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## Protecting Traditional Transnational Cultural Expressions in the United States and Mexico

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# PROTECTING TRADITIONAL TRANSNATIONAL CULTURAL EXPRESSIONS IN THE UNITED STATES AND MEXICO

*Caitlyn Herlihy* †

## ABSTRACT

Despite decades of urging from non-Western nations, the development of protection for Traditional Cultural Expression on an international level has been slow. The last three decades have brought broader international awareness of the profits made off of traditional art, style, and symbols, which has propelled the efforts to legally recognize and protect the intellectual property rights of historically marginalized people. This Note argues that while establishing domestic laws that protect the unique intellectual property of Indigenous groups is important, true protection cannot exist without joint efforts to ensure that provided protections can be enjoyed by all members of a community, regardless of which side of the border they reside on. To fulfill the obligations accepted by the United States and Mexico through the United Nations Declaration on the Rights of Indigenous Peoples, the two nations must develop an international agreement that establishes a cooperative system that provides transnational protection for their shared Indigenous populations.

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## I: INTRODUCTION

If Indigenous<sup>1</sup> communities are not confined within the borders of contemporary states, why are the laws protecting them, particularly intellectual property (IP) laws, limited to within those same borders? Traditional Cultural Expressions (TCEs), formerly referred to as expressions of folklore, are the forms in which traditional culture and knowledge are expressed.<sup>2</sup> TCEs are the tangible and intangible ways that Indigenous groups express and share their cultural heritage from generation to generation.<sup>3</sup> TCEs fall within the broader category of

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1. In this Note, “Indigenous” is used as a general term to refer to communities and descendants of those who inhabited a country or a geographical region before colonists arrived and began to occupy the land. Some of these peoples prefer other identities such as natives, tribes, first peoples/nations, aboriginals, ethnic groups, adivasi, or janajati. United Nations Permanent Forum on Indigenous Issues, Indigenous Peoples, Indigenous Voices: Factsheet, [https://www.un.org/esa/socdev/unpfii/documents/5session\\_factsheet1.pdf](https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf); Christina Leza, *Indigenous Identities on the U.S.-Mexico Border*, 60 J. SOUTHWEST., 914, 914 (2018) (“While U.S. members of border [I]ndigenous nations primarily identify by community or tribal affiliation, border peoples may also identify as “Native American,” “Native,” “Indigenous,” “Indígena,” “Indian,” “American Indian,” “American,” or “Mexican” depending on social context and personal life experience.”).
  2. *Traditional Cultural Expressions*, WORLD INTELL. PROP. ORG. [WIPO], <https://www.wipo.int/tk/en/folklore/> [<https://perma.cc/E3ED-BP7X>] [hereinafter WIPO TCE]; World Intell. Prop. Org. [WIPO], *Intellectual Property and Folk, Art and Cultural Festivals: Practical Guide*, at 23, WIPO Publication No. 1043E (2018), [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_1043\\_2018.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1043_2018.pdf) [hereinafter Practical Guide].
  3. Murphy Yanbing Chen, *Safeguarding Traditional Knowledge and Traditional Cultural Expression Through Intellectual Property Systems*, CTR. FOR ART L. (Feb. 1, 2023), <https://itsartlaw.org/2023/02/01/safeguarding-traditional-knowledge-and-traditional-cultural-expression-through-intellectual-property-systems/#post-57183> [<https://perma.cc/8ZCF-K47S>] ([TCEs] bear a record of the collective memories of

Intangible Cultural Heritage<sup>4</sup> along with Traditional Knowledge (TK)—the technical skills and knowledge that are developed, sustained, and intergenerationally passed on within a community.<sup>5</sup>

Although TK and TCEs are inextricably linked and frequently overlap, the two are often separated when discussed, as they will be here, because each benefits from different forms of protection.<sup>6</sup> TCEs, the focus of this Note, tend to fall more in line with “soft” IP, such as copyright and trademark law, where the proposed protections aim to promote creativity, enhance cultural diversity, and preserve cultural heritage.<sup>7</sup>

Despite decades of urging from non-Western nations, development of TCE protection has been slow at an international level.<sup>8</sup> This Note argues that to fulfill the obligations accepted by the United States and Mexico through their support of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),<sup>9</sup> the two nations must develop an international agreement that establishes a cooperative system permitting transnational protection for their shared Indigenous populations.

Part II examines the current IP systems used to provide protection for TCEs and the advantages and disadvantages of each. Part III reflects on the colonial history of IP, and surveys the steps taken by international and domestic legal systems. Part IV discusses the shared Indigenous peoples of the United States and Mexico and the steps that

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[I]ndigenous people . . . they are living, breathing, audiovisual narratives . . . passed down from generation to generation . . . They . . . provoke, invite, and ignite creativity and imagination for the modern audience while preserving, protecting, and inheriting from ancestral wisdom.”); *see also* Secretariat of World Intellectual Property Organization, *The Protection of Traditional Cultural Expressions: Draft Articles*, art. 3.1, WIPO Doc. GRTKF/IC/44/5, (July 7, 2022) [hereinafter July 7 Draft Articles].

4. *See* Practical Guide, *supra* note 2, at 23.
5. World Intell. Prop. Org. [WIPO], *Traditional Knowledge and Intellectual Property—Background Brief*, at 1 (2016), <https://wipo.int/publications/en/details.jsp?id=3858&plang=EN> [hereinafter Background Brief].
6. WIPO TCE, *supra* note 2; Practical guide, *supra* note 2; World Intell. Prop. Org. [WIPO], *Intellectual Property and Traditional Cultural Expressions/Folklore—Booklet no. 1*, at 9, WIPO Publication No. 913(E) (2005), [https://www.wipo.int/edocs/pubdocs/en/tk/913/wipo\\_pub\\_913.pdf](https://www.wipo.int/edocs/pubdocs/en/tk/913/wipo_pub_913.pdf) [hereinafter Booklet 1].
7. WIPO TCE, *supra* note 2; Booklet 1, *supra* note 6, at 9.
8. Background Brief, *supra* note 5, at 1.
9. *See* G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

can be taken to provide TCE protection that extends past the “invisible line”<sup>10</sup> separating their shared cultural communities.

## II: BACKGROUND

There are two primary approaches to granting Indigenous communities protection over their TCEs: positive protection and defensive protection.<sup>11</sup> Defensive protections prevent third parties from gaining or maintaining an exclusive right to a TCE.<sup>12</sup> These protections aim to prevent insulting, derogatory, or offensive use of TCEs.<sup>13</sup> Positive, or offensive, protections grant exclusive rights to the Indigenous communities.<sup>14</sup> These protections include moral rights of attribution and integrity, thereby recognizing the local and Indigenous communities as owners. This recognition allows communities to obtain legal relief if TCEs are exploited for commercial gain, or if they are manipulated or modified in a demeaning or offensive way.<sup>15</sup> Positive and defensive protections are not necessarily mutually exclusive; rather, they are different approaches to the same goal of ensuring legitimate use of TCEs. Still, it is important to distinguish the two because different methods of protection may be more appropriate depending on the goals of specific groups.

### *A: Traditional Cultural Expressions in the Western IP System*

When debating how to protect TCEs, there tends to be an initial push to fit TCEs within already established systems of IP protection.<sup>16</sup>

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10. Christina Leza, *For Native Americans, US-Mexico border is an ‘imaginary line’*, THE CONVERSATION (Mar. 19, 2019, 6:44 AM EDT), <https://theconversation.com/for-native-americans-us-mexico-border-is-an-imaginary-line-111043>. [<https://perma.cc/62V3-R97J>].
  11. When discussing TCEs, the terms “protection,” “safeguarding,” and “preservation” are sometimes incorrectly used interchangeably. Although the individual words are synonymous, when talking about IP, “protection” refers to defending intellectual creations from misappropriation or misuse where as “safeguarding” and “preservation” focus on promoting the viability, continued use and transmission of cultural heritage. WIPO TCE, *supra* note 2; Practical guide, *supra* note 2, at 27.
  12. Background Brief, *supra* note 5; World Intell. Prop. Org. [WIPO], *Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/Folklore—A Guide for Countries in Transition*, at 5, (2013) [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_transition\\_9.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_transition_9.pdf) [hereinafter Transition Guide].
  13. Booklet 1, *supra* note 6, at 18.
  14. Background Brief, *supra* note 5; Transition Guide, *supra* note 12, at 5.
  15. Practical guide, *supra* note 2, at 13.
  16. Within Indigenous communities, TCEs are typically protected through cultural norms. In some instances, only specific individuals within the community are permitted to reproduce certain TCEs, other TCEs may be reproduced by anyone within that community without issue. The need for

Outwardly, this certainly appears to be the quickest way to establish protection. However, the distinct characteristics of TCEs make it so they fall outside of what can be considered a protectable “work” under current systems, necessitating distinction.<sup>17</sup>

In 1982, the World Intellectual Property Organization (WIPO) and United Nations Educational, Scientific and Cultural Organization (UNESCO) jointly adopted the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions. This introduced the term “expressions” to distinguish TCEs from “works” that were protected by copyright law.<sup>18</sup> TCEs differ from works because TCEs typically lack the individual ownership and the “new and original” elements that are valued in IP systems.<sup>19</sup> These distinctions often leave TCEs unprotected and part of the public domain, allowing anyone to make use of them without the consent of the Indigenous communities to whom they belong.<sup>20</sup> Without considering these defining characteristics, it is easy to see why many assume that the TCEs would fall under the protection of copyright, trademark, or geographical indication law. Yet, these conflicting characteristics are so essential to the nature of TCEs and

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protection usually arises when TCEs are reproduced and exploited by people outside of those communities. Alexander Bussey, *Traditional Cultural Expressions and the U.S. Constitution*, 10 BUFF. INTELL. PROP. L. J. 1, 6 (2014).

17. Richard Awopetu, *In Defense of Culture: Protecting Traditional Cultural Expressions in Intellectual Property*, 69 EMORY L. J. 745, 750 (2020) (“Copyright law protects ‘original works of authorship including literary, dramatic musical, and artistic works, such as poetry, novels, movies, songs, computer software, and architecture.’ However, copyright law can only cover TCEs that are original works of authorship and exist in tangible form, so there are numerous types of TCEs that cannot be eligible for protection under U.S. copyright law.”) (internal citations omitted).
18. Lily Martinet, *Traditional Cultural Expressions and International Intellectual Property Law*, 47 INT’L J. LEGAL INFO. 6, 9 (2019).
19. Awopetu, *supra* note 17, at 753.
20. Molly Torsen & Jane Anderson, *Intellectual Property and the Safeguarding of Traditional Cultures*, WORLD INTELL. PROP. ORG. [WIPO] 16, WIPO Publication No. 1023(E) (Dec. 2016), [https://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo\\_pub\\_1023.pdf](https://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf); Elifuraha Laltaika & Neva Collings, *Update of the Technical Review of Key Intellectual Property-Related Issues of the WIPO Draft Instruments on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions Within the Framework of Indigenous Human Rights*, WORLD INTELL. PROP. ORG. [WIPO] Annex 4, WIPO/GRTKF/IC/47/INF/8, (Mar. 21, 2023) (“Unlike songs, plays or movies where entertaining individuals for profit is sought, TK and TCEs may contain indigenous peoples’ customary laws, customs, ceremonies, and worldviews that are integral to their collective culture. It is difficult for this kind of innovations to enter the public domain when TK and TCEs are so closely tied to a nation, group or community identity.”).

the current systems of IP protection that ultimately, the current IP systems cannot provide adequate protection for these expressions.<sup>21</sup>

### 1. Copyright

Copyright law provides authors with the exclusive right to reproduce, create derivatives of, and control the distribution of a work.<sup>22</sup> Since TCEs are forms of expressions, copyright is usually the first system assessed for TCE protection. Copyrights would grant most, if not all, of the protections needed for Indigenous communities to economically benefit from their TCEs and prevent dissemination or reproduction that would be offensive.<sup>23</sup> In practice however, while the occasional TCE may qualify for copyright protection, most contain elements that prevent them from conforming to the Western-centric idea of a protectable “work,” making copyright law inappropriate for TCEs as a whole.<sup>24</sup>

There are numerous overlapping issues that render TCEs a poor fit for protection by the copyright system. Many of these issues relate back to the element of originality, or individual expression.<sup>25</sup> Most TCEs fail to hit the mark for originality because they are comprised of intergenerational literary and artistic works, or words and symbols that are unprotected under standard copyright law.<sup>26</sup> The originality requirement prevents granting copyrights to individual works that are too similar to previous expressions or cultural “styles.”<sup>27</sup> This requirement is related to the next issue where, under the Berne Convention, copyright protection expires fifty years after the death of the author, or in the case of anonymous works—arguably a better fit for TCEs—fifty years after the work is lawfully made available to the public.<sup>28</sup> Because TCEs are living, intergenerational expressions, rather than single fixed expressions, the granted duration of protection is inadequate.<sup>29</sup> It is impossible to add an expiration date to the protection

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21. Background Brief, *supra* note 5.

22. Bussey, *supra* note 16, at 7–8.

23. *Id.* at 8.

24. See, e.g. Lauren M. Ingram, *Cultural Appropriation: What Should States Do?*, 111 L. J. INT’L TRADEMARK ASS’N 859, 867 (2021) (“Most cultural products fail both the originality and fixation requirements, do not fulfill the term requirements of the copyright, the concept of the public domain, the focus on sole authors, and fair use.”) (emphasis added) (internal citations omitted).

25. *Id.*

26. *Id.*

27. Practical Guide, *supra* note 2, at 16.

28. Berne Convention for the Protection of Literary and Artistic Works art. 7, ¶ 2, Nov. 19, 1984.

29. Bussey, *supra* note 16, at 8.

of expressions developed over generations without negatively impacting cultural heritage.<sup>30</sup>

TCEs that are presented and passed on orally run into an additional roadblock as copyright law requires fixation in a “tangible medium of expression.”<sup>31</sup> This can, and has, led to Western anthropologists and ethnographers receiving a copyright over an Indigenous group’s TCE simply because they were the first to record it.<sup>32</sup> Finally, the standard copyright system is inappropriate for providing TCE protection because the copyright system values individual ownership, whereas TCEs tend to belong to entire communities.<sup>33</sup>

## 2. Trademark

The trademark system solves some of the issues, such as originality and longevity, presented by using copyright to protect TCEs. Additionally, trademark law does not have a preference towards individual owners, making it a good fit for the communal ownership of TCEs. The general purpose of trademark law is to prevent confusion over the source of a product.<sup>34</sup> Applied to TCEs, this would theoretically be a positive step toward ensuring that Indigenous peoples receive recognition for their TCEs. The biggest concern about using trademarks to protect TCEs is the insufficiency of defensive protection.<sup>35</sup> Similar to anthropologists receiving copyrights over transcribed oral traditions, the trademark system is often not enough to prevent large companies from using designs in areas that do not use trademarks, such as fashion, or from simply using and registering a trademark before an Indigenous

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30. Laltaika & Collings, *supra* note 20, ¶ 22 (“Examined from the indigenous peoples’ perspectives, public domain is at odds with indigenous peoples’ human rights . . . indigenous peoples regard TK and TCEs and human rights associated to them . . . to be timeless. Correspondingly, subjecting indigenous peoples’ TK and TCEs to time limitation negates the limitless and trans-generational nature of rights associated with TK and TCEs among indigenous peoples.”).
  31. Bussey, *supra* note 16, at 8.
  32. There are countless examples of anthropologists documenting Indigenous cultures through audio recordings, films, and extensive field notes, especially during the period of “salvage-anthropology.” Krisztina Laszlo, *Ethnographic Archival Records and Cultural Property*, 61 ARCHIVARIA (SPECIAL SECTION) 299, 300 (2006). This issue is not only limited to anthropologists, it also prevalent in the music industry. Traditional music often cannot be copyrighted if it was passed down orally. However, non-Indigenous artists can derive the benefits of copyright law by recording mixes with the traditional music and fixing it in a tangible medium. See Awopetu, *supra* note 17, at 757.
  33. Martinet, *supra* note 18, at 11 (“Traditional cultural expressions do not belong to an individual since they express a collective cultural identity.”).
  34. See *Trademarks*, WIPO, <https://www.wipo.int/trademarks/en/> [<https://perma.cc/PZA7-ZVQJ>].
  35. Awopetu, *supra* note 17, at 752–53.

group can.<sup>36</sup> Corporate trademark rights for a TCE could not only undermine the Indigenous or local population to whom that TCE belongs, but they could also be used against those same Indigenous communities.<sup>37</sup> While these improper trademarks may be challenged, usually by arguing that the trademark creates a false connection to the Indigenous group, the initial use by outsiders would still harm these communities.<sup>38</sup>

### 3. Geographical Indications

Geographical Indications (GIs) are products of a certain quality or reputation that originate within a specific geographical location.<sup>39</sup> GIs are similar to trademarks, but differ insofar as GIs indicate some quality or characteristic that relates to a geographic location, rather than a specific owner.<sup>40</sup> GIs are not used by a single, particular enterprise, but instead are available to anyone who meets the geographic requirement.<sup>41</sup> Some suggest that this collective nature is what makes GIs the best way to protect TCEs.<sup>42</sup> Additionally, Indigenous peoples could economically benefit from protecting TCEs through GIs because recognized GIs tend to lead to an increase in sales and also enable the authorized user to charge premium prices for goods.<sup>43</sup> Finally, GIs are granted cross-border protection through World Trade Organization (WTO) agreements, enhancing the appeal for use in TCE protection.<sup>44</sup>

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36. *Id.* “Use” in trademark law typically refers to commercial use so while Indigenous groups may use their TCEs in cultural settings, a corporation may be the first to use a TCE in commerce. *See* Secretariat of World Intellectual Property Organization, Summary of Replies to the Questionnaire on Trademark Law and Practice, at 147–149, WIPO/STrad/INF/1 Rev.1 (Jan. 25, 2010), [https://www.wipo.int/export/sites/www/sct/en/meetings/pdf/wipo\\_strad\\_inf\\_1\\_rev\\_1.pdf](https://www.wipo.int/export/sites/www/sct/en/meetings/pdf/wipo_strad_inf_1_rev_1.pdf) (showing that many countries require affixation on goods in commercial applications in their definition of “use” in national trademark laws.); *see also* Ingram, *supra* note 24, at 868.
37. Awopetu, *supra* note 17, at 753.
38. *Id.* at 761–763.
39. *Geographical Indications*, WIPO, [https://wipo.int/geo\\_indications/en/](https://wipo.int/geo_indications/en/) [<https://perma.cc/L52N-7FYX>].
40. J. Janewa Osei-Tutu, *Protecting Culturally Identifiable Fashion: What Role for GIs?*, 14 FIU L. REV. 571, 574 (2020).
41. *Id.*
42. *Id.*
43. *Id.* at 575.
44. *Id.* at 573; *see, e.g.*, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

Under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement),<sup>45</sup> member states must prohibit dissemination of information, such as designations or presentations, that may cause the public to attribute GIs to the wrong geographical region.<sup>46</sup> The TRIPS Agreement also provides increased protection for wines and spirits by requiring members to prevent the use of GIs “even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as ‘kind,’ ‘type,’ ‘style,’[or] ‘imitation.’”<sup>47</sup> This higher protection serves to protect the authenticity of the original GI<sup>48</sup> and a similarly heightened level of protection would be necessary if used for TCEs.

The downside to using GIs to protect TCEs is that GIs are linked to *geographical locations* rather than specific groups.<sup>49</sup> Although communities are typically rooted to geographic locations, not all members of a cultural population are bound to remain in any specific region.<sup>50</sup> Members of a community residing outside of the range of a GI would not only be prohibited from using the GI on what is a culturally authentic TCE, but they would also be in violation of the GI and could potentially face legal consequences.<sup>51</sup> Conversely, should a third party replicate a TCE within that geographical location, there would be no remedy for the Indigenous community.

### *B: Current Efforts to Protect TCEs*

#### 1. International Efforts

The fight for international protection of TCEs has been ongoing for decades. Post decolonization, African countries began speaking out against the current IP system; arguing that “[i]nternational copyright conventions are designed, in their present form, to meet the need of countries which are exporters of intellectual works.”<sup>52</sup> Countries were

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45. Osei-Tutu, *supra* note 40, at 574.

46. Agreement on Trade-Related Aspects of Intellectual Property Rights as Amended by the 2005 Protocol Amending the TRIPS Agreement art. 22, Dec. 6, 2005.

47. *Id.* art 23.

48. Osei-Tutu, *supra* note 40, at 575.

49. *Id.* at 574.

50. *Id.* at 580.

51. World. Intell. Prop. Org. [WIPO], *Protect and Promote Your Culture: A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities*, at 24, WIPO Publication No. 1048E (2017), [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_1048.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1048.pdf).

52. EDWARD ELGAR, INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS IN A DIGITAL ENVIRONMENT 9 (Christoph Beat Graber & Mira Burri-Nenove eds., 2008) (quoting ROYCE FREDRICK WHALE, PROTOCOL REGARDING THE DEVELOPING COUNTRIES 8 (1968)).

outraged that literary and artistic works imported from the West were protected, but TCEs were automatically placed in the public domain, unprotected, and free to be used by anyone.<sup>53</sup> Despite the slow progress, nations continue to push for TCE protection.<sup>54</sup> During a WIPO Regional Seminar on TK protections, the opening presenter from Indonesia again denounced the inequality: “If the knowledge assets of developed countries are internationally protected, why [are] the developing countries’s . . . not?”<sup>55</sup> Global awareness of the exploitation and harm caused to Indigenous groups, as well as the profits made off of appropriated TCEs has increased within the last three decades, evoking a major push to recognize and protect the IP rights of historically marginalized peoples.<sup>56</sup>

In 2003, UNESCO adopted the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, which provides guidelines for protecting some forms of TCEs, such as oral traditions and expressions, performing arts, and social practices.<sup>57</sup> However, this Convention is limited to *intangible* forms of expression.<sup>58</sup> Additionally, this Convention aims to “safeguard the intangible cultural heritage,” which as defined in Article 2, means, “ensuring the viability of the intangible cultural heritage” rather than offering protection to the Indigenous people who practice these traditions.<sup>59</sup> This Convention has also been criticized for defining “intangible cultural heritage” in a way that excludes certain practices that may be culturally significant to a particular group.<sup>60</sup>

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53. Martinet, *supra* note 18, at 7.

54. Damos Dumoli Agusman, *Topic 1: An Introduction to Core Concepts and Objectives: What are Traditional Knowledge (TK), Genetic Resources (Grs) and Traditional Cultural Expressions (TCEs)? Why Should They Receive Legal Protection?*, WORLD INTELL. PROP. ORG. [WIPO], WIPO Doc. WIPO/IPTK/BKK/09/TOPIC1/1 (Dec. 16, 2009), [https://wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=130794](https://wipo.int/meetings/en/doc_details.jsp?doc_id=130794).

55. *Id.*

56. Kyle Jahner, *Mexico Testing Limits of Using Law to Bar Cultural Appropriation*, BLOOMBERG LAW (Apr. 11, 2022, 4:45 AM), <https://news.bloomberglaw.com/ip-law/mexico-testing-limits-of-using-law-to-bar-cultural-appropriation>. [<https://perma.cc/55FE-85F5>].

57. The Convention for the Safeguarding of the Intangible Cultural Heritage, art. 2, Dec. 17, 2003, 2368 U.N.T.S. 3.

58. *Id.*

59. *Id.* art. 1.

60. See Richard Kurin, *Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal*, 56 MUSEUM INT’L 66, 69-70 (2004).

In 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>61</sup> This resolution was carefully drafted and intensely debated over twenty years to best address the needs and wants of states and Indigenous peoples.<sup>62</sup> Although UNDRIP is generalized towards addressing human rights violations against Indigenous groups worldwide and assisting them in recovering from the colonization that prevented them from exercising their right to develop their cultural heritage in accordance with their own needs and interests.<sup>63</sup> Article 31 specifically addresses TK and TCEs:<sup>64</sup>

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.<sup>65</sup>

While UNDRIP was a significant step toward promoting and protecting the rights of Indigenous peoples, there are two issues that limit its effectiveness in protecting TCEs.<sup>66</sup> First, UNDRIP is a *non-binding* resolution.<sup>67</sup> It does not create any legal obligations for supporting nations to protect the TCEs of Indigenous peoples.<sup>68</sup> The second issue stems from the second portion of Article 31: “the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural

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61. G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sep. 13, 2007) [hereinafter UNDRIP].
  62. U.N. Permanent Forum on Indigenous Issues, Indigenous Peoples, Indigenous Voices: Frequently Asked Questions, Declaration on the Rights of Indigenous Peoples, [https://www.un.org/esa/socdev/unpfii/documents/faq\\_drips\\_en.pdf](https://www.un.org/esa/socdev/unpfii/documents/faq_drips_en.pdf) [<https://perma.cc/XBW7-JNPC>] [hereinafter U.N. Perm. Forum].
  63. *See generally* UNDRIP, *supra* note 61.
  64. *Id.* at art. 31.
  65. *Id.*
  66. *See* Kevin Crow, *Does UNDRIP Matter?: Indian Law in the United States & the International Right to Self Determination*, 13 HIBERNIAN L.J. 119, 121 (2014).
  67. U.N. Perm. Forum, *supra* note 62.
  68. Federica Cittadino, *Applying A UNDRIP Lens to the CBD: A More Comprehensive Understanding of Benefit-Sharing*, XXIV INDIGENOUS POL'Y J., no. 4, 2014, at 12.

expressions.”<sup>69</sup> As discussed in Part II(A) above, TCEs do not fit within the current IP system. So, without a new system in place, there is little that can actually be done to maintain and protect TCEs. Still, UNDRIP is currently the most significant instrument addressing TCEs in international law as there are currently no legally binding protections for tangible TCEs under international law.<sup>70</sup>

This is not to say that the journey towards drafting a legally binding international agreement for the protection of TCEs ended in 2007. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), is currently working towards this goal.<sup>71</sup> However, the IGC has now met for forty-nine week-long sessions,<sup>72</sup> and still has not come close to achieving a broad multilateral agreement for the protection of TCEs.<sup>73</sup> The most prominent obstacle preventing universal TCE protection, as with all areas of international law, is that different groups have varying needs and goals for protection within their own cultures.<sup>74</sup> The IGC itself notes in *The Protection of Traditional Cultural Expression: Draft Articles* that it is trying to take into consideration national and regional particularities and various historical and cultural backgrounds.<sup>75</sup>

While waiting for the IGC to finish drafting a larger agreement, one international organization has implemented a regional agreement to promote the development of TK and TCE protection in Africa.<sup>76</sup> The

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69. UNDRIP, *supra* note 61, art. 31.

70. D. A. Agyei, *Bridging the International Gap in the Protection of Folklore: Analysis of the Ghanaian Approach Against Comparative Experiences from Selected African Countries*, 28 TEX. INT’L PROP. L.J. 393, 396 (2020) (“In spite of the multi-dimensional significance of folklore, international law does not protect it . . . This lack of international protection of folklore is a major gap in international law.”).

71. *Intergovernmental Committee (IGC)*, WIPO, <https://www.wipo.int/tk/en/igc/> [<https://perma.cc/W6VK-YX4X>].

72. As of February 2024. *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Forty-Ninth Session*, WIPO, [https://www.wipo.int/meetings/en/details.jsp?meeting\\_id=80927](https://www.wipo.int/meetings/en/details.jsp?meeting_id=80927) [<https://perma.cc/6T4A-9F49>].

73. Cf. Wend Wendland, *International negotiations on Indigenous knowledge to resume at WIPO: a view of the journey so far and the way ahead*, WIPO MAG. (Feb. 2022), [https://www.wipo.int/wipo\\_magazine\\_digital/en/2022/article\\_0001.html](https://www.wipo.int/wipo_magazine_digital/en/2022/article_0001.html) [<https://perma.cc/9GEL-SUG8>].

74. Jonathan A. Franklin, *Traditional Cultural Expressions and Cultural Institutions*, in INDIGENOUS NOTIONS OWNERSHIP & LIBR., ARCHIVES & MUSEUMS 77 (2016).

75. July 7 Draft Articles, *supra* note 3, at 2.

76. See generally African Regional Intellectual Property Organization [ARIPO], *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore* (Aug. 9, 2010) (Revised and

African Regional Industrial Property Organization's (ARIPO) Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore was drafted in 2007 and, as of 2019, has eight contracting states—Botswana, The Gambia, Liberia, Malawi, Namibia, Rwanda, Zambia, and Zimbabwe.<sup>77</sup> These regulations aim to “protect [TCEs] against misappropriation, misuse and unlawful exploitation beyond their traditional context.”<sup>78</sup> These regulations address protection criteria, formalities, beneficiaries, exceptions and limitations, duration, and management of TCE rights.<sup>79</sup> This instrument is similar to the draft articles proposed by the IGC, in the sense that it is a commitment by the contracting states to develop TCE protection within their respective territories.<sup>80</sup>

## 2. National Efforts

The current trend, as suggested by WIPO and ARIPO, is for TCE protection to be developed and implemented domestically.<sup>81</sup> Over 100 nations have followed that suggestion and addressed TCEs within their national laws.<sup>82</sup> This Note focuses on two countries in particular—the United States and Mexico.

In the United States, the Indian Arts and Crafts Act of 1990 is the only TCE protection for Indigenous groups outside of the IP system.<sup>83</sup> The Act attempts to prevent non-Indigenous people from depriving legitimate Indigenous artists of potential sales and income, and also tries to preserve the history, meaning, and cultural traditions associated with authentic pieces.<sup>84</sup> It is a “truth-in-advertising”<sup>85</sup> law that prevents

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Reprinted 2019), <https://www.newaripo.online/storage/resources-protocols/1674640255phpJRYyDj.pdf> [<https://perma.cc/VY25-MRJE>].

77. *Id.* at 6.

78. *Id.* § 1.1(b).

79. *Id.* at 7–8.

80. *See id.*; *see also* July 7 Draft Articles, *supra* note 3.

81. *See generally* *Traditional Knowledge, Traditional Cultural Expressions, & Genetic Resources Laws*, WIPO, [https://www.wipo.int/tk/en/databases/tklaws/search\\_result.jsp?subject=tce](https://www.wipo.int/tk/en/databases/tklaws/search_result.jsp?subject=tce) [<https://perma.cc/9LQN-S4C3>]; *see also* ARIPO, *supra* note 76.

82. Practical Guide, *supra* note 2, at 26; *see also* *Traditional Knowledge, Traditional Cultural Expressions, & Genetic Resources Laws*, *supra* note 81.

83. Ingram, *supra* note 24, at 865.

84. Members of OLE & IACB, *Protecting Alaska Native Art, Culture, and Economics*, U.S. FISH & WILDLIFE SERV. (July 6, 2022), <https://www.fws.gov/story/2022-07/protecting-alaska-native-art-culture-and-economics> [<https://perma.cc/BW56-QE74>] [hereinafter OLE & IACB].

85. Federal truth-in-advertising laws require ads must be truthful, not misleading, and, when appropriate, backed by scientific evidence, and are enforced by the Federal Trade Commission. *Truth in Advertising*, FED.

non-Indigenous people from offering or displaying for sale, or selling, any arts or crafts product in a way that falsely suggests it is Indigenous-produced, an Indigenous product, or the product of a particular Indigenous person or group.<sup>86</sup> This applies to any Indigenous-style, traditional or contemporary, arts or crafts that were produced after 1934.<sup>87</sup> The caveats to this Act for TCE protection is that it (1) only applies to Indigenous groups that are officially recognized within the United States,<sup>88</sup> (2) only applies to sales that occur within the United States, and (3) only prevents claiming that a product was Indigenous-made but does not prevent the creation of said product.<sup>89</sup> Unlike other TCE laws, the Indian Arts and Crafts Act does have the benefit of being enforceable: complaints, concerns, and tips are processed by the Indian Arts and Crafts Board, which then forwards investigation level concerns to a specialized Indian Arts and Crafts Investigation Unit.<sup>90</sup> However, it has been critiqued for being “outdated,” and lacking the “teeth that it should have to protect the legitimate Indian arts and crafts industry.”<sup>91</sup>

In early 2022, Mexico established the “Federal Law for the Protection of the Cultural Heritage of People and Indigenous and Afro-

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TRADE COMM’N [FTC], <https://www.ftc.gov/news-events/topics/truth-advertising> [<https://perma.cc/73UZ-2K5G>].

86. OLE & IACB, *supra* note 84; Non-Indigenous people and companies have been circumventing this Act by referring to counterfeit objects as “native-inspired.” Eighth Generation, an art and lifestyle brand owned by the Snoqualmie Tribe, combats “native-inspired” designs with its tagline “Inspired Natives, Not Native Inspired.” *About*, EIGHTH GENERATION, <https://eighthgeneration.com/pages/about-us> [<https://perma.cc/W2Y6-6JSF>].
87. *Know the Law: Indian Arts and Crafts Act*, WIPO, <https://www.wipo.int/edocs/lexdocs/laws/en/us/us207en.pdf>.
88. Within the borders of the forty-eight contiguous states alone, there are approximately 400 groups that are not officially recognized by the U.S. Government. UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE (GAO), INDIAN ISSUES: FEDERAL FUNDING FOR NON-FEDERALLY RECOGNIZED TRIBES 1 (2012).
89. *Know the Law: Indian Arts and Crafts Act*, *supra* note 87.
90. While violators can face major fines or time in prison, in 2017, there were only two officers dedicated to Indian Arts and Craft Act investigations due to underfunding. Frances Madeson, *Do the Laws on Counterfeit Native Art Go Far Enough?*, HIGH COUNTRY NEWS (July 21, 2017), <https://www.hcn.org/articles/tribes-the-laws-on-plagiarized-native-art-dont-go-far-enough> [<https://perma.cc/U2SK-7YUF>]; OLE & IACB, *supra* note 84.
91. P.J. Randhawa, ‘I will Change This Federal Law in my Lifetime’: Knockoff Native Art Law Faces Renewed Criticism, KING5 (Mar. 1, 2022, 8:35 AM PST) <https://king5.com/article/news/community/facing-race/knockoff-native-art-law-renewed-criticism/281-dce7ef6f-e41a-44b7-9a04-aefd834b34c6> [<https://perma.cc/5FJZ-NBFY>].

Mexican and Communities.”<sup>92</sup> This new law seeks to address cultural appropriation, especially within the fashion industry, by recognizing the collective right to IP of Indigenous and Afro-Mexican communities.<sup>93</sup> It calls for the creation of a National Registry of Cultural Heritage, and allows the government to prosecute theft of a cultural work.<sup>94</sup> At face value, this law is a huge step towards protecting TCEs. However, concerns have already been raised regarding the broad and vague terms it uses when addressing ownership, particularly when it comes to who is allowed to grant temporary licenses to third parties and how compensation will be distributed.<sup>95</sup> Another concern emerges in establishing the origin of a cultural expression.<sup>96</sup> Mexico has sixty-eight Indigenous groups.<sup>97</sup> These different communities do not live in isolation; ideas and expressions were likely shared among different groups over time, possibly resulting in numerous communities claiming the same TCE.<sup>98</sup>

### III: DEVELOPING A COOPERATIVE SOLUTION TO PROTECT THE TRADITIONAL TRANSNATIONAL CULTURAL EXPRESSIONS IN THE UNITED STATES AND MEXICO.

The current border between the United States and Mexico was agreed upon through a series of three bilateral agreements between 1848 and 1963.<sup>99</sup> Despite being the most severely impacted by these agreements,<sup>100</sup> the Indigenous peoples of the land were neither consulted nor adequately considered in any of the border negotiations between Mexico and the United States.<sup>101</sup>

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92. Martin Michaus et al., *Federal Law for the Protection of the Cultural Heritage of Peoples and Indigenous and Afro-Mexican Communities (LFPPCPCIA)*, BASHAM (Feb. 21, 2022), <https://www.basham.com.mx/federal-law-for-the-protection-of-the-cultural-heritage-of-peoples-and-indigenous-and-afro-mexican-communities-lfppcpcia/> [https://perma.cc/S5W9-U8QM].

93. Chantal Flores, *Mexico’s Cultural Appropriation Ban is Off to a Messy Start*, THE VERGE (Feb. 12, 2022, 9:00 AM), <https://theverge.com/22924327/mexico-cultural-appropriation-law-indigenous-and-afro-mexican-communities>[https://perma.cc/EKE3-CQGW].

94. *Id.*

95. *Id.*

96. *Id.*

97. Jahner, *supra* note 56.

98. *Id.*; Flores, *supra* note 93.

99. ALIANZA INDÍGENA SIN FRONTERAS [AISF] & CHRISTINA LEZA, HANDBOOK ON INDIGENOUS PEOPLES’ BORDER CROSSING RIGHTS BETWEEN THE UNITED STATES AND MEXICO 2 (2019).

100. *See id.* at 2, 12.

101. *Id.* at 2.

UNDRIP, which is supported by both the United States and Mexico, imposes obligations on states to ensure the protection of rights of Indigenous peoples.<sup>102</sup> Part of this obligation involves adopting measures to protect TCEs. The United States and Mexico is one of many examples where Indigenous communities extend past contemporary national borders. While establishing domestic laws may protect the unique IP of Indigenous groups, true protection cannot exist without joint efforts to ensure that provided protections can be enjoyed by all members of a community, regardless of which side of the border they reside on.

*A: The Shared Indigenous Peoples of the United States and Mexico*

The establishment of the U.S.-Mexico border divided seven Indigenous peoples: the Yaqui/Yoeme, the O'odham, the Cocopah/Cucapá, the Kumeyaay/Kumiai, the Pai, the Apaches, and the Kickapoo/Kikapú.<sup>103</sup> Despite nearly 175 years passing since this division, many of these Indigenous people still identify with their indigenous community first, and their respective state second.<sup>104</sup> UNDRIP Article 36 establishes “the right [for Indigenous people divided by international borders] to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.”<sup>105</sup> Relying on this instrument, many Indigenous people routinely risk facing the rigorous border enforcement protocols to cross the U.S.-Mexico border to participate in cultural events, visit religious sites, attend burials, attend school, and visit family.<sup>106</sup> While physically separated by an international border, these Indigenous communities continue as unified peoples.

This continued connection raises new, or perhaps previously ignored, questions about TCE protection. Does the “imaginary line” that was drawn by colonists give Indigenous peoples on one side of the

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102. U.N. Dep't of Econ. and Soc. Aff., U.N. Declaration on the Rights of Indigenous Peoples, <https://www.un.org/development/desa/indigenous-peoples/declaration-on-the-rights-of-indigenous-peoples.html> [https://perma.cc/8CA2-3LGP].

103. AISF & LEZA, *supra* note 99, at 2.

104. Leza, *Indigenous Identities on the U.S.-Mexico Border*, *supra* note 1, at 914.

105. UNDRIP, *supra* note 61, art. 36; UNDRIP has not been ratified by the US Senate, so while it is a document of moral and political force, it is not considered US law. Jordyn Arndt, *United States Explanation of Position on “Rights of Indigenous Peoples,”* U.S. MISSION TO THE U.N., (Nov. 7, 2019), <https://usun.usmission.gov/united-states-explanation-of-position-on-rights-of-indigenous-peoples/> [https://perma.cc/Q5PL-BEG9]; See also U.N. Dep't of Econ. and Soc. Aff., *supra* note 102.

106. Leza, *For Native Americans, US-Mexico Border Is an ‘Imaginary Line’*, *supra* note 10.

line a stronger claim over shared TCEs rather than their community members on the other side?<sup>107</sup> If two TCEs were created 100 feet away by different members of the same cultural background, is it fair for those TCEs to receive different degrees of protection simply because of that same line?

*B: Centralizing the Voices of the Indigenous Peoples of the United States and Mexico*

As with the development and implementation of any law directly impacting Indigenous peoples, the voices of those peoples must be heard.<sup>108</sup> This is especially important when addressing historical injustices. Not only were Indigenous people repeatedly told that their culture and expressions were not important or valuable enough to protect, leading to the exploitation of their culture and practices, but they were also arbitrarily separated from their relatives and the land to which they have a cultural connection.<sup>109</sup> Although having the two states include the voices of the seven peoples impacted by the border seems easy and achievable, each peoples is represented by a number of internal communities.<sup>110</sup> As proven with the IGC, developing a legal instrument that respects and benefits different cultural groups is no easy task.

*C: Proposed Solution*

Along with ensuring that Indigenous voices are heard throughout the entire process, it is important when implementing new protections for TCEs to ensure that there is cohesion between overlapping approaches, whether domestic or international.<sup>111</sup> For the case at hand, this means developing an approach that adheres to both the Indian Arts and Crafts Act of 1990, the Federal Law for the Protection of the Cultural Heritage of People and Indigenous and Afro-Mexican and Communities, and any international agreements to which the two nations are parties.

Although this would be a regional solution, this Cooperative Solution differs from ARIPO's Swakopmund Protocol in two ways. First, the Swakopmund Protocol is an agreement among states to

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107. *Id.*

108. UNDRIP, *supra* note 61, art. 19.

109. DeNeen L. Brown, 'Barbaric': America's Cruel History of Separating Children from their Parents, WASH. POST (May 31, 2018, 10:43 am), <https://www.washingtonpost.com/news/retropolis/wp/2018/05/31/barbaric-americas-cruel-history-of-separating-children-from-their-parents/> [https://perma.cc/Y2HN-7W3F].

110. AISF & LEZA, *supra* note 99, at 2.

111. OLUWATOBILOBA (TOBI) MOODY, PROTECTING TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS 3 (2019) <https://www.cigi-online.org/sites/default/files/documents/ILRP%202019%20Toronto.pdf>.

implement their own domestic laws within a shared territory, whereas as TCE protection between the United States and Mexico would be a single joint solution for implementing transnational TCE protection for their shared Indigenous peoples. This joint legal instrument would erase the “invisible line” for matters of TCE protection. Second, while the Swakopmund Protocol is supported by eight states,<sup>112</sup> this Cooperative Solution would be solely between the United States and Mexico. This allows for the development of a solution that can be adapted to fit the specific needs of the United States, Mexico, and their shared Indigenous peoples, rather than an overarching instrument that is too broad to provide practicable protection.<sup>113</sup>

WIPO provides guidelines of key issues for consideration when creating a *sui generis* system for TCE protection.<sup>114</sup> This list includes: (1) defining the objectives of protection; (2) identifying the subject matter; (3) clarifying what the TCEs must be protected against, and what forms of behavior would be unacceptable or illegal; (4) determining any required formalities; (5) establishing sanctions and penalties; (6) determining any exceptions or limitations; (7) establishing the duration of protection; (8) deciding whether protection will be retroactive, prospective, or both; and (9) determining the enforceability of rights and dispute resolution mechanisms.<sup>115</sup> Examples of these provisions can be found within ARIPO’s Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore and the IGC’s draft provisions, as well as in numerous domestic laws.<sup>116</sup> Of the list provided, many of the suggested provisions fit within three categories: initial terms; methods of protection; and enforcement.

#### 1. Initial Determinations

In creating a Cooperative Solution, the WIPO guideline should be consulted and combined with the suggestions made through the lived experiences of Indigenous peoples. The first three issues presented by WIPO set the tone for the rest of the agreement. Before anything else, the policy objectives and guiding principles of the agreement need to be outlined. Without a set objective, it is difficult to determine which

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112. ARIPO, *supra* note 76, at 6.

113. As pointed out by the IGC Secretariat: “it is unlikely that any single ‘one-size-fits-all’ or ‘universal’ international template will be found to protect TCE comprehensively in a manner that suits the national priorities, legal and cultural environment, and needs of traditional communities in all countries” World Intellectual Property Organization [WIPO], *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*, Annex 8, WIPO/GRTKF/IC/11/4(c) (2007).

114. See Background Brief, *supra* note 5, at 3.

115. *Id.*

116. ARIPO, *supra* note 76, § 2; July 7 Draft Articles, *supra* note 3.

policy measures should be taken.<sup>117</sup> Based on the concerns continually raised by Indigenous communities, the main objective for transnational TCE protection between the United States and Mexico should be preventing misappropriation of culturally significant expressions.<sup>118</sup>

The subject of the agreement, TCEs, will also need to be defined. Indigenous communities should retain total discretion to determine specifically what constitutes a TCE, for purposes of this agreement. Because of the focus on just two nations, this definition could include specifics along with a broader definition that could allow for all types of TCEs, whether tangible or intangible.

Once a TCE is properly defined, appropriate ownership of the TCE must then be determined, along with its beneficiaries.<sup>119</sup> Possible beneficiaries include: (1) the Indigenous or cultural communities where the TCE originated; (2) the governments; and (3) the authors or performers.<sup>120</sup> Based on the objective of preventing misappropriation of culturally significant expressions, neither the United States nor Mexican governments should be made the beneficiaries of TCEs. Instead, due to the communal nature of TCEs, the beneficiaries should be the communities where the TCE originated, with exceptions for individual author ownership of expressions that are truly individual. Because the impacted people are large populations of peoples who share a culture, it would likely be most effective to define the “community” as the overall peoples rather than smaller subsections. From there, a method, such as committees with representatives, would have to be developed to determine how reparations would then be divided and distributed.

Finally, protection must be properly defined.<sup>121</sup> An effective solution needs to balance both positive and defensive protections.<sup>122</sup> This would

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117. Martin A. Girsberger, *Legal Protection of Traditional Cultural Expressions: A Policy Perspective*, in INTELL. PROP. & TRADITIONAL CULTURAL EXPRESSIONS IN A DIGIT. ENV'T, 123, 144 (Christoph Beat Graber & Mira Burri-Nenova ed., 2008) (“[I]f the objective is to stimulate the continued creative activities of traditional songwriters, applying copyright or a specifically designed *sui generis* form of such rights may serve to achieve this objective.”).

118. See, e.g. Brigitte Vézina, *Traditional Cultures, Indigenous Peoples and Cultural Institutions*, WIPO MAG. (Apr. 2010), [https://www.wipo.int/wipo\\_magazine/en/2010/02/article\\_0009.html](https://www.wipo.int/wipo_magazine/en/2010/02/article_0009.html) [<https://perma.cc/L3NY-H89Z>].

119. Agyei, *supra* note 69, at 435 (“The determination of who belongs to a particular community for IP protection will, however, not be an easy one, due to migration and intermarriage among traditional communities.”).

120. Girsberger, *supra* note 117, at 147.

121. *Id.* at 141.

122. *Id.* at 145 (“Considering the great diversity of TCE, the varying interests of their holders and the differing policy objectives their protection may

involve providing the means to prevent the misappropriation of TCEs by controlling the ways in which TCEs are used beyond customary and traditional contexts in preventing false or misleading claims of authenticity, regulating access to TCEs, and ensuring the fair and equitable sharing of the benefits arising from use of TCEs.<sup>123</sup>

## 2. Methods of Protection

Once the initial terms are laid out, the methods of protection can be determined. As previously stated, these methods should be cohesive with the Indian Arts and Crafts Act of 1990, the Federal Law for the Protection of the Cultural Heritage of People and Indigenous and Afro-Mexican and Communities, as well as any relevant international agreements.<sup>124</sup> All methods of protection will have advantages and disadvantages, so they should be individually considered to determine which methods are the most advantageous and least detrimental to the people impacted.<sup>125</sup>

Like the Indian Arts and Crafts Act of 1990, it should be illegal to market or sell fake Indigenous art as genuine. Additionally, proof that an artist is Indigenous could be required to lessen the number of counterfeits made.<sup>126</sup> Other defensive forms of protection, such as licensing, could be used as well. To bolster positive protections, digital databases can be created to spread awareness of what is protected.<sup>127</sup> Even with all the traditionally available methods of protection, true protection is unachievable if not extended to the internet.<sup>128</sup>

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have, a single measure is unlikely to be sufficient for the effective and efficient protection of TCE.”).

123. *Id.* at 141–42.

124. Indian Arts and Crafts Act, 25 U.S.C. § 305e (1990).

125. Girsberger, *supra* note 117, at 145.

126. Randhawa, *supra* note 91; Identification requirements would lessen counterfeits but not stop them completely as some people are already circumventing identification requirements through fraudulent tribal identification cards. *See* Madson, *supra* note 90.

127. Databases keep a record of what is protected but also make recorded TCEs more readily available for the public, a consequence that would have to be weighed against the advantage. Additionally, databases can only keep records of TCEs as they existed at the time of recording and would need to be updated regularly. Girsberger, *supra* note 116, at 144.

128. Madson, *supra* note 90 (“[L]awmakers need to make a legislative fix to prohibit non-Native companies from taking advantage of Google adware and search terms. ‘Native,’ ‘Native Art,’ all of these terms addressed by the [Indian Arts and Crafts Act] are already being dominated by non-Native companies . . . E-commerce is where the action is, . . . E-Bay pages created to sell (counterfeit native art) are everywhere . . . ”) (citing Dallin Maybee, Chief Operating Officer of Southwestern Association of Indian Arts).

### 3. Enforcement

Finally, the enforcement of the Cooperative Solution must be determined. This includes penalties, exceptions, dispute resolution, and most importantly, identifying the enforcers of TCE protection. “It’s one thing to pass legislation with good intentions . . . but without appropriations for enforcement, that’s all it is.”<sup>129</sup> With both the current laws in the United States and Mexico, enforcement is carried out by the government. However, some hope remains that TCE enforcement could be authorized to be prosecuted in tribal courts.<sup>130</sup> This pro-sovereignty view would allow Indigenous people to exercise their inherent sovereignty, though it may become complicated if there are conflicts over which community has ownership of a TCE. A final option would be to create a special court that operates solely for Cooperative TCE Protection. This court could involve combined input from both the United States and Mexico, as well as from Indigenous communities. Creating a special court would be the best solution to ensure that decisions are uniform regardless of which side of the border the violation occurs.

## IV: CONCLUSION

The global desire for the legal recognition and protection of TCEs is only growing, leaving feelings of resentment towards the nations that have not prioritized this issue. Although an international legal instrument is being drafted, projections show that this instrument will be generalized in order to appeal to the diverse needs and desires of the different Indigenous communities around the world. As a result, states must implement laws tailored to their specific populations.

In the United States and Mexico, a shared Indigenous population opens the door to developing such a shared solution. Creating a cooperative method of protection ensures that the Indigenous people who were divided by the creation of the U.S.-Mexico border receive equal protection in both states.

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129. *Id.*

130. *Id.*

