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# MAASAI RESISTANCE TO CULTURAL APPROPRIATION IN TOURISM

Naomi Lanoi Leleto\*

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## Introduction

In August 2016, Kenya adopted the Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs)<sup>1</sup> Act,<sup>2</sup> to provide a frame-

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<sup>1</sup> In his overview of policy and legal issues from an Intellectual Property (IP) perspective, Claudio Chiarolla defines TK as “knowledge resulting from intellectual activity in a traditional context, [which] includes know-how, practices, skills, and innovations.” Claudio Chiarolla, *Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs): An Overview of Policy and Legal Issues From an Intellectual Property (IP) Perspective*, WORLD INTELL. PROP. ORG. (Apr. 24, 2017), [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_ipTk\\_cmb\\_17/wipo\\_ipTk\\_cmb\\_17\\_presentation\\_2chiarolla.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_ipTk_cmb_17/wipo_ipTk_cmb_17_presentation_2chiarolla.pdf). He defines TCEs as the “forms in which traditional culture is expressed . . . [and] passed down from generation to generation,” noting that they are “integral to the cultural and social identities of [I]ndigenous and local communities / nations [and that] they embody know-how and skills, and they transmit core values and beliefs.” *Id.*

<sup>2</sup> The Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 (2016) KENYA GAZETTE SUPPLEMENT No. 154, available at [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProtectionofTraditionalKnowledgeandCulturalExpressionsAct\\_No33of2016.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/ProtectionofTraditionalKnowledgeandCulturalExpressionsAct_No33of2016.pdf) [hereinafter 2016 TK and TCE Act].

work for the protection and promotion of traditional knowledge and cultural expressions. The Act aims to protect communities from exploitation and allow them to control the use of culturally significant and economically valuable knowledge and expression by creating a new form of intellectual property right held by the community itself.<sup>3</sup> Under the Act, TK and TCEs are collectively produced and passed on along ancestral lines. They preserve Maasai values, cultures, and traditions and can promote Maasai economic interests.<sup>4</sup> The Act sets up a system to ensure that the rights are effectively protected<sup>5</sup> and criminalizes any misuse of TK and TCEs.<sup>6</sup> Communities further have the power to stop misuse of their TK and TCEs by obtaining court injunctions and forcing companies to pay for royalties for any commercialization of TK and TCEs that has not been agreed to in advance.<sup>7</sup>

For the Maasai, an Indigenous community found in Kenya and Tanzania, the law could not have come at a better time. Over the last two decades, there has been widespread exploitation of Maasai culture by non-Maasai, in Kenya and Tanzania and abroad, often without the consent of the Maasai peoples.<sup>8</sup>

Although the new law provides opportunities for the protection and promotion of Maasai TK and TCEs, it also presents numerous challenges for the community. These challenges include documentation of TK and TCEs for a community to be able to benefit from the protections under the Act, potential enforcement difficulties as a result of a weak policing and judicial system in Kenya, and a lack of political will to implement the Act by the dominant communities that control political power and are often the major appropriators of Indigenous TK and TCEs. Additionally, the Act defines ‘community’ broadly as a group with any of the following attributes: shared ancestry, language, culture, community of interest, ecological or geographical space.<sup>9</sup> Such a broad definition opens up opportunities for major conflicts between communities laying claim to various TKs and TCEs. Certain provisions of the Act may also contribute to conflict around decisionmaking, consent, and benefit sharing. And finally, because TK and TCEs can generate wealth from collective resources, management and control of such income may create division and conflict within communities.

Against this background, this Article explores the tensions in the protection and promotion of Maasai cultural practices in the context of the tourism sector in Kenya. Part I provides an overview of the dilemma in the promotion and protection of Maasai culture in the context of tourism.

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<sup>3</sup> *Id.*

<sup>4</sup> *See id.* §§ 6, 21–24.

<sup>5</sup> *See id.*

<sup>6</sup> *Id.* § 37–41.

<sup>7</sup> *Id.* § 38–39.

<sup>8</sup> *See* Edward B. Bruner & Barbara Kirshenblatt, *Maasai on the Lawn: Tourist Realism in East Africa*, 9 *CULTURAL ANTHROPOLOGY* 435 (1994).

<sup>9</sup> 2016 TK and TCE Act, *supra* note 2, § 2.

Part II looks at specific and detailed appropriation of Maasai culture. Part III highlights local and international approaches that are available for responsible tourism. Part IV concludes by looking at what the Maasai people are doing to develop a sustainable and inclusive tourism.

## I. The Dilemma

I am in a spacious hotel with a relaxed ambience, far away from the hustle and bustle of this world. It sits within the endless wilderness that truly feels like the middle of nowhere. I am here looking for business for our women's organization, whose specialty is beadwork. The manager of the hotel, a Maasai and longtime family friend, had informed me that close to 50 tourists, two of whom are renowned jewelry artists, will be visiting the hotel. During their stay, they plan to buy Maasai jewelry.

As I wait for the artists, I decide to stroll and admire the flora and fauna. Before me are two images. One is a sculpture made of wood, the other is an image made of flesh and blood. However, I am finding it difficult to differentiate one from the other. They both stand on the left leg, the right foot effortlessly hooked on the crook of the knee of the other. They sport long ocher-dyed hair and red sheets as the only attire on the body. A spear in the right hand and a stern face complete the picture. One of them is a carving of a Maasai man and the other is a young living Moran.<sup>10</sup>

The Moran walks towards me and after exchanging greetings, he tells me to ignore what I saw. "It's my only way of survival," he says. He then delves into his situation, opening a window to the dilemma faced by this ancient tribe as it adjusts to modern life in East Africa's largest economy. His name is Lerionka. He has no formal education. Most of the family livestock, the mainstay of the community, has been lost due to shrinking grazing land and climate change. Life was difficult in the village and he decided to look for greener pastures at the hotel. Like his cousin, Ole Parmuat, he hoped to marry a white woman and break out of the circle of poverty. "My cousin Ole Parmuat, who was doing the same job as I am doing now, referred me to this hotel. Ole Parmuat is now a very rich man. He married a *mzungu* (white) woman who took him to . . . is it New Zealand or Switzerland? I don't know. He came back to build a big house and bought so many cows and goats. I envy him," he added in displeasure. "I know I have gone against our culture, it's an abomination to do what I am doing. Unfortunately, I have no choice."

This personal narrative encapsulates the dilemma confronting many Maasai people. Tourism is an immense economic opportunity for the Maasai.<sup>11</sup> But tourism is also contributing to the dilution of Maasai culture as, increasingly, many Maasai people are commercializing their

<sup>10</sup> Traditionally, in Maasai, young men are known as Morans, the physical guardians of the Maasai community.

<sup>11</sup> See generally Dhyani J. Berger, *The Challenge of Integrating Maasai Tradition with Tourism*, in *PEOPLE AND TOURISM IN FRAGILE ENVIRONMENTS* 175–98 (Martin F. Price ed., 1996).

culture for tourism purposes. As one drives across Maasai land, for example, he or she will likely see Maasai in front of their kraals<sup>12</sup> beckoning at tourists or strategically positioned at hotel entrances to attract their interest. For a dollar, the tourist can both see and touch this creature of the wild.<sup>13</sup> And upon return home, the tourist satisfyingly claims to have met gentle, kind, and “beautiful people living in primeval paradise.”<sup>14</sup> For the tourism industry, Maasai culture is a multimillion dollar attraction that must be preserved.

Driven by deep economic desires that increasingly override their commitment to culture, the current expressions of Maasai culture, as the story of Lerionka demonstrates, are often an uncertain mix of traditional and modern.<sup>15</sup> The Maasai have occupied most of what is now Kenya and Tanzania since before the fifteenth century. They were once a highly self-sufficient people whose warriors formed the most prolific military force in all of Eastern Africa. Cattle raids on neighboring communities fueled wealth accumulation, and every aspect of their way of life was contingent upon livestock, from marriage rites and ceremonies, to their seminomadic migration patterns.<sup>16</sup> Their large herds of cattle required ample land for grazing, yet, in all this time, they did little to detrimentally impact the environment.<sup>17</sup> The way of life was simple but very effective, only depending on the land for pasture and utilizing it to the extent they needed and no more.<sup>18</sup>

That way of life began to change in the face of British colonialism. Through conquest, treaties, and laws, Britain dispossessed the Maasai of much of their ancestral territory. And subsequent laws by successive postcolonial regimes in Kenya and Tanzania resulted in the establishment of numerous national parks, game reserves, and conservancies, further diminishing Maasai territory,<sup>19</sup> and shrinking the land available for grazing, leaving the Maasai with no choice but to adapt to the Western influences that have gradually worked their way into day-to-day Maasai

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<sup>12</sup> A kraal is a village surrounding a cattle pen, mostly built with acacia, to prevent wild animals from attacking the livestock.

<sup>13</sup> See generally Berger, *supra* note 11.

<sup>14</sup> See SE Smith, ‘*The People Are So Beautiful!*’ *That’s Enough of the Colonial Tourism*, GUARDIAN (Apr. 8, 2014), <http://www.theguardian.com/commentisfree/2014/apr/08/people-beautiful-colonial-tourism-travel>.

<sup>15</sup> See generally A.F. ROBERTSON, GREED: GUT FEELINGS, GROWTH, AND HISTORY (2001).

<sup>16</sup> See Bitange Ndemo, *Maasai Entrepreneurship and Change*, 18 J. SMALL BUS. & ENTREPRENEURSHIP 207 (2005).

<sup>17</sup> See Moses Okello, Simon Ole Seno & Bobby Wishitemi, *Maasai Community Wildlife Sanctuaries in Tsavo-Amboseli, Kenya*, 13 PARKS J., 2003, at 62.

<sup>18</sup> See generally John G. Galaty, ‘*The Land Is Yours*’: *Social and Economic Factors in the Privatization, Sub-Division and Sale of Maasai Ranches*, 30 NOMADIC PEOPLES 26 (1992).

<sup>19</sup> Katherine Homewood, *Development, Demarcation and Ecological Outcomes in Maasailand*, 65 AFR.: J. INT’L AFR. INST. 331 (1995).

life.<sup>20</sup> For example, the Maasai have now perfected the act of dancing for tourists who come to their villages. Originally, these dances were performed during special traditional occasions, but now they are performed for money.

But such commercialization of a tradition can serve to diminish its original significance and importance to the local community, turning it into a mere tourism spectacle and undermining its value as a source of identity and recognition as a people.

## II. Exploitation of the Maasai Culture

For the last few decades, the Maasai have fought against the exploitation of their culture and the harms that occur through improper cultural exploitation from the tourism sector. While ostensibly praising the culture, the underlying objective of most tourism ventures is to maintain the Maasai culture so that they can continue reaping profits from selling tourism packages to tourists curious and eager to experience the “untouched,” “primitive,” and “savage”—“[p]hotographs and descriptions of ethnic [Maasai people] used to promote ecotourism,” for example, “give credence to the false notion that they are willing and available for ‘discovery’ by tourists.”<sup>21</sup>

Section 2 of Kenya’s Traditional Knowledge and Traditional Cultural Expressions Act of 2016 defines “exploitation” as:

the employment of the greatest possible advantage of traditional knowledge and cultural expressions for selfish purposes, taking advantage of unwary traditional knowledge and cultural expressions holders and advertising or a publicity program, including—

- (a) where the traditional knowledge is a product—
  - (i) manufacturing, importing, exporting, offering for sale, selling or using beyond the traditional context [of] the product; and
  - (ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context;
- (b) where the traditional knowledge is a process—
  - (i) making use of the process beyond the traditional context; and
  - (ii) carrying out the acts referred to under paragraph (a) of this subsection with respect to a product that is a direct result of the use of the process.<sup>22</sup>

The following narrative from the Guardian Africa Network demonstrates this damaging pattern of cultural exploitation, raising a number of questions, including whether a two- or three-month visit is enough to

<sup>20</sup> Peter G. Veit & Catherine Benson, *When Parks and People Collide*, CARNEGIE COUNCIL (Apr. 23, 2004), [https://www.carnegiecouncil.org/publications/archive/dialogue/2\\_11/section\\_2/4449](https://www.carnegiecouncil.org/publications/archive/dialogue/2_11/section_2/4449).

<sup>21</sup> Ole Kamuro, *Ecotourism: Suicide or Development?*, U.N. NON-GOVERNMENTAL LIAISON SERV., <https://www.unngls.org/orf/documents/publications.en/voices.africa/number6/vfa6.12.htm> (last visited Nov. 2, 2018).

<sup>22</sup> 2016 TK and TCE Act, *supra* note 2, § 2.

fully allow a tourist to connect with, authoritatively speak out against, or challenge the core tenets of a culture:

The story of Mindy Budgor, a white, middle class American who travelled to Kenya to live amongst the Masai Mara for three months to do charity work, is a troubling narrative for Africans. According to her blog, Budgor went to Kenya to build schools and hospitals before starting her MBA. While in Kenya, she asked the village chief why there were no women warriors. He apparently told her it was because Masai women are not “strong enough or brave enough.”

Inspired by feminism, she sets out to prove that women can become warriors—and ultimately becomes the first female warrior in her “tribe.” Budgor then returns home, attends the University of Chicago and is now putting her business skills to good use by marketing a book about her experiences. Her account, which has been reproduced widely—including in the *Guardian*, is problematic because it evokes popular narratives in western imaginations that Africans have been battling to redress for years.<sup>23</sup>

Most Indigenous communities that refuse to align their interests with national development priorities that negate cultural heritage are judged as failing to take on the responsibilities and demands of progress. This refusal to align interests, however, is often a reflection of fundamental differences in worldview. “In many [I]ndigenous cultures, social and political institutions are part of the cosmic order, and it is on the basis of their worldview, beliefs, values, and customs that [I]ndigenous [P]eoples define their own forms of governance, as well as their customary laws and norms.”<sup>24</sup> Additionally, “[I]ndigenous cultures . . . are based on a collective perspective. In the same way that [I]ndigenous [P]eoples consider their lands and resources to be collective assets, they see their cultural values and activities—their identity—as a function of the group, not individuals.”<sup>25</sup>

Professors Ziff and Rao identify four harms that come from inappropriate cultural borrowing:

1. Cultural degradation, with the accompanying loss of cultural diversity;
2. Removal of cultural objects from context, thereby changing or losing their meaning;
3. Channeling economic benefits to outsiders; and
4. Failure to recognize sovereign claims.<sup>26</sup>

The Maasai have experienced each of these.

<sup>23</sup> Sitinga Kachipande, *Mindy's Masai Mara Adventure is an Insult to Us All*, *GUARDIAN* (Sept. 19, 2013), <http://www.theguardian.com/world/2013/sep/19/kenya-mindy-budgor-masai-mara>.

<sup>24</sup> U.N. Secretariat of the Permanent Forum on Indigenous Issues, *State of the World's Indigenous Peoples*, 52, U.N. Doc. ST/ESA/328 (2009) [https://www.un.org/esa/socdev/unpfi/documents/SOWIP/en/SOWIP\\_web.pdf](https://www.un.org/esa/socdev/unpfi/documents/SOWIP/en/SOWIP_web.pdf).

<sup>25</sup> *Id.*

<sup>26</sup> *BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION* 8–15 (Bruce Ziff & Prati-ma V. Rao eds., 1997).

Tour companies, hotels, and other tourist enterprises have modified traditional rites, souvenirs, art, and religious ceremonies in a way that the tourist experiences the local culture without understanding its significance. This practice has influenced how the Maasai are defined in literature, which in turn impacts people's understanding of the Maasai. For example, Kenya Information Guide boldly describes the Maasai as "the authentic people of Kenya—a tourist favorite."<sup>27</sup> As one lands or departs from Kenya's largest airport, they will be met with a large billboard displaying Maasai images. Even the national carrier, Kenya Airways, uses images of the Maasai in its travel guides.<sup>28</sup> By reducing Maasai culture to one-dimensional image, such a discourse inevitably contributes to the erosion of Maasai culture and to misunderstandings of what that culture is.<sup>29</sup>

These tourism materials portray the Maasai as "un-urbanized" and contribute to myths about them that undermine their collective identity as a people and deny them recognition as such. For example, in some materials proffered to the tourist, the Maasai appear to have the same camera value as the big five animals—the buffalo, rhino, elephant, lion, and leopard.<sup>30</sup> But culture is much more dynamic than a camera moment. Culture, as a people's way of life, is not a commodity. Culture is an expression of a people's totality.<sup>31</sup> Portraying the Maasai in a manner that does not appreciate and support their cultural integrity is a great disservice to them<sup>32</sup>—"the Masai are not a cultural museum, nor do they want to be confined to being a photo opportunity for a tourist."<sup>33</sup>

<sup>27</sup> *Maasai: The Authentic People of Kenya—A Tourist Favorite*, KENYA INFO. GUIDE, <http://www.kenya-information-guide.com/maasai-tribe.html> (last visited Nov. 2, 2018).

<sup>28</sup> G. Nasieku Tarayia, *The Legal Perspectives of the Maasai Culture, Customs, and Traditions*, 21 ARIZ. J. INT'L & COMP. L. 183, 183 (2004). Ironically, the former Director at Kenya Airways, Mr. Titus Naikuni, comes from the Maasai community. During his tenure, the airline used Maasai culture and images as a promotional tool. These travel guides continue to create a fictional reality of the Maasai community. As a patriotic Kenyan national, I prefer traveling with the airline. However, it is frustrating to read the discourse on the Maasai in their travel magazines.

<sup>29</sup> See generally *id.* at 200.

<sup>30</sup> See Siloma Stephen, *I Am a Maasai And Am Not a Tourist Attraction*, SILOMASAYS (May 21, 2015), <http://silomasays.com/2015/05/i-am-a-maasai-and-am-not-a-tourist-attraction>.

I am a Maasai and am proud of it. I am proud of my culture and heritage. I am proud of my stupidity, chauvinism and pride. I am proud of my illiteracy, my low level of thought and my lowly life. It is with all this that you identify me as more of wildlife rather than a human being.

*Id.*

<sup>31</sup> See generally Tarayia, *supra* note 28, at 200.

<sup>32</sup> See Noel B. Salazar, *Imaged or Imagined? Cultural Representations and the "Tourismification" of Peoples and Places*, 49 CAHIERS D'ÉTUDES AFRICAINES 49 (2009). However, to take them to be a composite of Kenya is a lie. Culture is not a plastic thing. It is about real life.

<sup>33</sup> Dorine Reinstein, *The Quest for Authentic Africa*, TRAVEL WEEKLY (Jan. 7, 2014), <https://www.travelweekly.com/Middle-East-Africa-Travel/The-quest-for-authentic-Africa> (quoting Kenneth Firestone, international representative for Zinga African



Another example is the myth that has developed surrounding the practice of spear planting, a symbol of hospitality among the Maasai community but which outsiders have misconstrued as a sign of immorality. In between his long journeys, a clansman travelling to a far off place was welcomed to sleep in Maasai villages that were along his path. He could sleep in the host's main house. As a sign of respect, he would leave his spear, a weapon carried for protection against wild animals, outside the host's house. He might also leave his spear outside because the spear was too long to fit in the tiny Manyatta. However, popular myth (falsely) construes this practice as evidence of an invitation to enjoy the company of the host's wife.<sup>34</sup>

In the same vein are the myths surrounding Maasai warriors' sexual prowess,<sup>35</sup> which fuel a market for predominately young males to serve as sex workers for wealthy female tourists. Visitors to parks or hotels may notice a warrior strategically positioned to seduce female tourists, wearing the full Maasai traditional regalia.<sup>36</sup> Some tourists rent "Maasai guides" who are sex workers. These warriors may enjoy significant economic success from this work, which can cause them to become the envy of the village.<sup>37</sup> Exploitation in such cases is thus a two-way street.

Ziff and Rao's third harm, channeling economic benefits to outsiders, is evident in the context of the Maasai, as well. For example, most tourism companies operating in Maasai land belong to non-Maasai. Many of the companies have used and continue to use the Maasai image or name to sell products. Many companies around the world, in fact, use the Maasai image or name, including a company that makes vehicle accessories and parts for Land Rovers,<sup>38</sup> Masai Barefoot Technology,<sup>39</sup> and fashion house Louis Vuitton with its Maasai line that stocks beach towels, hats, scarves, and duffle bags.<sup>40</sup> Although these companies have

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Safaris).

<sup>34</sup> See *The Maasai Culture*, SOFTKENYA, <http://softkenya.com/tourism/the-maasai-culture> [https://web.archive.org/web/20161031020225/http://softkenya.com/tourism/the-maasai-culture]. A Maasai cultural expert Mr. Gideon ole Pesi disputes this myth as a total misunderstanding of Maasai culture, stating, "Nothing can be further from the truth . . . . The planting of the spear was actually meant to show you meant no harm and that if anybody doubted you, then they could even spear you, as you had surrendered you[r] weapon." *Id.*

<sup>35</sup> See, e.g., CORINNE HOFMANN, *THE WHITE MASAI* (Peter Millar trans., 2005). Corinne Hofmann, a Swiss tourist in 1986, then twenty-six years old, left her boyfriend and married Lketinga, a Maasai, who danced for tourists in a coastal town of Kenya. She sold thousands of copies of her book relating this experience.

<sup>36</sup> For example, Lerionka is strategically positioned at the hotel entrance to usher in visitors. However, he also aims to attract female tourists, specifically. See *supra* Part I.

<sup>37</sup> See George Paul Meiu, "*Mombasa Morans*": *Embodiment, Sexual Morality, and Samburu Men in Kenya*, 43 CAN. J. AFR. STUD. 105 (2009).

<sup>38</sup> MASAI VEHICLE ACCESSORIES & PARTS, <http://www.masai.co> (last visited Nov. 2, 2018).

<sup>39</sup> MBT PHYSIOLOGICAL FOOTWEAR, <https://www.mbt.com> (last visited Nov. 2, 2018).

<sup>40</sup> See Sarah Young, *Maasai People of East Africa Fighting Against Cultural Appropriation by Luxury Fashion Labels*, INDEPENDENT (Feb. 7, 2017), <https://www>.

been granted trademarks for the use of the Maasai name or images, the Maasai communities have not been consulted, nor have they received any compensation for the use of their name, images, or cultural expressions. Thus, the unauthorized use of TCEs commodifies Maasai culture and cultural objects regarded as sacred or infused with special meaning by the community.<sup>41</sup>

How, then, can Maasai people meaningfully implement a new law to protect their culture despite the global interest in it? How can the Maasai community as a whole benefit from the culture despite pressure from tourism interests? The following part explores possible options for claiming this ownership.

### III. Approaches to Responsible Tourism

Despite pressures from Western colonizing forces, the Maasai still cling to and are fiercely protective of their traditional culture. To borrow from a report issued by the World Intellectual Property Organization:

The Maasai are faced with more serious challenges than before[.] There is increasing pressure to change their land tenure systems and as such livelihood, culture and future. The diminishing natural resource base, food insecurity and poverty have eroded their self-confidence and self-determination. By and [l]arge, these interwoven realities threaten the intricate social, cultural and economic fabric that has made the Maasai unique. [They] need to develop their capacities to enable them [to] address these challenges. One of such glaring challenges is the preservation, promotion and protection of their cultural heritage given the reality of diminishing land, commercialization & commoditization of their heritage by others.<sup>42</sup>

The Maasai are not unique in this respect. Indigenous Peoples across the globe are struggling to protect their way of life and their cultural property from the harms done by appropriation. These struggles have resulted in a web of national and international standards that supply a framework for the Maasai to develop a coordinated response to the pressures of Western society in general and cultural tourism in particular.

To preserve and enhance cultural practices, Kenya has developed several laws, policies, and regulations.<sup>43</sup> For example, through its Culture

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[independent.co.uk/life-style/fashion/maasai-people-cultural-appropriation-luxury-fashion-retailers-louis-vuitton-east-africa-intellectual-a7553701.html](http://independent.co.uk/life-style/fashion/maasai-people-cultural-appropriation-luxury-fashion-retailers-louis-vuitton-east-africa-intellectual-a7553701.html); see also Cordelia Hebblethwaite, *Brand Maasai: Why Nomads Might Trademark Their Name*, BBC NEWS (May 28, 2013), <http://www.bbc.com/news/magazine-22617001>.

<sup>41</sup> See Hebblethwaite, *supra* note 40.

<sup>42</sup> Johnson Ole Kaunga, *WIPO Panel on, "Indigenous and Local Communities' Concerns and Experiences in Promoting, Sustaining and Safeguarding Their Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources"*, 2, WIPO Doc. WIPO/GRTKF/IC/9/INF/7(a) (Apr. 24, 2006), [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_9/wipo\\_grtkf\\_ic\\_9\\_inf\\_7\\_a.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo_grtkf_ic_9_inf_7_a.pdf).

<sup>43</sup> See *National Policy on Culture and Heritage*, REPUBLIC OF KENYA OFF. VICE-PRESIDENT MINISTRY OF STATE FOR NAT'L HERITAGE & CULTURE (2009), available at <https://>

and National Heritage Policy, the Kenyan government aims to ensure a strong and vibrant national identity that ignites pride and patriotism in the country's nationhood. The Culture and National Heritage Policy further ensures that fullest possible expression of culture and heritage in all their facets, including equal access for all cultures to art and to scientific and technological knowledge, are made in order to promote the development of national values and national cohesion, pride, and identity.<sup>44</sup>

Article 11 of the Kenya constitution recognizes culture as “the foundation of the nation” and obligates the State to “promote all forms of . . . cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage.”<sup>45</sup> Additionally, the State must “recogniz[e] the role of . . . [I]ndigenous technologies in the development of the nation.”<sup>46</sup> And Parliament is required to protect the intellectual property rights of the people of Kenya by “enacting legislation to ensure that communities receive compensation or royalties for the use of their cultures and cultural heritage,” and “recogniz[e] and protect the ownership of [I]ndigenous seeds and plant varieties, their genetic and diverse characteristics and their use by the communities of Kenya.”<sup>47</sup>

These laws are consistent with international law. For example, Article 11 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) reads:

1. Indigenous [P]eoples have the right to practi[c]e and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, art[i]facts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with [I]ndigenous [P]eoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.<sup>48</sup>

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[en.unesco.org/creativity/sites/creativity/files/activities/conv2005\\_eu\\_docs\\_kenya\\_policy.pdf](http://en.unesco.org/creativity/sites/creativity/files/activities/conv2005_eu_docs_kenya_policy.pdf).

[The] National Heritage [policy] arises from the Country's commitment to preservation, maintenance and promotion of Kenya's heritage. This can be illustrated in the legal steps in ratifying the Convention concerning the Protection of the World Cultural and Natural Heritage passed and adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organizations (UNESCO) meeting in Paris.

*Id.* at 7. In particular, the policy states: “The Government shall ensure the protection of the rights of all peoples and in particular promote the rights as are enshrined in International legal Instruments by either adopting or domesticating them.” *Id.* at 33.

<sup>44</sup> *Id.* at 3, 6.

<sup>45</sup> CONSTITUTION art. 11(1)–(2) (2010) (Kenya).

<sup>46</sup> *Id.* art. 11(2)(b).

<sup>47</sup> *Id.* art. 11(3).

<sup>48</sup> United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295,

A study by Paul Kanyinke Sena, former member of the United Nations Permanent Forum on Indigenous Issues, highlights the importance of “[r]ecognizing [I]ndigenous knowledge as intellectual property,” which “would enable [I]ndigenous and local communities, as well as Governments, to protect [(TCEs)] against misappropriation and enable communities to control and collectively benefit from any commercial exploitation of their [I]ndigenous knowledge.”<sup>49</sup> According to Dr. Kanyinke, misappropriation of Indigenous knowledge is a direct consequence of lack of awareness of the economic value of Indigenous knowledge across Africa.<sup>50</sup>

For some Indigenous communities, or groups within the communities, marketing of objects based on TCEs may present an ongoing or potential source of income to help alleviate poverty. “Importantly, Article 23(1) of the ILO Convention No. 169 dealing with traditional occupations stipulates that handicrafts, rural and community-based industries . . . shall be recognized as important factors in the maintenance of . . . cultures and in . . . economic self-reliance and development.”<sup>51</sup>

Crafts, for example, often develop in a specific area and may present one of the primary sources of income for the local community.<sup>52</sup> Since craftmaking frequently involves self- and family-employment, with the development of supporting industries, for example local stores that sell beads and those that market finished products, there may be a ‘multiplier effect.’ And furthermore, since women are traditionally involved in craftmaking in many Indigenous communities, such activities might present particular sources of income and autonomy for them. The sale of Maasai beadwork and other souvenirs, for example, present an important source of livelihood for Indigenous Maasai women.<sup>53</sup>

The Maasai people have a rich heritage in beadwork, and many of their traditional ceremonies and religious beliefs are expressed in color and pattern. The beadwork embodies the whole of Maasai culture,

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art. 11, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

<sup>49</sup> U.N. Permanent Forum on Indigenous Issues, *Study to Examine the Challenges in the African Region to Protecting Traditional Knowledge, Genetic Resources and Folklore*, ¶ 18, U.N. Doc. E/C.19/2014/2 (Feb. 19, 2014).

<sup>50</sup> See *id.* ¶¶ 22, 26. Kanyinke defines misappropriation as the “wrongful or dishonest use of [I]ndigenous [P]eoples’ knowledge without their free and prior informed consent” (FPIC). *Id.* ¶ 26.

<sup>51</sup> Tzen Wong & Claudia Fernandini, *Traditional Cultural Expressions: Preservation and Innovation*, in INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT: CURRENT TRENDS AND FUTURE SCENARIOS 175, 179 (Tzen Wong & Graham Dutfield eds., 2011) (internal quotation omitted).

<sup>52</sup> See generally Rene van der Duim, Karin Peters & John Akama, *Cultural Tourism in African Communities: A Comparison Between Cultural Manyattas in Kenya and the Cultural Tourism Project in Tanzania*, in CULTURAL TOURISM IN A CHANGING WORLD 104 (Melanie Smith & Mike Robinson eds., 2005).

<sup>53</sup> See Evaristus M. Irandu & Parita Shah, *The Role of Ecotourism in Promoting Women Empowerment and Community Development: Some Reflections from Kenya*, 2 J. TOURISM & HOSP. MGMT. 245 (2014).

representing beauty, strength, tradition, warriorhood, marriage, age, marital status, social status, and the deep love and devotion Maasai have for their cattle. Beadwork also plays an important role in bringing Maasai women together, and it provides a space to socialize and share creative ideas. In between their daily chores, Maasai women sit together and make beaded jewelry.

Colors hold a special meaning in this community.<sup>54</sup> Red is the color of the blood from the cows. It signifies danger, ferocity, bravery, strength, and especially unity within the community. Blue represents the sky, which provides water for the cows. Green represents the land, which grows food for the cattle to eat. Orange symbolizes hospitality because it is the color of the gourds that hold the milk that is offered to visitors. Yellow symbolizes fertility and growth because it is the color of the sun, which helps grow the grass to feed the livestock and sustain life. White symbolizes the color of cow's milk that provides sustained nourishment to the people. Black represents the color of the people and, more importantly, the hardships we all go through in life.<sup>55</sup>

With this cultural aspect in mind, women have taken advantage of their beadwork skills to generate income. The beadwork sales create a means for women to economically sustain their families and the community in general. It also enables educational opportunities for their children and future generations.<sup>56</sup> Being economically empowered has also helped build women's self-confidence, and widened their business experience, networks, and access to social capital. The economic empowerment of women is correlated with decreasing rates of early marriage, HIV/AIDS, and female genital mutilation (FGM), as well as greater access to education for girls throughout Maasai land.<sup>57</sup>

To sell their beadwork locally, women travel daily to market places in urban and semi-urban areas commonly known as Maasai markets,<sup>58</sup> despite the poor roads that make traveling an expensive affair in terms of both cost and time. Further, with the stiff competition from other non-Maasai traders, beadwork income is drastically reducing. To help

<sup>54</sup> See Donna Rey Klumpp, *An Historical Overview of Maasai Dress*, 7 DRESS 95 (1981).

<sup>55</sup> See Jerry Horsman, *Maasailand*, OSILIGI (Jan. 2009), <http://www.osiligi.org/maasailand.pdf>; *Meaning of Maasai/Masai Bead Colors*, AFRICANCRAFTS VILLAGE, <https://www.africancraftsvillage.com/home/blog/meaning-of-maasaimasai-bead-colors> (last visited Nov. 8, 2018).

<sup>56</sup> See Regina Scheyvens, *Promoting Women's Empowerment Through Involvement in Ecotourism: Experiences from the Third World*, 8 J. SUSTAINABLE TOURISM 232 (2000).

<sup>57</sup> See, e.g., Annie Corsini-Karagouni, *E-solidarity, A Means of Fighting Against FGM (Female Genital Mutilation)*, in EDUCATION AND THE KNOWLEDGE SOCIETY 231 (Tom J. van Weert ed., 2005).

<sup>58</sup> Maasai Markets in Nairobi "were started by [Maasai] women who wanted to sell directly to visitors." *Masai Markets in Nairobi*, AFR. SPICE SAFARIS, [http://www.africanspicesafaris.com/masai\\_market\\_shopping\\_nairobi\\_kenya.html](http://www.africanspicesafaris.com/masai_market_shopping_nairobi_kenya.html) (last visited Nov. 2, 2018). The Markets "have blossomed over the years" with an impressive offering of goods, and in most cases sales are done by the people who actually make the goods. *Id.*

protect the industry for Maasai makers and traders, the Narok County Government in Maasai land announced its intent to ban all hotels and lodges in the Maasai Mara Game Reserve from selling beadwork to tourists. According to Narok's County Governor, Mr. Samuel Tunai, the business should be left solely to Maasai women who reside around the park and depend on beadwork.<sup>59</sup> Unfortunately, a law instituting such a ban has yet to be implemented, and thus “[w]omen-owned businesses tend to compete in restricted local markets, where excessive competition leads to [the] underpricing of products and reduced incomes for women and their families.”<sup>60</sup> The ever-increasing demand for improved designs with high quality finish poses further challenges to the mostly uneducated Maasai women bead makers. Beads that do not meet the market standards attract very low prices and are even sometimes returned by customers due to beading errors. A challenge to creating products that will be competitive on the market, therefore, is how to improve handmade beads with a lack of proper tools, adequate resources, and knowledge of business management.<sup>61</sup>

#### IV. The Way Forward: The People's Perspective

In 2013, Basecamp Maasai Brand (BMB) implemented a project called Developing Leadership and Business Skills for Informal Women Workers in Fair Trade<sup>62</sup> to help its handicraft producers improve their livelihoods. The project draws inspiration from Maasai culture and supports women in creating better designs that have value and bring about new design experiences to a world marked by acculturation. The women are further trained on how to protect their beaded artwork and obtain a trademark for their work.<sup>63</sup>

Additionally, Maasai leaders and elders have started a vigorous campaign in pursuit of intellectual property rights.<sup>64</sup> In 2010 and 2011,

<sup>59</sup> See Kiplang'at Kirui, *Narok to Ban Hotels From Selling Beadwork*, STAR (June 3, 2014, 12:00 AM), [https://www.the-star.co.ke/news/2014/06/03/narok-to-ban-hotels-from-selling-beadwork\\_c948857](https://www.the-star.co.ke/news/2014/06/03/narok-to-ban-hotels-from-selling-beadwork_c948857). The article quotes Tunai as stating, “We will put in law that no hotel and lodge should be allowed to sell the beadworks to the tourists. Our women need to sustain themselves and this is the only way they can.” *Id.*

<sup>60</sup> See ICRW, *ONE WOMAN = ONE BUSINESS: WHY BUSINESS AND MANAGEMENT EDUCATION FOR WOMEN IS ESSENTIAL TO ECONOMIC DEVELOPMENT 3* (Sept. 2008), <http://www.icrw.org/wp-content/uploads/2016/10/One-Woman-Equals-One-Business.pdf>.

<sup>61</sup> See generally *id.*

<sup>62</sup> BMB aims to economically empower disadvantaged Maasai women's groups in Talek, Kenya. They maintain and enhance handicraft skills, knowledge and designs of the Maasai's famous bead and leather work, as well as take full responsibility for the timely delivery of the goods and for quality control. The “enterprise gives women an opportunity to make and sell traditional beaded crafts in a global marketplace.” Leslie Vryenhoek, *Developing Women's Leadership and Business Skills*, WIEGO (Nov. 2016), <https://www.wiego.org/sites/default/files/resources/files/Women-Leadership-and-Business-Skills-LVryenhoek-CaseStudy-Nov2016.pdf>.

<sup>63</sup> See *id.*

<sup>64</sup> See *The Maasai Cultural Brand*, LIGHT YEARS INTELL. PROP., <http://lightyearsip.net/the-maasai> (last visited Nov. 3, 2018).

a team comprised of a Maasai lawyer from Tanzania, the CEO of Light Years IP, and members of international law firm Arnold & Porter contributed to the drafting of documents for the creation of an IP rights-owning Maasai organization. Initial drafts were circulated among a group of Maasai leaders for feedback and edits, and ultimately the Maasai Intellectual Property Initiative Trust (MIPI) was formed. MIPI is a nonprofit now active across Maasai land in both Tanzania and Kenya. A General Assembly of Maasai leaders and elders serves as a representative body of the organization to ensure widespread inclusion of, and participation by, Maasai people in the organization's efforts, and it "has the authority of the decision-makers in the Maasai culture" to appoint a board that acts on its behalf to come to licensing agreements with companies using the Maasai name or culture.<sup>65</sup> Already, the MIPI "has recovered trademarks from a major corporation," and the hope is that continued action "will provide benefits to the Maasai people permanently."<sup>66</sup>

### Conclusion

The events leading to the hotel lobby scene described in Part I demonstrate the crossroads facing the Maasai. The Maasai can continue to trade away their culture in an unregulated manner, or they can seek to take greater control over access to their culture and the manner in which it is commercialized. The 2016 Protection of Traditional Knowledge and Cultural Expressions Act presents opportunities for the Maasai in this regard, most notably by defining Traditional Knowledge and Traditional Cultural Expressions and providing a framework for their management in a way that could better benefit the Maasai themselves.<sup>67</sup> But it will require continuing organization within the Maasai community and at the local level to fully realize the Act's potential.

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<sup>65</sup> *Id.*; see also Stephan Faris, *Can a Tribe Sue for Copyright? The Maasai Want Royalties for Use of Their Name*, BUS. WEEK (Oct. 25, 2013, 7:29 AM), <http://www.businessweek.com/articles/2013-10-24/africas-maasai-tribe-seek-royalties-for-commercial-use-of-their-name>.

<sup>66</sup> *The Maasai Cultural Brand*, *supra* note 64.

<sup>67</sup> See generally 2016 TK and TCE Act, *supra* note 2.