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# **TRADITIONAL CULTURAL EXPRESSIONS AND THE NEED FOR SUI GENERIS SYSTEMS UNDER INTELLECTUAL PROPERTY RIGHTS: A FRAMEWORK FOR PROTECTION AND PRESERVATION**

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Saumitra Sharma, United University, Prayagraj (U.P.)

## **ABSTRACT**

Traditional cultural expressions represent the intangible heritage of indigenous and traditional communities worldwide, encompassing folklore, traditional music, dance, crafts, and oral traditions. The existing intellectual property rights framework, designed primarily for individual creators and commercial purposes, fails to adequately protect these collective and culturally significant expressions. This paper examines the limitations of conventional intellectual property systems in safeguarding traditional cultural expressions and argues for the development of sui generis protection mechanisms. Through analysis of international frameworks, case studies, and theoretical considerations, this research demonstrates that specialized legal instruments are essential for preserving cultural heritage while respecting the rights and autonomy of traditional communities.

## I. Introduction

The globalisation of culture and the rapid advancement of digital technologies have created unprecedented opportunities for the dissemination and commercialization of traditional cultural expressions. While this increased accessibility can promote cultural understanding and economic development, it also poses significant risks to the integrity and ownership of these expressions by their originating communities.<sup>1</sup> Traditional cultural expressions, defined broadly as "productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community,"<sup>2</sup> face systematic appropriation and misuse under current intellectual property regimes. The conventional intellectual property framework, structured around concepts of individual authorship, originality, and limited duration of protection, proves fundamentally incompatible with the collective, ancestral, and perpetual nature of traditional cultural expressions.<sup>3</sup> This incompatibility necessitates the development of sui generis systems—specialized legal frameworks designed specifically to address the unique characteristics and protection needs of traditional cultural heritage.

This paper argues that sui generis systems represent not merely an alternative approach to intellectual property protection, but a necessary evolution in legal thinking that recognizes the distinct nature of traditional cultural expressions and the rights of indigenous and traditional communities. The analysis proceeds through examination of the inadequacies of existing intellectual property mechanisms, exploration of international efforts to develop specialized protection frameworks, and consideration of the theoretical and practical foundations for effective sui generis systems.

## II. The Nature and Significance of Traditional Cultural Expressions

Traditional cultural expressions encompass a vast array of intangible cultural heritage, including oral traditions, performing arts, social practices, traditional craftsmanship, and knowledge systems.<sup>4</sup> These expressions serve multiple functions within traditional communities, operating simultaneously as vehicles for cultural transmission, markers of

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<sup>1</sup> See generally MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? (Harvard Univ. Press 2003).

<sup>2</sup> UNESCO-WIPO World Forum on the Protection of Folklore, Phuket, Thailand, April 8-10, 1997, WIPO Doc. No. WIPO/FOLK/PKT/97/1.

<sup>3</sup> See ROSEMARY J. COOMBE, THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW (Duke Univ. Press 1998).

<sup>4</sup> UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 1.

identity, sources of economic activity, and repositories of ancestral wisdom.

The significance of traditional cultural expressions extends beyond their cultural value to encompass social, spiritual, and economic dimensions. For indigenous and traditional communities, these expressions often constitute fundamental elements of their worldview and social organization.<sup>5</sup> They embody relationships with the natural environment, historical narratives, and spiritual beliefs that have been developed and refined over generations. The unauthorized use or misrepresentation of these expressions can therefore cause not only economic harm but also cultural and spiritual damage to the originating communities. The collective nature of traditional cultural expressions distinguishes them fundamentally from conventional intellectual property subjects. Unlike individual creative works, traditional cultural expressions typically emerge from communal processes of creation, adaptation, and transmission that span generations.<sup>6</sup> They are characterized by their evolutionary nature, continuous development within traditional frameworks, and integral connection to the cultural identity of specific communities.

Furthermore, traditional cultural expressions often embody sacred or culturally sensitive elements that require protection beyond commercial considerations. Many indigenous communities maintain that certain expressions should remain within the community or be shared only under specific cultural protocols.<sup>7</sup> This sacred dimension adds complexity to protection efforts and underscores the need for legal frameworks that respect cultural values alongside economic interests.

### **III. Limitations of Conventional Intellectual Property Systems**

The existing intellectual property framework, comprising copyright, trademark, patent, and related rights, demonstrates significant limitations when applied to traditional cultural expressions. These limitations stem from fundamental assumptions embedded in conventional intellectual property law that conflict with the characteristics of traditional cultural heritage.

#### **A. Copyright Law Inadequacies**

Copyright law, designed to protect original works of authorship, faces several obstacles in

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<sup>5</sup> See generally DARRELL A. POSEY & GRAHAM DUTFIELD, BEYOND INTELLECTUAL PROPERTY: TOWARD TRADITIONAL RESOURCE RIGHTS FOR INDIGENOUS PEOPLES AND LOCAL COMMUNITIES (Int'l Dev. Research Ctr. 1996).

<sup>6</sup> See Peter Jaszi, Toward a Theory of Copyright: The Metamorphoses of "Authorship," 40 Duke L.J. 455 (1991).

<sup>7</sup> See generally Rosemary J. Coombe, The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law 11-74 (1998).

protecting traditional cultural expressions. The requirement of identifiable authorship proves problematic for expressions that emerge from collective and ancestral processes.<sup>8</sup> Traditional cultural expressions often lack identifiable individual creators, instead representing the accumulated creativity of entire communities over extended periods.

The originality requirement in copyright law creates additional barriers. Traditional cultural expressions may be based on ancient patterns, themes, or techniques that predate modern copyright concepts.<sup>9</sup> The legal system's emphasis on novelty and individual creativity fails to recognize the value and distinctiveness of traditional expressions that derive their significance from their connection to cultural heritage rather than individual innovation.

Duration of protection presents another significant limitation. Copyright protection typically extends for a limited period, often the life of the author plus a specified number of years.<sup>10</sup> Traditional cultural expressions, however, require perpetual protection as they represent ongoing cultural heritage rather than time-limited creative works. The expiration of copyright protection would leave traditional cultural expressions vulnerable to appropriation and misuse.

The fixation requirement in many copyright systems creates additional challenges. Traditional cultural expressions often exist primarily in oral or performative forms that may not meet technical fixation requirements.<sup>11</sup> This limitation excludes many important forms of traditional cultural heritage from copyright protection, leaving them vulnerable to unauthorized use and commercialization.

## **B. Trademark Law Limitations**

Trademark law offers limited protection for traditional cultural expressions, primarily through the prevention of unauthorized commercial use of distinctive traditional symbols or names. However, trademark protection focuses on commercial source identification rather than cultural integrity, leaving many aspects of traditional cultural expressions unprotected.<sup>12</sup> The requirement for use in commerce creates barriers for traditional communities that may wish to protect culturally significant expressions from commercial exploitation rather than commercialize them. Additionally, trademark law's emphasis on preventing consumer

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<sup>8</sup> Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DePaul L. Rev. 1063 (2003).

<sup>9</sup> L. Ray Patterson & Stanley W. Lindberg, *\*The Nature of Copyright: A Law of Users' Rights\** (1991).

<sup>10</sup> William F. Patry, *\*Copyright Law and Practice\** (2000).

<sup>11</sup> See Jane C. Ginsburg, *Creation and Commercial Value: Copyright Protection of Works of Information*, *\*Colum. L. Rev.\** 1865 (1990).

<sup>12</sup> J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* (West Academic Publishing, 4th ed. 2021).

confusion does not address the broader cultural harm that can result from inappropriate use of traditional cultural expressions.

### **C. Patent System Challenges**

While patent law primarily addresses inventions and industrial applications, issues arise when traditional knowledge systems intersect with patentable subject matter. Traditional knowledge that forms the basis for modern innovations may be appropriated through the patent system without recognition or compensation to originating communities.<sup>13</sup> This bio piracy represents a significant concern for traditional communities whose knowledge systems contribute to commercial developments.

The novelty and non-obviousness requirements in patent law can disadvantage traditional knowledge holders whose innovations may be well-known within their communities but not documented in ways recognized by patent systems.<sup>14</sup> This creates situations where traditional knowledge can be appropriated and patented by external parties who document and commercialize existing traditional innovations.

## **IV. International Frameworks and Initiatives**

Recognition of the inadequacies of conventional intellectual property systems has prompted various international initiatives aimed at developing specialized protection for traditional cultural expressions. These efforts reflect growing awareness of the need for sui generis approaches that respect the unique characteristics of traditional cultural heritage.

### **A. UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage**

The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage represents a significant international commitment to protecting traditional cultural expressions.<sup>15</sup> The Convention establishes a framework for identifying, documenting, and safeguarding intangible cultural heritage, including traditional cultural expressions.

The Convention's approach emphasizes community participation in heritage protection and recognizes the rights of communities to maintain, protect, and develop their cultural

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<sup>13</sup> Vandana Shiva, *Biopiracy: The Plunder of Nature and Knowledge* (South End Press 1997).

<sup>14</sup> Graham Dutfield, *Intellectual Property, Biogenetic Resources and Traditional Knowledge* (Earthscan Publications 2004).

<sup>15</sup> UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 1.

expressions.<sup>16</sup> This community-centered approach aligns with the collective nature of traditional cultural expressions and provides a foundation for developing legal protections that respect traditional governance systems.

However, the Convention primarily focuses on preservation and promotion rather than legal protection against unauthorized use. While it establishes important principles for heritage protection, it does not provide enforceable legal mechanisms to prevent appropriation or misuse of traditional cultural expressions.<sup>17</sup>

## **B. World Intellectual Property Organization Initiatives**

The World Intellectual Property Organization has undertaken extensive work on protecting traditional cultural expressions through its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.<sup>18</sup> This committee has developed draft provisions for the protection of traditional cultural expressions that incorporate sui generis elements.

The WIPO draft provisions recognize the collective and intergenerational nature of traditional cultural expressions and propose protection mechanisms that extend beyond conventional intellectual property frameworks.<sup>19</sup> These provisions include concepts such as community ownership, perpetual protection, and culturally appropriate enforcement mechanisms.

The WIPO approach acknowledges the need for flexible protection systems that can accommodate diverse cultural contexts and legal traditions. The draft provisions emphasize the importance of customary law and traditional governance systems in managing traditional cultural expressions.<sup>20</sup>

## **C. Regional and National Initiatives**

Various regional and national initiatives have developed sui generis protection systems for traditional cultural expressions. The African Regional Intellectual Property Organization has adopted model laws that incorporate traditional cultural expressions within intellectual

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<sup>16</sup> Id.at Art. 15.

<sup>17</sup> Janet Blake, Commentary on the UNESCO 2003 Convention on the Safeguarding of the Intangible Cultural Heritage (Institute of Art & Law 2006).

<sup>18</sup> See WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, available at <https://www.wipo.int/tk/en/igc/>. Last accessed on 16<sup>th</sup> Feb 2025

<sup>19</sup> WIPO, Draft Provisions for the Protection of Traditional Cultural Expressions: Policy Objectives and Core Principles, WIPO/GRTKF/IC/17/4 (2010)

<sup>20</sup> Ibid

property frameworks while recognizing their distinct characteristics.<sup>21</sup>

Several countries have enacted specialized legislation for protecting traditional cultural expressions. Peru's Law on the Collective Trademark of Native Peoples provides protection for traditional cultural symbols and expressions used in handicrafts and cultural products.<sup>22</sup> This law recognizes collective ownership and provides mechanisms for preventing unauthorized commercial use. Panama's Law on the Collective Rights of Indigenous Peoples establishes comprehensive protection for traditional cultural expressions, including traditional designs, music, and oral traditions.<sup>23</sup> The law creates a registry system for traditional cultural expressions and provides both civil and criminal remedies for unauthorized use. These national and regional initiatives demonstrate the feasibility of developing sui generis protection systems while highlighting the importance of adapting legal frameworks to specific cultural and legal contexts.

## **V. Theoretical Foundations for Sui Generis Systems**

The development of effective sui generis systems for protecting traditional cultural expressions requires careful consideration of theoretical foundations that address both legal and cultural dimensions. These foundations must reconcile the collective nature of traditional cultural expressions with legal concepts of ownership and protection.

### **A. Collective Rights Theory**

Traditional cultural expressions necessitate recognition of collective rights that extend beyond individual ownership models. Collective rights theory provides a framework for understanding how communities can hold and exercise rights over shared cultural heritage.<sup>24</sup>

The concept of collective rights acknowledges that certain cultural expressions derive their meaning and value from their connection to specific communities rather than individual creators. This perspective recognizes that traditional communities have legitimate interests in controlling the use and representation of their cultural heritage.<sup>25</sup> Collective rights theory also addresses the intergenerational nature of traditional cultural expressions. Unlike individual

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<sup>21</sup> African Regional Intellectual Property Organization, Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization (ARIPO) (Aug. 9, 2010).

<sup>22</sup> Peru, Law No. 27811 on the Collective Trademark of Native Peoples (2002).

<sup>23</sup> Panama, Law No. 20 on the Special Regime of Collective Intellectual Property Rights of Indigenous Peoples (2000).

<sup>24</sup> Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press 1995).

<sup>25</sup> See James Anaya, *Indigenous Peoples in International Law* (Oxford University Press 2004).

rights that typically terminate with the rights holder, collective rights can provide perpetual protection that reflects the ongoing relationship between communities and their cultural heritage.<sup>26</sup>

## B. Cultural Rights Framework

The international human rights framework recognizes cultural rights as fundamental human rights that include the right to participate in cultural life and to enjoy the benefits of cultural heritage.<sup>27</sup> This framework provides a foundation for understanding traditional cultural expressions as elements of human dignity and cultural identity that deserve legal protection. Cultural rights theory emphasizes the importance of cultural diversity and the rights of communities to maintain and develop their cultural expressions.<sup>28</sup> This perspective supports the development of protection systems that respect cultural values and traditional governance systems rather than imposing external legal concepts. The cultural rights framework also recognizes the interconnection between cultural rights and other human rights, including the rights to self-determination, non-discrimination, and participation in cultural decisions.<sup>29</sup> This holistic approach provides a comprehensive foundation for developing protection systems that address the full range of community interests in traditional cultural expressions. C. Stewardship and Custodianship Models. Alternative conceptual frameworks for understanding community relationships with traditional cultural expressions include stewardship and custodianship models. These models recognize that communities may view themselves as custodians or stewards of cultural heritage rather than owners in the conventional sense.<sup>30</sup> Stewardship models emphasize responsibility for preserving and transmitting cultural heritage to future generations. This perspective aligns with traditional community values that prioritize cultural continuity over individual ownership or commercial exploitation.<sup>31</sup>

Custodianship models recognize that communities may hold cultural expressions in trust for broader cultural or spiritual purposes. This concept allows for protection systems that respect sacred or culturally sensitive aspects of traditional cultural expressions while providing practical protection mechanisms.<sup>32</sup>

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<sup>26</sup> See Erica-Irene A. Daes, Protection of the Heritage of Indigenous People, U.N. Doc. E/CN.4/Sub.2/1995/26 (1995).

<sup>27</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948), art. 27.

<sup>28</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, art. 15.

<sup>29</sup> Yvonne Donders, Towards a Right to Cultural Identity? (Intersentia 2002)

<sup>30</sup> Darrell A. Posey, Cultural and Spiritual Values of Biodiversity (Intermediate Technology Publications 1999).

<sup>31</sup> See Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (2d ed. 2012).

<sup>32</sup> See Rosemary J. Coombe, \*The Cultural Life of Intellectual Properties\*, \*supra\* note 7, at 215-58.



## VI. Design Principles for Sui Generis Systems

Effective sui generis systems for protecting traditional cultural expressions must incorporate design principles that address the unique characteristics of these expressions while providing practical protection mechanisms. These principles should reflect the theoretical foundations discussed above while accommodating diverse cultural contexts and legal systems.

### A. Community-Centered Approach

Sui generis systems must prioritize community participation and control in all aspects of protection. This includes recognition of traditional governance systems and customary law in managing traditional cultural expressions.<sup>33</sup> Community-centered approaches require meaningful consultation with traditional communities in developing protection systems. This consultation should respect traditional decision-making processes and ensure that protection mechanisms align with community values and priorities.<sup>34</sup> The principle of free, prior, and informed consent should govern any external use of traditional cultural expressions. This principle recognizes community autonomy and provides a mechanism for ensuring that any authorized use respects community wishes and cultural protocols.<sup>35</sup>

### B. Flexible and Adaptive Protection

Sui generis systems must accommodate the diversity of traditional cultural expressions and the varying needs of different communities. This requires flexible protection mechanisms that can be adapted to specific cultural contexts and community preferences.<sup>36</sup> Adaptive protection systems should recognize that traditional cultural expressions continue to evolve within traditional frameworks. Protection mechanisms should accommodate this evolutionary nature while maintaining the integrity of traditional cultural systems.<sup>37</sup> Flexibility also requires recognition of different levels of protection for different types of traditional cultural expressions. Sacred or culturally sensitive expressions may require different protection mechanisms than expressions that communities are willing to share more broadly.<sup>38</sup>

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<sup>33</sup> S. James Anaya, *Indigenous Peoples in International Law*, \*supra\* note 25.

<sup>34</sup> See United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (2007).

<sup>35</sup> *Id.* art. 19.

<sup>36</sup> Susy Frankel, *Intellectual Property in New Zealand* (LexisNexis 2011).

<sup>37</sup> See Michael F. Brown, *Who Owns Native Culture?*, \*supra\* note 1, at 49-73.

<sup>38</sup> See generally Rosemary J. Coombe, *The Cultural Life of Intellectual Properties*, \*supra\* note 7.

### C. Perpetual and Inalienable Protection

The ancestral and intergenerational nature of traditional cultural expressions requires perpetual protection that does not expire after a limited period. This perpetual protection reflects the ongoing relationship between communities and their cultural heritage.<sup>39</sup> Protection should be inalienable, meaning that communities cannot be forced to surrender their rights over traditional cultural expressions. This principle protects against potential coercion or exploitation of traditional communities.<sup>40</sup> However, perpetual and inalienable protection must be balanced with provisions for authorized use and cultural sharing when consistent with community wishes. The goal is to provide strong protection while allowing for appropriate cultural exchange and development.<sup>41</sup>

### D. Enforcement and Remedies

Effective sui generis systems require robust enforcement mechanisms that address both commercial and non-commercial misuse of traditional cultural expressions. These mechanisms should include both civil and criminal remedies as appropriate.<sup>42</sup> Enforcement systems should be accessible to traditional communities and should not require extensive legal resources that may be unavailable to these communities. This may require specialized procedures or support mechanisms to ensure effective access to legal remedies.<sup>43</sup> Remedies should address both economic and cultural harm resulting from unauthorized use of traditional cultural expressions. This may include monetary compensation, injunctive relief, and measures to restore cultural integrity.<sup>44</sup>

## VII. Case Studies and Implementation Examples

Examination of existing implementations of sui generis protection systems provides valuable insights into both successful approaches and ongoing challenges. These case studies demonstrate the practical application of theoretical principles while highlighting areas for further development.

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<sup>39</sup> See Erica-Irene A. Daes, *Protection of the Heritage of Indigenous People*\*, *supra*\* note 26.

<sup>40</sup> See United Nations Declaration on the Rights of Indigenous Peoples, *supra*\* note 34, art. 11

<sup>41</sup> See generally Michael F. Brown, *Who Owns Native Culture?*\*, *supra*\* note 1.

<sup>42</sup> Peter K. Yu, *Intellectual Property and Information Wealth* (Praeger Publishers 2007).

<sup>43</sup> See Christoph Beat Graber, *Traditional Cultural Expressions in a Matrix of Copyright, Cultural Diversity and Human Rights*, in *New Directions in Copyright Law*\* (Fiona Macmillan ed., 2007).

<sup>44</sup> Daniel J. Gervais, *The TRIPS Agreement: Drafting History and Analysis* (4th ed. Sweet & Maxwell 2012).

### **A. New Zealand's Traditional Knowledge and Intellectual Property Framework**

New Zealand has developed comprehensive approaches to protecting traditional cultural expressions, particularly those of the Māori people. The Māori Trade Marks Act provides protection for traditional Māori symbols and cultural expressions within the trademark system while incorporating customary law principles.<sup>45</sup>

The New Zealand approach includes the establishment of the Māori Trade Marks Advisory Committee, which provides guidance on applications involving Māori cultural elements. This committee represents an innovative approach to incorporating traditional governance systems within conventional intellectual property frameworks.<sup>46</sup>

New Zealand's experience demonstrates both the potential and limitations of working within existing intellectual property systems. While the trademark approach provides some protection, it does not address all aspects of traditional cultural expressions and may not be suitable for all cultural contexts.<sup>47</sup>

### **B. Australia's Indigenous Cultural and Intellectual Property Framework**

Australia has developed various initiatives to protect Indigenous cultural and intellectual property, including protocols for researchers and artists working with Indigenous cultural materials. The Australia Council for the Arts has established protocols that recognize Indigenous rights over traditional cultural expressions.<sup>48</sup> The Australian approach emphasizes the development of ethical frameworks and industry protocols rather than comprehensive legal protection. While these initiatives have raised awareness and established best practices, they rely primarily on voluntary compliance rather than enforceable legal mechanisms.<sup>49</sup> Australia's experience highlights the importance of complementing legal protection with ethical frameworks and industry standards. However, it also demonstrates the limitations of purely voluntary approaches in addressing systematic appropriation of traditional cultural expressions.<sup>50</sup>

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<sup>45</sup> Trade Marks Act 2002 (N.Z.), pt. 2, subpt. 3.

<sup>46</sup> See generally Susy Frankel, *Intellectual Property in New Zealand* (LexisNexis 2011).supra\* note 36.

<sup>47</sup> Susy Frankel & Daniel J. Gervais, *Cultural Property and "the Public Domain": Case Studies from New Zealand*, in *The Public Domain of Information* 65 (P. Bernt Hugenholtz & Lucie Guibault eds., Kluwer Law Int'l 2006).

<sup>48</sup> Australia Council for the Arts, *\*Protocols for Consultation and Negotiation with Aboriginal People\** (2007).

<sup>49</sup> Michael Davis, *Biological Diversity and Indigenous Knowledge* (Earthscan 2008).

<sup>50</sup> Terri Janke, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Aboriginal and Torres Strait Islander Comm'n 1998).

### C. African Regional Intellectual Property Organization Model Laws

The African Regional Intellectual Property Organization has developed model laws that provide comprehensive protection for traditional cultural expressions. These laws establish sui generis protection systems that recognize collective ownership and provide enforcement mechanisms.<sup>51</sup> The ARIPO model laws incorporate concepts of community ownership, traditional authority recognition, and perpetual protection. They also establish registration systems for traditional cultural expressions while recognizing that protection exists independently of registration.<sup>52</sup> The African regional approach demonstrates the feasibility of developing comprehensive sui generis systems while highlighting the importance of regional cooperation in addressing cross-border issues related to traditional cultural expressions.<sup>53</sup>

## VIII. Challenges and Limitations

Despite the theoretical foundations and practical examples supporting sui generis systems for traditional cultural expressions, significant challenges remain in developing and implementing effective protection mechanisms. These challenges span legal, practical, and cultural dimensions.

### A. Definitional and Boundary Issues

One of the primary challenges in developing sui generis systems lies in defining traditional cultural expressions and establishing clear boundaries for protection. The fluid and evolutionary nature of these expressions complicates efforts to create precise legal definitions.<sup>54</sup> The challenge of determining authenticity and traditional origin presents additional complexity. Traditional cultural expressions may be shared among multiple communities or may have evolved through cultural exchange, making it difficult to establish clear ownership or control rights.<sup>55</sup> Furthermore, the relationship between traditional cultural expressions and contemporary cultural development raises questions about the scope of protection. The challenge lies in protecting traditional heritage while allowing for cultural evolution and contemporary artistic expression.<sup>56</sup>

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<sup>51</sup> African Regional Intellectual Property Organization, \*Swakopmund Protocol\*, \*supra\* note 21.

<sup>52</sup> *Ibid*

<sup>53</sup> Caroline B. Ncube, *Intellectual Property Policy, Law and Administration in Africa: Exploring Continental and Sub-Regional Co-operation* (Routledge 2016).

<sup>54</sup> Michael F. Brown, \*Who Owns Native Culture?\*, \*supra\* note 1, at 11-48.

<sup>55</sup> Rosemary J. Coombe, \*The Cultural Life of Intellectual Properties\*, \*supra\* note 7, at 134-58.

<sup>56</sup> 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 (2000).

## **B. Jurisdictional and Enforcement Challenges**

Traditional cultural expressions often transcend national boundaries, particularly in regions where traditional communities span multiple countries. This creates jurisdictional challenges for enforcement and protection.<sup>57</sup> The global nature of modern communication and commerce means that unauthorized use of traditional cultural expressions can occur across multiple jurisdictions, complicating enforcement efforts. International cooperation mechanisms are essential but often inadequate for addressing these challenges.<sup>58</sup> Additionally, many traditional communities lack the resources necessary for effective enforcement of their rights, even when legal protections exist. This creates a gap between legal rights and practical protection that must be addressed through support mechanisms and simplified procedures.<sup>59</sup>

## **C. Balancing Protection with Access and Development**

Sui generis systems must balance the protection of traditional cultural expressions with legitimate interests in cultural access, education, and development. Overly restrictive protection could impede cultural exchange and scholarly research.<sup>60</sup> The challenge lies in distinguishing between inappropriate appropriation and legitimate cultural sharing or scholarly use. This requires nuanced approaches that consider context, purpose, and community perspectives.<sup>61</sup> Furthermore, traditional communities themselves may have different views on sharing and protection, requiring flexible systems that can accommodate diverse community preferences while maintaining consistent protection standards.<sup>62</sup>

## **IX. Future Directions and Recommendations**

The development of effective sui generis systems for protecting traditional cultural expressions requires continued evolution of legal frameworks, international cooperation, and community engagement. Several key areas demand attention for future development.

### **A. International Harmonization and Cooperation**

The global nature of traditional cultural expression appropriation necessitates international cooperation in developing harmonized protection standards. While respecting diverse legal traditions and cultural contexts, common principles and minimum standards can facilitate

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<sup>57</sup> See generally Daniel J. Gervais, *\*The TRIPS Agreement\**, *\*supra\** note 44.

<sup>58</sup> See Peter K. Yu, *\*Intellectual Property and Information Wealth\**, *\*supra\** note 42.

<sup>59</sup> See Rosemary J. Coombe, *\*The Cultural Life of Intellectual Properties\**, *\*supra\** note 7.

<sup>60</sup> See Jessica Litman, *\*Digital Copyright\** (2001).

<sup>61</sup> See Michael F. Brown, *\*Who Owns Native Culture?\**, *\*supra\** note 1, at 74-102.

<sup>62</sup> See Linda Tuhiwai Smith, *\*Decolonizing Methodologies\**, *\*supra\** note 31.

cross-border protection.<sup>63</sup> International organizations, particularly WIPO and UNESCO, should continue their efforts to develop binding international instruments for traditional cultural expression protection. These instruments should incorporate the principles and mechanisms identified in this analysis while maintaining flexibility for national implementation.<sup>64</sup> Regional cooperation mechanisms should also be strengthened to address shared challenges and facilitate mutual recognition of protection systems. Regional organizations can play important roles in developing culturally appropriate approaches while ensuring effective cross-border enforcement.<sup>65</sup>

## **B. Technology and Digital Platforms**

The digital age presents both opportunities and challenges for traditional cultural expression protection. Digital platforms can facilitate cultural sharing and economic development while also creating new avenues for appropriation and misuse.<sup>66</sup> Future protection systems should address digital distribution and online platforms specifically. This may require specialized mechanisms for addressing unauthorized digital use and platforms for authorized cultural sharing.<sup>67</sup> Blockchain and other emerging technologies may offer new possibilities for tracking and protecting traditional cultural expressions while maintaining community control over their use. These technological solutions should be explored in partnership with traditional communities.<sup>68</sup>

## **C. Capacity Building and Community Empowerment**

Effective protection of traditional cultural expressions requires building capacity within traditional communities to understand and utilize available protection mechanisms. This includes legal education, documentation support, and access to enforcement resources.<sup>69</sup> Community empowerment programs should respect traditional governance systems while providing communities with the tools necessary to protect their cultural heritage effectively. This may require innovative approaches that bridge traditional and modern legal systems.<sup>70</sup> Furthermore, support systems should be developed to assist traditional communities in

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<sup>63</sup> See Daniel J. Gervais, *\*The TRIPS Agreement\**, *\*supra\** note 44.

<sup>64</sup> See WIPO, *\*Traditional Knowledge\**, available at <https://www.wipo.int/tk/en/>. Last accessed on 16 Feb 2025

<sup>65</sup> See generally Caroline B. Ncube, *\*Intellectual Property Policy\**, *\*supra\** note 53.

<sup>66</sup> Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity* (Penguin Press 2004).

<sup>67</sup> See Peter K. Yu, *\*Intellectual Property and Information Wealth\**, *\*supra\** note 42.

<sup>68</sup> Don Tapscott & Alex Tapscott, *Blockchain Revolution: How the Technology Behind Bitcoin and Other Cryptocurrencies Is Changing the World* (Portfolio/Penguin 2016).

<sup>69</sup> See generally Linda Tuhiwai Smith, *\*Decolonizing Methodologies\**, *\*supra\** note 31.

<sup>70</sup> See S. James Anaya, *\*Indigenous Peoples in International Law\**, *\*supra\** note 25.

documenting and managing their cultural expressions in ways that respect cultural protocols while providing legal protection.<sup>71</sup>

## **Conclusion**

The protection of traditional cultural expressions represents one of the most significant challenges facing contemporary intellectual property law. The conventional intellectual property framework, designed for individual creators and commercial purposes, proves fundamentally inadequate for addressing the collective, ancestral, and perpetual nature of traditional cultural heritage. This analysis demonstrates that sui generis systems represent not merely an alternative approach to intellectual property protection, but a necessary evolution in legal thinking that recognizes the distinct characteristics of traditional cultural expressions and the rights of indigenous and traditional communities. The theoretical foundations for such systems exist in collective rights theory, cultural rights frameworks, and stewardship models that respect the unique relationship between communities and their cultural heritage. The design principles for effective sui generis systems include community-centered approaches, flexible and adaptive protection mechanisms, perpetual and inalienable rights, and robust enforcement systems. These principles must be implemented through legal frameworks that respect cultural diversity while providing practical protection against appropriation and misuse.

While challenges remain in developing and implementing sui generis systems, the examples of existing initiatives demonstrate their feasibility and effectiveness. The continued evolution of these systems requires international cooperation, technological innovation, and ongoing community engagement to ensure that traditional cultural expressions receive the protection they deserve. The protection of traditional cultural expressions through sui generis systems represents more than a legal or technical challenge. It embodies fundamental questions about cultural rights, community autonomy, and the relationship between traditional knowledge systems and modern legal frameworks. The development of effective protection mechanisms requires recognition that traditional cultural expressions are not merely intellectual property in the conventional sense, but living heritage that connects communities to their ancestors and future generations.

As globalization continues to bring diverse cultures into contact, the need for effective protection of traditional cultural expressions becomes increasingly urgent. Sui generis systems offer a path forward that respects both the integrity of traditional cultures and the legitimate

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<sup>71</sup> See generally Darrell A. Posey & Graham Dutfield, *\*Beyond Intellectual Property\**, *supra* note 5.

interests of the broader global community in cultural access and development. The success of these systems will depend on continued collaboration between traditional communities, legal scholars, policymakers, and international organizations in developing and implementing protection mechanisms that truly serve the needs of cultural heritage preservation and community empowerment. The future of traditional cultural expression protection lies not in forcing these expressions into existing intellectual property categories, but in developing new legal frameworks that recognize their unique characteristics and provide appropriate protection. This represents a fundamental shift in intellectual property thinking that acknowledges the limitations of current systems while embracing the potential for legal innovation that serves both cultural preservation and human right.