MODERNIZING PROTECTIONS OF TRADITIONAL KNOWLEDGE: *BATEK* AND IPRA IN THE DIGITAL ECONOMY*

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ABSTRACT

The passage of the Indigenous Peoples' Rights Act of 1997 paved the way for the explicit recognition and protection of indigenous peoples' intellectual property rights in the Philippines. However, in spite of numerous legislation, this protection remains insufficient considering the primacy of intellectual property laws in the international arena and the exclusion of indigenous peoples' knowledge systems from protections granted under Philippine intellectual property laws. This inadequacy becomes more apparent when considering the challenges faced in protecting traditional knowledge in the digital economy. Considering the limited legal development in the protection of traditional knowledge in the Philippines, this paper seeks to evaluate the efficacy of the present legal framework in protecting indigenous people's traditional knowledge by analyzing existing legislation using the controversy surrounding the online platform Nas Academy's lessons on teaching the Kalinga art of tattooing (*batek*) to be conducted by Apo Whang-Od Oggay.

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INTRODUCTION

> *"Indigenous and local communities and developing countries in general have a complex relationship with the intellectual property system. From suspicion and trepidation, they engage that system reluctantly, but often proactively. [...] Like the "dialectics of the colonialized mind," indigenous peoples' attitude toward intellectual property reflects both admiration, and disaffection or resistance."*
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> —Chidi Oguamanam[1]

The Philippines is a country of diverse peoples and cultures. It is estimated that at least 10% of Filipinos are members of the 110 indigenous groups found in the country,[2] with some sources claiming that the number of those regarded both popularly and officially as indigenous people may reach 20 million.[3] Because of colonial histories, indigenous groups are left with four basic needs: cultural protection; recognition of land claims; recognition of individual, economic, and social rights; and political autonomy.[4] These indigenous groups also face the challenge of protecting their rights amidst the encroachment of dominant Filipino groups into their ancestral domains.[5] State policy has attempted to address these issues in order to ensure the protection of indigenous groups.

The 1987 Constitution expressly recognizes the importance of the protection of rights of indigenous cultural communities as a matter of state

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[1] Chidi Oguamanam, *Patents and Traditional Medicine: Digital Capture, Creative Legal Interventions, and the Dialectics of Knowledge Transformation*, 15 IND. J. GLOBAL LEGAL ST. 489, 490 (2008).

[2] Maria Ester Vanguardia, *Dreams for Sale: Traditional Cultural Expressions (TCEs) and Intellectual Property Rights of the Indigenous Pragmatic Group as Exemplified by the Dreamweavers*, 86 PHIL. L.J. 405, 406 (2012).

[3] CORAZON ALVINA ET AL., THE PHILIPPINES: CULTURAL POLICY PROFILE 33 (2020), *available at* https://asef.org/wp-content/uploads/2020/10/The-Philippines-Cultural-Policy-Profile.pdf.

[4] Antonio La Viña, *Intellectual Property Rights and Indigenous Knowledge of Biodiversity in Asia*, 2 ASIA PAC. J. ENVTL. L. 227, 244 (1997).

[5] Vicente Paolo Yu, *Controlling Indigenous Knowledge: Towards a Property Regime for Indigenous Knowledge Systems*, 70 PHIL. L.J. 27 (1995).

policy, in the context of national unity and development.[6] Specifically, it recognizes the need to protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions.[7] The subsequent passage of Republic Act No. 8371, or the Indigenous Peoples' Rights Act ("IPRA") of 1997, paved the way for the explicit recognition of indigenous peoples' intellectual property rights ("IPR") in the country. Section 34 of the IPRA expressly recognizes the existence of indigenous peoples' right to full ownership, control, and protection of their intellectual rights. Meanwhile, Section 32 expressly acknowledges the existence of these community intellectual rights and allows for restitution in cases where indigenous peoples' intellectual property is taken. Lastly, Section 35 states the necessity of indigenous communities' free and prior informed consent ("FPIC") to access indigenous knowledge in relation to the conservation, utilization, and enhancement of biological and genetic resources found within their ancestral lands and domains.

This legal development makes the Philippines one of the most active and progressive countries in Asia in terms of recognizing and protecting indigenous peoples' rights. However, the protection of their intellectual property under the IPRA remains insufficient considering the primacy of intellectual property laws ("IPLs") in the international arena and the exclusion of indigenous peoples' knowledge systems from the protection granted by IPLs. There has been an attempt to rectify this situation through the proposed Community Intellectual Property Protection Act, but this Act was not enacted into law.[8] In the meantime, the Intellectual Property Office of the Philippines (IPOPHL) and the National Commission on Indigenous Peoples (NCIP) also promulgated Joint IPOPHL-NCIP Administrative Order No. 01 ("JAO No. 1-16") or the "Rules and Regulations on Intellectual Property Application and Registration Protecting the Indigenous Knowledge Systems and Practices of the Indigenous Peoples and Indigenous Cultural Communities" in 2016, pursuant to the IPRA. Aside from this, provisions in certain laws such as the Natural Cultural Heritage Act and the Traditional and Alternative Medicines Act also introduce protections to traditional knowledge ("TK").[9]

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[6] CONST. art. II, § 22.

[7] CONST. art. XIV, § 17.

[8] Vanguardia, *supra* note 2, at 419. *See also* S. No. 35, 13th Cong., 1st Sess. (2004). Community Intellectual Rights Protection Act (CIRPA).

[9] Gonzalo Go III & Paolo Miguel Consignado, *Advancing the Lore: A Proposed Legal Framework for Filipino Traditional Knowledge Protection and Commercialization*, 60 ATENEO L.J. 992, 1000–01 (2016).

To address issues on conflicting national and international protections, there have also been several attempts in the international arena to reconcile indigenous peoples' rights to their TK[10] with the prevailing intellectual property ("IP") law regime. The main proponents of these efforts are the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO).[11] Jointly, they proposed the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions. There is also the UNESCO Universal Declaration on Cultural Diversity, the Convention on Cultural Diversity, and the Convention for the Safeguarding of the Intangible Cultural Heritage. WIPO has also created Draft Articles on Protection of Traditional Cultural Expressions, among others.

As the volume of these international declarations and conventions illustrates, there is not one single framework used internationally to provide protections to indigenous peoples' IPR. In spite of these attempts, there remains an ongoing debate about the best means of protecting indigenous peoples' rights to their TK. The international community is unclear about the terminologies used in defining "indigenous peoples"[12] and the parameters of their traditional cultural expression ("TCE") and TK.[13] There is also the issue of differentiating tangible and intangible cultural heritage ("ICH") and balancing the protections afforded to both.[14] A practicality problem arises when individual state protections clash with any international indigenous protection regime.[15] Issues also arise when determining the

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[10] In this paper, the term "TK" will be used to refer collectively to traditional knowledge ("TK"), traditional cultural expressions ("TCEs"), expressions of folklore ("EoF"), and traditional cultural marks ("TCM"). This work will adopt Sabine Sand's conception of indigenous intellectual property rights, but will use the term "TK" to distinguish it from IP rights. *See* Sand, *infra* note 13. For a demarcation of the terms TK, TCE, and EoF, *see* Picart & Fox, *infra* note 21.

[11] Luo Li, *The Saviour of Chinese Traditional Cultural Expressions: Analysis of the Draft Regulations on Copyright Protection of Folk Literary and Artistic Works*, 6 QUEEN MARY J. INTELL. PROP. 27, 27 (2016).

[12] *See* Sarah Harding, *Defining Traditional Knowledge - Lessons from Cultural Property*, 11 CARDOZO J. INT'L. & COMP. L. 511, 511 (2003).

[13] Sabine Sand, *Sui Generis Laws for the Protection of Indigenous Expressions of Culture and Traditional Knowledge*, 22 U. QUEENSLAND L.J. 188, 188 (2003).

[14] *See* Paul Kuruk, *Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention for the Safeguarding of Intangible Cultural Heritage*, 1 MACQUARIE J. INTL. & COMP. ENVTL. L. 111 (2004).

[15] Jimmy Pak, *Re-Imagining the Wheel: Seeking a Feasible International Regime to Protect Indigenous Cultural Expressions through Trademark Law*, 24 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 381, 383 (2011).

primary actors benefitting from state intervention in the preservation of indigenous peoples' IP, the inclusion and exclusion of stakeholders in the decision-making process, and their levels of participation in deciding the course that state policy should take—whether this be for cultural preservation or the commercialization of TK for economic development.[16] Because of the confluence of these tensions, there is no easy solution to seamlessly integrate the protection of indigenous peoples' TK in the existing legal framework.

Developments in the digital economy are the most recent challenge facing the protection of TK. While it can be argued that the uniformity brought about by the emergence of new technologies and globalization threatens cultural diversity, it can also be contended that technology itself is a neutral vehicle to express ideas, and its effect as a positive or negative force are dependent on its use.[17] This tension is exacerbated in the context of the protection of TK. An example of this conflict arose in August 2021, when YouTube vlogger and content creator Nuseir Yassin, otherwise known as Nas Daily, allegedly signed a contract with Apo Whang-Od Oggay, a *Dangal ng Haraya* awardee for her skill in the Kalinga art of tattooing. Under the contract, Apo Whang-Od would teach a tattooing class on Nas Daily's online learning platform, Nas Academy. However, Apo Whang-Od denied ever affixing her thumbprint to the contract. The NCIP also found the document to be grossly onerous, as it stated that Nas Academy would have exclusive ownership over the content produced for these classes.[18] This situation was problematic considering that the online content resulting from the contract contains Kalinga's TK, over which the indigenous community has no rights.

Considering the limited legal development in the protection of TK in the Philippines, this paper aims to contextualize and assess the effectiveness of the present legal framework on the protection of TK given the challenges faced by indigenous peoples in protecting their TK in the digital economy. While several scholars have extensively analyzed and critiqued the implementation of the IPRA in relation to IPL since its

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[16] *See* Miranda Forsyth, *Lifting the Lid on the Community: Who Has the Right to Control Access to Traditional Knowledge and Expressions of Culture,* 19 INT. J. CULT. PROP. 1 (2012).

[17] *See* Mira Burri, *Digital Technologies and Traditional Cultural Expressions: A Positive Look at a Difficult Relationship*, 17 INT. J. CULT. PROP. 33 (2010).

[18] Vincent Cabreza, *NCIP finds Nas Daily deal with Whang-od 'onerous,'* PHIL. DAILY INQUIRER, Aug. 31, 2021, *at* https://newsinfo.inquirer.net/1481019/ncip-finds-nas-daily-deal-with-whang-ud-onerous.

passage,[19] this paper aims to fill the gap in the literature by analyzing IPRA in the context of the digital economy. In fulfilling these objectives, the paper aims to answer the question: *In order to protect TK in the Philippines given the present digital economy, is there a need for the adoption of a new IP paradigm—or will such protection be sufficiently achieved through the present legal framework on TK protection?*

This paper will use the term "TK" as a general term encompassing all forms of expression of indigenous peoples' traditional knowledge, including TCEs and traditional cultural marks ("TCM"). The first section will discuss: the challenges in defining indigenous peoples and TK; the key differences between TK and IP, and the implication of these differences on the protection of TK; the challenges in creating international policies for TK protection; and the challenges to IP protection in the digital economy. The second section will discuss issues encountered by indigenous peoples in the protection of their IP. This discussion will analyze controversies at the community, national, and global levels, given the challenges presented by the digital economy. The third section will discuss the international debates on TK protection, focusing on two countervailing arguments: that it can be protected under IP regimes, and that *sui generis* legislation is necessary for TK protection.

After setting the context and background, the paper will then discuss the legal framework on the protection of TK in the Philippines and the critiques of this framework. The fourth section will provide an overview of the relevant laws in the protection of IPR and TK in the Philippines, and other previous and current proposals on TK protection previously lodged in Congress. It will also provide a literature review of journal articles discussing the relationship between IPRA and IPL in the Philippines. Once this legal framework has been established, the paper will then illustrate the effects of the digital economy in TK protection in the Philippines using the case study of Apo Whang-Od and Nuseir Yassin. The fifth section will explain the controversy between Nuseir Yassin and Apo Whang-Od, and their supposed contract for the latter to teach the Kalinga art of tattooing, or *batek*, on the former's online educational platform, Nas Academy. It will also discuss legal opinions arising from the controversy and the sufficiency of the present legal framework for TK protection in addressing issues arising from it. To conclude, the last section will explore possible policy recommendations that may improve the present TK protection framework.

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[19] *See* Vanguardia, *supra* note 2; Go & Consignado, *supra* note 9; Dee, *infra* note 130; Pena, *infra* note 261.

I. CONTEXTUALIZING THE CONFLICT BETWEEN TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY LAWS IN THE DIGITAL ECONOMY

A. Defining Indigenous Peoples and Traditional Knowledge

> *"[A]s a M[ā]ori leader articulated it, the most fundamental intellectual property right of indigenous peoples is the "right to define what their intellectual property is: the right to determine the extent and the meaning of the body of knowledge which shapes, and is in turn shaped, by their cultural heritage."*
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> —Antonio La Viña[20]

One of the main challenges in determining indigenous peoples' IPR under international law is defining what it means to be "indigenous" and what the scope of their rights is. It is difficult to determine who are considered as indigenous peoples due to the inherent diversity of the class of peoples subsumed under this term.[21] However, several international conventions have attempted to define indigenous peoples.[22] Three major approaches to the definition problem are presented by the United Nations (UN), the International Labor Organization (ILO), and the World Bank.[23]

It should be noted, however, that the UN Special Rapporteur on Protection of the Heritage of Indigenous People has recognized that the UN has never found it necessary to define the terms "peoples" or "minorities." The UN has also adopted the view that it would be in the best interest of justice to let the scope of the term "indigenous" develop over time through

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[20] La Viña, *supra* note 4, at 235.

[21] Caroline Joan Picart & Marlowe Fox, *Beyond Unbridled Optimism and Fear: Indigenous Peoples, Intellectual Property, Human Rights, and the Globalisation of Traditional Knowledge and Expressions of Folklore: Part I*, 15 INT'L. COMM. L. REV. 319, 322 (2013).

[22] For a more detailed discussion on the debates on defining indigenous peoples, *see* Picart & Fox, *id.* For a similar discussion from both the perspective of international law and indigenous peoples, *see also* Kingsbury, *infra* note 23.

[23] *See* Benedict Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT'L. L. 414, 419 (1998).

practice.[24] This is also recognized by the UN Permanent Forum on Indigenous Peoples, which notes that no official definition of "indigenous" has been adopted by any UN-system body. Rather, the term has been understood based on the following characteristics:

> (1) Self-identification as indigenous peoples at the individual level and accepted by their community as their member;
> (2) Historical continuity with pre-colonial and/or pre-settler societies;
> (3) Strong link to territories and surrounding natural resources;
> (4) Distinct social, economic or political systems;
> (5) Distinct language, culture and beliefs;
> (6) Form non-dominant groups of society;
> (7) Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.[25]

In the Philippines, the IPRA defines indigenous peoples and indigenous communities as:

> [A] group of people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as organized community on communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed and utilized such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have, through resistance to political, social and cultural inroads of colonization, non-indigenous religions and cultures, became historically differentiated from the majority of Filipinos. [Indigenous Cultural Communities/Indigenous Peoples] shall likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonization or at the time of inroads of non-indigenous religions and cultures or the establishment of present state boundaries who retain some or all of their own social, economic, cultural and political institutions, but who may have

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[24] United Nations (UN) Economic and Social Council, Final Report of the Special Rapporteur, Mrs. Erica-Irene Daes, in Conformity with Subcommission Resolution 1993/44 and Decision 1994/105 of the Commission on Human Rights, at 4, ¶ 18 E/CN.4/Sub.2/1995/26 (June 21, 1995).

[25] UN Permanent Forum on Indigenous Issues, INDIGENOUS PEOPLES, INDIGENOUS VOICES FACTSHEET, *available at* https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf (last checked March 2022). *See also* Picart & Fox, *supra* note 21, at 322.

> been displaced from their traditional domains or who may have resettled outside their ancestral domains[.][26]

Indigenous peoples' IP pertains to all cultural expressions of indigenous peoples, such as their paintings, biotechnology, and traditional medicine. However, it cannot be assumed that indigenous peoples' cultural expressions carry the conventional rights granted under IPL. Rather, the rights conferred to these expressions are contested. One of the main issues in determining these rights is the terminology used to define the parameters of indigenous cultural expressions.[27] Aside from this, indigenous knowledge is classified based on its nature, characteristics, utility, and form. Corollary to this is the determination of rights available to members and non-members of the community, as their rights are dependent on the classification of the indigenous knowledge.[28]

Indigenous peoples' cultural expressions can be classified into three main groups: TK, TCE, and TCM. These expressions can also be understood using the broader distinctions between tangible and ICH.[29] Scholars also understand TK as a human right or as an IPR. However, there is no internationally accepted definition of TK despite several international instruments pointing to its legal recognition.[30]

Daniel Gervais argues that it may not be possible to agree on a legal definition of TK that could sufficiently be incorporated into the international trade regime. He enumerates several considerations that make this endeavor difficult. First, TK may be defined by identifying who the holders of TK

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[26] Rep. Act No. 8371 (1997), § 3(h). The Indigenous Peoples' Rights Act of 1997.

[27] *See* Sand, *supra* note 13, at 188.

[28] *See* La Viña, *supra* note 4, at 233.

[29] *See* Kuruk, *supra* note 14. *See also* Lourdes Arizpe, *The Cultural Politics of Intangible Cultural Heritage*, 12 ART ANTIQUITY & L. 361 (2007), for a discussion on the development of protections for intangible cultural heritage. Intangible cultural heritage is important in the appreciation of TK, TCE, and TCMs because it refers to both material and non-material embodiments and enactments of meanings which are embedded in a culture's collective memory. This constitutes a recognition that culture is not staticm and certain facets or moments of it are captured and set apart by a community using tools, signs, and symbols. To further illustrate this argument, *see* Janet Blake, *From Traditional Culture and Folklore to Intangible Cultural Heritage: Evolution of a Treaty*, 2017 SANTANDER ART & CULTURE L. REV. 41 (2017), for a discussion on how the United Nations Educational, Scientific and Cultural Organization (UNESCO) 2003 Convention for the Safeguarding of the Intangible Cultural Heritage has shifted protection from traditional culture and folklore to that of ICH.

[30] Go & Consignado, *supra* note 9, at 995. For a more detailed discussion on the recognition of indigenous peoples and their TK in international conventions and by international bodies, *see* Ragavan, *infra* note 40.

are—referring to aboriginal peoples as the holders of TK. However, this may be insufficient because it would require that the term "aboriginal" be defined and would also require the consideration that not all knowledge held by aboriginal peoples are traditional.[31] J. Janewa OseiTutu also notes that TK may be difficult to define using TK holders as a reference point because TK holders are incredibly diverse. Despite the attempt to link and define TK in relation to indigenous peoples, there may be more persons considered as TK holders beyond indigenous groups.[32]

Second, TK does not only apply to cultural expressions, but also to religious and sacred arts, customs, and other expressions of faith and ancient beliefs. Third, it would be necessary to distinguish between TK that is considered sacred by its holders from TK that is exploited commercially.[33] Gurdial Singh Nijar further characterizes TK as both dynamic and scientific. First, TK does not embody inflexible traditions. Rather, TK is a reflection of communities' adaptive responses in their natural resource management. The perception of these practices as being inflexible may be due to very few studies in determining how indigenous communities' customary law developed over time. Lastly, TK is not diametrically opposed to western science. Rather, science often confirms ancient practices found in customary law. Thus, TK may supplement scientific knowledge where it is inadequate.[34]

Due to the difficulty of defining TK precisely in legal terms, Gervais presented a characterization of TK drawing from the definitions presented in the WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge. Following his characterization, TK is knowledge that: (1) is referred to as traditional because its creation and use are part of a community's cultural traditions, not necessarily because the knowledge itself is ancient or static; (2) represents cultural values of a people and is generally held by them collectively; and (3) is not limited to any specific technological or artistic field.[35] Thus, the term "traditional" should refer to the manner

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[31] Daniel Gervais, *TRIPS, Doha and Traditional Knowledge*, 6 J. WORLD INTELL. PROP. 403, 405–06 (2005).

[32] J. Janewa OseiTutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 MARQ. INTELL. PROP. L. REV. 147, 162 (2011).

[33] Gervais, *supra* note 31, at 405–06.

[34] Gurdial Singh Nijar, *Traditional Knowledge Systems, International Law and National Challenges: Marginalization or Emancipation*, 24 EUR. J. INT'L L. 1205, 1207 (2013).

[35] Gervais, *supra* note 31, at 405–06.

that the knowledge is developed, used, and shared, rather than the contents of the knowledge itself.[36]

Reflecting the general approach used internationally, the WIPO Secretariat, in its 2008 Gap Analysis, formulated a working definition of TK:

> [R]eferring in general to the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the knowhow, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources.[37]

In the Philippines, several key pieces of legislation, as well as rules and regulations—such as NCIP Administrative Order No. 01-98, or the Rules and Regulations Implementing Republic Act No. 8371 ("IPRA IRR")—have defined and set parameters for these contested terms.

"Community intellectual rights" is defined under Rule II, Sec. 1(j) of the IPRA IRR as follows:

> [R]ights of the indigenous peoples and indigenous cultural communities to own, control, develop, and protect: (a) the past, present and future manifestations of their cultures, such as but not limited to, archeological and historical sites, artifacts, designs, ceremonies, technologies, visual and performing arts and literature as well as religious and spiritual properties; (b) science and technology including, but not limited to, human and other genetic resources, seeds, medicine, health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, resource management systems, agricultural technologies, knowledge of the properties of fauna and flora, oral

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[36] Aman Gebru, *International Intellectual Property Law and the Protection of Traditional Knowledge: From Cultural Conservation to Knowledge Codification*, 15 ASPER REV. INT'L BUS. & TRADE L. 293, 299 (2015).

[37] *See* World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), The Protection of Traditional Knowledge: Draft Gap Analysis: Revision 4, WIPO/GRTKF/IC/13/5/(b) Rev. (2008). *See also* OseiTutu, *supra* note 32, at 163.

> traditions, designs, scientific discoveries; and, (c) language, script, histories, oral traditions and teaching and learning systems.

Rule II, Sec. 1(p) of the IPRA IRR also defines "indigenous knowledge systems" as:

> [S]ystems, institutions, mechanisms, and technologies comprising a unique body of knowledge evolved through time that embody patterns of relationships between and among peoples and between peoples, their lands and resource environment, including such spheres of relationships which may include social, political, cultural, economic, religious spheres, and which are the direct outcome of the indigenous peoples' responses to certain needs consisting of adaptive mechanisms which have allowed indigenous peoples to survive and thrive within their given socio-cultural and biophysical conditions.

IPOPHL-NCIP JAO No. 1, Rule 4(e) also expanded this definition as follows:

> The reference to [indigenous knowledge systems and practices] also means traditional cultural expressions or traditional knowledge and covers distinctive signs and symbols associated with the indigenous peoples and indigenous cultural communities and shall not be limited to a specific technical field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources.

B. Philosophical Differences Between Traditional Knowledge and Intellectual Property: Why Protect Traditional Knowledge?

Holders of TK argue that the current IP regime was designed by Western countries for Western countries.[38] The present IPR system is rooted in the Western and European concept of individual property rights. Differences between the value systems of Western and indigenous culture are essentially the main problem in enforcing TK rights for indigenous communities.[39] The fundamental difference between TK and IP begins with the understanding of the notion of "property" and "knowledge." Under the Western IP regime, it is not yet conceptualized that communities can own

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[38] Gervais, *supra* note 31, at 407.

[39] *See* Sand, *supra* note 13, at 189.

knowledge as a communal property.[40] Furthermore, under the Western regime, knowledge is characterized as a discrete, stand-alone entity. However, TK remains inseparable from a cohesive, whole, tangible system of knowledge, meanings, values, and practices deeply embedded in indigenous cultures.[41]

The motivations behind the use of the knowledge also differentiate IP from TK. The main motivation behind IPR is to give creators exclusive rights over their IP in order to incentivize them to innovate and generate progress. However, there is no need for such an incentive when producing TK as these already exist as part of an indigenous community's cultural heritage and way of life.[42] IPR also focuses on the protection of tangible intellectual products and ignores or undervalues intangibles. Although some TK may have features in common with IPR-protected objects or products, crucial differences such as the lack of material form may justify different legal treatment between the two.[43]

One main barrier that hinders the applicability of IPR to TK is the notion that TK falls within the public domain. Following the public domain position, TK should remain in the public domain to be shared by everyone around the world, in a global commons. Under this view, knowledge should not be commodified and proponents are wary of attempts to control or regulate its use via legal mechanisms bestowing ownership of TK to certain parties. Advocates of this position view creating IPR for TK as a stepping stone for the destruction of traditional structures and institutions.[44] When TK is granted protection under the IPR regime, this may lead to further partitioning of the cultural commons and a restriction of other people's liberties to express themselves using previously unprotected ideas. Hence, Kimberlee Weatherall argues a strong justification is required for the grant of such exclusive rights.[45]

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[40] Srividhya Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1, 35 (2001).

[41] Teshager Dagne, *The Protection of Traditional Knowledge in the Knowledge Economy: Cross-Cutting Challenges in International Intellectual Property Law*, 14 INT'L. COMM. L. REV. 137, 140 (2012).

[42] *See* Shubha Ghosh, *Globalization, Patents, and Traditional Knowledge*, 17 COLUM. J. ASIAN L. 73, 75 (2003).

[43] *See* Kimberlee Weatherall, *Culture, Autonomy and Djulibinyamurr: Individual and Community in the Construction of Rights to Traditional Designs*, 64 MODERN L. REV. 215, 229 (2001).

[44] Ghosh, *supra* note 42, at 80.

[45] Weatherall, *supra* note 43, at 222.

There is no universally agreed upon justification for TK protection. TK protection can be understood differently depending on the context this would apply in. Generally, arguments could either take the stance of defensive protection or positive protection. Defensive protection ensures that TK will not be misused by non-indigenous persons. The goal of defensive protection may be to preserve TK due to its inherent value to knowledge providers and to the world. It may also mean promoting TK in order to increase its use.[46] Meanwhile, positive or offensive protection aims to give TK holders control over the use of TK by non-indigenous persons by granting positive rights similar to those granted under patents, copyrights, trademarks, and trade secrets. This is considered more contentious than defensive protection partly due to the politicization of TK protection, as positive protections generally favor countries and communities in the Global South.[47]

TK protection can also be understood based on the motivation behind such protections. Primary motivations for TK protection fall under the economic argument, the equity argument, or the conservationist or protectionist argument.

Proponents of the economic argument posit that TK can be used commercially provided that communities could exercise control over its use. TK plays an important role in the global economy due to the market value of certain TK, such as plant-based medicines. Some indigenous communities may also view their TK as private property which can be commercialized. Thus, the economic argument focuses on how indigenous communities can share in the benefits of their TK.[48] On an international level, economic arguments have the advantage of convincing developed countries to agree to TK protection.[49]

However, the economic argument could also be framed from the perspective of who can benefit most from the use of the knowledge. The appropriation position argues that exclusive ownership of TK and rights to it should belong to whoever uses the knowledge commercially. Knowledge should be commodified especially by entities who can make it as widely

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[46] Gebru, *supra* note 36, at 302–03.

[47] *Id.* at 304.

[48] *See* OseiTutu, *supra* note 32, at 181–84.

[49] Gebru, *supra* note 36, at 315.

available as possible. Advocates of this view emphasize TK's benefits and the importance of disseminating such benefits through the market.[50]

Meanwhile, proponents of the equity standpoint argue that since developed countries' goods can be commercialized and protected to benefit them economically, this same treatment should be extended to the intangible goods of developing countries.[51] The present IP regime is viewed as inequitable because TK holders do not get benefits and protection despite the fact that their TK is used as basis for innovation. Moreover, they may even be charged in order to use the improvements and innovations based on their TK.[52] By protecting TK, the greater good will be served because there would be more motivation for TK holders to continue to innovate and preserve their physical and cultural environments.[53] A subset of the equity standpoint is the moral rights position, which posits that TK rights should be given exclusively to indigenous peoples in such a way that would enable them to block claims from entities appropriating or exploiting their knowledge. This view allows for commodification if it is the choice of TK holders to do so. Advocates of this view emphasize the long history of disseminating TK within their existing traditional structures.[54]

Lastly, cultural conservation focuses on keeping the culture authentic by keeping its various features as pure as possible. Because of the risk of cultural extinction, the recognition and protection of indigenous communities' TK is expected to play a part in the promotion of their culture and identity. It is also a tool that can be used in easing the socio-political, economic, and environmental pressures they face.[55]

Aman Gebru also proposes knowledge codification as a motivation to protect TK. He proposes a system that recognizes and protects documented TK in order to encourage indigenous communities to codify their knowledge and share it with outsiders, recognizing the inherent value of TK and its ability to be maximized through use by outsiders who can utilize its untapped potential. This system aims to benefit both the indigenous community and outsiders able to access TK fairly and equitably.[56]

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[50] Ghosh, *supra* note 42, at 80.
[51] OseiTutu, *supra* note 32, at 185.
[52] Gebru, *supra* note 36, at 308.
[53] OseiTutu, *supra* note 32, at 186.
[54] Ghosh, *supra* note 42, at 80.
[55] Gebru, *supra* note 36, at 322.
[56] *Id.* at 316.

Taking the perspective of conflicting interests between developed and developing countries, Srividhya Ragavan frames the motivation for TK protection as either moralistic or emotive in nature. Moralistic arguments are based on the premise that persons have the moral right to control the product of their labor or creativity. TK from developing countries has been used as a basis for research leading to high-value inventions which benefit developed nations, hence the former's argument for the necessity of protecting TK. Meanwhile, emotive arguments focus on the differing economic realities between developed and developing nations.[57]

C. Understanding the International Intellectual Property Law Regime: Challenges to Internationalizing Traditional Knowledge Protections

> "*The traditional knowledge debate occurs in the context of a culture clash between the developing and developed worlds, between different social structures in the South and in the North (as well as structures within those two regions). The questions of whether an artifact of traditional knowledge should have owners and of who the owner should be determine issues of development, sovereignty, and control over resources.*
>
> — Shubha Ghosh[58]

Due to the increasing importance of IPL in international trade, its governance has shifted from national-level policy to global-level laws and mechanisms. IPL has thus become an important instrument used by sovereign nations to leverage their socio-economic interests. While many laws have led to this shift in mindset, the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") Agreement is the most authoritative international instrument on IP.[59] The TRIPS Agreement imposes minimum standards on IPL for state parties to adhere to. Furthermore, compliance with the Agreement is a requisite to membership in the World Trade

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[57] Ragavan, *supra* note 40, at 7–8.

[58] Ghosh, *supra* note 42, at 76.

[59] Chidi Oguamanam, *Beyond Theories: Intellectual Property Dynamics in the Global Knowledge Economy*, 9 WAKE FOREST INTELL. PROP. L.J. 104, 137 (2008).

Organization (WTO).[60] Such compliance means that states must respect the IPR of their citizens and the citizens of other member states due to the principle of national treatment.[61] However, because the Agreement allows member states to put limitations on these rights, states have room to shape the structure of rights and powers granted to IPRs within their territory, provided that they comply with the general parameters set under the Agreement.[61]

The TRIPS Agreement has been criticized for perpetuating an IP system reflective of Western values and for benefitting IP-generating countries far more than developing countries. Thus, this caused a North-South divide between developed countries, who can benefit more from the system, as opposed to developing countries.[62] The Agreement unfairly disadvantages developing countries because of the resources necessary for its implementation. Most IP producers are located in wealthy countries where robust systems of IP protection have already been existing long before the Agreement's implementation. On the other hand, developing countries have less well-developed IP systems and the implementation of the Agreement may require administrative costs for smaller benefits as compared to those granted to developed countries.[63] The TRIPS Agreement created what can be considered as a protectionist IP model by imposing longer periods of protection, creating more property rights, imposing uniform substantive minimum standards of protection on all countries, and removing States' discretion to adjust these standards to suit their level of economic development. This protectionist model tends to benefit more industrialized, rather than industrializing, countries. It may also extend to other social and cultural spheres, which may then lead to issues such as misappropriation and commercialization of TK for use in the global market.[64]

However, Shubha Ghosh argues that because the TRIPS Agreement reduces the terms of international trade to simply IP protection, it has potentially reduced the imbalance between the North and South—since the Agreement provides mechanisms that protect both their interests. On the

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[60] Tsheko Ratsheko, *An Essential Component of the Knowledge Economy*, 8 JUTA'S BUS. L. 114, 116 (2000).

[61] *See* Ghosh, *supra* note 42, at 81.

[61] *Id.*

[62] *See* OseiTutu, *supra* note 32, at 159–60.

[63] Sonali Maulik, *Skirting the Issue: How International Law Fails to Protect Traditional Cultural Marks from IP Theft*, 13 CHIC. J. INT'L L. 239, 241–42 (2012).

[64] OseiTutu, *supra* note 32, at 159–60.

other hand, Ghosh also recognizes that an international system based on IPs alone does not eradicate the difference between the haves and have-nots. Rather, the system provides states with a competitive advantage in the international arena, since it relies on resources that can be created by the state, as opposed to natural resources, whose locations are random and may be out of the state's control.[65]

Due to the predominance of the WTO and the TRIPS Agreement in global IP governance, there has been the emergence of diverse fora at a global level which provide alternative sites for IP lawmaking as a form of resistance to the existing regime. Similar to the United States' successful attempt in connecting IP and trade through the TRIPS Agreement, many developing countries have made connections between IP and other issues such as protection of their TK and ICH, access to essential medicines and healthcare, and biological diversity, in order to forward their collective socio-economic interests. These efforts find fruition in the UN processes, the Convention on Biological Diversity ("CBD"), the WIPO, and UNESCO, among other international organizations also working towards IP protection in conjunction with other disciplines.[66]

Debates in these alternate forums also emphasize similar North-South tensions found in TRIPS negotiations. Because developed countries have obtained protection for their IP through the TRIPS Agreement, developing countries are seeking to do the same through TK protection both as a defensive and offensive strategy in response to the Agreement.[67] TK has become difficult to define and protect because of its increasingly political nature both domestically and internationally. At a domestic level, TK has become part of indigenous peoples' fight for internal self-determination. At an international level, TK is normally held by persons found in the Global South but is used by entities in the Global North, thus creating political tension during international negotiations.[68] Developing countries tend to support TK protection while industrialized countries are more reluctant to support it.[69] For example, debates in the UN Food and Agriculture Organization centered on the issue that genetic resources placed for the common good in international collection centers by farmers from developing countries were being used by commercial corporations for profit.

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[65] *See* Ghosh, *supra* note 42, at 82–83.
[66] Oguamanam, *supra* note 59, at 148–49.
[67] OseiTutu, *supra* note 32, at 204.
[68] Gebru, *supra* note 36, at 299.
[69] OseiTutu, *supra* note 32, at 173.

This has led to developing countries pushing for rights over their biological resources and TK, which were reflected in the CBD. The CBD supported the South's rights over their genetic resources and was met with opposition from industrialized countries like the US due to their effects on these countries' biotechnology industries.[70]

Attempts at proposing *sui generis* protection for TK at an international level can be traced to the Berne Convention for the Protection of Literary and Artistic Work, which provides for the protection of unpublished works. This may possibly encompass unfixed indigenous TK. The Tunis Model Law on Copyright for Developing Countries in 1976 sought to specifically recognize the preservation and commercialization of TK, although it did not require TK to be fixed in material form. It also gave perpetual protection to TK found in the public domain. However, the Model Law has not had an extensive impact on national laws.[71] Since 2001, the WIPO has convened the IGC. These meetings have attempted text-based negotiations on international legal instruments moving beyond the confines of IP categories and classifications.[72] This will be further discussed in the proceeding section.

At the regional level, there are several models of TK protection, such as the Model Law for the Protection of Traditional Knowledge and Expressions of Culture for the Pacific Peoples ("Pacific Model Law") used by countries in the Pacific Rim to combat the exploitation, inappropriate commercialization, and commodification of TK.[73] In South America, there is the Commission of the Cartagena Accord of the Andean Pact of Common System of Access ("Andean Pact"), which requires member countries to gain prior informed consent from indigenous groups before using their genetic resources. It also requires member states to grant financial incentives to the local indigenous community and penalizes the violation of the provisions of the pact through the cancellation of an IPR registered for a specific resource.[74] Lastly, in Africa, the African Regional Intellectual Property Organization (ARIPO) creates a centralized trademark registration system wherein each trademark application is sent to every member nation for

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[70] Nijar, *supra* note 34, at 1210.

[71] Sand, *supra* note 13, at 190.

[72] Jane Anderson, *Options for the Future Protection of GRTKTCEs: The Traditional Knowledge Licenses and Labels Initiative*, 4 W.I.P.O. J. 66, 66 (2012).

[73] Sand, *supra* note 13, at 191.

[74] Pak, *supra* note 15, at 395.

substantive review. Member countries can contest the mark within one year.[75]

Even indigenous communities are recognizing the primacy of IPR in the national and international arena, making efforts to codify their *sui generis* legal systems in order to put them on the same footing as other citizens enjoying the protections granted by IPR.[76] The importance of IP to indigenous communities is also highlighted in indigenous declarations and WIPO studies, which discuss the integral role that IP fulfills in indigenous communities and the importance of having control over cultural items that are used as a means of expressing indigenous identity.[77]

It is clear that the main challenge in internationalizing TK protection is that it is done using IPR logic due to the recognition of the latter's prevalence and importance in the international arena. Jane Anderson observed that negotiations conducted in WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC) highlight descriptions of TK systems using an IP legal logic, which is not the way indigenous communities discuss their own knowledge systems. By mapping indigenous knowledge systems using IP categories of copyright and patents, the logic and dominance of IPL are reaffirmed through the transformation and simplification of indigenous knowledge systems to adapt to the existing Western legal framework.[78]

Moreover, this conflict is compounded by the fact that IPRs are negotiated in an entirely different arena than TK protections. Chidi Oguamanato argues that due to the TRIPS Agreement, the leading institutional body governing international IPL governance shifted from the WIPO to the WTO.[79] Meanwhile, the primary international forum for negotiating TK international instruments is the WIPO.[80] Considering the primacy of the IP regime and the involvement of IP and international trade experts in WIPO IGC negotiations, this reaffirms the notion that TK protections are built as extensions to the existing IP system, which is inherently incompatible with TK by its nature.

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[75] *Id.* at 395–96.

[76] Valerie Phillips, *Indigenous Rights to Traditional Knowledge and Cultural Expressions: Implementing the Millennium Development Goals*, 3 INTERCULTURAL HUM. RTS. L. REV. 191, 191 (2008).

[77] *See* Weatherall, *supra* note 43, at 221; OseiTutu, *supra* note 32, at 180.

[78] Anderson, *supra* note 73 at 67.

[79] Oguamanam, *supra* note 59, at 138.

[80] OseiTutu, *supra* note 32, at 161.

D. IP Protection in the Digital Economy

> *"Knowledge or information constitutes the defining feature of the post-industrial information society. These are the pivotal elements of the [Global Knowledge Economy]. Information and knowledge are intangible and are mainly generated by, and often classified as products of the mind or the intellect. [...] As a mechanism for leveraging the allocation of rights over information and knowledge and their products, intellectual property is the currency of the GKE, now directly implicated in virtually all aspects of our socio-economic life"*
>
> —Chidi Oguamanam[81]

The present global economy is characterized as a knowledge economy. It refers to the rapid generation, transformation, and management of information through computer-driven digital technologies.[82] This process of digitization allows for the expression of any kind of information or content into a universal binary code that is applied to all information. Thus, this renders the nature of the information being transmitted through the network irrelevant because they will all be converted into binary digits. Resulting from the development of digital systems and optical fibers is the Internet—a global, publicly accessible network of interconnected networks—whereby digitized information containing a variety of content can be transmitted to anyone accessing it through the World Wide Web.[83]

Due to this development, information constitutes a crucial factor or tool of production that aids in sustaining global economic order. Digital technology expands the possibilities for use of information, allowing for the use of the Internet as a medium for creativity, innovation, wealth creation, socio-cultural interaction and exchange within and across national boundaries.[84] Because of decreased costs in identifying and communicating

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[81] Oguamanam, *supra* note 59, at 135.
[82] *Id.* at 131–34.
[83] *See* Burri, *supra* note 17, at 34–35.
[84] Oguamanam, *supra* note 59, at 131–34.

with like-minded individuals, the digital environment has resulted in the creation of social networks and other means for persons to collaborate with like-minded individuals.[85] The creative process in this space is interactive, collaborative, and responsive to previously existing works easily found in the domain, such as parodies and satires.[86] It can also lead to content creation through self-expression, as all that one needs is a computer and an Internet connection in order to be able to participate in this space.[87] With the advent of information technology, new markets have opened up to authors, publishers, artists, and inventors.[88]

Due to the importance of the information infrastructure in everyday life, it encounters IPL in a way it did not prior to the knowledge economy. First, technology has changed the economics of reproduction because of the availability of information in digital form.[89] Content is freed from the need for a tangible medium and can be swiftly distributed at almost no cost.[90] Using digital data, the reproduction of an indefinite number of copies of an original material can be done with consistent quality. Digital data also allows for easy alteration and adaptation of an artwork.[91] Infinite quality reproductions at a low cost erode the previous natural barriers to infringement—reproduction cost and reduction of the duplicate's quality upon each subsequent reproduction.[92]

Second, computer networks have changed the economics of distribution and publication.[93] Once digital data is on the Internet, it is distributed around the world, where it can be used and reproduced from any place where the information is accessed.[94] Data can be transmitted cheaply and in almost no time using networks. The accessibility and reach of the Internet have also allowed everyone to be a publisher through various forms of media. As a consequence, for instance, infringement can thus be committed by ordinary citizens through sharing copyrighted art, using

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[85] Burri, *supra* note 17, at 37.

[86] Oguamanam, *supra* note 59, at 131–34.

[87] Burri, *supra* note 17, at 37.

[88] Asif Kahn & Ximei Wu, *Impact of Digital Economy on Intellectual Property Law*, 13 J. POL. & L. 117, 118 (2020).

[89] *Id.* at 119.

[90] Burri, *supra* note 17, at 35.

[91] Oguamanam, *supra* note 59, at 131–34.

[92] Kahn & Wu, *supra* note 89, at 119.

[93] *Id.* at 119.

[94] Oguamanam, *supra* note 59, at 131–34.

copyrighted music in original videos, or uploading scanned copies of physical copyrighted material.[95]

From an economic perspective, there is an increased incentive to sell unpopular products because of the marginal costs of reproducing, storing, and distributing digital media products. This incentivizes suppliers to offer a more diverse range of products to appeal to a wider audience, which may include products appealing to a particular niche. It has also lowered the risk inherent in launching new cultural products while increasing their visibility because the space to market the products is unlimited. Moreover, access to a wide array of related content has become easier through the search process. The Internet allows searching through a single point of entry. Other methods such as samples, feedback, and advanced search tools based on collective intelligence allow users to discover more content based on their original search. Because consumers are more empowered to choose the content they want to consume, producers would be induced to generate new or niche products or content catering to these consumers' demands. Lastly, the accessibility of content in the digital environment may change the value attached to cultural content, since users can use it repeatedly as opposed to the one-time use of the content in traditional platforms. Because of this change in value, producers may be incentivized to produce good content that people would be willing to consume more than once.[96]

Attempts to regulate and protect these electronic works from exploitation could, as a consequence, reduce access to cultural and intellectual heritage, which digitization sought to address in the first place. It has been argued that control over digital access should be restricted because it infringes on the IPR holder's right to reproduce the information. However, if this is followed, traditional public access to information will be undetermined. As a result of these access problems, a further divide is propagated based on those who have access to information technology infrastructures, and those who do not. Since IP's dominant model of protection has been through physical, tangible items, this new mode of transmitting information has posed a challenge to existing IP regimes.[97] For example, copyright law is challenged by peer-to-peer file sharing; and trademark law, by issues in domain name and cyber-squatting.[98] Issues on software patents and copyrights were also among the first issues arising from

[95] Kahn & Wu, *supra* note 89, at 119–20.
[96] *See* Burri, *supra* note 17, at 35–36.
[97] Kahn & Wu, *supra* note 89, at 118.
[98] Oguamanam, *supra* note 59, at 133–34.

the advent of networks and digital technologies.[99] The extent of IP claims applied in the virtual world also challenges traditional notions of IPR.[100]

Due to rapid technological advancements, there is a need for a stronger IPR that strongly promotes the propertization of knowledge.[101] However, strengthening the existing IPR regime in the digital economy also poses a set of unique problems. The digital economy is a global phenomenon. While there is an overarching global framework on IP protection, IPL is still inherently local. There are substantial variations of enforcement and regulatory policies and cultural attitudes towards IP.[102] Propertization of knowledge mainly benefits technologically rich countries,[103] given that economic growth relies on the country's capability to convert knowledge into wealth and to achieve social development through innovation.[104]

In spite of these challenges, it cannot be denied that technology can play a big part in knowledge preservation, especially for indigenous communities. Applying technology to TK systems enhances its blending with modern scientific and technical knowledge and allows indigenous communities to protect their TK through preservation strategies. Using mass media technology draws the following benefits for indigenous communities: (1) it creates easily accessible TK information systems; (2) TK will be preserved for the future generation; (3) it promotes a cost-effective means for disseminating TK; (4) it promotes the integration of TK into formal and non-formal training and education; and (5) it provides a platform for advocating TK and its benefits to the poor.[105]

Because of the increasing demand for TK, there would be an increase in economic opportunities for indigenous communities to market their goods and be engaged in global trade. This could lead to substantial strengthening of the community's welfare. Demand for TK may also foster creativity, connectivity, and innovation, which may help preserve their culture more effectively than protectionism by increasing the dynamism and

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[99] Kahn & Wu, *supra* note 89, at 117.

[100] Oguamanam, *supra* note 59, at 133–34.

[101] *Id.* at 139.

[102] Kahn & Wu, *supra* note 89, at 120–21.

[103] Oguamanam, *supra* note 59, at 146.

[104] Ratsheko, *supra* note 60, at 116.

[105] Stella Nduka & Adetoun Oyelude, *Goge Africa: Preserving Indigenous Knowledge Innovatively through Mass Media Technology*, 48 PRESERV. DIGIT. TECHNOL. CULT. 120, 123 (2019).

vitality of their TK. More importantly, promoting TK in an online context may help the indigenous community reassert its identity and autonomy and serve as a platform for self-representation in the global community.[106]

II. ISSUES ON TRADITIONAL KNOWLEDGE PROTECTION

Issues surrounding TK protection are results of the confluence of factors rooted in the nature of the knowledge itself, the way it is transmitted, and its function in indigenous communities. At the onset, it should be emphasized that TK protection cannot be taken separately from other challenges faced by indigenous peoples, such as land rights and self-determination as these impact their cultural identity.[107] Problems in TK protection are best understood by analyzing conflicting interests within the indigenous community itself or with other indigenous communities, and conflicting interests of the indigenous community and the larger legal system to which they belong.[108]

A. Challenges to Traditional Knowledge Protection at a Community Level

The challenges faced in protecting TK at a community level are rooted in the view that communities have of knowledge in general. TK is usually transmitted orally in the community's language. It may be inaccessible to others who are not members of the community and may thus be difficult to use. It is also shared within the community and is a common resource, which makes the duty to protect it communal. While there is a need to protect the knowledge, it can be seen as a duty for others to perform because of its communal nature.[109] On the other hand, if a community member uses the knowledge in violation of communal interests, such as using TK for commercial gain without the community's consent, he may only be condemned by the community because modern legal systems do not recognize the restrictions provided under customary law.[110]

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[106] Burri, *supra* note 17, at 46.

[107] Sand, *supra* note 13, at 195.

[108] *See* Forsyth, *supra* note 16.

[109] Abha Nadkarni & Shardha Rajam, *Capitalising the Benefits of Traditional Knowledge Digital Library (TKDL) in Favour of Indigenous Communities*, 9 NUJS L. REV. 183, 186–87 (2016).

[110] Li, *supra* note 11, at 35.

In the context of IP protections, because IP is viewed as a private, individual right, there is also the problem of determining who among the community have the right to hold IPRs over the TK, should IPR be used in protecting the latter.[111] But the applicability of IP protections would still depend on the community's worldview over ownership of knowledge and natural resources; whether the community itself chooses to claim ownership over TK and the natural resources from which they are derived, as claiming ownership over these may be culturally objectionable.[112] It would also be dependent on the community's capacity to make informed decisions about IPL—such as when it is useful for them, how to assert legal ownership and control over TK being used by third parties, and how to combat exploitation and assert decision-making in documentation and digitization efforts.[113]

Furthermore, there may be an issue regarding the documentation and inventory of TK. Countries may grant property rights to an object based on the rule of automatic protection or after the fulfillment of the requirement of fixation. Granting a property right in respect to undocumented knowledge because of the rule of automatic protection may lead to legal uncertainties as to the protected knowledge. However, documenting TK is perceived by some as increasing the risk of unauthorized takings and may further perpetuate misappropriation.[114] From the perspective of the indigenous community, it should also be considered that resistance to documentation and disclosure of TK may only provide short-term benefits to the community. Since most indigenous communities face the risk of extinction or cultural domination, the knowledge may be lost due to resistance to document, resulting in a loss of social welfare both to the indigenous community and to the general public.[115]

Indigenous groups may also shun legal remedies and tend to avoid using litigation as a means of asserting their cultural property rights. Reluctance to litigate comes from litigation costs, the impropriety of lawyers, and inherent cultural opposition to Western courts.[116] However, because indigenous communities are still limited to their geographic localities, they would still have to seek protection under the national laws of their countries, which generally follow Western-modeled IPLs.[117]

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[111] *Id.* at 34.
[112] La Viña, *supra* note 4, at 234.
[113] Anderson, *supra* note 73, at 68.
[114] Gervais, *supra* note 31, at 413.
[115] Gebru, *supra* note 36, at 321.
[116] Pak, *supra* note 15, at 386.
[117] *Id.* at 393.

B. Challenges to Traditional Knowledge Protection at the National and Global Level

Under the UN Declaration on the Rights of Indigenous Peoples, nation-states have the responsibility to protect indigenous communities' rights, including the protection of the right of indigenous peoples to control their lands, territories, and other natural resources. This obligation can also be found in other conventions, such as the CBD and the UNESCO Convention on Cultural Diversity. But the impact of these international obligations on national policies has yet to be seen. This inaction leaves indigenous communities in a precarious position. While their laws are being recognized as *sui generis* at the international level, the deference of international law to national law, especially in the area of IPL, may lead to their customary laws and rules being ignored.[118] The conflict between international and national legal regimes is not only an issue that arises in discussing TK protection, but in IPR protection as well. There is no internationally accepted, uniform standard of IP protection although there are international conventions imposing IP mechanisms due to major differences in the nature of national protection policies and enforcements.[119]

This conflicting legal regime is problematic when considering the development of TK and the subsequent issues resulting from it. The value of TK to a country's cultural heritage and the increasing effects of globalization have led to the growth of TK industries. However, this could also cause their disappearance through commercialization and exploitation, with very little economic benefits given to indigenous communities. Using TK as an economic vehicle may separate it from its cultural context, resulting in misappropriation and exploitation of TK through imitation goods sold in the market.[120] The impact of cultural misappropriation can be so severe that indigenous communities may lose interest in reclaiming their TK.[121] Exploitation of TK also occurs in cases of biopiracy, which refers to the unauthorized use of common traditional knowledge and the exploitation of the natural resources of the country or community where the TK is found.[122] Biopiracy has also been heightened because of the global knowledge

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[118] Phillips, *supra* note 77, at 194–95.

[119] John Mittelstaedt & Robert Mittelstaedt, *The Protection of Intellectual Property: Issue of Origination and Ownership*, 16 J. PUB. POL. & MKT'G 14, 14 (1997).

[120] Li, *supra* note 11, at 231.

[121] Sand, *supra* note 13, at 189.

[122] Nadkarni & Rajam, *supra* note 110, at 186.

economy due to the use of technological advancements to appropriate and monopolize medicinal and agricultural TK and related natural resources. IPRs are fundamentally linked to biopiracy because claims of appropriation of genetic resources and their underlying TK have increased after the TRIPS Agreement.[123]

Attempts to create legal instruments to protect TK have been negotiated through the IGC, which has been convened by the WIPO since 2001. Three *sui generis* treaties are currently being negotiated by WIPO Member States, whose representatives to the IGC are primarily experts in IPL and trade, based on three categories: genetic resources, TCE, and TK.[124]

Anderson analyzed the debates occurring within the Committee in the creation of these *sui generis* treaties and forwarded two observations on these negotiations. First, the most contentious of the instruments is the *sui generis* treaty relating to genetic resources due to its increasing value and importance. Many powerful interest groups, specifically the pharmaceutical industry, are lobbying, through member states, to maintain TRIPS-based provisions. Issues on ownership of the genetic and biological resources on certain territories and ownership over the knowledge or its transformed version also spring more issues on sovereignty, economic benefits, access and benefit sharing, and free, prior, and informed consent, among others.[125]

Second, the treaty on TCEs has received the most partisan support and has the most largely coherent text. This is attributed to two interconnected factors: first, the economic interests involved are not as heightened as compared to those in the genetic resources treaty and, second, because this relates more to copyright than patents, this affects the identity of the interested parties and their effective lobbying power. The main actors in these debates are the public domain advocates, who are pushing to ensure that nothing understood to be already part of the public domain be covered by copyright protection, and members of cultural industries who have historically benefitted from free access and circulation of TCEs, such as the music and film industries. The implication of these interests is the removal of retroactive protections, limiting the scope of protections, and providing for generous exceptions.[126]

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[123] Dagne, *supra* note 41, at 142.
[124] Anderson, *supra* note 73, at 66.
[125] *Id.*
[126] *Id.* at 67.

However, in spite of attempts to create a uniform policy for TK protection and the usefulness of these basic principles that indigenous communities can use to integrate TK into Western IP systems, Molly Torsen reminds us that it is essential to recognize the uniqueness of each culture's interests and traditions. It would not be appropriate to create a one-size-fits-all *sui generis* system. Rather, international norms must be flexible enough to accommodate the diversity of indigenous communities.[127]

C. Challenges to Traditional Knowledge Protection in the Digital Economy

Anecdotal and empirical evidence shows that indigenous peoples are active Internet users despite the reality of the digital divide and the poverty faced by indigenous communities. Although some communities still reject it as a medium, their contact with digital technologies has intensified due to media literacy programs and efforts by various activities such as museum and archiving activities, non-governmental organization initiatives, and research and language preservation projects.[128]

In the context of indigenous peoples' TK, technology has allowed for the greater proliferation of their TK, leading to increasing public awareness of their culture.[129] Increasing global cultural exchange and interaction done through advancements in digital technology and the increasing social value of learning about other cultures as a means to develop self and communal identity has also contributed to this rising interest in TK.[130] However, because these works are more publicly accessible, this may lead to a reduction of indigenous peoples' cultural heritage into mere commodities or to their misappropriation.[131]

For example, using technology, indigenous peoples' woven patterns and textiles can easily be copied from photographs available on the Internet, completely bypassing the handweaving process in replicating these designs.

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[127] Molly Torsen, *Anonymous, Untitled, Mixed Media: Mixing Intellectual Property Law with Other Legal Philosophies to Protect Traditional Cultural Expressions*, 54 AM. J. COMP. L. 173, 181 (2006).

[128] Burri, *supra* note 17, at 39.

[129] Celine Melanie Dee, *Unravelling the Tapestry of Copyright Protection of Indigenous Woven* Art, 62 ATENEO L.J. 1373, 1375 (2018).

[130] *See* Stephanie Spangler, *When Indigenous Communities Go Digital: Protecting Traditional Cultural Expressions through Integration of IP and Customary Law*, 27 CARDOZO ARTS & ENT. L.J. 709, 710 (2010).

[131] Dee, *supra* note 130, at 1375.

This means of reproduction completely detaches the woven textile away from the sacred rites associated with creating it.[132] In the music industry, TK misappropriation is made easier by technological advancements through sampling, a common form of misappropriation of musical works whereby artists would use folk music from an indigenous community in their works.[133] Because control over the reproduction is taken away from indigenous peoples, they cannot ensure that the reproduction maintains the integrity of the original work or the reputation of its creator.[134] Misappropriation enhances incentives for cultural insularity, but protections placed as a response to misappropriation place limits on cultural exchange. But indigenous communities see these limits as necessary because uncontrolled replication of their TK facilitated by electronic media strips cultural elements of their history from the cultural artifact and undermines their authenticity. More than offending the community, misuse of the cultural artifact may change the significance and meaning of the cultural practice itself.[135]

There is also the question of the inclusivity of these digital platforms, considering issues regarding access to and the inherent design of the digital platform. On the first consideration, indigenous communities may not have their own digital platforms but may rely on external sources to provide them with access to digital platforms. This helps perpetuate the digital colonization of knowledge and may have an impact on how indigenous communities negotiate the sharing of knowledge.[136]

The second consideration is that digital design remains to be dominated by Western techno-scientific frameworks. TK can be included in mainstream digital platforms, but doing so may reinforce the oppressive power relationships between indigenous peoples and users of their TK. This consideration is further elucidated by three observations. First, integration of TK may help preserve indigenous culture, but it also reinforces the Western notion of knowledge as property rather than as embodied knowledge based on ancestral connections. Second, open technologies seeking to democratize access and participation in the digital space are still structured using Western knowledge and rely on the user's English

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[132] *Id.* at 1383.

[133] Spangler, *supra* note 131, at 710.

[134] Dee, *supra* note 130, at 1383.

[135] Spangler, *supra* note 131, at 710–11.

[136] Johanna Funk & Kathy Guthadjaka, *Indigenous Authorship on Open and Digital Platforms: Social Justice Processes and Potential*, 1 J. INTERACT. MEDIA EDUC. 1, 3 (2020).

proficiency.[137] Third, in most cases with digital domains, indigenous people are imagined as users of the platform, and not as its co-creators.[138]

Another consideration is that the integrity of the digital platform may hamper the preservation of the cultural artifacts that are digitized. Digital information is easily deleted, written over, or corrupted. The evolution of new hardware and software may also make it difficult to access and use materials that were created for a different type of digital format which may be rendered obsolete by new developments. This emphasizes the importance of digital sustainability, which, in this context, is ensuring that digitized formats used in cultural heritage are of high quality and can be accessed through a variety of platforms over time.[139]

Finally, the sustainability of the digital environment as a whole may also pose a challenge to digital sustainability in preserving TK. Many of the activities involved in digital preservation require the reproduction and distribution of work, which call for the exercise of exclusive rights and which may not fall under copyright's exceptions and limitations. Efforts should be directed towards balancing private and public interests and avoiding overregulation so that the generative characteristic of the digital environment can still be maintained. Considering the sustainability of the digital environment also poses a bigger question on who the proper custodian of this repository of knowledge should be. Search engines are critical in organizing and accessing information over the Internet. However, these search engines are operated by companies. Privatizing information repositories containing collective knowledge and heritage pose risks to sustainability since companies may not have the same longevity as universities or public libraries.[140]

In spite of these shortcomings and challenges, the use of digital technology is not bad per se; it is the means or purposes of applying technology that may have positive or negative effects. Law should respond to these effects in order to safeguard public interests and attain societal goals.[141] It is suggested that because of the lower economic thresholds for participation, the diversity of online content and the empowerment of users

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[137] *Id.* at 1–2.
[138] *Id.* at 3.
[139] Burri, *supra* note 17, at 47.
[140] *Id.* at 47–48.
[141] *Id.* at 34.

and communities have resulted in more opportunities for meaningful protection and promotion of TK.[142]

III. INTERNATIONAL DEBATES ON TRADITIONAL KNOWLEDGE PROTECTION

Traditional debates on TK protection generally posit two views: (1) that TK can be protected under existing IP frameworks; and (2) that the present framework alone is insufficient, and *sui generis* legislation is needed in order to protect TK. This paper will briefly discuss these two arguments. However, it should be noted that there is also the view that TK belongs in the public domain, and should thus not be granted protections under either an IP or a *sui generis* regime; advocates of this view suggest that conferring a new right to TK holders should serve a broader social good.[143] There are also scholars who argue that neither IP nor *sui generis* legislation would adequately protect TK, and resort to customary law is the most viable means of TK protection because it is already being applied by communities to effectively protect their TK. Moreover, challenges posed by the use of customary law are either identical to or no worse than those presented by IPR or *sui generis* alternatives.[144]

A. The Ability of Intellectual Property Regimes to Protect Traditional Knowledge

In his work, Ghosh takes the stance that TK can be protected under existing IPR structures. He argues that the protection of TK can be consistent with promoting progress in science and the arts using IPR. The more important questions pertain to the allocation of rights, the actors involved in allocating rights, and determining the markets for TK products.[145] Gervais takes a similar position and argues that it is possible to apply certain IPR without any modification to forms of TK that are exploited commercially, such as arts and crafts. For instance, collective or certification marks and geographic indications can be used to protect TK. Trade secret protection, laws on torts and delicts, and doctrines on misappropriation and unjust enrichment found in civil law could also be

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[142] *Id.* at 48.

[143] *See* OseiTutu, *supra* note 32, at 190.

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

[145] Ghosh, *supra* note 42, at 78–79.

applied.[146] He posits that collective or communal ownership of copyright should not be problematic because many countries already recognize collective works in their national law. TK protection would be an extension of this notion of collective works, with the rightsholder being the community concerned or the State, when appropriate.[147]

Stephanie Spangler is of the same belief that IPL can be used to protect TK even if the conventional IP system is, in itself, imperfect to protect certain forms of TK. IPL can serve as the legal framework for protection but must be altered to address inconsistencies towards both traditional and nontraditional expressions. Where IPL has gaps in TK protection, customary law must be integrated, specifically in determining definitions of what is protectable subject matter and in whom the IPR vests. However, she also recognizes that not all indigenous work can be protected under IPL, as with non-indigenous cultures. Rather, what should be achieved is a rectification of the imbalance in the fairness of how IPL protects non-indigenous and indigenous works.[148]

Elizabeth Lenjo, while agreeing with the same conclusion, is of the perspective that TK is inherently part of the public domain. Once indigenous communities abandon their TK, either in order to Westernize or as a result of natural processes, this should be considered as belonging to the public domain. When information about a culture, such as their lifestyle, is recorded and broadcasted, this becomes public knowledge and becomes publicly available. It may be hard to control what people do with this knowledge in the public expressions, but existing IP regimes may be used as a mechanism for control.[149]

The WIPO Intergovernmental Committee (IGC) on TK has recognized that traditional IP protections may apply to TK provided that the following guide points are observed:

> (1) It should be distinctively associated or linked with the cultural, social identity, and/or cultural heritage of (a) Peoples; or (b) any other national entity defined by national law;

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[146] Gervais, *supra* note 31, at 409–10.

[147] *Id.* at 414.

[148] Spangler, *supra note* 131, at 711–12.

[149] Elizabeth Lenjo, *Inspiration Versus Exploitation: Traditional Cultural Expressions at the Hem of the Fashion Industry*, 21 MARQ. INTELL. PROP. L. REV. 139, 149–50 (2017).

(2) It should be generated, maintained, shared, or transmitted in a collective context;
(3) It should be intergenerational or passed on from generation to generation; and
(4) It should have been used for a term not less than fifty years, as may be determined by each Member State.[150]

B. The Necessity of *Sui Generis* Legislation for Traditional Knowledge Protection

Numerous scholars have posited that TK can only be partially protected under existing IPR systems and that *sui generis* legislation may be necessary to protect TK.[151] *Sui generis* legislation pertains to the development of regional and national legislation to protect TK.[152] Aside from legislation, it may also pertain to the development of new international norms which also seek to fill gaps in the conventional IP system. These are common in the development of IP and have been used to deal with protections on integrated circuits, plant breeders' rights, and geographical indications.[153]

Several countries have passed *sui generis* legislation in order to protect TK rights. For example, the New Zealand Trade Marks Act provides protection through the Māori Trade Marks Advisory Committee, which recommends to the Commissioner whether a proposed trademark application appears to be derivative of a Māori Sign or is likely to be offensive to Māori.[154] Meanwhile, Panama passed a *sui generis* Indigenous IP system through Law No. 20. This aimed to address concerns about the misappropriation of the indigenous cloth "mola" which is culturally significant to the Kuna peoples. In order to qualify for protection, an indigenous group must register the IP and comply with the requirements of originality, authenticity to the indigenous group, and commercial viability of the subject matter.[155]

Weatherall is of the position that *sui generis* legislation must consider what justifications resulting from communal interests and concerns would

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[150] WIPO IGC, The Protection of Traditional Knowledge: Draft Articles, WIPO/GRTKF/IC/28/5 (June 2, 2014), *cited in* Go & Consignado, *supra* note 9, at 998.

[151] OseiTutu, *supra* note 32, at 153–54.

[152] Forsyth, *supra* note 16, at 6.

[153] Purcell Filipo Siaki Sali, *Protecting Traditional Knowledge: An Analysis of the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture*, 51 VICTORIA U. WELLINGTON L. REV. 559, 563 (2020).

[154] Pak, *supra* note 15, at 387.

[155] *Id.* at 389–90.

necessitate a regime that would control the use and derive profit from the exploitation of the TK. She argues that control over TK is essential in order to maintain the cultural and spiritual integrity of an indigenous community, and this sufficiently justifies granting control over TK to the community.[156] Protection of TK through *sui generis* law is required in order to respect customary law, specifically the means it allocates control over TK. If the aim of the law is to support the community's culture, then it is imperative that the community's rules are followed in determining authorized uses of the TK. Following customary rules also provides guiding principles for framing legal protection as any departure from customary rules must be justified. Controlling the use of TK also enables the community to prevent inappropriate commercialization and derive economic benefit for the community.[157]

OseiTutu, however, is of the opinion that a *sui generis* regime may be difficult to achieve due to two main difficulties presented by TK. First, because of the absence of a clear consensus regarding the meaning of "indigenous," it may be difficult to define the scope of the application of the *sui generis* right. Second, *sui generis* legislation would not rectify the inequities caused by the current IPR system because it addresses the problem by expanding the current IP system rather than correcting the flaws of the system.[158]

Lastly, several scholars posit the necessity of a pluralist approach in developing *sui generis* legislation. Torsen argues that because the Western IPR model may be insufficient to account for all differences among the indigenous communities' needs, understandings, and desires for TK protection, a body of law or a declaration, instead of a single legislation that attempts to encapsulate all of these differences, should be developed.[159] Similar to Torsen's plurality approach, Purcell Filipo Siaki Sali, building on Miranda Forsyth's pluralist approach, argues that taking a pluralist approach to understanding TK protection would require a bottom-up process where there are consultations with customary leaders and the community prior to the implementation of *sui generis* legislation. The state should act as a facilitator and adviser, rather than as a primary regulator, in developing TK protections. It should also provide customary leaders from indigenous communities with a platform to discuss their competing aims of

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[156] Weatherall, *supra* note 43, at 222–23.
[157] *Id.* at 225–26.
[158] OseiTutu, *supra* note 32, at 155.
[159] Torsen, *supra* note 128, at 178.

commercialization and conservation and to develop mechanisms that would allow the mediation between these demands while maintaining key cultural principles.[160]

However, it should be noted that, in her analysis, Forsyth notes that the development of *sui generis* legislation alongside the implementation of other TK protection strategies such as the development of cultural industries and the implementation of the Intangible Cultural Heritage Convention would severely hamper the implementation of the latter two initiatives as it would prioritize the interest of a narrower group of individuals over national public interest. In implementing these three strategies, there are potential tensions between the interests of the nation as a whole and various local groups holding TK. While these three developments proceed assuming that they are mutually compatible, their objectives, beneficiaries, and determination of who controls TK are all different. Hence, in the development of *sui generis* legislation, legislators must be aware that they may already be entering a contested regulatory space and the legislation to be introduced may affect an already prevailing balance of power in the regulatory space.[161]

IV. CONTEXTUALIZING THE PHILIPPINE LEGAL REGIME: INTELLECTUAL PROPERTY LAW VIS-À-VIS THE PHILIPPINES' *SUI GENERIS* SYSTEM

> *While the Philippines has adopted some* sui generis *legislation to protect traditional knowledge and genetic resources (e.g. the [IPRA] and the Traditional and Alternative Medicines Act [. . .]), and regulations were issued to require the disclosure of GRs, TK and TCEs and their origin, in applications for IP protection including evidence of prior informed consent and benefit-sharing scheme, additional efforts need to be in place to enhance the protection of GRs, TK, and TCEs, taking into account the cultural and community sensitivities, and*

[160] Sali, *supra* note 154, at 591–92.

[161] Forsyth, *supra* note 16, at 21–23.

> *other issues involved regarding their use and protection.*
>
> —National Intellectual Property Strategy (2020–2025)[162]

A. Intellectual Property Laws in the Philippines Relating to the Digital Economy

The IP system in the Philippines finds its roots in the 19th century through the introduction of IP decrees by the Spanish. The country's present primary source of IPL, the Intellectual Property Code ("IPC") was introduced in 1997 as a means for the country to fulfill its obligations under the TRIPS Agreement. The IPC includes protections on patents, copyright, and trademarks. Aside from this, other laws specific to the needs of the digital economy were also introduced in the country to further complement the protections granted under the IPC, such as the Optical Media Act and the E-Commerce Act.[163]

The Optical Media Act addresses gaps in IP protection for optical media. Relevant provisions of this act which protect IP relate to licensing requirements and the inclusion of new penal provisions. First, under this Act, persons, establishments, or entities engaging in businesses or activities relating to the sale, manufacture, or distribution of optical media or parts and accessories used in its mastering, manufacture, or replication are required to obtain licenses from the Optical Media Board (OMB).[164] Applicants who have been convicted by final judgment of an offense relating to the protection of IPR or applicants in whose place of business a violation of any law protecting IPR was committed, with the offenders having been convicted by final judgment, may be denied a license or a renewal of their license.[165] Conviction of an offense which violates any law protecting IPR is also a ground for the suspension or cancellation of a license.[166] Second, this Act penalizes the following acts: (1) manufacture or replication of any IP in optical media intended for commercial profit or pecuniary gain without the authority or consent of its owner, and (2) knowingly performing or rendering

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[162] Intellectual Prop. Off. of the Phil. (IPOPHL), The National Intellectual Property Strategy (2020–2025) 18 (Dec. 10, 2019), *at* https://drive.google.com/file/d/1R3zwex1ccuadq4YRYMCDV_xpBPXtAkZc/view.

[163] Andrew Jaynes, *Why Intellectual Property Rights Infringement Remains Entrenched in the Philippines*, 21 PACE INT'L L. REV. 55, 60 (2009).

[164] Rep. Act No. 9239 (2004), § 13. Optical Media Act of 2003.

[165] § 15.

[166] § 16.

the service of mastering, manufacture or replication of optical media, after having been licensed by the OMB, to any person, in respect of any IP, who does not have the consent by the owner of the IP or his representatives or assigns.[167]

Meanwhile, the E-Commerce Act includes additional liabilities for Internet piracy:

> Section 33. Penalties. – The following Acts shall be penalized by fine and/or imprisonment, as follows:
>
> * * *
>
> b)(33) Piracy or the unauthorized copying, reproduction, dissemination, distribution, importation, use, removal, alteration, substitution, modification, storage, uploading, downloading, communication, making available to the public, or broadcasting of protected material, electronic signature or copyrighted works including legally protected sound recordings or phonograms or information material on protected works, through the use of telecommunication networks, such as, but not limited to, the internet, in a manner that infringes intellectual property rights shall be punished by a minimum fine of One hundred thousand pesos (P100,000.00) and a maximum commensurate to the damage incurred and a mandatory imprisonment of six (6) months to three (3) years[.][168]

The National Intellectual Property Strategy of the Philippines (2020-2025) recognizes the fundamental changes resulting from technological advancements in the digital environment and the challenges they pose on IP enforcement. The IPOPHL also notes that responding to these threats requires a paradigm shift in the legislative IPR framework and may require updating the IPC in order to cope with these technological advancements.[169]

B. Indigenous Peoples Rights Act and Related Administrative Issuances

The right of indigenous peoples to own their ancestral domains and the resources found therein is recognized under the IPRA. Aside from

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[167] § 19.

[168] Rep. Act No. 8792 (2000), § 33. Electronic Commerce Act of 2000.

[169] IPOPHL, The National Intellectual Property Strategy (2020–2025), at 17 (Dec. 10, 2019), *at* https://www.ipophil.gov.ph/national-intellectual-property-strategy-nips/.

ownership, the law also confers onto these communities the right to develop their lands and natural resources, the right to stay in their territory, the right to regulate the entry of migrant settlers into their domain, and the right to claim parts of reservations part of their ancestral domains, among others.[170] Plans to develop their ancestral domains should be based on their indigenous knowledge systems and practices ("IKSPs") and the principle of self-determination.[171]

The IPRA also recognizes the right of indigenous communities to maintain their cultural integrity.[172] As part of this right,[173] three provisions in the IPRA specifically deal with indigenous peoples' TK. These pertain to the exclusive use, control, and ownership of their IP, and restitution in cases where their IP is taken without their FPIC and in violation of their laws, tradition, and customs:

> Section 32. *Community Intellectual Rights.* – ICCs/IPs have the right to practice and revitalize their own cultural traditions and customs. The State shall preserve, protect and develop the past, present and future manifestations of their cultures as well as the right to the restitution of cultural, intellectual, religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions and customs.
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> * * *
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> Section. 34. *Right to Indigenous Knowledge Systems and Practices and to Develop own Sciences and Technologies.* – ICCs/IPs are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights. They shall have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of fauna and flora, oral traditions, literature, designs, and visual and performing arts.

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[170] Rep. Act No. 8371 (1997), § 7.
[171] Rep. Act No. 8371 Rules & Regs. (1998), Rule VIII, Part II, § 1.
[172] Rule VI, § 1.
[173] Rule VI, § 3.

> Section 35. *Access to Biological and Genetic Resources.* – Access to biological and genetic resources and to indigenous knowledge related to the conservation, utilization and enhancement of these resources, shall be allowed within ancestral lands and domains of the ICCs/IPs only with a free and prior informed consent of such communities, obtained in accordance with customary laws of the concerned community.

A salient feature of these provisions is the requirement of FPIC, which the IPRA IRR defines as:

> [T]he 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 obtained after fully disclosing the intent and scope of an activity, in a language and process understandable to the community.[174]

The IPRA IRR expounds on the operability of these provisions. It provides that indigenous communities have the right to own, control, develop, and protect the following:

> a) The past, present and future manifestations of their cultures, such as but not limited to, archeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature as well as religious and spiritual properties;
> b) Science and Technology including, but not limited to, human and other genetic resources, seeds, medicines, health practices, vital medicinal plants, animals, minerals, indigenous knowledge systems and practices, resource management systems, agricultural technologies, knowledge of the properties of flora and fauna, and scientific discoveries; and
> c) Language, Music, Dances, Script, Histories, Oral Traditions, Conflict Resolution Mechanisms, Peace Building Processes, Life Philosophy and Perspectives and Teaching and Learning Systems.[175]

The IPRA has also laid out guidelines for the protection and promotion of IKSPs, manifestations of indigenous culture, and their

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[174] Rule II, § 1(k). For more information on the Guidelines on the Exercise of Free and Prior Informed Consent ("FPIC") and its related processes, *see* NCIP Adm. Order No. 3-12 (2012). This provides guidelines on the exercise of FPIC.

[175] Rule VI, § 10.

biological and genetic resources.[176] Unlike the latter two provisions, the provision on the protection of IKSPs provides for a specific set of guidelines that must be adhered to before research on indigenous peoples or their resources could be conducted. This provision also has two unique provisions not observed in the other TK protections. First, indigenous communities are entitled to a copy of the results of the research conducted on their IKSPs. Second, the research must attribute data provided by the community to them and definitively acknowledge them as a source in the paper. On the other hand, the latter two provisions provide general guidelines that have to be observed. These protections have various salient features. First, the FPIC of the indigenous communities is necessary before any use of their TK is allowed under these provisions. It should be noted that a written agreement specifying the terms of engagement of the community and the third party is only explicitly required for research on IKSPs, as the rule provides that the written agreement must specify the purpose, design, and expected outputs of the research. Meanwhile, a certificate of FPIC shall be required in case the indigenous community enters into a joint undertaking with a natural or juridical person for the use of biological and genetic resources for industrial, commercial, pharmaceutical, and other profit-making purposes and ventures. Lastly, for manifestations of indigenous cultures, no form is required for the community to follow in giving their FPIC for the commercialization or use of the indigenous culture for tourism and advertisement purposes. However, when consent is alleged, the NCIP is tasked to ensure that such consent was actually given.

Second, the community is given a wide latitude of control over the use of their TK by third persons. Indigenous communities have the right to regulate the entry of researchers into their ancestral domains. Indigenous peoples' organizations ("IPOs") seeking to research and document their IKSPs shall also receive technical and financial assistance from sources of their own choice in order to ensure effective control over the research. On the other hand, for presentation or performances of indigenous culture, the indigenous community shall have control over the content and manner of presentation of the performance. Furthermore, the IPRA IRR empowers indigenous communities to make an inventory of biological and genetic resources found in their ancestral domain for their exclusive use. They also retain and reserve all rights pertaining to the storage, retrieval, and dissemination of the information resulting from the inventory.

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[176] Rule VI, § 15–17.

Third, users of the TK are required to give forms of monetary compensation to the community in cases where research is conducted and published on their IKSPs or where manifestations of their indigenous cultures are performed. However, it should be noted that no specific provision on monetary compensation is stated under the protection of biological and genetic resources, and that the treatment of the financial compensation received by the community for research on their IKSPs is not specified. However, funds arising from financial compensation resulting from presentations or performances of their indigenous culture shall be managed directly by the community through their registered IPO. If there is none, the money shall be held in trust by the NCIP for the benefit of the community.

Fourth, there is a recognition of the applicability of customary law in the regulation of the use of their TK. Indigenous communities are allowed to control the performance of manifestations of their indigenous culture using their customary laws and traditions. Violations of customary law in the presentations of indigenous culture and in joint undertakings for the use of biological and genetic resources also warrant the application of penalties under customary law.

Aside from these protections, there is also the recognition that any integration of science and technology used in the fields of agriculture, forestry, and medicine into indigenous peoples' practices is subject to their FPIC. These integrative systems must build on existing IKSPs and self-reliant and traditional cooperative systems of the community.[177] The IPRA IRR also recognizes that in making administrative issuances for TK protection, the NCIP is required to consider the principle of first impression first claim, the CBD, the UN Declaration on the Rights of Indigenous Peoples, and the Universal Declaration of Human Rights.[178]

To complement the IPRA and its IRR, three administrative issuances related to TK protection should also be noted: (1) the NCIP-issued "The Indigenous Knowledge Systems and Practices (IKSPs) and Customary Laws (CLs) Research and Documentation Guidelines," (2) the "Rules and Regulations on Intellectual Property Rights Application and Registration Protecting the Indigenous Knowledge Systems and Practices of Indigenous Peoples and Indigenous Cultural Communities" jointly issued by the IPOPHL and NCIP, and (3) the Guidelines for Bioprospecting Activities in

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[177] Rule VI, § 14.

[178] Rule VI, § 10. *See also* Go & Consignado, *supra* note 9, at 1009.

the Philippines issued jointly by the Department of Environment and Natural Resources (DENR), Department of Agriculture (DA), Palawan Council for Sustainable Development (PCSD), and NCIP.

NCIP Administrative Order No. 1-12 ("AO No. 1-12"), otherwise known as the "Indigenous Knowledge Systems and Practices (IKSPs) and Customary Laws (CLs) Research and Documentation Guidelines of 2012," lists the requirements and proper process for conducting research in an indigenous community. The guidelines cover research solicited or initiated by the community; academic research; research in aid of policy; research conducted for understanding the social contexts of indigenous communities; and research necessary to implement the NCIP's mandates,[179] subject to certain exceptions.[180] The indigenous community's participation is required in the following steps of the research process: First, the indigenous community must be consulted in the preparation of the work and financial plan of the research.[181]

Second, the IKSP Team, which is formed to facilitate the proceedings outlined under these Rules,[182] is tasked to schedule a conference between the indigenous community and the applicant wherein the applicant presents the purpose of the research, its parameters, methodologies, materials, costs and source of funding, other related information, data gathering tools, and research work plan to the community. The researcher must also inform the community of the benefits that they may be able to get from the research activity.[183] After this conference, the community is given a period not more than 30 days to express their consent or denial to the research application, and the grounds thereof. If they accept the proposal, they are required to identify the following matters during the decision-making process: (1) the selected key informant/s; (2) the extent of the information that may be disclosed to the researcher; (3) possible restrictions and terms and conditions that the community deems appropriate; and (4) the authorized signatory to the memorandum of agreement.[184]

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[179] Nat'l Comm'n on Indigenous Peoples (NCIP) Adm. Order No. 1-12 (2012), § 7. This provides guidelines on Indigenous Knowledge Systems and Practices ("IKSPs") and Customary Laws ("CLs") research and documentation.

[180] *See* § 8, 11.

[181] § 8.6.

[182] § 8.4.

[183] § 8.7.

[184] § 8.8.

Third, a Memorandum of Agreement ("MOA") is prepared and negotiated by the parties. The terms and conditions of the MOA must be in the primary language or dialect spoken and understood by the indigenous communities and translated into English or Filipino.[185] Key inclusions in the MOA are: (1) the rights and responsibilities of the parties; (2) the extent of the information that may be disclosed to the researcher; (3) terms and conditions that the community deems appropriate; (4) the benefits to be received by the community; and (5) dispute resolution mechanisms and sanctions for non-compliance with the agreement.[186] Note that the principle of primacy of customary laws applies in cases of dispute. It is mandatory that the dispute is referred to the Council of Elders/Leaders. It is only when the dispute is unresolved that parties can resort to proceedings before the NCIP.[187]

Fourth, within ten days from completing the research, the researcher is required to present the output to the community for validation. A resolution is then issued by the community indicating their general impression on the genuineness of the output and compliance with the MOA and research process.[188] The community shall also issue a certificate of validation, which states that the researcher presented his/her output to the community and the community is fully satisfied with its content, extent, and manner of presenting information.[189] As a requirement for publication and the issuance of a certificate of validation, the researcher must provide a translation of his major findings and recommendations, and pertinent research documentation to the community. The community has the right to comment and/or correct factual data.[190]

Aside from their involvement in the research process, the guidelines also give the indigenous community the following benefits: First, the community has the sole and exclusive right to determine the extent, content or manner of presenting information to be published if the research output pertains to their religious, cultural beliefs, ceremonial paraphernalia or sites.[191] Second, the community is entitled to material benefits such as

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[185] § 8.9.
[186] § 8.10.
[187] § 15.
[188] § 8.14.
[189] § 8.15.
[190] § 8.17.
[191] § 8.17.

royalty, user fees, the final research output, and other non-monetary benefits that redound to the community's benefit.[192]

In the case of research conducted by the NCIP, only the requirements on conference and disclosure for community approval and output validation are required.[193] The rules also provide for sanctions in case of failure to comply with the Guidelines[194] and reaffirm the importance of establishing a registry of IKSP and CL to be managed by the NCIP.[195]

Two key developments in TK protection forwarded by AO No. 1-12 are the recognition of IKSPs as *sui generis* and the determination of ownership rights over the research. First, as to the recognition of IKSPs as *sui generis*, AO No. 1-12 acknowledges that IKSPs belong to a class of their own and are considered the collective property of the past, present, and future generations of an indigenous community.[196] The Order also states that the community has ownership of research initiated, solicited, or conducted by them. They also have joint ownership over research conducted by non-members of the community with the research proponent involved. Corollary to this is the enjoyment of joint rights to all works and materials resulting from the research and their inclusion in the copyright of the research or documentation output.[197]

Aside from AO No. 1-12, the IPOPHL and NCIP also issued the JAO No. 1-16, or the "Rules and Regulations on Intellectual Property Rights Application and Registration Protecting the Indigenous Knowledge Systems and Practices of Indigenous Peoples and Indigenous Cultural Communities" in 2016. Its primary aims are to prevent the misappropriation of indigenous knowledge and systems and encourage tradition-based creations and innovations.[198] The rules primarily discuss the examination and registration of IPR application in the IPOPHL which use IKSPs[199] and the creation of a registry for IKSPs.[200] It should be noted, however, that these rules do not apply where public interest so requires, specifically in the fields of health,

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[192] § 8.9.
[193] § 11.
[194] § 16.
[195] § 17.
[196] § 4(c).
[197] § 18.
[198] IPOPHL & NCIP Adm. Order No. 1-16 (2016), Rule 3. This provides rules for the protection of IKSPs and indigenous cultural communities.
[199] Rule 2.
[200] Rule 8.

nutrition, national security, and development of vital sectors in the national economy.[201]

Under these rules, an IPR application filed in the IPOPHL is required to disclose any IKSP used in the subject matter of the application. The application should contain the source or geographical origin of the IKSP and a statement of compliance with the FPIC requirement. If the IPR is not subject to registration, disclosure of the IKSP is required in all communication of the subject matter of the IPR to the public. Aside from these disclosures, the IPOPHL may also, *motu proprio* or after its initial evaluation on a request made by any person, refer the IPR application to the NCIP for purposes of verifying the use or ownership of the IKSP and compliance with the FPIC requirement. The IPOPHL may take such action regardless of the lack of declaration of the use of an IKSP in the IPR application. After referral, the IPOPHL may then determine whether the IPR may be registered. The IPOPHL's judgment to determine the registration of the IPR is without prejudice to the filing of an appropriate case by any party alleging that there was misappropriation of an IKSP. A registration issued in violation of these rules may be cancelled.[202]

JAO No. 1-16 also calls for the creation of a registry of IKSPs which the IPOPHL can use in the examination of IPR applications. This registry shall be created by the NCIP in coordination and collaboration with the National Commission for Culture and the Arts (NCCA) and other government agencies which have existing databases or documentation of IKSPs.[203] In the absence of a formal registry, the Order also authorizes the NCIP or any certifying authority including indigenous peoples recognized or accredited by the NCIP to certify ownership of the IKSP by the indigenous community concerned.[204]

Aside from these two developments, the Order also has the following salient features: First, there is an explicit recognition that individuals or specific families may serve as custodians of IKSPs on behalf of the community, in accordance with their customary law.[205] Second, there is a recognition of collective management of IPR over works in case an author or inventor cannot be identified but an indigenous community is

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[201] Rule 15.
[202] Rule 6.
[203] Rule 8.
[204] Rule 9.
[205] Rule 5(b).

recognized to have created or owned them. This provision applies to both tangible and intangible expressions of IKSPs.[206] Third, IPOPHL and NCIP shall establish appropriate mechanisms to defray the expenses incurred by indigenous peoples in securing certifications of ownership of IKSPs.[207] Lastly, customary laws and systems of dispute resolution practiced by indigenous communities shall be used in resolving disputes between or among them arising out of the implementation of the Order.[208]

Finally, the "Guidelines for Bioprospecting Activities in the Philippines" focus on ensuring that prior informed consent is obtained before bioprospecting activities are conducted and that resource providers get fair and equitable shares of the benefits derived from the utilization of their biological resources.[209]

Section 13 outlines the procedure for how prior informed consent should be obtained from resource providers, like indigenous communities, when bioprospecting occurs in their area. In the case of indigenous communities, the Guidelines are suppletory to the relevant regulations on FPIC under the IPRA.[210]

Meanwhile, the guidelines for benefit-sharing agreements provide for certain financial benefits accruing to the resource provider. First, a minimum of 2% of the total global gross sales of the products made or derived from samples collected from bioprospecting activities shall be paid annually to the national government and resource providers for as long as the product is sold in the market. Seventy-five percent of these royalties shall be payable directly to the resource providers. Second, an annual payment of USD 1,000 per collection site shall be paid to the resource provider for the duration of the collection period, subject to certain exceptions. This payment shall be considered as advances from royalties.[211] These payments are non-reimbursable even if there are no profits realized from the bioprospecting activity.[212] The monetary benefits given to indigenous peoples resulting from these benefit-sharing agreements shall be used consistent with the Ancestral

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[206] Rule 7.

[207] Rule 11.

[208] Rule 14.

[209] Dep't of Env't and Nat. Res. (DENR), Dep't of Agriculture (DA), Palawan Council for Sustainable Dev. (PCSD) & NCIP Adm. Order No. 1-05 (2005), § 1. This provides guidelines for bioprospecting activities in the Philippines.

[210] § 13.4.

[211] § 16.

[212] § 18.

Domain Sustainable Development and Protection Plan ("ADSDPP") prepared in accordance with IPRA. If there is no ADSDPP, the NCIP shall determine the proper disposition of the funds.[213]

Aside from these salient provisions, the Guidelines explicitly state that access to biological resources does not automatically imply access to the TK associated with these resources. If the user wants to access this TK, the user has to state this in his research proposal.[214] Furthermore, the resource user and resource provider may agree on non-monetary benefits as an addition to the minimum financial benefits provided under the Guidelines.[215]

C. Other Laws and Mechanisms for Traditional Knowledge Protection

The Philippine Innovation Act recognizes that, in setting the priority areas for innovation, the National Innovation Council shall consider the issues and challenges involved in potentially innovating TK.[216] Aside from this, the National Cultural Heritage Act, Traditional Alternative Medicines Act, and Philippine Technology Transfer Act contain provisions for TK protection.

The National Cultural Heritage Act of 2009 aims to protect, preserve, conserve and promote the country's cultural heritage, its properties and histories, and the ethnicity of local communities.[217] Cultural property, in this context, refers to both tangible and intangible products of human creativity through which people reveal their identity.[218] Arguably, TK can be considered as cultural property taking on either a tangible or intangible form.[219] However, the Act has a specific provision recognizing that the preservation of indigenous cultural and historical properties should be done by the appropriate cultural agency, in consultation with the NCIP.[220] But, in spite of this distinction of TK from the other cultural properties protected

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[213] § 20.3.

[214] § 10.

[215] § 17.

[216] Rep. Act No. 11293 (2018), § 10. Philippine Innovation Act.

[217] Rep. Act No. 10066 (2009), § 2. National Cultural Heritage Act of 2009.

[218] § 3(o).

[219] *See* § 3(x) for the definition of "intangible cultural heritage," § 3(y) for the definition of "intangible cultural property," and § 3(ii) for the definition of "tangible cultural property."

[220] § 21.

under the Act,[221] its provisions and mechanisms may be expanded or adapted in order to be used for TK protection. This will be discussed further in the sixth section of this paper.

Meanwhile, the Traditional and Alternative Medicines Act aims to improve the quality and delivery of health care services in the country through developing traditional and alternative health care and integrating it into the national health care delivery system. It also aims to create a legally workable basis by which indigenous societies could own their knowledge of traditional medicine so that when their TK is used by outsiders, the community can require permitted users to acknowledge their source and demand financial compensation for the TK's authorized commercial use.[222] Under the Act, the Philippine Institute of Traditional and Alternative Health Care is tasked with implementing a research program on indigenous Philippine traditional health care practices.[223]

Lastly, the Philippine Technology Transfer Act promotes research and development funded by the government and the facilitation of the transfer, dissemination, and effective use, management, and commercialization of IP, technology, and knowledge resulting from such research efforts.[224] Under this Act, research and development institutions are required to notify government funding agencies of IPR applications, licenses, and assignments made and are required to disclose any biodiversity and genetic resource, TK, and IKSPs used in their IP applications.[225]

Aside from these legal frameworks, there have also been efforts to protect indigenous expressions through alternative mechanisms. The National Commission for Culture and the Arts is mandated to extend recognition of artistic achievement through awards, grants, and services to artists and cultural groups which have significant contributions to the

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[221] It should be noted that under the Implementing Rules and Regulations of Republic Act No. 10066, § 14(c), the National Commission for Culture and the Arts (NCCA) shall monitor and administer the protection of intangible cultural property. However, the NCCA's written permit is not required when recordings of indigenous design are taken out of the country.

[222] Rep. Act No. 8423 (1997), § 2. Traditional and Alternative Medicines Act (TAMA) of 1997.

[223] § 12.

[224] Rep. Act No. 10055 (2009), § 3. Philippine Technology Transfer Act of 2009.

[225] § 8(c).

country's cultural legacy.[226] Specific to members of the indigenous community, the Philippine government confers awards to outstanding traditional folk artists through the *Gawad sa Manlilikha ng Bayan* enacted under Republic Act No. 7355 in 1992.[227] The award aims to honor and support traditional folk artists for their contribution to the national heritage and to acknowledge their cultural value. It also aims to revitalize a community's artistic tradition by encouraging folk artists to cultivate and preserve their culture to be transmitted to future generations.[228] To be eligible for the award, the Presidential Commission on Culture and Arts not only looks at the artist's individual skill and talent, but also considers the artist's work or willingness to work to teach his skill to other community members. The longevity that the folk art tradition has been in existence and documented is also a factor for consideration.[229] Aside from the recognition, the awardee is also given financial incentives, like a lump sum and a lifetime pension. The community also benefits from the award as the folk practice would be documented and catalogued, as well as commemorated in a provincial museum or the largest cultural center. There may also be an opportunity to convert the awardee's art into a specialized cottage industry in the awardee's province.[230]

D. Proposals for Traditional Knowledge Protection in the Philippines

Several proposals have also been lodged in Congress to improve present TK protections. This section briefly discusses some of these proposals.

First, the Community Intellectual Rights Protection Act aims to formally recognize community ownership over TK.[231] It also recognizes community ownership of IP, which is not only limited to indigenous peoples, but covers any group of people in a geographically defined area with common history and definitive patterns of relationship.[232] This IP shall be

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[226] Rep. Act No. 7356 (1992), § 12(a)(4). Law Creating the National Commission for Culture and the Arts.

[227] Maricris Jan Tobias, *Copyright Protection of Indigenous Expressions*, 73 PHIL. L.J. 831, 835 (1999).

[228] Rep. Act No. 7355 (1992), § 2. Manlilikha ng Bayan Act.

[229] § 4.

[230] § 5.

[231] S. No. 35, 12th Cong., 1st Sess., § 2(c) (2004). Community Intellectual Rights Protection Act.

[232] § 5.

held by the community at all times and in all perpetuity.[233] As owners of the IP, the community is entitled to collect a percentage from profits derived from the commercial use of their knowledge for a ten-year period starting from the date of registration. Benefits shall be given directly to the organization representing the community's interests. When there is no such organization, the State shall hold it in trust and will be released only by legislation enacted in the community's favor.[234] No action was taken on this proposal in the Thirteenth Congress.

Second, the Traditional Property Rights of Indigenous Peoples Act was proposed in order to protect the traditional cultural heritage of the indigenous peoples, whether tangible or intangible.[235] This proposal has the following salient provisions: First, TK shall not lapse into the public domain, but shall be held in perpetuity by the community and shall be considered as their IP.[236] This right is held by the community even if traditions change in continuum.[237] However, the rights of the community to the traditional item will lapse into the public domain in 50 years if after this period, it is no longer in production or used in cultural context within the society.[238] The community is likewise entitled to compensation for the use of their work.[239] They may also designate a society with legal personality to act in their behalf to enforce their economic and moral rights.[240]

Local government units ("LGUs") are also mandated to organize inventories of cultural properties that are distinctive, characteristic of, or derived from their particular traditional culture. These inventories will then be submitted to the NCCA in order to establish communal ownership over them and for these cultural properties to be registered under the indigenous community's name for protection under existing copyright law. This registry shall then be incorporated in the Philippine Registry of Cultural Property administered by the NCCA. [241]

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[233] § 4.

[234] § 5.

[235] H. No. 7811, 18th Cong., 2nd Sess., § 2 (2020). Traditional Property Rights of Indigenous Peoples Act.

[236] § 5.

[237] § 7.

[238] § 9.

[239] § 15.

[240] § 14.

[241] § 5.

The proposal also provides that derivative work resulting from the infusion of personal or individual variations on a traditional object must contain a substantial amount of new material or must be different enough from the original in order to be considered a new work. The new work must be original and copyrightable in itself in order for it to be considered new for the purposes of copyright.[242] Moral rights resulting from these newly created items should be registered with the NCCA in order for these to be protected.[243] As of writing, this House Bill is pending with the Committee on Indigenous Cultural Communities and Indigenous Peoples.

Finally, the Philippine Genetic Resources Access and Benefit-Sharing Act ensures the country's conformity to the Nagoya Protocol through changes in policy areas relating to access to genetic resources and compliance mechanisms.[244] Specific guidelines for the use of IKSPs and TK are outlined as follows: First, customary laws apply in matters relating to access and benefit-sharing from the use of IKSPs and TK associated with genetic resources. Second, mechanisms that inform users of their obligations relating to the use of IKSPs and TK should be created with the effective participation of indigenous communities. Third, mechanisms that enable the indigenous communities to develop their own community protocols, minimum requirements for mutually agreed terms, and model contract clauses should be established. Lastly, the customary use of IKSPs and TK shall be respected. However, this principle will not be recognized if it is asserted by non-indigenous and local communities.[245] In cases where the FPIC of the community is not secured, there shall be a voluntary benefit-sharing mechanism and researchers must also provide a minimum level of benefits from those that may be derived from the use of IKSPs and TK to the community.[246] As of writing, this Bill had been approved by the House of Representatives and transmitted to the Senate.

E. Challenges to Harmonizing and Implementing the Intellectual Property Code and Indigenous Peoples Rights Act in the Philippine Context

At the onset, it should be recognized that legal pluralism exists when discussing an issue as complex as the protection of TK. This involves the

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[242] § 8.

[243] § 12.

[244] H. No. 9143, 18th Cong., 3rd Sess., § 5 (2021). Philippine Genetic Resources Access and Benefit-Sharing Act.

[245] § 12.

[246] § 13.

interaction of customary, national, and international laws dealing with the same subject matter. However, because of the existence of legal pluralism, the law adhered to depends on the choice of the socio-legal entity that must follow it.[247]

It is argued that the framework for IPL and TK protection must be viewed as separate mechanisms despite their overlapping areas of concern. At present, TK is considered as similar to IPRs. Hence, when TK fails to meet the standard of protection under IPL, it will not be secure and is open for public appropriation. This illustrates the incompatibility of the philosophical foundations between these two regimes.[248] Moreover, the IPRA's IRR also omits the mention of any IP convention in enumerating the international principles, conventions, and declarations which the NCIP must consider in imposing the effective mechanisms for protecting indigenous peoples' community IPR—mentioning specifically the principle of first impression claim, the CBD, the Universal Declaration of Indigenous People's Rights, and the Universal Declaration of Human Rights.[249] Thus, it can be argued that the omission indicates that the rights conferred to indigenous peoples under the IPRA are not meant to be governed by the rules of the IPC.[250] The impact of this characterization greatly prejudices indigenous communities considering the international recognition accorded to IPR because of the TRIPS Agreement.[251]

This observation is supported by an assessment of the structure and nature of the country's IP regime. The Philippine IP regime emphasizes individualism—rewarding individual inventors and ensuring the protection of their rights—and statism, believing that IPR systems must serve state interest.[252] Article XIV, Section 13 of the 1987 Constitution, which is the basis of the country's IPL, clearly emphasizes these facets. This structure is not only observed in the Philippines, but is found in a wider range of Asian IPR laws. Antonio La Viña posits that using IPR laws to protect indigenous peoples' rights to their TK will be very limited because these regimes were

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[247] Mayo Buenafe, *The Legal Pluralism Phenomenon: Emerging Issues on Protecting and Preserving the Sacred Ifugao Bulul*, 26 NEB. ANTHROPOL. 159, 1 (2011), 130.

[248] Go & Consignado, *supra* note 9, at 1001–02. *See also* Vanguardia, *supra* note 2.

[249] Rep. Act No. 8371 Rules & Regs. (1998), § 10(a). *See* Vanguardia, *supra* note 2, at 426.

[250] Vanguardia, *supra* note 2, at 426.

[251] *Id.* at 422.

[252] Antonio La Viña & Mylin Sapiera, *Traditional Knowledge: Challenge to Intellectual Property Rights*, 70 PHIL. L.J. 140 (1995), 159–160.

not conceived to recognize their intellectual contributions.[253] While Asian IPR systems are largely patterned after Western IPR systems, a notable difference between them is the treatment of national interest. In Asia, IPR regimes emphasize national and state interests because of the belief that these systems must serve national interests. IPR is excluded or restricted when there are fundamental national interests involved. In many cases, national interests are linked to interests of economic classes and may not be similar to the interest of communities. Historically, national and local community interests are contradictory, hence, the limited applicability of IPR laws to the TK of indigenous peoples.[254] For IPR laws to apply to indigenous peoples, they must be willing to conform to the market and commercial premises of the system which may require them to set aside facets of their culture or ethics.[255]

Applying the standards of IPR used in the Philippines onto indigenous knowledge also shows the incompatibility of these regimes in their entirety.[256] This will be further discussed below, again, with the caveat that some authors argue that TK and TCEs can be subject to IPR, provided that they are able to fulfill the requirements for protection under the IPC. But this is not without its own challenges. The protection also only extends to the tangible product of the TK, and not to the idea itself. [257]

For instance, Vicente Paolo Yu argues that the closest type of IPR instrument which can be applied to indigenous knowledge on natural resource use and management would be patent law. The elements of patentability are novelty, utility, and non-obviousness. However, indigenous knowledge does not fulfill these requirements. It is not new in the sense intended by the law because it is knowledge that has been handed down and passed orally, in practice, or in written form for generations. In this sense, it is knowledge that was known or used by others in the Philippines before it was invented by the inventor. But, even if a member of the community is able to obtain a patent for a communal practice through improving upon it, it cannot be designated or assigned to the community because patents can only be assigned to natural or juridical persons. This would require the community to acquire a juridical personality. If they do not, the patent right still retains its nature as a private right and cannot be converted into a

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[253] La Viña, *supra* note 4, at 240.

[254] *Id.* at 235–36.

[255] *Id.* at 248.

[256] *See also* Vanguardia, *supra* note 2, for a detailed discussion of the incompatibility of TK protection with copyright, patent, and trademark law.

[257] *See* Go & Consignado, *supra* note 9; Dee, *supra* note 130.

communal right.[258] The IPC also requires all patentable inventions to be industrially applicable, which may not be applied to all TK since not all of them may be technical solutions to a problem in any field of human activity.[259]

Meanwhile, the application of copyright law on folklore poses issues on authorship, originality, and period of protection. First, artistic work must be attributable to a distinct author as required under Section 178 of the IPC. Indigenous artworks are authored by a group and are a result of their collective efforts. A single author cannot be identified because the work is a result of years of intergenerational traditions. Because of this, it is also a challenge to determine who in the community has the right to assign the copyright. Applying Section 171.2 of the IPC on collective work also may not be sufficient as it may not be possible to quantify the interests of each community member as co-owners of the work in the object as the artwork evolved from a way of life. Second, the requirement of originality may be difficult to meet considering that the focus of legal protections of indigenous knowledge is on faithful reproduction, not innovation. Moreover, these customs and traditions may already be considered to be within the public domain. Thus, a community member who creates original work but draws upon his customs and traditions would only have protection for the variation he introduced onto the work. On the other hand, a non-community member's variation or reinterpretation of the tradition may be protected, to the exclusion of the indigenous community. Lastly, copyrights follow a general lifetime plus a 50-year limit for their protection. This poses issues on the retroactivity of the protection—as the work may be part of the public domain due to the passage of the period for protection—as well as the prospective protections of the work, as a community may exist longer than the period of protection granted under copyright law.[260] Apart from these issues, copyright extends to the expression of an idea, not to the idea itself. Therefore, even if TK were to be copyrighted, unauthorized use of ideas or knowledge contained in an expression would not give indigenous peoples a cause of action for infringement.[261]

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[258] Yu, *supra* note 5, at 53–55.

[259] Go & Consignado, *supra* note 9, at 1017.

[260] Tobias, *supra* note 228, at 840–45. *See also* Patricia Ruth Peña, *Recognition and Protection of Traditional Cultural Expression: A Brief Overview of the International and Domestic Legal Regime*, 60 ATENEO L.J. 1030 (2016).

[261] Go & Consignado, *supra* note 9, at 1018.

Lastly, the law on trademarks, names, and secrets would also be inadequate to protect TK because these only apply for the protection of the commercial goodwill of a person or enterprise. The general view is that TK is sacred and outside the commerce of man, and thus, is not intended to be used commercially.[262] However, Maria Ester Vanguardia notes that the provision on collective and certification marks may have promising applications in the protection of TK. Since marks are used and owned by all group members, it benefits the community as a whole. Products of community members are then expected to meet a certain standard or set of requirements determined by the community. This mark is also recognized in international markets. Under the Paris Convention, collective marks are allowed to be registered and protected in countries other than the country where the association owning the collective mark is established. Registration in these countries cannot be denied solely for the reason that the association is not established in that country in accordance with its laws.[263]

However, even this suggestion poses its own problems. Section 123.1(j) of the IPC requires that a mark consists exclusively of signs or of indications that can designate the geographical origin of the goods or services being marked. Distinguishing goods produced from TK from other goods produced in the area can be done by using geographic indicators. However, this requires that the characteristics of the good are attributable exclusively to a particular geographic location. This may be problematic since TK is attributable to intergenerational knowledge of the community, and not necessarily to its geographic origin. Instead, Vanguardia proposes the use of National Certification Trademarks, or "label[s] of authenticity" which can be used to promote the indigenous peoples' cultural arts and products and protect them from fraudulent reproduction. However, there is no legislation providing for this at present.[264]

Moreover, the country's IPR framework also fails to consider customary law of indigenous peoples.[265] Before discussing this argument, it is important to note, however, that in the WIPO study on National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions, the Philippines' legislation was lauded for placing importance on customary laws as a determinant factor for the management and protection of the rights conferred under the IPRA. The study also notes

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[262] *Id.*

[263] Vanguardia, *supra* note 2, at 439–40.

[264] *Id.* at 440–41.

[265] *See Id.* at 471.

that there was national recognition that each indigenous community is an entity in and of itself and domestic law provides gaps for protection under customary law.[266] This observation, while upheld in the entirety of the IPRA, may have limited application in terms of protection of TK systems, as illustrated in the discussion of the IPRA IRR provisions above.

To elucidate, the 1987 Constitution expressly specifies that the application of indigenous peoples' customary laws in governing their property rights is in relation to the determination of the ownership and extent of their ancestral domain.[267] But it is silent on the applicability of customary laws in governing indigenous peoples' knowledge systems and expressions of culture, only recognizing the necessity of preserving and developing their cultures, traditions, and institutions.[268] The IPRA attempts to fill this gap by specifying the applicability of customary laws in relation to IP in two situations: (1) in cases of restitution, when IP is taken in violation of the indigenous peoples' laws, traditions, and customs[269]; and (2) in obtaining the FPIC of indigenous peoples in accessing their biological and genetic resources and indigenous knowledge within their ancestral lands and domains.[270]

The segmented application of customary law becomes an issue when considering that indigenous peoples' culture has an inseparable relationship with their land. The protection of their knowledge systems is necessarily connected to the territorial integrity of their ancestral domain because these are interlinked concepts in their way of life.[271] The manner by which indigenous peoples understand TK may not be compatible with the objectives of the IPC. Because TK is part of an indigenous community's identity, it may not always be consistent with commercialization and information dissemination.[272]

To elaborate, understanding IPR as viewed by indigenous peoples involves appreciating two concepts which are interrelated in their worldview: property and knowledge. Ancestral domain is commonly defined to extend to the land and other natural resources that may be found in, on, and below

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[266] Torsen, *supra* note 128, 179–80.

[267] *See* CONST. art. XII, § 5.

[268] *See* CONST. art. XIV, § 17.

[269] *See* Rep. Act No. 8371 (1997), § 32.

[270] *See* § 34.

[271] *See* Yu, *supra* note 5. *See also* La Viña & Sapiera, *supra* note 253; La Viña, *supra* note 4.

[272] Peña, *supra* note 261, at 1036.

such land. Because of the centrality of land to their economic, political, and social systems, land ownership and resource management are important in understanding indigenous knowledge systems as these are derived from the interaction of natural forces and people's livelihood.[273]

For example, it is posited that indigenous artists' creativity in their cultural expressions is derived from nature and is mostly believed to be given by nature to them as a gift.[274] This is commonly observed in weaving, which is considered as a spiritual, symbolic, and sacred form of cultural expression used to pass on and share historical and religious beliefs.[275] For the Ifugaos, their cultural expression is a reflection of their daily lives in the mountains.[276] They create the *Ga'mong* using stylized depictions of human figures, snakes, and lizards. This is a death blanket lain over the deceased to aid him in locating and reuniting with his ancestors. For the T'boli people, patterns formed from *t'nalak* weaving come to the weaver in the form of dreams. These patterns are inspired by their environment.[277] Unfinished fabric may not be cut with scissors because of the sacredness of the design so weavers use their teeth to separate the bolt of cloth from the loom.[278] Thus, the protection of indigenous land has an indirect effect on the preservation of indigenous culture.

On the other hand, the general view of indigenous peoples is that knowledge is something that cannot be owned and is to be freely shared. However, this does not mean that certain rights do not attach to knowledge. Indigenous knowledge is classified into different categories. The rights of community members or non-community members to share and use this particular knowledge depend on its classification. Knowledge of the shaman or religious and political leaders may be restricted to those persons fulfilling these roles.[279] Knowledge on traditional weaving is also only shared within the indigenous peoples' culture, sometimes only with certain community members, because of the importance of the knowledge to their cultural identity. This knowledge is also guarded against outsiders.[280] Meanwhile,

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[273] Yu, *supra* note 5, at 41.

[274] Vanguardia, *supra* note 2.

[275] Dee, *supra* note 130, at 1375.

[276] Peña, *supra* note 261, at 1032.

[277] Dee, *supra* note 130, at 1374.

[278] Tobias, *supra* note 228, at 831.

[279] Yu, *supra* note 5, at 44, *citing* La Viña, *Biodiversity, Indigenous Peoples, Traditional Knowledge: Interfaces in Asia*, 11 WORLD BULL. 1, 8 (1995).

[280] Dee, *supra* note 130, at 1381.

information on agriculture such as seed varieties and agricultural practices may be shared more freely.[281]

While there have been attempts to protect TK through various legal mechanisms, Gonzalo Go III and Paolo Miguel Cosignado argue that these are insufficient considering the complexity of TK for three reasons. First, they note that provisions for benefit-sharing arrangements in case of commercial bioprospecting and provisions on control over certain aspects of academic research outputs are provided for. But these protections are still lacking compared to the statutory monopoly granted by IPL that would prevent others from commercially exploiting indigenous peoples' TK. Second, the present FPIC Guidelines only apply to bioprospecting of TK which affects ancestral domains. However, some TK may not necessarily affect or relate to ancestral domains. Lastly, the TK Research and Documentation Guidelines state that the regulation of access to community IP is based on the recognition that communities own certain ancestral domains/lands. These two factors, when taken together, show that FPIC is only required when protecting TK related to ancestral lands and natural resources, but does not extend to intangible matters such as structures, methods, techniques, or processes, or to TK used outside of ancestral lands.[282]

Vanguardia's critique also supports this proposition, noting that because the focus of the IPRA is on community ownership of tangible property, as well as the lack of implementation and actionable provisions regarding community IP, it was necessary to introduce the Community Intellectual Rights Protection Act ("CIRPA") as a separate measure.[283] However, she also notes that the application of customary law may not be sufficient to protect TK because customary law applies only to individuals within the indigenous community. They would not have any relevance to outsiders unless they are embodied within national law. While the IPRA acknowledges the importance of customary law as a determinant factor for managing and protecting the rights granted by it, whether the sanctions imposed by indigenous groups for violations of their rights will be extended to third parties is yet to be seen.[284]

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[281] Yu, *supra* note 5, at 44, *citing* La Viña, *supra* note 280.
[282] Go & Consignado, *supra* note 9, at 1014–16.
[283] Vanguardia, *supra* note 2, at 419.
[284] *Id.* at 421.

Even with the passage of the IPRA, which provides for national-level protections, cultural poachers may not be citizens of the Philippines and may not fall under the coverage of the IPRA. This necessitates the imposition of TK protections at an international level. Unless cross-border legislation is imposed to protect TK, redress for infringement of indigenous peoples' rights would be incomplete.[285]

Compounding the challenge of implementing the relevant provisions on community IP under the IPRA are the larger challenges of implementing IPL in the Philippines. Andrew Jaynes argues that the Philippines has an adequate legislative framework and sufficient regulatory agencies to protect IPR. However, IP infringement in the country still remains a prevalent issue for three reasons. First, it can be attributed to the lack of resources, administrative capacity, and interagency cooperation, which hinders the effectiveness of enforcement policies. Second, there is little deterrence to discourage IP violators under the Philippine legal system due to backlogs and delays in the court system and the failure to ensure penalties. Lastly, IPR is low in the country's list of priorities and there is a culture of acceptance of IPR infringement.[286]

Alternative mechanisms for protecting TK in the country outside the IPRA or the IPC are also not enough to ensure that these rights are protected in the long-term. For instance, the mechanism of awarding the *Gawad sa Manlilikha ng Bayan* is not without its problems. The awardee receives a monthly stipend in order to aid the younger generation in learning the traditional folk art through apprenticeship and training, but the stipend is automatically cancelled when the awardee dies and the recognition granted to the community is withdrawn, even if there are other artists in the community still engaging in the tradition.[287]

V. CASE STUDY: APO WHANG-OD V. NAS DAILY

> *"Across the indigenous world, tribal peoples rarely describe tattooing as an artistic or aesthetic practice because there are no terms for 'art' or 'artist' in the majority of indigenous languages. Instead,*

[285] *Id.*

[286] Jaynes, *supra* note 164, at 103.

[287] Tobias, *supra* note 228, at 842.

> *tattooing is integrated into the social fabric of community and religious life, and typically speaking, it is a cultural, clan, or family-mandated ritual that anchors societal values on the skin for all to see."*
> — Lars Krutak[288]

A. Background on the Kalinga People and the Practice of *Batek*

The Kalinga people live in the Cordilleras in Northern Luzon. They are considered the strong people of the Cordilleras and are one of the only ethnic groups that were never colonized by the Spanish.[289] Due to its relative isolation and headhunting, the community was able to maintain its social and cultural functions for a longer period than other regions in the country.[290]

According to the beliefs of the Kalinga people, no one can claim absolute ownership of land, water, and mineral resources, because only *Apo Kabuniyan,* or the Supreme Deity, can own land. They view themselves as caretakers of divine lands and their concept of land is based on a complex body of customs, traditions, beliefs, and practices.[291] Land is very important to the Kalinga because of their intimate connection with economic, social, and religious values tied to land ownership. The main concern of the Kalinga elders is to ensure the continuity of family and kinship lines. This continuity does not only depend on having generations of descendants, but also depends on the uninterrupted transmission of the common property of the family. So long as the individual has land where he can work, he enjoys the security and social prestige connected with his family or kinship name in the community. Thus, the present members of the community are stewards of the land, keeping them intact for the next generation.[292]

The Kalinga communally own their lands. However, this does not mean that they do not recognize private and individual rights as, for example, specific fields belong to specific clans. Thus, there is a notion of exclusion

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[288] Lars Krutak, *The Cultural Heritage of Tattooing: A Brief History*, 48 TATTOOED SKIN HEALTH 1, 1 (2015).

[289] James Guindangen, *Kalinga Ethnic Identity Awareness*, 4 J. SOC. SCI. HUMAN. RES. 227, 228 (2019).

[290] Martin Soukup et al., *The Aura of Tattoos: The Commodification of Tradition in Buscalan Village, the Philippines*, 49 ASIAN J. SOC. SCI. 153, 156 (2021).

[291] Yu, *supra* note 5, at 40–41.

[292] Maximo Garming, *The Dynamics of Leadership in Kalinga*, 4 AGHAMTAO 26, 30 (1981).

of members outside the community from the enjoyment of property rights. There is even the exclusion of other community members from the enjoyment of property rights reserved exclusively to certain members of the community.[293]

Aside from this, certain knowledge pertaining to traditional healing practices is only reserved for healers or priests in the community. Not all persons are qualified or called to be healers. They are almost entirely a group of women who experience the "call" through signs such as sleeping badly, dreaming, growing thin, and lack of appetite, among others. It is believed that the healing rituals are taught to these priestesses by the gods.[294]

In the Philippines, the general term used for tattooing is *batuk* (or *batok*). But among the Kalinga, the word used is *batek*. The word, like other similar terms for tattooing used by groups found in Northern Luzon, is derived from the sound of the tapping of the stick to the tattoo instrument which pierces the skin. The Kalinga people are known for the symmetrical and elaborate tattoo designs of their *batek*, which is inscribed on their body as the only living testament to the practice observed by the community. *Batek* is characterized by marking, decorating, and designing on a material permanently. It is done through hand-tapped pricking which is performed by the *manbatek*, the tattoo artist in the village. Practices and techniques vary among the communities. For example, the Ilubo initially apply the patterns to the skin using a piece of wood carved with tattoo patterns dipped in ink. The skin is then pierced then the design is filled in through repeated tapping of the stick on a *gisi* or a carabao horn. The *manbatek*'s payment for the tattoo would depend on its location.[295]

Tattooing had already been a common practice among major warrior groups in the Cordillera, such as the Kalinga, in the 16th century. Foreign ethnographers posit that tattooing was done solely in connection with the practice of headhunting. The tattooing and tattoo designs in the Cordilleras are best understood in this context.[296] However, Analyn Ikin Salvador-Amores explains that there are a variety of reasons why the Kalinga tattoo their bodies and discusses the importance of *batek* in different rites tied to milestones or significant moments in an individual's life. For example,

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[293] *See* La Viña & Sapiera, *supra* note 253, at 155.

[294] *See Id.* at 156–57.

[295] Analyn Ikin Salvador-Amores, *Batek: Traditional Tattoos and Identities in Contemporary Kalinga, Northern Luzon Philippines*, 3 HUMANIT. DILIMAN 105, 108–09 (2002).

[296] *Id.* at 110.

women are tattooed with *lin-lingao*[297] before they marry their partners as protection from spirits dwelling in the village, especially after a headhunt. These spirits may take revenge on the warriors who killed them by taking away their children. The *lin-lingao* is meant to confuse the spirits since they would be unable to recognize the person they want to exact revenge on.[298] Meanwhile, men in the community are tattooed on their arms and chest upon reaching the age of maturity to signify their status as a warrior and their total departure from childhood and adolescence.[299]

Batek are deeply ingrained symbols within the Kalinga's specific social hierarchy which also signify different rites of passage. Each transition or change of an individual's body, nature, destiny, or social status is depicted by the *batek* and is tied to rituals which signify the individual's membership and belongingness to the community.[300] The images tattooed on an individual's body refer to particular ideas held by the community. Tattoos of the moon and stars signify direct light in the dark, which is significant as the community holds vigils at night before raiding a village. Images of powerful beasts, esoteric patterns, and religious formulas confer on the body strength and invulnerability. They also signify social standing in the community—more profusely tattooed men are considered as respected elders and fully tattooed women are considered daughters of the affluent.[301] Lastly, tattoos also signify the community's notion of beauty, as men and women are considered more beautiful when their bodies become more tattooed.[302]

In spite of *batek*'s importance to the Kalinga, factors such as migration, education, and religion—which are creating new value systems in the community—are causing the waning of the practice. Aside from this, younger members of the community who live and study in the city refuse to be tattooed in the traditional way because of embarrassment and the fear of being labeled as criminals. Women also fear that they would be exploited when they have tattoos as it attracts unwanted attention from people who want to photograph them. The gradual demise of headhunting practices has also led to fewer members of the younger generation getting tattoos. It is believed that the *batek* is reserved for warriors who participate in

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[297] *Lin-lingao* are x-marks found on the forehead, both sides of the cheeks, and the nose of a married or pregnant woman. *Id.* at 113.

[298] *Id.* at 110.

[299] *Id.* at 116.

[300] *Id.* at 111.

[301] *Id.* at 124–25.

[302] *Id.* at 125.

headhunting and it may be considered disrespectful to get *batek* without participating in the rituals associated with it.[303]

B. The Apo Whang-Od v. Nas Daily Controversy

Apo Whang-Od, born allegedly in February 1917, draws patterns on the skin with soot mixed with water, pierces the skin with the thorn of the pomelo tree fastened to a piece of bamboo, and rubs the dye into the pierced skin with her fingers. Presented as the "last living *manbatek*" to have tattooed the Kalinga headhunters, she gained global attention after being featured in an episode of the Discovery Channel's 20 07 series *Tattoo Hunter: Kalinga of the Philippines*. She was conferred the Dangal ng Haraya award by the NCCA and was nominated for the National Living Treasures Award. The exposure of Apo Whang-Od's tattoo practices in various forms of media and research then enabled the people of her village of Buscalan in Tinglayan, Kalinga, to use *batek* tattoos as a means of promoting indigenous cultural tourism. Indigenous cultural tourism is a form of tourism whereby the tourist's experience is characterized by visiting indigenous communities, purchasing their arts and crafts as souvenirs, and watching cultural displays and performances.[304]

In 2021, YouTube content creator Nuseir Yassin and Apo Whang-Od's grandniece, Gracia Palicas, got embroiled in a dispute over an online course supposedly offered by the content creator's online learning platform, Nas Academy, called "Learn the Ancient Art of Tattooing." The course was marketed as a course taught by Apo Whang-Od as a mentor for PHP 750. According to Gracia, Apo Whang-Od was not aware of a contract supposedly signed by her to enter into a partnership with Yassin for the program. She also said Apo Whang-Od did not understand what translators were telling her about the matter.

On the other hand, Yassin asserted that Apo Whang-Od had full knowledge of the project and that her niece, Estela Palangdao, was present during the contract signing. Palangdao translated the contents of the contract before Apo Whang-Od affixed her thumbprint to it. Thus, Apo Whang-Od fully signified her consent to the project. Moreover, Yassin stated that most of the profit generated by the project went directly to Apo Whang-Od and her family. Yassin's team only provided the technology and the marketing for the project. To prove that the said meeting occurred, Yassin also posted

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[303] *Id.* at 127.

[304] Soukup, et al., *supra* note 291, at 158.

a video of the meeting on the Nas Academy Facebook page.[305] However, Palangdao states that the provisions of the contract were not explained to them, and that they were made to sign the agreement regarding filming, interviews, photography, and other related matters.[306]

Atty. Marlon Bosantog, the NCIP Director in the Cordillera Region, stated that Apo Whang-Od denied affixing her thumbmark to the alleged contract and said that the provisions of the contract were not explained to her. The details and impact of the Nas Academy online class were also not properly disclosed to Whang-Od or the Butbut community, of which she is a part. Apparent disparities were also found when the validation team compared the thumbmark on the contract to a sample affixed by Apo Whang-Od on a clean piece of paper.[307] Aside from these issues surrounding Apo Whang-Od's consent, Bosantog also pointed out two problematic provisions of the contract and noted that the agreement was onerous. First, the contract stated that Nas Academy would have exclusive ownership of "any content that the show would produce," including the likeness, image, and voice of Apo Whang-Od, among others. Under the contract, Nas Academy's ownership of this content is in perpetuity and includes the right to alter, assign, and transfer the same without Apo Whang-Od's consent. Second, the contract would have been governed by Singaporean law, where Nas Academy is based.[308]

C. Responses to the Controversy: Legal Issues and Critiques

Experts point out that Nas Academy missed a major provision in Philippine law requiring the permission and consent not only of Apo

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[305] Bong Godinez, *Online course featuring tattoo artist Whang-od taken down after grandniece cries foul,* GMA, Aug. 5, 2021, *at* https://www.gmanetwork.com/entertainment/celebritylife/news/79313/online-course-featuring-tattoo-artist-whang-od-taken-down-after-grandniece-cries-foul/story.

[306] CNN Phil. Staff, *NCIP: Whang-Od did not give consent to teach in Nas Academy tattoo masterclass*, CNN PHIL., Aug. 29, 2021, *at* https://cnnphilippines.com/news/2021/8/29/NCIP-probe-Whang-Od-Nas-Academy.html.

[307] Cabreza, *supra* note 18.

[308] CNN Phil. Staff, *supra* note 307. *See also* NCIP, *Press Release: On Apo Whang-Od to teach the Kalinga Art of Tattooing on Nas Academy*, FACEBOOK (Aug. 31, 2021), *at* https://www.facebook.com/NCIPportal/posts/3469222693304088.

Whang-Od but also of the Butbut community's elders and leaders for the contract to be valid—as the art of *batek* is part of the community's culture.[309]

The NCIP stressed the importance of following the proper procedure for conducting activities within indigenous groups' ancestral domain, such as notifying the relevant government agencies, getting the community's consent, and observing cultural sensitivity.[310] As expressed in its press release:

> The art of tattooing is a cultural expression and it is practiced by the ICCs/IPs of Kalinga. Teaching of said cultural manifestation or expression in an open platform accessible to millions of people would render it generic and thus, it would lose its authenticity and cultural meaning. This would also discourage the next generation to learn and carry on with the tradition. The online platform can also lead to the demise of their culture-driven tourism industry. This is the sentiment and collective affirmation of the Elders and Traditional Leaders during the dialogue.[311]

Because of this development, Senator Imee Marcos also introduced Resolution No. 841, which called for the appropriate Senate Committee to conduct an inquiry, in aid of legislation, on the attempt to monetize and appropriate the *batek* without the Butbut community's FPIC. She also stated that "the incident is a stark reminder that the fast-paced world of social media, online content creators and digital learning platforms is becoming not only as an effective tool in the promotion of, but also as a threat of exploitation on the right to community IP, culture and traditions of the Indigenous Cultural Communities/Indigenous Peoples and that necessary legislation needs to be introduced to protect and promote these rights."[312]

A similar Resolution was introduced by Congresswoman Loren Legarda in the House of Representatives. She noted the necessity of

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[309] Rappler.com, *Nas Academy still insists it got Whang-Od's consent*, RAPPLER, Aug. 30, 2021, *at* https://www.rappler.com/life-and-style/arts-culture/nas-academy-statement-ncip-findings-whang-od-contract/.

[310] CNN Phil. Staff, *supra* note 307. *See also* NCIP, *supra* note 309.

[311] NCIP, *supra* note 309.

[312] S. Res. 841, 18th Cong., 3rd Sess. (2021). Resolution Directing the Appropriate Senate Committee to Conduct an Inquiry, in Aid of Legislation, on the Attempt to Monetize and Appropriate the Butbut Kalinga Traditional Tattoo Known as 'Batok' Without the Free and Prior Informed Consent of the Butbut Tribe with the End View of Identifying Necessary Legislations that Will Promote and Protect the Rights of the Indigenous Peoples to their Community Intellectual Property, Culture and Traditions.

revisiting the country's laws on the protection of indigenous peoples' property rights and creating a comprehensive cultural archive of all cultural properties of the country's various ethnolinguistic groups in order to record, classify, organize, and protect them. She also highlighted the importance of establishing explicit systems, procedures, legal protection, and remedies that are readily available and accessible to indigenous peoples so that they may be protected from unfair activities such as exploitation and commodification.[313] Both resolutions recognize the necessity of developing clearer rules on TK protection as this controversy highlighted the insufficiency of present IPL and TK-related laws to address the issue. As of writing, both resolutions are pending at the Committee level.

The author would like to posit three observations that must be considered when assessing this controversy. First, there is a certain degree of commercialization of the Butbut people's TK as this has become an integral part of tourism in their village. As the NCIP stated, there is a sentiment among elders and traditional leaders in the community that the online platform can lead to the demise of the community's culture-driven tourism industry. Martin Soukup, et al., also noted that the community has embraced the impact of cultural tourism brought about by the *batek*'s popularity and argues that the villagers themselves have commodified their cultural tradition for the purpose of economic profit. Based on their investigation in Buscalan village, where Apo Whang-Od resides, the villagers have adapted a smooth system in managing the tourism activities in their area. Tourists are required to pay an entrance fee and register before entering the village. Records are carefully maintained about the visitors. Visitors who would like to get tattoos from Apo Whang-Od are placed on a waiting list to ensure that they could get tattooed. Aside from this, there are also tour guides, accommodations, and dining facilities in the area.[314] Thus, it can be surmised that while the community is willing to commercialize their TK, it is primarily for the purpose of attracting tourists to their community, which may not necessarily be a benefit realized by conveying their *batek* practices on an online platform.

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[313] H. Res. 2148, 18th Cong., 3rd Sess. (2021). A Resolution Urging the Appropriate House Committees to Conduct an Inquiry, in Aid of Legislation, on the Issue of Exploitation and Commodification of the Kalinga Culture of Tattooing, Known as Batok, with the end in view of Strengthening the Protection of the Intellectual and Traditional Property Rights, Cultural Resources, Practices and Material Heritage of our Indigenous Peoples and Communities.

[314] Soukup, *supra* note 291, at 158.

Second, because of Nas Academy's intent to exercise exclusive ownership over the content generated for the online course, this would clearly call for the application of copyright law. After assessing the various guidelines on TK protection, the author posits that the only applicable guideline in this situation would be the JAO No. 1-16, which is arguably the least stringent of all the administrative issuances in terms of defining what attaining the FPIC of the indigenous community entails. The Order only requires that IPR applications using IKSPs contain a disclosure including a statement of compliance to the requirement of FPIC of the indigenous community concerned. However, the Order does not specify how this certification should be obtained and the form it should be presented it, nor does it make any reference to another guideline on FPIC which should be followed.

The author also argues that none of the other existing guidelines on FPIC would clearly apply in this situation. The FPIC requirement under the Guidelines for Bioprospecting Activities in the Philippines would not apply because this is not a bioprospecting activity. The Revised Guidelines on the Exercise of Free and Prior Informed Consent (FPIC) and Related Processes would also not apply, as there is a specific enumeration in the law for the exercise of such right by the community involved. These extractive[315] and non-extractive[316] activities are defined under the law. The creation of the Whang-Od Academy videos would not fall under any of these activities. Lastly, the author argues that while the intent of the online course was to educate people on the art of Kalinga tattooing, the IKSPs and CLs Research and Documentation Guidelines would not apply because the purpose of the online course does not fall under the definition of research provided under the guidelines.[317] Unlike all of the aforementioned guidelines which have specific steps on how FPIC is obtained, there are none laid out in the Order.

While the applicable JAO does provide for a safeguard in case consent is assailed—the referral of the application to NCIP to verify that the

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[315] NCIP Adm. Order No. 3-12 (2012), § 19.

[316] § 24.

[317] NCIP Adm. Order No. 1-12 (2012), § 6(g). Under Sec. 6(g) of the Guidelines, IKSP research is defined as "the gathering and analysis of data, information and facts, with the active and full participation of the ICCs/IPs, on the ICCs/IPs' IKSP and/or life ways for purposes of gaining knowledge and understanding for its advancement and enhancement, advocacy, basis for policy, plans and programs, decision making and for the continuity and protection of cultural integrity. It includes the four Rs; 1) Recover that from which is possible; 2) Reaffirm that which is relevant; 3) Readopt that which is necessary for the culture and; 4) Recreate or regenerate that which is required through new things."

FPIC requirement is met—this is a reactive, rather than proactive, measure. As illustrated in this case, Nuseir Yassin and Nas Academy raised issues with how the NCIP conducted its investigation, stating that it was unfair because the group was not allowed to explain their side before the NCIP released its statement. They also raised other factors to show their compliance with the FCIP requirement. First, they engaged a local production company known for their projects produced about indigenous peoples and were assured that the company would conduct due diligence and comply with Philippine law. Second, they released a video of the contract signing on social media, where Apo Whang-Od, her niece, her brother, two other members of the Butbut community, a tour guide, and a tourism officer were present. Lastly, Estela Palangdao set up a bank account to receive the funds from the project.[318] While the NCIP emphasized the importance of obtaining the consent of the community, it did not expressly state what guidelines should have been followed in order to comply with this requirement.[319]

Third, the only TK protection granted under the applicable JAO is the requirement of FPIC. While there is recognition that the community collectively owns the IPR resulting from their works, there are no provisions clearly outlining what their ownership over the IPR entails. The IKSPs and CL Research and Documentation Guidelines provide for benefits such as the exclusive right to determine the extent, content, or manner of presenting information to be published and royalty and user fees. The Guidelines for Bioprospecting Activities also provide for benefit-sharing agreements. None of these other attributes of ownership are recognized under the applicable JAO.

As illustrated, the issue emphasizes the inadequacy of the present IPR framework and guidelines in addressing issues pertaining to the use of TK in the digital platform.

VI. BEYOND IPRA: POLICY DIRECTIONS ON THE PROTECTION OF TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS

At the onset, it should be acknowledged that the indigenous groups in the Philippines are very diverse. Due to such diversity, their motivations in utilizing their TK may differ. Some may prioritize protecting the sacred

[318] Rappler.com, *supra* note 310.
[319] *See* NCIP, *supra* note 309.

nature of their knowledge and cultural expressions, while other cultures may prefer economically benefitting from them. Thus, policy directions benefitting one group may be considered detrimental to another.[320] Policies should also consider the reality that cultural exchanges between different communities have led to the spread of TK outside the geographic and communal boundaries of the specific community claiming to own it. Ownership over TK may not also be easily determined based on geographical location because certain areas may be shared by various indigenous groups.[321]

Aside from these conflicting views within the heterogenous group of indigenous peoples, there may also be a tension between the interests of the country as a whole, which pursues certain policy directions pertaining to TK, and the interest of the indigenous groups themselves. Regulations may also already be imposed upon a space already regulated through informal means and may upset existing balances of power within the space. This highlights the importance of considering local politics in accounting for regulations concerning TK.[322]

Maria Ester Vanguardia suggests that because of the issue regarding conflicting interests of indigenous groups, policy recommendations for *sui generis* legislation should be limited in scope to certain groups involved.[323] In formulating policy suggestions, it should also be considered that the balance of state interest in relation to enacting policies involving TK and cultural expression is uncertain. Some provisions suggest orientation towards the preservation of indigenous peoples' cultures, traditions, and institutions,[324] while others emphasize the importance of guaranteeing indigenous peoples' rights for economic development.[325]

There are two things, however, which are clear in understanding the state's conception of IPR in relation to TK, as reflected in national laws. First, the state recognizes IPR as the legal basis for indigenous communities' rights to have access to their TK, as well as to protect and control it.[326]

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[320] Vanguardia, *supra* note 2, at 461.
[321] Go & Consignado, *supra* note 9, at 1028.
[322] Forsyth, *supra* note 16.
[323] Vanguardia, *supra* note 2, at 462.
[324] *See* CONST. art. XIV, § 17. *See also* Rep. Act No. 8371 (1997), § 2(b).
[325] *See* CONST. art. XII, § 5. *See also* Rep. Act No. 8371 (1997), § 13.
[326] Rep. Act No. 8423 (1997), § 4(i).

Second, the state's orientation is towards encouraging indigenous peoples to use IPR schemes as a means to protect their TK subject to their FPIC.[327]

The policy recommendations below explore areas where national policy could be further improved, using existing policy mechanisms in other countries and recommendations from scholars as a starting point for further research. It is also recognized that no single piece of legislation may adequately resolve issues in TK protection, and that a plurality of approaches and strategies may be necessary to address the issue.[328] The author likewise recognizes that the best policy would be to amend existing IPL to accommodate TK protections and make IPL responsive to the changes brought about by the digital economy. That being said, three policy changes are recommended:

1. *The Adoption of Provisions of the National Cultural Heritage Act to Traditional Knowledge*

The author posits that while it seems that TK protection is seen as a separate endeavor from the implementation of the National Cultural Heritage Act due to Section 21 of the said Act, there are several provisions in this law that may actually be applied to TK, should the NCCA decide to broaden the scope of tangible and intangible cultural property.

First, rather than creating a new registry, the Philippine Registry of Cultural Property and the Philippine Inventory of Intangible Cultural Heritage may be used as the primary IKSP registry required under the Joint IPOPHL-NCIP JAO. The JAO itself acknowledges the necessity of collaborating with the NCCA in creating the proposed NCIP-administered registry because it may already have an existing database or documentation of IKSPs. Congresswoman Legarda's proposal in the Traditional Property Rights of Indigenous Peoples Act also integrates this proposal. These registries will be further discussed in the second policy recommendation.

Second, TK documentation may also be undertaken by LGUs for submission to be included in the Philippine Registry of Cultural Property, with the participation of the indigenous communities involved, pursuant to Section 16 of the Act. Documentation efforts in this scenario could be implemented in a manner analogous to the research and documentation

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[327] IPOPHL & NCIP Adm. Order No. 1-16 (2016), Rule 12.

[328] *See* Torsen, *supra* note 128, at 178.

necessary to implement the NCIP mandate as provided under Section 11 of the IKSPPs and CLs Research and Documentation Guidelines of 2012.

Third, the provision on heritage agreements under Section 18 of the Act may also be entered into with indigenous communities as private owners of cultural properties. Application of heritage agreements in conservation efforts involving the communities would reaffirm the recognition of the community's IPR.

2. The Digitization of Traditional Knowledge

Digital documentation has been suggested by the WIPO as one strategy to ensure TK protection. This can include the use of software and digital rights management tools, as well as the creation of digital databases. Software and digital rights management tools can be adjusted to meet the needs of indigenous communities, such as allowing them to define and control the rights, accessibility, and reuse of their digital resources, and to ensure that proper attribution to traditional owners is made and that customary law pertaining to secret or sacred knowledge is followed. Digital documentation places IP management in the hands of the indigenous community while simultaneously fulfilling copyright requirements on fixation and identifiable ownership. Digital databases not only help ensure that TK is organized in a fixed medium, but also serve as a means to create public awareness of the community's claim of ownership over the TK.[329]

An example of a digital documentation strategy is India's Traditional Knowledge Digital Library ("TKDL"). Because of India's experience with rampant biopiracy, its government instituted the TKDL as a defensive anti-appropriation strategy. The library was a result of the codification of inaccessible Indian traditional medicinal knowledge made available digitally so patent examiners can use it as evidence of prior art in order to reduce subsequent frivolous or biopiracy patents. TK found in the Indian public domain, written in its original language (Hindi, Sanskrit, Urdu, Persian, Arabic, Tamil, etc.), is made more internationally accessible because the digital library is translated in five international languages—English, German, French, Japanese, and Spanish. To guard against using the database in a way that facilitates biopiracy, those possessing the database legitimately are subject to a restrictive obligation regarding its access and use. The database

[329] Spangler, *supra* note 131, at 722–23.

has been successfully integrated with the international IP office activity of search and examination of prior art search systems.[330]

However, the TKDL presently only functions as a protective tool because it does not perform other functions of an IPR regime, mainly, ensuring that benefit of the TK accrues to indigenous communities.[331] Digital documentation may also affect the moral rights of the indigenous community. First, the nature or format of the TK is transformed through digitalization, especially when such is orally transmitted. The digitalization of the TK may be considered as a distortion or modification of the subject matter of the TK, which is considered a violation of the author's moral right. Documentation may also distort the custom or tradition that goes behind the transmission of the TK, thus, losing this aspect of the knowledge being documented.[332] Second, some TK relates to sacred rituals or rights. Communities may have an interest in maintaining the secrecy of these practices in order to avoid actions prejudicial to the community's honor or reputation which may result from the general public being able to access this TK.[333]

To address the first issue, Nadkarni and Rajam propose various means for the commercialization of TK, such as "Access Benefit Sharing," "Material Transfer Agreement," and "Traditional Knowledge Commons License."[334] To address the second issue, Stephanie Spangler proposes the integration of customary law with conventional IPL. For example, access to the database could be restricted to appropriate leaders in the community and limited to situations where the TK would be necessary evidence in an infringement suit.[335] The database can also only include TK that has been approved by customary law as authentic, approved expressions of their culture.[336] However, it would still ultimately depend on the indigenous community's view on the alternation of the tradition as some cultures may view this as a problematic change or distortion and may be unwilling to document their TK.[337] Integration of customary law with the IP system has already been done in certain cases. For example, the use of the *appellation d'origine contrôlée* ("AOC") in France in order to maintain the cultural and

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[330] Oguamanam, *supra* note 1, at 499–501.
[331] Nadkarni & Rajam, *supra* note 110, at 184–85.
[332] Spangler, *supra* note 131, at 724–25.
[333] *Id.* at 727.
[334] Nadkarni & Rajam, *supra* note 110, at 184–85.
[335] Spangler, *supra* note 131, at 726.
[336] *Id.* at 732.
[337] *Id.* at 726.

geographical authenticity of wine products is an application of local customs into IPL. The AOC provides rights to specific groups that follow the precise custom of producing a local wine product.[338] At present, the WIPO conducts a digital documentation project called The Creative Heritage Project, wherein indigenous community leaders and custodians are trained on how digital documentation can benefit the community as an IP management strategy.[339]

The IPOPHL has recognized that the laws mandating the creation of databases for cultural properties in the country are incomplete. It has also recognized that recording, digitizing, and disseminating TK make them vulnerable to misappropriation and misuse, especially in the digital world.[340] In spite of the various laws and administrative orders calling for the creation of various registries, the only existing registry at present is the Philippine Registry of Cultural Property ("PRECUP") released in 2021.[341] The PRECUP is a registry of all cultural properties in the country which are deemed important to its cultural heritage. LGUs prepare a local cultural inventory, which contains the tangible immovable cultural properties, the tangible movable cultural properties, and the intangible cultural properties and the documentation of traditional and contemporary arts and crafts in their jurisdiction.[342] The enumeration and basic information about the cultural properties shall be made publicly accessible online through the NCCA website, but information on location and ownership of privately-owned cultural properties are withheld.[343]

The major difference between the PRECUP and the TKDL is that the information in the TKDL can be used by any party, provided that they comply with an Access Agreement. However, there is no provision on Access Agreements under the present laws creating the PRECUP. This is important considering that the PRECUP is also supposed to serve as the national repository for intangible cultural property, which, as defined,

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[338] *Id.* at 731.

[339] *Id.* at 733.

[340] IPOPHL, The National Intellectual Property Strategy (2020–2025), at 29 (Dec. 10, 2019), *at* https://www.ipophil.gov.ph/national-intellectual-property-strategy-nips/.

[341] *NCCA publishes registry of national heritage sites*, BUSINESSWORLD, Jun. 9, 2021, *at* https://www.bworldonline.com/ncca-publishes-registry-of-national-heritage-sites/.

[342] Dep't of the Interior and Loc. Gov't (DILG) & Nat'l Comm'n for Culture and the Arts (NCCA) Mem. Circ. No. 2021-001 (2021), § 5.3. Amended Guidelines on the Standardized Submission of Local Cultural Inventory Under the Philippine Registry of Cultural Property for the Issuance of Certificates of Compliance to Local Government Units.

[343] § 5.4.2.

includes peoples' learned processes and the knowledge, skills, and creativity that they develop. The definition also includes oral traditions, languages, and expressions, performing arts, and knowledge and practices concerning nature and the universe, among others, which form part of a group's cultural heritage.[344] Thus, while the public can be informed of the different intangible cultural properties present in the country, it may not necessarily translate to being able to use the knowledge.

3. Defining and Outlining Community Rights to Traditional Knowledge

The IKSP and CLs Research and Documentation Guidelines recognize the community's ownership over the research conducted pursuant to the guidelines. Meanwhile, the Joint IPOPHL-NCIP JAO recognizes that individuals or specific families may serve as custodians of IKSPs on behalf of the community, in accordance with their customary law. However, customary law is varied and there is no singular approach to protect the community's rights in case there is a misuse of the community's IPR. Moreover, sanctions under the law for misuse of TK which follow customary law are only limited to cases of violation of customary law in the presentations of indigenous culture and in joint undertakings for the use of biological and genetic resources under the IPRA IRR. The different benefits and rights accorded to the indigenous community under the various laws and guidelines are also inconsistent and uniform. Incorporating guidelines for the use of community IPR by individuals and other protocols for TK use in the legal system may help protect the indigenous community by having minimum guidelines that have to be observed by individuals designated by the community as custodians of the TK or by individuals from the community seeking to use it for their personal benefit.

For example, in China, the Draft Regulations on Copyright Protection of Folk Literary and Artistic Works proposed a framework that would protect TCEs from the perspective of private rights.[345] Article 8 of the Draft Regulations limits community members' free use of their TCEs to traditional use or customary use for the purposes of cultural transmission and inheritance. Once a community member uses the TCE outside this purpose, the right to free use disappears because his personal use does not inure to the community's benefit. In this scenario, the individual's use is considered similar to a non-community member's use of the TCE. Thus, the community member is required to seek the community's permission to use

[344] § 3.6.

[345] Li, *supra* note 11, at 30.

the TCE and is required to give compensation to the community for the TK's use.[346]

Meanwhile, protocols are meant to outline important principles that should be observed in dealing with the use of TCEs and interacting with indigenous communities in order to ensure that indigenous peoples' rights are recognized.[347] The Australia Council for the Arts released protocols for producing indigenous new media, specifically focused on media taking a digital form. The protocols outline nine principles that must be observed in creating a framework for the protection of indigenous heritage taking the form of new media: (1) respect; (2) indigenous control; (3) communication, consultation, and consent; (4) interpretation, integrity, and authenticity; (5) secrecy and confidentiality; (6) attribution; (7) proper returns; (8) continuing cultures; and (9) recognition and protection.[348] The protocols also specify specific action plans or points of consideration that users should note when using different forms of media, such as CD-ROM, database works, photographs, film footage, and Internet publishing.[349]

CONCLUSION

The controversy between Apo Whang-Od and Nuseir Yassin is only the beginning of potential problems that may confront the present Philippine IP system when presented with TK found in the digital platform. While the online course was eventually removed from the platform, more challenges would have arisen if Nas Academy had exercised the exclusive rights supposedly granted to it by the parties' agreement. While community ownership over their IP is recognized under the IPRA, would this have extended to the video documentation of their TK, if such ownership rights were not expressly provided for under the Joint IPOPHL-NCIP JAO? The JAO only requires the disclosure of TK and compliance with the FPIC requirement, but does not give the community the exclusive right to control the use of the TK. Would their entitlement to restitution under the IPRA be sufficient recognition of their ownership over the content of the online

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[346] Li, *supra* note 11, at 35.

[347] Burri, *supra* note 17, at 44.

[348] Australia Council for the Arts, Protocols for Using First Nations Cultural and Intellectual Property in the Arts (2002), § 1.3.1.

[349] Terri Janke, NEW MEDIA CULTURES: PROTOCOLS FOR PRODUCING INDIGENOUS AUSTRALIAN NEW MEDIA 11 (2002), *available at* https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/atsia_indig_media.pdf.

course? Could the online course possibly count as a "performance" under the IPRA IRR so that the Butbut people may attain financial compensation for the videos and control the performances under the IPRA IRR? And even if the videos are considered a performance, how would the community be able to exercise control over its access and distribution, considering that it is being circulated in the digital space, over which they have no supreme authority?

Considering the possible questions arising from this controversy, it is clear that while there have been many developments for TK protection in the country and there has been a certain degree of recognition of indigenous communities' rights over their TK, significant reforms in legislation remain necessary in order to fully accommodate and anticipate the challenges presented by the digital economy. Indigenous culture plays a significant part in our country's heritage. Attempts to integrate it into the larger landscape of Philippine culture must not lose sight of its origins. While the country's orientation leans towards treating TK as part of its IP regime, protections must not lose sight of TK as an embodiment of living tradition.

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