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## Fashion as property in traditional culture: a Maasai case study

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# FASHION AS PROPERTY IN TRADITIONAL CULTURE: A MAASAI CASE STUDY

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## This Article

Protection of traditional knowledge and cultural expressions by a community is a thorny issue of which an all-encompassing definition is evasive.<sup>1</sup> Societal exposure to a *smorgasbord* of traditional culture expressed through fashion trends into the mainstream, may have inadvertently given rise to a sense of entitlement for such use. A misconception that such cultural property belongs to no individual as such, but is in the interests of those with access to it and thus free to use is unfortunate, even when the initial intention of exposing such culture was for its appreciation, safeguarding and preservation<sup>2</sup>. Some African countries<sup>3</sup> have proposed controls on the use and acknowledgement of traditional knowledge and cultural expressions.

The Maasai community is driving a rights take back of community property including textile, jewellery and image use to mitigate the rampant misuse of their cultural property.

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<sup>1</sup> A Adewopo, Protection and Administration of Folklore in Nigeria (2006) 3 (1) *SCRIPT-ed* 2

<sup>2</sup> P Andanda, 'Striking a Balance between Intellectual Property Protection of Traditional Knowledge, cultural Preservation and Access to Knowledge' (2012) 17 *JIPR* 547

<sup>3</sup> Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore within the Framework of the African Regional Intellectual Property Organization (ARIPO), signed by nine countries on August 9, 2010 at Swakopmund, Namibia, Treaty not yet in force. (Swakopmund Protocol)

This article provides an insight into one mechanism, beyond the hinges of statute, for the protection of cultural property with a case study of the *Maasai* community based in Eastern Africa and the means employed to safeguard their cultural property.

## Introduction

The cognizance of traditional knowledge and culture requires a perception into the history of a people of which their roots, culture and customs are encapsulated.

In Africa, tradition existed way before its naming, definition or record during the continental wave by explorers or missionaries, and with time, colonial ideology cast it into categorizations of customs and ethnic tribes.<sup>4</sup> The pre-existing tradition in its unaltered purity was distinct from the invented traditions Ranger<sup>5</sup> describes as having been handed to Africans through socialization in European neo-traditions. Cultural imperialism aside, the concept of traditional knowledge and cultural expressions is a probable novelty to western intellectual property systems depending on its discovery.<sup>6</sup> A western restrictive notion of intellectual property may consequently be ill-suited to incorporate other forms of property like culture or folklore outside its legal context<sup>7</sup>, posing a conflict of ideologies.

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<sup>4</sup> Jean-Francois Bayart, *The Illusion of Cultural Identity* (C. Hurst & Co. Publishers Ltd 2005) 29-30 (citing John Illife 'Europeans believed Africans belonged to tribes; [whereas] Africans built tribes to belong to').

<sup>5</sup> T Ranger, 'The Invention of Tradition in Colonial Africa' in E Hobsbawm and T Ranger, *The Invention of Tradition*, (Cambridge University Press 2006) 227

<sup>6</sup> M Rimmer, *Mapping Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar 2015) 6

<sup>7</sup> S Gray, 'Shaking the Skeleton of Principle: Teaching Indigenous Legal Issues in Intellectual Property Law' 4 *Ngija Talk the Law* 6

The Africa Regional Intellectual Property Organization (ARIPO) through its Swakopmund Protocol<sup>8</sup> recognizes tangible expressions such as textile, jewellery, costumes and needlework as expressions of folklore.<sup>9</sup> Mirrored in Kenyan legislation, the Protection of Traditional Knowledge Act<sup>10</sup>, effectuates explicit constitutional obligations on the national foundation of culture<sup>11</sup> which requires State legislative enactment for cultural protection including compensation for such use through royalties.<sup>12</sup>

### Traditional Culture

As colonies inherited carbon copies of intellectual property laws<sup>13</sup>, protection of traditional knowledge and cultural expressions may not have been a western priority.<sup>14</sup> Copyright laws which prevented the copying of publisher books, evolved into the concept of an author's exclusive ownership and control as we know it.<sup>15</sup> The adoption by countries of foreign copyright laws inadvertently meant that community interests were side-lined and ineffectively considered as property due to the complexity of communal use, accordingly denying it the type of protection awarded to owners in copyright law. This type of cross-cultural challenge tends to exist where

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<sup>8</sup> n. 3

<sup>9</sup> Ibid s 2 , expressions of folklore (iv)

<sup>10</sup> TKCE Act, s.2

<sup>11</sup> Constitution of Kenya 2010, Clause 11(1)

<sup>12</sup> Ibid Clause 11(3)

<sup>13</sup> In the East African Protectorate, through the reception clause under the East African-Order-in Council 1897 and the English common law.

<sup>14</sup> M Rimmer, *Mapping Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar 2015) 4

<sup>15</sup> Statute of Anne 1710

formal intellectual property systems govern informal intellectual property regimes based on tradition, cultural norms and practices.<sup>16</sup>

The World Intellectual Property Organization defines traditional knowledge as know-how, skills and practices developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.<sup>17</sup> In Kenya, it is ‘generated, preserved and transmitted from one generation to another, within a community, for economic, ritual, narrative, decorative or recreational purposes’<sup>18</sup>, individually or collectively<sup>19</sup> being integral to their cultural identity which they hold as custodians, guardians or collectively having been established by customary practices, laws or protocols.<sup>20</sup>

#### Dress as Cultural Expression

The Maasai are a nomadic community, speaking the Maa language and spread across Eastern Africa (Kenya and Tanzania). Of the forty four Kenyan communities and despite modernization, their identity has stood timelessly through maintenance of their rich culture reflected through traditional dress and other customary practices. These unchanging norms and a reluctance to modernize into the fashions which colonialism may have used as a tool of civilization ties in with the deep rooted aspects of their dress.

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<sup>16</sup> Andanda (n 2) 548

<sup>17</sup> < [www.wipo.int/tk/en/tk/](http://www.wipo.int/tk/en/tk/) > (Accessed 6 March 2018)

<sup>18</sup> The Protection of Traditional Knowledge and Cultural Expressions Act, 2016 section 6 (a) (TKCE Act)

<sup>19</sup> *ibid* s 6 (b)

<sup>20</sup> *ibid* s 6 (d)

The missionary Last, during his East African travels in 1883 noted that the Maasai were fond of red cloths which they wore during war, as well as small blue, pink and red beads.<sup>21</sup> Picturesque beads and wires were worn heavily by the women at times suspended completely covering their chests,<sup>22</sup> an account shared by Thomson during his explorations of Maasai land within the same period.<sup>23</sup>

Although historically the dominant clothing material was leather, the introduction of *Mericani/Americani*<sup>24</sup> cloth; cheap unbleached, plain weave cotton cloth, imported by the Americans to Eastern Africa in the 1860's, may have influenced the dyeing of that material to produce present day designs founded on the autochthonous red cloth noted by Last in his travels.

In 1887, the Maasai wore blue calico instead of animal skins<sup>26</sup> and by 1903 were wearing red blankets.<sup>27</sup> The Maasai *Shuka* or blanket is a bright cotton sheet with variations of plaid or checked patterns, the most common foundation being the red sheet. Heaped bead wearing was established as early as 1883<sup>28</sup> and continues to date.

Similarities between the Maasai *Shuka* with the modern kilt: *Tartan Philibeg*, is the inevitable elephant in the room, its Scottish counterpart having been invented in the 18<sup>th</sup> Century by Thomas Rawlinson, at the time modifying the Highland dress as necessity for a much more

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<sup>21</sup> JT Last, 'A Visit to the Masai People Living beyond the Borders of the Nguru Country', Proceedings of the Royal Geographical Society and Monthly Record of Geography, (1883) 5 (9) New Monthly Series, 531.

<sup>22</sup> Ibid 530

<sup>23</sup> J Thomson F.R.G.S, *Through Masai Land, A Journey of Exploration Among the Snowland Volcanic Mountains and Strange Tribes of Eastern Equatorial Africa Being the Narrative of the Royal Geographical Society's Expedition to Mount Kenia and Lake Victoria Nyanza 1883-1884*. (4<sup>th</sup> edn, Sampson Low, Marston, Searle and Rivington London) 428

<sup>24</sup> M Shaw, A J Anderson, 'Ivory for Cotton – Textile Trade Documents at the National Museum of American History', (2018) 61(1) *Curator: The Museum Journal* 149. Cotton had previously been imported from India.

<sup>26</sup> MM Gohil, 'The Historical Background of Textiles in Kenya' (University of Nairobi, Thesis 1983) 261

<sup>27</sup> Ibid 263

<sup>28</sup> Last (n 21) 111

comfortable factory dress for his workers.<sup>29</sup> Its evolution from a lower class outfit to fashionable bourgeoisie dress demonstrates the association of motifs and colours to the various Scottish clans.<sup>30</sup> Early references to the Scottish kilt in Kenya, with patterns considered similar to the Maasai *Shuka*, were visually depicted by rivalrous dance teams wearing kilts and parading through the streets of Mombasa<sup>31</sup> whilst playing bag-pipes as per their 19<sup>th</sup> Century Scottish tradition, to entertain the British Crown.<sup>32</sup> Maasai presence at the coastal city during this time is unclear.

Just as the historical symbolism of the Kilt is attributable to the Scots, so too is the Maasai *Shuka* and beadwork to the community wherever it is seen.

A new cultural expression may be conceived through inspiration from various other cultures. Clothing and appearance are important statement symbols in western civilization because elements of heritage and innovation underlie culture<sup>33</sup>. The authenticity of a new cultural expression should not be negated where heritage and meaning are attached, more so, if the borrowed elements are instrumental in providing the cultural basis for new norms which are then used perpetually. Materialism and symbolism of dress is significant as it allows individuals to situate within society and can also be used to send personal or political messages,<sup>34</sup> including communal situation.

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<sup>29</sup> E Hobsbawm and T Ranger, *The Invention of Tradition* (Cambridge University Press 2006) 21-22

<sup>30</sup> Ibid 205

<sup>31</sup> A coastal city in the Republic of Kenya

<sup>32</sup> T Ranger, 'The Invention of Tradition in Colonial Africa' in E Hobsbawm and T Ranger, *The Invention of Tradition*, (Cambridge University Press 2006) 245

<sup>33</sup> Jean-Francois Bayart, *The Illusion of Cultural Identity* (C. Hurst & Co. Publishers Ltd 2005) 195

<sup>34</sup> Ibid 200

## CASE STUDY

The Maasai Intellectual Property Institute (MIPI) is an organization registered in Tanzania and incorporated in Kenya. The ten year old organization is pivotal in the successful sensitization of the Maasai community in understanding the role of intellectual property relative to their traditional knowledge and cultural expressions. An interview with MIPI chairman, Mr. Isaac Ole Tialolo, yielded the following case study.<sup>35</sup>

About two million Maasai have registered with MIPI which also provides registration assistance. Registration however is not a prerequisite to community membership and thus not mandatory, as anyone with Maasai heritage automatically benefits from community membership. Upon registration, MIPI seeks opinion leaders within each of the relevant counties (about five), having in total about one hundred opinion leaders. In the establishment of a General Assembly, there is a cultivation of gender balance within leadership roles and the chairman is communally elected on running terms.

Mr. Ole Tialolo describes the belonging to a traditional community as occurring by virtue of heritage, and in a global village, it should not matter where one is born. The mission is to protect everything within the Maasai identity.

Maasai *Shukas* and beadwork can be traced back three generations. For up to two generations, the beads were derived from multi-coloured tree seeds. With time, the modern beads prove of better quality and durability and thus became widely used. The community seeks to protect the intrinsic and recognizable Maasai cloth design often associated with their community

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<sup>35</sup> Interview with Isaac Ole Tialolo, Chairman, Maasai Intellectual Property Initiative/ MIPI (Nairobi, Kenya, 14 February 2018)



along with other fashion ornaments. This is important because of the intentional and specific arrangement of colour where each bears a certain meaning, for example a colour arrangement could represent age, clan or marital status of an individual. Although beads are imported due to durability and low cost, the designs and colour combinations used remain carbon copies from historical practices.

Protection of the Maasai culture for the benefit of future generations is immensely important and the community is working on the formation of a centre for the preservation of all of its traditional knowledge and cultural expressions, aspects of which should remain undiluted with the end goal being the encapsulation of all cultural property in a database as part of its wider protection measures.

On the local use of community cultural property, he states that it is acceptable for personal citizenry use with permission requested as community courtesy for extended use. At the stage where such materials become commercial exports, community engagement through license fee discussions, royalties and related rights agreements is necessary. The respect of heritage validated through permissions cannot be emphasised enough and royalties are based on sales, although in some instances like local productions, simple acknowledgement may suffice without charge.

This brings to fore the two pronged ownership of cultural expressions. On one level, it is owned by the community of origin and on the other, nationally by the country or region where the community is based. Kenya being culturally rich with forty four communities, Tanzania with more than one hundred and twenty communities, benefits from all such cultural expressions, enabling its citizens to vicariously benefit from a multitude of cultural expressions through dress. This national interest and cultural unity also means that whenever there is cultural appropriation of dress

and images by outsiders, it not only offends the community of origin but an entire country or region.

Rampant exploitation of community property is evident through coffee table books, billboards and other media where some community images are indecently or inappropriately represented. This is usually for the benefit of commercial organizations and the photographers who take those images without acknowledgement or remuneration to the community members and failure to clarify how and where such works will be used. The Maasai are fighting back against this unworldly sense of entitlement with slow but progressive change as a warning against the monetization of community images, culture and identity.

Royalties collected from use of community cultural expressions have multiple benefits, largely for development projects and community initiatives. Some companies acknowledge the Maasai as their source of inspiration and are paying for use of their cultural expressions. The money is collected by the sitting organs of MIPI and utilised for the community development of schools, hospitals and other infrastructure.

Challenges in the protection of community property includes finances and ineffective education from local intellectual property institutions. In this vein, MIPI partnered internationally with Light Years IP which teaches local trainers on all aspects of intellectual property. Light Years IP, an organization based in Washington, USA lobbies for funds from the US government for various projects. This collaboration has empowered MIPI to venture into villages for insightful opinions on the member challenges whilst using local dialect in training communities on intellectual property.

The success of the project has been immensely delightful by virtue of companies paying royalties for use of community traditional and cultural property. About eighty companies have been engaged in the royalty seeking process, a sure acknowledgement that deriving benefit from Maasai community property deserves recognition and requisite permissions. In one instance, the company Land Rover, remunerated the community after MIPI engagement on their use of the Maasai identity expressed through community stereotypic images depicted as part of the commercial product, leading to an agreement based on the advertisement. This community take back of its traditional knowledge and cultural expressions is its defensive mechanism.

He agrees that the Traditional Knowledge Act in Kenya is a good start and that constitutional obligations should speed up its implementation to further enable vital cultural protection.

MIPI seeks to trademark the word *Maasai* and its variations like *Masai* in each jurisdiction to avoid passing off. This arises during the commercialization of products bearing the community name or images, in most cases such entities lacking association and confusing the public about the product origin or affiliations.

On the public domain assumption that prolonged existence of community property, even centuries, should entitle its free public use, one must note that cultural property does not have the same protection afforded to copyright or other intellectual property works. The knowledge holders' culture as well as their common law should define what falls into the public domain and not the formal intellectual property regime.<sup>36</sup> Traditional knowledge is living<sup>37</sup> property, such that

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<sup>36</sup> P Andanda, 'Striking a Balance between Intellectual Property Protection of Traditional Knowledge, cultural Preservation and Access to Knowledge' (2012) 17 JIPR 547

<sup>37</sup> World Intellectual Property Organization < [www.wipo.int/tk/en/](http://www.wipo.int/tk/en/) > (Accessed 6 March 2018)

although a community member passes on, others are still left to own that community property and with birthing, this property is essentially owned perpetually by the generations which carry it forward. This cultural immortality is the spiritual element of traditional cultural expressions, and taking or exploiting this exclusive creature may rip the very soul of the community, causing great disrespect and offense to something deeply cherished.

Mr Ole Tialolo reiterates the community ownership of its information despite its duration of public exposure, such property being intended for use by the immediate community. Whether taken out of context and commercialized, the knowledge was never intended to be placed in the public domain and should always remain communal property.

#### Exploitation and Appropriation

Cultural appropriation occurs where outsiders who unbound by the appreciation of culture, extend to copying and transforming cultural elements to suit them as well as channelling their individual tastes and at times profiteering.<sup>39</sup> The taking of parts of a minority culture by a dominant one and its incorporation into fashion is simplified when the taker has no sense of connection to the concept of tradition and culture itself. Differing concepts of culture could be based for example on spreading democracy, development and social change<sup>40</sup>, or more ironical, if the culture itself if one of taking. That disconnect simplifies the taking of an identity and unity of a people without remorse or guilt and in the process offending the originating community.

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<sup>39</sup> S Scafidi, 'The Commodification of Culture' *Who Owns Culture? Appropriation and Authenticity in American Law* University Press 2005) 9

<sup>40</sup> Jean-Francois Bayart, *The Illusion of Cultural Identity* (C. Hurst & Co. Publishers Ltd 2005) 33

The Swakopmund Protocol signatories seek to prevent exploitation of their traditional knowledge including its manufacture, import, export and sale beyond the traditional context.<sup>41</sup>

The unacknowledged use of cultural expressions to sell dress outside its traditional context side-lines communities, such taking landing the final blow to their civilization from intruders.<sup>42</sup> Some minimal courtesy as per Mr Ole Tialolo goes a long way.

Moral and economic rights exist to protect property in copyright and the concept may also be persuasive in the protection of cultural expressions<sup>43</sup> and heritage from distortion, mutilation<sup>44</sup> and non-acknowledgement<sup>45</sup> of owners, allowing communities dictation rights over use of their property.

For decades, the Maasai have worn sandals recycled from motor vehicle tyres due to ready availability, durability and affordability of discarded tyres. Locally the rubber sandals are known as *Akala*.

In early 2000, the Masai Barefoot Technology (MBT) shoe owned by the Masai Group International Ltd., was being marketed in the United Kingdom and sold primarily with images of the Maasai as part of the promotion campaign. Having seen this first hand, the campaign further stated that the technology was crafted from the Maasai who made their sandals from rubber for use in walking long distances thereby contributing to their good posture and limited back problems.

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<sup>41</sup>Swakopmund Protocol s 7.3(a)

<sup>42</sup> A Adewopo, Protection and Administration of Folklore in Nigeria (2006) 3 (1) *SCRIPT-ed* 3

<sup>43</sup> D Long, 'The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective' (1998) 23 *N.C. J. Int'l L. & Com. Reg.* 229

<sup>44</sup> TKCE Act, s.2 'derogatory treatment'.

<sup>45</sup> Swakopmund Protocol s 10 which requires the respect of cultural values by acknowledging holders, indicating the source and origin if possible.

This information has since been wiped off any sites and no connection is made between the shoes and the community as the brand previously did. The sense of national pride that the Maasai were the inspiration of such a product; at the time highly priced between £120-£160, and that Kenya was well placed on the map as having innovative cultural practices was astounding. The Maasai community have never associated with this brand and have been pursuing the company to reach an agreement on use of their name and originating innovation. The MBT shoe is patented, meaning that should the community commercialize their similar designs in those regions they could easily be slapped with patent infringement. Exploitation of this nature benefits the exploiter to the detriment of the community.

This exploitation problem is not unique to foreigners. Locally, there are Kenyan businesses using the Maasai name as part of their brand identity to sell *Akala* rubber sandals, thus not only have they trademarked a community name for that class of goods, but they are also commercially using community cultural expressions like the Maasai *Shuka* for trade exports. The Maasai are in pursuit of royalties where no connection exists with their community and neither agreements nor permissions are sought for commercial use of the community name along with requisite acknowledgement of where the inspiration came from.

National inaction and ineffective intellectual property protection and management exposes other cultural dress to exploitation. In the mid 2000's a British company tried to unsuccessfully trademark exclusive use of the word *Kikoy* which is a variation of the *Kikoi*, a common term used for a traditional multi-coloured cotton cloth worn in Eastern Africa, failing only because the application was spotted by an interested party and reported for opposition. This essentially would

have locked out any use or export of the popular textile with the same name as it would be associated with the registered trademark thus exposing locals to infringement.<sup>46</sup>

As copyright laws evolved for the benefit of creators, so too might the unfathomable concept of community ownership, its protection and the various mechanisms for the protection and compensation for unauthorized use.

Invisible cultures may provide new inspiration to those who have never seen any such expressions, implying that, external access to cultural property evidently affords society a claim to a sampling right masked as appreciation for that community.<sup>47</sup> Technology has simplified the digital dispersion of information making content containing cultural expressions easily available for replication, reproduction and commercialization, whether such taking is with or without the knowledge that they are appropriating, and without any guilt.<sup>48</sup> The time is ripe for user sensitization not only on intellectual property principles, but on the dicey concept of traditional knowledge and culture, an area which fashion law can effectively cater to.

## Conclusion

Protection of traditional knowledge and cultural expressions appears to have been sidelined by modern intellectual property law. The vicissitudes of improper use of community property through lack of acknowledgement or licensing agreements has led traditional communities to

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<sup>46</sup> P Mwaura 'Kenya is Still Sleeping on Its Intellectual Property Rights' *Daily Nation Media* ( April 19 2008) < <http://poorfarmer.blogspot.co.ke/2008/04/kenya-is-still-sleeping-on-its.html> > (Accessed May 4 2018)

<sup>47</sup> S Scafidi, 'The Commodification of Culture' *Who Owns Culture? Appropriation and Authenticity in American Law* University Press 2005) 8

<sup>48</sup> A Elia 'Appropriation in Fashion, Where to Draw the Line' *Copy Camp 2017* < <https://www.youtube.com/watch?v=6WGTJBfksqI> > (Accessed 11 May 2018)

resort to resourceful measures in the resolution of matters relating to their cultural exploitation and appropriation. Where statutes ineffectively address the protection of community property, merely protesting on the repugnant use by outsiders does very little to avert recurrence.

This case study raises important questions about the challenges faced by traditional communities in protecting their knowledge and cultural expressions when exploited both by large foreign corporations and local enterprises. The ease with which it is to register a brand based on the name of a community and the association of commercial products with such trademarks needs further review.

Much is yet to be done in the advocacy and sensitization of the public on the meaning, value and utility of traditional knowledge and cultural expressions and the effects of inappropriate use on the communities which own them.

Governments need to move expeditiously in implementing legislation supporting the protection of traditional knowledge and cultural expressions and further research would be useful in highlighting the defensive mechanisms used by communities to protect such commonly owned property.