

Unravelling the Tapestry of Copyright Protection of Indigenous Woven Art

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I. INTRODUCTION

At first glance, a *Ga'mong* appears to be a piece of woven textile “lined with red and black at the borders, with two middle pieces spun in black and white, and various symbols woven in between.”¹ People have mistakenly treated it as an accent piece, table cloth, bed cover, or wall hanging.² Others

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1. Anna Bueno, Do we give proper credit to the creators of our indigenous textiles?, *available at* <http://cnnphilippines.com/life/culture/2017/10/02/indigenous-textile-cultural-appropriation.html> (last accessed May 4, 2018).
2. Ambeth R. Ocampo, *History and Design in Death Blankets*, PHIL. DAILY INQ., Oct. 19, 2011, *available at* <http://opinion.inquirer.net/15599/history-and-design-in-death-blankets> (last accessed May 4, 2018).

have used the textile in contemporary fashion.³ Little do they know, a *Ga'mong* is a death blanket lain over the deceased.⁴ It is part of a practice deeply embedded in Ifugao culture, an Indigenous Cultural Community (ICC) in the Philippines.⁵ The woven patterns, often of “stylized human figures, snakes[,] and lizards[,]”⁶ allow a lost soul’s ancestors to locate and reunite him or her with other deceased family members.⁷

The same treatment has befallen the *T’nalak*, a T’boli woven fabric that represents “birth, life, union in marriage[,] and death.”⁸ The patterns depict symbols inspired by the environment.⁹ The T’boli “believe that the patterns are bestowed on them through [] dreams of their own, [or dreams] from their ancestors, [or dreams] granted specially through Fu Dalu, the spirit of the abaca.”¹⁰ The once-sacred fabric created by the T’boli “dream weavers” is now used for bags, handicrafts, and other commercial items sold locally in the Philippines or exported to Japan and parts of Europe.¹¹

These are but examples of the failure to look beyond indigenous woven fabrics and to understand their underlying meanings within the context of a particular ICC’s culture.

The Philippines is home to around 110 ethno-linguistic ICCs.¹² They are “distinct groups of people with a continuity of existence or identity

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3. Steph Sison, *Here’s Why You Should Be Mindful of the Indigenous Fabrics You Wear*, available at <https://www.preview.ph/fashion/cultural-appropriation-local-weavers-indigenous-fabrics-a00191-20171005> (last accessed May 4, 2018).
 4. Bueno, *supra* note 1.
 5. *Id.*
 6. Ocampo, *supra* note 2.
 7. Sison, *supra* note 3.
 8. One Weave, One Dream, *The History*, available at <http://www.one-weave.org/tnalak-history/> (last accessed May 4, 2018) [hereinafter *History*].
 9. One Weave, One Dream, *The Patterns*, available at <http://www.one-weave.org/the-tnalak-patterns/> (last accessed May 4, 2018).
 10. *History*, *supra* note 8.
 11. Carmencita A. Carillo, *Lake Sebu’s weavers seek IP protection for designs*, BUSINESSWORLD, May 29, 2015, available at <http://www.bworldonline.com/content.php?section=Economy&title=lake-sebu&8217s-weavers-seek-ip-protection-for-designs&id=108749> (last accessed May 4, 2018).
 12. United Nations Development Program Philippines, *Fast Facts: Indigenous Peoples in the Philippines*, available at <http://www.ph.undp.org/content>

tracing their roots to the tribes or nations of their ancestral past.”¹³ Each ICC has its own unique woven fabrics which differ in designs, patterns, and colors.¹⁴ Apart from the *Ga'mong* of the Ifugao, and the *T'nalak* of the T'boli, these fabrics include the *Inabal* (Bagobo), *Inabu* (Manobo), *Mabuel* (B'laan), *Habulan* (Higaonon), *Abel Iloko* (Ilocos), *Pifia* and *Rafia* (Aklan), and *Sinamay* (Bicol).¹⁵

Weaving is considered more than a traditional art form; it is an expression of identity as an ICC.¹⁶ Woven textiles are rooted in and representative of an ICC's distinct cultural “heritage, customs, practices, and belief systems.”¹⁷ The “spiritual, symbolic, and sacred”¹⁸ expression highlights how their historical and religious beliefs are passed on, shared, and preserved through art.¹⁹

The onslaught of technology poses challenges for woven textiles and other forms of indigenous art. It appears that technology greatly contributed to the proliferation of Indigenous Peoples' works by increasing awareness of the art's existence and accessibility to the public.²⁰ However, awareness and accessibility likewise introduced the danger of reducing the works — and their cultural heritage — into mere commodities. This often leads to misappropriation of indigenous works, albeit unwittingly, to the abuse of the rights of, and to the detriment of, Indigenous Peoples.

/philippines/en/home/library/democratic_governance/FastFacts-IPs.html (last accessed May 4, 2018).

13. Sedfrey M. Candelaria, *The Rights of Indigenous Communities in International Law: Some Implications under Philippine Municipal Law*, 46 ATENEO L.J. 273, 274 (2001).
14. Olympio V. Caparas, et al., *Handicrafts and Folkcrafts Industries in the Philippines: Their Socio-Cultural and Economic Context*, 2 SPAFA J. 22, 22 (1992).
15. Senate of the Philippines, Poe: Protect Indigenous Weaving, available at http://www.senate.gov.ph/press_release/2015/1114_poe1.asp (last accessed May 4, 2018).
16. Purrisima Benitez-Johannot, *Foreword to HABI: A JOURNEY THROUGH PHILIPPINE HANDWOVEN TEXTILES* (2017).
17. Bobby Guingona, Habi: Reviving the Lost Art of Philippine Weaving, available at <https://angbuhaylokal.com/blog/habi-philippine-weaving> (last accessed May 4, 2018).
18. Benitez-Johannot, *supra* note 16.
19. Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer*, 30 CONN. L. REV. 1, 9 (1997).
20. Caparas et al., *supra* note 14, at 24.

This Article shall focus on technology's appropriation of copyright-protected weaving designs of Filipino Indigenous Peoples in the context of relevant Philippine laws. It seeks to examine how technology has aided the commodification of Indigenous Peoples' cultural heritage, and how intellectual property (IP) laws, particularly copyright, may contribute to the preservation of the value of Indigenous Peoples' works. The discussion shall not delve into other IP laws, contract laws, human rights laws, and international laws and declarations, and the implementation of laws.

Part II shall briefly discuss relevant Philippine laws on the related rights of Indigenous Peoples, such as the 1987 Philippine Constitution and The Indigenous Peoples' Rights Act of 1997 (IPRA).²¹ Part III shall address the commodification and technologically-aided appropriation of indigenous woven fabrics, examine copyright protection and rights under the copyright law provisions of the Philippines, and study the insufficiency of copyright protection to safeguard the rights of ICCs over woven textiles and other indigenous knowledge. Part IV shall inquire as to whether other means of legal protection are more beneficial to preserve Indigenous Peoples' cultural heritage.

II. RELATED INDIGENOUS PEOPLES' RIGHTS UNDER RELEVANT PHILIPPINE LAW

A. 1987 Philippine Constitution

The rights of Indigenous Peoples under Philippine law are enshrined in the Constitution and the IPRA. The Constitution, the "basic and paramount law to which all other laws must conform and to which all persons, including the highest officials of the land, must defer[,]"²² provides for the fundamental rights specifically granted to Indigenous Peoples.

Article II, the Declaration of State Principles and Policies, includes basic ideologies that shed light on the meaning of the Constitution and other

21. An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes [The Indigenous Peoples' Rights Act of 1997], Republic Act No. 8371 (1997).

22. *Biraogo v. Philippine Truth Commission* of 2010, 637 SCRA 78, 137 (2010).

laws.²³ Section 22 therein provides the State policy of upholding the rights of ICCs, to wit —

Section 22. The State recognizes and promotes the rights of [ICCs] within the framework of national unity and development.²⁴

Article XII, on National Economy and Patrimony, elaborates on the recognition of Indigenous Peoples' rights, particularly on their ancestral domains, thus —

Section 5. The State, subject to the provisions of this Constitution and national development policies and programs, shall protect the rights of [ICCs] to their ancestral lands to ensure their economic, social, and cultural well-being.

The Congress may provide for the applicability of customary laws governing property rights or relations in determining the ownership and extent of ancestral domain.²⁵

Article XIV, on Education, Science and Technology, Arts, Culture, and Sports, highlights the significance of preserving and developing IPs' cultures and traditions in this wise —

Section 17. The State shall recognize, respect, and protect the rights of [ICCs] to preserve and develop their cultures, traditions, and institutions. It shall consider these rights in the formulation of national plans and policies.²⁶

Article XVI, on General Provisions, authorizes Congress to create an advisory “consultative body” composed of members of ICCs to develop relevant policies as follows —

Section 12. The Congress may create a consultative body to advise the President on policies affecting [ICCs], the majority of the members of which shall come from such communities.²⁷

The above provisions espouse the overriding significance of ICCs in Philippine culture. Indigenous Peoples' “histories and cultures” play an essential role in “the evolution of Philippine culture and are vital to the

23. JOAQUIN G. BERNAS, S.J., *THE 1987 PHILIPPINE CONSTITUTION: A COMPREHENSIVE PRIMER* 8 (2011 ed.).

24. PHIL. CONST. art. II, § 22.

25. PHIL. CONST. art. XII, § 5.

26. PHIL. CONST. art. XIV, § 17.

27. PHIL. CONST. art. XVI, § 12.

understanding of contemporary problems.”²⁸ As a result, these provisions “bec[a]me the cornerstones for the [IPRA],”²⁹ which was enacted “to insure the right of Indigenous Peoples to preserve their way of life”³⁰ and “to enforce and guarantee the realization of [their] rights[.]”³¹

B. The Indigenous Peoples’ Rights Act of 1997

Ten years after the promulgation of the Constitution, the IPRA came to fruition as the primary legislation for the protection of Indigenous Peoples’ rights. It champions the Indigenous Peoples’ right to ancestral domain over areas with which they possess “spiritual and cultural bonds[.]”³² and serves as “material bases of their cultural integrity.”³³ It upholds their right to self-governance and empowerment, with the notion of “respect[ing] the integrity of their values, practices[,] and institutions[.]”³⁴ and “freely pursu[ing] their economic, social[,] and cultural development.”³⁵ It likewise includes provisions on Social Justice and Human Rights.³⁶

The IPRA recognizes the value of the cultural identity of Indigenous Peoples. The provisions on cultural integrity acknowledge the unique cultures and traditions of ICCs, and highlight the significance of protecting and respecting these differences.³⁷

Section 29 enunciates the importance of taking the Indigenous Peoples’ cultures and traditions into consideration in the development of national-level plans and policies.³⁸ It provides —

Section 29. Protection of Indigenous Culture, Traditions[,] and Institutions.
— The State shall *respect, recognize[,] and protect the right of ICCs/[Indigenous Peoples] to preserve and protect their culture, traditions[,] and institutions.* It shall

28. *Cruz v. Secretary of Environment and Natural Resources*, 347 SCRA 128, 241 (2000).

29. *Candelaria*, *supra* note 13, at 314.

30. *Cruz*, 347 SCRA at 187 (emphasis omitted).

31. The Indigenous Peoples’ Rights Act of 1997, § 2 (f).

32. *Id.* § 4.

33. *Id.* § 5.

34. *Id.* § 13.

35. *Id.*

36. *Id.* §§ 21–28.

37. *See* The Indigenous Peoples’ Rights Act of 1997, §§ 29–37.

38. *Id.* § 29.

consider these rights in the formulation and application of national plans and policies.³⁹

Section 31 recognizes cultural diversity and ensures that such recognition is observed in different aspects of society.⁴⁰ It states —

Section 31. Recognition of Cultural Diversity. — The State shall endeavor to have the *dignity and diversity of the cultures, traditions, histories[,] and aspirations of the ICCs/[Indigenous Peoples]* appropriately reflected in all forms of education, public information[,] and cultural-educational exchange. Consequently, the State shall take effective measures, in consultation with ICCs/[Indigenous Peoples] concerned, *to eliminate prejudice and discrimination and to promote tolerance, understanding[,] and good relations among ICCs/[Indigenous Peoples] and all segments of society.* Furthermore, the Government shall take effective measures to ensure that the State-owned media duly reflect indigenous cultural diversity. The State shall likewise ensure the participation of appropriate indigenous leaders in schools, communities[,] and international cooperative undertakings like festivals, conferences, seminars[,] and workshops to promote and enhance their distinctive heritage and values.⁴¹

Notably, Section 32 promotes communal intellectual rights over Indigenous Peoples’ “cultural traditions and customs[,]”⁴² as opposed to the notion of individual authorship, to wit —

Section 32. Community Intellectual Rights. — ICCs/[Indigenous Peoples] have the *right to practice and revitalize their own cultural traditions and customs.* The State shall *preserve, protect[,] and develop the past, present[,] and future manifestations of their cultures* as well as the right to the restitution of cultural, intellectual, religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions[,] and customs.⁴³

Section 34 recognizes Indigenous Peoples’ ownership over “their cultural and intellectual rights[,]”⁴⁴ including their cultural manifestations and designs, as follows —

Section 34. Right to Indigenous Knowledge Systems and Practices and to Develop Sciences and Technologies. — *ICCs/[Indigenous Peoples] are entitled*

39. The Indigenous Peoples’ Rights Act of 1997, § 29 (emphasis supplied).

40. See The Indigenous Peoples’ Rights Act of 1997, § 31.

41. *Id.* § 31 (emphases supplied).

42. *Id.* § 32.

43. *Id.* (emphasis supplied).

44. *Id.* § 34.

*to the recognition of the full ownership and control and protection of their cultural and intellectual rights. They shall have the right to special measures to control, develop[,] and protect their sciences, technologies[,] and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of fauna and flora, oral traditions, literature, designs, and visual and performing arts.*⁴⁵

By virtue of the power granted under Article VI, Section 12 of the Constitution, the IPRA established the National Commission on Indigenous Peoples (NCIP)⁴⁶ to “protect and promote the interest and well-being of the ICCs[.]”⁴⁷ This government agency is tasked to extend government assistance to Indigenous Peoples,⁴⁸ to review their current conditions,⁴⁹ and to develop policies to promote their economic, social, and cultural development,⁵⁰ among others.

Undoubtedly, Indigenous Peoples enjoy ample protection of their rights under Philippine law. No less than the Constitution advocates the preservation and development of their diverse cultures and traditions. The IPRA advances the causes of ICCs by establishing rights to ancestral domain, self-governance, social justice and human rights, and cultural identity. These laws recognize the significance of uplifting the plight of Indigenous Peoples in enjoying their fundamental freedoms and protecting their cultural heritage.

III. COPYRIGHT PROTECTION OF INDIGENOUS PEOPLES’ WOVEN TEXTILES

Woven textiles provide “a glimpse of the culture and traditions” of ICCs.⁵¹ Intellectual and cultural works, including the art of weaving, are “living traditions” deeply embedded in their communal identity and cultural integrity.⁵² A concrete manifestation of their cultural heritage,⁵³ it is both a

45. *Id.* (emphases supplied).

46. The Indigenous Peoples’ Rights Act of 1997, §§ 38–50.

47. *Id.* § 39.

48. *Id.* § 44 (a).

49. *Id.* § 44 (b).

50. *Id.* § 44 (c).

51. Caparas et al., *supra* note 14, at 22.

52. MICHAEL A. BENGWAYAN, INTELLECTUAL AND CULTURAL PROPERTY RIGHTS OF INDIGENOUS AND TRIBAL PEOPLES IN ASIA 4 (2003).

representation of their self-identity,⁵⁴ and a connection with their group identity.⁵⁵ Their beliefs, knowledge, and histories are woven into intricate and symbolic patterns, which are passed on from generation to generation.⁵⁶

In consideration of how important and valuable weaving is for Indigenous Peoples, such form of indigenous and traditional knowledge and information is not freely shared with outside communities.⁵⁷ Kept within the confines of the particular ICC, the art representative of their cultural knowledge ideally “never enters the marketplace.”⁵⁸ Tradition and protection dictate that indigenous knowledge be shared only within their own culture, sometimes only with certain members,⁵⁹ because Indigenous Peoples “value the knowledge as part of their cultural identity.”⁶⁰ It is zealously guarded against outsiders.⁶¹ This is due to fear of appropriation “without permission, payment, recognition[,] or proper respect.”⁶²

Modernization, however, has posed a threat to ICCs by making art susceptible to commodification and appropriation.⁶³ The proliferation of technology has led to increased awareness and popularity of indigenous patterns and designs to a massive level.⁶⁴ On one hand, this resulted to a

53. *Id.* at 6.

54. Janet Blake, *On Defining the Cultural Heritage*, 49 INT’L & COMP. L.Q. 61, 77 (2000).

55. *Id.* at 84.

56. Irma De Obaldia, *Western Intellectual Property and Indigenous Cultures: The Case of the Panamanian Indigenous Intellectual Property Law*, 23 B.U. INT’L L.J. 337, 346 (2005).

57. Antonio G.M. La Viña, *Intellectual Property Rights and Indigenous Knowledge of Biodiversity in Asia*, 2 ASIA PAC. J. ENV’T L. 227, 232–33 (1997).

58. Jessica Myers Moran, *Legal Means for Protecting the Intangible Cultural Heritage of Indigenous People in a Post-Colonial World*, 12 HOLY CROSS J.L. & PUB. POL’Y 71, 80 (2008).

59. *Id.* at 74.

60. *Id.* at 80.

61. BENGWAYAN, *supra* note 52, at 4.

62. La Viña, *supra* note 57, at 234 (citing Janet McGowan & Iroka Udeinya, *Collecting Traditional Medicines in Nigeria: A Proposal for IPR Compensation*, in INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES: A SOURCEBOOK 60 (Thomas C. Greaves ed., 1994)).

63. See Angela R. Riley, *Straight Stealing: Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69 (2005).

64. *Id.* at 116.

positive and heightened interest in the cultures and practices of Indigenous Peoples. On the other hand, this negatively resulted to the sale of woven textiles for basic survival and technologically-aided appropriation. To aggravate the issue, ICCs rarely receive just compensation and attribution for their woven textiles and the use of their distinctive designs and patterns.

Weavers have been forced to commodify their sacred works by selling them to tourists and businesses. As per Marlon Martin, a champion of Ifugao culture, “[m]ost of [] [Ifugao] weavers weave so [that] they can have something to eat for the week.”⁶⁵ This shows how Indigenous Peoples have resorted to sacrificing their cultural heritage in order to survive daily life. In fact, the need to survive has led to weavers forsaking their cultural identity by omitting significant information regarding their works. This can be exemplified by the Ifugao’s sale of a death blanket to a curious tourist — “[The death blanket for example.] ‘*Yung magbebenta, [hindi] ka sasagutin na [hindi] pwede gamitin yan.*’ ... *Kung minsan, tawag ng pangangailangan.* (The sellers [would not] say [that] you [cannot] use a certain fabric. They need to sell [] [s]ometimes, out of their basic needs.)”⁶⁶ Another sad reality is, despite how hard Indigenous Peoples have labored over woven textiles, these are purchased by big businesses at low and, often, unfair prices. These businesses “siphon the profits of struggling [ICCs]” under the guise of promoting Filipino culture.⁶⁷ Unbeknownst to the public, the woven textiles are sold under consignment and weavers are paid only after a six-month period. This is a grave concern considering that weavers have already succumbed to commodifying their sacred weaves to survive, and yet have not received just remuneration for their hard work. Succinctly put, “*Ano na ‘yung nangyari sa weaver? Namatay na sa gutom, [hindi] [p]a nagbabayad [sic].* (What has happened to the weaver? The weaver has already died of hunger, and yet he or she has not received any payment.)”⁶⁸

Commodification of woven textiles likewise arose from cultural appropriation by means of technology. Technological advances have made appropriation easier by providing means for the unscrupulous consumer to bypass the ICCs themselves.⁶⁹ Gone are the days when outsiders would have to make an effort to learn the methods involved in creating patterns from members of ICCs. With the aid of technology, they can now simply copy

65. Sison, *supra* note 3.

66. *Id.*

67. *Id.*

68. Bueno, *supra* note 1.

69. Farley, *supra* note 19, at 7–8.

indigenous woven patterns and textiles from photographs readily available online. They can also use technology as a means of replicating and mass producing these designs into fabric without going through the handweaving process. These unauthorized reproductions result in “large-scale pirating of indigenous art for commercial gain ... [which is] a form of cultural theft.”⁷⁰ This is a mockery to ICCs because the weaving process usually involves sacred rites, which are rooted in their beliefs and cultural traditions. The act of misappropriation creates beautiful woven fabric that is devoid of any cultural significance. In effect, indigenous woven fabrics are exposed to risks because

[t]he very cultural heritage that gives Indigenous Peoples their identity, now far more than in the past, is under real or potential assault from those who would gather it up, strip away its honored meanings, convert it to a product, and sell it. Each time that happens[,] the heritage itself dies a little[,] and[,] with it[,] its people.⁷¹

Bereft of any control over the creation, reproduction, and distribution of their art, ICCs “cannot ensure that their work is reproduced in a way that maintains its integrity or the reputation of the creator.”⁷² This negative effect of commodification and indiscriminate appropriation arose from the misconception that traditional knowledge “do[es] not belong to anybody in particular and[,] therefore[,] must belong to everybody.”⁷³ Needless to say, corporations and consumers alike have failed to realize — or have deliberately chosen to ignore — the fact that indigenous woven fabrics enjoy protection under copyright law from the moment of creation.

A. Copyright Protection Under Philippine Law

The prevailing law on copyright protection in the Philippines is Republic Act No. 8293, as amended, or the Intellectual Property Code of the Philippines (IP Code).⁷⁴ Under the IP Code, a work is protected by

70. *Id.* at 8.

71. Moran, *supra* note 58, at 80 (citing Greaves, *supra* note 62, at ix).

72. Farley, *supra* note 19, at 8.

73. Obaldia, *supra* note 56, at 345.

74. An Act Prescribing the Intellectual Property Code and Establishing the Intellectual Property Office, Providing for its Powers and Functions, and for Other Purposes [INTELL. PROP. CODE], Republic Act No. 8293 (1996) (as amended).

copyright if it is an eligible subject matter, original, and fixed in a tangible medium.⁷⁵

Section 172.1 (g) of the IP Code includes a list of eligible subject matters, to wit —

Section 172. Literary and Artistic Works. —

172.1 Literary and artistic works, hereinafter referred to as ‘works’, are original *intellectual creations in the literary and artistic domain protected from the moment of their creation* and shall include in particular:

...

(g) Works of drawing, painting, architecture, sculpture, engraving, lithography[,] or *other works of art*; models or *designs for works of art*[.]⁷⁶

Indigenous woven fabrics are eligible subject matter of copyright protection as artistic works. The unique patterns and designs in the woven fabrics are also protected as designs for works of art. Taking the *T’nalak* of the T’boli as an example, the mental images inspired by their dreams are translated into concrete works of art—woven fabrics.

The same section likewise requires originality for works to be entitled to copyright protection. The Supreme Court held that a work is deemed original if it is “created by the author through his [or her] own skill, labor[,] and judgment, without directly copying or evasively imitating the work of another.”⁷⁷ In another case, it was decided that a work is original if it “evidences at least minimal creativity[,] that it was independently created by the author[,] and that it possesses at least [some] minimal degree of creativity.”⁷⁸ Under these standards, woven fabrics are considered original due to the creative efforts of the members of ICCs. However, only woven fabrics with patterns and designs unique to the creator are deemed original, because originality negates any direct copying and imitation. In the case of the *T’nalak*, the possible effect is that the originality requirement is satisfied only with respect to patterns and designs which a weaver has dreamt herself, and not to those which have been passed on from previous generations.⁷⁹

75. *Id.* § 172.

76. *Id.* § 172.1 (emphases supplied).

77. *Sambar v. Levi Strauss & Co.*, 378 SCRA 364, 374 (2002).

78. *Ching v. Salinas, Sr.*, 462 SCRA 241, 251-52 (2005).

79. Maria Ester Vanguardia-de Antoni, *Dreams for Sale: Traditional Cultural Expressions (TCEs) and Intellectual Property Rights of the Indigenous Pragmatic Group as Exemplified by the Dreamweavers*, 86 PHIL. L.J. 405, 432-33 (2012).

Fixation, the third requirement of copyright protection, is manifested by virtue of its creation. Section 172.2 provides that “[w]orks are protected by the sole fact of their creation, *irrespective of their mode or form of expression*, as well as of their content, quality[,] and purposes.”⁸⁰

It appears from a cursory reading of Section 172.2 that the mode or form of expression of a work is immaterial. It is worthy to note that commentators deem creation to have occurred “if something original is expressed in a fixed manner.”⁸¹ A work is protected as long as its expression is fixed — regardless of how it is fixed — in any tangible medium. In indigenous woven art, the creation of indigenous patterns and designs is manifested and embodied in fabrics woven by members of ICCs.

Considering the foregoing, it appears that indigenous woven fabrics, and the patterns and designs embodied therein, are entitled to copyright protection. Thus, the weaver, as the author of the work, may enjoy copyright protection over the indigenous woven fabric,⁸² and the rights attached thereto, during her lifetime and for 50 years from her death.⁸³

B. Economic and Moral Rights

The IP Code grants economic and moral rights to the creator of a copyrightable work. Section 177 grants the author the right to control the reproduction, distribution, and public display of his or her work, among other economic rights.⁸⁴ The provision states —

Section 177. Copyright or Economic Rights. — Subject to the provisions of Chapter VIII, copyright or economic rights shall consist of the exclusive right to carry out, authorize[,] or prevent the following acts:

- 177.1. *Reproduction of the work or substantial portion of the work;*
- 177.2. *Dramatization, translation, adaptation, abridgment, arrangement[,] or other transformation of the work;*
- 177.3. *The first public distribution of the original and each copy of the work by sale or other forms of transfer of ownership;*
- 177.4. *Rental of the original or a copy of an audiovisual or cinematographic work, a work embodied in a sound recording, a*

80. INTELL. PROP. CODE, § 172.2 (emphasis supplied).

81. JOSE R. SUNDIANG, SR., REVIEWER ON COMMERCIAL LAW 515 (2014 ed.).

82. See INTELL. PROP. CODE, § 178.

83. *Id.* § 213.

84. *Id.* § 177.

computer program, a compilation of data and other materials[,] or a musical work in graphic form, irrespective of the ownership of the original or the copy which is the subject of the rental;

177.5. *Public display of the original or a copy of the work;*

177.6. Public performance of the work; and

177.7. Other communication to the public of the work.⁸⁵

Section 193 extends moral rights to the author of a work.⁸⁶ These include attribution and objection to any distortion, to wit —

Sec[ti]on] 193. [Scope of Moral Rights.] — The author of a work shall, independently of the economic rights in Section 177 or the grant of an assignment or license with respect to such right, have the right:

193.1. *To require that the authorship of the works be attributed to him [or her], in particular, the right that his [or her] name, as far as practicable, be indicated in a prominent way on the copies, and in connection with the public use of his [or her] work;*

193.2. To make any alterations of his [or her] work prior to, or to withhold it from publication;

193.3. *To object to any distortion, mutilation[,] or other modification of, or other derogatory action in relation to, his [or her] work which would be prejudicial to his [or her] honor or reputation; and*

193.4. To restrain the use of his [or her] name with respect to any work not of his [or her] own creation or in a distorted version of his [or her] work.⁸⁷

ICCs may rely on these economic and moral rights to protect their cultural heritage as manifested through woven fabrics. Under their economic rights, they are entitled to seek compensation for reproduction and display of their patterns and designs, as well as the ability to control distribution in line with their traditional beliefs. Through the exercise of their moral rights, they may demand for attribution and object to any modification which harm their cultural integrity.

Unlike economic rights, the moral right of attribution subsists beyond the creator's life. Section 198 provides —

Sec[ti]on] 198. [Term of Moral Rights]. —

85. *Id.* (emphases supplied).

86. *Id.* § 193.

87. *Id.* (emphases supplied).

198.1. The right of an author under Section 193.1. shall last during the lifetime of the author and in perpetuity after his [or her] death[,] while the rights under Sections 193.2.[,] 193.3.[,] and 193.4. shall be coterminous with the economic rights[;] the moral rights shall not be assignable or subject to license. The person or persons to be charged with the posthumous enforcement of these rights shall be named in a written instrument which shall be filed with the National Library. In default of such person or persons, such enforcement shall devolve upon either the author's heirs, and in default of the heirs, the Director of the National Library.⁸⁸

In effect, this allows Indigenous Peoples to “ensure that the public gets an accurate account of indigenous culture and that the investment in that culture goes back to their communities.”⁸⁹

However, commodification and appropriation have resulted in the infringement of Indigenous Peoples' economic and moral rights under the IP Code. By engaging in “widespread commercial appropriation[,]”⁹⁰ corporations and consumers have ruthlessly disregarded the very statutory rights, which permit indigenous weavers to enjoy any form of control over or receive any benefit from their creations. Infringement threatens the “continued survival of Indigenous Peoples”⁹¹ because it deeply affects their belief systems and cultural identity by “intru[ding] into their already pillaged culture.”⁹²

C. Is Copyright Enough?

Despite the protection it extends to indigenous woven art, copyright law is still inadequate in ensuring the intellectual integrity of ICCs. This stems from copyright's origin as a Western concept,⁹³ which ICCs have relied on in hopes of preserving their cultural heritage. However, certain concepts of copyright protection are incongruent with the beliefs and practices of ICCs.

As previously discussed, copyright protection requires originality. Originality, however, is satisfied only with respect to indigenous patterns and designs arising from the intellectual creation of the weaver. Indigenous

88. INTELL. PROP. CODE, § 198 (as amended).

89. Farley, *supra* note 19, at 14.

90. *Id.* at 2.

91. Riley, *supra* note 63, at 76.

92. Farley, *supra* note 19, at 13.

93. Moran, *supra* note 58, at 71.

tradition, such as an indigenous woven fabric, is not deemed original if the design it contains originated from a previous generation.⁹⁴ Such passing of tradition is a common practice among ICCs. In most cases, the fabric remains unprotected under copyright laws,⁹⁵ which makes it susceptible to commodification and appropriation without any form of redress for Indigenous Peoples. This likewise begets questions on copyright ownership of indigenous designs and patterns, thereby affecting the time element of copyright protection.⁹⁶ If a particular indigenous design has been passed on from a previous generation, then copyright protection belongs to the original creator. In this case, ownership should have run from the time it was created at the very first instance. Considering that copyright ownership subsists during the life of the creator, and 50 years from his or her death, then indigenous designs passed on from one's ancestors would probably no longer enjoy copyright protection today. If any, they may only rely on the moral right of attribution, which subsists in perpetuity.

Another underlying issue is authorship. Contrary to the communal nature of Indigenous Peoples,

[the present IP protection] system struggles to assign [IP] rights to authors who fail to evoke the [r]omantic image of the solitary artist scribbling away in an unheated garret or the unkempt scientist walking from a fitful nap on a cot in the laboratory with a sudden flash of insight.⁹⁷

The fundamental values of ICCs are hinged on “collective creation and ownership[.]”⁹⁸ They treat their art as expressions of their beliefs and as extensions of their cultural identity as a group, rather than as mere commodities.⁹⁹ Traditionally, any form of use or alienation occurs only when an act is sanctioned by the leaders or by consensus of the ICC.¹⁰⁰ This is because the “work is produced for the benefit of the group and the group

94. See Obaldia, *supra* note 56, at 347-48.

95. Vanguardia de Antoni, *supra* note 79, at 430.

96. Obaldia, *supra* note 56, at 346.

97. Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793, 795 (2001).

98. Obaldia, *supra* note 56, at 348.

99. See Moran, *supra* note 58, at 80.

100. Maricris Jan Tobias, *Copyright Protection of Indigenous Expressions*, 73 PHIL. L.J. 831, 840 (1999) (citing Joseph Githaiga, *Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge*, MURDOCH U. ELECTRONIC J.L., Volume No. 5, Issue. No. 2, ¶ 11).

owns and controls it”¹⁰¹ even if only a few members have woven the fabric. In effect, this clashes with how copyright views authorship as individualistic — that copyright belongs to the one who actually created the work.

Copyright is inadequate in protecting ICCs from cultural degradation. It neglects to address the issue of originality in terms of designs and patterns passed on from generations before, and the notion of group ownership prevalent among Indigenous Peoples.

IV. CONCLUSION

Without a doubt, the protection of indigenous designs and patterns is necessary to preserve the cultural heritage, beliefs, and traditions of ICCs. Unconstrained commodification and appropriation of indigenous woven fabric not only harm the “economic value of traditional knowledge”¹⁰² and “the expressive forms that give each [ICC] a distinct identity”¹⁰³ but also threatens their cultural survival. However, such protection of indigenous art should not be hinged on existing IP law. These Western-based concepts prove to be inadequate in granting the rights that ICCs are entitled to for the conservation and development of their respective cultures.

The Philippines has taken the first step in enhancing the protection of indigenous art. It established a *sui generis* right of communal protection of indigenous intellectual art. Section 32 of the IPRA grants Indigenous Peoples the “right to practice and revitalize their own cultural traditions and customs” with the State assuming responsibility over “preserv[ing], protect[ing,] and develop[ing] the past, present[,] and future manifestations of [] cultures[.]”¹⁰⁴ To fully uphold the rights of ICCs, it is imperative for the State to further explore the sole provision on Community Intellectual Rights¹⁰⁵ under the IPRA. The State, together with stakeholders from the ICCs, must consider utilizing the existing provision as a stepping stone for drafting supplementary legislation. These may include provisions clarifying and defining the scope of “community intellectual property” and “community intellectual rights,”¹⁰⁶ as well as those granting communal

101. Farley, *supra* note 19, at 31.

102. Jo Recht, *Intellectual Property in Indigenous Societies: Culture, Context, Politics and Law*, 6 DARTM. L.J. 277, 282 (2008).

103. *Id.*

104. The Indigenous Peoples’ Rights Act of 1997, § 32.

105. *Id.*

106. *Id.*

authorship and attribution that ICCs deserve. While the protection of cultural heritage manifested in indigenous art is necessary, maintaining the balance between the interests of the State in preserving national unity and promoting development and progress, and of the IPs' right to cultural identity and ownership, remains paramount.

Nevertheless, guarding against and challenging the abusive practices of commodification and appropriation of indigenous woven art remain vital. These blatant acts of cultural thievery run afoul of the basic tenets of ethics, fairness, and just attribution. After all, theft — regardless of the medium — is still theft.