



**NEW YORK CITY BAR ASSOCIATION
AFRICAN AFFAIRS COMMITTEE**

**LEGAL FRAMEWORKS FOR PROTECTING TRADITIONAL CULTURAL
EXPRESSIONS IN WEST AFRICA**

FEBRUARY 23, 2016

This paper briefly describes the national and international legal frameworks in West Africa for extending intellectual property protections to traditional cultural expressions. Although creative works typically fall under the aegis of copyright law, traditional cultural expressions often cannot satisfy the prerequisites for obtaining copyright protections. To fill this void, a number of West African jurisdictions have enacted statutory regimes designed to provide additional protection for traditional cultural expressions. In addition, two international agreements among African nations seek to fit traditional cultural expressions into a broader, regional framework for intellectual property rights. However, these national, centralized statutory systems arguably do not adequately provide traditional communities with economic benefits or cultural protections. In lieu of these statutory systems, this paper proposes that West African legislatures grant traditional communities a tort-like remedy against exploitative or highly prejudicial uses of their traditional cultural expressions.

I. Introduction

Traditional cultural expressions (“TCEs”), also referred to as expressions of folklore (“EoF”), consist of tangible or intangible creative works through which indigenous communities

manifest or communicate their traditional artistic culture.¹ Tangible TCEs include the subject matter typically contemplated by intellectual property statutes: traditional crafts, folk art productions, and traditional architectural forms.² One example of a tangible TCE in Africa is kente cloth, a woven mosaic fabric produced by the Akan people of Ghana.³ On the other hand, examples of intangible TCEs include a broad array of oral traditions, folk legends, traditional rituals, and folk dances.⁴

The World Intellectual Property Organization (the “WIPO”) has articulated a set of policy objectives for protecting TCEs. The WIPO aims, first and foremost, to protect the contributions of indigenous communities to their cultural heritage and prevent the misappropriation or degradation of those traditions.⁵ Concurrently, the WIPO has expressed its goal to incentivize the further development of indigenous culture by allowing these communities to derive economic benefit from cultural works and activities.⁶ Furthermore, the WIPO has expressed its view that greater intellectual property protections for TCEs would allow cultural exchanges between indigenous communities and other societies to transpire on a more economically equitable basis.⁷

¹ World Intell. Prop. Org. [WIPO], *Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions*, at 40–41, WIPO Doc. WIPO/GRTKF/IC/22/INF/8 (Apr. 27, 2012).

² WIPO, *INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE 6* (2005) [*hereinafter* IP & TCEs].

³ Gertrude Torkornoo, *Creating Capital from Culture – Re-thinking the Provisions on Expressions of Folklore in Ghana’s Copyright Law*, 18 ANN. SURV. INT’L & COMP. L. 1, 1 (2012).

⁴ IP & TCEs, *supra* note 2, at 6.

⁵ Meghan Ruesch, *Creating Culture: Protection of Traditional Cultural Expressions and Folklore and the Impact on Creation and Innovation in the Marketplace of Ideas*, 35 SYRACUSE J. INT’L L. & COM. 369, 379 (2008).

⁶ *Id.* at 380.

⁷ *Id.*

II. National Copyright and *Sui Generis* Frameworks in West Africa

Protection for creative works in West Africa typically begins with the rights afforded by conventional intellectual property laws, namely copyright. These laws, however, may not provide adequate protection for TCEs, despite some international efforts to expand the scope of such laws.⁸ Consequently, several West African jurisdictions have sought to bolster the protection of TCEs through *sui generis* legislation, which gives their national governments unique custodial powers over the use and distribution of TCEs.

A. Copyright

Conventional systems of copyright in West Africa serve as the workhorse for intellectual property rights in most creative works. Copyright law typically defines the subject matter of copyright expansively,⁹ with copyright-eligible works including, *inter alia*: literary works; musical works; audiovisual works; pictorial, graphic, and sculptural works; architectural works; choreographic works; and sound recordings.¹⁰ For copyright protections to adhere, however, the work must represent an original work of authorship and, typically, be fixed in some tangible medium of expression.¹¹ An author who obtains a valid copyright in a work generally enjoys a

⁸ WIPO, CONSOLIDATED ANALYSIS OF THE LEGAL PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE 36 (2003) [*hereinafter* CONSOLIDATED ANALYSIS].

⁹ *See, e.g.*, Berne Convention for the Protection of Literary and Artistic Works art. 2(1), Sept. 28, 1979 (copyrightable works include “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression”); Law on the Protection of Intellectual Works and the Rights of Authors, Performers and Phonogram and Videogram Producers, No. 96-564, art. 6 (1996) (Côte d’Ivoire) [*hereinafter* Law on the Protection of Intellectual Works (Côte d’Ivoire)] (copyright applies “to all original works, regardless of the genre, merit, purpose or manner or form of expression thereof”); Law on Copyright and Neighboring Rights in Senegal, No. 2008-09, art. 6 (2008) [*hereinafter* Law on Copyright and Neighboring Rights (Senegal)] (“intellectual creations of a literary or artistic nature shall be considered works of the mind” protected by copyright).

¹⁰ *See, e.g.*, Law on the Protection of Intellectual Works (Côte d’Ivoire) art. 6; Copyright Act (2004) Cap. (28), § 1(1) (Nigeria) [*hereinafter* Copyright Act (Nigeria)].

¹¹ *See, e.g.*, Act Adopting a New Copyright Law of the Republic of Liberia, § 2.2(1) (1997) [*hereinafter* New Copyright Law (Liber.)]; Copyright Act (Nigeria) § 1(2)(b). *But see, e.g.*, Law on the Protection of Literary and Artistic Property, No. 032-99/AN, art. 4 (1999) (Burk. Faso) [*hereinafter* Law on the Protection of

range of exclusive rights with respect to the work, including the exclusive rights of reproduction, distribution, display, and performance.¹² These rights typically last for the duration of the author's life, plus a term of years following the author's death.¹³ Although conventional copyright regimes do not directly address TCEs, they can provide activities related to TCEs with at least some degree of indirect protection.¹⁴

But copyright seems ill-equipped to protect TCEs themselves. Establishing originality and authorship proves difficult when TCEs manifest a community-created cultural tradition stretching back for potentially hundreds or thousands of years.¹⁵ The very concept of ownership itself may prove inapposite to the customary, communal systems that give rise to these TCEs in the first place.¹⁶ Moreover, the near-ubiquitous requirement of fixation would frequently preclude intangible TCEs, like traditional dances or oral traditions, from receiving protection until they have been embodied in a permanent, stable, and physical form.¹⁷

Literary and Artistic Property (Burk. Faso)] (copyright “shall start as soon as the work is created, even if it is not fixed on a material carrier”).

¹² See, e.g., Law on the Protection of Copyright and Neighboring Rights, No. 2005-30, art. 4 (2006) (Benin) [*hereinafter* Law on the Protection of Copyright (Benin)]; Copyright Act (Nigeria) §§ 6–8.

¹³ See, e.g., New Copyright Law (Liber.) §§ 2.20–2.26; Copyright Act, No. 10-2004, arts. 21–25 (2004) (Gam.) [*hereinafter* Copyright Act (Gam.)].

¹⁴ Silke von Lewinski, *The Protection of Folklore*, 11 CARDOZO J. INT'L & COMP. L. 747, 760–61 (2003). For example, a videographer or photographer of a traditional performance is entitled to copyright protection in the ensuing work, *id.* at 761, but not necessarily in the performance itself. Cf. *Ets-Hokin v. Sky Spirits, Inc.*, 225 F.3d 1068, 1077 (9th Cir. 2000) (“the fact that two original photographs of the same object may appear similar does not eviscerate their originality or negate their copyrightability”); *Fleet v. CBS*, 8 Cal. Rptr. 2d 645, 652 (Cal. App. 2d Dist. 1996) (“the creative aspects of the motion picture as a whole must be separated from the creative aspects of the underlying subject matter”). Or, for instance, an individual who collects or arranges TCEs enjoys copyright protection in the compilation, to the extent the arrangement itself constitutes an original work of authorship. Cf. *Roy Exp. Co. Establishment of Vaduz v. CBS*, 672 F.2d 1095, 1103 (2d Cir. 1982) (under U.S. copyright law, “the compiler of a collective work cannot secure copyright protection for preexisting components that he did not create; protection is available only for that part of his product that is original with him”).

¹⁵ CONSOLIDATED ANALYSIS, *supra* note 8, at 36.

¹⁶ *Id.* at 40.

¹⁷ For instance, a traditional dance ritual would not appear to be copyrightable unless the dance had been recorded or transcribed via choreographic notation. See *id.* at 37 (2003) (discussing arguments to this effect). Cf. *Conrad v. AM Community Credit Union*, 750 F.3d 634, 636 (7th Cir. 2014) (“To comply with

B. Performers' Rights Statutes

Performers' rights statutes supplement the protections afforded by West African copyright regimes by strengthening performers' economic and moral rights over fixed and unfixed performances. Ordinarily, ownership of a copyright in a sound recording of a performance turns on the relationship between the producer and the performer;¹⁸ the rights may accrue to the performer, the producer, or both, depending on the exact nature of the employment relationship between the two.¹⁹ However, the West African performers' rights statutes promulgated under the WIPO Performances and Phonograms Treaty ("WPPT")²⁰ automatically grant performers the exclusive right of reproduction, publication, and distribution over performances fixed in sound recordings.²¹ The WPPT also gives performers of unfixed performances the exclusive right to broadcast, publicly communicate, and fix their performances.²² Performers of both fixed and unfixed performances further enjoy moral rights under the WPPT: to claim identification as the performer in the performance and to object to prejudicial modifications of the performance.²³ Admittedly, these provisions neither directly regulate TCEs nor encompass all forms of TCE.²⁴ But performers' rights laws do provide

the requirement of fixity [under U.S. law], [a dancer] would have had either to have recorded the performance or to have created a written 'dance notation' of it.").

¹⁸ Cf. H. REP. NO. 92-487, at 5 (1971) (observing that U.S. copyright law "does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved").

¹⁹ Cf. 1 NIMMER ON COPYRIGHT § 2.10 (discussing U.S. law).

²⁰ The West African signatories to the WPPT are Benin, Burkina Faso, Gabon, Ghana, Guinea, Senegal, and Togo. Nigeria has also enacted performers' rights legislation, although it has not signed the WPPT. Copyright Act (Nigeria) §§ 26–30.

²¹ WIPO Performances and Phonograms Treaty, Dec. 20, 1996, art. 7–10.

²² *Id.* art. 6.

²³ *Id.* art. 5.

²⁴ See WIPO Performances and Phonograms Treaty art. 2(a) (defining the subject matter of the treaty as performances of both "literary or artistic works or expressions of folklore"); Mari-Elise Gates, Note, *Problems in Applying Traditional Cultural Expression Laws to the Unique Medium of Dance*, 48 U.

performers of traditional musical works an additional measure of control over the fixation of their performances, even where the underlying performance could not be copyrighted.²⁵

C. *Sui Generis Protections for TCEs*

Augmenting these conventional intellectual property regimes are *sui generis* statutes that place the stewardship of TCEs in the hands of national governments, creating an analog to the doctrine of domain public payant.²⁶ These *sui generis* statutes generally prohibit the reproduction, distribution, and transformation of TCEs for commercial and non-customary uses.²⁷ Using TCEs in such a manner requires prior authorization from a designated government office;²⁸ in all but a few jurisdictions, such use also requires payment of a royalty to the government.²⁹ The amount of the required royalty is typically set at the amount customary for an analogous copyrightable work.³⁰ Moreover, these laws generally provide that the royalties collected by the designated government office are to be used for the promotion of culture and the

LOUISVILLE L. REV 665, 676 (2010) (observing that the WPPT does not protect audiovisual recordings of traditional dances).

²⁵ CONSOLIDATED ANALYSIS, *supra* note 8, at 16.

²⁶ Domain public payant refers to a system wherein the non-infringing use of public domain works requires payment of a fee to the government. Cathryn A. Berryman, *Toward More Universal Protection of Intangible Cultural Property*, 1 J. INTELL. PROP. L. 293, 307 (1994). Indeed, several West African *sui generis* protections for TCEs are part of a more general scheme for the protection of public domain works. *See, e.g.*, Decree-Law Revising Law on Copyright, No. 1/2009, art. 34(4) (2009) (Cape Verde) [*hereinafter* Decree-Law on Copyright (Cape Verde)].

²⁷ *See, e.g.*, Law on the Protection of Copyright (Benin) art. 80; Decree on Copyright, Related Rights and Expressions of Folklore, No. 93-027, art. 56 (1993) (Niger) [*hereinafter* Decree on Copyright (Niger)].

²⁸ *See, e.g.*, New Copyright Law (Liber.) § 2.31(5) (the Liberian Minister of Information); Decree on Copyright (Niger) art. 57 (the Copyright Office of Niger). The Burkinabé law is unique among West African TCE legislation by expressly providing that, before the TCE enters the public domain, any rights in the work accrue to the individual authors. Law on the Protection of Literary and Artistic Property (Burk. Faso) art. 89.

²⁹ *See, e.g.*, Copyright Act, No. 10-2004, art. 48(4) (2004) (The Gambia) [*hereinafter* Copyright Act (The Gambia)]; Law on the Protection of Intellectual Works (Côte d'Ivoire) art. 8.

³⁰ *See, e.g.*, Law on the Protection of Copyright (Benin) art. 81; Law on the Protection of Literary and Artistic Property (Burk. Faso) art. 93. Notably, however, Senegalese law caps the royalty for TCEs at fifty percent of the rate usually paid to authors “in accordance with current practice.” Law on Copyright and Neighboring Rights (Senegal) art. 157(2).

arts or for the benefit of the nation's authors,³¹ and that the government's right to manage and collect royalties from TCEs exists in perpetuity.³²

These *sui generis* laws typically contain a number of exceptions to the authorization and royalty requirements. Non-commercial or customary uses of TCEs generally do not fall within the ambit of *sui generis* legislation,³³ and many statutes specifically exempt private and gratuitous performances of TCEs.³⁴ In addition, authorization and royalty requirements typically do not apply to educational use of TCEs,³⁵ fair use in the creation of an original work,³⁶ or incidental use.³⁷ Even uses exempted from the authorization and royalty requirements, however, often must comply with attribution rights provisions, which require printed publications and public communications of a TCE to express its community or geographic origins.³⁸

Sui generis statutes generally allow national governments to pursue civil and criminal enforcement remedies against proscribed, unauthorized uses of TCEs.³⁹ National governments may, for instance, issue or obtain an order for the seizure of unauthorized copies or the proceeds

³¹ See, e.g., Decree-Law on Copyright (Cape Verde) art. 34(4) ("promotion and cultural development and social assistance to Cape Verdean authors"); Copyright Act, No. 690, § 64 (2005) (Ghana) [*hereinafter* Copyright Act (Ghana)] (for the promotion of folklore and indigenous art).

³² See, e.g., Copyright Act (The Gambia) art. 26; Copyright Act, § 26 (2011) (Sierra Leone) [*hereinafter* Copyright Act (Sierra Leone)].

³³ See, e.g., Law on the Protection of Copyright (Benin) art. 80; Decree on Copyright (Niger) art. 56. *But see*, e.g., Copyright Act (Ghana) § 4(1) (broadly prohibiting all public performances of TCEs).

³⁴ See, e.g., Law on the Protection of Literary and Artistic Property (Burk. Faso) art. 21; Copyright Act (Nigeria) § 31(2).

³⁵ See, e.g., Copyright Act (Ghana) § 19(1); New Copyright Law (Liber.) § 2.31(3).

³⁶ See, e.g., New Copyright Law (Liber.) § 2.31(3); Decree on Copyright (Niger) art. 58.

³⁷ See, e.g., Copyright Act (Nigeria) § 31(2); Copyright Act (Sierra Leone) § 9(2).

³⁸ See, e.g., Law on the Protection of Literary and Artistic Property (Burk. Faso) art. 90; Copyright Act (Nigeria) § 31(3).

³⁹ See, e.g., Law on the Protection of Intellectual Works (Côte d'Ivoire) arts. 63–65, 73; Law on Copyright and Neighboring Rights (Senegal) art. 159.

from unlawful uses of TCEs.⁴⁰ Governments may also have the authority to enjoin or suspend performances that violate their rights in protected TCEs.⁴¹ In addition, criminal penalties may attach to sales or offers to sell TCEs, the willful misrepresentation of the source of a TCE, or the willful distortion of a TCE in a manner prejudicial to the community from which it originates.⁴² These penalties include imprisonment for a term of up to five years, fines ranging anywhere from \$34.25 to \$2,558, or both.⁴³

III. International Frameworks in West Africa

These national legal frameworks for intellectual property protection are complemented by two international agreements among African nations. These treaties, the Bangui Agreement Relating to the Creation of an African Intellectual Property Organization (“Bangui Agreement”) and the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (“Swakopmund Protocol”), both seek to harmonize their signatories’ protection and treatment of TCEs.

The Bangui Agreement is an international agreement for the protection of literary and artistic works. The signatories to the agreement are members of the African Intellectual Property Organization (“OAPI”), which includes Central and West African countries.⁴⁴ Protections for TCEs extend to those created by a traditional community or by individuals “recognized as

⁴⁰ See, e.g., Copyright Act (Nigeria) § 33(3); Law on the Protection of Copyright, Folklore, and Related Rights, No. 9112, art. 78 (1991) (Togo) [*hereinafter* Law on the Protection of Copyright, Folklore, and Related Rights (Togo)].

⁴¹ See, e.g., Law on the Protection of Copyright, Folklore, and Related Rights (Togo) art. 78.

⁴² See, e.g., Copyright Act (The Gambia) art. 55(1); Copyright Act (Nigeria) § 33(1); Copyright Act (Sierra Leone) § 75(1).

⁴³ See, e.g., Copyright Act (The Gambia) art. 55(1); Copyright Act (Nigeria) § 33(1); Copyright Act (Sierra Leone) § 75(1). The statutes prescribe penalties in local currency; for comparison’s sake, this paper has converted those currencies into United States dollars, using the exchange rates on Google Finance as of October 6, 2015.

⁴⁴ The following nations are members of OAPI: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Côte d’Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Senegal, and Togo.

meeting the expectations of” such traditional community.⁴⁵ The Bangui Agreement protects not only TCEs, but also transformations of TCEs and other works derived from folklore.⁴⁶ Consistent with the region’s *sui generis* statutes, the Bangui Agreement requires a payment of royalties to “national collective rights administration bod[ies],” with at least a part of those royalties to go towards “welfare and cultural purposes.”⁴⁷

The Swakopmund Protocol establishes an analogous set of rules for the protection of TCEs. The protocol was devised by members of the African Regional Intellectual Property Organization (“ARIPO”), which predominantly consists of Southern and East African countries.⁴⁸ While the Swakopmund Protocol and the Bangui Agreement define TCEs similarly, the Swakopmund Protocol expressly articulates two prerequisites for protection. First, a TCE must be the product of “creative and cumulative intellectual activity,” including creativity by unknown authors.⁴⁹ Second, the TCE must be characteristic of community culture and used according to that community’s customs.⁵⁰ A TCE that satisfies both criteria need not comply with any formalities to receive protection.⁵¹ Like the Bangui Agreement, the Swakopmund Protocol envisions national governments policing commercial, non-traditional uses of TCEs.⁵² But the Swakopmund Protocol more clearly expresses the view that the benefits of TCE

⁴⁵ Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization, Feb. 24, 1999, Annex VII art. 2(xx).

⁴⁶ *Id.* Annex VII arts. 5–6.

⁴⁷ *Id.* Annex VII art. 59.

⁴⁸ The following nations are members of ARIPO: Botswana, The Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, São Tomé and Príncipe, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe.

⁴⁹ Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, Aug. 9, 2010, § 16.

⁵⁰ *Id.*

⁵¹ *Id.* § 17.

⁵² *Id.* § 22.

protection ought to accrue to local and traditional communities,⁵³ and that national governments ought to consult with affected traditional communities before granting or withholding authorization for the use of TCEs.⁵⁴

IV. Problems with National *Sui Generis* Frameworks for TCE Protection

In practice, however, *sui generis* legislation in West Africa falls short of its drafters' aspirations. *Sui generis* laws attempt to bring TCEs into the realm of intellectual property rights through centralized management. But government stewardship of TCEs and their associated royalties may, in many cases, provide neither economic benefit nor cultural protection to traditional communities. Moreover, merely modifying existing *sui generis* regimes to re-orient them towards traditional communities presents new administrative and other problems. Traditional communities would be better served by a robust and focused tort-like remedy against exploitative or highly prejudicial uses of TCEs.

The administration of TCEs by central governments under a *sui generis* system risks depriving traditional communities of access to, and revenues from, their own TCEs. West African laws frequently set aside TCE royalties for national cultural or artistic development—not the development of traditional communities.⁵⁵ A regional legacy of patronage-based politics⁵⁶ and extractive institutions⁵⁷ raises further concerns about the ultimate beneficiaries of royalty

⁵³ *Id.* § 18.

⁵⁴ *Id.* at § 22.

⁵⁵ 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, 805–06, 831 (1999).

⁵⁶ Leonardo R. Arriola, *Patronage and Political Stability in Africa*, 42 COMP. POL. STUD. 1339, 1440 (2009) (citing U.N. Secretary General, *The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa: Rep. of the Secretary General*, ¶ 12 U.N. Doc. A/52/871-S/1998/318 (Apr. 13, 1998)).

⁵⁷ M.A. Thomas, *Economics and the Study of Corruption in Africa*, in 1 THE OXFORD HANDBOOK OF AFRICA AND ECONOMICS 233, 239–40 (Célestin Monga & Justin Yifu Lin eds., 2015). “Extractive” institutions can be defined as those “designed to extract incomes and wealth from one subset of society [the masses] to

revenues from TCEs.⁵⁸ Additionally, the expansive language of certain *sui generis* statutes, like the Ghanaian law, may create obstacles to traditional communities' use of their own TCEs.⁵⁹ And sweeping central authority to protect traditional cultures from “undesirable” exploitation can be twisted easily into the power to suppress “undesirable” cultures themselves.⁶⁰

But re-orienting existing *sui generis* systems in West Africa to focus more on traditional communities may create more problems than it solves. As discussed above, the ownership of TCEs proves difficult to establish when their origins potentially lie hundreds or thousands of years in the past.⁶¹ Indeed, separate communities across multiple jurisdictions may have overlapping claims to the same TCE.⁶² Community ownership of a TCE further complicates the royalties envisioned by *sui generis* legislation. Entrusting community leaders with royalties merely replicates the existing risk of corruption on a smaller scale, and individual distributions

benefit a different subset [the governing elite].” Jared Diamond, *What Makes Countries Rich or Poor*, N.Y. REVIEW OF BOOKS (Jun. 7, 2012), <http://www.nybooks.com/articles/2012/06/07/what-makes-countries-rich-or-poor/>.

⁵⁸ Justin Hughes, *Traditional Knowledge, Cultural Expression, and the Siren's Call of Property*, 49 SAN DIEGO L. REV. 1215, 1261–62 (2012). Hughes draws an analogy to African commodities marketing boards; these boards were set up to purchase crops from smallholders at fixed, below-market rates and invest the profits in rural development. *Id.* at 1261 n.188 (citing George B.N. Ayittey, *AFRICA UNCHAINED: THE BLUEPRINT FOR AFRICA'S FUTURE* 74 (2005)). In practice, however, these boards were part of a “bloated and inefficient state apparatus” that “siphoned [resources] off the system” to the detriment of the very farmers the boards were meant to help. *Id.* at 1262 (quoting Benoit Daviron & Stefano Ponte, *THE COFFEE PARADOX: GLOBAL MARKETS, COMMODITY TRADE AND THE ELUSIVE PROMISE OF DEVELOPMENT* 102 (2005) and Andrew Dorward et al., *Agricultural Liberalisation in sub Saharan Africa* at ii (2004), available at <http://r4d.dfid.gov.uk/PDF/Outputs/EC-PREP/AgriculturalLiberalisationAfricaFinalReport.pdf>).

⁵⁹ *E.g.*, Copyright Act (Ghana) § 4(1) (broadly prohibiting all public performances of TCEs). Because Ghanaian law does not limit the scope of TCE protections to commercial and non-customary public performances, some have criticized the statute for establishing a “folklore tax” that risks inadvertently elevating Western culture (to which no folklore provisions apply) over traditional Ghanaian culture. Christiaan De Beukelaer, *Who owns folklore? An analysis of copyright legislation and ownership of folklore, based on a case study of the Ghanaian Copyright Law of 2005* (n.d.) (unpublished B.A. thesis, University of Amsterdam) (available at <http://vibeserver.net/scripties/who%20owns%20folklore.pdf>) (citing John Collins, *The “Folkloric Copyright-Tax” Problem in Ghana*, 50 MEDIA DEVELOPMENT 10, 11 (2003)).

⁶⁰ Hughes, *supra* note 58, at 1263.

⁶¹ CONSOLIDATED ANALYSIS, *supra* note 8, at 36.

⁶² Kuruk, *supra* note 55, at 805 (“For example, kente cloth . . . is produced by the Ashanti, Ewe, and Nzima communities found in Ghana, the Ivory Coast and Togo.”).

are equally problematic: a per capita grant risks undercompensating actual creators in favor of free riders, but a creator-favorable grant seems hard to justify when the value of the creation could be said to stem from the traditions of the community as a whole. Additionally, community royalties may force traditional communities to compete directly in the marketplace for intellectual property, potentially commoditizing traditional culture, exacerbating inequalities between different groups, and contributing to any pre-existing political instability.⁶³

V. A Tort-Like Alternative for Protecting Traditional Communities and TCEs

West African *sui generis* statutes provide traditional communities with neither the ability to reap the economic fruits of their TCEs nor the power to meaningfully limit uses of their TCEs. Shifting the locus of rights under the *sui generis* statutes to traditional communities themselves merely replaces these problems with new ones. Instead, this paper proposes to eschew the broad-ranging approach currently favored by West African legislation in favor of a focused, tort-like remedy against exploitative or highly prejudicial uses of a community's TCEs.

At the outset, the creation of a tort-like remedy against TCE misuse raises three key questions. First, what conduct ought to be regarded as tortious under the law? Second, should traditional communities be empowered to sue over proscribed uses of TCEs and, if so, when? Third, what measure of damages properly incentivizes meritorious litigation while preserving broad public access to a nation's traditional cultures?

Crafting tort-like protections for TCEs requires careful consideration of what conduct ought to be proscribed in the first place. *Sui generis* statutes are designed to give national governments the same expansive rights over TCEs that authors enjoy over copyrighted works. But the copyright model of protection leads to a number of risks, as discussed above:

⁶³ Hughes, *supra* note 58, at 1265 (citing Robert L. Ostergard et al., *Between the Sacred and the Secular: Indigenous Intellectual Property, International Markets and the Modern African State*, 44 J. MOD. AFR. STUD. 309, 324–26 (2006)).

misallocation of royalties, restrictive access to TCEs, and unwanted commoditization of traditional heritage. The fundamentally different nature of TCEs demands a fundamentally different approach. This paper proposes that traditional communities should enjoy a more tailored set of rights—specifically, the right to prevent uses of TCEs that are either (i) commercially exploitative, or (2) from the perspective of a reasonable person, highly prejudicial to the originating community.⁶⁴ Although traditional communities would not enjoy copyright-like exclusivity over the use of their TCEs, these narrower rights better reconcile the community’s economic and dignitary interests in TCEs with the public’s interest in free speech and access to traditional cultures.

A second question is whether and under what circumstances traditional communities, rather than individuals, should be empowered to pursue a tort-like remedy. Intellectual property regimes often struggle to define and protect “group” rights other than joint or collective works.⁶⁵ But collective lawsuits and organizational plaintiffs are far from alien to the legal system. West African legislatures can look to their countries’ respective requirements for organizational standing⁶⁶ or class action certification⁶⁷ as a model for the requirements necessary to ensure that

⁶⁴ The contours of “commercially exploitative” and “highly prejudicial” are the crux of any protections afforded by a tort-like remedy. But providing these terms with fixed and precise definitions may prove impracticable given the wide range of activities that defendants could be involved in. *Cf.* *Apex Hosiery Co. v. Leader*, 310 U.S. 460, 489 & n.10 (1940) (discussing similar considerations with respect to the meaning of certain terms in the Sherman Act, a U.S. federal antitrust statute). West African policymakers may be well advised to use Justice Stewart’s famous definitional heuristic: “I know it when I see it.” *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (discussing the meaning of obscenity under the First and Fourteenth Amendments to the U.S. federal constitution).

⁶⁵ Hughes, *supra* note 58, at 1252 & n.154 (citing David B. Jordan, *Square Pegs and Round Holes: Domestic Intellectual Property Law and Native American Economic and Cultural Policy: Can It Fit?*, 25 AM. INDIAN L. REV. 93, 99 (2000–01)).

⁶⁶ *See generally, e.g.*, *Summers v. Earth Island Institute*, 555 U.S. 488, 493–94 (2009) (discussing the requirements for organizational standing under Article III of the U.S. federal constitution).

⁶⁷ *See generally, e.g.*, FED. R. CIV. P. 23 (discussing the requirements to certify class action litigation in U.S. federal court).

a suit brought on behalf of a community generally represents the interests and consensus of the community's members.

Ultimately, however, the success of a tort-like approach to the protection of TCEs depends on the remedies available to the successful plaintiff. The most carefully crafted cause of action provides little redress if the rewards of litigation are insufficient to justify bringing a claim in the first place—and too draconian a remedy risks chilling legitimate and desirable uses of TCEs by third parties. Authorizing plaintiffs to pursue a combination of injunctive relief and monetary damages best balances the economic and dignitary interests of affected traditional communities. Together, these remedies (i) vindicate communal rights to prevent injurious uses of TCEs, (ii) encourage potential exploiters of TCEs to bargain with the community for the right to use TCEs, (iii) punish misconduct against populations that have historically lacked the legal and economic tools to respond effectively, and (iv) provide additional marginal incentives for adequate legal representation of traditional communities.⁶⁸

A tort-like remedy against TCE misuse offers several advantages over existing *sui generis* regimes in West Africa. On the one hand, vesting legal rights in affected communities, rather than central governments, allows the communities to exercise a degree of self-determination over the use of their TCEs. On the other hand, sharply defining the scope of those legal rights limits the ability of communal self-determination to interfere with free speech and broad public access to traditional culture. A tort-like remedy also enhances the economic position of traditional communities without requiring a cumbersome infrastructure for royalty distribution or fine distinctions between the contributions of community members. The tort-like

⁶⁸ See Mark P. Gergen, *Issues of Restitution Doctrine: Causation in Disgorgement*, 92 B.U. L. REV. 827, 830 (2012) (noting the deterrence and punitive aspects of the disgorgement remedy). Cf. Note, *An Economic Analysis of the Plaintiff's Windfall From Punitive Damage Litigation*, 105 HARV. L. REV. 1900, 1909 (1992) (“A plaintiff’s lawyer shares, either directly or indirectly, in a plaintiff’s windfall [from punitive damages].”).

remedy proposed by this paper would necessarily be smaller in scope than broad-ranging *sui generis* legislation. Yet a smaller solution may prove to be more nimble and responsive to the needs of traditional communities—the true stakeholders in a country’s TCEs.

VI. Conclusion

The primary legal protection for traditional cultural expressions in West Africa stems from *sui generis* regimes built around a system of collective management by central governments. Supplementing these *sui generis* regimes are two international agreements, which aim to weave traditional cultural expressions into regional frameworks for the general protection of intellectual property. But these *sui generis* regimes may not be up to the task at hand. Despite their emphasis on centralized control, these laws do not adequately secure the benefits that traditional communities ought to reap from generating and maintaining traditional cultural expressions. Traditional communities could be better served by a less centralized system that affords communities a tort-like remedy against exploitative or highly prejudicial uses of their traditional cultural expressions.

African Affairs Committee
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February 2016