

DREAMS FOR SALE:
TRADITIONAL CULTURAL EXPRESSIONS (TCEs) AND
INTELLECTUAL PROPERTY RIGHTS OF THE INDIGENOUS
PRAGMATIC GROUP AS EXEMPLIFIED BY THE
DREAMWEAVERS*

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*“Although we are in different boats you in your boat
and we in our canoe we share the same river of life.”¹*

*“In every Indigenous community I’ve been in, they
absolutely do want community infrastructure and they
do want development, but they want it on their own
terms. They want to be able to use their national
resources and their assets in a way that protects and
sustains them. Our territories are our wealth, the*

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¹ Chief Oren Lyons. Lyons is a Native-American “Faithkeeper of the Wolf Clan” & Indigenous Rights Advocate.

major assets we have. And Indigenous people use and steward this property so that they can achieve and maintain a livelihood, and achieve and maintain that same livelihood for future generations.’²

INTRODUCTION

More than seven thousand islands make the Philippines a good tourist destination for sand, sea and surf. An archipelago divided by waters, the Philippines is a diverse country in a small package. A day’s travel around the country will take you from the unearthly indigenous villages in the northern and southern tips of the country to the idyllic islands and surreal coral reefs scattered from Luzon to Mindanao. This perfect setting of sweeping rice plains, jungled peaks, razor-sharp cliffs, enclosing placid lagoons and white ribbons of sand, inspires culture and creativity in its people.

The population of the Philippines is currently estimated at 91 million strong, with ten percent (10%) being indigenous people (IP).³ In the 7,101 islands that constitute the Philippine archipelago, there are about 110 indigenous groups. The majority of these reside in the southern regions of the Philippines, with 70 percent (70%) on the Islands of Mindanao, Sulu archipelago, Palawan and Mindoro. the remainder are primarily concentrated in the Cordillera region to the north.⁴ The heritage of these indigenous cultural groups provides the new generation with a glimpse of how the early inhabitants of the country lived.

² Rebecca Adamson. Adamson is an American Indian Rights Activist and Founder of the First Nations Development Institute & First People's Worldwide.

³ Valsala G. Kutty, *National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines*. World Intellectual Property Organization, available at <http://www.wipo.int/tk/en/studies/cultural/expressions/study/kutty.pdf>, (last checked Mar. 18, 2012).

⁴ The Cordillera peoples, also collectively known as **Igorot**, refer to the assemblage of indigenous groups living in the highlands, foothills and river valleys of the Cordillera mountain ranges of Northern Luzon. **Tinguian**, **Isneg** and **Northern Kalinga** are found in the watershed areas of the Abulag, Itneg, and Chico rivers. Taken from International Work Group for Indigenous Affairs, available at <http://www.iwgia.org/sw16704.asp> (last visited Nov. 24, 2010).

The number of Traditional Cultural Expressions (TCEs) in the Philippines is as varied and multifaceted as the number of indigenous cultural communities residing in the country. Despite its diversity, every group is known to have its own distinct weaving industry.⁵ Being a tropical country, the Philippines has a wide variety of raw materials that can be used for weaving. Materials such as abaca, hemp, cotton, and water lilies grow in abundance and are used across the archipelago with each community using the materials selectively to produce a unique and distinctive product. One such indigenous cultural community with a distinct weaving product are the T'boli.⁶ Located on the shores of Lake Sebu in South Cotabato, Mindanao, the women of the T'boli are highly regarded as expert weavers.

The T'bolis are the indigenous people occupying the southern edge of the Cotabato and the Southwest coast range of the province of South Cotabato. The greatest concentration of the T'boli population used to be in the area surrounding Lake Sebu. However, with the influx of lowlanders, many of the T'boli were displaced from their ancestral lands and driven higher into the mountains.

The T'bolis are primarily known for being the creators of the T'nalak⁷, a type of textile fashioned entirely from abaca. They are dubbed as dreamweavers, transposing the scenes that present themselves in their dreams onto patterns woven into the T'nalak. Although the patterns are said to be inspired by their physical surroundings, they can be considered a fusion of objects found in their natural world as well as elements of the unique T'boli culture which is steeped in abstractions. To an outsider, the design of the T'nalak may not make sense, but to the weaver it tells a colourful story⁸ – one given to her⁹ in a dream or one told and retold to her by her ancestors.

⁵ The weaving industry covers not just textile but also basket weaving, banig weaving which is the local version of a sleeping mat made from buri, pandan or sea grass leaves, and other handicrafts.

⁶ T'boli is also spelled in other textbooks as "Tiboli". However, since the "i" letter does not really exist in the T'boli alphabet the term T'boli is more appropriate.

⁷ The T'nalak is sometimes referred as Tinalak, however, the proper spelling in the T'boli's language is "T'nalak".

⁸ As regards the designs seen on the T'nalak, there is indeed more than meets the eye. According to Lang Dulay, when she showed the author one of her designs, which looked like a simple repeating abstraction, the design is borne from her dream. Her dream was that of a little boy, shown in her design as a stick figure of a boy, who was sent by his mother to an errand. However, instead of following his mother, he played instead. Hence, when he went back to his mother, and his mother found out that he did not follow her, she

The production of the T'nalak is regarded as a community or family endeavor with the participation of both men and women. The T'boli women usually do the lighter, although admittedly more arduous, job of weaving the abaca. The men, on the other hand, harvest the abaca and process the twine for weaving.¹⁰ The whole process of producing a T'nalak takes about four months.¹¹ It is easy to see how this process maybe shortened in less than a day, or maybe less than an hour, by employing the use of a machine, which can churn out six meters¹² or more of cloth in no time. The T'bolis, however, refuse to take shortcuts and continue to follow the weaving process practiced and taught to them by their ancestors since time immemorial.

got angry with him. As a result, the boy ran away into the mountains, and he played with fire. This dream was translated into abaca by Lang Dulay through a design which showed an abstracted figure of a boy and aggressive spherical shapes tinted in red representing the fire.

⁹ The T'boli weavers are always women. In the T'boli tradition, the men were in charge of other tasks not relating to the actual weaving. This includes finding suitable abaca plants, as well as producing other crafts which the T'bolis are likewise known for like brass casting.

¹⁰ This starts with the purchasing of the abaca. After this, one of the women would spend her whole day selecting which ones of the abaca would be used as vertical or as horizontal fibers. It is important that only the softer fibers are used to make the vertical weaves producing the design. Once the fibers are selected, they would then be tied together with the finest knots to make sure some parts are not dyed, and the design envisioned by the weavers would be translated properly into the T'nalak. The arduous process of tying alone, the first step in ensuring that the pattern in the weavers' head is translated on the T'nalak, takes one whole day. This is followed by another three weeks of dyeing the T'nalak. Since the fibers are not dyed using today's conventional dyes, it takes 3 weeks before the fibers are dyed using plants native to the T'boli's place. After everything is prepared, the woman then sits in the longhouse and shuttles the thread back and forth pushing the threads to tighten with a flat piece of coco wood. She pushes it with three thuds. It is tight enough if the light does not stream through when the T'nalak is held up. She repeats the process over and over again. The production does not end after the last thread is incorporated, the T'nalak is given a sheen. To do this, the cloth is beaten and the rounded fibers are flattened to catch the light. The cloth is then rubbed with beeswax and burnished with a cowrie shell which will be done by the T'boli men.

¹¹ In the old days when the T'bolis still harvest their own abaca, the process of weaving takes even longer. This begins from the selection of the abaca, to the stripping of the fibers and eventually drying it. Nowadays, the T'bolis just purchase their abaca from other producers in the neighboring towns of Lake Sebu. One bundle would cost them fifteen pesos; they would normally use 25 bundles to produce 6 meters of T'nalak.

¹² The length of the T'nalak is constrained by the length of the Abaca fibers, hence, the regular length of a T'nalak is six meters.

In the olden times once a T'nalak was finished, it would be rolled up and wrapped in a cloth, only to be displayed during special occasions. It was considered an essential gift when one of the T'boli would give birth, believing it helps to safely deliver the baby, when used as a pre-natal covering. It was also exchanged along with other valuable pieces of property such as heirlooms, gongs, work animals, and swords during arranged marriages. The sanctity of the T'nalak in the culture of the T'bolis is clearly expressed in the tradition that it is forbidden to step on the T'nalak. Likewise, cutting it was considered taboo, and believed to bring sickness to the weaver or to the person cutting it. These days, however, many of the old taboos have been lost in favor of practical considerations. The finished work is either shipped, prepared for pickup by the contractor, or stored to be shown to tourists visiting Lake Sebu. Moreover, the T'boli's now put specific marks on the cloth, usually at three meters, where it may be cut. The current significance of the T'nalak now lies in the fact that it is one of the major source of income for some T'boli households.

Part I of this paper discusses how the T'nalak is currently protected under the Philippines *sui generis* law for indigenous people's protection: the Indigenous Peoples Rights Act and its Implementing Rules including the then pending bill on Community Intellectual Property Protection Act (CIPRA) Philippine law. Part II discusses intellectual property laws -- copyright, trademark and other concepts currently embodied in the general laws of the Philippines. Part III addresses the possibility of applying Human Rights for the protection of TCEs. In Part IV of this paper, an examination and analysis of international conventions, treaties and international agreements existing and which the Philippines has signed and ratified and is now part of the national laws of the Philippines by virtue of the incorporation clause in the 1987 Constitution. A look into the jurisprudence, local and international, on the intellectual property rights of indigenous people is also included in this part. Part V looks at the *sui generis* legislations from different countries vis-a-vis the WIPO model law. Under Part VI, the necessity for a *sui generis* law for the protection of indigenous intellectual property is argued. The formulation of this *sui generis*¹³ protection recommended in this part is based on the observation on the T'bolis who are representative of the indigenous group referred to in this paper as the "pragmatic group". The scope for the

¹³ The definition of *sui generis* proposal in this paper does not necessarily amount to a proposal for a new legislation, the *sui generis* protection to copyright may be embodied as well in the current intellectual property laws through amendment.

suggestions for a *sui generis* legislation in this paper are based on national legislations, both local and abroad.

TRADITIONAL CULTURAL EXPRESSIONS AND THE T'BOLI'S

*T'nalak are woven dreams. They are the hope sent out by a people that weave it and value it, to the dominant culture that can only appreciate it as artifact. But if its production and quality can be sustained by the weavers, t'nalak may serve to see the T'boli through a transition in their culture, and keep the old traditions alive.*¹⁴

The scope of the debate on protection of Traditional Cultural Expressions (TCEs) ranges from linguistic technicalities to intellectual property inclusion. The issue with regard to proper terminology to refer to cultural properties and expressions of indigenous people has raged since the 1980s when the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific, and Cultural Organization (UNESCO) brought together a Group of Experts on the Protection of Expressions of Folklore by Intellectual Property¹⁵ This resulted into putting cultural pieces of property and expressions of indigenous peoples under the generic term 'folklore'. In response to comments that the term 'folklore' is derogatory and connotes an inferiority of these types of art, traditions and processes over contemporary works, indicating a lower or superseded civilization,¹⁶ WIPO and UNESCO deemed it necessary to come up with a more appropriate definition. Thus, during the 1997 World Forum on the Protection of Folklore, WIPO and UNESCO came up with this definition of the term folklore: "a group oriented and tradition-based creation of groups or individuals reflecting the expectations of the community as an adequate expression of its cultural and social identity; its standards are transmitted orally, by imitation or by other means. Forms of folklore include, among others,

¹⁴ M.E. PATIERNO, DREAMWEAVERS (2001).

¹⁵ Megan Carpenter, *Intellectual Property and Indigenous Peoples: Adopting Copyright Law to the Needs of a Global Community*, 7 YALE HUMAN RIGHTS & DEVELOPMENT L.J. 51 (2004) citing Michael Blakeney, *Intellectual Property in the Dreamtime – Protecting the Cultural Creativity of Indigenous People*, Oxford Intellectual Property Research Center, Research Seminar, Pt. 1 (1999), available at <http://www.law.yale.edu/documents/pdf/LawJournals/carpenter.pdf>.

¹⁶ *Id.* at 55 - 56.

language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture, and other arts.”¹⁷ Despite this new definition, however, the debate continued with some representatives claiming that the term folklore has a limited scope depending on the geographical location.¹⁸ The term “Indigenous Cultural and Intellectual Property” was also proposed.¹⁹

The term Traditional Knowledge was subsequently introduced, replacing the term folklore and effectively shifting the parameters of discourse. The terms 'traditional cultural expressions' (TCEs) is used by WIPO as a neutral working term due to some reservations expressed by some communities about the negative connotations of the word, particularly the term "traditional". The terms “traditional cultural expressions”, otherwise known as “expressions of folklore”, “indigenous culture and intellectual property” and “tangible and intangible cultural heritage” as well as its scope and meaning have been discussed comprehensively both at the local and international levels. These terms potentially cover an enormous variety of customs, traditions, forms of artistic expression, knowledge, beliefs, products, and processes of production that originate in many communities throughout the world.

TCEs pertain to productions consisting of characteristic elements of traditional artistic heritage developed and maintained by a community of a certain country or by individuals reflecting the traditional artistic expectations of such a community. This term is used specifically for (a) verbal expressions, such as folk tales, folk poetry and riddles, signs, symbols, and indications; (b) musical expressions, such as folk songs and instrumental music; (c) expressions by actions, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form, and (d) tangible expressions, such as

¹⁷ Model Provisions for National Laws on the Protection of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1985), United Nations Educational, Scientific, and Cultural Organization (UNESCO), *available at* http://portal.unesco.org/culture/en/ev.php-URL_ID=30978&URL_DO=DO_TOPIC&URL_SECTION=201.html (Last checked: Oct. 10, 2010).

¹⁸ *Supra* note 15 at 56. As an African delegate noted, the concept of folklore has distinct interpretations based on region, that is, the conception in Africa of “folklore” was broad and encompassed all aspects of cultural heritage, including scientific knowledge. On the other hand, the western conception of “folklore” is typically focused on artistic, literary, and performing works. His observation was supported by an Aboriginal Australian representative.

¹⁹ *Id.*

productions of art, crafts, musical instruments, and architectural forms.²⁰ For purposes of discussing these forms of art in this paper, the term “traditional cultural expressions” or TCEs and expressions of culture would be used interchangeably.

A nation's cultural heritage lies at the heart of its identity, linking its past with its present and future. While in its most basic sense tradition may be regarded as a cyclical process of imitation and reproduction, it should be remembered that tradition, its practice and propagation, is also about innovation and creation within the traditional framework.²¹ While faithful reproduction would, in layman's term, render the particular TCE or artwork 'original', the mere recreation and replication of past traditions may not necessarily be the best way of preserving identity and improving the economic situation of indigenous communities. The ability of many tradition-bearing communities to combine tradition with influences and cultural exchanges of modernity for the purpose of improving their social and economic circumstances is best seen through the production of handicrafts.²²

TCEs are not static creations but are as alive and fluid as the people who create them and whose culture is embedded in each expression. It is a fact that most indigenous groups no longer live in isolation and have started to integrate and adapt the culture of those living with them and in their general vicinity.²³ With the changing landscape within which indigenous people nurture their culture and heritage, it is important to recognize that society and folklore share a symbiotic relationship with society -- with folklore producing its impact on society and society in turn being influenced by folklore.²⁴ As such, the nature of folklore has been transforming over the ages. Some experts argue that the influence of society on folklore is even greater than the influence of folklore to modern society. Since society is dynamic, this renders

²⁰ World Intellectual Property Organization, WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW, AND USE HANDBOOK 59 (2004), *available at* <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch2.pdf> (Last checked: Mar. 15, 2012). In particular drawings, paintings, carvings, sculptures, pottery, terracota, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, and costumes.

²¹ *Id.* at 56.

²² *Id.*

²³ The T'bolis, for example, are living with at least three groups: the Ilonggos who bought property around Lake Sebu, the Christians, and some Muslims.

²⁴ *Supra* note 3 at 9.

folklore animate as well, absorbing substantial societal changes and moving parallel to society.

The effect of society is specially apparent in indigenous communities who, because of the influx of migrant settlers in their community, are forced to leave the areas they have previously inhabited, or are compelled to share it with outsiders. This process of integration for the T'bolis began in the 1940s²⁵ when the first wave of Christian settlers set foot in their indigenous community. Armed with land grants and timber licenses, they encroached upon the T'boli homelands and disenfranchised those who had been living on the land since time immemorial. Deprived of the land area and lake where they used to obtain their source of food freely, the T'bolis had to capitalize on what they do well – their crafts. The T'bolis are expert craftsmen. Aside from their famous T'nalak, the women are also well versed in the craft of embroidery and beads-making while the men, and some women as well²⁶, are good in casting brass. They have used these skills to produce crafts which they sell. Deprived of their former source of livelihood -- fishing, hunting and agriculture -- the T'bolis now heavily rely on their crafts as a source of income.

With the availability of traditional and indigenous art to outsiders, and the inflow of foreign resources to the indigenous people, convergence between cultures has taken place. This can be seen in the contemporary art of the T'boli, as well as their crafts. It is undeniable that indigenous people and communities derive inspiration and innovate under the influence of contemporary culture. On the other hand, TCEs provide a source of inspiration and creativity for parties outside the traditional customary context. This influence is most apparent in the entertainment, fashion, publishing, design and other creative industries -- from the small cooperatives and merchants within the community to Hollywood and big designer names.²⁷ Despite this seemingly mutualistic interaction, the relationship between

²⁵ Local Government of Lake Sebu, *Helobung Souvenir Program* (2009).

²⁶ COWHED, the cooperative of the T'bolis for selling their crafts has a list of all their artisans who are members including their specialization. Of the brass casters, one of them is a woman.

²⁷ Fiona Kotur, a New York based designer, used the T'nalak for a minaudere that she designed. See <http://www.koturld.com/productdetail.php?itemid=154&return=20&cat=24> (Last checked: Oct. 9, 2010). Rafe Totengco, a Filipino designer based in New York also used the T'nalak as a material for some of his bags included in his Spring 2010 Collection. See <http://latestnews.rafe.com/> (Last checked: Oct. 9, 2010).

tradition, modernity and the marketplace can hardly be described as a happy one. Indigenous and traditional communities have expressed concerns that the distinct and diverse qualities of the world's multiple cultural communities are threatened by uniformity brought on by new technologies and the globalization of culture and commerce.²⁸ This concern is further magnified by the debate that expressions of traditional cultures and traditional forms of creativity and innovation are not adequately protected by existing intellectual property laws.

During the extensive fact-finding and consultations undertaken by WIPO, indigenous groups and traditional communities have expressed various needs related to intellectual property. These needs, according to the research, involve the use of intellectual property in three ways: (1) intellectual property to support economic development, that is, such communities wish to claim and exercise intellectual property in their tradition-based creations and innovations to enable them to exploit such commercially, (2) intellectual property protection to prevent unwanted use by others; some communities may wish to claim intellectual property to actively exercise intellectual property rights that prevent the use and commercialization of their cultural heritage by outsiders, including culturally offensive or demeaning use; use which may need to be prevented could include, for example, uses that falsely suggest a connection with a community, derogatory, libelous, defamatory, or fallacious uses, and inappropriate uses of sacred and secret TCEs; and (3) prevention of others acquiring intellectual property rights over TCEs, i.e. to prevent others from gaining or maintaining intellectual property over derivations and adaptations of TCEs and representations, which entails the use of defensive mechanisms to block or pre-empt third parties' intellectual property rights that are considered prejudicial to the communities interests, and to the integrity of their cultural heritage and cultural expressions. These needs identified by WIPO is consistent with the categorization used by Christine Haight Farley in her paper entitled *Protecting Folklore for Indigenous Peoples: Is Intellectual Property the Answer?*²⁹

In Farley's paper, two sets of concerns involving indigenous people are presented. According to her research, while there are some indigenous groups who would like to have their TCEs remain within the indigenous

²⁸ *Supra* note 20 at 56.

²⁹ Christine Haight Farley, *Protecting Folklore for Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1 (1997).

community, another group, the pragmatics³⁰ as referred to in this paper, would want to be compensated for their contribution to the artwork through licensing, profit sharing, or other similar arrangements. They likewise seek to exclude competitors who are not members of the indigenous community from the market by preventing unauthentic products from being marketed as made by indigenous people, or producing goods bearing similarity to it. The concern for this group is focused on the ability to participate in the celebration of their indigenous culture by gaining control over the circulation of their imagery. This is important to them because, by gaining control, they are able to ensure an accurate articulation of indigenous culture,³¹ and ensure that the investment in that culture goes back to their communities. The concern of the pragmatics may be said to fall on the first and third concerns identified by WIPO.

The T'bolis may be categorized as belonging to the “pragmatic group”, or based on Farley's term, the “realists”³². This group includes indigenous people who want to be compensated for their contribution to the artwork in the form of licensing agreements, and the exclusion of non-indigenous competitors from the market by preventing unauthentic products from being marketed as made by indigenous people. This concern is underscored by the economic importance that the production of crafts brings to the T'bolis. The T'nalak used to play an important part of the T'boli's culture due to the significant role it plays in the T'boli's religion and their reverence for Fu Dalu, the God of Abaca. These days, although the T'nalak may still hold a significant role in the life of the T'bolis, it has lost its primarily religious purpose. Instead, the T'nalak plays an important role in providing income for the T'bolis. A walk around Lake Sebu – from the souvenir shops in resorts to small stores in the highway – would immediately reveal how important T'nalak is as a source of income. Not only are they able to sell the T'nalak as a souvenir item for visitors and tourists, but the cloth is also used as a material for different kinds of T'boli crafts like handmade bags, folders, decors, and traditional costumes. In the case of Lang Dulay, a T'boli who received the Gawad ng Manlilikha Award³³ in 1998, the importance of the T'nalak as a source of livelihood is

³⁰ *Id.* at 14, 17-18. Although Farley used the term “realist” to refer to this group, the researcher deems it more proper to use the term “pragmatic”. It is the researcher's belief that the word pragmatic more accurately reflects the mindset of these groups rather than realist.

³¹ *Id.* at 5-6.

³² *Id.* at 14.

³³ The Gawad ng Manlilikha Award was created by virtue of Republic Act No. 7355, entitled, An Act Providing for the Recognition of National Living Treasures, otherwise

further emphasized. As opposed to the retail cost of other T'nalaks, Lang's work commands a price that is up to three times more expensive than the products of other T'boli women. Despite not being able to read nor write, she was advised to capitalize on her reputation. She now places her name on all her designs in order to raise its market value.³⁴

Branded as exotic and ethnic, the T'nalak cloth and T'nalak designs have reached as far as New York City³⁵ and can be bought wholesale or on order via the internet.³⁶ Despite this, however, the economic plight of the T'boli people remains poor, with many still on what can best be described as a subsistence income.

I. PROTECTING THE T'NALAK UNDER PHILIPPINE LAWS

T'nalak are woven dreams. T'boli women weave them, keen eyes and hands working together to judge lengths, to transfer patterns from memory to loom. T'nalak is made of the whitest abaca fiber connected end to end with the smallest possible knots and dyed red and blackest brown. Its patterns are handed from mother to daughter, or bestowed on the weaver in dreams by Fu Dalu, the spirit of the abaca. It is a product as much of the quietness of spirit as it is of skill, for not all women weave, and not all weavers dream.

The process begins with a dream. Fu Dalu shows a pattern laid out on a loom and give it a name. The weaver remembers it entirely and gives it form in the

known as the Manlilikha ng Bayan, and the Promotion and Development of Traditional Folk Arts, Providing Funds Therefor, and for Other Purposes. Under the law, Section 2, it is declared as a policy of the State 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.

³⁴ The work of Lang Dulay sells for Php1000.00 per meter, her students' works are priced at Php500, for other weavers the price ranges from Php300-450.00.

³⁵Supra note 27.

³⁶ A quick search at www.alibaba.com would yield one several sources for buying T'nalak wholesale.

*loom. T'boli weavers believe if they do not weave the patterns given to them this way, they will fall ill. But not all weavers learn their designs in this way. Some patterns are handed down, from grandmother to grandchild. In this way also, some are lost forever.*³⁷

A. Indigenous People's Rights Act

Indigenous cultural communities (ICCs) are possessors of traditional knowledge. This knowledge is reflected in their weaves, crafts, dances, songs, poetry, arts and other TCEs. The variety and variations found in each indigenous community represent the diverse culture, customs and traditions these indigenous communities have. Despite these differences, however, what all these communities have in common is that the weavers, potters, carvers, painters, embroiderers, goldsmiths, and other indigenous artisans rarely enjoy the fruits of their labor. It is a major challenge for every country to protect and preserve their specialized skills and knowledge, and an even greater hurdle to ensure that their work provides a viable livelihood. The latter challenge is necessary, if not a prerequisite, of the former.³⁸

The 1987 Constitution of the Philippines incorporates provisions for the recognition and promotion of the rights of indigenous cultural communities. Under the Declaration of Principles and State Policies, it is stated that "the State recognizes and promotes the rights of indigenous cultural communities within the framework of national unity and development."³⁹ The creation of autonomous regions of the Cordilleras and Muslim Mindanao, where most indigenous groups reside, is also provided. Under Article X, Section 15 of the 1987 Constitution, the composition of these autonomous regions would be from provinces, cities, municipalities, and geographical areas sharing common and distinctive historical and cultural heritage, economic and social structures and other relevant characteristics. Consistent with the declaration of state policies under Article II, Article XII dealing with the National Economy and Patrimony, the State is mandated to protect the rights of indigenous cultural communities to their ancestral lands to ensure their

³⁷*Supra* note 15.

³⁸ International Bank for Reconstruction and Development/The World Bank, *Poor Peoples Knowledge, Promoting Intellectual Property in Developing Countries*, 56. (J. Michaels Finger and P. Schuler, ed.) (2004).

³⁹ CONST. art. II, § 22.

economic, social, and cultural well-being.⁴⁰ These provisions which demonstrates the State's resolve to foster preservation, enrichment and dynamic evolution of a Filipino national culture based on the principles of 'unity in diversity' in a climate of artistic and intellectual expression is reiterated in Article XIII, Section 14.⁴¹

The struggle for the establishment of a legal system to address the specific demand of the indigenous people finally found its expression under the Indigenous People's Rights Act of 1997 (IPRA). Prior to the IPRA, there were no laws which dealt specifically with the protection of the rights of the indigenous peoples. The laws governing the indigenous people were the general laws of the land i.e. the Civil Code, the Revised Penal Code, and other similar laws of general application⁴². Under the provisions in Chapter VI of the IPRA, the intellectual property rights of the ICCs and Indigenous peoples include community intellectual rights, rights to indigenous knowledge systems, practices to develop their own sciences and technologies, and norms regarding access to biological and genetic resources⁴³.

The explicit recognition of community intellectual property rights is one the most remarkable provisions of the IPRA. This concept runs throughout its provisions and implementing rules. By attributing the intellectual property rights to the community, it effectively shifted the paradigm, in terms of recognizing indigenous intellectual property, from the individual to the community. According to this provision, the State must preserve, protect, and develop their cultural manifestations, whether of the past, the present or the future. As framed under the rules and regulations of the IPRA, cultural manifestations include archaeological and historical sites, designs, ceremonies, technologies, visual and performing art, literature as well as religious and spiritual property. It is through these bold and unambiguous terms enacted under the IPRA, that the legislation was successful in resolving

⁴⁰ CONST. art. XII, § 5.

⁴¹ CONST. art XIII, § 14.

⁴² Oliver N. Saniel, *IPRA Through the Years*, The Forum Vol. 11 Issue 5 (2010), available at <http://visayas.up.edu.ph/upforum2.php?i=123&pg=171&pgidx=&pgmax=1&issue=39> (Last checked: Mar. 19, 2012)

⁴³ Since this paper is focused on the protection of the pragmatic group, which to the researcher's perception is where the T'boli people are categorized, seeking to benefit economically from expressions of their folklore I would focus mainly on the provisions of IPRA pertaining to such.

the dichotomy between private ownership and community ownership, with the balance tilting in favor of the community responsible for maintenance and development of the vast resources of cultural biological and social heritage of the indigenous people.

Despite the novel provision of recognizing community ownership, these provisions are mainly focused on community ownership of tangible property -- specifically, lands which are referred to under the law as ancestral domains. The lack of implementation and actionable provisions with regard to community intellectual property, is probably the reason why a separate bill for Community Intellectual Property Protection Act (CIPRA) was submitted. This bill, however, was not passed and hence, did not become law.

The only provisions which pertain directly to community intellectual property are Section 32 and 34 of the IPRA. Section 32 gave Indigenous People the right to practice and revitalize their own cultural traditions and customs. Towards this end, the State is mandated to preserve, protect and develop the past, present and future manifestations of their culture. A right to 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 is also provided. Full ownership, control and protection of their cultural and intellectual rights are also granted to the ICCs/IPs under IPRA, Section 34.

Although not directly relating to but nevertheless relevant with regard to community intellectual property, another laudable provision in IPRA is the concept of free and prior informed consent of the communities. In a study commissioned by WIPO, this is said to be the most important provision of the IPRA.⁴⁴ Under the law, the State is obliged to restore cultural, intellectual, religious and spiritual property taken without the communities' free and prior informed consent. According to the rules, there must be a "consensus of all members of the indigenous communities to be determined in accordance with their customary laws and practices"⁴⁵ for consent to be valid. This guarantees

⁴⁴*Supra* note 2.

⁴⁵ Rep. Act. No. 8371 (1997), Implementing Rules and Regulations, Rule II, Sec. 1 (k). Free and Prior Informed Consent. As used in the Act, shall mean the consensus of all members of the ICCs/IPs to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and

that the community is free from all external manipulations, interference, and coercion. Another requirement is a disclosure of the full intent and scope of the activity is required.⁴⁶ The importance of recognizing and legislating the concept of community intellectual property is underscored by the Australian aboriginal cases. Mr. Bulun Bulun, the indigenous artist in one case said, "I am permitted by my law to create this artwork, but it is also my duty and responsibility to create such words, as part of my traditional Aboriginal land ownership obligation."⁴⁷ Similarly, another artist, whose work was likewise misappropriated explained that, "As an artist whilst I may own the copyright in a particular artwork under western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all the other Yolngu (her clan) who have an interest whether direct or indirect in it. In this way I hold the image on trust for all the other Yolngu with an interest in the story."⁴⁸

The IPRA gave indigenous people rights which, though not novel under customary laws, are not previously embodied under national legislations. Further guidelines for the safeguarding of indigenous peoples rights and knowledge systems are embodied in the rules implementing IPRA. These include: (1) the right to regulate the entry of researchers and research institutions, (2) a written agreement concerning the purpose, design, and expected output of the research, (3) the need to recognize the source of the material taken in case the information obtained is published and (4) the supply of copies of research output to the communities concerned, and most importantly (5) the sharing of income derived from the said research output with the community concerned.⁴⁹

Customary laws play a major role in the relationship of indigenous people with each other. It is argued that, as opposed to other systems, customary law provides a flexible solution, in that the indigenous customary law of each diverse indigenous group around the world can be applied to that group to protect its own TCEs. Herein lies the problem. The protection, and sanctions imposed in the customary law extends only to individuals subject to

obtained after fully disclosing the intent and scope of an activity, in a language and process understandable to the community.

⁴⁶ *Supra* note 2.

⁴⁷ *Bulun Bulun v. R & T Textiles Pty Ltd.*, 86 F.C.R. 244-246 (1998).

⁴⁸ *Id.*

⁴⁹ Rep. Act. No. 8371 (1997), Implementing Rules and Regulations, § 15.

the customary law, that is, the members of the indigenous group⁵⁰. To an outsider, customary laws do not have any relevance unless it is embodied within a national law which includes in its scope individuals not belonging to the indigenous group. With respect to this, it is worth noting that the importance of customary laws⁵¹ is reflected in IPRA.⁵² This may be seen through the numerous provisions included in the act which uses as a determinant factor for management and protection of the rights conferred therein the customary laws of the community and as may be seen under the IPRA's declaration of state policies.⁵³ Whether or not the sanctions imposed by the indigenous group will be extended to third parties by this provision is yet to be seen. The efforts to apply customary law to ICCs/IPs is laudable, however, it might prove ineffective since a number of cultural poachers are neither citizens nor members of the ICC/IP concerned. Vindicating the rights granted by IPRA have to be remedied on the international level. That is, until and unless a legislation can be enforced beyond the borders of the State or taken to the international level, redress for violations of the ICCs'/IPs' rights will never be complete.

The promise of IPRA lies not only within the provisions embodied therein. As a legislation to benefit ICCs/IPs, the IPRA may be used as a basis for the enactment of future legislation regarding issues which the IPRA was not able to address. Under the IPRA's declaration of State Policies, the State shall consider the rights of Indigenous People in preserving their culture, tradition and institutions and shall consider these rights in the formulation of

⁵⁰ Meghana RaoRane, *Aiming Straight: The Use of Indigenous Customary Law to Protect Traditional Cultural Expressions*, 15 PAC. RIM L. & POL'Y J. 827 (2006).

⁵¹ Rep. Act No. 8371 (1997) Sec. 3 (f). Customary Laws refer to a body of written and/or unwritten rules, usages, customs and practices traditionally and continually recognized, accepted and observed by respective ICCs/IPs.

⁵² Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, available at www.wcl.american.edu/journal/lawrev/48/pdf/kuruk.pdf (Last checked: Mar. 19, 2012)

⁵³ Rep. Act. No. 8371 (1997) § 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:

...

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;

national laws and policies.⁵⁴ In addition, the State is also mandated to 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 concerned benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population. Since it is merely contained in the declaration of State policies, which as a general rule is not actionable, these provisions merely serve as a guideline in the implementation and interpretation of the provisions of the IPRA. Currently, indigenous artists do not enjoy the protection of intellectual property laws. Since rights under intellectual property laws enjoy international recognition due mainly to the TRIPS agreement, the lack of intellectual property protection to ICCs/IPs greatly prejudices them.

As a legislation, the IPRA represents a shift of the State's view towards Indigenous People and Indigenous People's rights from the antagonistic and condescending attitude as exemplified by the 1919 decision of the Supreme Court in the case of *Rubi v. Provincial Board of Mindoro*⁵⁵ describing them as “of low grade of civilization” to one that recognizes their difference from other citizens and respects their rights accordingly. The IPRA, however, is not without criticisms. Right after its enactment, the IPRA was already criticised for being violative of the Constitution. Specifically, its critics say that it is inconsistent with the guaranteed right to “control and supervise the exploration, development, and utilization and conservation of natural resources.”⁵⁶ With the enactment of IPRA, which is now in implementation for fourteen (14) years, the Philippines has been regarded as one of the most active and progressive countries in Asia in terms of recognizing the rights of indigenous peoples and developing legislation to implement some of the recommendations on the Convention on Biological Diversity (CBD) in relation to bioprospecting.⁵⁷

A novel concept demonstrating the intersection of indigenous tradition on land ownership and the modern laws of property is seen in the provision of the IPRA recognizing ancestral domains. Although it pertains to ownership of land, this provision in the IPRA likewise benefits the protection

⁵⁴*Id.*

⁵⁵39 Phil 660 (1919).

⁵⁶ CONST. art. XII, § 2.

⁵⁷ World Rainforest Movement, *Philippines: Indigenous Peoples and the Convention on Biological Diversity* WRM Bulletin N°62, (September 2002) available at <http://www.wrm.org.uy/bulletin/62/Philippines.html> (last checked: Mar. 19, 2012).

of TCEs, albeit indirectly. The indigenous people's lands and their culture have an inseparable relationship. Unlike modern artists who merely derive inspiration from places, the culture – their cultural expressions and expressions of folklore – of the indigenous people is inextricably tied with their ancestral domains. Not only do traditional artists and communities derive their creativity from their surroundings but their creations are also about them and in most cases believed to be given by nature as their gifts. The dreamweavers, for example, believe that Fu'Dalu the god of Abaca, provides them with patterns which they eventually weave. With this intimate connection between their ancestral domains and expressions of their culture, the IPRA was successful in helping indigenous people in preserving their culture.

Despite the indirect benefit of the provision on the IPRA providing for ancestral domains as regards the preservation of indigenous culture, however, only half of the battle is won. Although the indigenous people are now granted a right to their ancestral domains where their culture is tied, it is not sufficient. Indigenous people all over the world, the T'bolis included, now live in a community where basic needs – food, electricity, drinking water, etc. - have to be purchased. As such, unless mechanisms for deriving economic benefit from their culture are put in place, assuming they would want to capitalize on their culture for economic gain, future generations of T'bolis may no longer be interested in learning how to weave T'nalak, relegating this aspect of their culture to history books.

Recognizing that the scope of the IPRA is not sufficient to protect cultural intellectual property of the community a new legislation was proposed. The bill for the protection of Community Intellectual Property Rights Protection (CIPRA) was proposed by Senator Juan Flavio in 1998. As indicated in the explanatory note of the CIPRA, its objective was to provide for a system of community intellectual property rights protection with respect to the innovative contribution of both local and indigenous cultural communities in the matter of development and conservation. The emphasis of the Bill was on the protection of rights relating to biodiversity innovation, however, the Bill does not bring within its purview all elements of traditional knowledge⁵⁸. Under Section 4⁵⁹ of the CIPRA, enumerating what can be

⁵⁸*Supra* note 3.

⁵⁹ §4. The following are Community Intellectual Property:

a) Parent strains and genetic material discovered or selected and conserved by local communities, which were used in the development of new plant varieties, and which can be harnessed for other potential uses;

considered as Community Intellectual Property, cultural products from local communities, such as weaving patterns, pottery, painting, poetry, folklore, music and the like are included. Section 4 of the CIPRA includes a provision as well which accords the same status as community cultural property for those not falling squarely under (a) to (e), Section (f) provides that so long as the product or process was discovered through a community process or the individual making the innovation does not claim ownership.

Another noteworthy provision of the CIPRA is its definition of the term “community” The CIPRA defined community as, “any group of people living in a geographically defined area with common history and definitive patterns of relationship.”⁶⁰ This definition is revolutionary in the sense that by not limiting the definition of community to those individuals belonging to a certain indigenous group, it recognizes the contribution of other individuals with whom the indigenous community interacts. This is consistent with the concept of the fluidity of culture which reflects the interaction of the indigenous cultural community not just with other members of the group but also with their environment and the community as a whole which may include individuals outside the indigenous group. The Bill purports to recognize and protect the contribution not just of indigenous people but also non-indigenous people in the cultural diversities and heritage of the nation. It likewise provides for a system of registration of the community as a tribal council, foundation, co-operative or any other organization that effectively represents the interest of the community.⁶¹ The CIPRA Bill was introduced in 1998 by

b) Seeds and reproductive material selected, cultivated, domesticated, and developed by local communities *in situ*.

c) Agricultural practices and devises developed from indigenous material, customs and knowledge;

d) Medicinal products and processes developed from the identification, selection, cultivation, preparation, storage, and application of medicinal herbs by local communities and indigenous peoples;

e) Cultural products from local communities, such as weaving patterns, pottery, painting, poetry, folklore, music and the like;

f) All other products or processes not made by a single person or juridical personality, which was discovered through a community process, or when the individual making the innovation does not claim the knowledge as his own, provided that any individual or juridical personality making such a claim should present proof of innovation or a history leading to the discovery that would justify his claim.

Cited in Kutty, *supra* note 3 at 28.

⁶⁰*Supra* note 3 at 28.

⁶¹*Id.*

Senator Juan Flavier. While the intent of the CIPRA bill was indeed laudable, it was forgotten after the end of the term of its proponent, Senator Juan Flavier.

The enactment of the IPRA in 1997 as well as the proposed CIPRA Bill were part of a growing trend seen in the last quarter of the twentieth century which witnessed an unprecedented pace of activities relating to the area of legal protection for folklore.⁶² Foremost of these developments is the collaboration between UNESCO and WIPO to address the concerns of developing countries and their fears of perceived threats to their cultural heritage by the improper exploitation of folklore. This partnership resulted in the formulation of a set of guidelines for domestic legislation which pertains to the legal protection of folklore. The provisions in the IPRA including its Implementing Rules and Regulations (IRR), reflect the broad principles⁶³ contained in the Model Provisions. Certain aspects of the IPRA and the IRR, however, have gone beyond or deviated from the Model Provisions.⁶⁴

In the analysis done by Dr. Valhala Kutty on the provisions of the IPRA and its related rules including the CIPRA Bill then pending, she concluded that the broad principles brought out through the Model Provisions have been substantially incorporated⁶⁵ although the structure of the Model Provisions was not followed.⁶⁶ Specifically, she concluded that the provisions in the Act, Rules, and the Bill are similar in nature to the requirement in the

⁶² During this period, the term folklore is still used to reform to indigenous cultural expressions/traditional cultural expressions (TCEs). *Supra* note 3 at 1.

⁶³ The Model Provisions is based on the concerns that it seeks to address as embodied under its preamble *i.e.* that the dissemination of folklore might lead to improper exploitation of the cultural heritage of a nation, that any abuse of a commercial or other nature or any distortion of expressions of folklore was prejudicial to the cultural and economic interests of a nation, that expressions of folklore constituting manifestations of intellectual creativity deserved to be protected in a manner inspired by the protection provided for intellectual productions, and that the protection of folklore had become indispensable as a means of promoting its further development, maintenance and dissemination.

⁶⁴ *Supra* note 3 at 29.

⁶⁵ *Id.*

⁶⁶ The study was conducted for three months commencing from December 9, 1998. The visits to the countries involved – Indonesia, India and Philippines – were done for 5 working days in January. The scope of the research extended to protection offered through laws on copyright and related rights, other laws on intellectual property rights (IPRs) like the laws relating to biodiversity issues and rights of indigenous people. Review of the Model Provisions was also within the scope of the study conducted. *Supra* note 3 at 1-2.

Model Provisions relating to acknowledgement of source, offenses, civil remedies, authorization and jurisdiction. She also found that the protection provided by the IPRA and the Rules provide for a wider scope.

The conclusion of Dr. Kutty was based on an analysis of the IPRA and its implementing rules as well as the then pending CIPRA bill. An assessment of the legal protection to traditional cultural expressions in the Philippines, however, would fall short of the broad principles in the Model Provisions. More importantly, it would fall short of the declaration of state policy embodied itself on the IPRA, that is, “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 ICC/IPs benefit on equal footing from the rights and opportunities which national laws and regulations grant to other members of the population.”⁶⁷

Under Section 32 of the IPRA, it is provided that the State shall preserve, protect, and develop the past, present and future manifestations of the culture of ICCs/IPs and under Section 10(a) of the IRR, these manifestations of the culture were enumerated to include archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature as well as religious and spiritual properties. The implementing rules further states that the NCIP, in partnership with the ICCs/IPs, shall impose effective mechanisms for protecting the indigenous peoples' community intellectual property rights along the principle of first impression claim, the Convention on Bio-diversity, the Universal Declaration of Indigenous People's Rights, and the Universal Declaration of Human Rights. There was no mention, however, of intellectual property conventions like TRIPS or its predecessor GATT or the half a century old Berne Convention. This omission leads one to believe that although designated as cultural intellectual property, the rights conferred to ICCs/IPs under the act is not meant to be covered under existing intellectual property laws. This is a major setback specially because despite provisions on IPRA and the IRR specific to TCEs, the enactment is replete with recourse provisions in cases of infringement.

⁶⁷ Rep. Act No. 8371, § 2 (e).

II. INTELLECTUAL PROPERTY LAWS OF THE PHILIPPINES

*T'nalak are woven dreams.
T'boli women weave them, keen eyes and hands working together to judge lengths,
to transfer patterns from memory to loom.
T'nalak is made of the whitest abaca fibers connected end to end
with the smallest possible knots and dyed red and blackest brown.
Its patterns are handed from mother to daughter,
or bestowed on the weaver in dreams by Fu Dalu, the spirit of the abaca.
It is a product as much of the quietness of spirit as it is of skill,
for not all women weave, and not all weavers dream.⁶⁸*

Protection of intellectual property in the Philippines is legislated through the enactment of national laws as well as the accession of the Philippines to international organizations like the WTO. Several international conventions lead the Philippines to being a signatory to several agreements relating to intellectual property protection.⁶⁹ Pursuant to the country's

⁶⁸*Supra* note 15.

⁶⁹ Currently the Philippines is a signatory to 8 conventions under the supervision of the WIPO (World Intellectual Property Organization), the WIPO Convention, Paris Convention, Berne Convention, Patent Cooperation Treaty (for ratification), Rome Convention, Budapest Treaty, WIPO Copyright Treaty (for ratification), WIPO Performances and Phonograms Treaty (for ratifications). Most notably the provision on the Berne Convention for the Protection of Literary and Artistic Works, under Article 15 (4), which *states*:

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

(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General of WIPO by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

ratification of the WTO – TRIPS (Trade Related Aspects of Intellectual Property Rights), the Intellectual Property Code of the Philippines, Republic Act No. 8293, was enacted January 1, 1998 providing for protection of Copyright and Related Rights, Trademarks, Service Marks, and Geographic Indications. The Intellectual Property of Traditional Cultural Expression of weavers straddles both industrial property and copyright.⁷⁰ As artworks, the possibility that TCEs may be protected by copyright is looked into. However, the copyright doctrine presents a myriad of barriers precluding full protection of copyright, i.e. the duration of protection, the originality requirement, the fixation requirement, the individual nature of the rights, the fair use exception, and the economic focus of the remedies.⁷¹

A. Copyright

The importance of copyright laws in the protection of TCEs is apparent and can be seen in several states where the specific legal protection for TCEs as intellectual property is largely embodied in their national copyright legislation.⁷² In other countries,⁷³ TCEs are simply referred to as a form of copyright work and most of the usual rules of copyright apply to them. Other

⁷⁰ WIPO divided intellectual property into two categories: industrial property and copyright. Industrial Property includes inventions (patents), trademarks, industrial designs, and geographic indications of source. On the other hand, copyright includes literary and artistic works, software, drawings, paintings, photographs, sculptures, and architectural designs. WIPO, *available at* <http://www.wipo.int/about-ip/en/> (last checked: Mar. 20, 2012).

⁷¹ *Supra* note 29.

⁷² It was the developing countries who made the first attempts in regulating the use of folklore creations and provided for its protection within the framework of their copyright laws (Tunisia, 1967 and 1994; Bolivia, 1968 and 1992; Chile, 1970; Iran, 1970; Morocco, 1970; Algeria, 1973; Senegal, 1973; Kenya, 1975 and 1989; Mali, 1977; Burundi, 1978; Cote d'Ivoire, 1978; Sri Lanka, 1979; Guinea, 1980; Barbados, 1982; Cameroon, 1982; Colombia, 1982; Congo, 1982; Madagascar, 1982; Rwanda, 1983; Benin, 1984; Burkina Faso, 1984; Central African Republic, 1985; Ghana, 1985; Dominican Republic, 1986; Democratic Republic of Congo, 1986; Indonesia, 1987; Nigeria, 1988 and 1992; Lesotho, 1989; Malawi, 1989; Angola, 1990; Togo, 1991; Niger, 1993; Panama, 1994. *Intellectual Property Protection of Expressions of Folklore: Attempts at the International Level available at* <http://www.tm.ua/laws/int/Intellectual%20Property%20Protection%20of%20Expression%20of%20Folklore%20Attempts%20at%20the%20International%20Level.pdf> (last checked: Mar. 20, 2012).

⁷³ Examples of these countries include Barbados, Cote d'Ivoire, Indonesia, and the Islamic Republic of Iran. WIPO Handbook, *supra* note 20 at 64.

states, in turn, have included in their copyright legislations provisions specifically designed for expressions of folklore. This group includes countries from Africa like Burkina Faso, Ghana, Kenya, Mexico, Mozambique, Namibia, Nigeria, Senegal, Sri Lanka, Togo, and the United Republic of Tanzania, as well as Vietnam in Southeast Asia.

Copyright deals with the rights of intellectual creators in their creations. Although protection is granted to these creators, the protection of copyright extends only to the form of expression and tangible manifestations of these ideas, and not to the ideas by themselves. The owner of rights in artistic works is protected by copyright law against those who “copy”, that is to say those who take and use the form in which original work was expressed by the author.⁷⁴ Copyright protection is, above all, one of the means of promoting, enriching, disseminating the national cultural heritage. The development of a country depends, to a very great extent, on the creativity of its people. Encouragement of individual creativity and its dissemination is a *sine qua non* for progress. It is on this aspect that copyright constitutes an essential element in the development process. Experience shows a positive direct relationship between the enrichment of the national cultural heritage and the level of protection afforded to literary and artistic works. This is shown by the fact that in the final analysis encouragement of intellectual creation is one of the basic prerequisites of all social, economic, and cultural development.⁷⁵

The Philippine copyright law was derived from Anglo-American jurisdictions. As such, originality⁷⁶ in the work protected is necessary. To qualify for copyright protection, however, it is not necessary that such product has never existed prior. It is only necessary that it evidences the individual skill and labor of the author to satisfy the requirement of originality under copyright laws. Thus, if the work is based on a preexisting work, a substantial – not merely trivial – variation is necessary. Both requirement of innovation and originality is problematic for the output of indigenous weavers in the Philippines. Since the weaving designs as well as the process for the production thereof is passed on by their ancestors the requirement of both originality and innovation does not exist. Moreover, as heritage passed on from generation to generation, derivation, not deviation, from prior works is

⁷⁴ WIPO Handbook, *supra* note 20 at 40.

⁷⁵ *Id.* at 41

⁷⁶ Quoted in Farley, *supra* note 48, *citing* Remich Music Corp., v. Interstate Hotel Co., 58 F. Supp. 523, 531 (D.Neb.1944).

the rule. This is specially true due to the sacred and educational nature of such works.

TCEs, like the T'nalak weavings of the T'boli women, are often incapable of being protected under existing intellectual property laws.⁷⁷ What was passed on from generation to generation by T'boli women – through their own dreams, their mothers, and their ancestors – remains unprotected in an intellectual property regime which came much later, but which these TCEs must now conform in order to be able to gain the benefits of the system of protection conferred to intellectual property holders.⁷⁸ As creators and artists the T'boli dreamweavers, have varied reasons in seeking the protection of their traditional knowledge which includes protection against commercial exploitation, attribution and benefit sharing. TCEs of indigenous people are not merely artworks, TCEs also embody their culture and way of living. The indigenous group's interest likewise involve ensuring the continuity of their culture. This can clearly be seen from the fact that unlike other ICCs/IPs who only wear their traditional clothes during special occasions or when there are festivities, the T'boli's wear their traditional costumes, or at least parts of it, almost everyday.

In their article Farley⁷⁹ and Carpenter⁸⁰ suggested that Intellectual Property provisions, specifically that of copyright, be extended to cover the works of indigenous artists. The possibility of this group being protected under current copyright laws as suggested by Farley has also been espoused by WIPO. According to WIPO, the national cultural heritage of developing countries can be protected within the framework of copyright legislation, through protection of the rights of these auxiliaries or of related (or neighboring) rights. Farley and Carpenter's proposal and recommendations are

⁷⁷ Molly Torsen, *Anonymous, Untitled, Mixed Media: Mixing Intellectual Property Law with Other Legal Philosophies to Protect Traditional Cultural Expressions*, 54 THE AMERICAN J. OF COMP. L. 173 (Winter, 2006).

⁷⁸ Although in Section 18 of the Tunis Model Law, Folklore was defined as all literary, artistic, and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage. Tunis Model Law (1976).

⁷⁹ *Supra* note 29.

⁸⁰ Megan M. Carpenter, *Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community*, 7 YALE HUM. RTS. & DEV'T L. J. 51 (2004), available at www.law.yale.edu/documents/pdf/LawJournals/carpenter.pdf (last checked: Mar. 20, 2012).

meant to overcome the provisions and effects of copyright law which precludes TCEs from enjoying its protection, to wit: the duration of the rights, the originality requirement, the fixation requirement, group rights, and fair use. The main thesis proposed by Carpenter revolves around the proposition that since Intellectual Property is, and have become, a formidable tool in the protection of artistic works and expressions, to deny this protection to indigenous people and their TCEs would be tantamount to denying them a right to vindicate any injury that was done to them.

According to Carpenter, while it is true that intellectual property laws are based on western developed markets, as well as western concepts of creation, invention, and ownership. Nonetheless, these laws are currently the primary vehicle for the protection of artistic, literary, and scientific works worldwide. Thus, she proposed, to segregate indigenous interests from this international regime would amount to denying them both a powerful shield and a powerful legal sword.⁸¹ She proposes a reconstruction of the machinery that is intellectual property law in order for it to work for all cultures. Carpenter argues that copyright laws can and must be expanded so as to maintain the vitality of, and protect, the creative artistic and literary works of indigenous cultures. In expanding these, the article proposes three main changes to copyright laws: incorporation of collective and communal notions of authorship, the expansion of the originality requirement to reflect these forms of authorship, and lastly the application of limits on the duration of copyright protection in a broader community context.

In her paper, Carpenter proposes that the means wherein the notion of authorship in copyright may be expanded is already existing within the copyright system. These mechanisms are the concept of joint authorship, transfer of rights, and works for hire. Of these concepts, Carpenter theorizes, the notion of joint authorship has the most logical possibility. Currently, however, as Carpenter admits it is practically impossible for indigenous people to meet the high threshold for joint authorship. Under current copyright laws, certain requisites must be fulfilled in order to qualify as jointly authored, these are: (1) collaboration in fact in the preparation; (2) intention of the authors, at the time of preparation, to have their contributions merged into inseparable or interdependent parts of a unitary whole and (3) each person's contribution is itself copyrightable. As regards using the notion of works for hire made for hire and transfer of rights, these concepts would necessarily require that the

⁸¹*Id.* at 51.

community regards its relationship with the members as that of employment, and in the latter case for the members to assign or transfer their rights to the community who acts as a corporate entity. The basis of Carpenter's proposal and the necessary changes that the indigenous community has to go through imposes a high cost for the culture and structure of the indigenous people that in the end such proposal might actually change and destroy the very basis of the cultural expression that we seek to protect.

The second proposal put forth by Carpenter to protect indigenous cultural expressions is modifying the originality requirement. Carpenter's theory in scaling this originality roadblock hinges on her prior proposal of changing the notions of authorship. That is, if the notion of authorship itself is expanded, then by extension we will no longer be relying upon the originality of one single creator but rather that of the community. As such, since the work is originally produced by the community itself then it should satisfy the litmus test of originality for copyright purposes.⁸² The author finds this proposal problematic, since although the community is itself considered an author, assuming that authorship including joint authorship requirement is modified, the reckoning period or delineation of originality would inevitably be traced from the time the first assignment of ownership or 'contract of employment' is had. Since this first assignment or contract would have transpired years ago, thus the subsequent reproduction of the first work would no longer be protected. Since the concern would be protecting the indigenous people and their TCEs and indigenous craft produced today, the result of this proposal would not only amount to such craft being 'unoriginal' but also open these crafts to possible exploitation or infringement since they are not original nor covered by copyright to begin with. To address this issue of the limited period of protection for copyright works, Carpenter finds inspiration from the United States legislation on trademark which gives protection to trademarks for so long as they are in use.

Under copyright laws, the owner of copyright in a work is generally vested in the person who created the work *i.e.* the author of the work.⁸³ In the case of the dreamweavers whose designs were handed down from generation to generation, the idea of ascribing it to one author is problematic. Does one ascribe it to the ancestor who originally thought, or more properly, dreamt of the pattern? Or should it belong to the current weaver who produced the

⁸² *Supra* note 80 at 69-70.

⁸³ WIPO Handbook, *supra* note 20 at 49.

T'nalak with the pattern that she learned and was handed to her by her ancestors or teacher? If we subscribe to the former, then naturally most patterns currently used by weavers would already be in the public domain and thus capable of appropriation by pretty much everyone – from wholesale manufacturers abroad to local entrepreneurs. It is worth noting that although publications regarding the Dreamweavers would say that a certain weaver knows more than a hundred designs of T'nalak, the weaver herself would tell you that of those she dreams only a few with most of the designs being passed to her by her mother, grandmother and great, great grandmothers.

One major difference between the concept of authorship between the indigenous people and traditional western conceptions is the fact that in indigenous cultures the authorship does not pertain to one single author but to the community, clan or family. Hence, for TCEs, although the weaver might have the biggest investment in terms of time and effort, the intellectual creation is not attributable to one single individual, but to the community or family which participates in its creation. The T'nalak, for example, would not achieve the same vibrancy of colors if not for the effort of the person who prepared the dye and boiled the abaca with it for about 3 weeks nor would the T'nalak have its remarkable sheen and softness if not for the skill of the person who burnishes it with the cowrie shell and beeswax. These steps are essential to the production of the art, which is the T'nalak in this case, and to disregard the contribution of these individuals and solely ascribe authorship to the weaver would not only be unfair to other individuals but would also run counter to the concept and idea of ownership by the weaver herself.

Related to the problem of authorship is the originality requirement necessary before a work can be held eligible for copyright protection. As a creation that is as much a tradition as it is an artwork for the T'bolis, the requisite of originality necessary for copyright protection is lacking. Moreover, as unschooled creators of this art, the right of the T'bolis to the copyright of the T'nalak is even endangered by the originality requirement, as codified under the Copyright laws. Under Copyright laws, ideas in the work do not need to be new but the form, whether artistic or literary, wherein the idea is expressed must be an original creation of the author.⁸⁴ In this case, since majority of the patterns of the T'nalak which are currently existing are largely undocumented,⁸⁵

⁸⁴*Id.* at 43.

⁸⁵ Probably the biggest effort, currently, of documenting the different weaves of the T'boli would be from the book *Dreamweaver*. M.E. Paterno, *supra* note 14.

copyright might actually pertain to the person who documents and/or publishes the patterns. Although, as a general rule, ownership of a copyright is vested in the author of the work, this provision is subject to national legislation. Thus, to remedy this concern a *sui generis* law protecting the Indigenous People's intellectual property is incumbent.

Another criticism advanced against the impracticability of employing copyright alone for the protection of TCEs is the relatively high cost associated with it. Copyright registration applies only to the nation where it is registered.⁸⁶ Since the lucrative market for indigenous crafts often lay in export markets,⁸⁷ the protection afforded by copyright, which is localized to the domestic market, would be rendered virtually useless. The solution would be, of course, to extend this protection outside the Philippines. This is a lot easier said, or written, than done. To do this, one must apply in each country wherein protection is sought. In case a prior registration is already made in that country, to obtain this protection, a successful challenge on the ground of prior use or prior registration must be made. The effect of this localized protection afforded by copyright is demonstrated by the case of the Peruvian artisans who were unable to fulfill contracts with importers for a number of years, and whose jewelry designs were even confiscated in trade fairs. In this case, European designers toured the Andean craft communities, they subsequently used some of the designs originally by the Peruvian craftsmen. Thereafter, these designs were registered by foreign designers preventing the indigenous artisans from marketing their own creations in countries where the designers registered them.⁸⁸ Consistent with the premise that Intellectual Property rights reside in the individual, copyright protection – including infringement prosecutions and actions – is also the responsibility of the artisan. Thus, if a counterfeit product is being marketed within the jurisdiction covered by the copyright holders protection, it is up to the artisan to bring this to the attention of the proper authorities. Most dreamweavers do not know how to

⁸⁶ J. MICHAEL FINGER AND P. SCHULER, POOR PEOPLE'S KNOWLEDGE: PROMOTING INTELLECTUAL IN DEVELOPING COUNTRIES, World Bank and Oxford University Press (2004).

⁸⁷ According to Lang Dulay, her buyers range from local and foreign tourists who visit Lake Sebu. Also, there are some foreigners – from Japanese to Egyptians – who order her weaves. Since not all buyers go through the NCIP, with most transactions solely between the weaver and the buyer no statistics of the nationality of buyers exists.

⁸⁸ WIPO – ITC, 2001, *supra* note 83.

read or write.⁸⁹ Aside from the fact that their personal circumstances and their inability to comprehend the nuances of copyright law, prosecuting copyright claims can also prove to be both overwhelming and expensive.

To address this issue of localised protection, countries enter into multilateral treaties. The most comprehensive multilateral agreement, at least to date, is the TRIPS Agreement which came into effect on 1 January 1995. Under the TRIPS agreement, minimum standards of protection to be afforded by each member state are set. These standards pertain to the subject matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection.⁹⁰ In terms of protection, possibly the most important provision in the TRIPS agreement is that which obligates a member country to accord the same treatment it provides to its nationals to those of other member countries. Moreover, as a member country of the World Trade Organization (WTO), enforcement of claims through the Dispute Settlement Unit (DSU) may also be achieved with the state bringing the claim in behalf of the aggrieved party. This remedy is specially useful in the case of the indigenous people who might not have the capacity to prosecute their claims. The problem with regard to prosecution of infringement claims is also, partly, remedied by the provision in the TRIPS agreement which gives registrants in member countries who made an earlier registration of a mark or creation a presumption of ownership.⁹¹ This, however, may also cause prejudice to the indigenous people should no assistance be provided to them for effecting registration as may be seen in the case of the Peruvian artisans.

As aptly put by Farley, although copyright law may be a logical choice and best suited in protecting indigenous folklore, the question is whether copyright law is capable of accommodating this art form. More importantly, it must be asked whether the needs of the community are satisfactorily addressed. She concludes that the copyright doctrine presents a myriad of barriers to the full protection of indigenous art and folklore, thus Farley proposes looking beyond copyright law and coupling the current provisions of copyright with other rights. Specifically, she proposes that provisions

⁸⁹ Although her original designs carry the letters 'Lang Dulay', Lang Dulay herself does not know how to read or write, prior to putting these words in her designs, she would instead put a thumbmark on her works.

⁹⁰ VICENTE AMADOR, *INTELLECTUAL PROPERTY FUNDAMENTALS* 230 (2007).

⁹¹ World Trade Organisation, *Agreement on Trade-Related Aspects of Intellectual Property Rights* (hereinafter, TRIPS Agreement), art. 16.

governing moral rights, public domain statutes and *domaine public payant*, laws dealing with unfair competition, and trade secrets be used.⁹²

One of the first limitations under copyright is the duration of the protection. According to Farley, assuming that the practical concerns of finding a 'person' or 'author' whose lifetime shall be the basis of the protection is addressed, a more paramount concern is the fact that the term of 'lifetime of the author plus fifty years' protection under the Berne Convention – subsequently adopted in the TRIPS agreement and in the Philippines Intellectual Property Law – is simply not sufficient. This period is too insignificant in the life of artistic traditions passed from generation to generation that date hundreds, or even thousands of years. Moreover, for the pragmatic group, a more pressing concern would be the fact that since these TCEs and other artworks have already appeared in publications or writings years prior, with or without their consent, these might already be considered as part of the public domain. To resolve this concern, Farley proposes that copyright law be reformulated making the protection retroactive and perpetual.⁹³

The remedy proposed by Farley, however, poses problems as well as solutions. The problem with granting TCEs perpetual protection as well as making it retroactive loses sight of the fact that TCEs are not similar to other creations of art. As a manifestation of culture, TCEs likewise evolve. Especially for the pragmatic group who would like to capitalize from their traditional art and craft as well as the techniques they learned in producing such, this protection might create more harm. That is, by protecting TCEs as static creations, this might preclude innovation, whether to address the market needs or just to make the production more efficient, which in turn hampers progress on the part of the indigenous group. One case in point was one order from a buyer abroad for the T'bolis to do flower patterned T'nalak, although they were not able to do the said pattern, theoretically if they were able to do that would that still, for example, be called T'nalak or would that be tantamount to a violation of the intellectual property rights protecting it. Another hypothetical case, for example, would be a request for the T'bolis to use only two colors⁹⁴, instead of the usual black, white, and red, to make the

⁹² *Supra* note 29 at 49-50.

⁹³ *Id.* at 17.

⁹⁴ To address demand, some T'nalaks have gone beyond not just using two colors e.g. black and white (the natural color of abaca), red and white, or a combination of these but have also started using other colors such as purple, orange, blue, etc.

T'nalak following all the patterns and process, would that then amount to infringement of copyright. Although this "freezing" of the process and creation of TCEs would be favored by what Carpenter refers to as the "traditional group" this would be prejudicial to the pragmatic group. These issues would inevitably arise due to the fluid nature of TCEs – they change and grow with the people who made them. This situation has in fact already happened when a local designer used T'nalak for his bags but instead of using the traditional patterns and colors of T'nalak 'ordered' that the cloth be composed of only two colors.

When all else fails and when the possibility of giving a *status quo ante* order is no longer feasible, the usual remedy proposed is damages. Although a provision for damages is provided under Copyright laws, more often than not this provides an inadequate remedy. As suggested by Farley, unless a provision for surrender of profits is added to the provision on injunctive relief and destruction of the infringing goods these penalties are not sufficient and would be ineffective to deter infringers from engaging in the "business" of selling and producing purportedly indigenous works. This suggestion, although ideal, loses sight of the fact that most infringement does not happen through legitimate channels but rather through black markets, thus, a sufficient gauge of profits is not available. Hence, this suggestion might not be practicable. Also, since unrealized profits are not included on the computation for damages, the indigenous people can only look to provisions under the law on moral and exemplary damages in order to seek reparation for whatever injury the act of infringement has caused them.

Although it is worth noting that countries such as Australia, recognized as a frontrunner in asserting the rights of indigenous people, has considered aboriginal customary law in the assessment of damages, this jurisdiction still does not recognize communal title under the Copyright Act. Under the Australian Copyright Act while protection for illicit copying of works owned by individual authors is provided, under the said law neither a remedy for the unauthorized copying of works through communal ownership nor communal harm is provided. In the case of *Yumbulul*⁹⁵, the Court explicitly held that the Copyright Act did not "provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin." Reading from the decision, it appears that not only does communal ownership preclude the operation of

⁹⁵ *Yumbulul v. Reserve Bank of Australia*, 21 IPR 481.

copyright, but precisely because there is communal ownership, this makes the subject work not copyrightable. Finally, although the use of copyright in protecting TCEs may be fraught with difficulties, its use should not be ignored in developing a *sui generis* system of protection.

B. Trademarks

Trademarks, unlike copyright, have existed since ancient times. Evidence for this traces back more than 3,000 years when Indian craftsmen would engrave their signature on their artistic creations prior to sending them to Iran. Fast forward to the current world of globalization and market-oriented economies, trademarks assume a more important role⁹⁶ in differentiating the various goods that fall within the same category. The means employed in differentiating goods which have no apparent differences for the consumer involved naming them. This naming mechanism eventually evolved to trademark.

A trademark is any sign that individualizes the goods of a given enterprise and distinguishes them from the goods of its competitors.⁹⁷ It may either be a word, phrase, symbol or design, or a combination thereof, identifying and distinguishing the source of goods of one individual or group from those of others.⁹⁸ This definition is composed of two aspects, sometimes referred to as the different functions of the trademark, but which are independent of each other but for practical purposes should always be looked at together.⁹⁹ The first is the source indicator and the second would be the differentiating factor. Both these functions are meant to "individualize" a product for the consumer. Although separate, the source indicating function presupposes that the trademark distinguishes the goods of a given enterprise from those of other enterprises. Both these aspects serve the traditional legal function of a trademark which is to indicate the source or origin of the goods on which it is used. Aside from this source-indicating function, trademarks also serve as a guarantee that the product attached to it is of a certain standard of quality.¹⁰⁰

⁹⁶ WIPO Handbook, *supra* note 20 at 53.

⁹⁷ WIPO Handbook, *supra* note 20 at 68.

⁹⁸ Rep. Act. No. 8293, § 177.

⁹⁹ WIPO Handbook, *supra* note 20 at 54.

¹⁰⁰ *Supra* note 90.

Although the duration of trademark protection is relatively shorter than copyright protection, unlike copyright, trademark registration is renewable and thus can continue until perpetuity or at least so long as it is still used by the original holder or ceded to a new holder. Therefore, the previous proposal put forth by Carpenter that the protection be made perpetual can be accomplished by this provision for allowing the trademark owner to renew his claim for the mark. This would mean however, that a registration must first be made and such mark must conform to the above requirements for a valid trademark. This provision of prior registration is admittedly a downside from that of copyright which begins at the moment of creation. Although the requirements of trademark might prove burdensome for the indigenous people, the provisions of copyright are still worth noting specially in the formulation of a *sui generis* system for the protection of TCEs. The burden of registration, however, should not be taken as an insurmountable roadblock to altogether dismiss what benefit trademark laws can provide for the indigenous people.

One provision in trademark laws that holds promise¹⁰¹ for the protection of indigenous crafts is the provision on collective and certification marks. A collective mark is defined under the Intellectual Property Code¹⁰² as “any visible sign which is designated as such in the application for registration and capable of distinguishing the origin or any other common characteristic, including quality of goods or services of different enterprises which use the sign under the control of the registered owner of the collective mark.” Collective marks are similar to regular trademarks and service marks since they all indicate the commercial origin of goods or services. Their difference lies in the fact that collective marks indicate origin in members of a group as opposed to a single origin for the goods bearing the trademark.¹⁰³ Since the mark is used by all members of the group, no one member can own the mark and the organization holds the title for the collectively-used mark for the benefit of all members of the group. Some countries, Panama for example, utilize collective marks for registered elements of traditional knowledge that may be shared or owned by the communities. Unlike copyright which pertains only to an individual, collective marks are owned by an association. Products from its members are expected to have a certain level of quality, or adhere to a specific set of requirements set forth by the association.¹⁰⁴

¹⁰¹*Supra* note 86.

¹⁰²INTEL. PROP. CODE, art. 121.2.

¹⁰³ *Supra* note 90.

¹⁰⁴ *Supra* note 90.

One advantage in using trademarks, specifically collective marks, over copyright, is that protection may be acquired for international markets as well. The Paris Convention contains provisions on collective marks under article 7 *bis*. Under the said provision, collective marks are to be admitted for registration and protection in countries other than the country where the association owning the collective mark is established. This means that although the association has not been established in accordance with the law of the country where protection is sought, this fact does not constitute as a valid ground for refusing such protection. An exception provided under the said Convention for refusing protection and allowing the country therefore to apply its own conditions of protection would be public interest.

Applying this to the case of the T'bolis, a problem in using collective marks in order to delineate between those products coming exclusively from Lake Sebu, South Cotabato and produced by the T'bolis would be the inherent restriction in the trademark provisions under the Intellectual Property Code. That is, Section 123.1 (j) precludes the registration of a mark that “consists exclusively of signs or of indications that may serve in trade to designate the geographical origin of the goods or services. While under the provisions of the IP Code these marks may be registrable matter, such registration carries with it a disclaimer that they cannot be exclusively appropriated. It may be argued that this problem of delineating products from Lake Sebu from other products not coming from this area may be solved by the use of Geographic Indicators (GIs). The use of GIs, however, carries with it an important condition: the characteristics of the product must be attributable exclusively to a particular geographic location.¹⁰⁵ The T'nalak is a product of the T'bolis' ingenuity and craft passed on from generation to generation of T'boli women. Though inspired by nature, it is not essentially attributable to its geographic origin, Lake Sebu.

Related to GIs but without the restriction that the goods covered must be distinct to the region are National Certification Trademarks. This Certification mark or “label of authenticity” is intended to help promote the marketing of the indigenous people's art and cultural products as well as deter the sale of products which falsely claim to be made by indigenous people. National Certification Trademarks, for example, were used by the Aboriginal

¹⁰⁵ TRIPS Agreement, art. 22(1).

and Torres Strait Islanders of Australia.¹⁰⁶ This label was developed by the National Indigenous Arts Advocacy Association (NIAAA) in 1999.¹⁰⁷ The use of these “authentication marks” was seen to be effective in maintaining the culture and integrity of Aboriginal and Torres Strait Islander art, ensuring a fair and equitable return to the community, maximizing consumers' certainty as to the authenticity, maximizing the multiplicity and diversity of indigenous art, and promoting the understanding, both nationally and internationally, of their cultural heritage and art.¹⁰⁸ Using this as a means to protect indigenous artists in the Philippines is promising and the task may be undertaken by the National Commission on Indigenous People (NCIP) which is created under the IPRA.

The renewable nature of trademarks and its possibility to extend the lifetime of the trademark indefinitely, as well as the possibility of collective ownership of such rights suggest that they may be suitable in protecting traditional knowledge. The same holds true for national certification marks or “labels of authenticity”. The challenge therefore is to enact a legislation creating an “authenticity label” for the T'nalak, and other TCEs, which would be registered as a trademark, as well as providing guidelines for its use, management and enforcement, similar to what Australia did for the Aboriginal and Torres Strait Islanders.

C. Moral Rights

The term moral rights originated under civil law and is a translation of the French *le droit moral*, a word which is meant to capture those rights of a spiritual, non-economic and personal in nature. These rights are based on the belief that during the process of creation, the artist injects his spirit into the work and that the artist's personality and integrity should thus be protected and preserved¹⁰⁹. In the case of TCEs like the T'nalak, it is easy to see how during the almost four-month process of producing the T'nalak the weaver inevitably “injects her spirit” into it.

¹⁰⁶ WIPO, *Traditional Knowledge and Geographic Indicators* at 7, available at www.iprcommission.org/papers/pdfs/final_report/Ch4final.pdf (last checked: Mar. 21, 2012).

¹⁰⁷ WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders*, WIPO Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), available at www.wipo.int/tk/en/tk/ffm/report/final/pdf/part1.pdf, (last checked: Mar. 21, 2012).

¹⁰⁸ *Id.*

¹⁰⁹ *Supra* note 90 at 29.

Moral rights consist, basically, of the following rights – rights of divulcation, paternity and integrity. They are usually inalienable and these rights allow artists to protect their artworks from denigration. Section 193 of the Intellectual Property Code provides that an author of a work shall independently of economic rights¹¹⁰ or the grant of such right, is granted moral rights. The scope of such rights include the right of attribution,¹¹¹ the right to make any alteration of his work prior to, or to withhold it from publication,¹¹² the right to object to any distortion, mutilation, or other modification, or other derogatory action to his work which is prejudicial to his honor or reputation,¹¹³ and the right 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.¹¹⁴ This distinction under Section 193 gives the author the right to enjoy moral rights although he has already licensed or assigned his economic rights. Under Section 201, however, moral rights shall not apply to prints, etchings, engravings, works of applied art, or works of similar kind wherein the creator primarily derives gain from the proceeds of reproduction. Based on this definition, T'nalak may fall under 'works of applied art', thus the question of whether or not it is covered by moral rights in the first place is brought to fore.

The protection that may be obtained under moral rights is for a finite number of years which is calculated at fifty years after the lifetime of the artist or author. After the death of the holder, the right cannot be assignable or

¹¹⁰ INTEL. PROP. CODE, § 177. *Copyright or Economic Rights*. - Subject to the provisions of Chapter VIII, 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, abridgment, 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.

¹¹¹ INTEL. PROP. CODE, § 193.1.

¹¹² INTEL. PROP. CODE, § 193.2.

¹¹³ INTEL. PROP. CODE, § 193.3.

¹¹⁴ INTEL. PROP. CODE, § 193.4.

subject to license since it is considered as a personal right which accrues only to the artist. As a right tied to the lifetime of the creator of the work, for the T'nalak whose original creators would be the ancestors of the current dreamweavers, it is debatable whether the current weaves are still covered by moral rights.

The artworks of indigenous people may be protected under this doctrine from preventing publication and reproduction without their consent, published without attributing the work properly or attributing it to them in a publication in poor quality, partial reproduction which distorts the message, or utilized in such a way that is inappropriate – according to their customs and traditions – to the nature of the original work.¹¹⁵ One of the criticisms with using the doctrine of moral rights, however, is that it is directed not to collective ownership but to the individual. The possible solution for this would be to have each weaver execute a waiver of rights – moral and economic -- in favor of the indigenous group. However, this situation and the assignment of such rights to a juridical person or group would be problematic in seeking redress. In the Philippine jurisdiction where moral harm, including moral damages, may be awarded only to an individual person¹¹⁶ and not to juridical entities, this would render useless the recovery of moral rights as a relief to the indigenous group concerned. Thus, in the end the only measure of damages due would be the economic right, rendering the provisions on moral rights nugatory.

D. Public Domain and *Domaine Public Payant*

Although the doctrine of public domain may not be relevant to indigenous people whose primary concern is to derive economic benefit and livelihood from their TCEs through their handicrafts, the doctrine of public domain might be relevant in seeking protection, specifically the doctrine of *domaine public payant*.

A *domaine public payant* literally means 'paying public domaine', which is generally understood as a legislative scheme that imposes a fee of works in the public domain when a specific identifiable author is lacking. Usually, funds

¹¹⁵ *Supra* note 29 at 10.

¹¹⁶ Although in past jurisprudence the Supreme Court has awarded moral damages to corporations this is awarded solely on the basis of besmirched reputation. *See* Asset Privatization Trust v. CA, 300 SCRA 379; *Jardine Davies v. Court of Appeals, Purefoods Corporation v. Court of Appeals* G.R. Nos. 128066 and 128069, 19 June 2000.

raised under this scheme goes to support organizations and could, in the case of the indigenous people, be directed towards organizations which benefit the community directly. The idea of using a system of *domaine public payant* to protect copyright issues had been explored by the WIPO and UNESCO in the past.¹¹⁷ Under this mechanism, when there is no identifiable author (which is usually the case for TCEs), one who desires to use the subject TCE must pay a royalty to the state. An example of a legislation that employs this mechanism is the African copyright legislation. Under this legislation, folklore is considered part of the national heritage and protected as such without regard to whether or not they qualify for copyright protection.¹¹⁸

E. Unfair Competition Laws

Unfair competition laws are employed in prohibiting and challenging the sale of fake copies of goods. As such, they are looked into as a possible source of protection for TCEs. In her paper, Farley concluded that for the indigenous community concerned only in economic benefit sharing, granting special protection to them would be better achieved through unfair competition laws.

Section 168 of the Intellectual Property Code of the Philippines governs unfair competition, rights, regulation and remedies. Under the said provision, Section 168.1, a person who has identified in the mind of the public the goods he manufactures or deals in, his business or services from those of others, whether or not it is registered, has a property right in the goodwill of the said goods, business or services so identified, which will be protected in the same manner as other property rights. Persons who shall employ deception or any other means contrary to good faith by which he shall pass off the goods manufactured by him or in which he deals, or his business, or services, for those of the one having established such goodwill, or who shall commit any such acts are also guilty of unfair competition. Subsection 3 of the same article provides an enumeration, though not exhaustive, of who shall be deemed guilty of unfair competition.¹¹⁹ Unfair competition has two essential elements;

¹¹⁷ See Daniel J. Gervais, *Intellectual Property Traditional Knowledge and Genetic Resources: A Challenge to the International Intellectual Property System*, cited in M. Carpenter, *supra* note 15 at 24.

¹¹⁸ *Supra* note 52 at 15.

¹¹⁹ Rep. Act. No. 8292, art. 168.3. In particular, and without in any way limiting the scope of protection against unfair competition, the following shall be deemed guilty of unfair competition:

first, that the person complained of shall have given his goods the general appearance of the goods of the complaining party; and second, that the person complained of should have clothed the goods with such appearance for the purpose of deceiving the public and defrauding the complaining party of his legitimate trade.¹²⁰ Penalties for persons found guilty of unfair competition include cancellation of their registration, destruction of the subject goods, damages, and in some cases imprisonment.

The term “unfair competition” presupposes competition of some kind. This doctrine is usually invoked when there is an actual market competition between the analogous products, that is, there can never be unfair competition unless there is something to compete with. However, the Courts tend to decide in favor of widening the scope of unfair competition. Although unfair competition is said to be broader than trademark infringement, there are cases wherein trademark infringement will not necessarily amount to unfair competition. When the infringer discloses on the labels containing the mark that he manufactures the goods, this would not amount to unfair competition since the public is not being deceived that the goods originate from the trademark's owner.¹²¹ As such, the current trend is for the Courts to rule on unfair competition although no direct competition exists, thus extending the doctrine of unfair competition to all cases in which one party fraudulently seeks to sell his goods as those of another.¹²² Broadly, any conduct that has

(a) Any person, who is selling his goods and gives them the general appearance of goods of another manufacturer or dealer, either as to the goods themselves or in the wrapping of the packages in which they are contained, or the devices or words thereon, or in any other feature of their appearance, which would be likely to influence purchasers to believe that the goods offered are those of a manufacturer or dealer, other than the actual manufacturer or dealer, or who otherwise clothes the goods with such appearance as shall deceive the public and defraud another of his legitimate trade, or any subsequent vendor of such goods or any agent of any vendor engaged in selling such goods with a like purpose;

(b) Any person who by any artifice, or device, or who employs any other means calculated to induce the false belief that such person is offering the services of another who has identified such services in the mind of the public; or

(c) Any person who shall make any false statement in the course of trade or who shall commit any other act contrary to good faith of a nature calculated to discredit the goods, business or services of another.

¹²⁰ V. Amador, *supra* note 90 at 29.

¹²¹ McDonald's Corporation and McGeorge Food Industries, Inc. v. I.C Big Mak Burger, Inc. et.al. ,G.R. No. 143993, August 18, 2004 *cited in* V. Amador, *supra*, note 90 at 29.

¹²² V. Amador, *supra* note 90 at 29.

the end and probably effect of deceiving the public or pass off the goods or business of one person as and for that of another constitutes an actionable case for unfair competition. By definition, therefore, unfair competition is a legal wrong for which the courts afford a remedy, it is not fraud but is categorized, instead, as tort.¹²³

Thus, all that an infringer or someone who desires to manufacture goods similar to the T'nalak has to do, is to actually disclose its origin. Clearly, as opposed to the claim of Farley, this is not sufficient protection for the Indigenous People – whether realist or traditionalist. All that infringer needs to do is to label it "made in X" and the act might no longer be regarded as infringement. The mere availability of a craft similar to the T'bolis but not originating from the T'bolis destroys the distribution and pricing model, which ideally should reflect the amount of labor required to produce it. This forces the indigenous people to sell their craft at ridiculously cheap prices in order to compete with the crafts produced using non-traditional methods, often manufactured with sophisticated machinery in foreign countries with no affinity to the product being produced. What took the T'bolis approximately four months to produce usually ends up being sold at prices garnering no more than a subsistence income for the craftsmen and their families.

F. Extending Customary Law to Third Persons

One of the criticisms in applying customary law to govern Traditional Cultural Expressions is the fact that such customary law sanctions would often make sense and would be enforceable only to members of the indigenous community. Since infringement is usually conducted by a person not a member of the community, customary law would not have 'teeth' to punish violators. The customary laws of a particular indigenous community and the sanctions provided therein is effective in controlling members of the indigenous community due to the moral ascendancy of the clan or tribe leader who is perceived to descend from their original ancestors¹²⁴ as well as the intricate social structure in the group which governs accountability among its members.¹²⁵ Without these structures, customary law would have no effect.

¹²³ *Id.* at 181.

¹²⁴ *See* Colson & Gluckman, noting the chief's authority is sanctioned by the belief that the chief descended from the original tribe, *cited* in P. Kuruk, *supra* note 52 at n. 72.

¹²⁵ Paul Kuruk, in his essay, *states*:

The social organization of traditional societies is based on strong pattern of kinship groups with lineage as their basic constituent. The lineage forms the foundation of

Thus, it is not hard to see why the relevant customary law and norms would have no application, and might even appear ridiculous to outsiders who are alien to these social structures, rules and tradition.

This is not to say that customary law would be totally ignored just because the alleged infringer is alien to the customary norms of the indigenous group. Customary law may still be used in the assessment of damages due to the indigenous people whose rights were violated. In Australia, in the case of *Bulun Bulun & Anor v. R & T Textiles Ltd*¹²⁶ the customary law of the Ganalbinga people surrounding the use of the painting "Magpie Geese and Water Lilies at the Waterhole",¹²⁷ the Court said that evidence of customary law may be used as a basis for the foundation of rights recognized within the Australian legal system. Justice Von Douss stated in his opinion that, "The conclusion that under the circumstances Mr. Bulun Bulun owes fiduciary obligations to the Ganalbinga people does not treat the law and custom of the Ganalbinga people as part of the factual matrix which characterizes the relationship as one of mutual trust and confidence. It is the relationship which the Australian legal system recognizes as giving rise to the fiduciary relationship, and to the obligations that arise out of it."¹²⁸

Unlike the Australian legal system, however, the recognition of customary laws is embodied in the IPRA. Under the IPRA, customary laws of the indigenous people must be taken in consideration in determining transfer

a wide social group called the clan. A system of interclan linkages in turn results in a tribe made up of people belonging to different lineages but speaking the same language with the same traditions. Within each group is a leader, selected on the basis of seniority, who is accountable to the leader of the next higher group. (Footnotes omitted).*Supra* note 52 at 781.

¹²⁶ *Bulun Bulun & Anor v R & T Textiles Ltd.*, 86 FCR 244 (1998). In this case, however, although the court rejected the concept of communal property, the court still ruled in favor of Bulun Bulun and the Aboriginal group to which he belongs on the basis of a fiduciary duty on the part of Mr. Bulun Bulun not to exploit the artistic work in such a way contrary to the laws and customs of the Ganalbingu people. Since the fiduciary duty is upon Mr. Bulun Bulun he is the one who must enforce his copyright, corollarily as a result of the fiduciary duty upon him, the Ganalbingu people can impose upon Mr. Bulun Bulun to enforce his right.

¹²⁷ Depicted on the painting is the main totemic well for the clan of Mr. Bulun Bulun called Djulibinyamurr, described as being the place from which the turtle creator of the Ganalbingu emerged.

¹²⁸ *Supra* note 126 at 262.

of rights as well as assessing whether there was a free and prior informed consent obtained from the indigenous community concerned.

III. HUMAN RIGHTS

It is a task that will take a few weeks at least. Counting, sorting, tying, all processes repeated over and over, the entire length of the loom. Finally the weaver sits, straps herself in, shifts her feet to find the exact point of tension, and begins to weave.

The weeks spent in preparation pay off. The warp fibers are in place to receive the weft threads, the ones that will go across the vertical warp to make the cloth. It is built slowly, thread by thread, each inch taking its strain on the back, the shoulders, the legs that must stay in position to provide the tension.

The light slants in across the cloth from the window and she sees with some satisfaction that the colors are true, that the design emerges on cloth as it was in her mind's eye.¹²⁹

The intersection of Intellectual Property and Human Rights often arise in the case of indigenous people and globalization, and the increasing commodification of content.¹³⁰ This debate on human rights has its origins on the argument that since current intellectual property laws do not protect Traditional Knowledge and TCEs, discrimination exists which is abhorrent to the tenets of human rights.

What took four months and at least four people collaborating together to produce would eventually be sold at prices ranging from Php300 to Php500.¹³¹ Considering it takes an apprentice over four years to learn the craft of T'nalak weaving – the same period it takes to finish a college degree in the

¹²⁹ See *supra* note 15.

¹³⁰ M. Carpenter, *supra* note 80 at 24

¹³¹ Lang Dulay, a national artist, is an exemption as her works are selling at Lake Sebu for Php1000.00 per meter.

Philippines – becoming a skilled weaver is a substantial investment. Added to that, since the T'boli have no direct access to the market, the weavers are frequently forced to offer their crafts through consignment at various souvenir shops and resorts dotted around Lake Sebu. Selling through consignment means money is only earned once their produce has been sold to a wondering tourist or foreign merchant. In other words, producing a T'nalak carries substantial risks for both the weaver and their families. Money spent fabricating the T'nalak instead of basic necessities may only be recouped after a substantial period of time has passed.¹³²

The potential of crafts in terms of employment generation and poverty alleviation in areas inhabited by indigenous communities is tremendous. For most T'bolis, the practice of their craft, from weaving to brass casting, embroidery and beads making, remains a major source of income. These crafts are sold on their behalf through COWHED (Cooperative of Women in Health and Development).¹³³ To date, COWHED has a total of 187 members. COWHED, small as it may seem, remains one of the major links of T'bolis to market their craft.¹³⁴ T'boli weavers, with very

¹³² Since the T'bolis no longer grow their own abaca, due to the disease in their local abaca, they would need to buy it from other suppliers. One bundle costs Php15, with one 6meters of T'nalak needing about 25 bundles. Moreover, they would also need to spend money to buy the cowrie shell which they use to burnish the T'nalak. Since the shell is not locally available, they would need to purchase it as well with one shell costing about Php100.00. The products sold at COWHED includes T'nalak weaving, T'nalak finished products, accessories made from beads and other indigenous materials, hand woven scarfs, malong, and tubaw, embroidered garments, vests, decorations, bamboo musical instruments and other functional items, hand carved softwood for decorations, gifts, and tokens, and brass figures.

¹³³ The Tribal Women's Health Project through the trading support of the formerly Australian International Development Aid Bureau now AusAID that lasted for seven years (from 1991-1998) gave birth to what is now COWHED. In order for the T'bolis to become a member of the Cooperative they would have to pay a membership fee of Php100. The crafts are sold on a consignment basis, with COWHED 'marketing' their goods in their display area – a princess hut called Gono Kem Boi in the T'boli dialect donated by a japanese patron Tomotsugo Natsuo – and them getting paid once their goods are sold. COWHED also offers loans to its members in order for them to purchase their raw materials.

¹³⁴ To date COWHED has four established market partners: Social Action for Filipino Youth's Handicrafts (SAFFY), Japanese Overseas Foster Parents Association (JOI'PA), Health Assistance Neighborhood Development Services (HANDS), Peace and Equity Foundation (PEF).

few exceptions,¹³⁵ usually market their craft through cooperatives like COWHED, middlemen, or through stores selling native crafts. Selling their crafts is one of the initial challenges, the other would be selling it for a price that would at least let them live a comfortable life. Like many other indigenous artisans, this price is ironically not high. Probably the most well-to-do weaver would be the *Gawad ng Manlilikha* awardee Lang Dulay. She is already more than 90 years old, and has been weaving since she was 12. Despite the more than 100 designs credited to her name, and having been flown to as far as Hawaii, her economic situation has remained largely unaltered. She continues to live in a thatched roof house, half of what probably is not more than 30 square meters is dedicated to weaving, decorated with photos featuring Lang Dulay with other weavers, as well as former President Ramos. At the other end of her modest house hangs a tarpaulin lauding Lang Dulay as a National Artist.

It is perhaps due to the often sad plight of indigenous artisans that advocates of indigenous rights have looked into the provisions of human rights laws in order to gain the protection of laws. Human rights laws although it may be related to intellectual property laws provide a wider scope of protection. Under the *1948 Universal Declaration of Human Rights*,¹³⁶ the *International Covenant on Economic, Social and Cultural Rights*,¹³⁷ and the *International Covenant on Civil and Political Rights*¹³⁸ guarantee the fundamental rights pertaining to, *inter alia*, labor, culture, privacy, and property. In the discussion by Yamin and Posey,¹³⁹ they proposed that the Universal Declaration and the International Covenants may be used to argue that the failure to grant equal intellectual property rights to indigenous people is tantamount to discrimination. In this regard, they may be used to protect the cultural property interests of the indigenous community.

The concept of moral and material interests resulting from any scientific, literary, and or artistic production is provided under the *Universal*

¹³⁵ An exception would be Lang Dulay, who being an awardee of the *Gawad Manlilikha* is relatively well-known in the local and foreign market.

¹³⁶ Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948), *cited in* P. Kuruk, *supra* note 52 at 15

¹³⁷ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 4, *cited in* P. Kuruk, *supra* note 52.

¹³⁸ International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 172. *Cited in* P. Kuruk *op.cit.* note 52 at 15

¹³⁹ See Yamin & Posey (discussing the manner in which the Universal Declaration and the International Covenants can be used to protect discrimination against traditional peoples' intellectual property rights), *cited in* P. Kuruk *supra* note 52.

Declaration of Human Rights.¹⁴⁰ The right to own collective property and not to be deprived of that property is also provided in the *Declaration*.¹⁴¹ The right to just and favorable remuneration of work¹⁴² and equal protection for all under the law¹⁴³ are also provided. However, as pointed out by Posey,¹⁴⁴ the utility of human rights provisions is limited due to the fact that they are directed toward state governments and establish no clear basis for its application to transnational corporations and to individuals engaged in unauthorized use of folklore. Even if they are directed toward state governments, human rights provisions may be used to advocate a *sui generis* legislation capable of protecting TCEs.

The intersection of human rights and intellectual property law is demonstrated in the case of *United States v. Carrow*.¹⁴⁵ In this case, Carrow was prosecuted under a legislation which punishes trafficking of cultural patrimony.¹⁴⁶ He is questioning the said legislation on the basis that it was void for vagueness, and the Federal Court held that the subject legislation was a human rights legislation, and thus rejected his defense.

¹⁴⁰ Universal Declaration of Human Rights. Article 27(2). Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author, *cited* in P. Kuruk *supra* note 52.

¹⁴¹ Universal Declaration of Human Rights Article 17 (1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property. *Cited* in P. Kuruk, *supra* note 52.

¹⁴² Universal Declaration of Human Rights, Art 23 (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection *cited* in P. Kuruk, *supra* note 52.

¹⁴³ Universal Declaration of Human Rights, Art. 7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. *Cited* in P. Kuruk, *supra* note 52.

¹⁴⁴ See Posey, (discussing the manner in which human rights can protect indigenous folklore), *cited* in P. Kuruk, *supra* note 52.

¹⁴⁵ *United States v. Carrow*, 947 F.2d 942.

¹⁴⁶ Cultural Patrimony is defined as an object of ongoing historical, traditional, or cultural importance central to native American Group or culture itself, rather than property owned by an individual Native American, and which, therefore, cannot be alienated, appropriated, or conveyed by an individual regardless of whether or not the individual is a member of the Indian tribe or Native Hawaiian organization, and such object shall have been considered inalienable by such Native American group at the time the object was separated from such group. See Section 2.D National American Graves Protection and Repatriation Act.

IV. PROTECTION IN THE INTERNATIONAL LEVEL

T'nalak patterns engulf in their complexity and mathematical precision, but they are symbols taken from daily life – the sown (phyton), the bagu k'lung (shield), the menaul (eagle).¹⁴⁷

The era for the recognition of TCEs and indigenous people's rights in the international community was ushered in 1967 through an amendment to the *Berne Convention for the Protection of Literary and Artistic Works* (Berne Convention). The amendment provides for a mechanism for the international protection of unpublished and anonymous works. The aim of this amendment, now reflected under Art 15.4¹⁴⁸ of the *Convention*, was to provide international protection for expressions of folklore/TCEs.¹⁴⁹ This effort, however, was not to protect folklore under a *sui generis* system of protection but merely to provide a way to introduce copyright protection for folklore at the international level.

The second of these developments is the *1976 Tunis Model Law on Copyright for Developing Countries*. The Tunis Model Law was in response to the revisions made in 1971 to the Berne Convention and the Universal Copyright Convention. That is, the concern then was that, if a State is to adhere to the Convention rules, it was therefore deemed appropriate to provide States with a text of a model law which, if the State so desired, they could take as a pattern when framing or making amendments or revisions to their domestic legislation.

¹⁴⁷ See *supra* note 15.

¹⁴⁸ Article 15.4 (a) In case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority who shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union. (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union. See Berne Convention.

¹⁴⁹ WIPO, Intellectual Property and Traditional Cultural Expressions WIPO Booklet No.1 p.5 2010 available at www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf (last accessed: March 21, 2012)

The most notable development introduced by the Tunis Model Law is the provision exempting works of indigenous groups from the fixation requirement.¹⁵⁰

The path to a *sui generis* protection which was commenced with the enactment of the Tunis Model Law was followed by the 1982 WIPO-UNESCO Model Provisions. These provisions were a product of the expert group convened by WIPO and UNESCO tasked to develop a *sui generis* model for the IP-type protection of TCEs. The Model Provisions established two main categories of acts against which the TCEs are protected, namely, 'illicit exploitation' and 'other prejudicial actions.' Two years after the Model Provisions was drafted, WIPO and UNESCO jointly convened a group of experts on the international protection of expressions of folklore by Intellectual Property. With a draft treaty at their disposal, based on the 1982 Model Provisions, WIPO and UNESCO worked for an international treaty. However, majority of participants at that time believed it was too still premature to establish an international agreement.¹⁵¹

The goal of establishing an international treaty was partly realized when in December 1996, WIPO Member States¹⁵² adopted the WIPO Performances and Phonograms Treaty (WPPT) which provides protection for the performer of an expression of folklore. For two years, between 1998 and 1999, WIPO conducted Fact Finding Missions (FFMs) in 28 countries to identify the IP-related needs and expectations of traditional knowledge holders. In 1999, consultations were also organized by WIPO on the protection of expressions of folklore. These consultations were conducted for African countries (March 1999), for countries in the Asia and Pacific Region (April 1999) and for Latin America and Caribbean (June 1999). Resolutions and recommendations were reached in these consultations, and one of these was that WIPO and UNESCO increase and intensify their work in the field of folklore-protection. Moreover, the recommendations were unanimous in one regard: future work in these areas should include the development of an effective international regime for the expressions of folklore. To date, no

¹⁵⁰ WIPO-UNESCO Tunis Model Law on copyright for developing countries 1976 (WIPO Publication No 812(E)) s 1(3).

¹⁵¹ *Id.*

¹⁵² The WPPT currently has 86 signatories including the European Union. See Contracting Parties > WIPO Performances and Phonograms Treaty 2010 available at <http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY&search_what=C&treaty_id=20> (last accessed: March 21, 2012)

agreement has been reached to establish an international convention or regime for the protection of folklore.

A. TRIPS Agreement

The TRIPS agreement is probably the most successful International Agreement in Intellectual Property with its membership composed of the member states of the World Trade Organization (WTO). The agreement, in a way, standardized the definition of Intellectual Property. The agreement codified what is now known as the common characteristics of intellectual property, that is, the presence of an identifiable author/s or inventor/s, an identifiable work or invention or other object, and defined restricted acts in relation to the said object which are done without the authorization of the rights-holders.

Although the development of the issue of Traditional Knowledge started in 1998 at the WIPO, the World Trade Organization followed suit almost immediately in 1999 when the General Council began preparing for the Seattle Ministerial Conference.¹⁵³ On August 6, 1999, two important documents were submitted to the General Council. One of these was the proposal coming from the Permanent Mission of Venezuela who proposed that in the next review of the TRIPS, *inter alia*, they should “Establish on a mandatory basis within the TRIPS Agreement a system for the protection of intellectual property, with an ethical and economic content, applicable to the traditional knowledge of local and indigenous communities together with recognition of the need to define the rights of collective holders.”¹⁵⁴

Aside from this proposal from Venezuela, other developing countries likewise made proposals for a legal framework on Traditional Knowledge. On October 12, 1999, a more detailed proposal was submitted by the governments

¹⁵³ The Third WTO Ministerial Conference was held in Seattle, Washington State, US between 30 November to 3 December 1999. *See* The Third WTO Ministerial Conference 2010 *available at* http://www.wto.org/english/thewto_e/minist_e/min99_e/min99_e.htm (last accessed: March 21, 2012)

¹⁵⁴ Graham Dutfield, *TRIPS Related Aspects of Traditional Knowledge* 33 *CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW* 233, 127 & 272 *citing* Preparations for the 1999 Ministerial Conference: Proposals Regarding the TRIPS Agreement: Para. 9(a)(ii) of the Geneva Ministerial Declaration, par. 2, WTO Doc. WT/GC/W/282 (Aug. 6, 1999), *available at* <http://docs.wto.org> (last accessed: March 21, 2012).

of Bolivia, Columbia, Ecuador, Nicaragua and Peru to the General Council.¹⁵⁵ This document proposed that the WTO should establish a mandate in a future trade round on the following: (1) to carry out studies, in collaboration with other relevant international organizations, in order to make recommendations on the most appropriate means of recognizing and protecting traditional knowledge as a subject matter of intellectual property rights, (2) on the basis of the prior recommendation, initiate negotiations with a view to establishing a multilateral legal framework that will grant effective protection to the expressions and manifestations of traditional knowledge, and (3) To complete the legal framework envisaged in (2) for it to be included as part of the results of this round of trade negotiations.¹⁵⁶

Currently, the relationship between the TRIPS Agreement and the CBD as well as the protection of TK, TCEs, and expressions of folklore is already raised as one of the issues put forth by the developing countries in the implementation of the Uruguay Round Agreements, in particular that of the TRIPS agreement. This issue is likewise mentioned in paragraph 19 of the Doha Ministerial Declaration.¹⁵⁷

¹⁵⁵ *Id.*, see note 130 at 273.

¹⁵⁶ *Id.*

¹⁵⁷ Although the DOHA Declaration did mention a review of the entire TRIPS Agreement as required by Article 71.1, the focus of Paragraph 17-19 is primarily more on public health and patentability as well as a discussion of Geographical Indicators. TK may also be undertaken under Paragraph 12 under Implementation-related issues and concerns. See The Doha Declaration Explained (2010) available at http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm (last accessed: March 22, 2012).

V. *SUI GENERIS* NATIONAL LEGISLATIONS

*T'nalak designs are like family heirlooms, handed down from mother to daughter. Only females weave. One weaver has inherited and kept a m'baga, a sampler template of sorts, a miniature version of a bed with different designs.*¹⁵⁸

A number of countries, the Philippines included though IPRA,¹⁵⁹ have already decided that the existing intellectual property system is not, on its own, sufficient in protecting traditional knowledge. To address this, these countries have either enacted or are in the process of enacting a *sui generis* system of protection.¹⁶⁰

This idea has its origins from the *Tunis Model Law on Copyright* in 1972, and the *Model Provisions* enacted a decade later in 1982. Under the *Model Provisions of 1982*, the protections are intended to provide protection for expressions of folklore against illicit exploitation and other prejudicial actions.¹⁶¹ While other member states who enacted such a system of protection have these ends in mind, another purpose was to provide protection for Intellectual Property in an effective and uniform manner.¹⁶² Panama, on the other hand, enacted its *sui generis* legislation with the objective of protecting collective IP rights and TK through registration, promotion, commercialization and marketing of their rights in such a way as to give prominence to indigenous socio-cultural values and cultural identities and for social justice.¹⁶³

¹⁵⁸ See *supra* note 15.

¹⁵⁹ Although the IPRA was legislated not with particular focus on TK and TCEs but more on resolving national issues on biopiracy and prospecting, thus under its provisions, a very vital element enacted is the provision on prior informed consent and the concept of ancestral domains. See Rep. Act. No. 8371, §3(g).

¹⁶⁰ Sui Generis system of protection is a distinct system tailored or modified to accommodate the special characteristics of traditional knowledge or folklore. Sui generis systems of protection are already provided in areas such as the protection of plant varieties (UPOV System) and system of databases (EC Directive 96/9/EC, 11 March 1996. See WIPO Handbook Chapter 4: Traditional Knowledge and Geographic Indicators. (2010) available at http://www.geographics.org/WorkGroups/WG1/eu_directive.pdf/ (last accessed: March 22, 2012).

¹⁶¹ 1982 Model Provisions, Preamble and Section 1.

¹⁶² Bangui Agreement of OAPI (as amended in 1999) Annex VII, Title I

¹⁶³ Executive Decree No. 12 (Panama); Panama Law No. 20 Preamble and Article 1 of Panama Law

In addition, the Panama legislation aims to protect the authenticity of crafts and other traditional artistic expressions. The *South Pacific Model Law for National Laws of 2002*,¹⁶⁴ aside from providing protection its Preamble, provides that, “the Model Law should not complement and not undermine IP laws.” Mindful of the growing market for Indian Crafts, the United States promulgated the *U.S.A. Indian Arts and Crafts of 1990*, where the institution of a Database of Official Insignia was provided.¹⁶⁵

A common thread running through all these different legislative enactments is the protection of economic value of TCEs, providing the possibility for commercial exploitation. Except for the *South Pacific Model Law for National Laws*, these *sui generis* systems were not intended to supersede the application of Intellectual Property Laws as regards TCEs and TK.

Under the WIPO's analysis¹⁶⁶ of *Sui Generis* systems, a comparison was made between the Tunis Model Law, the WIPO Model Provisions, and national legislations¹⁶⁷ where it was shown that the *sui generis* legislations of this country provide for a wider scope in terms of the subject matter as opposed to the *1982 Model Provisions*. An analysis of the scope provided in the *1976 Tunis Model Law* would show that the scope of folklore under Section 18 was defined as covering not just literary and artistic works, but likewise, scientific works. The narrowing of the scope of protection was apparent in the WIPO Model Law which failed to include scientific works and was focused only on the arts.¹⁶⁸ Despite this, however, the Panama Law No. 20 deemed it proper to

¹⁶⁴ 3.12. Relationship with Intellectual Property Protection There is a generally accepted principle that new forms of protection for TKECs should be complementary to any applicable conventional IP protection. This is often referred to as ‘filling the gap’ and is reflected in a guiding principle of the Pacific Model Law that states that ‘special protection for TKECs should be complementary to, and not replace or prejudice the acquisition of, any applicable conventional IP protection and derivatives thereof’ See Guidelines for Developing National Legislation for the Protection of Traditional Knowledge and Expressions of Culture based on the Pacific Model Law 2002.

¹⁶⁵ Section 302(a), Trademark Law Treaty Implementation Act, *Cited in Comparative Summary of Sui Generis TCEs Legislation* WIPO/GRTKF/IC/9/INF 4 (2010) available at www.wipo.int/tk/en/laws/pdf/suigeneris_folklore.pdf (last accessed: March 22, 2012).

¹⁶⁶ *Id.*

¹⁶⁷ These legislations are the Bangui Agreement of OAPI (amended in 1999), Panama Law No. 20 (June 26, 2010), and Executive Decree No. 12, the South Pacific Model Law for National Laws (2002), and the U.S.A. Indian Arts and Crafts Act of 1990.

¹⁶⁸ Under the Model Provisions of 1982, Productions were those consisting of characteristic elements of traditional artistic heritage developed and maintained by a

include biological, medical, and ecological knowledge, whereas the South Pacific Model law included a wider scope. Under this model, subject matter covers expressions of culture defined as, "any ways in which TK appears or is manifested." It is important to note that the *U.S.A Indian Arts and Crafts Act* did not include scientific knowledge per se, as its purpose was primarily a truth-in-advertising act.¹⁶⁹ Nonetheless, these legislations were consistent in including works of art and TCEs.

While some countries chose to enact a national law, other territories decided on entering into regional agreements with their neighboring countries. On March 2, 1977, some countries in the Africa entered into the *Bangui Agreement*.¹⁷⁰ The *Bangui Agreement* established the *Organisation Africaine de la Propriété Intellectuelle*. The Agreement, which came into force in February 28, 2002, covers patents,¹⁷¹ utility models,¹⁷² trademarks,¹⁷³ industrial designs,¹⁷⁴ trade names,¹⁷⁵ geographical indicators,¹⁷⁶ copyright,¹⁷⁷ unfair competition,¹⁷⁸ integrated circuit layouts,¹⁷⁹ and plant variety rights.¹⁸⁰ One of the purposes of the *Bangui Agreement* was to protect TCEs, and it appears that the expressions of folklore¹⁸¹ mentioned in the agreement are protected as copyright works.¹⁸²

community, in particular, verbal expressions, (folk tales, folk poetry, riddles); musical expressions (folk songs and instrumental music).

¹⁶⁹ Indian Arts and Crafts Act, Know the Law, p.2. Published by World Intellectual Property Organization (WIPO) (2010), available at www.wipo.int/clea/docs_new/pdf/en/us/us207en.pdf (last accessed: March 22, 2012).

¹⁷⁰ Signatories to the Bangui Agreement were Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Cote d'Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Senegal and Togo. 2010) available at http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=227&group_id=21 (last accessed: March 22, 2012).

¹⁷¹ Bangui Agreement, Annex I

¹⁷² Bangui Agreement, Annex II

¹⁷³ Bangui Agreement, Annex III

¹⁷⁴ Bangui Agreement, Annex IV

¹⁷⁵ Bangui Agreement, Annex V

¹⁷⁶ Bangui Agreement, Annex VI

¹⁷⁷ Bangui Agreement, Annex VII

¹⁷⁸ Bangui Agreement, Annex VIII

¹⁷⁹ Bangui Agreement, Annex IX

¹⁸⁰ Bangui Agreement, Annex X

¹⁸¹ Defined in the agreement as translations, adaptations, arrangements and other transformations of expressions of folklore as well as collections and databases of works and expressions of folklore (Article 6 (1) (i) & (ii). Bangui Agreement, *supra*.

¹⁸² The implementation of this is accomplished through a system of listing and classification. The effect of this is provided under Art 57. (1) Listing empowers the

Effectively, what the *Bangui Agreement* did was to relegate the status of “works capable of being subject to copyright” to the expressions of folklore mentioned therein whether or not they are on all fours with the requirements necessary for copyright under the TRIPS agreement. The signatories to the *Bangui Agreement* are all members of the WTO,¹⁸³ with the exception of Equatorial Guinea. Nevertheless, being an observer government, it also has ceded to the TRIPS agreement.¹⁸⁴ Hence, a question arises whether by relegating copyright status to these works, did the signatories of the *Bangui Agreement* agree to give the same protection and status to works of a similar nature as those in their agreement? Since “fake” works are usually not produced within the country, an important test of its effectiveness is how the signatory countries, as well as the beneficiaries which are the indigenous people themselves, are going to prosecute “infringement of their copyright” in non-OAPI countries.

The legislation of Panama, *Panama Law No. 20*, in providing very specific descriptions of subject matter covered is worth noting.¹⁸⁵ Since TCEs are as varied as the number of indigenous people in a certain country, this detailed provision of Panama providing for a classification system is laudable in one respect since it does not provide for very narrow nor very broad descriptions of protected material that would eventually be a source of confusion and guesswork for the implementing body. This specificity, however, may also work to the prejudice of those protected. For example, in Article 3¹⁸⁶ of the law which provides for traditional indigenous dresses, one

administrative authority to oppose: (i) any works liable to injure the integrity of the cultural property; (ii) the exportation or transfer of listed movable objects (2) Such opposition shall prohibit the work until expiration of the period of listing. *See Bangui Agreement available at* <http://www.wipo.int/wipolex/en/other_treaties/text.jsp?doc_id=132880&file_id=181152> (last accessed: March 22, 2012).

¹⁸³ *See List of WTO Signatory Countries, available at* <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> (last accessed: March 22, 2012).

¹⁸⁴ The Bangui Agreement was signed in 1977 and revised in 1999 which was before the coming of the TRIPS agreement into force and before the adoption of the DOHA Declaration.

¹⁸⁵ The provision, for example, in Article 3 gives such details as to what is recognized as a traditional indigenous dress leaves one to wonder whether those not enumerated therein shall be presumed as not covered by the act.

¹⁸⁶ Panama Law No. 20. Art 3. That worn by the Kuna, Ngöbe and Buglé, Emberá and Wounaán, Naso and Bri-bri peoples is hereby recognized as traditional indigenous dress, such as:

wonders whether this traditional dress should be protected individually, or does protection only apply to that whole category? Moreover, it leads one to ask what the status is of a certain TCE or TK which is not included in the law. Does it become part of the public domain, or does it become protected still by analogy and implication? Since infringement often carries with it a penal sanction, this ambiguity might operate against the protection of TCEs. Similar to the Legislation of Panama which strives to create a classification and reference of TCEs would be the mandate in the *Bangui Agreement* which states that, “states shall inventorize, determine, classify, place in security and illustrate the elements that make up the cultural heritage.”¹⁸⁷ In terms of coverage of protection, the *sui generis* legislations analyzed by WIPO appear to have a common characteristic with regard to which works of art and tangible expressions are protected;¹⁸⁸ the means of protection that these legislations provide, however, differs.

A common feature that runs through the *Model Provisions*, the *Bangui Agreement*, the *Panama Legislation*, and the *South Pacific Model Law*, is the provision on reciprocity. The willingness to extend the same benefit afforded by these legislations and agreement is indicative of the desire of the signatories and countries to enter into an international agreement and at the same time an

1. Dule mor. Consists of the combination of clothing with which Kuna men and women identify the culture, history and portrayal of their people. It is made up of the morsan, saburedi, olassu and wini.

2. Jio. Consists of the combination of clothing with which Embera and Wounaan men and women identify the culture, history and portrayal of their people. The women use the wua (paruma), boró bari, dyidi dyidi, kondyita, neta, parata kerá, manía, sortija, kípára (jagua), kanchí (achiote) and kera patura. The men use the same pieces of clothing, except the paruma; men also use the amburá and andiá ear and chest coverings.

3. Nahua. Consists of the dress with which Ngöbe and Buglé women identify the culture, history and portrayal of their people. It is a one-piece, calf-length dress that is made of smooth, brightly coloured cloth and decorated with geometric appliques of contrasting colours, and it includes a wide necklace made with beads.

The technical description of these traditional forms of dress shall be recorded in their respective registers available at http://www.wipo.int/wipolex/en/text.jsp?file_id=177308 (last accessed: March 22, 2012).

¹⁸⁷ See note 157 at 49

¹⁸⁸ Productions of folk art, drawing, paintings, carvings, sculptures, pottery, terracota, mosaic, woodwork, metalware, jewelry, basket-weaving, needlework, textiles, carpets, costumes, musical instruments, and [architectural forms]. WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Forms of Prejudicial Action, Section 2 (1982)

implied acceptance that the issue of protection of TCEs is something that must be undertaken on a global scale.

VI. *SUI GENERIS* LEGISLATION FOR THE PHILIPPINES

Because T'nalak is a product of the circumstances of the weaver and of the community in which she lives, it is difficult for outsiders to appreciate the value of the T'boli place on it. We can try and arrive at a monetary value by measuring the hours spent in production, or the value of the materials used to produce it. But that would be inadequate.¹⁸⁹

The status of our intellectual property laws are currently under assault from the very old and the very new.¹⁹⁰ Traditional knowledge has posed a serious challenge for the current intellectual property laws.¹⁹¹ These problems are often addressed by legislating a *sui generis* law that provides protection for this type of artwork and manifestations of culture, which do not fit into the western conceptions of intellectual property.

The Philippines, as an archipelago, has a very diverse group of indigenous people – some concerned primarily to protect the sacred nature of their TCEs while some strive to benefit economically and look at their culture as a means for them to survive. What may be seen as beneficial to one group may be disadvantageous to another. For example, a legislation which renders the publication and promotion of the TCE – through inclusion in government publication, information campaign, tourism advertisement etc – illegal and punishable might be favorable for an indigenous group whose primary concern is to keep the subject TCE within the indigenous group and prevent outsiders

¹⁸⁹ See *supra* note 15.

¹⁹⁰ Daniel J. Gervais, *The Internalization of Intellectual Property: New Challenges from the Very Old and the Very New*, FORDHAM INTELLECTUAL PROPERTY, MEDIA AND ENTERTAINMENT LAW JOURNAL (2002), available at [http://aix1.uottawa.ca/~dgervais/publications/Internationalization%20paper%20\(as%20published\).pdf](http://aix1.uottawa.ca/~dgervais/publications/Internationalization%20paper%20(as%20published).pdf) (last accessed: March 22, 2012).

¹⁹¹ Daniel Gervais, *Traditional Knowledge: A Challenge to the Intellectual Property System*. Paper prepared for the Fordham University Conference on Intellectual Property Law & Policy, New York City (2001) available at <http://www.cra-adc.ca/en/documents/traditional-knowledge#sdfootnote1sym>.

and third persons from acquiring knowledge. On the other hand, a similar prohibitive law might not be beneficial for another indigenous group (referred as the pragmatic group in this paper) whose main concern is to derive economic benefit from the handicrafts. Thus, it is important that before a law, whether a *sui generis* or one that expands our current intellectual property laws, be enacted, a careful study and classification of indigenous groups and TCEs must be done.

For purposes of outlining a proposal for a *sui generis* legislation, the scope would be limited only to the pragmatic group. Any recommendation is to primarily address the concern of this group, which is deriving economic benefit from the TCEs or handicrafts. This proposal was made after interviews with dreamweavers, and hence, these suggestions would be applicable only assuming that the indigenous group has similar concerns and goals as that of the T'bolis.

A. Policy Context and Objectives

As an important part of a nation's cultural heritage, TCEs and expressions of folklore as well as its use and regulation is imbued with State interest. Although considered a part of the nation's cultural heritage, it cannot be denied that these TCEs are considered as community property of the indigenous group. Thus, any legislation which would govern TCEs must take into consideration the balance of interest between the State and the indigenous people who, in the first place, must be the beneficiary of such legislation.

The balancing of interest must be taken into consideration when drafting a policy and objective in such a way that the interest of the State in preserving the cultural heritage of the nation does not conflict or unnecessarily encroach upon the exercise of ownership rights of the indigenous group. They are, after all, regarded as the owner, in terms of their desire to utilize their TCEs as a source of livelihood. To accomplish this, the State might need to undertake the role of *parens patriae* to the indigenous group and assure that sufficient safeguards are in place to regulate commercial dealings of TCEs. The policy objective of the *Panama Law No. 20* and the *U.S.A Indian Arts and Crafts Act of 1990* might provide instruction on how to accomplish this.

Under *Panama Law No. 20*, enacted in June 26, 2000, the objective of the law was to protect the collective IP rights and TK of indigenous communities. This is effected through registrations, promotion,

commercialization, and marketing of their rights in such as way to give prominence to indigenous socio-cultural values and cultural identities and for social justice.¹⁹² On the other hand, the *U.S.A Indian Arts and Crafts Act of 1990* provides, under its policy objective, the prevention of commercial interests from falsely associating their goods or services with indigenous people. It also provides for the creation of a board to assist in the promotion and development of Indian arts and crafts.¹⁹³ A system of registration must also be provided in the policy of the legislation. This registration may be undertaken by the National Commission on Indigenous People (NCIP)¹⁹⁴ and the National Commission for Culture and the Arts (NCCA),¹⁹⁵ whose mandates include the promotion of the rights of the indigenous people and cultural heritage, respectively.

In terms of policy objectives the *South Pacific Model Law for National Laws of 2002* may also be a source of reference, specifically its provision permitting tradition-based creativity and innovation, including commercialization thereof, subject to prior and informed consent and benefit

¹⁹² Preamble and Article 1 of Panama Law No. 20 and Preamble of Executive Decree No. 12. See note 157 at 49.

¹⁹³ *Id.*

¹⁹⁴ Rep. Act No. 8371, Art. 3(k) The NCIP is the office created under the IPRA which is under the Office of the President. The NCIP is the primary government agency responsible for the formulation, implementation of policies, plans and programs to recognize, protect and promote the rights of ICCs/IPs.

¹⁹⁵ Rep. Act. No. 7356 Sec. 12. Mandate. The Commission is hereby mandated to formulate and implement policies and plans in accordance with the principles stated in Title I of this Act.

- a) To encourage the continuing and balanced development of a pluralistic culture by the people themselves
- b) To conserve and promote the nation's historical and cultural heritage, is shall:
- c) To ensure the widest dissemination of artistic and cultural products among the greatest number across the country and overseas for their appreciation and enjoyment, it shall, with the cooperation of the Department of Education, Culture and Sports, Tourism, Interior and Local Government, Foreign Affairs and all other concerned agencies, public and private
- d) To preserve and to integrate traditional culture and its various creative expressions as a dynamic part of the national cultural mainstream cultural workers and administrators by qualified trainers.
- e) To ensure that standards of excellence are pursued in programs and activities implementing policies herein stated, it shall encourage and support continuing discussion and debate, through symposia, workshop, publications, etc., on the highest norms available in the matrix of Philippine culture.

sharing. Since our IPRA already provides the concept of prior and informed consent, this concept must likewise be retained in the law. Under our IPRA, customary laws were taken into consideration in terms of dispute resolution as well as to govern ownership. Although not in the Model Provisions of the WIPO nor in the other *sui generis* legislation, it is important to take into consideration customary laws. These should be incorporated into the policy framework of the legislation in order to give control to the indigenous people in alienating or governing their TCEs. Lastly, the *sui generis* legislation must not supersede nor render nugatory provisions in our current Intellectual Property laws which might be beneficial to the indigenous people whose works are sought to be protected.

B. Subject Matter

The diversity of TCEs and the cultures and interests surrounding them makes delineating the subject matter of any legislation governing expressions of culture a challenge. The WIPO Model Provisions gives a very general scope¹⁹⁶ providing for coverage on productions consisting of characteristic elements of traditional artistic heritage. These provisions remove the requirement in the *Tunis Model Law on Copyright* in 1976, which includes as one of the elements of folklore the element of being passed from generation to generation.¹⁹⁷ Some *sui generis* legislations have expanded on this definition. The legislation of Panama, for example, has included “collective IP rights” in addition to traditional knowledge, embodied in creations.¹⁹⁸

The provision on “collective IP rights” is very relevant for TCEs especially for a legislation which aims to insert the community's customary law.

¹⁹⁶ Productions consisting of characteristic elements of traditional heritage developed and maintained by a community, in particular, verbal expressions, (folk tales, folk, poetry, riddles); musical expressions (folk songs and instrumental music). *See* WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Forms of Prejudicial Action (1982)

¹⁹⁷ Section 18 *Definitions*. For purposes of this Law:

(iv) “folklore” means all literary, artistic, and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation, and constituting one of the basic elements of the traditional cultural heritage. *See* Tunis Model Law on Copyright.

¹⁹⁸ Examples of these creations are inventions, models, designs and drawings, innovations contained in images, figures, graphic symbols, petroglyphs, and other material, cultural elements of history, music, arts and traditional artistic expressions. *See* Panama Law No. 20, cited in WIPO/GRTKF/IC/9/INF 4. *See* note 157 at 49

Since the ownership rights may be vested in a community, as opposed to one individual, this provision also has important ramifications in the event that a “copyright-like” protection be accorded to TCEs, as some other Model Legislations provide,¹⁹⁹ specifically on extending the period of copyright protection beyond the lifetime of the holder.

Probably the most important addition to include in the *sui generis* legislation for the Philippines would be the definition contained in the *Bangui Agreement* of OAPI. That is, “expressions of folklore” defined as productions of characteristic elements of the traditional artistic heritage developed and perpetuated by a community or by individuals recognized in meeting the expectations of such community. This provision specifies that works of individuals must be recognized as meeting the expectations of such community. This is very important if the group who owns the TCE would like to impose some control in terms of quality for the works produced by their members. For example, in the case of the Dreamweavers, there would be some weavers who, whether T'bolis or outsiders, would create a short cut to the manufacturing process of the T'nalak by omitting one step like the arduous dying process by using other dyes or a burnishing process or omitting it altogether. Since the produce of indigenous people are primarily sought for and prized due to their workmanship, the presence of low quality products in the market is damaging for the indigenous people, both in terms of the reputation of their produce as well as for the price they can command in the market.

Intellectual property laws, particularly the provisions on copyright and trademarks, give a good framework of what a *sui generis* legislation must provide in terms of protection. However, as discussed above, certain provisions of the copyright law on protected material might prove problematic as regards the nature of TCEs. A *sui generis* legislation may in itself provide that the material be protected and treated as a copyright, similar to what the *Bangui Agreement* provides. However, as discussed, this may bring to fore issues when a decision or award is sought under such provision, or when that award is questioned internationally. To address this, instead of stipulating that TCEs are to be treated and protected as copyright material, a clear and explicit legislation may provide instead the same effect and result. Mindful of these, some countries

¹⁹⁹ Examples of these Legislations would be the *Bangui Agreement* of OAPI and Panama Law No. 20

and groups²⁰⁰ provided in their legislation a registration system conferring certain rights and privileges for the TCEs and “expressions of folklore” listed therein.

Another hurdle in treating “works derived from folklore” as copyright works instead of applying the *sui generis* law is the duration of protection. As copyrighted works, it will be mandatory that these become part of the public domain after the expiration of the period of protection. To address this issue, the State may take advantage of two provisions previously discussed in the earlier part of this paper – *domaine public payant* and community ownership.

The regime of *domaine public payant* was also embodied under the *Tunis Model Law* and was also used by the *Bangui Agreement* of OAPI.²⁰¹ Under the *Tunis Model Law*, the payment, which is a percentage of the receipts, must be made to a competent authority.²⁰² The same goes true with the *Bangui Agreement* which vests the collection of a relevant royalty to an administrative body. The *Bangui Agreement*, however, did not provide for a direct benefit to the community.²⁰³ It is incumbent that should a similar provision on the *sui generis* legislation for the Philippines be adopted, the community whose TCE is the subject of payment must derive the benefit directly instead of being put up in a community fund to be shared by the whole indigenous community in the country.

²⁰⁰ Panama Law No. 20 and the U.S.A Indian Arts and Crafts Act of 1990 provides for a special registration and registration of trademarks and insignia, respectively. See note 157 at 49.

²⁰¹ Section 59 of the *Bangui Agreement* of OAPI Provides, Expressions of folklore and works that have fallen into the public domain are subject to “*domaine public payant*”

²⁰² *Bangui Agreement* of OAPI, Section 17. *Domaine Public Payant*. The user shall pay to the competent authority percent of the receipts produced by the use of works in the public domain or their adaptation, including works of national folklore. The sums collected shall be used for the following purposes:

(i) to promote institutions for the benefit of authors [and of performers], such as societies of authors, cooperatives, guilds, etc.

(ii) to protect and disseminate national folklore.

²⁰³ Without specifying how the royalties would be spent, the Agreement merely indicates that the royalties shall be devoted to welfare and cultural purposes. That is, under the *Bangui Agreement*, it says that, “The exploitation of expressions of folklore and that or works or productions that have fallen into the public domain on expiry of the terms of protection shall be subject to the user entering into an undertaking to pay to the national collective rights administration body a relevant royalty. Royalties collected with respect to the exploitation of expressions of folklore shall be devoted to welfare and cultural purposes. See Article 31, *Bangui Agreement* of OAPI

As regards community ownership, instead of tying the period of protection to the lifetime of the person, the community may take ownership – through a provision for work for hire, assignment of rights or by provision of the statute – of the copyright, and extend the period of protection to the lifetime of the community. Consequently, a provision providing for protection, similar to the perpetual protection provision in trademarks for the period of actual use, should also be included as long as the subject TCE is still being used within the community concerned.

C. Criteria For Protection²⁰⁴

Under the *Tunis Model Law* and the *WIPO Model Law*, no specified criteria for protection were provided. Perhaps these laws deemed it proper, as deference to State sovereignty, to allow a wide latitude of flexibility to the countries enacting a legislation in limiting or expanding the conditions that a subject matter must meet prior to the grant of protection. In this regard, it is noteworthy that all legislations analyzed by WIPO in its comparative study provided for varying criteria.

In terms of providing the criteria for protection, it is in this regard that the important distinction between the traditional and pragmatic group be taken into consideration. For the pragmatic group, the criteria imposed by the Panama Law might be used as a basis for a national legislation. Under the Panama Law, the subject matter must be (i) capable of commercial use,²⁰⁵ (ii) be based upon tradition, although it need not be “old,”²⁰⁶ (iii) fit within the classification system established by Article 3 of the decree,²⁰⁷ and (iv) be “collective,” i.e., the subject matter must have no known author or owner and no date of origin, and constitute the heritage of an entire indigenous people²⁰⁸ or must be regarded as belonging to one or more of the indigenous communities of Panama.

²⁰⁴ Conditions that the subject matter must meet for protection. Examples: originality, novelty, distinctiveness, fixed form etc. *See* Note 157 at 49

²⁰⁵ Act No. 20 Article 1, (Panama) Special System for the Collective Intellectual Property Rights of the Indigenous Peoples, Panama.

²⁰⁶ Act No. 20, (Panama) Article 15, *Id.*

²⁰⁷ Executive Decree No. 12 (Panama) Article 3.

²⁰⁸ Executive Decree No. 12. (Panama) Article 2.

Although also workable for the pragmatic group, the author does not agree with the criteria under the IACA. To be protected under the IACA, it must be an Indian Product as defined by law and its Implementing Regulations. Such product must meet these requirements: (1) produced after 1935 with the producer of the concerned Indian Product a resident of the United States, and (2) it must have recognizable likeness to Native Americans or symbols perceived as being Native American in origin as included in the Database of Official Insignia. However, imposing a limitation on protection on the basis that a certain product was produced after a certain period, in this case 1935, may not prove effective. Imposing such limitation would effectively put majority of the TCEs beyond the protection of the statute. The second requisite of recognizable likeness may be adopted by the State in order to pursue its interest of encouraging indigenous creations, especially handicrafts etc., to remain faithful or at least have a semblance with the traditional works. It would be an incentive for the indigenous people to remain faithful to the indigenous designs and processes in order to enjoy the special treatment accorded to TCEs.

D. Holder of Rights

The *Tunis Model Law* entrusts the exercise of the rights granted under the law to a competent authority. This is consistent with perceptions at the time it was enacted that indigenous people are not capable of managing their property. However, when the WIPO Model Provisions was drafted, this perception has gradually shifted. Thus, under the *Model Law*, the holder of rights is designated as either the competent authority or relevant community.²⁰⁹

The legislation of Panama as well as the *South Pacific Model Law* vests the right to the community. The *South Pacific Law* justifies this provision making the indigenous community the holder of the right on the basis of their being regarded as traditional owners as well as custodians of the TK or expressions of culture.²¹⁰ On the other hand, while the Panama legislation likewise vests ownership to the community, they are represented by their general congresses or traditional authorities. In addition, the Panama law is noteworthy in providing that more than one community can be registered collectively as holders of the rights. This provision may be added in a Philippine legislation for *sui generis* protection of TCEs to address the possible

²⁰⁹ WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions, Section 10

²¹⁰ South Pacific Model Law (2002), Sec. 4

issue of overlapping rights, or similarities in TCEs.²¹¹ It may also address possible issues that may arise due to intermarriage between members of the community with other communities as well as migration wherein because although the member of the indigenous group has left the original settling area, he or she still continues to practice their indigenous traditions.

While vesting the intellectual property to the indigenous community, the *South Pacific Model Law*, however, provides that for derivative works, the intellectual property vests in the creator as provided for by the national law. This provision granting rights to the author of the derivative work is consistent with the goals of intellectual property law which is to provide incentive for innovation. However, with regard to governing innovations and rewarding such derivative works with intellectual property rights, safeguards must be legislated to protect the indigenous group whose TCE had become the basis of said "new" creation. That is, two conditions must be incorporated in the *sui generis* legislation – *domaine public payant* and prior informed consent.²¹²

E. Rights Conferred

The Panama legislation puts an emphasis on collective rights. Under the legislation, the right to apply for Intellectual Property over the protected subject matter is collective. These collective rights in turn govern two important aspects relevant for the pragmatic group – the right to authorize or prevent the use, commercialization,²¹³ and industrial reproduction.²¹⁴ The right to prevent or authorize third parties from acquiring exclusive intellectual property over the protected subject matter is also regarded under the law as a collective right.²¹⁵

Probably one of the most relevant for the concerns of the pragmatic group, likewise conferred as a collective right in the Panama Law, is the provision regarding the granting of consent to the certification of cultural

²¹¹ For example, although the T'nalak may be original to the T'bolis, the process of weaving might be similar to other weaving communities such as the backstrap loom weaving technique of the Women in Maguindana, a province near Lake Sebu, South Cotabato or the Ikat Weaving prevalent in Southeast Asia, specifically in Indonesia.

²¹² Rep. Act. No. 8371 Section 3(g).

²¹³ Act No. 20, Article 15, (Panama), Special System for the Collective Intellectual Property Rights of the Indigenous Peoples.

²¹⁴ Act No. 20 Article 20, *Id.*

²¹⁵ Act No. 20, Article 2, *Id.*

expressions as works of indigenous traditional art or handicraft and handmade by natives.²¹⁶ As mentioned earlier, for the protection of the TCE, it is important that the indigenous community has control of what will be regarded, marketed, promoted, and advertised as indigenous. Although laudable, the exemption on the law might defeat whatever rights conferred under this provision. Under the Panama Law, non-indigenous artisans in certain cases²¹⁷ can continue selling replicas of the crafts of the indigenous group, thus removing the exclusive economic right to produce and reproduce the said TCEs.

Although it encroaches upon the rights of the indigenous people, a national legislation similar to Panama's Article 27 in Executive Decree No. 12²¹⁸ might be useful in encouraging local artisans to participate in the promotion and improvement of the indigenous people's TCEs. Aside from this incentive, a similar provision – whether or not intended as such – would be ideal in a setting like the Philippines where the indigenous people often do not live in isolation but alongside other members of the locality who are not from the indigenous group. A provision such as this would also address the issue put forth by some scholars with regard to the status of the contribution of other members of the society, specifically the members of the locality, to the TCEs and the indigenous people's handicrafts. Since TCEs cannot be isolated from the people to whom it belongs, a provision giving recognition as well as certain rights to non-indigenous people on the basis that they have devoted themselves to the production and reproduction of the TCEs would give recognition of these individuals' or groups' contribution to the indigenous culture. This right granted to local artisans, however, must be subject to a profit sharing provision similar to what is provided under Section 12 of the *South Pacific Model Law*.²¹⁹

²¹⁶ Executive Decree No. 12, *Act No. 20*, Article 10 (Panama), Special System for the Collective Intellectual Property Rights of the Indigenous Peoples, Panama. and Article 15 of the Executive Decree No. 12

²¹⁷ Art 23 and 24 Act No.20 Special System for the Collective Intellectual Property Rights of the Indigenous Peoples, Panama.

²¹⁸ Executive Decree No. 12 (Panama), Article 27, Executive Decree No.12.

²¹⁹ Rep. Act. No. 8371, Sec 12. *Derivative Works*.

(1) Any copyright, trademarks, patent, design, or other intellectual property right that exists in relation to a derivative work vests in the creator of the work or as otherwise provided by the relevant intellectual property law.

(2) If a derivative work, traditional knowledge or expressions of culture are to be used for a commercial purpose, the authorised user agreement must:

Since the restrictions imposed on property currently embodied in our intellectual property system failed to consider customary laws of the indigenous people, it is important that a legislation protecting TCEs should take into consideration the tradition of the indigenous people with regard to exchanges of property. The provision of the *Panama Executive Decree No. 12* properly considered this. Article 11 of the *Decree* provides that “registration of the collective rights in an object or in traditional knowledge shall not affect the traditional exchange of the object or knowledge in question between indigenous peoples.” Herein, however, it is not clear whether the exchange is to be confined between indigenous people from the same group or as between indigenous people from different groups. Oftentimes, an indigenous group would be living within the same area as another indigenous group,²²⁰ thus it would be inevitable and contrary to experience that no exchange of object or knowledge would occur. In this regard, a *sui generis* legislation in adopting Article 11 must define exchanges between indigenous people as that occurring not only between indigenous people of the same group but as between indigenous groups.

Under the *South Pacific Model Law*, a basket of “traditional cultural rights” is provided under Section 7.²²¹ This may serve as a basis for a *sui generis* legislation.

-
- (a) contain a benefit sharing arrangement providing for equitable monetary or non-monetary compensation to the traditional owners; and
 - (b) provide for identification of the traditional knowledge or expressions of culture on which the derivative work is based in an appropriate manner in connection with the exploitation of the derivative work by mentioning the traditional owners and/or the geographical place from which it originated; and
 - (c) provide that the traditional knowledge or expressions of culture in the derived work will not be subject to derogatory treatment.

²²⁰ In Lake Sebu for example, the T'bolis live with another indigenous group, the Oboes, who are basket weavers.

²²¹ Rep. Act No. 8371 Sec. 7. Meaning of traditional cultural rights

(1) Traditional cultural rights are the rights set out in subsections (2) and (3).

(2) The following uses of traditional knowledge or expressions of culture require the prior and informed consent of the traditional owners in accordance with section 23 (1) or 25 (5):

- (a) to reproduce the TK or expressions of culture;
- (b) to publish the TK or expressions of culture;
- (c) to perform or display the traditional knowledge or expressions of culture in public;

F. Procedure And Formalities

A *sui generis* law's provision, no matter how good, is limited by the means prescribed under the law for its implementation. Under the *Tunis Model Law*, implementation is done through license agreements. The law provides for different requisites based on the purpose to which the license is sought for. That is, different requirements exist for licenses solely for teaching, scholarship, or research,²²² and another for reproduction.²²³

Under the *Tunis Model Law*, certain uses are not subject to consent of the author.²²⁴ Rather for these uses, it is the mandate of the competent authority to issue a license under the rules governed by Annex A. Under the terms of Annex A, it is noteworthy that although a Translation License may be granted without the authority of the author, the license will not be granted in cases where a translation of the work in question has been published by or with authorization of the owner.²²⁵ Moreover, the incorporation of the right of the owner to be heard is also sufficiently provided.²²⁶ These provisions safeguarding the rights of the indigenous people and the grant of the right to the State to grant licenses sufficiently protect the right of the indigenous people to their TCE without unduly burdening the right of the State to

(d) to broadcast the TK or expressions of culture to the public by radio, television, satellite, cable or any other means of communication;

(e) to translate, adapt, arrange, transform or modify the TK or expressions of culture.

(f) to fixate the TK or expressions of culture through any process such as making a photograph, film, or sound recording;

(g) to make available online or electronically transmit to the public (whether over a path or combination of paths, or both) TK or expressions of culture;

(h) to create derivative works

(i) to make, use, offer for sale, sell, import, or export TK or expressions of culture or products derived therefrom.

(j) to use the TK or expressions of culture in any other material form, if such uses are non-customary (whether or not a commercial nature).

(3) To avoid doubt, the traditional owners are entitled to use traditional knowledge or expressions of culture in the ways mentioned in subsection (2) in the exercise of their traditional cultural rights.

²²² Referred to as Translation License governed by Appendix A of the Tunis Model Law.

²²³ Tunis Model Law, Appendix B.

²²⁴ Tunis Model Law, Sec 7.

²²⁵ Tunis Model Law, Sec A.3.

²²⁶ Tunis Model Law, Sec. A3 (2)

promote its cultural heritage as reflected under the *Tunis Model Law*. However, what the drafters of the law failed to take into consideration is the fact that for traditional knowledge and TCEs, the owner is usually not designated as a person but is composed of a community who have an interest in the folklore in question. Thus, it is suggested that provisions for “prior informed consent of the community” must instead be taken into consideration, and alternatively on the provision providing for author's rights. The provision on prior informed consent is already reflected under our IPRA,²²⁷ and likewise provided for under the *South Pacific Model Law*.

Although the *Tunis Model Law* failed to take into consideration that TCEs mostly involve community rights, subsequent *sui generis* national legislations have reflected this. The legislation of Panama provides guidance in its special registration system²²⁸ in dealing with the collective rights. In the application, the applicant must specify that a collective right is involved.²²⁹ The registration must also specify that it belongs to one of the indigenous peoples of the country, the technique used, its history (tradition), and a brief description. More importantly, under Decree No.12 it states that the application shall be supported by inclusion of a copy of the rules of use of the indigenous collective right. These rules shall indicate the use or uses that are made of the traditional knowledge or of the object qualifying for protection.²³⁰ The latter condition ensures that the use of the matter properly reflects the needs and wants of the indigenous group concerned.

²²⁷ Rep. Act No. 8371

²²⁸ Article 1. The purpose of this Act is to protect the collective intellectual property rights and traditional knowledge of indigenous peoples in their creations, such as inventions, models, drawings and designs, innovations contained in the images, figures, symbols, graphics, stone carvings and other details; as well as the cultural elements of their history, music, art and traditional forms of artistic expression suitable for commercial use, via a special system to register, promote and market their rights, in order to highlight the social and cultural values of indigenous cultures and guarantee social justice for them. *See* Act No.20 Special System for the Collective Intellectual Property Rights of the Indigenous Peoples, Panama.

²²⁹ In the event that a similar registration procedure and disclosure is adopted in our national laws, the registration must be done with the cooperation of the NCIP units on the area identified to be the location of the indigenous people concerned. This would ensure accuracy in the information as well as a way of verifying whether indeed there was prior informed consent.

²³⁰ Executive Decree No. 12, (Panama) Article VII (iv)

Also contained in the Panama law is a provision that the application for registration must contain certain prescribed information including a specimen of the object sought to be protected. It is this latter provision that might be problematic for the pragmatic group. This provision brings to fore the question of whether or not it is only the works similar to the one provided in the specimen is protected, or does the protection extend to productions by analogy. If it is the former, then this would be a very limiting provision especially with regard to the fact that TCEs are dynamic. Moreover, for the pragmatic group who respond to the needs of the market, freezing and limiting the protection only to that provided prior as a specimen might prove detrimental to their interest.

Another important provision on the Panama legislation is the waiver of payment as well as the fact that it is expressly stated under the law²³¹ that the application procedure does not require legal services since a form will already be drawn up and manufactured by the Registry providing ease of use for the applicants. Moreover, the provision on publication and appeals would provide useful in cases where a wrongful application was made by an individual, group, or organization. However, another proposal and what this author suggests must be added in a *sui generis* system is a method wherein information is disseminated directly to the indigenous people who, considering that they are mostly located in areas where newspapers, radio and television are not widely available, might not be able to protest in time. In this regard, should a provision such as this be included in a Philippine legislation, it is suggested that aside from publication, notice to NCIP, which is distributed through its branches, must be added.

Under the Panama law, a Department of Collective Rights and Expressions of Folklore is established within the industrial property office to

²³¹ Article 7. The Departamento de Derechos Colectivos y Expresiones Folclóricas (Department of Collective Rights and Expressions of Folklore), through which shall be granted, inter alia, the registration of the collective rights of indigenous peoples, is hereby created within DIGERPI. This registration shall be requested by indigenous general congresses or traditional authorities to protect their dress, arts, music and any other traditional rights incurring protection. The registration of the collective rights of indigenous peoples shall neither lapse nor have a fixed duration; application for such registration to DIGERPI shall not require the services of a lawyer and shall be exempt from all payment. Appeals against said registration shall be notified personally to the representatives of indigenous general congresses or traditional authorities. See Act No.20 Special System for the Collective Intellectual Property Rights of the Indigenous Peoples, Panama.

approve applications as well as maintain the registry.²³² One of the functions of this Department under the law is to go to indigenous communities, and gather information necessary for prosecution of applications they may wish to file.²³³ Based on these administrative requirements, should a registry of TCEs be provided in a *sui generis* law, the functions of the Department of Collective Rights and Expressions of Folklore may be undertaken by the NCIP in cooperation with the Intellectual Property Office. Since the NCIP would already have existing offices in areas where a population of indigenous people is found, as mandated by the IPRA, the procedure of gathering applications and assisting applicants may be undertaken with relative ease as opposed to setting up a new agency or department who will perform similar functions as the Department of Collective Rights and Expressions of Folklore.

G. Sanctions And Enforcement Procedures

Under the *Tunis Model Law*, what constitutes infringement is the importation of copies of protected works into national territory.²³⁴ A person guilty of infringement is obliged to cease infringement, and is also liable for damages, and when found that the infringement is willful, fine or imprisonment (or both)²³⁵ will be meted out as a punishment. Though the punishment of imprisonment might deter people to infringe, the limiting definition of infringement itself, and what constitutes such, might prove ineffective. Under the definition, it is the importation of copies into the national territory which would constitute infringement. The question then is: What would happen if copies of the protected work is produced and distributed in another country or if the production is done within the national territory but not by its traditional owners? If strict construction of the provision in the *Tunis Model Law* is employed, this would not count as an infringement punishable thereunder.

The provision under the *South Pacific Model Law* providing for penal sanction and damages is noteworthy in drafting a *sui generis* national law. Under its provision, various forms of punishment for conviction by fine or term of imprisonment or both is provided. Also, traditional owners are given a right to institute civil proceedings. This right, provided under the act is useful specifically with regard to the different treatments under our Rules of Court

²³² Act No. 20 (Panama), Art. 7. *Id.*

²³³ See Note 157 at 49

²³⁴ Tunis Model Law, Sec. 15.

²³⁵ Tunis Model Law, Sec 15(1).

providing a stricter evidentiary requirement for penal cases and only a preponderance of evidence²³⁶ for civil cases. Interim remedies such as injunction is also provided under the *South Pacific Model Law*²³⁷ as well as damage for loss, public apology, cease or reverse false attribution of ownership or derogatory treatment, order for account for profits, seizure of objects, and others. Alternative means of settling disputes is also provided, such as mediation proceedings and resort to customary laws.²³⁸ The provision on the law providing for alternative modes of resolving issues may be beneficial for the pragmatic group who might desire to have disputes settled in an expeditious manner, similar to what the current business world requires. Similarly customary laws might also prove useful when settling disputes as between neighboring indigenous groups. This clause under the law providing for both criminal as well as civil liability for fine is also reflected under the *U.S.A Indian Arts and Crafts Act of 1990*, which criminalizes the misrepresentation of Indian Produced Goods and Products,²³⁹ and providing

²³⁶ RULES OF COURT, Rule 133, §1.

²³⁷ See note 157 at 49

²³⁸ *Id.*

²³⁹ 18 USC 1159 Sec. 1159. Misrepresentation of Indian produced goods and products.

(a) It is unlawful to offer or display for sale or sell any good, with or without a Government trademark, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the United States.

(b) Whoever knowingly violates subsection (a) shall--

(1) in the case of a first violation, if an individual, be fined not more than \$250,000 or imprisoned not more than five years, or both, and, if a person other than an individual, be fined not more than \$1,000,000; and

(2) in the case of subsequent violations, if an individual, be fined not more than \$1,000,000 or imprisoned not more than fifteen years, or both, and, if a person other than an individual, be fined not more than \$5,000,000.

(c) As used in this section—

(1) the term 'Indian' means any individual who is a member of an Indian tribe, or for the purposes of this section is certified as an Indian artisan by an Indian tribe;

(2) the terms 'Indian product' and 'product of a particular Indian tribe or Indian arts and crafts organization' has the meaning given such term in

stringent penalties for such. Since the law provides for penal provisions, a comprehensive reference of TCEs covered by the act is necessary for its implementation, especially of the criminal provisions. Otherwise, the law might be struck down for violation of due process.

CONCLUSION

The protection of indigenous people's rights is an issue that demonstrates the intersection between our current intellectual property laws as well as the convention on human rights that our nation has committed for its people. A recognition that while there exists a right and a corollary desire to exercise it on the part of the indigenous people, the manner as well as the means for which the indigenous people might want to exercise this right differs. This is an important step, and an indispensable requisite in coming up with measures in assisting and protecting indigenous people.

What might be a solution for one group, the traditionalists, might prove devastating for another group. Thus, it is important that whatever legislation be passed advocating for *sui generis* legislation must have in mind that in the end, what the law should seek to protect is not the art or TCE itself but the people whose culture, way of life, and TCEs are involved. Our current intellectual property laws and local legislation on expressions of culture are not sufficient in putting forward the rights of the indigenous people. In the meantime, a *sui generis* law, while an international convention governing TCEs

regulations which may be promulgated by the Secretary of the Interior;

(3) the term 'Indian tribe' means—

(A) any Indian tribe, band, nation, Alaska Native village, or other organized group or community which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians; or

(B) any Indian group that has been formally recognized as an Indian tribe by a State legislature or by a State commission or similar organization legislatively vested with State tribal recognition authority; and

(4) the term 'Indian arts and crafts organization' means any legally established arts and crafts marketing organization composed of members of Indian tribes.

(d) In the event that any provision of this section is held invalid, it is the intent of Congress that the remaining provisions of this section shall continue in full force and effect.

and expressions of culture is yet to be passed, will provide assistance in helping indigenous people assert their rights on their TCEs as well as generate income from such when they want to. The protection of TCEs and expressions of culture is not solely the concern of the indigenous people. As a source of our history and cultural heritage, the State also has a duty to protect these expressions of culture, and assist its people in realizing their rights as owners of these expressions of culture.

The struggle of the indigenous people is both a short-term and a long-term goal. The short-term goal is survival – trying to make do with their current resources, their TCEs included, in order to earn a living and to purchase their basic necessities. The long-term goal is to preserve a culture that is slowly dying. Some authors claimed that intellectual property laws – be it an existing Western Law or *sui generis* law – will be inadequate to address all the different types of cultures and expressions in existence.²⁴⁰ However, for a people who have been unable to enjoy the fruits of progress, whatever right that a legal system can provide to empower these societies can give hope both to the people and the nation in general. After all, as one of our great Presidents had said, “those who have less in life must have more in law.”²⁴¹

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²⁴⁰ See note 71 at 23.

²⁴¹ Ramon Magsaysay, Third President of the Republic of the Philippines

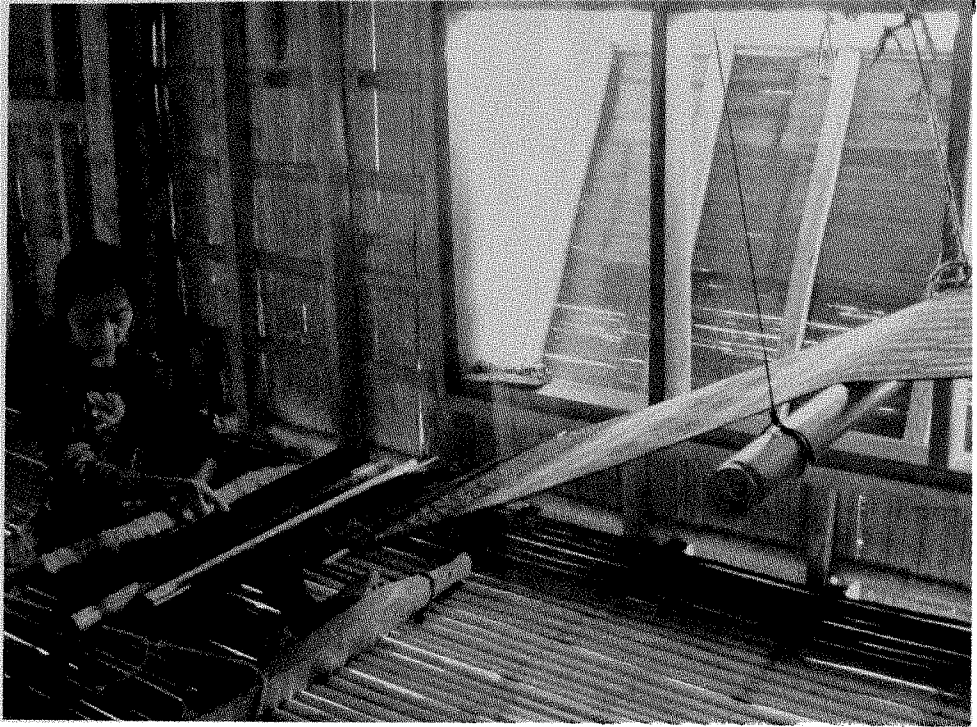


Fig. 1: One of Lang Dulay's students demonstrating the weaving process.



Fig. 2. One of Lang Dulay's patterns that according to her was given to her by a warrior in her dream, hence the sharp designs.

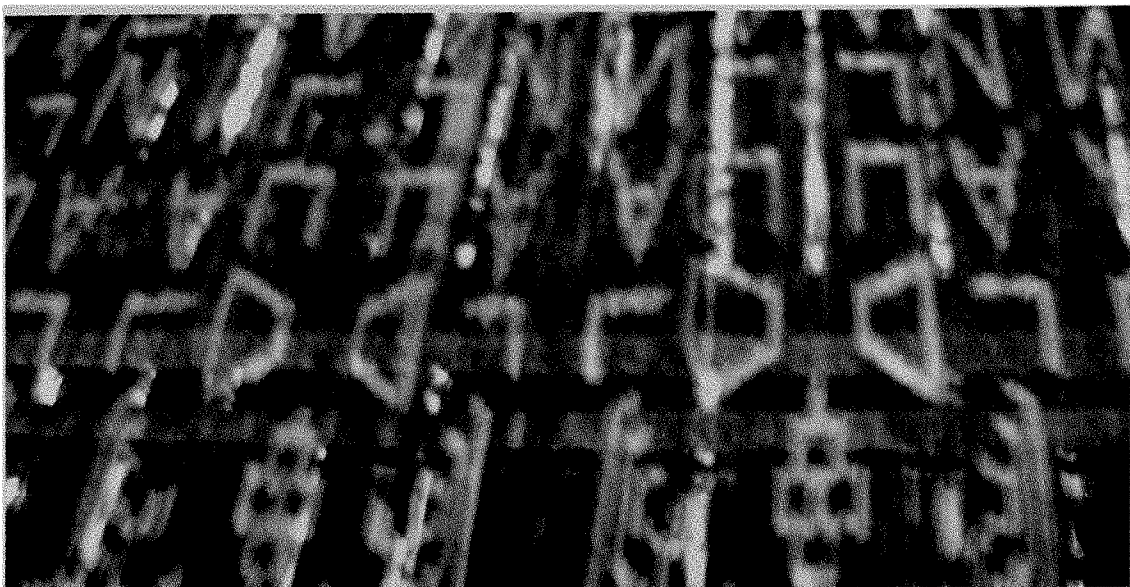


Fig. 3. The letters Lang Dulay are weaved into both ends of the 6-meter T'nalak.



Fig. 4. Framed photos of Lang Dulay. Leftmost photo is taken for the Gawad Manlilikha ng Bayan Award.



Fig. 5. The serene Lake Sebu: Land of the T'bolis.

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