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PROTECTING TRADITIONAL CULTURAL EXPRESSIONS: UNRAVELLING THE SIGNIFICANCE, JUSTIFICATION, AND APPROACHES TO PROTECTION

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ABSTRACT

Traditional Cultural Expressions (TCEs) refer to the manifestations of traditional and indigenous cultural heritage encompassing a wide range of creative expressions such as music, dance, folklore, art, rituals, symbols, and traditional knowledge. These expressions are rooted in specific communities' cultural identity and heritage and are passed down through generations, often forming the basis of their social and spiritual practices. TCEs are significant not only for the communities that create and sustain them but also for humanity's broader cultural diversity and heritage. They are repositories of traditional knowledge, values, and cultural practices that reflect communities' history, beliefs, and identity. TCEs are crucial in maintaining social cohesion, promoting cultural diversity, and preserving intangible cultural heritage. However, TCEs face various challenges in the modern world, including misappropriation, unauthorised commercialisation, and exploitation. Protecting TCEs involves addressing issues of intellectual property rights, cultural heritage preservation, and community rights and ensuring the equitable participation and benefit-sharing of the communities that hold and create these expressions. Efforts are being made at international, national, and community levels to develop frameworks and mechanisms for the protection and promotion of TCEs. These include discussions and negotiations within international organisations like WIPO, the development of sui generis legal frameworks, community-based approaches, and the involvement of indigenous and local communities in decision-making processes. The debate surrounding the protection of Traditional Cultural Expressions (TCE) has persisted for over a decade. Developing nations have consistently advocated for safeguarding intellectual creations from indigenous and local communities, which serve as expressions of their cultural heritage and are recognised as TCE. Consequently, draft

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legislation has been prepared to protect TCE; however, these drafts have not been adopted by countries in their respective jurisdictions. In response, the World Intellectual Property Organization (WIPO) established an Inter-Governmental Committee to facilitate discussions and develop internationally acceptable legislation for TCE protection. Despite nearly 20 years since the first WIPO session, consensus between developed and developing nations remains elusive. Attendance at WIPO IGC sessions has become a routine exercise of discussing and revising drafts without achieving comprehensive approval. Developed nations have raised concerns, asserting that TCE should not be considered subject matter for intellectual property protection. Regrettably, these concerns have not been adequately addressed, resulting in a lack of viable solutions. Moreover, many passionate developing countries have yet to enact domestic legislation for TCE protection, primarily due to an insufficient understanding of TCE characteristics, the imperative of its protection, and the challenges involved. This article aims to shed light on these issues, recognising that understanding an issue is the key to formulating effective solutions, as inherent within every problem lies its solution.

Keywords: Positive protection, Traditional Cultural Expressions, WIPO IGC, Community, Public Domain.

Introduction

Protecting traditional cultural expressions is a complex issue as this intellectual creation does not resemble other intellectual creations currently protected under various IP regimes.² Traditional Cultural Expressions (TCEs) have attributes that set them apart from Intellectual Properties (IPs), like Copyright, patents, and trademarks. TCEs encapsulate diverse communities' heritage, beliefs, and artistic traditions, bearing a collective essence that transcends individual ownership. While IPs focus on commercial value, TCEs intertwine social, spiritual, and historical significance. Preservation of TCEs entails safeguarding cultural continuity, fostering community bonds, and respecting indigenous knowledge. Hence, the uniqueness of TCEs lies in their cultural resonance, contrasting them against the more commercially oriented nature of traditional IP protection.

Discussions for protecting traditional cultural expressions (hereafter referred to as TCE) have been happening for decades. For instance, the Protection of TCE was an issue raised during the negotiation of the Berne convention³ happening in Stockholm. African countries have raised the demand for protecting folklore. In reaction to those demands, an amendment in the Berne

² The characteristics of TCE are unique and are not like the characteristics of IPs such as copyright, patent or trademark.

³ Berne Convention for the Protection of literary and artistic works (Paris act, 1971), (1971).

convention added Article 15(4),⁴ which resulted in protecting works for which the authors are unknown. Article 15 (4) provided that. The primary purpose of this provision is to cover works of what is called "folklore", although the expression is complicated to define and is not used in the Convention.⁵ The provision aimed to allow the countries to claim ownership over works whose authors are unknown if there are grounds to presume that the author of the said work may be a citizen of that country. This amendment did not do any good for the TCE holders; however, this did start the debates more occasionally. Another attempt was a draft legislation created by WIPO- UN called Model Provisions; this again did not converge into the domestic legislation of many countries. It remains a model provision till now. Learning from these failures, WIPO decided to conduct a fact-finding mission that would better explain the needs of the TCE holders and what type of protection they desire. Afterwards, WIPO formed an Inter-Governmental Council to draft international law protecting TCE and TK. It has been around 20 years since the negotiations started, and no international legislation has yet been created. From time to time, WIPO releases draft laws for TCE protection, but only to be amended in the next session. These never-ending negotiations are due to the North-south divide and the inadequate understanding of the TCE.⁶

Considering the ongoing negotiations at WIPO IGC, the present article will try to enhance the knowledge relating to TCE. Section 1 of the paper will address the characteristics of Traditional Cultural Expressions (TCEs). Section 2 will concentrate on the rationale for protecting TCEs and the compatibility of Intellectual Property (IP) safeguards with these objectives. Section 3 will analyse the challenges of TCE protection within the framework of Intellectual Property Rights (IPR), while also proposing potential remedies for these challenges. In the concluding part, specific suggestions that may guide Protecting TCE will be pointed out.

PART 1 – Meaning and Characteristics of TCE

TCE includes both Tangible as well as intangible expressions. Tangible expressions are those we can touch or feel or are reduced to material forms like stone carvings or paintings, while intangible expressions are those we cannot touch. They are not reduced to material forms like the performance of tribal dance. The definition provided by the WIPO IGC committee clarifies that TCE can be tangible or intangible, or a combination of both. Moreover, WIPO IGC has

⁴ Berne Convention for the Protection of literary and artistic works (Paris act, 1971)., Article 15(4) (1971) - "*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*"

⁵ Guide to the Berne Convention for the Protection of literary and artistic works (Paris act, 1971), 95 (WIPO 1978)

⁶ On one side there is demand for exclusive protection for TCEs while the other side holds that TCEs are in public domain and hence exclusive rights cannot be granted.

divided TCE into four categories – Verbal such as folk stories, legends, and poetry; musical expressions (folk songs and instrumental); musical expressions by action, such as popular dances, plays, and shows); tangible expressions, such as productions of folk art, especially drawings, paintings, sculptures, pottery, jewels, costumes, musical instruments, and architectural works.⁷ The expressions which form part of the culture and traditions are available in all forms.⁸ So the inherent nature of TCE is that it can be in the form of Tangible and intangible expressions or a combination of both. Hence, TCE is a basket filled with these expressions and sometimes combinations.

TCE is transmitted from generation to generation. The characteristic of traditional cultural expressions is that they are traditional, which means they are transmitted from one generation to another inside a human group.⁹ In addition, from the earlier definitions of Tradition, a tradition must be passed on from generation to generation.¹⁰ This traditional character resulting from intergenerational transmission differentiates traditional cultural expressions from the rest of the cultural expressions.¹¹ If the present community members create a new expression, it can only become Tradition if it enters the transmission flow from generation to generation. Hence, TCEs are passed on from generation to generation, or an expression of culture will only be considered a TCE when it can be proven that the expression was passed on from their ancestors.

TCEs are collectively held. Previously, it was mentioned that TCE is passed on from generation to generation. Hence it is not held by a single generation. Many of the TCEs are group expressions because groups sing the song or dance together. These people are just doing what they have learned from their ancestors. So, the expression is collectively held by all community members. They can be the members of an earlier generation, the present generation, or yet-to-be-born members of future generations. UNESCO's 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore ('Recommendation') regards folklore as a body of traditional creations about a 'cultural community which 'reflects its cultural and social identity.¹² The 1985 Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions ('Model Provisions') were adopted together by the United Nations Educational, Scientific and Cultural Organization

⁷ Article 1, the Protection of Traditional Cultural Expressions: Draft Articles, 46th Session, WIPO IGC.

⁸ Ton Otto, Tradition, the Blackwell Encyclopedia of Sociology. Edited by George Ritzer, Published 2016 by John Wiley & Sons, Ltd. He says “*tradition refers to the passing of beliefs, practices, institutions, and also things, so it can be both tangible as well as intangible.*”

⁹ Lily Martinet, *Traditional Cultural Expressions and International Intellectual Property Law*, 47 International Journal of Legal Information 6-12 (2019).

¹⁰ Id.

¹¹ Refer to definitions of traditions in the previous section

¹² Luminița Olteanu, *Riding on the Coat-Tails of Traditional Cultural Expressions*. Int J Semiot Law. (2020)

('UNESCO') and World Intellectual Property Organisation ('WIPO') define Expressions of Folklores, in Section 2, as: '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. Moreover, the TCE is not the same as in the earlier generation. Modifications have been brought to the TCEs; hence, all the community members have played an essential role in developing TCEs. The modification part will be dealt with more clearly in the preceding head.

TCEs are Evolving. Traditional cultural expressions are constantly evolving.¹³ As mentioned earlier, TCEs do not remain the same throughout their life as the same TCE. Through each passing generation, changes are brought into TCEs. TCEs are "continuously utilised, circulated, evolved and developed within the community for many years".¹⁴ To that end, TCEs change as they are expressed and transmitted to the next generation. Above all, a person expressing an art form will not be the same if another expresses an art form on the same topic. This is because of the difference in thinking, understanding etc. TCEs evolve, additions are made, or certain elements are deleted.

These characteristics are commonly found in TCE across the globe, and these can help understand the nature and meaning of TCE. However, the pertinent question to be asked is why should we protect TCEs? As mentioned earlier, the demand for protecting TCE at an international level has been happening. Why is such a demand raised? Before we move ahead on how to protect TCE, we must find answers to this critical question. Justification for protecting TCEs does not come under the radar of this paper. However, for better understanding, reasons for protecting TCE will be mentioned. This is important because we could determine what kind of protection TCE requires based on those needs only.

PART 2 – Why should we Protect TCE?

Most developing countries do not create an oversized variety of protected works by their authors and inventors compared to the quantity made within Western nations. However, developing countries can use their native culture in a way that benefits them.¹⁵ Using traditional cultural materials as a source of contemporary creativity can contribute to the economic development of traditional communities through community enterprises, local job creation, skills development, appropriate tourism, and foreign earnings from community

¹³ Intellectual property and Traditional Cultural/Expressions of folklore, (WIPO 2005).

¹⁴ Kuek Chee Ying, *Protection of Expressions of Folklore/Traditional Cultural Expressions: To What Extent is Copyright Law the Solution?* 32(1) JMCL (2015)

¹⁵ Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23(2) NCJ (1998)

products.¹⁶ It is said that "Cultural expressions function in a community and provide benefits such as healing, spiritual enrichment, produce and cash and maintenance of social order".¹⁷ For Indigenous communities, "marketing of objects based on TCEs may present an ongoing or potential source of income to help resolve problems of poverty".¹⁸ TCEs are subject to constant appreciation because of their uniqueness in various industries. The indigenous visual arts and crafts industry is estimated to have a turnover of approximately US\$130 million in Australia, of which indigenous people receive approximately US\$30 million.¹⁹ It is essential to understand how TCEs can benefit communities in different industries.

Tourism is one of the world's largest industries. For developing countries, it is also one of the biggest income generators.²⁰ Scholars Kastowo and Chryssantus have observed that:

"The results of human thought can be in the form of tangible objects, but can also be activities that can be repeated from time to time. Cultural activities can be managed to become an event with economic value. Community bearers consistently maintain and preserve the culture they have. Repeated events as traditions can unintentionally become a tourist moment, and bring economic benefits to the community".²¹

This means that Traditional cultural expressions can be an attraction point for tourists, and this can be of assistance in yielding economic benefits for the communities: many host communities, especially indigenous communities, trade cultural expressions for benefits that tourism can provide.²² Community-based tourism (CBT) is where the local communities invite tourists to stay in their locality and present them with their traditional cultural expressions. It is commonly understood to be managed and owned by the community for the community; it is a form of local tourism, favouring local service providers and suppliers and focused on interpreting and communicating the local culture and environment that has been supported by communities, local government agencies and non-governmental organisations (NGOs).²³ Community-Based Tourism programmes are developed around elements of local lifestyle,

¹⁶ Daphne Zografos, *The Legal Protection of Traditional Cultural Expressions*, 7 The Journal of World Intellectual Property 229-242 (2004).

¹⁷ R. W. (Bill) Carter * & R. J. S. Beeton, *A Model of Cultural Change and Tourism*, 9(4): 423-42, APTR (2004)

¹⁸ Tzen Wong & Claudia Fernandini, Traditional cultural expressions: Preservation and innovation, in Intellectual Property and Human Development 180 (Tzen Wong & Graham Dutfield 2010).

¹⁹ Id.

²⁰ Gao-Liang Wang & Harold Lalrinawma, *Impact of Tourism in Rural Village Communities: India's Sustainable Tourism*, 5 INT. J. BUS. MANAG. INVENT. 75-81 (2016).

²¹ Chryssantus Kastowo, *Contribution of Traditional Cultural Expression on Regional Economic Assets*, 140 374-379 (2020).

²² R. W. Carter & R. J.S. Beeton, *A model of cultural change and tourism*, 9 ASIA PACIFIC J. TOUR. RES. 423- 442 (2004).

²³ Rinzing Lama, *Community Based Tourism Development: A Case Study of Sikkim* (PhD. Thesis Kurukshetra University, 2014)

culture, people and nature that community members feel proud of and choose to share with guests.²⁴ Community-based tourism (CBT) and other sub-branches of sustainable tourism centred in communities have been commonly applied as vehicles for rural development in peripheral areas.²⁵ CBT allows for creating jobs and generating entrepreneurial opportunities for local communities from different backgrounds, skills, and experiences.²⁶ CBT can assist the local community in generating income and succeed in diversifying the local economy, protecting the environment, and bringing out educational opportunities.²⁷ TCEs play an essential role in this type of tourism as the host community showcases their dance forms, musical forms, and other tangible expressions to the guest. The revenue so generated is directly obtained by the communities. One example of this type of tourism is the Shaam-e-Sarhad project in the village of Hodka in State of Gujarat, where the village resort was constructed and managed by the local community.²⁸ The State of Kerala conducts another such tourism called the Responsible Tourism Mission. The objective stated is "*making tourism a tool for the development of the village and local communities, eradicating poverty, and emphasizing women empowerment are the main aims of the Responsible Tourism Mission*".²⁹ This project provides real village life experience with direct interaction with the local communities, and those communities showcase their TCEs such as coconut palm weaving, handicraft, cousins etc. Along with the beauty of the village, traditional cultural expressions bring such initiative into the limelight.

Traditional expressions have become an ornamental role and a marketing imperative for many fashion brands, whether locally in their respective countries or internationally.³⁰ The reason is that fashion designers searching for unique dressings and apparel often copy certain Traditional cultural expressions. Fashion designers have been borrowing stylistic elements from other cultures for centuries, and today, the appeal of traditional designs with an "ethnic" flair is as strong as ever.³¹ This appropriation of TCE is called Cultural appropriation. Cultural appropriation is the act by a member of a relatively dominant culture of taking a traditional

²⁴ Id.

²⁵ Seweryn Zielinski et al., *Why community-based tourism and rural tourism in developing and developed nations are treated differently? A review*, 12 SUSTAIN. 5–18 (2020).

²⁶ Ahmad Nazrin Aris Anuar & Nur Adila Amira Mohd Sood, *Community Based Tourism: Understanding, Benefits and Challenges*, 06 J. TOUR. HOSP. 1000263 (2017).

²⁷ Asia-Pacific Economic Cooperation, 2021. TOWARDS KNOWLEDGE-BASED ECONOMIES IN APEC. Singapore: Committees, Economic Committee.

²⁸ Refer <https://ses.splendidkutch.in/> - "Shaam E Sarhad - the name means "Sunset on the Border". the village resort that has been hand-crafted by the local community to replicate the vernacular traditions of architecture and design. All living spaces are designed to showcase local talent and are decorated handicrafts."

²⁹ <https://www.keralatourism.org/responsible-tourism/>

³⁰ Elizabeth Lenjo, *Inspiration versus Exploitation: Traditional Cultural Expressions at the Hem of the Fashion Industry*, 21 MARQUETTE INTELLECT. PROP. LAW REV. 139, 144 (2017).

³¹ Brigitte Vézina, *Curbing cultural appropriation in the fashion industry with intellectual property* Wipo.int (2019), https://www.wipo.int/wipo_magazine/en/2019/04/article_0002.html (last visited Dec 11, 2020).

cultural expression and repurposing it in a different context, without authorisation, acknowledgement, and compensation, in a way that causes harm to the traditional cultural expression holder(s).³² In the present fashion business, appropriation from different cultures' designs and intricacies is usual. Examples of these include the copying of traditional dressing Masaai tribes of Kenya and Tanzania by Kim Jones for Louis Vuitton, using of Mola pattern (Originating in Guna region of Panama) in Nike Airforce 1 shoes (cancelled the launch due to protest), Fashion designer Isabel Marant presented a blouse in her spring/summer "Étoile" collection which she claimed to be inspired from Mixe Community of Santa María Tlahuitoltepec, Mexico.³³ Later, the Mexican government accused Isabel Marant of appropriating traditional indigenous patterns, and she had to apologise for the Mexican appropriation.³⁴ Scholars Ao and Moatoshi pointed out that the shawls makhela and ornaments are worn by Naga tribes,³⁵ and other tribes from the Northeastern part of India were modified and redesigned by designers and then marketed for the high price making huge profits.³⁶

As mentioned earlier, Music is also considered an expression and can be called a TCE. Many communities around the world have their types of Music. There have been instances in which traditional Music was commodified through IPR, and the Traditional communities had to pay a royalty to sing those songs—for instance, the 'Nimbooda Nimbooda song' from the movie Hum Dil de Chuke Sanam (1999). The original version of such a song is Rajasthani folk music, composed by Ghazni Khan Manganiyar. The original composer was not allowed to sing the song without permission, and the worst part was that he had to pay a royalty to sing that song. The song was a massive hit and earned much revenue for the film producer, while the original Music produced did not receive any benefit, and to put salt in the wound, he had to pay a royalty to sing the song anymore. Tribal Music is gaining importance, and many music directors are using such tribal Music. The main disadvantage is that people take property rights over TCE without consent or authorisation from the community, thereby excluding the community from sharing such TCE. A situation like that happened in Thrissur District in the State of Kerala. Thrissur program is the name of the temple festival. In that festival, using Kerala Chenda

³² Id.

³³ Monica Bořa-Moisin & Shravani Deshmukh, How can the fashion industry treat Indigenous people and craft communities with fairness and equity? Culturalintellectualproperty.com (2020), <https://www.culturalintellectualproperty.com/post/how-can-the-fashion-industry-treat-indigenous-people-and-craft-communities-with-fairness-and-equity> (last visited Dec 4, 2020).

³⁴ BBC, Isabel Marant: Designer apologises for Mexican appropriation,, <https://www.bbc.com/news/world-latin-america-54971582?xtor=AL-72-%5Bpartner%5D-%5Bbbc.news> (2020) (last visited Dec 25, 2020).

³⁵ Nagas are various ethnic groups native to the north-eastern part of India.

³⁶ Moatoshi Ao, *Branding And Commercialisation Of Traditional Knowledge And Traditional Cultural Expressions : Customary Law Of North East Vis-A-Vis Contemporary Law*, 6(1), Indigenous Peoples' J.L. Culture & Resist. 75, 85, (2002).

(drums) and other instruments, three genres of this instrumental music are played, namely Panchavadyam, Panchari Melam, and Ilanjithara Melam annually. This festival happens annually and has been conducted for the past 100 years. People who see the festival usually take photographs, and video recordings and post live videos of this program on Facebook, YouTube, etc. In 2019 when people tried to share this festival live through Facebook and YouTube, the websites continuously restricted the sharing of audio and video of Thrissur pooram, citing that Sony had Copyright over those sounds and videos. Sony Music owns the Copyright of 'The Sound Story', which has covered Panchavadyam, Panchari Melam and Ilanjithara Melam.³⁷ Here the Music was appropriated; people were also excluded from enjoying those expressions. The critical question is how a company can take IPR over a traditional cultural expression without the consent and authorisation of the community that had created such expressions, thereby excluding those communities from enjoying those TCEs. There is an increasing demand for such expressions all over the globe. For instance, the appreciation and demand for Gond Tribal Paintings are increasing rapidly.³⁸ Gond Tribal paintings of Madhya Pradesh have gained worldwide recognition in recent years.³⁹ The reason is that the quality of these paintings is widely accepted. No two Gond paintings can ever be alike, and there will always be some change even if the same artist makes it, and that is the beauty of this art.⁴⁰ However, this quality or value will only remain when these works are authentic. By authentic, the author means that those traditional people, not outsiders, do the traditional works. For example, we will term a phone as an authentic Samsung phone only if the Samsung Company manufactures it. If not, then that phone is a duplicate one. Similarly, if outsiders create traditional works, the value or quality attached to those works will disappear, thereby damaging the credibility of those works. In order to promote the quality of those works, there is a need to ensure that the traditional works are done by those traditionally associated with such works, thereby increasing the credibility related to their quality and value.

The Australian government had formed a committee to investigate the impact of inauthentic art and craft in the style of First Nations peoples.⁴¹ The committee was of the view that "*When*

³⁷ Sony Music owns copyright of Thrissur Pooram: Resul Pookutty responds to controversy, Mathrubhumi (2019), <https://english.mathrubhumi.com/movies-music/movie-news/sony-music-owns-copyright-of-thrissur-pooram-resul-pookutty-responds-to-controversy-1.3799294> (last visited Dec 9, 2020).

³⁸ Gautam Das, Gond tribe's traditional art gets global recognition, selling at high prices BusinessToday.in (2014), <https://www.businesstoday.in/magazine/features/gond-tribe-traditional-art-global-recognition-selling-well/story/202691.html> (last visited Feb 4, 2021).

³⁹ Pradesh, Madhya, and Kumkum Bharadwaj, *Colors in Gond Tribal Art: An Interpretation and Critical Evaluation of Colors*, IJRG, 1–5, 1 (2014).

⁴⁰ Aishwarya Upadhye, The motif to paint: Artist Mahesh Shyam takes forward a legacy of Gond art The Hindu (2019), <https://www.thehindu.com/entertainment/art/the-motif-to-paint-artist-mahesh-shyam-takes-forward-a-legacy-of-gond-art/article29467007.ece> (last visited Mar 3, 2021).

⁴¹ *Report on the Impact of inauthentic art and craft in the style of First Nations peoples*, House of Representatives Standing Committee on Indigenous Affairs, The Parliament of the Commonwealth of Australia,

non-Indigenous people copy an artwork without permission or attribution, this has a profound and harmful effect on First Nations peoples and cultures, denigrating the meaning of the imagery and its cultural significance."⁴² Australian Department of Communication and Arts (DCA) commented that *"inauthentic products not only erode economic opportunities for First Nations peoples, as well as the ownership and control of their culture but also devalue tourist experiences of Australia"*⁴³ The communities are in a disadvantaged position because they are not able to enjoy the commercial benefits presently, as well as the quality of those works are being jeopardized due to creation of such works by outsiders (because the value of those TCEs will remain so only if the associated community creates them), which will result in the decline of sales of such TCEs in the future, thereby damaging the future economic opportunity of the community. Hence, specific measures must be adopted to restore value and authenticity in TCE.

Another critical need to protect TCE is the Preservation of TCE. The European Union and its member states have stated that the *"free access to and movement of folklore within these various European societies has been encouraged deliberately, and today's picture demonstrates that folklore is alive and well"*.⁴⁴ Certain scholars have raised skepticism regarding the preservation of TCE through protection since they say that preservation happens when it is left unprotected, as in that situation, anybody can use, enjoy, and yield benefits from the TCE, thereby leading to the preservation of the TCEs. However, studies say otherwise. For instance, the Report on Cultural Mapping of India Under UNESCO's Programme on Cultural Industries and Copyright Policies and Partnerships states explicitly that *"Skilled workers (experts) at remote locations are faced with a hand-to-mouth situation and are bound to leave their traditional work"* and *"There is an urgent need to preserve and revitalize these traditions and make them an integral part of our economic development"*.⁴⁵ The report conducted a detailed study and divided the traditions into different heads, such as arts, crafts, dance, Music, rituals, festivals, etc. It signaled that more than 180 traditions are dying, and preserving them is necessary. Many of the TCEs are disappearing because of globalisation, urbanisation, etc. For instance, Madan Biswal has suggested that *"the folk tradition Kathani of Orissa is on the verge of extinction due*

(2018), available at, https://www.aph.gov.au/Parliamentary_Business/Committees/House/Indigenous_Affairs/The_growing_presence_of_inauthentic_Aboriginal_and_Torres_Strait_Islander_style_art_and_craft/Report.

⁴² *Id*, page no. 23 of the report.

⁴³ *Ibid*, page no. 48 of the report.

⁴⁴ Communication from the European Community and its Member States for the 3rd WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore, WIPO IGC, May 16, 2002, WIPO/GRTKF/IC/3/11.

⁴⁵ Report on Cultural Mapping of India under UNESCO's Programme on Cultural Industries and Copyright Policies and Partnerships, Indira Gandhi National Centre for the Arts, 1988.

*to the forces of Urbanisation, westernization, and globalisation."*⁴⁶

If TCE is left unprotected, then TCE will disappear. So protecting the TCE will result in the preservation of TCEs. Nevertheless, the question is, why should a country invest in preserving the TCEs? The answer is that TCE is an essential embodiment of the culture of a community; this culture is essential for a community for its day-to-day activities. The culture of the community is necessary for the country because a country like India, which is known for its cultural diversity, should maintain this cultural diversity. Therefore, a country should take sufficient measures to maintain such cultural diversity. These measures can be in the form of protection for traditional cultural expressions.

Scholars who are against the protection of TCE often argue that if a TCE is economically beneficial to a community, then that community will preserve such expression. It is a relevant point, but what will happen if the community that had created such expressions cannot yield benefit from such expressions? On the contrary, outsiders can yield benefits from those expressions. The scholars against the protection will say that this is a good thing as TCE is preserved through others, ultimately leading to the preservation of TCEs. However, TCEs will not mean the same to outsiders as to the community. TCEs were transmitted to the present generation of the community from their ancestors. Hence there is a feeling attached to such TCEs, a mixed feeling of respect, pride, happiness, etc. However, outsiders may not have those kinds of feelings towards TCEs; hence there are chances that they will use those TCEs in a manner that will be derogatory to such TCEs. Moreover, outsiders will only have profit motives towards the TCE, rather than a sense of belongings towards the TCE. Henceforth preservation of TCEs will not be appropriate when outsiders do it.

How can IP protection help in meeting these needs?

In the context of protection for TCE and Traditional Knowledge, two types of protection are often discussed. One is Positive protection, and the other is negative protection. Positive protection, granting of rights that enable communities to promote their TCEs, control the use of their TCEs by nonindigenous persons, and benefit from the commercial exploitation of those TCEs.⁴⁷ The federal court of Australia's decision in *Milpururru v Indofurn Pty Ltd*⁴⁸ is an example of Positive protection. The TCE of the Milpuurru community was printed on a carpet and was sold in Australia. The community challenged this, and the court held that *"The right to create paintings and other artworks depicting the creation and dreaming stories, and to use pre-existing designs and well-recognised totems of the clan, resides in the traditional owners*

⁴⁶ Biswal, Madan, and Rashmi Pramanik, *Vanishing Oral Tradition: " Kathani " -A Folktale in Odisha*, 7(7) (IRJHRSS), 32-43, 32 (2020).

⁴⁷ Richard Awopetu, *In Defense of Culture : Protecting Traditional Cultural Expressions in Intellectual Property*, 69 EMORY LAW J., 746-779, 752 (2020).

⁴⁸ (1994) 30 IPR 209, 210 (Austl.).

(or custodians) of the stories or images"⁴⁹ Further the court said that *"If unauthorised reproduction of a story or imagery occurs, under Aboriginal law it is the responsibility of the traditional owners to take action to preserve the dreaming, and to punish those considered responsible for the breach."* Here the court, through the judgment, established that the right to print a TCE belongs to the Traditional owners or the community that has created such TCEs. This is an assertion that the right over a TCE inheres solely in the community. The community can use this right to exclude others from using such TCEs commercially or derogatorily.

Article 31 of the United Nations Declaration offers positive protection for TCE/TK; it is stated that *"Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over cultural heritage, traditional knowledge, and traditional cultural expressions."*⁵⁰ It is explicitly mentioned that the right over the TCE and TK vests with the indigenous people. The protection seen in Intellectual property regimes is positive because the exclusive rights are vested in the creator or inventor of that creation or invention. WIPO has mentioned the Protection for TCE and TK *is taken to mean the kind of protection that is most often considered in intellectual property contexts, that is to say, legal measures that limit the potential use of the protected material by third parties, either by giving the right to prevent their use altogether (exclusive rights), or by setting conditions for their permitted use the conditions set by license for a patent, trade secret or Trademark, or broader requirements for equitable compensation or a right of acknowledgement).*⁵¹

On the other hand, Defensive protection prevents third parties' illegitimate acquisition or maintenance of IP rights.⁵² Defensive strategies might also be used to protect sacred cultural manifestations, such as sacred symbols or words, from being registered as trademarks.⁵³ The offered protection prevents people from getting property rights over a TCE or TK. The justification for such protection is that Communities create the TCE or TK, and hence nobody

⁴⁹ Id.

⁵⁰ United Nations Declaration on the Rights of Indigenous Peoples, Article 3 (2007).

⁵¹ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, The Protection of Traditional Knowledge: Updated Draft Gap Analysis, WIPO Doc. WIPO/GRTKF/IC/37/6, Annex at 1, 3 (July 20, 2018) http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_37/wipo_grtkf_ic_37_6.pdf

⁵² World Intellectual Property Organization, *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, 22 (2015).

⁵³ Id.

should take ownership of that knowledge or expressions of knowledge. One of the best examples of defensive protection is Section 3(p) of the Indian Patent, which states that inventions that are effectively traditional knowledge are not the subject matter of Patent. Hence inventions involving Traditional knowledge will not be granted patent.⁵⁴ Under this Section High Court of Himachal Pradesh had revoked a patent over baskets made up of synthetic polymeric material for collecting leaves, which was based on Kila (a sort of bag made with bamboo) used by the Tribe there; if closely observed, it is a tangible form of Traditional Cultural expressions of that tribal community. This type of protection does not assert any right for a community over TCE or TK. Instead, it conveys that nobody should have rights over those TCEs and TK. An example of the defensive protection of TCE can be seen in the New Zealand Trademark Act. The act expressly prohibits the registration of Trademarks that insult a significant section of the community, including Maori.⁵⁵ Similarly, the Indian Trademark Act prohibits the registration of Trademarks when it *contains or comprises any matter likely to hurt the religious susceptibilities of any class or section of the citizens of India*.⁵⁶ So if a mark hurts the sacred emotions related to TCEs of a community, that mark will not be registered. Both these protections are used in Intellectual property regimes, Positive protection is offered by asserting rights over the intellectual creation of the creator, and defensive protection can be in the form of not granting rights over the intellectual creations or by cancelling the rights so granted such as revocation of patent, Trademark etc. So, IP protection for TCE can include both defensive and positive protection. Keeping this in mind, the author will try to see whether the need for protecting TCE, mentioned in earlier sections, can be met by either positive or defensive Intellectual property protection for TCE.

The concern is the appropriation of TCE for commercial profits without sharing any benefits or attribution to TCE holders. If exclusive rights are granted to a TCE holder over a TCE, then appropriation will be considered an infringement. If infringement happens, compensation can be sought by the TCE holders from the infringing parties. The TCE holders can grant a license over the TCE to the aspiring parties, and this license can help earn monetary benefits. Defensive protection can stop commercializing such TCE but may not benefit the TCE holders economically. For instance, if a trademark offending the tribal community is registered, the community can challenge Trademark registration and even succeed in revoking the registration but will not be granted compensation. On the other hand, in positive protection, compensation

⁵⁴ Section 3(p) of Indian Patent Act, 1970 states that “*an invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components.*”

⁵⁵ Trade Marks Act 2002, Section 17(1)(b)(ii) (New Zealand).

⁵⁶ The Trademarks Act 1999, Section 9(2)(b) (India)

can be sought if a right is infringed. In the earlier case law *Milpurrruru v Indofurn Pty Ltd*,⁵⁷ the Australian Federal Court compensated the TCE holders. IP protection can enable communities and members to commercialize their tradition-based creations, should they wish to do so, and exclude free-riding competitors.⁵⁸ TCE has a potential role in different sectors. Some of them had been discussed previously. If the TCE holders are granted exclusive property rights to their TCE, then the economic position can be improved. Hence, a country needs to empower its citizens using various policies. One such policy could be to create a suitable framework for enabling Tribal, indigenous, and local communities to get exclusive rights over their TCE.

As pointed out, the creation of TCEs by outsiders is jeopardizing the quality of the TCEs. If exclusive rights are granted to TCE holders, the outsiders will be barred from creating the TCEs. If an outsider is found appropriating the TCE or creating the TCE without the consent of the TCE holder, then infringement is caused, and the law will force the person to pay compensation. In addition to compensation, the court will also provide an injunction, thereby stopping the sale of those TCEs. In *Milpurrruru v Indofurn Pty Ltd*.⁵⁹ The court ordered the seller to stop selling the carpets. Defensive protection can help reduce inauthenticity because the law can stop the person from using the TCE name for his products. There will not be any misleading linkages with the TCE. IP protection can be used to prevent unwanted, culturally offensive, or demeaning use.⁶⁰ IP can assist in certifying the origin of arts and crafts (through certification trademarks) or by combating the passing off of fake products as 'authentic' (through the law of unfair competition).⁶¹

TCE holders are abandoning their TCEs because of poverty. It was pointed out by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in a Report on the Preliminary Study on the Advisability of Regulating Internationally, through a New Standard-Setting Instrument, the Protection of Traditional Culture And Folklore, that the disappearance of TCE is "*because the well-being of the creators of this heritage is endangered by economic, political and social forces such as socio-economic marginalization, a global entertainment industry, religious intolerance and ethnic wars*".⁶² If TCE holders are granted rights over the TCE and based on that, they can generate revenue and not abandon the TCE, leading to preservation. While for preservation, intellectual protection guarantees that those intellectual creations are preserved. For example, when we grant patent rights for an invention, that knowledge regarding the invention is

⁵⁷ (1994) 30 IPR 209, 210 (Austl.).

⁵⁸ Intellectual Property and Traditional cultural/Expressions of folklore, 6, (WIPO 2005).

⁵⁹ (1994) 30 IPR 209, 210 (Austl.).

⁶⁰ Intellectual Property and Traditional cultural/Expressions of folklore, Supra note 67, at 13.

⁶¹ *Id.* at 17

⁶² *Report on the Preliminary study on the advisability of regulating internationally, through a new standard-setting instrument, the protection of traditional culture and folklore*, UNESCO. Executive Board, 2001.

stored in the patent office in the specification, thereby preserving the knowledge. If a person wants to study this knowledge in the future, he will have access to this knowledge from the patent database. Similarly, when a right is granted over a TCE, then the information regarding the TCE is stored. However, TCE has unique characteristics not found in IP regimes, such as Copyright, Trademark, GI, etc.

PART 3- Issues in considering TCE as an Intellectual Property and some possible solutions

Intellectual Property protection is granted to Intellectual creations by granting exclusive rights over the intellectual creations to forbid others from utilizing such intellectual creations without the consent of the author or inventor of such intellectual creations. The purpose of granting Intellectual Property is for the progress of science and art. Hence, the role of IP is to maintain a balance between protecting the interest of authors and the public's need to access information or art. Because of this, specific intellectual creations are left unprotected in the IP world. The characteristics of TCE were previously discussed, and it is beyond doubt that many IP regimes, such as Copyright or TM or Patents, do not have those characteristics. In addition to that, IP has some characteristics that create roadblocks or obstacles for TCE to enter the IP world. These characteristics are mentioned below as problems that TCE might face, and possible solutions are proposed.

First problem – IP laws are Individualistic in Nature

IP law grants exclusive rights to individuals such as authors or inventors. The ultimate idea by which invention or creation took place is an intangible property of the person who took pains for the invention or creation.⁶³ The intellectual property applies to intellectual creativity such as invention, musical, literary, symbols, names, designs, images and even ideas.⁶⁴ Right over, a TCE cannot be granted to a single person. Instead, it must be granted to an entire community because the community members have punitively created such expressions.

As far as this individualistic nature is posed as a problem, the solution is within IP itself in the form of Geographical Indications⁶⁵. GI grant collective rights;⁶⁶ hence IP can be tailored to this collective rights design. However, in GI it can be shown that there is individual effort as Scholars Banarjee and Naushad mentioned that "*GI seeks to protect the economic interests of an entire community of producers from a particular region who specialise in the making or manufacturing*

⁶³ Jajpura, Lalit, Bhupinder Singh, and Rajkishore Nayak, *An Introduction to Intellectual Property Rights and Their Importance in Indian Context*, 22 (1), J. Intellect. Prop. Rights, 32–41, 32 (2017).

⁶⁴ Dushyant Kumar Sharma, *Intellectual Property and the Need to Protect It*, 9 INDIAN J. SCI. RES. 84–87, 84 (2014).

⁶⁵ GI is recognized as an intellectual property under Article 22 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995 and is defined as “*Geographical indications are indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.*”

⁶⁶ Banerjee, M. and Naushad, S, *Grant of Geographical Indication to Tirupathi Laddu: Commercialization of Faith?*, 3 NUJS L. REV.107,108(2010).

of a native product."⁶⁷, so each producer must put individual efforts. GI is not granted to a community but to producers who can be community members, residents in that locality, or those involved in producing that product that has been granted a Geographical Indications Tag. Moreover, the producers must register in GI to be authorised GI users.⁶⁸ GI is a collective right, not a community right since no guarantee of being a community member will automatically allow that person to use that GI tag.

While TCE is community rights, there is a requirement that a person, if born in a community, should have the rights over that TCE that the community has created. Hence the right must be granted to a community. However, why should community members be given a right to those not engaged in the creation or preservation of such TCE? Why should rights be granted only because they are born in a particular community? For example, if IP right⁶⁹ is granted over the Gond Paintings to the Gond community, all the members of the Gond community shall have the right over that painting. However, it may be hard to prove that all the community members have contributed to creating or preserving such expression. Hence granting rights to the entire Gond community may not make sense.

Nevertheless, there is a solution to this. If a law is made, there should be a registry in which the community members can register who are associated with those expressions in the sense of who is involved in creating or preserving such expression. As mentioned earlier, some members may have moved to urban cities, or some may have stopped creating those expressions as an occupation. Therefore, granting rights to such community members may not do any good; instead, rights should be granted to those associated with creating or preserving the TCE. A person born into a particular TCE-holding community can exercise the right over TCE only if her name is registered. Her name can be registered if she can showcase that she is currently involved in the maintenance of TCE.

There is no single definition of the public domain. However, most approaches share an instrumentalist vision: the public domain is a reservoir of resources accessible to the public for creative or consumptive uses.⁷⁰ The broadest definition of Public domain is that public domain means everything available to the public for unrestricted use. In intellectual property (IP) law, the public domain is generally said to consist of intangible materials not subject to exclusive IP rights and are, therefore, freely available to be used or exploited by any person.⁷¹ So it can

⁶⁷ *Id.* 107

⁶⁸ Section 2(b) of The Geographical Indications of Goods (Registration and Protection) Act, 1999 defines Authorized user as “the authorized user of a geographical indication registered under Section 17”.

⁶⁹ By IP right the author means the rights granted under a sui generis IP legislation and not any existing IP regime.

⁷⁰ Ruth L. Okediji, *Traditional Knowledge and the Public Domain*, Papers No. 176, CIGI, 4 (2018)

⁷¹ IGC Secretariat, *Note on the Meanings of the Term “Public Domain” In The Intellectual Property System with IP Bulletin (Vol. III Issue 2), 2022*

include inventions whose patent term has expired or copyright-free expressions or expressions for which Copyright has expired. EU and member countries argue that TCE is in the public domain because it is free for everyone.⁷² Hence, if exclusive rights are granted to TCE, then the expressions that were free to use till now will be transformed to restricted use, thereby destroying the vibrant public domain.

Various arguments often raised for arguing that TCE will negatively impact the public domain are

1. TCEs are Pre-existing works. Hence, they are in the public domain.
2. There is no clarity as to the standards or subject matter of TCE, hence ambiguity over what will be left in Public Domain after granting protection to TCE,

Traditional communities had more acceptance for sharing, but it would be wrong to conclude that everything is shared with everybody equally.⁷³ When arguing against the protection of TCE because of the Public domain, one common mistake is to ignore the existence of restrictions imposed on the use or sharing of TCEs by community customs. Customs are a set of rules and regulations followed within a community. For example, the Custom followed by the community who have created the Theyyam expression found in Kerala, a state in (Southern part of India) is that people are not allowed to take photographs of the Theyyam artist while performing. Another custom is that people outside the community are not allowed to practice Theyyam expressions because of their sacred nature to the community. If we are to recognise these customs, then Theyyam is not actually in the public domain, but these customs are ignored because the law does not uphold them.

Nevertheless, certain customs restricting the TCE are protected by law in states belonging to the Northeastern part of India. The Sixth Schedule of the Constitution of India grants the North-Eastern States of India autonomy to apply customary laws for internal governance and administration of justice, and laws that are followed in other parts of India cannot be exercised in the North-Eastern States. Everything related to Tribe is decided by the chief based on the Customs of that Tribe, from the practice of rituals to property rights.⁷⁴ Often, outsiders are not permitted to enter their sacred place or view their rituals, making certain TCE out of reach of

Special Reference to The Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Seventeenth Session, November 24, 2010, WIPO/GRTKF/IC/17/INF/8

⁷² Communication from the European Community and its Member States for the 3rd WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore, WIPO IGC, May 16, 2002, WIPO/GRTKF/IC/3/11

⁷³ Graham Dutfield, *Harnessing Traditional Knowledge and Genetic Resources for Local Development and Trade*, Draft paper presented at the International Seminar on Intellectual Property and Development, Organised by WIPO jointly with UNCTAD, UNIDO, WHO and WTO, 2005

⁷⁴ Kughatoli V Aye & Kahuli V Sangtam, *Customary Laws and Traditional System of Administration With Special Reference to Sumi Tribal Chief*, (IJHSSI), 30–36 (2018).

the public. Hence, we cannot say that all the TCEs are in the public domain.

Argument 1 - TCEs are in the Public domain because they are pre-existing works

By Pre-existing, what is meant is that TCEs exist for an extended period. Most of the TCEs we see have a long history, but the present form of TCEs is not the same as the earlier TCEs. In the characteristics of TCE, it was recognised that TCEs are evolving through each transmission process. Hence the present form of TCE is a modified version of the older TCE. For example, For Tribal Gond Painters, the basis of motivation for their motifs came from the immediate surroundings. It is said that Gond's paintings were less attractive in earlier times. However, Gond artist Jangarh Singh Shyam later developed and decorated the traditional paintings of the Gonds with new designs and motifs, thereby making them more beautiful. The Gond painters have developed an array of motifs to make their paintings more attractive and appealing in the present scenario of the commercialisation of art.⁷⁵ Modifications are brought to TCE by the community, so it cannot be called pre-existing work. Instead, these are new works

The subject matter of TCE is any form in which traditional cultural practices and knowledge are expressed.⁷⁶ This definition is based on categories as mentioned earlier (Like verbal or non-verbal, tangible or intangible etc.). Tangible expressions include handicrafts, pottery works can be included, and intangible expressions include verbal (Music, folktales, Poetry, etc.) and non-verbal expressions (Dance, Paintings, etc.). However, this expression should either be a traditional cultural practice or traditional knowledge. The expressions must be created based on the people's intellectual activity, insight, or experience in or from a traditional context. Some argue that there is an overlap between Traditional knowledge and traditional cultural expressions, creating confusion regarding the subject matter of TCE. The difference between TK and TCE is that the former is related to knowledge, while the latter is related to the expression of knowledge. So, there is no scope for any confusion. Even though the subject matter might look broad, that subject matter must meet specific standards to get protection. Hence all cultural practices or expressions of Traditional knowledge will not be protected. To consider cultural practice or knowledge traditional as a TCE, it must be shown that.

1. such cultural practice or knowledge was preserved, maintained, revealed, and developed by the community following their customary laws that
2. such expression has become an integral part of the cultural and social identity and traditional heritage of the people and

⁷⁵ Goswami, Manash P. and Priya Yadav. *Dots and Lines: Semiotics of the Motifs in Gond Painting*, 3(2), JM&C, 35-50, 39 (2019).

⁷⁶ Article 1 – Use of Terms, The Protection of Traditional Cultural Expressions: Draft Articles, Facilitators' Rev. (June 19, 2019), 39th Session, WIPO IGC Intergovernmental Comm. on Intellectual Prop. & Genetic Res., Traditional Knowledge & Folklore, World Intellectual Prop. Org.,

3. Is transmitted from generation to generation within a traditional community, whether consecutively or not.⁷⁷

To be protected, all three conditions must be met, according to the definition. The Standards provide that the expressions must be linked to a community and that the community remains linked to those TCEs. Furthermore, these norms are consistent with the definition of TCE outlined in the previous section. As a result, the subject matter and requirements are simple. TCEs with no traditional relationship with any one community will be left unprotected. If a community has forgotten about a cultural expression or knowledge and *is no longer in use, an adventurous and innovative individual or entity should not be castigated for finding gold in the trash*.⁷⁸ As a result, the public domain grounds used to oppose TCE are weak. It is odd to hear industrialised countries like the United States discuss a robust public domain when they have been trying to extend IP duration for years. Copyright duration legislation, ever-greening, and data protection regulations are all examples. Even TRIPS-plus agreements, aimed solely at developing nations, compel those governments to change their domestic legislation to extend the lifespan of IP rights. The arguments in Favor of the public domain have been considered and refuted.

Conclusion

TCEs are intellectual creations that members of a community create. These TCEs have been transmitted in accordance with the Tradition and have become an essential part of the culture of the community, because of which these intellectual creations have some unique characteristics which do not go along with the Western notion of Intellectual property rights. However, this does not prevent developing countries from adopting their notion of intellectual property rights, which are closely linked with developing countries' social and economic values. Protecting such intellectual creations is essential for developing countries to empower the indigenous and local communities. Ongoing discussions at WIPO IGC have created draft legislation for protecting TCE. However, the discussions have been happening for around 20 years, and still, there are some areas in the draft where a consensus between the members has not occurred. This, according to the author, is because of the North-south conflicts. However, with a proper understanding of TCE, a sui generis property protection law can be enacted domestically. This law created in a country can be a reference for the WIPO IGC members. Then again, before making such laws, there needs to be an understanding of the ground reality.

⁷⁷ Article 3 - Protection Criteria/Eligibility Criteria, The Protection of Traditional Cultural Expressions: Draft Articles, Facilitators' Rev. (June 19, 2019), 39th Session, WIPO IGC Intergovernmental Comm. on Intellectual Prop. & Genetic Res., Traditional Knowledge & Folklore, World Intellectual Prop. Org.,

⁷⁸ Lenjo, Elizabeth. Supra note 39, at 149

A concentrated empirical study must be conducted to understand the long-held customs used to govern such TCEs. This will help enact a law per the aspirations of the communities. These customs will be different for each indigenous community. Hence there is a need to widely study these customs and use such study in enacting such laws.
