

Law and Policy of Traditional Cultural Expressions: A Global Perspective

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INTRODUCTION

A music CD named Deep Forest was released in the year 1992. The music was made by using samples from the folk music of West Africa and various other parts of the world. It became a great success with over 2 million copies being sold in the succeeding year. The music in the CD was also used in a number of commercials including Coca-Cola, Porsche and Sony. Though the recording notes for the album promised to donate some amount to a fund for the welfare of the communities from which the music was taken, it never happened.¹

Around 5,000 indigenous and tribal groups and 300 million indigenous people are living amongst approximately 70 countries of the world.² Indigenous and traditional communities have always had a concern regarding commercial exploitation of their cultural expressions without their consent³ and they have viewed it as a threat to their cultural heritage. These cultural expressions can be called 'Traditional Cultural Expressions' (TCEs) or 'Expressions of Folklore' or simply 'Folklore'.⁴ Folklore represents the cultural heritage of a nation and reflects its socio-cultural identity. This might be a reason why nations across the world are very possessive about it.⁵

Along with its cultural value, the commercial potential of the traditional art forms of many countries is also immense.⁶ This can be seen as countries did a lot of efforts to protect their

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¹ ANTHONY SEEGER, *Traditional Music Ownership in a Commodified World*, in *MUSIC AND COPYRIGHT 225* (Simon Frith & Lee Marshal ed., 2004).

² ILO, Regional Office for Asia and the Pacific, *Indigenous people still the poorest of the poor*, (8 August 2001), available at http://www.ilo.org/asia/info/public/pr/lang-en/WCMS_BK_PR_26_EN/index.htm.

³ Prof. Paul Kuruk, *Key Policy Issues on Intellectual Property and Traditional Cultural Expressions*, http://www.wipo.int/edocs/mdocs/tk/en/wipo_iptk_ge_17/wipo_iptk_ge_17_presentation_3kuruk.pdf. (last updated Feb. 13, 2018)

⁴ WIPO, *Consolidated Analysis of The Legal Protection of Traditional Cultural Expressions/ Expressions of Folklore*, 6 (May 2, 2003), http://www.wipo.int/edocs/pubdocs/en/tk/785/wipo_pub_785.pdf

⁵ Mrs. P.V. Valsala G. Kutty, *National Experiences with the Protection of Expressions of Folklore/Traditional Cultural expression: India, Indonesia and the Philippines*, 4 (Nov. 25, 2002), http://www.wipo.int/edocs/pubdocs/en/tk/912/wipo_pub_912.pdf

⁶ SILKE VON LEWINSKI, *INTERNATIONAL COPYRIGHT LAW AND POLICY* 260 (1st ed. 2008).

TCEs after they were decolonized.⁷ In numbers, the folk arts and crafts industry of India alone was \$6.1 billion between 2000 and 2001. In China this is over CNY¥10 billion.⁸

There is a divide between the countries seeking protection of their TCEs and many western countries which believe that TCEs have origin in the distant past and have fallen into public domain especially with reference to Intellectual Property Rights.⁹ Though it cannot be denied that some efforts have taken place at the international level for the protection of TCEs, whether they have succeeded in achieving the objective is something to be answered.

The term ‘folklore’ was first coined by William Thomas in 1846.¹⁰ Expression of Folklore have been defined as “*any form of expressions, tangible or intangible, or a combination thereof, which are indicative of traditional culture and knowledge and have been passed on from generation to generation, including, but not limited to: (a) phonetic or verbal expressions; (b) musical or sound expressions; (c) expressions by action; and (d) tangible expressions*”.¹¹ It is important to note here that this definition distinguishes itself from the notion of Traditional Knowledge (TK). In simple term TCE can be understood to be referring to subject matters which are protected by copyright.¹²

This research paper will analyze the global law of policy of TCEs. The paper has been divided into four parts. Part one deals with various forms of legal protections that can be used for the protection of TCEs. This will include protection within intellectual property and outside intellectual property. Part two deals with the international attempts that have happened in the past or are currently under way that seek to protect TCEs in some or the other way. Part three deals with the protection afforded to TCEs in various countries around the globe. This will include countries from Africa, Asia-Pacific and Latin America. Finally, part four will deal with documentation of TCEs for its protection and preservation. Initiatives at international, national and individual level will be discussed.

⁷ CHRISTOPH ANTONS, *Intellectual Property Rights in Indigenous Cultural Heritage: Basic Concepts and Continuing Controversies*, in INTERNATIONAL TRADE IN INDEGINOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES 144 (Christoph Beat Graber& Karolina Kuprecht & Jessica C. Lai ed., 2012).

⁸ LUO LI, INTELLECTUAL PROPERTY PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS: FOLKLORE IN CHINA 27-28 (1st ed. 2014).

⁹ KAROLINA KUPRECHT, INDEGINOUS PEOPLES’ CULTURAL PROPERTY CLAIMS: REPATRIATION AND BEYOND 46-47 (1st ed. 2014).

¹⁰ Gertrude Torkornoo, *Creating Capital from Culture - Re-thinking the Provisions on Expressions of Folklore in Ghana's Copyright Law*, Annual Survey of International & Comparative Law, Vol. 18, 9 (2012).

¹¹ Draft Articles on TCEs, Art. 1 (2017).

¹² ENYINNA NWAUCHE, THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS IN AFRICA 19 (1st ed. 2017).

PROTECTION OF TCEs

A. Protection of TCEs with Intellectual Property

TCEs are very important cultural and economic assets of a community.¹³ Like other subject matters of intellectual property, this economic and cultural value of TCEs is also capable of being exploited by way of copying, adaptation and other forms of commercial exploitation.¹⁴ It is therefore important to protect TCEs within the framework of IP. Though copyright seems to be the best way of protection, it can also take place within other forms of Intellectual Property.

(i) *Protection under Copyright*: - The first major attempt for the protection of folklore at the international level took place at the Stockholm revision of the Berne convention which is the apex international agreement on copyright. This was done by adding Art 15(4) which gives protection to “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.” Though there was no explicit mention of the term folklore, as suggested by the delegation from India, it was taken into account that this provision can protect folklore.¹⁵ Further it was left upon the countries to appoint a competent authority which shall represent the unknown author and shall be responsible for enforcement and protection of this right.¹⁶ This authority shall be acting like an editor of the pseudonymous or anonymous works.¹⁷ Though this attempt can be seen as a major step, it did not serve the purpose adequately. This can be seen from the fact that only one notification, from India, has been given to the WIPO Director General regarding designation of such authority.¹⁸

Although this attempt can be seen as a major step towards creating awareness regarding folklore, there are major problems with respect to protection of folklore under the ambit of Art 15(4) or copyright as general. First, there is no author or co-authors in case of folklore as they pass on within a community from generations to generations.¹⁹ The application of the principle

¹³ WEND B. WENDLAND, “*It’s a small world (after all)*”: *Some Reflections on Intellectual Property and Traditional Cultural Expressions*, in INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS IN A DIGITAL ENVIRONMENT 154(Christoph Beat Graber & Mira Burri-Nenova ed., 2008)

¹⁴ WENDLAND, *supra* note 13, at 167.

WIPO, *supra* note 4, at 29.

¹⁵ Agnes Lucas-Schloetter, *Folklore*, in INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE 266(S. Von Lewinski ed., 2004)

¹⁶ Lewinski, *supra* note 6, at 535.

¹⁷ Masouye, *Guide to the Berne Convention (WIPO, Geneva, 1978)*, No. 15.11 p.95.

¹⁸ Lucas-Schloetter, *supra* note 15, at 268.

¹⁹ *Id.* at 294-295.

of anonymous works in this case does not solve the problem as the duration of protection, in principle, would have expired long time ago.²⁰ Secondly, the principle of limited duration of copyright protection is completely opposed to the concept of folklore.²¹ Thirdly, the concept of originality under copyright which constitutes author's own intellectual creation, does not aptly apply to folklore which evolves perpetually from one generation to another.²² And lastly, many common law countries have a requirement of fixation of the work in some material form which is completely opposed to folklore which is generally passed on orally.²³

Though direct protection of folklore under copyright seems to be difficult, there can be indirect protection under copyright and related rights. Works which are based on folklore i.e. adapted works and translated works can be protected under copyright. However, the protection extends only to the creative additions and not to the folklore itself.²⁴ The protection also extends with regards to the related rights e.g. when a phonogram producer makes sound recording of a traditional song, he acquires a neighboring right in the recording.²⁵

(ii) *Protection under other forms of Intellectual Property*- The subject matter of folklore which overlaps with intellectual property other than copyright can be protected in some other form as well.

Design law applies to 2d and 3d objects having artistic value, intended to have some industrial application. Design law can also protect adaptations of folklore just like copyright does.²⁶

Trade Marks are signs which distinguish goods or services of one undertaking from those of other undertakings.²⁷ The biggest advantage of protection under trade mark is that it is indefinite in time.²⁸ Trade mark can be used to protect distinctive indigenous names, signs or symbols²⁹ which include words and sounds i.e. instrumental music or popular songs.³⁰

²⁰ Lewinski, *supra* note 6, sec. 20.07.

²¹ Lucas-Schloetter, *supra* note 15, at 297; Lewinski, *supra* note 6, sec. 20.08.

²² Lucas-Schloetter, *supra* note 15, at 292-294.

J.A.L. STERLING, *WORLD COPYRIGHT LAW* 337 (3rd ed. 2011).

²³ Lucas-Schloetter, *supra* note 15, at 291-292; Lewinski, *supra* note 6, sec. 20.09.

²⁴ Lewinski, *supra* note 6, sec. 20.11.

²⁵ WIPO Performances and Phonograms Treaty (1996), Art 2(a).

²⁶ Lucas-Schloetter, *supra* note 15, at 305-306.

²⁷ The Agreement on Trade-Related Aspects of Intellectual Property Rights, article 15(1).

²⁸ The Agreement on Trade-Related Aspects of Intellectual Property Rights, article 15.

²⁹ Daphne Zografos Johansson, *The Branding of Traditional Cultural Expressions: To Whose Benefit?* INDIGENOUS PEOPLE'S INNOVATION: INTELLECTUAL PROPERTY PATHWAYS TO DEVELOPMENT 155 (Peter Drahos & Susy Frankel ed., 2012).

³⁰ Lucas-Schloetter, *supra* note 15, at 307.

Associations of indigenous people can also register *collective marks* for use by their members in relation to products or service.³¹ But trademark or collective marks does not provide wholesale protection to their words, symbols, etc but only for the ones related to general area of the folkloric activity.³²

Geographical Indications (GI) aims to identify products originating from a particular territory.³³ GI can be claimed by a particular traditional community in a particular geography in respect of a particular product and can prevent objectionable use by people outside community.³⁴

B. Protection outside Intellectual Property

Folklore can be protected outside intellectual property by means of customary laws, heritage legislations and human rights. These forms of protection, though outside the purview of intellectual property, can sometimes protect TCEs better than intellectual property.

(i) *Protection using Human Rights*- There are several obligations in the international human rights regime which directly or indirectly protect the rights of indigenous people in expression of folklore. Article 15 of International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the “*right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*” Also, Article 27 of International Covenant on Civil and Political Rights (ICCPR) provides to the cultural minorities the “*right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.*” Also, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007 recognizes under article 12(1) the ‘right to repatriation’ for human remains and the ‘right to the use and control’ for ceremonial objects.³⁵

(ii) *Heritage legislation*- Cultural/Heritage legislations at national level inspired by international legal instruments like the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972³⁶ can protect TCEs in a form and manner suited according to the particular country. The UNDRIP Convention on Stolen or Illegally Exported

³¹ Johnsson, *supra* note 29, at 159.

³² *Supra* note 30.

³³ Agreement on Trade-Related Aspects of Intellectual Property Rights, article 22(1).

³⁴ Lucas-Schloetter, *supra* note 15, at 311; Johnsson, *supra* note 29, at 155.

³⁵ Kuprecht, *supra* note 9, at 76.

³⁶ Lucas-Schloetter, *supra* note 15, at 321.

Cultural Objects, 1995 may be used as well to protect folklore at the national level. There are several other such international conventions but the form of protection they provide for folklore is more or less the same.

(iii) *Customary Laws*- Another important form of protection for folklore can be by the means of customary laws which may be defined as non-codified practices of an ethnic community.³⁷ When these customary laws and customs of indigenous people take shape of a binding law, the regulatory regimes is known as a sui generis system.³⁸ Sui generis protection models of many countries have been discussed later in detail which will help us understand this form of protection better.

INTERNATIONAL INITIATIVES FOR PROTECTION OF TCEs

There have been several attempts at the international level for the protection of TCEs. One of the earliest initiatives in this regard was during the Stockholm revision of the Berne convention which has already been discussed earlier.

A. WIPO Model provisions

(i) *The Tunis Model Law on Copyright (WIPO/UNESCO, 1976)* - A committee of governmental experts met in Tunis in 1976 and came out with the Tunis model law on copyright to assist developing countries in drafting their copyright law in general.³⁹ These model provisions also contained provisions regarding folklore. These provisions defined folklore and most importantly gave them unlimited duration of protection without requirement of fixation.⁴⁰ Like the Berne convention, the moral and economic rights in TCEs were authorized to vest in a national competent authority.⁴¹ The model provisions also established the concept of “Domaine public payant” under which the works of folklore are to be considered part of the public domain which can be used by subjecting the user to the payment of a fee. This fee shall then be used “to protect and disseminate national folklore.”⁴²

(ii) *The Model Provisions for National Laws on the Protection of the Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions (WIPO/UNESCO, 1982)* - In the year 1982 another WIPO/UNESCO committee of governmental experts adopted the ‘model

³⁷ Republican Constitution of Ghana (1993), Art.11(3).

³⁸ Kuprecht, *supra* note 9, at 165.

³⁹ Lewinski, *supra* note 6, at sec 20.30; Lucas-Schloetter, *supra* note 15, at 340.

⁴⁰ Tunis Model law (1976), s6, s18(iv), s6(2).

⁴¹ Tunis Model law (1976), s6.

⁴² Tunis Model law (1976), s17.

provisions for national laws on the protection of expressions of folklore against illicit exploitation and other prejudicial actions'. Unlike the Tunis model law which chose copyright approach for protection of folklore, this model provisions chose a sui generis model of protection. The model provisions expressly covered 'expressions of folklore' rather than 'works of folklore' due to the fact that they were specific provisions that did not derive from copyright.⁴³ The model provisions did not contain any express provision regarding competent authority which could be designated with the exercise of rights; rather it was believed that the rights should vest in the community of the origin of folklore which could have only been possible when the community was organized enough. Hence this was left upon the countries to decide. These provisions also laid down the obligation to indicate the source of any identifiable expression of folklore.⁴⁴

B. Draft Treaty and subsequent WIPO efforts

After the model provisions of 1982, a WIPO/UNESCO group of experts proposed to bring out a draft treaty based on these model provisions. Many participants considered it to be a premature idea as countries were still inexperienced in the protection of folklore at the national level. The expert group identified the difficulty in identifying expressions of folklore to be protected in other member countries and also lack of a dispute settlement mechanism.⁴⁵

After the efforts to bring a treaty failed in 1982, the debate re-emerged around 1996⁴⁶ and a forum was organized in Phuket in 1997.⁴⁷ This forum adopted an action plan was suggested on for bringing out a new international agreement on sui generis protection of folklore.

C. WIPO Intergovernmental Committee

The WIPO Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore held its first session in May 2001 and is going to held its 35th session in March 2018.⁴⁸ The aim of this committee is to bring an international legal instrument including protection for traditional cultural expressions. The committee seems to have been slow in reaching its objective as even the delayed deadline of 2011 has not been

⁴³ Commentary on the Model Provisions, No. 32.

⁴⁴ Lewinski, *supra* note 6, at sec 20.31.

⁴⁵ Lewinski, *supra* note 6, at sec 20.32.

⁴⁶ *Id.*

⁴⁷ WIPO, *UNESCO-WIPO World Forum on the Protection of Folklore*, (Apr. 8-10, 1997) ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_758efs.pdf

⁴⁸ WIPO, *The WIPO Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* <http://www.wipo.int/tk/en/igc/>

met.⁴⁹ An important and healthy aspect of these negotiations is that they also include representatives of the indigenous communities.⁵⁰ The latest draft for the protection of TCEs was published on June 16 2017 and contains 15 articles.⁵¹

These draft articles again take the approach of either assigning the rights to the community itself or to a competent authority as the situation permits in a particular country.⁵² This approach is similar to the model provision of 1982. The draft articles seem to have adopted a very flexible approach and give several options under many articles so that the countries can draft their legislations at national level very comfortably. The draft article 15 which talks about capacity building and awareness rising is an important part of the draft as awareness at this point is of utmost importance. It seems as of now that the IGC has not been able to bring about a radical change or development in current international regime of TCEs.

A major reason behind the failure of these negotiations is the unwillingness of the western countries to bring out an international agreement. Kuruk attributes this to a lack of interest by the traditional knowledge user countries, and states that there may even be evidence of their efforts to stall and protract the process.⁵³ This seems unfair as the developing countries have been very cooperative in the classical intellectual property rights treaties in the past which can be seen to be benefitting the developed countries more. Silke Von Lewinski believes that the developed countries should show a same amount of cooperation in this regard as well because they might result into very small economic losses but will definitely bring them great profits in terms of good will.⁵⁴

⁴⁹ TANIA BUBELA AND E RICHARD GOLD, *GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE: CASE STUDIES AND CONFLICTING INTERESTS* 12 (1ST ED., 2012).

⁵⁰ Natalie Stoianoff, *The World Intellectual Property Organisation (WIPO) and the Intergovernmental Committee: Developments on Traditional Knowledge and Cultural Expressions*, University of Technology Sydney, Faculty of Law Legal Studies Research Paper Series, 39 (Mar. 2014).

Also see generally WIPO, *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions* (2015) http://www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf

⁵¹ WIPO, *The WIPO Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* <http://www.wipo.int/tk/en/igc/>

⁵² Draft Article on TCEs (2017).

⁵³ Paul Kuruk, 'Goading a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Foreign Traditional Knowledge in the United States' 34, *Pepperdine Law Review*, 72(2007)

⁵⁴ Lewinski, *supra* note 6, at sec 20.42.

ROUND THE GLOBE PROTECTION REGIMES

A round the globe analysis of the various countries which directly or indirectly give protection to TCEs is important to understand which model fits best for it. This part of the paper has been divided in three sub-parts: Africa, Asia pacific and Latin America.

Africa

Africa is one of the most culturally rich continents in the world and it is very normal to expect African countries taking initiatives for protection of their folklore. Though there are many such countries, this paper has selected few out of them to cover almost all kinds/models of protection.

(i) *Tunisia* - Tunisia has a great wealth of cultural heritage including folk music, art, dances, handicrafts, etc.⁵⁵ Recognizing the fact that this heritage has a great traditional and commercial value, Tunisia was the first country ever to provide protection for TCEs in the year 1966.⁵⁶ The Tunisian step in protecting folklore was inspired from the first African Working Party on Copyright which held in Brazzaville in 1963 and which discussed about legal protection of folklore.⁵⁷ The 1994 act which is a revised version of the 1966 act is responsible for the protection of folklore in Tunisia.⁵⁸

To summarize the protection model of Tunisia, the works of folklore can be exploited in return of fees which is set by a body for the Protection of Authors' Rights OTPDA (Organisme Tunisien de Protection des Droits d'auteurs). The most important aspect of the protection system of folklore in Tunisia is that along with the legal protection the government also ensures protection by means of documentation and preservation activities carried out by the ministry of culture, youth and leisure.⁵⁹ The importance of these activities has been highlighted later in this paper.

(ii) *Ghana* - Ghana has a *sui generis* model of protection under which the ownership of folklore vests with the state. The Copyright Act (CA) of Ghana was enacted in the year 1961 but it wasn't until 1985 that the protection was extended to folklore. This was done after the model

⁵⁵ Draft Article on TCEs (2017).

⁵⁶ Daphne Zografos, *The Legal Protection of Traditional Cultural Expressions: The Tunisian Example*, *The Journal of World Intellectual Property*, Vol. 7, No. 2, pp. 229-242, at 230 (2004).

⁵⁷ Samantha Sherkin, *A Historical Study on the Preparation of the 1989 Recommendation on the Safeguarding Traditional Culture and Folklore* wmnv.folklife.si.edu/unesco/sherkin.htm

⁵⁸ Zografos, *supra* note 57, at 231.

⁵⁹ *Id.* at 239.

provisions came out in the year 1982.⁶⁰ Section 76 of the CA Ghana defines an expression of folklore as “the literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which are created, preserved, and developed by ethnic communities in Ghana, or by an unidentified Ghanaian author.”⁶¹ Section 4 of the CA Ghana vests the ownership of expressions of folklore with the president of Ghana.⁶² These rights vest for perpetuity meaning that the expressions of folklore can never enter into public domain.⁶³ Any commercial use of folklore requires permission from the national folklore board which exercises the rights vested with the president.⁶⁴ Also sec 19 provides for non-commercial uses where the permission is not required.⁶⁵ An example of working of this kind of a system is payment of \$2000 by a Japanese firm JVC which used Ghanaian folklore in a documentary on African music and dance.⁶⁶

Though Ghana has its own trademark, designs and GI act but the possibility of protection of folklore under them has not been considered yet due to a presence of a strong sui generis model.⁶⁷

(iii) *Nigeria* - The Nigerian copyright act of 1988 provides for a framework for the protection of folklore. The act defines folklore as “a group-oriented and tradition-based creation by groups or individuals reflecting the adequate expression of their cultural and social identity, their standards and values as transmitted orally, by imitation or by other means including folklore, folk poetry and folk riddles; folk songs and instrumental folk music; folklore dances and folk plays; and the production of folk arts.”⁶⁸ According to ES Nwauche, the problem in this definition arises from the fact that there are around 250 ethnic communities in Nigeria and no. of sub-ethnic communities which have attained a separate identity over the years and becomes very difficult to identify the communities this definition refers to. Though there is no clear indication of the ownership of folklore but it is reasonable to assume that it vests with the Nigerian copyright board as it is responsible for giving permissions for utilization of folklore.⁶⁹ Like the Ghanaian system here also any commercial exploitation requires permission from the

⁶⁰ Ludewig K, *The nationalization and commercialization of Ghanaian Folklore*, Michigan Journal of Public Affairs 1-39 (2009).

⁶¹ Copyright Act Ghana (1961), s76.

⁶² Copyright Act Ghana (1961), s 4.

⁶³ Copyright Act Ghana (1961), s17.

⁶⁴ Copyright Act Ghana (1961), s4(1) and s44.

⁶⁵ Copyright Act Ghana (1961), s19.

⁶⁶ Nwauche, *supra* note 12, at 65.

⁶⁷ *Id.* at 215-216.

⁶⁸ Nigerian Copyright Act (1988), Art. 28(5).

⁶⁹ Adewopo A, *Protection and Administration of Folklore in Nigeria*, Script-Ed 1-10 (2006).

copyright board.⁷⁰ In spite of such a *sui generis* model of protection there is lack of applicability on the ground. This is evident from the fact that there is no recorded instance of the copyright board giving authorization for the use of folklore.⁷¹ Nigerian film industry is one of the largest in the world and there is regular use of folklore in them without due authorization which is a sign of weak enforcement mechanism.

Kenya has a folklore protection system which is very similar to the model of Ghana and Nigeria.⁷²

(iv) *South Africa* - The South African National Heritage Resources Act (SA NHRA) forms the framework for the *sui generis* protection of folklore. The South African folklore is part of the 'national estate'⁷³ and the NHRA establishes different agencies at national and regional level for the management of these national estates.⁷⁴ This includes authorization for any use of the folklore.⁷⁵ An example of NHRA agency is promotion of the marginalized 'NAMA' traditional 'step dance'.⁷⁶ This system is a bit different from Ghana Nigeria because the *sui generis* system is outside the intellectual property. The system might look very healthy for the protection of folklore, but an in-depth analysis reveals that the focus of this system is on the protection of tangible heritage like monuments which is not usually associated with expressions of folklore.

The South African intellectual property rights regime seems to protect the folklore better than *the sui generis* system. In 2004 the South African cabinet approved a policy on an Indigenous Knowledge System (IKS)⁷⁷ for the protection of indigenous knowledge through intellectual property system. This led to the passing of the Intellectual Property Laws Amendment Act (IPLAA) in 2013. This act makes changes in the various IP legislations in order to accommodate the protection for TCEs. Protection to indigenous terms and expressions is given by Trade Marks Act South Africa.⁷⁸ Protection to indigenous designs is given by the South African Designs Act. Special category of rights termed "performance in traditional works" is now incorporated, through amendments, to the Performer's Protection Act South Africa. The ownership of the work vests with the particular indigenous community⁷⁹ and a prior informed

⁷⁰ Nigerian Copyright Act (1988), Art. 28.

⁷¹ Nwauche, *supra* note 12, at 61.

⁷² *Id.* at 122.

⁷³ South African National Heritage Resources Act (1999), Sec 3(2).

⁷⁴ Nwauche, *supra* note 12, at 80.

⁷⁵ South African National Heritage Resources Act (1999), Sec 27.

⁷⁶ Nwauche, *supra* note 12, at 176.

⁷⁷ Policy document on the Indigenous Knowledge Systems (IKS).

⁷⁸ Nwauche, *supra* note 12, at 113.

⁷⁹ South African Copyright Act (2002), s28(d).

consent of the indigenous community is required along with a benefit sharing arrangement.⁸⁰ Along with this form of protection the IPLAA has also established the National Trust and Fund for Indigenous Knowledge the promotion and preservation of indigenous cultural expressions and knowledge.⁸¹ One of the most important reforms that this act has brought is the establishment of a dispute settlement body which overlooks any dispute emanating from the changes brought about by the IPLAA 2013.⁸²

Asia Pacific

Asia Pacific is another region which is rich in culture and heritage. The protection models of some countries are unique and hence important for our discussion. It will be seen that along with the government, the judiciary has also been vocal about the protection of TCEs.

(i) *China* - China has a mass of folklore resources.⁸³ The Copyright Law of 1990 states that “[r]egulations for the protection of copyright in expressions of folklore shall be established separately by the State Council”.⁸⁴ Though the Chinese legislations are no special with regards to folklore protection but the efforts of the judiciary are worth discussing. The most important case in this regard is *Hezhe Ethnic Minority Township Government vs. Song Guo* (2002). In this case a song ‘wusuli chuangey’ was made by modifying a folk song of the ethnic Hezhe community. The local government of the Hezhe people represented them in court and claimed that the folk song on which ‘wusuli chuangey’ was based is a folk song of the community which has passed onto them from generations and it should be protected under the copyright law. The court found that the song was indeed based on the folk song and ruled that it should be identified as an adaptation rather than an original composition. Also the court added that any product or broadcast of the song should recognize the contribution of the Hezhe community and 30% of the song earnings have to be given to the community.⁸⁵

In 2011, the Intangible Cultural Heritage Act of the People’s Republic of China came into effect⁸⁶ which can be seen as a major step towards the protection of folklore. The act includes

⁸⁰ South African Copyright Act (2002), s28G(4).

⁸¹ Sec. 28(1) of the South African Copyright Act (2002) envisages the establishment of a Trust made up of five members and to be known as the National Trust for Indigenous Knowledge.

⁸² South African Copyright Act (2002), s28K (2).

⁸³ LI, *supra* note 8, at 14.

⁸⁴ Copyright Law of 1990, Art. 6.

⁸⁵ LI, *supra* note 8, at 131-135.

Also see Daphne Zografos, *Legal Protection of Traditional Cultural Expressions in East and Southeast Asia: An Unexplored Territory*, 18 AIPJ 167, 170-171(2007).

⁸⁶ Christoph Antons, *Geographies of knowledge : cultural diffusion and the regulation of heritage and traditional knowledge/cultural expressions in Southeast Asia*, WIPO journal, vol. 4, no. 1, pp. 83-91, 86 (2012).

“traditional arts, calligraphy, music, dances, drama, *Quyi* and acrobatics; traditional technology, medicines and calendars; traditional courtesy, festivals and folk customs; traditional sports and carnivals; other intangible cultural heritages” as to be a part of the folklore.⁸⁷

(ii) *Indonesia* - Indonesia is a group of several islands which inhabit several indigenous communities like Javanese and Sudanes. The gamelan music, handmade crafts, Wayang puppet drama and dances are some of the examples of the TCEs in Indonesia.⁸⁸ Protection to folklore is given under sec 10 of the copyright act of Indonesia. According to the act folklore which contains “stories, tales, fairy tales, legends, chronicles, songs, handicrafts, choreographies, dances, calligraphies and other works of art” is a common property held by the state.⁸⁹ This provision created several problems due to the fact that this would restrict domestic people to use these folklores. According to Ajip Rosidi, this led to a compromise where the state ownership of the folklore would extend only ‘with regards to foreign countries’⁹⁰. This provision aims to prevent monopolization, commercialization and damage of Indonesian cultural heritage by foreign entities.⁹¹ Any exploitation by the foreigners require license from the government. In reality no such license has ever been issued⁹² and according to academicians, this regulation is not much effective on the ground as any foreigner can use these folklores by registering a company in Indonesia.⁹³

(iii) *Philippines* - Philippines has around 12 million indigenous people which form about 13% of its population.⁹⁴ TCEs form an important part of the social, cultural and economic life of Philippines. The constitution of Philippines, 1987 mandates protection of indigenous heritage⁹⁵ which resulted in the passage of the 1997 Indigenous People’s rights act.⁹⁶ Section 32 of the Indigenous Peoples Rights Acts guarantees “community intellectual rights” and Sec. 34

The text is available at http://www.wipo.int/wipolex/en/text.jsp?file_id=215504

⁸⁷ Intangible Cultural Heritage Act of the People’s Republic of China (2001), Article 2.

⁸⁸ Kutty, *supra* note 5, at 30.

⁸⁹ Copyright Act of Indonesia (2002), Sec 10(2).

⁹⁰ A. Rosidi, *Undang- Undang Hak Cipta — Pandangan Seorang Awam (The Copyright Act - A layman’s perspective)*, Jakarta, 79-80 (1984).

⁹¹ CHRISTOPH ANTONS, *Traditional Knowledge and Intellectual Property Rights in Australia and Southeast Asia*. In *NEW FRONTIERS OF INTELLECTUAL PROPERTY LAW: IP AND CULTURAL HERITAGE* 48-49 (C. Heath & A. Kamperman Sanders eds., 2005).

⁹² Antons, *supra* note 86, at 90.

⁹³ A. Sardjono, “*Perlindungan Folklore: Apakah Rezim Hak Cipta Memadai?*” (*The Protection of Folklore: Is the Copyright Regime Sufficient?*), in: *Jurnal Hukum Internasional*, Vol. 1 No. 1., 124-137(2003).

⁹⁴ Kutty, *supra* note 5, at 30-31.

CIA: The world fact book: July 2006 estimate.

⁹⁵ Constitution of Philippines, Article II – Section 22.

⁹⁶ Zografos, *supra* note 85, at 172.

recognizes “Rights to Indigenous Knowledge Systems and Practices”. It can be concluded that the rights are vested with the community itself and the duty of the state is just to preserve and protect these rights. The IPRA creates a National Commission on Indigenous People for the implementation of programs and policies under the act.⁹⁷

One of the most important features of this act is the requirement of free and prior informed consent of the communities in accordance with the customary laws in order to exploit their folklore. This system first recognizes the community rights instead of just private property rights and secondly a lot of importance is placed on the customary laws.⁹⁸

The national cultural heritage act of 2009 also protects important cultural property against exportation, modification or demolition.⁹⁹ In general terms “no cultural property shall be sold, resold, or taken out of the country without first securing a clearance from the cultural agency concerned.”¹⁰⁰

(iv) *New Zealand* - Treaty of Waitangi is the founding treaty between the indigenous people of New Zealand (*Maori*) and the British Crown.¹⁰¹ The interpretation of this treaty is governed by the Treaty of Waitangi Act 1975 by means of a tribunal established by this act. This act provides that Māori have ‘unqualified rights over their *‘taonga* (treasures)’¹⁰² which includes cultural heritage.¹⁰³ These rights also extend over the IP aspects of the TCEs of Maori. For example According to the trademarks act of 2002, the Commissioner of Trade Marks can reject those trade mark applications which are offensive for the Maori.¹⁰⁴ The ‘Wai 262 report’ that came out in the year 2011 again recommended the government to modify the IP regime so that it best serves the interests of the Maori.¹⁰⁵

In Australia also, the Heritage Protection Act (HPA) protects folklore in the form that it prevents it from any injury or desecration.¹⁰⁶ Along with this Australia has also developed a

⁹⁷ Indigenous People’s Rights Act (1997), s3(k).

⁹⁸ Kutty, *supra* note 5, at 27.

⁹⁹ Republic Act No.7355, the Manlilikha ng Bayan Act.

¹⁰⁰ National Cultural Heritage Act (2009), s11.

¹⁰¹ Peter Dengate-Thrush, ‘Wai-262: *New Zealand Indigenous Flora and Fauna Claim*’, *New Zealand Intellectual Property Journal*, 1 (12), pp. 303-310, at p. 303 (1998).

¹⁰² Ministry for Culture and Heritage, Differences between the texts (20 December 2012) *New Zealand History*

¹⁰³ Waitangi Tribunal, Report of the Waitangi Tribunal on Te Roroa (1992).

¹⁰⁴ Trade Marks Act (2002), s17(1)(c) and s178.

¹⁰⁵ JESSICA CHRISTINE LAI, INDIGENOUS CULTURAL HERITAGE AND INTELLECTUAL PROPERTY RIGHTS: LEARNING FROM THE NEW ZEALAND EXPERIENCE 223 -300 (2014).

¹⁰⁶ Jake Phillips, ‘Australia’s Heritage Protection Act: An alternative to Copyright in the Struggle to Protect Communal Interests in Authored Works of Folklore’, *Pacific Rim Law and Policy Journal*, Vol. 18, no.3, at p. 567-568(2009).

certification mark system to allow customers to distinguish authentic Aboriginal products¹⁰⁷ but the overall outlook of the regime looks very weak.

(v) *Laos* - Laos protects folklore under the copyright part of its intellectual property law of 2008. The act defines “Artistic work and folklore” as “a result of compilation of the creations traditionally created in community or group reflecting the ways of life of such communities”.¹⁰⁸ The regulation extends only to the requirement of source of folklore and prevention of any damage to its original value by the user of the folklore.¹⁰⁹ The protection seems to be only with regards to the moral rights and not the economic rights of the folklore. A similar kind of protection is also given under the copyright act of Vietnam.¹¹⁰

Along with the protection under IP Laos also has a law on National Heritage, 2005 according to which the state will also “consider” copyright ownership in “national heritage items at national level which have high value, are rare and are of unique national character” and propose them for “registration of ownership and copyright in the name of the nation with international organizations”.¹¹¹ It may be concluded that the government has put a safety valve to prevent exploitation of folklore of national importance.

Latin America

Latin America is again one of the most culturally diverse regions on earth.¹¹² There are several countries in Latin America but for the purpose of this study we will look upon the legal regime of *Panama* in the context of traditional cultural expressions.

With 10% of its population as indigenous¹¹³, Panama is one of the earliest countries in the world to grant protection to TCEs.¹¹⁴ The constitution of Panama mentions that the state will promote and safeguard the culture of Panama¹¹⁵ which resulted in the enactment of the Panama Law, Act 20 of 2000. The act is a result of efforts of the Kuna people, which is an indigenous

¹⁰⁷ Janke T, *Minding culture: case studies on intellectual property and traditional cultural expressions*. WIPO, Geneva (2003) http://www.wipo.int/edocs/pubdocs/en/tk/781/wipo_pub_781.pdf

¹⁰⁸ Intellectual Property Law (2008), s3(32).

¹⁰⁹ Intellectual Property Law (2008), s87.

¹¹⁰ Antons, *supra* note 86, at 169.

¹¹¹ Law of National Heritage (2009), Art 28.

¹¹² See generally ANNA FRIEDERIKE BUSCH, PROTECTION OF TRADITIONAL CULTURAL EXPRESSION IN LATIN AMERICA: A LEGAL AND ANTHROPOLOGICAL STUDY (2015).

¹¹³ According to the census of 2000, there are 285,231 indigenous peoples in Panama.

¹¹⁴ The first known legislation to cover crafts in Panama was the Act 21 of January 30, 1967, which restricts imports of certain articles that are used as substitutes for, imitate, or compete with native artisanal products.

¹¹⁵ Constitution of Republic of Panama, Article 77.

community.¹¹⁶ This law aims at establishing 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" including "folkloric expressions of the indigenous communities."¹¹⁷ The rights vest with the community itself which are represented by their general congresses or their traditional authorities,¹¹⁸ though Anna Friederike Busch believes that there is no clarity as to the ownership.¹¹⁹ The law provides the indigenous communities the collective rights to authorize or prevent: (i) use and commercialization¹²⁰; and (ii) industrial reproduction¹²¹ of their TCEs.

The most unique and important aspect of the panama law is that it establishes a system of registers under which the community seeking protection of their TCEs has the right to frame "rules of use" for their TCEs which then have to be registered with an authority called DIGERPI.¹²² The access to this register has been made public.¹²³ Another important aspect of this act is that it provide for exceptions relating to education only after due authorization¹²⁴ which is very rare. The exception with regard to folkloric dance groups performing in national or international setting exists only when the persons organizing the dancing performances include members of the particular community.¹²⁵

DOCUMENTATION, DIGITIZATION: IS IT THE WAY OUT?

Sometimes initiatives by individuals and organizations at the national and international level can make huge difference. This part of the paper will discuss the benefits of documentation by governments for protection and promotion of traditional cultural expression. Several initiatives have will also be mentioned to get an overall outlook. In seems that there have been many such initiatives in the field of traditional Knowledge and Genetic Resources but relatively lesser for TCEs.

Digital documentation has been suggested as a useful tool for preservation of TCEs by WIPO. This might be due to the reason that it can provide identifiable authorship and fixation which

¹¹⁶ Busch, *supra* note 112, at 281-285.

¹¹⁷ Law No. 20, Panama, Article I; Panama Ministry of Trade and Industries, Executive Decree No. 12, March 20, 2001, Article 1.

¹¹⁸ Executive decree No. 12 of March 20, 2001, Article 5.

¹¹⁹ Busch, *supra* note 112, at 296-302.

¹²⁰ Panama Law No. 20, Article 15.

¹²¹ Panama Law No. 20, Article 20.

¹²² Busch, *supra* note 112, at 316-319.

¹²³ Panama Ministry of Trade and Industries, Executive Decree No. 12, March 20, 2001, Article 12.

¹²⁴ Panama Law No. 20, Article 14.

¹²⁵ Panama Law No. 20, Article 16.

forms the biggest barrier in the protection of TCEs.¹²⁶ Many TCEs can be recorded digitally and reproduced in high resolution over the internet for commercial gain of the community. A model for this purpose can summarize in the following chart¹²⁷:

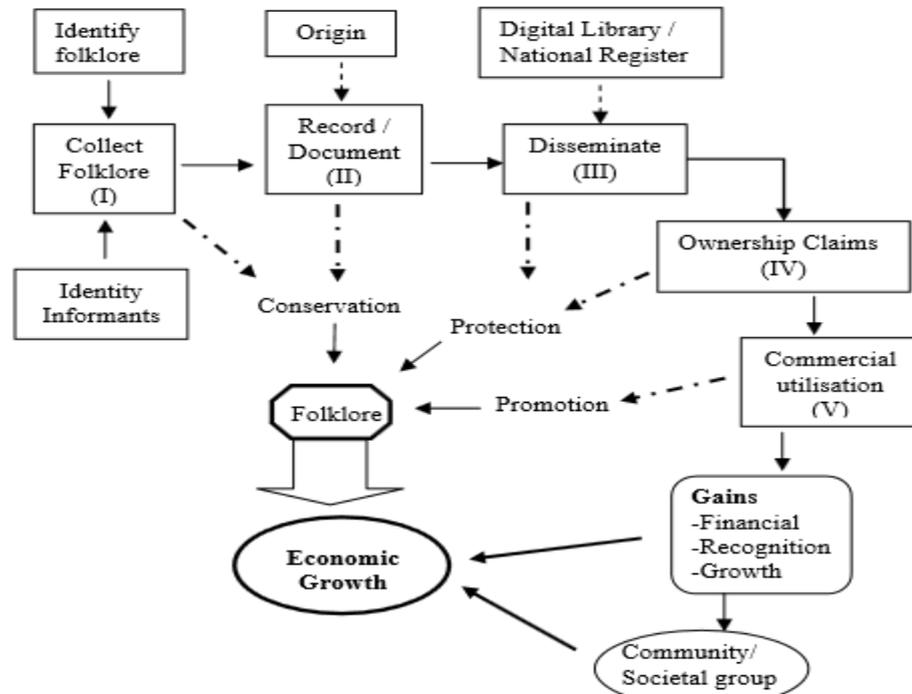


Figure 1: E-Government Approach to Management of Intellectual Property in Folklore

A. Initiatives at the international level

Though there have been various initiatives at the international level but one of the most important amongst them is the Creative Heritage Project of WIPO. The WIPO creative heritage project was started in 2008 after *Maasai*, an indigenous community of Kenya approached WIPO for preservation of its cultural heritage.¹²⁸ The objective of this project is to “...assist indigenous communities to document their own cultural traditions, archive this heritage for future generations, and safeguard their interest in authorizing use of their recordings and traditions by third parties”.¹²⁹ To summarize the initiative WIPO is training the Maasai community to record its TCEs and thereafter managing access to it. As a part of its training WIPO provides for assistance related to Intellectual Property and information technology

¹²⁶ Stephanie Spangler, *When Indigenous Communities Go Digital: Protecting Traditional Cultural Expressions through Integration of IP and Customary Law*, 27 cardozo ARTS & ENT. L.J. 720-723 (2010).

¹²⁷ The chart has been taken from Geetika Goyal & Rajesh Tripathi, *E-Government Approach to Management of Intellectual Property in Indian Folklore*, available at http://www.csi-sigegov.org/1/32_383.pdf

¹²⁸ Wend B. Wendland, *Seeking Tangible Benefits from Linking Culture, Development and Intellectual Property: An Interim report on WIPO’s Cultural Documentation Programme for a Maasai Community and National Museums of Kenya*, *IJIH*, Vol. 4(2), p. 129.

¹²⁹ Creative Heritage Project; (<http://www.wipo.int/tk/en/folklore/culturalheritage/wipo-afc-cds.html>).

during the documentation process. In this process WIPO gets to learn about the practices of cultural institutions and thus can better formulate policies and guidelines regarding the digitization and documentation of TCEs.¹³⁰

Similar types of collaborations have been done with the Intellectual Property Office of Mongolia and traditional music archive, the folk life centre and the National Museum in Sudan.¹³¹

B. Initiatives at national level

Documentation at the national level can take place by two means: either the law related to folklore mandates such documentation or the government takes a separate initiative for this purpose.

Example of former can be found in two countries: Panama and Peru. As already discussed above, law no 20 of 2000 of Panama gives positive protection to folklore after registration. This results in documentation of the TCEs in form of a register which is then made public. Similarly, Peru under Law no. 27811 passed in 2002 creates a regime for the Protection of Collective TK Relating to Biological Resources.¹³²

Some of the initiatives of national governments which are outside a legislative mandate are as follows:

- Taiwan has taken several Digital Documentation Initiatives for preservation of its TCEs. An example of digital documentation is the “Formosa Aborigines Collections” which is an initiative of the National Taiwan Museum under the National Taiwan Museum Digitizing Project. Under this initiative pictures of indigenous people and goods are collected in a digital format. Another initiative “Textile and Ornaments of the Aboriginal People in Taiwan” collects pictures covering ornaments or patterns of textile which have been adopted by Taiwanese aboriginal tribes.¹³³ Also, Ping-Hsun

¹³⁰ Molly Torsen, *Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues*, Intercultural Human Rights Law Review, Vol.3, p.213 (2008).

¹³¹ WIPO, *Creative Heritage Project: IP Guidelines for Digitizing Intangible Cultural Heritage*.

¹³² WIPO, *Documenting Traditional Knowledge – A Toolkit*, p.30 (2017), http://www.wipo.int/edocs/pubdocs/en/wipo_pub_1049.pdf

¹³³ Ping-Hsun Chen, *Exploitation of Works Derived from Indigenous Traditional Cultural Expressions Through a License-to-Read Model on the Digital Book Platform: An Aspect under the Taiwan Copyright Act*, *IurIs dIctIo Año 16. Vol 17 febrero- Julio*, p.14(2015)

Chen suggests that a business model can be formed out of it by compiling all the material in a 'Digital book'.¹³⁴

- British Library Archival Sound Recordings is another initiative of the British Library which is the national library of UK. It aims at digitizing sound recording by British Ethnomusicologists from around the world.¹³⁵ Presently it has around 50,000 recordings in its collection.¹³⁶ The library has a permitted usage code which it has drafted in collaboration with WIPO.

CONCLUSION

After looking upon various laws for protection of TCEs, various international legal obligations and various models of different countries it can easily be concluded that the most important requirement with regards to TCEs is that the countries should unanimously agree that it forms an important part of human culture and heritage. There might be disagreement on the peculiarities of a model TCE regime but there should be consensus they should be protected by some means or the other. The TCE protection regime is so flexible that countries can legislate according to their own policy objectives. Finally, the starting point has to be creation of awareness amongst the people and initiatives such as digital documentation of TCEs.

¹³⁴ *Id.* at 21-25

¹³⁵ Molly Torsen and Jane Anderson, *Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives*, WIPO, p. 74 (2010), http://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf

¹³⁶ About British Library Sounds, available at <https://sounds.bl.uk/Information/About/>