



**ADDIS ABABA UNIVERSITY  
SCHOOL OF GRADUATE STUDIES**

**School of Law**

**Business Law**

**Property Rights Approach towards Traditional Cultural  
Expressions in Ethiopia: Challenges and Prospects**

**By: Seble Mulat**

**Advisor: Biruk Haile (Assistant Professor)**

**A Thesis Submitted In Partial Fulfillment of the Requirements of LL.M.  
Degree in Business Law**

Addis Ababa

Nov, 2015

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I, SEBLE MULAT do hereby declare that the thesis '**Property Rights Approach towards Traditional Cultural Expressions in Ethiopia: Challenges & Prospects**' is my original work and that it has not been submitted for any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

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**School of Graduate Studies**

**Faculty of law**  
**Signed Approval Sheet by Board of Examiners**

Property Rights Approach towards Traditional Cultural  
Expressions in Ethiopia: Challenges & Prospects

By: Seble Mulat

Approved by Board of Examiners

\_\_\_\_\_  
Advisor

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Internal Examiner

\_\_\_\_\_  
Signature

\_\_\_\_\_  
External Examiner

\_\_\_\_\_  
Signature

## **Acknowledgement**

First, thank you the Almighty God for where I am today.

I am highly indebted to my advisor, Ass. Pro. Biruk Haile for his invaluable comments and constructive suggestions.

I am most grateful to W/ro Marta without whom none of this could ever happen. I would always be indebted to you.

I am also thankful for Ato Tedla Mamo, Copy Right and Community Knowledge Protection and Development Process Director for agreeing for the interview and giving me an insightful in to the topic at hand.

My family and friends thank you for your encouragements, without whom I would have never reached the finishing line.

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## ***Abstract***

*This thesis addresses a number of pertinent issues concerning Traditional Cultural Expressions, specifically in relation to what they are, the terms of protection, issues related with public domain, whether or not the existing IPRs regime is adequate for protection and the dilemma surrounding ownership. Most importantly the thesis examines whether or not the existing legal environment and policies of Ethiopia relevant to the protection of Traditional cultural expressions (TCEs) are adequate. In order to address these issues, this thesis will examine the development of, national, regional and International regulatory mechanisms and how the current discourse is evolving at these levels. At the international level there is no single legal binding document for the protection of TCEs. Over four decades have passed since negotiations started at the international level to come up with laws to regulate the use of TCEs. The complexity of the issue, the variation of interests among stakeholders and the fact that developed nations have not given due attention to the matter are some of the factors that have contributed for the delay. The inadequate legal recognition and, ultimately, insufficient international recognition and protection of TCEs has orchestrated the misappropriation of such works for the benefit of the non authoring community In Ethiopia there is no comprehensive legal regime to effectively protect TCEs. At the time of writing of this thesis a draft law for the protection of traditional cultural expression is being prepared by the Ethiopian intellectual property office. The biggest underlying issue today both at the international level and in Ethiopia is whether TCEs should be recognized within the domain of Intellectual Property Rights or through a sui generis system. This thesis argues that because of the communal nature of TCEs, existing regimes of protection – such as copyright, Neighbouring right laws ,patent, trademark, Industrial design – do not provide adequate protection for TCEs; and that, therefore, new systems of protection need to be considered, developed and implemented for protection of TCEs in Ethiopia.*

## Acronyms

<b>Art.</b>	Article
<b>CICH-</b>	Convention for the Safeguarding of the Intangible Cultural Heritage
<b>CDCE -</b>	Protection and Promotion of the Diversity of Cultural Expressions
<b>EIPO-</b>	Ethiopia Intellectual Property Office
<b>EOF-</b>	Expressions of Folklore
<b>ILO-</b>	International Labor Organization
<b>IP-</b>	Intellectual Property
<b>IPRs-</b>	Intellectual Property Rights
<b>P. -</b>	Page
<b>Sec-</b>	Section
<b>TCEs</b>	Traditional Cultural Expressions
<b>TK-</b>	Traditional Knowledge
<b>TRIPS-</b>	WTO Agreement on Trade Related Intellectual Property Rights
<b>UN-</b>	United Nations
<b>UNESCO-</b>	United Nations Educational, Scientific and Cultural Organization
<b>UNPFII-</b>	United Nations Permanent Forum on Indigenous Issues
<b>WIPO-</b>	World Intellectual Property Organization
<b>WIPO-IGC-</b>	WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
<b>WTO-</b>	World Trade Organization
<b>WPPT-</b>	WIPO Performances and Phonograms Treaty 1996

# CHAPTER ONE

## 1. INTRODUCTION

### 1.1. Background of the Study

Traditional Cultural expression<sup>1</sup> is the result of indigenous peoples' intellectual creations and a vital ingredient of human civilization.<sup>2</sup> The emergence of globalization has opened the door for people around the globe to become more intertwined with each other in areas of politics, culture and in economics. Services and goods are moving from one country to another easily. As a result of this movement a fierce competition is created in the market. Products with new and distinctive characters are more popular and more competitive. As traditional cultural expressions have rich cultures features and diversity, it becomes the best "raw" material for new designs or other new products<sup>3</sup>. This competition which is the result of globalization accelerated commercialization of TCEs into a global- scale market. The commercial exploitation of TCE in some instances has resulted in commercialization without respect for ethnic communities' culture, disclosure of a sacred or secret expressions and exploitation without benefit-sharing with the community which created such expression.

As a result intellectual property framework is used as a tool to protect and to benefit indigenous people from the use of their cultural expression through an intellectual property framework. Intellectual property laws may play an important role by providing legal protection for traditional cultural expressions. This protection can enable communities and their members to protect commercialize their traditional creations, if they wish to do so, or exclude competitors from free exploitation.<sup>4</sup>

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<sup>1</sup> . The terms "traditional cultural expressions", "expressions of folklore," "indigenous culture," and "intangible and tangible cultural heritage," are all used to refer to the traditional cultural creations of a community see Consolidated *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions*, at Annex 2, Annex 17, WIPO Doc. WIPO/GRTKF/IC/5/3(May2,2003),availableat[http://www.wipo.int/documents/meetings/2003/igc/pdf/grtkf\\_ic\\_5\\_3.pdf](http://www.wipo.int/documents/meetings/2003/igc/pdf/grtkf_ic_5_3.pdf)

<sup>2</sup> . Li Lou: *Intellectual property protection of traditional cultural Expressions, folklore in China* ( Springer International Publishing Switzerland 2014)

<sup>3</sup> .*Id*

<sup>4</sup> Dionyssia Kallinikou *Protection of traditional cultural expressions or expressions of folklore*Paper presented for the conference "Can Oral History Make Objects Speak?", Nafplion, Greece. (2005)< Available at <http://icme.icom.Museum>> accessed on October 13 2014

The protection of folklore, and whether an intellectual property framework should be developed in this area, has been an issue on the international agenda since the 1970's.<sup>5</sup> There is keen debate amongst indigenous communities, government officials, public negotiators and academic commentators alike over whether IPRs are appropriate for the preservation and legal protection of TCEs.<sup>6</sup> For developing countries like Ethiopia the intellectual property issues concerning traditional expressions differ significantly to those of developed countries which tend to be more concerned with protecting scientific inventions and innovations made by their multinational companies. Since the 1970s, misappropriation of indigenous resources aided by western IP laws topped UNESCO and WIPO's agendas for preservation of cultural heritage of underprivileged societies.<sup>7</sup> The Convention on Cultural Diversity is one of UNESCO's most recent initiatives on protection of traditional expressions. UNESCO/WIPO's Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions adopted in 1982 was one of the first comprehensive international initiatives to protect traditional expression resources. The Model Provisions provided a sui generis model for countries to adopt appropriate laws to protect their traditional expressions. Even though different efforts have been made to regulate TCEs at international level there is still no binding law to regulate TCEs to date.

## **1.2. Statement of the Problem**

Traditional expressions reflect and identify a community's history, cultural and social identity, and values. The traditional cultural expressions could be manifested through folk tales, riddles, folk songs, folk poetry, traditional songs, instrumental music, dances etc. having their own unique characteristics. It is expressed through means of creativity.

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<sup>5</sup> .Stephen palethorpe and stefaan verhulst "report on the international protection of expressions of folklore under intellectual property law" Contract Number ETD/2000/B5-3001/E/04 [available at [http:// www.googlebook](http://www.googlebook). Et] (October 2000) accessed on February 16 2014.

<sup>6</sup> . Tzen wong & Claudia Fernandini. *Traditional Cultural Expressions: Preservation And Introduction Innovation; IP Resources The Right Size, At The Right Time, In The Right Place* (2011) < available at [www.piipa.org](http://www.piipa.org)> accessed on December 6 2014

<sup>7</sup> . Dick Kawooya. *Copy right, indigenous knowledge and Africa's university Libraries: the case of Uganda* paper presented at the world library and information congress: 72nd IFLA general conference and council (20-24 August 2006,) Seoul, Korea <http://www.ifla.org/IV/ifla72/> index.htm accessed on February 16,2014

The protection of traditional cultural expressions has now become an issue at international level. A new awareness has emerged of indigenous peoples' and traditional communities' interests in owning, controlling and accessing their traditional expressions. After Colonization is over indigenous people sought recognition and protection of their TCE that ranges from stories, myths, folk tales, songs and music, to symbols, designs, paintings, sculptures, carvings, handicrafts, dances, and rituals.

Intellectual property rights (IPRs) are being considered as a tool to protect TCEs by preventing misappropriation and misuse, and contributing to the preservation and safeguarding of indigenous names, signs and symbols, and of TCEs generally. Some argued Existing international and national legal systems are not typically compatible with indigenous culture and law, and they do not sufficiently address the concerns of indigenous peoples for protection of their creative heritage. Because the laws were developed by the Western nations that didn't take into account the cultural needs of the indigenous people. Conversely, others feel the existing IPRs can fully be utilized to protect TCEs of indigenous people.

Ethiopia is a nation which is credited with having more than 80 Nation and Nationalities which are enriched with their unique TCEs. Nowadays TCEs are being considered as "cultural property". Unfortunately they are not fully utilized. For the indigenous people who want to secure their right to their cultural property the only solution they have could be the existing IPR laws since there are no specific laws concerned with the protection and commercialization of TCEs. In light of this the existing laws has to be examined to ascertain whether or not they can adequately protect TCEs.

The importance of legally protecting TCEs for Ethiopia will be explored in this paper. Along with identifying the objectives that are sought to be achieved, problems that will arise in the attempt to protect TCEs using the existing IPRs or other laws or systems will be identified. International laws will be discussed as they will have effect on the country and they could also serve as a bench mark.

### **1.3. Objective of the Study**

#### **1.3.1. General Objective**

The general objective of the study is to identify the challenges and prospects of protecting TCEs under the Ethiopian legal system.

#### **1.3.2. Specific Objective**

- Explaining the need and rationale of protection of TCEs in Ethiopia
- Examining the extent of protection and suitability of existing IP norms in Ethiopia

### **1.4. Research Questions**

This research will answer the following main research questions;

- Can the existing IPR laws adequately protect TCEs?
- What are the gaps in the existing IPR instruments both at the international and national level?
- Are sui generis systems suitable for protection of TCEs?

### **1.5. Significance of the Study**

Ethiopia is enriched with traditional expressions that have been passed down from one generation to the next. Now that globalization is closer to us more than ever before our traditional cultural expressions are exposed to the outside world. Therefore, the study hopes to contribute in the following way. First, it helps the community and the government to understand the challenges and prospects of protecting and commercializing of traditional cultural expressions. Second, it will help the law maker of Ethiopia to adopt the best kind of protection for TCE in the future by showing the inadequacy of the existing IPR instruments. Third, the findings and recommendations of the study will serve as an input for further research in this area.

## **1.6 Methodology**

The methodology employed in this study is mainly a desktop. It will analyze the existing literatures, policies and laws including relevant primary and secondary sources. It will also analyze secondary sources such as books, articles, documents, internet sources and etc. In addition interviews with the relevant personnel from different institutions will be conducted on issues related with protection and commercialization of traditional cultural expressions in Ethiopia.

In particular this research will cover the following legal documents and model laws;

- a) Selected international legal instruments that recognize the protection of TCEs like the WIPO/UNESCO model, the Tunis model law, Bangui Agreement, the pacific regional model laws will be discussed so that they can be used as a reference in framing the new national legislation for protection of EOF/TCEs TCEs in Ethiopia.
- b) domestic laws like the constitution, the Ethiopian IPRs laws will be discussed in order to analyze whether or not the existing Ethiopian laws offer adequate protection for TCEs
- c) The Ethiopian draft law on TCEs will be analyzed

## **1.7 Scope of the Study**

The mechanisms for protection of Traditional cultural expression are many including indigenous customary laws and other complimentary laws. Although the study highlights these alternatives it only focuses on the intellectual property rights protection of traditional cultural expressions in Ethiopia by analyzing international and domestic instruments.

## **1.8 Limitation of the Study**

This research aims to explore the protection of Traditional cultural expressions in Ethiopia. The issue of protection for TCEs is a recent phenomena as such the writer has encountered problems in finding reading material especially in Ethiopia to make an in depth analysis. The lack of knowledge on this area has also made it difficult to conduct

interviews with personnel at the relevant institutions. In addition lack of sufficient finance and the time constraint has made it difficult to conduct a comprehensive research.

## **1.9 Organization of the Study**

The study is organized into five chapters. The first Chapter gives a general outline to the study. The second chapter is an introduction to traditional cultural expressions. The third chapter explores issues, progresses and challenges in the protection and commercialization of cultural expressions at international level. The fourth chapter explores the commercialization and protection of traditional expression in Ethiopia. Conclusion and recommendations form chapter five.

## CHAPTER TWO

### 2 TRADITIONAL CULTURAL EXPRESSIONS IN THE PROVINCE OF IPRs

#### 2.1. Introductory Remarks on Traditional Cultural Expressions

Every nation claiming to be a part of the civilized world is proud of its cultural heritage. Folklore is probably the most important and well-acclaimed component of the cultural heritage of a nation. It can reflect the essentials of a nation's cultural attributes as in a mirror and is recognized as a basis for its cultural and social identity.<sup>8</sup> Traditional Cultural Expressions (Folklore) preserves ancient cultural memories and embraces the unique cultural features of an ethnicity. These memories and features, the result of human wisdom and intellectual creation, become the unique cultural identity of an ethnicity, distinguishing it from other ethnicities.<sup>9</sup>

Nations all over the world are quite possessive about this valuable heritage and express very strong sentiments about the management and protection of the rich resource especially the developing countries.<sup>10</sup> This is because historically many nations were colonized by the western nations and as a result the protection of TK and TCEs is seen by many indigenous peoples as 'central to their struggle for self-determination and control and management of their land and resources'.<sup>11</sup> After colonization was over Folklore was discovered as cultural capital and an economic resource of new nation states. But decolonization did not mean the abolishment of European state concepts and legal systems.<sup>12</sup> As Raorane noted "the cultural developments in Europe that influenced the development of law are not so universal and transcendent that the law can be lifted out of context and applied successfully to the diverse cultural traditions of indigenous peoples

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<sup>8</sup> . *A study on the protection of Expressions of folklore* WIPO/GRTKF/STUDY/1, 25 November 2002, at p.1, [available at <http://www.wipo.int/documents/> November 2002 ] accessed on November 2014 at p.1

<sup>9</sup> . Id *Supra* note 2

<sup>10</sup> . *Supra* note 8 at p.1

<sup>11</sup> . *Supra* note 6 at p.4

<sup>12</sup> . Monika Domman "Lost in tradition? Reconsidering the history of Folklore and its legal protection since 1800" Christoph B. Gaber and N. Burry-Neonva(Eds) *Intellectual Property And Traditional Cultural Expressions In A Digital Environment* (Edward Elgar Publishing Limited(UK) & Edward Elgar Publishing, Inc.(USA)2008)

around the world. Yet Western legal requirements are applied to TCEs. The result is that TCEs are often denied protection because they fail to meet the requirements imposed by the extrinsic laws, such as the requirements of authorship, originality, or fixation under copyright law. These requirements are not imposed by the indigenous peoples themselves and are inconsequential to the type of protection they desire. Imposing such requirements only leads to the denial of protection of TCEs.”<sup>13</sup> Lack of any formal or informal laws in many developing countries which specifically bestowed ownership rights of folklore on any community or group of persons to prohibit its exploitation without their consent<sup>14</sup> has led to continuing abuses and profiteering by outside corporations using western-centric doctrines. <sup>15</sup> As Dr. Mugabe noted “Indigenous cultural knowledge has always been an open treasure box for the unfettered appropriation of items of value to Western civilization. While we assiduously protect rights to valuable knowledge among ourselves, indigenous people have never been accorded similar rights over their cultural knowledge. Existing Western intellectual property laws support, promote, and excuse the wholesale, uninvited appropriation of whatever indigenous item strikes our fancy or promises profit, with no obligation or expectation to allow the originators of the knowledge a say or a share in the proceeds”.<sup>16</sup>

## **2.2. Traditional Cultural Expressions and Traditional Knowledge**

The line between "traditional knowledge" (TK) and "expressions of folklore" (EoF) or "traditional cultural expressions" (TCE) is a porous one.<sup>17</sup> This does not mean that that

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<sup>13</sup>. Meghana, Raorane *Aiming Straight: The Use of Indigenous Customary Law To Protect Traditional Cultural Expressions*, Pacific Rim Law & Policy Journal Association VOL. 15 NO. 3 (2006) p. 831

<sup>14</sup>. *Expressions of Folklore and its International protection*, report prepared by The Asian-African Legal Consultative Organization Secretariat(AALCO) E-66Vasant New Delhi– 110057 (India)

<sup>15</sup>. Jimmy Pak *Re imagining the Wheel: Seeking a Feasible International Regime to Protect Indigenous Cultural Expressions Through Trademark law* Global Business & Development Law Journal / Vol. 24 (2013) p.382

<sup>16</sup>. Dr.John Mugabe. *Intellectual property protection and traditional knowledge ;an exploration in international policy discourse* [available at [www.Wipo.Int.pdf](http://www.Wipo.Int.pdf)] accessed on November 28, 2014

<sup>17</sup>. C.J.S. Picart & M. Fox. *Beyond Unbridled Optimism and Fear: Indigenous Peoples, Intellectual Property, Human Rights and the Globalisation of Traditional Knowledge and Expressions of Folklore: Part I* International Community Law Review 15 (2013) 319-339 (P.229)

line is not a real one. But it does mean that the same object can be viewed from multiple and intersecting perspectives, as both an object of TK and TCE/EoF, much as the same "object" can be simultaneously protected by both patent law and copyright law.<sup>18</sup> Traditional knowledge is a less familiar concept under the legal system of the world. Some commentators use this phrase to refer to all that is known and expressed by traditional groups, including traditional cultural expressions.<sup>19</sup> Conversely, some commentators and policymakers have defined TCE to include all traditional knowledge.<sup>20</sup> However Indigenous and traditional communities often regard expressions of their traditional cultures/folklore as inseparable from systems of traditional knowledge (such as medical and environmental knowledge, and knowledge related to biological resources).<sup>21</sup> In 1998 WIPO developed a definition for the term traditional knowledge for the purposes of a 1998-1999 fact-finding mission (that has come to be regarded somewhat as a standard definition): In that definition traditional cultural expressions are included as category of TK

*Traditional knowledge refer [s] to tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. ....Categories of traditional knowledge could include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; **traditional cultural expressions (“expressions of folklore”) in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of language, such as names, geographical indications and symbols; and, movable cultural properties.....**<sup>22</sup>*

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<sup>18</sup> . *Id*

<sup>19</sup> .WIPO, Information Brochure, *Towards the Establishment of a Regional Framework for the Protection of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources in the Caribbean Region*, A3:L434E (2008), (<http://www.wipo.int/edocs/mdo>), last visited on December 13, 2014.

<sup>20</sup> . *Id*

<sup>21</sup> . Samantha Noronha. United Nations Educational, Scientific And Cultural Organisation And Intellectual Property Rights ( Unpublished MA Thesis submitted to College Of Law Margao- Gao)

<sup>22</sup> . Greg Young, Intellectual Property Rights, Legislated Protection, Sui Generis Models and Ethical Access in the Transformation of Indigenous Traditional Knowledge, october 2006, (unpublished PhD submitted to the university of British Columbia) p.162

However, WIPO noting the distinct legal tools and different set of policy questions arise when IP protection is applied to protect TCE and TK it further subdivided the material it seeks to cover as TK into two<sup>23</sup>: first, a general sense (TK lato sensu), which embraces the content of knowledge itself as well as traditional cultural expressions (TCEs)/expressions of folklore, and distinctive signs and symbols associated with TK;<sup>24</sup> and, second, a more precise sense (TK stricto sensu), which focuses on technical (for example, agricultural, environmental and medicinal) knowledge, which refers to “the content or substance of traditional know-how, skills, practices and learning”; this can be recognized as distinct subject matter, even though this “content or substance may be considered integral with traditional ways of expressing the knowledge and the traditional context in which the knowledge is developed, preserved and transmitted.”<sup>25</sup> It focuses on technical (for example, agricultural, environmental and medicinal) knowledge.<sup>26</sup>

The IP protection of TCEs raises certain specific questions of cultural policy and, unlike technical TK, involves legal doctrines closest to those underpinning the copyright and related rights systems.<sup>27</sup> The general principles and specific solutions for TCEs and TK are likely to differ, It is also important that the forms of protection provided for folklore be inspired and shaped by the appropriate legal and cultural policies and principles.<sup>28</sup> According to Samanta “a distinct focus on TCEs/folklore facilitates more specific, technical and concrete discussions, and engages more fully the experiences and perspectives of relevant stakeholders, such as Government offices and departments dealing with copyright, culture and education; indigenous and traditional bearers and performers of cultural traditions and artistic expressions; and folklorists, ethnomusicologists, archivists and other cultural scholars.”<sup>29</sup>

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<sup>23</sup> . Christoph Antons. *At the Crossroads: The Relationship Between Heritage and Intellectual Property in Traditional Knowledge Protection in Southeast Asia* (2013). p.82

<sup>24</sup> .Id

<sup>25</sup> . *Intellectual property and traditional knowledge: the work and the role of the world intellectual property organization* (WIPO), Shakeel T. Bhatti, (2004).

<sup>26</sup> .*Supra* note 16 p. 82

<sup>27</sup> .*Supra* note 21, p.16

<sup>28</sup> . *supra* note 21, at p.16

<sup>29</sup> . *Supra* note 21, at p.17

In the end though the differences between TK and TCE are porous, the pragmatic effect of different definitions is having multiple legal avenues to protect these valid property interests.<sup>30</sup>

## 2.3. Defining TCEs

### 2.3.1. Terminology

Although “expressions of folklore” was the term used most commonly in international discussions and is found in many national laws, some communities have expressed reservations about the negative connotations associated with the word “folklore.”<sup>31</sup> The term ‘folklore’ was first coined by William Thoms in 1846.<sup>32</sup> He referred to folklore in his letter to *The Athenaeum* to replace ‘popular antiquities’ and ‘popular literature.’ Initially the word had been used in hyphenated form ‘folk-lore,’ but later on the hyphen was discarded.<sup>33</sup> William Thoms meant to include manners, customs, observations, superstitions, ballads, proverbs and so on, in the term ‘folklore,’ which he summarized as the lore of the people.<sup>34</sup> Since the mid-1980s, when WIPO and UNESCO had convened a Group of Experts on the Protection of Expressions of Folklore by Intellectual Property, there has been a lively debate about the terminology, which should be used to describe the creations of a cultural community.<sup>35</sup> The representatives of the Spanish-speaking countries at the 1985 meeting of the Group of Experts took the position that “folklore” was an archaism, with the negative connotation of being associated with the creations of lower or superseded civilizations.<sup>36</sup>

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<sup>30</sup> Supra note 17, at P.230

<sup>31</sup> . WIPO, Intergovernmental Comm, on Intellectual Prop, and Genetic Res., Traditional Knowledge, and Folklore, Traditional Cultural Expressions/Expressions of Folklore: Legal and Policy Options, WIPO/GRTKF/IC/6/3 29, para, 110 (Dec, 1, 2003)

<sup>32</sup> . Mrs. P.V. Valsala G. Kutty. *National Experiences With The Protection Of Expressions Of Folklore/Traditional Cultural Expressions: India, Indonesia And The Philippines* p.7. [available at <http://www.wipo.int/tk/en/studies/cultural/expressions/study/kutty.pdf>] last visited 12/29/2014]

<sup>33</sup> . Id

<sup>34</sup> . Id

<sup>35</sup> . WIPO, *intellectual property and traditional cultural expressions (folklore)* [available at [http://www.wipo.int/export/sites/www/freepublications/en/tk/913/wipo\\_pub\\_913.pdf](http://www.wipo.int/export/sites/www/freepublications/en/tk/913/wipo_pub_913.pdf),] last visited on January 23 , 2014

23 , 2014

<sup>36</sup> . Id

Based on the reservations raised WIPO nowadays uses the term “traditional cultural expressions” (or simply “TCEs”) whereas, “expressions of folklore” is understood as a synonym of the prior.<sup>37</sup>

### 2.3.2. Owners of TCE

The link of TCE with cultural diversity and with relevant local traditions and communities has led to a debate at national and international level as to who precisely the right holders and beneficiaries of any form of TCE protection should be, once such protection is introduced.<sup>38</sup> Intellectual property rights protect the intellectual property of one or more (however always identifiable) person(s), company (ies) or other legal entities<sup>39</sup>. Whereas the ownership rights of TCEs are based on communal notions, where the community owns the cultural expressions passed down by its ancestors, and no individual member has the authority to alienate them.<sup>40</sup> According to Johnsson “TCEs is often that they do not have an author, but are attributable to a cultural group or traditional community who are seen as the ‘guardians’ of the work, and have responsibility for the work, but do not ‘own’ the work in the Western copyright sense.”<sup>41</sup>

During the IGC meetings, indigenous organizations continuously argued that the definition of beneficiaries should focus on local and indigenous communities as the holders and guardians of TCEs,<sup>42</sup> whereas a number of national delegations insisted on much broader definitions proposing to include such terms as ‘nations’, ‘families’, ‘minorities’ and/or ‘individuals’.

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<sup>37</sup> . Id

<sup>38</sup> . *Supra* note 23 at p.85

<sup>39</sup> . Yozo Yokota and the Saami Council *Guideline for the review of the draft principles and guidelines on the heritage of indigenous peoples* working paper submitted Twenty-second session of UNESCO for the review of the draft principles and guidelines on the heritage of indigenous peoples (17 June 2004 ) p.4

<sup>40</sup> . *Supra* note 13 at p. 16

<sup>41</sup> . *Supra* note 39 p.5

<sup>42</sup> . *supra* note 23 p.85

The current document<sup>43</sup> prepared by the IGC still contains mainly contentious terms and aspects in brackets and defines ‘beneficiaries of protection’ as ‘indigenous [peoples] or [local communities], [or as determined by national law or by treaty] [who hold, maintain, use or develop] the traditional cultural expressions as defined in determined by Article 1).<sup>44</sup>

As with the term TCE the term “indigenous people” is also difficult to define. Indigenous people themselves have expressed concerns regarding the idea of a formal definition for fear of excluding groups that are not encompassed by the definition. According to the United Nations Permanent Forum on Indigenous Issues (UNPFII), there are more than 370 million indigenous people in approximately ninety countries worldwide.<sup>45</sup> Scholars and different regional and international organizations have attempted to define indigenous people.

Erica Irene Daes who conducted a comprehensive review of the literature and the practice of international institutions that inform the meaning of the term “indigenous”, identified four factors relevant to determining whether a people is indigenous:<sup>46</sup>

- (a) Priority in time, with respect to the occupation and use of a specific territory;
- (b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- (c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity and

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<sup>43</sup> . At its Twenty-Seventh Session, which took place in Geneva, from March 24 to April 4, 2014, document WIPO/GRTKF/IC/25/7, was made available as document WIPO/GRTKF/IC/27/5. The IGC developed, on the basis of that document, a further text, “The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2”. It decided that this text, as at the close of its discussions on “Traditional Cultural Expressions”, under agenda item 7, on April 4, 2014, be transmitted to the WIPO General Assembly taking place in September 2014, “subject to any agreed adjustments or modifications arising on cross-cutting issues at the Twenty-Eighth Session of the IGC in accordance with the IGC’s mandate for 2014-2015 and the work program for 2014, as contained in document WO/GA/43/22”.

<sup>44</sup> . *Supra* note 23, at p.86

<sup>45</sup> . *History of Indigenous Peoples and the International System*, United Nations Permanent Forum On Indigenous Issues, <http://social.un.org/index/> Indigenous Peoples / (last visited Jan. 25, 2014)

<sup>46</sup> . *The Emerging International Law on Indigenous Peoples’ Rights: A Look at the Ethiopian Perspective* Bahar abadi, 2010 LLM thesis, Addis Abeba University p.11

(d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.<sup>47</sup>

The UN endorses the Martinez Cobo Report.<sup>48</sup> Instead of defining it the UN opted for an expansive definition of the term “indigenous communities, peoples and nations”:

*Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system.*<sup>49</sup>

On the other hand the international labour organization (“ILO”) defines indigenous people in convention No.107 of 1957 article 1(1) as;

*members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or geographical region to which the country belongs, at the time of conquest and which irrespective of their legal status, live more in conformity with the social, economic and cultural institution of that time than with institutions of the state to which they belong.*<sup>50</sup>

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<sup>47</sup> . Erica-Irene Daes, “Indigenous Peoples’ Rights to Land and Natural Resources”, in: Nazila Ghanea & Alexandra Xanthaki, eds., *Minorities, Peoples and Self-Determination*, 2005 as stated in *The Emerging International Law on Indigenous Peoples’ Rights: A Look at the Ethiopian Perspective* Bahar abadi, 2010 LLM thesis, Addis Ababa University p.11

<sup>48</sup> . Martinez Cobo defines indigenous person as one who belongs to these indigenous populations through self-identification as indigenous and recognized and accepted by these population as one of their members (see Jose Martinez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, UN Doc. E/CN.4/Sub2/1986/7, (1986-87)

<sup>49</sup> .Veronica Gordon. *Appropriation without Representation? The Limited Role Of Indigenous Groups In Wipo’s Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge, And Folklore* *Vand. J. Ent. & Tech. L. review* [Vol. 16:3:629 2014] ( p.637)

<sup>50</sup> . ILO Convention on Indigenous and Tribal Peoples in Independent Countries 1957(No 107) available at <http://www.un-documents.net/c169.htm>

Although all the definitions differ from each other, certain commonalities exist—such as cultural distinctiveness, self-identification, the experience of subjugation, and an occupation of the land prior to outside settlers—that are significant to an understanding the term “indigenous peoples.”<sup>51</sup>

The Other group of people enumerated as beneficiaries of TCE are local communities. WIPO defines local communities as “the human population in a distinct ecological area who depend directly on its biodiversity and ecosystem goods and services for all or part of their livelihood and who have developed or acquired traditional knowledge as a result of this dependence, including farmers, fisher folk, pastoralists, forest dwellers and others”.<sup>52</sup> Local communities can be of indigenous descent but are not necessarily descendants of indigenous populations.<sup>53</sup>

Another problem which can occur in relation to the identification of owners of TCE is the mixture of different cultures. TCEs are associated the most with the region or territory from which particular traditional communities originate.<sup>54</sup> Through geographical proximity, common history, migration or displacement of the TCE custodians to new territories, certain renditions of TCEs might well appear concurrently in different countries.<sup>55</sup>

### **2.3.3. Subject Matters of TCE**

What makes knowledge or cultural expressions “traditional” is not their antiquity: much TK and many TCEs are not ancient or inert, but a vital, dynamic part of the lives of many communities today.<sup>56</sup> The adjective “traditional” qualifies a form of knowledge or an expression which has a traditional link with a community: it is developed, sustained and

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<sup>51</sup> . *Supra* note 13, at p. 833

<sup>52</sup> . *Supra* note 49, at p.638

<sup>53</sup> . *Id*

<sup>54</sup> . C. Antons, ‘*The WIPO Journal*’, *what is Traditional Cultural Expression Developing Asia*, (2009), p.108

<sup>55</sup> . *Supra* note 6

<sup>56</sup> . WIPO, *Intergovernmental Comm, on Intellectual Prop, and Genetic Res., Traditional Knowledge, and Folklore, Traditional Cultural Expressions/Expressions of Folklore: Legal and Policy Options*, WIPO/GRTKF/IC/6/3 29, para, 110 [available at <http://www.wipo>. (Dec, 1, 2003) accessed on April 20 2014

passed on within a community, sometimes through specific customary systems of transmission.<sup>57</sup> What it means is that it is the relationship with the community that makes knowledge or expressions “traditional.”

What is and what is not considered part of ‘traditional cultural expressions’ is a complex and subjective question, and there are no widely accepted definitions of the term. But a working definition for the term TCE has been developed by WIPO. Accordingly **‘Traditional cultural expressions’** means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of *[name of country]* or by individuals reflecting the traditional artistic expectations of such a community, in particular:

- verbal expressions, such as folk tales, folk poetry and riddles, signs, words, symbols and indications;
- musical expressions, such as folk songs and instrumental music;
- expressions by actions, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and,
- tangible expressions, such as: productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, basket weaving, needlework, textiles, carpets, costumes;
- crafts;
- musical instruments;
- Architectural forms.<sup>58</sup>

‘Traditional cultural expressions (or ‘expressions of’ folklore) may be either intangible, tangible or, most usually, combinations of the two – an example of such a ‘mixed expression of folklore’ would be a woven rug (a tangible expression) that expresses elements of a traditional story (an intangible expression)<sup>59</sup>

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<sup>57</sup> .Id

<sup>58</sup> .supra note 35 pg no. 7

<sup>59</sup> . Id

### **2.3.4. Natures of TCE**

As mentioned earlier it's a difficult task to come up with widely accepted definition at international level. As Alan Jabbour stated as early as 1982, the meaning of folklore is one of the “fundamental dilemmas presented by efforts to protect folklore through an intellectual property framework.”<sup>60</sup> As such identifying the natures of TCE will help in understanding traditional cultural expressions more. The following are some of the natures of TCE;

- ❖ They are handed down from one generation to another, either orally or by imitation,
- ❖ reflect a community's cultural and social identity,
- ❖ consist of characteristic elements of a community's heritage,
- ❖ are made by ‘authors unknown’ and/or by communities and/or by individuals communally recognized as having the right, responsibility or permission to do so,
- ❖ Are often not created for commercial purposes, but as vehicles for religious and cultural expression, and are constantly evolving, developing and being recreated within the community.<sup>61</sup>

## **2.4. The Dialogue between TCE and IPRS**

### **2.4.1. Cultural Property**

TCEs are regarded as cultural properties. The term “cultural property” is a legal term referencing the concept that tangible and intangible cultural products can be owned by an individual or group, to the exclusion of all others.<sup>62</sup>

Cultural property is divided into two; tangible cultural property and intangible cultural property. Cultural property can be tangible in the form of sacred sites and natural landscapes, monuments, buildings, human remains, archaeological artifacts, handicrafts and other “real property” that has a cultural dimension.<sup>63</sup> On the other hand intangible

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<sup>60</sup> . Id *Supra* note 5

<sup>61</sup> .United Nations Educational, Scientific And Cultural Organisation And Intellectual Property Rights Llm Paper 1  
Project By : Samantha Noronha Sem Iii G.R.Kare College Of Law Margao- Gao)

<sup>62</sup> . *Supra* note 21 at p. 5

<sup>63</sup> . Id

cultural property refers to intangible cultural heritage that falls within the realm of “intellectual property” in the form of language, music, song, dance, ritual, customs, local knowledge, oral narratives and literary creations.<sup>64</sup> Sometimes cultural property can be both tangible and intangible.

#### **2.4.2. Public Domain**

There has been much scholarly discourse on how to define the public domain. Some scholars define the public domain as a cultural commons consisting of all the idea, facts, scènes à faire, and plots to which traditional copyright law has refused protection.<sup>65</sup> Other scholars have defined it as material which is merely unprotectible or uncopyrightable.<sup>66</sup> Others still define it in context of the rights it both confers and denies authors and artists, both an "incentive" and an "impediment" to creativity.<sup>67</sup> The WIPO Committee has understood it to mean the "elements of IP that are ineligible for private ownership and the contents of which are available for use by any member of the public".<sup>68</sup>

Traditionally, folklore and the tales of traditional communities were presumed to be in the public domain due to the nature of folklore as being ever-changing, unfixed, and belonging to a "common heritage".<sup>69</sup> Now a days there is a growing calls for a reevaluation of its public domain status particularly by indigenous and local communities concerned by the cumulative failure of IP to provide protection to pre-existing cultural heritage coupled with the availability of IP protection for contemporary tradition-based cultural expressions with no corresponding mechanisms to compensate those who preserved and developed the cultural resources.<sup>70</sup> These indigenous and local communities believe merely providing IP protection for contemporary, tradition-based

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<sup>64</sup> . Id

<sup>65</sup> . Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965, 968 (1990)

<sup>66</sup> . Id. p. 969

<sup>67</sup> . David Lange, Reimagining the Public Domain, 66 LAW & CONTEMP. PROBS. 463, 465-66 (2003)

<sup>68</sup> . *Supra* note 56 , at par. , 110

<sup>69</sup> . WIPO, Intergovernmental Comm. on Intellectual Prop, and Genetic Res., *Traditional Knowledge, and Folklore, Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore—An Overview*, at 4, WIPO/GRTKF/IC/1/3 (Mar. 16, 2001).

<sup>70</sup> . *Supra* note 1, at p.13

cultural expressions is an inappropriate ‘survival of the fittest’ approach that does not best serve cultural diversity and cultural preservation.<sup>71</sup>

Others on the other hand argue placing TCE in the public domain is good for the preservation and safeguarding of cultural heritage. James Boyle is arguably the earliest academic to express vocal opposition to the expansion of intellectual property rights.<sup>72</sup> In his 1996 book *Shamans, Software, & Spleens* he stresses the importance of the public domain. As Boyle sees it, protecting the public domain means protecting the cultural environment so that later generations will be able to share it.<sup>73</sup> According to this view the public domain status of cultural heritage plays a role as a source of creativity and innovation, and it is argued that it is through sharing and contemporary adaptation and arrangement that cultural heritage is kept alive and transmitted to future generations.<sup>74</sup>

It has therefore been suggested that any protection for TCEs should strike a proper balance between protection against abuses of TCEs and the encouragement of their further development and dissemination, as well as individual creativity inspired by TCEs.<sup>75</sup>

### **2.4.3. TCEs under the Prevailing IPRs Laws**

As discussed above TCEs are intangible cultural heritages and that fall in the realm of IPRs. Intellectual property rights are property rights. They are the domain of properties.<sup>76</sup> In legal sense, property may be defined as an exclusive right to control, use, transfer... an object or a thing of economic importance and its fruits, exclude all other

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<sup>71</sup> . Id 7, at P. 14

<sup>72</sup> .Yang, Chih-Chieh. *A Comparative Study Of The Models Employed To Protect Indigenous Traditional Cultural Expressions* Asian-Pacific Law & Policy Journal [Vol. 11:2] (p.65)

<sup>73</sup> .Id 72, at p.66

<sup>74</sup> .consolidated analysis of traditional cultural expressions/expressions of folklore,2003, WIPO publication 785 p.14

<sup>75</sup> . Id. 72,at 13 For example responses to WIPO questionnaire of 2001 of Canada; China; Ecuador; Kyrgystan; Malaysia; Mexico; Republic of Korea; Romania; Switzerland; United States of America.

<sup>76</sup> . Balew Mersha & G/Hadush *Law of intellectual property* , teaching material , 2009 available at [chilot.wordpress.com](http://chilot.wordpress.com)

persons from its use and enjoyment and the follow the thing and its fruits in the hands of any person who might have unlawfully taken it.<sup>77</sup>

There are different classification of property; movable and immovable, real and personal property, corporeal and incorporeal property. IPRs belong in the incorporeal domain of properties. Incorporeal things are things that do not have a material or physical existence, that cannot occupy space and hence that cannot be perceived by the senses. This category primarily include rights particularly those that have economic value and can be expressed in terms of money.

There is keen debate amongst indigenous communities, government officials, public negotiators and academic commentators alike over whether IPRs are appropriate for the preservation and legal protection of TCEs.<sup>78</sup>

Some indigenous communities may consider the concept and articulation of 'property rights' underlying Western IP systems as inapplicable to their TK, including their TCEs.<sup>79</sup> Joseph Githaiga argue that "modern intellectual property law regimes, which are rapidly assuming global uniformity, have facilitated and reinforced this process of economic exploitation and erosion of indigenous peoples' cultures. This is because they are based on notions of property ownership which are alien and detrimental to indigenous peoples. Liberal euro centric discourse, upon which these laws are premised, maintains that individuals have a right to private property."<sup>80</sup> Conversely, some communities may see the protection of TCEs by certain forms of IPRs as consistent with their vision of human development and sustainable livelihoods, and as a possible legal redress for third-party copying of their TCEs for commercial purposes.<sup>81</sup>

A conceptual divide between the scope of IPRs and the nature of TCE at different levels exists, especially with regard to individualistic vs. communal property notions.<sup>82</sup> whether

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<sup>77</sup> . Fassil Alemayehu, *Law of property teaching material*, 2009 available at [chilot. Wordpress.Com](#)

<sup>78</sup> . *Supra* note 2 at p.4

<sup>79</sup> . *Id*

<sup>80</sup> . Githaiga, Jose *Indigenous Intellectual Property Law and the Protection of Folklore and Knowledge*, Volume 5, Number 2(June 1998)

<sup>81</sup> .*Id supra* note 54

<sup>82</sup> . *Supra* note 5 at p. 30

TCE is tangible or intangible the essential features of TCE are: first, that it is “owned” in common or, at least, publicly; secondly, that the ownership rights focus on preservation, access and the sharing of benefits associated with it; and thirdly, that the role of TCE rights is to prevent or limit the privatization of cultural property.<sup>83</sup> Claims to intellectual property are, of course, quite different since they focus on a private property right. IP is typically protected by laws that establish private property rights in creations and innovations in order to grant control over their exploitation, particularly commercial exploitation, and to provide incentives for further creativity.<sup>84</sup>

### **I. Copyright**

Copyright protection is available for “literary and artistic works” and many TCEs for which protection is desired are “productions in the literary, scientific and artistic domain”, and therefore, in principle, constitute the actual or potential subject matter of copyright protection.<sup>85</sup> The notion of “cultural property” doesn’t exist in the realm of copyright. Rather copyright rules designate the object of protection (i.e. the author’s work) by means of definitions such as “personal intellectual creation; illustrated by a list of examples such as musical works, literary, art works etc.”<sup>86</sup> The prerequisites for protection under copyright law for a work are; Originality, fixation, identification of authors and duration of time.

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<sup>83</sup> . Fiona Macmillan “Human rights, cultural property and intellectual property: three concepts in search of a relationship” Christoph B. Gaber and N. Burry-Neonva(Eds) *Intellectual Property And Traditional Cultural Expressions In A Digital Environment* (Edward Elgar Publishing Limited(UK) & Edward Elgar Publishing, Inc.(USA)2008)

<sup>84</sup> . *Supra* note 5, at p.25

<sup>85</sup> . *Supra* note 1 at p.35

<sup>86</sup> . Silke von Lewinski “protecting cultural expressions: the perspective of law” Erich Kasten(ed). *Properties of culture – culture as property. Pathways to reform in post- soviet Siberia*, (Berlin Diertrich verlag,2004, 111- 127 ) (p.113-114)

**a) Originality**

b) To qualify for copyright protection, a work must first and foremost be original.<sup>87</sup>

For TCEs the principle of originality is considered as the acid test for being qualified for protection.<sup>88</sup> This is because TCEs are the result of an impersonal, continuous and slow process of creative exercised in a given community by consecutive imitation, where as works protected by copyright must, traditionally bear mark of individual originality.<sup>89</sup>

**c) Fixation**

For copyright to subsist in a work it must be fixed. It must be in writing, recorded or reduced to material form. The problem with this requirement for TCEs is some of the TCEs are not fixed, but are passed on orally from generation to generation. Most TCEs such as folk music, folk dances, etc are passed from generation to generation orally through the art of imitation and memorization and are not as such fixed in a material form as required by the modern intellectual property laws.<sup>90</sup> In some cases they are not fixed on material form on purpose to keep it a secret.

**d) Authorship and Ownership**

Copyright is author- centric and in the case of folklore, an author- at least in the way in which the notion of “author” is conceived in the field of copyright- is absent.<sup>91</sup> Copyright requires for one or more authors to be identifiable. TCEs by nature are handed down from generation to generation over a period of time and collectively owned by the community.

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<sup>87</sup> . UNESCO, *the ABC of copyright*, [available at <http://www.unesco.org/culture/copyright> ] accessed on October 12,2015

<sup>88</sup> . Supra note 32, at p.5

<sup>89</sup> . The protection of Expressions of Folklore: The Attempts at International level Asia and the pacific, January- June 1998, no.56/57[ISSN 1014-336X, WIPO publication 435(E) paper prepared by WIPO

<sup>90</sup> .Expressions of Folklore and it's International protection The AALCO Secretariat E-66, Vasant Marg, Vasant Vihar New Delhi- 110057 (India)

<sup>91</sup> . WIPO, *The protection of Expressions of Folklore: The Attempts at International level Asia and the pacific*, January- June 1998, no.56/57[ISSN 1014-336X, publication 435(E)

For pre-existing cultural expressions which have been communally developed for a long time, it is much more difficult, if not impossible, to trace and identify the authors.<sup>92</sup>

#### e) Duration of copyright

The term of protection under copyright law is restricted to the life time of the author plus limited period after his death. The Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) stipulate 50 years as the minimum period of protection and countries of the Berne Union are free to grant a longer term of protection.<sup>93</sup>

This aspect of copyright protection may be unfavorable to the interests of traditional communities that continue the customary usage of folkloric works because their cultural heritage may then be regarded as part of the public domain after only a short period of protection.<sup>94</sup> In addition the limited duration of copyright protection raises the temporal variable. Traditional communities have a continued interest in their expressions of folklore beyond the life of the author(s) plus a fixed period.<sup>95</sup>

In 2001, WIPO conducted an international study on legal protection of expressions of folklore at the national level, and received responses from 64 states.<sup>96</sup> The survey showed

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<sup>92</sup> .Kuek Chee Ying *Journal of Malaysian and Comparative Law Protection of Expressions of Folklore/Traditional Cultural Expressions: to what extent is copyright law the solution?* (2005)

<sup>93</sup> . See Berne Convention (Paris Act), Arts 7(2), (3) and (6); TRIPS, Art 12. Berne Convention (Paris Act), Arts 7(2), (3) and (6); TRIPS, Art 12

<sup>94</sup> . Supra note 5 p.29

<sup>95</sup> . Id

<sup>96</sup> . countries provide protection in the framework of their copyright laws (Tunisia, 1967 and 1994; Bolivia, 1968 and 1992; Chile, 1970; Iran, 1970; Morocco, 1970; Algeria, 1973; Senegal, 1973; Kenya, 1975 and 1989; Mali, 1977; Burundi, 1978; Côte d'Ivoire, 1978; Sri Lanka, 1979; Guinea, 1980; Barbados, 1982; Cameroon, 1982; Colombia, 1982; Congo, 1982; Madagascar, 1982; Rwanda, 1983; Benin, 1984; Burkina Faso, 1984; Central African Republic, 1985; Ghana, 1985; Dominican Republic, 1986; Democratic Republic of Congo, 1986; Indonesia, 1987; Nigeria, 1988 and 1992; Lesotho, 1989; Malawi, 1989; Angola, 1990; Togo, 1991; Niger, 1993; Panama, 1994). The 1990 Copyright Law of China indicates that it is the intention to protect expressions of folklore by copyright but Article 6 of the Law only provides that "[r]egulations for the protection of copyright in expressions of folklore shall be established by the State Council." The 1994 Copyright Ordinance of Viet Nam contains a similar provision: "Protection of copyright granted to folklore works shall be prescribed by the Government.)

that protections vary widely and that copyright law is difficult to apply to protection of folklore in many countries.<sup>97</sup> Certain contemporary expressions may indeed meet the copyright criteria, like tangible contemporary expressions of folklore – such as traditional folkloric designs expressed in previously unknown or unused media.<sup>98</sup> However, copyright as a genuinely individual right, rewarding personal creativity with a monopoly limited in time, may not in all cases prove to be the suitable framework for protection.<sup>99</sup> There are Certain Folkloric works that will not benefit from protection o copyright laws such as ancient cave paintings (Due to the absence of an identifiable author and the limited duration of copyright protection), contemporary folkloric works closely associated with an ongoing tradition, such as expressions associated with traditional rites and ceremonies(Due to the possible absence of “originality.”); and intangible contemporary expressions of folklore, such as unrecorded modern folk stories, song and dance.<sup>100</sup> As Janice pointed out,

*A major challenge to the protection of TCEs stems from the fact that the copyright system, grounded in a western Eurocentric worldview that places emphasis on individuality and on material aspects of property, does not easily extend to many types of traditional and indigenous creations. For a number of reasons traditional copyright protection is not well suited to TCEs as works or expressions that are traditionally unpublished, often not fixed in tangible medium, created not by one individual known author but collectively, and created not on a certain date but over time.<sup>101</sup>*

Copyright laws may also provide protection for another set of interests, of a more personal nature, which are commonly called the ‘moral rights’ of authors. These rights allow the authors to claim authorship in their works as well as respect for their integrity<sup>102</sup> Article 6bis of the Berne Convention recognizes moral rights as giving authors the “right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be

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<sup>97</sup> .*Supra* note 32

<sup>98</sup> . *Id*

<sup>99</sup> . *Supra* note 85 at p. 25

<sup>100</sup> . *Id* 33.p.30

<sup>101</sup> . Janice T. Pilch Issue Brief on *Traditional Cultural Expression* Library Copyright Alliance university of Illinois (September 1, 2009)

<sup>102</sup> . *Supra* note 85 at p. 28

prejudicial to his honor or reputation” (emphasis added). Moral rights therefore, protect creators’ rights of;

- (a) Attribution; The attribution right is the creator’s right to be identified as the creator of a work (also called the “identification right”). It may be useful in the *authentication* of folkloric works by allowing consumers to more readily identify genuine folkloric products and therefore reduce the demand for imitations.<sup>103</sup>
- (b) Integrity over their work; the integrity right which protects the reputation of creators may address the anxiety over the inappropriate use of expressions of folklore by preventing distortion, alteration or misrepresentation of creators’ works. This may provide redress against culturally inappropriate treatment of expressions of folklore.<sup>104</sup>
- (c) Publication including retraction; the publication right is the creator’s right to decide when, where and in what form a work will be published. It may be effective in providing creators of folklore with a degree of control over the publication or disclosure of sacred works and thus reduce the possibility of inappropriate use.<sup>105</sup>

However, the moral right protection of TCEs face the same problem as the authors right protection with regard to originality, fixation, identifiable authors and the time limitation.

## II. Neighboring Right Laws

Neighboring rights, also called ‘related rights’, are commonly understood to designate the rights granted to protect persons, other than the authors of works, who are involved in the dissemination of copyrighted works<sup>106</sup> such as: Performers; Producers of sound recordings and broadcasting organizations. Under this law only performers; producers and broadcasting organisation of traditional cultural expressions are protected not the

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<sup>103</sup> .Report On The International Protection Of Expressions Of Folklore Under Intellectual Property Law Stephen Palethorpe and Stefaan Verhuls October 2000)

<sup>104</sup> .ibid

<sup>105</sup> .ibid

<sup>106</sup> . The ABC of copyright, UNESCO culture sector available at <http://www.unesco.Org/culture/copyright>

indigenous people. Theoretically, none of the persons or organisations associated with performers, record producers and broadcasters, produces original works; they simply interpret record or transmit the works of others.<sup>107</sup> This kind of IP protection offers an indirect protection to TCEs.

The problem with the protection of TCEs through performers' right is that the protection is beneficial only for those who perform TCEs and not the indigenous people that created it. There may be cases where the performer is from the indigenous community who created it however the community will not be beneficial as a whole. More over the criteria of fixation, originality, and duration imposed up on performers, producers of sound recordings and broadcasting organizations will be an obstacle for their protection.

### III. Trade Marks

A trademark is basically a sign indicating trade origin of goods and services. This distinctive sign can be owned (as a form of IP) by one or more individuals, one or more business organizations or any other legal entity.<sup>108</sup> According to Article 15.1 of the TRIPs Agreement: 'Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark'.... The trade mark system can help indigenous communities benefit from the branding of their TCEs, and protect their economic interests in those TCEs by allowing the registration of distinctive indigenous names, signs or symbols.<sup>109</sup> Trademarks may be particularly useful in the form of so- called collective marks and (as a special form of a collective mark) certification marks, because collective marks correspond to the collective nature of TCEs.<sup>110</sup> For example Australia, Canada, New Zealand and Portugal have used trademarks, particularly certification marks, to ensure the authenticity and quality of indigenous arts and crafts. The disadvantages for TCEs are the

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<sup>107</sup> . *supra* note 5 at p.32

<sup>108</sup> . *Supra* note 6

<sup>109</sup> . Daphne Zografos Johnsson *The Branding of Traditional Cultural Expressions: To Whose Introduction Benefit?* paper presented at Trade, Intellectual property and the Knowledge Assets of indigenous peoples: the development of frontier conference at Victoria University of Wellington, (8-10 December 2010) p.155

<sup>110</sup> . *Supra* note 84

requirement of formalities in registering and renewing trademarks as well as opposition and invalidation proceedings.<sup>111</sup>

#### IV. Geographical Indication

A geographical indication identifies a good as originating in a territory or region, or locality in that territory, where a given quality, reputation, or other characteristic of the good is attributable to its geographical origin.<sup>112</sup> It is a sign used on products that have a specific geographical origin and possess qualities or a reputation that are due to that origin.<sup>113</sup>

The laws on geographical indications are better suited to the protection of expressions of folklore because they can be assigned to a territory rather than a natural or legal person.<sup>114</sup> Furthermore GIs are sustainable over a long period of time, even into perpetuity for as long as a particular method of production is maintained. A GI is also not reliant on concepts such as novelty or originality, like patent or copyright systems are.<sup>115</sup> And an entitlement is created that permits the holders of the right to protect not only a sign, but also a connection with or even paternity to the product that is the TCE.<sup>116</sup>

#### V. Industrial Design

The aesthetic features of a functional product are protected under industrial design laws; such an article may consist of two dimensional or three dimensional features.<sup>117</sup> Design rights can be based on creation or on registration, and confer exclusive rights to the

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<sup>111</sup> . Dionyssia Kallinikou *Protection of traditional cultural expressions or expressions of folklore* Paper presented for the conference "Can Oral History Make Objects Speak?", Nafplion, Greece. (2005) < Available at <http://icme.icom.Museum> > accessed on October 13 2014

<sup>112</sup> . Agreement on Trade Related Aspects of Intellectual Property (TRIPs), 1994, Art. 22.

<sup>113</sup> . WIPO, *Geographical Indications, an Introduction, WIPO Intellectual Property Handbook*, Publication No. 489 (E), 2004).

<sup>114</sup> . *Supra* note 61 p.4

<sup>115</sup> . Anselm Kamperman Sanders *Incentives for and Protection of Cultural Expression: Art, Trade and Geographical Indications* *The Journal of World Intellectual Property* (2010) Vol. 13, no. 2, pp. 81–93

<sup>116</sup> . Id

<sup>117</sup> . George Mandewo and Fatma Khalfan. *The Scope Of Protection For African Traditional Art And Designs: Is It Realistic Or Just A Fallacy?*

owner of the design. The duration of protection available for design rights amounts to at least 10 years. In some jurisdictions this period may even be longer.<sup>118</sup> The owner of a protected design has the right to prevent third parties from reproducing, selling or importing articles which embody the same or similar design to that of the protected design<sup>119</sup>

There are problems in applicability of industrial design law with regards to TCEs. The novelty and originality criteria are difficult to reconcile with the nature of expressions of folklore, since they can date back hundreds of years. The duration is also limited<sup>120</sup> and differing national approaches to the question of design protection resulting in a lack of uniform design protection at the international level create considerable uncertainty for traditional communities.<sup>121</sup>

In general the conventional IP system has been identified by some as not only inadequate to comprehensively and appropriately protect TCEs but also as positively harmful, in some respects.<sup>122</sup> First, IP rules exclude most TCEs *as such* from protection, relegating them to an unprotected “public domain.”<sup>123</sup> Second, follow-on creations derived from TCEs may receive protection as “new” IP, giving the right owners (whoever they may be) exclusive rights to determine the conditions under which third parties (including the TCE-holding communities themselves) may use the TCE.<sup>124</sup> Furthermore, the types of rights provided by current IP law and the nature of the rights conferred do not reflect customary laws, values and protocols associated with TCEs.<sup>125</sup>

As a result, many stakeholders call for new *sui generis* systems to protect TCEs, i.e., “special” or standalone systems which would address TCE issues particularly.<sup>126</sup>

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<sup>118</sup> . Article 26.3 of TRIPS Agreement of 1994

<sup>119</sup> . Article 26.1 of TRIPS Agreement of 1994

<sup>120</sup> . *Supra* note 61, at p.4

<sup>121</sup> . *Supra* note 5 at p.35

<sup>122</sup> . Molly Torsen And Jane Anderson *Intellectual Property And The Safeguarding Of Traditional Culture; Legal Issues And Practical Options For Museums ,Libraries And Archives*, 2010 p16

<sup>123</sup> .*Id*

<sup>124</sup> .*Id*

<sup>125</sup> .*Id*

<sup>126</sup> .*Supra* Note 64.P.17

## CHAPTER THREE

### 3.1. Conceptual Underpinnings of TCEs; Protection and Commercialization

#### 3.1.1. Protection

##### I. What is protection?

Indigenous People seek protection from corporations and individuals that have for many years been taking traditional knowledge, cultural expressions and genetic resources that originated among specific tribal or ethnic groups<sup>127</sup> to then turn them into copyrighted or patented works owned, not by the people who originated them but by those who market and distribute them to the world.<sup>128</sup> “Protection” can mean different things, depending on the context in which the term is used. World Intellectual Property Organization (WIPO) has used it in the context ‘Protection of the creativity and distinctiveness inherent in TCEs against unauthorized or illegitimate use by third parties, including commercial misappropriation, misuse, misrepresentation and use that is derogatory or offensive.’<sup>129</sup>

Protection is different from “preservation” or “safeguarding,” which are the identification, documentation, transmission, revitalization and promotion of knowledge and cultural heritage in order to ensure its maintenance or viability.<sup>130</sup> The objective, in that case, is to make sure that the TK or TCEs do not disappear, are lost or degrade, and to ensure that they are maintained and promoted.<sup>131</sup>

##### II. Objectives of Protection

The way in which a protection system is shaped and defined will depend to a large extent on the objectives it is intended to serve<sup>132</sup>. A key initial step, therefore, of the

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<sup>127</sup>. See generally *Supra* note 56

<sup>128</sup>. *Id*

<sup>129</sup>. Pamela Andanda *Striking a balance between Intellectual Property Protection of Traditional Knowledge, Cultural Preservation and Access to Knowledge* (Series 2 / 2012)

<sup>130</sup>. *Id* at 1.p.14

<sup>131</sup>. *Id*

<sup>132</sup>. WIPO; *The protection of TCEs/EOF revised objective and principles* document prepared by the secretariat Sixteenth session WIPO/Gtkf/Ic/16/4 May3-7, 2010

development of any legal regime or approach for the protection of TCEs/EoF is to determine relevant policy objectives. According to the new draft law prepared by the IGC protection of TCEs should aim to;

- Recognize that owners of TCEs consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values, and acknowledge that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as humanity.
- promote respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the peoples and communities that preserve and maintain expressions of these cultures and folklore
- meet the actual needs of communities be guided by the aspirations and expectations expressed directly by indigenous peoples and communities and by traditional and other cultural communities, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such peoples and communities
- prevent the misappropriation and misuse of TCEs provide owners of TCEs with the legal and practical means, including effective enforcement measures, to prevent the misappropriation of their cultural expressions and derivatives there from, and ways in which they are used beyond the customary and traditional context and promote the equitable sharing of benefits arising from their use;
- Support customary practices and community cooperation respect the continuing customary use, development, exchange and transmission of TCEs by, within and between communities;
- contribute to the preservation and safeguarding of the environment in which traditional cultural expressions/expressions of folklore are generated and maintained, for the direct benefit of indigenous peoples and communities and

traditional and other cultural communities, and for the benefit of humanity in general

- Encourage community innovation and creativity, promote intellectual and artistic freedom research practices and cultural exchanges
- where so desired by indigenous peoples and communities and traditional and other cultural communities and their members, promote the use of traditional cultural expressions/expressions of folklore for the development of indigenous peoples and communities and traditional and other cultural communities, recognizing them as an asset of the communities that identify with them, such as through the development and expansion of marketing opportunities for tradition-based creations and innovations
- preclude the grant, exercise and enforcement of intellectual property rights acquired by unauthorized parties over traditional cultural expressions/expressions of folklore<sup>133</sup>

### **III. Types of Protection**

Protection of TCEs is of two types; defensive protection and positive protection.

#### **a) Positive protection**

Under positive protection the IP systems is designed to enable holders, if they so wish, to acquire and assert IP rights in their TK and TCEs.<sup>134</sup> This can allow them to prevent unwanted, unauthorized or inappropriate uses by third parties (including culturally offensive or demeaning use) and/or to exploit TK/TCEs commercially, for example through the granting of licenses, as a contribution to their economic development.<sup>135</sup> In brief, positive protection is the granting of rights that empowers communities to promote their TK/ TCEs, control their uses by third parties and benefit from their commercial exploitation.<sup>136</sup>

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<sup>133</sup> . The Protection Of Traditional Cultural Expressions/ Expressions Of Folklore: Revised Objectives And Principles March 22, 2010

<sup>134</sup> . Supra note 56 at p. 20

<sup>135</sup> .Id

<sup>136</sup> . Id

## **B) Defensive protection**

The term ‘defensive protection’, refers to measures aimed at preventing the acquisition of IP rights over TCEs by parties other than the customary custodians of the knowledge or resources.<sup>137</sup> In defensive protection the IP system is designed to prevent the illegitimate acquisition or maintaining of IP rights by third parties. Stated otherwise, defensive protection aims to stop people outside the community from acquiring IP rights over TK and TCEs.<sup>138</sup> Demands for the disclosure of origin and geographical indicators are examples of defensive protection.<sup>139</sup>

In general, the legal protection of TCEs should be considered in an inclusive policy context, and not as an end in itself. Further WIPO, has stressed that “protection of TCEs should be undertaken in a comprehensive manner, potentially using both positive and defensive forms of protection. Defensive protection is no substitute for positive protection, and should not be mistaken for the acquisition and active exercise of rights in the protected material”. Often, the active assertion of rights (positive protection) is necessary to prevent the unauthorized or illegitimate use of TCEs”.<sup>140</sup>

### **3.1.2. Commercialization**

Today, TCEs are considered as cultural properties and as such can be commercialized in the market. Tradition-based innovations and creations, which are important parts of a community’s heritage and cultural patrimony, can act as inputs into other markets, such as entertainment, art, tourism, architecture, and fashion.<sup>141</sup> However, TCEs are being commercialized by big corporation that doesn’t belong to the community. In most cases, the communities who were the custodians or preservers of the EoF/TCEs do not enjoy the

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<sup>137</sup> . Shakeel T. Bhatti *Intellectual property and traditional knowledge: the work and the role of the world intellectual property organization* (WIPO),(2004)

<sup>138</sup> . *Supra* note .10.p.10

<sup>139</sup> . *Supra* note 39 p.2

<sup>140</sup> . Shakeel T. Bhatti *Intellectual property and traditional knowledge: the work and the role of the world intellectual property organization* (WIPO),(2004)

<sup>141</sup> . *Supra* note 5 p.13

economic benefit or share the returns from such unauthorised exploitation by persons not belonging to the communities.<sup>142</sup>

Commercial exploitation of folklore by outsiders has been viewed as a threat to cultural heritage mainly in the developing countries.<sup>143</sup> They perceive the commercial exploitation of folklore outside their community, without adequate recompense, as a moral, cultural and economic wrong.<sup>144</sup> Conversely, the perception of some of the developed countries in this regard is that since TCEs have fallen into public domain and are outside the purview of protection they can be taken freely and commercialized without benefiting the community. For example, according to an Australian report, published by the Department of Communications, Information Technology and the Arts It has been estimated that the indigenous visual arts and crafts industry has a turnover of approximately US\$130 million in Australia, of which indigenous people receive only approximately US\$30 million in returns.<sup>145</sup>

In addition to the above mentioned problem identifying the owners of particular TCEs so that they can be authorized to collect the royalty for TCEs has become a difficult task. Different approaches have been implemented by different nations. They can appoint a certain body or the community concerned could be given an authorization. For example, in Congo, a society known as the Body of Author is responsible for collecting royalties. The Body represents the interests of authors, and oversees the use of folklore,<sup>146</sup> which is regarded as part of the national heritage.<sup>147</sup> And under Mali law, all persons seeking to use folklore for profit purposes must obtain prior authorization from the Minister of Arts and Culture who *may* impose a fee for such use<sup>148</sup>

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<sup>142</sup> . see generally *Supra* note 90, at p. 3

<sup>143</sup> . Mrs. P.v. valsala & G. Kutty National experiences with the protection of Expressions of folklore/ traditional cultural Expressions: India, Indonesia and the Philippines, p.5

<sup>144</sup> . Id

<sup>145</sup> . Report of the Contemporary Visual Arts and Craft Inquiry, Australia, 2002, pages 116 and 135

<sup>146</sup> . Copyright and Neighboring Rights Laws of Congo (July 7, 1982) Art. 68-69

<sup>147</sup> . Id., Art. 15.

<sup>148</sup> . Ordinance Concerning Literary and Artistic Property laws of Mali (July 1, 1977 ) art. 8

Furthermore, identifying for what purpose the collected fee must be used is also a difficult task. The WIPO/UNESCO model provisions Offer a choice between promoting or safeguarding national folklore or prompting national culture or leave the choice to the community to decide the use of the collected fees. In Ghana "any sums of money accruing from the use of folklore shall be paid into a fund established by the Secretary and shall be used for the promotion for institutions for the benefit of authors, performers and translators <sup>149</sup>

### **3.3. Alternatives for protection of TCEs**

Beside the conventional IPRs systems different alternatives are suggested by scholars either to fill in the gap that existed in the IPRs laws or a completely new approach to govern TCEs.

#### **3.3.1. Sui generis systems**

There are two approaches on the appropriate law to protect TCEs. The first approach is that the existing IPRs systems are adequate to protect TCEs. Proponents of this approach argue the existing IPRs laws have rooms to afford protection for TCEs. On the other hand there are others who argue the existing IPRs don't take into account the special features of TCEs. Proponents of this approach call for a new sue generis system. A *sui generis* system is a system specifically designed to address the needs and concerns of a particular issue. <sup>150</sup>

Any country willing to establish sue generis system should include the following elements in the system ; clearly put the policy objectives of the intended protection, clearly define what is to be covered, the criteria to be satisfied for coverage, specify rights and the terms and conditions for the exercise of such rights. It would be necessary to state how and when rights arise, what would obligate the recognition of such rights,

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<sup>149</sup>.Ghana Copyright, Law, 17/05/2005, No. 690." May 17, 2005. <http://www.wipo.int/clea/en/details.jsp?id=1789> Act 690

Art. 5 (4)

<sup>150</sup> . Supra note 115 at p. 20

how the rights would be administered, enforced, transferred and acquired, and if and how they may be extinguished.<sup>151</sup>

There are different *sue generis* systems that exist for the protection of TCEs ; the Tunis Model Law on Copyright for Developing Countries, 1976, WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982, Bangui Agreement on the Creation of an African Intellectual Property Organization (OAPI), as revised in 1999; U.S.A. Indian Arts and Crafts Act, 1990 and Enforcement Act, 2000, Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge of Panama, 2000 and the related Executive Decree of 2001 and Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002. The WIPO-UNESCO model provisions and the Tunis model law will be discussed below.

### **3.3.2. Customary Laws**

Today there is an increasing recognition of the relevance of customary law for the protection of genetic resources, traditional knowledge and cultural expressions.<sup>152</sup> Some indigenous people consider IPRs as inappropriate instruments for the protection of their TCE. Thus they call for the use of customary laws to protect their TCEs. Indigenous representatives have reiterated that indigenous heritage must be protected in accordance with the concerned peoples' own legal practices and customs. On the 6<sup>th</sup> session meeting of the IGC's the representatives of the indigenous and local groups called for a greater recognition of customary laws.<sup>153</sup> As a result WIPO has decided to conduct a study on the relevance of customary legal systems for the protection of traditional knowledge and cultural expressions<sup>154</sup>.

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<sup>151</sup> . Ajeet Mathur *Missing Markets In World Trade the Case For 'Sui Generis' Protection of Traditional Knowledge* Working Paper No. 141 August 2004 p.73 available at [www.icrier](http://www.icrier.org) . res. Accessed on February 3,2014 p.73

<sup>152</sup> . *Supra* note 39 p.6

<sup>153</sup> . the WIPO intergovernmental committee on intellectual property and genetic resources, traditional knowledge and folklore convenes under its renewed mandate January –march 2004 (BULLETIN).

<sup>154</sup> .Id.96. p.4

Customary law “consists of the indigenous customs of traditional communities. Every ethnic group in the world has evolved its own discrete customary legal system of rules that are binding on its members. Unlike ordinary social habits and observances, the rules carry along with them local sanctions for their breach”.<sup>155</sup> The application of community-specific indigenous customary law allows for a flexible solution that rejects the one-size-fits all approach. Indigenous people want to take control over their cultural expressions and define how these expressions can be used. The application of indigenous customary law will allow them to do so<sup>156</sup>. It has been suggested that, for example, traditional forms of ownership be recognized and used within the context of the formal intellectual property system to determine who the "author" of a cultural expression is, or at least who is an owner and entitled to exercise control over it.<sup>157</sup>

Though the application of customary law for the protection of TCEs has its benefits it has also its own problems. As Kuruk pointed out customary law “relies on norms and sanctions that seem to make sense only to members of ethnic groups. Within the groups, there is pressure to recognize and respect the rights and privileges associated with folklore in the common interests of members of the community. However, many of the individuals engaged in the unauthorized use of folklore are foreigners; they may not have the incentive to respect the norms in the interest of the general community”.<sup>158</sup> Furthermore for the most part, the rules are unwritten<sup>159</sup> and as a result it would be difficult to ascertain the customary laws. It is also difficult to implement and enforce customary laws at the international level.

### **3.4. Recording and Documentation**

Documentation of traditional knowledge (TK) and traditional cultural expressions (TCEs) has attracted increasing attention in recent years from governments and cultural

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<sup>155</sup> . Paul Kuruk *African customary law and the protection of folklore* Copyright Bulletin vol xxxvI, No.2, (2002)

<sup>156</sup> . *Supra* note 13 p. 210

<sup>157</sup> . *Id* p.211

<sup>158</sup> . *Supra* note 153

<sup>159</sup> .*ibid*

institutions as well as from indigenous peoples and local communities.<sup>160</sup> Countries like Thailand (“Folk Performances of Thailand”) and USA (“Cultural Stories” database) have already started the documentation process.

Recordings and documentation of TCEs plays a great role in Safeguarding and preservation and Protection of secret and sacred TCEs. It can also help in research and development of TCEs. However, the very process of preservation of traditional cultural expressions through documentation can trigger concerns about their lack of legal protection against misappropriation and misuse.<sup>161</sup> Communities fear the very act of documenting communities traditional expressions can lead to misappropriation as it will be displayed for the public. For example Preservation efforts through the documentation of TCEs, particularly digitalization can make them more accessible and vulnerable to uses that are against the wishes of their holders.<sup>162</sup> Recording and Documentation has many implications for IP protection of TCEs;

- It may contradict the oral, intangible and ‘living’ nature of many TCEs because TCEs are often intangible and orally maintained requiring some form of prior documentation and/or registration in order to establish IP rights is contrary to their nature;
- the copyright that may vest in the documentation and recordings may not vest in the communities themselves under copyright law and, in any event, extends only to the ways in which the TCEs are expressed and not to the values, meanings and other ‘ideas’ connoted by the TCEs;
- if they are made available in digitized form, it makes the TCEs more accessible and available and may undermine the efforts of communities to protect them;

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<sup>160</sup> .*Documentation of traditional knowledge and traditional cultural expressions background brief No.9* The WIPO/TK documentation toolkit: [www.wipo.int/tk/en/resources/tkdocumentation.html](http://www.wipo.int/tk/en/resources/tkdocumentation.html)

<sup>161</sup> . Wend Wendland. *Intangible Cultural Heritage: Safeguarding Executive Summary and Inventory-Making Methodologies*, draft Paper prepared for the Sub-regional Experts Meeting in Asia 2005

<sup>162</sup> . WIPO, Intergovernmental Comm, on Intellectual Prop, and Genetic Res., Traditional Knowledge, and Folklore, Traditional Cultural Expressions/Expressions of Folklore: Legal and Policy Options, WIPO/GRTKF/IC/6/3 29, para, 110 (Dec, 1, 2003 p 15) .

- And there are costs involved in documenting and recording TCEs<sup>163</sup>

However, there are three areas worth pursuing that may justify the documentation/record of TCEs as a strategy for positive protection: the use of software and digital rights management tools; the protection available for collections and databases; and, the harmonization of industrial property documentation standards with cultural heritage documentation standards.<sup>164</sup>

### **3.5. International Foras’, International & regional Initiatives and National Experiences for the protection of TCEs**

#### **3.5. 1. International Foras’**

At the international level WIPO and UNESCO are the most important foras’ for protection and promotion of TCEs.

##### **a. UNESCO**

Unlike the WIPO initiatives UNESCO’s initiatives on cultural diversity and intangible cultural heritage are concerned with safeguarding public interests rather than private ones<sup>165</sup>. Different initiatives have been made by this organization on this issue the following are the major ones.

In 1982, UNESCO, together with WIPO, developed “Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions” (UNESCO-WIPO Model Provisions), a *sui generis* model for the IP type protection of TCE. In 1989, the UNESCO general conference adopted a

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<sup>163</sup> . *Supra* note 35 p.20

<sup>164</sup> . *Supra* note 1 p.69

<sup>165</sup> .Christoph Beat Graber. *Traditional Cultural Expressions in a Matrix of Copyright, Cultural Diversity and Human Rights*, paper presented at the Workshop ‘Copyright, Corporate Power and Human Rights’, organised at the Birkbeck School of Law, University of London ( January 2006)

recommendation on the safeguarding of traditional culture and folklore<sup>166</sup>. The recommendations provided guidelines for identification, conservation, preservation, dissemination, and protection of expressions of folklore through international cooperation<sup>167</sup>.

UNESCO adopted two conventions of interest to the topic of this paper, namely the Convention for the Safeguarding of the Intangible Cultural Heritage (CICH) in 2003<sup>168</sup>, and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE) in 2005<sup>169</sup>. It is noteworthy that neither the CICH nor the CDCE addresses IP-related questions<sup>170</sup>. The UNESCO policies also have several shortcomings;

- The CDCE does not impose great responsibilities or binding commitments on the signatory States.
- The CDCE does not appear to consider TCE to be an issue of major importance.
- With regard to the CICH, the drawing up of lists enumerating precisely what the important intangible heritage is, presupposes that this heritage has been identified and fixed. However, in many cases of misappropriated TCE a lack of fixation was at the core of the conflict.
- The documentation of TCE may be detrimental for those indigenous peoples who want to keep their heritage secret.<sup>171</sup>

#### **b. WIPO**

The World Intellectual Property Organization (WIPO) is a UN specialized agency that promotes the protection of intellectual property worldwide<sup>172</sup>. After the 1982 model provision in 1984, WIPO and UNESCO convened a group of experts to develop an

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<sup>166</sup> . Meeting of The General Conference of the United Nations Educational, Scientific and Cultural Organization in Paris from October 17 to November 16, 1989 at its twenty-fifth session, [available at <http://portal.unesco.org/en/ev.php>] accessed on July 20,2014

<sup>167</sup> . Id

<sup>168</sup> . The CICH entered into force 20 April 2006. At present, 78 States are party to this convention

<sup>169</sup> . The CDCE entered into force 18 March 2007. At present, 64 States and the European Community are parties to this convention.

<sup>170</sup> . Supra note 163 at p.77

<sup>171</sup> . ibid

<sup>172</sup> . WIPO Leaflet No. 12: *WIPO and Indigenous Peoples* [www.wipo.org](http://www.wipo.org). Leaflet No12

international treaty protecting expressions of folklore. Although the experts managed to prepare a draft treaty – based on the Model Provisions of 1982 – the majority of the participants believed that it was premature to establish an international treaty on the subject<sup>173</sup>. In 1997, the WIPO–UNESCO World Forum on the Protection of Folklore took place in Phuket, Thailand<sup>174</sup>. After that in 1998–1999, WIPO carried out numerous fact-finding missions on IP issues related to TK and TCE, which involved a wide range of stakeholders, including indigenous and local communities, non-governmental organizations, governments, researchers and private industry<sup>175</sup>. The quest was to find an appropriate find an appropriate legal framework for regulation of folkloric expressions.

In 2000, the 26th Session of the General Assembly of WIPO established the IGC, a special body mandated to address IP issues related to genetic resources, TK and folklore<sup>176</sup>. The IGC has worked towards formulating a framework that addresses concerns shared by both developing countries and indigenous communities in developed countries<sup>177</sup>. In 2014 a revised provisions for the protection of TCE/EOF, policy objectives and core principles were adopted by the committee<sup>178</sup>. It incorporates policy objectives, general guiding principles and specific substantive principles for recognizing TCEs as cultural intellectual creative assets of communities. It also provides the basis for

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<sup>173</sup> .WIPO, *Final Report on National Experiences with the Legal Protection of Expressions of Folklore* (2002) [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=2055](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=2055) accessed on July 7 2014

<sup>174</sup> . Id paragraphs 22–3

<sup>175</sup> .WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders, Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998–1999)*, Geneva: WIPO, April 2001

<sup>176</sup> . WIPO-GA, 2000b: *Report of the 26th Session of the WIPO General Assembly*, 25 September to 3 October 2000, WIPO-document WO/GA/26/10(October 2000) [http://www.wipo.int/documents/en/document/govbody/wo\\_gb\\_ga/pdf/ga26\\_10.pdf](http://www.wipo.int/documents/en/document/govbody/wo_gb_ga/pdf/ga26_10.pdf).)

<sup>177</sup> . *The Gap Between Indigenous Peoples' Demands And Wipo's Framework On Traditional Knowledge*, A Publication of The Centre for International Environmental Law available at [http://www.org/publications/WIPO\\_gap\\_sept07.pdf](http://www.org/publications/WIPO_gap_sept07.pdf)

<sup>178</sup> . Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2010), available at <http://www.wipo.int/edocs/mdocs/tk/en/>

cultural and communal authors to make claims in all areas of IP law<sup>179</sup>. Some of the highlights of the draft article are the following;

In the current draft article there is no description of the subject matter itself i.e. TCEs. Article 2 describes only the subject matter covered by the provisions. Paragraph (a) sets the substantive criteria which specify more precisely which of those expressions would be protectable. The more precise delimitation of TCEs/EoF that are eligible for protection under a specific legal measure are not given in the document.

The draft law has also put additional criteria's in order to get protection. According to Article 1 of the draft article the TCEs should be;

- a) Created or generated expressed and maintained, in a collective context, by indigenous peoples and local communities or nations whether they are widely spread or not
- b) the unique product of directly linked with distinctively associated with the cultural and or social identity and cultural heritage of indigenous peoples and local communities or nations
- c) transmitted from generation to generation, whether consecutively or not;
- d) that have been used for a term as has been determined by each Member State Contracting Party but not less than 50 years
- e) the result of creative intellectual activity creative activity of the intellect
- f) Which are dynamic and evolving<sup>180</sup>.

The draft law still did not address the issue of ownership. It uses the term “beneficiaries” instead of owners”. Article 2 reads as follows;

*Beneficiaries of protection are indigenous peoples and local communities and/or nations and nations that are custodians for the beneficiaries as provided for in Paragraph 3 who created, express, maintain, use and/ or develop the subject matter traditional cultural expressions as part of their collective cultural or social identity meeting the criteria for eligibility defined in this instrument or as determined by national law*

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<sup>179</sup> . Id

<sup>180</sup> . The Protection of Traditional Cultural Expressions: Draft Articles Rev. 2 (April 4, 2014,) Art 1

Article 3 deals with the misappropriation and misuse of TCEs of the draft provision is intended to address kinds of IP- related uses and appropriations of TCEs/EoF which most often cause concern to indigenous and local communities and other custodians and holders of TCEs/EoF<sup>181</sup>. This article calls on member states to take measures for the protection of both sacred and non sacred TCEs. The measures include equitable remuneration rights and a mix of legal and practical measures.

The exceptions provided under the draft article for which the utilization doesn't require authorization from the authoring community are taken from Model Provisions, 1982, the Pacific Islands Model Law, 2002 .Those exceptions are; for learning, teaching and research (for non profit-making or non commercial purposes) for preservation, display , research and presentation in archives, libraries, museums or other cultural institutions, for non-commercial cultural heritage or other purposes in the public interest and for the creation of an original work<sup>182</sup> . Protection of TCEs lasts as long as the traditional cultural expressions fulfill/satisfy the criteria of eligibility for protection put under article 1.<sup>183</sup>. The suggested provision embodies a trademark- like emphasis on current use, so that once the community that the TCE is characteristic of no longer uses the TCE or no longer exists as a distinct protection for the TCE would lapse<sup>184</sup>.

With regards to whether or not formalities should be put as a prerequisite for protection two interests has to be considered .It has been suggested that the acquisition and maintenance of protection should be practically feasible, especially from the point of view of traditional communities, and not create excessive administrative burdens for right holders or administrators alike. Equally important, is the need, expressed by several stakeholders such as external researchers and other users of TCEs/EOF, for certainty and

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<sup>181</sup> WIPO. The protection of TCEs/EOF revised objective and principles document prepared by the secretariat. Sixteenth session May3-7, 2010

<sup>182</sup> . *Supra* note 178, Art. 5

<sup>183</sup> . *Id* Art 6

<sup>184</sup> . *Supra* note 179 annex ,page 34

transparency in their relations with communities<sup>185</sup>. The new draft law leaves this option to member states; they can either put formalities for the protection of traditional cultural expressions or they can protect the TCEs up on creation<sup>186</sup>

### **3.5.2. International Initiatives**

#### **a. Berne convention (Stockholm revisions (1967))**

One of the significant developments in public international law has been the Berne convention. Before the Berne convention, there were no references to folklore in any international instruments<sup>187</sup>. At the 1967 Stockholm Diplomatic conference a proposal was made by the Indian delegation to include works of folklore in the enumeration of "literary and artistic works" in Article 2(1)<sup>188</sup>. At the Conference the following provision were included in the Stockholm Act of the Convention, and retained in the revision adopted in Paris in 1971: Article 15.4(a) reads as follows;

*“In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union”*

Sub article (a) of this article suggests in order for a work to get protection the three cumulative conditions must be fulfilled. These conditions are the work has to be unpublished, the author has to be unknown and there should be a ground to presume that the author is a national of a country of the Union. Member states are given the right to designate competent authorities to that represent the owner of the right so that it can

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<sup>185</sup> . Id

<sup>186</sup> . Id

<sup>187</sup> . Rajat Rana *Indigenous cultural and intellectual property rights* ,*Journal of Intellectual property rights* Vol 11, (march 2006) , PP 132-139,

<sup>188</sup> .Expressions of Folklore and it's International protection The AALCO Secretariat E-66, Vasant Marg, Vasant Vihar New Delhi- 110057 (India)

protect and enforce the right. Until now only India had implemented the provision by notifying WIPO about its designated competent authority<sup>189</sup>.

This article is however is difficult to apply for the protection of TCEs because first, folklore is not specifically mentioned in the amendment; it is not altogether clear how the amendment applies to folklore.<sup>190</sup> Second, it may be difficult to apply the amendment to folklore, which usually involves communal rights, because the amendment is phrased in terms of individual rights.<sup>191</sup>

Article 15(4) according to the intentions of the revision conference, implies the possibility of granting protection for TCEs. However in terms of providing protection for folklore it is largely 'redundant' because the Article commits Member States to very little. For the Article to have any effect 'Member States must enact domestic legislation that protects folklore. Only if a state's national copyright legislation includes folklore can the state seek international copyright protection under the Berne convention. Moreover, even if a state does protect folklore, Lucas-Schloetter suggests that the adoption of Art.15 (4)(b) is 'optional [...] in the sense that the countries of the Union are at liberty to designate a competent authority responsible for protecting their own folklore or not'.

Another problem identified with the Stockholm Revisions is that no term of protection is specified for folklore. As such, Lucas-Schloetter suggests that if a work or collection of folklore is published 'the rules for anonymous and pseudonymous works must apply by analogy that is to say that a period of 50 years starting from publication must apply'. As discussed earlier folklore evolves through time passing down from generation to generation as result communities seek perpetual protection.

#### **b) The Rome Convention (indirect protection)**

The Rome Convention requires contracting states to afford protection, *inter alia*, to performers which shall include the possibility of preventing unauthorised broadcasting

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<sup>189</sup> . Christoph Antons, *Asian Borderlands and the Legal Protection of Traditional Knowledge and Traditional Cultural Expressions* (2013) *Modern Asian Studies* 1408 p. 47

<sup>190</sup> . Paul Kuruk *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal Of The Tensions Between Individual And Communal Rights In Africa And The United States*

<sup>191</sup> . *ibid*

and communication to the public of their performance, except in the case of rebroadcasting or use of a fixation;<sup>192</sup> unauthorised fixation of their live performance<sup>193</sup> and unauthorised reproduction of a fixation of their performance.

However, under Article 3(a) of the Rome Convention, the word "performers" means "actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic work". As the concept of literary or artistic works is incompatible with the concept of EoF/TCEs, the somewhat rigid definition of "performers" in the Rome Convention does not appear to cover performers of EoF/TCEs and thus may not be adequate to provide indirect protection for EoF/TCEs.<sup>194</sup>

### c) The Tunis model law

One of the earliest attempts at a sui generis law for the protection of folklore can be found in the Tunis Model Law on Copyright for Developing Countries (hereinafter referred to as "Tunis Model Law"). A product of the joint effort of WIPO and UNESCO in 1976, the Tunis Model Law was drawn up to serve as a reference for developing countries to employ when drafting their copyright legislation.<sup>195</sup> Countries like Burundi, Cameroon, Ghana, Guinea, the Ivory Coast, Mali and Congo have used it in drafting their copyright laws.

The objective set out under the model law for protection of TCEs is “to prevent any improper exploitation and to permit adequate protection of the cultural heritage known as folklore which constitutes not only a potential for economic expansion, but also a cultural legacy intimately bound up with the individual character of the community.”<sup>196</sup>

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<sup>192</sup> . see Rome Convention 1961, Art 7(1)(a)

<sup>193</sup> . see Rome Convention 1961, Art 7(1)(b)

<sup>194</sup> . See generally *supra* note 90

<sup>195</sup> . Collins, Stephen The commoditisation of culture: folklore, playwriting and copyright in Ghan. (2015) (unpublished PhD thesis submitted to university of Glasgow ) <http://theses.gla.ac.uk/6263/>

<sup>196</sup> . Tunis Model Law on Copyright for Developing Countries. 1976. Web. 1 Oct. 2011 Section 6 Tunis model law 1976

Folklore receives *sui generis* protection. On the other hand, works derived from folklore are treated as copyright works.<sup>197</sup> “Folklore” is defined in Section 18 as all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage.

Under the Tunis model law no criteria is specifically stated for a folkloric works to be protected under copyright law. Unlike the conventional copyright law there is no fixation requirement<sup>198</sup> and more importantly there is no originality requirement. More over the duration of protection for folkloric works are unlimited.<sup>199</sup>

Under Section 6 of the model works of national folklore enjoy both economic rights: which includes the exclusive right to reproduce, make translation, adaptation, arrangement, and transformation, to communicate work to public either through performance or broadcasting<sup>200</sup> and moral rights; that includes claiming authorship, object to and seek relief in connection with distortion, mutilation, modification or any other action which would be prejudicial to his honor or reputation<sup>201</sup>. Rights in folklore are exercised by the competent authority.<sup>202</sup>

With regard to the protection of the same or similar cultural expressions from neighboring countries at the regional and international level section 6(3) states that Copies, adaptations etc of works of national folklore made abroad without authorization, shall not be imported or distributed in national territory. Importation of copies of protected work into national territory constitutes an infringement and can be seized. Person infringing rights obliged to cease infringement; liable for damages; if willful be punishable by fine or imprisonment or both.<sup>203</sup> Infringement of rights mentioned which are considered as violation of national cultural heritage and may be curbed by all

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<sup>197</sup> . Id section 2

<sup>198</sup> . Id 5bis

<sup>199</sup> . Id Sec. 6(2)

<sup>200</sup> . Id Sec. 4

<sup>201</sup> . Id Sec. 5(1)

<sup>202</sup> . Id Sec. 6 & 18

<sup>203</sup> . Id Sec. 15(1)

legitimate means.<sup>204</sup> Material proof of infringement may be provided by statements of police officers or certified statements of sworn agents of authors' organization.<sup>205</sup> There is however an exception the rights do not apply when works of national folklore are used by public entity for non commercial purpose.<sup>206</sup>

In general, the Tunis Model Law, attempts to resolve the deficiencies of the conventional copyright law system by widening the ambit of copyright law to accommodate the special features of folklore.<sup>207</sup> Specifically, it provides for three main forms of protection not available under standard copyright systems:(a) exclusion of a time limitation for protection; (b) exemption of folkloric works from the requirement of fixation; and (c) introduction of moral rights to prevent the destruction and desecration of folkloric works.<sup>208</sup>

#### **d) WIPO Performances and Phonograms Treaty 1996 (WPPT) (indirect protection)**

Under the WPPT, performers enjoy a wide range of exclusive rights, that is, the right to authorize the broadcasting, communication to the public and fixation of their unfixed performance,<sup>209</sup> reproduction right,<sup>210</sup> distribution right,<sup>211</sup> commercial rental, right<sup>212</sup> and right of making available of fixed performances.<sup>213</sup> Furthermore, the performers also enjoy the right to remuneration for broadcasting and communication to the public.<sup>214</sup> The performer has also moral rights of identity and integrity<sup>215</sup> Unlike the Rome Convention, the WPPT specifically mentions TCEs. Article 2 of the WPPT provides that for the purpose of the Treaty, "performers" are defined as "actors, singers, musicians, dancers,

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<sup>204</sup> . Id Sec. 15(2)

<sup>205</sup> . Id Sec. 15(4)

<sup>206</sup> . Id Sec. 61bis

<sup>207</sup> . Joseph Githaiga. *Intellectual Property Law And The Protection Of Indigenous Folklore And Knowledge* Murdoch University Electronic Journal of Law Volume 5, Number 2 (June 1998)

<sup>208</sup> . Id

<sup>209</sup> . WPPT, Art 6

<sup>210</sup> . Id ,Art.7

<sup>211</sup> . Id, Art.8

<sup>212</sup> . Id, Art.9

<sup>213</sup> . Id, Art.10

<sup>214</sup> . Id, art.15

<sup>215</sup> . Id, Art. 5

and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or “*expressions of folklore*”

However, the performers' rights under the TRIPS Agreement and the WPPT do not extend to the visual aspects of performances of EoF/TCEs they only protect parts that may be perceived by the human ear<sup>216</sup>

**e) WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore, 1982**

In 1978 the International Bureau of WIPO prepared a first draft of *sui generis* model provisions for intellectual-property-type protection of folklore against certain unauthorized uses and against distortion.<sup>217</sup> In 1982 after many deliberations the Committee of Governmental Experts, convened by the WIPO and UNESCO at Geneva, adopted the “Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions (Model Provisions).”

The Model Provisions doesn't provide an express definition of “folklore” rather it gives the characteristics of TCEs and lists protected folkloric expressions. According to section 2 of the model “traditional cultural expressions” are; “Productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of the country] or by individuals reflecting the traditional artistic expectations of such a community, in particular:

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

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<sup>216</sup> . *Supra* note p.45

<sup>217</sup> . Marg, Vasant Vihar . *Expressions of Folklore and it's International protection*, report prepared by The Asian-African Legal Consultative Organization Secretariat(AALCO) E-66Vasant New Delhi- 110057 (India)

The unique features of this model are it uses the words “expressions” and “productions” rather than “works” to underline the fact that the provisions are sui generis, rather than part of copyright<sup>218</sup> and only “artistic” heritage is covered by the Model provisions. This means that, among other things, traditional beliefs, scientific views (e.g. traditional cosmogony) or merely practical traditions as such, separated from possible traditional artistic forms of their expressions do not fall within the scope of the proposed definition of “expressions of folklore”<sup>219</sup>

The words “architectural forms” appear in the model provisions in square brackets to show the hesitation which accompanied their inclusion and to leave it up to each country to decide whether or not to include such forms in the realm of protected expressions of folklore.<sup>220</sup>

TCEs are protected against two things ‘illicit exploitation’ and ‘other prejudicial actions’. When publication, reproduction, distribution of copies, public recitation, performance, transmission by wire or wireless means and any other form of communication to the public is made with both gainful intent and outside the traditional or customary context, a prior authorization is required.<sup>221</sup>

Under the model “illicit exploitation” of expressions of folklore is defined as any utilization made both with gainful intent and outside the traditional or customary context of folklore, without authorization by a competent authority or the community concerned.<sup>222</sup> The conditions laid out in this article are a cumulative one. The absence of one condition will not amount to an illicit exploitation. If for example a work is used for commercial purpose but with the traditional or customary context then it will not be considered as an illicit exploitation of EOF.

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<sup>218</sup> . *Supra* note 89

<sup>219</sup> . *Id*

<sup>220</sup> .The protection of Expressions of folklore: the attempts at international level paper prepared by the international Bureau of WIPO publication No. 435(E) Visited on April 28, 2014

<sup>221</sup> . WIPO, UNESCO. “Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Use and Prejudicial Actions.” 1985. Web. 11 Nov. 2011. Section 3

<sup>222</sup> . *Id*

The model provision stipulates four acts as “prejudicial actions”. The first act is “application of origin” of TCEs. It is failing to identify the place of origin (source) of the TCEs as stipulated under section 5. The second is unauthorized utilization of an expression of folklore where authorization is required. The third act of prejudicial action is “passing off”. It is misleading the public by creating the impression that what is involved is an expression of folklore derived from a given community when, in fact, such is not the case.<sup>223</sup> The final act is distorting to the ‘prejudicial to the cultural interests of the community concerned.

The model law further requires acknowledgement of source<sup>224</sup>. Accordingly, a source must be acknowledged in appropriate manner (mentioning community and/or geographic place from where expression utilized has derived from) in all printed publications, in any communications to the public when folkloric works are taken with authorization. Under Section 6, non-compliance with the requirement of acknowledgement of the source is a punishable offence. However, no authorization is required for:

- (i) Purposes of education
- (ii) Utilization “by way of illustration” in original work
- (iii) Where expressions of folklore are “borrowed” for creating an original work of author
- (iv) “Incidental utilization” such as reporting on current events, located permanently in public place.<sup>225</sup>

An important aspect of this model law is that it gives a room for creativity. The model allows any member of a community of the country to freely reproduce or perform expressions of folklore of his own community in their traditional or customary context irrespective of whether he does it with or without gainful intent.

However, the model provisions failed to address the question of ownership with regards to expressions of folklore. The Model provision use the word ‘competent authority’ and

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<sup>223</sup> . *Supra* note 89

<sup>224</sup> . *Supra* note 219, Section 5

<sup>225</sup> . *Id* Section 4 and 5(2)

‘community concerned’ avoiding the term ‘owner’.<sup>226</sup> The designation of such an authority and who should be entitled to authorize the utilization of expressions of folklore is left up to individual national governments on the grounds that the ownership of folklore may be regulated in different ways in different countries<sup>227</sup>.

#### f) TRIPS

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) was signed in Marrakech, Morocco, on 15 April 1994. As a result of the Uruguay Round of Multilateral Trade Negotiations, it forms part of the legal obligations of the World Trade Organization (WTO)

The issue of TCE was explicitly included in the agenda of the TRIPS Council at the fourth Ministerial Conference of the WTO held in Doha in November 2001. In paragraph 19 of the Doha Ministerial Declaration, the Ministers instruct the TRIPS Council to examine, among other things, the protection of folklore. Up to now, however, the main focus of the examination, as foreseen in paragraph 19, was on disclosure requirements under patent law, whereas the issue of folklore has not been dealt with at all<sup>228</sup>. However some argue that Article 14(1) of the TRIPS Agreement which provides protection for performers in respect of their performance on a phonogram, can be construed as wide enough to cover performers of EoF/TCEs and therefore capable of protecting EoF/TCEs indirectly. "Performers"<sup>229</sup> Since there is no definition for the word “performers” to include performers of TCEs it will be difficult for those owners who perform TCEs to ascertain their legal rights with this provision

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<sup>226</sup> . *Supra* note 14

<sup>227</sup> . Githaiga, Jose. *Indigenous Intellectual Property Law and the Protection of Folklore and Knowledge*, Volume 5, Number 2(June 1998)

<sup>228</sup> . Martin A. Girsberger. "Legal protection of traditional cultural expressions: a policy perspective" Christoph B. Gaber and N. Burry-Neonva(Eds) *Intellectual Property And Traditional Cultural Expressions In A Digital Environment* (Edward Elgar Publishing Limited(UK) & Edward Elgar Publishing, Inc.(USA)2008) Page 134

<sup>229</sup> . *Supra* note 90

### 3.5.3. Regional initiatives

#### i. Bangui Agreement 1999

The Bangui Agreement was originally developed in 1977, and included provision for the protection of ‘expressions of folklore and works derived from folklore’ under Art.5 (1) (xii)<sup>230</sup>. The 1977 text was replaced in 1999. It is not legally binding document on the signatories; rather, it is designed to ‘generate compliance’<sup>231</sup>. The revised text protects both expressions of folklore and works derived from folklore as cultural heritages<sup>232</sup>. “Expressions of folklore” are defined in the text as productions of characteristic elements of the traditional artistic heritage developed and perpetuated by a community or by individuals recognized as meeting the expectations of such community, including folk tales, folk poetry, folk songs, instrumental music, folk dancing and entertainment as also the artistic expressions of rites and productions of folk art<sup>233</sup>. Expressions of folklore and works inspired by them like Translations, adaptations, arrangements and other transformations of expressions of folklore are regarded as “original” copyright works<sup>234</sup>. Furthermore collections and databases of works and expressions of folklore are also protected<sup>235</sup>

In addition, Performances of expressions of folklore are accorded the same protection as is accorded to other performances in the copyright law<sup>236</sup>. “Performances” is defined in the agreement to include performances of “expressions of folklore”<sup>237</sup>.

The Bangui Agreement requires that anyone, national or non-national, wishing to utilize folklore for commercial purposes must gain permission from the relevant competent

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<sup>230</sup> . OAPI, ‘Agreement Relating to the Creation of an African Intellectual Property Organization, Constituting a Revision of the Agreement Relating to the Creation of an African and Malagasy Office of Industrial Property’, (1977), revised 1999. Available at: [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=141261](http://www.wipo.int/wipolex/en/text.jsp?file_id=141261).

<sup>231</sup> . *Supra* note 193

<sup>232</sup> . *Supra* note 228, article 67(2)(i)

<sup>233</sup> . *Id*, Art. 2 (xx)

<sup>234</sup> . *Id*, Art. 5

<sup>235</sup> . *Id*, Art.6 (1) (i) & (ii)

<sup>236</sup> . *Id*, Art. 48

<sup>237</sup> . *Id*, Art 46

authority. Specifically, under Article 73(2) (a) which stipulates Prohibited Acts, the Act requires that permission be gained for:

- (a) the publication, reproduction and distribution of copies of any cultural property, whether classified or not, listed or not, ancient or recent, and considered by this Act as part of the national cultural heritage

However there are exceptions to this principle. Under Article 74(1) of the agreement the utilization of folklore for the following reasons doesn't require authorization from the owner;

- (a) use for teaching;
- (b) Use as illustration of the original work of an author on condition that the scope of such use remains compatible with honest practice;
- (c) Borrowings for the creation of an original work from one or more authors.

The duration of the Economic rights of the owner of TCEs under this agreement is lifetime of author + 70 years after death of the author. The Moral rights of the author are protected perpetual. Up on the expiry of the duration of the Economic rights protection the works will fall into public domain. Expressions of folklore and works that have fallen into the public domain are subject to "*domaine public payant*"<sup>238</sup>. The exploitation of expressions of folklore and that of works or productions that have fallen into the public domain on expiry of the terms of protection shall be subject to the user entering into an undertaking to pay to the national collective rights administration body a relevant royalty<sup>239</sup>. Royalties collected with respect to the exploitation of expressions of folklore shall be devoted to welfare and cultural purposes<sup>240</sup>.

The limitations of this agreement are; it doesn't address the issue of ownership, there are no specific provisions dealing with who the holder of expressions of folklore are, It is not backed by sanction and do not necessarily establish minimum standards between member states<sup>241</sup> and it doesn't deal with the question of the protection of the same or similar

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<sup>238</sup> . *Id.* Section 59

<sup>239</sup> . *Id.*

<sup>240</sup> . *Id.*

<sup>241</sup> . *Supra* note 193

cultural expressions from neighboring countries (so-called “regional folklore”). Furthermore since both expressions of folklore and works derived from folklore are considered as copyright works it suffers from the limitation a copyright law protection suffers in terms of the requirement of originality, identified owner, the limited duration of protection it affords. On the positive side the work is not required to be fixed on material medium to get protection<sup>242</sup>.

## **ii. Pacific Regional Framework for the Protection of TK and TCEs, 2002**

Expressions of culture are defined as any ways in which TK appears or is manifested, including inter alia names, stories, chants, riddles, histories, songs in oral narratives, art and craft, musical instruments, sculpture, painting, carving, pottery, terracotta mosaic, woodwork, metalware, painting, jewelry, weaving, needlework, shell work, rugs, costumes and textiles, music, dances, theatre, literature, ceremonies, ritual performances, cultural practices, designs, architectural forms.

In order to get protection under this regional framework the subject matter must be “traditional” i.e.,(i) created, acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative or recreational purposes; (ii) transmitted from generation to generation; (iii) regarded as pertaining to a particular traditional group, clan, or community of people; and (iv) is collectively originated and held<sup>243</sup>. Further, the TCEs need not be in material form to get protection<sup>244</sup>

The agreement accords both economic right and moral rights to the owners. Moral rights and traditional cultural rights continue in force in perpetuity, are inalienable, and cannot be waived or transferred<sup>245</sup>.

Contrary to the OAIP the pacific regional framework deals with the ownership right. Accordingly ownership right is given to a group, clan or community, or individual recognized as part of group, clan or community, in whom the custody or protection of the

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<sup>242</sup> . *Supra* note 228 Art.4(2)

<sup>243</sup> . Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002 Sec. 4

<sup>244</sup> . *Id* Sec.8

<sup>245</sup> . *Id*, Sec.9 and 13(4)

TK or TCEs are entrusted in accordance with customary law and practices<sup>246</sup>. If a derivative work is created, based on TCEs then IP right on the work vests in creator or as provided for by IP law.

The Model Law establishes “traditional cultural rights” (Economic right)<sup>247</sup> and “moral rights<sup>248</sup>,” in expressions of culture. Traditional cultural rights do not prevent uses of cultural expressions by traditional owners<sup>249</sup>, nor to face-to-face teaching, criticism or review, reporting news or current events, judicial proceedings, and incidental use, although sufficient acknowledgement is needed in these cases<sup>250</sup>

According to the framework uses of cultural expressions require prior and informed consent. Applications for consent may be made directly to a “Cultural Authority” or directly to traditional owners<sup>251</sup>.

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<sup>246</sup> . Id, Sec. 4

<sup>247</sup> . Traditional cultural rights are rights to authorize or prevent the following uses;(i) to reproduce the TK or expressions of culture; (ii) to publish the TK or expressions of culture; (iii) to perform or display the TK or expressions of culture in public; (iv) to broadcast the TK or expressions of culture to the public by radio, television, satellite, cable or any other means of communication; (v) to translate, adapt, arrange, transform or modify the TK or expressions of culture; (vi) to fixate the TK or expressions of culture through any process such as making a photograph, film or sound recording; (vii) to make available online or electronically transmit to the public (whether over a path or a combination of paths, or both) TK or expressions of culture; (viii) to create derivative works; (ix) to make, use, offer for sale, sell, import or export TK or expressions of culture or products derived there from; (x) to use the TK or expressions of culture in any other material form, if such uses are a non-customary (whether or not of a commercial nature) Id, Sec. 7

<sup>248</sup> . “Moral rights” refers to rights of attribution of ownership; the right not to have ownership falsely attributed; right not to have TK subject to derogatory treatment (Section 13). If cultural expressions and derivative works are used for commercial purposes, user must share benefits with traditional owners, acknowledge source and respect moral rights (Id, Sec. 12).

<sup>249</sup> . Id, Sec.7(3)

<sup>250</sup> . Id, Sec.7(4) and (5)

<sup>251</sup> . An authorized user agreement between the owners and the users should include terms and conditions about the following (i) sharing of financial and other benefits arising from the use of the TK or expressions of culture; (ii) compensation, fees, royalties or other payments for the use;(iii) whether the use will be exclusive or non-exclusive; (iv) duration of the use to be allowed and rights of renewal; (v) disclosure requirements in relation to the use; (vi) the possible sharing by the traditional owners of any IP rights arising from the use of the TK or expressions of culture; (vii) access arrangements for the traditional owners; (viii) education and training requirements for the applicant; (ix) controls on publication; (x) specify whether the rights arising under the agreement can be assigned; (xi) choice of law in relation to disputes under the agreement; (xii) respect for moral rights of the traditional owners. Applications to the Cultural Authority must be in prescribed form; specify manner in which applicant proposes use; state purpose for

Under this agreement various offences are created, punishable on conviction by fine or term of imprisonment, or both. Traditional owners may also institute civil proceedings. Remedies like injunction, damage for loss, public apology, cease or reverse false attribution of ownership or derogatory treatment, order for account for profits, seizure of objects, other are also provided. In lieu of the court system the parties can use customary laws. The agreement states in case of dispute, customary laws and practices can be applied as a means to resolve the dispute.

The agreement also deals with the question of the protection of the same or similar cultural expressions from neighboring countries (so-called "regional folklore"). Accordingly, the same or similar cultural expression found in the member state of the agreement is protected in accordance with reciprocal arrangements the states enter into.

#### **3.5.4. Selected National Experiences**

##### **I. Panama**

Panama Law, Act 20 of June 26, 2000 establishes a "special intellectual property system for the collective rights of Indigenous peoples, for the protection and defense of their cultural identity and of their traditional knowledge". The purpose of the law is to "protect the collective rights of intellectual property and traditional knowledge of the indigenous communities upon their creations", in addition to the "cultural elements of their history, music, art and traditional artistic expressions," "capable of commercial use, through a special register system."<sup>252</sup>

Under the Panamanian Law traditional knowledge constitutes "customs, believing, spirituality, religiosity" and "folkloric expressions of the indigenous communities." The Law explicitly states that these are part of the cultural assets of the indigenous communities and consequently "cannot be object of any form of exclusive right by not

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which use intended; prescribed fee. Applications are published by means of copy to traditional owners, copy in national newspaper, and if required broadcast on radio and TV.

<sup>252</sup> . Panama Executive Decree No. 12, March 20, (2001 )on Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge Art.1

Another key objective is also to protect the authenticity of crafts and other traditional artistic expressions (Art. 6).

authorized third parties under the intellectual property system such as copyrights, industrial models, trademarks, indications of regional origin and others".<sup>253</sup>

Under the Executive Decree, pre-existing intellectual property rights relating to art, music, literature, biological, medical and ecological knowledge and other subject matter and manifestations that have no author or owner and no date of origin and constitute the heritage of an entire indigenous people, is protected as "collective indigenous rights"<sup>254</sup>

The Panamanian Law allows exemptions for folkloric dance groups<sup>255</sup> and certain small non-indigenous artisans. However, these small, non-indigenous artisans will not be able to claim the collective rights of indigenous as recognized by the Panamanian law<sup>256</sup>. Compared to the UNESCO Model Law provisions, the Panamanian law does not provide for exceptions relating to education, "fair practice," "borrowing for producing original work," or for incidental uses in broadcasting or for reporting purposes.

The law establishes a registration system for TCEs. A special office has been created within the country's IP office to approve the applications and maintain the register. The procedure before the IP office does not require the services of a lawyer and there are no application fees. Regarding the consequence of the registration of the collective rights in an object or TCEs the law states that it shall not affect the traditional exchange of the object or knowledge in question between indigenous peoples.<sup>257</sup> In addition access to the register of collective rights is to be made public, with the exception of experiments and cognitive processes conducted by indigenous peoples and their traditional production techniques or methods used<sup>258</sup>

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<sup>253</sup> . Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge of Panama, (2000) Article 2, Panama Law

<sup>254</sup> . Id, Art. 2(v)

<sup>255</sup> . Id , Art. 16

<sup>256</sup> . Id

<sup>257</sup> . *Supra* note 250 Executive Decree, article II

<sup>258</sup> . *Supra* note 251 Article I2

Sanction is provided against importation of foreign goods originating from countries that are non-original products, recorded, embroidered, weaved or any other articles, that are imitated, in whole or in part. It also addresses the problem of trade in such goods outside its borders by invoking the principle of reciprocity.<sup>259</sup>

## II. The Philippines

The indigenous people of the Philippines roughly form 10% of its population of approximately 60 million people. There are 110 tribes in the groups of islands that constitute the Republic of the Philippines.<sup>260</sup> Recognition and promotion of the rights of indigenous cultural communities is recognized under the constitution of the country.<sup>261</sup> There is also a provision for the creation of autonomous regions in certain selected areas which share common, distinctive historical and cultural heritage and other relevant characteristics, with a view to protecting and promoting the ethnic diversities of the indigenous people.<sup>262</sup> The Constitution calls upon the State to protect the rights of indigenous cultural communities to their ancestral lands with a view to ensure their cultural well being, among other things.<sup>263</sup>

Based on the rights guaranteed under the constitution for the rights of indigenous cultural communities the Indigenous Peoples Rights Act of 1997 (IPRA) was enacted by the Senate and the Congress of the Republic of the Philippines on July 28, 1997. The IPRA has been described as an Act to recognize, protect and promote the rights of Indigenous Cultural Communities (ICCs)/Indigenous Peoples (IPs), creating a National Commission on Indigenous People (NCIP), establishing an implementing mechanism, appropriating funds therefore, and for other purposes. The Act defines Indigenous Cultural Communities/Indigenous People as;

*Indigenous Cultural Communities/Indigenous Peoples – refers to a group of people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as organized community on communal bounded and defined territory,*

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<sup>259</sup> . Panama Law No. 20, Article 25

<sup>260</sup> . *Supra* note 32

<sup>261</sup> . Indigenous Peoples Rights Act Of 1997 – Republic Act No.8371 Republic Of The Philippines Art. II – Sec. 22

<sup>262</sup> . *Id* Art.X – Sec. 15

<sup>263</sup> . *Id* Article XII – Section 5)(*ibid*)

*and who have, under claims of ownership since time immemorial, occupied, possessed and utilized such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have through resistance to political, social and cultural inroads of colonization, non-indigenous religions and cultures, become historically differentiated from the majority of Filipinos. ICCs/IPs shall likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonization, or at the time of inroads of non-indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains.*<sup>264</sup>

The community intellectual property rights recognize the right to practice and revitalize cultural traditions and customs of the indigenous communities. According to this provision, the State is bound to preserve, protect and develop the past, present and future manifestations of their cultures. The rules and regulations framed under the provisions of the Act further clarified the cultural manifestations to include archaeological and historical sites, artifacts, designs, ceremonies, technologies, visual and performing art, literature as well as religious and spiritual property. It is also obligatory on the part of the State to restore the cultural, intellectual, religious and spiritual property taken without the free and prior informed consent of the communities.<sup>265</sup>

Full ownership, control and protection of the cultural and intellectual rights are recognized in Section 34 of the IPRA. The indigenous communities have been given the right over them as well as other cultural manifestations.

All through the Act, the prevalence of customary laws of the community concerned has been established as a determinant factor for management and protection of the rights conferred by the Act. The act requires the free and prior informed consent of the communities to be acquired through the customary laws for the safe guarding the rights of IPs. The rules define free and prior informed consent as “consensus of all members of the indigenous communities to be determined in accordance with their customary laws and practices.”<sup>266</sup>

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<sup>264</sup> . Supra note 32, p.26

<sup>265</sup> . Id

<sup>266</sup> . Id.27

The rules also lay down some guidelines regarding the safeguarding of the rights of indigenous people and indigenous knowledge systems, these include (1) the right to regulate the entry of researchers and research institutions, (2) written agreement concerning the purpose, design and expected output of the research, (3) the need to recognize the source of the material taken in case the information regarding the material is published, (4) the supply of copies of research output to the communities concerned, and, most importantly, (5) sharing of the income derived from the research output with the community.<sup>267</sup>

### III. Ghana

After independence from British colonial rule and prior to the 2005 legislation, Ghana passed two copyright acts<sup>268</sup>. The first act in 1961 (Act 85) mimics U.S. copyright protection and does not include special protections for folklore under copyright<sup>269</sup>. The subsequent act, in 1985, drew from the WIPO/UNESCO 1982 Model Provisions and applied a tariff on foreign-produced music based on Ghanaian folklore<sup>270</sup>. Initially, Ghana's folklore was considered as public property that belongs to the public domain. In 1985, the Ghanaian government passed a copyright law<sup>271</sup> that removed folklore and other works of cultural heritage from the public domain.

Later in 2005, after several years of debate, the Ghanaian parliament passed Act 690, which allows the government to collect royalties on the commercial use of folkloric works developed both domestically and abroad and defines harsh consequences for those who infringe<sup>272</sup>.

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<sup>267</sup> .Id

<sup>268</sup> . Kathleen Ludewig *The Nationalization and Commercialization Of Ghanaian Folklore* *Michigan Journal of Public Affairs* –The Gerald R. Ford School Of Public Policy – The University Of Michigan, Ann Arbor Volume 6, Spring (2009 ) [available at [Www.Mjpa.Umich.Edu](http://www.Mjpa.Umich.Edu)] last accessed on June 17, 2014

<sup>269</sup> . Id

<sup>270</sup> . Id

<sup>271</sup> P.N.D.C. Law No. 110 “Ghana: Copyright, Law, 21/03/1985, No. 110.” March 21, 2005. <http://www.wipo.int/clea/en/details.jsp?id=1783> )

<sup>272</sup> . supra note 266

In the act “folklore” is defined as “the literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which are created, preserved and developed by ethnic communities of Ghana or by an unidentified Ghanaian author, and includes kente<sup>273</sup> and adinkra<sup>274</sup> designs where the author of the designs are not known, and any similar work designated under this Act to be works of folklore<sup>275</sup>,” The act offers protection against “reproduction, communication to the public by performance, broadcasting, distribution by cable or other means, and adaptation, translation and other transformation.<sup>276</sup>”

The ownership right to folklore is given to President on behalf of the Republic of Ghana<sup>277</sup> . This article has been equated to the “nationalization of rights to folkloric expressions” because it takes authorship rights away from the creators of expressions of folklore and places them in the President, as trustee for the entire nation<sup>278</sup> . Even though folklore is governed by a copy right law regime in Ghana the duration accorded for the protection of folklore is perpetual.

Anyone who wants to utilize a Ghanaian folklore has to pay royalty. Payment of royalties applies to commercial use of “works of [Ghanaian] folklore made in or outside the Republic<sup>279</sup>,” What it means is that not only a foreigner but also a Ghanaian has to pay a fee for the utilization of folklore. According to the act Revenues or royalties from the use of folklore should be used for the preservation and promotion of folklore and for the promotion of indigenous arts<sup>280</sup> .

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<sup>273</sup> . ‘Kente’ is a derivative of ‘kenten’, the Twi language word for basket. The name depicts both the art of weaving employed to create kente, and the conceptual mosaic framework of every kente design. Twi is a language spoken by many tribes within the middle belt of Ghana. Id

<sup>274</sup> . ‘Adinkra’ means ‘to say goodbye’. It is also a Twi word Adinkra is a language expressed in art form, which would have only aesthetic value) Id.

<sup>275</sup> . “Ghana: Copyright, Law, 17/05/2005, No. 690.” May 17, 2005. <http://www.wipo.int/clea/en/details.jsp?id=1789>  
Act 690, 61 Act 690, Section 76

<sup>276</sup> . Id. Sec. 4, Article 1

<sup>277</sup> . Id. Sec. 4, Article 2 (65)

<sup>278</sup> . Gertrude *Torkornoo Creating Capital From Culture – Re-Thinking The Provisions On Expressions Of Folklore In Ghana’s Copyright Law Annual Survey Of Int’l & Comp. Law (Vol. Xviii 2012)*

<sup>279</sup> . *Supra* note 273 Sec. 44, Art. 1, Clause a

<sup>280</sup> . Id Sec. 64, Art. 4, Clauses a and b

The National Folklore Board is entrusted with the protection of folklore, expressly extends the folkloric royalty to Ghanaians<sup>281</sup>, The law requires written permission from the National Folklore Board and royalties with an amount to be decided on a case-by-case basis for the commercial use, sale, or distribution of works or adaptations of Ghanaian folklore that are sold in Ghana, regardless of whether those works are produced domestically and internationally, by Ghanaians or non-Ghanaians<sup>282</sup>.

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<sup>281</sup> . Id Sec. 44, Art. 1, Clause b

<sup>282</sup> . Id Sec. 44, Article 1, Clause a & b

## CHAPTER FOUR

### 4. PROTECTION OF TCEs IN ETHIOPIA

#### 4.1. Introduction to TCEs in Ethiopia

Ethiopia is an old and historical country with more than eighty nation and nationalities. Different nationalities have their own traditional cultures. Ethiopia is a country with rich cultural heritages that act like a mirror of the past and a guiding light for the present, by which the present life is lived out, where amongst other things, it sets out the norms in society and the rules by which people have to live by, peacefully and harmoniously, and solve their problems.<sup>283</sup>

Those cultures are expressed through music, dance, folklore, religious beliefs, wedding and mourning ceremonies, drama etc. There is great diversity of folk songs and dances, as one would expect in a country with so distinct geographical, ethnic and cultural variations<sup>284</sup>. Music and dance in Ethiopia are as old as the nation. Folk music and dance, has become part and parcel of the life of the common man in Ethiopia<sup>285</sup>. Ethiopia has a rich musical heritage with a marked character of its own. The range of different types of music is extensive, running from the highly refined chants of the clergy, through melodious sentimental love songs, to the harsh squeal of the warriors' songs<sup>286</sup>. There are over 150 unique dance movements across Ethiopia and its regions. Different musical instruments are used to transmit certain ideas, religious beliefs, historical events, and ancient stories, and emotions, thoughts like krar, flute, drums and mesenko.

Traditional crafts are also one expression of culture they are a mirror of the cultural diversity in Ethiopia - they result from a combination of the creativity, culture and the

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<sup>283</sup> . EIPO, *Community knowledge in Ethiopia*, 2002 (BULLETIN).

<sup>284</sup> . Ellene Mocria, Mesfin Messele & Alemayehu G/Hiwot, *Survey of culture and media Background Documents Country Strategy Ethiopia 2003–2007*, 2003 p.10

<sup>285</sup> . Id

<sup>286</sup> . supra note 282 p.11

heritage and the environment of the craftspeople<sup>287</sup>. Ethiopian arts and crafts have diverse forms and applications: bead work, body sacrifications, tattoos, body decoration, carving (body paint, hairstyles); carving (on leather, wood, stone); farming implements and harvesting tools; housing construction methods, furniture, everyday household objects; Iconography church murals, dyptics and tryptics, bookmaking and illuminations; sacred crosses, ceremonial and ritual props of all kinds; jewellery, pottery, textiles, Weaponry<sup>288</sup>.

In Ethiopia folklore performs several important social functions “It helps the local communities to release cultural tensions and ambivalence, and it provides amusement and education. It strengthens social cohesiveness, raises the quality of life and assists in the development and articulation of cultural identity. They use folklore to reflect the past and make improvements for their future. Folklore gives them a chance of self-expression through music, song, dance, speech, and many other avenues. Such cultural manifestations create an invisible bond among individuals and groups and forge social and spiritual contact”<sup>289</sup>

At present in Ethiopia TCEs are being used without the authorization of the authoring community as source of inspiration and creativity for cultural industries, such as the entertainment, fashion, publishing, crafts and designs. Certain aspects of traditional cultures, particularly, traditional songs, music, dances, and chants were increasingly used without proper authorisation and outside of their traditional contexts.

The domestic commercial use of native arts is extensive. All industries in Ethiopia are replete with products using folkloric expressions, music and audiovisual industries. They draw upon local cultural materials requiring the need to provide real and actual incentives

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<sup>287</sup> . Jacques Dubois *Roots and flowerings of Ethiopia's traditional crafts* UNESCO publication for the millinium,2008 page 7

<sup>288</sup> .ld

<sup>289</sup> . Interview with Ato Tedla Mamo, In Ethiopia Intellectual Property Office (EIPO) Copy Right and Community Knowledge Protection and Development Process Director, Addis Ababa (September 17, 2015)

in private property rights to broaden the market through product proliferation and to make intellectual creativity a source of capital creation.

But how to protect these abundant, special, original cultures is a big question to modern society when facing the market economy and the invading of foreign culture. Although some organizations and institutions in international world such as WIPO and UNESCO try to reach some agreements and they have made significant progress in protecting TCEs, Ethiopia, as a developing country, still lags behind.

#### **4.2. Objective for Protection of TCEs**

The objective sought for protecting TCEs can be wide and comprehensive, ranging from moral to economic and from intellectual, artistic and cultural to protectionist objectives<sup>290</sup>.

However, Ethiopia believes protection of TCEs should be in conformity with human rights standards. At the 11<sup>th</sup> session of the IGC on intellectual property and genetic resources, traditional knowledge and folklore the Delegation of Ethiopia stated that “whereas the international recognition and protection of the rights of traditional communities to their cultural expressions had a direct economic and moral bearing, the objectives of the outcome sought should not be limited to these considerations it should be to recognize existing rights under international law and international human rights law.” The delegation further elaborated how the objective of protecting TCEs has relations with other rights “this objective had a direct correlation with other rights, such as the right to culture, the right to cultural self- determination and the right to development. This was not a regime of morality but of entitlements and rights. The basis of such protection should be neither moral nor economic, but was rather found in the realm of rights.”<sup>291</sup>

The Delegation drew attention to General Comment No. 17 of the Committee on Economic, Social and Cultural Rights which recognized the rights of communities to

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<sup>290</sup> .Adopted Report Inter governmental committee on intellectual property and genetic Resources, *Traditional knowledge and Folklore* 11th session Wipo/Grtkf/Ic/11/15 March 20, 2008 p.65

<sup>291</sup> . Id. p. 67

benefit from the protection of moral and material interests resulting from the protection of the moral and material interests resulting from any scientific, literary or artistic production, and referred in particular to paragraph 15 of that General Comment. The Delegation stated that international protection for TCEs should give concrete realization to these human rights norms<sup>292</sup>.

### **4.3. Policies and Laws on the Protection of TCEs in Ethiopia**

#### **4.3.1. The Constitution**

The two most important rights guaranteed under the constitution which are pertinent for the protection of TCEs are the right to property and the right to culture. TCEs by nature are mostly created and owned by communities collectively as a result communities right to own property collectively needs to be guaranteed. The right to property is recognized under article 40 of the constitution. Article 40(1) guarantees the right to the ownership of private property whose contents include the right to acquire, to use and to dispose of such property by sale or bequest or to transfer it otherwise subject to public interest and the rights of other persons. Sub article 2 of this article defines “private property” as;

*any tangible or intangible product which has value and is produced by the labour, creativity, enterprise or capital of an individual citizens, associations which enjoy juridical personality under the law, or in appropriate circumstances, by communities specifically empowered by law to own property in common.*

TCEs whether tangible or intangible is the fruit of communities’ creativity as a result they fall in to the realm of private property. Further reading of this sub article shows the constitution recognizes the concept of “communal ownership”. It stipulates that communities can own private property collectively if the communities are empowered by law to own property in common. However, even though the constitution paved the way for communities to own properties collectively there is no specific law to date that confers such rights for the authoring communities of TCEs.

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<sup>292</sup> . Id

The second important right guaranteed under the constitution is the right to culture. Under Article 39 of the Constitution which provides for the rights of nationalities, states that “Every Nation, Nationalities and Peoples of Ethiopia have the constitutional right to speak, write and develop their own language; to express, to develop their culture and to preserve their history.” The 1995 constitution of the federal democratic republic of Ethiopia uses the term nation, nationalities and people throughout the constitution. The constitution doesn’t define these terms individually what it does is define them holistically.

*Nation, Nationality or People’ for the purpose of the Constitution, is defined as a group of people who have or share a large measure of a common culture or similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory*<sup>293</sup>.

The federal government is given the power to establish and implement national standards and basic policy criteria for the protection and preservation of cultural and historical legacies<sup>294</sup>. Article 91 of the Constitution puts the duty on the government to support, on the basis of equality, the growth and enrichment of all cultures and traditions that are compatible with fundamental rights, human dignity, democratic norms and the ideals and provisions of the Constitution.

#### **4.3.2. Policy Consideration**

Before any law is enacted for the protection of TCEs preparation and implementation of appropriate policies should be given a priority. It ensures the effective protection of TCEs as it provides a framework in drafting laws. Two policies that are worth considering for the protection of TCEs in Ethiopia are the National cultural policy and the national Intellectual property law policy and strategy of Ethiopia.

The Ethiopian cultural policy is promulgated to bring about the practical application of Article 39/2 of the constitution and article 9/4 of the constitution which states “all

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<sup>293</sup> . The Federal Democratic Republic of Ethiopian Constitution Proclamation No 1/1995( “the Constitution”), entered into force on 21 August, 1995, Art 8(1) Art. 39(5)

<sup>294</sup> . Id Art 51(3)

international agreements ratified by Ethiopia are integral part of the law of the land.” the cultural policy is endorsed by the council of ministers on October 1997. The fundamental social and cultural changes, globalization, and the awareness of culture’s vital role to the development of the country are factors that led to the coming effect of the cultural policy.

Culture is defined in the policy as “a concept which incorporates all intellectual, ethical, physical, technical and other activities that characterize humankind as a rational being. It also involves the ability of man to learn and train himself in moral, technical and other sphere of knowledge like the modes of life, beliefs, traditions, and spiritual wealth which characterize a certain society as distinct from others”<sup>295</sup> (The cultural policy adopts the definition given by UNESCO). In the Ethiopian context the policy defines culture as the nations, nationalities and peoples varied social, economic, political, administrative, moral, religious and psychological conditions.<sup>296</sup> It includes languages, history, oral tradition, housing, instruments of production, food preparation, eating habits, costumes, ornamentation, aesthetic values and appreciation, beliefs and religious practices, the spiritual ceremonies related to birth, weeding and communal concerns that emanate from kinship, neighborhood and other types of relationships, traditional ways of social governance, traditional health care practices and other related aspects of their respective communities are also included<sup>297</sup>.

The cultural policy lists different objectives. From the list of objectives the one that is related to the topic at hand Stipulates heritages, history, fine arts, handicrafts and folk arts (tales, proverbs, popular poetry, dances, songs etc) of the nations, nationalities and peoples of Ethiopia should be recognized collected, registered, analyzed, and preserved.<sup>298</sup> This objective goes hand in hand with the recognized rights of the nation, nationalities and people of Ethiopia to develop their culture guaranteed under the constitution. The policy stipulates in order to achieve the objectives that are set out in the cultural policy laws and regulations are needed.

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<sup>295</sup> . National Cultural policy of Ethiopia (MYSC) available at [www.chilot.me](http://www.chilot.me)

<sup>296</sup> . Id

<sup>297</sup> . Id

<sup>298</sup> . Id

The second policy that should be considered for the protection and commercialization of TCEs is the national intellectual property policy and strategy of Ethiopia. As of now Ethiopia has no intellectual property law policy it is still at the draft stage. The goal of the policy is to provide adequate protection, promote and use of traditional knowledge and expression of folklore and ensuring sharing of equitable benefit arising from the use of TCEs<sup>299</sup>. In order to achieve this goal different strategies are set. The draft policy recognizes the existing IPRs laws alone doesn't protect TCEs<sup>300</sup> and suggest the enactment of sui generis laws to deal with the protection of expression of folklore taking into account international best practices, regional initiatives and developments at the international level<sup>301</sup>. Another strategy worth mentioning in this policy is it calls for the establishment and update of national database on TCEs<sup>302</sup>.

The lack of laws and mechanisms that would help to meet the need for the protection of traditional knowledge and expressions of folklore and address concerns related to misappropriation and sharing of benefits is identified as the major challenges for the Protection of TCEs under the draft policy<sup>303</sup>.

#### **4.3.3. General overview of the existing IPRs in Ethiopia for the protection of TCEs**

There is no specific law to prevent any unauthorized commercial exploitation of the rich store of TCEs in Ethiopia. The Ethiopian Intellectual property rights regime includes copyright, patent, trademark, geographic indication of origin, industrial design, trade secrets, etc. These IP regimes outlined briefly below.

In Ethiopia copyright law is governed by proclamation 410/2004. Under the proclamation copyright protection extends to literary, artistic and scientific works and these include: books, pamphlets, articles, computer programmes and other writings; speeches, lectures, addresses, sermons and other oral works; dramatic-musical works, pantomimes, choreographic works, and other works created for stage production; musical works with

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<sup>299</sup> . The draft intellectual property policy and strategy of the government of the federal republic of Ethiopia, November 2013 7(11)

<sup>300</sup> . the draft policy states where appropriate the existing IP laws could be used to protect TCEs 7(11)(c))

<sup>301</sup> . Id 7(11)(a)

<sup>302</sup> . Id 7.11.(e)

<sup>303</sup> . Id 6(i)

or without accompanying words; audio visual works and sound recordings; works of architecture; works of drawings, paintings, sculpture, engraving, lithography, tapestry and other works of fine arts; photographic and cinematographic works; illustrations, maps, plans, sketches, and three dimensional works related to geography, to topography architecture or science; derivative works; and collection of works, collection of mere data whether legible by machine or other form<sup>304</sup>.

The difficulties that exist in attempting to include folklore into copyright regime, under the 410/2004 proclamation Copyright law of Ethiopia is first there is no specific provision relating to protection of EoF/TCEs in the Copyright law. The only article which could be construed to refer to the protection for TCEs is found under the copyright and neighboring rights protection (Amendment) proclamation No. 872/2012. This proclamation added applied arts<sup>305</sup> to the types of works that are protected under article 2 sub Article 30. Communities could benefit from this sub article for their drawings, paintings, carvings, pottery, wood work, metal work etc. However, the problem with this sub article is that it is not inclusive it refers only to the small portion of the manifestations of TCEs. In addition in terms of fulfilling the conditions for subsistence of protection and duration there would be problems satisfying the requirement of the copyright law. First Under the proclamation the author of the work is entitled to protection for his work upon creation if the work is original<sup>306</sup>. Many TCEs in Ethiopia like in the rest of the world are not “original” since they are created many years ago. What is possible for protection of a work under this statute is the adaptation of TCEs. If a work is adopted from TCEs then it can be regarded as “original” copyright works. However the shortcoming of this law is that it only protects derivative works<sup>307</sup> of TCEs it fails to protect TCEs itself. Second, the proclamation requires the work to be written down, recorded, fixed or otherwise reduced to any material form<sup>308</sup>. This requirement prevents intangible and oral expressions of culture, such as tales, dances or songs from being protected.

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<sup>304</sup> . Copyright and Neighboring Rights Proclamation, Proclamation No. 410/2004, Federal Negarit Gazeta, Year 10, No. 54 Article 2(3) (a)-(i)

<sup>305</sup> . copyright and neighboring rights protection (Amendment) proclamation No. 872/2012 Art.2(30)J

<sup>306</sup> . Id, Art 6(1)(a)

<sup>307</sup> . Id Art 4

<sup>308</sup> . Id Art 6(1)(b)

Third, copyright law requires the identification of known individual creator/creators to determine the owners of the right. TCEs are communally created and held by the community as a group and it is difficult to identify the creators as they may simply be unknown or can't be located. In Ethiopia's multi-ethnic society, the identification of the members of any community for the purpose of determining the author(s) of a particular folkloric expression would prove to be an extremely difficult task. Furthermore, community membership is often expanded by the presence of long-term resident migrants. For example, there are many migrants from the neighboring Somalia, Kenya and Eritrea whose culture has been fused with the cultures of the Ethiopian different states. Exacerbating the difficulty of determining the exact authors of an expression of folklore is that folkloric expressions are changed subtly over long periods of time, thus obscuring the exact moment of authorship.

In addition the copyright law doesn't recognize the concept of "communal ownership". The only law in Ethiopia that recognizes the concept of "communal ownership" is the proclamation that is adopted to provide for access to Genetic resources and community knowledge and community rights No, 482/2006. Article 5(2) states "[t]he ownership of community knowledge shall be vested in the concerned local community. In drafting a law for protection of TCEs reference could be made to this proclamation.

Fifth, works are protected for the life of the author plus fifty years<sup>309</sup>. However, it is evident communities want their TCEs to be protected in perpetuity. Further, the limited terms of protection requires certainty as to the date of a works creation which is often impossible to ascertain in case of TCEs.

The other type of IPR that should be considered for the protection of TCEs is neighboring rights protection. Neighboring rights is defined under article 2(14) of proclamation 410/2004 as the rights of performers, producers of sound recordings, broadcasting organizations over their works. Neighboring rights can be useful for the protection of TCEs and may be able to meet the needs of communities. In an oral culture, it is often through performances of songs, and chants or narration of stories that elements of

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<sup>309</sup> . Id Art 20(1)

traditional culture are passed within a community and between generations. Folk tales, poetry, songs, instrumental music, dances, plays and similar expressions of folklore actually live in the form of regular performances. Performers' rights give the traditional performers the right to determine whether their performances should be fixed, and how the fixation of the performance should be further disseminated and used.(see article 26-31)

The protection of performances of expressions of folklore might, indirectly, provide adequate protection for the expressions of folklore themselves. This is probably a fair expectation, provided the performer is from the community that is the "holder" of the expression of folklore. The flip side to this argument is that it is not always the authoring community who performs TCEs. TCEs are being performed by non members of communities in such cases the expression may still receive indirect protection, but any benefits will not accrue to the community.

Article 2(19) of the proclamation defines "Performer" as actor, singer, musician, dancer, and other person who act, sing, deliver, declaim, play in, or otherwise perform literary and artistic works. The problem with this sub article is that first of all it doesn't specifically mention performance of TCEs. As mentioned in chapter 2 the WPPT treaty of 1996 has included in its definition of "performers" the performers of TCEs under article 2 in order to clearly confer rights to performers of TCEs. Second even if this sub article could be construed to include TCEs as TCEs are expressed through dances, songs, plays etc only performers of literary and artistic works are protected. It excludes other performers who perform TCEs other than literary and artistic works.

Moreover this type of protection faces similar issues relating to authors' rights, such as originality, fixation and duration<sup>310</sup> and they exclude certain folkloric performers, record producers and broadcasters.

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<sup>310</sup> . Five year for the performer (Art.26(4)) and it is fifty years for the rights of performers and producers of sound recordings (Art 27(2)) and 20 years for the rights of broadcasting organizations.(Art.31(2))

With regard to the protection of industrial design law the criteria used for industrial designs are: originality; industrial applicability; and those which are contrary to public order and morality are excluded from protection.<sup>311</sup> The protection period for an industrial design lasts for a period of five years which may be renewed for two extensions of five years each. Most of the industrial designs in Ethiopia are for shoes and furniture<sup>312</sup>. Here also the criteria's put for protection makes it difficult for holders of TCEs to benefit from such protection.

Trademark law is another IP tool that can be used for the protection of TCEs. The proclamation for trademark registration and protection No 50/2006 defines trademark as "Any visible sign capable of distinguishing goods or services of one person from those of other persons. It includes design, letters, numerals, colors or the shape of goods or their packaging or the combinations thereof"<sup>313</sup>. The registration process involves certain procedural steps. Under the trademark registration and protection proclamation, the registration process includes four stages: filing of the application, examination, publication, opposition, and registration<sup>314</sup>.

Given that trade mark protection permits some degree of control over the use of registered trademarks it may<sup>315</sup>: provide redress for the *appropriation* of expressions of folklore, such as folkloric symbols, through injunctive remedies for trade mark infringement; *compensate* traditional community for their contribution through payment of royalties for use of words, names or symbols or through damages for infringement; and promote the *authentication* of genuine folkloric products through the use of special collective or certification marks. The process involved in the application to obtain trademark and the limited duration are some of the problem they face to ascertain their rights.<sup>316</sup>

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<sup>311</sup> . A proclamation on industrial design Inventions, Minor Inventions and Industrial Designs Proclamation. Federal Negarit Gazeta Year 54 No. 25. Proclamation No. 123/1995.

<sup>312</sup> . Id. Art.

<sup>313</sup> .Trade Mark Protection Proclamation. Federal Negarit Gazeta Year 12 No. 37. Proclamation No. 501/2006.

<sup>314</sup> . Id. Art.

<sup>315</sup> . Supra note 5

<sup>316</sup> . Id

#### **4.4. The Draft Law on the Protection and Commercialization of TCEs**

Recognizing the need to protect TCEs in Ethiopia the EIPO prepared a draft law on the protection of community knowledge. Community knowledge under the draft law is defined as “ knowledge, skill, practice passed on from generation to generation created maintained or developed by a community or communities and it includes folklore , traditional medical practice and genetic resource<sup>317</sup>.”

##### **4.4.1. Subject Matter of Protection**

At the international level it’s understood that attempting to come up with a single definition of TCEs should not be attempted. Because by attempting to define TCEs, there was a risk of freezing or restricting the rights at the time that they were defined, hence not fully taking into account their evolutionary nature. Rather one should explore models of protection which did not require the elaboration of a formal definition of TCEs or that fully recognized the changing nature TCEs. Ethiopia’s view is not different from this. Ethiopia held the view “TCEs should to some extent be self- definitional, allowing the understanding of traditional or local communities of what constituted cultural expressions.”

The term “folklore” is defined under the draft law as traditional tangible and intangible heritage developed and maintained over generations by a community or by individuals reflecting the traditional artistic expression<sup>318</sup>. Intangible cultural heritage is ,defined in Proclamation 209/2000, as “any cultural heritage that could not be felt by hands but could be seen or heard and included different kinds of performances and shows, folklore, religious beliefs, wedding and mourning ceremonies, music, drama, literature and similar cultural values, traditions and customs of nations, nationalities and peoples”. This definition of “folklore” is different from the model provision in that it covers heritages that are not “artistic” like traditional beliefs, scientific views etc. The model provision accords protection only to “artistic” heritages.

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<sup>317</sup> . A draft law on Intellectual property protection of community knowledge 2014

<sup>318</sup> . Id. Art 2(4)

Under section 3 of the draft law an illustrative enumeration of the kind of expressions of folklore that are protected is found. Expressions of folklores that are protected under the draft law are the following;

- verbal expressions, such as folk tales, folk poetry , riddles<sup>319</sup>;
- expressions by action, such as folk dances, plays and artistic forms or rituals<sup>320</sup>;
- musical expressions, such as folk songs and instrumental music<sup>321</sup>;
- religious and cultural festivals; Article<sup>322</sup>
- productions of folk art, in particular, drawings, paintings, carvings, sculptures<sup>323</sup>
- pottery, terracotta, mosaic, woodwork, metalwork, jewellery, basket weaving, needlework, textiles, carpets, costumes architectural forms<sup>324</sup>

#### 4.4.2. Terms of Protection

The draft law deals the issues of ownership right, terms of protection, duration and registration of community knowledge in the general provision in section 2. Regarding the ownership right to community knowledge the draft law states if the community knowledge is found and maintained by a given community or a local administration then the ownership right will vest only on the given community or local government<sup>325</sup>. A community is defined as “*a human population living in a distinct geographical area and it may include religious institutions*”<sup>326</sup>. A local administration is defined as “*a place which is demarcated based on the place where community knowledge is found and it includes Worda, Zone, and state administrations.*”<sup>327</sup>

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<sup>319</sup> . Id. Article 3(2)(1)

<sup>320</sup> . Id. Art 3(2)(2)

<sup>321</sup> . Id Art 3(2)(3)

<sup>322</sup> . Id Art 3(2)(4)

<sup>323</sup> . Id Art 3(2)(5)

<sup>324</sup> . Id Art 3(2)(6)

<sup>325</sup> . Id Art 4(1)

<sup>326</sup> . Id Art2(11)

<sup>327</sup> . Id Art 2(10)

A joint ownership will be granted in two situations. The First one is If the community knowledge is created and maintained by different communities or different local administration<sup>328</sup> and the second situation is when community knowledge is created and maintained by individuals from the given locality and different the local administration or it is created by individuals from different communities or local administration<sup>329</sup>. In cases where the owner is unknown the state will be the owner<sup>330</sup>.

If a dispute arises on the ownership right of a community knowledge the law authorizes the state council if the dispute is between local communities or individuals within or the house of federation when the dispute is between two states to see the matter<sup>331</sup>.

The owners of TCE enjoy both economic and moral right. According to article 3(1) of the draft proclamation the owner or owners of folklore have the exclusive right to authorize the following acts; access, print, reproduce and distribute a fixed folklore , importation or exportation of original or copies of the folklore; broadcasting of folklore , adaptation, arrangement or other transformation of folklore, public display of folklore, communicate the folklore to the public, fixation, performance of folklore, rental , share benefits with owners of the intellectual property right obtained based on the folklore and other communication of the folklore to the public and benefit.

The draft law also confers moral rights which include the right to claim authorship of his EOF, to object any distortion, mutilation or other alteration of the folklore, where such an act is or would be prejudicial to the honor or reputation of the authoring community/individual/group.

#### **4.4.3. Duration of Protection**

Under the draft law the moral right of the holders of TCEs is perpetual<sup>332</sup>. However, the duration for the protection of their economic right is as long as community knowledge is created, maintained and protected based on the communities' tradition and culture and it

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<sup>328</sup> . Id Art 4.(2)

<sup>329</sup> . Id Art 4(3)

<sup>330</sup> . Id Art 4(4)

<sup>331</sup> . Id Art .4(5)

<sup>332</sup> . Id Art. 6(3)

reflects the community/communities day to day life and identity<sup>333</sup>. If the holder of right is an individual the duration of protection is 25 years calculated from the time he/she puts it for commercial use<sup>334</sup>.

#### **4.4.4. Transfer and Authorization of Rights on Folklore**

The owner of the EOF is entitled to permit utilizations or transfer of its rights on its expressions of folklore partially or totally subject to authorization<sup>335</sup>. The process of authorization, it follows from article 11 of the draft provision that an authorization must be preceded by an application submitted to the EIPO in writing<sup>336</sup>. The owner of the EOF has the right to collect fees for authorization<sup>337</sup>. The payment could be made in kind or it could be made through contribution to the development of the community<sup>338</sup>. The purpose for which the collected fees must be used is determined by the draft law. The law offers the choice between development of the community and development of the country or for research on the community knowledge.

#### **4.4.5. Limitations on the Right**

There are special cases enumerated under the draft law where there is no need to obtain authorization from the owner of TCEs. These are when the TCEs is used for personal use<sup>339</sup>, educational purpose<sup>340</sup>, incidental utilization of the TCEs<sup>341</sup> and when it is used by non-profitable libraries, museums<sup>342</sup>.

### **4.5. Documentation in Ethiopia**

Most TCEs are passed down from generation to generation orally hence are not documented properly. Documentation plays an important role in strategies for the

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<sup>333</sup> . Id Art. 5&6(1)

<sup>334</sup> . Id Art 6(2)

<sup>335</sup> . Id Art. 11(1)

<sup>336</sup> . Id Art 11(2)

<sup>337</sup> . Id Art 12(1)

<sup>338</sup> . Id Art 12(1)

<sup>339</sup> . Id Art 3(4)

<sup>340</sup> . Id Art.3(5))

<sup>341</sup> . Id Art (3(4)

<sup>342</sup> . Id Art 3(5)

safeguarding of cultural heritage and traditional cultures. It provides clarity to support legislative regulation of folkloric expressions in intellectual property law. In Ethiopia as of now there is no database for TCEs. Apart from the collection made by Different individuals and an association there is no collection of TCEs in the country. For example the Niqiya oral literature association was established in 2002, with the objective to collect, analyze, classify and publish different oral literary materials of various nations and nationality of Ethiopia<sup>343</sup>.

Currently, the EIPO is working to establish a national data base for community knowledge that includes TMK, GR and TCEs<sup>344</sup>. Before any collection of folklores is made the collection process should be backed by a law. The task of establishing a database for community knowledge is entrusted to EIPO under the draft law<sup>345</sup>. To establish the data base the EIPO has made a research on the matter. The research pointed out the necessity and importance of a data base for the protection and preservation of community knowledge. The experience of China, India and Korea was taken as the best bench mark for the establishment of database in Ethiopia<sup>346</sup>.

Under the draft law database is defined as an information store used to identify and store the countries knowledge with the aid of computer<sup>347</sup>. Registration is allowed under the draft law for the purpose of establishing database<sup>348</sup>. The registration could be made by the owners of the community knowledge or by the EIPO<sup>349</sup>. In order to get registered the community knowledge has to be fixed<sup>350</sup>. However it is to be noted that the fact that it is

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<sup>343</sup> . *Supra* note 282

<sup>344</sup> . *supra* note 287

<sup>345</sup> . *Supra* note 316. Art. (8(2))

<sup>346</sup> . የማህበረሰቦች እውቀት መረጃ ቋት መመስረት አስፈላጊነትና ምርጥ ተሞክሮ የኢትዮጵያ አዕምሯዊ ንብረት ጸ/ቤት የኮፒራይትና የማህበረሰቦች እውቀት ጥበቃና ልማት ዋና የሥራ ሂደት ሚዳዊያ 2005 ዓ.ም.

<sup>347</sup> . *Supra* note 316. Art. 2(8)

<sup>348</sup> . *Id.* Art. 7(1)

<sup>349</sup> . *Id.*

<sup>350</sup> . *Id.* Art 7(4)

not registered doesn't mean it's not going to be protected. Fixation is only required in order to get registered not protected<sup>351</sup>.

However, because of the money, involvement of Information Technology experts that are essential to ensure digital recordings are being properly stored and cataloged and the time it takes to establish data base the EIPO has decided to give priority to the establishment of database for TMK.

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<sup>351</sup> . Id Art.7(5)

## CHAPTER FIVE

### 5 Conclusions and Recommendations

#### 5.1. Conclusion

The absence of a clear understanding of TCEs as well as a well-defined policy and regulatory structure has contributed to the current appropriation and inefficient use of TCEs. Communities have thus failed to realize the full potential of their TCEs as a tool for socioeconomic development.. TCEs are currently used by members and non-members of communities without an understanding about how to clearly define them. The TCEs are also communally owned which creates challenges in proper accountability for use.

Discussions on international legal norms for the protection of TK/TCE have been ongoing since the late 1990s. It has been discussed in several international forums. The increased interest in this sphere is primarily a response to the negative effects of economic globalisation on indigenous communities. In particular, there is a risk of the knowledge and creativity of traditional communities being continuously appropriated and commercialised by global players without any possibility for these communities to prevent this<sup>352</sup>. However, even if four decades have passed only little advances have been made on the most important issues like the subject matter, beneficiaries, rights, or protections

In order to control misappropriation of expressions of folklore, today countries use the existing intellectual property regime or they establish of a *sue generis* system. In Ethiopia even though the country has so many TCEs a law to protect it has yet to come out. The conclusion is that without developing and agreeing upon a clear understanding of TCEs, they will be constantly subjected to misuse.

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<sup>352</sup> . *supra* note 163

## 5.2. Recommendations

This paper has discussed significant problems with protecting TCEs under modern intellectual property laws. The problem emanates from the very nature of Traditional cultural expressions. TCEs are created in a gradual fashion for use by traditional communities which eventually own it and as such expect a group right in the TCEs which can exist in perpetuity.

- Accordingly, the writer endorses the adoption of separate legal arrangements to accommodate the uniqueness of the Ethiopian folklore. It is imperative to come up with laws that Confers IP rights and entitlements in the creators of any TCEs works by passing a sui generis law on culture recognizing entitlements, rights and obligations of authoring communities.
- The law on TCEs should reflect a clear policy direction and stipulate a clear objective for protection that strikes a balance between recognizing the rights of communities in their TCEs and the society's interest in using TCEs as inspiration for further development and dissemination and individual creativity.
- The role of administrative bodies is most significant in the protection of TCEs. Administrative support is important because the communities that produce these works may not have the capacity to conduct arms-length commercial transactions to obtain appropriate remuneration for their works. They may also lack the capacity to pursue infringers in courts of law. Therefore, a clear law should be stipulated to designate an appropriate body to assist authoring communities in identification, conservation, preservation, dissemination and protection of expressions of folklore
- Creation of databases and other records of TCEs serve as a tool for the proper administration of TCEs as well designating owners of the particular TCEs. As a result a clear law on the documentation, recording and archiving of what constitutes each area of an Ethiopian folkloric expressions that ought to be protected against inappropriate exploitation must be promulgated.
- A clear law should be stipulated that confers the right to communities to utilize the fees collected from the transfer of some or the whole right communities have on TCEs on the development of the authoring community itself.



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