NOTE:

COPYRIGHT PROTECTION OF INDIGENOUS EXPRESSIONS

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I. INTRODUCTION

Baguio's thriving souvenir industry has both local and foreign tourists making the local market their last stop where they shop for, among others, woven blankets and traditional Ifugao dress. Other favorite items are wall hangings, bags, table linen and other household items. Many of the designs used in these items are purportedly based on the traditional patterns of the indigenous communities native to the Northern provinces, yet the beneficiaries of the thriving market are hardly the members of these cultural groups.

In Lake Sebu, South Cotabato, the Tboli people have a tradition of *tnalak* weaving, the art of making fabric from *abaca* fibers. These fabrics are intended to be used for traditional dress and the designs come to the weaver in the form of dreams. So sacred are the designs that the weavers believe that no scissors should be used on the unfinished fabric. Instead, the weavers use their teeth to separate the bolt of cloth from the loom. Yet now, *tnalak* is used as accents on bags, shoes, table linen, and other souvenir items. Cut up into small pieces, the poetry and the symbolism of the designs are lost.

The tourist trade has resulted in increasingly widespread commercial appropriation of indigenous images, patterns, designs, and symbols. Yet

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indigenous peoples[1] can do little to prevent non-community members from using indigenous patterns to produce commercial fabrics and other items using cheap materials and labor, thereby undercutting the indigenous peoples from the market. They can do even less in terms of protecting their sacred and secret imagery from being reproduced and distorted.

Due to the demands of the market, indigenous expressions[2] are seen more often and in more commercial contexts. Unfortunately, sometimes these indigenous expressions are used without permission, and worse, in a way that is offensive to the cultural group. Unauthorized reproductions can come in the form of craft items or cheap souvenir commodities, from wall hangings to tea towels, clothes and accessories in varying degrees of wearability and taste, and furniture and other household items. Art works influenced or inspired by indigenous expressions or adaptations of the same created by non-members of the indigenous community are also a form of exploitation, particularly when the work misleads people into believing that the artist is a member of the cultural group.

Films, videos, documentaries and music, have helped distort the way the public views indigenous communities. Savvy marketing and advertising campaigns that capitalize on indigenous motifs to sell everything from phone cards to baby powder result in "substantial profits" for companies and non-indigenous persons without resulting in any corresponding benefits for the indigenous communities.

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[1] Indigenous groups have been defined as peoples, communities or nations which, "having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems." See *Study of the Problem of Discrimination Against Indigenous Populations: Final Report (Last Part) Submitted by the Special Rapporteur*, UN ESCOR Human Rights Commission, 36th Session, Agenda Item 11, at 50, UN Doc. E/CN.4/Sub.2/AC.4/1993/21/Add.8 (1993).

[2] In this paper, "indigenous expressions" is used alternatively with "indigenous art," "indigenous creations," "expressions of folklore," or "folk art" to refer to "all literary and artistic works mostly created by authors of unknown identity but presumed to be nationals of a given country, evolving from characteristic forms traditional in the ethnic groups of the country." This is the definition of "folklore" used by the World Intellectual Property Office (WIPO), GLOSSARY OF TERMS ON THE LAW OF COPYRIGHT AND NEIGHBORING RIGHTS 119 (1980) and includes "folk tales, legends, songs, music, musical instruments, dances, designs, and patterns."

The problem is compounded by technological advances. With digital data, quality is not lost by copying, and therefore an indefinite number of original-quality clone copies can be produced.[3] The four months minimum needed by a Tboli weaver to reproduce a design on *tnalak* cloth is obliterated when an enterprising designer chooses to scan the image of the *tnalak* design and mechanically reproduce the same tie-dye effect on commerical fabrics using modern machines.

Another characteristic of digital data is that it allows for easy alteration and adaptation.[4] In a matter of minutes, any artwork can be digitized, altered, and distributed throughout the world, through the use of computers and the Internet. Once digital data of copyrighted works are put on a network, from that moment on usages of that work could occur anywhere in the world.[5] Since these technologies are readily available, theoretically, every individual, if he so chooses, can be an unauthorized publisher or copyist and be guilty of cultural theft. In the past, the author or creator could easily overcome this problem by refusing to make his work available to certain markets which he believes will only cause damage to himself and his work. The days in which an author can shield himself from would-be pirates through strategic distribution of his works are gone.[6]

> The consequence is that the indigenous people who created the art are not being compensated for its use. Another consequence is that indigenous communities are not exercising control over how their art is being used. This lack of control means that they cannot refuse to have their work put to particular uses and that they cannot ensure that their work is reproduced in a way that maintains its integrity or the reputation of the creator.[7]

The need to protect and preserve indigenous expressions cannot be denied. According to the World Intellectual Property Office (WIPO), "[f]olklore is an important element of the cultural heritage of every nation." It

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[3] Seiji Odaki, *The Impact of New Technology on the Exercise and Administration of Copyright and Neighboring Rights in Musical Works*, 1997 WIPO Regional Symposium on Copyright and Neighboring Rights for Asian and Pacific Countries (Manila, 9-12 December 1997).

[4] *Id.*

[5] *Id.*

[6] Orrin G. Hatch, *Toward a Principled Approach to Copyright Legislation at the Turn of the Millennium*, U. PITT. L. REV. 719, 730 (1998).

[7] Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 8 (1997).

is, however, of particular importance for developing countries, which recognize folklore as a means of self-expression and social identity.[8]

Indigenous artists and craftsmen serve as the voice of their people, the recorders of their oral history. Traditionally, indigenous communities have no written history. As a result, these designs are the means by which their culture is passed down through the generations. When these designs are appropriated for commercial use without due respect "for the cultural and economic interests of the communities from which [they] originate," they are not only plagarized but also robbed of their cultural significance.

II. COPYRIGHT PROTECTION: THE PHILIPPINE CONTEXT

The Philippines recognizes the need to protect, preserve and promote indigenous expressions. This policy is enshrined in article XIV, section 17 of the 1987 Constitution which provides that

> [T]he State shall recognize, respect, and protect the rights of 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.[9]

Other laws reiterate this declared policy of the State. The latest enactment is the Indigenous Peoples Rights Act of 1997[10] which was passed into law on 22 October 1997. Section 32 of said law provides that

> Section 32. *Community Intellectual rights.* ICCs/IPs have the right to practice and revitalize their own cultural traditions and cultures. 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.[11]

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[8] *The Protection of Expressions of Folklore: The Attempts at International Level*, (hereinafter *The Protection of Expressions of Folklore*), 1997 WIPO Regional Symposium on Copyright and Neighboring Rights for Asian and Pacific Countries (Manila, 9-12 December 1997).

[9] CONST. art. XIV, sec. 17.

[10] Rep. Act No. 8371 (1997).

[11] Rep. Act No. 8371 (1997), sec. 32.

while section 34 provides that

> Section 34. *Rights to Indigenous Knowledge Systems and Practices and to Develop Own Sciences and Technology.* 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 flora and fauna, oral traditions, literature, designs, and visual and performing arts.[12]

Another very important achievement in terms of protecting indigenous expressions is the enactment of the *Gawad sa Manlilikha ng Bayan.*[13] Established in 1992, the *Gawad sa Manililikha ng Bayan* is the highest award conferred by the Philippine government on its outstanding traditional folk artists. Patterned after Japan's program of giving recognition to "bearers of the skills and techniques essential for the continuation of certain important intangible cultural properties,"[14] it is the equivalent of the National Artist Awards (NAAW).

The *Gawad sa Manililikha ng Bayan* is awarded to

> a citizen or a group of citizens engaged in any traditional art uniquely Filipino, whose distinctive skills have reached such a high level of technical and artistic excellence and have been passed on to and widely practiced by the present generations in his/her community with the same degree of technical and artistic competence.[15]

Simply put, awardees may be individuals or a community which actively practice a traditional or folk art that reflects a distinct facet of Filipino culture.

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[12] Rep. Act No. 8371 (1997), sec. 34.

[13] Rep. Act No. 7355 (1992).

[14] *Guidelines on Human Living Treasures*, (hereinafter *UNESCO Guidelines*), 1999 UNESCO International Workshop of Human Living Treasures, (Venice, 24–27 February 1999).

[15] Rep. Act No. 7355 (1992), sec. 3.

In institutionalizing the *Gawad sa Manlilikha ng Bayan* through legislative action, the State made concrete its policy to

> preserve and promote its traditional folk arts whether visual, performing, or literary, for their cultural value, and to honor and support traditional folk artists for their contribution to the national heritage by ensuring that the artistic skills which they have painstakingly cultivated and preserved are encouraged and passed on to future generations of Filipinos.[16]

As keepers of the Filipino traditions, *Gawad sa Manlilikha ng Bayan* awardees are entitled to certain privileges similar to that received by National Artists, such as a cash grant upon conferment, a lifetime pension, a specially designed medallion presented during a public ceremony, and a place of honor at state functions or cultural events. Further, the entitlements include an assurance that the creative products of the awardees will be fully documented to ensure the continuity of the folk tradition.[17] Other rights include technical and financial assistance from various government agencies to help the awardees establish a system to effect the transfer of skills and the marketing of his/her products.

However, documentation and financial assistance go only so far as to ensure that certain recognized expressions of indigenous knowledge are preserved and promoted. To ensure their protection as intellectual and cultural property, one has to resort to the tradition of copyright law which, in the Philippines, began on 5 May 1887 when the Spanish Law on Intellectual Property of 10 January 1879 was extended to the Philippines by Royal Decree. When Spain ceded the Philippines to the United States of America on 10 December 1898 under the Treaty of Paris, the United States Copyright Law became the governing law.

Twenty-six years later, on 6 March 1924, the Philippine Legislature enacted Act No. 3134, entitled "An Act to Protect Intellectual Property," which was pattered after the American Copyright Law of 1909. The Act identified classes of works deserving of protection, which could be secured only after registration of claims to copyright, and deposit of copies of the work with the Philippine Library and Museum.[18]

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[16] Rep. Act No. 7356, An Act Creating the National Commission for Culture and the Arts (1992), sec. 2.

[17] Rep. Act No. 7355 (1992), sec. 5 par. (c).

[18] Act No. 3134 (1924), sec. 11.

As provided in section 3 of said Act, copyright shall consist in the exclusive right:

> a) To print, reprint, publish, copy, distribute, multiply, sell, and make photographs, photo-engravings, and pictorial illustrations of the works;
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> b) To make any translation or other version or extracts or arrangements or adaptations thereof; to dramatize it if it be a non-dramatic work; to convert it into a non-dramatic work if it be a drama; to complete or execute it if it be a model or design;
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> c) To exhibit, perform, represent, produce, or reproduce the work in any manner or by any method whatever for the profit or otherwise; if not reproduced in copies for sale, to sell any manuscripts or any record whatsoever thereof;
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> d) To make any other use or disposition of the work consistent with the laws of the land.[19]

Remedies for infringement consisted of injunction, damages, and criminal liability for the infringers, and those who aided or abetted the infringement.[20]

The passage of international treaties on intellectual protection contributed to the development of copyright law in the Philippines. On 1 August 1951, the Philippines acceded to the Berne Convention for the Protection of Literary and Artistic Works (hereinafter the Berne Convention), as revised in Brussels in 1948.[21] Since the Brussels revision in 1948, the Berne Convention has undergone two more revisions: the Stockholm Act (1967) and the Paris Act (1971).[22] The Philippines adhered to the administrative provisions of the Paris Act but not to its substantive provisions.[23]

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[19] Act No. 3134 (1924), sec. 3.

[20] IGNACIO S. SAPALO, BACKGROUND READING MATERIAL ON THE INTELLECTUAL PROPERTY SYSTEM OF THE PHILIPPINES 133 (1994).

[21] *Id.*

[22] *Id.* at 135.

[23] *Id.*

In November 1972, President Ferdinand Marcos issued Presidential Decree No. 49 (Intellectual Property Decree) by virtue of his legislative powers. This has since been repealed by Republic Act No. 8293 or the Intellectual Property Code (hereinafter IPC) which took effect on 1 January 1998. Said law was enacted to show the Philippines' conformity with the General Agreement on Tariffs and Trade (GATT) with its component Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (TRIPS) to which the Philippines acceded on 14 December 1994. The TRIPS requires member-States to enact, or amend, intellectual property laws to provide for certain minimum standards.[24] Section 9 paragraph (1) of the TRIPS Agreement also provides that members shall comply with Articles 1 to 21 of the Berne Convention, and the Appendix which provides for Special Provisions Regarding Developing Countries.

In enacting provisions that recognize and support the work of traditional and folk artists, the Philippines has succeeded in creating a formal structure that ensures stability and continuity.

> [I]n this way, people will know what the system means, how it functions and what can be expected of it. The legal provisions can [also] be used as an educational tool in instructing the public about the intangible cultural heritage and "living human treasures." The mere fact that these exist in the law enables publicists to draw on the system as a framework for their educational and publicity efforts.[25]

The question now is whether "indigenous art really finds the protection it needs in copyright law, or is copyright law's protection too limited both in its scope and subject matter to adequately respond to the needs of the indigenous communities?"[26] A study of the law on copyright would show that existing mechanisms may be ill-suited to protect certain types of indigenous art. Rather, the copyright protection regime raises certain problematic issues regarding questions of authorship and the individual nature of the rights, ownership, originality, duration of protection, moral rights, remedies for infringement, and enforcement of the rights, particularly in relation to the indigenous communities whose expressions are sought to be protected. Thus, while it is admirable that the State has taken steps to ensure

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[24] Miriam Defensor Santiago, *Philippine Intellectual Property Laws: A Review in Light of the GATT*, 70 PHIL. L.J. 17, 19 (1995).

[25] UNESCO Guidelines, *supra* note 14.

[26] Farley, *supra* note 7, at 7.

the protection of indigenous knowledge in terms of its preservation, promotion and cultivation, at the same time, it may have also established a system of intellectual property laws that is contrary to the spirit of what it seeks to protect.

A 1997 study by WIPO documents the limitations of copyright in protecting "expressions of folklore." According to the paper presented by the WIPO at the WIPO Regional Symposium on Copyright and Neighboring Rights for Asian and Pacific Countries held in Manila from 9 to 12 December 1997,

> [I]t seems that copyright law may not be the right, or certainly the only, means for protecting expressions of folklore. This is because, whereas an expression of folklore is the result of an impersonal, continuous and slow process of creative activity exercised in a given community by consecutive imitation, works protected by copyright must, traditionally, bear a mark of individual originality. Traditional creations of a community, such as the so-called folk tales, folk songs, folk music, folk dances, folk designs or patterns, may often not fit into the notion of literary and artistic works. Copyright is author-centric and, in the case of folklore, an author — at least in the way in which the notion of "author" is conceived in the field of copyright — is absent.[27]

More importantly, "[a]pplication of intellectual property laws, whose underlying logic is to facilitate dissemination, is fundamentally inappropriate to prevent sacred indigenous images from circulation and re-use."[28] Thus, indigenous communities that want to "control and restrict the flow" to prevent the "appropriation and manupulation of their cultural images and texts" cannot rely on copyright protection for help.

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[27] *The Protection of Expressions*, *supra* note 8.
[28] Farley, *supra* note 7, at 4.

III. COPYRIGHT PROTECTION OF INDIGENOUS EXPRESSIONS

A. Authorship, ownership and the individual nature of indigenous rights

At its core, copyright is intended to reward individual authors for their creation of intellectual property.[29] It aims to to encourage and reward individual creativity, and thus, copyright is regarded as a "proprietary interest" that can be bought or sold. In the Anglo-Saxon tradition, a work of creation is "in essence a commodity, to be freely traded and under the control of the person or corporation which holds title to it."[30]

In contrast, "indigenous world-view prioritizes the interests of the community as a whole over those of the individual. Ownership of folklore in indigenous culture is therefore a collective, as opposed to individual, phenomenon."[31] Therefore any use or alienation of indigenous heritage must be sanctioned by the community as a whole or by its traditional custodians acting with the mandate of the community, and must be on such terms as imposed by the group.[32]

Further:

> Indigenous appreciation of folkloric works is not simply based on their aesthetic qualities, but more fundamentally on the ability of the individual author to reflect the culture and livelihood of the community in the folklore: art is considered to be precious, not as an object, but for its life-sustaining qualities. The language it uses — the signs, symbols and codes may all be information necessary for survival.
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> The realisation that folklore is intimately linked with the identity of indigenous communities therefore informs on the definition of ownership in indigenous culture. The concept is akin to custodianship rather than exclusive proprietorship, and hence connotes a set of

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[29] *Id.* at 29.

[30] Mike Holderness, *Moral Rights and Authors' Rights: The Keys to the Information Age,* The Journal of Information, Law and Technology <http://elj.warwick.ac.au/jilt/inforsoc/98 1hold/>.

[31] Joseph Wambugu Githaiga, *Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge*, 5 Murdoch University Electronic Journal of Law <http.//www.murdoch.edu.au/elaw/issues/v5n2/githaiga52 body.html>.

[32] *Id.*

> responsibilities owed to the indigenous community by those in whom ownership of folklore is vested.[33]

This raises the question of "Who is an author?" Section 178 of the IPC provides that in the case of original literary and artistic works, copyright shall belong to the author of the work.[34] Attribution is crucial in order to secure the rights[35] granted by the IPC.

Being premised on individual rights, copyright recognizes group rights only in limited situations. Yet most indigenous artworks are "actually executed by a group" because these gain meaning only within the context that a community provides. Dances, songs, chants, and other performances and presentations performed for ritual purposes such as for a wedding, burial or thanksgiving harvest need the cooperation of the community as a whole. Absent the celebration or event, the creator would not have an occasion to perform the ritual or create the work of art.

Thus, the originator of the work is the whole community. The work is an expression of the whole community and the result of the community's collective efforts. Christine Haight Farley likens giving rights to one individual author in the indigenous community to "letting one individual control the use of the Star of David or the image of Jesus on the cross."[36]

The primary difference between individual creations and indigenous expressions is that in the latter, the author cannot be identified. The work is the product of years of tradition passed on through generations. There can be

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[33] *Id.*

[34] INTELLECTUAL PROPERTY CODE, sec. 178.1.

[35] As provided in the INTELLECTUAL PROPERTY CODE, sec. 177, copyright or economic rights shall consist of the exclusive right to carry out, authorize or prevent the following acts:

177.1 Reproduction of the work or substantial portion of the work;

177.2 Dramatization, translation, adaptation, abridgement, arrangement or other transformation of the work;

177.3 The first public distribution of the original and each copy of the work by sale or other forms of transfer of ownership;

177.4 Rental of the original or a copy of an audiovisual or cinematographic work, a work embodied in a sound recording, a computer program, a compilation of data and other materials or a musical work in graphic form, irrespective of the ownership of the original or the copy which is the subject of the rental;

177.5 Public display of the original or a copy of the work;

177.6 Public performance of the work; and

177.7 Other communication to the public of the work.

[36] Farley, *supra* note 7, at 31.

no single person to whom the work can be attributed. Instead, the work is defined according to the community from which it emerged.

In keeping with the Intellectual Property tradition, the *Gawad sa Manilikha ng Bayan* is conferred on specially identified citizens or groups of citizens, not the community itself. Awardees are given a cash award upon conferment and a monthly stipend for life, subject to the condition that he/she "transfers the skills of his/her traditional folk art to the younger generation through apprenticeship and such other training methods as are found to be effective."[37] The *Manlilikha ng Bayan* awardee is expected to use his/her monthly stipend to teach his/her skills to the younger generation, and a local coordinator is tasked to see that this duty is carried out.

However, the monthly stipend is automatically cancelled when the *Manlilikha ng Bayan* awardee dies and recognition accorded to the community tradition is withdrawn, despite the fact that others in the community may still be active in the practice of their tradition.

This also raises the question of who owns these indigenous creations and who can give permission for their use, as well as assign the rights. The designated author as provided by the IPC? The elders of the community representing their community? The community voting as a whole? It is possible that they will be governed by the provision in the Code regarding joint authorship for collective works. Section 171.2 of the IPC defines a collective work as

> [A] work which has been created by two or more natural persons at the initiative and under the direction of another with the understanding that it will be disclosed by the latter under his own name and that contributing natural persons will not be identified.[38]

In that case,

> the co-authors shall be the original owners of the and in the absence of agreement, their rights shall be governed by the rules on co-ownership. If, however, a work of joint authorship consists of parts that can be used separately and the author of each part can be identified, the author of

[37] Rep. Act No. 7355 (1992), sec. 6 par. (a).
[38] INTELLECTUAL PROPERTY CODE, sec. 171.2.

> each part shall be the original owner of the copyright in the part that he has created.[39]

In that case, the provisions of the Civil Code will apply. Article 488 is particularly relevant because of its emphasis on proper use of the thing.[40] However, the provisions on co-ownership also imply that it is possible to quantify the interests of the co-owners in the object,[41] something which is impossible when we speak of non-material things, more so when what is at stake is a way of life.

B. Originality

Copyright law requires that a work be "original intellectual creations"[42] to be eligible for protection and the "essence of a copyright infringement is the similarity or at least substantial similarity of the purported pirated works to the copyrighted works."[43]

However, indigenous art "draws upon custom and tradition" and "represents a continuation of . . . time-honoured myths and legends."[44] Although folklore can be entirely new, it is most often directly derived from preexisting works.[45] Faithful reproduction, rather than innovation, is what is valued. In fact, the *Gawad sa Manlilikha ng Bayan* is awarded to those artists who best exemplify the traditions of their community.

Further, "if the work is based on a preexisting work . . . only the variation from that work is protectable. That is, the underlying work may be in the public domain, and it is only what the artist adds, a background or a change in medium, for example, that would be protected."[46] Thus, it is

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[39] INTELLECTUAL PROPERTY CODE, sec. 178.2.

[40] CIVIL CODE, art. 488. Each co-owner may use the thing owned in common, provided he does so in accordance with the purpose for which it is intended and in such a way as not to injure the interest of the co-ownership or prevent the other co-owners from using it according to their rights. The purpose of the co-ownership may be changed by agreement, express or implied.

[41] CIVIL CODE, art. 485. The share of the co-owners, in the benefits as well as in the charges, shall be proportional to their respective interests. Any stipulation in a contract to the contrary shall be void. The portions belonging to the co-owners shall be presumed equal, unless the contrary is proved.

[42] Rep. Act No. 8293 (1998) sec. 172.1.

[43] 20th Century Fox Film Corp. v. Court of Appeals, G.R. No. L-76649-51, 19 August 1988, 164 SCRA 655, 664.

[44] Farley, *supra* note 7, at 21.

[45] *Id.*

[46] *Id.* at 22.

possible that a non-member of the indigenous community will create objects completely based on traditions and images which are already considered to be within public domain, make slight variations to distinguish his work from the indigenous artist's and copyright his own interpretation, "thereby obtaining a monopoly over the use of those designs."[47] He may then, through mass production, corner the market for indigenous products, thereby effectively shutting out the indigenous artist. The indigenous community may find that rather than being the owners of their traditions, they would now have to seek permission from other persons to create and market their work.

C. Period of protection

The IPC, following the Berne Convention, limits the duration of protection to "during the life of the author and for fifty years after his death."[48] In case of joint authorship, the protection extends through the lifetime of the "last surviving author and for fifty years after his death."[49] Anonymous or pseudonymous works are "protected for fifty years from the date on which the work was first lawfully published,"[50] but the lifetime plus fifty-years limit would apply if, before the expiration of the said period, the author's "identity is revealed or is no longer in doubt."[51]

In a survey of laws enacted by developing countries to regulate the use of folklore, the WIPO concluded that "[i]t follows from the very nature of folklore — namely, from the fact that it is the result of creative contributions of usually unknown members of a number of subsequent generations — that its protection could not be reasonably limited in time."[52] It is clear that indigenous traditions span a period considerably longer than fifty years, and the effect is that all indigenous traditions may have conceivably passed into the arena of public domain, and may therefore be reproduced by anyone without need for permission. Once the period has expired, the community has no right under

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[47] *Id.*
[48] INTELLECTUAL PROPERTY CODE, sec. 213.1 (1998).
[49] INTELLECTUAL PROPERTY CODE, sec. 213.2 (1998).
[50] INTELLECTUAL PROPERTY CODE, sec. 213 (1998).
[51] INTELLECTUAL PROPERTY CODE, sec. 213.3 (1998).
[52] *The Protection of Expressions of Folklore, supra* note 8.

copyright laws to restrain the use of the work, despite its religious, social and cultural significance to the community.[53]

Many indigenous rights advocates argue that perpetual protection should be granted to folklore because "the protection of the expression of folklore is not for the benefit of individual creators but a community whose existence is not limited in time."[54] Even assuming that works would be protected for fifty years as an unpublished anonymous work that period is still insignificant in the life of artistic traditions that date back thousands of years.[55]

Further, for indigenous expressions, the problem is compounded by the fact that it is difficult to identify "a particular author by whose life the term may be measured."[56] One way to get around this problem is to designate the indigenous community as the rightful holder of the copyright. Thus, as long as the community endures, then the protection will subsist. However, this also raises the issue of who may validly claim membership in the community. Should membership be limited to those who actually reside among the community and take part in daily community life, or should it be expanded to anyone who claims membership by consanguinity or affinity? These are issues best left to the community to decide.

According to Farley, "the copyright law must be reformulated so that (1) protection is retroactive for all works of indigenous folklore, and (2) protection is perpetual."[57] She herself notes that one problem with reformulating the law specifically for folklore is to find a way to "define folklore in order to limit the amendment to these works."[58] It is also possible that such a modification may be against public interest in the free flow of information. Perpetual protection also has the potential to impede creativity, inhibit innovation, and discourage "commercial investment in new developments."

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[53] Michael Fraser, *The Protection of Expressions of Folklore: The Experience of Australia*, (hereinafter *The Experience of Australia*), 1997 WIPO REGIONAL SYMPOSIUM ON COPYRIGHT AND NEIGHBORING RIGHTS FOR ASIAN AND PACIFIC COUNTRIES (Manila) at 6.

[54] Folklore Against Illicit Exploitation and Other Prejudicial Actions (Geneva, June-July 1982) 16(4) Copyright Model Provisions for National Laws on the Protection of Expressions 62 (1982).

[55] Farley, *supra* note 7, at 17.

[56] *Id.*

[57] *Id.* at 18.

[58] *Id.*

D. Moral rights

The most important reason why indigenous expressions need to be protected is because of the danger that non-community members will use said expressions in a way that distorts or is against their rightful context. It is most difficult in case of indigenous concepts where people would adopt them for commercial use in the understanding that it is community owned. As an Internet site on American Indian art provides,

> [c]ultural property belongs to the cultural group, rather than to the individual. As an individual has the right to control use of his/her property, the cultural group has the right to control the use of its property. Not all people recognize cultural property. As a result, some individuals will use another group's cultural properties without permission; often that use is offensive to the cultural group, because the property is used in a way that distorts or is disrespectful to the group's beliefs.[59]

Such view would be in violation of the concept of the creator in Intellectual Property law. However, authors enjoy certain moral rights, which are defined as

> [t]hose rights belonging to an artist in relation to their control over the use or display of the works, after the work has been sold. Until an artist sells, assigns or by other means relinquishes his or her rights afforded under copyright the artist has full control over the use of his or her works and has the right to exploit those works for economic gain.[60]

Moral rights are personal rights, in contrast to copyright being a property right. Its purpose is to protect the author's work, reputation and integrity. Generally, moral rights include the rights of (1) attribution, (2) integrity, (3) disclosure and (4) withdrawal or amendment. The IPC more fully enumerates these rights as follows:

> Section 193. The author shall, independently of the economic rights in section 177 (Copyright or Economic Rights), have the right:

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[59] *A Line In the Sand* <http://hanksville.phast.umass.edu:8000/cultprop/sand.html>.

[60] Patricia Ryan, *The Berne Convention Provisions for Moral Rights Ought to be Implemented in Australia as Soon as Possible* <http://www.ozemail.com.au/faslaw/essay07.htm>.

> Section 193.1 To require that the authorship of the works be attributed to him, in particular, the right that his name, as far as practicable, be indicated in a prominent way on the copies, and in connection with the public use of his work;
>
> Section 193.2 To make any alterations of his work prior to, or to withhold it from publication;
>
> Section 193.3 To object to any distortion, mutilation or other modification of, or other derogatory action in relation to, his work which would be prejudicial to his honor or reputation;
>
> Section 193.4 To restrain the use of his name with respect to any work not of his own creation or in a distorted version of his work.[61]

The preservation of moral rights to all creators is crucial for several reasons. The Response to the Green Paper prepared by UK journalists provides for two of them:

> First, because the integrity and authenticity of an artist's work is of importance to society as a whole. The enduring value of a piece of writing or a photograph or a design may not be immediately recognised. Unless moral rights are preserved there is a danger that the original work will be modified to make it commercially "successful." Very quickly the vigour and variety of our culture will degenerate into what is merely easy to sell.[62]

The second reason has to do with public being able "to trust — to rely on — the authenticity of the images and information which are being provided. That trust cannot be located in an anonymous corporation . . . but in the moral and ethical standards of journalists themselves."[63] These sentiments may be extended to all creative artists, whether indigenous or not.

In all cases where a work is produced by an individual, a strong and enforceable moral right of integrity is a simple public guarantee of such personal responsibility for the content.[64] In the same way, when a community

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[61] INTELLECTUAL PROPERTY CODE, sec. 193.

[62] National Union of Journalists of Great Britain and Ireland Response to the European Commission (Directorate General XV) on the Green Paper: *Copyright and Related Rights in the Information Society* <http://www.gn.apc.org/media/nuj-eugp.html>.

[63] *Id.*

[64] Holderness, *supra* note 30.

claims authorship of a work, then it also takes on responsibility for the work's meaning and veracity.

Artists are more likely to produce work if they are assured that "their works will be protected and they will be credited for them."[65] Also, some works of art "are a cultural treasure and good for society to have — and that the artists who created them are the best people to see that they are preserved in fact and treated appropriately."

Moral rights also have an economic aspect. According to Mike Holderness, "the right of identification is critical to authors' livelihoods, especially in the early stages of their careers. Equally, the right of integrity has a direct economic impact."[66] A work which is not "an accurate reflection of an author's skill" but is passed off as an authentic indigenous artifact may propagate the bias that indigenous artists are less creative and talented than their contemporary counterparts, and worse, encourage belief in cultural stereotypes against indigenous communities. On the other hand, there have been many instances wherein "the use of Indigenous words, motifs and symbols by non-Indigenous businesses misleads consumers into believing that the business is owned and run by Indigenous people or that benefits in some way flow back to Indigenous communities."[67]

Moral rights may be waived only through a written instrument,[68] but no such waiver shall be valid when the effects is to permit another "to use the name of the author, or the title of his work, or otherwise to make use of his reputation with respect to any version or adaptation of his work which, because of alterations therein, would substantially tend to injure the literary or artistic reputation of another author; or to use the name of the author with respect to a work he did not create.[69] Unfortunately, the Code also restricts protection of moral rights to the lifetime of the author and for fifty years after his death. Since the author is "absent" or unknown in cases of indigenous creations, it is impossible to reckon the time when said period begins to toll.

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[65] *Moral Rights*, The Information and Communication Law Site <http://ozemail.com.au/~faslaw/morrt.htm>.

[66] *Id.*

[67] "What are the major concerns for Indigenous People?," <http://icip.lawnet.com.au/part1-3.htm>.

[68] Rep. Act No. 8293 (1998), sec. 195.

[69] See INTELLECTUAL PROPERTY CODE, sec. 195.1 and 195.2.

E. Enforcement of remedies

Indigenous communities whose rights are violated need to go through the legal system to obtain relief against copyright infringers. However, many indigenous communities see the legal process as an expensive, complicated and time-consuming matter, alien to their own culture and tradition. Litigation, with its emphasis on confrontation and cross-examination, may not be the most effective and efficient way to prevent the denigration of indigenous culture.

There is also the question of who has standing to sue. The designated creator? The community as a whole? The elders of the community? And again, in the event that the case is decided in favor of the indigenous artist or community, then who is entitled to share in the award of damages? This goes back to the question of authorship and membership in a community.

There is a need to define a process whose method of enforcement will protect, and not destroy the culture. Thus, the process should be "culturally appropriate" and not "unneccessarily involved" and that will allow all members of the community to participate in a democratic manner in keeping with their traditions.

IV. CONCLUSION AND RECOMMENDATIONS

There is much that should be done in terms of protecting indigenous creations and the survey of existing laws show that present legislation is sadly inadequate to provide the necessary protection. If no measures are enacted soon, there is the very real possibility that authentic indigenous expressions will soon be watered down by homogenous ideas altered to meet the demands of the market.

There have been various international efforts to protect indigenous expressions. These include the 1967 Diplomatic Conference of Stockholm, which resulted in the revision of the Berne Convention to allow for the protection of unpublished works of unknown authors;[70] the 1976 Tunis Model

[70] Githaiga, *supra* note 31. *See* also Berne Convention art. 15, par. (4).

Law on Copyright for Developing Countries, which provides for protection of folklore "without limitation in time;"[71] and the 1985 Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, which was the result of a consultation by the United Nations Educational, Scientific and Cultural Organization (UNESCO) and WIPO with a group of experts nationwide. Being neither treaties nor conventions, the Model Provisions do not have any force and effect, but countries may refer to them as guidelines in the formulation of their respective national policies.

The most important terms in the 1985 Model Provisions are the two main categories of acts against which expressions of folklore are protected: (a) illicit exploitation,and (b) other prejudicial actions. The former is defined as:

> Any utilization made both with gainful intent and outside the traditional or customary context of folklore, without authorization by a competent authority or the community concerned.[72]

> This means that a utilization — even with gainful intent — within the traditional or customary context should not be subject to authorization. On the other hand, a utilization, even by members of the community where the expression has been developed and maintained, requires authorization if it is made outside such a context and with gainful intent.[73]

According to WIPO,

> [A]n expression of folklore is used in its "traditional context" if it remains in its proper artistic framework based on continuous usage of the community. For instance, to use a ritual dance in its "traditional context" means to perform it in the actual framework of the respective rite. On the other hand, the term "customary context" refers rather to the utilization of expressions of folklore in accordance with the practices of everyday life of the community, such as selling copies of tangible expressions of folklore by local craftsmen. A customary context may develop and change more rapidly than a traditonal one.[74]

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[71] Farley, *supra* note 7, at 43.
[72] *The Protection of Expressions of Folklore*, *supra* note 8, at 7.
[73] *Id.*
[74] *Id.*

Other prejudicial actions, as provided in the Model Provisions, are offenses subject to penal sanctions. These are (a) failure to acknowledge the source of any identifiable expression of folklore; (b) unauthorized use of expressions of folklore where authorization is required; (c) misleading the public by creating the impression that what is involved is an expression of folklore when, in fact, such is not the case; and (d) distorting expressions of folklore in any direct or indirect manner prejudicial to the cutural interests of the community concerned.

At present, there are no counterpart provisions in Philippine law that deal specifically with the situations presented by the Model Provisions. However, the Philippines may choose to refer to said Model Treaty to strengthen the provisions of the existing law and ensure the protection of indigenous artists.

However, there are other steps that can be taken in terms of protecting indigenous expressions.

A. Public awareness and education

Public education is at the cornerstone of the campaign to protect the rights of indigenous artists. Programs that promote greater public awareness and appreciation of indigenous culture will encourage respect of their traditions, and perhaps result in less instances of distortion or mutilation of said expressions. These efforts should necessarily begin at the primary level, as part of a unified campaign to teach school children the value of their cultural heritage. However, the promotion, research and dissemination of indigenous culture should not be limited to the formal educational system, but should involve the mass media and other means of communication, such as publications, documentary films, exhibits, and others.

Indigenous communities themselves should benefit from a program that will inform them of their rights and enable them to make use of the remedies available to them while alternative programs for the protection of their culture are still not in place.

B. Documentation

If one can trace the provenance of an artwork or a design, then it would be easier to give credit to the author. This documentation process should include defining indigenous expressions within their proper context, and knowing which forms of expression require authority before prior use. If authority is required, who is to exercise it?

However, it is difficult to document certain forms of indigenous expressions since these may be expressed or performed only within the context of a ritual or a special occasion. If the occasion does not arise, the expression does not manifest. Also, most indigenous expressions gain meaning only within the context of the community. To remove the physical manifestation of the culture from the context from which it arose would limit the understanding and appreciation of such expression, and would contribute to erroneous or distorted interpretations.

C. Remedies for infringement

Infringement has been defined as:

> A tresspass on a private domain owned and occupied by the owner of the copyright, and, therefore, protected by law, and infringement of copyright, or piracy, which is a synonymous term in this connection, consists in the doing by any person, without the consent of the owner of the copyright, of anything the sole right to do which is conferred by statute on the owner of the copyright.
>
> A copy of a piracy is an infringement of the original, and it is no defense that the pirate, in such cases, did not know what works he was indirectly copying, or did not know whether or not he was infringing any copyright; he at least knew that what he was copying was not his, and he copied at his peril. In determining the question of infringement, the amount of matter copied from the copyrighted work is an important consideration. To constitute infringement, it is not necessary that the whole or even a large portion of the work shall have been copied. If so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially and to an injurious extent

> appropriated by another, that is sufficient in point of law to constitute a piracy.[75]

The IPC provides the copyright holder a number of remedies against infringement, particularly the right to demand (a) an injunction restraining such infringement; (b) payment of damages, including legal costs and other expenses as well as lost profits; (c) delivery of sales invoices and other documents evidencing sales, all articles and their packaging alleged to infringe a copyright and implements for making them; delivery of all infringing copies or devices as well as all plates, molds, or other means for making such infringing copies for destruction; (d) and such other terms and conditions, including the payment of moral and exemplary damages, as well as (e) the destruction of infringing copies of the work.[76] In addition, copyright infringement is punishable by imprisonment of up to six years and a fine of up to Php1,500,000.[77]

Indigenous communities may never be able to receive adequate compensation for the damage caused by unauthorized use of indigenous expressions to their culture. However, it is hoped that the stiffer penalties for infringement as provided in the new law will discourage further violations. The grant of moral and exemplary damages to affected indigenous artists and communities will not only provide a measure of compensation for the damage wrought to them for the misuse of their traditional designs, but will also send a strong message that the courts are concerned about the problem of intellectual theft and cultural distortion. Unlike in Australia, where there have been several landmark cases that defined indigenous rights to their traditions,[78] there has yet to be a case filed before Philippine courts. It would be interesting to see how the court will rule on the matter.

D. Collective administration

> [T]he individual exercise of copyright is, in most instances, ineffective. It is practically impossible for an individual composer or author to know who is performing or copying his work, where, when and for what

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[75] Columbia Pictures, Inc. v. Court of Appeals, G.R. No. 110318, 28 August 1996, 261 SCRA 144, 183-184, citing 18 C.J.S., Copyright and Literary Property, sec. 90, 212.

[76] *See* INTELLECTUAL PROPERTY CODE, sec. 216.

[77] *See* INTELLECTUAL PROPERTY CODE, sec. 217.

[78] *See* Milpurrurru v. Indofurn Pty. Ltd., 54 F.C.R. 240 (1994); Yumbulul v. Reserve Bank of Australia 21 I.P.R. 481 (1991).

> purpose in his own country . . . It is equally difficult for an individual composer to approach a user to demand payment for the use of his . . . works as an individual copyright owner can be easily discriminated against by the user who may decide not to use the works of that particular composer who has demanded his rightful royalties.[79]

Thus, one solution to the problem of enforcing copyrights is the collective administration of the same. Section 183 of the IPC allows the copyright owners or their heirs to "designate a society of artists, writers or composers to enforce their economic rights and moral rights on their behalf."[80] The collective administation of the copyrights "is to assist copyright owners to effectively enforce certain of the economic rights granted to them by the copyright laws of their respective countries."[81] A collective administration organization will not only facilitate the licensing, marketing and distribution of works, but will also establish a monetary scale for the use of said works.

It is possible that the indigenous community will be the entity designated as the collective administration organization for works produced by members of its community. This way, ownership and attribution of the indigenous expressions will remain within the community. The community will also be empowered to determine the proper uses of the work, and to withdraw or withhold the work when it believes that the use will be contrary to their traditional beliefs.

E. *Sui generis* legislation

> The fundamental objective of the copyright law is to promote artistic evolution. Therefore, any control over a work is for a limited time so that future artists can build on the work.[82]

Copyright law does not protect indigenous communities from unauthorized reproductions and alterations of their work. Neither does it reserve to them the right of exclusive use and distribution. Proposals for *sui generis* legislation have been made, with the intention that "protection should be perpetual and retroactive, and derivative works should be strictly

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[79] Ang Kwee Tiang, *The Collective Administration of Copyright and Neighboring Rights in Musical Works*, 1997 WIPO Regional Symposium on Copyright and Neighboring Rights for Asian and Pacific Countries (Manila, 9-12 December 1997),at 3.

[80] Rep. Act No. 8293 (1998),sec. 183.

[81] Ang Kwee Tiang, *supra* note 79.

[82] Farley, *supra* note 7, at 55.

controlled."[83] *Sui generis* legislation would allow the law-makers to deal with the problem much more comprehensively, while at the same time avoiding the need for major overhaul of current regimes.[84]

Some suggested provisions for such *sui generis* legislation include (1) the definition of indigenous intellectual property law in accordance with indigenous customary law; (2) the perpetual and retroactive protection of indigenous expressions; (3) the attribution of authorship and ownership to the indigenous community, rather than to the individual artist; (4) the designation of competent authority empowered to "authorize the commercial use of indigenous folklore and knowledge,"[85] and (5) the prohibition on unauthorized use and modifications on sacred and secret indigenous imagery.

However, *sui generis* legislation has its own dangers, particularly the possibility of the stagnation of indigenous culture, and the retardation of the growth of the individual artist who just happens to be a member of the community. Culture, being a way of life, necessarily evolves although the effects of this evolution may not be felt until something calls attention to the change.

In the end, despite the evolution of copyright law to accommodate the unique features of indigenous expressions, or the development of *sui generis* legislation that will balance the interests of the indigenous community with the individual artist, the issue remains one of respect for the intellectual work of others and the responsible exercise of the privilege to share in the information.

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[83] *Id.*
[84] Githaiga, *supra* note 31.
[85] *Id.*