Misappropriation And Dilution of Indigenous People’s Cultural Expression through the Sale of Their Arts And Crafts: Should More Be Done?

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ABSTRACT

Indigenous cultural expressions, a component of traditional cultural expressions (TCEs), are drawing tourists to Malaysia by their millions and hence are considered valuable resources that need to be preserved to ensure their sustainability. Equally valuable are the indigenous arts and handicrafts which are sold and traded by craft centres set by the government or by private sellers. Unfortunately, these arts and handicrafts have fallen prey to counterfeit and fakes. This paper examines national initiatives to regulate the sale of indigenous people’s arts and crafts as a means of constraining the misappropriation of these cultural expressions in Malaysia, and compares these initiatives with those in Australia, New Zealand and the United States of America. This paper uses the mixed methods of library-based and qualitative research. The latter consists of unstructured, face-to-face interviews with respondents from selected communities of aborigines in Peninsular Malaysia as well as Sabah and Sarawak. The focus is to explore and understand the problem and to observe whether misappropriation and dilution are real issues within the indigenous people. Based on the information and data collected from the interviews, the problem of misappropriation proves to be a real threat to the sanctity of indigenous people’s cultural expression, in particular their arts and crafts. The paper concludes that Malaysia must adopt a multi-pronged approach including a range of laws to effectively curb the misappropriation of indigenous arts and crafts as well as preventing them from being diluted.

Keywords: Traditional cultural expression, arts and crafts, indigenous people, cultural heritage
INTRODUCTION
Malaysia is home to more than 70 groups of indigenous peoples. In Peninsular Malaysia, the three main groups of indigenous peoples are the Negritos, Senoi and Proto Malays, amounting to about 0.8% of its total population. In Sabah and Sarawak, the natives constitute the majority with a total of 61.22% of the total population in Sabah and 71.2% in Sarawak.

As tourism is one of the important industries in Malaysia, the government is committed to leveraging the country’s multicultural and multi-ethnic indigenous groups as a strong, unique drawing power for tourism (Norhasimah, et al., 2014). Unfortunately, there has been an increase in the supply of fake and imitation indigenous arts and crafts in Malaysia. The lack of laws regulating sales and exports of indigenous arts and crafts renders all the illegal reproductions out of the reach of law. In light of the lack of regulatory laws, his paper considers the position of Malaysia’s indigenous people or orang asli before examining the regulation of cultural heritage as a means to protect TCEs. Finally, by way of comparison, this paper considers legal approaches in Australia, New Zealand and the United States that provide regulations under consumer protection and intellectual property protection of indigenous people’s art and craft.

COMMERCIALISATION OF INDIGENOUS CULTURAL EXPRESSION IN MALAYSIA
Orang Asli in Malaysia – An Overview
The Orang Asli are the indigenous minority peoples of Peninsular Malaysia. The name is a Malay term which transliterates as ‘original peoples’ or ‘first peoples.’ It is a collective term introduced by anthropologists and administrators for the 18 sub-ethnic groups of the three major groups consist (Negrito, Senoi and Proto-Malay). The 1997 statistics show that the indigenous peoples represent a mere 0.5% of the total national population. The Orang Asli, nevertheless, are not a homogeneous group. Each has its own language and culture, and is hence unique in this sense. Linguistically, some of them speak Aslian languages which can be traced back to the indigenous peoples in neighbouring countries of Malaysia such as Myanmar, Thailand and Indo-China. Interestingly, those people of the Proto-Malay tribes speak dialects which belong to the same Austronesian family of languages as Malay, with the exception of the Semelai and Temoq dialects (which are Austroasiatic) (Nicholas, 1997).

The Orang Asli have various unique ways of life, in particular, the occupations and activities that they engage in to sustain their life. The Orang Laut, Orang Seletar and MahMeri, for example, live close to the coast and thus most of them are fishermen. Some Temuan, Jakun and Semai people have taken to permanent agriculture and now manage their own rubber, oil
palm or cocoa farms. Other groups such as Temiar, Che Wong, Jah Hut, Semelai and Semoq Beri however, live close to, or within forested areas. This explains why the majority of them are involved in hill rice cultivation, hunting and the gathering of forest products. They usually earn some cash income by selling forest products such as petai, durian, rattan and resins. It is common to see Orang Asli selling these products at small booths or huts along the roadside in most Orang Asli villages (for example in Tapah, Perak and Gombak, Selangor). Despite the fact that the majority of Orang Asli now have permanent homes, a very small number, for example Jahai and Lanoh from the Negrito group, are still semi-nomadic, which means that they move from one forest area to another as they prefer to take advantage of the seasonal bounties of the forest. A growing number of Orang Asli, in particular the young generations, are now living in urban areas as they have obtained proper education and qualification to work in various professions in town, earning salaries by working in the public and private sectors (Nicholas, 1997).

Indigenous peoples have unique TCEs that exclusively represent their identity and heritage (Tarmiji et al, 2014). Every expression on carvings, weavings, in dance movements and rituals for example, has significant meaning which is peculiar to all members of an indigenous group. These expressions portray the life and beliefs that are attached to the land and the environment surrounding it. These expressions are passed verbally from one generation to another reliving the beliefs, the value and authenticity of the cultural expression and thus binding them as one community sharing one communal belief, values and tradition.

The indigenous community’s cultural expression is very much influenced by its environment and geographical demography. The MahMeri in Pulau Carey is a good example since they lived near mangrove swamps which supply an abundance of Batu Nyireh wood. The wood has an attractive colour and appearance and is suitable for carving. It becomes the natural choice for the MahMeri community for their carving work. The wood art in the forms of masks or figurines depicting super naturals or spirits known as moyang are used for rituals to cast away diseases and to protect their household members from evil spirits. Among the famous sculptures is the Moyang Harimau Berantai or tiger spirits in chains. Behind each of the Moyang lies hidden traditional folk tales that are relevant to their beliefs (Ratos, 2006). Similarly, the Semiar of Batang Padang and Temuan communities at Bukit Payung are all talented weavers who can easily obtain mengkuang and bertam leaves for making handicrafts, baskets, mats and roofs. Bamboo and rattan are in abundance in the areas and are used to make baskets and bamboo walls. These examples, to some extent, supports the view that the Orang Asli community has a specific human nature interdependence as they adapt to their specific environment.
Another form of TCEs among the indigenous peoples in Malaysia is traditional dances. The Sewang, for example, is a traditional Semai dance that combines elements of rituals, songs, dance and music. The Sewang is practiced by the Semai community not only for rituals but for medicinal purposes. Its rituals, songs, dance and music have been handed down verbally and have not been reduced to written form. Further examples of traditional dances include those of the natives of East Malaysia, such as the Sumazau that is the most famous dance of the Kadazandusun communities in Sabah and the Ngajat dance of the Iban and Bidayauh in Sarawak.

However, globalisation and commercialisation have indirectly diluted the original cultural expression to merely a performance rather than an appreciation of the intrinsic values that are attached to the expression itself. Consequently, the authenticity of the cultural identity and values may be lost and forgotten in the face of the threats of globalisation and commercialisation (Graber et al., 2012).

Is Misappropriation A Real Threat?
For the purpose of this research, various fieldtrips which included visits to selected indigenous villages in Sarawak and Peninsular Malaysia were undertaken to obtain a better understanding of the their TCEs. According to Nicholas Mujah from Persatuan Dayak Iban based in Sarawak, there have been many efforts to preserve the traditional culture (e.g. their cultural heritage, language, and land rights) of the Dayaks. It is their belief that traditional cultural heritage belongs to the community, such as the Bunga Terung tattoo– a sign that one belongs to the Iban community. The Iban community also complains that the performance of Ngajat as portrayed in the media is inauthentic. To the Ibans, Ngajat signifies everything. The steps for Ngajat in welcoming people are different from dances performed for other functions. To the Ibans, Ngajat is a sacred dance as it is an art of respect and not just a ‘show’ to outsiders. Since the association is just a small group, there is nothing much they can do against the adulteration of their cultural performances. The only effort that they can make is to preserve the authenticity of Ngajat in their own village. They cannot take any action against the commercial performances of Ngajat outside their village.

Cultural heritage is very diverse. This is one of the reasons why it is difficult to ensure everything is protected by the law, except for some crafts such as the Pua Kumbu which is very popular among the tourists. In terms of its design, if the maker is from Lubok Bangku, there is a distinctive line in its design. From that, it is possible to ascertain the origin or the place where it was designed. Prior to designing these crafts, the artist usually gets inspiration from their dreams. They conduct a specific festival called membangun, during which they become possessed and inspired by the sprits through dreams. The inspiration comes from the males in the community,
while the process of producing, such as the *Pua Kumbu* cloth will be undertaken by the females. The resulting designs will be considered as communal property or knowledge. When the designs are sold, the profits are normally divided among them. Most of the time, the women who have woven the cloth will get the bigger share of the profits.

It has been observed that the *Orang Asli* in general and in particular those communities such as *Iban* and *Bidayuh* of Sarawak are being protective over their heritage as they are afraid it might be abused. This is the discovery by Sarawak Biodiversity Centre (SBC) based on its collaborations with the people of *Iban* and *Bidayuh* in recording the medicinal practice of the people, from the preparation of the medicine itself, through to its utilisation. The SBC has even documented the plants that were used to charm people.

A short visit to *Kampung Orang Asli Guntur* in Kuala Pilah, Negeri Sembilan reveals that young people lack interest in learning about their traditional culture and prefer modern life as compared to traditional ones. TCEs have become something they do for tourists by way of sale of their handcraft items and hence are no longer regarded by the younger generation as cultural traditions. Modernity has taken over their cultural identity resulting in a loss of identity. A visit to *Kg. Orang Asli* in Sg. Rengsak in Tapah, Perak is interesting as it is observed that the aborigines to some extent managed to maintain their traditional and cultural values. For example, when Jabatan Kemajuan Orang Asli (JAKOA) provided them with new brick houses, some old folks refused to move for their love of traditional houses. Nevertheless, many of the younger generation have obtained higher education and have moved to live in towns. This has resulted in the dilution of TCEs since they have not been passed down to the next generations.

**Government Initiatives**

In Malaysia, culture, arts and heritage related industries, especially crafts, have been identified as one of the important sources of economic growth since the Eighth Malaysian Plan (2001-2005). The significant role of arts and crafts was further emphasised during the Ninth Malaysian Plan (2006-2010). One of the strategic thrusts of the Ninth Malaysian Plan was the development of the craft industry and the promotion of craft products for the world market as part of a bigger plan to boost the tourism industry as a whole.

Undeniably, indigenous TCEs are an integral, indispensable component of Malaysia’s unique rich heritage. In this regard, the Tourism Ministry has included them as part of tourism packages in Malaysia with the aim of attracting tourists worldwide. Additionally, the government has organised annual festivals featuring indigenous cultural expression as well as setting up cultural villages that showcase their physical as well as intangible cultural expression. Examples of such cultural villages are Monsopiad Cultural Village, Mari-mari Cultural Village, Sarawak
Cultural Village and *Pulau Carey MahMeri* Cultural Village. These physical locations, as well as the festivals which are held regularly, are the main highlight and serve as a focal point of cultural heritage tourism throughout Malaysia.

Indigenous traditional performance attracts thousands of tourists every year. The annual festivals such as the Rainforest Music Festivals, the National Crafts Fair, the Cultural villages and other cultural activities organised by the tourism ministry focus on indigenous music, dance and performance. Some of the performances are a mixed blend of traditional and modern dances. For example, at Santubong Cultural village, the dances shown are not authentic renditions of the culture of the specific indigenous peoples. What is performed is a combination of all the cultures of indigenous people in Sarawak to promote the concept of “unity in diversity”, however, such a combination diminishes the identity of the specific group within the indigenous community. Thus, commercialisation of cultural heritage brings only harm to the indigenous community in the long run. To make things worse, these cultural performances and products are simply performed and produced to meet tourists’ demand without an understanding of their cultural significance (Nicholas Mujah, personal communication, April, 2014).

As indigenous TCEs are important resources for cultural heritage tourism in Malaysia, a consideration of the heritage protection law as one mechanism to preserve the authenticity of designated cultural heritage in Malaysia is necessary before exploring the initiatives undertaken in Australia, New Zealand and the United States of America.

*Heritage Law as the ‘Primer’ For Protection of TCES in Malaysia*

In Malaysia, the National Heritage Act 2005 (NHA 2005) was passed as a domestic support towards UNESCO’s effort in preserving cultural heritage. The Act, which was enforced in March 2006, paved the way for the designation of both tangible and intangible cultural heritage for the purpose of conservation and preservation. Among the indigenous cultural expressions that have been designated as national heritage is *Mayin Jooh* (the Mah Meri cultural dance), the art of land clearance (Iban, Sarawak), the *Petudui Culture* (the marriage culture of Melanau, Sarawak) and *Sogit* (the culture of paying compensation among the Kadazandusuns), *Ngajat* (cultural dance of the Iban) and *Sumazau* (cultural dance of the Kadazandusuns), *Pakaian Adat Kadazandusuns*, *Datun Julud* (Cultural Dance of the Kenyah Tribe) and *Adat Mandi Anak Iban* (Bath Rituals for Iban Babies).

Under the Act, TCEs fall within the definition of intangible cultural heritage (Section 2, National Heritage Act, 2005). Intangible cultural heritage consists of living expressions as well as culture and traditions inherited from ancestors and transmitted to descendants. Such a process occurs all over the world in a myriad of groups, tribes and communities and it
usually exists on an oral basis without any proper documentation or recording, as compared to modern life. The urge to safeguard this valuable heritage can be traced back to the attractive profit reaped from international trade and irresponsible commercial exploitations of cultural heritage, whereas the people or community who are the preservers of the heritage gain extremely little, in fact meagre economic returns. (Hussein, et al., 2001)

The NHA primarily empowers the respective authorities to conserve Malaysian built and natural heritage, tangible and intangible cultural heritage, and traditional arts and culture and other manifestations such as heritage food and heritage persons. The Minister is responsible for the policies needed for the conservation and preservation of heritage. Section 4 of the NHA recognises the establishment of a Commissioner for Heritage. The Commissioner is vested with the authority to register any heritage object having cultural heritage significance in the Register (s 67 NHA 2005).

The role of the NHA (2005) in the preservation of cultural heritage has been lauded by many parties despite its apparent limitations although the scope of cultural heritage, for example under the purview of 2001 UNESCO Declaration, is broader (Nurulhuda Adabiah & Nuraisyah Chua, 2013). In this regard, it is to be noted that Malaysia is yet to ratify some relevant conventions within this sphere such as the Convention for the Safeguarding of the Intangible Cultural Heritage 2003, the Safeguarding of Traditional Culture and Folklore Convention 1989, and the Universal Declaration on Cultural Diversity of 2001(Mustafa & Abdullah, 2013).

Unfortunately, not all cultural heritage of Malaysia is listed in the Register unless the Commissioner and the public are actively involved in identifying certain objects as having cultural heritage significance.(Mustafa & Abdullah, 2013). Furthermore, the heritage protection law is only meant for preservation, but it does not define who are the beneficiaries of intangible heritage are. The duty of the Commissioner is merely to designate what is considered as national heritage. The Commissioner cannot take action against any third party who offended any of provisions of the Act. What is more worrying is that not all TCEs are designated as Malaysian cultural heritage. Just like culture in general, intangible heritage is constantly changing and evolving and being enriched by each new generation. Many expressions and manifestations of intangible cultural heritage are under threat, endangered by globalisation and cultural homogenisation, and also by a lack of support, appreciation and understanding. There is a concern that it fails to provide the prime support for the preservation of TCEs and the sales of indigenous arts and crafts. By way of comparison, consideration is now given to approaches to the protection of indigenous cultural heritage in Australia, New Zealand and the United States of America.
**Australian Law**

Indigenous art is significant to the Australian economy, and furthermore, has been growing remarkably over the past 10 to 15 years (Bowrey, 2009). This trend applies for souvenirs as well as for high quality art. Prices in the fields of art, craft, and tourism have risen according to the increasing demand. Nevertheless, in the trade of Indigenous arts and crafts, exploitation occurs in cases where commercial traders sell or offer their products at a much lower price. They are able to do so as they have been importing “Aboriginal” art from Indonesia. One specific example is when Didgeridoos are offered for about A$10 to A$20 (approximately one tenth of the price Aboriginal artists would receive from a fair business) (Thomas Scheele, 2007).

One of the legal mechanisms is by enacting a specific legislation to protect aboriginal art through the Protection of Moveable Cultural Heritage Act, 1986. This Act restricts the export of items that are of significance to Australia’s Cultural Heritage. In 1999, the minimum age of items of heritage value to be exported without permit was reduced from 30 to 20 years and the value of art was increased from $5,000 to $10,000. Many Indigenous communities applaud this Act as it assists in the monitoring of important Aboriginal art leaving the country.

The Competition and Consumer Act, 2010 (replacing the Trade Practices Act, 1974) makes it an offence to engage in misleading and deceptive marketing. This restricts the sale and marketing of aboriginal arts that are not genuine. In addition, the Australian Consumer and Competition Commission (ACCC) is vested with powers to prevent misleading or deceptive conduct by prosecuting those who falsely market products as ‘Aboriginal-made’ or ‘authentic Aboriginal merchandise’. As indigenous people and discerning consumers become aware of products falsely claiming indigenous attribution, they may draw this to the attention of the Commission. In addition, labelling and protocols are also aimed at benefiting indigenous arts producers. For instance, the Indigenous Art Code provides that ‘Dealer members must not make false and misleading representations or engage in conduct which constitutes misleading or deceptive conduct or conduct that is likely to mislead or deceive, when dealing with a person in connection with an artwork.’ (Terri Janke, 2012)

**New Zealand Law**

Over the past few years, an increasing number of companies in New Zealand and overseas have started using Maori imagery and text in order to increase the commercial value of their products. Two of the most well-known examples are the use of Maori and Polynesian names for a range of toys by Lego and the use of Maori imagery by Sony Playstation in a game called the Mark of Kri. (Zografos, 2005). In addition, a growing quantity of imitation products, mass-produced offshore or by non-Maori artists, have appeared on the New Zealand market, mainly in the field of tourism, to the detriment of local authentic works.
In response to growing Maori concerns about the inappropriateness of existing intellectual property laws to protect their traditional knowledge and TCEs, New Zealand amended its trademark law of 1953 to incorporate a mechanism by which the interests of sections of the community, particularly Maori, can be taken into account during the trademark registration process (Fernando, 2013-2014). In particular, Section 3(c) of the New Zealand Trade Marks Act 2002 Act disallows the registration of a trademark if it is culturally offensive to the Maori. The Act also envisages the creation of an advisory committee to help the Commissioner of Trade Mark assess the potential offensiveness of a trademark.

As opposed to a trademark specifying a specific producer or manufacturer of a goods or services, a certification mark is usually applied to a product by an outside “certifying” body. Certification marks are an indication to consumers that certain standards have been met and certification marks therefore have a “stamp of approval” function. A renowned example is toihoTM, which is a registered certification trademark to certify that the arts and crafts are made by a person of Maori descent and to provide a mark of quality. It was developed and implemented in response to calls from Maori to assist them retain ownership and control of their taonga (treasures) and maintain the integrity of their art culture. While, overall, the introduction of the toihoTM mark has been beneficial to artists and consumers alike, the certification mark was disinvested in 2010. Some of the reasons for the disinvestment were that: (a) toihoTM no longer fitted in the strategic priorities of Creative New Zealand; (b) there was insufficient funding and resources to run the scheme appropriately; (c) the breadth of the scheme’s design was too wide. Despite the disinvestment, artists have not been deregistered and the toihoTM scheme is currently in a transition phase. One possible plan for its future would be for a group of Maori artists to create a trust to take over the toihoTM mark.

In short, the New Zealand Trade Marks 2002 does not aim to provide a general protection of Maori culture and heritage, but only practical measures to deal with cultural offensiveness. Even if the registration of a trademark may prevent the registration of offensive and deceptive marks, it will not prevent the offensive and deceptive use of indigenous names, signs and symbols where the user does not seek to register a trademark, and nor will it prevent the registration of indigenous names, signs and symbols by third parties where the signs are not considered offensive or deceptive. In the same way, the use of a certification mark or authenticity label will not, in itself, prevent the sale of imitation products in the marketplace (Zografos, 2012).

United States Law

In the United States, indigenous intellectual property protections slowly emerged through privatised programmes (Willis, 2006). Private organisations
initiated a movement in the 1970s to protect the marketing of indigenous arts and crafts with the creation of the Indian Arts and Crafts Association (IACA). At that time, legislation to protect the market of indigenous arts and crafts was barely in existence, so the IACA came together demanding the dignity of authentic indigenous arts and crafts. As a result of the IACA’s advocacy, the Indian Arts and Crafts Act of 1990 was enacted. Under the Act, civil and criminal penalties may be imposed for unlawfully misrepresenting arts and crafts as those of a federal or state recognised American Indian tribe. An artisan must truthfully mark all works with the proper tribal affiliation to prevent misuse and protect traditional knowledge needed for constructing these artistic works.

Another influential protection mechanism from 1990 is the Native American Graves Protection and Repatriation Act (NAGPRA), which can be found at 25 U.S.C. § 3001. The NAGPRA is aimed at protecting Indigenous artefacts with particular cultural value. Unfortunately, this statute is limited to protection of human remains and items of cultural heritage that are specifically held by museums or institutions receiving government funding (Schuler, 2013).

In relation to intellectual property rights, the USPTO has created a database for the voluntary registration of Indigenous insignia and symbols of state and federally recognised tribes known as the USPTO Database of Official Insignia of Native American Tribes. However, although there are guidelines for entering insignia, there is no investigation as to whether this is the official insignia of the registering tribe (Genia, 2012). Since the database is voluntary and is merely a collection of insignia, no intellectual property protections are gained through the database, like trademark rights. The database is used as a reference device to aid in examining trademark applications to refuse admittance of marks that “falsely suggest a connection with particular institutions” per 15 U.S.C. § 1052(a)(2)(a).

CONCLUSION & WAY FORWARD

The misappropriation and diminution of TCEs in Malaysia has been the result of multi–factors that are legal and non legal. TCEs in Malaysia are suffering from the threat of commercialisation from acquisition of customary land and cultural identity (Nicholas 2000, Masron 2014). TCEs have also suffered from being diluted according to demands from tourists, such as the Sewang dance. Mass productions dilute TCEs and the spiritual values attached to them. When TCEs lose their spiritual values, adulteration of cultural identity becomes a consequence. The new resettlement to replace the customary land is totally a different environment, therefore the indigenous peoples are not able to carry out their normal cultural activities and rituals. As a result, the culture is lost due to the detachment of the indigenous peoples with their customary land. To this effect, Rameli Dollah, an Orang Asli,
lamented, ‘to chase Orang Asli from their land means to destroy their identity and life’. Acquisition of customary lands by governments cause indigenous people to be unable to continue with traditional customary practices hence diminishing their cultural identity. Indigenous peoples also suffer from the threat of assimilation and integration policy. For example, they marry ‘outsiders’ which automatically causes their cultural identity to be diluted (Jabatan Orang Asli Daerah Alor Gajah, personal communication, April, 2015).

It is submitted that laws governing the protection of indigenous peoples in Malaysia are out-dated as they merely define who ‘orang asli’ are. The Jabatan Kemajuan Orang Asli (JAKOA) was created as the ‘guardian’ to Orang Asli where they treat them as groups of peoples requiring ‘special protection’. As a matter of fact, the Orang Asli wants to live in peace, undisturbed by any socio-political agendas from outsiders. It was also discovered that land rights under the Aborigines Peoples Act 1954 are very weak. When government acquires aboriginal lands, cultural traditions are similarly taken away. Mechanisms to register or gazette aborigines’ lands should therefore be improved. We must emulate the good practices of the Philippines, for example, who have a broad range of indigenous rights including the right to ancestral domains, right to self-governance and empowerment, social justice and human rights and cultural integrity (Tobias, 1998-1999).

It was unsurprising to discover that cultural identity diminishes with TCE through erosion of memory. More indigenous peoples prefer a modern life compared to the traditional ones (Salim Jantan, personal communication, March, 2015). In contrast with the MahMeri, many young people are involved in cultural preservation. The MahMeri does not mix with the Malays, making them feel proud of their cultural uniqueness. Contrary to popular view, modern lifestyle does not inhibit the Mah Meri to continue with their animistic beliefs. Further, many indigenous craftsmen (such as ‘Bah Dek Crafts’ in Tapah, Perak) make crafts based on demands and incentives from the government. If there are no demands, there will be no incentive to produce indigenous arts and crafts. As a result, many young generations of Orang Aslis are no longer interested in the traditional lifestyle as they adopt modern gadgets and entertainment (Salim Jantan, personal communication, April, 2015). As such, there is a lack of transmission of TCEs from older generations to the younger ones resulting in the loss of an appreciation of their roots and identity among the young orang asli.

The fieldwork demonstrates that TCEs in Malaysia are in a state of dilution due to various identified factors including the waves of modernisation. Available laws on the protection and preservation of TCEs in Malaysia are arguably too weak to prevent this from happening. It is imperative that we revisit these laws and consider stronger measures for the protection of TCEs in
Malaysia. Perhaps it is also time to consider amending the Aborigines Peoples Act 1954 by introducing special provisions on rights over culture whilst at the same time strengthening their rights over communal lands from which TCEs revolve.

Moreover, the only possible legal protection is through the heritage protection law. While heritage protection is perfect for tangible cultural heritage, its effectiveness over intangible cultural heritage, including TCEs, leaves a lot to be desired. The designation process denies protection to the whole range of TCEs, with only certain ‘widely publicised and promoted’ TCEs to be placed within the system.

Practices in Australia, New Zealand and the United States of America attest to the fact that what is needed is not a single piece of legislation that deals with all aspects of commercialisation or dilution of TCEs. What can be seen in Australia is a combination of consumer laws targeted against deceptive practices in the sales of indigenous arts and crafts. Strong provisions are introduced to ensure that the aboriginal arts and crafts are not expropriated to other countries. New Zealand, on the other hand, maximises intellectual property protection in the form of certification marks. Revered images of the Maori tribe are given special protection and recognition and this keeps them away from being used outside their community or adulterated by others. In order to do this effectively, a database containing the sacred symbols and insignia of the Maori are created and maintained. The United States, on the other hand, focuses on the sale of Indian arts and crafts, making it a criminal offence to sell fake items. The USA also maintains a database containing insignia and symbols for defensive purposes.

While it is not possible to eliminate altogether the dilution of TCEs as a result of modernisation and other social factors as have been identified through the field work, it may be possible to prevent them from being misappropriated through the sales of their arts and crafts or improper use in trademark registrations. While dilution and misappropriation are two separate processes, they are intertwined. Dilution can further lead to misappropriation. In this context, both must be reduced, if not eliminated. It is in this context that Malaysia must emulate the practices of New Zealand, Australia and the United States of America that have a long standing tradition in this area.

REFERENCES


