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THE CULTURAL DIVIDE:  
TRADITIONAL CULTURAL EXPRESSIONS  
AND  
THE ENTERTAINMENT INDUSTRY  
IN DEVELOPING ECONOMIES

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DISSERTATION

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## ABSTRACT

This study addresses a number of pertinent issues concerning Traditional Cultural Expressions [TCEs], specifically in relation to what they are and the dilemma surrounding ownership vis-à-vis custodianship in an environment that is biased towards protection of Intellectual Property Rights.

The present inadequate legal recognition and, ultimately, insufficient international recognition and protection of TCEs has orchestrated the misappropriation of such works for the benefit of the entertainment industry and other economic sectors as well. The biggest underlying issue therefore is – whether TCEs should be recognized within the domain of Intellectual Property Rights. The fact that TCEs are considered as part of the public domain raises a key issues as to how they can be protected so as to serve the interests of ethnic communities, States, as well as the users of the TCEs. The claim made in this study is that because of the communal nature of ownership and difficulty in defining TCEs, this has contributed to their abuse by all users. The current origin-based I.P regimes are considered as inadequate in protecting TCEs which are mainly characterized by communal ownership and absence of fixation. This therefore calls for a specific sui generis regulatory mechanism that can address the interests of all stakeholders with a view of effective utilization of TCEs towards socio-economic development.

On the regulatory scene, the study looks at International Instruments, Regional Treaties as well as select National Laws from Africa in evaluating the current adequacy of protection offered to TCEs. In this evaluation, it points out key principles that amount to protection of TCEs and scrutinizes their inclusiveness in the current regulatory mechanisms.

The study also relies on multiple case studies to show the extent of TCE appropriation in different parts of the world. It brings in empirical findings drawn from field research, mainly in Uganda, to highlight stakeholder perspectives on various matters pertaining to the use of TCEs and how they can be used to generate socio-economic development. These findings, supported by theoretical arguments derived from secondary data, support the general claim made in this research over the need for a sui generis regulatory system over TCEs.

Some of the fundamental concerns for TCE Custodians include preservation of their cultural values in the TCEs; entitlement to part of the royalties generated from usage; and the right of attribution. As such, the general recommendation presented for the realization of effective TCE usage, is an equal-based partnership between TCE Custodians and State Agencies. Under this arrangement, the right of self-determination by the Custodians is balanced out with State involvement in management and enforcement of TCE property rights.

It is generally hoped that this study can be used as an impetus for further research in the development of sui generis policy and regulatory frameworks in the appreciation of Traditional Cultural Expressions in developing economies.

## DEDICATIONS

To my Father, the later Professor Joseph M.N. Kakooza, for having held me like an arrow, pulled back, pointed towards the bull's eye and let go. You never lived long enough to see where I would land, but all the same you had faith that I would hit the mark. To my Mother who always believed in me and fanned the wind that propelled me faster towards my mark. Lastly, to my wife, children and siblings – we have journeyed far together, but this is yet a new beginning.

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## PREFACE

This is a research study that is stemmed from one President's thoughtful way of attracting people's votes during an election campaign – singing to them. It is about a song that captured the hearts of an East African Nation and ultimately won the votes for one man who had exercised a unique sense of creativity by modernizing a centuries-old folklore. However, to the legal mind, the ripple effects from this song caused a realization about how vague the law is in addressing various concerns over the use of folklore in the modern entertainment industry.

The search for answers in this arena led me into looking at various International Instruments, regional treaties and national laws, confirming that the protection of folklore, or Traditional Cultural Expressions (TCEs), is very challenging. My research also explored how various scholars have theorized protection of TCEs and what they mean to the communities from which they originate. I was intrigued into digging out arguments as to how TCEs can be used as tools in raising the socio-economic levels of the ethnic communities that cherish them as their form of identity.

The richness of the cultural diversity in Uganda served my research goals perfectly. As a native of this country, in the summer of 2013, I focused my field study in this country and drew together empirical findings on the use of TCEs; what they mean to ethnic communities and how they can be protected with a view towards elevating the socio-economic standings of the indigenous people. I synchronized those findings together with the theoretical information I had picked up from other sources.

This book is my attempt to present a variety of arguments and perspectives as a way of building my claim to the effect that TCEs are a unique form of traditional intellectual property that require tailor-made or sui generis regulatory mechanisms. This is so as to effectively utilize them as a resource for socio-economic development.

Urbana-Champaign, Illinois  
April, 2014

## CHAPTER ONE

### Understanding the Cultural Divide: Traditional Cultural Expressions and modern music

*“I think music in itself is healing. It’s an explosive expression of humanity. It’s something we are all touched by. No matter what culture we’re from, everyone loves music.”*

- Billy Joel (American pianist, singer-songwriter and composer)

*“Culture is like wealth; it makes us more ourselves, it enables us to express ourselves.”*

- Philip Gilbert Hamerton  
(English Artist: 1834-1894)

#### 1.0 Introduction

In late 2010, I received a call from a distraught colleague. Presidential elections in Uganda were a few months away and the current President - Yoweri Kaguta Museveni, had just released a rap song titled “*You want another rap?*” This rap song was in the President’s native *lunyankole* language from the Ankole ethnic community<sup>1</sup>. My colleague was seeking my opinion on behalf of some traditional elders from the Ankole community. They were disgruntled by the fact that the President’s song was derived from Ankole Folklore and was being branded as *his* song. They were also concerned that he was going to claim a copyright to it and thus prevent them from freely enjoying their traditional cultural expression as they had been doing so for time immemorial.

I embarked on some legal research by looking up the law and existing precedents that would formulate a favourable answer. Various questions run through my mind: Where do we draw the line between pieces of traditional music from past generations and their performances today? How do we address the social, economic and legal dimensions involved? Is a modern performer of traditional folklore entitled to claim it as his property under copyright law? How then do we address the claim to property rights by the ethnic community from which these cultural expressions spring from? In my efforts to establish answers to these questions, the revelations were both disappointing and intriguing. On the one hand, they were disappointing in the sense that I hit dead ends on satisfactory legal jurisprudence as well as statutory law to satisfy my quest. On the other hand, the legal lacuna I

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<sup>1</sup> The term ‘*ethnic community*’ is used interchangeably with terms such as ‘*indigenous societies*’ or ‘*indigenous communities*’ throughout this study though the meaning is the same.

discovered was so overwhelming that it provoked me into formulating a research thesis with the intent of covering the gaps.

This thesis is thus a culmination of empirical and desk research that explores the cultural divide between traditional cultural expressions and modern expressions of music in the entertainment industry. The central claim in this thesis is premised on the socio-economic benefits of TCEs to the source communities in particular and the source countries in general. In this sense, my argument is that since modern artists earn significant royalties from music that is derivative of TCEs, then the source communities of the TCEs can utilize their cultural heritage as a resource base to raise their socio-economic levels and ultimately, the State too can do the same.

### 1.1 Background to the Study

This study is founded on the Ugandan President's derivative version of folklore from his Ankole Kingdom. My overall thesis investigates actions such as these from a legal, social and economic perspective. In this part of the chapter, I analyse the origins and significance of the President's rap song: "*You want another rap?*" I highlight how this rap song is indicative of the cultural divide between cultural institutions and the modern entertainment world. I then proceed to explain what the cultural divide stands for. In the next part of the chapter, I present the aims and objectives of the research study with details as to the issues considered in the study. I then explain the study methodology that was employed in generating material leading up to the conclusions. This explores the data compilation and analysis methods that were utilized.

In the part that follows, I explore both the thematic and geographical scopes of the study with justifications for the choices made. In the thematic scope, I define and explain key terms that are consistent with the study. Under the geographic scope, I also give justification for my focus on Africa and Uganda in particular. In looking at Uganda, I give an account of the historical significance of boundary creations to the potential challenges in identifying origins of – and ultimately regulation of TCEs. A historical account of the evolution of TCE usage is offered, leading up to the present influence they have on the Ugandan entertainment industry. In the conclusive parts of the chapter, I present the significance of the study. This includes personal convictions as to the beneficial

outcomes envisaged from this research. Furthermore, I point out the limitations encountered during the research and how they were mitigated upon. The final part provides a chapter synopsis with a breakdown of what each of the chapters entails.

### 1.1.1 The 'Hip-Hop' President saga

Naturally, as Head of State of Uganda, President Yoweri Kaguta Museveni is well informed about the fact that the youth, of voting age, take up a large percentage of Uganda's population<sup>2</sup>. He capitalized on this knowledge and in a run up to the Presidential elections of February 2011, he engaged the services of a renowned Ugandan music artist and producer by the name of Richard Kaweesa to produce a rap song that would help capture the votes of the young voters. The rap song in mind, was drawn from two folklore poems that were *supposedly* from the Ankole community<sup>3</sup>.

The Lyrics to the President's song are here below<sup>4</sup>. On the left are the original folklore poems and on the right are the creative additions made by the President in his derivative version. What is fundamental to note, is the slight addition he made to the original folklore.

Verse one:

*Well, well - I can even give you some rap myself now.*

*Natema Akati kaarara  
Kaarara nikaḻa Igara  
Igara owa Ntambiko  
Ntambiko yampa akasyo  
Akasyo nakaha abagyesi  
Abagyesi bampa oruro  
Oruro naruba Warukoko  
Warukoko yampa ihuri  
Ihuri nariha abaana  
Abaana bamp'engyeya*

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<sup>2</sup> This fact is elaborated upon further when analysing Uganda in the geographical scope. See Ugandan youth population statistics in note 65 infra.

<sup>3</sup> In my interview with Professor of History Mwangusya Ndebesa on July 19, 2013, he explains the true origin of the poems, which is discussed below.

<sup>4</sup> Lyrics reprinted with kind permission from author's duly authorized legal representative: Edgar Tabaro of M/s Karuhanga, Tabaro & Associates. See video of song on <http://www.youtube.com/watch?v=XXe3uRL3gog> – last accessed October 17, 2013.

Engyeya naagiba omukama  
Omukama yampa Kasha  
Kasha nagishweza omukazi  
Omukazi yanzuarira omwana  
Namveeta Mugarura  
Yaagarura eby'ow'ishe n'isbenkuru

*Today, these young people taught me about this rap,  
Because I was not following what they were saying,  
You want another rap? [Yes Sevo] [x4]*

Verse Two:

Mp'enkoni mp'enkoni mp'enkoni  
Mp'enkoni engarama züzire  
Züzire niicund'ebinio  
Ebinio bya Rutendegere  
Rutendegere enkuba emuteere  
Emuteerere abaiguru mpariya  
Abaiguru mpariya hariyo orwitiri  
Orwitire oruzaarwa n'enkura  
Enkura esboroma etegire  
Etegere akaara k'embogo  
Ak'embogo kariga Nsharira  
Nsharira omunda y'engoma  
Y'engoma, y'engoma, y'engoma

*You want another rap? [Yes Sevo] [x4]  
That's wonderful. Now I know what you have been up to.*

The translation follows:

Verse 1: The stick I cut strayed into Igara where Ntambiko reigns. Ntambiko gave me a knife which I gave to millet harvesters, who gave me millet, that I gave to a hen, which gave me an egg, that I gave to children who gave me a monkey that I gave to the king, who gave me a cow that I used to marry my wife. She gave me a child I called Mugarura who raided back what belonged to me and my fathers.

Verse 2: Give me my stick! Invaders from Ngarama have arrived, shaking their bums like Rutendegere. May thunder strike Rutendegere from above where there is abundance that helps the rhinoceros to thrive. The rhinoceros feeds but remains ready for a buffalo attack. The buffalo, whose meat is salty. The salt that comes from Nsharira deep inside the kingdom.

President Museveni's gamble, by reaching out to the Nation through the entertainment industry, paid off well. He won the February 2011 Presidential elections with a landslide victory. However, Professor Mwangutsya Ndebesa, a traditional elder from the same ethnic community as President Museveni, had a personal discomfort with the release of the rap song<sup>5</sup>. In explaining what he believes to be the actual origin of the folklore, Ndebesa states that: "*I don't think I have done much research but it does not seem to be a Banyankole song. It seems to be a Bahororo song, a Bahororo poem, because even the places they are naming (referring to the lyrics in the song), they are not Banyankole places.*" He goes on to recite the poem: "*Natema akati kaarara, Kaarara nikaŕa **Igara***" (– emphasis mine). The History Professor then drives his point further by arguing that '*Igara*' was not located in Nkore region (Ankole) but is located in the Mpororo region (hence a Bahororo poem). He argues further that the poem used in the rap song refers to the King as "*Omukama*" and yet the King in Ankole is not called "*Omukama*" but is called "*Omugabe*". The "*Omukama*" name was for the Mpororo community. Ndebesa's historical account should however be taken in cautiously. This is because literature on the two communities suggests that the Bahororo ethnic community is a sub-group of the Banyankore (Ankole) community. The Banyankore was a dual pyramid with people from the pastoral (Bahima) and agricultural (Bairu) communities<sup>6</sup>.

The significance in this argument is as to the true origins of the folklore and emphasizes the challenges that abide with trying to attribute TCEs to particular communities, particularly in a country like Uganda where a huge variety of ethnic communities were bundled together into one Country. Where the issue of origin arises, then this questions the legal capacity of a particular community to lay a claim to the management and use of TCEs and thus also affects the Community's direct entitlement to any royalties that would accrue from such use.

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<sup>5</sup> During the interview with the Professor (see note 3 supra), he also expressed his displeasure with my reference to the song as "the President's rap". He argued that the folklore in the song belongs to all the Ankole people and therefore cannot be attributed to the President as 'his' rap.

<sup>6</sup> Tumusiime James (Ed.): Peoples and Cultures of Uganda, 4<sup>th</sup> Ed., Fountain Publishers (2011), at p. 54.

### 1.1.2. Objections to Copyright in Folklore

In his efforts to prevent the President from obtaining copyright to the rap song created from the folklore, Professor Ndebesa and a colleague by the name of Dr. Katono Nzarwa Deo, filed an objection before the Registrar of Copyright at the Uganda Registration Services Bureau. Throughout the proceeds of that Objection, as reflected in the Registrar's ruling, the question as to originality of the Folklore never came up. In any case, reference as to origin of folklore was to the Ankole Community.<sup>7</sup>

The grounds for Ndebesa's objection were briefly that:

- a) The applicant (President Museveni) is not the author of the rhythms "*Natema Akati Karara*" and "*Mpenkon?*";
- b) The work is not musical;
- c) The work is in the public domain free for all to use;
- d) The applicant has not made any improvement on the poems;
- e) The applicant merely recited the poem as an act of performance;
- f) The work constitutes public property and that the application is an abuse of intellectual property.

Furthermore, in his objection, Ndebesa points out through his affidavit that the two songs "*natema akati karara*" and "*mpenkon?*" are not the sole ownership of the author of the rap song in question but are also traceable from published collections of two re-known Runyankole-Rukiga writers. Interestingly, no discussion is made as to the significance or effects of the copyright protection in these publications, considering that they too were drawing their works from existing folklore. It can also be noted that the objection was more focused on moral rights or attribution of the folklore to the Community, as opposed to who was entitled to the economic rights accruing from the President's derivative work.

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<sup>7</sup> See: In the Matter of an Application No. 25 of 2010 for registration of Copyright by Yoweri Kaguta Museveni in the song "You want another rap" and In the Matter of an Objection by Mr. Mwambusya Ndebesa and Dr. Katono Nzarwa Deo.



Edgar Tabaro, who was the President’s Counsel in this matter, pointed out the difference between the Traditional Cultural Expression in the Ankole poems and the copyright in the musical expression created by the President. He argued that the President is only electing to protect his derivative expression “rather than restrict the use of earlier and differently expressed versions”<sup>8</sup>. This argument is what marks the present cultural divide between Traditional Cultural Expressions as we know them and the new and evolving musical works that appropriate from TCEs. This practice amongst Ugandan musicians defines a new trend that can be branded as the modern Cultural Expressions in the Ugandan music scene. Modern cultural expressions have identifiable owners and thus carry the advantage of copyright protection as derivative works.

The Registrar of Copyrights<sup>9</sup> dispelled the Objectors’ argument that the President’s rap song was not original. She reasoned in her ruling that “*the transformation of a folksong is to my mind an original creation which as expressed constitutes a derivative work . . . the idea seems obvious but the expression is original.*” She thus passed ruling to the effect that the President’s rap song was a derivative work which by selection and arrangement of its content, constituted original work and was thus entitled to copyright protection by virtue of section 5(1) of the Copyright and Neighbouring Rights Act of Uganda<sup>10</sup>. She, however, noted that “*copyright in a derivative work covers only the additions, changes or other new material appearing for the first time in the work and does not extend to any pre-existing material and does not prevent anyone else from using the existing work for another derivative work*”.

In summing up her ruling, the Registrar stated that:

*“I am aware that the objectors were under the impression that the applicant was attempting to monopolize a piece of heritage of the Banyankole/ Bakiga. I hope that they can now rest assured that the heritage of the aforementioned people can still be enjoyed by anyone and has not in any way been misappropriated but instead can now be enjoyed by anyone including the young generation whom, I hazard to say, may relate to the applicant’s new arrangement of the said works.”*

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<sup>8</sup> Ibid, at p. 7

<sup>9</sup> Ms. Mercy K. Kainobwiso is the Registrar of Copyrights that handled this matter.

<sup>10</sup> Section 5 of the Copyright and Neighboring Rights Act, No. 13 of 2006, provides for works entitled to Copyright Protection.

The President's rap song was, as such, registered as a derivative work. Arguably, both parties came out as winners in this matter. The President got the Copyright protection that he sought and the Objectors got the assurance that the original folklore was still free for their use.

This matter, as the first legal contestation over property rights in folklore in Uganda, creates precedence in the balancing of interests between TCEs and derivative music in Uganda. However, other issues that did not arise included the compensation of ethnic communities or sharing of royalties with them, coupled with the right of attribution; as well as the preservation of cultural values in the original TCE.

### 1.1.3. Significance of the President's song

#### (i) Legal Significance

Although the representatives of the Ankole ethnic community prevailed in ensuring non-restricted enjoyment of their folklore through this matter, the case highlighted the inadequacy of the Ugandan *Copyright and Neighbouring Rights Act*, No. 13/2006 in the protection of TCEs. The Act simply states that works *eligible for copyright* include traditional folklore and knowledge.<sup>11</sup> However, it does not provide for ownership of TCEs nor does it state how such works can be identified or how such protection can be implemented. It is also erroneous in ranking TCEs as "*eligible for copyright*" and yet they lack a clearly identifiable origin; have no defined ownership; and no ascertained duration unlike recognised works of copyright.

The Act goes on to state that the protection of derivative works shall not affect the protection of pre-existing works<sup>12</sup>. The President's rap song therefore particularly signifies the importance of appreciating the relationship of modern adaptations of traditional folklore (TCEs) as derivative works of such folklore. The case also raised a challenging issue of determining how to deal with a

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<sup>11</sup> Section 5(1)(j).

<sup>12</sup> Section 5(3).

situation in which a member of an ethnic community appropriates folklore from his own community. The remarkable irony in this matter, is that it portrays how people who have a strong sense of their cultural heritage, rose up to protect what they believed was rightfully theirs. This is albeit the fact that the very person who had appropriated from their folklore, was not only a member of that same community, but also the present Head of State.

(ii) Socio-economic significance

The President's rap song highlights the economic dimensions that are evident from the use of folklore in the production of modern music. Economic benefits that accrued to the President from the song were evident as its popularity grew shortly after it first aired on the radio stations. Beverage companies scrambled for advertisement space within the popular YouTube video of the song. Uganda's leading mobile communication giant, MTN (Mobile Telecommunication Network) also purchased a license to use the song as a calling tune. The deal was estimated to be worth billions of Ugandan shillings<sup>13</sup>. The focus of the economic benefits was on the derivative work and not on the original folklore. As such, consideration over compensation to the Ankole community did not arise. It is intriguing whether this was premised on the absence of structural guidelines to that effect; the absurdity of or need for such compensation.

Furthermore, from a historical perspective, the utilitarian purpose of TCEs was basically to serve society in various ways. In choosing the two Ankole poems to create a rap song, the President was also motivated by the societal significance behind the folklore. Richard Kaweesa<sup>14</sup> explains that the President's inspiration in this particular folklore was based on the concept he wanted to bring across to the music consumer base. Kaweesa stated that the President had this concept he believed in called *Dialecticism*. This is, "...the aspect that everything is interlinked: With every event interlinked into another event, one thing always leads to another; that one little thing that seems like it is insignificant, all of a sudden ends up giving you something else, like – gets you into marriage, and after marriage, gets you a son – what bigger gift can you ever get, but where did it all begin? It is that inter-linkage.... So don't isolate your light in an event. Events are inter-linked to

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<sup>13</sup> The current currency exchange of the U.S Dollar to the Ugandan shilling is \$1 = Ug. Shs 2,515 as of October 2013.

<sup>14</sup> Richard Kaweesa is a Music artist and producer as well as Proprietor of Spirit of Africa Ltd. He was interviewed in July 2012.

*create bigger events that are currently bigger than your thoughts, and you don't see the way ahead. So don't underestimate those little steps with the things that you do in life. They may shock you. So there are too many lessons that they use in that rap."*

This reasoning highlights a fundamental social value attached to TCEs that can have a direct impact on music consumers today. In the past generations, TCEs were used to convey different messages to the community as is elaborated upon further in this study. The value attached to these messages, in as long as it preaches issues related to goodwill, morality and other related issues, is the foundation for social development of Ugandans today. In as long as people listen to, interpret and apply the message behind urban music today that is derived from TCEs with such values, the positive impacts upon society would be evident. Milton Wabyona<sup>15</sup>, a folklore musician, has also used messages behind traditional music containing social values, to lure children off the streets and provide them with the basic necessities that they need. Through a not-for-profit organization called Uganda Heritage Roots, he uses folklore music to rehabilitate former street children and guide them towards the right direction in life.

The President's rap song also portrayed the evolutionary nature of TCEs both in purpose and form. In times past, various Indigenous societies relied on their cultural expressions as a form of identity; as a way of marking specific activities for certain seasons; and, among other reasons, as a way of grooming their youth into following particular rituals and ultimately, preserving their culture. As these societies developed and interacted with alien societies, cultural evolution and foreign contamination could not be avoided. As is evident in the President's case, the embracing of globalization has also led to a conflict between communal interests in cultural expressions and the rights of individuals in the protection of their derivative creations from such expressions.

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<sup>15</sup> Milton Wabyona is a specialist in African Music Composition and Performances; Executive Director of Uganda Heritage Roots. He is a lecturer in the School of Performing Arts at Makerere University, Uganda. He was interviewed on July 16, 2013

This creates a dilemma: The purpose of indigenous societies in trying to jealously guard their cultural expressions is mainly so as to preserve their cultural tenets through the *youth*, who are the *elders of tomorrow* and as such, the conduits through which such culture can be maintained. However, a growing number of the youthful generation are more in touch with modern day depictions of such cultural expressions. These depictions, which partly fall within the entertainment industry, have controlled-ownership and intellectual property protection, but are considered appropriations of the Traditional Cultural expressions. In previous generations, TCEs were for communal benefit. However, today, the persons responsible for such appropriation have selfish motivations that fit squarely within copyright protection of their derivative works. Furthermore, considering that property rights in culture, vulnerable as they are, constitute a great source for creativity and innovation. They thus become easy targets for appropriation of works. These are the signs of a cultural divide that needs a connecting bridge.

## 1.2 What is the Cultural Divide?

There are two major cultural depictions in this study with one feeding into the other. The “Culture” of Traditional Cultural Expressions, as portrayed by Indigenous Societies, is an ancient culture, though very rich and alive in many societies. However, the level of appreciation for TCEs today is not as high as it was in the past. The second cultural depiction is that of modern entertainment portrayed through the movie and music industry though in this study, the particular emphasis is on the music industry. It thrives on creativity, market demand and competition to survive, hence the need for Intellectual Property protection. These two cultures are informative and entertaining.

Many cultural expressions have currently become eroded by alien influences to the extent that modern generations are no longer as conversant with the cultures of their peoples in the same way that past generations used to be. However, as the entertainment industry samples bits and pieces of TCEs, the TCEs are indirectly revived as they are given a modern touch. The study therefore also gives a descriptive analysis of the cultural divide portrayed through the common ties in TCEs and the entertainment industry. Traditional Institutions provide a linkage between the past, present and the future. They thus form a cultural identity that can be effectively preserved, among other ways, through music and other cultural expressions. Darrell Posey and Graham Dutfield dismiss concerns

as to erosion of cultural identity through modern day influences.<sup>16</sup> They argue that it would “... *seem paternalistic to assume that consumption of luxury goods will necessarily weaken a group’s cultural identity.*” Their argument leans on the assumption that it is inaccurate to conclude that the appropriation of TCEs by those who are absorbed by consumer demand for their intellectual property creates a risk to the very existence of culture itself.

However, in as long as there is a wide cultural divide between custodians of TCEs and the parties that appropriate the TCEs, the cultural identity would risk being weakened thus disproving the Posey-Dutfield argument. Today there is hardly any harmonious existence between Traditional Cultural institutions and modern day musicians, which is a necessary ingredient in fostering a positive relationship and cultural growth. The TCE custodial communities view modern day musicians as selfish parties that are simply out to exploit cultural heritages for personal gain riding on inexistent or inadequate regulation. On the other hand, modern day artists and composers have indeed benefited from sampling TCEs in their work and although they may or may not acknowledge such sampling, they take most of the recognition<sup>17</sup>. There is, however, nothing legally wrong because what is sampled is taken from what is out in the public domain and has no identifiable author. The Ugandan President’s rap song, for instance, highlights that TCE samples are legally recognized as part of a new creation of art and therefore justify Intellectual Property protection.

Another concern for TCE holders is that there is more appropriation of their cultural heritage today than it was thirty or forty years ago. Increased competition, financial gain and recognition among players in the entertainment industry is pushing them to innovate at a faster rate. This is compelled further by the internet which makes communication flow much easier through one global village. It

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<sup>16</sup> Darrell A. Posey & Graham Dutfield: *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, 1996, International Development Research Centre, Canada, at p. 44

<sup>17</sup> For instance, Erica Muhl, a Professor of Composition at the Thornton School of Music at the University of Southern California, is the recipient of various grants and awards for her music. Her compositions, which have been played worldwide, incorporate folk music of various kinds including traditional folk music. In Ireland, some contemporary music groups incorporate Irish Cultural music in their productions. These include Altan, Teada, Danu, Derish, Lunasa and Solas (See: <http://www.discoverireland.com/us/about-ireland/culture/> - accessed March, 31, 2012)

is now easier to pick up on TCEs from the internet as well as making new creations of art to market through the same medium. The new virtual environment has thus made it even more difficult for the protectors of cultural idioms to confine them within certain limits.

The integration of various societies through intermarriages, migrations and the like, has forced cultures to evolve. New ideas and forms of expression keep coming in through these channels. It is no longer possible to easily identify the originality, authorship or purpose of many forms of expression – making appropriation even much easier. The appropriation of TCEs into modern works of entertainment is therefore important in this study because of a number of reasons: Modern entertainment has a strong influence on different age groups today. It influences the way we express ourselves in walking, talking, and dressing as well as in the way we think. It also affects the economy because Corporations seize the opportunity of what is popular by channeling the marketing of their brands through the entertainment industry. The Media industry is also included because it is a key player in marketing. As such, there are elements of TCEs around us in various fields and the outreach is significantly contributed upon by the appropriation of such TCEs.

A huge outcry over the appropriation of TCEs comes from ethnic Communities based in North America and Australia, as well as developing countries in Africa and Asia. In spite of various debates and policy measures at local, regional and International levels, there has been hardly any significant progress in the direction of concrete protection. At the International level, the World Trade Organization has acknowledged prioritizing the needs and interests of developing countries, including: “the lack of recognition of intellectual property rights for the protection of traditional knowledge and folklore...”<sup>18</sup>

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<sup>18</sup> See: Monterrey Consensus, March 2002. Source: <http://www.un.org/esa/ffd/aac257L13-E.doc>, cited in Report of the Commission on Intellectual Property Rights: Integrating Intellectual Property Rights and Development Policy, London, September, 2002, at p.10. See: [www.iprcommission.org/papers/pdfs/final\\_report/ciprfullfinal.pdf](http://www.iprcommission.org/papers/pdfs/final_report/ciprfullfinal.pdf) (Accessed Jan. 18, 2012)

This thesis therefore serves a current thirst for information and solutions on ways and means through which the different players on the opposite sides of the cultural divide can address the separate as well as mutual interests. The aims and objectives of the study are elaborated below.

### 1.3 Overall research aim and individual research objectives

In the previous part of this chapter, I have highlighted the Ugandan President's rap song as the main motivator behind this study. This is premised on the absence of legal language to navigate through the issues that arise as to ownership and use of TCEs. This next part therefore, serves to articulate the aims and objectives of the research.

The overall aim of this research was to advance an understanding of the role TCEs can play in the socio-economic development of Society. Society in this sense means the ethnic communities from which the TCEs originate as well as the host nation. However, in order for such development to be achieved, there has to be not only recognition and appreciation, but also effective utilization of TCEs while bearing in mind the concerns of the source communities. There cannot be enjoyment of the benefits of one's cultural diversity without knowing how to define, understand and ultimately place the characteristics of the expressions of one's culture within a given context. Developing an understanding as to what TCEs are, therefore, helps us to better appreciate them and to develop an organized system through which we can utilize them without wastage or abuse.

The study thus, gives a critical analysis of a vast amount of existing literature, International and regional instruments as well as Statutes from a global perspective that address property rights in TCEs. An evaluation is made of the concept of Protection of property rights in TCEs through existing regulatory frameworks. The purpose is to learn from the weaknesses and draw from the strengths in an attempt to formulate a way forward using a sui generis regulatory system for the use of TCEs.



The strategies for formulating this analysis are drawn from two key areas: The review of existing literature, and the collection and analysis of empirical data. The details of the techniques relied upon are explained in the methodology section in the later part of this Chapter.

### 1.3.1. Specific research objectives

Specifically, the research objectives were as follows:

- a) To explore the various ways in which TCEs are presently being exploited by the music industry. This objective served the purpose of highlighting the existing connection between TCEs from ethnic communities and cultural expressions from the modern music industry, that is - the two institutions in the Cultural divide that feed into each other. The connection is that the communities feed the industry with their folklore and the industry serves the community as a channel of cultural evolution. This relationship was stretched further by studying how the economic benefits obtained by the music industry through the use of TCEs, can ultimately also benefit the communities.
  
- b) To identify the challenges surrounding property rights in Traditional Cultural Expressions. This is inclusive of definitions, characteristics, enjoyment, preservation, protection, management and use by various parties. It also involved aspects of ownership, custodianship and scope of the rights. It was also with a view towards creating their easy identification and appreciation, especially within the context of modern music. There is more to TCEs than the music and dance expressions covered in this study. Ethnic communities have sacred rites to protect through their TCEs. This objective covered an analysis of issues related to respect for these sacred rites by institutions that have no attachment to them and yet seek to, or actually use the TCEs.
  
- c) Formulate suggestions on a respectable use of TCEs in the modern entertainment industry through ways in which the respective interests of ethnic communities, TCE users and the nations as a whole, would be mutually catered for.

The first objective (a) was mainly premised on empirical research with Uganda as my key focus. This empirical research comprised conducting interviews with stakeholders including music artists,

academicians, policy makers and representatives of TCE holders. This gave me an opportunity of benefit from the insight of various persons with vast knowledge in the field. The primary investigations were supported with desk research to supplement the findings as well as establish counter arguments. The empirical findings were also fed into the second and third objectives. However, the second objective relied more on secondary research through existing literature.

The second objective also focused on the issues that make it difficult to place property rights in TCEs within the realm of existing concepts of Intellectual Property Rights. This was highlighted as the basis for challenges in regulating the use of TCEs, hence the justification for leaning towards a *sui generis* system. This objective also involved an analysis of the present legal frameworks on the use of TCEs that have been developed in various parts of the world, but more particularly within Africa. The first two objectives therefore provided a funnel system of arguments and discussions. These culminated into the recommendations and study conclusions on TCE usage which satisfied the purposes of the final objective.

### 1.3.2. Issues considered in formulating the research objectives

There are a number of issues that helped in the formulation of the research objectives. For starters, music is a form of expression whose enjoyment and appreciation cannot be confined to a particular society or affiliation of people. Ultimately, everyone loves music. It is used to tell stories; to educate; as a relaxant; and, above all, to entertain. Arguably, music is as old as mankind. Music and dance expressions have been passed along over generations and today, are referred to either as Traditional Cultural Expressions (TCEs) or Traditional Folklore. Like many other art forms, TCEs evolve over time, and with this, the message portrayed and the purpose, are also likely to change. This is where, in many respects, the cultural divide is established between Traditional music as a form of expression and modern music as portrayed in today's entertainment industry.

Another issue that prompted this study is the question as to who has a monopoly over culture. The study investigates the property rights concept in which ethnic communities make a claim over TCEs. This is based on the question as to whether Indigenous Societies can claim culture as theirs to

protect. Even if we were to explore the claim to protection of culture through legislation or other means, we are bound to face challenges in defining what amounts to protection as well as identifying the enforcing authority. This includes questions as to whether ethnic communities can manage their TCEs on their own; whether they need State involvement or whether the State should take over the role entirely. There is an ongoing debate as to whether Traditional Knowledge, inclusive of Cultural Expressions, is protectable as Intellectual Property. The study therefore sought to address the question as to how Intellectual Property rights relate to property rights in T.C.Es. Furthermore, the legitimate embodiments of culture are also hard to identify within a given community considering that the sources of culture are not well defined. Anyone can lay claim to cultural evolution and thus express it differently from another. Nonetheless, it is not disputed that ethnic communities or Indigenous Societies lay claim to protection of social values and their sacred rites imbedded within TCEs. This is one of the core arguments they present against the use of their cultural expressions.

As such, the research objectives sought to investigate whether Indigenous Societies should build high walls and shut the gate to appropriation of their Cultural expressions through stringent Policy and legal frameworks. Arguably, doing so would not only risk destroying the dissemination of their culture and recognition of their identity by the outside world, but would also stifle cultural evolution. A related debate is over the differentiation between the *protection* of Traditional Cultural Expressions from misappropriation and the *preservation* of TCEs. If Indigenous Societies are concerned about the erosion of the quality, sacred rites and messages portrayed through their TCEs through misappropriation, how different would safeguarding their TCEs as a form of Cultural Heritage be from protection through regulation? Wouldn't regulation replace a centuries-old system of sharing resources and innovation as a social norm, with a foreign restrictive and anti-social system involving checks and balances? This study, thus, relies on both a descriptive and normative analysis through a 'Law and Society' perspective in addressing these questions and breaking through the cultural divide.

#### 1.4 Study methodology

In this part of the Chapter, I describe the research methodology employed in addressing the various issues that are the basis for this study.

The methodology employed was generally a Qualitative analysis with small elements of a quantitative nature. It was both analytical and empirical. It basically covered having an understanding of the root problem, that is, an appreciation of TCEs; speculating about what an adequate policy and legislative structure on TCEs should entail - or whether having such a structure is necessary, and; knowing the right qualitative and quantitative analysis to employ in investigating issues related to the research.

As seen above, one of the specific objectives of this study was to establish how TCEs are presently being exploited within the music industry. The primary research findings in satisfaction of this objective were drawn from empirical data. The methodology relied upon in building up this data involved conducting interviews with a number of stakeholders inclusive of academicians, musicians, members of indigenous communities and Intellectual Property lawyers. The majority of subjects interviewed were from Uganda by virtue of it being the case study of the research. However, in order to capture the perspective of TCE usage and the efficacy of enforcement mechanisms in other countries, there were a few persons from the United States, Ghana and Kenya that were interviewed as well.

#### 1.4.1. Research Strategy

This involved use of the case study method and compilation of data from two major sources:

- Secondary data compilation from existing literature and data sets. These include existing reports from regional and international institutions, text books and articles.
- Primary data compilation from surveys and interviews conducted through field research.

#### 1.4.2A. Case study research method

I chose the Case study method as the most appropriate method in conveying my research problem. Robert Yin suggests that some of the pertinent situations in which the case study method can be applied include situations when addressing an explanatory question (such as *how* or *why* did

something happen?); or when it is necessary to illuminate a particular subject of interest so as to get an in-depth and first hand understanding of it<sup>19</sup>.

I therefore opted to illuminate the subject of investigation in my study by starting with the Ugandan Presidents' rap song as a form of storytelling. It is from this story that I proceed to guide the readership as to what is happening (the exploitation of TCEs – portrayed in Chapters One, Two and Four) and why (motivations behind TCE usage – portrayed in chapters Three and Four). Through my Third Chapter, I also use the case study method to highlight what regulatory mechanisms have been used in the management and enforcement of TCEs in particular jurisdictions with a view of evaluating the adequacy of such mechanisms.

Robert Yin's Case Study method was therefore adequate in guiding the flow of my research by focusing on Uganda as the jurisdiction from which I drew most of my primary data collection and analysis. It also enabled me to decide on expanding into smaller multiple case studies, through secondary sources, that provided information on other jurisdictions which have TCE usage. The use of smaller multiple case studies as comparative tools with the Ugandan case study strengthened my research findings as well as the general claim for a sui generis regulatory mechanism in my study. For instance, I evaluated a number of developed countries (United States, Australia and China) as well as developing countries in Africa (Tunisia, Ghana, Nigeria, Benin, Botswana, Kenya and South Africa) that have instances of TCE appropriation or regulation on the usage of TCEs. I also used theoretical perspectives drawn from secondary information to support my arguments throughout the study.

On the whole, the case study method was significant in defining the research problem; justifying the choice of smaller multiple case studies; and the adoption of theoretical perspectives that were brought in to build on my general study claim.

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<sup>19</sup> Robert K. Yin, Cosmos Corporation., *Case Study Methods*, Revised Draft (January 20, 2004), at p. 2 – To appear in the 3<sup>rd</sup> edition of *Complementary Methods for Research in Education*, American Educational Research Association, Washington, DC, forthcoming (as of 10/1/04), See: <http://www.cosmoscorp.com/Docs/AERAdraft.pdf> (last accessed March 23, 2014).

#### 1.4.2B. Data collection

##### (i) Secondary data compilation:

Secondary data compilation consisted of desk research comprising acquisition of relevant data sourced from text books, journal articles, report compilations and the internet. Case studies from other African Countries were also analyzed with comparative references to developed economies that have previously addressed or encountered issues relating to the protection of TCEs. The methodology relied upon here was content analysis, a qualitative analysis method, through probing deeply and critically analyzing various theoretical arguments and practical implementations on TCEs. The goal was to evaluate how these arguments can be applied within the scope of this study as well as provide lessons out of their weaknesses in implementation.

The relevance of secondary data was that through conducting a literature review, I was able to discover prevailing gaps that still needed to be investigated in the subject of TCEs. As such, various scholarly articles and textbooks were analyzed. Particularly, the analysis centered on what the literature provided on the understanding of TCEs; the co-relation between TCEs and Urban music; the co-relation between TCEs and socio-economic development; and whether, and if so, how Custodians of TCEs work together with urban musicians in protecting TCEs in the modern day. It was established that the current literature hardly addressed each of these points and neither did it have existing empirical data directly linking TCEs to socio economic development. The goal of the review of existing literature was therefore to further justify the need for conducting further studies on the subject of TCEs as well draw out findings from an empirical analysis so as to establish a direct correlation between TCEs and socio-economic development.

Regulatory frameworks relating to TCEs were also analyzed as part of gathering of secondary data. These included International Instruments, regional instruments as well as some domestic legislations. The goal here was to evaluate how TCEs are regulated and to use this as part of the bench mark in the conducting of interviews, to see what the perceptions are from the interviewees on the subject of regulating TCEs. At the same time, at this stage it was also beneficial to evaluate whether domestic legislation, where it exists particularly in developing economies, is contributing to adequate utilization of the TCEs towards socio-economic development, or whether there are issues

that need to be improved upon. An analysis of case law was therefore also of benefit because case law helps to point out flaws in legislation. In instances where there was no access to case law, I made my own critique of the strengths and weaknesses in current legal frameworks addressing TCEs. Overall, this analysis was of significance in pointing out various issues that should be addressed in the effective regulation of TCEs.

(ii) Primary data compilation:

Semi-structured interviews were conducted with representatives of all the relevant sectors so as to establish whether or not there is a correlation between the use of TCEs and socio-economic development.

The Semi-Structured interviews were based on a mixture of convenience and snow-ball sampling of readily available stakeholders with an interest in TCEs as opposed to a random selection. The Interviews were designed to provide qualitative information about the status quo, motivations and practices that form the setting through which TCE Custodians and urban musicians co-exist and operate. Through Convenience Sampling, the stakeholders interviewed were within my network base and therefore convenient for the research. The Clustered Samples included music artists, representatives of TCEs from the prominent indigenous societies in Uganda, academicians, Intellectual Property lawyers, Representatives of Collecting Societies, Intellectual Property Policy makers – both from government and private agencies and Music promoters. A few lawyers and I.P Policy makers from other countries such as the United States, Ghana and Kenya were also interviewed so as to get a feel of perspectives and experiences from those countries. It is these clusters that, combined together, represent a picture of the role of TCEs in fulfilling the objectives of this research study.

(a) Generating of data through an I.P/Folklore International Conference.

Prior to drawing out a sample population that was relied upon in the interview process, it was deemed necessary to organize a one day Conference on TCEs. The theme of the Conference was: *‘Our Culture, Our future: Perspectives on Economic Development through Uganda’s Traditional Cultural*

*Expressions*. Facilitation from the University of Illinois' Program in Intellectual Property and Technology Law enabled me to hold the Conference on the 28<sup>th</sup> of June 2013 at the Africana Hotel in Uganda's capital city – Kampala. Its overall objective was to tap into various minds in addressing the growing influence that TCEs have on the entertainment industry in Uganda. It also served the purpose of highlighting the policy and regulatory frustrations that TCE holders endure in enforcement of their rights through recognition and control from commercial exploitation by others. The goal of the Conference was to establish a notch as to how there can be a harmony in ensuring that there is not only a preservation of cultural values but also that our cultural expressions continue to evolve as they contribute to socio-economic development.

The Conference drew on a broad range of stakeholders who would later on contribute to the clusters of interviewees. Thirty people are estimated to have attended this workshop and these included representatives from Ugandan ethnic groups, music artists and producers, entertainment specialists, Intellectual Property Lawyers and academicians, representatives of Music licensing organizations and Government agencies that engage in law reform, economic monitoring and copyright registration. Presentations were made on the following topics:

1. A global perspective of Traditional Knowledge and Folklore.
2. An analysis of the challenges in the protection of our folklore in today's Uganda.
3. Administration of Folklore in Uganda: Reality or fiction? - A Registrar's perspective.
4. Open licensing as an avenue in the use of Ugandan Folklore: Analysing the pros and cons.
5. Exploitation of the Music Industry in Uganda: Economic and Fiscal considerations.
6. Waking the sleeping giant: An analysis of the economic potential in Uganda's traditional music.
7. Enforcement of Folklore in Uganda: Addressing the legal challenges.

A panel of three persons was constituted to discuss each presentation and reactions and comments were also drawn from participants present. The panel was made up of the Chief Executive Office (C.E.O) of Uganda's sole music Collecting Society (Uganda Performing Right Society), a representative of music consumers, as well as a music promoter.



On the whole, the Conference, which was officiated over by the Chairman of the Uganda Law Reform Commission, was successful in building up debates on substantive issues amongst the participants to the potential role that can be played by TCEs in the socio-economic development of Uganda. The down-side was that insufficient evidence of the connection of TCEs to economic development in particular, was generated from the Conference. This made the need for further gathering of primary data crucial. Nonetheless, the Conference paid off well particularly in provoking a select group of participants to anticipate the interview questions that I would be asking them as well as to prepare their responses to the same. The conference also enabled me to anticipate any potential problems that may arise during the conducting of the interview and thus paved the way for me to deal with such problems well in advance. For instance, the understanding of what constitutes TCEs was well elaborated to the participants during the conference. The concept of '*Traditional Cultural Expressions*' is a technical term and whereas people can identify with TCEs, they may not be in a position to explain the term itself. As such, the Conference helped to clear the air on this issue.

The other technical terms that were dealt with during the conference were terms such as "Intellectual property rights" and "copyright". It should be noted that the Conference included stakeholders outside of the intellectual property field such as traditional elders and musicians that lacked an intellectual understanding of such terms. It helped therefore, that some of the presentations given during the conference gave explanatory positions of these terms in a nutshell. I was also reminded of the fact that, with particular respondents, I would have to simplify the terms to use in my interview.

The Conference further helped to highlight the relevance of the questions being researched upon. The issues raised during the conference are basically the same issues addressed in the interview questions and the Conference was beneficial in confirming the fact that the research is timely and there is high enthusiasm in the research findings among different stakeholders.

A few days after the Conference, I started conducting my interviews with a sample population which was inclusive of some of the Conference participants. The first sample population constituted a total of twenty six (26) people who were interviewed over the course of the next five weeks between June and July of 2013. Another four people were interviewed within the months of November and December 2013 through February of 2014, making a total of thirty interviews. Of the four extra interviews that were conducted, only one of them (interview of a Ugandan Traditional elder) relied on the same semi-structured questions that were used with the previous subjects. The other three interviews were conducted briefly and were specific to the subjects interviewed. These three included an interview with an American Law Professor with experience in the rights of the Indigenous Peoples of America; a Ghanaian Copyright Law Professor and the Chairperson of the Copyright Board of Kenya.

(b) Field-work interviews

The traditional elders interviewed were from the first and second largest and most influential ethnic communities in Uganda, that is – the Baganda and the Banyankole, respectively. The biggest percentage of TCEs in the modern music sector are drawn from the Buganda Community. The views from these respondents therefore were also sufficiently representative. In the cluster of Intellectuals, these too are the voices of Uganda’s small sector of intellectuals that has an appreciation of Intellectual Property law, particularly matters related to TCEs. One efficient technique in empirical research is that one of the central points in sampling involves the determination of how confidently one can apply what is learned from a particular sample to the population from which it is drawn<sup>20</sup>. It is therefore my assertion that the number of interviewees fairly represents the voices of the clusters within the samples that have the ability to safely satisfy the research field objectives.

It is also my assertion that the sample size did not negatively affect the population characteristics. This is because the variable relied upon in studying TCE usage used a mixture of quantitative and

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<sup>20</sup> Robert M. Lawless, Jennifer K. Robbennolt & Thomas S. Ulen, *Empirical Methods in Law*, 2010 Aspen Publishers, at p. 140.

ordinal variables in capturing numbers as well as scaling usage of TCEs. Initially, the objective was to apportion the clusters out with a fair representation of each sample. However, in meeting with the respondents, it transpired that some of them had interests that flowed into different clusters. For instance, three of the respondents were falling in both the music category as well as that of traditional elders; seven of the respondents carried the titles of musicians and music producers; while two of the respondents were both traditional elders as well as academicians. They were thus given the option of deciding which cluster they would comfortably represent most effectively prior to undertaking the interview. Their representation of a mixture of clusters did not appear in any way to negatively affect the viability of the research findings. On the contrary, basing on the fact that I was drawing on their perspectives, the consistency of opinions helped to strengthen the reliability of the findings.

I also relied heavily on my networking opportunities with the Uganda Performing Rights Society (U.P.R.S) to interview a satisfactory number of Ugandan musicians. The UPRS is a Collecting Society with approximately 1000 (one thousand) members. I have a long standing professional relationship with this organization and took advantage of this in accessing musicians to be interviewed. The snowball sampling effect was employed in the sense that with the first few interviews conducted, I was given contacts of other people of interest that would be of use to me in generating answers for the interviews. The cluster sampling method, involving both convenience and snowball sampling, was therefore quite effective in the development of a comprehensive number of representatives from all the relevant categories of stakeholders for this study.

The average time spent on each of the first twenty six interviews was one hour. They were all conducted personally on a face to face basis, save for five interviews that were communicated via email. The interview questions were to a large extent open-ended and scripted questions, save for those connected to survey responses which were close-ended. All interviews, apart from one, were recorded using a recording device. The interview transcripts were electronically stored and all the respondents were comfortable with being quoted, other than two government officials who requested anonymity. The transcripts include details about the positions held by each of the subjects interviewed.

Part of the goal of this study was to evaluate the need for regulation of TCEs and what kind of structure such regulation would entail. I therefore spoke to Intellectual Property academicians and practitioners as well as policy makers – both government agents and civil society members involved in I.P Policy debates. This same cluster of interviewees gave me their perspectives as consumers of music. The Convenience sample was used to pick out most of the people falling in the cluster of intellectuals because of my familiarity with them as a member of the same profession.

I also spoke to people involved in marketing urban music so as to get a feel of the marketing environment and what their perspectives are concerning the role of TCEs in the marketing of urban music. It was necessary to get responses from this cluster because I was investigating the role of TCEs in boosting profit in the music industry. As a former practicing Copyright Attorney in Uganda, some of the subjects in this cluster have been clients of mine. As mentioned above, I therefore relied on snow-ball sampling technique to generate other subjects to interview in this cluster. Additionally, I spoke to traditional and modern day musicians to understand their perspectives and experiences on how TCEs have evolved and what nature they portray today. This is inclusive of issues pertaining to ownership, consent and compensation in the use of TCEs. It was also necessary to draw from them the relevancy of a partnership between TCE custodians and urban musicians.

Analytically, the interviews were connected to the literature reviewed throughout the study in drawing out the recurring questions in the overall research. Standardized questions were used so as to analyze and elicit a similarity in the answers given. The ordering of questions started with easier fact-based questions. These helped the respondents to relax and respond to the questions in a conversational manner. They were then followed by opinion-based questions that called for more critical thinking. The questions were thus a mixture of open-ended and close-ended questions. The open-ended questions suited the personal opinions that I was looking out for, while the close-ended

questions suited the survey questions that I had. The interview questions as well as the list of subjects interviewed, are attached to this study as appendixes<sup>21</sup>.

The interview questionnaires were structured along the lines of the overall research objectives and generally covered the following elements:

1. Understanding Traditional Cultural Expressions and the challenges involved in the use of TCEs, and
2. Establishing a relationship between TCEs, the music industry and economic development.

The extra interviews conducted with the American, Ghanaian and Kenyan lawyers, were specifically structured towards drawing on their perspectives and experiences on matters related to TCEs. These were also open ended but brief. The interview with the American Law Professor lasted about thirty minutes and the interviews with the Ghanaian and Kenyan Copyright Lawyers were via emails that were preceded by brief introductions via telephone communication. The purpose of these interviews was to generate ideas as to how TCEs have been utilized and enforced in these jurisdictions.

This study thus proceeds under modest terms to draw out an understanding of TCEs from the different persons interviewed. The goal here is to provide a richer understanding of the concept of TCEs and relate it to existing literature so as to make a scholarly contribution on important issues that matter in appreciating TCEs.

The interview questionnaire also involved a variety of surveys. These surveys touched on the following areas:

- i. An estimation of how many modern day/urban musicians appropriate TCEs in their music;
- ii. The element of ownership and consent to use TCEs under the property theory;
- iii. The requirement for compensating custodians of TCEs for such appropriation;

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<sup>21</sup> See: Appendix A: Interview Questionnaire and Appendix B: List of Subjects interviewed.

- iv. The need for a law to govern the use of TCEs, whether customary or Statutory law;
- v. Whether the State, TCE Custodians, or both, should exercise control over how TCEs are used;
- vi. The possibility of TCE Custodians to partner with urban musicians to ensure preservation of cultural values;
- vii. The need for the law on TCEs to operate retrospectively if it were enacted.

On the whole, the qualitative analysis and results of these surveys were not purposed on evaluating numerical strength in perspectives. Rather, they served the purpose of elucidating the existence of a connection between TCEs and socio-economic development with Uganda as a case study. The surveys also served the purpose of bringing together views on the subject of regulation of TCEs and the kind of structure that the regulation should have.

The interview questionnaire further looked at how the benefits derived from TCEs can be better protected, considering that TCEs are established as significant in modern day Society. I thus addressed the question of regulation basing on the existing Intellectual Property domain which favors individual ownership of property. The questions posed were meant to provoke thoughts on whether TCEs are property and the kind of protection that can be accorded to them. The overriding basis here was to tease out the argument for a *sui generis* system of protecting TCEs as opposed to relying on the existing Intellectual Property regime. In pushing for a *sui generis* system, I discovered that the common argument from the interviewees was to the effect that it is the *outcome* of TCE usage that deserves protection through regulation and not the TCEs themselves.

The conclusive questions were structured to address the imperfections in the use of TCEs today. This is by drawing out how the benefits in socio-economic development can be maintained through forging a partnership between recognized TCE custodial institutions and urban musicians. The purpose here was to support the thesis that Indigenous communities, which are considered amongst the poorest communities in the world, can draw from their TCEs to boost their economic levels by making use of those that derive benefit from such TCEs.

(c) Framework for data analysis

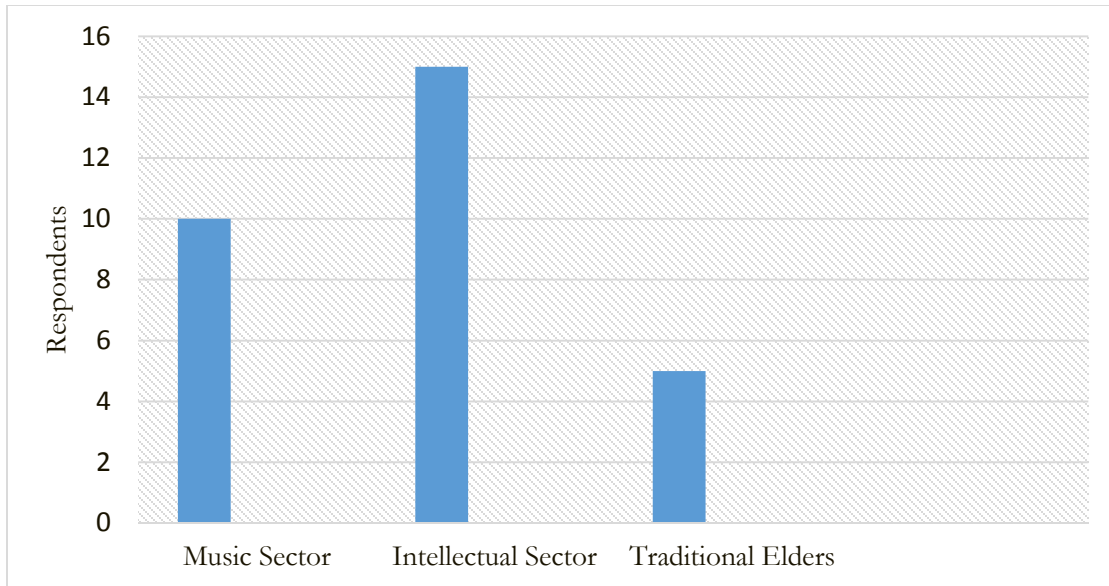
The literature reviewed through the desk research guided my analysis as to what the global consensus is regarding the use of TCEs. The research study also relied on the data from the field research to draw out the general picture on the use of TCEs in Uganda as a case study. This was helpful in structuring the argument for a direction towards a formidable policy and legislative structure in the use of TCEs within developing economies. As such, the research findings from the surveys and interviews are handled as follows:

(d) Coding of data

The information obtained from the interviews was coded into a standardized form so as to simplify the process of analyzing and contextualizing the study findings. This was premised on the following:

- i) Creation of three major clusters: Music Industry personnel, Traditional leaders and Intellectuals. The observations are based on the appreciation of TCEs under these three clusters. This thus focused on a categorical variable because it captured the quality of TCEs under study and their effect on the music industry. These variables were relied upon in gathering the qualitative analysis on TCE usage in Uganda from the three different perspectives. However, in helping project a picture of the survey results as to the connection between TCEs and Urban musicians, all the respondents were grouped together as one. On the whole, the clusters of subjects interviewed were represented as follows:
  - a) 15 persons representing Intellectuals: I.P Academicians, I.P Policy makers (Government I.P officials, Representatives of Collecting Societies) and Practicing I.P Attorneys.
  - b) 10 persons representing the Music Industry: Urban and Traditional Musicians; and Music Promoters/Producers.
  - c) 5 persons representing Traditional elders.

A graphical illustration of the Clusters interviewed is as follows:



**Figure One:** A graphical illustration of the clusters represented in the gathering of Primary Data.

- ii) The other surveys that were conducted focused on the following issues:
  - a) Whether ethnic communities are entitled to compensation by urban musicians for the usage of their TCEs.
  - b) Whether there should be a regulation in place for the usage of TCEs.
  - c) Under the regulation on TCEs, who should exercise control of TCE usage – the State, ethnic communities or both?
  - d) Whether it is possible for representatives of ethnic communities to partner with modern musicians in ensuring that cultural values are preserved in instances where TCEs have been modernized.
  - e) Whether there should be a retrospective provision in the new regulation on TCEs or whether it should focus on future use.

The surveys were generalized among the interviewees with close ended answers of ‘Yes’, ‘No’ or ‘maybe’ with the need for clarification. This methodology thus constituted the parameters within which the research was conducted.



## 1.5 Scope of the Study

This part of the Chapter covers the research scope and explains the main theme of the study as well as the Geographical scope. The thematic scope addresses the definitional challenges in appreciating TCEs. It also defines the key terms used in understanding the concept of TCE Custodianship. The geographical scope generally justifies the choice of Africa and Uganda in particular, as the main jurisdiction for empirical research. It narrows down to explaining the choice of indigenous societies analyzed in the study.

### 1.5.1 Thematic scope

#### A) Defining the term Traditional Cultural Expressions

The principal focus of this study is on the question: *What are Traditional Cultural Expressions?* Establishing a connection between TCEs and modern derivative works, includes appreciating a meaning of TCEs. The misunderstanding as to what constitutes Traditional Knowledge, inclusive of TCEs, is at the core of addressing how to effectively utilize and protect it. This same view is expressed in the report compiled by the London Commission on Intellectual Property Rights in which it is stated that:

*“Only with a deeper understanding and greater practical experience at national or regional level[s] would it be realistic to develop an international system of protection for traditional knowledge.”<sup>22</sup>*

Thus, as discussed below, one of the issues that has generated most debate at the international level is the definition of the term ‘Traditional Cultural Expressions’. The significance in creating a harmonious understanding as to what TCEs mean, includes being able to easily identify the various elements that make up TCEs. Through this, we can be able to recognize the basis of claims concerning misappropriation. This is particularly in instances whereby TCEs have been appropriated into works that receive Intellectual property protection in the entertainment industry.

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<sup>22</sup> Report of the Commission on Intellectual Property Rights: Integrating Intellectual Property Rights and Development Policy; London, September 2002; at p. 78. See supra note 18.

(i) Terminology issues

The challenge goes beyond an internationally agreed upon definition of the term TCEs. There is also a lack of consensus as to the appropriate phraseology to rely upon. The phrase “Traditional Cultural Expressions” has been used interchangeably with “Traditional Folklore” or “expressions of folklore”. However, the choice of phraseology to rely on and identification of the subject matter, are ultimately issues to be decided upon by policy makers and relevant communities at the local and national levels<sup>23</sup>.

Daphne Zografos<sup>24</sup>, for instance, points out that there are various terms used to describe the subject matter of TCEs and these include: ‘folklore’, ‘traditional cultural expressions’, ‘expressions of folklore’, ‘indigenous cultural and intellectual property’, ‘indigenous heritage’ and ‘traditional knowledge. She adds that there is no agreed legal definition for TCEs because of the complexity in defining the term depending on the region and traditional community from which the definition emanates.

Michael Blakeney<sup>25</sup> also analyzes various debates that stretched from back in the mid-1980s over an agreeable terminology that should be used to describe the creations of a cultural community. In his analysis, the issue of terminology was at the fore-front of the 1985 meeting of the Group of Experts convened by WIPO and UNESCO. He further points out how the terminology issue persisted into the World Forum on the Protection of Folklore, convened in April 1997 by WIPO and UNESCO. At this forum, various speakers criticized the western attitude and narrow definition of the term ‘Folklore’. The terms ‘Traditional Cultural Expressions’ or ‘Traditional Knowledge’ were thus incorporated to accommodate the concerns of the members at the Forum.

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<sup>23</sup> WIPO: Intellectual Property and Traditional Cultural Expressions/Folklore, Booklet No. 1; WIPO Publication No. 913(E), Switzerland; p. 2. See:

[http://www.wipo.int/freepublications/en/tk/913/wipo\\_pub\\_913.pdf](http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf) (accessed Nov. 11, 2012)

<sup>24</sup> Daphne Zografos: Intellectual Property and Traditional Cultural Expressions, Edward Elgar 2010, Cheltenham, at p.2

<sup>25</sup> Michael Blackeney (undated), *The Protection of Traditional Cultural Expressions*, Queen Mary, University of London, EC-ASEAN Intellectual Property Rights Co-operation Programme (ECAP II), at p. 2. See: [www.ecap-project.org/.../traditional\\_cultural\\_expressions\\_word.pdf](http://www.ecap-project.org/.../traditional_cultural_expressions_word.pdf) (accessed Nov. 12<sup>th</sup>, 2011).

For purposes of this study, the term “*Traditional Cultural Expressions*”, with the acronym TCE, is the preferred option as opposed to using the term “*Traditional Folklore*”. The study also addresses the issue as to whether TK and TCEs are one and the same and therefore should be regulated together or separately. A significant amount of literature, in defining TCEs, is biased towards looking at them generally in the context of cultural norms that existed before there was contamination with any foreign cultural practices. This study questions as to whether that is an accurate assessment as to what TCEs are. A flawed understanding of TCEs can create a potential disaster in the structuring of policy and legislative frameworks on TCEs. This is because if there is a reliance on misguided conclusions as to what TCEs are, without adequate consultation with representative bodies of ethnic Communities as well as other stakeholders, the final print of the policy framework on TCEs will be of inadequate assistance to those that it is meant to serve.

(ii) Can one size fit all?

Another question worth analyzing is – do we need to have a globally harmonized understanding as to what TCEs are? On the one hand, it is important to focus on ensuring that developing countries have established minimum standards of protection and enforcement of their Intellectual Property regimes. This is as opposed to pressuring them into joining the band wagon of global harmonization of IP protection through organizations like WIPO – an argument advanced by developed countries. On the contrary, however, it may be necessary to explore an understanding of TCEs by using an international forum which can also play the role of overseeing the establishment of local and regional policy and regulatory institutions over TCEs. These would ultimately have their own recognition criteria as endorsed by WIPO in consultation with stakeholders such as the local ethnic communities, host governments, regional organizations and other parties of interest.

The London Commission on Intellectual Property Rights has opined that there is no single institutional body with the capacity, expertise or resources to handle all aspects of traditional knowledge<sup>26</sup>. This therefore begs the question as to how efforts to come up with an understanding

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<sup>26</sup> Supra note 18 at p. 78.

of TCEs and their effective use can be well coordinated in such a coherent manner so as to establish a universal consensus on the matter. This study provides an analysis into the practicalities involved with such concerns and the likely loopholes to be addressed.

(iii) A review of literature on the definition of TCEs

There are two basic views noticeable out of the literature that attempts to define TCEs:

- (a) In the first view point, Traditional Cultural Expressions and Traditional Knowledge are understood and defined as distinctive of one another with entirely separate aspects. This view point is biased by initial debates and consultations held under various forums that came up with limited perspectives on the concept of TCEs. Ultimately, this view point also limits its own understanding as to what TCEs and TK entail.
  
- (b) The second view point attempts to define TCEs as part and parcel of Traditional Knowledge. It is more considerate of the claims of Indigenous Societies in the appreciation of TCEs and thus, my claim is that it brings out a more concrete and workable understanding of TCEs.

In this part of the Chapter, I briefly explain the first view point and show why I am inclined against following it. I then elaborate on literature that has given more consideration to the second view point, showing why it is the preferred choice in the understanding of TCEs in this study.

(a) First view point

Discussions over the establishment of a concrete definition for TCEs started with the African Study Meeting on Copyright held in Brazzaville, Congo in August 1963<sup>27</sup>. In the 1970s, the United Nations Educational Scientific and Cultural Organization (UNESCO) also held discussions over defining TCEs and there were a subsequent series of meetings held under the auspices of the World

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<sup>27</sup> Michael Blackeney (undated), *The Protection of Traditional Cultural Expressions*, Queen Mary, University of London, EC-ASEAN Intellectual Property Rights Co-operation Programme (ECAP II), at p. 1, citing [1963] Le Droit d'Auteur 250. See: [www.ecap-project.org/.../traditional\\_cultural\\_expressions\\_word.pdf](http://www.ecap-project.org/.../traditional_cultural_expressions_word.pdf) (accessed Nov. 12<sup>th</sup>, 2011).

Intellectual Property Organization (WIPO) in the early 1980s. The various International debates and subsequent resolutions arising from these meetings proposed definitions to the term TCEs and understanding of the terminologies used, as part of the safeguarding of Traditional Cultures and Folklore.

In 1985, WIPO and UNESCO convened a Working Group meeting on the Protection of Expressions of Folklore by Intellectual Property and came up with the following definition of Folklore<sup>28</sup>:

*Folklore (in the broader sense, traditional and popular folk culture) is a group oriented and tradition-based creation of groups or individuals reflecting the expectations of the community as an adequate expression of its cultural and social identity; its standards are transmitted orally, by imitation or by other means. Its forms include, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.*

This definition suggests that Folklore is the same as Traditional Cultural expressions. It points out that the author is the community as a whole and not an individual; it posits the value of the expressions through culture and social identity; and highlights the oral method of communication as well as the forms through which folklore can be identified.

A WIPO handbook on the Policy, Law and Use of Intellectual Property, leans towards an underlying difference between Traditional Knowledge and Traditional Cultural Expressions<sup>29</sup>. The hand book provides massive information on Patents, Copyright and related rights, Trademarks, Industrial Designs and Integrated Circuits, Geographical Indications and Protection against Unfair Competition. It points out the role of Intellectual Property in development, particularly showing how it can be utilized by Developing Countries. Other topics of interest covered in the hand book

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<sup>28</sup> UNESCO/WIPO: Model provisions for National Laws on the Protection of Expressions of Folklore against illicit exploitation and other prejudicial actions, OMPI/WIPO 1985

<sup>29</sup> *WIPO Intellectual Property Handbook: Policy, Law and Use*, WIPO Publication No. 489(E), ISBN 92-805-1291-7, WIPO 2004, 2<sup>nd</sup> Ed., Geneva, para. 7.71 at p. 446

include enforcement of Intellectual Property rights, information on the various Treaties and Conventions on I.P, Administration and Teaching of I.P, as well as Technology and legal developments in I.P. In covering Biotechnology as part of legal developments in I.P, the hand book addresses the challenges in defining Traditional Knowledge and Traditional Cultural Expressions. In attempting to define the two terms, it states that:

*“ . . . traditional knowledge is considered as the content, substance or idea of knowledge (such as traditional know-how about the medicinal use of a plant, or traditional ecological management practices), as distinct from the form, expression or representation of traditional cultures (such as a traditional song, performance, oral narrative or graphic design), which are known as TCEs or expressions of folklore.”* (Emphasis mine).

The WIPO handbook thus does not go far in explaining TK and TCEs. The definition given appears to totally dissect TCEs from Traditional Knowledge by stating that Traditional Knowledge is “ . . . distinct from the form, expression or representation of traditional cultures. . .” However, it is pertinent to look at the creation of “*song, performance, oral narrative or graphic design*” as derivative of ‘knowledge’, which makes TCEs part and parcel of the rich diversity of Traditional Knowledge.

Furthermore, in pointing out the concerns of holders of TK, the WIPO handbook acknowledges their push for recognition of the “*holistic relationship between their TK, the genetic resources (such as plants) which form part of their environment, and the TCEs or expressions of folklore that reflect their cultural identity*”<sup>30</sup>. However, the understanding of these concepts gets lost along the way, with the handbook focusing on the recognition of TK within the international legal setting in relation to the conservation of biological diversity. The appreciation of TK and TCEs as separate concepts in this handbook portrays inadequate consideration of the claims raised by Indigenous societies as to what their TK and TCEs mean to them, which forms the basis of understanding how misappropriation comes about. This study therefore identifies this as a gap in the appreciation of TCEs.

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<sup>30</sup> Ibid, para. 7.72

(b) Second view point

Graham Dutfield's report on '*Protecting Traditional Knowledge and Folklore*'<sup>31</sup> provides an interesting perspective on understanding TK and TCEs because it contains a mixed opinion on the two concepts. Professor Graham Dutfield is arguably one of the most prolific scholars on Traditional Knowledge and Cultural Expressions. His report starts by acknowledging that TK and folklore are not different in meaning and yet, for certain reasons, the two are differentiated (which is the first view point).

The Report addresses the relevant international forums involved in negotiating a pathway for placement of TK and Folklore within the I.P rights domain. It gives an analysis of the high-level discussions that have been held at the World Trade Organization (WTO), the Conference of the Parties to the Convention on Biological Diversity (CBD), and at the WIPO Intergovernmental Committee on Intellectual property and Genetic Resources, Traditional Knowledge and Folklore (IGC), as well as other Institutions and forums.

A significant part of the report gives a clarification of the terms Traditional Knowledge and Folklore (TCEs). The report posits TK and TCEs differently by suggesting that TK "*commonly refers to knowledge associated with the environment rather than knowledge related to, for example, artworks, handicrafts and other cultural works and expressions (which tend to be considered as elements of folklore)*". However, Dutfield gives consideration to Michael Blakeney's views on the narrow-minded approach that was given to Folklore in the discussions over the subject in the early 1970s. Here, Folklore was restrictively looked at in terms of copyright or copyright-plus terms whereas present discussions over TK cover plants and animals in medicinal treatment, thus invoking a discourse on a relationship with patent

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<sup>31</sup> Graham Dutfield: *Protecting Traditional Knowledge and Folklore - A review of progress in diplomacy and policy formulation*; Issue Paper No. 1, June 2003, Intellectual Property Rights and Sustainable Development; UNCTAD-ICTSD Project on IPRS and Sustainable Development, Switzerland; p.6. See: <http://www.iprsonline.org/resources/docs/Dutfield%20-%20Protecting%20TK%20and%20Folklore%20-%20Blue%201.pdf> (accessed Nov. 28, 2011) at p. 19.

law and biodiversity rights<sup>32</sup>. This appears to suggest that the limited understanding of folklore in these early discussions set the stage for the later misinterpretation as to what constitutes TK and TCEs.

The Dutfield report also quotes the UNESCO definition of Folklore, found in the Recommendations on the Safeguarding of Traditional Culture and Folklore, adopted in 1989<sup>33</sup>: “*folklore (or traditional and popular culture) is the **totality of tradition-based creations of a cultural community**, expressed by a group of individuals and recognized as reflecting its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts*”. (Emphasis mine). From the perspective of this definition, it would appear that TK is part of TCEs as the *totality of tradition-based creations of a cultural community*.

Dutfield further highlights the variance in the portrayal and appreciation of TK and TCEs between developed countries and developing countries, with the former perceiving these concepts as archaic while the latter embracing them as living and evolving, thus an integral aspect in the lives of indigenous peoples. This contrast, it would seem, explains why developed and developing countries understand the meaning of folklore differently. This is in the sense that the various forms of Folklore pointed out in the Dutfield report, such as<sup>34</sup>: (i) music, dance and other performing arts; (ii) history and mythology; (iii) designs and symbols; and (iv) traditional skills, handicrafts and artworks, have been historically associated with copyright within the western world and do not attract as much attention (in terms of relevance) to developed countries as is the case with Traditional Knowledge which is associated with Patents and the environment, hence the distinction within the mind-set of developed countries.

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<sup>32</sup> Ibid, citing Blakeney, M. (1999), “*What is traditional knowledge? Why should it be protected? Who should protect it? For whom?: Understanding the value chain*”, 3 WIPO Doc. WIPO/IPTK/RT/99/3, available at [http://www.wipo.int/eng/meetings/1999/folklore/index\\_rt.htm](http://www.wipo.int/eng/meetings/1999/folklore/index_rt.htm).

<sup>33</sup> See: [http://portal.unesco.org/en/ev.php-URL\\_ID=13141&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed Jan/3/2013)

<sup>34</sup> Note 31 supra at p. 20.



The Dutfield report also points out that the term “*indigenous knowledge*” is sometimes used in the place of “*traditional knowledge*” premised on the understanding that traditional knowledge is that which is held by indigenous peoples. However, as he further elaborates, this is not a water tight argument because other claims are to the effect that holders of traditional knowledge are also inclusive of urbanized and westernized societies that are not considered indigenous.

Other factors that may cause confusion in the understanding of Traditional knowledge, as illustrated in the Dutfield report, relate to informal and oral TK systems as opposed to formalized and well documented systems. Examples cited include the formal TK health systems in South Asian countries. The conclusive suggestion given in the report is that TK should not be given a fixed and dogmatic understanding while consideration should be given to the differing concerns and interests of the various types of indigenous societies. This is thus supportive of my research methodology which involves gathering together the concerns of representatives of indigenous societies as well as members of the entertainment industry.

What can be noted from this analysis, however, is that it is more inclined towards giving a separate interpretation of TK and TCEs rather than elaborating on a sound understanding of these terms as one and the same. Nonetheless, understanding the characteristics as portrayed in the report goes a long way in explaining TK and TCEs. More importantly, the report also does admit that definition of the terms is a difficult task and serves more significance in highlighting the reasons why<sup>35</sup>.

The Dutfield report also gives suggestions for the effective protection of Traditional Knowledge from misappropriation through what are termed as *defensive* and *positive* protection<sup>36</sup>. The former involves accommodating TK holders in any benefits that arise from the commercialization of their knowledge, while the latter involves granting TK holders IPR protection of their own. These measures, however, do not adequately consider all the interests of TK holders, especially the

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<sup>35</sup> Ibid, p.22.

<sup>36</sup> Id, pp. 33 and 40.

argument that protecting their social and religious values are more of a priority than benefit sharing. Granting IPR protection over TK has also been rejected in the past and does not fit in well with the characteristics of TK and TCEs. This research therefore looks at building upon the aspects of the Dutfield Report that focus on accommodating the interests of TCE holders in the appreciation and exploitation of TCEs. Findings obtained from qualitative research, as pointed out in the later chapters, help to throw light on this information.

Daphne Zografos's study on *Intellectual Property and Traditional Cultural Expressions*<sup>37</sup> gives a critical exposure into the different methods that have been tabled in protecting TCEs under the benchmarks of Intellectual Property rights. She also alludes to the fact that there is no agreed upon definition due to the complexity of the task and relies on a proposed definition provided by the Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore<sup>38</sup>. It states:

- (a) *'Traditional Cultural Expressions' or 'expressions of folklore' are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:*
- (i) *Verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;*
  - (ii) *Musical expressions, such as songs and instrumental music;*
  - (iii) *Expressions by action, such as dances, plays, ceremonies, rituals and other performances; whether or not reduced to a material form; and*
  - (iv) *Tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms;*  
*which are:*
    - (aa) *the product of creative intellectual activity, including individual and communal activity;*

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<sup>37</sup> Supra note 24.

<sup>38</sup> This definition is quoted from Article 1 of the Substantive Provisions of the WIPO Revised Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore, cited on p.3 of note 24 supra.

*(bb) characteristic of a community's cultural and social identity and cultural heritage; and*  
*(cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.*

*(b) The specific choice of terms to denote the protected subject matter should be determined at the national and regional levels.*

The highlights from this definition are that TCEs embrace Traditional Knowledge since they are an expression of such Knowledge and thus, not distinct from TK; the definition also encompasses formal or documented and informal or oral expressions; it also embraces the fact that TCEs are ever evolving and not archaic or static; it gives a thorough description of the various forms involved in TCEs and concludes with a blanket provision over the choice of terms relied upon for TCEs so as not to leave out any that are not specifically addressed in the definition.

The definition therefore shows that the IGC has come a long way in incorporating various views as a result of consultations and developments in the understanding of what constitutes TK and TCEs. In 2012, a few minor changes and updates were made to the IGC's glossary of various key terms<sup>39</sup>. The definition of TCEs remained largely unaffected but there were improvements on the understanding of TK which appear to divert from the earlier definition of TK contained in the WIPO handbook on the Policy, Law and Use of Intellectual Property<sup>40</sup>. While the IGC also continues to concede to the fact that there is as yet no accepted definition of Traditional Knowledge (TK) at the international level, the glossary gives its own suggestion of a definition<sup>41</sup>. It states:

*“Traditional Knowledge,” as a broad description of subject matter, generally includes the intellectual and intangible cultural heritage, practices and knowledge systems of traditional communities, including indigenous and local communities (traditional knowledge in a general sense or lato sensu). In other words, traditional*

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<sup>39</sup> See: Intergovernmental Committee on Intellectual property and Genetic Resources, Traditional Knowledge and Folklore, 23<sup>rd</sup> Session, Geneva, February 4-8, 2013. Glossary of Key Terms related to I.P and Genetic Resources, TK and TCEs. Document WIPO/GRTKF/IC/23/INF/8, dated November 2, 2012. [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_23/wipo\\_grtkf\\_ic\\_23\\_inf\\_8.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_23/wipo_grtkf_ic_23_inf_8.pdf) (accessed 1/4/2013)

<sup>40</sup> See note 29 supra.

<sup>41</sup> See Substantive Provisions, note 38 supra, Annex, p. 40.

*knowledge in a general sense embraces the content of knowledge itself as well as traditional cultural expressions, including distinctive signs and symbols associated with traditional knowledge.*

The implication from this definition is that WIPO, under which the IGC falls, no longer looks at TK and TCEs as distinctive concepts as earlier portrayed in the WIPO handbook, but complimentary of one another.

This study therefore is supportive of the aforementioned IGC definition of TCEs and also advocates for embracing TK and TCEs as complimentary and not distinctive of one another. This is also fundamentally in line with making the concerns of representatives of Indigenous societies inclusive in bringing out an understanding of TCEs. It therefore helps expand the appreciation of the parameters of TCEs unlike the first view point which limits such parameters.

My attempt at defining Traditional Cultural Expressions therefore is simply that these *are Communalistic practices among a group of people that attribute to their identity and sense of origin.* This may not be an exhaustive definition, but it embraces tangible and intangible expressions as well as expressions through action. It also gives credence to traditional knowledge and the absence of individualism. This study chooses to focus on Traditional musical expressions and their relevance in socio-economic development for developing economies as opposed to other forms of TCEs. This is provoked by the Ugandan President's rap song which highlighted the fact that the law is vague in this area as well as the questions as to entitlement to royalties, permission prior to use and the right of attribution that were raised from this song.

The International Community has thus come a long way in its endeavors to address TCEs with a view of protecting the underlying interests, especially from the perspective of defining them. However, the fact that there is no agreed upon definition of TCEs adds to the on-going confusion

as to how to identify and address the rights imbedded therein. Nonetheless, as opined by Dutfield, the focus should not be on stressing on a specific definition for TCEs and TK<sup>42</sup>. One cannot also safely conclude that all the major stakeholders have presented their views, in spite of the various consultations and progress made by International Organizations. Regardless of how concerns of Indigenous groups have so far been handled at the international level, this study also advocates for considering the views of those that appropriate TCEs.

#### B) Defining the term ‘Indigenous Peoples’

Traditional Cultural Expressions are a product of culture and as such, associated with close-knit communities that share beliefs, values, aesthetics or practices. The roots of TCEs are therefore intertwined with Indigenous peoples spread out all over the globe. This part of the study builds on the justification for focusing on the indigenous communities in specific regions and starts out by establishing who *Indigenous peoples* are.

The term ‘Indigenous Communities’ or ‘Indigenous societies’ is used interchangeably with ‘ethnic communities’ in this study though the concept is the same. Munzer and Raustiala, in defining Traditional Knowledge (TK), show the connection between indigenous peoples and TCEs. They highlight the indigenous peoples as the custodians of TCEs<sup>43</sup>. They state: “*Traditional knowledge, more fully and carefully defined, is understanding or skill, which is typically possessed by indigenous peoples and whose existence typically predates colonial contact (typically with the West), that relates to medical remedies, plant and animal products, technologies, and cultural expressions.*”

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<sup>42</sup> Note 31 supra.

<sup>43</sup> Stephen R. Munzer and Kal Raustiala, *The Uneasy case for Intellectual Property Rights in Traditional Knowledge* 27 *Cardozo Arts & Entertainment Law Journal* 37-97 (2009), (See: [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1397367](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1397367)) citing Graham Dutfield, *TRIPS – Related Aspects of Traditional Knowledge*, 33 *CASE W-RES. J. INT’L.* 233-240(2001); Srividya Ragavan (2001), *Protection of Traditional Knowledge*, 2 *MINN. INTELL. PROP. REV.* 1, 4.

However, there is no internationally recognized definition of the term ‘indigenous peoples’. Sharon Cromer<sup>44</sup>, for instance, refers to them as “*distinctive social and cultural groups that are relatively politically, economically and/or socially marginalized and therefore vulnerable.*”

Dr. Erica-Irene Daes, on the other hand, identifies four factors to consider in providing a definition<sup>45</sup>. These are outlined as follows:

- a) Priority in time with respect to the occupation and use of a specific territory;
- b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;
- c) Self-identification, as well as self-recognition by other groups; and
- d) An experience of subjugation, marginalization, dispossession, exclusion, or discrimination, whether or not these conditions persist.

Michael Newcity<sup>46</sup> also advances a variety of factors to consider in defining indigenous peoples. These are inclusive of the following:

- Historical continuity with pre-invasion and pre-colonial societies which may consist of occupation of ancestral lands, common ancestry with the original occupants of the land, as well as cultural and linguistic connections with those earlier societies;

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<sup>44</sup> Sharon Cromer, “Indigenous Peoples of Africa” – Written Statement before the Tom Lantos Human Rights Commission, Committee of Foreign Affairs, U.S. House of Representatives, Thursday, May 12, 2011, see:

[http://tlhrc.house.gov/docs/transcripts/2011\\_05\\_12\\_Indigenous\\_Peoples\\_Africa/Testimony\\_Sharon\\_Cromer.pdf](http://tlhrc.house.gov/docs/transcripts/2011_05_12_Indigenous_Peoples_Africa/Testimony_Sharon_Cromer.pdf), accessed June 11, 2012.

<sup>45</sup> See: K.D. Raju: Intellectual Property law, New Era Publications, 2005, India; citing Professor Erica-Irene Daes, a highly respected academic, diplomat and UN expert who has dedicated her career to the promotion of human rights. She is known for her work in strengthening the rights of indigenous peoples as Chairperson of the UN Working Group on Indigenous Populations from 1984 to 2001. She is also the principal author of the UN Draft Declaration on the Rights of Indigenous Peoples.

<sup>46</sup> Michael Newcity, *Protecting the Traditional Knowledge and Cultural Expressions of Russia’s “Numerically-Small” Indigenous Peoples: What has been done, what remains to be done* (November 18, 2009). *Texas Wesleyan Law Review*, Vol. 15, pp. 357-414 at 366. See: [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1508497](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1508497)

- Whether the people in question consider themselves distinct from other sectors of the societies now prevailing in those territories;
- Whether a particular group is a tribal society that has retained its traditional institutions and way of life; and
- Self-identification as indigenous or tribal.

The first three factors fit within the definition of Traditional Knowledge provided above by Munzer and Raustiala, in that they relate to cultural existence before any form of interaction with an alien form, more especially colonial interaction. Globally, many groups of people with cultural identities have gone through some form of cultural contamination and, as such, accurately fall within the aforementioned factors that contribute to the definition of indigenous peoples. However, there are a number of indigenous communities today that have kept their cultures intact without any form of outside connection or interaction, such as the Amazon Indian tribes in South America. These too, possess TCEs and yet they have not experienced significant invasion of their cultural practices.

Another noteworthy definition for *Indigenous People* is contained in Article 1 of the 1989 International Labour Organization Convention (No. 169) (I.L.O) Concerning Indigenous and Tribal Peoples in Independent Countries<sup>47</sup>. It defines indigenous and tribal peoples as follows:

- a) *Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;*
- b) *Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.*

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<sup>47</sup> See: International Labour Organization [ILO], Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, Art. 1, June 27 1989, 1650 U.N.T.S. 384 (entered into force Sept. 5, 1991) [www.ilo.org/ilolex/cgi-lex/convde.pl?C169](http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169) , also cited by Michael Newcity, *supra* note 46.

These definitions, and more particularly the I.L.O definition above, give a clear perspective of Indigenous Peoples or ethnic communities as understood within the context of custodianship of TCEs in this study. They also help to provide insight into the basis for focusing on the indigenous peoples of Africa, particularly Uganda in East Africa, as the geographical scope of the study. The concept of ‘Custodians of TCEs’ is also better appreciated through the I.L.O definition where it relates ‘Tribal peoples’ to ‘social, cultural and economic conditions’. Where these conditions or customs regulate the way of life of such people, is indicative of the attachment they have to their ways of culture to which they hold as custodians. ‘Custodians of TCEs’ are thus the whole membership of the ethnic community by virtue of their culture which constitutes part of their identity and way of life.

The study, takes cognisance of the fact that there are a number of indigenous communities spread out all over the globe with a rich cultural diversity. It is estimated that there are more than 370 million Indigenous peoples around the world in some 70 countries with the biggest concentration of Seventy per cent (70%) in Asia and the Pacific<sup>48</sup>. The estimation, in millions, is that 106 are from China, 95 from South Asia and 30 from Southeast Asia, followed by 22 in Africa<sup>49</sup>. The remaining numbers are scattered in other parts of the globe.

Indigenous peoples are said to constitute roughly 4.5 per cent of the global population and account for about 10 per cent of the poor<sup>50</sup>. It is also accepted that their quality of life in certain countries, is lower than that of the general population<sup>51</sup>. However, due to their rich cultural diversity, there is a lot of economic benefit to be gained by Indigenous Communities through their Traditional Cultural Expressions as evidenced by recent ethnicity trends coupled with today’s digital culture. It is argued

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<sup>48</sup> See: “IFAD and Indigenous peoples” at <http://www.ifad.org/english/indigenous/index.htm> accessed 06/11/2012

<sup>49</sup> *Id.*

<sup>50</sup> World Bank Policy Brief: Indigenous Peoples: Still among the poorest of the poor [http://siteresources.worldbank.org/EXTINDPEOPLE/Resources/407801-1271860301656/HDNEN\\_indigenous\\_clean\\_0421.pdf](http://siteresources.worldbank.org/EXTINDPEOPLE/Resources/407801-1271860301656/HDNEN_indigenous_clean_0421.pdf) - accessed May 10, 2012. Note that this is not a formal publication of the World Bank and is only circulated to encourage thought and discussion. The views expressed therein are those of the authors of the publication and should not be attributed to the World Bank.

<sup>51</sup> *Id.*



that such trends can very well improve the economic standards of indigenous communities<sup>52</sup>. It is also perceived that the beneficiaries of commercial exploitation of TCEs include the host countries of the indigenous communities. We should therefore consider that the protection of folklore is significant to the promotion of the national heritage of the host countries regardless of the existence of different indigenous communities within such countries.

Regardless of the current overriding influence of hosting Countries, traditional knowledge and cultural expressions have been collectively managed by Indigenous peoples since time immemorial through customary regulations<sup>53</sup>. Currently intellectual property law, under State supervision and as opposed to the historical role of customary law, oversees the individual use of TCEs in the creation of derivative products. This thus presents a conflict with the interests of Indigenous communities that would desire a more significant involvement in the way their cultures are represented to the public. In as much as representatives of Governments are the voice for indigenous communities at the world stage, State objectives may not necessarily satisfy all the interests of the indigenous communities that they represent<sup>54</sup>. States may, for instance, be more concerned about protecting the commercial benefits tied in with their underlying national traditional knowledge and cultural expressions. The interests of indigenous communities, on the other hand, may be more in line with issues such as preventing cultural erosion; attribution of source and acknowledgement of the significant role played by their TCEs on today's entertainment.

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<sup>52</sup> Daphne Zografos Johnson: *The Branding of Traditional Cultural Expressions: To whose Benefit?* p. 146-163 at p. 146, in – Peter Drahos & Susy Frankel: *Indigenous Peoples' Innovation: Intellectual Property Pathways to Development*; 2012, Australian National University, E. Press, Australia. This title is available on line at <http://epress.anu.edu.au> Also see: <http://epress.anu.edu.au/titles/indigenous-peoples-innovation-ip-pathways-to-development> (accessed November 30, 2012).

<sup>53</sup> United Nations Secretariat, Department of Economic and Social Affairs: *The State of the World's Indigenous Peoples*, United Nations, 2009, at p. 106. See: [www.un.org/esa/socdev/unpfi/documents/SOWIP\\_web.pdf](http://www.un.org/esa/socdev/unpfi/documents/SOWIP_web.pdf) (accessed Nov. 11, 2011) at p. 66.

<sup>54</sup> In the October 4, 2012 meeting of the WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore, an Indigenous representative, in a statement, urged that Indigenous Peoples should be given an equal place at the table with governments who are deciding their fate. See: <http://www.ip-watch.org/2012/10/07/wipo-members-again-intensify-talks-on-genetic-material-tk-folklore/> (accessed 11/1/2012). The statement adds:

*“It is not acceptable to reduce our rights to the lowest common denominator for Indigenous Peoples while promoting broader “States rights” standards that allows [sic] States and other parties to take our property without our free, prior and informed consent.”*

It has also been noted that developed countries are more interested in African Art than in the names of the Artists. More so, Traditional Cultural Expressions, music in particular from Egypt, Ghana, Mali, Benin and other parts of Africa, are also said to have provided a significant impact on twentieth-century music but scant attention goes to the source of such music<sup>55</sup>. The origins of traditional music therefore lose traceability in such situations as the cultural relevance also disseminates.

### C) Defining the term ‘Traditional Elders’

In the previous part of the Chapter, the definition of the term ‘indigenous peoples’, brings out the suggestion that members of indigenous communities are the custodians of TCEs. This alludes to the communal ownership that is characteristic of property rights of this nature. However, another term that is consistently mentioned in this study, is that of ‘Traditional Elders’.

The term *Traditional Elder* is a hard one to define, at least in the context of African ethnic communities which constitute the general scope of this study. In the various scholarly articles on TCEs, terms such as ‘*traditional elders*’, ‘*custodians of TCEs*’ and ‘*traditional leaders*,’ have been relied upon in associating TCEs with some form of authority. However, I would be hard-pressed to find an article that delves into defining these terms by way of explaining the monitoring and supervisory powers over the use of TCEs.

Members of ethnic communities in Uganda, for instance, give due recognition to certain individuals as ‘*traditional elders*’ without questioning the title itself. This is simply because, in the traditional African setting, a traditional elder is deemed to be a well-respected elderly person in the community that is considered to possess a lot of wisdom about the community’s cultural norms and values by virtue of age and experience. This constitutes an understanding of the term ‘Traditional Elder’. As such, similar to the previous terms explored, there is no internationally recognized definition for this

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<sup>55</sup> Traditional African Music (Author unknown) See: [www.aainnovators.com/CMS/modules/wfsection/html/baje\\_ed2\\_ch1.pdf](http://www.aainnovators.com/CMS/modules/wfsection/html/baje_ed2_ch1.pdf) (accessed March 10/ 2012).

term. The empirical research conducted in Uganda, which constituted part of this study, involved interviewing a number of persons recognized in their ethnic communities as traditional elders. There is no contention over the acquisition of this title for those that have it and the thought did not cross my mind during the interviews. One such interview was with Augustine Mutumba, a traditional elder and head of the Kkobe clan in the Buganda Community<sup>56</sup>. He confirmed my perception that Traditional elders in Africa attain that title through age and experience. He stated that to his knowledge, there is no written definition of the term ‘Traditional Elder’.

The term ‘Traditional Leader’ can be interpreted differently from that of ‘Traditional Elder’. While an elder can be a traditional leader, the two are not in the same realm in all respects. Again, in the Ugandan context, according to the Institution of Traditional or Cultural Leaders Act<sup>57</sup>, a “*Traditional or cultural leader*” is defined as a *king or similar traditional leader or cultural leader by whatever name called who derives allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or consent of the people led by that traditional or cultural leader.*” It therefore follows that whereas a Traditional leader can be recognized as a head of a community that is brought together by their customs and traditions, this is not necessarily the case with a traditional elder. There are therefore some traditional elders who are not leaders of any community whatsoever. Nonetheless, it should be noted that is mainly traditional elders that are most vocal against the appropriation of community TCEs. This creates the erroneous perception that they are the custodians of TCEs when in actual fact, the custodianship applies to all community members by virtue of culture being part of their identity.

### 1.5.2 Geographical scope

In this part of the Chapter, I turn from discussing the various terms used in the study, to discussing the jurisdictions given priority. Ethnic communities exist in many parts of the world and, as such,

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<sup>56</sup> Augustine Mutumba, a clan leader in the Buganda Community, was interviewed on November 26, 2013. Buganda Kingdom has 56 clans though only 50 are officially recognized. A clan head is the final link between the clan and the King of Buganda. The Kkobe fruit is the totem for the Kkobe clan. It is a yam that creeps up other plants and bears edible fruits similar to small yam root tubers. It is a taboo for Kkobe clan members to eat the Kkobe fruit. See: <http://www.kkobeclan.com/english/introduction.htm> (accessed February 25, 2014).

<sup>57</sup> Institution of Traditional or Cultural Leaders Act, No. 6 of 2011, Section 2.

the issue of TCEs is a global issue. However, justification is given as to why ethnic communities in Africa, and Uganda in particular, stand out in the study as opposed to communities from elsewhere.

#### 1.5.2A. Why focus on Africa?

The attention on the African Continent in this study is mainly influenced by the fact that, unlike any other continent, the variety of its traditional music is as diverse as its cultures and peoples. Africa, however, possesses some outstanding common elements of TCEs that fall within specific regions, particularly in the sub Saharan parts of Africa which historically had insignificant Arab influences and infiltration, thus keeping their cultures intact. The western concept of copyright recognition therefore was historically alien to Africa where, generally, social norms were aligned towards communal ownership of intangible property. The influence of the western style of copyright protection and enforcement in Africa started with the spread of colonialism throughout Africa, as the Colonialists preferred entrenching their own laws within their colonial conquests as opposed to relying on the existing local laws in colonial administration. The foreign laws imposed by the Colonialists advocated for individualism as opposed to the communal creation, development and ownership of expressions that the Indigenous peoples had been used to.

As such, it is safe to assume that the origins of the cultural divide started with the different ways in which indigenous African societies and their colonial masters appreciated protection of works of art. The latter's form of protection was defined by principles of individualism, originality and fixation while the former understood protection as defined by social norms. In this sense, regardless of communal ownership of cultural expressions, only certain groups could perform certain works; play certain musical instruments; or sing certain songs. Out of respect for each other's customs and traditions, the respective groups did not encroach on each other's social roles in society<sup>58</sup>.

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<sup>58</sup> Deborah Wassel, *From Mbube to Wimoweh: African Folk Music in Dual Systems of Law*, Fordham Intell. Prop. Media & Ent. L. J. (Vol. 20:289), 298, citing Paul Kuruk, *Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions between Individual and Communal Rights In Africa and the United States*, 48 AM. U.L. Rev. 782-84, (1999). A pdf version of this note is available at <http://iplj.net/blog/archives/volumexx/book1> (accessed Feb 25, 2012)

The present unique geographical nature of the indigenous peoples of Africa also highlights the impact of colonialism and adds to the value of the African continent to this study. When European Countries were scrambling for partitions of Africa, ethnic communities were split up in the creation of new colonial boundaries. As a result, the eventual colonial territories that eventually gave birth to independent Africa were characterized by members of the same ethnic communities in cross-border territories.

In light of this historical dimension, this study therefore draws on the fact that there are a number of TCEs in Africa that are shared by indigenous communities spread out in different countries. Where a government is the advocate for the rights and interests of an indigenous community, a potential challenge in sustaining this role is envisaged in a situation where such a community historically shares similar TCEs with another indigenous community across the border. There is a potential conflict here in terms of regulation where there is a need to establish which community or Government holds a better right to the TCE.

The most commonly shared TCE among African nations is musical expressions. Many indigenous communities separated by national boundaries, possess strikingly similar musical cultural expressions and other social characteristics. These include the Bahima of south western Uganda who share cultural traits with the Batutsi of Rwanda. Both ethnic groups are historically part of the Bantu people who are said to have originated from the Congo region of central Africa and spread out to eastern and southern Africa<sup>59</sup>.

Music plays an integral part in the traditional lifestyles in Africa. It is a form of communication and is used to mark many significant events such as child birth, courtship, marriage, hunting, as well as political events. It also has utilitarian aspects to it, as is evidenced in work songs and ceremonial

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<sup>59</sup> Supra note 6 at pp. 8 and 12.

songs that are never performed outside of the intended social boundaries<sup>60</sup>. This raises concerns over loss of value where such works are removed from their original culture and incorporated into another environment where their true significance is not well appreciated<sup>61</sup>. The utilitarian aspects to any musical expression, for instance, are better appreciated by the custodial society that was involved in the creation of such TCEs. It is therefore hardly the case that it would be viewed within the same lens by someone who samples such music and transforms it into something else to suit a different audience altogether. In the same realm, Susan Scafidi suggests that the significance of cultural products to their communities of origin is central to their need for protection once such products have left their origins and been circulated as property<sup>62</sup>.

The influence of African TCEs in the developed world is thus predominantly evidenced through sampling of African folk songs. These have been ingrained in productions of record companies and performance groups in developed countries inclusive of the United States of America<sup>63</sup>. However, such instances of appropriation are not only by persons who are outside the countries of origin but are also heavily prevalent within the very countries where the cultural expressions originate from. This study bases on the Ugandan President's rap song to establish a claim that modern day musicians, particularly in Uganda, have a tendency of appropriating TCEs from local indigenous societies. In most instances, as members of the same societies, those that appropriate the music do not see it as appropriation but entitlement.

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<sup>60</sup> See: [http://www.newworldencyclopedia.org/entry/Music\\_of\\_Africa](http://www.newworldencyclopedia.org/entry/Music_of_Africa) (accessed March 10/2012).

<sup>61</sup> The general concern here is that limitations on the use of the works of folklore to special occasions and rituals are not likely to be respected where such works are removed from their original culture. See: [www.wcl.american.edu/journal/lawrev/48/pdf/kuruk.pdf](http://www.wcl.american.edu/journal/lawrev/48/pdf/kuruk.pdf) - accessed October 30/2012: Paul Kuruk, *Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions between Individual and Communal Rights In Africa and the United States*, 48 AM. U.L. Rev. 769, (1999); citing generally: Alan Jabbour, *Folklore Protection and National Patrimony: Developments and Dilemmas in the Legal protections of Folklore*, 17 COPYRIGHT BULL. (No. 1) 10, 11 (1983); E.P. Gavrilov, *The Legal Protection of Works of Folklore*, 20 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 76, 79 (1984)

<sup>62</sup> Susan Scafidi: *Who owns Culture? – Appropriation and Authenticity in American Law*, Rutgers University Press, New Jersey, 2005; at p. 39.

<sup>63</sup> See supra Paul Kuruk note 61 citing: Babacar Ndoye, *Protection of Expressions of Folklore in Senegal*, 25 COPYRIGHT MONTHLY REV. WORLD INTELL. PROP. ORG. 374, 375 (1989) (decrying that there is more African art in cities like New York than in African cities).

### 1.5.2B Uganda as a case study

This study analyses various conceptions on the appreciation of TCEs from a number of Countries. However, Uganda stands out as the major case study. Uganda has been identified as the most ethnically diversified Country in the whole world<sup>64</sup>. According to the 2011 World Population Data Sheet released by the Population Reference Bureau of Washington D.C, Uganda was also identified as one of the Countries with the youngest populations globally, with almost half of the country's population aged 15 or younger<sup>65</sup>. These two attributes of this fifty one year old East African Nation<sup>66</sup> contribute significantly to the investigation of the co-relation between urban or modern music and TCEs in Uganda today. This is because issues pertaining to Cultural Expressions and entertainment play a significant role in helping to define the benchmarks of the Cultural Divide that exists between traditionalists on the one hand and the urban youth on the other. These two Community sectors are also key players in the constitution of Uganda's ethnic communities and music sectors respectively.

#### (I) A historical account of the boundary creations & the resulting legal dimensions

Uganda is a land-locked country located in Eastern Africa. It is bordered to the west by the Democratic Republic of Congo (D.R.C). In the north, Uganda borders South Sudan. The final demarcation of this border was fixed in 1914 when the Lado Enclave was given to the [then] Sudan and West Nile was transferred from the Belgian Congo (currently D.R.C) to Uganda. To the east,

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<sup>64</sup> See: Matt Blake - <http://www.dailymail.co.uk/news/article-2326136/Worlds-apart-Uganda-tops-list-ethnically-diverse-countries-Earth-South-Korea-comes-bottom.html> - last accessed May 20, 2013. According to the 1995 Constitution of the Republic of Uganda, as of February 1, 1926, there were fifty six (56) Indigenous Communities in Uganda; Also see: Kabann I.B. Kabanankye and Dorothy Kwagala, *Culture, Minorities and Linguistic Rights in Uganda: The Case of the Batwa and the Ik*, Human Rights & Peace Centre, 2007, at p. 1, which mentions that there are sixty five (65) ethnic categories of people; while in the Report by the Uganda National Commission for UNESCO (2009), *Cultural Industries in Uganda– Final Report* (UNC for UNESCO, Kampala, Uganda; December 2009)- it also mentions that Uganda has 65 indigenous communities.

<sup>65</sup> See: <http://www.africomnet.org/communication-resources/highlights/1182-uganda-has-worlds-youngest-population.html> (accessed June 10, 2013); also see Taddeo Bwambale, "For Uganda's population, it's more youth, more problems" – New Vision Newspaper article published on February 26, 2013 and accessible at <http://www.newvision.co.ug/news/640143-for-uganda-s-population-it-s-more-youth-more-problems.html> (accessed October 17, 2013). This article quotes from a State of Uganda Population Report dated December 2012, to the effect that Uganda has the youngest population in the world with over 78% below the age of 30 years. The Report states that 52% of Ugandans are below 15 years of age; 39.3% are between 19 and 59 years of age; while 4.6% are in the age bracket of 60+ years.

<sup>66</sup> Uganda became a Nation on October 9, 1962, after attaining Independence from Great Britain.

Uganda borders Kenya. Prior to 1902, this eastern boundary was reaching as far as Lake Turkana. However, gradual adjustments by the British colonial power finally marked out the boundary to its current position in 1926. To the South, Uganda borders Tanzania. Even here in Southern Uganda, boundary adjustments in 1910 by the then colonial powers - Britain, Belgium and Germany, fixed the southern boundary of Uganda by including Kigezi as part of Uganda from the Belgian Congo (D.R.C) and Bufumbira (present day Kisoro), which was formally part of German East Africa (Tanzania). Kigezi was originally part of Rwanda which together with Burundi and Tanganyika (present day Tanzania), formed German East Africa.<sup>67</sup> These border demarcations were made with disregard to the indigenous communities that inhabited the affected locations.

## (II) Ethnic settlements

The period 1890 to 1926 therefore witnessed the forging of the boundaries of present day Uganda by the British. The name 'Uganda' was derived from the Kingdom of Buganda in the central part of the Country. Over thirty ethnic groups inhabited Uganda at the time of the coming in of the British. Historians have divided these groups into four broad linguistic categories namely: The Bantu, the Luo, the Atekerin and the Sudanic<sup>68</sup>.

1. The Bantu: These take up over 50 % of the Country's total population and are located in the Southern region of Uganda. They constitute the Baganda, the Banyoro, the Basoga, the Bagisu, the Banyankore, the Bakiga, the Bafumbira/Banyarwanda, the Batooro, the Bakonjo, the Bamba, the Batwa, the Banyole, the Basamia-Bagwe and the Bagwere.
2. The Luo: These originated from South Sudan and are found in the West Nile, northern and eastern regions. They constitute the Acholi, the Alur, the Jonam and the Jopadhola.
3. The Atekerin: This group is also referred to as the Para-Nilotics, the Lango or the Nilo-Hamites. They inhabit the north, the east and north-eastern region of Uganda. They

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<sup>67</sup> Tumusiime James Supra note 6 at p. 2; Also see: Bureau of Intelligence and Research (U.S.A): International Boundary Study No. 54-July 1, 1965, Rwanda-Uganda Boundary, available at <http://www.law.fsu.edu/library/collection/LimitsinSeas/IBS054.pdf> – last accessed Oct. 1, 2013 ; See: Bureau of Intelligence and Research (U.S.A): International Boundary Study No. 106-September 5, 1978, Sudan-Democratic Republic of the Congo (Zaire) Boundary, available at <http://www.law.fsu.edu/library/collection/limitsinseas/ibs106.pdf> – last accessed Oct. 1, 2013.

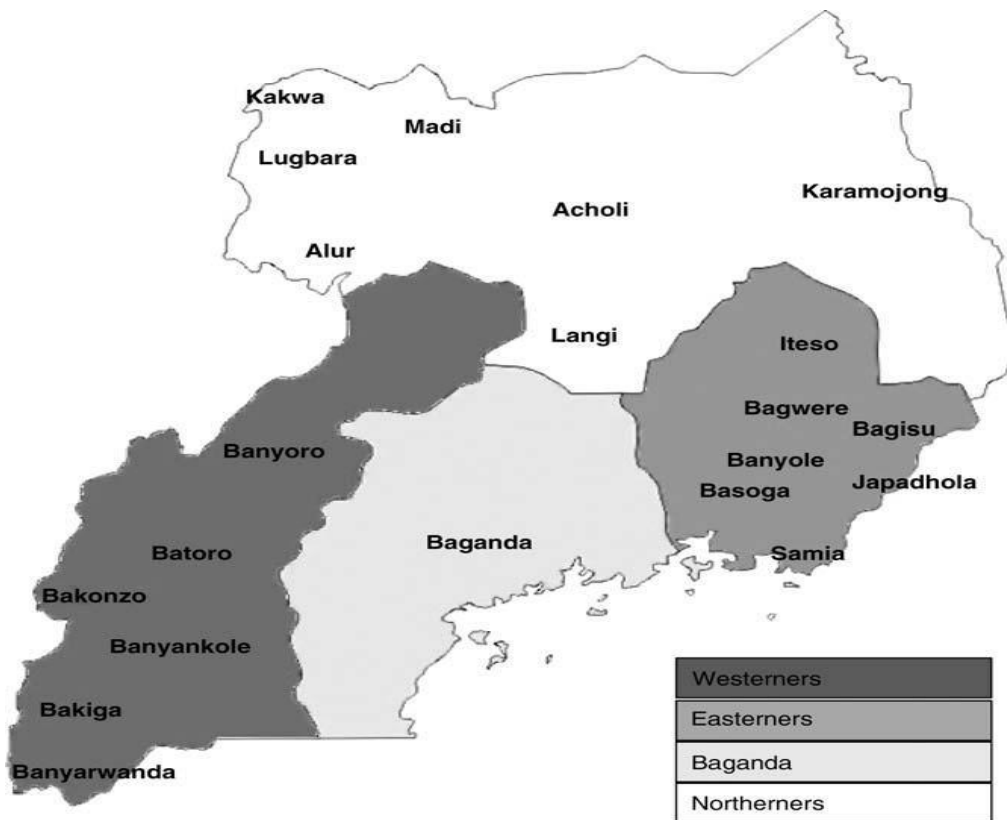
<sup>68</sup> Supra note 6 at pp. 2-6.



constitute the Langi, the Karimojong, the Iteso, the Kakwa and the Kumam. They trace their origins to Ethiopia.

4. The Sudanic: This group comprises the Madi, the Lugbara, the Okebu, the Ban, and the Metu. They trace their origins to the Sudan and are located in the northern region of Uganda.

The Map below shows how the different ethnic communities in Uganda are spread out under the geographical regions.



**Image 1:** An illustration of Uganda’s ethnic locations according to regions<sup>69</sup>.

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<sup>69</sup> See: <http://i1.wp.com/blogs.lse.ac.uk/africaatlse/files/2011/09/Uganda-map-of-ethnic-regions.jpg> - last accessed March 18, 2014.

Currently, although the ethnic origins and regions of Ugandan communities are identifiable, geographical demarcations are no longer given serious thought. Rural-urban migrations, inter-marriages and a host of other factors have saturated this cultural tie<sup>70</sup>.

### (III) Historical perspectives of TCEs in Uganda

The ethnic community in Uganda that arguably has the most profound influence nationwide from its TCEs is that of the Baganda. Bearing that in mind, this study, to a large extent, focuses on the Baganda but also discusses particularly relevant TCE influences from other large ethnic communities such as the Banyankole, which is the subject of the President's rap song.

#### (a) The pre-colonial era: The utilitarian role of TCEs in Ugandan ethnic communities

The Baganda are the largest ethnic community in the Country and occupy the central part of Uganda. According to Aloysius Matovu Joy<sup>71</sup>, in the Buganda setting (as well as other traditional African settings), education was informal and normally conducted in the evenings around the fire place. This involved storytelling and would be followed up by music and dance. John Roscoe<sup>72</sup> gives a vivid description of the pre-colonial function of dances among the Baganda:

*"Dances, among the young people, took place nightly amidst the plantain groves during the time that the moon was nearing the full, and especially on the night of full moon....The mixed dances ended frequently in immoral conduct."*

In support of this description, Aloysius Matovu Joy expresses an admiration for the intellect of the historical Baganda musicians in pointing out that, "*they had many imbedded meanings or messages behind the singing... and actually the Baganda are some of the best vulgar community [sic] when it comes to language... they*

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<sup>70</sup> Tumusiime J., Supra note 6 at p.4. Also see Kawooya, Dick, *Traditional Musician-Centered Perspectives on Ownership of Creative Expressions*. Ph.D. diss., University of Tennessee, 2010. [http://trace.tennessee.edu/utk\\_draddiss/711](http://trace.tennessee.edu/utk_draddiss/711) at p. 27

<sup>71</sup> Aloysius Matovu Joy is a Traditional elder and entertainer/musician from the Buganda Kingdom – Interviewed on July 20, 2013.

<sup>72</sup> John Roscoe, *The Baganda: An account of their native customs and beliefs*, Macmillan & Co. Ltd, London (1911) at p. 24. See: [www.archive.org/details/bagandaaccountof00roscooft](http://www.archive.org/details/bagandaaccountof00roscooft) (accessed Nov. 10, 2012).

*used the similes to refer to something else when it comes to sex...now the musicians we are talking of (present day musicians), they used these adaptations without knowing what they mean. But more than 80% of those songs were sexually oriented.*"<sup>73</sup>

Silver Kyagulanyi, a National award winning song-writer and producer, alludes to the same point.<sup>74</sup> He expresses his frustration over "so-called" musicians who try to get folklore and put in their own music without understanding the mind of the original writer. He states: "*If you don't understand the mind of the author, the original author, it is very easy for you to go astray.*" He then makes reference to a number of traditional songs from the Buganda community that have been adapted today without an understanding as to the sexual innuendos behind these songs. From an economic standpoint, if urban musicians cannot relate with the functional nature of the traditional songs that they adapt, it can affect the value of the adaptation and influence the market base. It will either be received well by the consumers and thus give a positive reflection on profits earned or, if received poorly, incur losses for the musicians involved.

However, the utilitarian nature of traditional music in Buganda was not all about sexual innuendos. Other functions were education and community ridicule depending on the gathering and or type of celebration.<sup>75</sup> Although the practices of certain TCEs were confined to particular groups, there are no recorded enforcement or regulatory mechanisms over the use or enjoyment of TCEs in Buganda<sup>76</sup>. It is likely that the strong regard to such TCEs as a cultural norm commanded strong adherence to the system. As such, abuse of TCEs was never heard of.

Musical instruments were a central part of TCEs. The drum is the most significant instrument amongst the musical instruments of the Baganda. Apart from music, it was used to announce both joy and sorrow; it was used to communicate happy events such as the birth of children, as well as

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<sup>73</sup> Supra note 71.

<sup>74</sup> Ugandan Music artist, Producer and Song-writer, interviewed on July 19, 2013.

<sup>75</sup> Tumusiime J., supra note 6 at p. 19.

<sup>76</sup> Id., at p. 20.

sad events such as the mourning of the dead. It also communicated war, and announced the return of a victorious army from a battle<sup>77</sup>. Amongst the cattle herding Ankole Community, traditional music was also used to sing to the cows so as to boost their moral and enable them to feed well<sup>78</sup>.

(b) The latter years: Development of a new music industry

Silver Kyagulanyi traces the history of TCEs in Buganda from the pre-colonial era when most of the music was drum-oriented. He brings in the introduction and influences of the “white-man’s” guitar that led to a type of music popularly referred to as “*Kadongo kamu*” (loosely translated as “*one beat*”) which was started by the legendary Eli Wamala. This went on from the 1970’s to the mid 1980’s when Congolese and South African music influences came in. The stagnation of the Ugandan music industry during this period was mainly attributed to the political instability that marked the same time frame from the early 1970’s to the mid 1980’s. As political stability set in after the mid 1980’s, the music industry still lacked any fresh innovations and the musicians at the time simply preferred to sing like; dance like; and play music like the Congolese. Local music (*Kadongo-Kamu*), with a traditional cultural touch to it, was relegated to the backstage and gradually shunned by the urban elite as “old-fashioned”, for “the elderly” and “low-class”. This perception of local music also influenced its sale to the extent that from that time to this day, the sales of the *kadongo kamu* type of music are restricted to down-town Kampala (the capital city of Uganda) where the urban elite hardly frequent. The other market base for such music is the village setting and, as Kyagulanyi suggests, the musicians associated with producing *Kadongo Kamu* music end up spending ninety percent of their time in such settings because that is where the impact of their music is felt the most. Thus, it is this same market base that has sustained the *kadongo kamu* music. Kyagulanyi reasons further that this type of music would have withered away completely but managed to survive because it was more lucrative in the villages were it was highly appreciated by a more focused market<sup>79</sup>.

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<sup>77</sup> Roscoe, John, *Supra* note 72 at p. 25.

<sup>78</sup> Interview with Mwangusya Ndebesa, *supra* note 3.

<sup>79</sup> Kyagulanyi interview *supra* note 74.

Towards the end of the 80's, music class divisions emerged with a new group seeking to define its place and taking on the name 'Ragga Muffins', which was later refined to 'dance hall' music.

Kyagulanyi opines that although the so-called *Ragga Muffins* were regarded as the "high end musicians" making the money, the reverse was true. He recalls about how a struggle in the music industry developed in the early 90's with the young people trying to fill the gaps in the industry.

They liked something different, not entirely *kadongo kamu* but somewhere in the middle. He says: "*I also started in the late 90's. We were trying to fill in that middle gap. Not raga muffins, not kadongo kamu, but singing the music that was ours, which was mainly influenced by the hymn structure of singing and also imbibing elements of the west – and you know when we talk about hymns, it is western influence. So we wanted to create a hybrid that was working.*"<sup>80</sup>

Roger Mugisha<sup>81</sup>, another pioneer in the '90's music industry in Uganda, adds his voice to the historical narrative. He states that when he started out in 1993 with a colleague by the name of Peter Sematimba, the media industry had just been liberalized, FM stations were mushrooming and the desire to have local music content started coming up. Civil war in Uganda was over and Peter Sematimba had just returned from the United States, with a dream to revamp the Ugandan music industry. His starting point was with traditional cultural folklore and interestingly, the title to his first music album was based on a Buganda folklore song called "*Kakokolo*".

Basing on this perspective of the 90's era, it is noteworthy how TCEs played into the Ugandan market, and from this we can draw their emerging influence on the socio-economic scene. Mugisha, for instance, narrates that when Peter Sematimba was working on his album collaboration with Mugisha and other music artists, he didn't have to teach anybody the songs because these were folk songs that everybody knew from their childhood. The questions thrown around in the studio were: "*How do we play the bridge; how do we tune this; what beat do we use?*" But everybody could sing along. He adds that:

*"Sematimba wanted to jump start a dead industry and the best way was to look for common ground; to look for that place that would create a nostalgic feeling so that people do not feel like you are presenting alien*

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<sup>80</sup> *Id.*

<sup>81</sup> Roger Mugisha (formerly a music artist and currently a marketer, media personality and entertainment expert in Kampala, Uganda), interviewed on July 11, 2013.

*music. So the common denominator was that since you guys [the music consumers] like funky beats, let's throw some digital beat into this folklore and see how it goes. The best and most recent example is the President's rap. He also picked a folklore song and gave it a hip hop, R'n'B beat and before you know it, he had a re-election and voting majority of people below 25 years of age."*

This study thus picks up from Roger Mugisha's narrative in showing the significance of the President's rap song to this research. The research therefore used this as a launch pad to address the provocative issues that were brought to the core through the rap song.

### 1.6 Significance of the Study

Having addressed the scope of the study and given justification for the same, I now turn to the significance. The focus here is making an argument as to the relevance of this research as a contribution to legal scholarship and what value can be attained out of it.

There were no standard research methodologies that were relied upon in formulating the research for this study. The reliance on qualitative data for the major part of my field research meant that I had no clear alternatives to fall back on so as to guide the formulation of my data and in analyzing the data results. As Lofland states: "*Qualitative field research seems distinct in the degree to which practitioners lack a public, shared and codified conception of how what they do is done and how what they report should be formulated.*"<sup>82</sup>

As such, the qualitative research method that formed the research foundation, shows that this study banks on empirical information based on field results and archival data in making its claim over TCE usage. This strengthens the research findings as original and authentic. Research material backed up by empirical data are significantly effective in supporting the study claims and, thus,

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<sup>82</sup> Lofland, J. (1974). Styles of reporting qualitative field research. *American Sociologist*, 9, 101-111, at p. 101. Cited in Matthew B. Miles & A. Michael Huberman, *An Expanded Sourcebook. Qualitative Data Analysis*, 2<sup>nd</sup> Ed. Sage Publications (1994) at p. 281.

become a major source for consultation as well as contributor of scholarship in this area. As highlighted in this study, there have been a number of on-going negotiations at the international stage on matters related to Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Presently, the WIPO Intergovernmental Committee addressing this subject has been facing challenges in accommodating the demands of representatives of Indigenous Communities for equal representation in the on-going debates. This study is therefore timely in that it concerns an issue of current international debate. It presents information that will, hopefully, bring out a representative understanding of the interests of the major parties involved in TCEs and modern music, from their own perspectives.

A number of developing Countries have vibrant ethnic communities. As the geographical scope of this study reveals, the research findings can resonate with a number of developing economies in which TCEs can be effectively utilised for socio-economic development. The study advocates for Uganda to draw lessons from other developing economies that have made headway in providing policy and legislative frameworks for the use of their TCEs. In the same vein, the study also builds on best practices that can be utilized in developing such frameworks by pointing out the likely weak points as well as the strong points where regulation of TCEs is already in effect. In effect, this points at the current and future identification and development of TCEs by showing that having a mechanism in place is beneficial for TCE usage. The strength in this study, therefore, is through the resourceful information presented that can be utilized by the Ugandan government, and other governments of a similar nature, on developing more generalized studies as to what TCEs are and how property rights in TCEs can be put to good use.

Furthermore, the study is not just restricted to music but – to a limited extent- explores other forms of TCEs such as dances, handicrafts and artefacts. It therefore follows that Indigenous communities, as well as their host countries, have a lot to gain in terms of socio-economic benefits if TCEs are adequately utilized with contribution from the findings and suggestions in this study.

## 1.7 Study Limitations

This section of the Chapter addresses the limitations generated from the findings in this study; the likely effect this can have on the outcome of the research findings and what means were employed to mitigate any negative effects on the accuracy of the research findings.

### (a) The Study findings cannot be generalized

The research findings are limited by the fact that the qualitative data is drawn from Ugandan perspectives. It therefore cannot be assumed that the same perspectives apply across the board to other developing countries. This is derived from the fact that the thesis is making a claim for TCE contribution in socio-economic development in all developing countries and not just Uganda and therefore does not effectively allow me to draw full conclusions about my claims. As mentioned above, under the geographical scope of this study, TCEs are evident in many parts of the world where there is a strong presence of ethnic communities and at the same time, poor economies. Nonetheless, the economic priorities of these countries are not the same regardless of the existence of ethnic communities.

As such, although this research relies on Uganda as a case study to guide developing countries with a rich cultural diversity in the use of their TCEs for socio-economic development, it is limited with regard to how far the research findings can be generalized to apply to all developing countries globally. Not every country would give priority to regulating and utilizing its TCEs for development purposes. In the same vein, this study mainly relies on a qualitative research method that draws on people's perspectives on TCE usage in Uganda. The perspectives in other developing countries may be different as to how TCEs are being used today and as such, structuring a way forward as opined in this study may not resonate with the situation in other developing countries.

Furthermore, the study is also not generalizable in the sense that the claim made for utilization of Traditional Musical Expressions may not easily apply in other forms of TCEs. It can be argued that the general suggestions and recommendations given in this study are applicable to all TCEs regardless of form. However, it may be easier to structure a legal mechanism to protect tangible



TCEs such as handicrafts and artefacts as opposed to intangible TCEs such as musical expressions. To this extent, the study findings, which are primarily focused on traditional musical expressions, cannot cover all categories of TCEs.

(b) Inadequate availability of data on TCEs in some countries

This study was quick to pick up on the fact that there is very limited information on the connection between TCEs and socio-economic development, particularly in the developing countries studied. This is unlike the case with Science-oriented Traditional Knowledge (TK) and is largely because TK represents tangible Traditional Intellectual Property whose roots and uses are easily identifiable and traceable. TCEs, on the other hand, are mainly intangible – particularly musical expressions and poetry. Usage is not easily identifiable or traceable where various derivative versions are made. Connecting this to existing literature for review therefore becomes a challenging task as this study was able to establish. Furthermore, considering that the research was focused on developing countries, identifying efficient tax policies over TCEs was impossible. The research goal in this respect was to look up revenue data that would have provided accurate figures as to how much money is generated by government from the music industry as well as the traditional music sector. However, such information was not available. Ugandan Government officials admitted to lacking the technical expertise to effect such taxes. They also admitted to the absence of any data on taxation in the music industry.

Rather than concentrate on government records that were apparently inexistent, I chose to rely on actual case studies between TCE holders and users. The use of the case study method was helpful in mitigating the aforementioned limitations arising from the qualitative research methodology. These studies were therefore used to reveal a practical portrayal of direct socio-economic gain to the ethnic communities from the usage of TCEs. Interview responses were also generated showing the practical side of this claim.

## 1.8 Chapter Synopsis

This part of the chapter lays out the road map of the study as broken up into separate chapters with independent themes.

(a) Chapter One - Introduction: Understanding the Cultural Divide: – TCEs and modern music  
This introductory chapter gives the motivation behind the study, which is the Ugandan President's rap song that was derived from folklore. It presents the genesis of the rap song and gives a detailed discussion as to the objection to registration of copyright that was filed before the Copyright registrar. The legal, social and economic significance of the song are also discussed. Through these, the parameters of the cultural divide between the TCE holders and users is portrayed. The chapter also brings out the aims and objectives of the study as well as the scope of the study. In addressing the scope, particular regard is given to the thematic scope, which discusses key terms used in the study; and the geographic scope, which discusses the choice of Africa and Uganda in particular as case studies. The Chapter also includes a discussion of the research methodology relied upon in generating data for this study. It also lays out the limitations encountered during the conduct of the research and how these limitations are allayed.

(b) Chapter Two - Property Rights in Traditional Cultural Expressions: Deflating the debates  
This Chapter explores the debate over perceptions in the ownership of TCEs, particularly traditional music, through the view point of a Property regime. It generally addresses arguments as to why TCEs cannot be placed within the Intellectual property regime of protection. A discussion is given of the debate between the western concepts in music ownership vis-à-vis the African traditional concepts. TCEs are balanced against Intellectual Property Rights such as Copyright, Trademark and Geographical Indications. The Chapter then discusses the issue of custodianship of property rights in TCEs. Here it presents the argument that every member of an ethnic community has a claim to the TCEs of that community and does not consider the need to seek permission from anyone before use. It highlights the challenges posed by the existence of cross-border ethnic communities and the risks involved in regulating the use of their TCEs. The Chapter also looks at what constitutes violation of Property Rights in TCEs. The unique nature of TCEs presented in this chapter emphasizes the argument that TCEs call for a sui generis form of regulation. On this basis, there is a need to evaluate existing regulatory frameworks for TCEs and how they are functioning. This leads us to the next chapter for the answers.

(c) Chapter Three – Policing Traditional Cultural Expressions: The good, the bad and the ugly  
This chapter evaluates regulatory structures on TCEs. It looks at the international dimensions, regional agreements and domestic regulations within the African Continent that provide for the Protection of TCEs. The general purpose of the Chapter is to analyze what constitutes protection of TCEs and in drawing out the different applicable principles in this analysis, to explore how the various regulatory frameworks have addressed Protection. The claim made in this chapter is that a well-structured sui generis system that adequately covers all the principles of protection is the most ideal in the full utilization of TCEs as commodities. After an evaluation of the concept of Protection under different regulatory frameworks, the chapter then presents the claim that customary law is no longer relevant in the regulation and enforcement of TCEs discusses issues related to management of TCEs through enforcement and regulatory regimes. This claim is backed up by empirical findings from Uganda. The Chapter then presents empirical findings on interviews and survey questions related to the issue of regulation of Cultural expressions in Uganda. This includes requirements for consent and compensation for TCE usage. The argument presented in the study is that it is the outcome of culture as opposed to culture itself that should be regulated so as to foster orderly use of TCEs. It concludes by asserting that a sui generis structure, following best practices drawn from this Chapter, is ideal for developing countries with a rich cultural diversity in need of TCE regulation. It sets the stage for the fourth chapter by making the case that with proper regulation, TCEs can be able to generate socio-economic development for communities.

(d) Chapter Four – Socio-Economic dynamics in Traditional Cultural Expressions: Where the past meets the future

This Chapter presents the claim that utilization of TCEs can lead to socio-economic development of communities and States as a whole. This claim is demonstrated through a review of case studies and empirical findings which explore the practical relevance of TCEs through their commodification and commercialization, particularly in the African context. It presents a sub-claim to the effect that it is the vulnerability of source communities that simplifies the appropriation of TCEs. The Chapter looks at the appropriation of TCEs by individuals as well as communities to reveal the level of vulnerability in source communities. Challenges faced by developing countries in the exploitation of TCEs, are also analyzed. Suggestions are then given as to how to address these challenges with lasting solutions for effective utilization of TCEs. The major emphasis is on an effective partnership

between State authorities and source communities and a discouragement from relying on taxation of TCEs as a source of economic development.

(e) Chapter Five – Conclusive thoughts and issues for further research

This final Chapter provides a nutshell recap of the whole study and gives a summary of conclusive thoughts drawn from the study findings. The Chapter also presents questions for the future by looking into areas in which TCEs will continue to come to the fore and will thus spark more questions, particularly in areas where the present answers are inadequate. These include the harmonization of regulatory standards over TCE enforcement among different countries; an appreciation of TCEs in the digital realm; an exploration of how a Government Cultural Authority can be structured for managing TCE usage; as well as the relevancy of international organizations such as WIPO considering that Traditional Knowledge and TCEs are arguably outside of the domain of I.P which is WIPO's focus.

## CHAPTER TWO

### Property Rights in Traditional Cultural Expressions: Deflating the debates

*“After all, what is a folk song” Who owned it? It was just out there, like a wild horse or tract of virgin land on an unconquered continent. Fortune awaited the man bold enough to fill out the necessary forms and name himself as the composer . . .”*

- Rian Malan (South African writer)

*One of the long-running debates over TCEs is as to whether or not they amount to Property. Part of the debate stems from the argument that TCEs are part of Culture and Culture cannot be regarded as property because it cannot be owned. However, it is also important to appreciate the perspective from which the debate emanates. What is, for instance, considered as the “Western Perspective” is influenced by Developed Countries (mainly Europe and North America) that are biased into looking at property as individually owned and either inherited or earned out of one’s actions; whereas the perspective of Developing Countries (mainly in Africa and Asia) is that property can be owned by a community through cultural norms and not as a result of one’s efforts.*

*The Western perspective of property in music, for instance, identifies it as an Intellectual Property Right, for the purpose of placing economic value and legal protection over it and thus restricts the nature of its enjoyment within defined principles. The dimensions of Property rights in music in the perspective of Ethnic Communities, on the other hand, are much wider. What is significant, however, is that economic value and legal protection are as less significant as the protection of cultural values in TCEs.*

*This Chapter therefore serves the purpose of ironing out the differences in these perspectives as well as establishing where the common ground lies in this debate. It analyses and weighs out the factors influencing the debate over Property Rights. It takes account of perceptions of property in a system where ownership is communal and makes the claim that the IP regime is incapacitated from protecting TCE property rights. The Chapter relies on the characteristic nature of TCE and I.P property rights, as well as the violations of property rights in TCEs to pave way for the justification of a unique regulatory structure that can protect TCEs.*

## 2.0 Introduction

Cooter and Ulen assert that, in the legal sense, property refers to *a bundle of rights*<sup>83</sup>. Steven Shavell<sup>84</sup> goes on to define Property Rights broadly as *possessory rights and rights of transfer*. It is difficult to apply this understanding of Property Rights within the context of Traditional Musical Expressions. This is premised on the fact that traditionally, much as possessory rights existed, there was never a practice of transferring TCEs. Now that they are taking on a new form as copyright works derivative of folkloric music, the element of transferability comes in, but not in the original sense. So does Shavell's understanding of property rights apply to TCEs? This Chapter demonstrates that there are a bundle of rights within TCEs, hence the Cooter and Ulen element of property is present. However, the unique manner within which these bundle of rights are exercised, is what this chapter sets out to demonstrate by highlighting the nature of TCEs as apart from property rights in I.P. For instance, exercising property rights in I.P gives one control or possession to the exclusion of all others. However, for TCEs, exclusive use is only in exceptional cases which, in most respects are the dictates of sacred rites. Otherwise TCEs normally involve free and open access. The major concern of ethnic communities is not exclusive use, but is mainly with regard to upholding cultural values and the TCE user having to respect the Moral rights of the community.

This Chapter explores two different concepts in the protection of Property rights in musical expressions. The general approach that the Chapter takes is an exploration of the Western and Ethnic Community Concepts that form the basis of recognition of Music as property. The claim made in this chapter is that Property rights in TCEs are at variance with Intellectual Property Rights and as such deserve different regulatory regimes. To substantiate this claim, I highlight substantial differences in the concepts of property rights between TCEs and I.P pointing out the limitations in each system that prevent them from being placed in the same realm.

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<sup>83</sup> Robert Cooter & Thomas Ulen, *Law and Economics*, 6<sup>th</sup> Ed. Addison-Wesley (2012), at p. 73.

<sup>84</sup> Steven Shavell, *Economic Analysis of Law*, Fountain Press (2004) at p. 5.

In pointing out that there are unique property rights imbedded in TCEs, the purpose of this chapter therefore is to identify what those property rights are and explain why they are considered as property.

## 2.1 Deflating the debate

Long standing debates leaning against granting property rights in Traditional Knowledge and Traditional Cultural Expressions, have been premised on the following:

- Difficulty in identifying ownership or authorship.
- Difficulty identifying originality.
- Inexistent limitations over third party use.
- Challenges over how to handle transferability, assignment and licensing.
- Identification as a public good or private good.

These and other challenging attributes of TCEs make regulation of their use a daunting task and lead some to haphazardly place TCE protection within the realm of Copyright law, albeit the major and obvious differences.

However, the most apparent issue for which property rights in TCEs are rejected, is that what ethnic communities consider as their traditional intellectual property is actually something in the public domain. This argument is an Intellectual Property biased approach which perceives TCEs as something in the public domain and therefore free to use. It is on this basis that the I.P perspective regards TCEs and TK in the mindset of knowledge building upon knowledge. In this sense, the argument is that creativity built from TK and TCEs is knowledge worthy of Intellectual Property protection. As such, if the knowledge from which such creativity is drawn, is also recognized as property and given a form of protection, then the freedom to exercise creativity will be curtailed.

These proponents of Intellectual Property Rights have been accustomed to a personal merit system that rewards creativity and innovation with the hope that it can incentivize further innovation.

Society grants them a limited duration of monopoly but with the purpose that after a certain lapse of time, the property right will die out and will be substituted with unlimited use.

The Custodians of TCEs, on the other hand, have a different understanding as to the enjoyment of property rights in their TCEs. They have unlimited access, unrestricted enjoyment and perpetual use of the property right. The proof of ownership is as intangible as the property itself – in some respects.

The ever increasing need to exercise creativity influenced by a very competitive market constantly pushes those in the I.P industry to source their innovations from ethnic communities where no access barriers exist - or so it seems. The increasing foreign influx into previously free-flowing TCEs and TK has led TCE holders to transform their mindsets as to how they perceive their property rights.

This Chapter starts at that point and seeks to draw out the perceptions that ethnic communities have over their property rights and the challenges associated with protection of those rights. In the first part, the Chapter gives a comparative analysis between the western concepts of property rights vis-à-vis the ethnic community concepts. The theoretical underpinnings that connect to our understanding of property rights in TCEs and I.Ps strongly influence the current utilization of the two concepts. What motivates I.P protection vis-à-vis what motivates TCE protection? This takes center stage in the evaluation of the property rights differences. I develop the claim that much as one system feeds knowledge into the other, the same nature of protection cannot be applied to both concepts because of their underlying differences, which I present.

One major aspect of the debate between property rights in TCEs and I.P is about handling of the concept of ownership. In the second part of the Chapter, I approach a deflation of this issue by explaining custodianship of property rights in TCEs. I rely on scholarly material, case studies and



empirical findings to illustrate how custodianship or ownership of TCEs is handled differently from ownership of property rights in I.P.

The main claim presented in the second part of the Chapter is that every member of the community is considered a custodian of its cultural expressions. This grants the community members a sense of identity, security and purpose. However, with communal ownership, challenges arise often as to how to deal with abuse of property rights. Management and enforcement issues are harder to address. In the third part of the Chapter, therefore, I present instances in which property rights in TCEs are violated. I highlight the common violators of those property rights, as well as show challenges associated with handling the violations. I make the claim that in the absence of structural guidelines and a unique regulatory structure that addresses TCE challenges, it is difficult for ethnic communities to protect their property rights from encroachment. I draw my conclusions in the final part of the paper.

#### 2.1A. The Western concept in music ownership versus the Ethnic Community Concept

The part of the Chapter starts with highlighting the major points of motivation behind the establishment of property rights in I.P and TCEs. Focusing on the foundational theories that direct the outcome of the property rights, helps to create an appreciation of the current characteristics of the two concepts. Major differences between the two concepts are presented pointing towards the suggestion that TCEs should be better regulated under a different and unique regulatory system.

##### 2.1.1 Theories in the appreciation of property in music

###### (A) The Western Concept

Although the fundamental purpose of existence of the U.S Copyright system is to “promote progress”<sup>85</sup>, the western concept of the Copyright system, as a whole, hinges on the purpose of

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<sup>85</sup> Cohen J.E, Loren L.P, Okediji R.L and O'Rourke M.A, *Copyright in a Global Information Economy*, 3<sup>rd</sup> Ed. Aspen Publishers 2010, at p. 4

protecting works of authorship from those who would otherwise illegally profit from them. As such, this concept focuses more on the author as opposed to the consumer of the works. This is through the incentives covered under the legal system that are meant to encourage further production of works recognizable as intellectual property rights. These incentives include exclusive ownership and enjoyment of benefits for a given duration. A recognition of ownership is thus established whereby society recognizes an individual as the owner of a particular form of expression.

John Locke provides a justification for the claim for property rights in music. In his *Two Treatises on Government*<sup>86</sup>, he states:

*Though the Earth, and all inferior Creatures be common to all Men, yet every Man has Property in his own Person. This no Body has any Right to but himself. The Labour of his Body, and the Work of his Hands, we may say, are properly his. Whatsoever he then removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joined to it something that is his own, and thereby makes it his Property . . . [I]t hath by this labour something annexed to it, that excludes the common right of other Men. For this Labour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joined to, at least where there is enough, and as good left in common for others.*

This theory is thus based on the idea that ownership in property rights is assigned to particular individuals by virtue of the labor that they have put into establishing that property. It highlights the notion that we build on someone else's pre-existing work. Making use of such work without authorization of the author harms the interests of the author in as long as her duration of protection is still running.

A number of other rights accrue to the author. For instance, authorization prior to use creates economic rights which are in tandem with rights of attribution or moral rights. The recognition of

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<sup>86</sup> Book II, ch. V (1690), adapted from: Cohen J.E, Loren L.P, Okediji R.L and O'Rourke M.A. *id.*

these rights translates into branding of the product which ultimately is tied back to the economic rights.

Where the duration of protection expires, the western concept's view is that the property rights terminate and the work falls into the Public domain. It is at this point, as some would argue, that TCEs meet up with intellectual property works whose duration of protection has expired. This is because TCEs are considered, under the western concept, as public domain works that should be freely accessible by anyone which is similar to intellectual property rights that have outlived their duration. However, to perceive TCEs as expired intellectual property rights, would be placing them within the domain of I.P, which is what this study advocates against. The theories underpinning property rights in TCEs vary from the western concept in various ways as discussed below.

#### (B) The Concept of Ethnic Communities

Traditional Cultural Expressions (TCEs) which are rooted in ethnic communities, are associated with identity, pride and a sense of belonging. Most TCEs have been around since time immemorial and are orally passed down from one generation to another. Some of these TCEs evolve at every stage and in some instances, they are presented in material form through unique works of art inscribed in various ways inclusive of cave and wall paintings, clothing, baskets and floor mats. Others carry their uniqueness through dance and musical expressions or oral expressions such as folkloric songs and poetry. It is on this basis that TCEs are normally associated with copyright.

TCEs are arguably the most effective communication tool for ethnic communities. This can be thus understood as the major theory that defines TCEs. From a historical perspective, TCEs were not only for entertainment purposes but also served utilitarian roles. Traditional music and dance performances were relied upon to convey messages to the community for a particular purpose or event. Such events include the birth of a special child, say from the head of the ethnic community; the death of a significant member of the community; or, an impending disaster or war. In Uganda, for instance, traditional musical instruments constitute a large part of the people's cultural heritage

and have also been classified as serving different purposes. A drum is one of the most prominent musical instruments in many Ugandan ethnic communities and has been known to play the following roles<sup>87</sup>:

- a) Communication: Drums were used to summon community members to convene for hunting - the drumming pattern helped in indicating the place where the hunters were to convene and the type of animal to be hunted; they were used to warn people about a looming war; and, to gather people together for communal work that was to benefit the community.
- b) Rituals: Drums were relied upon to convey the message of the new installation of a King or traditional leader; the birth or burial of a member of the royal family; and, to commemorate the birth of twins.
- c) Worship and healing: Drums also served the purpose of worship and therapeutic treatment in evoking ancestral spirits to bring about desired results. It was believed that the dancers would get possessed by the spirits induced by the drums, so as to carry out certain practices.

This study was not able to establish any instance where a community member was given recognition as a music composer or author of any related TCE. Neither is there any established restrictive use associated with individual ownership. As such, the paramount element that stands out in TCEs is that they are of a communal establishment that attaches a social value to a tangible item or practice. It is the community that orchestrates the musical performances through their lifestyles, which ultimately serve a communal purpose. Susan Scafidi clearly sums up this point in her thesis on the ownership of culture when she states: *“For Intellectual Property, the intangible element is an idea; for cultural products, the intangible element may be an expression of community beliefs, values, aesthetics, or practices.”*<sup>88</sup>

The underlying differences in property rights between the Western concept of Intellectual Property and the concept under TCEs, was debated upon in a Conference I organized as part of my data

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<sup>87</sup> Supra note 6 at pp. 190-195.

<sup>88</sup> Supra note 62 at p. 31.

collection for this study<sup>89</sup>. Professor Jay Kesan<sup>90</sup>, who was one of the participants at that Conference, opined that there are two key characteristics in the western concept of property rights that fall outside of folklore: *Fixation* and *Ownership*. Unlike with TCEs, under the western concept, I.P.Rs dictate that the creative expression should be fixed in a tangible form and the ownership should be identifiable. This makes TCEs different from modern musical works because TCEs are characterized by problems associated with the work and not the nature of the work. As such, when you create a particular category of Folklore or TCE, you have an interface problem with the traditional Intellectual Property regime such as copyright. So in creating a new category of Folklore, dealing with this interface becomes a challenge. The problem is that the new version of folklore that has been created has identifiably new expressions attached to the TCE – So is it a TCE or is it a work of copyright? Ordinarily, due to the added expressions, it would pass as Copyright.

It is therefore the essential characteristics of fixation and ownership on the one hand, and an element of community and oral expression on the other hand, that draw out the dividing line between the theoretical underpinnings of the western and ethnic societal concepts of property rights in music. It is on this basis that the two concepts cannot be regulated under the same I.P regime.

Steven Rwangyezi<sup>91</sup>, a renowned Ugandan Folklorist, also rejects the notion that property rights in TCEs can be attributed to any single individual: He states:

*“If you go to anyone of their dances, whether it is ekitagururo (a type of cultural performance amongst the Ankole Community in Uganda) or any other, the same community will not do it exactly the same twice; move from one area to another and it turns slightly different. So when we are going to restrict these*

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<sup>89</sup> Conference theme: “*Our Culture, Our Future: Perspectives on Economic Development through Uganda’s Traditional Cultural Expression*”. This was an International Conference held at Hotel Africana, Kampala, Uganda on June 28<sup>th</sup> 2013. It was funded by the University of Illinois (Urbana-Champaign) College of Law - Program in Intellectual Property & Technology Law and was hosted by the Uganda Christian University, Faculty of Law.

<sup>90</sup> Professor Jay Kesan is the Director of the Program in Intellectual Property & Technology Law at the University of Illinois (Urbana-Champaign) College of Law.

<sup>91</sup> Steven Rwangyezi is the proprietor of Ndere Dance Troupe, one of the most popular Traditional music groups in Uganda. He was interviewed on July 24, 2013.

*boundaries and talk about property, to me, something does not become a property and we need to be able to define the form in which we fixed it as property of that particular owner. Because when we perform it again and someone else who had not been in the group that was defined as owner at that time, adds something else, then it has changed.”*

The take-home from this is that property rights in TCEs are easily susceptible into I.P conversion. The aspect of communal ownership in TCEs means that any member of a given community picks from what is freely accessible to all and expresses it as he deems fit. For instance, although the main theme in a traditional dance expression is captured by a performer, its nature varies with every performance depending on the individual. A couple of issues to pick from this are: TCEs, especially in music and dance, easily evolve with time since they are susceptible to change through constant performances, and secondly, it is easy for one to obtain copyright protection from a simple transformation of a TCE. This shows a thin line between property rights in TCEs and I.P, which factor has to be given consideration in the regulation of TCEs. The vulnerability of property rights in TCEs does not apply to I.P rights because part of their protection hinges on the fixation requirement, which is lacking in TCEs.

Despite their vulnerability, TCEs are perceived as property with possessory rights assigned to particular communities that enjoy a defined bundle of rights over the TCEs. The next part of the paper brings out this dimension. It presents the claim over the unique nature of TCEs as property which justifies a specific sui generis regulatory framework outside of I.P.

### 2.1.2 Property rights in TCEs and the existing Intellectual Property regime: A comparative perspective

In this part of the Chapter, the claim made is that TCEs are property but in a different sense from what the western concept perceives as property. This claim leads up to the argument that because of the unique nature of property in TCEs, they cannot be accorded the same caliber of protection that is given to I.P rights. To support this claim, I rely on empirical findings and scholarly material which draw out various perspectives on the nature of property rights in TCEs.

As has been demonstrated in the previous part of the paper, an I.P biased perspective does not look at TCEs as property because of the absence of property boundaries that the western world of I.P is used to. Here, I show that property rights concepts in TCEs are different from what we recognize as property in the Intellectual Property domain. Edgar Tabaro, a Ugandan Intellectual Property practitioner, asserts:<sup>92</sup>

*“The understanding of Property in the western world is not the same understanding of property in our traditional setting. In the western world, property is usually individually owned. For us, we have collective ownership... land, what we call ‘obutaka’, is collectively owned by a clan, a family, sub-clan, a cluster of families, some lineage and what have you. And so, I could say yes (TCEs are property), but in what context? In our traditional context – yes. Now to marry the two is the biggest challenge... the other thing is that our traditional knowledge was meant for the good of the community, what we call ‘obulungi bwa’nsi’. In the western world, it is a commodity that can be traded in and that is where the tension is. It is almost impossible to reconcile these two worlds.”*

Tabaro’s analysis is to the effect that recognizing property rights in TCEs is based on having a social cohesion amongst members of a community; whereas I.P.Rs are, to a greater extent serving a commercial purpose. Tabaro also points out the collective ownership aspect and in this, he echoes the picture of communal ownership of property in Ugandan ethnic communities portrayed by Eria Onyango in his article with regard to Ugandan traditional societies. He writes that<sup>93</sup>:

*“Communities were known to share the basic sense of sociability. People generally lived as families or members of kin-groups from minimal to maximal lineages; they lived together and constituted a community. In these Ugandan societies, especially in the East, North and West, farmland was communally owned, streams of water and markets were all shared by people who were considered to be a community. There also existed communal shrines, ritual objects and festivals for social and religious purposes. It was common to find*

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<sup>92</sup> Interview with Edgar Tabaro, Intellectual Property practicing Attorney (Karuhanga, Tabaro & Associates, Uganda) and I.P Policy maker (July 15, 2013)

<sup>93</sup> Eria Olowo Onyango, *Ugandan Traditional Cultural Values*. Full article available for download from [http://www.academia.edu/1937342/Ugandan\\_Traditional\\_Cultural\\_Values](http://www.academia.edu/1937342/Ugandan_Traditional_Cultural_Values) (accessed on October 15, 2013) at p. 5.

*members of the same clan making a distinction of themselves through expertise in a specific skill or profession, for instance among the Rwenzururu there were experts in rain-making or traditional medicine.”*

One would therefore argue that the possessory right in property is present in TCEs in the sense that the communal ownership gives everyone that right to possess the TCE. That in itself removes the need to exercise any rights of transferability since everyone owns and has access to the same property. This, however, does not absolve TCEs from the need for a level of protection. The free flow of property rights in TCEs is rooted in their historic nature in which they were confined to particular territories. The current migrations and interactions amongst societies has exposed the vulnerability in TCE property rights. Close-knit communities were able to preserve cultural values in their TCEs in spite of the free flow because they all understood the cultural norms well as part of their identity. The current exposure of TCEs to the outside world (that is, outside of communities) creates a risk to such value systems that thus require effective protection that the I.P protective system is incapacitated from offering hence the need for a sui generis system.

I proceed to show the specific variances between property rights in TCEs and I.P rights in support of the argument for a specific regulatory regime that addresses the unique needs of TCEs.

(a) Relating TCEs to Intellectual Property: The limitations

In the preceding part of the paper, I have presented the claim that the unique nature of property rights in TCEs calls for a sui generis regulatory system. However, there are a number of challenges in making significant progress globally in the creation of policy and regulatory frameworks over TCEs. The most pressing is the strong influence of the Intellectual Property bias in the property rights debate over TCEs. My claim here, is that property rights in TCEs cannot be protected under the I.P biased regime due to a number of limitations. A large part of my analysis relies on the study conducted by Daphne Zografos<sup>94</sup> in which she balances out the placement of TCE property rights within origin-based I.P protective mechanisms. In reviewing her claims on the placement of TCEs

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<sup>94</sup> Supra note 24.



within these I.P regimes, I highlight the limitations to such joint protection. These limitations are presented below:

(i) Protection of TCEs as part of the Intellectual property domain: Copyright, Geographical Indications and Trademark rights.

(a) TCEs and Copyright:

The suggestion for protecting TCEs using I.P enforcement mechanisms would work effectively where TCEs are at the same level with IP in terms of the necessary elements of the origin-related IPRs. In that regard, Zografos gives an analysis of TCE protection with copyright, trademarks, certification marks and collective marks, fair trade labelling, geographical indications, and finally, passing off and laws against misrepresentation. However, the model laws and case studies she relies on, highlight the overriding challenge of placing TCEs within a system that demands for recognition of individual creativity; compilation and documentation of existing works; and payment of royalties. There are, for instance, irreconcilable differences between TCEs and copyright that block out the protection of TCEs within the copyright regime as I illustrate below.

Characteristics of Copyright	Characteristics of TCEs
Original works of authorship	Tradition-based authorship
Author is known except for “orphaned” works	Author is unknown
Individual authorship	Communal authorship
A means of expression	It is also a means of expressing Culture
Fixed in some material form	Mostly orally transmitted and evolving over time
Protected over a fixed duration at the International and Domestic level	There is no harmonious protection and existence is over an undetermined period of time.
Creation is mainly profit motivated	Creation is mainly derived from social and spiritual motivations

**Table 1:** Differences between Copyright and TCEs.

It therefore follows that a significant aspect of TCEs, as covered in this study, involves the evolution of works through the involvement of community and, contrary to the thesis brought forward by Daphne Zografos, it is difficult to place the protection of TCEs within the confinements of an IPR regime, particularly Copyright. Although property rights under Copyright are fixed in a tangible form, they also undergo development overtime and acquire protection for their updates as derivative rights. However, they do not have the same nature of community input towards such development. As such, in spite of the similarity in the aspect of evolution, the difference in ownership continues to stand out. Property rights in Copyright are also differentiated from TCEs by the fact that whereas both Copyright and TCEs give the source of the creativity the right to benefit from such creativity, this is not the primary objective of TCEs. Creativity under TCEs is mainly focused on exchange, free flow and transmission of information<sup>95</sup>.

One striking illustration of the variances between property rights under the western concept and the concept of ethnic communities is drawn from the United States District Court Case of *Victor Whitmill versus Warner Bros. Entertainment Inc.*<sup>96</sup> In this case, Mr. Whitmill, a visual artist based in rural Missouri brought up an action for injunctive and other relief against Warner Bros. Entertainment Inc. shortly before the release of the Movie *Hangover II* in May 2011. In marketing the release of this movie, Warner Bros. had engaged in advertisements and promotions which depicted one of the key actors, Ed Helms, with his face bearing a tattoo similar to that of Mike Tyson, a former U.S. World Heavyweight Boxing Champion. Mr. Whitmill was the creator of the original Mike Tyson tattoo and had agreed with Mike Tyson that Whitmill would own the artwork in the tattoo. His contention in the present suit, therefore, was that Warner Bros. did not ask for his permission, neither did they obtain his consent in creating the derivative work based on the original tattoo.

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<sup>95</sup> Johanna Gibson, *The Lay of the Land: The Geography of Traditional Cultural Expression*, (December 1, 2008). Intellectual Property and Traditional Cultural Expressions in a Digital Environment, Graber, C.B. & Murri-Nenova, M., eds., pp.182-201, Cheltenham; Edward Elgar, 2008 at p. 183. Electronic copy available at: <http://ssrn.com/abstract=1446812>

<sup>96</sup> In the United States District Court for the Eastern District of Missouri, Eastern Division, *S. Victor Whitmill v. Warner Bros. Entertainment Inc.* Civil Action No. 4:11-cv-752

Although Whitmill was denied his injunction, the parties privately settled the main suit out of court. However, of significance to this study, is the close similarity between Whitmill's tattoo and the tribal tattoos of the Maori ethnic community in New Zealand. In Whitmill's case, the claim was limited to the copyrightability of the tattoo and the design itself. However, the nature of the tattoo design bears some similarity to the tattoos of the Maori people which constitute part of their TCEs. Both Whitmill and the Maori Community have property rights in their tattoos. Whitmill's creativity gives him copyright protection under the western concept, while the Maori people would also recognize the expression as similar to their designs.

The images below are an illustration of my argument<sup>97</sup>:



**Image 2:** The first image is of a member of the Maori indigenous community in New Zealand; the middle image is of Ed Helm's character "Stu" in the movie *Hang over II* and the third image is of Mike Tyson with a view of Whitmill's tattoo. Notably, there is a striking similarity between the last two tattoos.

The Honorable Catherine D. Perry, who presided over Whitmill's injunction, reasoned that his likelihood of prevailing in the main suit was strong<sup>98</sup>. There is no dispute that Whitmill was the

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<sup>97</sup> All images are courtesy of google images: [www.google.com](http://www.google.com) (last accessed November 14, 2011)

author of the tattoo that Warner Bros. Entertainment copied for their movie and I will be quick to place a caveat on any insinuation here that Whitmill appropriated his tattoo from the Maori Community. The argument adduced here, is the distinction between what he was able to point out as his copyright as opposed to what the Maori community can claim as their property right. It is however, noteworthy that tattoos constitute part of the Maori community TCEs and Whitmill's design was ironically described as a *tribal tattoo* in the Court exhibits<sup>99</sup>. This case therefore supports my claim as to the limitations in protection of TCE property rights that call for sui generis legislations to address them.

Another case that highlights the inability of copyright law to protect TCEs is the Australian case of *Bulun Bulun and Anor v. R & T Textiles Pty Ltd and Anor*<sup>100</sup>. In this case, the first Plaintiff (Mr. Bulun Bulun) created bark painting entitled '*Magpie Geese and Water Lilies at the Waterhole*', and incorporated imagery that was sacred and important to his clan group, the *Ganalbingu* people and their cultural heritage. His work was created in accordance with the traditional laws and customs of the *Ganalbingu* people and after obtaining the necessary consent from the appropriate *Ganalbingu* elders. R & T Textiles (The defendant) altered and copied the plaintiff's painting onto fabric which was imported into Australia and sold nationally by the defendant.

The defendant admitted to copyright infringement of the Plaintiff's work, withdrew the infringing work and consent orders were entered into. However, Mr. Milpurrurru, the co-plaintiff in the same

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<sup>98</sup><http://www.lexisnexis.com/legalnewsroom/intellectual-property/b/copyright-trademark-law-blog/archive/2011/05/27/the-hangover-ii-must-go-on-tattoo-artist-denied-injunction-in-mike-tyson-tattoo-copyright> (accessed January 21, 2014).

<sup>99</sup> See: Court Exhibit 5, Certificate of Registration No. VA 1-767-704 for Case: 4:11-cv-0072 Doc. No. 1-5 Filed: 04/28/11 Page:1 of 1

<sup>100</sup> *Bulun Bulun and Anor v. R & T Textiles Pty and Anor* (1998) 41 IPR 513; For further comments on this case, also see: Terri Janke (WIPO), *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (World Intellectual Property Organization, Geneva, 2003), pp. 49-68; Michael Blakeney, 'Communal Intellectual Property Rights of Indigenous Peoples in Cultural Expressions' (1998) 1 JWIP 985-1002; Michael Hall, 'Case Note: *Bulun Bulun v R & T Textiles*' (1998)16 Copyright Reporter 124-35; Daphne Zografos supra note 24 at pp. 37-40; [http://www.vanuatu.usp.ac.fj/sol\\_adobe\\_documents/usp%20only/customary%20law/bulun.pdf](http://www.vanuatu.usp.ac.fj/sol_adobe_documents/usp%20only/customary%20law/bulun.pdf) (last accessed May 6, 2013)

case and also a senior representative of the *Ganalbingu* people, acting in his own right, claimed that the traditional Aboriginal owners of *Ganalbingu* country were the equitable owners of the copyright subsisting in the painting. He sought this claim as a test case on determining the communal intellectual property rights of indigenous Australian peoples as a result of copyright infringement.<sup>101</sup> As such, the Court had to consider whether the communal interests of the *Ganalbingu* people created binding legal or equitable obligations on persons outside of the Community.<sup>102</sup>

In her analysis of the case, Daphne Zografos notes as follows:

*On the issue of legal obligation, while the court recognized that customary Aboriginal laws relating to the ownership of artistic work survived the introduction of the common law of England in 1788, they were abolished when the law of copyright was codified in Australia. . . . the exclusive domain of the Copyright Act 1968 in Australia was expressed in section 8, namely that 'copyright does not subsist otherwise than by virtue of the Act', making it impossible for Australian common law to recognize a legal obligation in the communal interests of traditional Aboriginal owners in cultural work . . .*<sup>103</sup>

In addressing equitable obligations, the Court noted that Mr. Bulun Bulun was placed as the author of the artistic work and a trustee for the artwork in favor of the *Ganalbingu* people.<sup>104</sup> The Court therefore did not see the need, legal or equitable, of recognizing a separate claim for the *Ganalbingu* people. This case therefore lays further emphasis on the claim that Copyright and TCEs do not go together and TCEs require separate protection of their own. It also points to the fact that customary law which originally was relied upon in guiding enjoyment of TCEs in Australia, has been rendered irrelevant by written law. As such, customary law does not even act as an alternative means of protection for TCEs.

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<sup>101</sup> Ibid. Bulun Bulun case at pp. 515-16

<sup>102</sup> Ibid. p. 524

<sup>103</sup> Daphne Zografos, supra note 24 at p. 38

<sup>104</sup> *Id.*

(b) TCEs and Geographical Indications:

Zografos further suggests that TCEs can, in some instances, be protected as Geographical Indications (GIs). Through a table illustration, she highlights similar characteristics between TCEs and Geographical Indications<sup>105</sup>:

Geographical Indications	TCEs
GIs identify a good produced by a number of different producers	TCEs are usually produced within a community
GIs are often based on traditional formulas and processes	TCEs are produced according to traditional methods
The know-how attached to GIs is transmitted from one generation to another	The know-how attached to TCEs is transmitted from one generation to another
GIs are granted for products which have a relationship with the land, local resources or the environment	TCEs are generally linked to a specific place where a certain product is made or to traditional methods or conditions used in a specific place for making a product, often using raw material from sustainable resources
Many years are required to produce the link between a product and its geographical origin	There is an element of time in the creation of TCEs
The value of GIs is linked to their origin	The value of TCEs is linked to the knowledge that a particular community from a particular region or place has produced it

**Table 2:** Characteristics of GIs and TCEs.

The Characteristics as illustrated above point to the fact that TCEs and GIs have a lot in common especially in terms of community-based protection of property rights. However, it would be inaccurate to assert that property rights in TCEs should be protected as Geographical Indications.

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<sup>105</sup> *Id* note 24 supra, table 6.1 at p. 165

This is premised on the questionability of the term ‘*Geographical Indications*’. According to the TRIPS Agreement<sup>106</sup>, ‘Geographical Indications’ refers to the –

*“indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”*

In responding to this definition – within the context of TCEs, Salvador Lawrence d’Souza<sup>107</sup> suggests that *“the set of indications that identify the ‘origin’ of a good is part of the complexity of what originality may mean”* and he argues thus that *“both TRIPS and Lisbon models for appellation of origin are unable to clearly define what those indications of origin may be.”* He looks at Chocolate as a case in point and points out that much as it is presently associated with Belgium, the origin of cocoa and cocoa seeds can be traced back to the Amazon where it was locally used in Mesoamerica in a drink called *tejate*<sup>108</sup>. He adds further that the cocoa products used in the making of Belgium chocolate are obtained from the ECOWAS region in Africa. Conclusively, his argument is that *“eliminating the key ingredient for making chocolate is wholly inadequate in the definition of origin”*.<sup>109</sup> It therefore becomes confusing to draw up a notion as to the adequacy of relying on Geographic Indications as a protective mechanism for I.P where there is a mix up of products from different locations.

Community migrations to different locations can also be a limitation to protection of TCEs through Geographical Indications. For instance, Susan Scafidi points to the issue of community interactions that lead to cultural dilution as a limitation to relying on Geographical indications in the protection of TCE property rights. She suggests that *“members of a source community may be scattered rather than living*

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<sup>106</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 22, para. 1. See: [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf) (accessed January 9, 2012)

<sup>107</sup> Salvador Lawrence d’Souza, *Geographical Indicators: The cultural character of ECOWAS and the wider Africa*. “Geographical Indications in the WTO and EPAs”, Training Materials for Module 4 “Trade Related Areas”, Training on Legal Aspects of Trade Policy, Regional and Multilateral Trade Negotiations for the West African Region”, 9<sup>th</sup> February 2010. See: <http://www.ofamfa.org/consultancy/documents/item1-paperecowas-sld.pdf> (accessed November 10, 2012)

<sup>108</sup> Ibid, citing Soleri, Daniela and Cleveland, David A. , ‘*Tejate: Theobroma Cacao and T. bicolor in a Traditional Beverage from Oaxaca, Mexico*’, Food and Foodways, 15:1, 107 - 118, 2007

<sup>109</sup> Supra, note 107, p. 2.

*and working together in a particular location, and thus authorship may be a more effective measure than geography.*<sup>110</sup> In the same vein, advocating for the protection of TCEs as Geographical Indications (G.Is) creates the potential for conflict not only between neighboring indigenous communities that have historical connections and as such, similarities in their TCEs, but also between scattered indigenous communities that have a claim to the TCEs and Government agencies with the legislative mandate to protect the TCEs as G.Is. Christoph Antons, in rejecting the notion of G.I protection for TCEs, suggests that problems are always likely to arise in situations involving foreign migrant communities and communities that feel ethnically different or culturally not well integrated into mainstream society.<sup>111</sup>

The limitation posed by community migrations also applies squarely in Uganda where there is a difficulty in ironing out the confinements of the different ethnicities of Uganda. This difficulty is attributed to colonialism, education, development of transport networks and urbanization, which have all orchestrated rural-urban migrations, intermarriages and a loosening of cultural ties<sup>112</sup>. In support of this view, Juliet Nasuuna<sup>113</sup> opines that, “*I can say I am from Fort Portal (a District in Western Uganda) and you think that I am a mutooro (the local ethnic community in Fort Portal) when I am not. Then we see Baganda (ethnic community based in Central Uganda) picking Batooro cultural expressions and making hits.*” She was alluding to the fact that because of the constant migrations and loosening of cultural ties, it is becoming increasingly difficult to relate a particular ethnicity to a given region. This difficulty spreads further into creating challenges in the connection of TCEs to specific geographical regions which limits the reliance on G.Is as a mode of protection.

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<sup>110</sup> Supra, note 62 at p.57.

<sup>111</sup> Christoph Antons, *Asian Borderlands and the Legal Protection of Traditional Knowledge and Traditional Cultural Expressions*, at p. 10. See: <http://www.deakin.edu.au/buslaw/law/research/papers/antons-asianbor.pdf> (accessed Jan. 9, 2013) Cambridge University Press. This paper was originally presented at the 2<sup>nd</sup> International Conference of the Asian Borderlands Research Network in Chiang Mai, Thailand, on 6 November 2010.

<sup>112</sup> Supra note 6 at p.4. Also see Kawooya, Dick, “Traditional Musician-Centered Perspectives on Ownership of Creative Expressions.” PhD diss., University of Tennessee, 2010. [http://trace.tennessee.edu/utk\\_draddiss/711](http://trace.tennessee.edu/utk_draddiss/711) at p. 27

<sup>113</sup> Interview with Juliet Nasuuna, Director – Intellectual Property Department, Uganda Registration Services Bureau (U.R.S.B) on July 11, 2013.



Furthermore, Geographical Indications are also not a favorable protective mechanism for TCEs because of disparities in boundary demarcations that are connected to the establishment of many States around the world, more so, for developing countries. In the drawing up of boundaries for a majority of the Countries, history reveals that there was no consideration given to the existing ethnic communities on the ground. In the case of Africa, for instance, there were rude intrusions into cultural settings and confusion sprung up as ethnic communities were awakened to the sad reality that they had been split up into different State boundaries. In Central Africa for instance, Congolese communities were partitioned off between the French Congo, Belgian Congo and Portuguese Angola, while in Eastern Africa, Somaliland was split up between Britain, Italy and France. Lord Salisbury, who was British Prime Minister at the time<sup>114</sup>, remarked cynically that: “*We have been giving away mountains and rivers and lakes to each other, only hindered by the small impediment that we never knew exactly where they were.*” As a result, at the end of the scramble for Africa, over 10,000 African communities had been amalgamated into forty European colonies and protectorates<sup>115</sup>.

The effect of this haphazard partitioning of African territories has been long felt in our traditional music and dance expressions. For instance, the Bahima of south western Uganda share cultural traits with the Batutsi of Rwanda. Both ethnic groups are historically part of the Bantu people who are said to have originated from the Congo region of central Africa and spread out to eastern and southern Africa<sup>116</sup>. Similarly, in Nigeria<sup>117</sup> Adebambo Adewopo, points out that a collection of communities share similarities in their TCEs, both within the northwest and southwest parts of

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<sup>114</sup> Robert Gascoyne-Cecil, 3<sup>rd</sup> Marquess of Salisbury, was three times Prime Minister of the United Kingdom, from 1885 to 1886, 1886 to 1892 and 1895 to 1902. See: Marjie Bloy: British Prime Ministers 1760-1901, The Victorian Web: Literature, history & culture in the age of Victoria, <http://www.victorianweb.org/history/pms/pmlist.html> (accessed 11/10/12)

<sup>115</sup> Martin Meredith, *The State of Africa: A history of fifty years of Independence*; Jonathan Ball Publishers, 2006, Johannesburg, p. 2. The effect of this colonial boundary split of Indigenous Communities is clearly illustrated in the Ugandan and Kenyan context where, for example, Mr. Aggrey Awori, a seasoned Ugandan politician and one time Presidential Aspirant in Uganda, is a sibling to the ninth Kenyan Vice-president Arthur Moody Awori. They belong to the Samia Indigenous Community that is located in Western Kenya and Eastern Uganda.

<sup>116</sup> Note 6 supra at pp. 8 and 12.

<sup>117</sup> Adebambo Adewopo, *Protection and Administration of Folklore in Nigeria*, SCRIPT-ed, Vol 3, Issue 1, March 2006, pp. 9-10. Electronic copy available at: <http://ssrn.com/abstract=1127645> (last accessed April 28,2013)

Nigeria as well as in the neighboring countries. This makes it difficult to establish the originality of the TCE.

However, the general perception from my empirical findings, is that the issues of cross-border ethnic communities as well as historical migrations of ethnic groups from one region to another, are not perceived as a big threat to the protection of property rights in TCEs, particularly identification and attribution of TCEs to specific communities<sup>118</sup>. Steven Rwangyezi<sup>119</sup>, had a satirical way of putting it:

*“The problem is that we are politicizing these communities. They know who belongs where. Picking a banyala dance, the Banyala know that even if they were under Buganda, the Banyala would have their own sub-community and the royalties should go to the Banyala... if a dog produces in a Kraal, does that make the puppies calves? They still remain puppies and the dog should proudly know, I have my calves [puppies] and the cow has its own calves. But if the dog says I produced in the Kraal therefore my puppies have become calves, then he will have a problem with the cow. But the people know. If you go to the Border of Uganda and Kenya, they don't even respect that border. No. The Samia know who their brother across the border is. The borders were put, for lack of a worse word, illegally.”*

Agreeably, there is no cultural variance across the borders and the community members know each other. This however does not negate the fact that there is a need for structural guidance as to how the respective parties can better utilize their TCE resource power with support from the respective neighboring countries. If such a matter is left unattended to through regulatory gaps, neighboring states are likely to end up in disputes as to which country the TCEs originate. This is exactly what

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<sup>118</sup> Interviews with Arthur Mpierwe (I.P lawyer in private practice, Kampala, Uganda), Prof. David Bakibinga (I.P Law Professor and academician at Makerere University, Uganda), Dr. Ronald Kakungulu-Mayambala (I.P lawyer and academician at Makerere University, Uganda), Prof. John-Jean Barya (Traditional elder from Ankole Community and Law Professor, Makerere University, Uganda), Daniel Kazibwe (Ugandan music artist going by the stage name of ‘Ragga Dee’), Patrick Nyanzi (Ugandan music artist going by the stage name of Pato), Roger Mugisha (formerly a music artist and currently a marketer, media personality and entertainment expert in Kampala, Uganda), Milton Wabiona (Ugandan Professor of Music and traditional musician) and Steven Rwangyezi (Ugandan Traditional musician and proprietor of Ndere Dance Troupe) - July 2013.

<sup>119</sup> See supra note 91.

transpired between Malaysia and Indonesia in October of 2007 over a traditional folk song “*Rasa Sayang*” or “*Feeling of Love*”. Indonesia, a neighboring Country to Malaysia, had threatened to sue Malaysia for copyright infringement after the Malaysian government used the folk song in a tourism campaign. The history of this folk song connects it to the ethnic community of the Malay Archipelago, who are located in Indonesia, Malaysia, Southern Thailand and Brunei. The Malaysian Culture, Arts and Heritage Minister at the time, Rais Yatim, questioned the nature of action that would be used against Malaysia – and rightly so.<sup>120</sup> It is to this extent that Geographical Indications, as an Intellectual Property regime, does not fit in with property rights in TCEs which further emphasizes the need for specific regulations on TCEs.

(c) TCEs and Trademarks

Arguably the closest I.P protection that can be given to tangible TCEs is in the Trademark domain. The highlight of Zografos’ thesis on protection of TCEs as Trademarks is on the registration of tangible expressions such as traditional drawings and designs, as figurative marks. She explores examples of images associated with Native Americans in the United States and the Aboriginal communities in Australia that have been granted Trademark registration and concludes that it is possible to register tangible expressions such as sculptures or handicrafts as trademarks<sup>121</sup>.

It is indeed apparent that property rights in TCEs that are tangible and easily identifiable, come closer to the western concept of property rights, particularly in Trademark law. However, the limitation as to individual ownership remains a challenge even under Trademark rights which begs the question as to how a community can register their tangible TCEs under Trademark law? This is addressed by Michael Newcity where he explores the protection of TK and TCEs amongst the Indigenous Peoples of Russia<sup>122</sup>. As a comparative analysis, he points out that in Australia and New Zealand, the indigenous communities have registered their TCEs as Trademarks so as to guarantee

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<sup>120</sup> Associated Press: Malaysia urges Indonesia to drop plans to sue over folk song, posted 10/05/2007. <http://melayuonline.com/eng/news/read/1652/malaysia-urges-indonesia-to-drop-plans-to-sue-over-folk-song> (last accessed January 10, 2014).

<sup>121</sup> Supra note 24 at p. 57.

<sup>122</sup> Supra note 46

their authenticity and the quality of arts and crafts sold using their names and designs. He goes on to cite the National Indigenous Arts Advocacy Association in Australia which has registered certification marks on behalf of Aboriginals and Torres Strait Islanders, and in New Zealand the Maori Arts Board which has registered *toi iho*<sup>TM</sup> “*to protect and sell authentic, quality Maori arts and crafts.*” He further highlights how trademark law in Russia makes it possible for ethnic communities in Russia to register and protect their traditional arts and crafts from counterfeits through two avenues: The first is through registration as a collective mark, which allows for registration by “an amalgamation of persons”. The second is through registration of indications of geographic origin, which favors a connection of human cultures to their local land and environment.<sup>123</sup>

These are all commendable efforts in establishing defensive protection of property rights in TCEs but it is apparent that the overriding limitations between TCEs and Trademark rights are not sufficiently addressed. The aspect of communal ownership continues to bring out the major difference between TCEs and I.P.Rs. In both Australia and New Zealand as seen above, it is legal entities that act *on behalf* of the ethnic communities in registering their TCEs as Trademarks. In Russia, although the law allows for “an amalgamation of persons”<sup>124</sup>, it requires a specification of the individuals involved in the application for registration. As such, where the community is desirous of registering its TCEs as a collective mark, it is impossible for the whole community to have their names included in the registration process. This is because the use of the collective mark is restricted to only those whose names have been registered and, in my view, this is counter to the interests of the community in protecting what is communally theirs. Ultimately, the law indirectly grants a sense of ownership to the ‘amalgamation of persons’ involved in the registration process and not the whole community. This therefore positions Trademark law as ineffective in protecting property rights in TCEs.

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<sup>123</sup> *Id.* at pp. 401-402

<sup>124</sup> *Id.*, citing: *Grazhdanskii Kodeks RF [GK] [Civil Code] art. 1510(1) (Russ.)*. The Russian word used in this provision (*ob’edinenie*— that Maggs and Zhiltsov have translated as “amalgamation” (CIVIL CODE OF THE RUSSIAN FEDERATION, FOURTH PART: PARALLEL RUSSIAN AND ENGLISH TEXTS (Peter B. Maggs & Alexei N. Zhiltsov eds. & trans., 2008), at 396) can also be translated as “association,” “corporation,” or “union.” T. RENKVIST, *RUSSKO-ANGLIISKII IURIDICHESKII SLOVAR’ PO GRAZHDANSKOMU I MEZHDUNARODNOMU CHASTNOMU PRAVU* 228 (2002).

Zografos also acknowledges the limitations of Trademark law over TCE protection, in her article: *The Branding of Traditional Cultural Expressions: To whose Benefit?*<sup>125</sup> This article highlights the argument that branding of TCEs through trademark registration raises the issue as to whose benefit the protection of these property rights would go. As the article portrays, there are substantial risks that follow from trying to squeeze property rights in TCEs into the Trademark domain. In this article, Zografos looks at how traditional words, images, symbols, music, performances or objects are increasingly being used for branding purposes, raising issues over ownership, authorization, attribution and exploitation. She concludes that the IP Branding tools cannot provide a comprehensive system of protecting TCEs and can only achieve a certain length in satisfying TCE objectives of protection.

(i) Can fixation work for TCEs?

As already pointed out, fixation is a major component of property rights under the western concept and there have been calls for creating permanent forms of TCEs as a way of building up protection of the property rights<sup>126</sup>. However, bringing TCEs closer to the IP realm through documentation and preservation of images and themes, especially those with a spiritual and social significance has its benefits and weaknesses. On the upside, the motivations for this action include strengthening the community hold over such expressions, protection of community interests and establishment of easier enforcement schemes for such interests. It is even easier to exercise this option over Traditional Knowledge, which can be expressed in a tangible form.

In the article - *Preserving traditional knowledge: Initiatives in India*<sup>127</sup>, Rupak Chakravarty looks at measures undertaken by India in the preservation, protection and use of its traditional knowledge. The focus of the article is on the traditional medicinal knowledge in India. Initiatives in India to preserve and

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<sup>125</sup> Supra note 52.

<sup>126</sup> Mr. Silver Kayondo, a Ugandan Lawyer and I.P enthusiast, was a participant at the I.P Conference I organized on TCEs (see note 7 supra). He opined that “*as a consumer of folklore music, permanentization of our rich heritage is a welcome move and a right step in the right direction*”.

<sup>127</sup> Rupak Chakravarty, Preserving traditional knowledge: Initiatives in India, International Federation of Library Associations and Institutions (IFLA) Journal, December 2010. See: <http://ifl.sagepub.com/content/36/4/294> (accessed March 19, 2012)

document such knowledge through digital libraries were based on the fact that a lot of such knowledge was misappropriated in the form of patents on non-original innovations. As such, the preservation and documentation makes it easier for patent examiners to make searches for relevant traditional knowledge as prior art. The most famous case in point relates to when the US Patent and Trademark office (USPTO) re-examined and rejected granting a Patent over the use of turmeric in wound healing, upon a request by the Indian Council of Scientific and Industrial Research (CSIR). This was after the USPTO established through CSIR that turmeric has been used in India for thousands of years for healing wounds and therefore its medicinal use was not novel<sup>128</sup>.

The Indian action in seeking to preserve its TK is a welcome initiative as it seeks to protect knowledge that has served various indigenous communities for centuries as well as the sacred value attached to such knowledge. There are, however, weaknesses to consider in the argument for documentation and preservation of TCEs. For instance, one limitation is the applicability of the concept. The digital libraries initiative in India is focused on traditional “environmental” knowledge associated with cultural methods of enhancing the health of the indigenous communities. As such, this has a “fixed” element to it as opposed to intangible TCEs, a subset of traditional knowledge which evolve over time. Most forms of TCEs, such as musical expressions and expressions by action, risk losing their value in society if they are preserved and documented. This bears on the significance of TCEs that have been passed on orally from one generation to the other. Each new generation that receives and passes them on to the next, makes its own input to keep the cultural expressions alive and relevant. This input may be based on the experiences and exposures of that generation. TCEs are a communal expression and as such, capture the social and emotional mood of an era evolving as one era fades and is replaced by another<sup>129</sup>.

TCEs are therefore educative tools with large amounts of historical data and social science tools stored orally. In a way, preserving such expressions through some form of fixation can create the

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<sup>128</sup> Report of the Commission on Intellectual Property Rights: Supra note 18 at p. 76.

<sup>129</sup> Supra, note 62 at p. 28

risk of stagnating cultural evolution. However, on the other hand, without any form of preservation, it would also be difficult to assert administrative and enforcement mechanisms over TCEs. The preservation also helps to ensure that the cultural expressions do not die out with a particular generation. In weighing out all these concerns, this study leans towards preservation of cultural expressions. This is because it does not create any barriers to the furtherance of oral transmission; the preserved material can act as a fall back point of reference in case of disputes as to authenticity of the TCEs; and, the data base acts as a good resource base for those involved in management and enforcement of TCE usage.

Regardless of the benefits of fixation in TCEs, Indigenous communities are nonetheless sceptic about having their TCEs associated with IPRs and would rather have a unique form of protection instead. In *Community and the Exhaustion of Culture*<sup>130</sup>, Johanna Gibson analyses the risks involved in the assimilation of traditional knowledge within intellectual property models. She suggests that a separate classification of property rights in Traditional Knowledge and Traditional Cultural Expressions is contrary and foreign to the realities of such knowledge for the Indigenous Communities. She further highlights a collective statement from the Indigenous People's Council on Bio colonialism (IPCB) that the classification of the two terms separately in order to generate compatibility with Intellectual Property rights is part of the ploy of developed countries to ease exploitation rather than support protection of cultural creativity<sup>131</sup>. Going by Gibson's thesis, it should therefore be noted that property rights in TCEs cannot be isolated from Traditional

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<sup>130</sup> Johanna Gibson, *Community and the Exhaustion of Culture. Creative Territories in Traditional Cultural Expressions*. p. 1-2. Electronic copy available at: <http://ssrn.com/abstract=1446809>

<sup>131</sup> Indigenous People's Council on Biocolonialism (IPCB), Collective Statement of Indigenous Peoples on the Protection of Indigenous Knowledge, Agenda item 49(e): Culture. UN Permanent Forum on Indigenous Issues. Third Session, New York, 10-21 May 2004:

*We know the current proliferation of debate regarding the protection of traditional knowledge and genetic resources that is taking place in various UN fora is centered on mechanisms for exploitation, not protection. These discussions focus on the use of Western Intellectual Property Rights to be used as the mechanisms for the protection of Indigenous Knowledge. These mechanisms are not only inadequate, but dangerous.*

*Indigenous peoples who have participated in the CBD, WIPO, and other UN processes, have consistently asserted our proprietary, inherent, and inalienable rights over our traditional knowledge and biological resources. Those who wish to impose intellectual property rights over our traditional knowledge and resources, if successful, will transform our knowledge and resources into individually owned, alienable commodities, subject to IPR protection for a short period of time.*

Knowledge rights because they all fall in the bracket of traditional intellectual property rights. The need for a sui generis protective system should apply to both concepts.

As my claim suggests, it is therefore evident from the arguments presented above that the regulation of TCEs under I.P regimes, albeit with the differences in the underlying principles, will also negatively affect the access to TCEs by the indigenous persons that have been openly benefiting from such traditional knowledge since time immemorial.

I opine further in my claim that a balance of the different concepts in property rights should be drawn up by checking how far applicable the western concept can be relied upon in creating parameters around property rights in TCEs and at the same time appreciating its limitations. A sui generis system of protection that fits within particular interests of ethnic communities can serve this purpose. In a short but fascinating article<sup>132</sup>, Sita Reddy and D.A. Sonneborn present four case studies that portray a unique balance in addressing the interests of communities over a guarantee of rights to their folklore, while at the same time retaining rights of ownership with the Smithsonian Folkways Recordings Institution. The Institute has a data base of folk songs gathered and recorded from various communities worldwide. While ownership of the sound recordings remains with the Institution, control over use is returned to the communities and artists that produced the music. The writers describe the unique concept as involving a licensing-back of recording rights to communities of origin for a dollar and in return, the Smithsonian Institute would receive a royalty for each copy made by the licensee<sup>133</sup>. The four case studies are from Uganda, Papua New Guinea, Western Australia and North America.

Each of these case studies captures an important aspect of balancing the interests over I.P and TCE rights holders. In Uganda, it portrayed a social and economic revitalization of the local communities through the sharing of their folklore with the Institute; in Papua New Guinea, it addressed the right to control use with part of the royalties from the folklore albums being used to fund an archival

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<sup>132</sup> Sita Reddy and D.A. Sonneborn, Sound Returns: Toward Ethical “Best Practices” at Smithsonian Folkways Recordings, *Museum Anthropology Review* 7(1-2) Spring-Fall 2013

<sup>133</sup> Id. at p. 130



project as well as funding educational scholarships; in the last few case studies, what is revealed is how TCE users can exercise restraint out of respect for cultural values in TCEs. These case studies are given a detailed analysis in the fourth chapter of this study. The important lesson to pick from them is the relevancy of having a sui generis regime and guiding structure in place to foster avenues through which property rights in TCEs can be better utilized. Creating avenues for proper exploitation of TCE property rights also requires having an understanding as to whose interests the regulatory framework is meant to serve. The next part of the paper explores an understanding of custodianship of property rights in TCEs.

## 2.2 Custodians of the Property Rights in TCEs

In making the claim for sui generis protection over property rights in TCEs, the previous part of the paper has demonstrated that property rights in TCEs have no individual ownership and therefore have no place in an I.P regime. This part continues to raise the argument for a unique regulatory mechanism over TCEs further by demonstrating the nature of custodianship over property rights by ethnic communities due to the communal nature of ownership. It attempts to explain rights of possession and transfer within the context of ethnic communities so as to bring out a justification for their ownership in TCEs. It also relies on secondary data and empirical findings to show the challenges in communal ownership of TCEs, further demonstrating the need for sui generis regulation.

The portrayal of custodianship rights in this paper also brings out another important dimension: Appropriation of TCEs involves persons who are foreign to the community but there are also instances of community members who prepare derivative works from their own community's TCEs. Their actions are not regarded as appropriation on the basis that they are also considered as custodians of the same TCEs that they are using. However, I.P law grants them exclusive rights to their creations derived from TCEs. This study presents the claim that the major concern of most communities in such instances is the risk of abuse to cultural values where the TCE users are custodians that lack a full appreciation of the cultural norms. This is as opposed to the requirement of permission or payment of compensation for using their community's TCEs. As I demonstrate

below, an understanding of the concept of TCE custodianship is necessary in the structuring of sui generis mechanisms that will protect TCE interests.

### 2.2.1 Understanding the concept of custodianship over property rights in TCEs

This part of the chapter looks further at the ownership of property rights in TCEs. Two parts of the debate that are analysed here are as to whether TCEs are property and whether it can be communally owned. I rely mainly on empirical findings to posit my claim further that the unique aspects of TCEs as property that is communally owned, justify a sui generis regulatory structure that can guide the key players in maximizing such ownership.

In past generations, ethnic communities only enjoyed a self-awareness with no concern, interest or knowledge of the outside world. This enabled their cultural expressions to remain intact. Save for instances of class-restrictions as to certain TCE practices<sup>134</sup>, there were no barriers to the use and enjoyment of TCEs. As has been highlighted in chapter one of this study, the roles of the respective groups in communities with regard to participation in cultural performances, were guided by mutual respect of their parameters<sup>135</sup>.

Putting the historical context of property rights in TCEs into perspective allows us to appreciate the level at which TCEs are considered as property. This is because in understanding custodianship of the property rights, they have to be first acknowledged as property. John T. Cross, analyses the debate over the identity of Traditional Knowledge (and for that matter TCEs) as property in his article '*Justifying Property rights in Native American Traditional Knowledge*'. He dismisses the property rights argument for Traditional Knowledge protection reasoning that it would be difficult to decide "who owns the right".<sup>136</sup> He downplays the reasoning that collective ownership is generally relied upon as

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<sup>134</sup> For instance, amongst the Baganda of Uganda, the *amagunju* royal dance had always been considered a preserve of the *Butiko* (Mushroom) clan though the clan no longer has a grip on this restriction.

<sup>135</sup> Supra note 58.

<sup>136</sup> John T. Cross: *Justifying Property Rights in Native American Traditional Knowledge*; Texas Wesleyan Law Review [Vol. 15, 2009], p. 259. This paper was originally presented at the Symposium on "Intellectual

an argument against intellectual property protection asserting that it is also used to argue for an expansion of indigenous intellectual property protection. He also presents the assumption that indigenous communities claim property rights in TK and TCEs so as to hold a right to exclusive use<sup>137</sup>.

My empirical findings, which are discussed in the next part of this chapter, are at variance with Cross' arguments. Contrary to his arguments, they reveal that exercising the right to exclusive use is not the paramount basis for the claim to property rights in TCEs. A more significant basis is the need to preserve the value in the TCE and thus prevent any erosion that comes with misappropriation. In other words, a fundamental aspect of protection of TCE property rights, looks at usage within certain contexts as opposed to exclusive use. It is because society is groomed in the knowledge of these contexts that every responsible and morally conscious member of a given community, based on identity and pride, develops a sense of accountability for the preservation of their culture and thus takes on the identity of a 'TCE Custodian'.

However, this creates challenges as to establishing the voice for the Community when they feel that their property rights in TCEs have been violated in terms of entitlements and attribution over TCE usage. A case in point that highlights the differences in property rights between TCEs and Copyright in bringing out these challenges, is that of the Hezhe Community in China. . In 2003, the Beijing Higher People's Court passed a decision in a case involving a dispute over the originality of a song between a modern composer and the ethnic Hezhe minority<sup>138</sup>. In this case, a musician, Guo Song, and two others, composed a song in 1962 known as "*Wusuli Chantey*" inspired by studies he conducted in the area where the ethnic Hezhe lived. On 12 November 1999, an international folk song festival was organized in Nanning City in which the performance of the song "*Wusuli Chantey*" by Guo Song, was featured. After its performance, a presenter announced that the song was actually

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Property and Indigenous Peoples" hosted by the Texas Wesleyan University School of Law on October 24, 2008. See: [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1328473](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1328473) (accessed Sept. 10, 2012)

<sup>137</sup> Id. at p. 340

<sup>138</sup> Daphne Zografos *supra* note 24, at p. 42: Citing 17 December 2003 Decision of the Beijing Higher People's Court in Case No. 246 (2003)(final)(2006) 37 *IIC* 482-7

an original composition although it had initially been presented as an adaptation from traditional Hezhe folklore.

In reaction, the local government of the ethnic Hezhe people, acting as representatives of the Hezhe Indigenous community, instituted a claim in the Beijing People's Second Intermediate Court, asserting that Guo's "*Wusuli Chantey*" was derived from their centuries-old folklore which belonged collectively to the ethnic Hezhe and for which they sought protection under copyright law. The Court agreed, reasoning that "*Wusuli Chantey*" should be identified as a derivative work of the Hezhe folklore rather than as an original composition and that future use of the song should attribute originality to the Hezhe people. On appeal, the Beijing Higher People's Court confirmed the earlier Court's judgment on December 17, 2003. The lower Court's decision was based on articles 6<sup>139</sup> and 12 of the 1990 Copyright Law of the People's Republic of China (as amended in 2001). Article 12 stipulated for copyright protection for adaptations without prejudice to copyright in pre-existing work. It provided that:

*Where a work is created by adaptation, translation, annotation or arrangement of a pre-existing work, the copyright in the work thus created shall be enjoyed by the adapter, translator, annotator or arranger, provided that the exercise of such copyright does not prejudice the copyright in the pre-existing work.*

In 2006, an amendment to the Chinese Copyright Law further reinforced this provision. It states that:

*A performance by a performer of a pre-existing work or folklore shall be protected as an independent work. Protection of a performance shall not affect the copyright in the pre-existing work.*

Although the song was identified as derivative of the Hezhe people's folklore, the Court did not give any specific mention to the abuse of the right to attribution or entitlement of the Hezhe Community

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<sup>139</sup> See Daphne Zografos *ibid*, at p. 44. She notes that "*Article 6 provided that measures for the protection of copyright in works of folk literature and art should be formulated separately by the State Council. The State Council, however, never implemented such measures.*"

to part of the royalties from the Song. It is also important to note the relevancy of the Local Government that came in as a voice for the Community where they could not collectively defend their communal ownership to the Folklore.

It therefore follows that a sui generis regulatory mechanism can be used as a guide in streamlining effective protection of property rights in TCEs for communities where communal ownership presents challenges in raising claims against TCE abuse. Every member of an ethnic community believes they have a stake to their culture, more particularly a stake to the TCEs involved. However, it is not necessarily the case that every member of a given ethnic community exercises authority or control over their cultural expressions. They do, on the other hand, feel morally obliged to adhere to the cultural norms and values of their communities, albeit not in a strict sense. Conflicts may therefore arise within communities as to when it is appropriate to stand up and defend their cultural values, or who has a right to speak for the community in defence of their TCEs. Having a Sui Generis regime that lays out parameters as to how TCEs can be used; what level constitutes abuse of TCE usage; handling of claims over entitlement to royalties and rights of attribution, can offer remedies to these gaps in the ordering of society. Consultation and analysing different perspectives from relevant stakeholders on matters pertaining to custodianship of TCEs is also crucial. The next part of the Chapter addresses findings from stakeholder consultations.

(a) Perspectives on Custodianship of property rights: An empirical study from Uganda  
I carried out an investigation amongst members of various ethnic communities in Uganda in an effort to gauge different perspectives on the issue of custodianship and ownership of property rights in Uganda's TCEs. My interviewees included private I.P lawyers, traditional elders, musicians and music promoters. Notably, all the subjects interviewed asserted confidently that no ethnic community leader could lay a claim, whether individually or in a representative capacity, to TCEs<sup>140</sup>.

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<sup>140</sup> The traditional elders interviewed were: Andrew Benon Kibuuka (a Clan head in the Buganda Community and Drama-artist – interviewed on July 18, 2013); Aloysius Matovu Joy (a traditional elder in the Buganda Community and Drama/music artist – interviewed on July 20, 2013) Joel Isabirye (Buganda traditional elder, traditional musician and Professor of Performing Arts, Kyambogo University, Uganda – interviewed on July 18, 2013); Mwangusya Ndebesa (History Professor, Makerere University and traditional elder in the Ankole Community – interviewed July 19, 2013); John Jean Barya (Law Professor, Makerere University and

This dispels any conclusions that the custodians or authorities over cultural matters, inclusive of TCEs, are the leaders of the ethnic communities.

This therefore also means that the Community leader wouldn't automatically have the right to rely on that position to prevent any community member from using TCEs that are attributed to his ethnic community. For instance, in response to the question as to whether permission is required from Traditional or Community leaders before using TCEs, Dr. Mercy Mirembe Ntangaare<sup>141</sup> responded by stating that: *“I reject permission because the traditional leaders do not own – even if you are the King of Buganda, you do not own the folk music in the Kingdom.”*

Furthermore, in the case of a rap song titled, *“You want another Rap?”*, which is discussed in the first chapter, Mwangusya Ndebesa, who filed an objection against copyright registration in the song by the President, stated<sup>142</sup>: *“There is no body who is actually known out there that is there to protect the cultural music...I did myself attempt to stop the President from appropriating the traditional music, but that was purely individual. No body mandated me to do it.”*

These opinions are evident of the self-accountability that members of ethnic communities have over their TCEs by virtue of the fact that each member is a custodian of the TCE.

There is yet another noteworthy dimension to the issue of ownership and consent in the use of TCEs. Where history can be relied upon in tracing ownership and the function of particular TCEs,

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traditional elder in the Ankole Community – interviewed July 26, 2013); and Augustine Mutumba (a clan head in the Buganda Community and Senior Government Medical Officer – interviewed on November 20, 2013). See Appendix B for the full list of interviewees.

<sup>141</sup> Dr. Mercy Mirembe Ntangaare is an Associate Professor of Drama/Theatre at Makerere University. She is also a playwright and Folklorist. She is the Chairperson – Board of Trustees of the Uganda National Cultural Centre (interviewed on July 26, 2013).

<sup>142</sup> Supra note 3.

this has been seen to guide some form of Community-led control as to how TCEs should be used. Roger Mugisha<sup>143</sup> brings out this dimension when he reasons that: “*There are some songs that are performed for the Kabaka (King of the Baganda community) and probably ownership would be at a Kabaka’s feast, so it makes it somehow the Kabaka’s song.*” The basis of this line of thought is derived from the history of Buganda. One of the earliest Kings in the Buganda Kingdom, Kabaka Namulondo, became King at a very tender age. In order to stop him from crying as he presided over the Parliament (Olukiiko), his Uncle Najjantyo Ggunju, who was from the Mushroom clan, created a ritual drumming and dance method as a form of entertainment for the King that became popularly known as “*Amaggunju*” from Ggunju’s name<sup>144</sup>. This dance is still popularly reserved for people from the mushroom (*Obutiko*) clan in Buganda today. However, although it was purely meant to entertain the Kabaka, this cultural value has increasingly become eroded and the dance is no longer for the sole entertainment of the Kabaka (King of Buganda).

Traditional elders in Buganda assert that the royal family has a claim to the *Amaggunju* dance. However, their focus is on the cultural significance of the performance as a preserve for the King as opposed to the need for compensation before use. Steven Rwangyezi<sup>145</sup>, a renowned Ugandan folklorist entertainer, narrated in an interview how elders from the Buganda Community had protested strongly against his group’s performance of the *amaggunju* dance stating that “*it should only be performed by the mushroom clan and only in front of the King*”. Regardless of the origins of the ‘*Amaggunju*’ dance, the Buganda Community elders lack the capacity to enforce its use around the country. Furthermore, this cultural performance has been popularized by entertainers such as Rwangyezi and, as he opined, restricting such a performance to the confinements of the King’s palace can lead to its slow demise.

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<sup>143</sup> Supra note 81.

<sup>144</sup> Odoobo Bichachi and Mariam Nakisekka (Editors), *The Kings of Buganda and the roots of a 700-year-old Kingdom*, Fountain Publishers, 2011, at p. 15. For a video of the amaggunju dance, see: <http://www.youtube.com/watch?v=mzguB-zZ6rU> (last accessed November 8, 2013).

<sup>145</sup> Supra note 91.

During the Conference I organized to debate on issues related to TCEs and I.P. rights, Rwangyezi also came up with an interesting argument on the issue of Custodianship of property rights in TCEs<sup>146</sup>. He asserted that there is a difference between the concept of protection of property rights in TCEs and monopolization of property rights in TCEs at the exclusion of all others. He went on further to ask rhetorically: “*Whose property is Culture, if culture is the aggregate wisdom of society, whose property is it?*” This thought provoking question alludes to the argument that the custodians of property rights in culture cannot commodify it to the extent of depriving it of others since it is something that many members of society have partaken in creating. If it is something intangible that in one way or another guides society in the way of life, then we are all a part of it. Nonetheless, this further emphasizes the need for special regulation that places these arguments in the form of principles so as to guide the proper usage of TCEs.

An analysis of the history of the structural nature of some of the ethnic communities – particularly the Baganda and the Ankole, further explains how the authority over cultural matters is structured. In Buganda, prior to 1750 when the Kabaka assumed a position of political importance above other clan leaders (known as ‘*Abataka*’), the *Bataka* ruled over their respective clans. The only uniting factor amongst the Baganda, was the common language and culture, otherwise, each clan had a loose autonomy.<sup>147</sup> This is why the Kabaka (King) also carries the title of “*Ssabataka*” which means – ‘Head of Clans’. Similarly among the Banyankole, in Mwangusya Ndebesa’s interview, the History Professor gives an account of the Community’s history<sup>148</sup>. He states:

*“In Ankole, there is no head of clans. All clans were operating separately. So there has never been a central authority to allocate power, to allocate resources, apart from the political role...here in Buganda what you call ‘Ekika’, the English translation is ‘Clan’. ... Now the same name is there in Ankole, it is called ‘Ekika’ but ‘ekika’ does not mean a ‘Clan’ (in Ankole). ‘Ekika’ is ‘lineage’. ... A Lineage is composed of those people of the same clan, but who can trace some biological ancestors of theirs. Those ones can play some role of*

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<sup>146</sup> Supra note 89.

<sup>147</sup> See Tumusiime note 6 supra at p. 24 and Odoobo note 144 supra at p. 3. In an interview with Prof. David Bakibinga, an Intellectual Property law Professor from Makerere University, Kampala, he stated that there are sham custodians of traditional music, where such control is “*manifested in the various clans which are given tasks and responsibilities*” (interviewed on July 15, 2013).

<sup>148</sup> Supra note 3.



*traditions, but that will be traditions in as far as members of that community is [sic] concerned. If you talk about music which is shared by the whole ethnic group, then there is no body who was responsible for it. Music was cutting across, but you see, there are certain morals; certain customs that were supposed to be observed; taboos that were not supposed to be broken...”*

Ndebesa thus points out the underlying key reasons as to why every member of a community can be regarded as a custodian of the TCEs. These are: (a) Communities do not have a central authority that possesses the responsibility of a cultural-head – the Kings are more of Political heads; (b) The culture, such as music, cuts across every member of the community; and (c) Every member of the community has a moral obligation to observe and respect the culture of that community.

He argues further that cultural preservation does not have to go with formal leadership and cites the French culture as an example. He asserts: *“The French are said to be the most cultured in Europe meaning that they have certain mannerisms. They abolished the monarchy more than 200 years ago. Now, who is the head of the French Cultural System?”*

The Ugandan legislation on Traditional leaders supports the above opinions. Section 9 of the Institution of Traditional or Cultural Leaders Act (No. 6 of 2011) provides for the role of the traditional or cultural leader. It states that a traditional leader “*shall –*

- (a) promote and preserve the cultural values, norms and practices which enhance the dignity and wellbeing of the people where he or she is recognized as such; and*
- (b) Promote the development, preservation and enrichment of all the people in the community where he or she is recognized as such.”*

It therefore follows that the role of a Traditional Leader is that of a political head of the community. Much as the statutory law gives the Cultural leader the role of preserving cultural values, this does not equate to ownership or sole authority of cultural expressions. As such, the general consensus, from my empirical research is that there is no central authority within Ugandan ethnic communities

that can exercise control over the way cultural expressions are utilized. Secondly, the custodians of Cultural performances are the members of the Community who generate their sense of identity from their culture.

These accounts thus explain why the common perception amongst the interview subjects, especially the traditional elders, was that the Community leaders cannot be recognized as the authorities to control the use of TCEs. It is the same reason why all the interviewees believe that if we are to talk about ownership of TCEs, then they belong to every individual member of the ethnic communities as a whole and permission prior to use does not suffice amongst members of the same community<sup>149</sup>.

(b) Can custodianship of TCEs go beyond Community members?

As a custodian of cultural expressions from his community, Ndebesa felt it was his right to take up action with a view of saving his community's TCEs. However, it may not be necessarily only community members that can exercise some authority over how TCEs are used. But should this be the case, considering that it creates a peculiarity over the understanding of custodianship of TCEs. I use Professor Naomi Mezey's analysis in the matter of Chief Illiniwek of the University of Illinois to illustrate this dilemma:

In *The Paradoxes of Cultural Property*, Professor Naomi Mezey examines how the National Collegiate Athletic Association (NCAA) - a non-governmental organization, simply exercised its influential muscle to stop the use of Native American names and mascots by University and College teams

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<sup>149</sup> A cluster of subjects (grouped as academicians/Legal Practitioners/Policy makers) were asked if they know of any structure of authority in place amongst ethnic communities for the use of their TCEs – the same question was posed differently to Traditional elders. None of them confirmed the existence of such a structure. This would mean that ethnic communities have never formally considered exercising control or management over TCEs attributed to them.

under its jurisdiction<sup>150</sup>. The teams were required to first obtain consent from Native American communities or otherwise desist from performances that were considered a “*racial mockery and a misappropriation of Native American culture*”. A particular case of interest concerned Chief Illiniwek who, for over eighty years, was cherished by fans at the University of Illinois because of his dance performances that included the powwow. In February 2007, almost two years after the NCAA had issued its prohibitive policy over performances and images considered hostile to Native Americans, the University of Illinois officially retired the Chief Illiniwek performances at the University sporting events.<sup>151</sup> The University was only allowed to continue use of the name “Illini” because it was emblematic of the State.<sup>152</sup>

What is of fundamental interest in this and other similar cases initiated by the NCAA policy, is that there was no federal policy or statutory law in existence that was relied upon by the NCAA. It was simply motivated by what the NCAA considered as images or performances that portrayed a picture of discrimination, racism and hostile environment towards Native Americans. Ironically, regardless of any apparent elements of such portrayal, in as long as the College teams obtained approval from Native American tribes under the NCAA policy, they were free to continue displaying such images and performances<sup>153</sup>. It is therefore difficult to determine if the NCAA policy was motivated by the protection of cultural values of the Native Americans through their traditional cultural expressions. It is also debatable whether these dance performances were a true replica of the TCEs performed by the ethnic communities that were imitated or whether these were simply new creations meant to serve the thirst for entertainment from sports fans. What is clear is that the NCAA was not acting in the capacity of a custodian of TCE property rights.

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<sup>150</sup> Mezey, Naomi, *The Paradoxes of Cultural Property*, 107 Colum. L. Rev. 2004-2046 (2007) at p. 22. This paper can be downloaded free of charge from: <http://scholarship.law.georgetown.edu/facpub/899> (accessed November 11, 2012).

<sup>151</sup> For a video of the last dance of Chief Illiniwek, see: Watch Chief Illiniwek’s Last Dance, at <http://fightingillini.cstv.com/genrel/022107aaa.html> (University of Illinois, 2007) (on file with the Columbia Law Review).

<sup>152</sup> Note 150 supra, p. 22

<sup>153</sup> *Id.*

Although on the face of it, it would appear that the NCAA policy was pushing the argument that it was trying to represent the interests of Native Americans in protecting their TCE property rights, it would be far-fetched to place this argument within the context of the case of Chief Illiniwek. The Chief was a modern day invention that was eventually adopted and embraced by the University of Illinois, hence – arguably - their own cultural creation. At the time of the Chief’s creation, there was no Illinois Indian in existence that the Chief could be attributed to or from whom consent for use could have been sought. The Illiniwek tribe, from which the French word “Illinois” is rooted, comprised of a collection of native communities inclusive of the Peoria, Kaskaskia, Cahokia, Tamaroa and the Michigamea.<sup>154</sup> Their population consisted of about 10,000 around the Seventeenth century<sup>155</sup>. However, due to displacements related to war and disease, increased migrant settlements, intermarriages and so on, by 1833 it is reported that there were only about 132 remaining Illinois Indians<sup>156</sup>. In 1916, an anthropologist concluded in his report that there were no pure-blooded Peoria left and the remaining few had been so culturally integrated that the Illinois Indians were effectively extinct<sup>157</sup>.

Chief Illiniwek was created by Lester Leutwiler, an Illinois Student interested in Indian crafts who had made the costume as part of a scouting project. In 1926, during a University of Illinois football game against the University of Pennsylvania, he performed in the costume during half time and thus began a tradition (and a culture – so to speak) of half time performances by the Chief which were to go on for the next eighty years.<sup>158</sup>

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<sup>154</sup> Supra note 150 at p. 29, citing Carol Spindel, *Dancing at Halftime: Sports and the Controversy over American Indian Mascots* (2000). Further citation is made by Carol Spindel of *The Jesuit Relations and Allied Documents: Travel and Explorations of the Jesuit Missionaries in New France* (Reuben Gold Thwaites ed., 1896).

<sup>155</sup> Supra note 150 at p. 30, citing Carol Spindel at 42-43.

<sup>156</sup> Id, citing Carol Spindel at 44-45.

<sup>157</sup> Id.; also see David Prochaska, *At Home in Illinois: Presence of Chief Illiniwek, Absence of Native Americans*, in *Team Spirits: The Native American Mascots Controversy* 1, 8 (C. Richard King & Charles Fruehling Springwood eds. 2001) at p.160

<sup>158</sup> Id at p. 32, citing Spindel (cited in note 154 supra) at 80-81; see also Prochaska (cited), supra note 157, at 162-63 (describing Leutwiler’s recruitment).

The key question drawn from this saga in relation to custodianship of TCEs is: Which Native American community was Chief Illiniwek offending, especially considering that the Illinois tribes had been officially rendered extinct and that the Chief was a creation of the University of Illinois? The policing instituted by the NCAA also creates a dilemma as to how far authority over TCE property rights can go. The United States does not have any regulation that directly addresses use of TCEs. As my claim holds, instances such as this one illustrate the underlying dangers associated with an absence of a regulatory framework in place for property rights in TCEs.

As the next part of the paper demonstrates, the need for a sui generis legislative system on TCEs is not only premised on the clear cut differences between property rights in TCEs and I.P law. It also stretches to an understanding as to who the violators of TCE property rights are. The claim is that those regarded as abusers of the TCE property rights also bring out a uniqueness that is far apart from violation of Intellectual Property Rights.

### 2.3 Violation of the Property Rights in TCEs

Last, but not least of all, the property rights debate turns to identifying the violators. In the western concept, the property rights regime makes it easy to identify a violator as one who deprives the I.P owner from the rights to his property. This is simplified by the fact that you have an identifiable owner; an identifiable Intellectual Property and set parameters of ownership. As already noted, all these elements are not easily identifiable in the property rights setting of TCEs. In this part of the paper, I address my claim for the need of specific regulation over TCEs premised on the fact that the circumstances under which violation of property rights comes about, and the way it is addressed, are also far different from what the I.P regime can adequately protect. I also point out that in some respects, the I.P regime is relied upon in the violation of TCE property rights. As in previous parts of this chapter, I support my claim through scholarly arguments, case studies and empirical findings.

### 2.3.1 Identifying the violation.

Susan Scafidi hits the mark when she asserts<sup>159</sup>:

*“ . . . Who can assert a right to define the normative use of a cultural product; or who may give permission to copy a cultural product [?] The issue of control does not arise when source-community members have exclusive possession of their cultural products and use them in consensual manner. Rather, conflict may appear in the case of contested or nonconforming use by source-community members or in the case of any use by nonmembers.”*

Scafidi gives a good analysis of how violation of property rights in TCEs reveals itself. All community members are owners of TCEs by virtue of their allegiance to a particular community. There is no concern as to how they use or profit from such TCEs in as long as they conform to the cultural norms, religious values or sacred rites that attach to the particular TCE that they are using. As such, cause for concern arises only in two situations: (a) when the community member breaches the cultural values of the TCE through its use, or (b) if a non-community member uses the TCE.

In times past, TCEs have also been relied upon in grooming youthful members of ethnic communities into following particular rituals and ultimately, preserving their culture. As these societies developed and interacted with alien societies, cultural evolution and foreign contamination could not be avoided. The embracing of globalization further orchestrated a conflict between communal interests in cultural expressions and the rights of individuals in the protection of their derivative creations. There is thus a thin line between community members being seen as violators of TCE property rights because in most instances these are youthful members of the community that partake of their TCEs without having an appreciation of the values attached. Non-member actors on the other hand, are easily identifiable as such because they do not carry the cultural identity with them. In the next part, I present an analysis as to how violations of TCE property rights by these two categories occur and then consider other categories of violators.

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<sup>159</sup> Note 62 supra at p. 53.

### 2.3.2 Violations of TCE Property rights by community members

Although I agree with Scafidi's description of violators falling in the aforementioned two categories, some sentiments raised among community members hinge on instances in which no monetary compensation goes back to a community when a member uses its TCEs. This would hardly amount to a violation because there is no deprivation of property and the user is as entitled to the TCEs as any community member. Nonetheless, where communities inevitably turn their TCEs from being identified as culture into commodities, other community members consider such acts as violations – with no legal basis to their claim, save for jurisdictions where this is specifically provided for.

Where cases are likely to arise from such considered violations of property rights, it is naturally easier to establish a claim on the loss of economic gain than on the tainting of cultural values. With or without realizing it, ethnic communities have turned their identities into commodities when fighting against the violation of their property rights in TCEs. Arguably, this has never been their intention. Michael F. Brown highlights this point<sup>160</sup> when he states that:

*“... a tidy separation of property and privacy is impossible within a market system that turns identity into a commodity. When persons or groups choose to commercialize their identity for economic gain, courts are less likely to accept the argument that unauthorized use of that identity undermines their dignity. Identity (in the sense of moral integrity and worth) and personality (in the sense of a social marker with commercial potential) coexist in a highly unstable relationship.*

*This volatility helps explain why indigenous peoples' complaints about the appropriation of elements of their cultures often jump from the abstract language of human rights to narrowly framed demands for monetary compensation. The difficulty of keeping the two issues separate is often misinterpreted as evidence that what indigenous peoples really care about is the economic value of their cultures. Even when grievances are presented entirely in terms of a group's desire for dignity and self-respect, capitalism imbues them with a mercantile logic that is difficult to suppress.”*

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<sup>160</sup> Michael F. Brown, *Who owns Native Culture?* Harvard University Press, 2003 at p. 38

As such, whereas ethnic communities would be satisfied by a property rule that can guarantee protection of their cultural values, the market dictates otherwise. Ultimately, without intent or purpose, the liability rule overshadows the property rule. The liability rule is a legal relief in the sense that it favors compensation for what the communities would consider as harm already done – in this sense, lost royalties; while the property rule is an equitable relief in that it looks into preventing future acts that could inflict further harm to the community<sup>161</sup> – and in that sense, this includes an erosion of the cultural values that the communities hold sacred.

The question, thus, how does one establish a connection between violation by members and the abuse of cultural values? The responses are most likely varied. However, Milton Wabyona<sup>162</sup> throws some light on the matter when he explains that ethnic communities will accept a musician's work if he borrows from a folk song and does it thoroughly well, following the right procedures. He goes on to add that: *"I think where the problem comes in is, we have had so many masquerades in the music industry because they want money. They eventually end up doing things haphazardly and they are not bringing out the true picture, so definitely people are going to complain."* As such, the influence of the so-called masquerades on the social scene who are purely focused on the monetary rewards, could negatively impact the value in the TCEs that they derive their music from. This is particularly if their music sends out the wrong message that devalues educative and socially uplifting cultural norms in TCEs. Mwangusya Ndebesa<sup>163</sup> has a succinct way of putting it: *"if the music is looked at merely for entertainment value, not for preservation [of culture] value, [then] we are losing out."*

The preservation of cultural values is therefore still highly esteemed in certain circles despite the gradual commodification of TCEs. When Steven Rwangyezi – a non-member of the Baganda, was criticized by the Buganda community leadership regarding his use of the traditional *amaggunju* dance<sup>164</sup> in one of his group's performances, he stressed that the issue of monetary compensation never came up. They were only concerned about a preservation of the cultural values attached to the

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<sup>161</sup> Supra note 83 at p. 95.

<sup>162</sup> Supra note 15.

<sup>163</sup> Supra note 3.

<sup>164</sup> See notes 134 and 91 supra.



original dance, that is, the fact that the original dance was meant to be performed for only the King and within his palace.<sup>165</sup>

### 2.3.3 Violations of TCE Property rights by foreign persons

Ironically, in an evaluation of the debate regarding protection of TCE property rights through the I.P legal system, it becomes apparent that the very same system can be, and indeed has been depended upon in the violation of property rights in TCEs. In *Facing the Music: Traditional Knowledge and Copyright*, Bryan Bachner<sup>166</sup> gives a critical review of how the western styled I.P protection is relied upon by foreign musicians in violating the property rights of ethnic communities. He points out the imbalance between ethnic communities that demand for better recognition and protection of their musical expressions, and the western world that recognizes such works as Public domain and free for all to use. He then provides case studies on a number of famous controversies between individual copyright ownership and claims of misappropriation by traditional music rights holders:<sup>167</sup>

(a) The case of “Mbube” or “*A Lion Sleeps tonight*” which involved a conflict between the South African family of the late Zulu song writer - Solomon Linda and the use of a song by Disney Enterprises, Inc. (b) The case of “*Song of Joy*” or “*Return to Innocence*” which involved the appropriation of traditional music from the Ami People of Taiwan by a rock group called Enigma on their 1993 album “*Cross of Changes*”. These cases are discussed in detail in chapter four of this study.

Another case study that portrays the use of I.P by foreigners in the violation of TCE property rights is that of the Wik Apalech dancers in Australia. Terri Janke highlights this as a case study on the protection of Indigenous Dance Performances in a 2003 report she carried out for WIPO<sup>168</sup>. In this

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<sup>165</sup> Supra note 134.

<sup>166</sup> Bryan Bachner, *Facing the Music: Traditional Knowledge and Copyright*, Human Rights Brief Vol 12, Issue 3, Article 3 (2005):9-12. See: <http://digitalcommons.wcl.american.edu/hrbrief/vol12/iss3/3/> (accessed 01/15/2012)

<sup>167</sup> *Id.*

<sup>168</sup> Terri Janke (WIPO), *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions* (World Intellectual property Organization, Geneva, 2003).

study, she reports about the commercial exploitation of traditional dance performances by the Wik Apalech dancers, part of an indigenous society known as the Wik Community<sup>169</sup>:

The community has regionally performed traditional cultural dances in the Cape York region in Australia for thousands of years and continues to do so as part of the Laura Aboriginal Dance and Cultural Festival. The highlight of this case study shows the effective role a sui generic customary law can play in addressing a number of challenges faced in the protection of TCEs. For instance, the issue of ownership is dealt with through the customary relationship the Wik People have with their Senior Custodians. The Senior Custodian stands in the gap as the figure of ownership and decision-making as well as collecting and accounting for commercial dues from the community's cultural expressions. Where such a central authority exists in the administration of cultural performances, the community ensures that the social values of their TCEs are not abused and there is a control on misappropriation, without concerns as to regulation through an I.P system.

A commercial photographer who attended the dance festival in 1995 took a photograph of the dancers and had it reproduced on CDs, postcards and cassettes, as well as on a related website without their consent. The dancers asked the Cape York Council to take action to end the unauthorized exploitation of their image.

The cross-cutting issue that stands out in this case was the conflict between the image rights of the Wik Apalech dancers in demanding an entitlement to the control of the dissemination of their images under cultural principles, and the copyright interests of the Commercial photographer who exercised skill and talent in taking the photograph. Much as the photographer ceased use of the image, he refused to offer any apology or to pay any damages, insisting on his intellectual property rights.

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<sup>169</sup> *Id* at pp. 87 – 97.

The pursuit of legal action was necessary to the Indigenous Community because the display of photographic images was contrary to their cultural beliefs. However, on being enlightened about copyright and intellectual property rights in general, they regrettably abandoned the matter. The Wik Community thus appreciated that ownership in copyright to the images would vest in the person taking their photograph. Photography of such performances has since then become restricted and audiences of such performances are only members of the indigenous communities that value the same cultural norms<sup>170</sup>. This case points out the downside of I.P rights as a tool in the violation of TCE property rights. It also reveals that cultural values as part of TCE property rights can be overshadowed by the bundle of I.P rights.

This re-enforces my claim to the effect that sui generis regulation on TCE property rights can be the best alternative approach to elevating protection of TCEs to the level of I.P rights, in which case cultural values are also given adequate attention. R. Hokulei Lindsey further illustrates this point when she argues against focusing on the economic compensation but rather, to redirect the focus of the violations of property rights to the erosion of cultural values. She paints a grim picture over exploitation of TCEs in *Reclaiming Hawai'i: Toward the protection of Native Hawaiian Cultural and Intellectual Property*<sup>171</sup>. In highlighting the commercial significance of traditional knowledge, she points out how TK and TCEs have been commercially exploited from indigenous communities around the world. She, for instance, mentions that pharmaceutical companies exploit “*the traditional and customary knowledge of indigenous peoples around the world, generating sales of more than \$130 billion annually, with little or no return to the indigenous communities that provided the knowledge.*”<sup>172</sup> She also points out instances where “*Traditional songs of the Ami of Taiwan and the Mbuti of Central Africa have been exported and copyrighted as original works of authorship by non-indigenous performers, often without the knowledge or authorization of the source*

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<sup>170</sup> *Id.*, p. 89.

<sup>171</sup> Lindsey, R. Hokulei, *Reclaiming Hawai'i: Toward the Protection of Native Hawaiian Cultural and Intellectual Property* (July 26, 2011). UCLA Indigenous Peoples' Journal of Law: Culture & Resistance, Vol. 1 No. 110, 2004. Available at SSRN: <http://ssrn.com/abstract=1895770> (accessed January 20, 2013)

<sup>172</sup> *Id.* p. 111, citing: Dr. John Mugabe, *Intellectual Property Protection and Traditional Knowledge: An Exploration in International Policy Disclosure* at 7 (1998), available at <http://www.wipo.int/globalissues/activities/> (author: last visited May 24, 2003)

peoples. Stereotypes of American Indians are used as marketing strategies, and Native American spirituality has been commodified and trivialized by new-age shamanism.”<sup>173</sup>

#### 2.3.4 Government agencies as violators of TCE property rights

Government agencies also stand out as violators of TCEs. Lindsey suggests that other than foreigners, violators of Hawaiian property rights in TCEs include the government itself. For instance, the most obvious examples of TCE misappropriation that she identifies are the mass commercialization of the *hula* (a traditional dance) and the concept of *aloha* (love, affection, compassion, kindness) by the State of Hawai‘i and the tourist industry respectively<sup>174</sup>. She thus bases the discussion of her paper on the argument that since the various cultural expressions of the Hawai‘i native people are central to their histories, rituals, cultural concepts, morality and integrity, there is a need to look into their right to determine the fate of their own cultural heritage and take the responsibility away from the State.<sup>175</sup>

Lindsey also gives instances of how cultural expressions in Hawai‘i have gradually gone through commodification and exploitation by Non-natives. An example she gives is the tourism industry in Hawai‘i. She relents as to how it is mass-based, controlled by multi-national corporations and state supported with profits going back to corporate home countries.<sup>176</sup> This highlights the reality in TCE

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<sup>173</sup> Id p.112, citing: Erica-Irene Daes, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples* E/CN.4/Sub.2/1993/28, pp81-82; *Harjo v. Pro-Football, Inc.*, 1999 WL 375907 (Trademark Tr. & App. Bd.) (seeking the cancellation of the trademark “Redskin(s)”), rev’d, *Pro-Football, Inc. v. Harjo*, Civ. No. 99-1385 CKK (D.C.Cir. Sept. 30, 2003), available at <http://www.dcd.uscourts.gov/district-court-recent.html>; Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse in Tribal Court*, in *BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION* 195 (Bruce Ziff & Pratima V. Rao eds., 1997) (discussing the appropriation of the name Crazy Horse to market a malt liquor) [hereinafter *BORROWED POWER*]; James D. Nason, *Native American Intellectual Property Rights: Issues in the Control of Esoteric Knowledge*, in *BORROWED POWER*, *supra*, at 244;

<sup>174</sup> Id, p. 113 citing: Mary Kawena Pukui & Samuel H. Elbert, *Hawaiian Dictionary* 82 (rev. & enlarged ed. 1986); Haunani-Kay Trask, “*Lovely Hula Hands*”: *Corporate Tourism and the Prostitution of Hawaiian Culture*, in *FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII* 136, 144 (rev. ed. 1999) (Stating that, in the context of the tourist industry, “everything in Hawai‘i can be yours, ...[t]he place, the peoples, the culture, even our identity as ‘Native’ people is for sale.”)

<sup>175</sup> *Ibid*, p.114.

<sup>176</sup> *Id*, p. 121

exploitation: One is the commercial value that arises from cultural expressions particularly through the tourism industry; secondly, is the abuse of social values in TCEs, and; thirdly, there is inequality in economic gains as a result of exploiting TCEs.

The paper shows how non-natives have not only demeaned and sought to replace cultural expressions in Hawai'i but also commercialized and exploited whatever else they could, almost to a point of rendering TCEs in Hawai'i meaningless, such as the *Aloha*.<sup>177</sup> The experience is described as follows<sup>178</sup>:

*“[a]lienated from their own historical traditions, first by government and now by commerce, they find their “culture” valued while their peoples and their political struggles continue to be ignored[; t]he experience of everywhere being seen, but never being heard, of constantly being represented, but never listened to, of being treated like artifacts rather than as peoples.”*

Government agencies are therefore hardly silent partakers of TCE property rights violations. As I shall demonstrate in the next chapter, in some instances, the government agencies come in to manage and enforce the TCEs on behalf of the nationals but end up overstepping their boundaries.

## 2.4 Conclusion

This Chapter has provided a contrast of opinions and perspectives to map out an argument that property rights in TCEs cannot be regulated within the same realm as property rights in Intellectual property. The analysis backing up this argument has relied on presenting the differences between the theories that underpin I.P rights as well as those that underpin TCEs from a historical context. Comparisons between the two concepts have also been laid out particularly looking at origin-based I.P rights such as Copyright, Geographical Indications and Trademark. Major limitations identified through these comparisons have helped to strengthen the major claim in this chapter that property

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<sup>177</sup> Id, p.123

<sup>178</sup> Id, p. 124, citing Rosemary J. Coombe, *The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination*, at 88.

rights in TCEs require their own unique form of regulatory protection – termed as a Sui Generis regulatory system.

A further analysis of the key violators of TCE property rights as well as the forms the violations take, have also revealed experiences in traditional intellectual property violation that are only unique to ethnic communities by virtue of the fact that they have communal ownership of intangible property of which they also have cultural values to protect.

The vulnerability of TCE property rights to exploitation and appropriation has also been identified as a key factor that not only disfavors them in protection under I.P parameters, but also bears risks on the very cultural values they hope to protect from erosion or dilution.

The study, on this basis, concludes that the subject of protecting TCE property rights should be approached cautiously in a manner in which the cultural norms are catered for as the commercialization of TCEs goes underway. The role of government cannot be taken for granted: As a partaker in the violation of TCE property rights, it needs to give more priority to the interests of ethnic communities as it serves the tourist industry; and, as a manager and enforcer of rights in TCEs on behalf of the communities, it needs to involve them at every level due to their understanding of their own cultures.

The custodians of TCEs also need to focus on the positive benefits of TCE commodification instead of discouraging other members who create derivative versions of their TCEs as I.P rights. Exercising creativity of this nature can help boost socio-economic development in the communities and the potential of this happening comes from support among community members as opposed to branding some of them as violators of the TCE property rights. Concerns over devaluation of culture amongst members can be addressed through sensitizations and community outreach programs. Once those interested in using their innovation to develop the TCEs realize that other

community members are supportive, concerted efforts will lead to strengthening of the communities at both the social and economic fronts.

Ethnic communities should freely share the knowledge in their TCEs because this is part of the essence of cultural expressions, which is - serving the purpose of exchanging and informing social values. It also allows for smooth cultural evolution through managed exposure. However, the purpose of coming up with a regulatory mechanism over TCE usage should not be lost in this process. The argument for regulation of TCEs is not focused on regulating culture, which is impractical in my view. On the contrary, the purpose is to regulate the way it is utilized so as to enhance rather than constrain the development of cultural expressions.

As I have therefore demonstrated throughout this chapter, the western I.P concepts do not have the capacity to protect TCE property rights. Establishment of a sui generis regulatory system would help ethnic communities steer through the various challenges highlighted in this chapter and hopefully be able to adequately enjoy protection of their property rights and interests in TCEs. The next chapter thus provides an evaluation of existing sui generis and other regulatory regimes that give reference to TCEs. An evaluation of these structures is meant to guide this study on best practices to follow in the regulation of TCEs.

### CHAPTER THREE.

#### Policing Traditional Cultural Expressions: The good, the bad and the ugly

*The law should regulate in certain areas of culture — but it should regulate culture only where that regulation does good. Yet lawyers rarely test their power, or the power they promote, against this simple pragmatic question: "Will it do good?" When challenged about the expanding reach of the law, the lawyer answers, "Why not?" We should ask, "Why?" Show me why your regulation of culture is needed. Show me how it does good. And until you can show me both, keep your lawyers away.*

- Lawrence Lessig (born June 1961. American legal academic)

#### Abstract:

*Intellectual commons proponents have consistently argued against stringent protections issued out over Intellectual property rights such as copyright. If intellectual property rights are all about knowledge building upon existing knowledge for the benefit of society, then why have protection? This is a valid argument, but on the other side, are those that argue that if a person has exercised skill and labor, that person is entitled to the rewards that follow the creativity that has been added upon a product. So, stretching these back and forth arguments to Traditional Cultural expressions (TCEs) adds a whole new dimension. In this category, we are not looking at existing intellectual creativity; the author is not an individual but a whole community; and, the focus of the creativity is ever evolving.*

*The constant migration and interaction of ethnic communities today has raised calls for the policing of TCEs with a view of protecting them against inappropriate use as well as misappropriation. But how do you regulate something intangible that has been around for generations and was deemed free for all? The question is no longer whether there is a need to regulate TCEs but looks at the framework for such regulation. This Chapter explores the delicate handling of enforcement and regulatory mechanisms over TCEs. Through case studies, a review of literature and interview findings, I develop the claim that adequate protection of TCEs entails having a well-structured regulatory framework which, in effect, helps generate socio-economic benefits for stakeholders. In that sense, I show that the good regulatory mechanisms are the ones that offer the most adequate protection for TCEs; the bad mechanisms are the ones that come close but leave a lot to be desired; and the ugly regulatory mechanisms are the ones that do not give adequate consideration to key principles of protection for TCEs and yet regulate the same.*



### 3.0 Introduction

The enjoyment of Cultural Expressions is historically derived from customary law and, in that sense – unwritten. Professor Friedrich Karl Von Savigny (1779-1861), the founder of German Historical Jurisprudence, famously stated that “*Law grows with the growth and strengthens with the strength of the people and finally dies away as the nation loses its nationality*”<sup>179</sup>. This statement can be equated to the growth of culture. Culture lives in the people that express it. Its growth is dependent on the freedom and laxity that flows with the way it is utilized. As such, any regulations attached to culture that affect the way it is expressed, can affect its growth as well.

This Chapter looks at the role played by International Instruments, regional and domestic regulations in the protection of Traditional Cultural Expressions or expressions of folklore – as they are interchangeably referred to. International Instruments that are often given coverage on Intellectual Property matters, such as the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement), are not considered at all in this chapter simply because they have no direct provision on TCEs/Folklore. Furthermore, it should be noted that there are a wide variety of instruments and regulations concerning Traditional Knowledge as a whole but it is not the intention of this study to analyze each and every one of them. More so, it is not the intention of this study to look at Instruments touching on aspects of Traditional Knowledge particularly in the fields of medicine and healing, biodiversity conservation, the environment, food and agriculture such as the Convention on Biological Diversity (CBD). This is because of the generality involved that risks shifting the focus beyond TCEs. Rather, the study focuses on existing model laws or Instruments and domestic frameworks that directly affect the exploitation of components of Traditional Cultural Expressions such as music, dance and “artisanat” (i.e. designs, textiles, plastic arts, crafts, etc.) of an indigenous people<sup>180</sup>.

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<sup>179</sup> Frederick Charles Von Savigny, *Of the Vocation of our age for legislation and Jurisprudence* (Abraham Hayward trans., Littlewood & Co. 1831), at p. 27, cited in Brian Z. Tamanaha, *The Unrecognized triumph of Historical Jurisprudence*, *Texas Law Review* [Vol. 91:615, 2013] 616-632 at p.625 (<http://www.texaslrev.com/wp-content/uploads/Tamanaha.pdf> - last accessed Feb 01, 2014)

<sup>180</sup> WIPO International Forum on “Intellectual Property and Traditional Knowledge: Our Identity, Our Future”, organized by the World Intellectual Property Organization (WIPO) in cooperation with the Government of the Sultanate of Oman: *The Protection of Traditional Knowledge, including Expressions of Folklore*, Muscat January 21 and 22, 2002. See:

Nonetheless, there can be no complete isolation of TCEs from Traditional Knowledge when discussing the protective mechanisms involved. It is evident in various literature, that TCEs are biased towards a copyright perspective because of the nature of literary, musical and artistic works involved. It is for this reason that many countries already protect TCEs as neighboring rights under Copyright law. However, looking at TCEs from this perspective alone still leaves gaps in protection that can only be effectively dealt with by evaluating the protection of TCEs broadly through Traditional Knowledge as a whole. This position has been effectively laid out in the following statement from WIPO:

*“... the technological and methodological content of folklore (inventions, crafts, designs, carvings) may not be adequately protected if the holders are given the right to prevent others only from reproducing their creations or disseminating them to the public through performance or broadcasting. Technological content consists of ideas, and ideas are protected by preventing others from using them. Therefore, the mechanisms of industrial property protection (for example, patents, trademarks and industrial designs) are likewise important tools to protect technical ideas from being misappropriated by unauthorized third parties. This explains why the term “traditional knowledge”, which is not linked to a specific area of intellectual property, may be broader and more inclusive than “folklore”. The work program of WIPO takes a holistic approach, studying the legal and economic features of all forms of intellectual property (both copyright and industrial property) as possible means of protecting traditional knowledge, including folklore.”<sup>181</sup>*

It therefore follows that protection of TCEs, in some instances, is covered as a sub-set through the protection of Traditional Knowledge. The WIPO Statement suggests approaching ways and means through which I.P can be used to protect TCEs. However, I argue against taking this approach due to the variances between TCEs and I.P. WIPO looks at the protection of TCEs in the Intellectual property sense but there has been a lot of rhetoric as to whether this is the most efficient means of protection available, with TCE holders showing disregard over TCEs being related to I.P<sup>182</sup>. This is

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[http://www.wipo.int/arab/en/meetings/2002/muscat\\_forum\\_ip/documents\\_mct02.htm](http://www.wipo.int/arab/en/meetings/2002/muscat_forum_ip/documents_mct02.htm) (accessed Jan 14, 2013), at p.3

<sup>181</sup> Ibid, p.4

<sup>182</sup> The Indigenous People’s Council on Biocolonialism (IPCB) issued a statement at the UN Permanent Forum on Indigenous Issues (Third Session, New York, 10-21 May 2004) expressing their disdain over

also related to the fact that an I.P bias of TK looks at it in the perspective of knowledge that is in the public domain. This chapter therefore also analyses sui generis frameworks in the protection of TCEs and further looks at how disputes arising from the use of TCEs have been handled under the guidance of the existing I.P and Sui generis frameworks.

In this chapter, I evaluate how protection of TCEs has been approached from the global stage to the regional and domestic level. In this, I evaluate strengths and weaknesses in TCE Protection. The purpose is to draw out best practices that can be looked at by developing countries seeking to establish policies and regulatory frameworks for TCE protection. My general claim in this chapter is that I.P legal frameworks do not fit hand-in-glove with TCE protection and that TCEs require a sui generis system of protection and enforcement. This chapter is therefore mapped out in five parts and is as follows:

In the first part, I review literature on regulatory mechanisms over TCE exploitation. This involves an analysis of scholarly material on debates as to the most efficient means of protection that can be accorded to TCEs. Considering that my claim is that a Sui Generis system of protection is the best option for TCEs, I lean towards arguments that favor this view and are dismissive of an I.P regulatory system over TCEs.

The second part of the chapter analyzes the term 'Protection'. I present the principle concepts that make up protection of TCEs and use these as a score sheet on regulating frameworks that address TCEs. This is from International Instruments to domestic regulations. My particular focus of Regional Agreements and National Laws is the African Continent since it constitutes the geographical scope of the study.

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international efforts to impose intellectual property rights over traditional knowledge and biological resources. See note 131 supra.

The third part touches on the relevance of customary law as a mechanism in the regulation of TCEs. Interview findings are brought in to show reflect common perceptions against reliance on customary law as a regulator of TCEs.

In the fourth part, using empirical findings, I explore arguments for and against regulation and enforcement mechanisms for TCEs in Uganda as a case study. I present a qualitative analysis of interview findings on the concepts such as the need for consent before use and payment of compensation on the use of TCEs. In the conclusive part, I wrap up with the claim that regulation of Cultural expressions is necessary in guiding the evolution of TCEs as societies grow. In my claim, I also argue that the most viable form of regulation for TCE usage is one that is structured in a sui generis manner, taking into account the unique property rights concepts involved.

### 3.1 Protection of TCEs under a sui generis system: A Literature review

In this part of the chapter, I look at scholarly material that discusses the challenges surrounding regulation of TCEs under a sui generis system. The central focus is on literature that supports a sui generis model framework and the reasons given in favor of such a model as opposed to a model that is in favor of the I.P System.

The phrase *Sui Generis* has a Latin origin and is defined in Black's Law Dictionary<sup>183</sup> as, "*Of its own kind or class; unique or peculiar*". Although this is not authoritative, for purposes of this study, Sui Generis legislation can be taken to mean '*unique legislation*'. Kilian Bizer *et al* have carried out a study on the applicability of a unique mode of protecting TCEs<sup>184</sup>. In their paper, they analyze potential economic effects that would arise from the implementation of the unique modes of protecting

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<sup>183</sup> Bryan A. Garner (Ed. In Chief), *Black's Law Dictionary* (7<sup>th</sup> Ed.), West Group Publishing Co., 1999, at p. 1448.

<sup>184</sup> Kilian Bizer, Matthias Lankau, Gerald Spindler, Philipp Zimbehl, *Sui Generis Rights for the Protection of Traditional Cultural Expressions: Policy Implications*, 2 (2011) JIPITEC 114, para. 1. See: <http://www.jipitec.eu/issues/jipitec-2-2-2011/3083> (accessed November 23, 2011)

TCEs. The paper looks at five sui generis model laws that have been proposed over the years. These are: (1) Model Provisions of the UNESCO/WIPO, 1982 (2) the South Pacific Model Law for National laws of 2002 (3) the Tunis Model Law on Copyright for Developing Countries of 1972, (4) the WIPO Draft Provisions of 2004 and (5) the ARIPO Provisions of 2010. Right holders are identified as (1) legal owners of TCEs, (2) beneficiaries of protection, i.e., the actors entitled to receive compensation, and (3) actors responsible for negotiating access with non-traditional users.

This scholarship material is addressed from the perspective of Law and Economics and thus offers suggestions on the treatment of TCEs as property rights for traditional owners and third parties. The article mentions the fact that transaction costs would be raised due to the challenges in determining TCE ownership. It thus points out a very fundamental issue about “ownership” of culture. If Sui Generis policies are to focus on aspects such as legal owners of TCEs and compensation for wrongful use or misappropriation, then the pertinent question should be as to which persons are covered in such status, before addressing the question as to which actors negotiate access. This study thus serves to explore this point further by looking at regulatory models that provide for TCE ownership.

Daniel A. Green presents a number of provocative questions on the balance between Sui Generis and I.P protection over Traditional Knowledge in *Indigenous Intellect: Problems of calling Knowledge Property and assigning it Rights*.<sup>185</sup> The article emphasizes having an understanding of the nature, scope and origin of the knowledge or products of indigenous communities, before we can focus on addressing the creation of a legal action. Some of the general questions posed are: *To whom should the profits of collective knowledge attain? Does anyone have a right to the profits of collective knowledge?*<sup>186</sup> He suggests that the limits of enforcement of rights determine the boundaries of the right itself. This is the basis of his argument as to understanding the nature and scope of TK so as to be able to construe a claim.

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<sup>185</sup> Daniel Austin Green, *Indigenous Intellect: Problems of calling Knowledge Property and assigning it Rights*, (March 31, 2009) Texas Wesleyan Law Review, Vol. 15, p. 335-355, 2009. Available at SSRN: <http://ssrn.com/abstract=1410147> (accessed November 20, 2012)

<sup>186</sup> Ibid, p. 337

In analyzing the nature of rights in TK, he further ponders as to whether protection of TK is akin to the right to privacy and asks whether collective knowledge can be considered private, especially in light of having to justify original acquisition. He also looks at the nature of property in TK, showing the impracticalities in placing the *Lockean* property theory<sup>187</sup> within the concept of Indigenous intellectual property.

Green's contention in this respect is to do with the concept of communal ownership over TK and TCEs, particularly with regard to how it does not conform to the I.P regulatory system which favors individual ownership of property rights. As such, the issues he ponders over with regard to profits over collective knowledge and the right to privacy in collective knowledge further support the claim for sui generis regulations over TCEs.

Conclusively, he argues that I.P. Rights have no place with Indigenous knowledge because they serve more of an incentive to innovate rather than as a tool in the exploitation of existing methods. Overall, as he acknowledges, his article presents more questions than answers. Nonetheless, he gives very intuitive questions on the considerations of placing a Sui Generis system of enforcement over indigenous knowledge; provides caution on anticipating “the dynamics of intra-group conflicts and politics”<sup>188</sup> in circumstances where a sui generis policy empowers indigenous groups to control their knowledge; and lays emphasis on focusing the discussion about protection for indigenous knowledge around the nature of the claim and not past wrong doing. His basis for fronting the *nature of the claim* as the gateway for protecting indigenous knowledge is that it allows us to answer the question as to whether this is a new type of right altogether or an extension of existing Intellectual Property Rights.

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<sup>187</sup> A quotation from John Locke's theory (Two Treatises on Government, Book II, ch. V, 1690) states that: *Though the earth and all inferior creatures be common to all Men, yet every Man has a Property in his own Person. This no Body has any Right to but himself. The labour of his body and the work of his hands . . . are properly his.* Adapted from: Cohen J.E et al, Supra note 85.

<sup>188</sup> Supra note 185 at p. 347.

Green's suggestion over the current *nature of the claim* can be applied in the context of the question of past misappropriations of TCEs. The issue in this regard is whether considered regulation should be retrospective in nature or focus on future abuses of TCEs. Going by his suggestion therefore, our focus should be on a regulatory framework that provides for future abuse of TCEs.

In *Beyond Intellectual property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*<sup>189</sup>, Darell A. Posey and Graham Dutfield also analyze the challenges associated with communal ownership of traditional intellectual property and the related regulatory problems. They raise key issues through analyzing questions inclusive of: Who benefits from traditional resources?, What right do communities have to say 'yes' or 'no' to commercialization?, How can a community take legal action?, Are intellectual property rights useful?. These, and many other questions, have been the basis for on-going negotiations at the international level in understanding the scope of TCEs and how to offer protection over TCE holders.

Suggestions are offered for the protection of, and compensation for the knowledge and resources of holders of TCEs. The authors, for instance, raise the issue of self-determination for communities when they address the question as to whether communities can be able to develop their own system for protecting traditional resource rights. In the establishment of a sui generis framework, the authors suggest a hybrid system that involves ethnic communities and other stakeholders. For instance, they reason that local communities are basically inadequate and inappropriate in providing the necessary protection over indigenous knowledge but should nevertheless be involved in the development of an appropriate sui generis legal system<sup>190</sup>.

This resonates with the position favored by Elizabeth Tamale, a Deputy Commissioner of Trade in the Ugandan Ministry of Trade. On the question as to which parties can be involved in the management of TCEs, she advocates for a fusion of the State and leaders of ethnic communities. In

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<sup>189</sup> Supra note 16.

<sup>190</sup> Id, pp 77-78.

her view, this would be an effective way of harmonizing the interests of the State – which generally involve the pulling together of resources for sustainable development - with the interests of the ethnic communities, which include preservation of cultural heritage and compensation for use of their TCEs. Augustine Mutumba, a traditional leader and clan head in the Buganda Community also opines that: “*The best way is to involve all stakeholders to avoid finger pointing when things go wrong, this will also keep the communities in participation rather than resigning their roles.*”<sup>191</sup>

In the same vein, Mercy Kainobwisho, also asserts that the State has to work with the communities. She adds that ethnic communities look at their TCEs as private I.P rights. As such, if someone makes use of these TCEs and benefits through payment of royalties to him, the community leaders will not seat back when the State comes it to start regulating the use of the TCEs. She opines that if the State is to establish a legal framework, the community leaders should come in as consultants and work with the State. She further opines that a sui generis system should be used as a guide in the establishment of structures from a grass-root level. These structures can be used in enforcing TCE usage and arbitration of dispute matters at the smallest community level upwards as a way of dealing with challenges associated with cross-border communities that share the same TCEs<sup>192</sup>. My claim therefore is that a sui generis framework would be the most convenient to apply in establishing a regulatory measure that involves a fusion of State parties and private parties such as representatives of ethnic communities. It would otherwise be challenging to organize such a hybrid of parties within an I.P legislative system.

Another significant suggestion made by Posey and Dutfield relates to the use of the term ‘*Traditional Resource Rights*’ (TRR) in the place of Intellectual Property Rights (IPR). The argument for this substitution, is as a way of expanding on the limits of protection and compensation provided by IPR

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<sup>191</sup> Interviews with Ms. Elizabeth Tamale, Assistant Commissioner for Trade, Ministry of Trade and Cooperatives, Government of Uganda (July 12, 2013); and Augustine Mutumba, a clan leader in the Buganda Community, was interviewed on November 26, 2013.

<sup>192</sup> Interview with Ms. Mercy Kainobwisho, Manager in the Intellectual Property Department at the Uganda Registration and Services Bureau, Ministry of Justice and Constitutional Affairs - interviewed on July 11, 2013.



while recognizing traditional resources in the establishment of a Sui Generis system. The authors argue that TRR, which is described as a bundle of rights, has far reaching implementation both domestically and internationally; and that it can also guide the negotiation process amongst all parties interested in Indigenous knowledge<sup>193</sup>.

My discomfort with this suggestion, however, is in having to determine which parties would be involved in negotiating for Traditional Resource Rights. The authors do not exhaustively address this issue with regards to practical ways in which various parties such as government agencies, TCE users and representatives of Indigenous communities can work together with respect to TRRs. In the same vein, they do not adequately give consideration to the handling of potential conflicts pertaining to TCE originality or attribution amongst cross-border Indigenous Communities with historical ties. The exercising of TRRs is a novel and sound concept but in order to be achievable, such concerns have to be given some attention. This study therefore looks at going beyond the suggestions given by Posey and Dutfield by analyzing different regulatory frameworks and establishing the most favorable protective mechanisms for TCEs under a sui generis system.

The question of the relevance of International Instruments as an influence in the drafting of domestic legislations is addressed by Posey and Dutfield. This is based on the weak fulfilment of obligations by signatory States. They however choose not to discredit the continued importance of such instruments on the basis that they “contain important rights, principles and concepts that can be valuable in the building of the sui generis TRR system”<sup>194</sup>. Although the authors proceed to analyze useful provisions in various legal instruments and their relevance for sui generis proposals, this study notes the I.P bias and limited connection to TCEs in these Instruments. Edgar Tabaro, a Ugandan I.P Lawyer, expresses his skepticism over the reliance on International treaties as a way forward for TCE protection, arguing that developing countries have not been pro-active in setting the agenda for such International treaties<sup>195</sup>. This chapter therefore draws from this perspective to

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<sup>193</sup> Note 16 supra at p. 78.

<sup>194</sup> Note 16 supra p. 84.

<sup>195</sup> Supra note 92.

iron out the adequacy of international instruments in TCE protection by analyzing the level of protection to TCEs that is offered in these instruments.

In another piece of scholarship, J. Janewa OseiTutu looks at the pros and cons of a sui generis system as an alternative to I.P protection in '*A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*'<sup>196</sup>. In this paper she provides guidance on issues that policy holders have to consider before advocating for a sui generis system. She argues that in spite of the absence of a uniform International legal system in the protection of Traditional Knowledge, it can only be protected to a limited extent under existing intellectual property laws, hence the calls for a sui generis regime. She however warns that a sui generis system also comes with its own limitations such as the likelihood of increased costs and the need to pay to access what was hitherto freely accessible cultural goods of others.<sup>197</sup>

OseiTutu's concerns over payment before use are appreciated. However, in order to tap into the socio-economic values attached to TCEs, there have to be elements of transactional costs and license payments. TCEs are regarded as previously freely accessible simply because they belonged to particular communities. Now that there is constant interaction between persons of different communities and Nations, it would be justified for foreigners that have no ownership attachment to TCEs to pay for their use. A tailor made regulatory framework that provides for management and licensing of TCEs as well as protection of cultural values, would be the most effective in addressing this concern.

The need for a sui generis legal framework is further supported by the fact that it requires less harmony than other domestic legislations, particularly those in the I.P domain that have to be in strict conformity to international I.P norms for the benefit of International trade. This factor is a

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<sup>196</sup> See: 15 Marq. Intell. Prop. L. Rev. 147 (2011) "Emerging Scholars Series." Paper can be downloaded from <http://ssrn.com/abstract=1574996>

<sup>197</sup> Ibid, p.171

significant contributor to the reasons as to why international efforts on establishing a global framework for TCE protection have dragged on for a long time without bearing fruit. OseiTutu, for instance, highlights the determinations that have been made at the International level through WIPO's efforts of reaching a consensus between developed and developing nations on an international legal instrument to protect traditional knowledge. She points out that in this tension, developed countries such as the United States are not welcoming of an international legal protection for TK whereas nations from Asia and Africa are in favor of expediting the establishment of international legally binding instruments to protect TK, including sui generis mechanisms.<sup>198</sup>

The paper also analyses various approaches to I.P, such as Professor Drahos' instrumentalist approach, which considers the social costs of intellectual property protection<sup>199</sup> and Professor Chon's distributive justice approach, which "*focuses on the needs of users in both developed and developing countries for accessible and affordable knowledge goods*" which can be approached from either an economic perspective or a political perspective. She suggests that the language of the international treaties leans towards a distributive justice approach to international I.P law<sup>200</sup>.

The paper then irons out the objectives for providing protection towards TK with the view of analyzing whether an I.P model would be more suitable than a sui generis model. In this part of the paper, she first points out the commonalities between policy objectives of I.P and TK. These are listed as: Exclusivity of use; Economic rationale and; Innovation. Even then, the author acknowledges underlying differences between IP and TK within these core objectives. For instance, she points out that the economic benefit of TK is the sharing of benefits obtained from the commercialization of their TK while the economic rationale in IP relates to creating incentives for innovation. Regarding the distinction in terms of equity-oriented goals, she suggests that "*Traditional*

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<sup>198</sup> Ibid, p.173, citing: WIPO IGC, TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE AND TRADITIONAL KNOWLEDGE, COMMENTS OF THE UNITED STATES OF AMERICA 5–7, 12–4 (2007), *available at* [http://www.wipo.int/export/sites/www/tk/en/igc/pdf/usa\\_tk-tce.pdf](http://www.wipo.int/export/sites/www/tk/en/igc/pdf/usa_tk-tce.pdf) (responses to Questions 5, 6, and 8)

<sup>199</sup> Ibid, p.176, citing: Peter Drahos, *A Philosophy of Intellectual Property*, 213-214, 223 (1996)

<sup>200</sup> Ibid, p. 177-8

*knowledge has been characterized as representing intangible developing country goods while intellectual property protects intangible developed country goods*”.<sup>201</sup> This categorization is however limited in perspective because it disregards TK from developed countries such as the United States, Canada and Australia<sup>202</sup>. It is nonetheless her basis for reasoning as to why some advocates for TK protection seek a sui generis regime for what they describe as Intellectual Property in Traditional Knowledge<sup>203</sup>.

She suggests that holders of TK are generally in a weaker position than IP holders due to factors such as education, economic status<sup>204</sup> and appreciation of I.P matters. She then poses the question as to whether a sui generis system would thus be able to place them at an equitable footing from a distributive justice perspective<sup>205</sup>. The paper posits that a sui generis system is posited above an IP system because of its equity seeking objectives such as the protection of cultural heritage and the promotion of value and respect. These are objectives which the I.P system would fall short in protecting<sup>206</sup>.

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<sup>201</sup> Id, pp. 181-185.

<sup>202</sup> In an interview with Professor Carroll Hurd, a U.S lawyer for Canadian, Australian and Native American Indigenous people with over 40 years of experience in the field of indigenous law, he revealed how the Indigenous People he has worked with, are deeply concerned about the protection of their TK – Interview conducted on November 22nd 2013. He asserts, for instance, that according to the Indigenous people of North America, land is a sacred right that was granted by the spirits and therefore no one can claim individual ownership to it.

<sup>203</sup> Supra note 196, p. 186, citing: WIPO IGC, DECLARATION OF SHAMANS ON INTELLECTUAL PROPERTY AND PROTECTION OF TRADITIONAL KNOWLEDGE AND GENETIC RESOURCES 15, WIPO Doc. WIPO/GRTKF/IC/2/14 (2001); UNESCO *Symposium on the protection of traditional knowledge and expressions of indigenous cultures in the Pacific Islands, Noumea, 15-19 February 1999 Final Declaration*, UNESCO, available at <http://portal.unesco.org/culture/en/files/14264/10645002355Noumea1999.pdf/Noumea1999.pdf> (last visited by OseiTutu- Nov. 4, 2010).

<sup>204</sup> Indigenous people are reported to be among the poorest communities in the world. This is according to the World Bank Policy Brief: *Indigenous Peoples: Still among the poorest of the poor* [http://siteresources.worldbank.org/EXTINDPEOPLE/Resources/407801-1271860301656/HDNEN\\_indigenous\\_clean\\_0421.pdf](http://siteresources.worldbank.org/EXTINDPEOPLE/Resources/407801-1271860301656/HDNEN_indigenous_clean_0421.pdf) - accessed May 10, 2012. Note that this is not a formal publication of the World Bank and is only circulated to encourage thought and discussion. The views expressed therein are those of the authors of the publication and should not be attributed to the World Bank.

<sup>205</sup> Supra note 196, p.186

<sup>206</sup> Supra note 196, p.187

Conclusively, she suggests that there should be a balancing of rights in which there is provision of adequate protection for TK rights holders as well as TK users. Such an equitable system should accommodate contributions from non-western cultures and the interests of individuals, vis-à-vis large corporations or institutions. On the downside, which is nonetheless not so significant, her suggestions are more focused on the regulation of environmental or scientific benefits in TK as opposed to Cultural expressions. For instance, she suggests that: “*A distributive justice analysis of intellectual property that gives greater weight to the user oriented social goods may assist in correcting the imbalance in both industrialized and industrializing countries.*”<sup>207</sup> It is my understanding that “*user oriented social goods*” provide more of physical enrichment for the consumer as opposed to products of musical expressions which provide more of spiritual, emotional or sentimental enrichment. This is one of the distinguishing factors between TK and TCEs.

The current study therefore looks into how the distributive justice approach would also apply in addressing the imbalance brought about by the misappropriation of cultural expressions, particularly from developing countries. The author appears to offer practical guidance in the establishment of a distributive justice system when she opines that the I.P regime should be refined so that sophisticated users of the global I.P system do not trample upon poor people’s rights. Nonetheless, when giving examples of I.P International instruments that have addressed this issue, she again limits her attention to scientific and environmentally biased Instruments such as the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture.<sup>208</sup> This Chapter therefore serves to place her opinions within the context of legal frameworks that lean towards TCE protection.

In ‘*The Uneasy case for Intellectual Property Rights in Traditional Knowledge*’, Stephen R. Munzer and Kal Raustiala also present an interesting thought-provoking assessment of the practicalities in legislating over Traditional Knowledge, especially through the creation of Sui generis rights through

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<sup>207</sup> Supra note 196, p.206

<sup>208</sup> Supra note 196, p.210.

international treaties<sup>209</sup>. They opine that Traditional Knowledge is inclusive of cultural expressions and in assessing the level of legal protection that can be afforded to Traditional Knowledge, they analyze the relationship that Traditional Knowledge has with existing IPRs. They look at issues such as public domain of Traditional Knowledge and raise unanswerable issues such as - which descendant was the first to conjure up a dance move for an elaborate 300 year old dance that is identifiable with a particular indigenous group. They point out that ownership of TCEs should be associated with groups (under a sui generis IP right) as opposed to individuals from certain groups since the claim for group ownership transcends the current membership.

The paper also looks at the custodianship of Traditional Knowledge from the perspective of stewardship. It suggests that if there is a conflict as to which indigenous society is the legitimate steward over an existing TK, the law would have a difficulty in adjudicating over the matter. This is true of situations where cross-border ethnic communities present potential conflicts over management of TCEs. Regulation of TK and TCEs should therefore give keen consideration to such likely eventualities. One counter measure would be for a sui generis legislation that advocates for self-determination. In this way, the community would be in charge of usage of its TCEs, regardless of which side of the border it is in. The important thing, yet again, is to ensure that the laws of each neighboring State are in harmony in as far as recognition of community self-determination is concerned. The argument therefore is that even sui generis legislation requires harmony – to a given extent – with other related laws in the country's region so as to effectively cover the interests of cross-border communities. This harmony is best ascertained through international instruments hence the review of the adequacy of regional and international instruments in this chapter.

Another important virtue in the paper is that it also addresses the concerns of TK holders in the absence of legislative remedies. The authors present the argument of unjust enrichment – where people gain from unregulated TK; misappropriation – where the enrichment is dishonest or

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<sup>209</sup> Supra note 43.

deliberate, and; restitution - where the party riding on the benefit of absence in legal protection of TKs ought to compensate the TK rights holder so as to remove the injustice. However, consideration is not given to situations where a member of a community makes use of the community TCE for his own benefit. It is unlikely that this can be labelled as unjust enrichment or misappropriation on the grounds that such community member, under communal ownership, is also a custodian of the TCEs he uses. Musicians that engage in such acts do not even consider the need to seek permission or pay some form of compensation by way of restitution.<sup>210</sup>

The general claim through this review therefore is that Protection of TCEs requires consideration of a number of factors in establishing a sui generis protective system. These include the following: The role of international instruments in guiding domestic legislation; addressing issues of self-determination by communities; and, last but not least, a preservation of cultural values. Ethnic communities are adapting to the fact that globalization has gradually turned their cultural expressions into commodities. As such therefore regulation through a sui generis system can be able to address these considerations more adequately than an I.P system would. It all comes down to understanding what protection involves and this is what the next part of the chapter sets out to do.

### 3.2 What does the term “Protection” entail?

In this part of the chapter, I formulate a basis for suggestions of a structured framework as to what a sui generis TCE enforcement and regulatory system should encompass. In leading up to these suggestions, I evaluate the concept of ‘Protection’ of TCEs and analyze the adequacy of current frameworks on protection of TCEs using principles from WIPO that give an understanding of protection mechanisms for TCEs. At a later stage of the paper, I incorporate other principles developed through this study and present a claim as to their relevance in a well-structured sui generis legal framework. My claim therefore is that where these regulatory frameworks do not adequately address the principles on protection of TCEs as presented in this chapter, then they fall short of

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<sup>210</sup> See empirical findings in part four of this chapter *infra*.

satisfactorily regulating the use of TCEs. In putting my claim forward, I point out weaknesses and criticisms in the frameworks as they arise.

Michael Brown portrays discomfort in the regulation of culture when he asserts that: *“If we turn culture into property, its uses will be defined and directed by law, the instrument by which states impose order on an untidy world. Culture stands to become the focus of litigation, legislation, and other forms of bureaucratic control. The readiness of some social critics to champion new forms of silencing and surveillance in the name of cultural protection should trouble anyone committed to the free exchange of ideas.”*<sup>211</sup> My claim is that the current appropriation of cultural expressions has already transformed them into a form of tradable property. This is so because we already have regulations that dictate how transaction costs in TCEs should be handled, failure of which calls for sanctions or civil remedies. The regulation needed is with a view towards establishing a use of culture that prevents abuse of culture itself. The current appropriation - especially that which is undertaken by outsiders - creates the biggest risk to cultural abuse because the TCE users have no understanding of the cultural norms that go with the expressions. It is on this premise that there is a need for protection. Where I disagree with Brown’s assertion is that if such protection is undertaken strategically in line with established norms of protection, then there would be no concern about restricting the free exchange of ideas and there would be no silencing of cultural expressions.

The term “protection” attracts concerns as to what it is that is being protected under the subject of culture; from whom and for what purpose? It is therefore important to ensure that TCE policies and legislative frameworks are drafted in a way in which Cultural growth and access are not hindered in anyway in efforts towards regulating against misappropriation. The WIPO booklet on Intellectual Property and Traditional Cultural Expressions/Folklore<sup>212</sup> offers suggestions as to what can be included in the understanding of the basis for “protection” of TCEs. These are:<sup>213</sup>

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<sup>211</sup> Supra note 160 at p. 8.

<sup>212</sup> Supra note 23.

<sup>213</sup> *Id.*, p. 12. Also see Appendix C of this study which is a summary of provisions from International Instruments on what amounts to “*protection of TCEs*”.



- (a) The Preservation and safeguarding of cultural heritage;
- (b) The promotion of cultural diversity;
- (c) The respect for cultural rights;
- (d) The promotion of artistic development and cultural exchange;
- (e) The needs and interests of indigenous and traditional communities; and,
- (f) The promotion of tradition-based creativity and innovation as ingredients of sustainable economic development.

I will personally add another principle to this list, which I deem vital in the protection of TCEs, and that is the Right to Self-determination.

The WIPO booklet also sums up the needs of various Indigenous Communities regarding the forms of protection that can be rendered over their TCEs. These are:<sup>214</sup>

- Protection of traditional literary and artistic productions against unauthorized reproduction, adaptation, distribution, performance and other such acts, as well as prevention of insulting, derogatory and/or culturally and spiritually offensive uses;
- Protection of handicrafts, particularly their ‘style’;
- Prevention of false and misleading claims to authenticity and origin/failure to acknowledge source; and
- Defensive protection of traditional signs and symbols.

It is clear from these needs that in the general perspective of WIPO, TCE holders are not bent on completely preventing other parties from using their TCEs. On the contrary, they are interested in *controlled use* of the TCEs with consideration of originality, the right of attribution and the preservation of the cultural values attached to the TCEs. These needs thus evolve around a combination of positive and defensive protection<sup>215</sup>. Ultimately, although there is no single measure or “one-size-fits-all” framework in the protection of TCEs, the aforementioned principles become

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<sup>214</sup> *Id.*

<sup>215</sup> Positive protection covers the obtaining and asserting rights in the protected material, while on the other hand; Defensive protection is meant to prevent others from gaining or maintaining adverse IP rights. See *ibid*, p. 13.

the key benchmarks that can be used to evaluate regulatory policies and frameworks as good, bad or ugly. Other relevant principles of protection such as the right to self-determination, are also incorporated into this study and evaluated.

It is the claim in this study therefore, that regulation on culture is not about regulating culture itself – which cannot be regulated - but about regulating *the use* of culture in such a way that cultural norms, are respected and adhered to. In the next part of the paper, I will support my claim by showing how various regulatory frameworks perform on each of the principles that constitute protection of TCEs as presented above.

### 3.2.1 An evaluation of protective mechanisms for TCEs under established frameworks

In this part of the paper, I present the WIPO principles on protection of TCEs and evaluate coverage of these principles by the different regulatory frameworks inclusive of the international instruments, model laws, regional instruments and domestic legislations.

#### (a) The Preservation and safeguarding of cultural heritage

##### i) International Instruments

A number of UN Conventions cater for the preservation and safeguarding of cultural heritage. These include the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (articles 2, 4, 5 and 14); the 1972 UNESCO Convention for the Protection of World Cultural and Natural Heritage (articles 11 and 24); the 2001 UNESCO Universal Declaration on Cultural Diversity (article 7); the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (articles 1, 11, 12 and 13); and, the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (article 6).

However, a few of these UN Conventions are not short of weaknesses in as far providing for TCEs is concerned. The 1970 Convention, for instance, is purely focused on the protection of the tangible

cultural heritage and does not give any consideration to intangible expressions such as music and dance.

The 2003 Convention has also been criticized for its attempt to completely isolate tangible from intangible expressions. This is in article 2.2 where it provides a list of domains of tangible expressions. Richard Kurin<sup>216</sup> suggests that it is problematic to dissect intangible from tangible heritage. I agree with his argument that sometimes the preservation of the tangible and intangible are intimately conjoined. He states, by way of example, that “*the tangible textual scripts, costumes, props and stage settings are part and parcel of a performance tradition like India’s Sanskrit Kutiyattam theatre and Japanese Nogaku theatre.*”<sup>217</sup>

The preservation and safeguarding of the cultural heritage, entails developing an understanding of intangible and tangible expressions of culture. Protection of TCEs would be lacking if the focus is on one aspect of the cultural heritage as opposed to all of them.

Furthermore, article 8 of the 2005 UNESCO Convention appears problematic by stipulating for a ‘*wait and see*’ situation before measures for the protection of cultural expressions can come into place. It provides for Parties to determine the existence of special situations where cultural expressions are in peril and at the “*risk of extinction, under serious threat or otherwise in need of urgent safeguarding.*” However, one wonders whether the creation of protective measures in safeguarding the cultural heritage, has to first be provoked by such desperate situations. The provision creates uncertainty as to the determinants of TCEs that are under serious threat. In the alternative, States should be encouraged to have provisions in their legislations that offer safeguards to their cultural heritage regardless as to whether it is at risk or not.

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<sup>216</sup> See: <http://onlinelibrary.wiley.com/doi/10.1111/j.1350-0775.2004.00459.x/pdf> (accessed March 3, 2013) Richard Kurin: *Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal*, 56 MUSEUM INT’L 66, 68 (2004)

<sup>217</sup> *id* at p. 5.

## ii) Model laws and Regional Instruments

The 1977 Bangui Agreement on the Creation of an African Intellectual Property Organization (OAPI), which was revised in 1999 is the only Regional Instrument on the African Continent that directly provides safeguards for cultural heritage. This is in Title II: Article 73 and 93 of the Agreement.

Under Title II of Annex VII, Article 67 lists the composites of the Cultural heritage. This Article is to the effect that the cultural heritage consists of material or immaterial human productions that are characteristic of a nation over time and space. These productions relate to folklore, sites and monuments and ensembles. However, this provision in the Agreement leaves out consideration of cross-border communities. Some aspects of the cultural heritage traverse nations through being shared by indigenous communities across national boundaries. It would therefore be more accurate for this provision to state to the effect that the human productions are characteristic of *one or more communities within and outside of a nation* as opposed to directly connecting them to a nation.

My claim here is that in an ethnically diverse region, there is no effective protection of the cultural heritage if no consideration is given to ethnic communities across State borders. This protection is best achieved if the neighboring States recognize and respond to situations in which they share ethnic communities across their borders by establishing regulatory mechanisms that have harmonized enforcement of rights provisions.

## iii) National laws

A few African countries provide for the preservation and safeguard of their cultural heritage under their domestic laws. These include Tunisia (Art. 7), Nigeria (Sec. 31) and Benin (Art. 8). These States are motivated by their strong endearment towards their cultural heritage as well as their recognition of the economic and social rewards that flow as a result of that heritage. In the words of Mohamed Kheireddine Abdel Ali, Managing Director of the Tunisian Body for the Protection of Authors' Rights (Organisme Tunisien de Protection des Droits d'Auteurs-OTPD):

*“To protect Tunisia’s cultural heritage does not mean to freeze it, for this cultural heritage should be able to be exploited, to develop and to evolve also. We inherited it, but this legacy should not be frozen. It is important that the memory of our cultural heritage be protected as it is, in its original form, but it is also important that we let it develop.”<sup>218</sup>*

As TCEs are exploited and utilized for the economic value, they can be prone to abuse by those that have no appreciation for the cultural heritage attached to them. In order to avoid the risks of abuse as TCEs evolve through usage, it is therefore paramount for countries to give topmost consideration to the preservation and safeguarding of their cultural heritage through regulating their use.

The following principles on TCE protection are also directly addressed and stipulated for particularly by International Instruments:

(b) The promotion of cultural diversity

The 2001 UNESCO Universal Declaration on Cultural Diversity (Articles 1 and 7) and the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Articles 1 and 6) provide for the promotion of cultural diversity. However, in falling short of adequate measures of protection, the 2001 Declaration does not clearly identify ownership or control of culture. The issue of communal ownership should therefore be given consideration as well in formulating guidelines as to how cultural expressions are to be managed through a regulatory structure.

(c) The respect for cultural rights

The 1970 UNESCO Convention (Articles 10 and 12), the 2003 UNESCO Convention (Articles 1 and 13(d)) and the 2005 UNESCO Convention (Article 2), all provide for the respect for cultural rights.

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<sup>218</sup> Zografos, Daphne, *The Legal Protection of Traditional Cultural Expressions – The Tunisian Example* (2004). The Journal of World Intellectual Property, Vol. 7, No. 2, pp. 229-242, March 2004, Available at SSRN: <http://ssrn.com/abstract=1633367> (last accessed may 6, 2013), citing a conversation held with the author (Zografos) in October 2003.

(d) The promotion of artistic development and cultural exchange

This principle is provided for under Articles 2, 5, 6 and 8 of the 2001 UNESCO Convention; Article 14 of the 2003 UNESCO Convention and Articles 1, 7 and 16 of the 2005 UNESCO Convention.

The 2005 Convention is however criticized in this respect by Naomi Mezey as “*primarily aspirational rather than obligatory*” and that “*it articulates and promotes a vision of the world in which cultures come into contact with each other.*”<sup>219</sup> Her general evaluation of the Convention is that State Parties have the freedom to choose whether or not to incorporate the principles it stipulates into their domestic laws.

By advocating for cultural exchange, the Instruments are focused on encouraging benefits from exchange of ideas in a world of cultural diversity. However, the frameworks need to also recognize cultural restrictions that are closed in on account of sacred rites. Domestic policies and regulatory frameworks that provide for cultural exchange through this principle should therefore give exception to such considerations as part of TCE Protection.

(e) Addressing the needs and interests of indigenous and traditional communities

The 1970 Convention (Articles 5, 9 and 12); the 1972 Convention (Articles 4 to 7); the 1976 International Covenant on Economic, Social and Cultural Rights (ICESCR) (Article 15); the 2001 Convention (Articles 3, 4 and 5); the 2003 Convention (Articles 1 and 13); and, the 2005 Convention (Article 8) – all specifically provide for the needs and interests of ethnic communities.

Article 15 of the ICESCR is particularly noteworthy. 15.1(c) provides for State Parties to recognize the right of everyone to “*benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*” 15.2 goes on to provide that the steps taken in the full realization of this right shall include the conservation, development and diffusion of science and culture.

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<sup>219</sup> Supra note 150 at p. 12.

In his evaluation of article 15.1(c), Christoph Graber<sup>220</sup> cites an interpretation from the General Comment No. 17 as adopted in November 2005 by the Committee on Economic, Social and Cultural Rights (CESCR Committee). Paragraph 32 is adapted as follows:

*“With regard to the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of indigenous peoples, States parties should adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge. In adopting measures to protect scientific, literary and artistic productions of indigenous peoples, States parties should take into account their preferences. Such protection might include the adoption of measures to recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property right regimes and should prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties. In implementing these protection measures, States parties should respect the principle of free, prior and informed consent of the indigenous authors concerned, the oral or other customary forms of transmission of scientific, literary or artistic production and, where appropriate, they should provide for the collective administration by indigenous peoples’ of the benefits derived from their productions.”*

Grabber rightfully points out<sup>221</sup> that article 15.1(c) and the interpretation that follows from the CESCR Committee, are biased into looking at TCEs within the framework of I.P rights and therefore as individualistic as opposed to communal rights. The ICESCR is therefore apt to mislead in protection of TCEs which cannot be regulated for under an I.P biased system.

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<sup>220</sup> Graber, Christoph B., *Can Modern Law Safeguard Archaic Cultural Expressions? Observations from a Legal Sociology Perspective (2009)*. Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region, Christoph Antons, ed, pp. 159-176. Kluwer Law International; NCCR Trade Working Paper No. 2007/09. Available at SSRN: <http://ssrn.com/abstract=1090800> or <http://dx.doi.org/10.2139/ssrn.1090800> (accessed March 15, 2013), at p. 9.

<sup>221</sup> Ibid, at p.10

(f) The promotion of tradition-based creativity and innovation as ingredients of sustainable economic development

The 1970 Convention (Article 5); the 1972 Convention (Article 24); the 2001 Convention (Article 3); and the 2005 Convention (Articles 2, 13 and 14) provide for the promotion of cultural creativity.

The UNESCO Conventions have been long seen as measures through which the United Nations is advocating for protection of the cultural heritage of ethnic communities. However, much as focusing on using tradition-based creativity is laudable in this respect, due regard needs to be given to potential clashes with the World Trade Organization which is also focused on encouraging member states in the same direction.

Tania Voon also raises concerns over the possibility of conflict that could be created between the Convention and the interests of the World Trade Organization (WTO).<sup>222</sup> In her general assessment of the 2005 UNESCO Convention, she suggests that the Convention and WTO agreements can be mutually supportive of one another such as through assisting in “*clarifying various exceptions to core WTO disciplines such as national treatment and MFN [Most Favored Nation] treatment in connection with cultural products.*”<sup>223</sup> She further ponders whether fulfilment of an obligation under the UNESCO Convention doesn’t create a conflict where such an action is prohibited by WTO agreements. Article 20.2 of the Convention, for instance, provides that the Convention does not modify “*rights and obligations of the Parties under any other treaties to which they are parties.*” Her interpretation of this provision is the perception that the Convention could not modify rights or obligations of WTO Members under future WTO agreements<sup>224</sup>. She concludes that the UNESCO Convention is likely to arouse

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<sup>222</sup> Tania Voon: *UNESCO and the WTO: A Clash of Cultures?*; July 2006, Oxford University Press: 55(3) International and Comparative Law Quarterly 635, at p. 2. See: [www.worldtradelaw.net/articles/voonunesco.pdf](http://www.worldtradelaw.net/articles/voonunesco.pdf) (accessed Aug. 20, 2012).

<sup>223</sup> Ibid, at p. 13

<sup>224</sup> Ibid, at p. 16, citing article 30(4) of the 1969 Vienna Convention on the Law of Treaties. Article 30(3) states: “*When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty*”. Article 30(4): “*When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States Parties to both treaties the same rule applies as in paragraph 3; (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.*”



more attention from WTO members towards the plight of cultural interests and thus influence positive negotiations that will promote the combined trade and cultural interests of all member States.

It therefore follows that as States look to International Instruments in formulating guidelines for the protection of their TCEs, it is also important to ensure that State obligations to other Instruments are not abused. At the same time, I would assert that States have to see to it that the interests of their nationals are given priority as they put together regulatory frameworks that are meant to steer development through their TCEs. It is in this respect that a sui generis framework would suffice for ethnic communities in prioritizing their interests as well as ensuring that the State parties follow their obligations under the International Instruments.

(g) The right to Self-determination

My claim for prioritizing the interests of ethnic communities as mentioned above, also relates to allowing them to exercise their right to self-determination as to how the TCEs should be managed. The aforementioned WIPO principles on protection do not directly address the right to self-determination. However, the 2007 United Nations Declaration on the Right of Indigenous Peoples places this as a core principle and I would therefore argue that it is a fundamental component in the protection of TCEs.

Article 3 of the Declaration provides for the right to self-determination for Indigenous peoples. It gives them the free determination of their political status and the freedom to pursue their economic, social and cultural development. In light of this provision, it is more effective for indigenous peoples to enjoy the freedom of determining their self-identification as indigenous peoples on the basis of their historical nature, social standing as well as cultural beliefs and practices. This is as opposed to

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For the full text of the Vienna Treaty, see:  
[http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf) (last accessed March 21, 2013).

creating boundaries as to what an indigenous person is, under pre-determined principles set by State Parties to an International Instrument<sup>225</sup>. The proposition for self-determination is also the argument presented by Ruth Hokulei Lindsey as an avenue for protecting the TCEs in Hawai'i when she states that the protection of TCEs “. . . *can only be achieved through a system of control created and governed by the indigenous peoples concerned. For only such a sui generis system can adequately maintain cultural identity and cultural integrity, as defined by the source peoples, and thus be an exercise of self-determination.*”<sup>226</sup>

Article 4 further strengthens the right to self-determination further by stipulating for the right to autonomy or self-government in determination of matters related to the internal affairs of Indigenous peoples, including financial management of their autonomous functions.

These provisions on self-determination are therefore beneficial in encouraging States to recognize the interests and independence of Indigenous Peoples within those States in determining how their TCEs should be utilized. The right to self-determination should however not hinder the communities from working in partnership with the State or civil society organizations in obtaining financial or technical assistance.

The 2007 Declaration also provides for indigenous peoples to participate fully in the cultural life of the State (Article 5); for States to assist indigenous peoples in creating means of protecting their TCEs (Article 11); and, for indigenous peoples to maintain, control and develop their cultural heritage, TK and TCEs (Article 31). It is my contention that this Declaration clearly spells out how ethnic communities can work together with States in protecting their TCEs. By focusing on the interests of indigenous peoples as a whole in the utilization of their TCEs for socio-economic development, it creates a clear demarcation between protection of I.P rights and property rights in

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<sup>225</sup> Although there is currently no internationally agreed upon definition of the term ‘Indigenous People’, Article 1 of the 1989 International Labour Organization Convention (NO. 169) Concerning Indigenous and Tribal Peoples in Independent Countries provides one of the most referred to definitions. See supra note 47.

<sup>226</sup> See Lindsey, R. Hokulei, supra note 171 at p. 7. Citing Dr. Erica-Irene A. Daes, Keynote Address at the Protecting Traditional Knowledge Conference, Vancouver, British Columbia, Canada (Feb. 2000), available at <http://www.ubcic.bc.ca/docs/keynote.pdf> (“The solution is to resolve any disputes over the acquisition and use of indigenous peoples’ heritage according to the customary laws of the indigenous peoples concerned.”)(last visited- by Lindsey – May 24, 2003).

TCEs. The Declaration thus provides good benchmark provisions on an ideal sui generis framework for TCEs. It is the claim of this study that if these States are to enact domestic legislations in line with the principles of the Convention, to a large extent there will be a harmonious sui generis global legal system in the regulation of TCEs.

### 3.2.2 An evaluation of other principles of Protection

Apart from the principles on protection of TCEs that are laid out by WIPO, this study suggests that effective protection of TCEs also has to include a number of other principles that are common to TCE regulatory frameworks. These are listed as follows:

- (a) Definition of TCEs or Folklore,
- (b) Ownership or Holders of TCEs,
- (c) Promotion of artistic or cultural development,
- (d) Utilization of TCEs subject to authorization,
- (e) Promotion of tradition-based creativity and innovation as ingredients of sustainable economic development,
- (f) General needs and interests of indigenous communities,
- (g) Right of Attribution or Moral rights,
- (h) Criminal Sanctions or Civil Remedies against abuse of TCEs,
- (i) Provision for a Government Cultural Authority.
- (j) Provisions for Cross-border TCEs.

I will claim in this part of the study that these principles, though not necessarily exhaustive, are adequate in building together an effective sui generis system of TCE protection. I will show through an evaluation of different regulatory frameworks, how effective they have been in responding to regulation of their TCEs on account of the presence of these principles in their frameworks.

#### (a) Definition of TCEs

##### (i) Model laws and Regional Instruments

The 1976 Tunis Model law on Copyright for Developing Countries (Section 18); the 1982 WIPO/UNESCO Model Provisions for National Laws for the Protection of expressions of

Folklore Against Illicit Exploitation and Other Prejudicial Actions (Sec. 2); the 1977/1999 Bangui Agreement on the Creation of an African Intellectual Property Organization (OAPI) (Title II: Art. 68); and the 2010 Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (ARIPO) (Sec.2) all provide for the definition of TCEs and Traditional Folklore.

It is essential in a sui generis legislation of this nature to have a defining provision so as to better understand the dimensions of TCEs. The Bangui Agreement in particular, has a very detailed picture as to what can be included in the definition of folklore and, as such, gives insight into the level of protection that can be extended to folklore.<sup>227</sup>

A positive take from the 1982 Model Provisions in particular, is that they created a balance between protection of cultural expressions on the one hand, and ease in the development and dissemination of culture on the other hand<sup>228</sup>. Historically, Traditional Cultural Expressions flourished through the guidance of customary law. As such, part of the recent concerns over regulation of TCEs, have been with regard to creating a balance between TCEs as seen within the eyes of customary law and any established national system of regulation.

The 1982 Model Provisions were able to capture that balance by taking into account the significance of folklore as an integral part of the host community; the need for the cultural values imbedded within such folklore to be preserved, while at the same time allowing for cultural growth through dissemination of folklore without rigid protection. These are the same principles that historically provided a basis for the customary legal system overseeing folklore in Indigenous Communities. We will, however, explore the current place of customary law in the regulation of TCEs at a later stage of this Chapter.

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<sup>227</sup> Assafa Endeshaw, *Intellectual Property Policy for Non-Industrial Countries* (Dartmouth, 1996) 166, cited in Zografos Daphne, *supra* note 43 at p. 17

<sup>228</sup> See: *Intellectual Property Protection of Expressions of Folklore: Attempts at the International Level*, <http://itt.nissat.tripod.com/itt9903/folklore.htm> (last accessed April 17, 2013).

Negative reactions to the 1982 Model Provisions, are premised on its use of the term ‘*Folklore*’. Critics are mainly concerned as to the misleading perceptions from the use of this term as well as the narrow definition given in the 1982 Model Provisions. Mrs Mould-Idrissu, for instance, has argued that the western conception of the term *folklore* is limited to artistic, literary and performing works as opposed to its broader inclusion of all aspects of cultural heritage. A related criticism is of the western misconception of *folklore* as representing something dead that is in need of collection and preservation, rather than appreciating its reality as “*an evolving living tradition*”.<sup>229</sup> It is on the premise of arguments such as these that the term “*Traditional Cultural Expressions*” has slowly come in to replace the use of the term *Folklore* in International forums.

In spite of this criticism, subsequent developments in discussions over creating international and national legal frameworks for the protection of TCEs have been easily facilitated with guidance from the 1982 Model Provisions. The model laws are therefore helpful in defining TCEs and establishing ways in which cultural expressions can be allowed to flourish through a sui generis system of protection. In so doing, they alleviate fears of cultural stagnation through regulation.

#### (ii) African National Laws

This study established that definitions for TCEs or Folklore are provided in the national laws of Tunisia (Article 7 of Law No. 94-36 on Literary and Artistic Property – as amended by Law No. 2009-33); Nigeria (Copyright Act, Chapter 28, section 31(5)); Ghana (Copyright Act, 2005 (Act 690), sec. 76); Benin (Article 1<sup>230</sup>), Mali (Article 107<sup>231</sup>), Botswana<sup>232</sup> (Section 2), and the Democratic Republic of Congo (D.R.C) (Article 6(k)).

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<sup>229</sup> Protecting Traditional Cultural Expressions: The International Dimension, at p. 4, See: <http://www.copyright.bbk.ac.uk/contents/workshops/blakem.pdf> (last accessed April 20, 2013) citing: WIPO doc, UNESCO-WIPO/FOLK/PKT/97/1 (March 17,1997); Janke, ‘UNESCO-WIPO World Forum on the Protection of Folklore: Lessons for Protecting Indigenous Australian Cultural & Intellectual property’ (1997) 15 Copyright Reporter 104 at 109; ‘1967,1982,1984: Attempts to Provide International Protection for Folklore by Intellectual Property Rights’, WIPO doc., UNESCO-WIPO/FOLK/PKT/97/19 (March 21,1997)

<sup>230</sup> Law No. 2005-30 of April 5, 2006 relating to Copyright and Related Rights of the Republic of Benin, see: [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=260895](http://www.wipo.int/wipolex/en/text.jsp?file_id=260895) (last accessed May 30, 2013). Also see Appendix E for a summary of protective mechanisms under select African National Laws.

The Nigerian legislation has a rather peculiar definition of folklore. Under section 31.5, the Act defines ‘folklore’ as “. . . *group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means, including: folklore, folk poetry, and folk riddles; folk songs and instrumental folk music; folk dances and folk plays; productions of folk arts in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, handicrafts, costumes, and indigenous textiles.*”

Note, however, that there is no connection of folklore to ethnic or indigenous communities in Nigeria. Rather, the focus of the definition is on groups or tradition-based groups or individuals. This does not necessarily equate to Ethnic individuals or communities. As such, by way of interpretation both TCEs that have been around since time immemorial as well as recent works, including those derivative of TCEs, can be grouped together under this definition.

Such ambiguous clauses can lead to countless law suits over disputes related to the use of TCEs if they are not clearly defined. As such, unclear definitions mean that TCEs are not given adequate protection.

#### (b) Ownership of TCEs

Having a clear understanding of ownership aspects in the regulation of TCEs is also vital for their protection. A number of frameworks cater for ownership of TCEs as demonstrated below:

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<sup>231</sup> See: [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=197931](http://www.wipo.int/wipolex/en/text.jsp?file_id=197931) (last accessed Aug. 8, 2013) for a copy of the Mali Copyright Law.

<sup>232</sup> Republic of Botswana: The Copyright and Neighbouring Rights Act: No. 8 of 2000, see: [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=133575](http://www.wipo.int/wipolex/en/text.jsp?file_id=133575) (last accessed August 14, 2013)

(i) Model laws and Regional Instruments

Section 18 of the Swakopmund Protocol provides for ownership of TCEs. In this section, it integrates customary law in the protection of TK and TCEs by using customary law to evaluate the beneficiaries of TCE protection, in which case it is the custodians of TCEs. The Model laws, on the other hand, have no provision on ownership of TCEs.

(ii) National Laws

The laws of Benin (Article 11), Mali (Article 108) and the Democratic Republic of Congo (Article 14) provide for ownership or holders of TCEs.

Folklore protection, in these regulations, is placed in the care of the State in trust for the nationals. For instance, Article 11 of the 2006 law of Benin<sup>233</sup> provides to the effect that folklore belongs, by its origin, to the national heritage. In this respect, it is important to realize that through a sui generis legislation on TCEs, the State plays a pivotal role as owner of the TCEs in trust for its people. However, the indigenous peoples that are recognized as custodians of the TCEs, should still be in a position to exercise a substantial amount of self-determination over their TCEs in line with the principles of the 2007 UNESCO Declaration on the Rights of Indigenous Peoples. In this way, the essential elements of TCE protection are fulfilled.

One case from Benin that provoked discussion on the question of ownership of folklore is the case of *Akpovi Athananse v. Kidjo Angelique*<sup>234</sup>. This case was reported prior to the 2006 law, though its main issue focused on the infringement of works derived from folklore. In this case, the defendant was found liable for having infringed the plaintiff's musical works. The argument in defense was that the alleged works were folklore and thus part of the public domain. Court rejected this argument, stating that the Plaintiff had obtained copyright in the works and the defendant should not have reproduced in full the original or derivative work of the plaintiff on the basis that the defendant was

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<sup>233</sup> Supra note 229.

<sup>234</sup> E.S. Nwauche, The Protection of Expressions of Folklore through the Bill of Rights in South Africa, (June 2005) Vol. 2, Issue 2, SCRIPT-ed, footnote 31 at p.7. See: <http://www.law.ed.ac.uk/ahrc/script-ed/vol2-2/folklore.pdf> (last accessed May 30, 2013) – citing H.G Adoukonou in XXXVI *e Copyright Bulletin* 58.

inspired by folklore. E.S. Nwauche points out that the Court rejected the defendant's plea because the onus of proving existence of folklore was not discharged under the Beninese law of evidence. However, in highlighting the challenging issue as to ownership of cultural expressions, Nwauche raises a number of interesting questions for consideration in the protection of folklore in Benin as portrayed through this case. These are:

*“Suppose the words used by the plaintiff are the same words used by the expression of folklore, then it would not be wrong for the defendant to have used the same wordings. What rights does the plaintiff have if his work is an exact copy of the expression of folklore? Why should the plaintiff obtain copyright in the folklore and bar everybody else from using the work?”<sup>235</sup>*

(c) Promotion of artistic and cultural development

(i) Regional Agreements

The Bangui Agreement, under Title II: Articles 93, 94 and 95, addresses the promotion of artistic and cultural development.

(ii) National laws

The laws of Ghana<sup>236</sup> (sec. 64) and Botswana<sup>237</sup> (Sec. 4), provide for the promotion of artistic and cultural development.

Provisions on artistic and cultural development are vital in guiding the proper and acceptable evolution of culture and thus an important component of ‘Protection’. My claim is that the key players in the evolution of culture are both the members of the State or community, as well as foreigners. The latter may lead to the abuse or deterioration of culture as they use TCEs while the former are principally the main avenue through which TCEs evolve. Protective mechanisms are therefore required in line with this principal to ensure that TCEs evolve in a manner that preserves cultural values as well as keeps the TCEs competitive on the market.

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<sup>235</sup> *Id.*

<sup>236</sup> Ghana: Copyright Act, 2005 (Act 690), [www.wipo.int/clea/docs/new/pdf/en/gh/gh012en.pdf](http://www.wipo.int/clea/docs/new/pdf/en/gh/gh012en.pdf), Accessed March 15th 2012.

<sup>237</sup> *Supra* note 232.



(d) Utilization of TCEs subject to authorization

(i) Model laws and Regional Agreements

The 1982 WIPO/UNESCO Model laws (sec. 3 and 10), the Bangui Agreement (Title II: Art. 80 and 87), and the Swakopmund Protocol (Sec. 19) provide for the need for consent before use of TCEs.

(ii) National laws

The National laws of Tunisia (Article 7), Nigeria (Sec. 31(4) and 32), Ghana (sec. 64), Benin (Article 85) and Mali (Article 113) all cater for the need for permission before use of TCEs.

All the aforementioned provisions mandate a government agency to authorize use of TCEs on behalf of the community. However, there is a contradiction of the principle of common ownership in the TCEs if permission is required before use by a community member. By coming in to supervise and manage TCE usage, government agencies are effectively usurping full control over cultural enjoyment instead of working hand in hand with TCE custodians on the shared objectives. One way of utilizing the provision of permission before use, under a sui generis law, is that it should be selectively applied to TCE users between those who are members and those that are not members of the source community. My claim is that if all persons, both national and foreign, are made to pay for consent to use TCEs, it will cause a stagnation of cultural growth. This is because members of the community will be discouraged from exercising their creativity over cultural expressions.

This was the case with Ghana in the mid 1990's prior to the enactment of the 2005 Copyright law. In 1990, Paul Simon requested for permission to use a popular Ghanaian folk tune titled *Yaa Amponsah* as a major component of a track in his album, *The Rhythm of the Saints*.<sup>238</sup> He signed an agreement with the Ghana Copyright office in 1990 granting him authorization to use the popular folklore within his song. Paul Kuruk, in citing this example, argues that because of the very low

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<sup>238</sup> To listen to the track see: [http://www.youtube.com/watch?v=R\\_wCpufIDI](http://www.youtube.com/watch?v=R_wCpufIDI) (last accessed May 28, 2013)

number of foreign applications for use of folklore, the “*revenue-raising potential of folklore continues to be bleak under these laws, to the obvious detriment of traditional communities*”.<sup>239</sup>

In the mid-1990s, following the experience with Paul Simon, there were attempts to introduce a tax regulation as part of the authorization process on the use of Folklore by both foreigners and local musicians. The hope was that this would control foreign use of local TCEs as well as generate some sort of revenue for the government. This not only disenfranchised local musicians but the idea to introduce such a bill was met with objections from various circles that deemed it inappropriate to pay for the use of their folklore. Eventually, due to interruptions with political instabilities, the attempts to introduce this provision in the bill died out.<sup>240</sup> Nonetheless, under the 2005 Ghanaian Copyright law, Section 64 requires that a fee should be paid for the use of Folklore and there is no restriction as to whether it is only foreign persons to pay such a fee. Ultimately, this is still a hindrance to local creativity through folklore usage and the lesson drawn from this is that foreign users of TCEs, as opposed to locals, would be more inclined to pay such a fee, provided the government incentivizes them to do so, since foreign parties have no attachment to the cultural heritage. Such incentives can include giving a larger share of royalties to the foreign party.

(e) Promotion of tradition-based creativity and innovation as ingredients of sustainable economic development.

(i) Model laws and Regional Agreements

Section 17 of the 1976 Tunis Model law as well as Article 59 (Annex. VII) and Title II: Article 95 of the Bangui Agreement, provide for promotion of creativity and innovation with a view towards sustainable economic development.

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<sup>239</sup> Paul Kuruk, supra note 61 at p. 38, citing Andrew Ofoe Amegatcher, Ghanaian Law of Copyright 23 (1996) at p.22.

<sup>240</sup> John Collins, *Copyright, Folklore and Music Piracy in Ghana*, Published 2006 by Critical Arts: A Journal of South-North Cultural and Media Studies Culture, Communication and Media Studies, (ed. Kyan Tomaselli), Howard College Campus, University of KwaZulu-Natal, King George V Ave, Durban, 4001 2006(1). Based on a talk at a Copyright Seminar for the Graduate Studies Dept. of Kwa Zulu-Natal, University organized by Prof. Kyan Tomaselli in May 2004. See:

[https://www.academia.edu/4481847/JOHN\\_COLLINS\\_S.AFRICAN\\_COMMUNICATION\\_and\\_MEDIA\\_STUDIES\\_2006.\\_Copyright\\_Folklore\\_and\\_Music\\_Piracy\\_in\\_Ghana](https://www.academia.edu/4481847/JOHN_COLLINS_S.AFRICAN_COMMUNICATION_and_MEDIA_STUDIES_2006._Copyright_Folklore_and_Music_Piracy_in_Ghana) (accessed January 15, 2014).

(ii) National laws

Sections 63 and 64 of the Ghanaian Copyright Act, as well as Article 84 of the Benin Copyright legislation provide for creativity through TCEs as a way of fostering economic development.

It is noteworthy that the above regulatory frameworks recognize the potential for economic growth through TCEs and choose to cement this potential through regulation. In order to establish a sense of order as to how TCEs can be milked of their economic potential, the suggestion is that a provision to this effect should be placed in a sui generis legislation. A well-organized system of utilizing TCEs therefore also accounts towards protection of TCEs.

(f) General needs or interests of Indigenous Communities

(i) Model laws and Regional Agreements

Sections 15 and 17 of the 1976 Tunis Model law and Article 59 (Annex. VII) of the Bangui Agreement cater for the general needs of the ethnic communities.

(ii) National Laws

Section 80 of the Benin Copyright law protects rights related to cultural expressions as a way of serving the interests of indigenous communities.

It is apparent that provisions that specifically address the needs or interests of indigenous communities are not spread out across the different frameworks. Protection of TCEs requires provisions that in one way or the other directly touch on the interests of the indigenous communities. This will encourage them to be more open about their cultures as well as exercise creativity in utilizing them with developmental objectives.

(g) The Right of attribution

(i) Model laws and Regional Agreements

Section 5 of the 1976 Tunis Model law and Section 5 of the 1982 WIPO/UNESCO Model law provide for moral rights or the right of attribution in the use of TCEs.

(ii) National laws

Section 31(3) of the Nigerian Copyright law, Article 83 of the Benin Copyright law and Article 112 of Mali Copyright legislation all provide for the right of attribution.

It is pertinent for regulations on TCE protection to have provision for rights of attribution. This is on the basis of the modern reach of cultural expressions, particularly musical and dance expressions. Where a foreigner negotiates and pays for a license to use the TCEs, the custodial community earns both royalties as well as recognition of originality by virtue of the exercise of moral rights. Furthermore, if it is a community member that uses the TCEs, the most that such a member can give to the community, is a recognition of their moral rights to the TCE. Either way, the folklore is commoditized and branded through the community. The community ultimately attracts outside attention inclusive of within the tourism industry. Protection of TCEs therefore needs to extend to the right of attribution of source communities because this also leads to socio-economic development.

(h) Criminal Sanctions and Civil Remedies

(i) Model laws and Regional Agreements

The 1976 Tunis Model law (sec. 15); The 1982 WIPO/UNESCO Model law; The Bangui Agreement (Title II: Art. 96); and the Swakopmund Protocol (Section 23).

(ii) National laws

Article 51 of the law of Tunisia; sections 32 and 33 of the Copyright law of Nigeria; section 44 of the Copyright law of Ghana; and, Articles 85, 97 and 118 of the Copyright law of Benin, have provisions for civil remedies and criminal sanctions for violating TCE usage.

The claim here is that there can never be full protection of any given resources unless there is an effective means of enforcement against abuse. As such, an adequate sui generis regulatory framework on the use of TCEs should have provisions for enforcement of rights that have been abused. In most instances, indigenous peoples do not have the capacity to institute a legal claim against abuse of their property rights in TCEs. As I demonstrate in the next principle of protection below, my follow-up claim is that the most effective enforcer of property rights in TCEs is a government agency that is legally mandated for that purpose.

(i) Provision for a Government Cultural Authority

(i) Model laws and Regional Agreements

Sections 6 and 7 of the Tunis Model law; Section 10 of the 1982 WIPO/UNESCO Model law; Article 60 (Annex. VII) of the Bangui Agreement; and Sections 3 and 22 of the Swakopmund Protocol, have provisions for the creation of a Government Institution to manage and supervise the use of TCEs.

(ii) National laws

Article 7 of the Tunisia law; Section 34 of the Nigeria Copyright law; Section 59 of the Ghanaian Copyright law; and Article 12 of the Benin Copyright law, provide for the establishment of a National office to oversee matters pertaining to administration, monitoring and promotion of TCEs, among others.

It is advantageous to place the protection of TCEs in the hands of government agencies due to the networking opportunities, financial and technical resources that they have at their disposal.

However, effective protection of TCEs requires partnership between government agencies and the TCE Custodians that are better informed of their cultural expressions.

Government agencies also play a key role as enforcer of property rights in TCEs where communities are incapacitated from instituting claims against TCE abuse. A case in point, which falls outside of traditional musical and dance expressions, involved the use of the *Kikoi*, a well-known fabric in

Kenya that is part of the country's cultural diversity. In 2008, a British Company tried to register "Kikoy" (derived from *Kikoi*) as its trademark. Ultimately, such registration would have given the company the sole commercial rights to the term "Kikoy" and would have infringed on the free expression of the Kikoi – a Kiswahili word for the distinctive colorful wrappings worn by men and women all over Eastern Africa. The registration was successfully opposed by Traidcraft Exchange and a law firm (Watson Burton) acting on behalf of the Government of Kenya through the Kenya Industrial Property Institute (KIPI)<sup>241</sup>. The *Copyright Act, Cap. 130* of Kenya provides that any person who wishes to use TCEs for commercial purpose should obtain permission from the Attorney General<sup>242</sup>. This therefore implies that the Kenyan Government, represented by the Attorney General, is the custodian of TCEs in Kenya on behalf of its indigenous societies.

It therefore follows that Government agencies are a necessary partner in TCE protection. However, it is my claim that where Government agencies overstep their authority, the regulatory mechanism becomes diluted which renders protection of TCEs ineffective. A further explanation of this risk factor, involves an analysis of the South Africa Intellectual Property Laws Amendment Act, No. 28 of 2013 (IPLAA). The law, which is still in its infant stage, was enacted in February 2014 after years of debate which included an unsuccessful proposal of an alternative private members' bill that conformed to WIPO principles<sup>243</sup>.

IPLAA amends various South African I.P legislations through incorporating indigenous knowledge into the existing I.P system and the establishment of a National Trust Fund to handle all matters pertaining to TK and TCEs<sup>244</sup>.

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<sup>241</sup> See: Vnzomo: The Intellectual Property tale of how Kenya almost lost the Kikoi fabric, IP Kenya: Intellectual Property from a Kenyan Perspective, [www.ipkenya.wordpress.com/2012/01/16](http://www.ipkenya.wordpress.com/2012/01/16) - accessed April 18, 2012.

<sup>242</sup> Section 49(d)

<sup>243</sup> In the run down to the legislation, Dr. Willmott James, Federal Chairperson of the Democratic Alliance, submitted an alternative WIPO-aligned legislative approach, *the Protection of Traditional Knowledge Bill*, as a Private Member's Bill. The Bill failed to garner the required support.

<sup>244</sup> Republic of South Africa: Government Gazette no. 37148 of 10 December 2013.

The Act gives peculiar provisions on retrospective payment of royalties<sup>245</sup>. It creates the duty to pay royalties to the National Trust Fund for something that was not recognized as a traditional work or traditional design prior to the commencement of the Act, but which has been given due recognition under the Act. Calculation of such royalties is going to be cumbersome, if not contested.

There are disadvantages that flow from too much government involvement. For instance, Indigenous communities in South Africa do not seem to have a direct input as to how the royalties from the use of their TCES are utilized under the Act. According to clause 28I, they have to go through a National Trust set up by the Government (National Trust for Indigenous Knowledge) which is responsible for promotion and preservation of indigenous cultural expressions and knowledge.

There is therefore no guarantee that all the interests of the community as to how they are to benefit from their cultural heritage, will be addressed if the government has overall control with regards to utilization of their TCE royalties. Dr. Owen Dean, Chairman of Intellectual Property Law at the University of Stellenbosch, argues that *“There is nothing in the law that requires the government to actually transfer the license revenue to the rights holders.”* This is clearly evident in the fact that the law creates a lot of red tape in the enjoyment of hitherto cultural products. It establishes different agencies to handle all measure of TCE and TK usage. Dr. Dean adds that: *“The law turns indigenous knowledge into a national resource, with the government managing the rights.”*<sup>246</sup> Dr. Willmott James, the author of the alternative private members’ Bill, adds his criticism to the fray by stating that: *“The requirements for protection and licensing are too burdensome for traditional communities to benefit.”*<sup>247</sup>

It is also noteworthy that the excessive control enjoyed by the Government with regard to the usage of TCES, displays a lack of respect for the right of self-determination by the South African

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<sup>245</sup> Clauses: 28G(3) and 53F(2)(a).

<sup>246</sup> Jon Tullet: *Cultural IP now protected by law*, ITWeb Software, Johannesburg, 11 February 2014. See: <http://www.itweb.co.za/?id=70772:Cultural-IP-now-protected-by-law> (accessed February 26, 2014).

<sup>247</sup> *Id.*

Indigenous communities as enshrined in Article 31.1 of the 2007 United Nations Declaration on the Rights of Indigenous Peoples. This article provides for the right of Indigenous peoples to “*maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions*”.

(j) Provisions for cross-border TCEs.

(i) Regional Agreements.

Section 24 of the Swakopmund Protocol provides for situations in which the TCEs of cross-border ethnic communities can be protected. These include matters pertaining to reciprocal protection among the neighboring States as well as referring concurrent claims to the African Regional Intellectual Property Organization (ARIPO) for resolution.

The Swakopmund Protocol, which falls within the framework of the African Regional Intellectual Property Organization (ARIPO), came into force on January 1, 2012<sup>248</sup>. As such, its influence over the 18 member countries of ARIPO is rather limited<sup>249</sup>. This translates into an absence of a guarantee over new laws that will provide for reciprocal protection of TCEs among neighboring States in Africa. Regional agreements such as the Swakopmund Protocol have minimal guiding power over developing countries in Africa. This is because the States are normally financially and technically incapacitated from following up on effective measures presented by the Regional Agreements in improving their domestic legislations.

Mercy Kainobwiso opines that International or Regional Agreements can only be a guide but not the solution to the quest of ethnic communities for TCE regulation. She argues that the kind of

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<sup>248</sup> See: Intellectual Property Perspectives with Richard Pasipanodya, *ARIPO traditional knowledge and folklore mandates*, The Zimbabwe Independent, March 1, 2013 <http://www.theindependent.co.zw/2013/03/01/aripo-traditional-knowledge-and-folklore-mandates/> (last accessed April 26, 2013).

<sup>249</sup> The ARIPO members are Botswana, the Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Liberia, Rwanda, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. There are also 12 potential members that have observer status in meetings organized by ARIPO. See: <http://www.aripo.org/index.php/about-aripo/membership-memberstate> (last accessed April 26, 2013).



framework that springs from such instruments can only provide limited guidance on regulation because of the element of different cultures and institutions worldwide. She, however, credits the Protocol as a smartly crafted document that gives proper credence to TCEs by virtue of being an African Instrument that was prepared by Africans for Africans<sup>250</sup>.

This study was not able to establish any other regulatory frameworks, both regional and domestic, that provide for trans-border folklore. However, it should be considered that protection of TCEs can be more effective if it includes a harmonious arrangement with neighboring States in which cross-border communities are located. Protection across borders should also encompass situations in which different states have equally reliable enforcement mechanisms over TCE usage. As such, improvement of TCE protection within different countries is essential in order to establish a form of harmonious development through their cultural roots. As Dr. Poku Adusei argues: “*How many countries protect folklore in their laws beyond Africa. Since Copyright protection and enforcement is territorial, how can a violation in countries with no provisions on folklore be vindicated? This is a major challenge to any benefits that may be anticipated.*”<sup>251</sup>

### 3.3 Can customary law mechanisms regulate TCE usage?

In the previous part of the chapter, I have analyzed literature on TCE regulation that argues for a biased approach in favor of a sui generis system of protection over and above an I.P system. I have also evaluated different frameworks that address TCE regulation within the lens of what I coined out as principles of protection. In this part, I address the question of the relevance of customary law as a means through which TCEs can be protected. The basis for this evaluation is that customary law and TCE are both rooted in culture and before many ethnic communities got a taste of statutory law, their very means of existence was defined by customary law.

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<sup>250</sup> See note 192 supra.

<sup>251</sup> Interview on February 13, 2014 with Dr. Poku Adusei, Senior Lecturer, Faculty of Law, University of Ghana.

The claim I make in this part of the chapter, is that as cultural expressions continue to evolve and take up a commoditized nature, the place of customary law in the ordering of TCEs continues to diminish. The principles that form the basis of customary law in the regulation of TCE usage, thus have no place in the modern world in which property rights in TCEs compete alongside property rights in Intellectual Property. I will demonstrate my claim by arguing that in the African perspective, TCEs have never been structured through a customary law system and as such, there is hardly any customary law to refer to in the governance of TCEs. I particularly support my claim through interview responses drawn from TCE stakeholders in Uganda as well as theoretical arguments fronted from secondary sources.

From the very onset of the debate as to the relevancy of customary law, it should be noted that within the African setting, customary law hardly had a strong presence in the structuring of TCEs. One reason for this is that TCEs have never been elaborately structured in traditional society. Secondly, the organizing of TCE performances in ethnic communities is a class system based on totems and mutual respect among community members. It is essentially this concept that structures the way customary law acts in the regulation of TCEs. In Paul Kuruk's analysis of the protection of folklore through customary law, he asserts that "*such rights are recognized under social criteria depending upon the degree of the kinship, age, sex, title or role of individuals in the society, and are enforced either by sanctions based on common interests or a system of magical or religious beliefs.*"<sup>252</sup> In this modern day and age, social interaction and migrations among communities have contributed to the saturation of most cultural values. Inevitably, this has also affected the class systems to the extent that they are not as clearly defined or as deeply rooted as they were generations ago. Ultimately, this has also negatively affected the relevance of customary law as a determinant of how TCEs can be used and thus my claim is that aspects of customary law, such as mutual respect of boundaries in cultural expressions, do not carry as much weight today as they used to.

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<sup>252</sup> Paul Kuruk, *supra* note 61 at p.12.

My empirical findings also lean to the same conclusion. A compilation of my interview findings on this issue helped to shape my analysis. Dick Kawooya, for instance, reasons that: “*customary laws don’t necessarily address ownership but rights, obligations, responsibilities, duties or privileges assigned to individuals or groups like clans in the community. Protection, as we know it, presumes ‘ownership’. That makes customary laws difficult to transfer to ‘protection of TK’.*”<sup>253</sup> Augustine Mutumba, a traditional leader and clan head in the Buganda community, asserts that: “*Customary law is no longer adequate in protection of traditional knowledge in a society that is currently used to a more coercive modern law. However, customary law can be used as a stepping stone to building a modern customary-inclusive law.*” Charles Batambuze also argues against the relevance of customary law by posing a rhetoric question: “*I don’t know how enforceable customary law is in a commercial sense, because we are talking about commerce. So, if people are going to exchange rights for money, how would, or what would be the implication of that on customary law?*”<sup>254</sup> The interview subjects thus deem customary law as entirely archaic and ill-fitting in the modern day and age that has witnessed an evolution in TCEs as well as the way they are appreciated.

James Wasula, a veteran in enforcement of Copyrights in Uganda, suggests that by its very nature, customary law has no place in the protection of TCEs today. He presents two reasons for his claim. First, that where customary is not in harmony with written law, it is pushed aside – as such, it lacks effectiveness as an enforcement mechanism. Secondly, there is a challenge of modernity and the digital era in which customary law does not fit in. He thus advises that we can probably only pick out the good in customary law and use it to develop a new law and in codifying it, we bring it into adequately addressing the various challenges. However, this proposal also does not seem practical because from a historical perspective, there was never a sound doctrine that regulated TCEs under customary law. Arthur Mpeirwe also argues that customary law is of no relevance today and would instead lead us into meandering and losing our objective of protection. This is because, as he asserts, historically, customary law did not develop in the entertainment sector because nobody expected to

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<sup>253</sup> Interview with Dr. Dick Kawooya (Assistant Professor, School of Library & Information Science, University of South Carolina) – July 31 2013.

<sup>254</sup> Interviews with Augustine Mutumba, Clan head in the Buganda Community, interviewed November 26, 2013; and, Charles Batambuze, (C.E.O – National Book Trust of Uganda – a Collecting Society for Book Publishers in Uganda) – interviewed July 7, 2013

benefit materially from music and dance performances.<sup>255</sup> Mwangutsya Ndebesa, a History Professor and Traditional elder from the Ankole Community in Western Uganda, perceives customary law as the morals or values of a given society that govern a relationship amongst individuals and between different communities. He also refers to them as the “*dos and don’ts*” or “*beliefs that were written in the hearts of the people*”. He asserts that although such restrictions existed in the past, in what has come to be termed today as customary law, there was no regulation for traditional intellectual property. As such, he avers that customary law cannot be relied upon in the regulation of TCEs.<sup>256</sup>

It is therefore appreciated that although social norms used to be effective in controlling the use of traditional musical expressions in the past, this is not the case anymore. The reasons for this are tied to the re-ordering of society in which intermarriages between members of different ethnicities, group migrations from one region to another, and Statutory legal reforms which marginalize customary law, have broken up the homogeneity within ethnic communities and changed the nature in which such societies used to adhere to their Cultural expressions. Community members have thus been exposed to different cultural practices which have gradually led to a dilution of cultural values that, hitherto, strongly guarded these social norms.

The nature of TCEs and their usage historically, falls squarely into the discussion of property rights by Elinor Ostrom and others in which they evaluate the use of what they term as Common Pool Resources (CPRs)<sup>257</sup>. The authors refer to CPRs as resource systems regardless of the property rights involved. They go on to state that: “*When resource users interact without the benefit of effective rules limiting access and defining rights and duties, substantial free-riding in two forms is likely: overuse without concern for the*

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<sup>255</sup> Interviews with James Wasula, C.E.O of Uganda Performing Rights Society – A Copyright Collecting Society in Uganda; and Arthur Mpeirwe, I.P Law Attorney (Partner – Mpeirwe & Co. Advocates, Uganda) (interviewed July 23, 2013)

<sup>256</sup> Mwangutsya Ndebesa interview supra note 3.

<sup>257</sup> Elinor Ostrom, Joanna Burger, Christopher B. Field, Richard B. Norgaard and David Policansky, *Revisiting the Commons: Local Lessons, Global Challenges*, Science 284, 278 (1999). See: [http://faculty.bennington.edu/~kwoods/classes/global%20change/global\\_2012/readings/Ostrom%20et%20al.%20-%201999%20-%20Revisiting%20the%20commons%20local%20lessons,%20global%20chal.pdf](http://faculty.bennington.edu/~kwoods/classes/global%20change/global_2012/readings/Ostrom%20et%20al.%20-%201999%20-%20Revisiting%20the%20commons%20local%20lessons,%20global%20chal.pdf) (last accessed March 24, 2014).

*negative effects on others, and a lack of contributed resources for maintaining and improving the CPR itself.*<sup>258</sup> One convenient example given by Elinor Ostrom *et al* for their claim over misuse of CPRs, is the marine ecosystems. They suggest that use by one individual can reduce the quantity or quality available to others, and that use by others negatively affects the attribute to the resource.<sup>259</sup> A practical portrayal of this example is applicable to the fishing of lobsters and shrimp in the Pensacola area in the Gulf of Mexico.

The take-back from the CPRs thesis above is that TCE usage in the past was perceived customarily as a common pool that lacked restrictions. The homogenous nature of TCE usage within the Communities that had limited to inexistent communication with the outside world, meant that the resources from their TCEs were well utilized to fit within the TCE purpose. For instance, where traditional musical expressions were utilized to announce the birth of a child in the royal family or to announce the death of an eminent member of the community, all the community members were able to discern this message from hearing the music or playing of drums. However, as the close-knit cultural norms in the communities started disintegrating due to, *inter-alia*, migrations and intermarriages, the need for effective rules in the utilization of TCEs has gradually become more apparent. This is either due to over-use of TCEs by some community members or foreign persons with disregard to the cultural values attached. This supports the claim in this study on two fronts: The first is the absence and irrelevance of customary law to prevent or control the misuse of TCEs as a Common Pool Resource, and the second, is the need for a sui generis mechanism that can define the rights and duties imbedded in TCEs as well as create restrictive use of the collective resources in TCEs. This is with a view towards protecting the cultural values and quality of the TCEs used.

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<sup>258</sup> *Id.*, at p. 279.

<sup>259</sup> *Id.*

Paul Asiimwe, however, tilts the argument slightly towards favoring customary law. He believes that customary law has a favorable role to play in as long as it is not arbitrary or manifestly offensive.<sup>260</sup> The argument here is that if there was homogeneity between Customary law and statutory law in TCE usage, then customary law would be perceived as essential in TCE regulation. Nonetheless, such regulatory uniformity is difficult to place into context where customary law has historically given a vague perception as to how TCEs are managed. As such, the characteristic nature of customary law with respect to TCEs undermines its relevance.

These perceptions are all drawn together with our previous analysis of International and regional instruments in making the assertion that the obligation is upon individual States to establish policy and legislative structures that protect the use of their TCEs. In the same vein, it is for individual States to verify the extent at which customary law can be integrated, through codification, with statutory law. Nonetheless, as I have demonstrated through my claim, customary law, on its own, cannot regulate the use of TCEs.

Having analyzed the principles to consider for an adequate sui generis regulation of TCEs, as well as looked at the lack of relevancy in customary law as a regulatory tool, the next part of the chapter considers empirical findings on regulation and enforcement mechanisms for TCEs in Uganda.

### 3.4 Exploring regulation and enforcement mechanisms for TCEs in Uganda

Members of ethnic communities, particularly in largely ethnically diversified developing countries like Uganda, have benefitted from TCEs for generations without restriction and without claim for recognition or benefit. As such, the question as to whether regulation is the most viable approach to take in protecting their cultural heritage, is one that I sought out to explore in my field studies focusing on Uganda as a case study. In this last part of the chapter, I provide empirical findings on the issue as to whether it is feasible to regulate the use of TCEs, given their openness and socio-

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<sup>260</sup> Interview with Paul Asiimwe, Intellectual Property practicing Attorney (Partner - Sipi Law Associates, Uganda) and I.P Policy maker (July 4, 2013)

economic significance. I show that the majority of interview respondents, particularly I.P professionals such as legal practitioners and policy makers, are opposed to the regulation of TCEs. I give general categorizations to my findings as for and against regulation with reasons for the opinions. On the basis of my empirical findings, my claim is that the concerns of the pro and anti-regulation subjects can be combined in establishing regulatory mechanisms over TCEs. We cannot afford to utilize TCEs for development without a regulatory system to provide a sense of order. At the same time, we need to address concerns of those who are against regulation by establishing a framework that does not stifle the free enjoyment of culture. This claim is substantiated by empirical findings from survey responses on key questions related to the management of TCEs.

The perspectives on the regulation of TCE usage generated two distinctive outcomes: those who favored regulation with set bench marks; and those who were opposed to regulating TCEs but favored regulating the spin-off from TCEs.

#### a) Pro-regulation

There is an assumption that regulation of TCE usage can generate some form of sensibility into the management of TCEs by the custodians as well as cementing their control against erosion of cultural values by the users. Understandably, these sentiments were expressed by some of the traditional elders interviewed<sup>261</sup>. These views from this cluster of subjects is not surprising considering that they all resent the way in which cultural values are constantly abused by those that appropriate TCEs without a concern for the deep-rooted messages in the TCEs. It is however noteworthy that their basis for regulation is not focused on a claim for royalties that may be due to the community as a result of TCE usage, but rather on the loss of cultural values attached to the TCEs.

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<sup>261</sup> Of the six traditional elders interviewed, three of them – from the Buganda Community (Andrew Benon Kibuuka, Augustine Mutumba and Aloysius Matovu Joy) were in favor of regulating the usage of TCEs. Thirteen (13) subjects were in favor of regulation, while Fifteen (15) subjects were against it. However, very few responses had a clear cut *Yes* or *No* position but tended to sway to different sides of the opinion. Hence, these survey results cannot be properly evaluated on a weighing scale.

Other reasons given in support of regulating TCE usage are as follows:

- i. In any area in which there is economic value, the State has to come in to regulate the activities around the use of traditional knowledge generally with a view towards creating more wealth for the communities.<sup>262</sup>
- ii. Rather than destroy culture, regulation of TCEs will actually enhance culture. The law is coming in to create the “don’ts”. The law can therefore be used to establish recognition of TCEs, tying them to particular communities, and place a mechanism on how the traditional institutions can benefit from them.<sup>263</sup>
- iii. Establishing a law would help to maintain standards and quality in the music industry, inclusive of work pertaining from TCEs. This has to go hand in hand with having established structures that are well defined<sup>264</sup>.

Another response that leaned in favor of regulation was more specific as to what the regulation should entail as opposed to advocating for blanket regulation. Milton Wabyona<sup>265</sup> is in favor of regulation. However, he clarifies that no one has the capacity to regulate culture. What can be regulated, in his view, is the outcome of culture. He refers to this as “*the flows that come out of culture.*” This is similar to having a law that stipulates for the don’ts as highlighted above. This goes back to the issue raised earlier about the principle focus of the proponents for regulation, which is respect for cultural values in the appropriation of TCEs. Wabyona also suggests that by regulating the outflows, the State is able to come up with a mechanism of taxing the proceeds from TCE-related musical works. However, as already discussed, our findings show that taxation of TCE usage is not a viable measure to take and as such, should not be a motivation for regulation.

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<sup>262</sup> Interview with Charles Batambuze, see note 254 supra.

<sup>263</sup> Interview with Mercy Kainobwiso, supra note 192.

<sup>264</sup> Interview with Isaac Mulindwa, Proprietor of Mulin Group. This is a conglomerate of companies inclusive of companies in the entertainment industry such as PAM Awards, Club Silk, HOT 100 fm station and many others. He was interviewed on July 22, 2013; and, interview with Government official, Ministry of Gender – preferred anonymity; Arthur Mpeirwe interview, see note 255 supra; and James Wasula, supra note 255, are all in favor of a sui generis legislation.

<sup>265</sup> Supra note 15.



The issue of enforcement did not generate a significant proportion of responses. Having established that Benin utilizes its Collective Management Organizations in the enforcement of Folklore, the question was posed as to whether the same principle can be applied in Uganda. However, Collective Management Organizations (CMOs) were generally not viewed by the majority of interviewees as a viable means of enforcing the rights of TCE Custodians in Uganda. One proponent for the use of CMOs as watch dogs for ethnic communities, was of the view that since traditional music is played in public places and by media stations, CMOs can come in to help exercise the rights of TCEs in the same places and mediums<sup>266</sup>. However, placing this in a practical context would reveal the difficult task involved. This is because CMOs deal with a membership of individuals. This therefore means that ethnic communities would have to be registered at an institutional level so as to acquire legal status before they can seek the services of CMOs in the protection of their TCE interests<sup>267</sup>. It is apparent therefore that if regulation of the outcomes is to be articulated clearly within a sui generis form of legislation, the avenues for enforcement also need to be given clarity.

b) Anti-regulation

Professor John Jean Barya<sup>268</sup> summarizes the common sentiments expressed by those opposed to the regulation of TCEs. He states:

*“I doubt whether you need a law because culture is something that is part of people’s daily lives. I don’t think that we should go to the extent of regulating this kind of thing. Regulation will actually kill initiatives. You cannot bureaucratize people’s day to day lives through law. You don’t need a new law. But if you can recognize in one way or the other, then you don’t really need a detailed regulatory framework to deal with this.”*

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<sup>266</sup> This was a suggestion by Charles Batambuze, see interview, note 254 supra.

<sup>267</sup> In the interview with James Wasula, the C.E.O of the Ugandan CMO in charge of protecting and enforcing the rights of Musicians in Uganda – note 255 supra, he was opposed to relying on CMOs to enforce the rights of TCE Custodians. He suggested that the Office of the Registrar General would be better equipped to handle such responsibilities. However, Juliet Nassuna, who works with the Office of the Registrar General as a Director of the Intellectual Property Department, believes that CMOs can manage the interests of TCE Custodians in as long as the rapporteur is there.

<sup>268</sup> Professor John Jean Barya is a Professor of Law at Makerere University. He is also engaged in private legal practice as Senior Partner in the law firm of M/s Barya, Byamugisha and Company Advocates in Kampala, Uganda. He was interviewed on July 26, 2013 in his capacity as a Traditional Elder and Legal Secretary of Banyankole Cultural Foundation, a private body that oversees cultural interests of the Ankole Ethnic community.

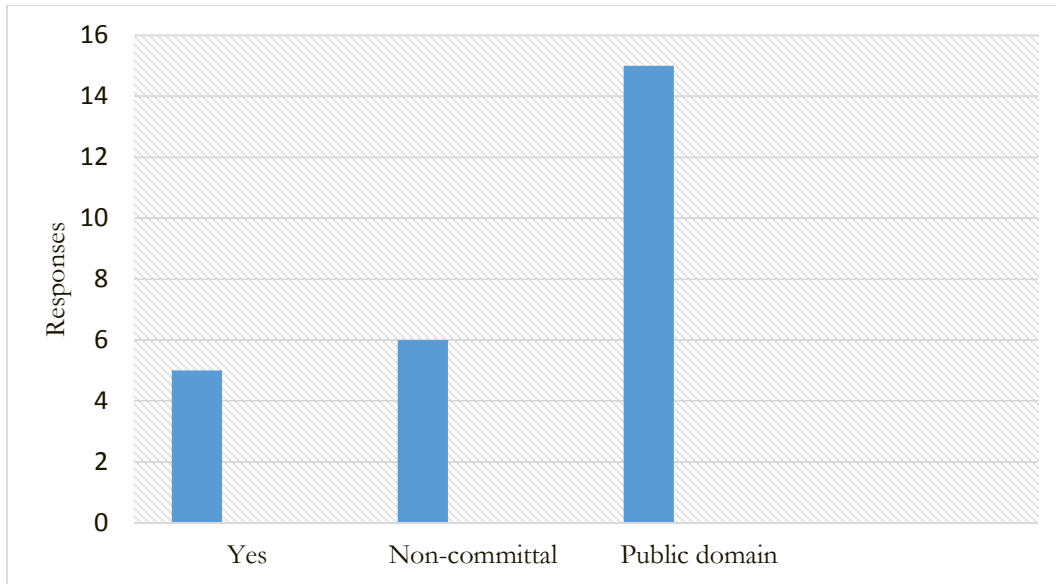
This sentiment is regardless of the fact that Professor Barya, and most of the others who were opposed to regulation, are otherwise in favor of ethnic communities being given attribution for the originality of TCEs by the users, as well as a percentage of the royalties earned from derivative works of TCEs. As already pointed out, culture is rooted in the people. This explains the common view that TCEs should not be regulated because regulation tends to restrict the freedom that comes with common ownership<sup>269</sup>. That same sense of ownership is the basis for the claim to the right of attribution as well as payment of royalties.

The right of attribution is aligned with the issue as to whether permission should be granted before one can use TCEs from an ethnic community. I therefore undertook a survey to determine stakeholder responses on whether permission is a necessary pre-requisite to TCE usage. On this question, out of twenty-six subjects interviewed, five of them felt that permission was necessary, provided that there was a guiding structure in place. Of these five subjects, three are Intellectual Property lawyers, one is engaged in a Collective Management Organization and one is a Music Promoter. Six of the subjects were non-committal as to whether permission was necessary or not. On the whole, they seemed undecided as to whether in saying 'Yes' to the question, they would be acknowledging the existence of some kind of authority over TCEs, or in saying 'No' they would be acknowledging that there is disorganization in such use. Their inclination appeared as a suggestion that there was no principal on which to base their response to the question. These six subjects were also a mixed breed of persons: Two of the subjects are Government employees; another two are Intellectual Property lawyers; one is employed by a Collective Management Organization and; the last one is a Musician/Song writer/Music Producer. The majority of survey responses totaling fifteen in number, were to the effect that there should not be any need for permission whatsoever on the basis of the fact that TCEs are in the public domain.

A graphical representation of this study finding is depicted in the figure below:

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<sup>269</sup> Fifteen of the twenty-eight subjects interviewed, were against any regulation of TCEs, under the common argument that regulation stifles the growth of culture.



**Figure 2:** Responses on the need for consent before using TCEs.

It is interesting to note different responses from the various clusters having spread out in the categories of *Yes*, *No (Public domain)* and *May-be (non-committal)* over the issue of obtaining permission. The implication I drew out of this is that the cluster within which a subject falls, does not have any influence on his or her thought pattern as to whether the issue of consent is significant or not in the use of TCEs. However, this could also be because one’s cultural identity over-rides the cluster that the subject belongs to. For instance, regardless of whether the subject interviewed was a lawyer, traditional elder or musician, he or she was first and foremost a Ugandan belonging to a particular ethnic community before assuming another status. Therefore considering that all the subjects interviewed were at least above twenty-five years of age, they all had a fair understanding of their cultures and could attest to how they would want to use the TCEs attributed to them.

However, consent prior to using TCEs takes a whole new dimension when the person seeking permission is not a Ugandan. For instance, although Dick Kawooya<sup>270</sup> is opposed to a Ugandan music artist having to seek permission before making use of a TCE, he reasons that: “*A foreigner, say*

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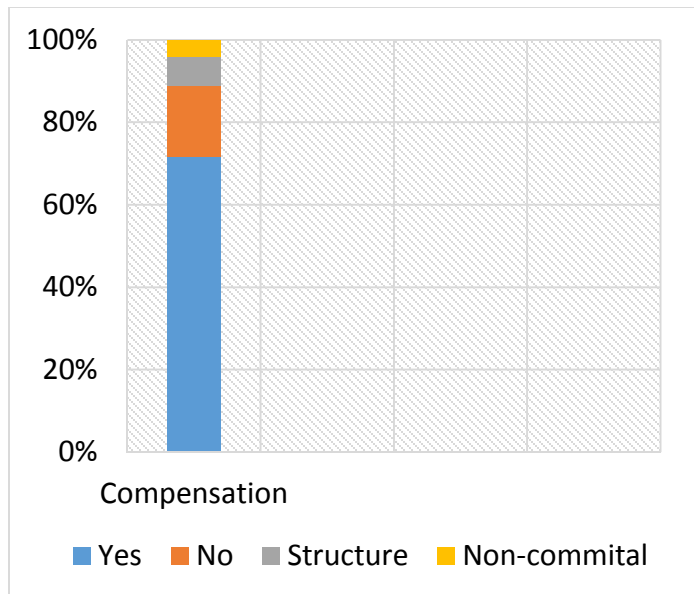
<sup>270</sup> See note 253 supra – Interview with Associate Professor Dick Kawooya.

*from Europe coming to Uganda, should definitely be subjected to some kind of scrutiny, not only for purposes of generating revenue, but most important - ensuring they are putting the traditional resources to good use.”* I would support this view on the basis of the fact that appropriation of TCEs transcends borders just as infringement of Intellectual Property Rights also transcends borders.

As such, the issue of permission is much more fundamental when looking at the International exposure of TCEs, something which the majority of subjects interviewed did not give any consideration in the survey. This is because the survey question was to the effect as to whether it was necessary to seek permission from ***someone of authority (either State Agent or a representative of an Indigenous community)*** – emphasis mine. The inclusion of the ‘*State Agent?*’ option was to gauge whether the responses would simply be based on cultural sentiments influencing the right to the use of cultural expressions or whether they would also factor in the need for State involvement in managing such use.

On that basis, although most of the subjects were opposed to the idea of obtaining permission before use, the majority of these same subjects were in favor of compensating communities for the use of TCEs. The variance was in the nature of the compensation. As such, most of the interviewees (twenty in number out of twenty eight subjects) were in favor of compensating or acknowledging ethnic communities for the use of their TCEs; five of the interviewees were against compensation, though some of them in this category settled for some form of attribution or an optional token of appreciation; two of the interviewees preferred compensation only as conditioned by a structure or guiding policy in place. The least number of the subjects (one interviewee) had no response on this issue.

An illustration of this finding is in the figure below:



**Figure 3:** Illustration of responses as to whether ethnic communities are entitled to compensation for TCE usage.

The findings on the need for permission before use (Figure 2) appear contradictory to the findings on the need for compensation after use (Figure 3). This, understandably, can provoke questions as to the sincerity of the research findings. However, a deeper scrutiny reveals that there is no such contradiction. This is because compensation for TCE usage does not directly equate to monetary compensation but also emphasizes community entitlement to recognition of their property rights in TCEs through respect of their rights of attribution. This is mainly where a fellow community member is involved in the use of TCEs in the derivative musical expression. This claim for entitlement only stretches to a claim for commercial entitlement where foreign users of the TCEs are involved. In the western concept of Intellectual Property Rights, permission is a property right granted to the individual or joint authors, hence the requirement of monetary compensation prior to the grant of permission. However, since property rights in TCEs are communal in nature, the regulatory mechanism for structuring provisions on permission and monetary compensation is more realistic if the party interested in the use of the TCE is foreign to the community as opposed to a community member. Otherwise, where a fellow community member is involved in TCE usage, the right of attribution to the Community is the most effective form of compensation that can be given.

The common basis for the opposition to regulation of TCEs is thus because they fall within the parameters of culture. As such, since the cultural identity is intertwined with ethnic communities in Uganda, regulating TCEs is interpreted as State interference with the way in which the communities handle themselves. The interviewees opposed to regulation commonly base their argument on the suggestion that since TCEs are a cultural issue, they do not require regulatory mechanisms to dictate their management. Rather, TCEs should be managed by the members of the communities who are the real stewards of culture. However, it should be noted that the majority of subjects interviewed were in favor of compensation for TCE usage, while a fair number of subjects also favored the need for permission before use of TCEs. Taking into account these considerations in the use of TCEs, requires the establishment of a sui generis legal framework in which indigenous peoples are equal participants in the management of their TCEs.

This is in line with Johanna Gibson's argument for the creation of a sui generis system which facilitates the community's legal and social capacity to "*regulate itself and develop through social and cultural differentiation unique to itself.*"<sup>271</sup> On the whole, what appeared apparent to me in the course of generating the responses on regulation, was that the pro and anti-regulation responses can be easily married. This is in the sense that since the pro-regulation subjects were more inclined towards having a legislative check on the outcomes of TCEs and not the TCEs themselves, then they are actually aligned with the interests of the anti-regulation subjects. Those opposed to regulation are also focused on leaving culture intact without any legislative controls, but do not mind having a guiding structure on how the outcomes of such culture can be utilized. This is where the Sui Generis system comes in. The focus, thus, would be on the creation of a unique operating system that is tailor-made to suit the interests of the specific communities involved.

### 3.5 Conclusion

This Chapter of the study has attempted to provide a detailed perspective on various consideration that touch on 'Protection' of TCEs through regulation. The analysis as to how different regulatory

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<sup>271</sup> Supra note 130 at p. 17.

frameworks from the global level to domestic level, have approached protection for TCEs, helps to expose the numerous challenges involved. It also highlights the fact that this is a matter of global concern and not just limited to particular jurisdictions. As such, the requirement of a harmonized regulatory system is also crucial.

Respect for and effective protection of Intellectual Property Rights are some of the bench marks on the basis of which developed countries have been able to build strong economies. It therefore follows that TCEs need to be appreciated as cultural or traditional intellectual property rights. Commodification and commercialization of TCEs therefore also requires ensuring that all the principles of protection evaluated in this chapter, are adequately covered in the regulatory frameworks. This is so as to smoothly engage in trade related aspects of TCEs. In the same vein, this will also significantly contribute to the strengthening of economies of the States and ethnic communities that possess these TCEs.

Grouping the regulatory frameworks under specific principles on protection helps to gauge their strengths and weaknesses. It also helps to draw out the most ideal frameworks to guide the structuring of domestic legislation on TCEs, where it is lacking or inadequate.

Although there are objections to the regulation of culture, it should be noted that Cultural expressions evolve over the years with every passing generation. To the most part, this evolution is engineered by the indigenous people themselves. However, constant interactions with persons that are foreign to cultures from ethnic communities poses a threat that affects the very roots of our cultural expressions. Although foreign uses of TCEs are inevitable, if these are not monitored or supervised under an orderly system, it could lead to a dilution or abuse of TCEs. It is therefore important to craft together a policy and legal regime that guides the relationship between outsiders and community members, in ways that cater for the mutual interests of all stakeholders as well as supports the free flow of culture.

It is therefore worthwhile to take note of how international, regional and domestic regulations on TCEs play out the relationship between the holders and users of TCEs without negatively affecting the cultural values imbedded as well as the development of such TCEs. The ever increasing use of TCEs makes their regulation a necessary evil. It should not be interpreted as regulation of culture, *per se*, but regulation of the way TCEs should be enjoyed. In proof of Friedrich Savigny's philosophy, the law is growing with the people. However, as is the case with any other regulation, there are challenges involved in coming up with legal principles on TCEs and it is difficult to satisfy the interests of all stakeholders.

There will always be differences in perceptions of the law on TCEs as good, bad or ugly. Nonetheless, one requires an in depth analysis of the perspectives of all stakeholders concerned so as to be able to trace their points of contention and ensure that in regulating cultural expressions, the various interests involved are sufficiently addressed. The overall claim made in this chapter is that it is only through an all-inclusive and well regulated TCE standard that developing countries can be able to achieve socio-economic development from proper utilization of their TCEs.



## CHAPTER FOUR

### Socio-Economic dynamics in Traditional Cultural Expressions: Where the past meets the future

*“Every man’s work, whether it be Literature, or Music, or Pictures, or Architecture, or anything else, is always a portrait of himself.”*

- Samuel Butler (1612-1680. British poet and Satirist)

*“After all, what is a folk song” Who owned it? It was just out there, like a wild horse or tract of virgin land on an unconquered continent. Fortune awaited the man bold enough to fill out the necessary forms and name himself as the composer . . .”*

- Rian Malan (South African writer)

#### Abstract

*Traditional Cultural Expressions (T.C.Es) today are struggling to hold on to the same meaning and purpose as they used to in past generations. Somehow, the European and North American spirit of individualism and material gain is gradually usurping the spirit of communal ownership, sharing of social benefits and protection of cultural values which are the tenets in TCEs. In a way, it is a clash of two intellectual systems: The old system, characterized by communal ownership and innovation in what can be termed as traditional intellectual property, met the societies in their spiritual, physical and emotional needs. There was no merit given to individual ownership and contractual considerations did not precede consumption of the expressions; the new system, in a way is also characterized by communal ownership. However this ownership is in the form of corporate entities and market forces that jealously protect their Intellectual Property against any unauthorized use. To them, economic interests surpass any other and are, in some respects, the only interests.*

*The connection between these two systems is established when the latter taps into information from the former to feed its ever-hungry knowledge and consumer base. The custodians of TCEs thus find themselves constantly having to gauge the economic benefits that accrue to Intellectual Property holders from the appropriation of their works. In their eyes, what was initially perceived as a cultural heritage is inevitably commoditized and perceived in terms of how it can be used to elevate the socio-economic conditions of the ethnic communities. This Chapter makes a case for how to harness TCEs in a manner that provides socio-economic development benefits to communities. It relies on a review of case studies and empirical findings in exploring the practical relevance of TCEs in socio-economic development, particularly in the African context. Using practical suggestions, it presents the claim that TCEs, in their original form as well as those that have been appropriated and given Intellectual Property protection, can be used to benefit and elevate ethnic communities at the socio-economic level.*

#### 4.0 Introduction

This Chapter draws from existing scholarly material, secondary empirical data, case studies and personal empirical findings to present a claim on the relevance of TCEs to socio-economic development. Various scholars have written on the subject of TCEs but, as the Chapter will show, finding direct evidence as to how TCEs can be used to improve on socio-economic conditions of ethnic communities is hard to come by and this makes the review of any literature on the subject a daunting task. That does not necessarily mean that there is no causation. As such, this Chapter serves to tease out a co-relation between TCEs and third parties that make use of such TCEs motivated by economic gain. My case studies also highlight examples in which different entities have appropriated TCEs, in some instances for selfish reasons and, in other instances, with the objective of transforming the source communities. The success stories with revelations of financial proceeds made from these appropriations provide the data input that this study relies on to argue the case for the socio-economic value ingrained in TCEs.

The layout of this Chapter is constituted in four parts. In the first part, I analyze scholarly material and case studies that highlight the linkage between TCEs and economic development. In this sense, I show how the attachment as a cultural heritage is being replaced by commodification and commercialization of TCEs. It is challenging enough to make a claim that TCEs have a role to play in socio-economic development without substantiating this with concrete evidence. The significance of this part of the Chapter, therefore, is the weight it brings into the overall claim over the TCE value system. I provide case studies as examples, with the purpose of provoking reader mindsets on whether ethnic communities are entitled to any of the proceeds from royalties accruing from derivative works. Notably, the examples show that where these communities are involved in or give consent to the usage of their TCEs, they do get to benefit from the proceeds. However, where appropriation is obtained without any form of cohesion with the appropriating parties, then there is no benefit whatsoever to the Communities. Worse still, there is a higher concern over the abuse of their cultural heritage in the latter scenario.

In the same part of the Chapter, I analyze empirical findings from field investigations that were conducted in Uganda, highlighting the linkage between TCEs and Socio-economic development. In

spite of the examples highlighted and the perspectives presented giving the linkage between TCEs and economic outcomes, developing countries have consistently fallen short of exploiting TCEs to the fullest level. In the second part, I address challenges faced by developing countries in establishing a direct measurement of socio-economic development through their TCEs. Relying on secondary data and perspectives drawn from interviews, I show how these challenges play out. In the third part of the chapter, I pose suggestions as to how the status quo can be altered to nurture a community and State benefit from TCEs. In this part, I present recommendations on effective management of TCEs drawn from a qualitative analysis and enquiry of existing data. It advances the concerns of the different stakeholders involved in the use of TCEs and suggests on ways in which there can be mutual benefit from commercialization of TCEs and a harmonization of stakeholder interests. The objective is to continue raising the profile of TCEs as an avenue for socio-economic development through practical means. The recommendations given highlight the establishment of a Government Cultural Authority to assist TCE holders in the management of TCEs; suggestions for practical ways in which there can be a preservation of cultural expressions; negotiated use of TCEs between interested stakeholders; proposals through which stakeholder partnerships can be sustainable; and, encouraging development of creative content through open local access to TCEs. In the final part of the Chapter, I make my conclusions.

#### 4.1 Commercialization and Commodification of TCEs

##### 4.1.1 The Vulnerability of Source Communities in the exploitation of their TCEs

In this section, I will start by highlighting reasons as to why there is inadequate scholarly work on the subject of commercialization and commodification of folkloric expressions. I show that the reasons as to why it is difficult to trace socio-economic benefits to TCEs are the same reasons as to why TCEs are easily misappropriated.

In analyzing the relationship between cultural expressions and economic outcomes, it is necessary to also consider the outcry that ethnic communities have over protection and respect of their cultural heritage. However, in tracing the sources of Intellectual property in these settings, it is naturally easier in the domain of Traditional Knowledge that is science-oriented as opposed to its subset of Traditional Cultural Expressions. Traditional Knowledge in the science realm is linked to Patent

rights in the same way that TCEs are linked to Copyrights, Trademarks and Geographical Indications. However, establishing a connection of TK to the Patent system is much easier because of the disclosure requirements involved in the patenting process that easily connect such tangible products to ingredients from the domain of TK. The same applies to TCEs in tangible property such as handicrafts and artefacts. In such cases, it is easier to make observations as to how these TCEs lead to positive economic output through the marketing industry. It is these very reasons as to why most scholarly work focuses on the domain of TK and tangible TCEs.

On the other hand, Copyright material appropriated from traditional musical expressions requires very minimal extra creativity to earn copyright protection. Most TCEs are orally passed on from one generation to another. As such, one only needs to place the TCE into a fixed form with or without little added forms of expression in order to claim copyright in the fixation. This is, naturally, to the chagrin of the custodial communities – that is, if they eventually discover the misappropriation of their property rights. The absence of fixation as well as the oral nature of most TCEs make it difficult for source communities to prove ownership and originality, especially in folklore. Mores so, this also simplifies misappropriation and makes it even harder to associate economic outcomes in such TCEs to any particular ethnic communities. It has also been argued that misappropriation can hamper cultural development of the source community. This is particularly in instances where the cultural values are strongly restrictive as to how or who should be involved in the practice of the TCE<sup>272</sup>. As such, socio-economic development from TCE usage is not as easily identifiable or traceable in any written material as it is with TK.

These reasons form the basis as to the focus of more literature on the economic relationship between TK and Patents, as well as tangible TCEs, as opposed to literature on folklore and Copyrights. As I will demonstrate below, there are related reasons as to the vulnerability of TCEs to constant misappropriation which ultimately make it difficult to adduce an accurate connection between TCEs and socio-economic development.

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<sup>272</sup> Supra note 62, at p. 105.

In *'Harnessing Traditional Knowledge and Genetic Resources for Local Development and Trade'*,<sup>273</sup> Graham Dutfield analyzes the relationship between TK and trade. He looks at the general role TK has been playing in areas of Research and Development (R&D), arts and crafts, and agricultural and forest products, contributing to international trade and boosting economic value everywhere else other than in the communities where such TK comes from.

He raises a fundamental point in asserting that in many traditional societies, cultural expressions such as handicrafts and artworks are not mass produced as a result of well-structured guidelines handed down over time from the ancestors. Rather, they are produced by individual artisans and artists with the relevant skills in the cultural expressions of the given society. Dutfield adds that Trade in handicrafts produces substantial economic rewards and illustrates that in Burkina Faso (West Africa) handicrafts constitute 70 percent of GDP and generally, handicrafts represent an estimated value of US\$30 billion in the World market<sup>274</sup>. Thus, my claim as to the vulnerability of ethnic communities, particularly their deprivation of benefits accruing from their TCEs, rests on the following points:

- i. The absence of structures in communities that can guide their utilization of communal ownership in TCEs can be a hindrance as to how such communities tap into and maintain economic rewards from their TCEs.
- ii. The communal identity attached to the TCEs produced. This is in spite of the fact that it is skilled individuals that produce the TCEs and not a whole community as such.
- iii. Absence of Self-determination of property rights in TCEs: The country where the TCEs are produced takes the economic rewards as opposed to direct benefit to the source community. Although the actual experts that put together handicrafts also receive some economic benefit, it still does not negate the fact that it is the State Agencies that control the market

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<sup>273</sup> Draft paper presented at the International Seminar on Intellectual property and Development. See: [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=103975](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=103975) (accessed February 1, 2013)

<sup>274</sup> Ibid, p.2 and p.10, citing Fowler, B.J. (2004) "Preventing counterfeit craft designs", in Finger, J.M. and Schuler, P. (eds), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries*, Washington DC: The World Bank, pp.113-131

forces. As Dutfield points out, it also does not rule out the threat of misappropriation and mass production by outsiders which would ultimately deprive the artisans of their source of income<sup>275</sup>.

Dutfield also warns that that trade can increase dependence on outsiders and vulnerability to exploitation<sup>276</sup>. It is my assertion that engaging in the exploitation of TCEs as commodities in the absence of a regulatory structure to guide such an activity widens the vulnerable nature of the communities. Both the ethnic community and the State stand to lose out on economic benefits in instances where misappropriation goes unnoticed.

It therefore follows that communal ownership, absence of structural guidelines as well as disconnect within the communities in the determination of how economic benefits from their TCEs can be utilized, contribute to their vulnerability towards TCE misappropriation.

#### 4.1.2 Case studies on the exploitation of Traditional Musical Expressions

In the previous section, I have made the claim as to the basis of the vulnerability faced by ethnic communities in the misappropriation of their TCEs. In this section, I explore case studies that highlight instances of such vulnerability and how the individual cases bring out an appreciation of the role TCEs can play in socio-economic development.

##### 4.1.2A Works derivative of folklore and the right to royalty payment

Here, I show how individual claims to derivative versions of TCEs effectively overshadow would-be communal claims with the latter being silenced by absence of structures and enforcement mechanisms. As such, the royalties only go as far as the individuals and not the community.

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<sup>275</sup> *Id.*

<sup>276</sup> *Id.*, p.15

(a) *Mbube* and the Zulu Community in South Africa

The song “*The Lion Sleeps tonight*” had achieved international fame way before it was incorporated into the Walt Disney animated movie *The Lion King* in 1994 making it an even bigger international hit. The first studio version of this song was introduced under the title of *Mbube* (a Zulu word for ‘Lion’) by a South African Zulu migrant worker and entertainer by the name of Solomon Linda in 1939<sup>277</sup>. He assigned his rights to Gallo Records in South Africa and over the years the song found its way to the United States of America and was assigned to a music publishing company called Folkways. First with a folksinger by the name of Pete Seeger (who changed the title to *Wimoweh* – a corruption of the Zulu lyrics, *Uyimbube*, or “he is the lion”) to, amongst others, a group called *The Tokens*, derivative versions of the song were hugely successful worldwide without any royalties being paid to the Solomon Linda Estate (he passed away penniless in 1962) by virtue of copyright assignments based on U.S Copyright law.

The family of Solomon Linda eventually filed a suit in South Africa in 2004 against Disney Inc. (*Griesel NO v. Walt Disney Enterprises Inc. and Others*) for rights over the *Mbube* song. The case was eventually withdrawn and settled out of court. Generally the terms of the settlement were that the Linda family would receive payment for past uses of *The Lion Sleeps Tonight* and an entitlement for future royalties from its worldwide use. It is estimated that by that time, the song had earned over \$15 million in composer royalties worldwide.<sup>278</sup>

Deborah Wassel’s study on *African Folk Music in Dual Systems of Law* looks at Western exploitation of traditional African music<sup>279</sup>. She traces the history of the *Mbube* Song after it gained popularity in South Africa and states:

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<sup>277</sup> WIPO Magazine, Issue 2/2006: Owen Dean: *Copyright in the Courts: The return of the Lion* (April 2006), [www.wipo.int/wipo\\_magazine/en/2006/02/article\\_0006.html](http://www.wipo.int/wipo_magazine/en/2006/02/article_0006.html) - accessed April 14th 2012. Dr. Owen Dean, of South African law firm Spoor and Fisher, personally directed the litigation on behalf of the Linda Family against Walt Disney Enterprises Inc.

<sup>278</sup> *Id.*

<sup>279</sup> Deborah Wassel, *supra* note 58. To listen to the original Solomon Linda version here: <http://www.youtube.com/watch?v=6tZvke0G7eo> (accessed November 11, 2011); to watch and listen to the *Lion King* version here: [http://www.youtube.com/watch?v=O8milJNj\\_W0](http://www.youtube.com/watch?v=O8milJNj_W0) (accessed November 11, 2011)

*Mbube and its subsequent covers were so popular that approximately “[one hundred and fifty] artists eventually recorded the song.” It was “translated into languages from Dutch to Japanese,” and was featured “in more than [thirteen] movies.”*<sup>280</sup>

It is noteworthy, however, that although Solomon Linda was the first to perform *Mbube* in Studio, his *Mbube* song was also inspired by, and derived from Zulu folklore<sup>281</sup>. At the time, South Africa did not have a guiding legal framework as to how to address TCE usage by foreign persons<sup>282</sup>. Whereas it was easier for Solomon Linda’s family to be compensated for use of the song, the same wouldn’t apply for the Zulu Community that has custodial interests to the folklore. In this sense then, there is no evidential economic outcome to the ethnic community where the folklore, which earned millions in royalties from the different derivative versions, could have benefitted the community in one way or another. This study was not able to establish any literature that points to a claim by the Zulu Community to the economic benefits which followed the derivative versions of *Mbube*. On the contrary, all the attention has been focused on the Linda family and their pursuit of compensation on a song that was inspired by Zulu Folklore.

(b) *Return to Innocence* and the Ami people of Taiwan

Another matter in which the elements of communally raising a claim to royalties would have been challenging, relates to the successful single “*Return to Innocence*” by a rock group called Enigma on

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and to listen to the Peter Seeger/The Weavers version here:

<http://www.youtube.com/watch?v=77VUYPMtWY> (accessed February 12, 2014)

<sup>280</sup> *Id.*, p. 2 citing: Independent Lens, *A Lion’s Trail*, <http://www.pbs.org/independentlens/lionstrail.html> (last visited by author- Sept. 18, 2009); Sharon LaFraniere, *In the Jungle, the Unjust Jungle, a Small Victory*, N.Y.

TIMES, Mar, 22, 2006, at A1, available at

<http://www.nytimes.com/2006/03/22/international/africa/22lion.html?r=1&scp=3&sq=solomon%20linda&st+cse>.

<sup>281</sup> *Id.* Also see comments following Miriam Makeba’s performance of the original “*Mbube*” at <http://www.youtube.com/watch?v=U6AAAtKmx6Qk&feature=related>, (accessed March 20<sup>th</sup> 2012) where it is mentioned that the original version of *Mbube* has been sung for centuries within the Zulu Community.

<sup>282</sup> In February 2014, the South African government signed into law the Intellectual Property Laws Amendment Act, No. 28 of 2013 which was published in Government Gazette no. 37148 of December 10, 2013. The aim of this law is to, *inter alia*, “provide for the recognition and protection of certain manifestations of indigenous knowledge as species of intellectual property.” This law has been criticized by many South African I.P. professionals as heavily cumbersome.



their 1993 album “*Cross of Changes*.” Bryan Bachner<sup>283</sup> provides an analysis of the appropriation of traditional music from the Ami people of Taiwan which takes up a substantial part of the song. While on a cultural exchange program in Paris, Kuo Ying-nan, a member of the Taiwanese Ami ethnic community, performed the folk song- “*Jubilant drinking song*” with his wife, across Europe at the invitation of the French Cultural Ministry. Without their knowledge, the performances were recorded and distributed on CD by the French Cultural Ministry. The license to the music productions was eventually purchased by a German Music producer, Michael Cretu, who was accredited with the creation of the musical project called Enigma and the production of the “*Cross of Changes*” album. The Ami song was incorporated into the heart of the single “*Return to Innocence*”.

Kuo Ying-nan and his wife sued Cretu for the rights to the Song and later settled out of Court for an undisclosed amount of money<sup>284</sup>. Just like with the Solomon Linda case, it was easier for these particular individuals to pursue their claim under copyright infringement as opposed to the source community pursuing a claim over the use of its musical expression. The case also emphasizes how easy it is for economic rights to play into the hands of individuals that have used derivative versions of TCEs from their own Communities.

It naturally follows from above examples that if a member of an ethnic community makes use of the Community’s folklore as part of his own musical expressions, the resulting royalties are his entitlement. Copyright law, which supports this view, shows that this would be regardless of whether the musician has made any alterations to the original folklore or not. All that matters here is that the TCE has been performed by someone and placed in a fixed form. Under Patent Law, Traditional Knowledge would come in as prior art to prevent the patenting of a so-called innovation that has been known by ethnic communities to exist in the past<sup>285</sup>. However, as the foregoing

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<sup>283</sup> Bryan Bachner, supra note 166 at p. 10; For a YouTube video of the song: [http://www.youtube.com/watch?v=Rk\\_sAHh9s08](http://www.youtube.com/watch?v=Rk_sAHh9s08) (accessed February 17, 2014).

<sup>284</sup> Richard F. Roper (1999): “Taiwanese Settle lawsuit claiming their original composition was stolen; they will now set up Foundation, [www.web.archive.org](http://www.web.archive.org) – accessed April 15<sup>th</sup> 2012

<sup>285</sup> The US Patent and Trademark office (USPTO), for instance, re-examined and rejected granting a Patent over the use of turmeric in wound healing, upon a request by the Indian Council of Scientific and Industrial

examples show, an individual cannot fail to be given copyright recognition in music that has been known to exist as a TCE for generations. The key requirement is fixation regardless of the extra input in the actual expressions. The Ugandan President's version of Ankole Folklore which he turned into a rap song, "*You want another rap?*" with little personal input, is another example that emphasizes this point. My claim on this basis is that the royalties that are earned by modern users of TCEs, can also serve as a direct indication of the economic value in TCEs. This is albeit the fact that the community does not get to enjoy the benefits together with the individual member, save at his or her discretion.

#### 4.1.2B Voiceless Communities

This section shows appropriation of TCEs that has been going on unchecked by the source Communities to their detriment. In this again, I show the same factors as discussed above that lead to community vulnerability. These are: Communal ownership of property rights in TCEs; the absence of structural guidelines on TCE usage; and lack of self-determination of TCE management by the Communities.

##### (a) The Pygmies of Central Africa

It can be argued that the individuals who pursue copyright infringement claims for music derived from folklore, are – to an extent, standing in the gap of their voiceless communities. It is apparent that in these examples, the economic benefits come as personal financial gains to a few members of the communities. This plays out better than in situations where foreign persons use TCEs without any benefit to the source communities. In instances where there is no one to speak for the Communities, TCE users will always get away with the appropriation of traditional music expressions with no benefit whatsoever to any member of the Source Community.

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Research (CSIR). This was after the USPTO established through CSIR that turmeric has been used in India for thousands of years as traditional knowledge for healing wounds and therefore its medicinal use was not novel. See: Report of the Commission on Intellectual Property Rights: Supra note 18.

In *Who Owns Native Culture?* Michael F. Brown gives an exposé of the exploitation of TCEs from vulnerable ethnic communities for economic gain. He argues that in some instances, the appropriators believe that by carrying out their acts of TCE misuse as far away from the source community as possible, they will probably not get noticed. Brown highlights a study report by Steve Feld, an anthropologist and ethnomusicologist, who tracks traditional musical expressions among an ethnic group in Central Africa that are termed as ‘Pygmies’ in the West. In order to fully capture the way in which the TCE is appropriated from the community, the following excerpt is taken from Brown’s study<sup>286</sup>:

*First recorded systematically in the 1950s, the distinctive intervals and timbre of Pygmy music soon worked their way into the Afrocentric jazz of the 1970s (Herbie Hancock’s *Headhunters* album), then into the emerging genres of world music and electro-acoustic music of the 1970s (the work of Egberto Gismonti and Brian Eno, among others), then, perhaps inevitably, into the pop diva Madonna’s album *Bedtime Stories* in the 1990s. The most significant recent appearance of Pygmy music is a cameo role in the bestselling album *Deep Forest*, ostensibly created by French musicians but based heavily on material taken from field recordings of indigenous music. *Deep Forest* sold more than two million copies, and its music has been featured in advertisements for products ranging from skin cream to sports cars. Although the CD’s producers claim that some of the proceeds from the album find their way back to the tribal people whose voices and instruments figure in it, Feld could find no evidence that Pygmy populations benefited financially from the album’s success.<sup>287</sup>*

This excerpt substantiates the claim made in this paper that without proper structures as to how to safeguard communal ownership in TCEs, particularly traditional musical expressions, community vulnerability will feed more appropriation of TCEs. As with previous examples, it also shows that a voiceless community loses out on any benefit from royalties on their TCEs.

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<sup>286</sup> Supra note 160.

<sup>287</sup> Id, citing: Steven Feld, “Pygmy POP: A Genealogy of Schizophonic Mimesis,” in *Yearbook for Traditional Music* 1996 (New York: International Council for Traditional Music, 1996), 1-35. For promotional information about the creators of *Deep Forest*, see [www.sonymusic.fr/deepforest/](http://www.sonymusic.fr/deepforest/).

(b) The *Maasai* name and the East African Maasai Community

Moving on from musical expressions, the National Geographic also gives a report concerning the appropriation of the *Maasai* name from the Maasai Community which is spread out over Kenya and Tanzania. Through such appropriation, the word *Maasai* is used as a brand name by various corporate entities worldwide. At the same time, the Maasai name is the paramount cultural identity of the Maasai people who consist of over three million across borders of the two East African Countries. It is stated that “*more than 80 products estimated to be worth billions – including cars, clothing, and jewelry – are labeled with the name of the nomadic group.*” According to Isaac ole Tialolo of the Maasai Intellectual Property Initiative (MIPI), no one has ever bothered to seek their permission before using the name<sup>288</sup>.

However, it is not clear as to whether the Maasai people are more concerned about protecting their cultural heritage or supervising the use of the name subject to monetary terms. It is reported that the objective of the MIPI is to establish an authorizing agent that will oversee the use of the name by reviewing requests for branding of future products as well as assessing those that are already on the market. Tialolo adds that “*As the cultural owners, we want respect. We want to protect our heritage, our name, our image.*”<sup>289</sup> What makes this puzzling is that the objectives of the proposed authorizing agent are not clear as to whether it is to monitor against usage that would appear detrimental to the name or as to whether the purpose for monitoring is to ensure payment of royalties. The former, which is a moral rights doctrine, does not carry as much enforcement weight as the latter, which is an economic rights doctrine. As TCEs increasingly become commoditized, the economic rights doctrine which is easily associated with and can be enforced by individuals, continues to marginalize the moral rights doctrine which is a justifiable claim by communities as a whole, and yet difficult to enforce.

Either way, the efforts of MIPI are laudable because they seek to confront and deal with the issue of community vulnerability. This is by establishing structures that would cover the loopholes in the

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<sup>288</sup> National Geographic, December 2013, Vol. 224, No. 6. See ‘*Culture Stock*’ at p. 21.

<sup>289</sup> *Id.*

exploitation of the ‘*Maasa*’ name. It is apparent that in the absence of structural guidelines and a voice for the community, socio-economic benefits to source communities or individuals from these communities are less likely where the appropriator is a foreigner that has no regard for the interests of the ethnic community.

As for the usage of TCEs by members of the source community, every community member is considered a custodian of the community TCEs. This is because the culture of any given community is ingrained in every member of that community. Solomon Linda and Kuo Ying-nan would never have been considered as appropriating traditional musical expressions from the Zulu and Ami communities respectively because they were members of those communities. In the same vein, Daniel Kazibwe, a.k.a Ragga Dee - an urban-based Ugandan musician, who often appropriates TCEs into his music, argues that he does not need to seek permission from anyone before doing so because it is part of his culture and, as he says, “*your culture is you*”. He adds that once in a while he may choose to give a small token of appreciation to Cultural institutions based in his Buganda Community<sup>290</sup>. Mercy Mirembe, a Ugandan Folklorist, also believes that every member of an ethnic community is entitled to make use of the TCEs without any form of constraint because culture is made by the people and has no owner. She however adds that: “*Certainly I would want them to acknowledge that they have got this piece of music from a certain folk who [sic] is based on this either proverb or this story, as a way of acknowledgement because there is no author of folklore – though in modern folklore you can have authors . . .*”<sup>291</sup>

It therefore follows in my claim, that the aspect of communal identity as illustrated in this section is a strong indicator of community vulnerability to continued appropriation of TCEs. This negatively affects proper enjoyment of the socio-economic benefits attached to TCEs.

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<sup>290</sup> Daniel Kazibwe (Ugandan music artist going by the stage name of ‘Ragga Dee’) was interviewed on July 19<sup>th</sup> 2013.

<sup>291</sup> Supra note 141.

#### 4.1.2C Developing a nexus between socio-economic development through TCEs and ethnic communities

The previous part of this section has been focused on mounting up a position for socio-economic development through TCEs from the perspective of experiences by individuals and voiceless communities. It is challenging to make a case for TCEs through such avenues. This part of the section therefore gives case studies that show how TCEs have been successfully utilized by communities in developing countries to benefit their members socially and economically. In order to create parameters through which the claim is made, I start with giving an understanding as to what the term ‘socio-economic development’ means. I then present the case studies through the lens of the definition given with the objective of portraying them as examples of socio-economic development at work in communities through their TCEs. These case studies are portrayed through two segments: The first is for the use of intangible or musical expressions, and the second is for tangible expressions which include handicrafts.

##### (a) Defining Socio-economic development

Steven Rwangyezi provides an interesting dimension as to how one interprets socio-economic development through the eyes of different individuals in the community. He uses an illustration of the Baheesi, a Ugandan ethnic group, in analyzing how TCEs can be utilized for economic gain based on their beautiful musical and dance expressions. Rwangyezi suggests that if these TCEs are well documented and registered, those who are foreign to the community and come in to use them, would be monitored as to how they have used the TCEs. Furthermore, the royalties earned would also be monitored. In this sense, the Local Government would have clear instructions for collecting and ensuring, through supervision, that the royalties go to the Baheesi. However, this is where establishing what amounts to development comes in. Rwangyezi states that once the Baheesi get their royalties, *“each one can go out to buy a cow or chicken; have a wedding or marry another woman, and so on. To them, that is development. It is at an individual family level but it is development. The other option, is that if the royalties go through the local government structures, then it’s a road; it’s a school, and these are communal projects. The discouragement however, is that the communal project will not make the people want to create another dance because they did not see direct benefit. People do not see a new school or road as theirs. They see it as [belonging to] government. If you give [the royalties] it to the Baheesi, they will go back and say – let’s work hard because you*

*remember the house you have? The iron sheets were bought using the money from the music and dance performances. So if someone is not attending the rehearsal, they will be serious about it.”*<sup>292</sup>

Black’s Law Dictionary<sup>293</sup> looks at ‘Development’ as “*An activity, action, or alteration that changes undeveloped property into developed property.*” On the other hand, the Oxford Dictionary and Thesaurus has rather basic definitions for the terms – ‘Development’, ‘Economic’ and ‘Social’. It equates ‘Development’ to the words: “*enlargement, evolution, expansion, extension, growth, increase; advance, improvement, progress.*”<sup>294</sup> The word ‘Economic’ is also defined as “*enough to give a good return for money or effort outlaid.*”<sup>295</sup> Furthermore, the word ‘Social’ is defined as “*of a society or its organization*”<sup>296</sup>. Although these are not authoritative positions, I would relate with them in teasing out my own interpretation of the term ‘Social-Economic Development’, as “*the improvement of a society’s conditions based on monetary or financial input.*”

The claim made in this part of the chapter, therefore, is that TCE holders can be able to enjoy socio-economic development through utilizing their TCEs. This is achievable once the holders are in a position to work out a mutual understanding with TCE users with regard to how the TCEs can be used without disrespecting the cultural values attached. The case studies highlight how financial input from the use of TCEs has been used to improve the educational and economic lifestyles of the community members.

(b) The Smithsonian Case studies: Viable partnerships in musical expressions

Sita Reddy and D.A. Sonneborn provide interesting case studies depicting how ethnic communities in different jurisdictions have been able to benefit economically from the use of their TCEs. The

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<sup>292</sup> Supra note 91.

<sup>293</sup> Supra note 183 at p. 462.

<sup>294</sup> Sara Hawker & Chris Cowley (Editors): *The Oxford Colour Dictionary & Thesaurus*, Oxford University Press, 1996, at p. 129

<sup>295</sup> *Id.*, at p. 152

<sup>296</sup> *Id.*, at p. 480

Smithsonian Folkways Recordings, a U.S.-based Institution has been engaged in a partnership with different ethnic communities since 1987 in the collection, documentation and use of traditional musical expressions in a way in which they can appeal to a global audience. In the use of the TCEs, the Institution gives due recognition to the economic and moral rights of the Communities concerned, inclusive of upholding their cultural heritage. In this sense, it practices digital repatriation of audio recordings and circulation of traditional knowledge (in TCEs) through publication, payment of royalties and license fees. The recording of traditional music by the Institute onto a recording device, implies fixation and thus justifies its ownership of the recorded work and any financial benefits accruing to publication of the recorded work. At the same time, the interests of the ethnic communities in the protection of their cultural heritage and moral rights are well served since they get to retain control over TCE usage and still get to enjoy some financial benefits from the music through a licensee arrangement with the Smithsonian Institute.<sup>297</sup>

These case studies reveal how returns on TCEs can make positive differences to ethnic communities. The first case study is given more attention due to the fact that it is from Uganda, which is also the key geographical scope of my own study. The other case studies are from the ethnic communities of Papua New Guinea, the Aboriginal communities in Australia and Native American communities in the United States. A brief review of these case studies follows:

(i) The Abayudaya (Jewish) community in Uganda and their revitalization through TCEs  
In 2000, the Smithsonian Institute picked interest in Jeffrey Summit's recording of religious music by the Abayudaya (Jewish) community of Uganda. This interest sparked off a field trip to Uganda which resulted in the recording and documentation of the entire musical life of the whole community. This was inclusive of lullabies, children's songs, political songs and work-related music<sup>298</sup>. The Institute then infused the recordings with rich choral singing, Afropop, 19<sup>th</sup> century European music and traditional drumming. The Institute's end result received a Grammy Award nomination in 2005 for Best Traditional World Music Album. Members of the Ugandan Abayudaya

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<sup>297</sup> Supra note 132.

<sup>298</sup> To listen to a song (*L'cha Dodi*) from the Abayudaya Jewish community in Uganda, visit this YouTube link: <http://www.youtube.com/watch?v=uKFGk2XNWME> (accessed February 15, 2014)



Community also reaped from the Album royalties which funded nineteen university scholarships of their choice.<sup>299</sup>

Furthermore, the Abayudaya community also runs an interfaith coffee cooperative called Delicious Peace (*Mirembe Kawomera*). The activities of the cooperative have expanded to women empowerment, provision of medical care, education and sustainable farming practice. Over 1,000 farmers from the cooperative have been engaged in musical performances at various community gatherings, expressing themes of relevance locally and globally. The Smithsonian Institute engaged in recording and documenting the musical performances and published the *Delicious Peace* album. Royalties from this album are also for the social and economic benefit of the inter-religious groups involved in the coffee farmers' cooperative.

Suffice to state that the Abayudaya Community is not, *per se*, a Ugandan ethnic community<sup>300</sup>. The Community was founded by Semei Kakungulu, a Ugandan military general, in 1917 after he broke ties with the British Administration of the time. Semei Kakungulu had initially been converted to Christianity by British missionaries around 1880 and helped the British in expanding their political control over much of present day western Uganda. Subsequently, around 1919, he broke ranks with the British after a political disagreement which was coupled with his new found faith in the customs and beliefs of the Torah. In cementing himself in the new belief, he circumcised his children and gave them Hebrew names much to the chagrin of the British. He then established a community known as the *Kibina Kya Bayudaya Abesiga Katonda* (the “Community of Jews who trust in the Lord”). This community eventually became known as the *Abayudaya* (“People of Judah”). As such, the Abayudaya community is knitted together by its religious practice of Judaism. It currently numbers

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<sup>299</sup> Supra note 297 supra at p. 5.

<sup>300</sup> Although the Abayudaya are recognized as a Community of Persons, they are not indigenous. The Third Schedule of the 1995 Constitution of the Republic of Uganda, which is pursuant to article 10(a) of the Constitution, provides a list of Uganda's Indigenous Communities as at 1<sup>st</sup> February 1926. This list does not include the Abayudaya.

just over 100,000 people with an establishment in Mbale District (Western Uganda) and surrounding areas where it has invested in Jewish Schools, a synagogue and medical clinic<sup>301</sup>.

The music of the Abayudaya is community-based and rooted in religious culture. The partnership undertaken with the Smithsonian Institute supports my claim as to how a community is using its cultural expressions for socio-economic development. In the words of Aaron Kintu Moses, the Headmaster of Abayudaya Primary School, “*We have been saved by our music.*”<sup>302</sup> It is also noteworthy that the principle of self-determination is exercised by the community in this respect, with no involvement by the State.

(ii) Controlling the use of TCEs among the Kaluli people of Papua New Guinea

In 1991, Steven Feld – an anthropologist and ethnomusicologist who had been researching on the musical expressions of the Kaluli people in the Bosavi rainforest of Papua New Guinea, produced *Voices of the Rainforest*, a CD of Bosavi music and rainforest soundscape. Feld was able to do this with technical support from Mickey Hart, a percussionist with a music group known as Grateful Dead.<sup>303</sup> The Bosavi People’s Fund, a non-governmental organization controlled by the Kaluli community, was set up with Feld’s help to receive all the royalties from the CD recordings. The resulting royalties have been used by the Fund to finance projects such as building of schools and clinics, the creation of a Bosavi-English dictionary, and the re-release of a 3-CD set of Bosavi music on the Smithsonian’s Folkways label. The Kaluli community are using their own TCEs, with the support of foreign persons, to develop themselves both socially and economically, as well as ensuring a preservation of their cultural heritage.

In realizing the economic value of their TCEs, the Bosavi people are bent on preserving and utilizing them even further with support from people like Feld. Another music album – *Bosavi*:

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<sup>301</sup> [http://www.shavei.org/category/communities/other\\_communities/africa/abayudaya-uganda/?lang=en](http://www.shavei.org/category/communities/other_communities/africa/abayudaya-uganda/?lang=en) (accessed Feb 15, 2014).

<sup>302</sup> *Supra* note 297 at p. 5.

<sup>303</sup> *Id.*, at p. 6. Steven Feld’s production is now HRT 15009 in the Smithsonian’s Mickey Hart Collection.

*Rainforest Music from Papua New Guinea*, is a 25-year compilation of the musical expressions from the Papua New Guinea rainforest ethnic community. Part of the proceeds from these recordings have been used by the community to fund the Bosavi Digital Archive Project which is digitizing all recordings, images and texts gathered by Feld and other researchers. Some of the royalties have also been utilized in providing educational scholarships to the younger generations of Bosavi.<sup>304</sup> The past is thus being used to provide for the future. It is also evident that the Bosavi have recognized the economic value in their TCEs, hence the need to preserve them for future use through the Digital Archive Project.

(iii) The Rights to Secrecy and Sacred Rites among the Western Australian Desert Aborigines  
This case study tackles the issue regarding the handling of community attachments to sacred values in TCEs that are being used by foreign parties. The study focuses on the Ngatatjara people of the Western Australian desert whose sacred traditions are based on music and ceremonial performances. These performances include varying degrees of restricted access based on gender. The Smithsonian Institute had a compilation of recordings on Songs of the *Western Australian Desert Aborigines* that had been made available to the public. After being alerted about the sacred rites attached to the recordings, they were removed from public accessibility. Debates ensued concerning, on the one hand - the rights of access to the recordings by female audiences in the U.S. by virtue of free speech rights, the Institute's recording contract and U.S. Copyright law. On the other hand, in Australia, there would not have been such accessibility. Interestingly, further consultations carried out by the Smithsonian Institute in Australia revealed that public access to the recordings was forbidden to *everyone* and not just the female audience. R.A. Gould, the original author of the recordings which were done in 1966, was also consulted and he agreed that the album should be withdrawn from public accessibility.

Although the album remains unavailable today, the finger-nail biting concern is with regard to the more than a thousand or so copies of the album that had already been released to the public (globally, inclusive of Australia) before the sacred rites issue was raised. Reddy and Sonneborn raise

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<sup>304</sup> *Id.*

important practical questions over this concern: “*How should privacy, and restricted access to traditional knowledge, be balanced against greater public access to such material? What are museum obligations to balance respect for the privacy or secrecy of those groups who were recorded, with requests to hear and study them? Should museums consult elders on how recordings must be used after they are collected?*”<sup>305</sup>

Clearly, as the authors point out, every case has its own concerns and the Institute makes its decisions on how to relate with different ethnic communities on a case-by-case basis<sup>306</sup>. I can also add, in agreement with Reddy and Sonneborn, that there are no simple answers to the questions raised above. However, the direction that my study goes in raising suggestions that address these concerns is that consultation with ethnic communities is crucial to establishing how or whether a partnership can be established in the use of their TCEs. The Smithsonian Institute was apparently caught off-guard because adequate consultation with ethnic communities had not been pursued prior to the use of their TCEs in this case. Such consultations can help reveal how the source communities would like to utilize their TCEs for economic benefit. In a conference I organized on the relevance of TCEs for Economic Development, Charles Batambuze, who is the lead representative of the Uganda Creative Commons affiliate, while discussing the sharing of cultural performances between ethnic communities and outsiders, stated: “*Strategy is the key. You decide how you want to make money*”.<sup>307</sup> If profiting from the TCE is crucial to all parties, then negotiations as to usage should follow with an agreement as to how cultural values in the music will be respected. The parties can also agree in partnership as to the distribution of royalties. Strategic planning therefore makes it easier to make the musical expressions accessible for utilization.

In an interview with Ndebesa Mwangutsya, a History Professor and traditional elder from the Ankole Community in Uganda, he also opines that partnership between the custodians and users of TCEs is possible and should be encouraged. He adds that: “. . . *the commercialization itself has led to the revival [of TCEs]. First of all, there was an onslaught of traditional cultural expressions by religion, basically Islam*

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<sup>305</sup> *Id.*, at p. 7

<sup>306</sup> *Id.*

<sup>307</sup> Charles Batambuze presented a paper on ‘*Open licensing as an avenue in the use of Ugandan Folklore: Analyzing the pros and cons.*’ at the I.P/Folklore Conference that was organized as part of this study. See supra note 89.

*and Christianity. . . The Colonial rule, imperialism also, undermined those cultural expressions. This commercialization in some way is creating a revival but it is a revival that is not informed by any moral ground or cultural interest per se but profit interest. That's the problem, you see. But they are popularizing and creating a revival, but a revival that is not informed or located in any domain at the mind level, even that would continue reminding them and reflecting, that we should probably not completely vulgar[rize] these cultures. That is the problem.*<sup>308</sup>

As a lesson learned from the case study of the Australian Aborigines, if the communities decide that they do not want to make money and that preserving their restrictive sacred rites is more important to them, then that too should be respected. The challenge, as noted above, is if TCEs with restrictive cultural traits are already accessible to the public. Nonetheless, my claim is that generating economic benefit from TCEs can be marginalized by ethnic communities in instances where they value their sacred rites in the TCEs or where the sacred rites conflict with commodification of the TCEs.

(iv) Native American Communities and the Right to hear Ancestors' voices

Contrasting opinions as to open accessibility of TCEs in this last case study also point to the fact that every situation is unique – as emphasized above. In 2004, the Smithsonian Institute withdrew an album compilation of traditional music (the *Washoe-Peyote* Songs) from the Washoe tribe. This was after being informed by a spokesperson of the Washoe tribe that the *Washoe-Peyote* Songs album should not be available to the public due to its sacred content. The Washoe is a community of Native Americans based in Nevada and California. The *Washoe-Peyote* Album is a compilation of recordings collected by Warren d'Azevedo over a period of nine months in 1954-55, consisting of five songs sung by three Washoe members as part of a religious gathering. This musical performance is regarded as a Peyotist practice that relies on the peyote cactus (*Lophophora williamsii*) as a form of sacrament and sacred medicine. The songs describe how a Peyotist found “the Way” through “the medicine”.

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<sup>308</sup> Supra note 3.

However, another Smithsonian recording of Peyotists received a different reaction to that of the Washoe community. The *Kiowa Peyote Meeting* (Album FW04601) was recorded by Harry Everett Smith in 1964-65 in Anadarko, Oklahoma. In 2009, with support from Donald Topfi, then chief of the Kiowa tribal council, the Smithsonian Institute was able to track down the living descendants of the singers of the album. All the descendants were in agreement that they wanted the material out in the public. As summed up by Topfi: “*A hundred years from now, we want our children’s children to be able to bear the voices of their ancestors.*”<sup>309</sup> As the Kiowa study shows, recording and documentation of TCEs serves the purpose of entrenching certain cultural performances into a medium through which they can be easily disseminated and used as an educative tool for current and future generations to come. This resonates with the view from Juliet Nasuuna, a Ugandan Intellectual Property government official, who states that we [Ugandans] need to document, legislate, digitize and have a databank of our TCEs<sup>310</sup>. Creation of a data base helps in having a resource base for TCEs for preservation purposes as well as to tap into the educative and informative aspects of TCEs. Documentation should, however, be done while bearing in mind that the evolutionary aspects of TCEs should not be restricted by such preservation.

The Smithsonian Institute’s case studies, as tried and tested, provide practical insights into a number of considerations on milking the socio-economic side of TCEs. They confirm my claim that where the interested parties work in harmony, giving respect to each other’s rights and interests, they all get to benefit from the cultural expressions.

(c) Case studies on TCEs in tangible expressions

In this part of the paper, in emphasizing my claim as to the socio-economic values attached to TCEs, I continue to show how TCEs in tangible products have been utilized by ethnic communities in partnerships with civil society organizations and corporate institutions.

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<sup>309</sup> See note 297 supra at p. 9.

<sup>310</sup> Supra note 113.

(i) Namibian handicrafts and DLA Piper's New Perimeter Organization

Other than the musical and dance aspects, the economic force of TCEs in foreign markets is also felt in the tangible expressions such as handicrafts. New Perimeter, is a nonprofit organization established by global law firm DLA Piper as a pro bono initiative. One of its objectives is the advancement of economic development in Developing and Post-Conflict countries. The Organization, which was established in 2005, engages in various activities including the provision of assistance to the *Omba Arts Trust*, a non-profit organization based in Namibia. The Namibian organization deals in product development, training, mentoring, sales and marketing support to rural art and craft producers in Namibia. It provides a marketing linkage with members of rural-based communities in trading off their art and crafts. Through this linkage, the products are able to make it to national, regional and international markets<sup>311</sup>. The Namibian communities can thus appreciate the economic side of their tangible TCEs through the partnership generated by New Perimeter.

(ii) Chinese expressions and the IKEA collaboration

Swedish retailer company - IKEA, has also embarked on a new way of strengthening its consumer base, particularly in the United States. In a new and innovative style of doing business that its design director described as “*a starting point for a new behavior within IKEA*,” the company introduced Scandinavian products laced with Chinese Cultural Expressions.<sup>312</sup> The limited-edition of products labelled as a ‘Trending collection’ was released in U.S stores just in time for the Chinese New Year on January 31, 2014. The products were a merger of Scandi design aesthetic with materials and motifs of Chinese design. No doubt this collaboration between Sweden and China principally targeted the market base in America. In commenting about the design line, IKEA’s head of design stated, “*We weren’t tourists shopping around for expressions from foreign cultures. It was a new way to work with design. We learned even more about working together, about sharing ideas and how everyone can contribute to one single product. The result is that the whole group takes credit for the ideas.*”<sup>313</sup>

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<sup>311</sup> See: [www.newperimeter.com/our-work/economic-development/namibia-economic-development.html](http://www.newperimeter.com/our-work/economic-development/namibia-economic-development.html) (accessed January 22, 2014).

<sup>312</sup> See: [http://homes.yahoo.com/blogs/spaces/ikea-takes-sharp-turn-to-the-east-in-its-first-cultural-collaboration-203407215.html?soc\\_src=mediacontentstory](http://homes.yahoo.com/blogs/spaces/ikea-takes-sharp-turn-to-the-east-in-its-first-cultural-collaboration-203407215.html?soc_src=mediacontentstory) (accessed January 28, 2014).

<sup>313</sup> *Id.*

The business innovation by IKEA demonstrates additional support to the claim over the TCE economic value system - in this sense, relating to tangible TCEs. It is also a further example of how TCEs can undergo further evolution with foreign input. There is great creativity involved when IKEA makes use of Chinese products that are attached to their cultural heritage and then uses these as ideas to improve on its furniture and other products. Save for the likelihood that some of these products have restrictive cultural values attached, as seen in some of the case studies above, and considering that this is a collaboration with China, it would be ludicrous to imagine that Chinese sacred rites have been trampled upon in the process. This, as well as a guiding structure on sharing royalties on the products, is probably what could make the Swedish-Chinese collaboration a success.

#### 4.1.3 TCEs and Socio-Economic Development: Empirical findings from Uganda

At the onset, I explored the vulnerability of ethnic communities that opens them up to misappropriation of TCEs. Using examples and case studies, I then showed how the socio-economic value in TCEs has been utilized by both community members and foreigners. In this part of the Chapter, I continue to present my claim, through various perspectives, as to how TCEs can further be enhanced for Socio-Economic development. These perspectives are drawn from empirical findings undertaken in Uganda among interested stakeholders.

Milton Wabyona,<sup>314</sup> a music composer, traditional music artist and lecturer at Makerere University, provides some good examples of how TCEs are contributing to Uganda's socio-economic development, albeit directly meriting individuals as opposed to communities. He explains his passion for music composition in the traditional music setting when he reasons that music comes in to fill the void left by a bad reading and writing culture in Uganda. He states: "... *when you have good music; well organized, people will come and listen, and when you have a good message that you really want to pass on, be sure that at least 60% of your message is going to be passed on, compared to which, if you donated a library of books, I promise you, you will come back one year later – you will just come to dust those books.*" He then supplements his point with a comical suggestion that was once made by a Ugandan radio personality to the effect

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<sup>314</sup> Supra note 15.



that since the majority of Uganda's politicians are always caught on camera napping during the Finance Minister's reading of the National Budget, the lengthy reading of the budget should be converted into a song. After all, as Wabyona states, "*you are not going to find many people sleeping at a music concert*"<sup>315</sup>."

Wabyona also gives a remarkable example of a man from an ethnic community in Northern Uganda who, after becoming unemployed, started making traditional musical instruments, such as the adungu and agwaras<sup>316</sup>. His client base consisted of traditional dance troupes and the first clients started recommending other similar dance troupes to purchase musical instruments from him. Currently, according to Wabyona, the musical instruments used at the Makerere University School of Performing Arts, are supplied by that same individual as well as the instruments used during their tours across the globe. Traditional music has made the young man of humble origins, a very wealthy man.

Furthermore, Wabyona asserts that his global concert tours, mainly to the United States and to Europe attract earnings of not less than 4 million U.S Dollars. However, he laments that the earnings are far less than what the outcome would have been - for the individuals involved, as well as for the Country, in terms of tourism. This is because of the absence of a structured system in the country through which the traditional music expos can be branded and marketed more efficiently as national products.

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<sup>315</sup> Ibid. In the interview, Milton Wabyona was making reference to a comment made by Radio Journalist Simon Kaggwa Njala of *Radio One*, about the fact that every year when the Ugandan National Budget is read, many of the Members of Parliament and Cabinet Ministers are found dozing off. As such, it would be better to turn the Budget speech into a song that can be sung to them, so as to keep them entertained and focused.

<sup>316</sup> The Adungu is a nine-string arched (bow) harp of the Alur community of northwestern Uganda. The Agwara is a side blown horn-wind instrument that comes from the Lugbara and Kebu communities of the West Nile region. For pictures of these instruments, see: [http://www.face-music.ch/instrum/uganda\\_instrumen.html](http://www.face-music.ch/instrum/uganda_instrumen.html) - last accessed October 20, 2013.

Steven Rwangyezi also highlights the social developments that have arisen out of his investments in the Ndere traditional dance troupe. He states that he has been with Ndere since 1994 and since that time, many of the young people that were employed at Ndere have gone on to start their own dance troupes which have turned out to be successful. Rather than hold grudges against them for abandoning Ndere, he applauds their ambitions and wishes them on. This is because he looks at the mushrooming of other dance troupes, as a way of ensuring that culture is continuously made available to the public. In any case, he adds, considering that his group is hired to perform at weddings and other functions every weekend, they would be rendered inadequate if they were unable to keep up with the demands of the market – hence the need for healthy competition<sup>317</sup>.

It is on that premise that the majority of wedding receptions in Uganda’s urban centers have traditional performers as part of the entertainment. Roger Mugisha, who M.C’s (Master of Ceremony) at a minimum of four weddings in a month, confirms that the demand for traditional music performers is usually at weddings. As such, the market is there and not likely to die out<sup>318</sup>. This can therefore be seen as an area in which society and the economy will be reaping from, for a very long time. Isaac Mulindwa<sup>319</sup> also looks at the economic development derived from TCEs in a broad sense. In arguing that this does not simply apply to TCEs but music in general, he states that *“when a musician goes to produce the song in the studio, he needs instrumentalists and so on. So there is a chain of monetary value where, economically, everybody is benefitting.”*

These perspectives all point to the increasing relevance of traditional musicians and the musical expressions themselves within the entertainment settings of developing countries like Uganda. The market reception given to this branch of the entertainment industry supports my claim as to the positive role it is playing on socio-economic improvements at all levels.

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<sup>317</sup> Supra note 91.

<sup>318</sup> Supra note 81.

<sup>319</sup> Supra note 264.

Another area in which TCEs today have played a major positive role is in improving the appreciation of local dialects, especially among the urban youth in Uganda. The aftermath of colonialism brought about a “*deculturalization*” or “*westernization*” of Uganda in the sense that the urban youth constantly associate themselves with American or West European ways of life, especially in a social sense. The English language is constitutionally recognized as the national language<sup>320</sup>. This is because English is perceived as the language that unifies the numerous ethnic communities together. Speaking English therefore indirectly adds to the westernization and many people in the urban areas grow up without any strong ties to their cultural roots whereas they are more conversant with matters concerning the English language. TCEs come in to remedy that situation through the modern entertainment industry. This social development is a benefit to both the artists as well as the consumer base. A number of interviewees opined to the effect that the use of TCEs in urban music today is helping to promote the understanding of our local languages. This benefits the artists who need to master the language so as to express themselves eloquently in their music, as well as the members of society that purchase and enjoy this music. As such, there is entertainment value given to the society in exchange for monetary gains for the artists. There is also a potential for this to increase as more local music artists are attracted into performing urban music with an integration of TCEs and an expectation of large profits. Inevitably, there is also a greater appreciation of the local languages.

Other interviewees also root for the educational value attached to the TCEs. Mercy Kainobwiso<sup>321</sup> and Isaac Mulindwa<sup>322</sup> make reference to the educational message that is always engrained in traditional music. For instance, some TCEs bear messages about discipline or how to get through a challenging situation – issues which are of less significance in modern entertainment, hence making a fusion of the two quite significant. As Mulindwa puts it: “*...if he re-writes or remakes a song that is educative to the younger generation, and in a modern way that appeals to that generation, the message will be passed on to that generation.*”

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<sup>320</sup> Article 6 of the 1995 Constitution of the Republic of Uganda stipulates that the English language is the official language of Uganda.

<sup>321</sup> Supra note 192.

<sup>322</sup> Supra note 264.

Furthermore, although the contribution of TCEs to the tourism industry was not significantly highlighted in the interviews, there is a definite potential in this sector as well. In one instance, University students from the United States of America, have been transformed into ambassadors of Ugandan cultural arts through a programme jointly organized by New York University (NYU) and Makerere University's Department of Performing Arts and Film (DPAF)<sup>323</sup>. This program has been ongoing since 2007. In January of every year, students from NYU travel to Uganda, under a Study Abroad Programme, and are taught a number of traditional dances including the Bakisimba and Amaggunju from Buganda; the Ekimandwa, Ekizino and Ekitaguriro from Ankole; the Gaze from West Nile; the Owaro from the Samia community; and the Naleyo from the Karamajong community. The program has obviously become a global marketing tool for Uganda's cultural arts, especially considering that some of the participating students from NYU are international students stretching from countries such as Australia as well. Looking at this from a legal perspective, the programme would be deemed as imparting educational value and therefore fair use – which would dispel any claim for compensation. However, the ripple effects in terms of marketing and boosting the value of Uganda's TCEs are immense.

However, there is also a down side to the relationship between TCEs and urban music in Uganda. The foundation of the problem springs from the absence of a database on registered copyright works in Uganda, particularly in the music sector. This is also compounded by the fact that there is low appreciation of intellectual property rights across the board. This starts with the performing artists – as to what their rights are, and stretches to the consumers – as to the respect of the intellectual property rights of artists. In such a situation, music artists can easily fall prey into appropriating music that is not in the public domain, while acting in the mistaken belief that such music is a piece of folklore.

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<sup>323</sup> Brian Magoba: How cultural exchanges market Uganda's arts. See article: <http://www.monitor.co.ug/arts/culture/Reviews/How-cultural-exchanges-market-Uganda-s-arts/-/691232/1675184/-/or8fudz/-/index.html> – last accessed January 27, 2013

To elaborate on this position further, Aloysius Matovu Joy<sup>324</sup> narrates an experience in which Robert Ssentamu Kyagulanyi, an urban musician from the Buganda community who goes by the stage name of ‘Bobi Wine’ sang a song titled “*Matyansi Butyampa*”<sup>325</sup>. This song, like many others before it, was an instant hit for Bobi Wine. However, before long, he was contacted over copyright infringement by an elderly member from the same Buganda Community called Rev. Fr. Mbazira who, as it turned out, was the author of a poem which Bobi Wine had substantially sampled in coming up with his music hit. Bobi Wine’s defense, according to Aloysius Matovu, was that: “*I grew up hearing this poem*”. Apparently Bobi Wine assumed that the poem he was accustomed to hearing from his childhood, was a part of Buganda folklore. He did not bother following up on whether it was actually in the public domain or not. Silver Kyagulanyi (no blood relationship to Robert Kyagulanyi, a.k.a Bobi Wine), who was called in to mediate over the matter, also confessed in his interview that “*we thought that the person who had created it was dead.*”<sup>326</sup>

Using this as an example, I agree with Aloysius Matovu’s statement in summing up the prevailing challenge in Uganda. He states as follows: “*The issue of copyright law hasn’t been imparted, or people have not been sensitized properly about their moral rights.*” The full appreciation of copyright law is yet to take shape in Uganda. Copyright owners and users alike, do not quite understand the dimensions on copyright law. As such, this reflects badly on how the realizations from, not just TCEs, but music in general, can play a stronger role in socio-economic benefits for the country. In as much as musicians are currently profiting from their performances and musical productions, the profits would be a whole lot more realizable if there was a more robust appreciation of and respect for copyright interests.

This part of the Chapter has thus given an elaborate picture as to how commercialization of TCEs has changed the way they are perceived today. The perceptions are both positive and negative depending on a number of factors. For instance, I have shown how individual members of ethnic communities have been able to enjoy both economic and moral rights recognition over their

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<sup>324</sup> Interview with Aloysius Matovu Joy, see supra note 140.

<sup>325</sup> For a video of the song by Bobi Wine, see: <http://www.youtube.com/watch?v=l6exNLzi5m4> (accessed October 22, 2013).

<sup>326</sup> Supra note 74.

derivative works, even at the expense of litigation. Relying on a definition of socio-economic development, and practical examples as to how communities are being enriched through their TCEs, I have also argued that, indeed, TCEs are playing a positive role in such development, albeit with a few weaknesses in the system. However, these success stories are not spread out across States, particularly in developing countries which have a strong presence of ethnic communities. As such, it is still difficult to ascertain whether socio-economic development at the individual or community level, as seen in the instances above, can bear the same impact at the National level. If individuals and communities are able to exploit the socio-economic benefits of their TCEs, why is it that the same realization is still lacking at the National level in many developing countries? The next part of the Chapter explores these challenges.

#### 4.2 Challenges faced by developing countries in exploiting their TCEs for Socio-Economic Development

In this part of the Chapter, I will show reasons as to why developing countries have struggled at the Government level to utilize their TCEs in the same way that individuals or private entities have excelled. Relying on empirical findings from Uganda as my case study, I start by giving reasons that motivate modern musicians to rely on TCEs for their songs and demonstrate empirical findings to this effect. In spite of the findings on the use of TCEs from my field research, I proceed to show that government agencies struggle with compilation of data on TCE usage which also affects the capacity of government to utilize TCEs as a State resource. Interviews conducted in Uganda as well as interview findings from Ghanaian and Kenyan officials<sup>327</sup>, reveal that there is inadequate data and input at the National level that connects TCEs to socio-economic development. Traditional Musical Expressions in Uganda, for instance, attract a revenue stream but, in spite of success stories at the individual and Community level as portrayed above, there are no National records that connect TCEs to economic development. The claim therefore is that the Ugandan government is not effectively utilizing TCEs as a resource for socio-economic development.

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<sup>327</sup> Short interviews on the status of TCE policy and regulatory measures in Ghana and Kenya were conducted between January and February 2014 with Dr. Poku Adusei, a Senior Lecturer in I.P Law at the University of Ghana, Faculty of Law and Dr. Marisella Ouma, Executive Director, Kenya Copyright Board.

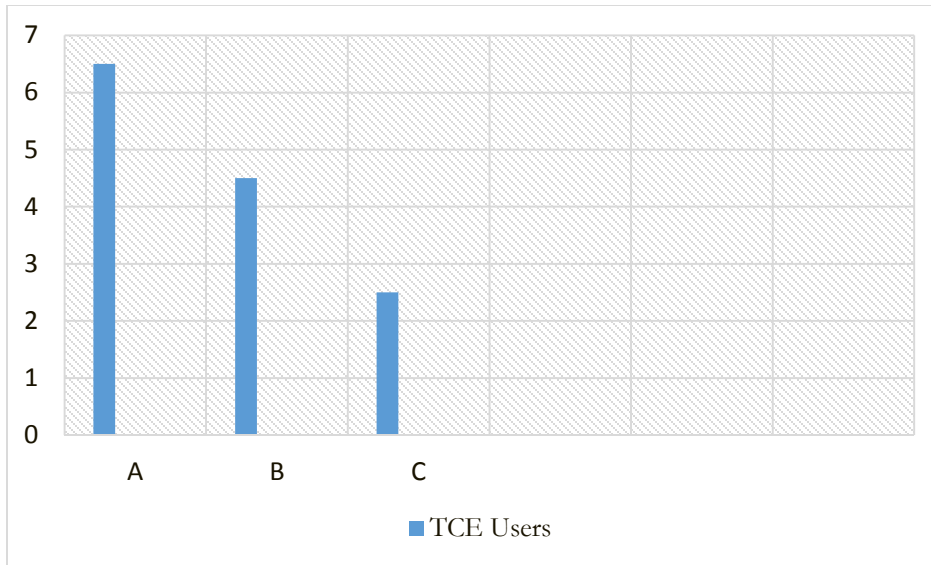
#### 4.2.1 What motivates modern musicians into using folklore?

My field research in Uganda, was premised on investigating with persons in the music industry whether improvement to personal financial stature is a motivator to those that engage in using Traditional Musical expressions.

I first set out to establish from various perspectives as to the range of Ugandan modern musicians that use TCEs in their music production. The study employed an ordinal variable using a *Likert* scale. Under this variable, the respondents were asked to rate, on a scale of 1-10 with ten being the highest number, how many musicians (urban or modern day musicians) make use of Traditional music. A compilation of the survey findings revealed that a fairly substantial number makes use of such music.

Of the Twenty six subjects that were interviewed, only Seventeen subjects responded to the survey question. These were split into two clusters: (a) Those falling in the Intellectual Property law professional field without a day-to-day engagement in the music industry. These included academicians, attorneys, Government policy makers and those engaged in Copyright management; and, (b) those engaged in the music industry in one way or another. These included traditional musicians, urban musicians, music producers and agents of Collective Management Societies. The first cluster had ten subjects and the second cluster had seven subjects.

Nine of the subjects interviewed did not commit to an answer on the basis that they did not have an idea or simply dodged answering the survey question; Five subjects responded that six or seven out of ten modern musicians rely on TCEs in Uganda – this response was coded ‘A’; Nine subjects responded that four to five out of ten musicians rely on TCEs – coded ‘B’; and Three subjects responded that two to three out of ten musicians rely on TCEs – coded ‘C’. In combining the results, conclusively the estimate is that twelve subjects – out of Seventeen - believe that not more than five out of ten modern musicians rely on traditional music in their own productions. The figure below gives an illustration of the findings.



**Figure 4:** Illustration of the rate of TCE users in Uganda (out of ten).

Considering that the subjects interviewed have a reasonable knowledge of the subject of investigation, it is fair to say that the empirical findings were statistically significant. The findings therefore support my claim which suggests that TCE usage is a significant practice in developing countries like Uganda. It therefore requires specific sui generis regulation to address the needs of the stakeholders which include effective utilization of TCEs and proper regard to the cultural values attached to them.

Silver Kyagulanyi, a music artist and producer, explains that the basis for urban musicians' tendency to rely on TCEs is tied around the need for economic gain. He argues that when some people rely on traditional music and convert it to meet their specific needs as musicians, this is based on the need to create something and the need to create is also fed by the need to make some money. He adds that since there are no legal repercussions, the musicians falling in this bracket are going to go on and do it. They will either be successful in coming out with a good piece of music, or they will spoil it – it is the consumer base that determines the end product<sup>328</sup>.

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<sup>328</sup> Supra note 74.



The opinion of Aloysius Matovu Joy<sup>329</sup> resonates with that of Silver Kyagulanyi. Matovu is a veteran in the Ugandan entertainment industry and laments about the state of the music industry in Uganda today. He states:

*“Unfortunately our modern musicians sing so as to sell . . . there is a very big difference between a musician and a singer. But here we call them musicians. . . A musician is supposed to have read music, okay? Professionally. But when someone starts singing, automatically they start calling themselves musicians. So, what happens is that some of us are not composers. We have got sweet voices, but everyone wants to compose for himself and record and sing. Sometimes we call them poets, poetry reciters, because some vocals are not so sweet to be called vocals of a musician, because the vocal cords cannot reach there, . . . because the other traditional folklore songs have always been there and we grew up singing them, it becomes very easy for someone to adapt or to pick a certain piece and put it in his song and actually, you will find that the listeners will feel more comfortable with what they know and hear. . .”*

As such, the general motivation for the use of TCEs in Uganda today is the market rewards that follow the music and the fact that traditional music is easily and freely accessible. Most of the interview responses were to the effect that it is the market that dictates the outcome and since the market is more familiar with traditional cultural music, then it is modern music, with a touch of culture, that will sell. Daniel Kazibwe [a.k.a Ragga Dee] confirms that he relies on TCEs a lot in his music and part of the motivation behind this is that *“to me, if you are going to sell anything that has, already, a touch on the people, it means that it is going to be easy marketing.”*<sup>330</sup>

However, Isaac Mulindwa<sup>331</sup>, a prominent Ugandan businessman and music promoter, believes that the market issue is not a motivation for musicians to engage in using TCEs. He opines that it is simply a matter of choice based on cultural ties. It is interesting that someone whose business empire is partly built around the music industry, does not share the general belief that TCEs are a strong motivator for urban musicians to make money. I would agree that cultural ties are also a

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<sup>329</sup> Supra note 140.

<sup>330</sup> Supra note 290.

<sup>331</sup> Supra note 264.

motivator for the use of TCEs by modern musicians in Uganda. Nonetheless, this still does not negate the existence of a correlation between TCEs and socio-economic development through urban musicians as the findings tend to suggest.

Milton Wabyona<sup>332</sup> also had a unique perspective to the financial motivation in the use of TCEs. As a music composer, he has carved a niche in the Ugandan traditional music environment and also performs globally. However, although he too believes that the economic benefits are a strong motivator for the growing influence of TCEs today, he is personally uncomfortable about recording his performances both locally and abroad. As a Music Professor at the School of Performing Arts at Makerere University, Milton values the quality of his music and appreciates the fact that the sounds of traditional music instruments heard directly during a performance, are quite different from the sounds one tends to hear from a compact disc recording. If the consumer is not conversant with the difference in sound created by the technology in the recording, he or she is bound to question the quality of the music artist more than the quality of the recording. On this premise, Milton does not want to risk tarnishing his professional image due to a minimal error in judgment. As such, he would rather forfeit any earnings that would have been due to him by virtue of placing recordings of his work on the market. So he focuses more on live performances which are also paying off well. The bottom line is that whether his music is accessible from music stores or through live performances, he is also partly consumed in the trade due to monetary motivations.

This study therefore has shown from the empirical observations that there is a strong relationship between TCEs and socio-economic development in Uganda. This is evidenced from the findings as to a fairly substantial number of modern musicians in Uganda who rely on TCEs, coupled with the motivation for money and the large market for their music. Local urban musicians in Uganda all belong to an ethnicity in the country. As such, the economic benefits they earn from the use of TCEs can also be looked at as gains for the community, going by the argument presented in part one of this chapter. Nonetheless, government statistics as to matters pertaining to the music

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<sup>332</sup> Supra note 15.

industry, copyright and TCEs in particular, are lacking. The next part of the chapter discusses this issue and reveals how it poses a challenge in the realization of economic development from TCEs.

#### 4.2.2 Existence of Government data on TCEs and the question of TCE taxation

This part of the chapter discusses the absence of government records on TCE usage. It argues that this is a major weakness on the part of governments from developing economies. This weakness is demonstrated by showing that even in the absence of a database or understanding of TCEs and the music industry, the industry is still taxed under an unclear system. Arguments are then given as to why a tax system on TCEs would not be the best way forward in generating economic benefit out of TCEs. The claim in this part of the paper is that taxation of TCEs is not only impractical, but it would hamper a well-organized utilization of TCEs and scare away potential local users.

The State is a key player in the utilization of TCEs. However, where it lacks proper records and structures of its own to undertake its responsibilities, the socio-economic benefit sought through TCEs cannot gain momentum and appropriation goes on unchecked. The Uganda National Culture Policy reveals that there is inadequate research and documentation of culture, which has made it difficult to quantify its contribution to national development.<sup>333</sup>

This study set out to establish how much revenue is generated from traditional and urban music. Informal investigations with the Uganda Revenue Authority, Uganda's national tax body, yielded no positive results, save for the affirmation that there is no direct tax imposed upon traditional music or on music works of a copyright nature, though this is in the offing.<sup>334</sup> However, according to a 2009 Report published by UNESCO, during the period 2006-2009, creative goods and services

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<sup>333</sup> The Uganda National Culture Policy: A Culturally vibrant, cohesive and Progressive Nation, Ministry of Gender, Labour and Social Development, Kampala, Uganda, December 2006, at p. 19. See: [http://ocpa.irmo.hr/resources/policy/Uganda\\_Culture\\_Policy-en.pdf](http://ocpa.irmo.hr/resources/policy/Uganda_Culture_Policy-en.pdf) - last accessed March 23, 2013.

<sup>334</sup> There is no formal document that was submitted to this effect. This affirmation came as a result of a phone interview that I had with a senior official working with the Uganda Revenue Authority – he preferred to speak with me in confidence.

contributed Ug. Shs. 12.6 billion in tax revenue (US\$ 6.7 million) arising from the creative industries<sup>335</sup>. The Report does not give direct reference to TCEs neither does it mention whether TCEs fall within the creative industries. However, it generally lists the music industry as falling in the category of creative industries. The findings in this report are therefore too generalized to be considered as giving a clear picture as to the economic contribution made by TCEs through the music industry.

At the Conference on TCEs and Economic Development that was held in Uganda in June 2013, Georgina Mugerwa, a Senior Commercial Officer with the Ministry of Trade, Industry and Cooperatives, presented a paper on '*Exploitation of the Music Industry in Uganda: Economic and Fiscal Considerations*'.<sup>336</sup> In her presentation, she cited the 2009 UNESCO Report as the latest government literature on the Music Industry in Uganda. On that basis, she stated that exportation of music in Uganda is still at a low stage. In further reliance to the UNESCO Report, She mentioned that between 2004 -2008, Uganda's exports in Cultural goods and services were valued at \$20M (Ug. Shs. 50 Billion). She went on to admit that the Ugandan government is collecting revenue from the Music Industry but – "*The industry still remains under-researched with insufficient information or data on its economic performance.*" This unfortunate factual situation shows that it is not just information on the general music that is lacking, but the component on Traditional Musical Expressions within the music industry is further lost in the shadows.

#### 4.2.2A Why taxation of TCE usage is not feasible

In this part of the paper, I present the claim that taxation of TCE usage is not a practical measure for States to employ in generating economic benefit from TCEs. I also give detailed reasons to substantiate my claim.

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<sup>335</sup> Uganda National Commission for UNESCO, *Cultural Industries in Uganda – Final Report* (UNC for UNESCO, Kampala, Uganda; December 2009) at p. 8.

<sup>336</sup> See note 89 supra for Conference theme.

Ugandan Music artists such as Steven Rwangyezi (traditional music) and Daniel Kazibwe (Ragga Dee) acknowledged that they pay taxes on their work<sup>337</sup>. However, regardless of the present absence of a statistical determinant as to how much the Uganda Revenue Authority obtains from taxing those engaged in traditional musical expressions, a tax base would be a false determinant of placing value on TCEs because taxation of TCEs is not feasible. This is due to the following considerations:

- i. The identity element: It is difficult to identify and differentiate pure TCEs from works of Copyright since most current TCEs are expressed with a modern adaptation hence they lean more to works of copyright than folklore. TCEs, by way of definition, encompass, *inter alia*, music and dance expressions from older generations. However, the TCEs as articulated today, have modern adaptations depending on the performer. It is therefore difficult to draw the line between a purely original TCE and one that has gone through some form of modern revision, however slight. The latter category is entitled to copyright protection and could thus not be considered as folklore in the legal sense. This creates challenges for revenue officers and law enforcers in terms of structuring together a guiding framework for taxation and other purposes.
- ii. There is no readily ascertainable value for the user of TCEs and thus, an ad valorem tax is not practical. This creates tax challenges for the government if it is to oversee negotiation and payment of royalties prior to or after TCE usage by foreign parties. On the other hand, in the absence of a supervisory or overseeing authority, such negotiations between TCE users and the custodians possess a risk of spiralling out of control through manipulation of vulnerable custodians by foreign parties or placement of unreasonably high royalty fees by the TCE Custodians. Furthermore, considering that TCEs have been said to belong to the whole ethnic community, it is difficult to rate them as personal property within an ad valorem tax system.

In the same perspective, Milton Wabyona also believes that culture cannot be regulated and thus, cannot be taxed. He clarifies that it is the outcomes of culture that could probably be regulated – that is, if they can be quantified. He suggests that one way of

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<sup>337</sup> See notes 91 and 290 respectively, for interviews conducted.

regulating in this sense, would be by stipulating that the first proceeds from a particular TCE usage should be channelled back into the ethnic community<sup>338</sup>.

- iii. Administrative challenges place limits on the taxation of TCEs:
  - a. Taxing the revenue stream requires accurate measurement of the outflow from TCEs on a regular basis. For instance, Rwangyezi laments about how the Uganda Revenue Authority have been demanding that he pays taxes based from the time he established his dance troupe in 1994. He raises provocative questions – “*Did they even know that Bakisimba [a type of cultural dance from the Buganda Community] could be used as a sellable commodity other than playing it at a drinking party? Retrospective punishment is discouraging . . . it means that before you creatively make up an idea, you should start paying taxes. At what point did it become economically viable?*”<sup>339</sup>
  - b. Attributing the portion of revenue to a TCE from a larger work would be arbitrary considering the challenge in identifying a pure TCE (as aforementioned in point (i)). A number of African Countries such as Tunisia and Ghana, have legislations in place for the protection of TCEs as part of the Cultural Heritage regulated and enforced by government agencies. If the use of TCEs is to be taxed as TCEs, it would be administratively challenging to dissect a TCE from a work that has obtained copyright protection as being derivative of TCEs. This presents a dilemma on going into the direction of recognizing the TCE within works of I.P and tax them as one. Doing so would be acting contrary to the position that these works are entirely different, from a legal perspective.

Paul Asimwe, a Ugandan I.P practising Attorney, proposes that the best way forward in tackling this problem, would be by devising a licensing mechanism that enables most of the revenue to remain in the community, while the State may take some income<sup>340</sup>.

However, it would still be problematic to determine the portion taken by the State. Worse still, the objective of creating an avenue through which TCEs can boost economic

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<sup>338</sup> Supra note 15.

<sup>339</sup> Supra note 91.

<sup>340</sup> Supra note 260.

development may fail to be achieved when the key players are scared off the market due to the imposition of taxes. As is discussed in this chapter below, Ghana almost made this mistake, which would have negatively affected the growth of its music industry.

- c. Most developing countries with rich cultural diversity lack administrative structures to effectively tax TCEs due to inadequate human resource capital. Apart from inadequate expertise, the concern here is as to which parties can represent the human resource capital needed to enforce the taxing of TCE usage. Wabyona suggests: “*Who enforces the law? . . . I think the Cultural leaders have got to have a very strong stake in that . . . because they are the custodians; they are the initiators. So they have got a lot more interest or a closer interest than the State would [have].*”<sup>341</sup> Agreeably, the cultural institutions have a strong role to play. But that does not negate the fact that with diverse communities involved where cultural practices have become commoditized, the involvement of the State is also crucial and should be encouraged. Furthermore, the State normally has the financial and technical resource base to handle such an administrative matter. On the one hand, TCE holders cannot be marginalized because their knowledge of cultural practices requires their involvement in enforcement and administrative matters. As such, this also requires a partnership with the State agencies from a technical point of view.

As for the State representatives on such matters, specialized training should be included as a requirement to enable them acquire a more robust understanding of how the music industry works and how the taxation of TCE usage should be handled. Silver Kyagulanyi portrays a fascinating picture of the current status among the Government agencies:

*“Music, is an economic thing now. . . they [government tax agencies] have not studied the industry, they do not know how it works and then they want to tax – understand? And it will not work, if you want to eat a leaf and you kill a chicken. You cannot get the same effect. So what happens is that basically they do not know how the industry works, they do not know whether to tax, so they will come on a show, a musician has staged a show, they do not know who to tax, maybe the promoter or the musician, and when they are taxing on the show, they do not know whether this guy has put in money on the radio. . . yet really, this being something of value, then it needs to be*

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<sup>341</sup> See note 15 supra.

*standardized. Costing – everybody using music can pay a small tax – radios, businesses, that is how they should tax music.*<sup>342</sup>

- d. Challenges with corruption and too much red tape make it impractical to draw any taxes out of TCE revenue from most developing countries. Professor Mwangutsya Ndebesa, for instance, suggests that, in the event that there is a proper structure in place, the taxation of TCEs should be on the Community members so that the money goes into a common pool for purposes of preserving the traditional institutions. This is so that the benefit to the community matches with the benefit made by an individual who uses the TCE for commercial purposes<sup>343</sup>. The problem with this suggestion, however, is that it also lacks practicality. This includes the ‘*how to*’ aspect of taxing the community’s TCEs, and secondly, many developing countries are burdened by unethical practices by government agencies. As such, there is hardly any guarantee that the money collected from the community’s TCEs would be utilized as suggested by Ndebesa due to high levels of corruption and poor government accountability in developing countries.

South Africa’s enactment of the Intellectual Property Laws Amendment Act, No. 28 of 2013 (IPLAA) in February 2014, has already been discussed in chapter three above. This law has been criticized as impossible to work around for a number of reasons. One of the concerns is the suffocation of community rights to self-determination with respect to issues affecting licenses and payment of royalties from the use of TCEs. Independent control over the use of TCEs has been placed in the hands of various Government bodies. The immense red tape in this legislation is likely to negatively affect the enjoyment of TCE usage in South Africa.

- e. Most developing countries also lack an appreciation of, as well as, access to international tax enforcement mechanisms to ensure collection of taxes on cross-border use of TCEs. TCEs are a territorial property right in the sense that their identity is restricted to particular communities within certain jurisdictions, inclusive of cross-border communities. As such,

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<sup>342</sup> See note 74 supra.

<sup>343</sup> See note 3 supra.



enforcement of TCEs, especially musical expressions, can easily fall into the same challenges faced by works covered by copyright protection. Protection of such works is territorial in nature and becomes cumbersome when the infringement occurs across borders. In the same realm, going by the examples from South Africa, Taiwan and Central Africa covered above, Traditional musical expressions face misappropriation across borders at a fast rate. This not only presents challenges in enforcement of claims but cross-border taxation also becomes difficult.

As highlighted in chapter three above, in the 1990s, the Government of Ghana introduced a provision in its Copyright Bill that would demand that Ghanaians obtain permission from and pay a royalty-tax to the government for the commercial use, sell or distribution of Ghanaian folklore or derivative works of folklore. The Bill proposed that Criminal sanctions were to be placed upon those who contravened the provision. In the excerpt below, John Collins gives an analysis of the Bill with warnings of the likely negative consequences that would arise if the folkloric royalty tax were allowed to pass<sup>344</sup>:

- *The Stunting of informal interpersonal, oral and informal cultural creativity; including generational cultural adaption. This tax will act as a disincentive on Ghanaian youth to develop, recycle and commercialise [sic] their indigenous roots.*
- *The problem of Ghanaian folklore also occurring across the border in neighbouring African countries – Who exactly owns the agbadza and gabu traditional drum-dances of Ghana, Togo and Benin, or the Kente cloth designs of Ghana and the Cote D’ivoire?*
- *The government ownership of folklore vis-à-vis its own Ghanaian nationals could also lead to possible future conflict between the central government and the cultural localities as to who own what: like who owns the Akan adinkra symbol – the Asanti court or the state?*
- *The law is a totalitarian one that probably contravenes conventions on human rights. For how can a democratic state own the folklore of it[s] own people: it can surely only be a custodian. So these folkloric clauses in the new bill may touch on matters concerning the Ghana Commission on Human Rights and Administrative Justice (CHRAJ).*

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<sup>344</sup> Supra note 240 at p. 7.

- *By putting brakes on Ghanaian folkloric development, these clauses may enhance the influx of free western cultural and folkloric norms and other components of Western 'cultural imperialism that are already flooding into Ghana.*

Although there was opposition to the payment for the use of folklore, the Ghanaian government went ahead and included a provision to that effect in its 2005 Copyright law (see discussion of the same in chapter 3.2.2 above). This ultimately created a negative effect on the use of folklore in Ghanaian modern music with a significant number of musicians shunning their local folklore in modern musical productions.

The John Collins excerpt above, therefore sums up the arguments made in this chapter with regard to the need for self-determination by TCE custodians vis-à-vis government involvement through regulation and taxation of TCEs. As far as taxation is concerned, besides concerns over its practicability, governments need to consider whether the benefits outweigh the risks on the use and enjoyment of TCEs. My claim therefore is that the issuance of government taxation as an avenue for economic empowerment through TCEs, risks deterring local and foreign parties from trying out new innovations in dance and musical expressions derived from TCEs.

#### 4.2.2B Involvement of the State in TCE management

This part of the paper discusses levels at which the State can get involved in TCE management with TCE Custodians. I make the claim that although the TCE Custodians have a right to self-determination of their Cultural heritage, partnership with the State in management affairs cannot be avoided. I present this claim through perspectives drawn from my field research and available secondary data.

As pointed out in some of the perspectives above, TCE Custodians are more conversant with their Cultural heritage. They should thus be more involved in the management process as opposed to surrendering this to the State. This would also absolve the State authorities of challenges related to

cross-border ethnic communities. Indigenous peoples that are spread across different State borders should be in a position to structure themselves in such a way that they are able to utilize their TCEs in a manner that covers the interests of all members of the community, regardless of which side of the border they are on. This arrangement would not necessitate involving the State. Establishing cultural museums across the different borders as a way of attracting the tourist industry would be one way of satisfying this measure.

The Communities, however, can – out of convenience, partner with State authorities in the enforcement of their rights since private enforcement of property rights of this nature can be quite challenging. As such, State involvement, *per se*, does not have to be through taxation of TCE usage. When it comes to utilizing TCEs as an economic good, having a policy framework within which to operate would necessitate State involvement. Charles Batambuze opines<sup>345</sup>:

*“When it comes to economics and the State is interested in economic development, and for all those areas where they think there is economic value, there are laws regulating. So, like when you think of minerals, there is the Mining Act. Whereas they would have left it open for everybody to go and mine and sell the way they want, but because it has economic value, [sic] so because we believe that traditional knowledge has economic value, then there has to be a way of regulating the economic activities around the use of traditional knowledge. Because that is the only way, for instance, the State can get tax. Otherwise they will not get any tax. But it is also the only way of organizing the producers or the people who are seeking to use traditional knowledge to create new things. So you regulate them and support them so. It is very difficult for the State to support a sector that is not regulated, but once you have regulation, then they can support it and create more wealth for the communities.”*

From this stand point therefore, State involvement cannot be avoided. This study only deviates from the argument above with regard to focusing on taxation as the most efficient avenue through which the State can benefit from the use of TCEs. Socio-economic empowerment has also been seen to manifest itself through other ways. The Abayudaya Jewish Community of Uganda, for instance, have

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<sup>345</sup> Supra note 254.

been economically and socially empowering themselves through their TCEs since 2005, seemingly without any State involvement. Nonetheless, private management of TCEs also needs government involvement because a private ordering of rights on its own can be very messy, especially with regard to enforcement of the rights and claiming a place in a competitive world market. In line with this view, Mwangutsya Ndebesa argues as follows:

*“In as much as we need to reward innovators or inventors, there is a need to have the benefits of civilization shared by the general public as a Community. The State can also do something to promote its culture. For instance, China is promoting Confucius Centers; France is promoting Alliance Francaise; the U.K is promoting the B.B.C [British Broadcasting Corporation] – as a resource. So it is not only promoted by the Private Sector.”<sup>346</sup>*

However, where the State comes in to play a role in the management and enforcement of TCEs, it also has to create a mechanism through which it can incentivize private players in the use of TCEs to channel their projects through the State. For instance, organizations such as the Smithsonian Institute have been dealing directly with ethnic communities in the use of their TCEs and mutual benefits for the stakeholders have been generated from these partnerships. As such, bringing in the government as a new player may either strengthen the partnerships or destroy them. This creates a fragile situation in which the government should not be too directly involved in such projects and should leave the status quo to remain as is. Considering that ethnic communities do not have a single voice to speak for them, the role of the government in such instances, should be to encourage ethnic communities to seek its assistance where they deem necessary in the enforcement of their property rights where abuse of such rights materializes. This is as opposed to creating new avenues through which organizations such as the Smithsonian Institute should access TCE usage, which may ultimately discourage future engagement with the foreign parties.

Developing countries therefore need to tap into their natural resource base, which in this sense is their cultural heritage and market their cultural products as a way of utilizing the rich cultural

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<sup>346</sup> See note 3 supra. Comments made at I.P/Folklore Conference – note 89 supra.

diversity imbedded in TCEs. The State Agencies have more access to funds than the ethnic communities. The State also has a greater networking power both within the country and across the borders. It should therefore be obligatory upon the State to finance the collection of its TCEs together for the benefit of interested parties and to expand its trade and tourism industries so as to raise its profile and attract revenue for the communities and the country as a whole.

Steven Rwangyezi gives his take on how a country like Uganda can generate economic benefits from its TCEs. He suggests: *“In order to turn our culture into an economic good, we need to overcome the structural bottlenecks. Ideas should be turned into policy proposals. In exercising the entrepreneurial skills of Ugandans, this begins with an idea. The main idea in the cultural set-up is our comparative advantage and this is the main idea that others have lost. The developed world is not so concerned about what’s on the ground, and that is what we can sell to them. To be able to turn that which had been branded as primitive and backward, into something that can be sold, is the entrepreneurial element of it. Once we identify these TCEs, the next thing is capital investment and you only need yourself for that.”*<sup>347</sup>

Rwangyezi’s suggestion resonates with the general claim in this study to the effect that States should harness their TCEs and milk them of their socio-economic benefits by putting in place structural guidelines that will guide the harnessing of TCEs. We perceive TCEs differently and it is on this basis that different entities are able to draw cultural expressions from any given community and transform it into economically profitable products in ways that no community member would ever have imagined. There is a need therefore for source communities to provoke their creative minds into exploring ways in which they can transform their TCEs into saleable products as a way of uplifting themselves without negatively impacting their Cultural values.

The raw material is in the cultural product. Whether tangible or intangible, it can be used and transformed in many ways that would attract both local and foreign markets. The next part of this

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<sup>347</sup> Steven Rwangyezi – for profile, see note 91 supra. Rwangyezi made the statement while at the Intellectual Property and TCE Conference organized in Uganda. For Conference theme, see note 89 supra.

chapter presents recommendations as to how TCEs can be effectively utilized to attract both local and foreign markets.

#### 4.3 Recommendations in addressing the needs of the different parties

This study concludes that Ethnic communities are, to a larger extent, more concerned about preservation of Cultural values than payment of royalties for the use of their TCEs. It is on that basis that they should be given freedom to exercise their right to self-determination in the use of their TCEs in conformity with the 2007 UN Declaration on the Rights of Indigenous Peoples. The study also highlights that the appropriation of property rights in culture has lured impoverished ethnic communities into commoditizing their cultural heritage as a new way of appreciating their cultural expressions. The demand for compensation associated with previous abuse of property rights in TCEs and the calls for protection against future misuse, create a mixture of property and liability rules. This mixture of rules forms the basis for the preference of a sui generis legislative system to address TCE usage.

This part of the chapter therefore provides practical suggestions drawn from lessons learned through case studies highlighted in previous chapters. It does not offer detailed provisions as to what the sui generis structure for TCEs would look like, but sets out proposals as to what should be considered in the drafting of the structure.

Generally, the claim made through these recommendations, is for a partnership between the State and ethnic communities in the protection and management of TCEs. The State has the technical expertise to come up with a policy and regulatory mechanism. It also has the financial resources to fund the management of TCEs. Ethnic Communities on the other hand, are knowledgeable about their cultural expressions and the value system imbedded within them. The claim made is that in bringing these two stakeholders together, TCEs will be effectively utilized for socio-economic development. The points proposed to be considered are discussed below:

(a) Involving the State: Establishing a Government Cultural Authority

Based on the analysis of the practicalities and likely effects on Taxation of TCE usage as discussed above, taxation as a way of generating revenue from their commoditization is a risky venture that will only discourage growth of an infant and fragile sector in developing economies. As proposed in this part of the chapter, there are other more practical measures that can be employed by the State in creating avenues of benefit from its cultural heritage. From a general perspective, the government can benefit through sharing of licenses with the local communities themselves. As has been observed above, the attainment of socio-economic development from TCEs for any given State or Community, springs from the existence of a structure in place. Many ethnic communities do not have structures with mechanisms as to how royalties from the use of their TCEs can be maximized.

The state can thus capitalize on this by establishing a Cultural authority that oversees management, enforcement and regulation of TCE usage. This authority can be established as a semi-autonomous body. In this sense, it is recognized as government agency but is run in an independent manner on the basis of which it is accountable to the Parliament. This would include ensuring that the Executive Board and Administrative Board are not appointed through political interests but on merit, based on their expert knowledge of matters related to traditional intellectual property. This expertise should encompass representatives of traditional elders, Intellectual property law experts as well as persons from the entertainment and commerce industries. The purpose of this measure is to safeguard equal representation from the key stakeholders in the usage of TCEs.

The Head of the Authority should be appointed by the President with approval of Parliament. The composition and functions of the Authority can also be prescribed by Parliament. In this way, there is a guarantee that the people's interests in the structuring and running of the authority, are well represented through an accountable organization - which is the Parliament. The members of the Executive and administrative board should hold tenures of office for a limited period of time which can only be renewed once. This fosters accountability and a goal-oriented service delivery. It also guarantees that other well qualified persons are given the opportunity to serve in the same capacities with fresh ideas. Accountability of the Authority is further guaranteed based on its nature as a Government Administrative entity with the power to sue and be sued in its own name. The actions

of the Authority would thus be cautiously administered with the knowledge that they can be brought to question either through Parliament or before the courts of law. Elements of corruption and nepotism which are synonymous with government offices, especially in developing countries, are controlled from the onset.

(b) Preserving culture

It is essential that the Cultural Authority helps communities in the documentation of their cultural heritage. This can be done through the creation of an archival base which will ease in tracing appropriated TCEs to particular ethnicities as well as prompt users to enter into negotiation of licenses with the Authority on behalf of the TCE holder.

A number of private entities in Uganda have already established museums with archival data on their cultural heritage. For instance, in February 2014, a local Ugandan Businessman opened a museum that aims to document, preserve and promote the history and local technology of various ethnic communities such as the Bakiga and Banywaranda of Uganda, as well as the Baziba of Tanzania and Burundi. The establishment of this museum was purposed on the need to protect the rich heritage of the ethnic communities in the area; to benefit the younger generation, as well as generate revenue from tourism<sup>348</sup>. This is not the first of such museums in Uganda. Another renowned Ugandan Businessman by the name of James Tumusiime established a one-stop institution for cultural material and information in western Uganda in December 2011. Tumusiime's Igongo Cultural Centre documents the Banyankole culture. It offers many services particularly to the tourist industry though its main attraction is the Museum of South Western Uganda which has ancient and modern history of the region<sup>349</sup>.

Although it is easier to archive tangible aspect of TCEs as these Ugandan museums have been doing, there should also be an emphasis on collecting and archiving intangible expressions of

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<sup>348</sup> See: Bwogi Buyera, *Museum opens in Ntungamo*, The New Vision newspaper, published February 20, 2014. <http://www.newvision.co.ug/news/652763-museum-opens-in-ntungamo.html> (accessed February 21, 2014).

<sup>349</sup> See: <http://www.igongo.co.ug/> (accessed February 27, 2014).



folklore such as music and poetry. These can be written down or recorded and archived with the rest of the database. Preserving these forms of cultural expressions through a Digital Library, for instance, should include details as to origins and explanations as to the meanings behind these expressions. In this way, the cultural significance and sacred rites, are also highlighted, preserved and protected. This is to the extent that those that intend to incorporate the songs through derivative works would either be turned away on account of sacred rites that forbid such exploitation, or would have to do it within the confinements of the underlying cultural values.

#### 1. Capacity building in the preservation of culture

Other entities such as Education Service Providers can come in to play an effective role in the creation of the required human resource capital for the preservation of culture. Academic Institutions at the High School or College level, can be useful in providing education that involves structuring of skills in TCE management. This is so as to ensure that musical and dance expressions, for instance, are understood and preserved in their correct form so as to avoid risks of dilution. The students that are imparted with these skills eventually have the opportunity of working with the ethnic communities or government agencies in the management and enforcement of TCE usage.

The Academic Institutions can also play an effective role as research institutions that feed their information into other entities such as the Government Cultural Authority, Community Cultural Centers and Digital Libraries. These Institutions can thus be given the mandate to research and publish on matters related to TCEs. Resource bases of this nature can guide in the establishment of more structures to manage TCE affairs. Mercy Kainobwisho, in the same vein, recommends that, “*It is important to design an education curriculum that promotes the role of culture and enriches the local students with cultural aspects.*”<sup>350</sup> Enriching the youth with information related to their cultures, makes them better appreciative of their roots and cultural heritage. This in turn makes them better custodians of their TCEs and thus better negotiators over usage. It can also boost their

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<sup>350</sup> Mercy Kainobwisho, Registrar – Intellectual Property Rights, Uganda Registration and Services Bureau, ‘*Protection and Administration of Folklore in Uganda: Reality or fiction*’, a paper presented at I.P./Folklore Conference. For Conference theme – see note 89 supra.

innovative skills in thinking up ways and means of creating news ways of expressing their folklore while preserving the values within. Creativity of this nature boosts the I.P regime as well as the economic stature of society.

(c) Negotiated use of TCEs

The creation of a data base should not be seen as a way of stagnating cultural evolution, as some critics have expressed concern. On the contrary, if handled through a well-established and agreed upon procedure, it would act as an impetus for users with creative minds to enter into negotiations with the Authority and ethnic communities on the creation of derivative works from TCEs. The derivative works that are guided by the data base, are themselves indicative of cultural evolution. As such, these negotiations can focus on a number of key factors inclusive of the following:

1. Economic rights and License fees for TCE usage: The Government Authority can negotiate a rate for the use of a particular TCE with consultation from mandated leaders belonging to the particular source community. The royalties collected from the usage of the TCE can be split between the Authority and the source community. However, the payment of license fees should be restricted to only foreign potential users of TCEs and not nationals of the same State as the source community. In this way, nationals will not be discouraged from exercising their creative minds with derivative products from their TCEs and the general claim over communal ownership of the cultural heritage will not be overstepped. Foreign users, on the other hand, have no claim of communal ownership to the cultural expressions and are therefore in a better position to negotiate for and pay a license fee with the Authority.
2. Sacred rites or cultural values at risk through creation of a derivative work: The adherence to cultural values in TCEs applies to both foreign and local users. The parties should come to terms of agreement as to how any sacred rites or cultural values will be handled through the derivative work. If there is no guarantee as to their preservation or protection, the Authority, in consultation with the source community, can exercise its freedom to reject granting of a license. Another way in which a license can stand to be rejected is if the sacred rites are in total conflict with the grant of user access. This is

similar to the case discussed in the earlier part of this chapter in which the Smithsonian Institute was not able to enter into an access of TCEs arrangement with the Western Australian Desert Aborigines Community over the use of their folklore. This was on the basis that their sacred rites prevented persons who were not from that community from accessing their cultural expressions.

3. Rights of Attribution over TCEs: Although it has been recommended above that Nationals that make use of TCEs should not be required to pay for such use, they – as well as foreign users - should have the obligation to attribute the TCE used, to a source community. Moral rights or rights of attribution have the advantage of raising the profile of the source community from which a work derived from TCEs is placed on the market. Depending on how the marketing and attribution are structured, consumers of derivative products are likely to develop a keener interest in the source community as they appreciate the derivative product. This is equivalent to advertising the source community's cultural wealth to the tourism industry.

(d) Developing a stakeholder partnership for TCE usage

In the establishment of Cultural Centers and Digital Libraries on TCEs, it is viable to establish a working partnership between ethnic communities and the proposed Government Cultural Authority so as to avoid having a duplication of services or conflict in service provision. The Igongo Cultural Centre, for instance, already has a working relationship with the Ugandan government. The government, through the Uganda Wildlife Authority<sup>351</sup>, entered into a partnership with the Cultural Centre through which the Authority financed the research and documentation on the relationship between wildlife and people's clans of southwestern Uganda. Under the cultures of the people in the western Uganda regions of Kigezi and Ankole, wildlife are either totems - which are cultural identities of friendly animals, or taboos.<sup>352</sup>

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<sup>351</sup> The Uganda Wildlife Authority is a governing body that regulates wildlife conservation in Uganda.

<sup>352</sup> Supra note 349.

Partnerships are therefore crucial between Government and private entities in orchestrating ways in which cultural expressions can be utilized in a more beneficial manner towards the attainment of socio-economic development. Private entities and the ethnic communities they are affiliated to, have a hands-on knowledge about their cultural heritage and the values imbedded within. This strengthens the argument for self-determination among ethnic communities. However, limited financial and technical capacity makes it difficult for ethnic communities to tap into their cultural resources which makes the partnership with government a better option.

Nonetheless, in some instances, governments in developing economies may also lack the financial or technical capacity to support their ethnic communities in research, documentation and display of the cultural heritage. Civil Society Organizations can come in to execute this role, particularly those specifically established to contribute their resources towards such a cause. An example in this regard is New Perimeter, a non-profit organization established by the global law firm of DLA Piper which supports TCE initiatives in rural-based communities in developing and post-conflict countries<sup>353</sup>.

A partnership between TCE holders and the State is also viable in the enforcement of property rights. Private enforcement of traditional property rights can be potentially challenging, especially where cross-border infringement is concerned. The Government Cultural Authority can take up the enforcement obligation on behalf of ethnic communities to ensure that the rights enshrined in their TCEs are well protected and that remedial measures are available in case of breach. This is the role currently played by the National Folklore Board of Ghana as stipulated by the Ghana Copyright Act of 2005. Government agencies are also in a better position to follow up on cross-border infringement through reciprocal arrangements with other States where the infringement party is based. Nonetheless, ethnic communities should have the capacity to pursue civil remedies while the State can play the role of pursuing criminal remedies on their behalf.

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<sup>353</sup> See note 311 supra.

There are a few challenges that have to be recognized and addressed when looking at viable partnerships among stakeholders in TCE protection. It would, for instance, be more efficient for the State to support ethnic communities or individuals that set up their own Cultural Centers through the means suggested above, as opposed to the State running such a Center as well. Government agencies are likely to encounter challenges in soliciting for information from indigenous peoples with a view towards creating a data base for a National Cultural Center. Mercy Kainobwisho opines that members of ethnic communities would be suspicious of government agencies who approach them requesting for information connected to their cultural expressions. The communities may view this as a breach of their valued community secrets and may not appreciate the fact that the government measure is meant for the creation of a cultural database<sup>354</sup>. The partnership between the State and the ethnic community would, understandably, also be limited in instances where the community is restricted by customary norms from surrendering its cultural information to an entity that is considered foreign to the community. A typical example of such an instance is the case of the Native American Washoe community discussed in Chapter four of this study. The community was not able to partner with the Smithsonian Institute in the use of its TCEs due to restrictions derived from its sacred rites.

Thus, there may be instances where the TCE holders are more comfortable with creating their own digital libraries for archiving their cultural expressions as opposed to handing over such data to the State. A standard form of approach ought to be established. The State authorities ought to position themselves in the partnership as a source of finance capital or as a middle ground between interested users and the TCE holders. The middle ground service could entail providing contact information for interested users as to which communities can be reached for specific themes to use in cultural expressions.

Another area in which this study is skeptical is with regard to the viability of a partnership between TCE holders and TCE users in the general sense. Such a partnership can only be considered on a

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<sup>354</sup> Supra note 192.

case by case basis depending on the nature of the TCE that the foreign party is interested in; the cultural norms attached to it; and, the general interests of the source community concerned. The existence of a structure, as suggested above, is also essential for partnerships. It can be cumbersome to try and establish a partnership where the ethnic community has no structural organization as a starting point to guide round-table negotiations. Isaac Mulindwa, a Ugandan businessman and investor in the music industry expresses strong pessimism over the viability of a partnership between modern musicians and TCE holders in fostering an understanding in TCE usage. Isaac argues that in the past, the composers of traditional music earned societal prestige from their expressions and individual ownership was never an issue. However, today, because of biases in intellectual property rights, no particular individual can claim ownership to TCEs, whereas an individual can claim ownership to property rights that are derivative of TCEs. Isaac argues further that it is even difficult for a modern musician to identify who to go to in terms of discussing a partnership. He states: “*Which traditional leaders would you got to? Would you got to my clan members? Do you go to the village I came from?*”<sup>355</sup> As such, going by this argument, a direct partnership between musicians and TCE holders is quite difficult to formulate unless both entities have structures in place with avenues through which this can be made possible. Where such structures are inexistent on the side of ethnic communities, the Government Cultural Authority can come in to play that role.

(e) Encouraging creative content

All stakeholders should work together in encouraging creative content from TCEs. This helps to promote evolution of TCEs and also guarantees a continued supply of TCE products for the ready market. Mercy Kainobwiso also builds on this recommendation and suggests for the creation of media programs rooted on TCEs and purposed for children and the youth. She adds that this would motivate them to respect, enjoy and protect their TCEs as well as be able to contribute towards the growth of the cultural heritage<sup>356</sup>.

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<sup>355</sup> Supra note 264.

<sup>356</sup> Supra note 192.

The overall benefit of the State working hand in hand with indigenous peoples in elevating their TCEs to marketable levels will also act as an encouragement towards further development of creative content amongst local communities; a creation of employment opportunities; and, a better appreciation of Intellectual Property regimes. This is because, as publicizing of TCEs picks up through digital libraries and cultural centers, there will also be an upsurge of knowledge building upon existing knowledge through derivative works. Ultimately, this will be a boost to the economies of such countries through embracing of I.P regimes.

This study has generally established that developing countries present themselves as vulnerable and open to abuse of their TCEs on the basis of their inability to exploit their cultural heritage as well as take advantage of the Intellectual Property systems. The Intellectual Property regime cannot be relied upon to protect TCEs but it can play an effective role in protecting derivative products of TCEs. This can run in harmony with a new sui generis system that protects TCEs as well in their original form.

It therefore follows that ethnic communities should be able to exercise their ability to generate wealth from their TCEs as well as simultaneously protect them. This will place such countries at a higher competitive edge within the I.P system. Eventually, global collaboration with other stakeholders in the industry will increase investment opportunities and, as such, socio-economic development in the communities and the countries as a whole. The concerned States should thus focus more on education; financial support towards community initiatives on cultural preservation; sensitization on the values of exploiting the TCEs; generating institutional efficiency and building up human resource capacity.

#### 4.4 Conclusion

This Chapter has provided empirical observations as well as secondary evidence to support the claim that TCEs have a role to play in socio-economic development. Developing countries have often been characterized with abject poverty. However, many of them also possess richness in cultural diversity. It is their roots in culture that ought to be nurtured to raise their poverty levels. Where this has already been established, the parties involved should be encouraged further though sound

policies and frameworks to guide the process. Ethnic communities are generally weary of a regulatory regime being imposed upon the way they express their cultures. However, rather than have such policies and legal frameworks *imposed* upon them, sensitization and consultation can be used as means through which they are guided to the structural benefits of regulating *not* their culture, but the *mannerisms* of TCE usage. If communities are willing to exploit their TCEs in an organized manner that can generate socio-economic growth, they should also be willing to be consulted upon and share ideas with their governments as to how a sui generis policy and legal framework can guide them into nurturing their TCEs to their benefit.

Individuals and Business corporations in the developed world are already ripping from TCEs in developing countries. In some of these capacities, proper arrangements have been made with the source communities to ensure that they too can benefit without any disregard towards their cultural heritage. However, in other instances, the vulnerability and ignorance of the source communities has significantly contributed to the mass exploitation of their cultural resources by external parties. Many of these communities lack structures in place to enforce their property rights or enter into sound collaborations similar to the Swedish-Chinese collaboration under IKEA. Collaborations of this nature also require financing of research and compilation of TCEs that are rooted in particular communities as they are prepared for transformation as commodities. Ultimately, State involvement through the provision of funding of research, as well as giving technical support in the creation of policy and regulatory regimes, would be key to preserving cultural expressions and ensuring proper usage.

The downside of State involvement however, is the considerable handicaps that States in developing countries have over exercising their role as protector and enforcer of the TCE holders' interests. The appreciation of Intellectual Property in many developing countries is still lacking. Many of them do not have National I.P or Traditional Knowledge policies for that matter. Since States should be relied upon by TCE holders in the provision of technical expertise, this can potentially pose some challenges were the States themselves did not have the technical capacity needed to support ethnic communities. African developing countries in particular should therefore take advantage of their networking positions in memberships with organizations such as the WIPO and ARIPO to boost



their technical personnel in I.P and T.K related matters so as to provide better technical assistance to the ethnic communities.

Furthermore, in order to ensure full realization of returns in the economic exploitation of TCEs, there should be complete accountability procedures in place within a system that guarantees effective checks and balances. Most developing countries are riddled with high levels of corruption and a lack of political will to curb corruptive tendencies. This should be born in mind in the structuring of a policy and legal framework that guides proper collection and use of royalties from TCEs. As such, the administrative set up of structures entrusted with monitoring the use of TCEs and collection of royalties should be accountable to Parliament and should be composed of representatives from all stakeholders. This is so as to create an internal system of accountability as well.

A partnership built on shared objectives of achieving socio-economic benefits for communities and the country as a whole, would work well for developing countries in the utilization of their TCEs. As such, building on sound policies and a legislative structure that encourage creativity, accountability and proper collection as well as dissemination of proceeds from the use of TCEs, will transform visions into realities in effecting the role of TCEs for socio-economic development.

## CHAPTER FIVE

### Conclusive thoughts and issues for future research

#### 5.0 Introduction

The commercialization of TCEs has taken center stage world-wide. Folklore and Traditional Knowledge are no longer merely sources of identity that serve utilitarian purposes in one community or another. They have become commoditized and are balanced between benefitting communities as well as individuals. Nevertheless, that does not place TCEs within the realm of Intellectual Property Rights. This is because regardless of the transformed recognition of TCEs, the characteristics remain the same which are deserving of a *sui generis* enforcement and regulatory framework. In previous generations, TCEs were purely enjoyed by the particular ethnic communities to which they belonged. Today, however, there are three major stakeholders that deserve a say in the management and use of TCEs, that is: (1) the ethnic communities that are recognized as the custodians; (2) the parties that appropriate them; and (3) the State in which the ethnic community is found.

This chapter is a culmination of case studies, arguments and discussions presented in the previous chapters. It provides conclusions that, in a nutshell, address the study findings on ways and means through which the commoditization of cultural expressions can be utilized without suffocating the interests of any of the three key parties involved. The Chapter relies on lessons learned from the highlights of the previous chapters to make a claim for a system through which TCEs and trade can go together without trampling the evolution of culture through regulation or the devaluation through uncontrolled usage. It also draws from personal perspectives and existing literature in presenting the conclusive thoughts for the study.

There are two major parts that make up this chapter. The first part gives a recap of the study. It summarizes the genesis of the study; the research issues that were addressed; the objectives of the study; and, the findings and conclusions. The second part of the chapter highlights new and emerging areas of interest in TCEs that have not been given exposure in this study but would warrant deeper investigation. TCEs evolve with the development of societies around them. This means that scholarship on the use of TCEs also has to remain relevant in a developing environment.

The objective of highlighting issues that require further research, is to show the future relevance of this study in a changing world.

### 5.1 Recap of the Study

This study was provoked by the mixed reactions to the Ugandan President's release of a rap song in October 2010. On the one hand, Ugandan youth were excited about the song mainly because of its hip hop style which appealed to them. On the other hand, the traditional elders from the Ankole ethnic community were not too pleased because the President had used Ankole Folklore in creating his rap song. The mixed reactions thus presented an apparent cultural divide. The President's rap song earned a lot of media attention and airwaves. In the process, a number of individuals profited from its economic success. An objection against Copyright registration was filed by some of the disgruntled Ankole Community elders. Nonetheless, a copyright was registered in the song as a derivative product of Ankole Folklore. Licensing contracts were made with a number of corporate entities that proceeded to use the song for their product labels.

#### (a) Research Issues

On a general front, the foregoing set of events triggered a number of research issues: The key issue was as to where to draw the line between what we perceive as traditional intellectual property rights that have been known to exist since time immemorial, and modern intellectual property rights that are derivative of the former. This issue required looking at the underlying differences in property rights between concepts in Traditional Cultural Expressions on the one hand, and the western concept of Intellectual Property Rights. It also required analyzing enforcement and regulatory mechanisms over the use of TCEs from older generations to the present day so as to determine best practices for the future. Furthermore, it was also essential to scrutinize the major players involved in the use of TCEs in what is deemed as misappropriation by TCE holders; to examine what provokes this practice; and, how it can be addressed for the future while accommodating the interests of all the parties. It was apparent that those using TCEs benefit economically and as such, the issue was whether such economic benefits can also be shared with the ethnic communities.

(b) Research objectives

In order to address the issues mentioned above, aims and objectives were drawn up as follows: The general aim was to develop an understanding of the role TCEs can play in the socio-economic development of Society. This was broken up into the following objectives:

- i. An exploration of ways in which the modern music industry is exploiting TCEs.
- ii. An identification of the challenges surrounding property rights in TCEs.
- iii. A formulation of suggestions for respectable use of TCEs within the current generation.

Chapter one, which was the introductory chapter, gave a detailed analysis of the research problem and justification for the study, while chapters two, three and four provided in-depth coverage of objectives (i), (ii) and (iii) above. This closing chapter sums up my conclusions on the study.

(c) Research findings and conclusions

The methodology relied upon in generating the research findings involved use of a qualitative analysis. There was also a minimal reliance on a quantitative analysis to explore the strength in specific issues under investigation. These involved survey responses to test the strength of perspectives over issues of ownership and use of TCEs. The qualitative analysis, which included organizing an International Conference in Uganda, also guided the flow of the research in drawing out opinions as to the understanding of what TCEs entail. The analysis also drew opinions on how TCEs should be regulated and how proceeds from the use of TCEs should be used for socio-economic development, particularly in developing economies.

The use of secondary resource material was also vital in leading up to the research conclusions. Existing literature that was reviewed did not reveal an adequate connection between TCEs and socio-economic development. As such, a combination of the primary and secondary findings led this study to the following conclusions:

- a) The absence of a clear understanding of TCEs as well as a well-defined policy and regulatory structure have contributed to the current appropriation and inefficient use of TCEs. Ethnic

communities have thus failed to realize the full potential of their TCEs as a tool for socio-economic development. Garrett Hardin argues in *'The Tragedy of the Commons'*<sup>357</sup>, that if property is not well defined, it will be subjected to ill use and that if no one owns or has an interest in the resource, it will be over-used. This position is clearly evident in this study in the sense that TCEs are currently used by members and non-members of ethnic communities without an understanding about how to clearly define them. The TCEs are also communally owned which creates challenges in proper accountability for use. The conclusion is that without developing and agreeing upon a clear understanding of TCEs, they will be constantly subjected to misuse.

- b) Following from the foregoing conclusion, it can also be conclusively argued that the most concrete and well elaborated definition for TCEs that was picked up in this study is found in Article 1 of the Substantive Provisions of the WIPO Revised Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore<sup>358</sup>. This was prepared by the Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, which is under the World Intellectual Property Organization (WIPO). The definition drawn from this draft text can be a useful guide to stakeholders that seek to have a better understanding as to what TCEs are. It is also helpful for Countries that are in the stage of preparing their own policy and regulatory frameworks on the protection of TCEs.
- c) Garret Hardin suggests further in *'The tragedy of the commons'*<sup>359</sup> that one solution to the tragedy is the development of a governance structure that restricts access to the commons so that the resource is efficiently used. This solution applies squarely both within the conclusions as well as recommendations of this study. In as far as the conclusions are concerned, relying on Uganda as a case study, the study revealed that the absence of a governance structure for TCEs, calls for a need to advocate for measures to address the legal and structural vacuum in

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<sup>357</sup> Garrett Hardin, "The Tragedy of the Commons"; Science No. 13, December 1968: Vol. 162 no. 3859 pp.1243-1248. See: <http://dicoff.org/page95.htm> (accessed march 6, 2014).

<sup>358</sup> See note 38 supra.

<sup>359</sup> Supra note 357.

TCE protection. A number of regulatory frameworks stood out amongst those that were reviewed: The 2007 UN Declaration is significant in addressing principles on self-determination of cultural values among indigenous peoples; the IGC texts – as argued above - help with a general understanding of TCEs; and the ARIPO Swakopmund Protocol is important for developing countries like Uganda, in highlighting ways in which the State can work with the traditional communities in enhancing and protecting their TCEs.

The overall conclusion in this respect is to draw ideas from a combination of these Instruments to address the legal vacuum in developing countries like Uganda by coming up with a governance structure that regulates TCE usage. Picking best practices from other countries that are transitioning towards TCE protection can also be helpful. Countries that have made strides towards developing structures in TCE protection such as Ghana, Benin, Kenya and South Africa can be relied upon in this respect. As Steven Rwangyezi states:

*“In as long as TCEs are not structured, it [sic] will remain fluid and as long as it remains fluid, it cannot become an economic good and it cannot be packaged and sold.”<sup>360</sup>*

- d) In conducting research, there were mixed views on the question of regulating culture. This study leans towards the view that it is not culture that is regulated but the outcomes of culture. This is because culture – and cultural expressions at that – is ingrained in every member of a given ethnic community and not necessarily owned by the leader of the community. As such, the regulation of TCEs should be focused more on how they are used. In this way, the interests of the State, the TCE holders and the users, are all covered.
- e) It also follows from the foregoing conclusion that although communities can benefit economically from their TCEs, it is impractical to rely on taxation of TCE usage as an avenue towards this achievement. Licensing and sharing of royalties are a more favorable approach through a partnership between TCE holders and State parties. Taxation, on the other hand, will only hamper proper utilization of TCEs by discouraging potential users from exercising their creativity through TCEs due to the tax burdens involved. In as far as

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<sup>360</sup> Supra note 347.

licensing is concerned, the obligation to pay a fee prior to use makes more sense if it is a person that is foreign to the community who bears this responsibility. Community members, as custodians of the cultural expressions, should only have the responsibilities of respecting cultural norms and rights of attribution associated with the TCEs.

- f) If governments were to establish proper records of their TCEs and the economic value that accrues from them, they would be better motivated to protect and oversee enforcement of the community property rights in their TCEs.

## 5.2 Issues for further research

The previous part of the chapter has presented conclusive findings on this study. However, a number of issues remain to be addressed in future research related to this study. This part of the study presents a discussion of these issues:

- (a) Harmonization of TCE standards among different countries.

This study has not been able to determine avenues through which states can harmoniously protect TCEs on behalf of nationals belonging to different States and yet identified under one ethnicity. Much as the fore-going part of this Chapter has suggested that self-determination of property rights in TCEs by ethnic communities would be one way of addressing such challenges, building harmony amongst States in this direction is a necessary but difficult task.

Many African countries, for instance, already have regulations on the use of their TCEs which place the cultural heritage in the hands of the State on behalf of the communities. Where there are cross-border communities involved, enforcement of such regulations can create conflicts among neighboring States, especially where their regulatory frameworks cannot be harmonized. One observation is that of the Ewe Community which is based between the Ghana and Togo border<sup>361</sup>. Ghana is a member of the African Regional Intellectual Property Organization (ARIPO) and under

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<sup>361</sup> Paul Kuruk, *supra* note 58 at p. 36.

its Copyright law, Folklore is held by the Government in trust for the people<sup>362</sup>. Togo, on the other hand, is a member of the African Intellectual Property Organization (OAPI) which also subscribes to the principle of empowering State Agencies to foresee management, protection and enforcement of TCE usage<sup>363</sup>. In this instance, both regulatory mechanisms grant the States with the power to manage and enforce TCE usage. However, since both States share certain ethnic communities such as the Ewe people, there is a potential for conflict as to which State speaks for the people in the protection of their property rights in TCEs.

As such, the likelihood of a potential tug of war over TCE ownership and protection in this case is premised on the fact that the different States concerned subscribe to regulatory regimes that cannot be reconciled. The Swakopmund Protocol<sup>364</sup> to which ARIPO members like Ghana are obligated to follow, provides under section 17.4 that: *“Where two or more communities in the same or different countries share the same expressions of folklore, the relevant national competent authorities of Contracting States and ARIPO Office shall register the owners of the rights in those expressions of folklore.”* This provision does not illuminate any way out of the problem that States find themselves in when having to deal with cross-border communities. It is also difficult to determine which voice speaks for cross-border ethnic communities when their TCE property rights are violated. Due to the lack of clarity in the regional and national regulatory frameworks as well as absence of harmonious protection of TCEs amongst different States, this study is therefore hard-pressed to find answers to this dilemma and leaves it as an issue that requires further research.

(b) Structuring the role of a Government Cultural Authority in TCE management

Although this study emphasizes the need for a Government Cultural Authority in the management and enforcement of TCE usage, defining the parameters within which the Cultural Authority is to play its role as well as partner with ethnic communities, is a humongous task. This structural partnership needs to be well elaborated so as to establish a regulatory mechanism that does not

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<sup>362</sup> Sec. 5, Ghana: Copyright Act, 2005 (Act 690), supra note 236.

<sup>363</sup> Title II, Article 72 of the Bangui Agreement. See:

[http://www.wipo.int/wipolex/en/other\\_treaties/text.jsp?file\\_id=181151](http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=181151) (last accessed April 27, 2013).

<sup>364</sup> See: <http://www.cbd.int/doc/measures/abs/msr-abs-aripo-en.pdf> (last accessed April 25, 2013).



infringe on the ethnic communities' right to self-determination of the property rights in their TCEs. The Communities desire protection of the cultural values in their TCEs; they desire some entitlement to the proceeds from the use of the TCEs; and also desire attribution in the TCE usage. However, conflicts within the Communities as to what constitutes protection of TCEs, cannot be ruled out.

As such, if a Government Cultural Authority is going to be given statutory mandate in ensuring that the Ethnic Communities achieve their desires, this requires a lot of consultation from the grass-roots levels upwards to government enforcement agencies, the users of TCEs as well as the consumers. This is because the Cultural Authority may only offer solutions that apply to particular individuals or specific communities as opposed to satisfying the majority. Ultimately, a great deal of research is required in building together guidelines as to how the Government Cultural Authority should be structured. The National Biodiversity Authority of India<sup>365</sup>, for instance, has a well elaborated structure through which there is effective sharing of resources associated with collective ownership in India. Lessons can therefore be drawn from this Authority in developing mechanisms in which there can be a sustainable use of the resources of ethnic communities drawn from their cultural heritage as well as fair and equitable sharing of resources

(c) Testing the future relevance of WIPO in the protection of TCEs

The friction in the relationship between WIPO and UNESCO in the joint establishment of an International Instrument on TCE protection is portrayed through the differences in International Instruments that have been adopted by these two organizations in this area. Arguably, the basis for the underlying differences lies in the nature of TCEs as communal and lacking in duration of protection. This makes them more of public rights than private rights – the cultural heritage and cultural diversity argument, which is the priority for UNESCO. WIPO, on the other hand,

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<sup>365</sup> See: National Biodiversity Authority (An Autonomous and Statutory Body of the Ministry of Environment and Forests, Government of India), <http://nbaindia.org/> (last accessed March 24<sup>th</sup>, 2014).

prioritizes private property rights through pushing for a framework similar to the Intellectual Property regime, which is characterized by individualism and a given duration of protection.<sup>366</sup>

The WIPO Intergovernmental Committee on Intellectual property and Genetic Resources, Traditional Knowledge and Folklore (IGC) has been working on legal texts on the protection of genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs) since the year 2000. The 2013 drafts of the Instrument address issues such as definitions of TK and TCEs; identifying the rights holders; procedures of resolving competing claims by communities; and what rights and exceptions ought to apply.<sup>367</sup> Although the IGC is member-led and not secretariat-driven, it has suffered from occasional impasses with representatives of indigenous communities who are disgruntled over inability to air their views during the IGC debates. The rules of procedure relied upon in the conduct of the debates did not accommodate receiving views from the indigenous communities.

In the late 1990s - prior to the birth of the IGC, there were various International meetings that culminated in the creation of the United Nations Permanent Forum on Indigenous Issues (Indigenous Forum). The Forum is an advisory body to the Economic and Social Council and is mandated to discuss indigenous issues related to economic and social development, culture and the environment, among others. It is made up of sixteen independent appointed or elected experts, functioning in their personal capacity on a three year renewable term. Eight of the members are nominated by governments and eight are nominated directly by indigenous organizations in their regions.<sup>368</sup> The Indigenous Forum has an observer status in sessions held by the IGC.

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<sup>366</sup> Christoph Beat Graber, *Can Modern Law Safeguard Archaic Cultural Expressions? Observations from a Legal Sociology Perspective*, NCCR Trade Working Paper No. 2007/09, April 2007. Electronic copy available at: <http://ssrn.com/abstract=1090800>

<sup>367</sup> WIPO: Intellectual property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions, An Overview, 2012. WIPO Publication No. 933E. See: [http://www.wipo.int/export/sites/www/freepublications/en/tk/933/wipo\\_pub\\_933.pdf](http://www.wipo.int/export/sites/www/freepublications/en/tk/933/wipo_pub_933.pdf) (last accessed May 1, 2013). All meeting reports and relevant documents of the IGC are available online: [www.wipo.int/tk/en/igc/](http://www.wipo.int/tk/en/igc/). Also see Appendix D of this study, which summarizes the priority areas catered for by the Model laws and Regional Instruments in offering protection for TCEs.

<sup>368</sup> See [www.social.un.org/index/indigenouspeoples](http://www.social.un.org/index/indigenouspeoples) - accessed April 27th 2012.

In February of 2012, the legitimacy of the IGC debates was called into question when the International Indigenous Forum withdrew from the discussions of the WIPO Committee. The withdrawal was instigated by the fact that the proposals of the Indigenous Forum had consistently been ignored by the IGC in its sessions and yet the work of the IGC was going to directly impact the interests of the Indigenous Communities represented by the Forum. The reaction from the IGC delegates to the withdrawal was one of “regret” reasoning that the change in the rules of procedure to allow full and equal representation would require a decision from the WIPO General Assembly.<sup>369</sup> This unfortunate episode at the international scene raises the question as to how influential WIPO-led instruments will be in guiding countries with indigenous communities in establishing their own policy and regulatory frameworks.

The relevance of WIPO in the structuring of TCE frameworks also requires further investigation when juxtaposed with the influence regional organizations such as OAPI and ARIPO have on their membership. These two organizations, for instance, have come up with the Bangui Agreement and the Swakopmund Protocol, respectively in dealing with the protection of TCEs. WIPO looks at the protection of TCEs from an I.P and trade bias whereas the interests of developing countries includes the protection of their cultural heritage. As such, the general focus of the WIPO agenda as well as the continuous delays observed with the IGC texts, call for further research into the relevancy of WIPO relevant in the future protection of TCEs. The WIPO efforts in guiding domestic legislation on TCEs will also be considered late in coming if members of regional organizations such as OAPI and ARIPO structure their TCE frameworks under the guidance of these organizations as opposed to WIPO.

In the same line, the study would also be interested in researching into how Sui generis systems of protecting TCEs can be placed – or whether they have to be placed - within an I.P regime overseen by WIPO. The 1994 Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) fuses regulation on all forms of international trade with intellectual property rights. It obligates

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<sup>369</sup> Intellectual Property Watch: Catherine Saez: <http://www.ip-watch.org/2012/02/22/indigenous-peoples-walk-out-of-wipo-committee-on-genetic-resource..> (Accessed March 20th 2012).

members of the World Trade Organization to establish I.P regulatory regimes that are in harmony with the TRIPS agreement. The issue for further research therefore, would be as to whether a sui generis legislation on TCEs – which cater for communal ownership in property rights, can also be harmonized with the TRIPS Agreement which is advocated for by WIPO and focuses on individual ownership of property rights.

(d) Management of TCEs in a digital era

As developing economies consider ways of exploiting their TCEs with the guidance of established frameworks, they will also have to deal with instantaneous copying of products associated with ethnic communities and effortless manipulation and distribution of such works courtesy of technological advances.

Ethnic communities, most likely, find themselves between a rock and a hard place: On the one hand, they have the opportunity to generate economic benefit from their TCEs through their creativity and opening up their cultures to the market through digital technology. On the other hand, however, an unchecked digital means of marketing their trade can lead to immeasurable misappropriation and abuse of TCEs. Michael Brown highlights about this plight when he portrays the lament of a man from Oregon's Klamath Tribe: *"It's upsetting that the songs of my relatives can be on the Internet. These spiritual songs live in my heart and shouldn't be available to just anyone. It disturbs me very much."*<sup>370</sup>

It would therefore be necessary to investigate the impact of the digital technology on the protection of TCEs. The nature of the impact involves looking into the market for TCEs; the consumer response through a digitized environment; and, the considered future behavior of the stakeholders involved in TCE usage. TCEs evolve over time and, in the same way, technology also develops at a fast pace. This therefore calls for questions as to the nature and extent of protection that can be accorded to TCEs in the digital era without hampering the right to communal ownership of TCEs.

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<sup>370</sup> Supra note 160.

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## APPENDIXES

### Appendix A: Interview Questionnaire.

- Interviewee/Subject reference:
- Date:
- Time:

*Thank you for agreeing to this meeting. This interview forms part of my dissertation research into the use of Works of Art (Traditional Cultural Expressions (TCEs)). The purpose of this interview is to obtain your views on a number of aspects related to the use of TCEs within Uganda.*

### Data Collection Technique: Semi-Structured Interview

(Representatives of Indigenous Societies)

### Generating Facts:

### Theme: Understanding TCEs (Traditional Music) and barriers to the use of TCEs

1. How do you make use of traditional music originating from your Community (e.g., for ceremonial purposes; as a show of cultural values from the Community, etc.)?
2. Is the practice mentioned in answer to Question 1 new/recent or has it been the practice for some period of time?
3. Do you have a person/figure of authority in your community who is recognized as exercising control over how traditional knowledge, inclusive of music, from your community is used (Please explain)?
4. If you answered yes to Question 3 above, is there a guiding system in place for the use of Traditional music within and outside of your community (Please explain)?
5. Do you think that Traditional Knowledge, and specifically – Traditional music, is property and should be assigned rights of a similar nature?
6. Is there an existing database of the traditional knowledge originating from your community, and if so, does this database include traditional music?
7. Other than Traditional music, which other element(s) of Traditional Knowledge do you think attract(s) more value, commercially or otherwise, in your community? (Please explain)
8. How does such benefit to the community come about (e.g., is it from Tourists visiting the community, or other means)?

9. Please explain how the commercial reward from your Traditional Knowledge is utilized by the community, e.g., does it go towards community development projects; is it subject to State Tax or does the State stake partial claim to it; or are there specific individuals that receive a percentage as their personal reward for making and marketing the community's traditional knowledge?
10. Do you know of any instances in which traditional music from your community has been used by modern musicians (Please give examples)?
11. If you answered Yes to the above question, was there any practical reaction from yourself or any member of your community? How was the issue resolved?

Personal Opinion:

Theme: Relating TCEs to the music industry and economic development

12. When do you think the practice of modernizing traditional music started and what do you think caused it?
13. Currently, there is no clearly defined International legal framework or domestic legislation on the use of traditional music. Do you have any understanding of the current formal (Intellectual Property) IP System and if so, do you think it can offer adequate protection over traditional music or traditional knowledge in general?
14. What, in your view are the gaps in the current formal IP System that offer inadequate protection over Traditional Knowledge, particularly music?
15. Do you think that any benefits that modern musicians earn from the production of newer versions of Traditional music ought to be shared as a form of compensation with the Indigenous Communities from which the original music originates?
16. What, in your view, would amount to a form of compensation for the use of traditional music by members of the music industry, e.g., can it be a mere attribution, monetary or any other means of compensation (please explain)?
17. Do you think the State should put in place a law to control access, use and enforcement of Traditional Knowledge (which includes music) today (If you answered Yes or No, please explain why)?
18. Wouldn't the use of a law to control the flow of Traditional Knowledge slow down or eventually destroy the development of culture, such as traditional music?
19. Alternatively, is customary law a more adequate option in the protection of Traditional Knowledge in this modern day and age?



20. Should any new law be an improvement of the formal IP System by including protection of Traditional knowledge (inclusive of music), or should there be a separate stand-alone law that caters for Traditional Knowledge?
21. Under the new law, should members of Traditional Communities exercise full control over how their Traditional Knowledge is used, or (b) Should this be left under the full control of the State, or (c) Should the State work jointly with traditional communities in the control of the use of traditional knowledge? (Please give reasons for your choice of answer).
22. There is Traditional Knowledge that originates from communities that are split between different States. How do you think such Knowledge should be made use of under the law?
23. What is your opinion about the notion that modern musicians are simply recreating and widening the dissemination of traditional music? Is this modernizing of culture or a destruction of the cultural component of traditional music?
24. Is it possible for representatives of Traditional or Indigenous Communities to partner with modern musicians to ensure that cultural values are preserved in instances where traditional music is modernized (e.g., conveying the same message but with a modern touch to it)?
25. In your opinion, if monetary compensation for the use of traditional knowledge is made an obligation under the law, how effectively can this be utilized for the benefit of the community and the State as a whole?
26. Assuming monetary compensation is introduced in the law, would you prefer for this to be retrospective or focus on future use of Traditional music?
27. How do you think the Community can effectively protect its interests in the Traditional Knowledge through Court action if such interests are abused?
28. What other practical alternatives, do you think, can be employed in working out a solution in the use of traditional music by modern day musicians?
29. How do you think modern songs, with elements of Traditional music, can be used to bring about economic development in the community and the country at large?

Data Collection Technique: Semi-Structured Interview

(Representatives of the Music Industry).

(Particularly those that have used Traditional Music in their modern songs).

Generating Facts:

Theme: Understanding TCEs and the barriers to the use of TCEs.

1. In your view, is Traditional Music of significant importance in the modern entertainment industry and if so, how?
2. Do you think it is common practice in Uganda for modern day musicians to use some traditional music in their songs? If so, on a scale of 1-10 with ten being the biggest number, please rate how many musicians out of ten make use of Traditional music?
3. Do you think using Traditional music within a modern artist's song helps to make that song more marketable (e.g., better sales for the song)?
4. Since modern music has identifiable owners, do you think Traditional Music has an identifiable owner from whom you should seek consent before producing your own version of such music?
5. In identifying Traditional music for inspiration, were you guided by an existing database of such music or did you rely on other factors? (please explain)

Personal Opinion:

Theme: The Co-relation between TCEs and the Music Industry.

6. What motivated you to create your own version of music from traditional music?
7. Have you ever received any reaction from members/representatives of an indigenous community over the use of their traditional music? How was the issue resolved?
8. If you do not think that the issue in your answer to question 7 above was adequately resolved, how would you have preferred for it to be resolved?
9. From your experience, are there any issues that you have given consideration in the process of creating your own version of the music, e.g preservation of the cultural values in the original/traditional music?
10. Do you think it is necessary to seek permission from someone of authority (either State Agent or a representative of an Indigenous community) before making use of the traditional music (please explain)?
11. Do you think that Traditional music is property and as such, that it should be assigned rights of a similar nature?

12. When do you think the practice of modernizing traditional music started and what do you think caused it?

Theme: Benefits derived from the use of TCEs.

13. Do you think that any benefits that you earn from your version of Traditional Music ought to be shared as a form of compensation with the indigenous community from which the earlier song originates (commercial benefits, rights of attribution – Please explain)?
14. Currently, there is no clearly defined International legal framework or domestic legislation on the use of traditional music. Do you have any understanding of the current formal (Intellectual Property) IP System and if so, do you think it can offer adequate protection over traditional music or traditional knowledge in general? (Or: Do you think the copying of traditional music should be handled in the same way as the copying of modern music?)
15. What, in your view are the gaps in the current formal IP System that offer inadequate protection over Traditional Knowledge, particularly music?
16. What, in your view, would amount to a form of compensation for the use of traditional music by members of the music industry, e.g., can it be a mere attribution, monetary or any other means of compensation (please explain)?
17. Do you think the State should put in place a law to control access, use and enforcement of Traditional Knowledge (which includes music) today (If you answered Yes or No, please explain why)?
18. Wouldn't the use of a law to control the flow of Traditional Knowledge slow down or eventually destroy the development of culture, such as traditional music?
19. Alternatively, is customary law (where it exists) a more adequate option in the protection of Traditional Knowledge in this modern day and age?
20. Should any new law be an improvement of the formal IP System by including protection of Traditional knowledge (inclusive of music), or should there be a separate stand-alone law that caters for Traditional Knowledge?
21. Under the new law, should members of Traditional Communities exercise full control over how their Traditional Knowledge is used, or (b) Should this be left under the full control of the State, or (c) Should the State work jointly with traditional communities in the control of the use of traditional knowledge? (Please give reasons for your choice of answer).
22. There is Traditional Knowledge that originates from communities that are split between different States. How do you think such Knowledge should be made use of under the law?
23. What is your opinion about the notion that modern musicians are simply recreating and widening the dissemination of traditional music? Is this modernizing of culture or a destruction of the cultural component of traditional music?

24. Is it possible for representatives of Traditional or Indigenous Communities to partner with modern musicians to ensure that cultural values are preserved in instances where traditional music is modernized (e.g., conveying the same message but with a modern touch to it)?
25. In your opinion, if monetary compensation for the use of traditional knowledge is made an obligation under the law, how effectively can this be utilized for the benefit of the community and the State as a whole?
26. Assuming monetary compensation is introduced in the law, would you prefer for this to be retrospective or focus on future use of Traditional music?
27. What other practical alternatives, do you think, can be employed in working out a solution in the use of traditional music by modern day musicians?
28. How do you think modern songs, with elements of Traditional music, can be used to bring about economic development in the community and the country at large?

### Data Collection Technique: Semi-Structured Interview

(Representatives of the Academia, Intellectual Property lawyers and representatives of Collecting Societies in Music) [Jointly referred to as “Intellectuals”].

### Generating Facts:

#### Theme: Understanding Traditional Cultural Expressions

1. What is your understanding of Traditional Cultural Expressions/Traditional music?
2. Do you think that Traditional Music of significant importance in the modern entertainment industry and if so, how?
3. Do you think it is common practice in Uganda for modern day musicians to use some traditional music in their songs? If so, on a scale of 1-10 with ten being the biggest number, please rate how many musicians out of ten make use of Traditional music?
4. Since modern music has identifiable owners, do you think Traditional Music has an identifiable owner from whom consent should be obtained before someone produces a derivative version of the traditional music?
5. Does the State, any Institution or any Indigenous Community that you know of in Uganda, possess a database of traditional knowledge, inclusive of traditional music? (please explain)
6. Is there any Indigenous Community in the Country with an established structure of Authority in the management, authorization and use of its traditional knowledge, inclusive of music?
7. Do you think that Traditional Knowledge, and specifically – Traditional music, is property and should be assigned rights of a similar nature?
8. Other than Traditional music, which other element(s) of Traditional Knowledge do you think attract(s) as much or more value, commercially or otherwise, within any given indigenous community? (Please explain)
9. How does such benefit to the community come about (e.g., is it from Tourists visiting the community or other means)?
10. How is the commercial reward from Traditional Knowledge utilized by the local indigenous communities, e.g., does it go towards community development projects; is it subject to State Tax or does the State stake partial claim to it; or are there specific individuals that receive a percentage as their personal reward for making and marketing the community’s traditional knowledge?
11. Please describe any instance you know of in which traditional music from a local indigenous community has been used by modern musicians and explain how the issue was resolved?

Personal Opinion:

Theme: Relating TCEs to musicians + Regulation

12. Can Collective Management Societies be relied upon to manage the use of Traditional music or is the involvement of a representative from the traditional community also paramount (Please explain)?
13. Do you think it is necessary to seek permission from someone of authority (either State Agent or a representative of an Indigenous community) before making use of the traditional music (please explain)?
14. When do you think the practice of modernizing traditional music started and what do you think caused it?
15. Can Traditional Knowledge/TCEs be regarded as a private right if it involves communal ownership?

Theme: Benefits derived from the use of TCEs

16. Do you think that any benefits that modern musicians earn from their derivative versions of Traditional Music ought to be shared as a form of compensation with the indigenous community from which the earlier song originates (commercial benefits, rights of attribution – Please explain)?
17. Currently, there is no clearly defined International legal framework or domestic legislation on the use of traditional music. Do you think that the current formal (Intellectual Property) IP System can offer adequate protection over traditional music or traditional knowledge in general? (Or: Do you think the copying of traditional music should be handled in the same way as the copying of modern music?)
18. What, in your view are the gaps in the current formal IP System that offer inadequate protection over Traditional Knowledge, particularly music?
19. What, in your view, would amount to a form of compensation for the use of traditional music by members of the music industry, e.g., can it be a mere attribution, monetary or any other means of compensation (please explain)?
20. Do you think the State should put in place a law to control access, use and enforcement of Traditional Knowledge (which includes music) today (If you answered Yes or No, please explain why)?
21. Wouldn't the use of a law to control the flow of Traditional Knowledge slow down or eventually destroy the development of culture, such as traditional music?
22. Alternatively, is customary law (where it exists) a more adequate option in the protection of Traditional Knowledge in this modern day and age?

23. Should any new law be an improvement of the formal IP System by including protection of Traditional knowledge (inclusive of music), or should there be a separate stand-alone law (Sui generis law) that caters for Traditional Knowledge?
24. Under the new law, should members of Traditional Communities exercise full control over how their Traditional Knowledge is used, or (b) Should this be left under the full control of the State, or (c) Should the State work jointly with traditional communities in the control of the use of traditional knowledge? (Please give reasons for your choice of answer).
25. There is Traditional Knowledge that originates from communities that are split between different States. How do you think such Knowledge should be made use of under the law?
26. What is your opinion about the notion that modern musicians are simply recreating and widening the dissemination of traditional music? Is this modernizing of culture or a destruction of the cultural component of traditional music?
27. Is it possible for representatives of Traditional or Indigenous Communities to partner with modern musicians to ensure that cultural values are preserved in instances where traditional music is modernized (e.g., conveying the same message but with a modern touch to it)?
28. In your opinion, if monetary compensation for the use of traditional knowledge is made an obligation under the law, how effectively can this be utilized for the benefit of the community and the State as a whole?
29. Assuming monetary compensation is introduced in the law, would you prefer for this to be retrospective or focus on future use of Traditional music?
30. What other practical alternatives, do you think, can be employed in working out a solution in the use of traditional music by modern day musicians?
31. Are the International Agreements useful in paving a way for States to come up with adequate domestic legislation or should other avenues be exploited?
32. How do you think modern songs, with elements of Traditional music, can be used to bring about economic development in the community and the country at large?

## INTERVIEWEE/SUBJECT DEMOGRAPHIC QUESTIONS

[The significance of these questions is to give the interviewer a better understanding of the biases and perceptions of the subject based on his or her demographics]

1. How old are you?
2. Gender?
3. Ethnicity?
4. Education level?
5. Nature of employment (non-related to TCEs)?
6. Nature of employment related to TCEs and for how long?



## Appendix B: List of Subjects Interviewed

### Legal Practitioners, Academicians and Policy makers:

- 1) Mr. Paul Asiimwe, Managing Partner, Sipi Law Associates, Kampala, Uganda.
- 2) Ms. Mercy K. Kainobwisho, Manager, Intellectual Property Department, Uganda Registration and Services Bureau.
- 3) Ms. Juliet Nasuuna, Director, Intellectual Property Department, Uganda Registration and Services Bureau.
- 4) Dr. Ronald Kakungulu-Mayambala, I.P Lecturer, Makerere University School of Law, Kampala, Uganda.
- 5) Ms. Elizabeth Tamale, Assistant Commissioner, Internal/External Trade, Ministry of Trade, Tourism and Industries, Kampala, Uganda.
- 6) Mr. Edgar Tabaro, Partner, Karuhanga, Tabaro & Associates, Uganda.
- 7) Mr. Arthur Mpeirwe, Partner, Mpeirwe & Co. Advocates, Uganda.
- 8) Prof. David Bakibinga, I.P Lecturer, Makerere University School of Law, Kampala, Uganda.
- 9) Associate Professor Dick Kawooya, School of Library & Information Science, University of South Carolina, U.S.A.
- 10) James Wasula, C.E.O, Uganda Performing Right Society.
- 11) Charles Batambuze, C.E.O, National Book Trust of Uganda, and Lead Representative, Creative Commons – Uganda Affiliate Chapter.
- 12) Ministry Official from Uganda’s Ministry of Gender, Labour and Social Development – Chose anonymity.
- 13) Prof. Carroll P. Hurd, Political Scientist, University Administrator and Indigenous Rights Lawyer, Laramie, Wyoming, U.S.A.
- 14) Dr. Marisella Ouma, Executive Director of the Kenya Copyright Board.
- 15) Dr. Poku Adusei, Senior Lecturer in I.P Law, University of Ghana, Faculty of Law, Accra, Ghana.

### Musicians, Music Producers, Folklorists and other Entertainment personalities:

- 1) Roger Mugisha, Media and Marketing Specialist, Radio Presenter on 93.3 KFM D’Mighty breakfast Show, Kampala, Uganda.
- 2) Richard Kaweesa, Music Artist, Producer and Proprietor of Spirit of Africa Ltd, Uganda.

- 3) Milton Wabyona, Folklorist, Executive Director of Uganda Heritage Roots, Lecturer in the School of Performing Arts, Makerere University, Uganda.
- 4) Daniel Kazibwe, aka, Ragga Dee – Uganda Ragga Artist.
- 5) Nyanzi Patrick, aka, Pato of the Ugandan music duo ‘Ngoni’.
- 6) Silver Kyagulanyi, Music Artist, Writer and Producer. Director of Sikia Media Services.
- 7) Steven Rwangyezi, Folklorist, Proprietor of Ndere Dance Troupe, Uganda.
- 8) Dr. Mercy Mirembe Ntangaare, Associate Professor of Drama/Theatre at Makerere University, Playwright and Folklorist. She is the Chairperson – Board of Trustees of the Uganda National Cultural Centre.
- 9) Isaac Mulindwa Jr, Executive Director of Mulin Group under which companies such as Hot 100, Club Silk, Selas Ltd, PAM Awards, Ufit Micro Finance, Moma International, Mulindwa Plantations and Mullens Services, are run.
- 10) Aloysius Matovu Joy, Traditional elder, Professional Teacher, Musician and Drama-artist with Bakayimbira Dramactors.

Traditional Elders:

- 1) Andrew Benon Kibuuka, Clan head in the Buganda Community, President of Uganda Performing Rights Society, Director with Bakayimbira Dramactors.
- 2) James Isabirye, Traditional Elder in the Buganda Community, Folklorist, Lecturer at Kyambogo University School of Performing Arts. He teaches traditional musical instrument playing, voice, music management and studio recording, script writing and play production.
- 3) Mwangutsya Ndebesa, History Professor at Makerere University, Traditional Elder in the Ankole Community and member of Banyankole Cultural Foundation.
- 4) Prof. John Jean Barya, Traditional Elder in the Ankole Community and Legal Secretary for Banyankole Cultural Foundation, Labour Law Professor at Makerere University School of Law.
- 5) Augustine Mutumba, Clan head in the Buganda Community, Lecturer at Makerere University, College of Health Sciences.

Appendix C: TCE protection under International Instruments: What does “Protection” entail?

<b>Terms of Protection</b>	<b>1970 UNESCO Convention*</b>	<b>1972 UNESCO Convention **</b>	<b>2001 UNESCO Universal Declaration ***</b>	<b>2003 UNESCO Convention ****</b>	<b>2005 UNESCO Convention *****</b>
<b>Defining TCEs/Cultural Property/Cultural Heritage</b>	Article 1	Article 1	-	Article 2	Article 4
<b>Preservation of Cultural heritage</b>	Article 2, 4, 5 and 14	Article 11 & 24	Article 7	Article 1, 11, 12, 13	Article 6
<b>Promotion of Cultural diversity</b>	-	-	Article 1, 7	-	Article 1, 6
<b>Respect of Cultural rights</b>	Article 10, 12	-	-	Article 1, 13(d)	Article 2
<b>Promotion of artistic &amp; Cultural development</b>	-	-	Article 2, 5, 6, 8	Article 14	Article 1, 7, 16
<b>Covering needs &amp; interests of indigenous &amp; traditional Communities</b>	Article 5, 9, 12	Article 4, 5, 6, 7	Article 3,4,5	Article 1, 13	Article 8
<b>Promotion of tradition-based creativity &amp; innovation as ingredients of sustainable economic development</b>	Article 5	Article 24	Article 3	-	Article 2, 13, 14

\*1970 UNESCO Convention on the Means of Prohibiting & Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.

\*\*1972 UNESCO Convention for the Protection of World Cultural and Natural Heritage

\*\*\* 2001 UNESCO Universal Declaration on Cultural Diversity

\*\*\*\*2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage

\*\*\*\*\* 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

Appendix D: TCE protection under Model laws and Regional Instruments: A Score card on priority areas.

<b>Key clauses on TCE Protection</b>	<b>1976 Tunis Model Law <sup>a</sup></b>	<b>1982 WIPO/UNESCO Model <sup>b</sup></b>	<b>1977/1999 Bangui/OAPI Agreement <sup>c</sup></b>	<b>2010 (ARIPO) Swakopmund Protocol <sup>d</sup></b>
<b>Defining TCEs/Folklore</b>	Sec. 18	Sec. 2	Title II: Art. 68	Sec. 2
<b>Preservation of Cultural heritage/Values</b>	-	-	Title II: Art 73, 93	-
<b>Ownership/Holders of TCEs</b>	-	-	-	Sec. 18
<b>Promotion of artistic &amp; Cultural development</b>	-	-	Title II: Art. 93, 94, 95	-
<b>Utilization of TCEs subject to Authorization/Consent</b>	-	Sec. 3, 10	Title II: Art. 80, 87	Sec. 19
<b>Promotion of tradition-based creativity &amp; innovation as ingredients of sustainable economic development</b>	Sec. 17	-	Art. 59 (Annex. VII), Title II: Art. 95	-
<b>General needs/Interests of Indigenous Communities</b>	Sec. 15, 17	Sec. 1	Art. 59 (Annex. VII)	-
<b>Right of Attribution/Moral rights</b>	Sec. 5	Sec. 5	-	-
<b>Criminal Sanctions/Civil Remedies</b>	Sec. 15	Sec. 6, 8	Title II: Art. 96	Sec. 23
<b>Provision for a Government Cultural Authority</b>	Sec. 6, 17	Sec. 10	Art. 60 (Annex. VII)	Sec. 3, 22

Key to table:

- a. 1976 Tunis Model law on Copyright for Developing Countries
- b. 1982 WIPO/UNESCO Model Provisions for National Laws for the Protection of expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions.
- c. 1977 Bangui Agreement on the Creation of an African Intellectual Property Organization (OAPI), revised in 1999.
- d. 2010 Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization (ARIPO)

Appendix E: TCE protection under select African National laws: A Score card on adequacy.

Key clauses on TCE Protection	Tunisia (1994/2009)	Nigeria (2004)	Ghana (2005)	Benin (2006)	Botswana (2000)	Mali (2008)	Democratic Republic of Congo (1986)
<b>Defining TCEs/Folklore</b>	Art. 7	Sec. 31 (5)	Sec. 76	Art. 1	Sec. 2	Art. 107	Art. 6(k)
<b>Preservation of Cultural heritage/Values</b>	Art. 7	Sec. 31	-	Art. 8	-	-	-
<b>Ownership/Holders of TCEs</b>	-	-	-	Art. 11	-	Art. 108	Art. 14
<b>Promotion of artistic &amp; Cultural development</b>	-	-	Sec. 64	-	Sec. 4	-	-
<b>Utilization of TCEs subject to Authorization/Consent</b>	Art. 7	Sec. 31 (4), 32	Sec. 64	Art. 85	-	Art. 113	-
<b>Promotion of tradition-based creativity &amp; innovation as ingredients of sustainable economic development</b>	-	-	Sec. 63, 64	Art. 84	-	-	-
<b>General needs/Interests of Indigenous Communities</b>	-	-	-	Art. 80	-	-	-
<b>Right of Attribution/Moral rights</b>	-	Sec. 31 (3)	-	Art. 83	-	Art. 112	-
<b>Criminal Sanctions/Civil Remedies</b>	Art. 51	Sec. 32, 33	Sec. 44	Art. 85, 97, 118	-	-	-
<b>Provision for a Government Cultural Authority</b>	Art. 7	Sec. 34	Sec. 59	Art. 12	-	-	-