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# **Unprotected Heritage: The Inadequate Safeguarding of Traditional Knowledge and Cultural Expressions under Intellectual Property Law and the TRIPS Agreement**

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# **Unprotected Heritage: The Inadequate Safeguarding of Traditional Knowledge and Cultural Expressions under Intellectual Property Law and the TRIPS Agreement**

By: Kennedy Wilson\*

This paper examines the challenges of protecting traditional knowledge and cultural expressions within existing intellectual property frameworks along with the Trade-Related Aspects of Intellectual Property Rights Agreement. While intellectual property law is crucial for protecting creations of the mind, its application to the unique characteristics of traditional knowledge and cultural expressions—often communal, intangible, and spiritually significant—reveals significant inadequacies.

An analysis of copyright, patent, and trademark systems reveals shortcomings in adequately safeguarding traditional knowledge and cultural expressions. Copyright's emphasis on originality and fixation in tangible form excludes much intangible cultural heritage. Patent systems frequently grant protection without acknowledging traditional knowledge as prior art and inspiration, often leading to misappropriation. Trademark protection requires commercial use, threatening the cultural integrity of indigenous practices. The Trade-Related Aspects of Intellectual Property Rights Agreement, while comprehensive, reflects Western values and fails to fully address the diverse cultural contexts in which traditional and cultural expressions exist.

Finally, potential solutions are explored, including better utilization of existing intellectual property measures and the development of a *sui generis* regime specifically designed for traditional knowledge and cultural expressions. The need for a distributive justice approach within intellectual property policies is also emphasized, acknowledging the systemic imbalances affecting indigenous communities. This paper concludes by advocating for educational initiatives to empower traditional knowledge holders and for a more equitable and culturally sensitive intellectual property system that genuinely protects and preserves cultural heritage.

## **I. Introduction**

Intellectual property (IP) law is essential for protecting the creations of the mind, ensuring that creators can maintain control over and benefit from their innovations. Moreover, it plays a pivotal role in safeguarding the traditional knowledge (TK) and cultural expressions (TCEs) of indigenous communities. By offering legal safeguards for these unique practices, beliefs, and innovations, IP rights empower indigenous peoples to uphold and preserve their identity and legacy. However, the intersection of IP rights with indigenous rights is characterized by the complexity involved in adequately protecting TK and TCEs. Indigenous communities frequently face numerous obstacles in this endeavor, including the risks of exploitation, appropriation, and misappropriation of their intellectual property. These challenges are further exacerbated by limited access to legal resources, difficulties in documentation, and cultural misunderstandings. The Trade-Related Aspects of Intellectual Property (TRIPS) agreement is a critical component of international trade law and the most comprehensive multilateral agreement on IP to date. However, due to the unique nature of TK and TCEs, they struggle to fit neatly into classic IP frameworks designed for the modern, technological, and industrial innovations of western nations. This is only compounded by limited

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legal resources and cultural misunderstandings. The TRIPS agreement and traditional IP frameworks inadequately protect traditional knowledge and cultural expressions, leaving indigenous communities vulnerable to exploitation and misappropriation due to a mismatch between their unique cultural heritage and the IP systems designed primarily for modern industrial innovations, highlighting the need for reforms that address the specific needs of indigenous peoples.

This paper will explore the complexities of protecting TK and TCEs within current IP systems and frameworks, such as the TRIPS agreement, copyright, trademark and patent. First, by outlining the historical and legal context of the issue, then identifying which forms of traditional intellectual property are most suitable for this purpose, this paper critically assesses each framework, highlighting shortcomings and proposing ways to enhance the protection of TK and TCEs. Finally, it discusses potential remedies under consideration to evolve and improve IP systems, aiming for more effective means of safeguarding the knowledge and creations of all people.

#### A. HISTORICAL BACKGROUND ON TKs AND TCEs

“Traditional knowledge” refers to the collective wisdom, practices, and innovations handed down through generations within indigenous communities.<sup>1</sup> It covers a broad spectrum of disciplines, such as medicine, agriculture, crafts, and storytelling. This knowledge is often shared orally and is deeply interwoven with the cultural fabric of these societies.<sup>2</sup> The World Intellectual Property Organization (WIPO) uses the term “traditional cultural expressions” (TCEs) to describe the tangible and intangible forms in which TK and culture can be expressed, communicated, or manifested.<sup>3</sup> TCEs include traditional music, performances, narratives, names, symbols, designs, handcrafted items, and architectural forms.<sup>4</sup> Although traditional knowledge and traditional cultural expressions are related, one can understand traditional knowledge to include TCEs as well. Together, TK and TCEs represent the intellectual activity passed down from one generation to another within specific communities and form an integral part of the cultural heritage and identity of many indigenous and local communities. Their protection is vital for the welfare and sustainability of these communities. “Protection” encompasses several important meanings such as “preservation” and “safeguarding,” which involve the identification, documentation, transmission, revitalization, and promotion of cultural heritage to ensure its continuity and viability.<sup>5</sup> In this context, the goal is to ensure that TK and TCEs are not lost and are actively maintained and promoted. The complexity of TK and TCEs highlights the need for more protective IP frameworks that also defend against cultural misrepresentation and misappropriation, ensuring the integrity and rights of TK and TCE holders.

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<sup>1</sup> Simran Kaur Khalsa, *IP and Indigenous Communities: Protecting Traditional Knowledge and Cultural Heritage*, DEPENNING & DEPENNING Blog (Aug. 2023), [<https://perma.cc/U7YQ-N34B>]; See Stephanie Spangler, *When Indigenous Communities Go Digital: Protecting Traditional Cultural Expressions through Integration of IP and Customary Law*, 27 CARDOZO ARTS & ENT. L.J. 709 (2010).

<sup>2</sup> *Id.*

<sup>3</sup> World Intellectual Property Organization, *Transition Guide for Copyright-Rich Industries*, WIPO Publication No. 9, at 3 (2022), [<https://perma.cc/BU56-JZV4>]

<sup>4</sup> *Id.* at 4.

<sup>5</sup> *Id.*

## II. Legal Context and Background

The legal frameworks surrounding the issue, highlighted by the TRIPS Agreement and current IP standards, reveal significant challenges and limitations in adequately protecting TK and TCEs. This section delves into the complexities and enforcement struggles of the existing IP systems, emphasizing the need for evolving these frameworks to cater to the unique needs of indigenous communities.

### A. TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY AGREEMENT

The Trade-Related Aspects of Intellectual Property (TRIPS) agreement, which took effect on January 1, 1995, stands as the most comprehensive multilateral accord on intellectual property to date.<sup>6</sup> Serving as a benchmark for intellectual property standards, TRIPS outlines the commitments made by all World Trade Organization member nations. Under Article I, participating countries pledge to provide protection for intellectual property.<sup>7</sup> The TRIPS agreement encompasses several areas of intellectual property, including copyrights and related rights (encompassing the rights of performers, producers of sound recordings, and broadcasting organizations); trademarks, including service marks; geographical indications, such as appellations of origin; industrial designs; patents, including the protection of new plant varieties; the layout-designs of integrated circuits; and undisclosed information like trade secrets and test data. The agreement itself is the result of a compromise among nations with differing perspectives on the role of intellectual property in development.<sup>8</sup> These opposing viewpoints are often evident in the agreement, which can be perceived as a somewhat incoherent mix of concepts. This complexity contributes to some of the gaps and challenges we encounter in its implementation today.

### B. IP FRAMEWORKS UNDER TRIPS

The standards of protection for copyrights, trademarks, and patents under the TRIPS agreement are key areas impacting the protection, or lack thereof, for intellectual property like TK and TCEs. Copyright protection under TRIPS is governed by the Berne Convention. Specifically, Article 9.2 asserts that copyright protection only applies to expressions, not ideas, procedures, concepts or methods.<sup>9</sup> The general protection term, as outlined in the Berne Convention and supplemented by Article 12 of the TRIPS Agreement, is the life of the author plus 50 years. Article 13 permits limitations on exclusive rights only in special cases that do not interfere with normal exploitation or harm the legitimate interests of the right holder. These principles collectively guide the interpretation and application of copyright under the TRIPS framework.<sup>10</sup>

Trademark protection is outlined in Article 15, which states that any sign capable of distinguishing goods or services can be registered if it is visually perceptible. If a sign does not inherently

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<sup>6</sup> World Trade Organization, *Standards and Principles Concerning the Availability, Scope and Use of Intellectual Property Rights*, WIPO [<https://perma.cc/7NNL-L6RE>] (last visited Oct. 31, 2024).

<sup>7</sup> *Id.*

<sup>8</sup> Robert M. Sherwood, *The Trips Agreement: Implications for Developing Countries*, 37 IDEA: THE JOURNAL OF LAW AND TECHNOLOGY 491-544 (1997).

<sup>9</sup> See WTO, *Standards and Principles Concerning the Availability, Scope and Use of Intellectual Property Rights* (last visited Oct. 31, 2024).

<sup>10</sup> *Id.*

distinguish goods or services, member countries may require that distinctiveness is acquired through use for registration.<sup>11</sup> Countries can also decide if non-visually perceptible signs, such as sound or scent marks, are registrable.<sup>12</sup>

Patent protection in Article 27.1 of the TRIPS Agreement mandates that member countries must grant patents for inventions across all technological fields without discrimination regarding origin or whether the products are imported or locally produced, provided they meet criteria of novelty, inventiveness, and industrial applicability. Product patents grant exclusive rights to make, use, sell, and import inventions and process patents cover the rights to use the process and products derived from it. The protection term for patents is set at a minimum of 20 years from the filing date.<sup>13</sup>

In order to be effective, IP rights require enforceable legal remedies. Articles 41 to 61 of the TRIPS Agreement provide measures for enforcing IP rights, including action against infringements and protections for confidential information, with Article 61 addressing necessary criminal procedures. However, implementing these measures is challenging for less developed countries, as it requires substantial changes to judicial systems and resources. This underscores the need for alternative frameworks that support the unique needs of these countries and indigenous communities. Understanding the legal background is essential to recognize the limitations of current frameworks and their inadequacies in protecting traditional knowledge and cultural expressions. This discussion is pivotal for developing legal mechanisms that better address the unique characteristics of TK and TCEs and the needs of these cultural assets.

### III. Analysis

Legal scholars have grown concerned that under classic IP systems such as patent, copyright and trademark, along with the core standards under TRIPS, TKs and TKEs can't be fully protected.<sup>14</sup> IP encompasses all of the legal mechanisms that protect intangible property, traditionally including patent, copyright and trademark and trade secret protection.<sup>15</sup> The U.S. Office of Intellectual Property Enforcement touts that America's strong IP rights system "assures inventors, industrial designers, and creative artists that their ideas will be protected".<sup>16</sup> This section will discuss the shortcomings of traditional IP forms and their applicability with respect to TK and TCEs.

#### A. INADEQUACIES IN COPYRIGHT PROTECTION FOR TK AND TCEs

The challenges posed by the current copyright system highlight the inadequacies in protecting TK and TCEs of indigenous communities. Copyright protection is granted to new or "original works of authorship" once they are fixed in a tangible form, safeguarding only the physical expressions

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<sup>11</sup> *Id.*

<sup>12</sup> See Robert M. Sherwood, *The Trips Agreement: Implications for Developing Countries*, 37 IDEA: THE JOURNAL OF LAW AND TECHNOLOGY 491-544 (1997).

<sup>13</sup> See WTO, *Standards and Principles Concerning the Availability, Scope and Use of Intellectual Property Rights* at Article 33. (last visited Oct. 31, 2024).

<sup>14</sup> See Lindsey Birch, *Cultural Heritage: Applicability of Intellectual Property Systems*, 16 LANDSLIDE 26 (June/July 2024).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

of ideas, not the ideas themselves or factual information.<sup>17</sup> Even though the criteria for such originality is low, this element is still critical for copyright protection thereby creating obstacles for TK and TCEs, particularly with intangible expressions and knowledge.<sup>18</sup> Indigenous communities often pass down literary and artistic traditions through generations without change, but these are only protected by copyright if their original elements are fixed in a particular fixation thus the requirement of fixation precludes the protection of intangible cultural heritage until it is fixed in a tangible medium.<sup>19</sup> Further, the fixation requirement precludes the protection of intangible cultural heritage until documented, often by outsiders such as anthropologists or researchers, which could lead to misappropriation by not guaranteeing that rights are held by the original cultural custodians.<sup>20</sup>

With these limitations, works that do not clearly align with copyright law are left vulnerable, posing significant threats to the cultural assets of many communities. Furthermore, the need for an identifiable owner in copyright law produces inequitable effects, particularly in indigenous communities where the concept of ownership in the IP sense may be unfamiliar or inappropriate. The World Intellectual Property Organization (WIPO) notes:

It is difficult, if not impossible, however to identify the creators of TCEs [traditional cultural expressions], and hence the rights holders and beneficiaries in TCEs, because TCEs are communally created and held and/or because the creators are simply unknown and/or unlocatable. The very concept of “ownership” in the IP sense may also be alien to many indigenous peoples.<sup>21</sup>

These challenges underscore the necessity for evolving legal frameworks that better recognize and protect the communal and intangible nature of TK and TCEs, ensuring that these cultural expressions are respected and preserved for future generations. Strengthening these protections requires an adaptable approach that acknowledges the unique cultural contexts and contributions of indigenous communities.

## B. INADEQUACIES IN PATENT AND TRADEMARK PROTECTION FOR TK AND TCEs

The current patent and trademark systems present significant challenges in protecting TK and TCEs. Patents grant holders the right to exclude others from making, using, selling, or importing an invention during the patent term.<sup>22</sup> However, the invention must meet specific criteria: it must be new or novel, possess credible, specific, and substantial utility, and must not be obvious.<sup>23</sup> TK and TCEs often struggle with patentability because it is neither new nor nonobvious, presenting inherent barriers within the system. A critical concern both in the U.S. and internationally is that patents have sometimes been granted for inventions without appropriate acknowledgment of TK

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *See Id.* Lindsey Birch, Cultural Heritage: Applicability of Intellectual Property Systems, 16 LANDSLIDE 26 (June/July 2024).

<sup>20</sup> *Id.* at 28.

<sup>21</sup> World Intellectual Property Organization, Draft Provisions For The Protection Of Traditional Knowledge And Expressions Of Folklore - Policy Objectives And Core Principles (2006), available at [<https://perma.cc/6T5B-ZJTU>]

<sup>22</sup> *Id.*

<sup>23</sup> Patent Act, 35 U.S.C. §§ 1 *et seq.* 19. *Id.* § 101.

or TCEs as sources of prior art and inspiration, leading to problematic patents.<sup>24</sup> Additionally, patent examinations often fail to conduct exhaustive searches within indigenous communities to thoroughly review TK and TCE resources.<sup>25</sup>

For instance, India and Southern Africa have faced challenges in protecting traditional practices popularized in Western culture.<sup>26</sup> The turmeric patent in the U.S. is a notable example, where a patent was granted for the use of turmeric in healing wounds.<sup>27</sup> The Council of Scientific and Industrial Research successfully challenged this patent by submitting evidence of its pre-existing use as TK in Indian communities, eventually invalidating it.<sup>28</sup> Similarly, in Southern Africa, the San people have long used the *Hoodia* cactus plant to control hunger.<sup>29</sup> However, a patent was granted to Pfizer for a hoodia-based weight loss drug, capitalizing on the TK of the San people without fair compensation, while the San continued to live in poverty.<sup>30</sup>

Trademarks, which can take the form of a word, symbol, or phrase, must be distinctive and capable of identification as the source of a particular good or service to receive protection.<sup>31</sup>

A significant barrier for TK and TCEs in securing trademark protection is that they must be associated with a commercial purpose or use to be eligible, which can threaten the distinctiveness required for protection.<sup>32</sup> More importantly, public use of TK and TCEs for commercial purposes poses a direct threat to the sanctity and sacredness of indigenous communities and their heritage which further underscores the need for legal adaptations that genuinely respect and preserve the cultural and communal nature of indigenous innovations.

### C. INADEQUACIES UNDER THE TRIPS AGREEMENT IN PROTECTION FOR TK AND TCEs

The minimum enforceable standards established by the TRIPS agreement have been criticized for reflecting Western values by failing to adequately respect the rights of developing countries and indigenous communities, often leading to the misappropriation of their TK and TCEs.<sup>33</sup> TRIPS, a multilateral agreement, aimed to harmonize IP protection globally in an attempt to standardize, has arguably neglected the diverse cultural contexts in which TK and TCEs exist. The requirement for "originality" in securing copyright protection under TRIPS presents a significant hurdle for TK

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See Elizabeth M. Lenjo, *Inspiration versus Exploitation: Traditional Cultural Expressions at the Hem of the Fashion Industry*, 21 Marq. Intell. Prop. L. Rev. at 148-151 (Summer 2017).

<sup>27</sup> *Id.*

<sup>28</sup> 25. U.S. Plant Patent No. 5,751. Manuel Ruiz, *The International Debate on Traditional Knowledge as Prior Art in the Patent System: Issues and Options for Developing Countries*, Ctr. for Int'l Env't L. 1 (Sisule F. Musungu ed., Oct. 2002), [https://www.ciel.org/wp-content/uploads/2015/03/PriorArt\\_ManuelRuiz\\_Oct02.pdf](https://www.ciel.org/wp-content/uploads/2015/03/PriorArt_ManuelRuiz_Oct02.pdf).

<sup>29</sup> Stolen Knowledge: The Hoodia Case, PUBLIC EYE, [<https://perma.cc/Rf98-KFE8>] (last visited Oct. 25, 2024).

<sup>30</sup> *Id.*

<sup>31</sup> J. Janewa Osei-Tutu, *What Do Traditional Knowledge and Traditional Cultural Expressions Have to Do with Intellectual Property Rights*, 9 LANDSLIDE 20 (March/April 2017).

<sup>32</sup> J. Janewa Osei-Tutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 MARQ. INTELL. PROP. L. REV. 147 (Winter 2011).

<sup>33</sup> *Id.*

and TCEs often passed down through generations with minimal modification.<sup>34</sup> This traditional mode of transmission often lacks the distinct "author" and "fixed expression" required by copyright law, rendering much of the intangible cultural heritage unprotectable.<sup>35</sup> The emphasis on tangibility further complicates matters, as the act of documenting TK and TCEs, often undertaken by outside researchers, can inadvertently lead to the assertion of ownership rights by those who did not originate or traditionally hold the knowledge with indigenous communities seeing their cultural assets appropriated, patented, or trademarked by external entities, without their consent or benefit.<sup>36</sup> Further compounding these issues are the challenges inherent in the application of patent and trademark law to TK and TCEs under TRIPS. The novelty and non-obviousness requirements for patent protection frequently contradict the long history and widespread use of many forms of TK along with the commercial nature of trademark law which similarly clashes with traditional cultural practices which are often not used for commercial purposes.<sup>37</sup> The current TRIPS framework thus fails to recognize the cultural and societal significance of TK and TCEs, valuing them primarily for their potential commercial exploitation rather than their inherent cultural value.<sup>38</sup>

Addressing these inadequacies in protecting TK and TCEs necessitates a fundamental shift in perspective. This requires moving beyond the limitations of Western-centric IP frameworks to develop alternative, or supplementary, protections that acknowledge and respect the communal, intangible, and often spiritually-rich nature of indigenous knowledge systems.<sup>39</sup>

#### **IV. Looking at Legal Adaptations and Addressing the Challenges**

Addressing these challenges requires legal adaptations that genuinely respect and safeguard the cultural and communal nature of indigenous innovations and ensure their benefits are directed to rightful custodians. Legal discourse on how classic IP systems can be better suited to protect the traditional knowledge proposes a few solutions to address the challenges.

##### **A. BETTER USE OF EXISTING INTELLECTUAL PROPERTY MEASURES AND SYSTEMS**

Exploring how TK and TCEs can be protected under current IP frameworks like copyright and patents offers a solution that does not necessitate expanding existing IP measures. TCEs and their derivatives, when attributed to specific authors, are eligible for copyright protection.<sup>40</sup> This can include composite works, like a collection of fairy tales, or derivative works, such as adaptations

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<sup>34</sup> See Robert M. Sherwood, *The Trips Agreement: Implications for Developing Countries*, 37 IDEA: THE JOURNAL OF LAW AND TECHNOLOGY 491-544 (1997).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 499-502.

<sup>38</sup> See, e.g., Public Eye, *Stolen Knowledge: The Hoodia Case* (last visited Oct. 25, 2024). (illustrating how external entities can profit financially from the appropriation of TK while the original custodians remain impoverished)

<sup>39</sup> See Robert M. Sherwood, *The Trips Agreement: Implications for Developing Countries*, 37 IDEA: THE JOURNAL OF LAW AND TECHNOLOGY 491-544 (1997).

<sup>40</sup> See WIPO, *Transition Guide for Copyright-Rich Industries*, WIPO Publication No. 9, at 16 (2022).



of folk songs.<sup>41</sup> Additionally, TCEs, such as performances of folk songs, dances, and music recordings, may be safeguarded under related rights.<sup>42</sup>

While TK often falls short of the novelty and inventive step criteria required for patents, inventions based on TK might qualify for patent protection if they are not widely known or documented.<sup>43</sup> Such patentable inventions may encompass previously unknown foods and their production methods, household and personal goods, as well as novel approaches to farming, hunting, fishing, disease prevention, and treatment.<sup>44</sup> By leveraging these aspects of existing IP systems, communities can gain valuable protection and recognition for their cultural heritage, enabling them to control how these works are used, distributed, and commercialized.

## B. A SUI GENERIS REGIME

The evaluation of existing measures and systems has led some to the conclusion that a *sui generis* approach is needed. WIPO has suggested expansion of the IP definition to specifically include TK, TCEs and subject matter that does not fit within classic IP systems and frameworks.<sup>45</sup> The definition of intellectual property includes “creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce.”<sup>46</sup> WIPO’s role in potentially safeguarding TK by considering such knowledge as intellectual property acknowledges that international intellectual property law is dynamic, suggesting the possibility of establishing new categories of intellectual property.<sup>47</sup> Additionally, there have been initiatives to protect matter that might otherwise not clearly meet the criteria for protection. The *WIPO Copyright Treaty*, for example, expressly requires protection for compilations of data.<sup>48</sup> But a further step is needed beyond this to expand classic justifications for what is protectable under intellectual property law.<sup>49</sup>

However, with a *sui generis* regime, recognition and understanding of the historical and political context of this issue is necessary. Many developing countries and indigenous communities struggle with trust of western leaning mechanisms like IP and have objected to the global reach of IP rights for legitimate reasons.<sup>50</sup> Primarily, increased cost and accessibility to goods that later become protected by IP rights. Economically, many also see IP laws as not best suited for the economic

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 14.

<sup>44</sup> *Id.*

<sup>45</sup> See J. Janewa Osei-Tutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 MARQ. INTELL. PROP. L. REV. 147 (Winter 2011); See WIPO, *Leveraging Economic Growth Through Benefit Sharing*; See Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARDOZO ARTS & ENT. L.J. 37 at 89 (2009).

<sup>46</sup> World Intellectual Property Organization, *About Intellectual Property*, [<https://perma.cc/98NW-X443>] (last visited Nov. 1, 2024).

<sup>47</sup> See J. Janewa Osei-Tutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 MARQ. INTELL. PROP. L. REV. 147 (Winter 2011).

<sup>48</sup> WIPO: Copyright Treaty, adopted Dec. 20, 1996, 36 I.L.M. 65, art. 5 (1997).

<sup>49</sup> Lucy M. Moran, *Intellectual Property Law Protection for Traditional and Sacred Folklife Expressions - Will Remedies Become Available to Cultural Authors and Communities*, 6 U. BALT. INTELL. PROP. L.J. 99 (Spring 1998).

<sup>50</sup> *Id.*

development and stimulation of their communities but rather more traditional western communities use of IP protection to reap economic benefits.<sup>51</sup>

The adoption of a *sui generis* IP right in traditional knowledge, signals a push for recognition that international intellectual property is not static but rather should be open to evolution with new IP rights that carefully considered and preserve holders of TK and TCEs seeking to protect their IP.

#### C. ACCOUNTING FOR DIVERSE CIRCUMSTANCES AND EDUCATION IN PROTECTING TK AND TCEs

Some legal scholars have argued that the implementation of a distributive justice framework within global intellectual property policies would facilitate a critical shift in focus from economic utilitarianism toward addressing systemic imbalances regarding the protection of TK and TCEs.<sup>52</sup> This approach aims to safeguard the rights of individuals who lack adequate economic, political, and informational resources and establish measures that prevent the misappropriation of TK in the acquisition of intellectual property rights.<sup>53</sup> Furthermore, the IP regime must be refined to ensure that more sophisticated users do not infringe upon the rights of marginalized communities.<sup>54</sup>

In addition to accounting for diverse circumstances, WIPO should continue to advocate for education on utilizing the current intellectual property system, empowering traditional knowledge communities to guard against misappropriation. While the existing intellectual property framework may predominantly benefit industrialized nations, it is important to recognize that certain aspects of traditional knowledge can still be protected under current laws.

### V. Conclusion

TKs and TCEs are a vital part of indigenous communities as a form of creation but also crucial to their identity and sustainability. The inability to protect threatens TK and TCEs threatens the integrity and rights of these communities and leads to inequitable results. The knowledge that traditional knowledge holders seek to protect cannot be fully protected using current intellectual property systems. Classic IP aims to protect new or original creations. Given that much TK and TCEs are passed through generations, it is unlikely to meet such a requirement to be protectable. The knowledge may be considered to be a part of the public domain, as it might be too old or widely known. Even if not widely known, patent law still might fail to protect TKs and TCEs due to its requirement of being new, useful and nonobvious.<sup>55</sup> The increasing public awareness of these key challenges with protection of TK and TCEs under traditional IP frameworks have begun to create a push for more equitable results and stimulated dialogue among legal scholars and ways in which they can be better protected with solutions ranging from existing IP measures that may afford protection to the expansion of the IP definition to include a *sui generis* regime. Leveraging these existing IP structures while taking active steps to expand the bounds of IP to better recognize

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

<sup>52</sup> See J. Janewa Osei-Tutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law*, 15 MARQ. INTELL. PROP. L. REV. 147 at 209-215 (Winter 2011).

<sup>53</sup> *Id.* at 209-10.

<sup>54</sup> *Id.*

<sup>55</sup> Patent Act, 35 U.S.C. §§ 1 *et seq.* 19. *Id.* § 101.

TK and TCEs not only preserves cultural heritage but also promotes justice and equity within traditional IP frameworks so that diverse communities are able to protect and preserve the traditional knowledge and cultural expressions that are foundational to the cultural fabric of communities.