

# ARTICLES

## TRADITIONAL CULTURAL EXPRESSIONS AND THE U.S. CONSTITUTION

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SYNOPSIS

This article addresses whether U.S. Constitutional law permits IP rights in Traditional Cultural Expressions (TCEs). I conclude that such rights are permissive, but only in a limited manner. Copyright-like rights must be limited in duration, and other rights based on trademark law must only apply to TCEs in commerce. Finally, a robust fair use exception is necessary to avoid First Amendment Infringement.

## INTRODUCTION

In Early 2012, the Navajo Nation filed a lawsuit in U.S. District Court in New Mexico against the popular clothing retailer Urban Outfitters for the retailer's unauthorized use of the Navajo name and traditional Navajo patterns.<sup>1</sup> The Navajo Nation described Urban Outfitter's Navajo products as "derogatory and scandalous."<sup>2</sup>

This dispute is part of an ongoing concern involving the appropriation by western cultures of the traditional cultural expressions (TCEs) of indigenous societies throughout the world. Scholars and international organizations have been considering solutions that would provide various forms of intellectual property (IP) protections for TCEs. Much of the discussion up to this point has been whether or not it is a good idea to implement such protections, and, if so, to what extent. Unsurprisingly, conclusions on this discussion vary widely, with some scholars arguing that human rights implores strong protections,<sup>3</sup> and with others suggesting that TCE protections simply cannot be justified by standard property justifications.<sup>4</sup> As this discussion has unfolded, the World Intellectual Property Organization (WIPO) has been working through its Traditional Knowledge (TK) group to promote the rights of indigenous communities and is attempting to draft an international instrument that would provide the protections that indigenous communities seek for their TCEs.<sup>5</sup>

Whether or not TCE protection is a good idea, it has yet to be implemented throughout most of the world despite an expansive trend in IP. This suggests that there is another question to be asked: Can current legal regimes support such protections? Unlike previous scholarship that has focused on whether TCEs *should* be protected, this article addresses whether TCEs *can* be protected. I approach the issue from the perspective of U.S. Constitutional law to determine if there is room for TCE protection in the United States. My claim is that the U.S. Constitution places significant limits on the forms of protection available within the United States, and I conclude that although it is possible to implement certain protections for TCEs, those protections

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<sup>1</sup> See *Corporate Watch*, WALL STREET JOURNAL (Feb. 29, 2012), available at <http://online.wsj.com/article/SB10001424052970203986604577253662877375738.html>.

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

<sup>3</sup> See generally, Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW & CONTEMP. PROBS. 97 (2007).

<sup>4</sup> See generally, Stephen R. Munzer and Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 CARDOZO ARTS & ENT. L.J. 37 (2009) (applying various justifications for property rights to traditional knowledge, and concluding that the justifications are unworkable).

<sup>5</sup> See World Intellectual Property Org., *Traditional Cultural Expressions*, <http://www.wipo.int/tk/en/folklore/> (last visited Oct. 1, 2013).

cannot be as robust as most have thus far proposed, and they must exist only for a limited duration or be applied only to TCEs used in commerce. Part I of this paper will describe the background of the TCE movement with a description of the solutions that have been proposed by various outlets. Part II will analyze the various solutions under a Constitutional lens by considering whether TCE protection can be justified by the IP Clause or the Commerce Clause of the U.S. Constitution, and, if so, whether these protections would be limited by First Amendment rights. Finally, Part III will provide an outline of a limited TCE solution that would be workable based on the justifications and limitations discussed in the previous part. This article, admittedly, takes a U.S.-centric approach. I do not mean to suggest that this is the best approach to this issue, but that it is more workable in the United States than other proposals.

## I. BACKGROUND

### A. *Definition of Traditional Cultural Expressions*

Traditional Cultural Expressions are a subset of a broader idea known as Traditional Knowledge (TK). TK is generally understood to be knowledge that is “refined and passed . . . from generation to generation,” within a community, and “is often an important part of their cultural identities.”<sup>6</sup> Some examples include knowledge of biodiversity and traditional medicinal cures and treatments, folklore, traditional dances, and spiritual symbols or patterns. TCE, more specifically, is the non-scientific branch of TK, and examples of TCEs are very diverse.<sup>7</sup> TCE, or folklore, can be defined as “traditional customs, tales, sayings, dances, or art forms preserved among a people.”<sup>8</sup> Generally, all forms of TCE share three characteristics: “(1) TCE is passed from generation to generation, either orally or through imitation; (2) TCE is generally not attributable to any individual author or set of authors; and (3) TCE is being continuously utilized and developed within the indigenous community.”<sup>9</sup> The World Intellectual Property Organization has developed a more comprehensive definition

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<sup>6</sup> Peter K. Yu, *Traditional Knowledge, Intellectual Property, and Indigenous Culture: An Introduction*, 11 CARDOZO J. INT’L & COMP. L. 239 (2003).

<sup>7</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, 776 (1999).

<sup>8</sup> THE MIRIAM-WEBSTER DICTIONARY (11th ed. 2014).

<sup>9</sup> Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 5 (1997) (citing U.N. ESCOR, *Committee of Governmental Experts on the Safeguarding of Folklore*, 16 Copyright Bull. 27, 37 (1982)).