Criminalisation of Misappropriation of Traditional Cultural Expression (TCE)

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ABSTRACT
An act can only be regarded as a crime if its exercise can cause harm to others. On that basis, many activities that usurp copyright and can possibly pose harm to the society have been criminalised. In relation to traditional cultural expression, model laws such as the World Intellectual Property Organisation (WIPO) Draft Articles on the Protection of Traditional Cultural Expressions (2011), WIPO-UNESCO (the United Nations Educational, Scientific and Cultural Organisation) Model Provisions for National Laws on the Protection of Expression of Folklore Against Illicit Exploitation and Other Prejudicial Action (1982) and the South Pacific Model Law for National Laws (2002), as well as some national laws of the United States of America and the Philippines have criminalised certain acts constituting the misappropriation of traditional cultural expressions (TCEs). TCEs or expressions of ‘folklore’ are considered by many developing countries as part and parcel of their cultural fabrics and their misappropriation as ‘harmful’ not only to the right holder’s interest but also to the country. To that extent, the misappropriation of TCEs must be criminalised. This paper commences with an examination of copyright protection over TCEs in Malaysia with a view to assessing the adequacy, relevancy and efficacy of criminal sanction and ensuring effective enforcement against misappropriation of indigenous TCEs. The article also examines national initiatives on TCEs, particularly countries that have criminal provisions on certain activities involving TCEs. To lend support for criminalisation, the article further revisits the initiatives of WIPO and UNESCO. The article concludes that introducing some form of criminal offences within the context of copyright law is possible either through the extension of the existing criminal provisions or by having a special part dealing only with misappropriation of TCEs.

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INTRODUCTION

Traditional cultural expression (hereinafter referred to as “TCE”) includes “any tangible or intangible form of creativity including phonetic or verbal expressions, musical or sound expressions, expressions by actions and tangible expressions (WIPO)”\(^1\). Internationally, WIPO and UNESCO have for decades tried to come up with model laws on TCEs, with differing objectives and purposes. One of the components of TCE is indigenous TCEs and international treaties dedicated to the rights of the indigenous peoples include some form of control over their TCEs. The main international instrument here is the Declaration on the Rights of the Indigenous Peoples.

At the General Assembly of the United Nations Permanent Forum on Indigenous Issues, Malaysia, together with another 143 states, voted in favour of the Declaration on the Rights of Indigenous Peoples. The event, which took place on 13\(^{th}\) September 2007, saw four countries voting against it. These four countries were Australia, Canada, New Zealand and the United States. The enormous support received by the Declaration is a testimony to the recognition of the indigenous people’s value and diversity of their cultures to the world (Kuruk, 2004). In relation to cultural heritage, Article 31 declares the dominion and intellectual property of the Indigenous Peoples over their cultural heritage, traditional knowledge and traditional cultural expressions. The broad term of traditional knowledge and TCE encompasses their manifestation of cultures, as well as their sciences and technologies. It also includes inter alia, oral traditions, literatures, human and genetic resources, knowledge of flora and fauna, and the like. As Malaysia has voted in favour of the Declaration, the country is duty-bound “to take effective measures to recognise and protect the exercise of these rights”.

This paper considers only the punishment meted in the event of misappropriation of TCEs. As far as the current legislation is concerned, there is neither specific law addressing the issue of misappropriation of TCE in Malaysia, nor specific provisions under intellectual property laws, particularly the Copyright Act 1987 (hereinafter referred to as “the Act”). It considers whether criminal punishment can be proposed especially in cases where the moral interests of the practitioners of the TCEs have been impaired. In order to do this, the paper starts by discussing the position of TCE under the Copyright Act 1987, then the normal criminal provisions in the Act before venturing further into national and international initiatives on criminalising offences relating to TCEs.

\(^{1}\) WIPO: The Protection of Traditional Cultural Expressions: Draft Articles, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WIPO/GRTKF/IC/18/4Rev, available online at www.wipo.int
INDIGENOUS TCE IN MALAYSIA
Malaysia is a country of multi-racial population, blessed with diverse and unique cultural heritage. A small percentage of the population is the Indigenous people; though they are small in number, they greatly contribute to the cultural richness of the country. The Indigenous population of Malaysia includes the Orang Asli or “original people” in Peninsular Malaysia and the Indigenous people in Sabah and Sarawak. The Negritos, the Proto-Malay and the Senoi are among the major tribes of Orang Asli who live in Peninsular Malaysia. As compared to Peninsular Malaysia, Sabah has more diverse ethnic groups of the Indigenous people such as the Bajau, Murut and Dusun. In Sarawak, the Indigenous people include ethnic groups like the Iban, Melanau, Bidayuh and Orang Ulu. As a matter of fact, these Indigenous people have been practising and preserving their rich and unique cultural expressions which include inter alia, traditional dances, music instruments and various handicrafts. For example, a popular handicraft which belongs to the Iban of Sarawak is Pua Kumbu (hand-woven textile), while unique wood sculptures depicting forest spirits belong to the Mah Meri tribe who live on Carey Island in the state of Selangor.

TCE is undoubtedly a significant part, in fact an integral component, of the cultural heritage of a nation. This means that TCE is closely linked with the social identity of a nation, regardless of whether the country is categorised as a developed, developing or least developed. The notion is particularly relevant and proves to demonstrate the real challenge to some developing countries as they have encountered unjustifiable commercial exploitation of TCE by tradesmen who are not legally connected with the true owner of the TCEs. This in turn leads to unfortunate consequences as the Indigenous people, who were the real owners of the TCEs, would not be enjoying neither the economic reap nor reasonable profit from such unauthorised exploitation. It is disheartening to note that in some cases, very little or no respect at all was shown to the preservers of the TCEs in such dealings to the extent that the TCEs were exploited in ways that were culturally offensive, spiritually degrading and even insulting to the real custodians of the TCEs (Kuek, 2005).

Developing countries including Malaysia consider TCE as a valuable component of their cultural heritage and view their misappropriation as a serious threat to the integrity of the heritage. The serious efforts of developing countries on the need for an effective and feasible legal framework for the protection of TCE culminated in the proper legislation when many countries in the African continent incorporated specific provisions within their national copyright laws. Undoubtedly, there is a real need to find out an effective solution through a legal mechanism for protection and preservation of TCE (Farley, 1997-1998). As far as legal protection is concerned, copyright law is one of the mechanisms to protect the TCEs. Apparently, copyright law is thought as the possible option that
can afford adequate protection for the TCEs on the basis that it aims to prevent, *inter alia* unauthorised reproduction of the copyright works (where such TCEs satisfy the essential qualifications, or fall in the category of copyright works).

As far as copyright is concerned, it is a statutory, exclusive and assignable legal right given to the originator or creator in certain creative works such as literary, dramatic, musical, artistic and other intellectual works for a specific period. The main governing legislation in Malaysia pertaining to copyright is the Copyright Act 1987 (hereinafter “the Act”). Section 7(10) of the Act expressly states that:

> “...the following works shall be eligible for copyright:
> (a) literary works;
> (b) musical works;
> (c) artistic works;
> (d) films;
> (e) sound recordings; and
> (f) broadcasts.
>
> Copyright shall also subsist in every work which is eligible for copyright and which—
> (a) being a literary, musical or artistic work or film or sound recording is first published in Malaysia...”

In this regard, those TCEs which comprise of tribal arts, tales and musical compositions would potentially be considered as literary, artistic and musical works under the domain of copyright. Nevertheless, section 7(3) of the Act expressly spells out the requirement for such works to be qualified for protection, that is, such works must be original in character. Having said that, the ensuing problem arises, as most of the TCEs belonging to the Indigenous people in Malaysia have been practised for so many generations and they have been passed down from the forefathers.

A careful scrutiny of the provisions of the Act reveals that there is no specific or direct provision relating to protection of TCEs in Malaysia. Nevertheless, it is still possible for certain forms of TCEs to be protected by the Act as long as they fulfil the requirements of copyright under the Act. In other words, the Act does not
foreclose new renditions of TCEs in the country from being subject matters under the purview of copyright. For instance, the handcrafts, wood carving and sculptures produced by the contemporary Indigenous people in the country may qualify for the scope of “artistic works” if “sufficient effort has been expended to make the works original in character” under section 7(3) of the Act.

As far as TCEs vis-a-vis the Act is concerned, the only provision that mentions the phrase “expressions of folklore” is found in section 2 of the Act, under the definition of “live performance” in paragraph (a)(vi) which includes within the ambit of recognised performance as “performance in relation to expressions of folklore which is given live by one or more persons in Malaysia, whether in the presence of an audience or otherwise …”. Meanwhile, a “performer” is defined under the same section as “a person who performs a live performance under the Act”. In theory, it seems that expressions of folklore in Malaysia may possibly qualify for protection though through an indirect manner. In practice, however, in the absence of the definition of “expressions of folklore” in the Act, it is somehow not an easy task to ascertain the specific nature of expressions that falls within the scope of the provision. Apparently, the interpretation of the provision is left for judges to decide. The extent of the indirect protection of TCE provided by the Act is yet to be ascertained as at to date, there have been no reported cases on live performance of expressions of folklore.

Apart from the performer’s rights, another relevant provision is section 26(4) (c) of the Act. This provision stipulates that “in the case of unpublished work where the identity of the author is unknown, but where there is every reason to presume that he is a Malaysian citizen, copyright in the work shall be deemed to vest in the Minister charged with the responsibility for culture”. From this provision, it is observed that if TCE meets the requirement of a literary, musical or artistic work within the meaning of the Act, copyright in such work shall be conferred to the Minister and the Minister is legally responsible to give proper protection as well as to enforce the rights of the unknown Malaysian author of such work in Malaysia. Such rights are equally afforded to authors from the Berne Union countries.

This article focuses on the criminal remedies for the infringement of TCEs since it is possible for TCE to be recognised under copyright law in Malaysia [in particular under Section 2 and section 26(4) (c), as mentioned above] and fulfils the copyright requirements under Section 7(3) of the Act. In relation to criminal remedies, various attempts have been made over the years to furnish better legal remedies and solutions for the protection of TCEs, and these include discussion and proposal of imposing criminal penalties for wilful infringement involving TCEs.

Thus, in principle, many of the TCEs are protectable subject matters under the copyright law. In terms of fulfilling the conditions for subsistence of protection and
duration, however, there would be problems satisfying the requirement of the copyright law (Moran, 2008). The “originality” requirement under section 7(3)(a) of the Act, which is of paramount importance, means that copyright protection is only conferred to the “original” works, and many traditional literary and artistic productions are not “original” in this sense. In addition, certain ‘fixed’ expressions under section 7(3)(b) of the Act may not fulfil the requirement of an artistic work such as sand carvings, body painting, face painting and the like. Looking from another angle, adaptations of TCEs can still qualify for the copyright protection and hence be legally protected as the ‘original’ copyright work and designs (Lim, 2012). In fact, there are quite a number of limitations of copyright law vis-a-vis protection of TCEs as have been suggested by many legal jurists and authors, but the originality requirement and the fixation requirement are some of the oft-cited ones (Vanguardia, 2011-2012; Farley, 1997-1998; Kuruk, 1998-1999).

COPYRIGHT INFRINGEMENT & CRIMINAL REMEDIES

Infringement has always been one of the issues revolving around intellectual property rights, and this includes copyright. Infringement occurs when a person does or causes other persons to do an act controlled by copyright without the consent of the owner. Those acts are listed under Section 36 of the Act which include sale, distribution and exhibition of the product in the public for purpose of sale. Misappropriation of TCEs may amount to copyright infringement (on the assumption that TCE is protected under copyright) in various ways, such as by way of unauthorised reproduction or commercialisation of handicrafts or products made by Indigenous people with no sharing of economic benefits, neither monetary profit nor acknowledgment of the original creator [which falls under the purview of moral rights of copyright law, i.e. section 25(2) of the Act].

When an infringement of copyright has occurred, civil actions may be initiated by the copyright owner. Remedies available to the copyright owner include inter alia, damages and injunction. Section 37(1) of the Act clearly provides that “Subject to this Act, infringements of copyright shall be actionable at the suit of the owner of the copyright and in any action for such an infringement, all such relief by way of damages, injunction, accounts or otherwise, shall be available to the plaintiff as are available in any corresponding proceedings in respect of infringement of other proprietary rights”. A defendant who has infringed an IPR may also face criminal action for his infringing activities. The criminalisation of these activities, instead of simply making them the subject of civil suit, is justified because of the mischief these activities have caused on the society. The criminal offences include making for selling or hire, or exhibiting for the purpose of sale and importing infringed goods into Malaysia. The punishment meted upon conviction can be quite dire, i.e. a combination of both monetary fine and imprisonment. The
enforcement of copyright criminal offence is done by the Enforcement Division of the Ministry of Domestic Trade, Cooperatives and Consumerism.

It is to be noted that provisions on enforcement are provided under Part VII Copyright Act 1987, from section 44 to section 57. The seized goods can be subjected to forfeiture regardless whether the perpetrator is convicted guilty or not for the offence. The criminalisation of certain copyright offences can be a useful mechanism to deter the public from committing certain offences.

In relation to TCEs, criminal offences can be a strong weapon against misappropriation of these expressions outside the cultural domain of such practices. In addition, where the misappropriation leads to offensive use of revered images of the TCEs, stronger punishment should entail. This requires a careful revision of the current criminal provisions to reflect the sanctity of certain images of TCEs which should be meted with heavier punishment.

In order to understand which context criminal offences can be introduced, this article further examines the practices in some national legislations, as well as recommendations in international framework such as WIPO and UNESCO.

**NATIONAL COUNTRIES EXPERIENCE WITH CRIMINAL OFFENCES DEALING WITH TCEs**

Legal mechanisms in several countries tend to show a trend of tightening their copyright laws and enforcement in addressing misappropriation of TCEs. Some countries have taken serious efforts by treating copyright infringement as offences under criminal law, and these include misappropriation of TCEs (Tellez & Waitara, 2007). In comparison to other regions, African countries have been observed to be very vocal in protecting their TCEs. For instance, a paramount significance is attached to the legal definitions of the term ‘folklore’ and interestingly, this has underscored the importance of communal rights (Blavin, 2003). A cursory look at various copyright laws of African countries reveals that the legislation affords a comprehensive definition to ‘folklore’. For example, S.31(5) Copyright Act 1999 (Nigeria) defines folklore as:

> “a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means.”

Likewise, a similar definition is incorporated in the legislation of other African countries. Art. 15, Law on Copyright and Neighboring Rights (Congo) 1982 for instance, defines folklore as:

> “all literary and artistic productions created on the national territory by authors presumed to be Congolese nationals or by Congolese ethnic communities, passed from generation to generation and constituting one of the basic elements of the national traditional cultural heritage.”
A similar provision can also be found in Art. 4 of Decree-Law Regulating the Rights of Authors and Intellectual Property (Burundi, 1978), which defines folklore as:

“all literary, artistic and scientific works created on the national territory by authors presumed to be nationals of Burundi, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage.”

From the above-mentioned legislations, statutory examples of folklore would include poetry, riddles, songs, instrumental music, dances, and plays, productions of art in drawings, paintings, carvings, sculptures, pottery, handicrafts, costumes, as well as indigenous textiles and the like, though these examples are not exhaustive. Other than the national laws, regional efforts of the African Intellectual Property Organization have also come up with a broader definition of folklore. Annex VII of the Revised Bangui Agreement of 1999 folklore denotes:

“…literary, artistic, religious, scientific, technological and other traditions and productions as a whole created by communities and handed down from generation to generation.”

Interestingly, African legislatures have developed some other alternative legal mechanisms in order to enhance the current protection over folklore rights. A relevant example is a number of African copyright laws which enunciate that such copyright may be vested in the government instead of individual or communal rights. This mechanism is possible as the government is treated as if it were the creator of the original work. Another round of observation on Nigerian laws (which has express provisions on this point) reveals that legal protection of IPRs is specifically expounded under the Nigerian Copyright Act, with amendments in 1992 and 1999. S. 28(1) of the 1999 Act, states:

“Expressions of folklore are protected against:

(a) reproduction;
(b) communication to the public by performance, broadcasting, distribution by cable or other means;
(c) adaptation, translation and other transformations, when such expressions are made either for commercial purposes or outside their traditional or customary context.”

Thus, it is apparent from the above provision that the Nigerian laws have managed to include the aspect of protection of the cultural rights and traditional cultural expressions which many developing countries are still hesitant to follow suit, the reasons inter alia, for fear that such provision may be exploited (Ezeani, 2011). It is also worth noting that S. 29A of the 1999 Copyright Laws specifically provides for criminal liability for the infringement of any expression of folklore. It states that:

“Criminal liability in respect of infringement of folklore.
29A. (1) A person who-
(a) does any of the acts set out in section 28 of this Decree without the consent or authorisation of the Commission; or
(b) does not comply with the requirement in subsection (4) of section 28 of this Decree; or
(c) wilfully misrepresents the source of an expression of folklore; or
(d) wilfully distorts an expression of folklore in a manner prejudicial to the honour, dignity or cultural interests of the community in which it originates, commits an offence under this Decree.

(2) A person convicted of an offence under subsection (1) of this section is liable on conviction;
(a) in the case of an individual, to a fine not exceeding N100,000 or to imprisonment for a term of 12 months or to both such fine and imprisonment;
and
(b) in the case of a body corporate, to a fine of N500,000."

Criminalisation of misappropriation of TCEs would run parallel to the notion that the illegal taking should be considered as a crime; in fact, it is not a concept that is foreign to intellectual property law. Proposal and suggestions for criminal sanctions and remedies are made with the primary goal of deterring the criminal conduct, while also providing a realistic, achievable remedy for indigenous people (Vincent, 2010) who are often a vulnerable party in misappropriation cases involving TCEs. Criminalisation of infringement of TCEs owned by indigenous people would to some extent address the problem of misappropriation of TCEs and hence facilitate better protection of their rights. Since intellectual property is recognised and generally considered as a form of property, the proposition to criminalise primary infringements of copyright could be justified on the same reasoning as offences pertaining to the violation of general property interests. A relevant example would include the law of theft (Cheng, 2010).

Other than African countries, several other countries have also legislated on TCEs at the national level by criminalising several activities constituting the misappropriation of TCEs with particular emphasis on indigenous TCEs (Kuruk, 1998-1999). Of notable mention is the Indian Arts and Crafts Act (2000) of the United States of America. The Act was passed with the objective of preventing commercial interests from falsely representing their services with indigenous peoples. Section 104(a), for instance, "prohibits misrepresentation in marketing of Indian arts and crafts products in the US" comes with "criminal penalties
punishable with fines up to $250,000 of five years imprisonment”. The Implementing Regulations (Section 309.2(d)(1) further clarifies that, “an Indian product covers only any art or craft product made by an Indian both in traditional and non-traditional Indian style or medium.”

It is clear that the Act makes it illegal, and hence it is a criminal offence to sell or to be involved in trade activities in respect of an art or craft when a person claims them to be created by an Indian, but the truth is that they are not really the products of Indian. It is thus a crime to sell products claiming to be Indian Jewellery in US if it is not true. The only constraint in the Act is that it only applies to the arts and crafts produced after 1935 and the producer of the concerned Indian products must be a US resident.

In the ASEAN region, the Philippines has successfully legislated a broad range of indigenous rights. Under the Philippines national laws, among the rights conferred to the indigenous people are the right to control and govern ancestral domains, as well as the right to self-governance and empowerment, to be given social justice and equal treatment as part of human rights and more fundamentally cultural integrity over their cultural heritage. As the Act serves to recognise and promote all rights of the indigenous cultural communities, it provides for criminal punishment for certain rights and obligations laid down in Section 72 of the Indigenous Peoples’ Rights Act of 1997. This includes unauthorised and/or unlawful intrusion upon ancestral lands (as spelt out in Section 21). The Act also covers the unlawful acts pertaining to employment (section 24), as well as rights to religious, cultural sites and ceremonies (Section 33). The provision clearly states that the commission of violation of any of the provisions of the Act will entail criminal punishment and is not confined to only the situations mentioned.

**INTERNATIONAL INITIATIVES**

The Western copyright system is not designed to give full recognition of the interests of the right holders of TCEs (Torsen, 2008). It is for this very reason that WIPO’s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC) recommends for a mixture of proprietary, non-proprietary and non-Intellectual Property measures (Girsberger, 2008). This will ensure a more comprehensive treatment of TCEs by considering both the monetary and moral interests of the right holders.

The Model Provisions for the National Laws on the Protection of expressions of folklore against illicit exploitations and other prejudicial actions (1985) prepared by UNESCO and WIPO are among the earliest model laws on TCEs. The Model Provisions recommend penal provisions in four instances, as follows:

i) Wilful non-compliance with section 5. Section 5 deals with acknowledgement of source of TCEs. Thus, by deliberately not mentioning the source of
the TCEs, i.e. the community or geographic place where the TCEs are derived would entail criminal sanction.

ii) Wilful utilisation of TCE without the authorization or consent of the holder of the TCEs. In this context, utilisation includes publication, reproduction and any distribution of copies of TCEs or public recitation, performance transmission and communication of such TCEs.

iii) Deceiving the origin of artefacts or subject matters of performances or recitations made available to the public to be derived from a certain traditional community when they are not.

iv) When a person publicly uses, in any direct or indirect manner, expressions of folklore wilfully distorting the same that would prejudice the cultural integrity of the TCEs.

On that score, the WIPO IGC during its seventh session in Geneva (2004) recommends that any type of legislative solution must address the interests of the traditional communities themselves. Any legislative solution must address certain key objectives such as raising deference over traditional cultures and folklore, with the aims of paying reverence to the dignity, cultural integrity, as well as intellectual and spiritual values of the right holders of the TCE. One way of achieving these is by empowering them to assert authority over their own TCEs including taking action against perpetrators, should they wish to do so.

The WIPO IGC recognises the need to look at the interests of the traditional community in a broader perspective. The Report stresses the need to explore a wide range of legal mechanisms to achieve the intended objectives of the protection and not just within the narrow confines of copyright. This includes a mixture of non-proprietary and non IP measures. Among the non-IP measures highlighted in the Report is the law in relation to the promotion of arts and handicrafts.

The WIPO IGC recommends member countries to restrain the offensive use of TCEs that might prejudice the honour of the beneficiaries or the integrity of the TCEs. In particular, Article 8 recommends member countries to adopt measures that are necessary to prevent wilful or negligent infringement against the economic or moral interests of the TCE holders sufficient to deter them from repeating the conduct in the future.

Among the conducts that may justify effective sanctions in the WIPO IGC Report (2004) include:

“(a) unauthorized reproduction, adaptation and subsequent commercialisation of TCEs, with no sharing of economic benefits;

(b) use of TCEs in ways that are insulting, degrading and/or culturally and spiritually offensive;
(c) unauthorised access to, and
disclosure and use of sacred/
secret materials;
(d) appropriation of traditional
languages;
(e) unauthorised fixation of live
performances of TCEs and
subsequent acts in relation to
those fixations;
(f) appropriation of the reputation
or distinctive character of TCEs
in ways that evoke an authentic
cultural product, by use of
misleading or false indications
as to authenticity or origin, or
adoption of their methods of
manufacture and ‘style’;
(g) failure to acknowledge the
traditional source of a tradition-
based creation or innovation;
(h) granting of erroneous industrial
property rights over TCEs and
derivatives thereof.”

From the WIPO IGC Report, several
observations can be drawn. A broad range
of offences can be created in relation to the
misappropriation of TCEs. Among them are
those considered as ‘harming’ the cultural
identity of the TCEs. These include the use
of the TCEs in culturally degrading manner
and failure to acknowledge the source of
the TCEs. However, some offences that
impaired the material needs of the rights
holder can also be penalised. These include
unauthorised access to secret/sacred TCE,
the sale of fake indigenous arts and crafts
and the granting of IPRs over the TCEs.
Both the impairment of the materials
and moral interest of the TCEs can cause
considerable harm to the society and
should be penalised. If the widespread
sales of fake indigenous arts and crafts are
left unchecked, there is little respect left
for creativity and on the basis of just theory
should be curbed.

Another important model law is the
South Pacific Model Law for National Laws
(2002) lends support to the proposition
that certain misappropriation of TCEs can
be criminalised. Section 26 of the Model
Law provides the criminal punishment for
a person who makes use of TCE outside its
traditional usage or uses it for commercial
purpose without prior consent from the
right holders. Other instances of criminal
offences are acts inconsistent with the
moral rights of their traditional holders are
_inter alia_, Section 27 of the South Pacific
Model Law for National Laws (2002),
where TCEs which are kept sacred and
secret are used outside their customary
use (as provided under Section 28 of the
Model Laws) and also Section 29, which
provides for importation or exportation of
TCEs without the prior informed consent
of the TCEs.

From these international documents,
we can propose that certain usage of TCEs
must, as a matter of policy, be criminalised.
Only then can we take effective measures
against misappropriation of TCEs, which
will not only harm the right holders but
also the society.
CONCLUSION & RECOMMENDATIONS

The extension of copyright over TCEs is the most logical argument raised by many scholars. Similarly in Malaysia, certain renditions of TCEs qualify for copyright protection. Once recognised as a subject matter of copyright, the extension of the criminal provisions to cover the misappropriation of TCEs is the next logical move.

Both UNESCO and WIPO have developed model laws that can be used against misappropriation of TCEs. These two model laws recommend criminalising of activities that impair both the moral and material interests of the TCE right holders. These recommendations support the practices in some countries that have legislated to this effect such as Nigeria and the Philippines. Meanwhile, the US targets only the sale of fake indigenous arts and crafts.

All these international and national initiatives attest to the fact that more should be done to arrest the widespread misappropriation of TCEs. Criminalising certain offences that harm the interest of the right holders of the TCEs serves not only the right holder’s interest but also the society. In Malaysia, this can be done by extending the criminal provisions to cover the situations mentioned in the WIPO IGC reports. Another way to do this is by having a special part dedicated solely to the criminalisation of misappropriation of TCEs. The newly introduced part for criminal offences relating to camcording could be a good example. If camcording can be criminalised, so can offences that impair the materials and moral interests of the TCEs. In addition, further support can also be obtained from Article 61 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) that allows the criminalisation of copyright offences “particularly when they are committed willfully and on a commercial scale.” Most of the sales of fake indigenous arts and crafts are done with blatant disregard of the rights of the TCE holders and with the intent of making commercial profit. To that extent, the criminalisation of misappropriation of TCEs falls squarely within Article 61 TRIPS Agreement and thus, is justifiable.

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