



## Protecting Indigenous Art: Challenges in Protecting Traditional Cultural Expressions in the Philippines<sup>1</sup>

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**Abstract:** It cannot be denied that indigenous people have traditional knowledge which is the source of rich cultural expressions in the form of writings, songs, designs and other literary or artistic works. These are works handed down from generation to generation through the passage of time. However, when the “outside world” visits the indigenous people there is a risk that these indigenous works may be appropriated by the and used for commercial purposes without permission. Worse, once it is exposed to the outside world, it may be prone to abuse by unauthorized sale, copying or distribution. How can indigenous art be protected and the cultural heritage of the indigenous people be preserved? The aim of this paper is to show that the indigenous people produce rich artistic cultural expression that should be protected because they should be preserved for future generations to come . To protect indigenous art, there is a need to (1) identify them, (2) survey the legal environment to determine if there are sufficient laws that protect them, and if current laws are lacking; (3) Propose ways on how to sufficiently protect them.

The paper will show that (1) the current legal protection afforded to indigenous art is lacking as there is no specific process and substantial provision in the law about protecting indigenous art as an intellectual property; (2) The traditional means of protecting indigenous art through the intellectual property code and relevant laws and regulations are insufficient; and (3) There is a need to increase awareness of the existence of indigenous art and the need to protect them to expose the benefits and risks in exposing indigenous art. In conclusion, the paper will propose that a sui generis (custom-made) law in protecting indigenous art is necessary to fill in the gaps of the current system of protection of indigenous art.

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<sup>1</sup> The author has a similar article entitled “IP of IP: Challenges in Protecting Traditional Knowledge in the Philippines (2017). The present work, however, is more focused on Traditional Cultural Expressions rather than Traditional Knowledge in general.



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## 1. INTRODUCTION

The Philippines is home to many indigenous peoples and communities. Away from the megacities of Manila, Cebu and Davao, there exists indigenous communities living in far-flung areas and mountainous regions in the Philippines mostly untouched by the technological advancements of urban life where the internet and skyways are mostly unheard of. For better or for worse, these indigenous communities have remained mostly insulated from the rigors of city-life and have survived the trials of everyday life using traditional methods of hunting, fishing, cooking and expressing themselves through dance, music and other rituals. Some have ventured into living in urban towns and cities to experience the harsh realities of modern living, only to go back to their communities in the mountains which they truly belong.

There are approximately 370 million indigenous people in 70 countries across the globe.<sup>2</sup> In the Philippines, there are around 14-17 million Indigenous People (IP) belonging to 110 ethno-linguistic groups which are located mainly in the Cordillera Administrative Region (33%), Mindanao (61%) and some in the Visayas.<sup>3</sup> There are two main indigenous groups representing the northern and southern indigenous peoples of the Philippines: (1) The Igorots in the north; and the (2) Lumands in the south. The Igorots are known to be the have built of the Banuae Rice Terraces which trace back more than 2,000 years ago. The Lumads, which comprise several other specific ethnic groups, are known for their tribal music produced by indigenous instruments. The other major indigenous groups include the Badjaos (sea tribes of Sulu), Ati (Panay), Aetas or Negritos (animalistic rituals), Palawan tribes, and the Mangyans (Mindoro).<sup>4</sup> All of these indigenous groups share a common vision of preserving their rich cultural heritage.

<sup>2</sup> Paper on the United Nations Indigenous People Permanent Forum on Indigenous Issues Fact Sheet, p.1.

<sup>3</sup> UNDP Programme Fast Facts Lago (2010), [www.undp.org.ph](http://www.undp.org.ph)

<sup>4</sup> Valdeavilla, Ronica (2018), A guide to the Philippine Tribes of the Philippines. <https://theculturetrip.com/asia/philippines/articles/a-guide-to-the-indigenous-tribes-of-the-philippines/>.

Despite their growing number and influence today, indigenous peoples are still considered part of the marginalized and poor sectors of society. In a 2018 report of World Mission, a Catholic-based missionary group, *“they (indigenous communities) lag behind in terms of social and economic development, being the most impoverished groups in their countries. They are poor, illiterate and unemployed, making up 15 percent of the world’s poor.”*<sup>5</sup> In a report of the United Nations Permanent Report on Indigenous Issues in 2010, indigenous people “make up fully one-third of the world’s poorest peoples, suffer disproportionately in areas like health, education, and human rights, and regularly face systemic discrimination and exclusion.”<sup>6</sup> In some areas in Mindanao, they are being displaced from their homes and their traditional practices disrespected. This has resulted to conflicts which even led to violence and war. Indeed, these circumstances have threatened not only the use of traditional knowledge, but the very existence of the indigenous communities itself. For these reasons, there is a need to protect and uphold the cultural heritage and traditional knowledge of the indigenous people not only in the Philippines but the entire world.

One of the things that make indigenous people unique is their cultural heritage and traditional knowledge. This is what makes them united as a people and affirms their identity to the “outside world”. Traditional knowledge are in the form of traditional cultural expressions (TCE) and traditional genetic resources (TGR). Traditional cultural expressions (TCE) are artistic expressions of the community that is handed down from generation to generation and become part of their everyday life. These include writings, songs, dances, designs that make up the cultural fiber of the community. On the other hand, traditional genetic resources (TGR) are the unique ways of living in the community like planting, hunting and fishing, or ways of curing illnesses. To illustrate, TGR include the use of plao-noi plant to treat ulcers and the hoodia plant of the San people to curb hunger during hunting.<sup>7</sup>

<sup>5</sup> World Mission Magazine (August 2016). Struggles of the Indigenous, No. 303, Vol. XXVIII, p. 5.

<sup>6</sup> Supra on No. 2, p. 1.

<sup>7</sup> WIPO Publication No. 933 (E), Box 5, p. 14.



The traditional knowledge composed of TCE and TGR are supposedly owned by the indigenous people and can be considered as part of their patrimony, history and cultural identity. Considering that traditional knowledge is a very broad topic, this paper shall limit its discussion on Traditional Cultural Expressions which are in the form of songs, dances, designs and other forms of cultural expressions. These expressions which have been handed down from generation to generation can also be considered as intellectual property in using the conventional system of protection. Considering, however, that traditional knowledge has a different nature and objective from that of the conventional subjects of intellectual property, can the traditional knowledge in the form of traditional cultural expressions still be protected under intellectual property regime of the state in the form of copyright, trademark of industrial designs? If yes, how can this be implemented? What types of intellectual property (patents, trademark, copyright or trade secret etc.) can be used to protect traditional cultural expressions? Can there be another way of protecting traditional cultural expressions aside from using the conventional intellectual property system?

The objective of this paper is to determine how traditional cultural expressions in the form of indigenous art can be protected in the Philippines and whether there are other alternative ways of protecting indigenous art. It will show that the indigenous people produce rich artistic cultural expression that should be protected because they should be preserved for future generations to come. Also, indigenous art should be protected because it is prone to abuse from the outside world. To protect indigenous art, there is a need to identify them, survey the legal environment to determine if there are sufficient laws that protect them, and if current laws are lacking; (3) Propose ways on how to sufficiently protect them.

In order to protect indigenous art, the paper will discuss the concept of traditional knowledge, specifically traditional cultural expressions, and how they can result to indigenous art. The resulting indigenous art will then be classified to determine if they fall into the traditional forms of intellectual property under the law. The paper will proceed with a survey of the

current modes of protection, both legal and extra-legal, in the protection of indigenous art. This will be done by looking at the existing legislation and the enforcement programs by the government in ensuring protection of indigenous art. It will then make an analysis and evaluation of the state of protection of indigenous art in the Philippines and the ways on how these works of art may be exploited to the prejudice of the indigenous people. It will cite specific instances when indigenous art can be exploited and abused by the outside world and how these can be minimized, if not eliminated. The paper will show that (1) the current legal protection afforded to indigenous art is lacking as there is no specific process and substantial provision in the law about protecting indigenous art as an intellectual property; (2) The traditional means of protecting indigenous art through the intellectual property code and relevant laws and regulations are insufficient; and (3) There is a need to increase awareness of the existence of indigenous art and the need to protect them to expose the benefits and risks in exposing indigenous art. In the end, the paper will make recommendations on how to protect indigenous art using the conventional intellectual property system and the need to have a custom-made or sui-generis kind of protection.

## 2. TRADITIONAL CULTURAL EXPRESSIONS AS TRADITIONAL KNOWLEDGE

Traditional knowledge (TK) has been defined as *“a living body of knowledge passed on from generation to generation within a community. It often forms part of a people’s cultural and spiritual identity.”*<sup>8</sup> This embodies the soul of the community and the essence of what they are. Specifically, traditional knowledge consists of *“knowledge, know-how, skills, innovations and practices that are passed between generations in a traditional context; and that form part of the traditional lifestyle of indigenous and local communities who act as their guardian or*

<sup>8</sup> WIPO Website: <http://www.wipo.int/tk/en>



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*custodian.*<sup>9</sup> Despite these definitions, traditional knowledge is still considered abstract and vague. While there are suggested definitions, “*there is not, as yet, any generally accepted, formal definition of these terms.*” At best, working definitions are used to refer to the components of traditional knowledge. In summary, traditional knowledge includes the following:

*“Mental inventories of local biological resources, animal breeds, and local plant, crop and tree species. It may include such information as which trees and plants grow well together which are “indicator plants” (plants that show soil salinity or are known to flower at the beginning of the rains, for example). TK includes practices and technologies, such as seed treatment and storage methods and tools used for planting and harvesting. It also encompasses belief systems that play a fundamental role in people’s livelihoods, maintain their health, and protect and replenish the environment. TK is dynamic in nature and may include experimentation in the integration of new plant or tree species into existing farming systems or a traditional healer’s tests of new plant medicines.”*<sup>10</sup>

One kind of traditional knowledge (TK) which is the subject matter of this paper are Traditional Cultural Expressions (TCE). They are the expressions of the people’s cultural heritage and history which are manifested through their “*dances, songs, handicraft, designs, ceremonies, tales or many other artistic or cultural expressions xxx and are seen as integral to the cultural and social identities and heritage of indigenous and local communities, reflecting core values and beliefs.*”<sup>11</sup> It is sometimes referred to as folklore or folksoul. These are works handed down from generation to generation through the passage of time by people living the same community. The following are forms of TCE:

- *Verbal expressions or symbols (stories, epics, legends, tales, riddles, etc.)*

- *Musical expressions (songs, instrumental music)*
- *Expressions by action (dance form, play, ritual, etc.)*
- *Tangible expressions (drawings, designs, paintings, body art, carvings, sculptures, pottery, terracotta, warli painting, mosaic, woodwork, rockwork, metal work, jewelry, basket, needlework, glassware, textiles, carpets, etc.)*
- *Intangible expressions reflecting traditional thought forms*
- *Architectural forms*<sup>12</sup>

In a WIPO study by P.V. Valsla G. Kutty entitled “*National Experiences with the Protection of Folklore/Traditional Cultural Expressions*” (2002)<sup>13</sup>, the following were considered part of the folklore or traditional cultural expressions of the Philippines: (1) Indigenous Music for rituals, feasts, harvest, religious and social ceremonies; (2) Musical instruments made out of bamboo and other indigenous materials; (3) Bronze instruments like gongs; (4) Basketry in the Cordillera region; (4) Textile designs in Mindanao; (5) Ethnic architecture seen in design of houses; (5) Folklore based on influence of Spanish and American colonizers.

To understand and appreciate these rich creations in the form of indigenous art, people from the “outside world” visit the indigenous people to gain knowledge of their rich culture and history. Through these visits, these works of art are revealed to the public. However, when the “outside world” visits the indigenous people there is a risk that these indigenous works may be appropriated by the “visitors” and used for commercial purposes without attribution and economic benefit to the indigenous people. Worse, once it is exposed to the outside world, it may be prone to abuse by unauthorized sale, copying or distribution. The

<sup>9</sup> WIPO Publication No. 933 (E), p. 13.

<sup>10</sup> Hansen SA and JW Van Fleet (2007), p. 1523.

<sup>11</sup> Supra on footnote 4, p.16.

<sup>12</sup> Singh & Associates (2012), Traditional Culutral Expressions, found in <https://www.lexology.com/library/detail.aspx?g=a806fd78-711e-4811-a881-ed269533b635>

<sup>13</sup> Kutty, P.V. Valsala (2002). National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions, WIPO, Geneva, Switzerland.

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classic case of abuse on the use of TCE, as observed by the World Intellectual Property Organization, involves artistic and literary works like songs:

*“an indigenous folk song could be adapted and copyrighted, without acknowledgment of the indigenous community which created the song and without sharing any of the benefits arising from the exploitation of the song with the community”<sup>14</sup>*

In response to the possible abuses on the rights of indigenous peoples, the government pursuant to the 1987 Constitution passed a comprehensive law to protect indigenous peoples: the Indigenous Peoples Rights Act (R.A. 8371). There is, however, insufficient provisions to detail the protection of traditional knowledge as intellectual property. Even the intellectual property code of the Philippines (R.A. 8293) do not have a separate chapter or dedicated provisions for the protection of traditional knowledge as intellectual property. Hence, there is a need to look into the possible gaps in legislation in order to make policy recommendations to better protect traditional cultural expressions.

To have a better understanding and appreciation of the issues regarding traditional cultural expressions on one hand, and the conventional intellectual property system on the other, there is a need to discuss each separately. After knowing each component, a discussion of how one intersects with the other shall be made. A survey of the laws on intellectual property relevant to traditional cultural expressions shall be made followed by an analysis of its applicability to traditional cultural expressions.

Can traditional cultural expressions in the form of songs, dances, poems, writings, designs, paintings, sculptures, and other traditional artistic and literary works be considered as intellectual property using the standards of the conventional intellectual property system? A discussion of the intellectual property system, specifically copyright and trademark and industrial designs, are in order.

### 3. COPYRIGHT, TRADEMARK AND INDUSTRIAL DESIGN AS RELEVANT FORMS OF INTELLECTUAL PROPERTY FOR TRADITIONAL CULTURAL EXPRESSIONS

The World Intellectual Property Organization (WIPO) has defined Intellectual property as *“creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.”<sup>15</sup>* Except for inventions, the relevant intellectual property for traditional cultural expressions in the said definition include literary and artistic works, designs, names and symbols. In the conventional system of intellectual property protection under the law, these works are protected in the most part as copyright, trademark and designs: (1) Literary and artistic works are protected by copyright and related rights; (2) Designs are protected by industrial design; and (3) symbols, names and images are protected by trademark. While there are other forms of intellectual property (like geographical indications and trade secrets) that may protect traditional cultural expressions, this paper shall limit its discussion to these three kinds.

(1) Copyright: The World Intellectual Property Organization defines copyright as the “legal term used to describe the rights that creators have over their literary and artistic works.”<sup>16</sup> This is the legal form of protection to any expression of an artistic idea. In *“The Arts and Copyright”<sup>17</sup>*, the World Intellectual Property Organization explained how copyright protects artistic works:

*“Copyright protects the way in which ideas are expressed. This expression is the unique way in which words, musical notes, colors shapes etc. are chosen and arranged. It is the expression that makes*

<sup>14</sup> Supra on Note 8, p. 14.

<sup>15</sup> What is Intellectual Property? (WIPO Publication No. 450n (E), p. 2.

<sup>16</sup> WIPO website: <https://www.wipo.int/copyright/en/>

<sup>17</sup> World Intellectual Property Organization (2007), *The Arts and Copyright: Learn from the Past, Create the Future*, Geneva, Switzerland, p. 17.

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*a work original. This means that there can be many different works about the same idea and all of them will be protected by copyright, as long as they express this idea in an original way” (p.17).*

Under the Intellectual Property Code of the Philippines, the following are protected by copyright either as original or derivative works:

- (a) Books, pamphlets, articles and other writings;*
- (b) Periodicals and newspapers;*
- (c) Lectures, sermons, addresses, dissertations prepared for oral delivery, whether or not reduced in writing or other material form;*
- (d) Letters;*
- (e) Dramatic or dramatico-musical compositions; choreographic works or entertainment in dumb shows;*
- (f) Musical compositions, with or without words;*
- (g) Works of drawing, painting, architecture, sculpture, engraving, lithography or other works of art; models or designs for works of art;*
- (h) Original ornamental designs or models for articles of manufacture, whether or not registrable as an industrial design, and other works of applied art;*
- (i) Illustrations, maps, plans, sketches, charts and three-dimensional works relative to geography, topography, architecture or science;*
- (j) Drawings or plastic works of a scientific or technical character;*
- (k) Photographic works including works produced by a process analogous to photography; lantern slides;*
- (l) Audiovisual works and cinematographic works and works produced by a process analogous to cinematography or any process for making audio-visual recordings;*
- (m) Pictorial illustrations and advertisements;*
- (n) Computer programs; and*
- (o) Other literary, scholarly, scientific and artistic works.*

The following are the derivative works:

- (a) Dramatizations, translations, adaptations, abridgments, arrangements, and other alterations of literary or artistic works; and*
- (b) Collections of literary, scholarly or artistic works, and compilations of data and other materials which are original by reason of the selection or coordination or arrangement of their contents. (Sec. 2, [P] and [Q], P.D. No. 49)*

As applied to traditional cultural expressions, the songs, dances, writings, paintings, photographs, drawings, poems, sculptures, and other literary artistic and literary works of indigenous people can be protected using the conventional intellectual property system as copyright and related rights of copyright. For example, the rituals of Igorots praying for a good harvest can be protected as copyright subject to the limitations of copyright provided by law.

(2) Trademark: WIPO defines trademark as “a sign capable of distinguishing the goods or services of one enterprise from those of other enterprises.”<sup>18</sup> In commercial business, it is the visible sign that differentiates the products of services of one from that of another. It creates name recall and goodwill that serves several functions to the product or service that it represents. It may include a name, symbol, logo, emblem, figure, letter or word. The most popular trademarks in the world include Google, Facebook and IBM. In the Philippines, San Miguel Corporation and Jollibee are famous examples of trademarks. In the Philippines, the following marks cannot be registered:

123.1. *A mark cannot be registered if it:*

- (a) Consists of immoral, deceptive or scandalous matter, or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols,*

<sup>18</sup> WIPO website: <https://www.wipo.int/trademarks/en/>



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*or bring them into contempt or disrepute;*

*(b) Consists of the flag or coat of arms or other insignia of the Philippines or any of its political subdivisions, or of any foreign nation, or any simulation thereof;*

*(c) Consists of a name, portrait or signature identifying a particular living individual except by his written consent, or the name, signature, or portrait of a deceased President of the Philippines, during the life of his widow, if any, except by written consent of the widow;*

*(d) Is identical with a registered mark belonging to a different proprietor or a mark with an earlier filing or priority date, in respect of:*

*(i) The same goods or services, or*

*(ii) Closely related goods or services, or*

*(iii) If it nearly resembles such a mark as to be likely to deceive or cause confusion;*

*(e) Is identical with, or confusingly similar to, or constitutes a translation of a mark which is considered by the competent authority of the Philippines to be well-known internationally and in the Philippines, whether or not it is registered here, as being already the mark of a person other than the applicant for registration, and used for identical or similar goods or services: Provided, That in determining whether a mark is well-known, account shall be taken of the knowledge of the relevant sector of the public, rather than of the public at large, including knowledge in the Philippines which has been obtained as a result of the promotion of the mark;*

*(f) Is identical with, or confusingly similar to, or constitutes a translation of a mark considered well-known in accordance with the preceding*

*paragraph, which is registered in the Philippines with respect to goods or services which are not similar to those with respect to which registration is applied for: Provided, That use of the mark in relation to those goods or services would indicate a connection between those goods or services, and the owner of the registered mark: Provided further, That the interests of the owner of the registered mark are likely to be damaged by such use;*

*(g) Is likely to mislead the public, particularly as to the nature, quality, characteristics or geographical origin of the goods or services;*

*(h) Consists exclusively of signs that are generic for the goods or services that they seek to identify;*

*(i) Consists exclusively of signs or of indications that have become customary or usual to designate the goods or services in everyday language or in bona fide and established trade practice;*

*(j) Consists exclusively of signs or of indications that may serve in trade to designate the kind, quality, quantity, intended purpose, value, geographical origin, time or production of the goods or rendering of the services, or other characteristics of the goods or services;*

*(k) Consists of shapes that may be necessitated by technical factors or by the nature of the goods themselves or factors that affect their intrinsic value;*

*(l) Consists of color alone, unless defined by a given form; or*

*(m) Is contrary to public order or morality.<sup>19</sup>*

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<sup>19</sup> Sec. 123, Intellectual Property Code of the Philippines.



As applied to traditional cultural expressions, the name of the tribe or a symbol used by the tribe in expressing its unique cultural experience can be registered as a trademark subject to the negative list provided by law. For example, the picture of an American Indian used by a tribe in America can be registered as a trademark by the tribe to prevent its use by others without its permission.

(3) **Industrial Designs:** WIPO has defined an industrial design as “constitutes the ornamental or aesthetic aspect of an article. An industrial design may consist of three dimensional features, such as the shape of an article, or two dimensional features, such as patterns, lines or colors.”<sup>20</sup> In the Philippines, an industrial design consists of “any composition of lines or colors or any three-dimensional form, whether or not associated with lines or colors; provided that such composition or form gives a special appearance to and can serve as pattern for an industrial product or handicraft.”<sup>21</sup> They are important in the design of handicrafts, jewelry, and other personal accessories.

As applied to traditional cultural expressions, the handicrafts, jewelry and other personal effects made by the indigenous people can be protected as industrial designs under the law. For example, unique handbags or earrings made by the indigenous people can be protected as industrial designs to prevent others from misappropriating them without permission.

After knowing that traditional cultural expressions can be protected, for the most part, as either copyright, trademark or industrial design, should this be the strategy of indigenous people in protecting their traditional cultural expressions? What are the issues that pervade protecting traditional cultural expressions using the convention forms of intellectual property protection? This is where we go to next.

#### 4. INTERSECTION OF TRADITIONAL CULTURAL

#### EXPRESSIONS AND INTELLECTUAL PROPERTY (COPYRIGHT, TRADEMARK AND INDUSTRIAL DESIGN)

In my previous article entitled “*IP of IP: Challenges in Protecting Traditional Knowledge in the Philippines*”<sup>22</sup>, I pointed out the intersection of traditional knowledge in general and intellectual property and mentioned that the relationship is a complex one for the following reasons:

*First*, the intellectual property system rewards novelty and innovation while traditional knowledge aims to preserve antiquity and old traditions and expressions. *Second*, the intellectual property system rewards individuals or entities exclusive rights while there is normally no single “inventor”, “author” or “creator” and oftentimes the author or inventor is of traditional knowledge is unknown. *Third*, the purpose of the intellectual property system is for the inventor to disclose the information to the public so that after the protection expires, the information becomes part of public domain. On the contrary, indigenous people do not generally want their traditional knowledge to be part of public domain as they want to retain exclusive possession of them as this is what makes them unique as a people. *Fourth*, conventional intellectual property is generally tangible and complete so as to know the extent or coverage of protection over the work. On the other hand, traditional knowledge is generally abstract, unlimited and ever-evolving. And *fifth*, conventional intellectual property is protected mainly for commercial purposes while traditional knowledge is protected primarily for preservation and not for commercial application.<sup>23</sup>

<sup>20</sup> WIPO website: <https://www.wipo.int/designs/en/>

<sup>21</sup> Sec. 112, Intellectual Property Code of the Philippines.

<sup>22</sup> Published in the Conference Proceedings of the DLSU Arts Congress in 2017.

<sup>23</sup> Supra on footnote 16, pp. 26-27.





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In addition, I pointed out in the same article the opinion of Eliana Torelly de Carvalho (2003) in her article *Protection of Traditional Biodiversity-Related Knowledge: Analysis of Proposals for the Adoption of a Sui Generis System*, regarding the challenges in applying conventional intellectual property to traditional knowledge:

*“At first glance, it is already possible to detect the contradiction between the protection of traditional knowledge associated with biodiversity and the modern legal framework of intellectual property rights. Traditional knowledge of indigenous and local communities has characteristics that make it unsuitable for protection by ordinary intellectual property rights laws. In most cases, traditional knowledge is neither attributable to one individual, nor can it be dated, since it is the result of a work that is passed through generations inside a community. Also, it is usually not documented in a written form. These characteristics exclude the patentability of traditional knowledge under the legal regime of the United States<sup>24</sup>*

The following hypothetical case can illustrate several of the many issues in protecting traditional cultural expressions: Consider a research team from a university who visits an indigenous community in the mountains of the Cordillera. The objective of the research is to document the songs and dances used by the indigenous community in planting and harvesting rice. These songs and dances have been used by the indigenous farmers as a way to please the gods so that they will have a bountiful harvest. These

cultural expressions have been passed on from generation to generation and the research team wants to document them all for publication for the appreciation of the general public. The researchers think that this will also give due recognition to the artistic and creative people of the indigenous community so that it will be preserved for posterity for the benefit of future generations. However, the leader of the indigenous community has some reservations on the research project. While the leader believes that the researchers have only good intentions in doing the research, he is worried that their works may be commercialized and trivialized. He is also worried that their work may pass through the hands of profit-oriented individuals and their work may be used without their permission. He is also not sure if their works can be protected using the conventional intellectual property system considering his lack of knowledge about the intellectual property system. You are a student of anthropology, history and intellectual property and the leader asks for your opinion on what to do to protect the traditional cultural expressions of the indigenous community. What would you advise the tribal leader?

A complex situation needs to be simplified and processed one by one. Indeed, this is not a simple situation as this involves the very being and existence of the indigenous community. A wrong decision might jeopardize the artistic works of the community and be subject to exploitation and abuse. The following is my proposed answer to the tribal leader to enable him to have a well-informed decision:

- 1) Make an inventory of the traditional cultural expressions of the indigenous community and classify them according to type of artistic creation. This is similar to an audit of the existing intellectual assets of the community.

<sup>24</sup> Eliana Torelly de Carvalho, *Protection of Traditional Biodiversity-Related Knowledge: Analysis of Proposals for the Adoption of a Sui Generis System*, 11 Mo. Envtl. L. & Pol'y Rev. 38 (2003), p. 39.

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For example, put all songs on one list and then put all dances on another.

- 2) Make a survey of the legal and regulatory framework in protecting traditional knowledge in general and traditional cultural expressions in particular. This will provide a good baseline in the existing legal protection of the traditional cultural expressions of the community;
- 3) Classify the traditional cultural expressions into the type of intellectual property which it can seek protection from using the conventional intellectual property system;
- 4) Decide if the TCEs shall be applied for legal protection or not. If yes, choose the appropriate type of protection. If not, is there another type of protection available? Is it better to leave the work unprotected for other justifiable reasons?
- 5) If the decision is to protect the work but the current legal system of protection is not appropriate or is inadequate, can a custom-made or sui-generis type of protection better?

By using this protection (thought) process, it is argued that the tribal leader faced with a team of researchers will have a better understanding of the situation and will be able to make the right decision in protecting (or not protecting) the traditional cultural expressions of the indigenous community.

## 5. THE PROTECTION PROCESS IN ACTION

Protecting traditional cultural expressions is not like protecting present-day artistic and literary works due to philosophical and social differences, but they also have some things in common.

Consider a faculty-researcher of a university who is able to write a textbook for use in his class on one hand, and a tribal leader who is able to make a compilation of lyrics of songs from his indigenous community on the other. The following are their similarities and differences:

Similarities	Differences
<u>As to content:</u> Both are expressions of creative ideas	<u>As to purpose:</u> The textbook was created for public use; The Compilation of Songs was created either for public use or for use only by the indigenous Community.
<u>As to eligibility for legal protection:</u> Both can be protected by Copyright	<u>As to Originality:</u> The textbook is an original expression of the author; The Compilation of Songs already exists and is not an original expression of the author as this has been handed down from one generation to another.
	<u>As to the author:</u> The identity of the author of the textbook is known; The author of the lyrics of the songs are not known as it is part of the history of the community.
	<u>As to objective:</u> The textbook is either for profit or not; The compilation of songs was created to preserve the work for the generations to come.
	<u>As to type of legal protection:</u> The textbook is protected by copyright; The compilation of songs is protected not only by copyright but by



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	international treaties and local laws for the protection of traditional knowledge (the need for informed consent and benefit sharing agreement)
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The table above clearly shows that there are more differences than similarities. This means that while the conventional intellectual system of protection can be used in some aspects of protection, it is not in four squares with traditional cultural expressions. For this reason, the thought process proposed in the previous chapter can be used as a guide in the protection of traditional cultural expressions. The following is the thought protection process in action:

1. Inventory and Classification: The first step, and usually the most challenging part, is making an inventory of the TCE. This involves scouring through the different literary and artistic works of the indigenous community and unearthing all available cultural expressions which can be in the form of writings, drawings, paintings, sculptures, and other literary and artistic works. After making an inventory, the list should be classified according to the conventional types of work: Books, songs, dances, poems etc. This can be housed in an electronic database for easy access and retrieval.
2. Survey of the Existing Laws Protecting TCE in the Philippines:

The 1987 Constitution is replete with provisions protecting national and cultural heritage and the recognition of the diverse cultures in the Philippines. The fundamental protection of traditional knowledge is found in the 1987

Constitution. Section 17 of Article XIV provides that:

*“The State shall recognize, respect and protect the rights of the indigenous cultural communities to preserve and develop their cultures, traditions and institutions. It shall consider these rights in the formulation of national plans and policies.”*

To provide teeth to this constitutional provision, a special law for the protection of indigenous people enacted, which is the Indigenous Peoples Rights Act (Republic Act No. 8371) or IPRA which took effect on 29 October 1997. The salient provisions of the IPRA are:

*“SECTION 2. Declaration of State Policies. — The State shall recognize and promote all the rights of Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs) hereunder enumerated within the framework of the Constitution:*

*a) The State shall recognize and promote the rights of ICCs/IPs within the framework of national unity and development;*

*b) The State shall protect the rights of ICCs/IPs to their ancestral domains to ensure their economic, social and cultural well being and shall recognize the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain;*

*c) The State shall recognize, respect and protect the rights of ICCs/IPs to preserve and develop their cultures, traditions and institutions. It shall consider these rights in the formulation of national laws and policies;*

*d) The State shall guarantee that members of the ICCs/IPs regardless of sex, shall equally enjoy the full measure of human rights and freedoms without distinction or discrimination;*



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*e) The State shall take measures, with the participation of the ICCs/IPs concerned, to protect their rights and guarantee respect for their cultural integrity, and to ensure that members of the ICCs/IPs benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population; and*

*f) The State recognizes its obligations to respond to the strong expression of the ICCs/IPs for cultural integrity by assuring maximum ICC/IP participation in the direction of education, health, as well as other services of ICCs/IPs, in order to render such services more responsive to the needs and desires of these communities.*

*Towards these ends, the State shall institute and establish the necessary mechanisms to enforce and guarantee the realization of these rights, taking into consideration their customs, traditions, values, beliefs, interests and institutions, and to adopt and implement measures to protect their rights to their ancestral domains.”*

With regard to the protection of the intellectual property rights of indigenous people and communities in particular, Section 32 and 34 of R.A. 8371 or the IPRA provides that:

*“SECTION 32. Community Intellectual Rights. — ICCs/IPs have the right to practice and revitalize their own cultural traditions and customs. The State shall preserve, protect and develop the past, present and future manifestations of their cultures as well as the right to the restitution of cultural, intellectual, religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions and customs.”*

*“SECTION 34. Right to Indigenous Knowledge Systems and Practices and to Develop own Sciences and Technologies. —*

*ICCs/IPs are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights. They shall have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of fauna and flora, oral traditions, literature, designs, and visual and performing arts.”*

The two most important provisions in the IPRA relating to the rights of the indigenous peoples include: (1) The right of prior informed consent found in Section 32 of the IPRA; and (2) Right to own and benefit to the indigenous communities under Section 34 of the IPRA. These two features addresses the two pain points of indigenous communities: (1) The extraction of traditional knowledge and appropriating them as commercial goods without consent from the indigenous community; and (2) Getting economic benefit or profit without sharing them with the indigenous community. The other important features of the law include the shift from individual to community ownership of traditional knowledge and the importance given to customary laws and traditions.

The other relevant laws are as follows: (1) The Wildlife Resources and Conservation Act (R.A. 9147); (2) The Traditional and Alternative Medicine Act (R.A. 8423); (3) The Magna Carta for Women (R.A. 9710) on the rights of indigenous women of their traditional knowledge and practices; and (4) The Technology Transfer Act (R.A. 10055).

With the knowledge of the relevant laws in the protection of TCEs, the indigenous peoples are now more equipped to face the challenges facing them. This will also give them an informed decision on which strategy to take in the protection of their TCEs.

### 3) Classification of Traditional Cultural Expressions and its Form of Protection:

Once the inventory is made, it is now



ready for classification according to the type of intellectual property protection: Whether they should be protected as copyright, trademark or industrial design. Another option is just to leave it as a “secret” only for the community to know. For example, an indigenous dictionary can be classified under copyright while a drawing/logo which identifies the tribe can be protected as a trademark. The beauty with traditional knowledge is that the bias for publication and disclosure does not apply because the decision to protect or not is left solely on the discretion of the indigenous community. It only the indigenous community that best knows how to do with its traditional knowledge taking into account their beliefs and culture.

#### 4) Decision to Apply for IP Protection:

After classifying the TCE, the next step is to make a decision on whether or not to apply for intellectual property protection using the conventional intellectual property system . While most of the TCE complies with the requirements of intellectual property protection under the intellectual property code, there may be some indigenous communities who may opt not to apply for protection. The following may be some of these reasons:

(1) Trust issues: The indigenous communities may not be confident with the system and instead of sharing their works of art, they fear that disclosure would open them to abuse. They are also not sure if the intellectual property system is the right way of protecting their TCEs;

(2) Lack of knowledge about the IP system: The IP system contains technical subject matter which may be difficult to understand even to a law student. This lack of knowledge and awareness of the IP system contributes to the decision not to apply for application as people normally fear what they do not know;

(3) The TCE is sacred: There are some components of the TCE that the indigenous people may find sacred to be applied for protection. For example, sacred prayers or designs may not be proper for intellectual property protection, which is similar to the non-patentable subject matter under Section 21 of the intellectual property code of the Philippines. This is unique to each community and should be respected; and

(4) TCE should be preserved as a secret for the community: Some indigenous communities want to preserve TCEs so as not to dilute its content. This will also give them a sense of uniqueness as they are the only ones who know their TCEs.

The decision to apply for protection depends solely on the community. There is no right or wrong decision as this wholly depends on the unique circumstances of the community and whether they want to open up their culture to the outside world or not. For some, it may not be the right time yet.

5) The Decision is to apply for protection. But is the existing legal protection under Philippine laws adequate?

Traditional Cultural Expressions (TCE) can be protected using the conventional intellectual property system under the Intellectual Property Code of the Philippines. Protection using the current legal system will enable the indigenous communities to acquire certain legal rights. It is *“the granting and exercise of rights that empower communities and promote their traditional knowledge, control its uses and benefit from its commercial exploitation.”*<sup>25</sup> For TCE, legal protection can be applied for using copyright, trademark or industrial design protection. TCE will then have to conform to the requirements of the conventional system. For example, a tribal

<sup>25</sup> Supra on footnote 18, p.2.

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leader can seek industrial design protection over the design of baskets made by the community. The design can then be licensed to third parties who may want to use the basket design. The indigenous community will acquire industrial design protection that it can use to prevent exploitation and abuse of others. Licensing the design can also result to economic benefits to the community.

Legal protection under the Intellectual Property Code of the Philippines (R.A. 8293) may be the first resort to protect the rights of the indigenous communities. If this is not sufficient, other alternative modes of protection are available. For example, the mandate of the Indigenous Peoples Rights Act (R.A. 8371) and relevant laws to protect their TCEs give them elbow room to enter into contracts or agreements to protect their interest. These include provisions for informed prior consent and benefit sharing agreements. However, it is admitted that the present conventional system does not fully protect TCEs under all possible situations. As stated in my previous article<sup>26</sup> involving a similar topic mentioned above, while there is an existing legal framework for the protection of TCEs, there is still room for improvement for the following reasons: “(1) The Intellectual Property Code of the Philippines (R.A. 8293) does not include traditional knowledge as one of the intellectual property rights protected under the code; (2) The Indigenous Peoples Right Act does not provide the legal mechanism for the protection to traditional knowledge in the same way as conventional intellectual property like patents, trademark and copyright; (3) The Indigenous People’s Right Act (R.A. 8371) pertaining to traditional knowledge does not address the lack of legal protection afforded to traditional knowledge as they address only specific issues and are, therefore, not comprehensive; and (4) The requirements of legal protection under the conventional intellectual property system (R.A. 8293) are for the most part not consistent with the nature of traditional knowledge.”

While the legal protection is not complete, the Philippines should be commended for it has already made great strides in the protection of traditional knowledge, which includes traditional cultural experience. The next step is to make a

custom-made or sui generis law that would fill in the gaps of the current system of protection.

## 6. CONCLUSION AND RECOMMENDATION

Traditional Cultural Expressions or folklore represent the identity, cultural heritage and common bond of a community. It is something sacred to the community because it represents who they truly are. For this reason, there is a need to respect and protect these traditional cultural expressions. As discussed above, there are already existing laws and structures that recognize, uphold and protect traditional cultural expressions. However, legislation is only one aspect of the solution. A more comprehensive approach is necessary to fully protect the TCEs of the indigenous community. While the laws can be amended to keep abreast with the changing needs of TCEs, other non-legal support are necessary. Indeed, legal protection under the Constitution, the Intellectual Property Code and the IPRA, among others, already provide the legal infrastructure for protection, there is still room for improvement. The model format by UNESCO for the protection of traditional knowledge can be a good template for a more rigorous protection of TCEs. “Still, for many reasons, traditional Knowledge remains elusive to current IP laws.”<sup>27</sup>

Moving forward, the following are my recommendations to better protect traditional cultural expressions:

1. Build Trust in the Intellectual Property System. In my conversations with some indigenous peoples, the one thing that keeps them from fully applying for intellectual property protection is the lack of confidence and trust in the system. At the back of their minds, they always think of the possibility of “outsiders” taking their intellectual creations without giving them credit. Worse, these TCEs may even be used for commercial purposes and do not

<sup>26</sup> See Footnote 1.

<sup>27</sup> Supra on footnote 16, p.1537.



get any economic benefit from them. One way for them to patronize the IP system is to build trust among all the stakeholders. This will indeed take time but it is the only way to go if we want a long and enduring relationship that would benefit not only the indigenous community but the society as a whole.

2. Increase Awareness on Traditional Cultural Expressions as Subject Matter of intellectual property protection: One of the main reasons for lack of trust in the intellectual property system is the lack of knowledge in the intellectual property system itself. Having laws protecting TCEs is not enough. There is a need to have a comprehensive information dissemination campaign about TCEs as proper subject matter of intellectual property protection. Dialogues, visits, talks and seminars, to name a few, are just some of the ways to put intellectual property in the radar of indigenous peoples.
3. Realize that intellectual property protection is not for everyone. In the protection thought process that I proposed in the previous chapter, there is a decision to be made on whether intellectual property protection is the right strategy to make. While most TCEs are eligible for protection, this may not be the right decision for everyone. Each indigenous community must evaluate themselves and determine if intellectual property protection is the right way to go.
4. Establish Sui Generis protection for Traditional Cultural Expressions: It is admitted that the current legal protection for indigenous art, while providing basic protection, is not sufficient to give better protection for TCEs. Considering that each community is unique and has its own set of folklore, it is imperative that a custom-made or sui-generis protection be made by each community. While there are general minimum standards of protection as provided in the model template of UNESCO, a custom-made kind of protection, I think, is necessary. For this

purpose, the National Center for Indigenous People (NCIP) should take the initiative for crafting a sui-generis kind of protection. They should invite all stakeholders for consultation so that they can draft a sui-generis policy statement and law enhancing the IPRA. I think that a “one-size-fits-all” solution is not the answer but a custom-made form of protection. This will also give a lot of flexibility to the indigenous people to make their own destiny.

Hansen and Van Fleet (2007)<sup>28</sup>, aptly stated that “*access, development and distribution must be balanced against equitable benefit sharing, sustainable development and conservation*” of traditional knowledge. Protection of traditional cultural expressions needs the support of all stakeholders keeping in mind the rights of the indigenous people. Balancing the interests of all these stakeholders is the key to make the system a sustainable one.

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<sup>28</sup> Supra on footnote 16, p. 1537.



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