primary guardians of it. These rights should be applicable for the community as a whole. Therefore in Estonian context, the determined area where an ancestral pattern or ornament originates would have a say in the definition of their upload input and their region should always be namely attached to the heritage they have uploaded.
2) Authorization of commercial use – has gained general support. In Australian context the control of commercial usage must be in accordance with the customary laws, however, since Estonian influenced communities have not established such regional framework, then either every local involved entity would create analogue framework and annex it to the regional policies (would definitely add legal legitimacy, but takes more time to amend) or go without it and establish the expected usage in the designated part of the uploaded database. Hereby it has also been suggested to add the compensation for subsequent usage which has been done without authorization to the framework. Considering that the usage of the database is not obligatory then in Estonian context that might be solvable only upon the cases where a

[161] Parallels for the code of ethics sanctions are drawn from many different regulations in Estonia (bar association, real estate agents, brewers association etc.) All of these cited above.
[162] *Supra note 120.* Janke, T. 1999, page 43-48

downloading entity has registered the usage of one pattern but not the others, hence it will fall under the non-compliance paragraph.

3) Commercial benefit – has gained general support. It encompasses the royalties paid upon the usage of a pattern or an ornament. The percentage which is designated to be paid can be calculated in two different ways. Firstly it can be upon the negotiations with the local community, depending on the scope and reasoning (this would also meet the contextual suggestion of Australian indigenous peoples), or secondly it can be an agreed lump percentage which is communicated also in the regulation of the database. These amounts must always be agreed upon before the usage of any pattern or ornament.
4) Proper attribution – has gained general support. Estonian context of that proposal would be linked to the first point, which is full acknowledgment of the originating community and their traditions.
5) Prevention of derogatory and offensive use – many additional suggestions were made to this right. It was mentioned that unintentional offence should be excluded, as well as 'offence' needed to be correctly defined so there would be unanimous understanding of the possible wrongdoing. In Estonian context it should rather be interpreted in relation to cultural integrity and misleading information. Obviously offensive usage must be condemnable as well. Regulation needs communicate such matters in a relatively narrow scope.
6) Prevention of distortion and mutilation – Estonian interpretation of it should rather be upon the negotiations before the usage, because since in local communities the work is not as interwoven with traditional knowledge and religious customs as is in Australia, then it would be partly redundant. However, if there is a pattern or an ornament with the construction which shouldn't be mutilated or distorted then it should be marked to the designated place in during the uploading.
7) Preservation, care, management and control of the heritage – Australian indigenous communities have a long list to add under this title, but in Estonian context author chooses to interpret it in different light. It should rather be understood as a possibility to edit the uploaded content, to be fully in charge of the management. Also a possibility to overlook the agreements with the downloading entities, following the regulation and holding necessary negotiations.

From the downloading side (companies and designers), there is no such exclusive list concluded, but there can be some countering conclusion to be made from the communicated expectations, although only speculative. For a further research, a survey on it is definitely next necessary and logical step.

As freedom of contract is the underlying rule of commerce, then commercial self-regulatory system should represent same values, irrespective of whether it's business-to-business or business-to-consumer model.[163] The value in self-regulatory system lies in its flexibility[164] and an objective to being a part of the system for businesses or entrepreneurs is definitely submerged with the ways of becoming more cost effective and also with the aspiration to avoid conflicts.[165] One might wonder now, where is the cost effectiveness when downloading parties are expected to pay royalties to the uploading parties. The money flow calculations are a must for figuring out the real monetary value which can be gained while being enrolled in the ethical database system. If numbers show better position on the market after enrollment than before then the cost-effectiveness has been established.

Among other objectives which downloading parties may have, one is definitely a need for a clearly defined regulation. The self-regulatory framework must represent different companies' and entrepreneurs' interests and be worded in a uniformly comprehendible language, so the risks of getting involved in involuntary or accidental misconduct is brought to a minimum. Another thing that should be relevant from the perspective of a downloading party is an opportunity to step out of the regulatory framework once the payment of royalties become irrelevant or redundant in relation to the change of sales articles. In the same time a chance to become a member again should be always open to the ones whom have not been involved with any non-conformity with the regulation.

2.4 Residual liability

This particular condition is not very clear cut and it is by the essence of it very specific for rather American law and society. It communicates the understanding that if a company is in compliance with all the governmental regulations and rules then they might still be liable for the conduct towards the individuals and it might be that individuals still have the right to file a lawsuit against the company. However it is rather condemnable and suggested for the individual to exert their individual rights

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[163] Nilson, Å. History – Is Self-regulation a New Concept? The EDI Law Review. Vol 6, 1999, page 183-186, at page 186

[164] *Ibid.,* at page 185

[165] *Ibid.,* at page 182

instead and for the company to not hide behind a policy. In the context at hand it is not very relevant condition to be discussed. Despite the fact that it is almost impossible for the situation to arise for the self-regulatory system for ancestral patterns and ornaments, author tries to still work out an example which might come close to the interpretation of the condition.

Let us assume that there is an Individual A, who holds a copyright on the interpretation of the ancestral pattern. There cannot be no legally binding ban for Individual A from being able to upload their content into the self-regulatory database of ancestral patterns, which is initially meant for the communities, assuming that such is communicated also in the code of conduct. The clash of two adversary rights will rise – the copyright protection and a right to royalties by the regulation. This however places the Individual A into a preferential situation in relation to other uploading parties. One cannot strip the rights deriving from the copyright act away from Individual A, but the company who wishes to register the use of Individual A's work is in unfair position, because two different set of rights are then applicable, however the prevailing one is one of the positive law (and then the licensing of the work should rather be under negotiations). For Individual A, this is then only a platform to promote their work for free. To avoid such collision it is rather advisable to the people like Individual A to exercise their individual rights, because it is usually a better framework for them. Under the current example the individual rights are meant as rights deriving from Copyright Act.

2.5 Rationale for parties involved

Creation of databases might seem to be not a desirable measure in the first place when the voice of the indigenous peoples is to be heard,[166] but when seeing the reasoning behind it, it is wholly understandable why they would not want a registry of their traditional cultural knowledge. Biggest concern is that of the access, they worry that people can find and then use all of their heritage easily, mostly when it comes to the commercially motivated gain. Self-regulatory database, is practically everything indigenous peoples would vociferate against, but therein, behind the commercial usage, lies the benefit for them as well.

As history has proven, it is hardly ever a case, that indigenous peoples obtain full protection on their traditional cultural expressions. Zia tribe from the state of New Mexico in United States went far to find solutions for protection of their sun symbol. They turned to both legal and non-legal measures

[166] *Supra note 120.* Janke, T. 1999, page 37

and not very surprisingly the non-legal approach has shown much better results.[167] Some legal measures to mitigate the misappropriation of the sacred ornaments can be used, such as the Trademark Law, but drawing an example from the Zia tribe, it is only a solution if an indigenous tribe has resources to spare, because the litigation process is lengthy and expensive.[168] According to Trademark Law, tribe has an option to file a petition towards every case where the applicant(s) want to get a trademark constituting of Zia's sun symbol, but it is just a short term solution and does not result in any legal protection, let alone any monetary reimbursement.[169] One important fact is that although the New Mexico flag is representation of Zia Pueblo sun symbol, it is protected according to the Lanham Act, but it is impossible for the tribe itself to anyhow gain the protection to it.[170]

The ideal solution, as already communicated several times before, is the complete ban from using the sacred symbols, however the "realist" view of the situation is to understand that once the symbol is already in the public use (this case the state flag), then concerns about how to tackle the "non-indigenous competitors" to benefit from the clan's cultural property is far more burning question.[171] Loss of control of the cultural property is the most troubling aspect of the commercial usage to indigenous peoples, which leads to their inability to control the accurate perception of their culture and their symbols to lose the initial significance. Neither comes anything back inasmuch as the investment, be it moral or financial, does not return to the tribe.[172]

Zia example was brought because they successfully harvested the results from political pressuring and non-legal results.[173] By reaching the agreements with commercial entities, it showed other companies a way of good practice of conduct. They didn't either want to appear disrespectful, because it could harm the companies' reputation, and it also shows the respect and acknowledgment of all the cultural rights there are of any indigenous players.[174] The situation between Zias and both public as well as private sector resulted therefore in better outcome for parties involved, remarkably without any legal

[167] Turner, S.B. The case of the Zia: Looking beyond Trademark law to protect sacred symbols. *Chicago Kent Journal of Intellectual Property*. Vol. 11 (2), 2011, pages 116-145, at page 116
[168] *Ibid.,* at page 129
[169] *Ibid.,* at page 126
[170] *Ibid.,* at page 121-122
[171] *Ibid.*, at page 123
[172] Farley, C.H. Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?, *Connecticut Law Review.* Vol.30 (1), 1997, page 1-58, at page 14-15
[173] *Supra note167.* Turner, S.B. 2011, at page 138-142
[174] *Ibid.*, at page 142

instrument involved. The Pueblo did put a lot of their bets into positive law, but what was not considered in the discussions was the negative law, the self-regulatory framework. With the self-regulatory registrational solution all of the Zia Pueblos concerns could be tackled (except of course the overall ban). They obtain the control back, with the fact that only the communities themselves can upload the material, only they are responsible for the descriptive content about the traditional cultural expressions and they dictate which would be the most ethical ways of commercially taking advantage of any particular item listed. It is not legally enforceable, but as far as it is tied to a regulation then then the misconduct culminates in sanctions. And on top of that as an ultimate far-reaching bonus would be the financial support, the percentage of the turnover of the people who have made profit of the use of indigenous heritage. The monetary benefit can thereat be channeled exactly where they want it to go, be it a scholarship fund or a boost into infrastructure.

It is often speculated why companies want to be socially responsible and act upon standard ethics, so some companies have carried out a survey to evaluate the gravity of being socially responsible. The initiatives scale pretty high on several categories. Firstly, employees are expecting for their employer to be socially responsible and 32% of employees thought they would consider leaving their job is the employer gave nothing to charity, 62% would consider leaving when the company harmed the environment. Secondly, over 88% of customers think that companies should be improving the society and environment, 83% believe that companies must be involved with the charities.[175]

Preserving indigenous culture, is not necessarily what is meant under the environment and society in this context, but when to put it all together, the charity-environment-society, it can be interpreted in a way suitable to current context as well. Most important for the company is to know that their public behavior doesn't harm their money flow, whether it's by losing staff or customers. Therefore once self-regulatory framework is in place, companies would have initiative to follow the conduct, to make their public appearance reputable. Voluntary commitment of self-regulatory framework have proven not only to achieve heightened profitability but also better employee morale and productivity.[176]

[175] Forbes | www.forbes.com/sites/csr/2010/12/15/new-study-consumers-demand-companies-implement-csr-programs/#52c3efee5e1d (24.04.2016)

[176] Sharma, S., Sharma, J., Devi, A. Corporate Social Responsibility: The Key Role of Human Resource Management. *Business Intelligence Journal*. Vol.2 (1), 2009, page 205-213

Concluding the findings clearly indicates that the right approach, be it by positive law or negative law or non-legal approach. It is possible to come to the terms of both parties involved. Cultural rights will be noted and companies would get much better rating of being an ethically motivated entity.

2.6 Public interest

Self-regulation can be divided in several different ways. Firstly, there are two different types of self-regulation in general, one is individual self-regulation and other is self-regulation by groups. A prevalent form of the self-regulation under the latter is industry-level,[177] which is important in the context of current research paper as well. Secondly self-regulation can be of economic character or social,[178] latter would again be better fit in the scope of this thesis. And a third distinction is the government involvement,[179] whereas, because of the nature of the self-regulation needed for the protection and preservation of ancestral patterns and ornaments, the governmental presence should be partial but rather small. So conclusively, we have a partially government controlled industry-level social self-regulatory framework, which has to fit also to the public needs.

Before knowing how to meet the public interest, it is crucial to know what is that they need and want from the particular sector. Since the concept of self-regulatory application for traditional cultural expressions is new as such, then there is no established public interest standard yet for that field. However it is possible to take the logical approach of common points of public interest. Usually people are driven of speed and quality, they seek trustworthy service and most importantly whatever it is, it should have an added value for them. Setting those expectations as assessing tool for the customized self-regulatory system should give a sufficient answer to whether or not there is public interest met.

Self-regulation in its core basics is already a much simpler structure and as communicated earlier in this research, there is transparency throughout the levels of the regulation. Thereby the system can be much more easily trusted by the public, because they are able to comprehend the functionality. Since the public body is less present than in government induced regulation then the speed is already a natural derivative of the processes being much more easily executable. That being said, two of the

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[177] Gunningham, N., Rees, J. Industry self-regulation: an institutional perspective. *Law &* Policy. Vol.19 (4), 1997, pages 363-414, at page 364
[178] *Ibid.,* at page 365
[179] *Ibid.*

speculative expectations of the public are therefore met. Assessment of the quality and added value for the public interest needs a more dedicated approach.

The characteristics of patters and ornaments, or in broader meaning, of traditional cultural expressions dictate the possible public interest in it a little. As traditional cultural expressions are closely attached to the personal value of it (be it the originating area or some specific customs) then the quality in the eyes of the public lies most likely in the certainty that a particular pattern or ornament is truly made according to the standards and traditional methods of originating region and that the meaning of it and other information provided is competent. Finding the best measure for guaranteeing the quality of the patterns or ornaments, takes us out of the traditional area into the world of food production instead.

In food production the "geographical indication" is described in the TRIPs agreements as "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."[180] The most well-known indication of such is "Appellation d'Origine Contrôlée" meaning "registered designations of origin", marked with the abbreviation AOC, is a concept that originates from France and represent the goods produced of local material, using traditional knowledge and often in original conditions.[181]

AOC has become an indivisible mark for the special food items or beverages (mostly alcoholic) which are known for their unique qualities and is meant to protect the certain goods of the false production of similar items. Agritrade discussion paper brings a very well-equipped list of names which carry the special quality indication of the product it represents – such as gorgonzola, champagne, cognac, Bordeaux etc. Geographical indication represents the names of a specific location, but geographical names can also sometimes be non-geographical (such as Feta). [182] In EU there is even a register for all such protected goods.[183]

[180] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, the legal texts: the results of the Uruguay Round for multilateral trade negotiations (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994)

[181] Posey, D.A., Dutfield, G. Intellectual Property: Toward traditional resource rights for indigenous peoples and local communities. *International Research Development Centre*, Canada, 1996, page 90-91

[182] O'Connor and Company. Geographical Indications and the challenges for ACP countries. *Agritrade*. 2005, page 3

[183] *Supra note 181.* Posey, D.A., Dutfield, G. 1996, at page 91

However, since AOC doesn't necessarily need to be attributable the edible goods, then similar "quality sings" could be used also to mark some of the handicraft items which are linked to a particular area. To get AOC for any region, then the community must first set up a local association with their appellation and government needs to recognize it.[184] Certification of the products helps the consumers to differentiate between the authentic and fake, but can also be an indicator of something produced in an ethical way or in environmentally friendly manner.[185] Hence in order to add value to the self-regulatory database, it can be linked to the issuance of a quality sign. If an uploading party has registered a pattern or an ornament in the database then automatically it is linked with a uniformly established quality sign, meaning that once a downloading party registers the use of such pattern or an ornament, their product will be marked with a special sign, indicating that the design originates from an authentic source and that the downloading party is paying royalties and running therefore an ethical business model.

Next to geographical indication there are also certification marks and they are defined by Lanham Act, also known as a U.S Trademark Act, as "any word, name, symbol, or device, or any combination thereof that is used by a person other than its owner, or which its owner has a bona fide intention to permit a person other than the owner to use in commerce."[186] What is important in this definition for the context of indigenous self-regulatory framework, is the part where it's said that the mark is not used by the owners. Such classification suits perfectly into the concept of the registrational program, because this sign of certification will only be used by the people who follow the particular code of conduct. It makes system of signs very clear for the consumers and is traceable straight to the program.

Some efforts to grant the quality signs or authentication signs on indigenous craft has already been done. In Canada as part of the trademark system, some certification marks have been issued to emphasize the authenticity of indigenous peoples' work. "Genuine Cowichan Approved", "igloo design identifying Canada Eskimo art", "Dream Catcher design" are among those names which have been successfully registered as certification marks. It should help to support the appropriate pricing and protect the certified products from the imitations.[187] Most of all, certification marks might just be

[184] *Ibid.*
[185] *Ibid.*
[186] Lanham Act of 1946, 15 U.S.C, paragraph 1127
[187] Brascoupe, S., Endemann, K. Intellectual property and Aboriginal People: a working paper. Research and Analysis Directorate, Department of Indian Affairs and Northern Development. 1999, page 20

the most powerful marking system available today to protect patterns and ornaments originating from an indigenous community or being linked to the ancestral designs.[188]

On the other hand it might be that some people don't really care about the product being authentic, or are just not aware of the meaning of such marking system.[189] Therefore the educational side of the database is again very important to have as a complementary addition to the database functionality. There is no reason just create yet another meaningless register, but adding value to it definitely attaches interest of larger network of people. In order to avoid the possible confusion[190] between the certification marks, it is better to keep it database centric, in the meaning that there will be only one quality sing for everything which gets registered in the database, not different specifications for the different regional crafts. When standards are communicated clearly in the regulation, then the certification mark is functioning as a guarantee to the consumer that this product is complying with the industry standards[191] and more importantly complying with the standards set by the owner.[192]

"Silver hand" in Alaska successful since 1961, "Māori made" *Toi Iho* discontinued in 2009, Australian Authenticity Label discontinued after two years of its launch in 1999. The fluctuation in success of the certification marks of the indigenous or aboriginal crafts has gained wide range of opinion statements.[193] It does raise a question, why some of the voluntary measures work and some don't. When looking closer into the Australian system, then it has been found that it did lack the proper definition to some of their requirements, therefore it was difficult to apply for it. Also there were problems with funding and lack of proper administration body and poor governance.[194]

There has been at least one attempt to issue the quality signs in Estonia as well. On the island of Muhu, in order to popularize handicraft as an important source of income, a statute of a quality sign was passed in the county's local government.[195] The quality sign is issued to the worthy items every year in February on the National Independence Day. The assessment process is conducted by a special

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[188] *Ibid.*
[189] *Supra note 181.* Posey and Dutfield. 1996, page 92
[190] *Ibid.*
[191] Barron, M.R. Creating Consumer Confidence or Confusion? The Role of Product Certification in the Market Today. *Marquette Intellectual Property Law Review*. Vol. 11 (2), 2007, pages 414-442, at page 414
[192] *Ibid.,* at page 416
[193] Drahos, P., Frankel, S. (ed.) Indigenous peoples' innovation: Intellectual Property pathways to development. *Australian National University E Press*. 2012, page 101
[194] *Ibid.,* at page 102-104
[195] Euroopa Sotsiaalfondi Eesti edulood. *Eesti Vabariigi Sotsiaalministeerium*. 2007, Page 52-53

board, where they evaluate the usage of local raw-material, quality, and connections to the uniqueness of the region and history. Further, the county uses products with the quality sign as official present upon the visits of foreign commissioners or as prizes to some local government endorsed competitions.

All the aforementioned proves that all kinds of geographical indications, certification marks and quality signs are in place for protection of many goods. It is capable of creating confusion among consumers when the classification is made too complicated. Latter can be countered with the good regulation and clear expectations to the signs. The whole regulation has to be well administered and all the standards communicated in a very clear and understandable language, to avoid failures such was the Australian example. All in all, it leaves no doubt that such marking of products adds value to the planned self-regulatory database and raises its quality in the eyes of the public (both consumers and government bodies) and private entities.

Summary

Protection and preservation of indigenous traditional cultural expressions has been a relatively emotional topic for decades for many legal scholars. It is often hard to work with the area which is tightly knit to very personal aspects of one's culture. The will to be protected against exploitation and appropriation of their culture, have made indigenous peoples to vociferate their wants and needs more loudly. In the same time, even if there are people who listen and bother to create institutions in attempt to find solace for the unprotected minorities, then the complications which derive from the very bottom of this issue are hard to overcome or set aside. The expectations to the legal system are high, but the reality shows that amending new provisions of kind into the existing legal framework is modestly speaking impossible. The kind of protection that is sought for is demanding to extreme and no set of laws can realistically accommodate every part of it. The research about alternative protection is rather minimal, because of the perception of the only strong framework to be found from the positive law. However, as little as it is investigated, soft law, self-regulation and some non-legal approaches have proven itself much more beneficial to the indigenous peoples. The hypothesis, that the self-regulation for the protection of ancestral patterns and ornaments is feasible, has proven itself to be generally possible. The purpose of the research was to reason the need for an alternative approach towards the protection of traditional cultural expressions, as well as identify possible shortfalls of such approach.

First research question was, what are the underlining reasons which make indigenous heritage protection necessary, and are there any legal instruments supporting it. Author came to the conclusion that in indigenous societies it is impossible to divide one part of the culture of another and reasons for protection are based on identity, religion, economic inferiority and social recognition. No legal instrument gives the protection overarching all the communicated reasons.

Author found that the communities' reasoning for the opposition to the commercialization of their traditional cultural expressions is not necessarily the act of reproduction, but rather the way it is conducted and how it often distorts the image of their views and customs. Because of the ubiquitous disrespect and offensive exploitation towards the sacred heritage, moral education and raising awareness about their culture is strongly promoted. Religious manifestations, whether in the form of a ceremony or a piece of art shall be protected by the European Convention of Human Rights, but the room for interpretation is so broad that it could never suffice to count only on that, besides it would

protect the act of painting, but not the painting itself. In order to not lose the chance of profiting of their traditional cultural expressions, indigenous peoples surrender to the provocative nature of marketing and get involved with entrepreneurship and tourism. Market pressures the change upon the indigenous communities, but the participation in the commercial activities doesn't mean that they are content with it, they are motivated of the prospect of keeping something within their community like this. The more accessible their culture to the outsiders become, the more open indigenous peoples get towards negotiations, as long as they possess control over where and why their cultural heritage is being used. They also see that the fair monetary compensation for the reproduction of their traditional cultural expressions is appropriate and necessary for the development of their communities.

After establishing the reasoning for the need of protection, Author found it necessary to find some legal instruments which are assumingly protecting indigenous peoples according to their own expectations. Human Rights can often be used as a counterargument in legal disputes, but that as the individual rights not as collective rights, which could be used by indigenous peoples, but are rather condemned and recognition of it is mostly found in common law countries. The fear of collective rights appearing stronger than individual rights is to be blamed. According to one theory, collective interests are derived from the individual interests, because the collective rights are a collection of individuals with the same interest. Therefore collective versus individual should be seen as one single interest against another single interest. The protection of collective indigenous rights can only be found in UNDRIP but that is not legally binding. Customary law is a very powerful instrument in the protection of indigenous rights, but they are only applicable in one particular region and its scope cannot be broadened outside of the physical territory where the indigenous traditions and customs are practiced. Within a community, the customary law framework is of the highest order and regulates conducts effectively. Without the national or even international recognition, the customary law cannot provide sufficient protection to indigenous communities.

Second research question was, can copyright prove itself as a sustainable protective measure. Author came to the conclusion that copyright could only be considered as a possible protective measure if folklore was explicitly added into the scope of the Copyright Act and exceptions would be applied on some core values of copyright protection. Sustainability would be achieved not only by waiving the term of protection but by accepting the communal and heritable characteristic of indigenous traditional cultural expressions.

Author established that the aspiration of many scholars and researchers to customize copyright for protection of the indigenous peoples' intellectual property rights is rather impossible and it would be easier to create a separate legal framework for that. Copyright protection is meant to protect the rights of individuals and their creative expressions. Approach of this framework is concentrated on the development of copyright-based industries and international trade. Folklore is generally excluded of the scope of protection and even new reproduction of it might not be granted the expected protection without the originality prerequisite. Even if the term of protection would be extended it wouldn't change anything from the perspective of indigenous peoples, only waiving of the term would have some effect, but that alone couldn't give the protection expected. Moral rights are most important for the indigenous peoples, but copyright protection supports only the individual moral rights. In order to apply the copyright protection to the indigenous intellectual property rights, it should be changed too much and would therefore lose its value for current protégées. Technological area has placed many challenges to copyright protection in general because of the borderless marketplace, therefore it couldn't offer sufficient and expected protection anyway.

Third research question was, what, if anything can be learned from Australian protective measures for indigenous cultural expressions. Author came the conclusion that despite the fact that Australia has so large indigenous community and regional powerful customary laws which provide great legal protection in the area then before these laws do not get full recognition on the national level then indigenous peoples are still left without the necessary protection. Australian indigenous rights protection can be set as an example with being forward-minded and open to craft new legislative instruments, as well as they have a relatively respectful environment for indigenous peoples. On the other hand Australia is one of these countries which is afraid of the collision of powers and while having best framework for protection of indigenous rights, they often choose not to magnify it nationally and therefore suspend many excellent ideas for legal instruments which are introduced to the government.

Author analyzed the national legislation of Australia which included Aboriginal and Torres Strait Islander Heritage Protection Act, Aboriginal and Torres Strait Islander Commission Act and Australian Institute of Aboriginal and Torres Strait Islander Studies Act. Author found that all of these three Acts are functioning in line with each other and latter two ensure the improved scope and provisions of the premier. The joint purpose of those three Acts is the promotion of improvement on

the governance by having a more voluminous indigenous voice in the decision processes and better cooperation between the non-indigenous and indigenous groups; the information and resource collection about the indigenous peoples, whereas conclusions upon the research are to be used to better the legal framework with the knowledge about the actual needs of indigenous peoples; and to preserve and protect aboriginal traditional cultural expressions by providing a broad interpretation room for the definitions. Author also found that while Australian legislation has been very accommodating to the indigenous rights legislation, there are still important legal instruments pending the approval of the government. Either no sufficient protection is provided for the defamation when it is addressed to the community and not namely towards a particular individual.

Fourth and last research question was, what are the conditions to self-regulation and can these be applied in the context of protection of traditional cultural expressions. Author concluded that there is a list of recommended conditions of which the creation of self-regulatory system should take guidance from and with modest modification these can be applicable in the context of protection of traditional cultural expressions. The conditions were as follows: (1) standards must be set down and preferably not by public but by private organizations. That controls the professional reasons in the industry and begins to dictate the best practices to set higher goals. Sometimes it is still good though when government steps in so the pressure from both directions provides the voluntary compliance with the highest motivation involved; (2) a powerful utilization has to be present, because community needs to perceive that there will be consequences behind regulation; (3) the motive for working towards the goal can only be effective when the expected results are clearly communicated, otherwise the compliance with regulation will be less likely to happen; (4) even if institution is in full compliance with the regulation it is never wholly protected from the individual lawsuits, so there will always be a risk of residual liability; (5) the institution's choice to engage itself with the self-regulation must be justified as far as the cost efficiency goes relative to the standard methods of conducting business; (6) public has to have a sufficient interest in the voluntary compliance in order to encourage the conduct, only this will prove the sustainability of the self-regulatory choice. After all the ultimate goal is to benefit the public while being compatible with business needs.

Author analyzed the essence of self-regulation and different variables to find the suitable definition which corresponds to the needs of indigenous peoples. Author found that self-regulation is not always a successful measure and this conclusion had to be followed by the elaboration on the six conditions

set upon the self-regulation in the context of the protection of traditional cultural expressions, more importantly so while keeping in mind the application in Estonia. One of the conditions, author decided, was not relevant in the Estonian context, therefore the sub-paragraph on the residual liability is in overall just a reasoning to why is it left aside.

The balance between private and public entities designates the foundation of self-regulatory framework. While self-regulation is more functional when run by private entities then for social self-regulation the governmental support is on one hand necessary but on the other hand inevitable. Public sector is interested in endorsing the social need and offering guidance as to how to better regulate the issue at hand. Government can choose to stay in the observer's role, but they can assume the guiding role instead. When something socially important is going to be regulated by voluntary means then government's interest is to guarantee that the private body is doing the necessary things for the regulation to be successful. In Estonian context government is most likely to adhere to the observing. The core principle of setting the standards is the establishing of consensus definitions. The objective of the regulation has to be clear an executable. The people involved must be fairly represented.

There needs to be a clear communication as to what measures will be used for settlement upon dispute. Court of Honor is considered as the most viable solution for tackling the non-conformities to the regulation. In Estonian context, Court of Honor is a standard practice and there would really be no need to establish a new solution, while previous is fully functional. The sanctions to the misconduct could include a public apology, a monetary obligation or an advertising impediment and exclusion from the quality sing use along with the ban to the access of the database. Being part of the self-regulation is not in any way obligatory and therefore non-compliance with the rules once voluntarily accepted might bear quite serious and far-reaching consequences.

Recommendations, as to what should be protected, originating from the indigenous peoples are exclusively analyzed in the Estonian context. Suggestions are in categories such as: Ownership and control, authorization of commercial use, commercial benefit, proper attribution, prevention of derogatory and offensive use, prevention of distortion and mutilation and last but not least preservation, care, management and control of the heritage. List of the expectations was significantly longer, but author chose not to include the points which were in relation to the rights in relation to the land and sacred element of the culture, because these rights do not have a proper parallel in Estonian context and are thus redundant for establishing a self-regulation. Speculative expectations from the

downloading side are communicated to draw the full picture and balance the scales. Most important points are freedom of contract, flexibility, cost efficiency, need for clearly defined regulation within the meaning of uniformly comprehendible language and a chance to revise one's position and step out of the framework.

Author established that based on several successful non-legal approaches to protection of indigenous traditional cultural expressions, the self-regulatory system in mind has a great potential to become a very good tool for tackling the issues as well. Therein lies the answer to the question why would communities want to be part of the self-regulatory system. Voluntary regulation can be written in the image of the creator, therefore meeting necessary expectations to the industry. From companies' standpoint the value lies in being socially responsible. Author found several indicators, such as the customers' satisfaction, employees' decision to keep working for a company or even the employees' productivity, which illustrate the value for the company with statistical numbers. A speculative approach is also taken towards the public interest, because the self-regulatory application for traditional cultural expressions is new and there public interest can be assessed upon the event of some real customer feedback data. Author believes that public is driven of speed and quality, they are looking for a trustworthy service and most importantly an added value for them. For finding the added value and quality aspect, author goes into length with the analysis of different quality signs and their pros and cons. Geographical indication and certification marks are both found suitable for the self-regulatory system as both are seen as adding value to the it. Both quality ensuring signs are regulated with positive law instruments and that could place the self-regulation into the co-regulation area after all.

Resume in Estonian

Resümee

Rahvusmustrite kasutamine müügiartiklina on saanud üsna tavaliseks, kuid selle ala regulatsioon on pigem tagasihoidlik. Rahvusmustrite kaitse ning kogu seda ümbritsev õiguslik raamistik on keskendunud positiivse õiguse reeglite järgimisele ning ei paku ulatuslikku ega piisavalt kaitset põliselanike teravdatud vajadustele. On selge, et traditsioonilised õiguslikud instrumendid on liiga kitsalt tõlgendatavad ja seetõttu teistsugust lähenemist eeldav rahvuspärand on tihti nende ulatusest väljas. Käesolev magistritöö uuribki alternatiivse võimalusena iseregulatsiooni sobilikkust antud kontektsi. Püstitatud hüpotees ongi iseregulatsiooni võimalikkus rahvusmustrite ja ornamentide kaitseks. Autor on leidnud võrdlemisi positiivset kinnitust oma hüpoteesi tõestuseks. Vajaliku tulemuseni jõudmiseks seadis autor eesmärgiks vastata neljale uurimisküsimusele:

1) mis on peamised põhjused miks on põlisrahvaste pärandi kaitse oluline ja kas seda on praegu toetamas õiguslikud vahendid;
2) kas autoriõigus on võimeline pakkuma jätkusuutlikku kaitset;
3) kas, kui üldse, on võimalik õppida midagi Austraalia põlisrahvaste traditsiooniliste esemete kaitsemeetmetest;
4) mis on tingimused iseregulatsioonile ning kas neid saab rakendada traditsiooniliste esemete kaitseks?

Autor leidis, et põlisrahvaste pärandi kaitse olulisus seisneb eelkõige selle kordumatus väärtuses, mis avaldub piirkonniti valmistatavate esemete näol. Nende tööde kasutamine kolmandate isikute poolt kaubanduslikul eesmärgil, jätab põlisrahvad nende enda pärandist saadud tulust kõrvale, tihti lisaks alahinnates nende esemete pühalikkust ning koheldes neid austust mitte üles näidates. Riikides, kus on olemas suuremad põlisrahvaste kogukonnad, on neile tavaõigusest nähtuvalt kohalduv õiguslik raamistik, mis määrab ära kuidas nende töid kasutada võib just eelkõige kogukonna siseselt. Eestis ja ka paljudes teistes riikides, kus selline raamistik puudub ei osutu selline asi võimalikuks ning abi peab otsima mujalt.

Intellektuaalse omandi kaitseks on autoriõigus parim õiguslik instrument, rahvakunst on aga autoriõiguseseadusest välja arvatud ning isegi kui see kohalduks rahvakunstile, siis on ikkagi selles raamistikus mitmeid takistavaid punkte, mis ei lase autoriõigusel kohalduda. Ajaline limiit, mis on

küll riigiti erinev, kuid ei pakuks ka limiidi pikendamisel vajalikku kaitset, sest sellisel juhul tuleks ajaline piirang täielikult tühistada. Mitmed asjaolud, mis räägivad autoriõiguste kaitse vastu on seotud autoriõiguse isikustatud kaitsega ehk teisisõnu, seoses sellega, et rahvakunst on kollektiivne ning seda ei ole alati võimalik siduda ühe konkreetse autoriga, siis autoriõigus pakub kaitset just eelkõige ühele konkreetsele autorile. Kui autorikaitseseadust hakata kujundama vastavalt rahvakunsti kaitse eeldustele, siis kaotaks autorikaitse seadus oma praegusel kujul mõtte. Seetõttu oleks mõistlikum koostada juba täiesti uus seadus rahvakunsti kaitseks.

Autor kasutas paralleelide tõmbamiseks Austraalia õiguslikke meetodite analüüsi. Kahjuks on Austraalia ja Eesti õiguslikud keskkonnad võrdlemisi erinevad nind võrdlust võib käsitleda ainult suunava soovitusena. Austraalias on välja töötatud mitmeid erinevaid kohalikke ning mõjusaid õiguslikke instrumente kuid ka selles kontekstis puudub korralik riiklik tugi ning eelkõige saab Austraalia näitel õppida, et ilma riigipoolse toetuseta ei saa sellise emotsiaalse sotsiaalse probleemiga tegeleda õiguslikul tasandil. Austraalia on hoolimata sellest teinud mitmeid edukaid samme parema seadusandluse poole ning eeskujuks võib seda riiki seada just nende proaktiivsuse poolest esitada valitsusele ettepanekuid seadusemuudatusteks. Austraalias on aktiivne erasektor, kes on võtnud põlisrahvaste õiguste kaitse enda huviorbiiti ning sellist aktiivsust võiks soosida ka mujal riikides.

Põhjusel, et ükski positiivse õiguse raamistik ei ulatu pakkuma korralikku kaitset rahvuspärandile ning rahvusmustritele ja ornamentidele, pöördus autor negatiivse- või ka pehme õiguse poole. Iseregulatsioonil põhinevaid raamistikke kasutatakse mitmetes erasektorites ja päris tulemuslikult. Vaadeldes näiteid kogu maailmast, selgub, et põlisrahvad on leidnud just parimat kaitset mitte-õiguslikke meetmeid kasutades. Kogutud informatsiooni põhjal analüüsis autor iseregulatsiooni võimalusi Eestis ning eeskätt rahvapärimuse kaitset silmas pidades. Iseregulatsioon on käsitletud kuue erineva tingimuse valguses ning kõikidele tingimustele vastavus on pandiks, et iseregulatsioon saaks edukalt töötada. Iseregulatsiooni külge võib lisada ka positiivse õigusega reguleeritavaid laiendusi ning ühe võimaliku laiendusena näeb autor kvaliteedimärgist, mille väljastamine tooks lisaks ka majaduslikku kasu mustrite ja ornamentide põlistele omanikele nende piirkonnas.

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