

# Protection of Indigenous Cultural Expression Under Ethiopia Legal Regime: Analysis of the Current Existing Law

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## Abstract

Traditional cultural expression (TCE) is artistic heritage which is developed and maintained by community or by individual reflecting the traditional artistic expectation of the community. Traditional Cultural expression is one of the indigenous/traditional knowledge systems, the protection of which as creativity is debated for the last four decades and still remain unsettled and challenging issues to date. With advent of new technologies this matter has come to the surface raising not only as legal matter but also, as a political concern in the context of international organization. This study tried to analyse the necessity of granting protection for indigenous knowledge/indigenous TCE.

The researcher tried to analyse data from various literature, WIPO, ARIPO and OAPI. Moreover, the researcher tried to analyse international and domestic legal regime whether it protect TCE or not. Protection of TCE is not reached agreement at international level and it is also highly neglected in Ethiopia. There is no clear law that protect TCE in Ethiopia. Even at policy level there is no clear policy document that aspires for protection of indigenous knowledge system.

For sustainable economic development Ethiopia shall enact indigenous customary law or sui generis legal regime for protection of indigenous artistic cultural knowledge.

**Keywords:** Ethiopia, Traditional cultural expression (TCE) , indigenous knowledge, Sui generis,

## 1. Introduction

What indigenous traditional cultural expression (TCE) is? Different scholars defined the concept differently. Hence, for the purpose of this paper TCE is “any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested . . . which are: the products of creative intellectual activity, including individual and communal creativity; characteristic of a community’s cultural and social identity and cultural heritage; and maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community. In particular; verbal expression such folk tales, folk poetry and riddles, musical expression such as folk songs and instrumental music , expression by action such as folk dances plays and artistic forms or rituals; whether or not reduced to material forms and tangible expression such as production of folk art , in particular drawing , painting , carving , sculpture , pottery, terracotta, mosaic woodwork, metal work jewellery, basket weaving, needle work, textiles,

carpets, costumes musical instrument and architectural forms.<sup>1</sup> Some scholars use interchangeably the term folklore for TCE before it is opposed as derogatory term<sup>2</sup>.

Indigenous knowledge and indigenous cultural expression and its relationship with formal IPRs system has emerged as main issues in international forum on conservation of biological diversity, international trade, protection of TCE, and intellectual property rights including the TRIPS agreements. In the past few years high level discussion on the subject matter have been taking place at WIPO the conference of parties to the convention on the biological diversity at the world intellectual property organization which has established an inter governmental committee on intellectual property, genetic resource, traditional knowledge and TCE.<sup>3</sup> Several developing countries representatives in these forums have adopted the view that TK and TCE need to be protected legally, in similar way with the current IPR system for legitimizing the misappropriation Indigenous knowledge. On these and other international forum developing countries come up with the proposal called defensive and protection and positive protection. The former kind of protection responds to developing countries concerns about their knowledge or cultural expression being subject to monopolization and commercialization through, IPRs to the advantage of an authorized person, without sufficient opportunities for their indigenous to obtain equitable share in the resulting benefit. In the context of defensive protection one major proposal relates to the introduction of disclosure of origin requirement into patent law to assure a fair participation of by holder of TCE in any benefits arising from commercialization of their knowledge.<sup>4</sup> Consequently, though there are stiff debate among the developed and nation who wish to have strong IP laws and developing countries like, ( specially, Peru, panama, India and Tunisia) came up with their own national laws for protection of indigenous knowledge system. Concerning, Ethiopia though the country has enormous cultural expression there is no separate legal regime to protect her indigenous cultural expression. The second is protection indigenous knowledge contributes to the improvement of economic development. At international level despite, the existence various international initiatives WIPO drafted model provision that a developing countries has to follow into their effort to design the protection for Ethiopian TCE which is important for two reasons;

First, it is important preserve and maintains diversity and protects national identity.

## 2. Objective of the study

The general object of this study is to assess the necessity of protection of traditional cultural expression in Ethiopia and how the existing law of the country is ill suited for its protection and indicate some other new type of law to be incorporated in Ethiopian legal regime. Therefore, the main research object of the research is to indicate how traditional cultural expression shall protected and indigenous knowledge holder start to be benefited from their creative cultural expression and preserve it from misappropriation through commercialization of their heritage.

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<sup>1</sup> Mikael Frankel and Terri JANke (1998), *our culture our future*, Australia indigenous cultural right and intellectual property right available at ([www.cdu.edu.au/.../our20%culture%20our20%future%20report](http://www.cdu.edu.au/.../our20%culture%20our20%future%20report) {2}20c. P 12

<sup>2</sup> The representative of Spanish speaking countries at the 1985 meeting of group of experts took the position that folklore was an archaism with negative connotation of being associated with the creation of lower or superseded civilization. however, over that objection the 1985 t meeting adopted another definition traditional and folk popular culture; is group oriented and tradition based creation of groups or individual reflecting the expectation of the community as an adequate expression of its cultural and social identity; its standards transmitted orally, by imitation or by other means; its forms include among other languages literature, music dance, games mythology rituals, customs, hand crafts, architecture, and other arts. e

<sup>3</sup> ibid

<sup>4</sup> ibid

### 3. Research Methodology

This paper done based on doctrinal legal research. Analysis the primary data such as existing law, national laws and international convention was done. The information has been gathered from books, internet, articles, journals, official documents and web sites. It also use the proposals<sup>5</sup> made by developing countries in several international fora with respect to the protection of traditional cultural expression.<sup>6</sup> Moreover, some land mark cases of clear violation of TCE were carefully examined.

### 4. The debate on protection of TCE

Among other factors one key factor in the debate over protecting traditional knowledge its economic benefits. Traditional knowledge has been a topic of contention between North and South over ownership and control of resources in relation to this issue.<sup>7</sup> The debate also centres on the conflict between a communitarian, gift-based culture and the development of a market culture.<sup>8</sup> According to experts on the subject, there are three views to the traditional knowledge dispute over how and to whom the rights should be distributed. These sides include public domain, appropriation, and moral rights.<sup>9</sup> In order for traditional knowledge to be shared by all groups within a global community, public domain position proponents advocate keeping it in the public domain<sup>10</sup>. So, in order to maintain control over the use of traditional knowledge, supporters of this position support old social structures and oppose the commoditization of traditional knowledge. They disagree with each other because they believe that granting traditional knowledge intellectual property rights (IPR) will harm the institution and the way that traditional knowledge has always been organized.<sup>11</sup> Supporters of the appropriation viewpoint, in contrast to public domain proponents, called for a single institution or organization to have exclusive ownership of traditional knowledge and to decide how to utilize it for profit and other reasons. They contend that traditional knowledge ought to be sold and advertised as far as possible. In order to decide how and who is allowed to exploit traditional knowledge, supporters of this viewpoint believe that intellectual property law is crucial<sup>12</sup>. This position's presence has led global corporations to utilise traditional knowledge. Thus, traditional knowledge must be safeguarded for three major reasons: first, to enhance the quality of life for traditional knowledge holders and their communities; second, to strengthen national economies; and third, to prevent traditional knowledge from being inappropriately used. Though there is no agreement on the protection of TCE, the majority of international community supported for the protection of it. Among the justification for protection of TCE the followings are the main reason. These justifications are; to better the lives of traditional knowledge holders and communities; strengthen national economies; and guard against the exploitation of traditional

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<sup>5</sup> Proposal made by various fora are categorised into two; these are positive and defensive protection. defensive protection disclosure of origin requirement into patent law to assure a fair participation by the holders of TK in any benefits arising from the commercialisation of their knowledge and establishment of TK prior art databases. Defensive protection legal systems for protecting knowledge and intellectual works tend to operate as either property regimes, liability regimes, or as combined systems containing elements of both.

<sup>6</sup> the issue of protection of TCE raised at various international forum like world trade organization, world intellectual property organization, convention on biological diversity (CBD)

<sup>7</sup> Dewi Avilia( ) traditional knowledge database: a defensive measure against traditional knowledge cross border misappropriation LLM thesis

<sup>8</sup> Ghosh S, (2003) "Reflections on the Traditional Knowledge Debate" 11 *Cardozo J. Int'l & Comp. L.* 497

<sup>9</sup> ibid

<sup>10</sup> ibid

<sup>11</sup> ibid

<sup>12</sup> ibid

knowledge. By considering the following facts, one can understand the significance of traditional knowledge. Around 90% of the world's poorest people (more than half of the population, including indigenous and local populations), rely on the direct use of biological resources (and related traditional knowledge) for food, medicine, and shelter.<sup>13</sup> On their indigenous technical knowledge their way of doing this knowledge were take place according their world view and traditional cultural expression. In addition to protect knowledge holder and national economy the other justification for protection of TCE is to avoid misappropriation.

## **5. Attempt to protect TCE by modern Law**

High-level debate has been taking place at the World Intellectual Property Organization (WIPO) and the Conference of the Parties (COP) to the CBD in recent years. These debate aim, among other things, to explore ways to make the IPR system and the CBD's provisions on access to traditional knowledge and effort to protect TCE under International genetic resources and benefit sharing more mutually supportive. For this reason various attempt has been made both at national and international level.

### **5.1. Protection sought at international level**

At international level various efforts for protection of has been made for the protection of TCE. Among these the researcher selected few of them for the purpose of this paper. These are; the Bern convention, Convention on biological diversity, Rome, Phonograms and Satellites Conventions for an indirect Protection of certain Expressions of Folklore, TRIPS Agreement and World intellectual property Organization (WIPO)

#### **5.1.1. Protection under Bern Convention**

TCE copyright protection was attempted to be implemented on a global scale during the 1967 Stockholm Diplomatic Conference for revision of the Berne Convention. As a result, Article 15(4) of the Stockholm and Paris (1971) Acts of the Berne Convention contains the following provision: "(a) In the case of unpublished works where the identity of the author is unknown, but there is a very reason to believe that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce this right.<sup>14</sup> (b) Countries of the Union making such a designation in accordance with the terms of this article shall notify the Director General of WIPO by means of a written declaration providing full information regarding the designated body. As soon as possible, the Director General should inform the other Union nations of this pronouncement. According to the goals of the revision conference, this article of the Berne Convention suggests that Traditional cultural expressions may be given legal protection.<sup>15</sup>

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<sup>13</sup> Ruiz, Manuel, (2002)The International Debate on Traditional Knowledge as Prior Art in The Patent System: Issues and Options For Developing Countries, Centre For International Environmental Law. Para 10

<sup>14</sup> Bern Convention 19

<sup>15</sup> ibid

### 5.1.2. Rome, Phonograms and Satellites Conventions for an indirect Protection of certain Expressions of Folklore

TCE fall into a number of categories, many of them may be protected by copyright-style laws but in unique ways. Some of them, especially the creations of folk art (drawings, paintings, carvings, sculptures, pottery, terra-cotta, mosaic, woodwork, metal ware, jewellery, textiles, carpets, etc.), plainly cannot benefit from indirect protection through "neighbouring rights."

However, neighbouring rights can be employed as a pretty effective kind of indirect protection in the case of many other significant types of traditional cultural expressions. TCE, folk poetry, folk music, songs, instrumental folk music, folk dances, dramas, and other comparable manifestations genuinely exist in the form of regular performances. As a result, if the protection of performers is extended to include those who perform these forms of TCE, as it is the situation in many nations, then these forms of TCE performances also benefit from protection. The same can be said for the protection of the rights of phonogram producers and broadcasting organizations with regard to the phonograms and broadcasts that they make that, respectively, contain such performances. Being that what are protected are not the manifestations of TCE itself, such protection is indirect. "Neighbouring rights" do not shield TCE from unauthorized public performance, fixation in phonograms, reproduction, broadcasting, or other public communication. Therefore, the Rome, Phonograms, and Satellites Conventions do not provide any protection against foreigners performing, recording, broadcasting, etc. national TCE. However, folklore expressions are typically performed by members of the community in the nation where they originated. If the performances of such performers and the phonograms and broadcasts that embody their performances enjoy the proper protection, this offers a rather effective method for an indirect protection of folkloric expression, that is, protection in the form in which they are really made available to the public. In general, the Rome, Phonograms, and Satellite Conventions provide a suitable foundation for such an indirect form of international protection. The Rome and Phonograms Conventions' definition of "phonograms" is sufficiently inclusive and explicitly includes phonograms that represent performances of folkloric idioms. The Rome Convention's definitions of "broadcasting" and "broadcast" also include the transmission of artistic sounds, or of images and sounds, including, of course, sounds, or of images and sounds, of performances of folklore expressions. Additionally, the term "program-carrying signals" as used in the Satellites Convention is sufficiently neutral and inclusive of all program types. Interestingly, and regrettably, there is a small issue with the Rome Convention's definition of the term "performers" and the idea of "performances," which derives indirectly from the phrase "performers." The term "performers" refers to individuals who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works, as was previously stated in accordance with Article 3(a) of the Rome Convention. The concept of literary and creative works as a whole does not apply to folklore expressions, as was previously discussed. As a result, it appears that performers who present folkloric expressions do not fall within the relatively caustic and restrictive definition of "performers" in the Rome Convention. However, the unfortunate Rome Convention definition of "performers" does not exclude the use of "neighbouring rights" to provide performers of folkloric expressions with global protection. The minimum level of protection is exclusively determined by the definition. In accordance with the principles of national treatment, international performers are also protected if national laws define "performers"—as many of them do—in a more comprehensive and flexible way to include performers of folkloric expressions. The Rome Convention's Article 9 provision, which states that "[any Contracting State may, by its domestic laws and regulations, extend the protection provided in this

Convention to artists who do not perform literary or artistic works," reaffirms the fact that the scope of application of the Rome Convention and, consequently, the obligation to grant national treatment, extends to the rights of all performers covered by such more general and flexible definitions. There is increasing consensus on a global scale that folkloric performers should also be covered under the protection of performers. In the memorandum issued by the International Bureau of WIPO for the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms<sup>16</sup>, this agreement was referenced in paragraphs 17 and 28(a).

### 5.1.3. Protection of TCE by TRIPS Agreement

The first intellectual property regulations entered the multilateral trading system through the WTO's agreement on trade-related aspects of intellectual property rights (TRIPS) negotiated in the 1986–1994 Uruguay Round.<sup>17</sup> Recognizing the value of knowledge and concepts in trade is the justification underlying the TRIPS Agreement. The amount of ingenuity, invention, research, design, and testing that goes into new pharmaceuticals and other high-tech items is what gives them most of their worth.<sup>18</sup> Books, computer software, movies, music, and online services are all valued for their creativity and information rather than the plastic, metal, or paper that went into their creation.<sup>19</sup> Many items that were once considered low-tech goods or commodities, such as designer apparel or novel plant kinds, now have a bigger amount of invention and design in their worth.<sup>20</sup> Traditional knowledge is neither protected by the TRIPS Agreement nor is it acknowledged as previous art, although this has changed in a way that makes it possible to remedy these problems. The Doha Declaration has elevated the conversation around traditional knowledge for a number of reasons. First off, many nations have come to the realization that they have not benefited greatly from their "traditional" types of intellectual property, despite the fact that they are now wealthy in this information, particularly genetic resources and folklore. Second, indigenous people are gaining political clout in a number of nations. Pharmaceutical and biotech firms are also looking into how to use plants, other resources, and traditional medical knowledge that are frequently present in underdeveloped nations.<sup>21</sup> The Doha Declaration's acknowledgement of the significance of intellectual property protection for the development of novel medications and its expression of worry over their price-related impacts are its key takeaways<sup>22</sup>. The declaration states that it is necessary to "examine, among other things, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1."<sup>23</sup>

<sup>16</sup> WIPO document INR/CE/1/2

<sup>17</sup> Understanding the WTO: The Agreements; Intellectual Property: Protection and Enforcement [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm).

<sup>18</sup> *Ibid*

<sup>19</sup> *ibid*

<sup>20</sup> *ibid*

<sup>21</sup> Gervais, Daniel J, (2005) Intellectual Property, Trade and Development: The State of Play, Fordham L. Rev 505, , p. 514.

<sup>22</sup> [http://www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_trips\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm)

<sup>23</sup> The Convention on Biological Diversity, access to genetic resources and IPR, Yovana Reyes Tagle University of Helsinki

## 5.2. Under modern Ethiopian IPRs Laws

Under Ethiopia IP regime we cannot clearly find the protection of traditional cultural expression. However, some scholars argue that TCE can be protected under various existing IPRs laws. Therefore, let us test whether the existing law is adequate to protect folkloric expression.

### 5.2.1. Examining protection TCE under copyright

Copyright is a set of specific right given to creator of dramatic, literary, artistic, or musical works and the maker of sound recording, films and audio recording.<sup>24</sup> Folkloric expression that needs protection in Ethiopia can be categorized into four parts. these are; first, Verbal expressions, such as names, stories, chants, epics, legends, poetry, riddles, and other narratives, histories, words, signs, indications and symbols;<sup>25</sup> second, Musical expressions, such as songs and instrumental music;<sup>26</sup> third; Expressions by actions, such as dances, plays, ceremonies, rituals and other performances, whether or not reduced to a material form<sup>27</sup>; and fourth, Tangible expressions, such as drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewellery, basket, needle work, weaving, textiles, glassware, carpets, costumes, handicrafts, musical instruments and architectural forms.<sup>28</sup>

Under the current Ethiopian copy right proclamation no clear reference made for protection of traditional cultural expression. What matters is not only the absence of incorporation of the term TCE in the proclamation but how the unique nature of TCE is recognized is crucial. Even though, no concept of folkloric expression incorporated in proclamation, the law can protect where other requirement is fulfilled as protection in TCE is sought in Milpururu case<sup>29</sup>. There are situation where copyrightable works such craft, design, sculpture and drawing as artistic work protected under copy right law.<sup>30</sup> According to the proclamation the author the work should be a person which is different from TCE which is ownership of the community which is handed down from generation to generation orally.<sup>31</sup> Under the current Ethiopia copyright law a work to be protected under this law must fulfil various requirements. These are Originality requirement, fixation requirement known author requirement, the owner of the work requirement, and duration of the protected work under copyright law. Firstly, an originality criterion requires the work must be original. This means the creation should not be copied from other works and the creator has exerted some degree of skill, labour and judgement to produce the work that is important to benefit humanity.<sup>32</sup> However, when we come to Traditional cultural expression it is not original since it inherited from ancestors and it is result of pre existing clan design, painting , dancing, and ceremonies and legend that handed from generation to generation so it is not qualified to be granted protection by the current Ethiopia copyright and neighbouring right law. However, in (Milpururu vs indofurn) case the Australia high court decided though the work based on the

<sup>24</sup> Terry Janke

<sup>25</sup> <https://www.abyssinialaw.com/blog/exploring-the-protection-for-tibeb-patterns-under-ethiopian-law-are-tibeb-patterns-works-of-applied-art-or-traditional-cultural-expressions> accessed on August 18,2023

<sup>26</sup> ibid

<sup>27</sup> ibid

<sup>28</sup> ibid

<sup>29</sup> According Paul Karuk, when the work original, fixed, the author is known though the concept traditional cultural expression incorporated in the proclamation it can be protected by copyright law.

<sup>30</sup> ibid

<sup>31</sup> copyright and Neighbouring protection proclamation , a proclamation no 410/2004 Negarit gazettaa of Federal democratic republic of Ethiopia , 10<sup>th</sup> year no. 55 Addis Ababa Ethiopia art 3(2) and 2(16)

<sup>32</sup> Terry JANke p 55

already existing the evidence was to prove the artistic interpretation of the work is has to be protected. Secondly, with regard to fixation requirement, to be granted protection the author must write down or must be recorded in some permanent tangible form. Non permanent forms of traditional cultural expressions such as performance of stories, song and dances do not meet the core principal requirement of material form that a must for material that is a must for obtaining protection by copyright proclamation. Thus, indigenous community traditional cultural expression cannot qualify protection. Thirdly, the requirement for known author, under the current Ethiopia copyright proclamation to be granted copyright protection the author the work must be known.<sup>33</sup> However, in almost all cases the author of many traditional cultural expressions is unknown. For instance architectural design of Aksum obelisk, Lalibela rock hewn church which is amazing architectural design is not known hence according to the proclamation copyright cannot be granted. Moreover, the Ethiopian traditional music, traditional dance, myth, confidential oral tradition cannot be granted copyright protection. Anyone can misappropriate the record using advanced technology and reproduce as they wish against the Ethiopian indigenous community wish.

Fourthly, the requirement is copyright is not for eternity. It will be granted protection for limited period of time.<sup>34</sup> in the modern intellectual protection period of limitation given for longer period to encourage literary, artistic and musical production work guarantee the economic return, such work fall into public domain after expiry of the given period of limitation. This justification does not apply for indigenous communities' traditional cultural expression because this works are culturally, significant indefinitely. For instance copyright does not protect image depicted in the rock, painting that have been in existence since time of immemorial is not protected under copyright law despite the image is part of cultural heritage. Since traditional cultural expression of Ethiopian indigenous community is part of their identity limiting such knowledge by period of limitation is equal to limiting continuation of indigenous community identity as community. Protecting Traditional cultural expression is impossible. Therefore, there must be another alternative to protect it.

### 5.2.2. Toward sui generis protection of TCE in Ethiopia

As we have tried to discuss above whether at national or international level modern law is inadequate to protect indigenous traditional cultural expression its public domain character and other issues.<sup>35</sup> Hence, the next question is what the fate of indigenous knowledge system is. The protection of traditional knowledge may be seen as not only an intellectual property issue, but also as a trade and human rights issue. Despite, the inadequacy of the existing intellectual property protection of Indigenous traditional cultural expression is justified by a number of reasons. Firstly, it is to protect culture, heritage and dignity of indigenous community affected by misappropriation of their knowledge system.<sup>36</sup> Secondly, it is ascertain economic benefit from their knowledge system. Thirdly, it is crucial for cultural development. Despite parallels to intellectual property rights, TCE is created, owned, and used

<sup>33</sup> Art 2(16) of the copyright proclamation

<sup>34</sup> Art 201(1a) of the copyright proclamation

<sup>35</sup> Ping Xiong ( ) Traditional Knowledge and Intellectual Property Protection – The Endeavour Of Niue

<sup>36</sup> J. Janewa OseiTutu ( ) Emerging Scholars Series: A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law, University of Pittsburgh School of Law, Marquette Intellectual property law review volume 15, issue 1 available at <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1169&context=iplr> accessed on July 26, 2023



differently, which is the basis for the case for adopting a separate legal instrument.<sup>37</sup> Contrary to intellectual property, TCE is meant to be used by all people rather than to provide financial rewards to individual inventors. Therefore, it is pointless to attempt to incorporate TCE within the tightness of national intellectual property law.<sup>38</sup> In order to give effect to the protection of traditional community's inherent right to safeguard its interests from unfair exploitation, unique legal regime is necessary if the uniqueness of TCE cannot be adequately accommodated under contemporary intellectual property concepts.<sup>39</sup> If developing countries have gradually come to understand the wisdom of upholding developed countries' intellectual property rights at great economic cost,<sup>40</sup> it is only fair that developed countries do the same for issues that directly affect developing countries.<sup>41</sup> Based on this, wealthy nations ought to commit to safeguarding traditional cultural expression even in cases where they do not directly gain or incur harm. Even if new agreements regarding TCE would entail a break from some long-standing intellectual property principles, for African in general and for Ethiopia in particular, it would not be as dramatic as anticipated because they have already made great strides in the protection of traditional cultural expression.

## 6. Conclusion

The debate over the protection of TCE within IP regime at international level is began at Stockholm diplomatic conference in 1967 which was aimed revision of the burn convention. At this conference, thou the delegation of states raised the inclusion of protection of TCE in the Bern convention, the proposal for the inclusion of the same was rejected at that time. From this time onwards, the controversy , the current trends calls for the coming into force of new legal regime for the protection TCE even if the protection of it by sui generis is considered as premature by developing nation. The agreement to protect TCE at international level is not reached yet, two potential ways by which TCE can be protected is identified from debate so far conducted i,e defensive protection and positive protection. while defensive protection emphasize on the value of patent system in protecting traditional knowledge through the disclosure of origin and the establishment of sui generis law in protection of TCE. Even though the disclosure of for the protection of TCE is going ahead starting from Stockholm diplomatic conference, finally, the protection of TCE is justified on the following three points though very late. The first justification for protection of TCE relates to cultural integrity of indigenous community who are the custodian of those TCE work and to prevent the loss of their identity since some TCE works are strictly attached to their cultural heritage. The second justification for protection of TCE is to avoid unjust exploitation of TCE of indigenous community. The research thesis has discussed the current controversy regarding the protection of TCE and problems of protecting TCE under modern IP laws. Though, there is similarity between TCE and IP, TCE is to be protected by sui generis laws. Unlike other intellectual properties which confer TCE exclusive short term right to individuals. Instead it recognizes communal right which can exist for indefinite period of time together with the community concerned. Accordingly this article has clearly, indicated the need to have comprehensive, unique legal

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<sup>37</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

<sup>38</sup> ibid

<sup>39</sup> ibid

<sup>40</sup> ibid

<sup>41</sup> ibid

regime for the protection of TCE. Even though international treaties has great role for protection of TCE, it is not effective as such due to the fact that developed nation view TCE as public domain. Interestingly, there some promising good beginning for the protection TCE even at international level. In the first place, there some clues indirectly, incorporated in the international instrument concerning the protection of TCE; only, to mention few, in the Bern convention the work of unknown person, when the author is presumed national of one of the member states. There is also another indication of provided under art 27(3) of the TRIS agreement which states that concerning indigenous knowledge in biodiversity sui generis system will be developed. There is some indication of to the effect that in the absence of any protection for the TCE under current IP Law regime having sui generis law that protects creative works is imperative.

Being convinced on inadequacy of the current IP regimes, the WIPO began to find adequate solution for protection of TCE. Having, recognized in adequacy of existing IP regime to protect indigenous TCE they took various measures for protection of indigenous knowledge system.

Generally, the in this research the effort to diagnosis whether the Ethiopian IP regime protect TCE is shown to be in adequate. Under copyright proclamation a number of requirements create obstacle for its protection. For instance, TCE does not meet the originality and fixation requirement. Moreover, impossibility to identify the author of the work the work, the absurdity to set duration of the protection as well as difficulties of indentifying the owner of creative works are also among the prohibitive requirements. Since all this requirements lacks from TCE it can't be qualify for the protection of under the current IP regime. Beside these, TCE is not fixed, it is orally transmitted from generation to generation, as a result it is not illegible for protection under the current IP regime. In the same token TCE can't fulfil the originality requirement; for it has been imitated from what ancestors had been practicing. From the perspective of the period of limitation it is also difficult to provide period of limitation for TCE, since it closely, attached to the concerned communities identity and the way of life which is absurd to limit it by time. As far as author and ownership is concerned it is difficult to protect TCE due the fact that folk art passes from generation to generation rendering identification of author and owners is almost impossible. Hence when we look at the existing Ethiopian legal regime since is directly copied from western intellectual property law it is generally inadequate to protect TCE in Ethiopia. Therefore, depending on the above analysis it is rightful time for Ethiopian to have sui generis legal regime for protection of TCE.

### **Recommendation**

- The government has to take immediate measures to protect TCE of Ethiopia indigenous community such as images , music, costumes, dances, painting, design, sculpture, and ways of life by enacting sui generis to ensure TCE belonging to certain Ethiopian ethnic groups are protected which lays foundation to develop their culture and benefit them from commercialization of their way of life.
- During an attempt to design legal regime that protect TCE the government must pay due attention to the unique nature of folk arts. In the first place, there, should be identification of folk expression which are creative artistic work but, denied protection under the current IP regime due their nature.
- Before, legislating new sui generis law that regulate TCE/ folk arts the government must make sure the concerned indigenous community whose traditional folk art is going to be protected will participate and contribute their opinion.

- The requirement recognized under IP law for protecting a work such as fixation, authorship, ownership, period of limitation, exception to exclusive ownership, should be clearly addressed. The requirement for protection of contemporary IP has to be avoided.
- An indigenous law which has been practice for protection their sacred knowledge must be acknowledge and incorporated in the law.
- All indigenous cultural expression n must be identified and documented to encourage in the future creativity inspired by indigenous knowledge. Secret and sacred folk arts must be kept secret and should be given recognition to be utilized according to customary laws of the concerned indigenous community.
- The communal ownership of indigenous of Ethiopian over their TCE should be recognized. Securing prior consent of the community concerned or the organ to be established to administer the same should be made condition president for commercial of TCE by non indigenous people or community. Even with prior authorization the use by the concerned organ must be subject to payment of prescribed fees. The fees collected from such service should be inter alia be used to improve the life of the community from the work subject to payment originates.
- The government must enact laws that acknowledge TCE is not the memory of the past but living and still developing tradition which has great role in designing various national policies including development policy.

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