Batok in the East, *Aloha* in the West: Intellectual Property Protections of Indigenous Peoples in the Philippines and the United States

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Introduction

Apo Whang-Od is a 106-year-old mambabatok, or traditional tattoo artist, from the Philippines.[1] Hailing from the remote village of Buscalan, she is the oldest member of the Kalinga indigenous group[2] to practice *batok*, the ancient art of hand-tapped tattoos, which showcases the group's sacred symbols.[3] Though she lives in a small village in the mountains,[4] her work is the topic of various intellectual property disputes.[5] In 2019, a Filipino government agency tasked to protect and promote the interests and well-being of indigenous peoples[6] directed a global clothing brand named New Era Co. to obtain the Kalinga group's Free Prior and Informed Consent ("FPIC") before it could use

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1. Audrey Carpio, *Meet the 106-Year-Old Woman Keeping an Ancient Filipino Tattooing Tradition Alive*, Vogue (Apr. 7, 2023), https://www.vogue.com/article/apo-whang-od-and-the-indelible-marks-of-filipino-identity [https://perma.cc/7B9K-ZD6T].

2. Kate Springer, *Meet Whang Od Oggay: The Philippines' oldest tattoo artist*, CNN Travel (Aug. 6, 2017, 7:25 PM), https://www.cnn.com/travel/article/philippines-oldest-tattoo-artist/index.html [https://perma.cc/V3VR-B6BQ].

3. Bernice Marie Violago, *Modernizing Protections of Traditional Knowledge: Batek and IPRA in the Digital Economy*, 95 Phil. L.J. 347, 408–09 (2022) (explaining the practice of *batok*).

4. Springer, *supra* note 2.

5. Carpio, *supra* note 1.

6. *Mandate, Vision and Mission*, Republic of Phil.: Off. of the President, https://ncip.gov.ph/mandate-vision-and-mission/ [https://perma.cc/5GWZ-JSNJ].

traditional Kalinga tattoo designs on its products.[7] In 2020, the NCIP mandated the well-known Vans Philippines brand to seek the Kalinga's informed consent prior to using the group's python tattoo design on Vans merchandise.[8] Most recently, Nuseir Yassin, an Israeli-Palestinian social media influencer known as Nas Daily, arranged for Whang-Od to teach a *batok* class on Yassin's online learning platform.[9] The online class sparked nationwide controversy and was discontinued after news broke that Yassin did not receive proper FPIC.[10] Instead of obtaining the Kalinga group's required consent before using collectively owned indigenous knowledge for commercial purposes, Yassin allegedly only communicated with Whang-Od and her representatives.[11]

On the other side of the world, another group faces a similar challenge to protect its heritage from appropriation. "Aloha" is an expression known and used as a greeting or a farewell.[12] In native Hawaiian culture, "aloha" is more than a word—it expresses that thinking and showing good feelings to others is an integral way of life.[13] As a Native Hawaiian poke restaurant owner in Anchorage, Alaska, the word's cultural meaning may have contributed to Tasha Kahele's reluctance in changing the name of her business from "Aloha Poke Stop" to "Lei's Poke Stop" after she received a surprising cease and desist letter.[14] Jeff Sampson, co-founder of the Honolulu restaurant Aloha Poke Shop, received the same letter.[15] Kahele and Sampson were not alone; several Native Hawaiian business owners across the United States received the same cease and desist letter by Aloha Poke Company, a

7. Dexter A. See, *Apo Whang-od's Tattoos Not for Commercial Use*, MANILA TIMES (Jan. 7, 2021), https://www.manilatimes.net/2021/01/07/news/regions/apo-whang-ods-tattoos-not-for-commercial-use/824036 [https://perma.cc/LH5P-XD2B].

8. *Id.*

9. Ara Eugenio, *What Went Wrong With Nas Daily and Whang-Od? Anthropologist Explains*, SPOT.PH (Aug. 6, 2021), https://www.spot.ph/newsfeatures/culture/98497/nas-daily-academy-whang-od-anthropologist-explains-a4713-20210806 [https://perma.cc/R5JL-UHX6].

10. Dana Cruz, *Nas Daily takes down masterclass featuring Whang-Od after grandniece calls it 'scam'*, PHIL. DAILY INQUIRER (Aug. 4, 2021, 5:19 PM), https://entertainment.inquirer.net/417529/nas-daily-takes-down-masterclass-featuring-whang-od-after-grandniece-calls-it-scam [https://perma.cc/Z9W3-EJLA].

11. Vincent Cabreza, *NCIP finds Nas Daily deal with Whang-od 'onerous'*, PHIL. DAILY INQUIRER (Aug. 31, 2021, 4:45 AM), https://newsinfo.inquirer.net/1481019/ncip-finds-nas-daily-deal-with-whang-ud-onerous [https://perma.cc/QFZ9-2378].

12. *Aloha*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/aloha [https://perma.cc/63JZ-CNKC].

13. Angela Louise R. Tiangco, *Selling Aloha: The Fight for Legal Protections over Native Hawaiian Culture*, 29 WM. & MARY J. RACE GENDER & SOC. JUST. 489, 490–91 (2023).

14. Brett R. Tobin, *Raw Emotions and Fishy Judgment*, 23 HAW. B.J. 4, 4 (2019).

15. Audrey McAvoy, *Aloha Poke claim revives Hawaiian culture protections push*, ASSOCIATED PRESS NEWS (Apr. 18, 2019, 5:14 PM), https://apnews.com/travel-general-news-462d51c0117d48b2ba587f93f77bc398 [https://perma.cc/KUH4-VWV].

Chicago-based restaurant chain.[16] Aloha Poke Company representatives claimed the company successfully registered a trademark for "Aloha Poke."[17] Thus, any use of "aloha" in relation to food products and services is an infringement of its federally registered trademark.[18]

The Philippines and the United States are geographically and culturally distinct from each other. However, the two countries have a decades-long history of cooperation and collaboration.[19] Their alliance spans matters such as military, economy, education, human rights, environment, and health.[20] Now, the two countries also share a similar problem. Indigenous peoples, such as the Kalinga group of the Philippines and the Native Hawaiians of the United States, are engaged in a continuous battle to protect their cultures.[21]

In line with the ongoing collaborative relationship between the Philippines and the United States, this Comment seeks to explore and compare the intellectual property protections available to their respective indigenous peoples for the purpose of protecting their traditional cultural expressions. Part I explains how the term "indigenous peoples" is identified, rather than defined, in international law and provides an overview of the many indigenous communities in the Philippines and in the United States. Part II explores how the World Intellectual Property Organization ("WIPO") impacts how the Philippines and United States interpret traditional cultural expressions. Part III outlines existing international legal frameworks, the implementation of statutes and agreements in the Philippines and the United States, and problems surrounding these laws. Lastly, Part IV discusses each country's observed strengths and weaknesses with respect to their protection of indigenous intellectual property. Part IV concludes this Comment by offering suggestions for how the two countries may further develop protections in the future.

16. *Id.*

17. Tiangco, *supra* note 13, at 504.

18. *See* Tobin, *supra* note 14.

19. *See* LINDA ROBINSON ET AL., U.S. SPECIAL OPERATIONS FORCES IN THE PHILIPPINES, 2001–2014 xxiii–xxv, 9–10 (RAND Corp. 2016).

20. *FACT SHEET: Investing in the Special Friendship and Alliance Between the United States and the Philippines*, WHITE HOUSE (May 21, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/01/fact-sheet-investing-in-the-special-friendship-and-alliance-between-the-united-states-and-the-philippines/ [https://perma.cc/EY67-8FK5].

21. *See* UNHR Off. of the High Comm'r, *Indigenous Peoples and the United Nations Human Rights System*, U.N. Doc. Fact Sheet No. 9/Rev. 2, at 4–6 (Aug. 1, 2013) [hereinafter UNHR Fact Sheet].

I. The Many Faces of Indigenous Peoples

The term "indigenous peoples" lacks a universal and authoritative definition in international law. In recognizing their diversity, the United Nations ("UN") emphasizes the need to identify, rather than define, indigenous peoples,[22] which stems from the fundamental human rights principle of self-identification.[23] Nonetheless, one UN subcommission focused on preventing discrimination provides a working definition of the term that is widely accepted among indigenous peoples and their representative organizations:[24]

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.[25]

Similarly, the UN International Labour Organization's Indigenous and Tribal Peoples Convention distinguishes indigenous peoples as those in sovereign nations who possess ancestral ties to the territories they inhabit, regardless of their legal status, and maintain elements of their distinct social, economic, cultural, and political systems established prior to conquest, colonization, or the establishment of current state borders.[26] They are recognized as having their own language and belief systems.[27] This distinction is important in determining what international laws apply to them.[28]

22. U.N. Permanent F. on Indigenous Issues, Who Are Indigenous Peoples?, https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf [https://perma.cc/C7XA-NUUH].

23. *See* Indigenous and Tribal Peoples Convention, 1989 (No. 169), June 27, 1989, Int'l Labour Org. [ILO], art. 1 ¶ 2.

24. World Intell. Prop. Org. [WIPO], Glossary of Key Terms Related to Intellectual Property and Traditional Knowledge 21 (2018) https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_37/wipo_grtkf_ic_37_inf_7.pdf [https://perma.cc/PMH4-4CAD].

25. *Id.* at 21–22.

26. UNHR Fact Sheet, *supra* note 21, at 2–3.

27. *See* U.N. Permanent F. on Indigenous Issues, *supra* note 22.

28. UNHR Fact Sheet, *supra* note 21, at 2–3.

A. Indigenous Peoples of the Philippines

The Philippines is home to 110 indigenous groups, comprising an estimated ten percent of its entire population.[29] The country defines its indigenous peoples as those who have continuously lived as an organized community on communally bounded and defined territory, and have occupied, possessed, and utilized such territories under claims of ownership since time immemorial.[30] Additionally, they share common bonds of languages, customs, traditions, and other cultural traits, or are historically distinct from the majority of Filipinos through their "resistance to political, social and cultural inroads of colonization, non-indigenous religions and cultures."[31] The indigenous peoples of the Philippines generally live in geographically isolated parts of the country.[32] This allows them to retain much of their culture, social institutions, and living practices.[33]

Some of the indigenous groups in the Philippines can be classified as part of the Igorot group of Luzon, the Mangyan group of the central islands, and the Lumad group of Mindanao.[34] These groups share a common goal of preserving their cultural heritage.[35]

B. Indigenous Peoples of the United States

In the United States, "indigenous peoples" refers to descendants of those who have a preexisting sovereignty, a shared national identity, and inhabited the Americas and the Pacific prior to European colonization.[36] As of 2021, their estimated population in the country is between 3.1 and 8.7 million.[37]

29. Violago, *supra* note 3, at 348.

30. Indigenous Peoples' Rights Act of 1997, ch. II § 3(h), Rep. Act No. 8371 (Phil.).

31. *Id.*

32. *Indigenous Peoples in Philippines*, Int'l Work Grp. for Indigenous Affs., https://www.iwgia.org/en/philippines.html [https://perma.cc/MSB9-UHL7].

33. *Id.*

34. *Id.*

35. Christopher E. Cruz, Protecting Indigenous Art: Challenges in Protecting Traditional Cultural Expressions in the Philippines 1, 2 (De La Salle Univ. Feb. 2019), https://www.dlsu.edu.ph/wp-content/uploads/pdf/conferences/arts-congress-proceedings/2019/FAC-01.pdf [https://perma.cc/AK5J-CP5C].

36. *Native American and Indigenous Peoples FAQs*, UCLA Equity, Diversity & Inclusion, https://equity.ucla.edu/know/resources-on-native-american-and-indigenous-affairs/native-american-and-indigenous-peoples-faqs/ [https://perma.cc/WC37-TC8N].

37. Sebastian Braun, *The Indigenous World 2023: United States of America*, Int'l Work Grp. for Indigenous Affs. (Apr. 3, 2023), https: //www.iwgia.org/en/usa/5188-iw-2023-usa.html [https://perma.cc/4AQX-3D5N].

The term "indigenous peoples" is often used interchangeably with "Native Americans."[38] Similar to the Philippines, indigenous groups in the United States can be categorized into three bigger groups: the Native Americans, the Alaska Natives, and the Native Hawaiians and other Pacific Islanders.[39] While indigenous peoples may be considered racial minorities, they are not strictly racial categories because being a member of these groups requires a membership status.[40] Each indigenous group has its own membership rules which involve some basis in blood quantum,[41] history, and political relationships with the government.[42] Thus, DNA tests alone are not sufficient to determine membership.[43]

II. Traditional Cultural Expressions of Indigenous Peoples

Traditional cultural expressions ("TCEs") are tangible and intangible expressions of an indigenous group's cultural identity and heritage.[44] An indigenous group's TCEs may include music, dance, art, designs, names, signs, symbols, performances, ceremonies, architectural forms, handicrafts, narratives, and many other artistic or cultural expressions.[45] TCEs flow from generation to generation[46] and embody indigenous knowledge, skills, values, and beliefs.[47] Thus, TCEs are essential to the identification and preservation of indigenous identities.[48]

38. *See U.S. Census Bureau History: American Indians and Alaska Natives*, U.S. CENSUS BUREAU (Nov. 2021), https://www.census.gov/history/www/homepage_archive/2021/november_2021.html [https://perma.cc/5WVY-FXH4].

39. *See id.*

40. UCLA EQUITY, DIVERSITY & INCLUSION, *supra* note 36.

41. Kat Chow, *So What Exactly Is 'Blood Quantum'?*, NAT'L PUB. RADIO [NPR] (Feb. 9, 2018, 6:00 AM), https://www.npr.org/sections/codeswitch/2018/02/09/583987261/so-what-exactly-is-blood-quantum [https://perma.cc/7BC3-3N6V] (stating that blood quantum, which is calculated by a tribal or government official using tribal documents, is the amount of "Indian blood" an individual possesses. That documentation lists "the original enrollees of a tribe who were counted on Census rolls, and . . . [had] their blood quantum . . . documented, and usually those original enrollees had a full blood quantum.").

42. UCLA EQUITY, DIVERSITY & INCLUSION, *supra* note 36.

43. *Id.*

44. Richard Awopetu, *In Defense of Culture: Protecting Traditional Cultural Expressions in Intellectual Property*, 69 EMORY L.J. 745, 749 (2020).

45. *Traditional Cultural Expressions,* WORLD INTELL. PROP. ORG. [WIPO], https://www.wipo.int/tk/en/folklore/ [https://perma.cc/J5AQ-2EWS].

46. *Id.*

47. Dalindyebo Bafana Shabalala, *Intellectual Property, Traditional Knowledge, and Traditional Cultural Expressions in Native American Tribal Codes*, 51 AKRON L. REV. 1125, 1130 (2017).

48. *See id.* at 1132.

A. Indigenous Peoples' TCEs in the Philippines

With over 7,000 islands, the Philippines is a culturally diverse country.[49] The National Commission for Culture and the Arts classified the country's art forms into six major groups: music, dance, drama, painting, sculpture, and literature.[50] In 2002, a WIPO study specifically identified common TCEs in the Philippines: (1) indigenous music, as expressed in rituals, feasts, harvest festivities, religious or social ceremonies, and recreation, (2) bronze instruments of various types, sizes, and styles, (3) basketry, which reflects ways of life for agricultural groups, (4) unique textile designs primarily made out of *abaca* plant fiber, (5) tribal dance traditions, (6) ethnic architecture, and (7) folk literature.[51]

The TCEs of the indigenous groups are largely influenced by their ways of living.[52] For instance, traditional hand-tapped tattoos on Butbut male warriors served as an announcement that they killed someone, while tattoos on women were an aesthetic accessory.[53] The close relationship between the TCEs and the indigenous groups' day-to-day lives makes TCEs more meaningful to the country's heritage.[54] This shows the expressions are not merely ceremonial but instead serve a greater purpose.[55] Though these warriors ceased to exist,[56] and non-indigenous communities and western colonizers began contributing to Filipino culture, TCEs remain meaningful and influential to the county's dynamic culture.[57]

B. Indigenous Peoples' TCEs in the United States

In a more populated country like the United States, discussions surrounding TCEs are more complex due to the distinctions between federally recognized and non-recognized indigenous groups. The

49. *Fast Facts: Indigenous Peoples in the Philippines*, U.N. Dev. Programme: Phil. (July 24, 2013), https://www.undp.org/philippines/publications/fast-facts-indigenous-peoples-philippines [https://perma.cc/8YCG-BRH7].

50. Corazon S. Alvina et al., The Philippines: Cultural Policy Profile (Feb. 2020), https://asef.org/wp-content/uploads/2020/10/The-Philippines-Cultural-Policy-Profile.pdf [https://perma.cc/5WDY-MFGZ].

51. P.V. Valsala G. Kutty, National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines (World Intell. Prop. Org. [WIPO] 2002), https://www.wipo.int/edocs/pubdocs/en/tk/912/wipo_pub_912.pdf [https://perma.cc/BS94-TCWK].

52. *See id.* at 8, 30.

53. Springer, *supra* note 2.

54. *See* Kutty, *supra* note 51, at 7, 33.

55. *Id.*

56. Springer, *supra* note 2.

57. Kutty, *supra* note 51, at 24–25.

hundreds of indigenous communities in the country each have their own TCEs, which are influenced by their ways of life.[58] Drumming, weaving, tattooing, and storytelling are everyday practices with inherent artistic and historical value dating back to the time of their ancestors.[59]

In 2006, a group of Native American and non-Native American archivists, librarians, museum curators, historians, and anthropologists created protocols that recommend best practices for dealing with indigenous TCEs held in libraries and archives.[60] The protocols cover: (1) recordings and transcripts of songs, chants, oral histories, community histories, myths, and folklore, (2) personal or family information, (3) cartographic materials of such things as sacred sites or areas, village sites, territories, use areas, and (4) archaeological data, ethnobotanical materials, or genealogical data.[61] The protocols further described TCEs in the United States as materials that represent the cultural heritage or knowledge developed and passed down by Native Americans.[62] The protocols also included Native Hawaiians, who are accorded special status by federal and state law despite not having federal recognition.[63] Some examples include African American quilts depicting Bible stories in appliquéd designs,[64] the Mardi Gras Indians' costumes, instruments, floats, and music,[65] and the sacred *mele inoa* chants of Native Hawaiians.[66]

III. Philippine and American Intellectual Property Protection of TCEs

A 2005 study published in the Washington University Journal of Law and Policy explores the tension that exists between intellectual

58. Susannah Gardiner, *Who Gets to Define Native American Art?*, SMITHSONIAN MAG. (Apr. 25, 2022), https://www.smithsonianmag.com/smithsonian-institution/who-gets-to-define-native-american-art-180979968/ [https://perma.cc/DX64-5AFU].

59. 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/ [https://perma.cc/6GLZ-RJUB].

60. FIRST ARCHIVIST CIRCLE, PROTOCOLS FOR NATIVE AMERICAN ARCHIVAL MATERIALS (2007), https://www2.nau.edu/libnap-p/PrintProtocols.pdf [https://perma.cc/UL82-7R9N].

61. Kay Mathiesen, *A Defense of Native Americans' Rights over Their Traditional Cultural Expressions*, 75 AM. ARCHIVIST 456, 457 (2012).

62. *Id.*

63. FIRST ARCHIVIST CIRCLE, *supra* note 60.

64. Alberto Vargas, *WIPO's Proposed Treatment of Sacred Traditional Cultural Expressions as a Distinct Form of Intellectual Property*, 23 CHI. J. INT'L L. 235, 245 (2022).

65. *Id.*

66. Awopetu, *supra* note 44, at 769.

property law and indigenous peoples.[67] That study argues there is a constant tug-of-war between commercial interests on one side and human rights interests on the other.[68] An understanding of international law is critical to understanding this relationship vis-à-vis the legal frameworks of the Philippines and the United States.

A. International Intellectual Property Protections

In 1995, the World Trade Organization ("WTO") Agreement on Trade-Related Aspects of Intellectual Property Rights ("the Agreement") came into force as the "most comprehensive multilateral agreement on intellectual property"[69] for the protection of the socio-economic interests of the member states.[70] WTO members must comply with the Agreement pursuant to the national treatment principle, meaning member states must respect the intellectual property rights of their citizens and those of other member states.[71] The Agreement sets minimum standards for member states' intellectual property laws but still allows member states to structure how those rights and powers are granted within their territories.[72]

Though TCEs have existed for centuries, the international community only recently considered them worthy of intellectual property protection.[73] In 2004, international delegates held a WIPO committee meeting in Geneva, Switzerland to discuss indigenous intellectual property issues and develop a system of international legal protection for indigenous peoples' TCEs.[74] There, the committee developed the Draft Provisions for the Protection of Traditional Knowledge and Traditional Cultural Expressions, and Intellectual Property & Genetic Resources ("the Draft Provisions").[75] Though the Draft Provisions have no formal status, they illustrate possible perspectives and approaches

67. *See* Lorie Graham & Stephen McJohn, *Indigenous Peoples and Intellectual Property*, 19 WASH. U. J.L. & POL'Y 313, 313–14, 322 (2005).

68. *Id.* at 322.

69. *TRIPS—Trade-Related Aspects of Intellectual Property Rights*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/tratop_e/trips_e/trips_e.htm [https://perma.cc/FY35-72BP].

70. Violago, *supra* note 3, at 362.

71. *Id.* at 363.

72. *Id.*

73. WORLD INTELL. PROP. ORG. [WIPO], PROTECT AND PROMOTE YOUR CULTURE: A PRACTICAL GUIDE TO INTELLECTUAL PROPERTY FOR INDIGENOUS PEOPLES AND LOCAL COMMUNITIES 10 (2017), https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1048.pdf [https://perma.cc/4MAM-MMRX].

74. Vargas, *supra* note 64, at 238.

75. *Draft Provisions for the Protection of Traditional Knowledge and Traditional Cultural Expressions and Draft Texts of IP & Genetic Resources*, WORLD INTELL. PROP. ORG. [WIPO], https://www.

indigenous groups can use to protect their TCEs against misappropriation or misuse at a national and international level.[76] The Philippines and the United States are parties to both the Agreement[77] and the Draft Provisions.[78]

TCEs receive protection in international intellectual property law as well as international human rights law. Adopted in 2007, Article 31 of the UN Declaration on the Rights of Indigenous Peoples ("the Declaration") emphasizes the right of indigenous peoples to "maintain, control, protect and develop their intellectual property" over their TCEs, sciences, and technologies.[79] Compared to the non-binding status of the Draft Provisions,[80] the Declaration is more than just a guiding document because it also directs states to take effective measures to recognize and protect this right.[81]

Though the Philippines agreed and signed the Declaration in 2007,[82] the United States initially refused to do so.[83] U.S. President Barack Obama announced the country's change in position to support the Declaration in 2010.[84] This change was in response to the many calls from Native Americans and others in the United States to address issues raised by Native Americans, including poverty, unemployment, environmental degradation, health care gaps, violent crimes, and discrimination.[85] Many believed government support toward the Declaration would be an important contribution to the country's policies protecting Native Americans.[86]

Despite the enacted international measures for the intellectual property protection of TCEs, the misappropriation of indigenous

wipo.int/tk/en/igc/draft_provisions.html [https://perma.cc/62M8-4UC9] [hereinafter *Draft Provisions*].

76. *Id.*

77. *Members and Observers*, WORLD TRADE ORG. [WTO], https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [https://perma.cc/L4WA-4KT].

78. *Member States*, WORLD INTELL. PROP. ORG. [WIPO], https://www.wipo.int/members/en/ https://perma.cc/MF3H-FBYT].

79. G.A. Res. 61/295, art. 31, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

80. *Draft Provisions*, *supra* note 75.

81. G.A. Res. 61/295, *supra* note 79.

82. Press Release, General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007).

83. U.S. DEP'T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2011).

84. *Id.*

85. *Id.*

86. *Id.*

knowledge persists.[87] Businesses, scholars, and government agents collect indigenous information on TCEs, like the art of *batok* and the use of the word "aloha," take them out of their original context, and claim intellectual property rights for themselves.[88] These acts of appropriation by outsiders are often performed with no regard for traditional methods of transmission or requisite compensation.[89] These gaps in the intellectual property system make it challenging for indigenous communities to control and benefit from the appropriation of their own cultural expressions.[90]

B. Protection of TCEs in the Philippines

1. The Constitution, Relevant Legislation, and Other Supporting Agreements

The Philippine Constitution serves as a testament to the country's efforts to recognize, preserve, and develop its cultures, traditions, and institutions.[91] Under the Philippine Constitution, "the State shall recognize, respect, and protect the rights of indigenous cultural communities to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies."[92]

To support this constitutional goal, Congress enacted the Indigenous Peoples' Rights Act of 1997 ("IPRA"). The IPRA recognized the right of indigenous peoples to maintain their cultural integrity[93] and introduced the concept of community intellectual rights while granting indigenous peoples the right to practice and revitalize their cultural traditions and customs.[94] This legislation puts the Philippines at the forefront of recognition and protection of indigenous peoples' rights in Asia.[95]

87. Erica-Irene Daes, Address at the Proceedings of the Ninety-Fifth Annual Meeting of the American Society of International Law on Intellectual Property and Indigenous Peoples (Apr. 4–7, 2001), *in* 95 AM. SOC'Y INT'L L. PROC. 143, 144 (2001).

88. James D. Nason, *Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation*, 12 STAN. L. & POL'Y REV. 255, 260 (2001).

89. *Id.*

90. Awopetu, *supra* note 44, at 752–53.

91. CONST. (1987), art. XIV, § 17 (Phil.).

92. *Id.*

93. *Id.* §§ 29, 32; Indigenous Peoples' Rights Act of 1997, § 29, Rep. Act No. 8371 (Phil.).

94. Mario C. Cerilles, Jr. & Harry Gwynn Omar M. Fernan, *Indigenizing the Intellectual Property System*, IPWATCHDOG (Aug. 8, 2021, 12:15 PM), https://ipwatchdog.com/2021/08/08/indigenizing-intellectual-property-system/ [https://perma.cc/ZWS3-N79L].

95. Violago, *supra* note 3, at 349.

With respect to TCEs, the IPRA grants indigenous groups the exclusive use, control, and ownership of their intellectual property.[96] Additionally, the IPRA raises potential restitution measures for indigenous groups in cases where TCEs are taken without their consent or FPIC, and in violation of their indigenous laws, traditions, and customs.[97] Since the IPRA requires parties who want to use an indigenous group's TCE to obtain clear consent that is free from external manipulation, interference, and coercion, the FPIC requirement is a notable and important feature of the law.[98]

To set the IPRA in motion, different government agencies came together to enact joint policies, standards, requirements, and procedures for the protection of the intellectual property rights of indigenous peoples.[99] For instance, in 2012, the National Commission on Indigenous Peoples issued an administrative order for the proper research and documentation of indigenous knowledge systems and customary laws.[100] The order discusses community initiated research, academic research, and research meant to develop aid policies or programs.[101] In 2016, the National Commission on Indigenous Peoples and the Intellectual Property Office of the Philippines issued a joint administrative order detailing rules related to the intellectual property rights application and registration of indigenous knowledge systems and practices.[102] Specifically, the joint order states, "indigenous peoples have the right to own, control, develop and protect the past, present and future manifestations of their cultures."[103] As such, registration of these indigenous knowledge systems and practices with the Intellectual Property Office of the Philippines must have the FPIC of the group or community concerned.[104]

Unfortunately, the Intellectual Property Code of the Philippines is disconnected from indigenous peoples' needs. This is because it is

96. *Id.* at 385.

97. *Id.* at 349.

98. Office of the President: National Commission of Indigenous Peoples, The Indigenous Peoples' Rights Act of 1997, Admin. Ord. 1, Rule II § 1.k (June 9, 1998) (Phil.).

99. Violago, *supra* note 3, at 388–89.

100. Office of the President, The Indigenous Knowledge Systems and Practices (IKSPs) and Customary Laws (CLs) Research and Documentation Guidelines of 2012, Admin. Ord. No. 1 (Mar. 15, 2012) (Phil.).

101. *Id.*

102. Intellectual Property Office of the Philippines-National Commission on Indigenous Peoples, Rules and Regulations on Intellectual Property Rights Application and Registration Protecting the Indigenous Knowledge Systems and Practices of the Indigenous Peoples and Indigenous Cultural Communities, Admin. Ord. No. 1, 2016 1, 2 (Oct. 28, 2016) (Phil.).

103. *Id.* at 4.

104. *Id.*

more focused on the commercial rights of scientists, businessmen, and artists, rather than balancing these interests with the moral, cultural, and spiritual dimensions of TCEs.[105] Philippine intellectual property law puts a premium on individualism and statism, as the law tends to reward and protect individual inventors while serving the interest of the state.[106] This issue makes enforcement more challenging, especially when "disputes routinely cross international frontiers and generally involve parties with vastly different levels of power, information, and financial resources."[107] When intellectual property violations do occur, government actors and members of indigenous communities struggle to combat them.[108] Funding to pursue violators is often limited, the laws and protective mandates are confusing, and there is a lack of coordination between stakeholders.[109]

2. Recent Issues and Controversies

Aside from the controversies surrounding Apo Whang-Od, other issues concerning the intellectual property protection of TCEs surfaced in the Philippines in recent years. In 2017, Marlon Martin, Chief Operations Officer of the Save the Ifugao Terraces Movement, criticized fashion designers and interior designers for appropriating indigenous textiles and sacred patterns by incorporating them on gowns and furniture covers.[110] According to Martin, these disrespectful acts devalue the indigenous craft.[111] In some instances, non-indigenous designers profit without giving any benefit to the original crafters.[112] Another issue involving indigenous textiles is the importation of counterfeit Cordillera-woven blankets and garments into the Philippines from China.[113] In response, the National Commission on Indigenous Peoples

105. *See* Cerilles, Jr. & Fernan, *supra* note 94.

106. Antonio G.M. La Vina & Mylin Sapiera, *Traditional Knowledge: Challenge to Intellectual Property Rights*, 70 PHIL. L.J. 140, 159–60 (1995).

107. Daes, *supra* note 87, at 146.

108. Harry Gwynn Omar M. Fernan & Mario C. Cerilles, Jr., *Culture under threat: are we doing enough to protect indigenous weaves?*, LIFESTYLE INQUIRER (July 28, 2021, 1:10 AM), https://lifestyle.inquirer.net/386296/culture-under-threat-are-we-doing-enough-to-protect-indigenous-weaves/ [https://perma.cc/XPB5-TXPJ] [hereinafter *Culture Under Threat*].

109. *Id.*

110. Real Living Team, *Don't Use A Funeral Cloth For A Sofa*, REAL LIVING (Oct. 17, 2017), https://www.realliving.com.ph/lifestyle/arts-culture/don-t-use-a-funeral-cloth-for-a-sofa-a00043-20171017 [https://perma.cc/LK36-V72Y].

111. *Id.*

112. *Id.*

113. *Cordillera weavers seek protection vs fake fabrics*, INQUIRER.NET (Jan. 29, 2021, 4:20 AM), https://newsinfo.inquirer.net/1389488/cordillera-weavers-seek-protection-vs-fake-fabrics [https://perma.cc/7NML-6B3W].

prepared to take legal action by calling to end the importation and sale of these machine-made counterfeit goods.[114] In yet another example, a Filipino footwear brand called Tribu Nation received backlash when it named some of its products after indigenous groups.[115] The affected groups and their representatives expressed disappointment, alleging that the Tribu Nation brand used indigenous names to gain popularity and profit without obtaining the groups' FPIC.[116]

3. A Bright Future Ahead

Despite the weak enforcement of intellectual property laws in the country,[117] legal practitioners came together to work on protecting the TCEs of indigenous peoples. In January 2022, the Intellectual Property Office of the Philippines signed a memorandum of agreement with the Integrated Bar of the Philippines ("IBP") to support indigenous communities in protecting their intellectual property rights.[118] The Intellectual Property Office of the Philippines hopes the memorandum will provide a better connection with the indigenous communities in IBP's extensive network of regional and local chapters throughout the country.[119] The IBP will aid in the registration, prosecution, and enforcement of the communities' intellectual property rights by providing pro bono legal assistance.[120]

C. Protection of TCEs in the United States

1. Federal Recognition as the First Step to Protection

Federal recognition involves the establishment of a political and legal relationship between an indigenous group and the federal government, creating particular rights and responsibilities for both parties and potentially entitling the indigenous group to certain federal

114. *Id.*

115. Kimberlie Quitasol, *'We will not be ascribed as a sandal': IP leaders rage at use of ethnic groups' names as footwear brands*, INQUIRER.NET (July 29, 2020, 8:39 PM), https://newsinfo.inquirer.net/1314076/we-will-not-be-ascribed-as-a-sandal-ip-leaders-rage-at-use-of-ethnic-groups-names-as-footwear-brands [https://perma.cc/KA6T-ZX79].

116. *See id.*

117. *Culture Under Threat*, *supra* note 108.

118. Joseph Nacino, *IPOPHL, IBP bat for IP rights of indigenous cultural communities and MSMEs*, INTELL. PROP. OFF. OF THE PHIL. (Feb. 9, 2023), https://www.ipophil.gov.ph/news/ipophl-ibp-bat-for-ip-rights-of-indigenous-cultural-communities-and-msmes/ [https://perma.cc/9HBB-8DQJ].

119. *Id.*

120. *Id.*

resources.[121] Indigenous groups may be federally recognized if the following are true: "(1) Congress or the executive [branch] created a reservation for the group either by treaty, by statutorily expressed agreement, or by executive order or other valid administrative action; and (2) the United States has some continuing political relationship with the group," like using federal agencies to provide services.[122] Only groups with federal recognition may seek protection of their TCEs under U.S. intellectual property law.[123]

Out of the three major indigenous groups, only the Native Americans and the Alaska Natives, to some extent, receive federal recognition.[124] As of 2021, there are 574 federally recognized indigenous groups and most of them have recognized national homelands.[125] Federally recognized groups are treated as sovereign and self-governing nations but remain domestic dependent nations of the United States.[126] This means the Native Americans and the Alaska Natives receive more government support and assistance compared to the unrecognized Native Hawaiians.[127]

The push for Native Hawaiians to receive federal recognition is a long-standing issue[128] because government actors, advocacy groups, and even Native Hawaiians themselves have different positions on the matter.[129] Supporters believe federal recognition would provide Native Hawaiians with the right to self-governance and proffer similar legal protections to Native Americans.[130] On the other hand, the opposition views federal recognition as inconsistent with the Native Hawaiians' fight for full independence from the United States through international avenues.[131] While this debate is ongoing, cases of others misappropriating their culture accumulate.[132]

121. UCLA Equity, Diversity & Inclusion, *supra* note 36.

122. Le'a Malia Kanehe, *The Akaka Bill: The Native Hawaiians' Race for Federal Recognition*, 23 U. Haw. L. Rev. 857, 861 (2001).

123. *See* Awopetu, *supra* note 44, at 763–64, 767.

124. Braun, *supra* note 37.

125. *Id.*

126. Hannah White, Comment, *Indigenous Peoples, the International Trend Toward Legal Personhood for Nature, and the United States*, 43 Am. Indian L. Rev. 129, 130 (2018).

127. *See generally* Braun, *supra* note 37.

128. *See* Kanehe, *supra* note 122, at 858–60.

129. Keli'i Akina, *Federal Recognition of Hawaiian Sovereignty: One People, Many Views*, Ka Wai Ola (Feb. 1, 2023), https://kawaiola.news/oha/trustees/federal-recognition-of-hawaiian-sovereignty-one-people-many-views/ [https://perma.cc/3ZWT-JXX3]; Kanehe, *supra* note 122, at 888–89, 896–97.

130. Akina, *supra* note 129; Kanehe, *supra* note 122, at 895.

131. Kanehe, *supra* note 122, at 896.

132. *See* Nina Mantilla, *The New Hawaiian Model: The Native Hawaiian Cultural Trademark Movement and the Quest for Intellectual Property Rights to Protect and Preserve Native Hawaiian Culture*, 3 Intell. Prop. Brief 26, 26–27, 30–31 (2012).

2. U.S. Trademark Registration of TCEs

The hundreds of Native American indigenous groups each have their own system of ownership for TCEs, varying methods of creation, and transmission of rights.[133] This variety puts them at great risk of misappropriation because the existing U.S. intellectual property framework is not applicable to them on a one-to-one basis, meaning it would be nearly impossible to create an exhaustive list of Native American TCEs.[134] Therefore, TCEs of indigenous groups do not receive adequate protection in the United States.[135]

The Lanham Act, or the Trademark Act of 1946, provides the framework for federal trademark registrations but it is silent as to whether TCEs may be registered.[136] One problem in trademark registration is that despite the significance of TCEs, they may be denied registration for reasons unrelated to their status as TCEs.[137] For instance, the Lanham Act states that an application for a trademark registration may be denied if the mark "[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may *disparage* or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute."[138] In 2017, this provision became the center of an important intellectual property dispute in the U.S. Supreme Court case *Matal v. Tam*.[139] In that case, Simon Tam, the lead singer of a rock group, fought to register his band's name.[140] The members of the band were all of Asian descent and called themselves "The Slants."[141] Tam sought to register the band's name to reclaim the term and remove its force as a derogatory term for Asians.[142] However, the U.S. Patent and Trademark Office denied Tam's registration because the name was offensive or disagreeable to a particular audience.[143]

133. Shabalala, *supra* note 47, at 1133.
134. *Id.*
135. *See id.* at 1132–33.
136. *See generally* 15 U.S.C. § 1052 (2012).
137. Awopetu, *supra* note 44, at 762.
138. 15 U.S.C. § 1052(a) (2012) (emphasis added).
139. *See generally* 582 U.S. 218 (2017).
140. *Matal v Tam: Supreme Court Holds Disparaging Trademark Ban Violates First Amendment,* CONST. L. REP. (June 27, 2017), https://constitutionallawrporter.com/2017/06/27/matal-v-tam-2017/ [https://perma.cc/JP8W-8N79].
141. *Id.*
142. *Id.*
143. *Tam*, 582 U.S. at 218.

Another problem with the Lanham Act is that TCEs are not commonly registered by the communities that developed them.[144] Letting non-indigenous people register TCEs puts indigenous peoples at risk of significant losses from misappropriation.[145] The previously discussed Aloha Poke controversy serves as an example of when non-Native Hawaiian businessmen were able to register the word "aloha" for their brand name.[146]

The U.S. government attempted to address these loopholes in trademark law by enacting certain measures. The U.S. Patent and Trademark Office established a database of official tribal insignias of recognized Native American tribes that cannot be registered as trademarks.[147] The database aims to protect tribal insignias as cultural property by determining if pending trademark registrations have false connections to the tribal insignias.[148] While tribes are not legally required to submit their insignias, the creation of the database helps them protect their intellectual property and cultural heritage if a conflict arose.[149] Additionally, Congress passed the Indian Arts and Crafts Act of 1990,[150] which mandated that "work marketed as authentic Indian art and craftwork must be produced by an artist or artisan who is an enrolled member of a federally or officially State recognized Indian tribe, or an Indian Artisan certified by the tribe of their direct descent."[151] Though the law does not confer trademark rights to federally recognized indigenous groups, it provides them with a federal cause of action in cases of infringement even if the group does not have a trademark registration.[152] Unfortunately, the enforcement of this Act is ineffective because violation sanctions are either lacking or insignificant.[153] Many cases go unreported or are dropped.[154]

144. Awopetu, *supra* note 44, at 763.

145. *See id.*

146. *See* Tobin, *supra* note 14.

147. *Native American tribal insignia*, U.S. Pat. & Trademark Off., https://www.uspto.gov/trademarks/laws/native-american-tribal-insignia [https://perma.cc/W5JZ-J2QF].

148. *Id.*

149. *Id.*

150. Indian Arts and Crafts Act of 1990, 25 U.S.C. §§ 305–10 (2012).

151. *Cultural Sovereignty Series: Modernizing the Indian Arts and Crafts Act to Honor Native Identity and Expression: Field Hearing Before the S. Comm. on Indian Affairs*, 115th Cong. 12 (2017) (testimony of Meredith Stanton, Director, Indian Arts and Crafts Board, U.S. Department of the Interior).

152. Awopetu, *supra* note 44, at 767.

153. Jemima Gravatt, *The Indian Arts and Crafts Act of 1990: Fit for Purpose?*, Ctr. For Art L. (Nov. 8, 2023), https://itsartlaw.org/2023/11/08/the-indian-arts-and-crafts-act-of-1990-fit-for-purpose/ [https://perma.cc/V39C-9QXC].

154. *Id.*

3. U.S. Copyright Protection of TCEs

Copyright law in the United States provides little aid in preventing the misappropriation of TCEs. In fact, similar to trademark registration, those registering for copyright protections are not required to be a member of the indigenous group from which their work takes.[155] This framework of U.S. copyright protection poses three major problems with respect to authorship, length of protections, and identifiable contributors.

First, copyright law requires the author of a work to demonstrate originality and a certain amount of creativity to grant protection.[156] Therefore, if items are copied from preexisting works, such as TCEs passed on from one generation to another, they do not receive protection as they are no longer deemed original.[157] However, non-indigenous authors who modify TCEs into transformative or derivative works may obtain copyright protection, thereby appropriating the work for themselves.[158]

Second, explorers, missionaries, anthropologists, and scientists studied and documented TCEs throughout the years, which placed them in the realm of public domain for a significant amount of time.[159] This caused many TCEs to lose their protection from infringement or use.[160] Even if TCEs are able to receive copyright protection, the holder is only granted a time-limited monopoly on the work.[161] After the monopoly expires, the work becomes part of public domain and loses its protection.[162]

Third, on the issue of joint authorship, the law requires all contributors to the work be identifiable to be granted protection.[163] This requirement is a problem for TCEs because it is impossible to identify a single author for works inherited and modified over long periods of time.[164]

155. *See* Awopetu, *supra* note 44, at 757, 769.
156. David R. Hansen, *Protection of Traditional Knowledge: Trade Barriers and the Public Domain*, 58 J. COPYRIGHT SOC'Y U.S.A. 401, 417 (2011).
157. *Id.*
158. Awopetu, *supra* note 44, at 771.
159. Tiangco, *supra* note 13, at 498.
160. *See* Hansen, *supra* note 156, at 423–26.
161. *Id.* at 416.
162. *Id.*
163. *Id.* at 418.
164. *Id.*

4. NAGPRA Supports the Protection of TCEs

In 1990, Congress enacted the Native American Graves Protection and Repatriation Act ("NAGPRA") to assist federally recognized indigenous groups with the protection, return, and repatriation of Native American remains and artifacts found on federal or tribal lands.[165] The goal of this statute is to address:

> (1) how museums fail to "represent Native American culture accurately and appropriately; (2) [the] museums' possession and display of Native American human remains; (3) the presence of sacred and culturally sensitive material in museum collections; and (4) the illicitness, even violence, with which most of the objects in these collections had been obtained.[166]

Though NAGPRA is not tantamount to intellectual property protection, it serves to protect cultural meanings and ideas carried by artifacts and objects.[167] In January 2024, an important development in the implementation of NAGPRA occurred when new timelines and penalties were put in place.[168] This action, which is meant to strengthen NAGPRA's enforcement, is geared toward administration, exhibit, and repatriation of Native American human remains and sacred artifacts in U.S. museums.[169] Since this development, a number of museums across the country decided to cover up their displays of Native American artifacts.[170]

Conclusion

On a world map, the Philippines and the United States lie on opposite ends—the former in the east and the latter in the west. The two countries are vastly different, yet they face similar issues with respect to the intellectual property protection of indigenous peoples' TCEs. Though these legal mechanisms have existed for years, gaps and gray areas persist, allowing the exploitation of vulnerable parties and misappropriation of heritage.

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165. *See* Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048, 3050–57 (1990) (codified as 25 U.S.C.S. §§ 3001–13).

166. D. S. Pensley, *The Native American Graves Protection and Repatriation Act (1990): Where the Native Voice Is Missing*, 20 WICAZO SA REV. 37, 37 (2005).

167. *See* Shabalala, *supra* note 47, at 1153.

168. Gabriella Angeleti, *US museums cover Native American displays as revised federal regulations take effect*, ART NEWSPAPER (Jan. 29, 2024), https://www.theartnewspaper.com/2024/01/29/us-museums-nagpra-native-american-displays-new-regulations [https://perma.cc/ZC56-QZF3].

169. *Id.*

170. *Id.*

In dissecting the intellectual property protection of TCEs in the Philippines and in the United States, it is clear both frameworks have their own strengths and weaknesses. The Philippines has an established framework rooted in its constitution.[171] The Philippine Constitution highlights the value of indigenous peoples to the country and this sets the tone for enacting related legislation.[172] This foundation is strengthened by the IPRA and reinforced by government agencies, which came together to implement supportive regulations.[173] Given the variety of indigenous groups that exist in the United States,[174] protection over indigenous TCEs may be more difficult because each group has its own culture, rules, and traditions. Its strength lies in the ability of its indigenous peoples, advocacy groups, government officials, and other citizens to come together and call for action from the federal government.[175] Because of its power as a nation, the United States has tools within its reach to improve its existing legal framework.

On the surface, the legal framework in the Philippines appears strong—in reality, it has no teeth.[176] Current protections lack meaningful enforcement.[177] Due to insufficient education, support, and funding, indigenous peoples living in remote areas are unaware of their rights.[178] This combination makes indigenous peoples in the Philippines susceptible to cultural exploitation and misappropriation by businesses and corporations.[179] In comparison, the U.S. framework appears weak and decentralized due to its different sources of protection and classification for indigenous peoples and their TCEs. The lack of a single authority for its TCE protection creates a possibility of confusion as to indigineous peoples' rights, thereby making indigenous groups vulnerable. Different classifications of indigenous peoples cause discrimination such that non-federally recognized Native Hawaiians receive less rights, protection, and government support.[180]

Because of the relationship between the Philippines and the United States, it is the hope of this Comment that a better understanding of indigenous peoples and their current intellectual property protections will encourage the development of stronger intellectual

171. *See* Violago, *supra* note 3, at 348–49, 403.
172. *Id.* at 348–49.
173. *See id.* at 349.
174. *See* Braun, *supra* note 37.
175. *See* U.S. DEP'T OF STATE, *supra* note 83.
176. Cerilles, Jr. &. Fernan, *supra* note 94.
177. *See Culture Under Threat*, *supra* note 108.
178. Cerilles, Jr. &. Fernan, *supra* note 94.
179. *Id.*
180. *See* Tiangco, *supra* note 13, at 492–93.

property protections. Despite these countries' different approaches to TCE protection, there is much room for them to learn from each other in this matter.