

**THE CURIOUS CASE OF TRADITIONAL ‘CROSS-CULTURAL’ EXPRESSIONS:
DIFFICULTIES IN PROVENANCE, FENCING AND INTELLECTUAL PROPERTY
PROTECTION**

Mandavi Singh¹

Traditional Cultural Expressions (TCEs) – colloquially known as ‘folklore’ – are verbal, musical, literary, creative and other spiritual expressions, which have been traditionally developed and maintained by any group or community. “Cross-Cultural” TCEs are a special case of TCEs, where a particular community’s cultural materials appear to have ‘borrowed’ elements from another community’s cultural materials. Such borrowing may be the result of colonialism, prolific trade or globalization, or of shared history, terrain or belief-systems.

Because of the borrowed elements and the corresponding obscure provenance, Cross-Cultural TCEs may become the subject of multiple cross-claims by more than one stakeholding community or third party beneficiary (such as traders, researchers, academics and developers). Illustrations of Cross-Cultural TCEs facing multiple contentious claims include the African Wax Prints and World Music compositions.

TCEs carry symbolic and/or sacred value for the communities that produce them, and immense potential for monetization and trade; therefore, protecting them against misappropriation and misuse through intellectual property law becomes necessary. The manifestation of multiple cross-claims on a Cross-Cultural TCE creates difficulties in identifying and demarcating ownership or multiple-party stakeholding in the cultural materials and, therefore, providing optimal intellectual property protection. Therefore, ‘fences’ or boundaries need to be drawn in the stakeholding of the various competing communities and beneficiaries in the Cross-Cultural TCE. This Paper has set out possible strategies for fencing the Cross-Cultural TCEs, and suggests certain regulatory modifications that may be made to localized, national and international legal regimes to serve for better protection of Cross-Cultural TCEs.

¹ Mandavi Singh is a senior associate at Samvad Partners, a multi-disciplinary law firm based out of Mumbai, India. She graduated from Harvard Law School in 2017, and is interested in international development and social impact investment.

I. INTRODUCTION

“Good fences make good neighbours,” Robert Frost in *Mending Wall*, would argue otherwise. The fences that we erect against our neighbours alienate us from fellow human beings by instigating us to dwell on the differences rather than appreciate the similarities. Yet, when my dear friend from Ghana told me that the wax prints that she so loves wearing, and that have become the hallmark of African fashion, are under contest from Indonesia, I wondered whether the much-hated fences could have practical necessity as well.

One precarious realm where the issue of fences come up frequently is that of the Traditional Cultural Expressions (“TCE(s)”), colloquially known as ‘folklore’. There is now a growing demand by indigenous communities to be recognised as custodians of their own TCEs, in order to prevent the misappropriation or misuse of the TCEs by third parties, and/ or to share the economic benefits from the usage of such TCEs by third parties. Since national and international intellectual property (IP) systems can be used to provide protection to such TCEs, it becomes necessary to identify ‘fences’ of ethnicity, nationality and geography for the TCEs.

This is even truer in cases where the TCE in question is of such synthesised/hybridised nature that more than one particular community may claim authority for its authorship, ownership or sustained production. For lack of a better term, they have been referred to as ‘Cross-Cultural TCE(s)’ in this Paper. Typically, this cross-cultural element in TCEs arises due to some commonalities of shared history, belief-system or geographical terrain among the communities with parallel claims.

There are countless historical illustrations of Cross-Cultural TCEs: the *Gandhara* school sculptures, that depicted a unique convergence of Hellenistic anthropomorphic art techniques with the Mahayana Buddhist an iconic art styles of China and northern India;² (ii) the Lusterware pottery of Spain, that was an intriguing synthesis of Muslim,

² Benjamin Rowland, *Gandhāra Art in Rome*, 21(3/4) ARTIBUS ASIA 282-284 (1958); Benjamin Rowland, *Gandhara and Late Antique Art: The Buddha Image*, 46.2 AM J ARCHAEOLOGY 223-236 (Apr-June 1942); Iqtidar Karamat Cheema, *The Historical Origins and Development of Gandhara Art*, 8 INTL J BUDDHIST THOUGHT & CULTURE 75-91 (Feb 2007); Benjamin Rowland, *Graeco-Bactrian Art and Gandhāra: Khalchayan and the Gandhāra Bodhisattvas*, 75 ARCHIVES OF ASIAN ART, 29-35 (1971); Y. Krishan, *Was Gandhāra Art a Product of Mahāyāna Buddhism?*, 3(4) J ROYAL ASIATIC SOCIETY OF GREAT BRITAIN & IRELAND : 104-119 (1964); Rekha Morris, *Some Observations on Recent Soviet Excavations*

Christian, Jewish traditions during the *Morisco* reign;³ (iii) the *Delftware* tiles of Netherlands used for home furnishings in Europe and the American Colonies, that emulated the 'blue willow' porcelain patterns of Ming porcelain from China;⁴ and (iv) the felt-making tradition that evolved in parallel among the Mongols, Tibetans and Turkic peoples of Siberia due to the common terrain and climatic conditions of the Steppes.⁵

Modern-day cross-culturalism has been especially prevalent in textile traditions, such as the *Jamdani* muslins of Bangladesh and India that evolved in communities with a shared history and territory;⁶ the *Batik* or textile wax-printing techniques used by diverse communities across the world, including in Indonesia, China, India and Western Africa;⁷ the Calico Chintz textile of India that was customised repeatedly to meet growing and diverse demands of European consumers;⁸ the masquerade fabric which is a *Kalahari* refurbishing of another Indian textile;⁹ and the Tibetan art rugs that are in reality customised and produced in Nepal.¹⁰ Another Cross-Cultural TCE that

in Soviet Central Asia and the Problem of Gandhāra Art, 103(3) J. AM. ORIENTAL SOCIETY 557-567 (1983).

- ³ PETER VON SIVERS ET AL., PATTERNS OF WORLD HISTORY 541, Oxford University Press, (2012).
- ⁴ Florian Knothe, *East Meets West: Cross-Cultural Influences in Glassmaking in the 18th and 19th Centuries*, 52 J GLASS STUD : 201-216, 234, 273-274 (2010); Josslyn Kay Stiner, *Piecing It Together: The Introduction of Delftware Tiles To North America And Their Enduring Legacy In Charleston* (2010) (PhD dissertation, Graduate Schools of Clemson University and the College of Charleston); Sivers et al., *Patterns*, *supra*, note 2, at 714-715.
- ⁵ Murray Lee Eiland III, *Felting Between East and West*, 20 VISUAL ANTHROPOLOGY, 263-283 (2007)(indicating that this parallel evolution resulted in similarities in the texture and motifs of felts produced in Hungary, Turkmenistan and other regions).
- ⁶ SHAHIDA KHATUN, THE JAMDANI SARI: AN EXQUISITE FEMALE COSTUME OF BANGLADESH, Sanjay Garg ed., *Traditional Knowledge and Traditional Cultural Expressions of South Asia* (Colombo: SAARC Cultural Centre, 2015), 187-196 (positing that the *Jamdani* fabric came to be popular both in Bangladesh and India as the art in both regions received patronage and cultural influences from the Mughal Empire).
- ⁷ See *infra*, notes 94 to 101 (Part IV(B) of this Paper).
- ⁸ Lou Taylor, *The Indo-Chinese Influence on British Chintz Design*, 6 NEWSLETTER OF MUSEUM ETHNOGRAPHERS GROUP 10-14 (1978); Giorgio Riello, *Asian Knowledge and the Development of Calico Printing in Europe in the Seventeenth and Eighteenth Centuries*, 5 J GLOBAL HIST : 2 (theorising that Calico prints arose out of a fusion of Indian, Safavid Persian, and Chinese influences) (2010).
- ⁹ C. B. Steiner, *Textile Transformations and Cultural Continuities in West Africa* (presentation at Proceedings of the 4th Biennial Symposium of the Textile Society of America, Los Angeles), TEXTILE SOCIETY OF AMERICA 63-66 (1994); Josephine Maria Moreno, *Retailers as Interpreters of Textile Traditions in Antigua, Guatemala* (1995), (PhD dissertation, Iowa State University, (noting that the *Kalahari Ijo* people in the Niger Delta transform Indian Madras cloth with cut-and-pull methods of embellishment, into masquerade festival clothes for parades).
- ¹⁰ Erin McGuckin, *Tibetan Rugs*, 2.3 J MAT CULTURE, 291-310 (1997); Tom O'Neill, *The Lives of the Tibeto-Nepalese Rug*, 4.1 J MAT CULTURE 21-38 (1999).

has also proved to be particularly lucrative today is World Music,¹¹ which fuses strains of folk music from different regions with contemporary music.

The cross-culturalism in TCEs can be problematic because as long as their provenance remains contested or obscure, it is difficult to identify the community that should be given economic and moral rights over the concerned TCE. Further, if multiple claims to such Cross-Cultural TCEs may be established without doubt, this would still lead to complications of representation, benefit sharing, administrative and enforcement costs.¹² These controversies have been particularly thorny in the case of the World Music renditions¹³ and the African Wax Prints based on *Batik*-dyeing techniques.¹⁴

Due to these inherent controversies, drawing ‘fences’ with respect to the multiple claims to the same Cross-Cultural TCE may be necessary to prevent misappropriation and misuse by unauthorised communities and third parties, not only because folklore is intricately linked to the self-determination and identity of communities, but it is also a multi-attribute economic good¹⁵ with enormous potential for monetisation and trade.¹⁶ Today, folk-art is increasingly responsible for lucrative contributions to music, fashion, media, trade, development of tourism and e-commerce¹⁷, and for many developing countries, it has become an important source of exports, employment and “cultural heritage” tourism.¹⁸ This increase in demand for folklore stems from both its aesthetic appeal, and its honorific value quotient – of nostalgia for the stability of the past

¹¹ See *infra*, notes 87 to 95 (Part IV(A) of this Paper).

¹² TERTIA BEHARIE AND TSHEPO SHABANGU, TRADITIONAL KNOWLEDGE, TRADITIONAL CULTURAL EXPRESSIONS AND FOLKLORE in INTRODUCTION TO INTELLECTUAL PROPERTY LAW 342-359 (Owen Dean and Alison Dyer eds., Southern Africa, Oxford University Press (2014)).

¹³ See *infra*, notes 87 to 95 (Part IV(A) of this Paper).

¹⁴ See *infra*, notes 96 to 103 (Part IV(B) of this Paper).

¹⁵ Massimiliano Mazzantia, *Cultural Heritage as Multi-Dimensional, Multi-Value and Multi-Attribute Economic Good: Toward a New Framework for Economic Analysis and Valuation*, 31.5 J SOCIO-ECON. 529–558 (2002).

¹⁶ MIGUEL A. CENTENO ET AL., THE POLITICAL ECONOMY OF CULTURAL WEALTH, THE CULTURAL WEALTH OF NATIONS 26, (Nina Bandelj and Frederick Wherry eds., California: Stanford University Press, (2011); ALEXANDRA KOWALSKI, WHEN CULTURAL CAPITALIZATION BECAME GLOBAL PRACTICE, (CULTURAL WEALTH, 73-89).

¹⁷ AGNES LUCAS-SCHLOETTER, FOLKLORE, INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, 259 (Silke von Lewinski eds., The Hague: Kluwer Law International, 2004), ; ANTOINETTA DI BLASÉ, TRADITIONAL KNOWLEDGE, CULTURAL HERITAGE OF INTELLECTUAL PROPERTY RIGHT, 145-159 (Valentina Vadi and Bruno de Witte eds., London and New York: Routledge) (2015).

¹⁸ JENNIFER BAIR, CONSTRUCTING SCARCITY, CREATING VALUE, CULTURAL WEALTH 195.

untrammelled by technology, of aesthetics that seeks to humanise the edges of rampant industrialisation, of retrospection about how far societies have progressed.¹⁹

Complete global data is not available as to a calculation of the economic value of the folklore industry, especially since it typically pertains to the unorganised sector, but the domestic economic value of folk art / handicrafts alone has been estimated variously at £3.4 billion (UK),²⁰ US\$ 4.5 billion (India),²¹ US\$ 29 billion (U.S.A.),²² \$747 million (Australia),²³ and CNY10 billion (China).²⁴

Hence, drawing fences in the ownership of Cross-Cultural TCEs is of paramount importance for building an appropriate IP protection regime, which may then help the “rightful” stakeholders in preventing cultural misappropriation and utilising the TCEs for economic advancement.

II. THE MURKY CONTOURS OF CROSS-CULTURAL TCEs

A. Nature of TCEs

TCEs are verbal, musical, literary, creative or spiritual expressions, developed by any group or community in tangible or intangible medium or in the form of activities.²⁵ TCEs, thus, range across folk tales and riddles, folk music and musical instruments, folk dances, plays and rituals, handicrafts and pottery, mosaic, woodwork, metalwork, and

¹⁹ Susan Lynn Freund Isaacs, *Pots, Potters, and Patrons: The Ethnography, History, and Meaning of Contemporary Pennsylvania Redware* (1991) (PhD. Dissertation, University of Pennsylvania), 566-632.

²⁰ *Towards a Craft Revival: Recalibrating Social, Cultural, Economic and Technological Dynamics*, RICHES (Renewal, Innovation and Change: Heritage and European Society)(April 2016), https://ec.europa.eu/research/social-sciences/pdf/policy_briefs/riches_april_2016-1.pdf.

²¹ *Overview: Indian Handicrafts Industry and Exports*, INDIAN BRAND EQUITY FOUNDATION (November 2016,), <http://www.ibef.org/exports/handicrafts-industry-india.aspx>.

²² *Craft: State of the Market*, AMERICAN CRAFT COUNCIL (September 2011), <https://craftcouncil.org/magazine/article/craft-state-market>.

²³ *Arts and Culture in Australia: A Statistical Overview*, AUSTRALIAN BUREAU OF STATISTICS <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/25B64FD3449F4C1FCA257968000CB8FC?opendocument>.

²⁴ Luo Li, *The Saviour of Chinese Traditional Cultural Expressions? Analysis of the Draft Regulations on Copyright Protection of Folk Literary and Artistic Works*, 6.1 QUEEN MARY J INTELLECTUAL PROP. 27-54 (2016).

²⁵ See World Intellectual Property Organisation (WIPO) and United Nations Educational, Scientific and Cultural Organisation (“UNESCO”) Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Forms of Prejudicial Action (hereinafter, referred to as the “**Model Provisions**”), § 2 (Protected Expressions of Folklore), 1985, <http://www.wipo.int/wipolex/en/text.jsp?fileid=186459>.

weaving.²⁶ TCEs have been described variedly across these multifarious regulations, including: ‘expressions of folklore’, ‘cultural heritage’ (especially, ‘intangible cultural heritage’), ‘indigenous cultural expressions’, ‘folklore’, ‘works of indigenous people’, and ‘traditional knowledge’.²⁷ Although the historical evolution and significance of the terms are not identical²⁸, for the purposes of this Paper, these terms have been used interchangeably.

Presently, a web of domestic statutes, bilateral treaties and international agreements and protocols converge on the subject matter of IP protection of TCEs. Several human rights conventions too, somewhat more controversially, protect TCEs as a means of self-determination of indigenous groups.²⁹

However, the international instruments most germane for the *sui generis* protection of folklore against illicit exploitation and other prejudicial actions are: (i) the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (‘Model Provisions’), which were developed jointly by World Intellectual Property Organisation (‘WIPO’) and the United Nations Educational, Scientific and Cultural Organisation (‘UNESCO’) in 1982; and (ii) the Draft Articles on the Protection of Traditional Cultural Expressions (‘WIPO Draft Articles’)³⁰ formulated in 2014 and last revised in 2017 by the WIPO Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.³¹

²⁶ *Ibid.*

²⁷ Lucas-Schloetter, *Folklore*, 259-291 (noting that many indigenous communities have perceived “folklore” to be a pejorative term); MATTHIAS LEISTNER, TRADITIONAL KNOWLEDGE, INDIGENOUS HERITAGE 49-58 (explaining the differences between the meanings of “indigenous” and “traditional”, and how the term “indigenous” may not work too well for regions which have seen frequent waves of immigration or invasion, such as the Indian subcontinent).

²⁸ *Ibid.*

²⁹ A.D. Stewart, *Kayano v. Hokkaidi Expropriation Committee Revisited: Recognition of Ryfikyfians as a Cultural Minority under the International Covenant on Civil and Political Rights, an Alternative Paradigm for Okinawan Demilitarization*, APLPJ 4.1 (2003) 382; Marina Hadjioanno, *The International Human Right to Culture: Reclamation of the Cultural Identities of Indigenous Peoples Under International Law*, 8 CHAPMAN L. REV. 201(2005).

³⁰ *Draft Articles on the Protection of Traditional Cultural Expressions*, WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES (Mar 3, 2017), http://www.wipo.int/t/edocs/mdocs/tk/en/wipo_grtkf_ic_34/wipo_grtkf_ic_34_6.pdf (hereinafter, referred to as the “WIPO Draft Articles”).

³¹ SILKE VON LEWINSKI, PROTECTING CULTURAL EXPRESSIONS: THE PERSPECTIVE OF LAW, PROPERTIES OF

The Model Provisions describe TCEs as “*productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of the country] or by individuals reflecting the traditional artistic expectations of such a community*”.³² The WIPO Draft Articles, on the other hand, have tried to define TCEs to include one or more of the following features: (i) being transmitted from one generation to another (whether consecutively or not); (ii) being the unique, directly linked or distinctively associated product of the group's social identity and cultural heritage; (iii) having been used by the group for at least 50 years or through at least 5 generations; (iv) being made in a collective context by indigenous peoples, local communities or nations; (v) being dynamic and evolving; and (vi) being the result of creative and literary or artistic intellectual activity.³³

Thus, both instruments pivot the definition of TCE on two essential features: (a) it must be “traditional”; and (b) it should possess certain characteristic elements or elements that are unique, or distinctively associated to a particular group, generally for an extended duration of time. However, this stress on tradition and distinctive elements of TCE can be problematic because of several reasons.

First, ‘tradition’ is not a historical event fixed in time; instead, it is constantly evolving. Tradition is usually transmitted across generations (either orally, by imitation or by other means of transmission), and therefore, like the folklorists, tradition is flexible, dynamic, continuous, and ongoing.³⁴ Shipbuilding, for instance, is considered a ‘traditional’ craft; yet, it has evolved over time from Egyptian planks to Viking ‘clinkered’ plank-joining, to a melding with the Baltic cog and the Genoese ‘roundship’ techniques, and thereafter, to the caravels and galleons of the Portuguese, Spanish, Dutch and English.³⁵

CULTURE - CULTURE AS PROPERTY: PATHWAYS TO REFORM IN POST-SOVIET SIBERIA 120-122, (Eric Kasten ed., Berlin: Dietrich Reimer Verlag) (2004).

³² Model Provisions § 2 (Protected Expressions of Folklore).

³³ WIPO Draft Articles, art 3 (Alt 2 and Alt 3). See also C.J.S. Picart and M. 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 INTL. COMMUNITY L. REV. (2013) 335 (2013); St. Palethorpe and St. Verhulst, *Report on the International Protection of Expressions of Folklore under Intellectual Property Law* (REP. NO. 1.1.1, University of Oxford, 2000), 7.

³⁴ Moreno, Retailers as Interpreters, *supra* note 8, at 1-242.

³⁵ Sivers et al., *Patterns*, *supra*, note 2, at 530-531.

Second, although some features have indeed been found to be recurring in ‘traditional’ processes (such as: anonymity in authorship due to the group-based nature of the activity; use of localised, manual and older production techniques, raw materials and equipment; ceremonial or public nature of purpose; application of symbols or colours with specific meanings; and lack of standardisation in workmanship), the recurrence of such features is not common across all traditions, and there are significant regional and community variations as well.³⁶ For instance, the *Calico* prints of India are marked by a fusion of Indian, Persian, and Chinese patterns of bursting fruits, full-bloom flowers and lush foliage, but the European renditions (i.e. the *Chintz*) are marked by lighter bi-chrome patterns, crewelwork, and European motifs such as the Scandinavian tree of life.³⁷ Such variations in the same folklore make defining ‘characteristic elements’ or distinctive, prolonged links between the TCE and the community impracticable.

Even if the characteristics of a TCE were capable of distinction, it is not clear who may have the authority to formally identify such characteristic elements. Evaluation of culture is a sensitive terrain, because cultures are not perfectly coherent or unchanging and because questions of cultural identities are deeply political. The criteria and outcomes of cultural evaluations could change tremendously, depending on the evaluator – connoisseur or manufacturer, ruler or subject, judges or jury, experts or public opinion.³⁸ For instance, whether the Malaysian song *Rasa Sayang* may have hailed in the pre-colonisation era from the Indonesian island of Ambon may have different answers depending on the evaluator.³⁹

³⁶ Moreno, Retailers as Interpreters, *supra* note 8, at 1-242; Isaacs, Pots, Potters, *supra*, note 18, at 566-632; Palethorpe and Verhulst, *Report on International Protection of Expressions of Folklore*.

³⁷ See Lou Taylor, *The Indo-Chinese Influence on British Chintz Design*, 6 NEWSLETTER OF MUSEUM ETHNOGRAPHERS GROUP, 10-14 (1978); Giorgio Riello, *The Rise of Calico Printing in Europe and the Influence of Asia in the Seventeenth and Eighteenth Centuries*, 5 J GLOBAL HIST: 1-53 (2010); RUURDJE LAARHOVEN, A SILENT TEXTILE TRADE WAR: BATIK REVIVAL AS ECONOMIC AND POLITICAL WEAPON IN 17TH CENTURY JAVA 6-7 (paper presented at 13th Biennial Symposium on “Textiles and Politics”, Washington D.C., September 19-22, 2012).

³⁸ Ruth Katz and Elihu Katz, *Evaluating Culture: World Music and Fusion Food*, 18.2 INTL J CULTURAL STUDIES 155-165 (2015).

³⁹ Lorraine V. Aragon, *Copyrighting Culture for the Nation? Intangible Property Nationalism and the Regional Arts of Indonesia*, 19 INTL. J. CULTURAL PROP. 269-312 (2012) (noting that similarities in the cultural traditions have possibly arisen because Malaysia and Indonesia had shared history and territory right until their colonization as British East Indies and Dutch East Indies respectively).

Finally, sometimes, even within a given community, there may not be internal consensus on the authenticity of the characteristics of the folklore.⁴⁰ Communities produce TCE as per their customary norms (most of which are orally transmitted or sacred and confidential); this means there is also often a distinct lack of tangible evidence for proving the TCE's distinctive characteristics.⁴¹

B. Emergence and Evolution of Cross-Cultural TCEs

Cross-Cultural TCEs are said to emerge on account of cultural imperialism, cultural hybridity or cosmopolitan adaptation, each of which causes the folklore of a community ('Emulating Community') to ultimately subsume or mirror certain cultural elements from pre-existing or contemporaneous folklore of another community ('Reference Community').

The cultural imperialism theory argues that the Emulating Community absorbs the foreign elements of the Reference Community's cultural traditions due to subordination of the Emulating Community by the more dominant Reference Community (either directly as the imperialist, or indirectly as the group favoured and endorsed by the imperialist).⁴² Colonisation has been a significant propagator of such cultural imperialism.⁴³ In colonial Vietnam, the national art school encouraged local artists to produce only oriental, pro-native paintings of Indochina scenes, which were immensely popular with the French bourgeoisie.⁴⁴

This is not to say that the subordinated Emulating Community has no agency or conscious choice of its own, that it is simply a passive recipient of change, and that there is no reciprocal flow of cultural influences from the subordinated to the dominant

⁴⁰ Ruth Katz and Elihu Katz, *supra* note 37 at 155–165.

⁴¹ Joseph Githaiga, *Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge*, 5.2 MURDOCH U ELECTRONIC J L (1998).

⁴² EMILY A. SCHULTZ AND ROBERT H. LAVENDA, *CULTURAL ANTHROPOLOGY: A PERSPECTIVE ON THE HUMAN CONDITION* 191-192, 380-389 (Oxford University Press)(2012); Juniper Hill, *Global Folk Music Fusions: The Reification of Transnational Relationships and the Ethics of Cross-Cultural Appropriations in Finnish Contemporary Folk Music*, 39 YB. FOR TRADITIONAL MUSIC 50-83 (2007).

⁴³ Rodney Harrison and Lotte Hughes, *Heritage, Colonialism and Postcolonialism, Understanding the Politics of Heritage*, *Understanding Global Heritage* 234-269 (Rodney Harrison ed., Manchester University Press) (2009).

⁴⁴ Nora Annesley Taylor, *The Artist and the State: the Politics of Painting and National Identity in Hanoi, Vietnam 1925-1995* (1997) (PhD dissertation, Faculty of Graduate School of Cornell University).

power.⁴⁵ Recognition of this agency and conscious choice of the subordinated Emulating Community in the sustained, intentional adoption or emulation of foreign cultural elements has been the cornerstone of the theory of cultural hybridity.⁴⁶

'Hybridity' indicates a cultural borrowing where the Emulating Community has the authority to choose which elements to absorb, and then to further domesticate and customise the foreign cultural influences in ways that create new versions out of the old.⁴⁷ No doubt these choices are not free from internal struggles, but these are intentional changes over which the Emulating Community has greater control.⁴⁸

The evolution of the Haitian *Vodou* art in the 1940s is a unique case of cultural hybridity. American visitors and missionaries in Haiti at the time expected the local people to have a 'primitive' folk-art form that was symbolic of the "*strangeness of the charming tamed Caribbean nation state*". The local artists took advantage of these misinformed expectations by showcasing their art precisely as such.⁴⁹ Modern *Inuit* commercial folk art (i.e. *Eskimo Art*) in Canada also grew out of a similar cycle of hybridity during the 1930s-1950s. A few non-*Inuit* agencies in Canada encouraged the *Inuits* to project themselves as an animalistic hunter-gatherer magic society, so that interest in their folklore would incentivise the Canadian government to offer more social welfare schemes for them as traditional yet pan-Canadian symbol(s).⁵⁰

On the other hand, growing trade, digitisation and globalisation can popularise the cultural elements of the Reference Community's folklore to such an extent that a "cosmopolitan" art form emerges. The theory of *Kantian Cosmopolitanism* (or globalism) posits that since cultural heritage has no fixed beginning or ending, it

⁴⁵ SCHULTZ AND LAVENDA, *CULTURAL ANTHROPOLOGY*, *supra*, note 41 at 380-389.

⁴⁶ Matthew Liebmann, *The Mickey Mouse Kachina and other "Double Objects": Hybridity in the Material Culture of Colonial Encounters*, 15.3 *J. SOC. ARCHAEOLOGY*, 319-341 (2015); SCHULTZ AND LAVENDA, *CULTURAL ANTHROPOLOGY*, *supra*, note 41 at 380-389; HARRISON AND HUGHES, *HERITAGE, COLONIALISM*, 234-269.

⁴⁷ LIEBMAN, *THE MICKEY MOUSE KACHINA*, *supra* note 45, at 319-341 (analysing power imbalances vis-à-vis hybrids such as Mickey Mouse *Kachina* dolls where the corporate culture and the Hopi Native American culture entangle).

⁴⁸ SCHULTZ AND LAVENDA, *CULTURAL ANTHROPOLOGY* *supra* note 44, at 380-389.

⁴⁹ Karen E. Richman, *Innocent Imitations? Authenticity and Mimesis in Haitian Vodou Art, Tourism and Anthropology*, *ETHNOHISTORY* 55.2 (Spring 2008): 203-227.

⁵⁰ Nelson H.H. Graburn, *Authentic Inuit Art: Creation and Exclusion in the Canadian North*, *J MAT CULTURE* 9.2: 141-159 (2004).

belongs to and should be protected by the whole of humanity, and not just the Emulating and Reference Communities.⁵¹ Thus, Cosmopolitanism argues that free adoption of cross-cultural strains is a way of celebrating global artist relationships, of seeking inspiration, and of eliminating ‘chilling effect’ barriers on individual creativity and innovation.⁵² For instance, Japanese *sushi* has gone global to the extent that tuna technicians are sent in from Tokyo to Boston to instruct foreign fishers on how to handle tuna, and then fusion dishes are prepared by restaurants for customers of different nationalities.⁵³

In cases where the Cross-Cultural TCE is considered a ‘cosmopolitan’ art-form, one does need to note the underlying inequities. First, there is a danger that Cosmopolitanism could end up as a means of further cultural imperialism in the hands of those with more economic or geo-political resources⁵⁴ or digital market networks.⁵⁵ Second, Cosmopolitanism ignores the fact that the Reference Community may not view the cultural borrowing by the rest of the world with the same enthusiasm, and may consider it a chauvinist challenge to its own cultural sovereignty.⁵⁶ Finally, treating folklore as a ubiquitous benefit-for-all has high risks of unethical usurpation in the hands of unscrupulous Cosmopolitan researchers, developers, collectors, and curators.⁵⁷

⁵¹ Kenney C. Cortelyou, *Reframing Indigenous Cultural Artefacts Disputes: An Intellectual Property-Based Approach*, CARDOZO ARTS & ENTER L J 28: 502-552 (2011); Debora L. Threedy, *Claiming the Shields: Law, Anthropology, and the Role of Storytelling in a NAGPRA Repatriation Case Study*, J LAND RESOURCES & ENVIR L 29: 104-05 (2009) (recounting intra-tribal battles over repatriation of ancestral remains).

⁵² HILL, GLOBAL FOLK MUSIC, *supra* note 44, 50-83; CORTELYOU, REFRAMING... DISPUTES, *supra* note 50, at 502-552.

⁵³ SCHULTZ AND LAVENDA, CULTURAL ANTHROPOLOGY, *supra*, note 41, at 382-383; KATZ AND KATZ, EVALUATING CULTURE, 155-165.

⁵⁴ SCHULTZ AND LAVENDA, *supra* note 44, at 380-389; Olga Sezneva, *Pirate Cosmopolitics and the Transnational Consciousness of the Entertainment Industry*, ETHNIC & RACIAL STUD 37.12 (2014).

⁵⁵ MARK GRAHAM, CULTURAL BROKERS, THE INTERNET, AND VALUE CHAINS, CULTURAL WEALTH, 222-239.

⁵⁶ CORTELYOU, REFRAMING... DISPUTES, *supra* note 50, at 502-552; Mads Daugbjerg and Thomas Fibiger, *Introduction: Heritage Gone Global. Investigating the Production and Problematics of Globalised Pasts*, HIST & ANTHROPOLOGY 22.2: 135-147; Hill, GLOBAL FOLK MUSIC, *supra* note 44, at 50-83 (2011); B. BOATENG, AFRICAN TEXTILES AND THE POLITICS OF DIASPORIC IDENTITY-MAKING, IN FASHIONING AFRICA: POWER AND THE POLITICS OF DRESS 212-226, (J. Allman ed., Bloomington: Indiana University Press) (2004); Josephine Asmah, *Historical Threads: Intellectual Property Protection of Traditional Textile Designs: The Ghanaian Experience and African Perspectives*, INTL J CULTURAL PROP 15: 271-296 (2008).

⁵⁷ CORTELYOU, REFRAMING... DISPUTES, *supra* note 50, at 502-552.

III. DRAWING FENCES IN OWNERSHIP OF CROSS-CULTURAL TCEs

A. Formulating a Composite Index for Fencing Cross-Cultural TCEs

Because of the manner in which they emerge and evolve, Cross-Cultural TCEs can be the subject of several competing claims by alleged stakeholders – by (i) the Emulating and the Reference Communities who seek to protect their tradition against usurpers (‘Competing Communities’), and (ii) interested (cosmopolitan) third parties (‘Competing Beneficiaries’). Competing Beneficiaries include researchers and scholars, developers of “derivative works” (i.e. works inspired by and significantly transformed from the original TCE, with due authorisation by the relevant communities),⁵⁸ and producers and retailers. If a particular community’s claim has sufficient provenance – quantitative evidence (such as historical documentation, etc.) and qualitative evidence (relating to reliability of the quantitative evidence) – to suggest a prior and more ‘authentic’ existence of the relevant tradition,⁵⁹ then such community may be accorded IP rights over the concerned TCE.

More often than not, however, sufficient tangible records or documentation for the provenance of the Cross-Cultural TCE are not available,⁶⁰ and the ownership of Cross-Cultural TCEs remains indeterminate, obscure and contested. This difficulty in “fencing” among the Competing Communities and Competing Beneficiaries consequently translates into poor IP protection for Cross-Cultural TCEs.

The question of determining the original producers/ contributors of a Cross-Cultural TCE – and, thus, the rightful recipient of the related IP rights – is a knotty one. After

⁵⁸ See CORTELYOU, REFRAMING... DISPUTES, *supra* note 50, at 502-552; LI, FOLKLORE IN CHINA, 26; WIPO Guide to the Copyright and Related Right Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, (April 15, 2018), <http://www.wipo.int/tk/en/resources/glossary.html> (explaining that “**derivative works**” exist in the form of translations, adaptations, arrangements, alterations, or even compilations/ collections, of pre-existing protected works, such as documentaries, linguistic studies, audio-visual guides in museums, motion pictures based on oral stories or folk tales, etc. Only if the creation of such derivative works has been authorised by the authors of the protected pre-existing works, or if the derivative work is able to prove its “originality” and “transformative use” in comparison to the TCE it is based on, then it would not amount to cultural misappropriation of the TCE). See also *Fu-yuan Hong v. Lin-hai Qing* (Hong) (2008) (China) (Chinese courts analysing whether the Batik paper cut-art in question was transformative enough for copyright protection).

⁵⁹ See, e.g., *Bonnichsen v. U.S.*, 367 F.3d 864, 876 n.17 (9th Cir. 2004) (holding that none of the three Indian groups could show sufficient evidence for provenance of the impugned artifacts as “Native American” through radiocarbon dating).

⁶⁰ Moreno, “Retailers as Interpreters”, *supra* note 8, at 1-242.

all, such a determination is likely to hinge on systematic cultural comparisons among the traditions of the Competing Communities,⁶¹ and cross-cultural studies are often dismissed as being too subjective and incapable of quantification⁶² and, therefore, unreliable.

In response to these concerns, the composite index has been suggested for drawing boundaries or fences in the ownership of Cross-Cultural TCEs, which is aimed at reviewing the actions of the community, instead of any cross-cultural comparisons.⁶³ The proposed index would have to be developed on the basis of international best practices, such as unbiased collection and collation of domain-specific data from representative sampling groups, formulation of linear regression data model which incorporates inter-group complexities and variations, and an enforceable code of conduct for researchers.⁶⁴ The cross-cultural composite index would have two-fold uses – the evaluation of provenance of the Cross-Cultural TCE, and the estimation of cultural wealth of States.⁶⁵

Having said that, although the proposal for developing the cross-cultural composite index had found favour, the factors that should be examined by the index for prioritising and distinguishing among the various competing claims to the same Cross-Cultural TCE are still unascertainable. Accordingly, in this **Part III**, certain criteria have

⁶¹ Ilesanmi O. Olatundun, *What Is Cross-Cultural Research?*, INTL J PSYCHOLOGICAL STUD 1.2: 82-96 (2009); F.J. van de Vijver, *Types of Comparative Studies in Cross-Cultural Psychology*, ONLINE READINGS IN PSYCHOLOGY & CULTURE 2.2 (2009), <http://dx.doi.org/10.9707/2307-0919.1017>.

⁶² Michael Schnegg, *Anthropology and Comparison: Methodological Challenges and Tentative Solutions*, ZEITSCHRIFT FÜR ETHNOLOGIE 139.2 (2014): 55-72.

⁶³ Victor de Munck and Andrey Korotayev, *Cultural Units in Cross-Cultural Research*, 39.4 ETHNOLOGY, SPEC ISSUE: COMP RES & CULTURAL UNITS (2000): 335-348 (2000); Roberto Foa and Jeffery C. Tanner, *Methodology of the Indices of Social Development* (ISD Working Paper Series) (2012-04); Heba E. Helmy, *An Approach to Quantifying Social Justice in Selected Developing Countries*, 12.1 INTL J DEVELOPMENT ISSUES 67-84 (2013).

⁶⁴ Munck and Korotayev, *Cultural Units*; Maggie O'Neill et al., *Renewed Methodologies for Social Research: Ethno-Mimesis as Performative Praxis*, 50.1 SOCIOLOGICAL REV 69-88 (2002); SCHNEGG, ANTHROPOLOGY AND COMPARISON, 55-72; Anne-Wil Harzing et al., *Rating versus Ranking: What is the Best Way to Reduce Response and Language Bias in Cross-National Research?*, 18 INTL BUS REV 417-432 (2009); Peter N. Peregrine, *Cross-Cultural Comparative Approaches in Archaeology*, 30 ANN REV ANTHROPOLOGY : 1-18 (2001); Carl Ratner and Lumei Hui, *Theoretical and Methodological Problems in Cross-Cultural Psychology*, 33 J THEORY SOC BEHAVIOUR 67- 94 (2003); OLATUNDUN, WHAT IS CROSS-CULTURAL RESEARCH?, 82-96.

⁶⁵ Foa and Tanner, "Methodology of the Indices"; Helmy, "Approach to Quantifying Social Justice", 67-84.

been proposed as pivotal for the comparative examination anticipated under the index: (i) degree of transformation attributable to the TCE by the Emulating Community; (ii) degree of integration of the TCE by the Emulating Community; (iii) the motives for cross-claims to the same TCE by Competing Communities and Competing Beneficiaries; and (iv) the comparative degree of sustained contribution to the TCE by the Emulating Community. These criteria are neither exhaustive nor do they in any way signify a cultural hierarchy or superiority *inter se* the claimants; they only have to be read harmoniously.

B. Criteria to be considered by the Cross-Cultural Composite Index

(i) Degree of Transformation

One important factor to be considered is the degree of transformation, i.e. prolonged change and innovation, wrought upon the borrowed cultural elements by the Emulating Community since the time of such borrowing. The test is whether the Emulating Community appropriated or mimicked the alien elements on an 'as-is' basis, or whether the Emulating Community also further reworked the alien cultural elements before such consumption or appropriation. The greater the degree of transformation from the original material, the more substantial would be the ownership stake of the Emulating Community.⁶⁶

The transformative capacity of an Emulating Community would fall lower on the index scale, if the transformation is revealed to be merely a functional or haphazard response to a cultural imperialist (rather than an intentional, systematic effort at hybridity by the Emulating Community). If the Emulating Community insisted on putting its own stamp on the folklore to fit its own requirements,⁶⁷ and if its production process managed to acquire the elements of traditional processes,⁶⁸ then it would imply higher levels of transformation by the Emulating Community.

⁶⁶ G.C. Spivak, Poststructuralism, Marginality, Post-Coloniality and Value, *Literary Theory Today* 219-244 (P. Collier and H. Geyer-Ryan eds., Ithaca: Cornell University Press) (1990); Liebmann, *The Mickey Mouse Kachina*, *supra* note 45, at 325.

⁶⁷ LIEBMANN, *THE MICKEY MOUSE KACHINA*, *supra* note 45, at 319-341.

⁶⁸ *See supra* notes 22 to 51 (Part II of this Paper).

(ii) Degree of Integration

This factor examines how emotionally invested the Emulating Community is in the production of the Cross-Cultural TCE. Evidence for this test would include the duration and the nature of use of such TCE by the Contributor Group, and whether the folklore is inextricably linked to the cultural and ethnic identity and cultural and political rights of self-determination⁶⁹ of the Emulating Community. The degree of fervour or detachment of the community as a whole towards the TCE thus becomes a central factor.⁷⁰

For instance, the frozen 2500-year-old female mummy, the *Ice Maiden*, was unearthed in Russia in 1993, but since the indigenous Altaians in the region had long considered her to be their mythical ancestress, the mummy was specifically repatriated to them.⁷¹

(iii) Motives for Competing Claims

At times, the contestation of a TCE's authenticity disguises an imbalance of power in social relations between those who receive benefits from production, and those who are exploited during the production.⁷² This is why one must examine 'who' has called cultural authority over the TCE in doubt,⁷³ and 'what' such a claimant seeks to gain from such a challenge.

Claims that are purely commercial in nature, such as claims by third party traders hoping to enter the production chain, would carry less weightage under this motives test, and in that sense, perhaps, the test can also be used to assign the burden of proof. Similarly, claims by erstwhile colonial powers would be suspect under the motives test, if the cultural imperialist had primarily acted as cross-pollinator of specific folklore from one part of the empire to another, without also effectuating corresponding

⁶⁹ Stewart, *Kayano v. Hokkaido Expropriation: 'The Nibutani Dam Decision'*, INTERNATIONAL LEGAL MATERIALS, 38 394 (1999) ; Hadjoanno, *International Human Right to Culture Reclamation of the Cultural Identities of Indigenous Peoples Under International Law*, 8 Chap. L. Rev. 201 (2005).

⁷⁰ Edmund Carpenter, *Review of Eskimo-Plastik aus Kanada by Henry Schaefer-Simmern*, 62.2 AM ANTHROPOLOGIST 346-348 (1960); GRABURN, AUTHENTIC INUIT ART, 141-159.

⁷¹ KEIR REEVES AND GERTJAN PLETS, CULTURAL HERITAGE, SOCIAL NEEDS, AND IDENTITY, A COMPANION TO HERITAGE STUDIES 209-210, (William Logan et al. eds., U.K.: John Wiley and Sons) (2016).

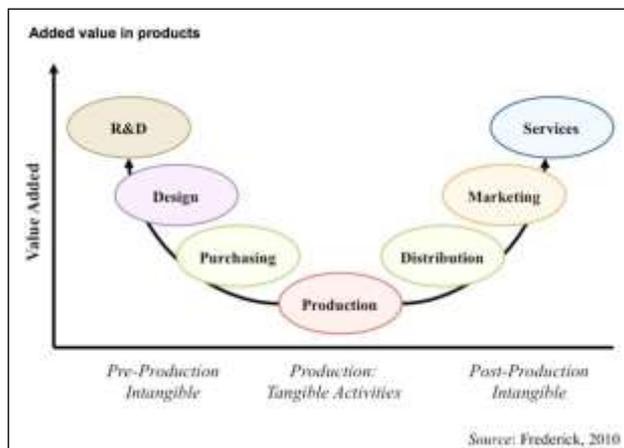
⁷² Erin McGuckin, *Tibetan Rugs*, 2.3 J MAT CULTURE : 291-310 (1997).

⁷³ Edward Bruner, *Abraham Lincoln as Authentic Reproduction*, 96.2 AM ANTHROPOLOGIST : 397-415 (1994).

transformation and integration. In fact, enabling such demands by imperialists would be tantamount to reducing the competing subordinated group to a mere colonial residuary without independent judgment.⁷⁴

(iv) Degree of Sustained Contribution

Since the production process is integral to folklore continuity,⁷⁵ the sustained contribution test would identify the area or community responsible for the maximum production volume and/or maximum contribution over time, towards the concerned TCE. The Global Value Chain ('GVC') analysis may be used for measuring "sustained contribution" across the various stages of design, manufacture, distribution or trade, and consumption of the TCE (see figure below⁷⁶).⁷⁷



Past GVC analyses have revealed that the groups that control the stages of product generation, consumption, or the addition of the 'cultural component to the product contributes the most to the concerned TCE (and not the brand designing/ marketing stages).⁷⁸ In TCEs, the stage of addition of cultural components thus becomes highly

⁷⁴ TAYLOR, THE ARTIST AND THE STATE, 1-5, 7-35 (noting a conscious effort of Vietnamese painters to reject European customer demands, and switch back to "depicting folk heroes, illustrating popular legends and proverbs and inserting mixtures of Buddhism, Taoism and village deities into their paintings"); HARRISON AND HUGHES, HERITAGE, COLONIALISM, 234-269 (noting how colonial imprints on Kenyan culture have been similarly shunned under a growing spirit of nationalism).

⁷⁵ MORENO, RETAILERS AS INTERPRETERS, *supra* note 8, at 1-242.

⁷⁶ Bui Van Tot, *Textile and Apparel Industry Report: Opportunities for Breakthrough* (Vietnam: FPT Securities, April 2014), 5, [http://fpts.com.vn/FileStore2/File/2014/07/01/Textile%20and%20Apparel%20Industry%20Report%20\(latest\).pdf](http://fpts.com.vn/FileStore2/File/2014/07/01/Textile%20and%20Apparel%20Industry%20Report%20(latest).pdf).

⁷⁷ BAIR, CONSTRUCTING SCARCITY, CULTURAL WEALTH, 181-184.

⁷⁸ STEFANO PONTE AND BENOIT DAVIRON, CREATING AND CONTROLLING SYMBOLIC VALUE, CULTURAL WEALTH, 197-221; BAIR, CONSTRUCTING SCARCITY, CULTURAL WEALTH, 181-184.

significant, and can be supported by GVC data on the locales of maximum historical production, and typical source locations of the raw materials and equipment for the TCEs.⁷⁹

Further, as part of the sustained contribution test, one would need to identify the production ‘masterminds’ i.e. those who controlled the function and meaning of the concerned cultural materials.⁸⁰ After all, without the involvement of such cultural controller or overseer, the production chain of the given TCE would have remained incomplete, significantly delayed or, even, non-existent.⁸¹ True control of sustained contribution would be inferred from the independent decision-making ability of the controller or overseer on the production, evaluation, and uses of TCE; recruitment of artisans; the type of equipment used; and the nature of work settings.⁸²

C. Application of Cross-Cultural Composite Index to Multiple Identified Communities

Based on the four-fold test mentioned above, if *one specific community* may be identified which has clearly showed the maximum degrees of transformation, integration and sustained contribution, then it would be easy to accord ownership and IP rights over the TCE to such a community.

Two consequences are possible from the application of the four-fold test mentioned above: (i) one specific community may be identified which has clearly showed the

⁷⁹ Boatema Boateng, *The Hand of the Ancestors: Time, Cultural Production, and Intellectual Property Law*, 47.4 L & SOCIETY REV 943-973 (2013); Ken Taylor, *Landscape and Memory: Cultural Landscapes, Intangible Values and Some Thoughts on Asia* (paper presented at the 16th ICOMOS General Assembly and International Symposium: “Finding the Spirit of Place – Between the Tangible and the Intangible”, Quebec, Canada, September 29 – October 4, 2008) .

⁸⁰ MORENO, RETAILERS AS INTERPRETERS, *supra* note 8, at 1-242.

⁸¹ Robert W. Nicholls, *Running John Bull: The Provenance of a Masquerade in the Lesser Antilles*, FOLKLORE 120 133-156 (2009) (implying that the Caribbean bull masquerade tradition may have been introduced by the British sea-faring colonizers in Antigua or carried over from practices of Africans of Upper Guinea, but ultimately resulted in a tradition most quintessentially “West Indian”). *See also* Helmut Weber, *The 'But For' Test and Other Devices - The Role of Hypothetical Events in the Law*, HIST SOC RES 34.2: 118-128 (2009); Keith Patten, *Personal Injury: The Big Question*, 160 N L J 825 (2010); Jane Stapleton, *An 'Extended But-For' Test for the Causal Relation in the Law of Obligations* 35.4 OXFORD J LEGAL STUD 697-726 (2015).

⁸² S. BAIZERMAN, *TEXTILE TOURIST ART: CAN WE CALL IT TRADITIONAL?* (paper presented at Symposium on “Current Issues in Ethnographic Costume and Cloth: Middle America and the Central Andes of South America”, Haffenreffer Museum, March 1987); N. GRABURN, *INTRODUCTION: ARTS OF THE FOURTH WORLD, ETHNIC AND TOURIST ARTS: CULTURAL EXPRESSIONS FROM THE FOURTH WORLD* 1-32, (N. H.H. Graburn ed., Berkeley: University of California Press) (1976). *See also* MORENO, *RETAILERS AS INTERPRETERS*, *supra* note 8, at 19, 50-51.

maximum degrees of transformation, integration and sustained contribution towards the subsistence of the same Cross-Cultural TCE, among the various Competing Communities; (ii) more than one Competing Communities and Competing Beneficiaries are shortlisted for having shown varying but equally significant degrees of transformation, integration and sustained contribution towards the subsistence of the same Cross-Cultural TCE. In the former case, it would be easy to accord ownership and IP rights over the Cross-Cultural TCE to the identified single community; in the latter case, there is need for further deliberation.

In cases where more than one Competing Communities and Competing Beneficiaries are shortlisted, the application of the four-fold test can help the anthropologist to set actual numerical figures to the degree and extent of each competing group's claim, i.e. devise and apportion 'stakeholding percentages' to the multiple claimants on the basis of their transformation efforts, integration, motivation and sustained contributions by an agreed cut-off date. On the basis of such allocated stakeholding, these multiple competing participants can be afforded rights over the TCE. Proportionality of stakeholding is, after all, the basis of many liability apportionment principles,⁸³ such as the market share liability principle that has been used to assign liability in international law or tort law to remedy "indeterminate defendant" situations⁸⁴ – and can be applied in the "indeterminate author" TCE context as well.

Imagine that Community A has been producing a traditional fabric for a century, while Community B has been fashioning that fabric as a traditional head-wrap for as many years. If Community B significantly transforms the fabric itself before converting it to a head-wrap, then Community A will not have a market share in the headpiece. But if

⁸³ Andrew B. Nace, *Market Share Liability: A Current Assessment of a Decade-Old Doctrine*, 44 VAND L REV 395-407 (1991); Allen Rostron, *Beyond Market Share Liability: A Theory of Proportional Share Liability for Nonfungible Products*, 52 UCLA L REV : 205-212 (2004); Suzanne Ernst Drummond, *DES and Market Share Liability in Ohio – A Lesson in How What You Don't Know Can Hurt: Sutowski v. Eli Lilly*, U CIN L REV 67: 1341-42 (1999); Mark A. Geistfeldt, *The Doctrinal Unity Of Alternative Liability And Market-Share Liability*, U PA L REV 155: 447-500 (2006).

⁸⁴ See, e.g., *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980) (United States); *Hunnings v. Texaco, Inc.*, 29 F. 3d 1480 (11th Cir. 1994) (United States); *Thomas v. Mallett*, 701 N.W. 2d 523, 567 (United States); *Allen v. British Rail Eng'g Ltd.*, (2001) ICR PIQR 942, 952 (A.C.) (United Kingdom); *Holtby v. Brigham and Cowan (Hull) Ltd.*, (2000) 3 All E.R. 421, 429 (A.C.) (United Kingdom). See also Naomi Sheiner, *Comment: DES and a Proposed Theory of Enterprise Liability*, FORDHAM L REV 46: 963 (1978).

Community B has simply been purchasing the original fabric from Community A (without any input in its embellishment), then both communities could be accorded stakeholding percentages for the commercial profits from the head-wrap based on existing market shares.

Such proportionate collaborations among multiple claimants are not unheard of. Under the cultural bank or eco-museum model, like the Culture Bank in Mali, folklorists seek micro-credit in return for offering their folk-art as collateral for display at the bank, and the loan amount depends on the degree of provenance possible for *each* artist's work.⁸⁵

Another example is the *Mundo Maya* Project alliance among Mexico, Guatemala, Belize, Honduras and El Salvador, for promoting tourism across a transnational Meso-American region of common aesthetic, ecological and archaeological importance (see map below⁸⁶).⁸⁷



IV. CASE STUDIES ON CROSS-CULTURAL TCEs

In this **Part IV**, two of the most confounding categories of Cross-Cultural TCEs – World Music and African Wax Prints – are discussed here, by way of illustration on how the

⁸⁵ FREDERICK WHERRY AND TOD CROSBY, *THE CULTURE BANK*, *CULTURAL WEALTH*, 139-155; MADINA REGNAULT, *CONVERTING (OR NOT) CULTURAL WEALTH INTO TOURISM PROFITS*, *CULTURAL WEALTH*, 170-171 (quoting the example of the Mayotte Island where *village vacances* have been set up to promote cultural heritage tourism).

⁸⁶ E.C. Wells and W.A. Goodwin, *Mundo Maya: Reference Work Entry*, *ENCYCLOPEDIA OF GLOBAL ARCHAEOLOGY* 5099 (2014).

⁸⁷ BAIR, *CONSTRUCTING SCARCITY*, *CULTURAL WEALTH*, 185-194.

four-fold cross-cultural composite index may be used to generate solutions to thorny fencing issues in the ownership of Cross-Cultural TCEs.

A. Case Study: World Music

Cross-cultural borrowing and convergence are especially common in contemporary music, constituting a new class of music popularly called 'world music'.⁸⁸ For instance, *Baliphonics* is world music from Sri Lanka that combines the traditional *Bali* ritual music with elements of modern jazz. Interestingly, the first *Baliphonics* musical group comprised three New Zealanders and one Sri Lankan.⁸⁹ Similar musical fusion among other musical strains has brought about the unique – and lucrative – phonetics of *Deep Forest*, and Norwegian saxophonist Jan Garbarek and Hugo Zemp's UNESCO-sponsored *Solomon Islands* music.⁹⁰

The spirit of Cosmopolitanism has particularly supported the emergence of World Music: contemporary musicians oppose the notion that folk music first belongs to musicians from specific cultural groups. Cosmopolitan borrowings in World Music are a double-edged sword – if done properly, cultural borrowing provides homage and popularity; if not, it re-entrenches old power hierarchies and unjust enrichment problems.⁹¹

The map below shows the multiple geographical loci of World Music sources,⁹² and simultaneously highlights the fact that the cities of London, Berlin, Munich, Johannesburg, Los Angeles, New York and Paris remain the central clusters for "label" or concentrated production of world music.

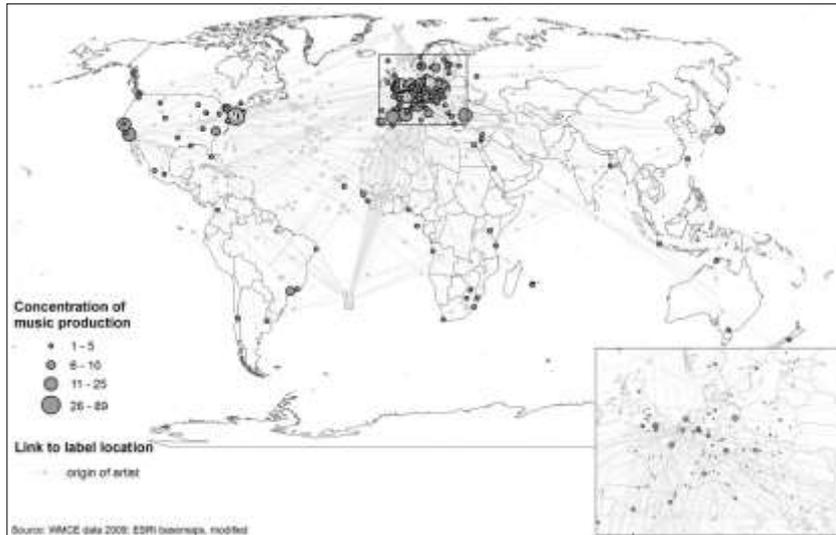
⁸⁸ KATZ AND KATZ, *EVALUATING CULTURE*, 155–165.

⁸⁹ SUMUDITHA SURaweera, *BALIPHONICS: ADAPTATION OF SRI LANKAN, LOW COUNTRY, BALI RITUAL MUSIC ON TO THE CONCERT STAGE*, SOUTH ASIA, 145.

⁹⁰ STEVEN FELD, *A SWEET LULLABY FOR WORLD MUSIC*, *GLOBALISATION* 189-216, (Arjun Appadurai ed., London: Duke University Press)(2001) (critiquing each of these World Music artists for manipulating TCEs for customer base expansion without adequate disclosures, compensation or due acknowledgement).

⁹¹ HILL, *GLOBAL FOLK MUSIC*, *supra* note 44, at 50-83.

⁹² A.M.C. Brandellero and K. Pfeffer, *Multiple and Shifting Geographies of World Music Production*, *AREA* 43.4, 499 (2011).



Clearly, there subsists a spatial distance between the sources of World Music (i.e. the folk-musicians) and its consumption (i.e. the label music producers), and folk-musicians can bridge this distance only if they agree to conform to the standards of label music producers. Under this frame of reference, World Music is not as Cosmopolitan as it claims to be, and fences in ownership will have to be drawn.

The transformation *test* of the cross-cultural index (discussed above) could be applied here to review when and how the alien musical elements are introduced into the contemporary musician's production. World Music is typically created through the following three modes:⁹³

- i. *Elemental Appropriation* of traditional musical elements into another musical tradition, so that neither original material is 'fundamentally altered';
- ii. *Collaboration* with musicians from other traditions, resulting in fusion or experimental music for both groups; and/or
- iii. *Immersion* by seriously learning a particular musical tradition from foreigners or through field research, and mixing both musical materials and instruments.

The transformation test questions whether the outcome of the three modes of borrowing under World Music is a replica of the traditional music, or whether it creates something new and transformative. Under this test, collaborative World Music would constitute an egalitarian joint venture representation, and immersive World Music

⁹³ HILL, GLOBAL FOLK MUSIC, *supra* note 44, at 50-83.

would be treated as an authorised 'derivative work' – both, thus, 'Cosmopolitan' in nature. On the other hand, World Music based on elemental appropriation may be akin to unjust misappropriation, especially when created without acknowledgement, knowledge, or consent of the traditional musicians.

The integration test may be similarly applied to World Music. In immersive and collaborative forms of World Music, significant time, effort and emotional commitment are invested by the World Musicians in learning the musical traditions and/or creating new fusion compositions – but this is not the case in elemental appropriation.

When it comes to the motives test, no doubt that the more lucrative the composition is likely to be, the greater is the contemporary musician's incentive to unethically exploit the traditional musicians, even in the more collaborative and immersive forms.⁹⁴ Some critics have even criticised the indigenous groups' clamour for profits only when the World Music actually becomes a huge hit or is used in a movie,⁹⁵ but this should not distract us from the realisation that the end result is still one of unjust enrichment for the foreign musicians.⁹⁶

The sustained contribution test has been discussed before by way of the GVC analysis map included above. While Western musicians have the maximum global marketing outreach and concentration on the production side, without the stewardship of the traditional musicians, neither the traditional musical elements nor the environment in which the folk-music originally emerged would have survived.

Thus, if the creation of a given composition of World Music has not been authorised by the traditional musicians, and if the elemental appropriation, immersion or collaboration approach did not involve significant levels of transformation to and personal investment in the traditional music by the foreign musicians, then that World Music composition would not be a Cross-Cultural TCE or a Cosmopolitan derivative work; it would lead to cultural misappropriation.

⁹⁴ Hugo Zemp, *The/An Ethnomusicologist and the Record Business*, 28 YEARBOOK FOR TRADITIONAL MUSIC, 36-56 (1996).

⁹⁵ Anthony Seeger, *Ethnomusicology and Music Law*, 36.3 ETHNOMUSICOLOGY 345-359.

⁹⁶ HILL, GLOBAL FOLK MUSIC, *supra* note 44, at 50-83.

B. Case Study: African Wax Prints

African Wax Prints (sample figure below)⁹⁷ are the colourful mosaic-patterned fabrics that are produced in Western Africa, particularly in Ghana, using wax resins and dyes (or machine-prints imitating the wax type effects), on both sides of fabric. African Wax Prints are known by various terms in different regions – *Ankara*, *Javanaise*, *Hollandis*, *Ukpo* and *Chitenge*.⁹⁸ These fabrics have found widespread application in the fields of fashion clothing and furniture. Lately however, they have been denounced as not being authentically “African” in nature because of the cross-cultural manner in which they have evolved.



During the 19th century, the Dutch imperialists and the West African slaves and mercenaries recruited by them at the Indonesian colonial outposts⁹⁹ acquired knowledge of a local technique of wax-resist dyeing called ‘Batik’. Batik techniques themselves are of obscure origin, and are not necessarily of Javanese origin,¹⁰⁰ some

⁹⁷ *Nouvelle Histoire Collection*, designed by Sasja Strengtholt, Deux d’Amsterdam, for Vlisco, photograph by Carmen Kemmink, SELECTION MAGAZINE (2011), <http://www.selectionsarts.com/2017/01/out-of-africa/intext1/>.

⁹⁸ Tunde M. Akinwumi, *The ‘African Print’ Hoax: Machine Produced Textiles Jeopardize African Print Authenticity*, 2.5 J PAN AFRICAN STUD. 179 (2008); Nina Sylvanus, *The Stuff of Africanity*, 57 TEMPS MODERNES (2002)128-144 (2002).

⁹⁹ Ineke van Kessel, *Courageous But Insolent’: African Soldiers in the Dutch East Indies as seen by Dutch Officials and Indonesian Neighbours*, 4.2 TRANSFORMING CULTURES EJOURNAL (2009), <http://epress.lib.uts.edu.au/journals/TfC>.

¹⁰⁰ See generally Michael Hitchcock and Wiendu Nuryanti, *Building on Batik: The Globalization of a Craft Community*, (Aldershot: Ashgate Publishing) (2000).

pointing towards Chinese roots,¹⁰¹ and others to an Indian-inspired design.¹⁰² Noting the high demand in Western Africa for *Batik*, a Dutch Unilever-owned textile printing company named *Vlisco* succeeded in machine-printing the wax-dyes and opened trading houses in Netherlands and England for exporting wax prints to Western African ports. Vlisco also set up joint ventures with the local authorities, such as the Ghana Textile Printing Company (GTP) in 1965 and UniWax with the Ivory Coast authorities in 1967. Through these networks, Vlisco was able to establish a market monopoly in Western Africa.¹⁰³

Due to widespread use and integration of the fabrics from Vlisco in Western Africa, the unique colour combinations, patterns and motifs in the fabrics gradually came to acquire special meanings and names among the local African consumers. These motifs are limited in number and are peculiar to the Western African cultural notions of family reunification and African independence, such as *flying birds*, *fallen tree*, the famous Ghanaian sword and commemorative portraits of certain tribal chiefs. The traders of the fabrics also developed a ritual of assigning names to the waxes used which often signified important or popular global events, like *Dallas*, *Saddam Hussein*, and *Premier Gao*. Even the colours used in the fabrics were regionally designated – blue for Nigeria, orange and black for Ghana, pastels for Zaire, and sunset colours and greens for Ivory Coast. Soon, the African Wax Prints graduated into cultural symbols of status, and began to be reserved for ceremonial occasions. These choices were made by the Western Africans themselves, which were then relayed to Vlisco producers, who were compelled to accede to these choices due to their local popularity. In short, eventually, an Asian folk-art, which was cross-pollinated to Africa by cultural imperialists and then globalised via Vlisco's retail trade, was transformed significantly and was integrated successfully in Western African socio-cultural ethos.¹⁰⁴

¹⁰¹ See LI, FOLKLORE IN CHINA, 152-157 (theorising that the *Batik* is traditional knowledge of an ethnic minority group in China). See Ruurdje Laarhoven, A Silent Textile Trade War: Batik Revival as Economic and Political Weapon in 17th Century Java 6-7 (paper presented at 13th Biennial Symposium on "Textiles and Politics", Washington D.C) (2012) (theorising that the Chinese residents in the Dutch colony of Batavia learnt the knowledge of *Batik* through trade).

¹⁰² JULIA FELSETHAL, THE CURIOUS HISTORY OF 'TRIBAL' PRINTS, HOW THE DUTCH PEDDLE INDONESIAN-INSPIRED DESIGNS TO WEST AFRICA, DESIGN, (2012).

¹⁰³ Marcel Hoogenboom et al., *From Local to Global, and Back*, 52.6 BUS. HIST. 932-954 (2010).

¹⁰⁴ SYLVANUS, STUFF OF AFRICANITY, 128-144; AKINWUMI, AFRICAN PRINT HOAX, 179-192; HOOGENBOOM ET

There are several competing claims to the African Wax Prints – from Competing Communities in Indonesia, India and China, each of whom claim to be the prior origin point for *Batik* techniques, and Competing Beneficiaries, such as fashion-houses and trading groups, who argue that wax printing is not an African tradition, but a Cosmopolitan skill instead. It is clear that counterclaims by Competing Beneficiaries are commercially motivated and, therefore, not entirely reliable, under the *motives test*. Any cross-claims by Competing Communities would certainly carry more weight; however, as noted before, even the cross-claims of the Competing Communities are of contested provenance.

From a sustained contribution perspective, it is true that the local populace has, in a circular fashion, directed and overseen the manufacturing process, commodity design and trade. The Vlisco and other factories themselves employ West Africans, consult with local African traders and are supervised in part by African governmental authorities.

Clearly, the application of the transformation, integration, motives and sustained contribution tests indicates that African Wax Prints have, in time, acquired the unique characteristics of a new TCE distinct from other versions of Asian *Batik*-based fabrics. While it is true that cross-pollination by cultural imperialists served to introduce *Batik* from another continent, Western Africa too proved to be a ready market, source of labour and innovator of substantial changes and local hybridisations to the fabric due to their own predilection for it. Given the foregoing, the African groups' variant of *Batik* techniques should not be construed as cultural misappropriation, but instead should be treated as a separate and distinct TCE.

V. MODELS OF INTELLECTUAL PROPERTY PROTECTION FOR CROSS-CULTURAL TCEs

AL., FROM LOCAL TO GLOBAL, 932-954. *See also*, for a sample of the *flying bird motif*, *Wax Print Textile: Tu Sors, Je Sors*, COOPER HEWITT, SMITHSONIAN DESIGN MUSEUM (1978), http://collections.si.edu/search/results.htm?q=record_ID%3Achnm_2015-1-1andrepo=DPLA.

A. *Model for IP Protection: Copyright, Trademark, Geographical Indicator or MICO?*

Let us then assume that by application of the composite index described in **Part III** of this Paper, the authenticity and ownership, or the market shares, with respect to the Cross-Cultural TCEs may indeed be determined. That being the case, the next step would be to offer IP protection to the identified owners. Such IP protection would prevent parasitic competition against the TCEs and the unauthorised exploitation or distortion of the TCEs.¹⁰⁵

For this purpose, the ideal IP protection regime should be one that imposes clear restrictions of use on third parties with respect to copying, trading, reproducing, and adapting the TCEs without permission of the identified owners. Much has already been written about whether the best IP model for this would be copyright, trademark, patent, geographical indicators, or marks indicating conditions of origin:

i. *Copyright Protection for Cross-Cultural TCEs:*

Given the creative component of folklore, there is a powerful argument for the copyright protection of TCEs. However, copyright protection of Cross-Cultural TCEs, suffers from a variety of impediments, including: the anonymous identity of authorship in group-generated work;¹⁰⁶ the restrictions on term of protection under most copyright regimes;¹⁰⁷ the perception of works that have been produced over several generations in a similar vein as lacking in originality and novelty;¹⁰⁸ the difficulties in differentiating original folklore from copies or derivative works thereof;¹⁰⁹ and the inadequacy of

¹⁰⁵ LUCAS-SCHLOETTER, *FOLKLORE*, 312-315; ANNETTE KUR AND ROLAND KNAAK, *PROTECTION OF TRADITIONAL NAMES AND DESIGNATIONS, INDIGENOUS HERITAGE* 239-242.

¹⁰⁶ BEHARIE AND SHABANGU, *TRADITIONAL KNOWLEDGE*, 342-359.

¹⁰⁷ *See, e.g., Berne Convention for the Protection of Literary and Artistic Works* (hereinafter, referred to as the "**Berne Convention**"), art 15(4), Sept. 9, 1886, as last revised Jul. 24, 1971, 828 U.N.T.S. 221 (providing protection to "anonymous works", for only 50 years from date made available to the public). *See also* LI, *FOLKLORE IN CHINA*, 4-9, 12; J.M. SWAMINATHAN, *THE LEGAL SAFEGUARD FOR TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS, SOUTH ASIA* 108.

¹⁰⁸ LUCAS-SCHLOETTER, *FOLKLORE*, 291-298; BEHARIE AND SHABANGU, *TRADITIONAL KNOWLEDGE* 342-359.

¹⁰⁹ *See, e.g., Merchandising Corp of America Inc. v. Harpbond Ltd.*, F.S.R. 32 (1983) (requiring the English Court of Appeal to analyse difference in originality levels of the Beijing Opera folk facial paintings imitated in Meng-Lin Zhao's album covers and other artists' similar art on T-shirts); *Wulfjum Halitan v. Xingjiang Luobin Cultural Art Development Co. Ltd.* (2006) (requiring the Chinese Court to identify differentiations of plagiarism, derivation and originality in the works of musicians based on an *Uygur* ethnic minority folk tune). *See* LI, *FOLKLORE IN CHINA*, 42-46.

documentation or fixation of work in folklore in material form or in a tangible medium.¹¹⁰

ii. Trademarks:

Trademark regimes are advantageous because they particularly empower members of the community to conduct business or trade in the TCEs, with a protection term that runs parallel to the continuity of the business or trade.¹¹¹ Trademark protection for TCEs has been instituted in New Zealand,¹¹² South Africa,¹¹³ and United States¹¹⁴. However, the trademark protection for TCEs also suffers from numerous drawbacks: restrictions on multiple trademark registrations in favour of the other stakeholding communities;¹¹⁵ the focus of trademarks towards halting or mitigating ongoing infringement by third parties (rather than proactively and pre-emptively protecting the TCE even before such infringement comes to light); disinclination of communities to trademark and thus commercialise their more sacred TCEs; and requirements of registration procedures which may prove too expensive or politically cumbersome for traditional artists.¹¹⁶

iii. Geographical Indicators:

Geographical Indicators ('GI(s)') would work by associating the TCE with a geological heritage system that references a specific place and time, and signifying certain levels

¹¹⁰ LI, FOLKLORE IN CHINA 42-46 (critiquing the requirement under copyright regime of *fixation* of the work in tangible medium, which cannot be always achieved in folklore based on self-taught or transgenerational "living" knowledge that may not be concretized or documented, such as facial make-up techniques for folk theatre or sacred folk music tunes).

¹¹¹ Nicole Aylwin and Rosemary J. Coombe, *Marks Indicating Conditions of Origin in Rights-Based Sustainable Development*, UCD L REV 47: 753-786 (2013-2014).

¹¹² New Zealand's Trademarks Act, 2002, § 17(1)(c)(1) (prohibiting the Commissioner for Trademarks from registering marks whose use or registration likely to offend a significant sub-group of the community including the indigenous *Maori*).

¹¹³ The South African Trade Marks Act, 1993, § 12 (preventing registration or allowing trademarks to be removed from register if they are "*likely to give offence to any class of persons*", including indigenous groups).

¹¹⁴ The U.S. Trademark Act, 1946, 15 U.S. Code § 1052(a) (authorizing U.S. Patent and Trademark Office to prevent registration if mark disparages or suggests a false connection to any other person, belief, or national symbol, or brings them into contempt or disrepute, including to Native American tribes).

¹¹⁵ See, e.g., LUCAS-SCHLOETTER, FOLKLORE 307-311 (quoting the example of Rooibos, a shrub tea of South Africa, that was not permitted registration as a beverage trademark in Germany under the need-to-keep-free doctrine).

¹¹⁶ LI, FOLKLORE IN CHINA, 54-56.

of quality of the TCE.¹¹⁷ But GIs are usually deployed as markers of standardisation for the product and the production process, brought about due to newer technologies that have enabled easier replication and reproduction even by persons exogenous to the producer group. Such standardisation may not be possible in the case of TCEs, where members of the same community may not always be geographically concentrated in any given region, and where geo-cultural provenance is difficult to delineate with certainty.¹¹⁸

iv. Marks Indicating Conditions of Origin:

Marks Indicating Conditions of Origin ('**MICO(s)**') have been proposed as a hybrid of trademark and GI regime, where the MICO would have the capacity to indicate the source, appellations of origin, geographical terrain and the cultural heritage of the concerned cultural materials. The MICOs need not indicate standardised production like the GIs, but they would signal to purchasers that certain accepted protocols have been met in the production of the TCEs, including guarantee of accountability and localised governance of the commodity-chain.¹¹⁹

Under the proposed MICO scheme, two primary kinds of MICOs have been suggested: (a) certification marks for indicating that the mark is associated with one particular community's TCE; and (b) collaboration or collective marks for indicating that the TCE has resulted from authorised negotiations between a community and extraneous persons.

The MICOs can be owned by the entire community, and not just by a single folklorist, and would, therefore, be untrammelled by duration or geographical restrictions.¹²⁰ Schemes analogical to MICO schemes have been set up in Australia and India,¹²¹ and under the Paris Convention of 1883¹²².

¹¹⁷ MARION DEMOSSIER, *THE POLITICS OF HERITAGE IN THE LAND OF FOOD AND WINE, A COMPANION TO HERITAGE STUDIES* 94.

¹¹⁸ DEMOSSIER, *POLITICS OF HERITAGE IN THE LAND OF FOOD AND WINE* 312; LUCAS-SCHLOETTER, *FOLKLORE* 259-291; KUR AND KNAAK, *PROTECTION OF TRADITIONAL NAMES* 239-242.

¹¹⁹ AYLWIN AND COOMBE, *MARKS INDICATING CONDITIONS OF ORIGIN*, 753-786.

¹²⁰ LUCAS-SCHLOETTER, *FOLKLORE* 259-291; KUR AND KNAAK, *PROTECTION OF TRADITIONAL NAMES* 239-242; AYLWIN AND COOMBE, *MARKS INDICATING CONDITIONS OF ORIGIN* 753-786.

¹²¹ SWAMINATHAN, *LEGAL SAFEGUARD* 108.

¹²² Paris Convention for the Protection of Industrial Property (hereinafter, referred to as the "**Paris**

B. Terms and Conditions for Marks Indicating Conditions of Origin

As discussed above, MICOs are arguably the most suitable regulatory model for IP protection of TCEs,¹²³ but such a MICO scheme would also have to be streamlined through the imposition of certain conditions on eligibility, usage and enforcement; a few illustrative conditions have been described in detail below.

(i) MICO Calibration Conditions

A number of calibrations should be incorporated within the MICO scheme. Varying grades of MICOs may be allotted, indicating: (i) different levels of provenance and contestation, (ii) different types of holders, transmitters and beneficiaries, and (iii) different types of uses. Different eligibility criteria and operation guidelines could be made to apply to each MICO grade. Specifically, MICOs for derivative works may be classified into separate sub-categories of the same MICO, at the same time clearly distinguishing between the original TCE and derivative works based on the TCE,¹²⁴ so that different IP rights may be accorded.¹²⁵ Similarly, competing cross-claims or lower levels of provenance evidence for the TCE may be indicated through supplementary MICO gradations; existence of such MICO categories could serve as warnings to unauthorised third parties, as well as due acknowledgement of the cross-claims.

Another tiered distinction may have to be made among the various holders and users of the TCEs, rather than aggregating both developers and users of TCEs into the

Convention”), Mar. 20, 1883, as last revised Jul. 14, 1967, 828 U.N.T.S. 305, art 7bis (permitting collective marks), art 10 and art 10bis (preventing false indications of product origins and unfair competition).

¹²³ LUCAS-SCHLOETTER, FOLKLORE 266-291.

¹²⁴ CORTELYOU, REFRAMING... DISPUTES, *supra* note 50, at 502-552.

¹²⁵ See, e.g., *Whithol v. Wells*, 231 F.2d 550, 554 (7th Cir.) (United States) (permitting copyright protection for religious composition inspired by and significantly transforming a Latvian folk song); *Tribunal de grande instance Seine*, 28 March 1957, RIDA 1957, Vol. 16, 138 (France) (denying copyright protection to “slavish” copy of French/ Canadian folk song); *Tribunal de grande instance Paris*, 19 January 1972, RIDA 1972, Vol. 72, 172 (France) (denying copyright protection to composition even if based on public domain folk song due to insufficiency of creative effort); *Manitas de Plata Tribunal de grande instance Paris*, 19 January 1968, RIDA 1968, Vol. 56, 133 (France) (permitting copyright protection to guitar rendition of Flamenco folksongs which bore artists’ imprint of own temperament and style); *CA Paris* 14 January 1992, Gaz. Pal. 1992, 2, 570, 575 (France) (denying copyright protection to an anthology of Cajun folklore, as the anthology was based on a public domain work and did not contain the anthologist’s stamp of personality). See ALSO BEHARIE AND SHABANGU, TRADITIONAL KNOWLEDGE, 342-359; Aylwin and Coombe, Marks Indicating Conditions of Origin, 753-786; The South African Trade Marks Act, 1993, § 43B.

“holders” category. Such aggregation is not a cogent construction, and should be segregated among the various interested stakeholders depending on their objectives, such as: authors, transmitters, recorders, and beneficiaries.¹²⁶

More detailed qualifications would also have to be prescribed for awarding MICO to applicants. These qualifications could include due representation of community, evidence that the applications are non-detrimental to public and based on fair trade practices, and relevant disclosures,¹²⁷ the local reputation of the folklore, and the nature of the first intended audience (i.e. tourists or more lucrative markets).¹²⁸

(ii) MICO Certification Authorities

A certification authority would have to be designated under national laws for registering the MICOs, either directly or by further delegating such authority to third party approved certifiers in regional or state centres. Delegation to regional centres may be required depending on distances from community concentrations, and availability of relevant representatives. The certification authorities would need prior training in this regard, and funding may be sourced through MICO application fees, donations, government contributions and funds through corporate social responsibility (‘CSR’) programs.¹²⁹

The certification authorities would be empowered to review and approve any benefit-sharing arrangements/ licenses to third party beneficiaries, would act as repositories of information, reporting and disclosures regarding the MICO-registered TCEs, and would supervise the use and sales or trade under the MICOs through accredited shops, galleries, emporiums etc.¹³⁰

¹²⁶ LI, FOLKLORE IN CHINA, 66.

¹²⁷ See, e.g. *The Australian Trademarks Act, 1995* (Commonwealth Consolidated Acts), (April 19, 2017), http://www.austlii.edu.au/au/legis/cth/consol_act/tma1995121/.

¹²⁸ Leanne Wiseman, *Regulating Authenticity*, 9.2 GRIFFITH L REV : 248-273 (2000); L. WISEMAN, LABELS OF AUTHENTICITY 14-25.

¹²⁹ BEHARIE AND SHABANGU, TRADITIONAL KNOWLEDGE 342-359; WISEMAN, REGULATING AUTHENTICITY 248-273; WISEMAN, LABELS OF AUTHENTICITY, 14-25; CORTELYOU, REFRAMING... DISPUTES, supra note 50, at 502-552.

¹³⁰ WISEMAN, REGULATING AUTHENTICITY, 248-273; WISEMAN, LABELS OF AUTHENTICITY 14-25.

(iii) Vesting of MICO in Collecting Societies

The representatives of the community seeking MICO-registration of their TCE ('Represented Community') are faced with numerous responsibilities: transacting with third party beneficiaries for licenses and benefit-sharing arrangements, handling disclosures and reporting to certification authorities, reviewing activities and policies of third parties for ensuring community access, accreditation and participation to the TCE, managing funds generated from the commercialisation of TCEs, enforcing penalties against misappropriation, and tackling dispute resolution processes.¹³¹ To facilitate the myriad functions of the representatives, it is recommended that the Represented Community should first organise and incorporate its representatives as a non-profit association, trust or cooperative society (the 'Collecting Society').

The Collecting Society model also finds support under the 'cultural stewardship theory', which suggests that instead of electing the State as the centralised authority in which the IP rights for the TCE would vest in perpetuity or instead of treating TCE as public domain,¹³² the communities themselves should act as trans-generational "stewards" of the IP. The Collecting Society would not be treated as "owners" of the TCEs, but only as a group of custodians vested with the fiduciary capacity to govern the TCE for the Represented Community as a whole.¹³³

To the extent possible, constituents of the Collecting Society should be chosen via a process of democratic elections, so as to ensure that they are truly representative of the best interests of the TCE and the Represented Community. The "best interests" threshold implies that the constituents of the Collecting Societies should be persons most well-versed in the daily management, education, production or decision-making

¹³¹ BEHARIE AND SHABANGU, TRADITIONAL KNOWLEDGE, 342-359; Gertrude Torkornoo, *Creating Capital from Culture - Re-thinking the Provisions on Expressions of Folklore in Ghana's Copyright Law*, 18.1 ANN SURVEY INTL & COMP L 1-43 (2012), Alejandro Argumedo et al., *The Role of Registers and Databases in the Protection of Traditional Knowledge: A Comparative Analysis*, UNITED NATIONS UNIVERSITY, INSTITUTE OF ADVANCED STUDIES (2004), <http://www.iapad.org/wp-content/uploads/2015/07/Protection-of-TK.pdf> (recommending model guidelines for developing databases and registers).

¹³² See, e.g., The Copyright and Neighbouring Rights Protection Act, 1996 of Sudan; The Copyright Act, 2005 (Act 690) of Ghana. See also LI, FOLKLORE IN CHINA, 188-207; BOATENG, THE HAND OF THE ANCESTORS 943-973; TORKORNOO, CREATING CAPITAL 1-43; LEISTNER, TRADITIONAL KNOWLEDGE 82-85.

¹³³ Kristen A. Carpenter, Sonia K. Katyal and Angela R. Riley, *In Defense of Property*, 118 YALE L J : f1j 1068-1112 (2009).

processes of the Represented Communities, such as the council / clan elders. Constituent stakeholders in the Collecting Society may also be identified through other prisms, such as levels of civic participation, experience or intent and enthusiasm, a sense of belonging to either the community or to the global humanity.¹³⁴

Collecting Societies have worked well in both the copyright and trademark milieus,¹³⁵ such as the *Maori Arts Board of Creative New Zealand* that regulates the licensing and use of the trademark of *Toi Iho Maori Made*; the cooperative society of Mexico's *Seri* communities that regulates trade in their ironwood goods; the African Trust's *Maasai Intellectual Property Initiative* (teamed up with Light Years IP) to market the brand *Maasai*.¹³⁶

In case of Cross-Cultural TCEs where more than one Competing Community or Competing Beneficiary has been identified using the proposed cross-cultural index, a *pyramid model* may be further employed for building an alliance among the various Collecting Societies based on common agenda for stronger protection.¹³⁷ Examples of the pyramid model include: (1) global bio-collecting societies to coordinate enforcement work and review mechanisms,¹³⁸ (2) public-private partnerships for contributing funds for complementary objectives,¹³⁹ and (3) joint stakeholder management organisations, such as the cultural bank¹⁴⁰ or the *Poronguito* association comprising the Cajamarca city cheese-makers, local NGOs who connect the cheese-makers with livestock producers, specialty shops, and national certification

¹³⁴ HILL, *GLOBAL FOLK MUSIC*, *supra* note 44, at 50-83; LI, *FOLKLORE IN CHINA* 152-157; LUCAS LIXINSKI AND LOUISE BUCKINGHAM, *PROPERTIZATION, SAFEGUARDING AND THE CULTURAL COMMONS, CULTURE AND INTERNATIONAL ECONOMIC LAW* 160-174 (Valentina Vadi and Bruno de Witte eds., London and New York: Routledge, 2015)

¹³⁵ See BEHARIE AND SHABANGU, *TRADITIONAL KNOWLEDGE*, 342-359 (quoting, *inter alia*, the examples of Dramatic, Artistic and Literary Rights Organisation (DALRO) and Southern African Music Rights Organisation (SAMRO) established in South Africa).

¹³⁶ FOLARIN SHYLLON, *CULTURAL HERITAGE AND INTELLECTUAL PROPERTY, A COMPANION TO HERITAGE STUDIES* 63-65.

¹³⁷ SWAMINATHAN, *LEGAL SAFEGUARD*, 109.

¹³⁸ Peter Drahos, *Indigenous Knowledge, Intellectual Property and Biopiracy: Is a Global Bio-Collecting Society the Answer?*, 22 *EIPR* 245-250 (2000).

¹³⁹ LUCKY BELDER, *DIGITIZATION OF PUBLIC CULTURAL HERITAGE COLLECTIONS AND COPYRIGHT IN PUBLIC PRIVATE PARTNERSHIP PROJECTS, CULTURE AND INTERNATIONAL ECONOMIC LAW* 175 (quoting, for example, investors that sponsor TCE marketing for governments, in return for tax rebates or commercialisation rights).

¹⁴⁰ See, *supra* note 82.

authorities.¹⁴¹ In such cases, an accord may be signed among the multiple Collecting Societies, with demarcation of proportion of remuneration to be shared among them, and/ or territory restrictions on business.¹⁴²

There have been some concerns against the pyramid model, that when multiple stakeholders are permitted entry as constituents of the Collecting Society, it could increase internal disagreements over the methodologies, content, and custody rights, and the propensity to extract high rents or remuneration for usage of the Cross-Cultural TCEs (that would ultimately spill down to the consumers).¹⁴³ Multiple stakeholders within the pyramid structure would mean that building consensus even on seemingly innocuous issues could become a time- and cost- consuming affair. Most judicial systems are also not equipped to deal with the bitter disputes that could arise over these issues.¹⁴⁴

Nevertheless, empirical data on these speculations is not available till date, and assumptions that Represented Communities will always be unreasonable or unscrupulous in contractual negotiations are self-defeatist and should be avoided. Both digitisation and appropriate inclusions in national laws can significantly reduce hurdles of time and asymmetries of information in negotiations.¹⁴⁵ Moreover, the MICO scheme would also incorporate safeguards against possible administration failures by Collecting Societies,¹⁴⁶ including clarification of legal and customary norms applicable, model contractual protocols for bargaining with third parties, and emergency funding availability.¹⁴⁷

VI. INCORPORATION OF CROSS-CULTURAL TCE PROTECTION INTO NATIONAL AND INTERNATIONAL INTELLECTUAL PROPERTY REGIMES

¹⁴¹ AYLWIN AND COOMBE, MARKS INDICATING CONDITIONS OF ORIGIN 753-786.

¹⁴² LI, FOLKLORE IN CHINA, 188-207.

¹⁴³ CORTELYOU, REFRAMING... DISPUTES, *supra* note 50, at 502-552; BEHARIE AND SHABANGU, TRADITIONAL KNOWLEDGE, 342-359; LIXINSKI AND BUCKINGHAM, PROPERTIZATION 160-174; Githaiga, "Intellectual Property Law", *supra* note 40.

¹⁴⁴ CORTELYOU, REFRAMING DISPUTES, *supra* at note 50, 502-552.

¹⁴⁵ *Ibid.*

¹⁴⁶ Elizabeth Evatt, *Review of the Aboriginal and Torres Strait Islander Heritage Act, 1984* (Report to Australia - Office of the Minister for Aboriginal and Torres Strait Islander Affairs, August 1996), <http://www3.austlii.edu.au/au/other/IndigLRes/1996/1.html>.

¹⁴⁷ Githaiga, Intellectual Property Law, *supra* note 40.

A. Improvisations to National IP Regimes

Many countries have already adopted laws that provide for measures to protect folklore;¹⁴⁸ however, certain improvisations would have to be made to the national IP regime (in the form of amendments to existing laws or enactment of entirely new laws), to incorporate the suggestions highlighted above and to provide infrastructural support to the MICO scheme and the Collecting Societies.¹⁴⁹ These improvisations have been discussed in some detail under this **Part VI(A)**:

(i) Deference to Community Customs.

Many of the folklorist communities abide by internal protocols based on varying degrees of kinship, gender, age or role of members, which over time, have evolved into their mandatory customary norms. These community norms would have to be respected under national laws on the proposed MICO scheme, especially in cases of dispute. Such deference consists of bestowing on the communities the right to define their TCE, the code of ethics for external users and third party beneficiaries of such TCE, the right to be mandatorily consulted by implementing/ certification authorities.¹⁵⁰ The 1993 Maatua Declaration¹⁵¹ signed among the delegates of fourteen countries similarly enshrines the principle of deference to the customary norms of the communities.

(ii) Infrastructural Support.

National governments would be required to provide additional infrastructure support to TCEs in terms of: (a) prevention of exploitation by the middlemen or concentration of elite family-based production in the value-addition chains; (b) public sensitisation

¹⁴⁸ See, e.g., Philippines' The Indigenous Peoples Rights Act of 1997; Portugal's Decree-Law No. 118 of 2002 (taking cognizance of need of prior informed consent and customary rules).

¹⁴⁹ BEHARIE AND SHABANGU, TRADITIONAL KNOWLEDGE, 342-359.

¹⁵⁰ See, e.g., *Bulun Bulun v. R and T Textiles Pty. Ltd.*, 41 IPR 1998, 517-519 (Australia) (recognizing that under the customs of the *Ganalbingu* Aborigines, only community members could prepare folklore, and holding such customs to be accepted as admissible evidence); *Terry Yumbulul v. Reserve Bank of Australia*, (1991) 21 I.P.R. 481 (holding that public display of sacred artefacts was not breach of confidentiality if such use was authorised under customary norms of the community). See also Githaiga, *supra*, note 147, fjj112-116.

¹⁵¹ *The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, (adopted at First International Conference on the Cultural & Intellectual Property Rights of Indigenous Peoples, Aotearoa, New Zealand) (1993), http://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/mataatua.pdf.

about TCEs;¹⁵² (c) establishment of community-controlled training centres and incentives for private financing of folklore; (d) enforcement of sanctions against third parties from violating the customary norms of the community or the rules of the Collecting Society;¹⁵³ and (e) modifying national trade, culture and tourism policies to account for the protection of TCEs against smuggling.¹⁵⁴

(iii) Creation & Management of Disclosures & Databases.

The national legislative regime should also aid creation of databases of the TCEs.¹⁵⁵ The databases would facilitate information recording; inventory and market consolidation; research by scientists; monitoring by IP offices; verification of the “derivative” nature of initiatives by developers; dispute resolution investigations;¹⁵⁶ and even preservation efforts. In order to mitigate costs of maintaining the databases, national governments could enter into private-public partnerships and act as supervisors,¹⁵⁷ or agree on collaboration treaties with other governments.¹⁵⁸

Previous database collections and collaborations include UNESCO’s roster of National Living Human Treasures and Memory of the World Programme, the Representative List of the Intangible Cultural Heritage of Humanity and the List of Intangible Cultural Heritage in Need of Urgent Safeguarding, India’s Traditional Knowledge Digital Library, China’s documentation of folk ballads and proverbs, and Australia’s digitised PANDORA.¹⁵⁹

¹⁵² AYLWIN AND COOMBE, MARKS INDICATING CONDITIONS OF ORIGIN, 782-784 (illustrating how the agricultural co-operative of *El Ceibo* promoted social festivities for sensitizing the public about its cocoa-production project).

¹⁵³ Githaiga, *supra* note 40, fjj102-108.

¹⁵⁴ See, e.g., Indigenous Knowledge Systems Policy of 2004 of South Africa. See ALSO REGNAULT, CONVERTING (OR NOT), 162-164; BEHARIE AND SHABANGU, TRADITIONAL KNOWLEDGE, 342-359.

¹⁵⁵ See Principles and Guidelines for the Protection of the Heritage of Indigenous People, Jun. 21, 1995, elaborated by resolution 1993/44 and decision 1994/105 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, Economic and Social Council, United Nations, E/CN.4/Sub.2/1995/26, G.E. 95-12808 (E).

¹⁵⁶ LEISTNER, TRADITIONAL KNOWLEDGE, 92-97.

¹⁵⁷ BELDER, DIGITIZATION, 177.

¹⁵⁸ BEHARIE AND SHABANGU, TRADITIONAL KNOWLEDGE, 342-359; SWAMINATHAN, LEGAL SAFEGUARD, 98-116.

¹⁵⁹ LIXINSKI AND BUCKINGHAM, PROPERTIZATION, 160-174; BEHARIE AND SHABANGU, TRADITIONAL KNOWLEDGE, 342-359; SWAMINATHAN, LEGAL SAFEGUARD, 98-116; ANCA CLAUDIA PRODAN, MEMORY AND HERITAGE, A COMPANION TO HERITAGE STUDIES, 133-145.

The databases should also be protected from information abuse through confidentiality safeguards, rules for public displays and dissemination, access restrictions and penalties for misrepresentations, except with the prior informed consent of the concerned groups. A catalogue of best practices may be adopted under the national and/ or multilateral arrangements for the use of the databases.¹⁶⁰

(iv) Distinction between Moral and Economic Rights.

The community's moral rights (i.e. (inalienable rights connected to attribution and integrity, but not the content, of the work) and economic rights (i.e. rights to commercialisation of the work) vis-à-vis the TCEs, should be distinguished to the extent possible. In other words, the community would have the power (but not the obligation) to transfer or alienate its *rights of use* of the TCEs to third parties in return for remuneration (the '**beneficiaries**'), while at the same time retaining the continued right to be acknowledged as the original source of the TCE. For instance, the *Yothu Yindi* Foundation in Australia organises the *Garma* cultural festival in Arnhem Land, and allows the festival to be exhibited online subject to a protocol that photographers and audiences must pre-sign.¹⁶¹

(v) Supervising Benefit-Sharing Arrangements.

Communities can elect to alienate their economic rights in their TCEs to third party beneficiaries by way of licensing, tariff or other benefit-sharing arrangements. These arrangements are negotiated by Collecting Societies, but the national legislative regime would still have to set out guidelines for the same. These guidelines should necessitate: the prior written consent of the Collecting Society; a minimum guaranteed percentage share in the financial returns from third party commercialisation of the TCEs to be given to the Collecting Society; minimum levels of care and custody required from third party beneficiaries; application of the funds pooled by the Collecting Society from third

¹⁶⁰ BEHARIE AND SHABANGU, TRADITIONAL KNOWLEDGE, 342-359; CORTELYOU, REFRAMING... DISPUTES, *supra* note 50, at 502-552; Lixinski and Buckingham, Propertization, 160-174.

¹⁶¹ LI, FOLKLORE IN CHINA, 172-207.

parties; and confidentiality and disclosure requirements.¹⁶² Such guidelines have been prescribed under several domestic laws and regional conventions.¹⁶³

B. Improvisations to International IP Regime

A web of international and regional IP laws to protect TCEs has erupted over the years,¹⁶⁴ leading to much confusion and disparity of IP treatment towards TCEs.¹⁶⁵

As an alternative, a bottom-up law-making approach may be applied to TCEs, in which rules would be foremost generated and implemented at the grassroots level by the practitioners themselves (i.e. the communities).¹⁶⁶ Such a bottom-up model could accommodate customary norms, and make relevant adjustments for capacity building for the communities. The regulatory model for MICO schemes proposed earlier in this

¹⁶² LEISTNER, TRADITIONAL KNOWLEDGE, 92-97; LI, FOLKLORE IN CHINA, 4-9, 12.

¹⁶³ See, e.g., Philippines' Indigenous Peoples Rights Act of 1997 (empowering indigenous groups to demand a share in the financial returns); Peruvian Law Establishing a Regime of Protection of the Collective Knowledge of the Indigenous Peoples related to Biological Resources, Aug. 10, 2002 (guaranteeing minimum 0.5% compensation from outside parties); African Bangui Agreement, 1977, art 8 (expecting beneficiary to provide a payment fee for the appropriation of TCEs, even if in public domain); South Pacific Model Law, 2002 (requiring prior consent and benefit sharing with communities, and treating moral rights separate from economic rights).

¹⁶⁴ See, e.g., African Union's Charter for African Cultural Renaissance, 2006; Pacific Regional Framework for Protection of Traditional Knowledge and Expressions of Culture, 2002; TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights ("**TRIPS Agreement**"), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organisation, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299; UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 2005, Oct. 20, 2005, in UNESCO, Records of the General Conference, 33rd sess., Paris (2 vols, 2005), vol. I, 83 ("**2005 UNESCO Convention**"); UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, No. 11806, 823 U.N.T.S. 231 ("**1970 UNESCO Convention**"); UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore, adopted by the General Conference at its 25th Session, Paris, Nov. 15, 1989 ("**1989 UNESCO Recommendation**"); UNIDROIT (The International Institute for the Unification of Private Law) Convention on Stolen or Illegally Exported Cultural Objects, Jun. 24, 1995, 34 I.L.M. 1322 ("**UNIDROIT Convention**"); WIPO Draft Articles, as last revised in 2017; UNESCO World Heritage Convention - Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 11 I.L.M. 1358 (1972) ("**World Heritage Convention**").

¹⁶⁵ LUCAS-SCHLOETTER, FOLKLORE, 266-291; BEHARIE AND SHABANGU, TRADITIONAL KNOWLEDGE, 342-359; BELDER, DIGITIZATION, 175-177; ANA FILIPA VRDOLJAK, INTERNATIONAL EXCHANGE AND TRADE IN CULTURAL OBJECTS, CULTURE AND INTERNATIONAL ECONOMIC LAW 124.

¹⁶⁶ Janet K. Levit, *A Bottom-Up Approach to International Lawmaking*, 30.1 YALE J INTL L 30.1 126-127 (2005); PETER K. YTU, INTELLECTUAL PROPERTY TRAINING AND EDUCATION FOR SOCIAL JUSTICE, INTELLECTUAL PROPERTY, ENTREPRENEURSHIP AND SOCIAL JUSTICE: FROM SWORDS TO PLOUGHSHARES 162 (Lateef Mtima ed., U.K.: Edward Elgar Publishing) (2015); INTRODUCTION TO CULTURAL EXPRESSION AND GRASSROOTS DEVELOPMENT: CASES FROM LATIN AMERICA AND THE CARIBBEAN 1-6 (Charles D. Kley Meyer, ed., London: Lynne Rienner Publishers) (1994).

Paper involves a bottom-up approach. National laws, rather than international and regional ones, are more aptly placed to adopt such a bottom-up approach and determine the specific conditions for folklore protection. The role of the international regulatory regime should, thus, be primarily only to bestow recognition and acknowledgement to the national and local regulatory regimes.¹⁶⁷ To accomplish this, a few measures for harmonisation between the national and the international regulatory regimes would have to be constructed, as have been discussed briefly, below.

First, the international regulatory regime would have to accommodate cross-cultural evaluations, such as the composite index proposed in this Paper, and the MICOs as a new class of IP rights. No doubt, this would be a painstaking endeavour on the part of anthropologists, lawmakers, researchers and economists, but would also be central to the fencing of ownership over Cross-Cultural TCEs.

Second, remedies available under international laws for infringement of related types of intellectual property may also be applied for MICO protection. For example, restrictions on trade of stolen cultural movable articles under the *1970 UNESCO Convention*,¹⁶⁸ and the cultural asset restitution/ recovery system under the *UNIDROIT Convention*¹⁶⁹ could also include TCEs under their purview. Similarly, provisions for preservation of cross-cultural heritage under the *World Heritage Convention*¹⁷⁰ may also be used to protect folklore databases and contentious folklore. Further, existing international treaty provisions on confidentiality and database mechanisms¹⁷¹ and the

¹⁶⁷ SARA BANNERMAN, *THE WORLD INTELLECTUAL PROPERTY ORGANISATION AND TRADITIONAL KNOWLEDGE, INDIGENOUS INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH* 104 (Matthew Rimmer ed., U.K.: Edward Elgar Publishing) (2015); MIRA BURRI NENOVA, *THE LONG TAIL OF THE RAINBOW SERPENT: NEW TECHNOLOGIES AND THE PROTECTION AND PROMOTION OF TRADITIONAL CULTURAL EXPRESSIONS, INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS IN A DIGITAL ENVIRONMENT* 236 (Christoph Beat Graber and Mira Burri Nenova eds., U.K.: Edward Elgar Publishing) (2008); STEPHEN B. BRUSH, *INDIGENOUS KNOWLEDGE OF BIOLOGICAL RESOURCES AND INTELLECTUAL PROPERTY RIGHTS: THE ROLE OF ANTHROPOLOGY, INTELLECTUAL PROPERTY RIGHTS: CRITICAL CONCEPTS IN LAW* 262 (vol. 1) (David Vaver ed., New York: Routledge Taylor and Francis) (2006)

¹⁶⁸ See 1970 UNESCO Convention, art 1, art 3, art 11, art 12, art 13.

¹⁶⁹ See UNIDROIT Convention, art 2, art 3 and 4 (restitution of stolen cultural objects), art 5 and 6 (return of illegally exported cultural objects).

¹⁷⁰ See World Heritage Convention, art 11; 1989 UNESCO Recommendation.

¹⁷¹ See, e.g., World Intellectual Property Organization Copyright Treaty ("**WIPO Copyright Treaty**"), art 5, Dec. 20, 1996, 36 I.L.M. 65 (1997), art 10(2), art 5; TRIPS Agreement, art 39 (protecting traditional knowledge of sacred or confidential character from being disclosed to non-members).

miscellaneous existing remedies against breach of confidence¹⁷² or trade secret laws should also be accepted as remedies for TCE misappropriation.¹⁷³

Third, international consensus would have to be achieved with respect to the appropriate remedies for misappropriation and misuse of Cross-Cultural TCEs; without such consensus, nationally-routed remedies may be difficult to enforce. Remedies accorded under statutes or by courts are typically in the nature of monopoly of ownership (i.e. property remedies), economic restoration for misappropriation (i.e. liability remedies), and prohibition of transfer of title in order to prevent misappropriation (i.e. inalienability remedies).¹⁷⁴ However, none of these remedy structures would work in the case of TCEs, on account of their 'living' nature; accordingly, special kinds of international remedies would have to be carved-out which should ensure deference to the customary norms of the related Collecting Societies and also prevent the 'passing off' of goods as authorised copies or derivatives.¹⁷⁵

Finally, proposals to establish a World Heritage Tribunal for the settlement of disputes concerning cultural elements has not been successful till date because of the lack of ground rules on adjudging cross-cultural claims, and overlap in jurisdiction between sovereign State and the indigenous communities.¹⁷⁶ Therefore, in lieu of such an international court for cross-cultural disputes, specific legal provisions should be introduced in the international regulatory regime for recognising time-bound and standardised alternate dispute resolution mechanisms, through public and private

¹⁷² See e.g., *Foster v. Mountford*, 14 A.L.R. (1977) 71 (Australia) (holding that disclosure by anthologist of sacred information relating to *Pitjantjatjara* Aborigines of Australian desert was a breach of fiduciary duties of anthologist under Australian laws).

¹⁷³ LUCAS-SCHLOETTER, *FOLKLORE*, 266-291, 321- 325; GITHAIGA, *INTELLECTUAL PROPERTY LAW*, *supra* note 40, ffj 41-48.

¹⁷⁴ CORTELYOU, *REFRAMING... DISPUTES*, *supra*, note 50, at 502-552; CARPENTER, KATYAL AND RILEY, *IN DEFENCE OF PROPERTY*, ffj 1068-1112; Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV L REV 1089-1092 (1972); Daniel A. Crane, *Intellectual Liability*, 88.2 TEX L REV 253-300 (2009).

¹⁷⁵ CORTELYOU, *REFRAMING... DISPUTES*, *supra*, note 50, at 502-552; CARPENTER, KATYAL AND RILEY, *IN DEFENCE OF PROPERTY*, ffj 1068-1112; Crane, *supra*, note 174, at 253-300.

¹⁷⁶ Valentina Vadi, *The Cultural Wealth of Nations in International Law*, 21 TULANE J INTL & COMP L 87 (2012-2013) (quoting the bitter conflict between China and South Korea for UNESCO's recognition as the first origin point of the boat festival; the Chinese Dragon Boat festival and Korean *Gangneung Danoje* festival share history and cultural similarities).

institutions (such as the *WIPO Arbitration and Mediation Centre*), as alternatives to costlier and tardier judicial mechanisms.¹⁷⁷

The WIPO Draft Articles, which are more recent and more expansive in scope than the Model Provisions, appear to capture many of the aforesaid harmonisation measures, such as recognition of the continuously evolving nature of the TCEs;¹⁷⁸ necessity for “*fair and equitable*” terms for¹⁷⁹ and “*prior informed consent... and involvement*” of¹⁸⁰ communities; and respect for ‘customary’ norms of the communities.¹⁸¹ Member States have the authority to establish the ‘formalities’ for protection – such as the proposed MICO scheme – in accordance with ‘national laws’.¹⁸² Further, the WIPO Draft Articles also contain proposed provisions pertaining to confidentiality,¹⁸³ preventing misappropriation and misrepresentation,¹⁸⁴ and fair use exceptions for derivative works¹⁸⁵ – although the draft provisions are more limited in nature than those proposed in this Paper.

Nevertheless, it should be noted that the WIPO Draft Articles do not make references to protection for Cross-Cultural TCEs. Article 2.3 of the earlier 2014 version of the WIPO Draft Articles had authorized member States to designate a national custodian even in cases where the TCEs are not ‘confined’ or ‘attributable’ to a specific indigenous community,¹⁸⁶ but that provision has now been omitted from the 2017 version. Instead,

¹⁷⁷ Molly Torsen and Jane Anderson, *Intellectual Property and the Safeguarding of Traditional Cultures: Legal Issues and Practical Options for Museums, Libraries and Archives* 26 (World Intellectual Property Organization) (December 2010) http://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf; BEHARIE AND SHABANGU, TRADITIONAL KNOWLEDGE, 342-359.

¹⁷⁸ See WIPO Draft Articles, art 12.1, art 13, art 14.

¹⁷⁹ See WIPO Draft Articles, art 1(c) (alternative 1), art 5.

¹⁸⁰ See WIPO Draft Articles, principle 11 of the preamble.

¹⁸¹ See WIPO Draft Articles, art 1(b) (alternative 1), art 7 (alternatives 1 and 2), art 5 (alternatives 2 and 3).

¹⁸² See WIPO Draft Articles, art 8, art 9.

¹⁸³ See WIPO Draft Articles, art 5 (alternatives 2, 3 and 4), art 7.2 and 7.3 (alternative 3), art 9.2 (option 2).

¹⁸⁴ See WIPO Draft Articles, art 1(a) (alternative 1), art 5, art 10.4.

¹⁸⁵ See WIPO Draft Articles, art 5.2 and 5.3 (alternative 4), art 7 (alternatives 2 and 3).

¹⁸⁶ See *Draft Articles on the Protection of Traditional Cultural Expressions 2014, art 2.3(b)-(c)*, WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, WIPO/GRTKF/IC/28/6 (28th Session, Geneva) (Jun. 2, 2014), http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_28/wipo_grtkf_ic_28_6.pdf.

the 2017 version of the WIPO Draft Articles suggests that they shall not apply to TCEs that have been “*widely known*” or “*used outside the community of the beneficiaries*” for a reasonable period of time.¹⁸⁷ This alternative suggestion, if accepted, could indicate that a Cross-Cultural TCE in which multiple stakeholders may have equally legitimate rights would *not* be capable of IP protection at all – which possibility is *not* advisable, for the reasons discussed in this Paper.

Further, the broad-based eligibility criteria set out under the WIPO Draft Articles for TCEs (as discussed above),¹⁸⁸ including uniqueness or direct links with the community and the minimum cut-off period of 50 years or five generations, are subject of significant divergence among the negotiating parties¹⁸⁹ and consensus on this would, no doubt, impact the identification and fencing of Cross-Cultural TCEs as well. Discussion and agreement on these issues would be critical for the survival and future of Cross-Cultural TCEs.

VII. CONCLUSION

Cross-Cultural TCEs are a special case of TCEs, where a particular community’s cultural materials appear to have ‘borrowed’ elements from another community’s cultural materials. Such borrowing may be the result of colonialism, prolific trade or globalisation, or of shared history, terrain or belief-systems. Because of the borrowed elements and the consequent obscurities in provenance, Cross-Cultural TCEs may become the subject of multiple cross-claims by more than one community or third party beneficiary hoping to monetise the Cross-Cultural TCE (such as traders, researchers, academics and developers). Illustrations of Cross-Cultural TCEs facing multiple contentious claims include the African Wax Prints and World Music compositions.

¹⁸⁷ See WIPO Draft Articles, art 5.2 (alternative 1), art 5.2 and 5.3 (alternative 4, option 2), art 7.4(d) (alternative 3).

¹⁸⁸ See, *supra*, notes 25, 28.

¹⁸⁹ See, e.g., Catherine Saez, *Text Protecting Indigenous Cultural Expressions Streamlined at WIPO, but Divergence Persists*, INTELLECTUAL PROPERTY WATCH (February 3, 2017), <https://www.ip-watch.org/2017/03/02/text-protecting-indigenous-cultural-expressions-streamlined-wipo-divergence-persists/>; Catherine Saez, *Indigenous Peoples At WIPO Call For Respect of their Sovereign Rights, Prevention of Cultural Genocide*, INTELLECTUAL PROPERTY WATCH (February 3, 2017) <https://www.ip-watch.org/2017/03/02/indigenous-peoples-wipo-call-respect-sovereign-rights-prevention-cultural-genocide/>; Catherine Saez, *WIPO Committee on Protection of Folklore: Shall We Dance?*, INTELLECTUAL PROPERTY WATCH (February 24, 2017) <https://www.ip-watch.org/2017/02/24/wipo-committee-protection-folklore-shall-dance/>.

The manifestation of multiple cross-claims on the same TCEs creates difficulties in identifying and demarcating ownership in the cultural materials and, hence, providing optimal IP protection. Accordingly, 'fences' or boundaries need to be drawn in the stakeholding of the various competing communities and beneficiaries in the Cross-Cultural TCE.

The first step to drawing fences in the ownership of such TCEs would be to prepare a composite index for cross-cultural studies for a given TCE. This Paper has suggested a number of factors that may be included in such index, including: the 'degrees of transformation and integration,' which examine whether the competing community had any agency over the nature, extent and internal assimilation of the borrowing or whether it was merely a passive receptacle for the cross-cultural borrowing; the *motives* for questioning the competency of the claims to the Cross-Cultural TCE, i.e. whether they are purely commercial in nature or supported by some degree of provenance-related evidence; and the most extensive 'sustained contribution' among claimant communities towards the evolution and expansion of the Cross-Cultural TCE, in terms of both production volumes and production process control.

This Paper also proposes that the most optimum model for intellectual property protection of TCEs is that of Marks Indicating Conditions of Origin, in the form of calibrated or graded certification marks (i.e. marks bestowed on communities) and collaboration marks (i.e. marks bestowed on third party beneficiaries post negotiations with communities). For communities to obtain MICOs, they would have to first organise themselves as Collecting Societies, with minimal government involvement. The Collecting Societies would be treated as 'cultural stewards', not as owners of the TCEs, and their constituents would be elected as democratically as possible and with pyramidal collaborations with other stakeholders who would be allocated proportions in the production, management and profits from the TCE on *pro rata* basis.

To ensure the smooth functioning of the MICO scheme, several modifications to the national legal regimes would have to be undertaken, foremost being the acknowledgement of customary laws of the communities. National laws may also prescribe minimum guaranteed licensing benefits from third parties, confidentiality requirements, access and participation rights of communities vis-à-vis derivative works,

and collation of databases on TCEs and any cross-claims thereto. Additionally, national measures for infrastructural support, legal procedural exemptions, and alternative dispute resolution mechanisms may be instituted.

Currently, a wide network of international laws already exists for protection of TCEs, and the WIPO Draft Articles on protection of TCEs are also presently being negotiated. Although these instruments do not make specific references to the fencing problems posed by Cross-Cultural TCEs, they do contain general remedial provisions that may also be transposed to national IP laws. To this extent, this Paper proposes that some degree of harmonisation may be required for international IP law, for recognition of cross-cultural indices, MICO-based protection models, deference to customary norms of the communities, and endorsement of alternate dispute resolution mechanisms. That being said, the realm of regulation of TCEs should primarily be accorded to the national systems only, as after all, it is the national government that would be most aptly positioned and informationally armed to take grassroots action and provide sufficient protection to Cross-Cultural TCEs.