



SUSCEPTIBILITY OF INDIGENOUS COMMUNITIES AND THE DEVELOPMENT OF EXPRESSIONS OF FOLKLORE.

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Abstract

Traditional cultural expression, can also be referred to as 'expressions of folklore' is defined as diversity within cultural expression, embracing traditional dances, songs, music, handicraft, ritual and other artistic expressions. India possesses an ancient legacy of extremely rich and diverse culture; the indigenous tribes comprising approximately 15% of the total population. Therefore, it is crucial to safeguard India's rich heritage and imbibe stricter laws for protecting its traditional cultural expressions. The aim and objective of this paper is to illuminate the legislation which addresses the unidentifiable case of IP infringement faced by vulnerable classes and determining the efficacy of these legislations and worldwide implementation.

In furtherance to this, the paper provides suggestions for strengthening and safeguarding the existing laws, by analyzing secondary data. On various occasions the legislators are unable to foresee the obstacles that hinder the end result. Even in the presence of these unfettered and wide sets of legislations, exploitation of IP is quite prevalent in this segment, which includes exploitation of traditional cultural expression for commercial purposes and similar exploitation in national and international market value. The second half of the paper is devoted towards analyzing the core reasons which revolve around the failure to implement these laws by comparing them to the provisions of other countries.

Keywords: Traditional knowledge, Folklore, Indigenous, protection, intellectual property.

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Literature Review

1. **'The Concept of Folklore: An Overview of The Psychoanalytic Reading of Folklores' (2018) Vol-3 International Journal of English Literature and Social Sciences (IJELS)-** By Farhain Khan- This article discusses about psychoanalytic readings and folklore and how it enables comprehending and reaching collective consciousness of the society.
2. **Traditional Knowledge Digital Library-** India's initiative to safeguard Indian traditional medicinal knowledge & prohibit misappropriation of the same at International Patent Offices.
3. **“National Experiences with The Protection of Expressions of Folklore/ Traditional Cultural Expressions”-** By P.V. Valsala G. Kutty- It discusses about the International and domestic experience in relation to Folklore.
4. **“Intellectual Property and the Safeguarding of Traditional Cultures”-**By Molly Torsen and Jane Anderson- The research article discusses about digitalization and distribution of cultural expressions of various nations.
5. **“Protection of Traditional Cultural Expressions in India” –** By TC James and Deepika Yadav- The paper discusses about the issues and challenges associated with traditional cultural expressions in India.
6. **The World Intellectual Property Organization, “Report on The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)”-** The official document demarcates work program and agendas of IGC on Traditional Knowledge and Folklore for the year 2020-2021.



Introduction

The concept of 'Folklore' transpired in Europe in the middle of the nineteenth century. Initially, it signified primitive tribal customs and ancient festivals, myths, legends and fables, classic tales and proverbs which were commonly used. The chronicle of the same, rarely proved to be authentic and practical. The primary embodiment of expression of folklore takes us back to the dawn of human diversification and hence comprises elementary forms of verbal as well as visual symbols.³

The field of folklore or folklife constitutes, firstly and primarily of oral literature also known as verbal art or expressive literature. This stands for those oral literature either spoken or sung or voiced forms of traditional utterances showing a repetitive pattern.⁴ The Grimm brothers started publishing different volumes of oral folk narratives and formulating it in German mythology.⁵ This concept of Folklore was initially referred to as 'Popular antiquity' and was given the term "Folklore" in 1846 by William John Thomas and has ever since been regarded as a whole new area of research and learning.⁶

India is a diverse nation, induced with rich traditional cultural heritage and knowledge which can be traced back thousands of years ago. Traditional knowledge (TK) was considered as a fusion of different customs and knowledge, which has evolved overtime and has been passed on from generations to generations within a particular community or tribe, thereby constituting a significant part in establishing cultural and spiritual recognition.⁷

3 Dan Ben Amos, 'The Idea of Folklore: An Essay' [1983] Scholar Commons, https://repository.upenn.edu/cgi/viewcontent.cgi?article=1130&context=nelc_papers, accessed 30 May 2021.

4 Farhain Khan, 'The Concept of Folklore: An Overview of The Psychoanalytic Reading of Folklores' (2018) Vol-3 International Journal of English Literature and Social Sciences (IJELS), <https://dx.doi.org/10.22161/ijels.3.6.21>, accessed 30 May 2021.

5 N. J. Girardot, 'Initiation and Meaning in The Tale of Snow White and The Seven Dwarfs' [1977] The Journal of American Folklore, <http://www.jstor.org/stable/539520>, accessed 29 May 2021.

6 Anurag Dwivedi and Monika Saroha, 'Copyright Laws as A Means of Extending Protection to Expressions of Folklore' (2005) Vol 10 Journal of Intellectual property rights, <http://docs.manupatra.in/newsline/articles/Upload/50DF5D41-4A20-40CA-9B69-A7D5E04FF85B>, accessed 28 May 2021.

7 Saba, 'Protecting Traditional Knowledge – The India Story till Date', The SCC Online Blog, <https://www.sconline.com/blog/post/2018/04/23/protecting-traditional-knowledge-the-india-story-till-date/>, accessed 28 May 2021.



One of the striking examples of folklore is the famous mythological folklore of Ramayana, which was prevalent in the Indian culture and within the religious sensibilities of the people.⁸ Ayurveda, which fosters healthy living through therapeutic uses of medicinal plants, embodies and acknowledges the existence of 'traditional knowledge' in the Chakra Samhita and Sushruta Samhita.⁹ India now has a forum containing a unique digital library, known as the Traditional Knowledge Digital Library (TKDL) in order to safeguard ancient and traditional knowledge of the country from getting exploited.¹⁰

The form folklore has not been inscribed in any national or international legal document, but the term 'expressions of folklore' has been defined in the Model Provisions prepared by WIPO and UNESCO, so as to frame relevant legislations as required for that area. According to the definition- "Expressions of folklore mean productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of (name of the country) or by individuals reflecting the traditional artistic expectations of such a community, in particular:

- (i) Verbal expressions, such as folk tales, folk poetry and riddles;
- (ii) Musical expressions, such as folk songs and instrumental music;
- (iii) Expressions by action, such as folk dances, plays and artistic forms of rituals whether or not reduced to a material form; and
- (iv) Tangible expressions such as, productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalwork, jewelry, basket weaving, needlework, textiles, carpets, costumes; musical instruments; architectural forms"¹¹

8 Farhain Khan, 'The Concept of Folklore: An Overview of The Psychoanalytic Reading of Folklores' (2018) Vol-3 International Journal of English Literature and Social Sciences (IJELS), <https://dx.doi.org/10.22161/ijels.3.6.21>, accessed 30 May 2021.

9 Shruti Khanduri, Srikanth Narayanam and Padhi Madan, 'Ayurveda And Traditional Knowledge: Scope Of Innovation And Research', https://www.researchgate.net/publication/275211350_Ayurveda_and_traditional_knowledge_Scope_of_Innovation_and_Research, accessed 23 May 2021.

10 Traditional knowledge Digital Library, <http://www.tkdl.res.in/>, accessed on 28 May 2021.

11 Farhain Khan, 'The Concept of Folklore: An Overview of The Psychoanalytic Reading of Folklores' (2018) Vol-3 International Journal of English Literature and Social Sciences (IJELS) <https://dx.doi.org/10.22161/ijels.3.6.21>, accessed 30 May 2021.



Research Questions

- (I) Whether or not commercialization of expression of folklore leads to illicit exploitation and its impact on cultural heritage?
- (II) Whether or not the existing folklore laws sabotage the rights of the vulnerable communities and necessary improvements?

Research Analysis I

Folklore centers around traditions, expressive forms of human behavior which are conversed by interactions. It covers a wide range of -behaviors, rituals, folk-art material, culture to games, sayings, and songs and common 'lore' of various peoples bonded by ethnicity, age, gender, family, occupation, recreation, religion, and region.¹² The traditional folk culture was infused within the sacred and secular domains of a community. However, the spread of mass media communication, led to increasing and selective integration of folk-lore in television programmers, telephone and internet discourse.¹³ There are various occasions and instances where traditional folklore has been exploited, a few of the examples are discussed to evaluate the significance of safeguarding the same. Reproduction of images of Indigenous performances by a commercial photographer, depicting the dance group dressed for ceremony with body painting and feathered headdresses, captured without the knowledge and consent of the Indigenous dancers from Cape York.¹⁴ *Bulun Bulun* case, where t-shirts sold at a local market denoting Indigenous rock art from Eastern Arnhem Land¹⁵.

12 Sharon R R. Sherman and Mikel J Koven, *Folklore/Cinema: Popular Film as Vernacular Culture*, (Utah State University Press, Logan 2007)

13 Yogendra Singh, 'Modernization and Its Contradictions: Contemporary Social Changes in India.' <http://www.jstor.org/stable/41969438>, accessed 29 May 2021.

14 Terri Janke, 'Case Studies on Intellectual Property and Traditional Cultural Expressions' https://www.wipo.int/edocs/pubdocs/en/tk/781/wipo_pub_781.pdf, accessed 30 May 2021.

15 Kuek Chee Ying, 'Protection of Expression of Folklore/ Traditional Cultural Expression: To What Extent is Copyright Law the Solution?', *Journal of Malaysian and Comparative Law*



Reproduction of imported carpets which produced copyright works of Indigenous artists was found to be a clear infringement of each Indigenous artist's works¹⁶. Deep forest CD produced in 1992, which combined the digital samples of music from Ghana, the Solomon Islands and African 'pygmy' communities with 'techno-house' dance rhythms.¹⁷

Renaming and transforming traditional musical instruments into modern instruments and commercializing the same, used by non-traditional persons active in the world music community or the New Age movement, or for purposes of tourism (such as the steel pan of the Caribbean region and the didgeridoo of indigenous Australians)¹⁸

The post- independence era has witnessed a large-scale migration of peasants and farmers from states like Bihar, Uttar Pradesh, Madhya Pradesh, Rajasthan, Orissa, etc., to different cities of India.¹⁹ Folklore has paved its way into Indian cinema through songs and dances. Bollywood songs such as 'Kesariya Balama', 'Sun mere bandhu re', 'lekin yara sili sili' are a few examples of songs which were influenced by folk tunes.²⁰

In addition to this, certain Bollywood dances are heavily influenced by folk dance of India such as 'Ghoomar' in the movie Padmavati which is a folk dance of Bhil Tribe of Rajasthan, Folk dance of Kashmir which is 'Rouff' which can be seen in movie Mission Kashmir. Folk dance of Odisha which is Odissi can be seen in the movie Bhool Bhulaiya are some examples of folk dance shown in Indian Cinema.

https://www.academia.edu/14096589/Protection_of_Expressions_of_Folklore_Traditional_Cultural_Expressions_To_What_Extent_is_Copyright_Law_the_Solution, accessed 28 May 2021.

16 Michael Blakeney, 'Milpurruru and ors v Indofurn Pty Ltd and ORS – Protecting Expressions of Aboriginal Folklore under Copyright Law'(1995) 2 Murdoch University Electronic Journal of Law <http://www5.austlii.edu.au/au/journals/MurUEJL/1995/4.html>, accessed 28 May 2021.

17 Farhain Khan, 'The Concept of Folklore: An Overview of The Psychoanalytic Reading of Folklores' (2018) Vol-3 International Journal of English Literature and Social Sciences (IJELS) <https://dx.doi.org/10.22161/ijels.3.6.21> ,accessed 30 May 2021.

18 Ibid.

19 Dogra Sapna, 'Folklore and commercialization' [2019] 11(ISSN 2349-1949) Chandigarh Government College Teacher Association, https://www.iq.cgcta.co.in/rwe/documents/1a2ab_Article.pdf, accessed 30 May 2021

20 Isha Bhattacharya, 'Folk and Pop Culture', <https://www.folklog.com/blog/folk-and-pop-culture->, accessed 17 July 2021





Case Study 1: Badshah's "Genda Phool" Controversy (2020)

Facts: Badshah (Popular Indian rapper and singer) released the song "Genda Phool" on March 26, 2020 and was accused of plagiarism. Badshah was thoroughly criticized for copying the verbatim lines-'*Boroloker bitilo, lomba lomba chul, Emon mathay bendhe debo lal genda phool*' (Daughter of a rich man/ long, long hair/ I shall adorn such hair with a red marigold) which is from a Bengali folk number 'Boro Loker Biti Lok'.²¹

'Boro Loker Biti Lok' was written by veteran artist Ratan Kahar in the 1970s and no credits were given to the original singer and lyricist. Later Badshah stated that the folk lyrics were not safeguarded from any copyright infringement and that it was not the first time that the lyrics are being used in any songs. Hence, he was not liable for any such copyright infringement for the Bengali folk song.

Analysis: No legal actions were taken against Badshah for sampling the verbatim lyrics. 85-year-old Kehar stated in one of the interviews that he neither had the money or power to fight such legal battles. However, on 'humanitarian backgrounds', Badshah acknowledged the lyricist and provided him with a financial aid Rs.5 lakhs and a promise to collaborate.²²

In this case it is evident that due to the vulnerable state of the Bengali Folk Artist, no legal actions could be taken by him. Badshah's song "Genda Phool" topped the Global YouTube Music Video Charts and attracted various international listeners and artists over the globe as well. Yet, the compensation provided for the same was solely Rs 5,00,000 whereas the royalties gained by Badshah for the same song is much more. On the contrary, in the Bollywood movie "Dream Girl", a Marathi Folk song "Dhagala Lagli" that originally featured in "Bot Lavin Tithe Gudgulya" was used for promotional purpose, Delhi High Court ordered the removal of the promotional song from digital platforms, citing copyright violations.²³

²¹ SpicyIP, 'Badshah's Genda Phool Controversy – Cultural Appropriation, Cumulative Creativity and Copyright Law', <https://spicyip.com/2020/04/spicyip-fellowship-badshahs-genda-phool-controversy-cultural-appropriation-cumulative-creativity-and-copyright-law.html>, accessed 17 July 2021.

²² The Hindustan Times, 'Genda Phool Singer Payal Dev On Copyright Allegations: "There Are No Rights To Folk Songs, They Don't Have Proof"' (2020) <https://www.hindustantimes.com/music/genda-phool-singer-payal-dev-on-copyright-allegations-there-are-no-rights-to-folk-songs-they-don-t-have-proof/story-mXE97YWCibhUGXJxs2RSoN.html>, accessed 29 May 2021.

²³ 'HC Restrain Balaji Motion Pictures, ALT Digital Media & Zee Entertainment From Using Sound Recording Of Marathi Movie In Film 'Dream Girl' (LayersConnect), <http://lawyersconnect.info/hc-restrain-balaji-motion-pictures-alt-digital-media-zee-entertainment-from-using-sound-recording-of-marathi-movie-in-film-dream-girl/>, accessed 29 May 2021.



Case Study 2: *“Nimbooda Nimbooda”* song in the film ‘Hum Dil De Chuke Sanam’

Facts: ‘Nimbooda Nimbooda’ song, from the 1999 Hindi film ‘Hum Dil De Chuke Sanam’ is a Rajasthani Folk song of the Indigenous Community known as Manganiyar. Rupayan Sansthan, which is an institute in Jaipur, had accumulated all songs formulated by Rajasthani’s singers and sued music directors of Hindi films on the grounds of copyright infringement. The song ‘Nimbooda’ was stolen from the original singer, who was later not permitted to sing his own song and was demanded royalty for the same by a Bombay composer.²⁴

Analysis: The true composer for the song Nimbooda, Gazi Khan Manganiyar was not even permitted to sing his own composition and sought license permission for recreating the version of the popular folk-music Nimbooda, which was well known folk song in the Manganiyar community. Hence, proves that the standard of protection of these folk compositions is very substantial in this country and often recognition is absent. There are various Traditional expressions which are yet to be ascertained by any governmental/ independent authority.

The conclusion reached through both these case studies is that these folk artists rarely have any legal backing or knowledge regarding the legal actions that could be taken, after the mass misappropriation takes place. Huge Bollywood production houses and large music recording companies often try to exploit these inherited rights and provide no recognition to these artists. In few cases where due recognition is given on moral and ethical grounds, compensation of the same has not been given to the source communities/indigenous communities due to the absence of a legal framework on Intellectual property in India relating to the subject in hand.

²⁴ Amlam Chakraborty, ‘Missing legal protection for Cultural Expressions in India? : A brief write-up on issues concerning them at contemporary times’, accessed 17 July 2021.



Research Analysis II

Traditional cultural expression (TCE) such as ancient music, art and other traditions are not only alluring, but also readily accessible to the ones who can exploit it for commercial use, which can threaten the rights of the Indigenous community. The primary concern of indigenous community regarding protection of indigenous folklore and knowledge, is continuing unsettled matters; and this issue has been intensified through rapid globalization and international trade.

Globalization has made it easier to plagiarize, copy or use TCE and traditional knowledge illicitly as we have observed in the case study of “Genda Phool” which is originally a folk song of Bengal and he was accused of not giving credit to the origin creator of the song. Often these exploitations are ignored, waived off or forgotten, the consequence of commercialization of rich heritage of indigenous folk artists is regarded as culturally inappropriate and unjustifiable.

There are many examples of such cases where the indigenous folklore is used for the purpose of trade without availing prior permission or acknowledgment.²⁵ In this next segment we analyze the existing law dealing with Traditional Cultural expression to discover the loopholes within these legal structures and provide solutions for the same.

²⁵ 'Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions', https://www.wipo.int/edocs/pubdocs/en/wipo_pub_933_2020.pdf, accessed 29 May 2021.



India: Existing Legal Provision on Traditional Cultural Expression

(i) Constitutional Provisions

The basic law of the land, Constitution of India has not directly addressed the issue of protection of Traditional cultural expression, but it has mentioned it under Article 29 of the Constitution which guarantees certain right to the minorities²⁶. Another general provision formulated in order to protect folklore is, Article 51A (f) which states that “to value and preserve the rich heritage of our composite culture” as the fundamental duty of every citizen of India, but no action has been taken in respect to it.

(ii) Legislations in Intellectual Property Rights.

1. The Copyright Act, 1957:

Cultural tradition is protected under the umbrella of copyrights, however traditional cultural “Expression” as a whole is not safeguarded by copyrights. The Copyright Act, fails to protect the interest of the community that gave rise to the contemporary interpretation of the cultural expression, and most importantly the protection is limited to the reproduction of the work, performances and does not include works which are inspired or influenced by it.

In addition to this, copyright is subjected to statutory exceptions for educational purposes, museums and archives which make traditional cultural expression at very high risk of exploitation. As the ‘traditional cultural expression’ ultimately falls within the ambit of public domain, Copyright laws fail to safeguard the traditional ancestral secret or sacred knowledge which poses a major threat of misuse and profiteering. The Act has been amended numerous times, but it does not precisely mention about the protection of traditional cultural expressions (TCE). It may be functional in safeguarding the present day works, but not pre-existing works of traditional cultural expressions, which are in public domain and can be misused by anyone.

26 P.V. Valsala G. Kutty, 'National Experiences with The Protection of Expressions of Folklore/ Traditional Cultural Expressions' https://www.wipo.int/edocs/pubdocs/en/tk/912/wipo_pub_912.pdf, accessed 29 May 2021.



The Copyright Act emphasizes and focuses on 'authorship' which is not present in work relating to TCE, as TCEs are often only manifested, practiced, passed on and preserved in oral form.²⁷ One of the significant loopholes within this Statute which was of major concern is that the Act provides protection for limited life span which is contradictory to the very essence of existence of Traditional cultural expressions. Protection of indigenous folklore therefore requires consideration of the concept of community ownership of works and management of rights associated with those works in accordance with the customs of the particular indigenous culture.²⁸

2. Geographical Indications of Goods (Registration and Protection) Act in 1999:

GI (Geographical Indications) is a community right, which enables the traditional community to safeguard certain rights associated with their goods, indicating its origin linked to their territory or region. The Act extends- goods, handicraft, handlooms, certified fruits, delicacies etc. For examples- Chanderi Saree, Orissa ikat or Nirmal Paintings²⁹ which represents cultural expressions of the communities. The Act although revolves around safeguarding and certifying from unfair trade practices, but does prioritize the unauthorized use or economic interest of the owner of the TCEs.

3. Trade Mark Act, 1999:

The Act aids in distinguishing goods and services of one person from another and helps in identifying its source. Under Section 61 of the Act, "Collective marks" can be used to 'distinguish the goods or service of one person from those of others', similarly it can be used to create a brand image for traditional goods and services such as paintings, handlooms, weaves, etc.³⁰ "Certification Marks" such as India Organic or ISI Mark can be used to protect traditional goods, which have cultural significance.³¹

27 Molly Torsen and Jane Anderson, 'Intellectual Property and the Safeguarding of Traditional Cultures' [2010] (978-92-805-2016-3) The World Intellectual Property Organization, https://www.wipo.int/edocs/pubdocs/en/tk/1023/wipo_pub_1023.pdf, accessed 29 May 2021.

28 Id.

29 'Geographical Indication and How to Protect It' <https://www.ilms.academy/blog/geographical-indication-and-how-to-protect-it#:~:text=A%20geographical%20indication%20%28GI%29%20is%20a%20name%20or,is%20a%20community%20right%20not%20a%20private%20right>, accessed 28 May 2021.

30 Ruth Clifford, 'Design and Business Education for Handloom Weavers in India: Innovation, Tradition and Entrepreneurship' [2020] Global Inch Journal <https://globalinch.org/article/design-and-business-education-for-handloom-weavers-in-india/>, accessed 29 May 2021.

31 TC James and Deepika Yadav, 'Protection of Traditional Cultural Expressions in India' [2019] <http://ris.org.in/fitm/sites/default/files/Scooping%20Paper%20No%203.pdf>, accessed 29 May 2021



(iii) Institutional Framework

Many efforts were made to digitize and create online libraries for preserving the folklore and promoting it to the general public; these were readily accessible to masses, so that they are well informed and educated about the traditional cultural expression of India. Various contributions are made towards preservation of traditional cultural expression by NGOs, civil societies and state governments. Such as The Indian National Trust for Art and cultural heritage (INTACH)³², The National Folklore Support Centre (NFSC)³³, The Archives and Research Centre for Ethnomusicology at American Institute for Indian Studies in India (AIISI).

A major initiative of the government in protecting TCEs has been the establishment of the *Indira Gandhi National Centre for Arts (IGNCA)*, which aims to serve as a major resource center for arts, especially written, oral and visual source material.³⁴ *National Mission for Manuscript*,³⁵ is another initiative taken by the government to preserve and digitalize the manuscript of India.³⁵ It must also be taken into consideration that digitalization has also given scope for duplication and transmission of copies of various forms of TCEs, thus creating an environment where it is easy to exploit cultural heritage of the indigenous people with or without their approval,³⁶ so the issue needs to be examined and necessary steps or policy needs to be taken in respect to the same.

32 Indian National Trust for Art and Cultural Heritage, <http://www.intach.org/about.php>, accessed 28 May 2021.

33 World Intellectual Property Organization, 'Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore' (2002) <https://www.bing.com/search?q=Chaudhuri%2C+S.%2C+The+Experience+of+Asia%2C+WIPO-UNESCO+World+Forum+on+the+Protection+of+Folklore%2C+2002.&cvid=dfe02ebde23642b882f130e59e95169b&aqs=edge.0.69i59.760j0j1&pqlt=41&FORM=ANNTA1&PC=LCTS> accessed 28 May 2021.

34 Indira Gandhi National Centre for The Arts, <http://ignca.gov.in/about-ignca/aims-objectives/> accessed 27 May 2021.

35 National mission for manuscript, <https://namami.gov.in/our-programmes> accessed 27 May 2021.

36 TC James and Deepika Yadav, 'Protection of Traditional Cultural Expressions in India' [2019] <http://ris.org.in/fitm/sites/default/files/Scooping%20Paper%20No%203.pdf> accessed 29 May 2021.



(iv) International treaties

1. Berne Convention

The first notable attempt of the protection of expressions of folklore was undertaken internationally in the 1967 Stockholm Revision Conference of the Berne Convention for the Protection of Literary and Artistic Works³⁷. The initial facet that folklore is distinct from the author's work barely helped in folklore protection. But new paragraph was added under Article 15(4) which reads as follows- "In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union"³⁸. One of the prime reasons for it being unsuccessful is because it was solely based on the concept of individual authorship.

2. World Intellectual Property Organization (WIPO)

1. Tunis Model Law – The main focus behind the Tunis model law was to assist the developing countries in drafting their own copyright laws. The lacuna behind the model was that it does not focus on the folklore and solely acknowledged a minor part of folklore, it has also been criticized as most of the times it does not coherent with the national legislations.³⁹

2. UNESCO-WIPO Model Provision for National Laws on the protection of expression of folklore against illicit exploitation and other prejudicial actions. It came into existence to safeguard Traditional cultural expression and Folklore. An attempt was made to make it a binding international treaty. However, it turned out to be unsuccessful, because of the conflict between the countries interest.⁴⁰

3. The WIPO Performances and Phonograms Treaty (WPPT)- It deals with the rights of performers and producers of phonograms. Article 2 of the Treaty provides for protection of performances of "*expressions of folklore*". India has yet not acceded to the treaty.⁴¹

37 Yenny Eta Widyanti, 'The Protection of Folklore' [2020] Cardozo Journal of International and Comparative Law, <https://arenahukum.ub.ac.id/index.php/arena/article/view/1065>, accessed 28 May 2021.

38 Peter Jaszi, 'Protecting Traditional Cultural Expressions – Some Questions for Lawmakers' [2017] WIPO Magazine, https://www.wipo.int/wipo_magazine/en/2017/04/article_0002.html, accessed 28 May 2021.

39 TC James and Deepika Yadav, 'Protection of Traditional Cultural Expressions in India' [2019] <http://ris.org.in/fitm/sites/default/files/Scooping%20Paper%20No%203.pdf>, accessed 29 May 2021.

40 Id.

41 Id.



4. The UNESCO/WIPO World Forum on Protection of Folklore- It recommended a plan of action for conducting regional consultations for paving a way for a sui generis law.⁴²⁴³
5. WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)- The aim was to discuss IP-related issues pertaining to TK, TCEs and GR. It also acts as a forum for cases of alleged misappropriation.⁴⁴⁴⁵
6. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)- It was adopted in light of the dynamic nature of the international legal provisions and their impacts on TK and the rights of indigenous people attached to it.⁴⁶

Protection of Traditional Folklore in different countries

(I) Ghana

Ghana has one of the world's most restrictive laws on folklore; its protection and restrictive use. The copyright act of Ghana defines folklore as "the literary, artistic and scientific expression belonging to the cultural heritage of Ghana which are created, preserved and developed by ethnic communities of Ghana or by an unidentified Ghanaian author."⁴⁷ These rights are deemed to exist in perpetuity. Section 4 of the acts also suggested that the folklore will never fall within the ambit of public domain and cannot be used for "reproduction, any communication to the public by performance or broadcast or any other means, and adaptation or translations or any other transformation."⁴⁸

42 Id.

43 Sean A. Pager, 'Folklore 2.0: Preservation Through Innovation', <https://core.ac.uk/download/pdf/228469674.pdf>, accessed 28 May 2021

44 TC James and Deepika Yadav, 'Protection of Traditional Cultural Expressions in India' [2019] (FITM) Forum on Indian Traditional Medicine, <http://ris.org.in/fitm/sites/default/files/Scooping%20Paper%20No%203.pdf>, accessed 29 May 2021.

45 'Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions', https://www.wipo.int/edocs/pubdocs/en/wipo_pub_933_2020.pdf, accessed 29 May 2021.

46 Id.

47 Stephen Collins 'Ghana's Copyright Law for Folklore Hampers Cultural Growth' [2019] The Wire, <https://thewire.in/world/ghanas-copyright-law-for-folklore-hampers-cultural-growth>, accessed 29 May 2021.

48 Id.





(II) China

China does not possess a separate law to protect TCEs. It relies on the Copyright Law to protect TCEs and derivative works⁴⁹. China also directs that copyright protection measures for folklore works will be separately provided by the State Council, but such measures have not been promulgated so far.⁵⁰

(III) Thailand & South Africa

The TCEs in Thailand are protected by IPR laws. However, according to the Department of Intellectual Property, a sui generis law bill to protect TCE's is under process.⁵¹ South Africa has also tabled a Traditional Knowledge Bill, for providing sui generis intellectual property approach for protection of different aspects of TK. In the bill, definition of TCEs includes language, music or different forms of expressions, which have become inherent part of the traditional and the indigenous community.⁵²

(IV) Philippines

Philippines has a specific law for the protection of TCE's. The Act is known as the Indigenous Peoples Rights Act of 1997 (IPRA) enacted by the Senate and the Congress of the Republic of the Philippines on July 28, 1997. The Basic aim of the Act is to recognize, protect and promote the rights of Indigenous Cultural Communities (ICCs)/Indigenous Peoples (IPs), creating a National Commission on Indigenous People (NCIP) and establishing an implementing mechanism.⁵³

49 TC James and Deepika Yadav, 'Protection of Traditional Cultural Expressions in India' [2019] <http://ris.org.in/fitm/sites/default/files/Scooping%20Paper%20No%203.pdf>, accessed 29 May 2021.

50 Qi Lei, 'A Brief Discussion on Copyright Protection for Folklore Works—Bai Guangcheng V. Beijing Daoxiangcun Foodstuff Co., Ltd.' [2021] IP China Intellectual Property, <http://www.chinaipmagazine.com/en/journal-show.asp?id=752>, accessed 29 May 2021.

51 TC James and Deepika Yadav, 'Protection of Traditional Cultural Expressions in India' [2019] (FITM) Forum on Indian Traditional Medicine, <http://ris.org.in/fitm/sites/default/files/Scooping%20Paper%20No%203.pdf>, accessed 29 May 2021.

52 Id.

53 P.V. Valsala G. Kuty, 'National Experiences with The Protection of Expressions of Folklore/ Traditional Cultural Expressions', https://www.wipo.int/edocs/pubdocs/en/tk/912/wipo_pub_912.pdf, accessed 29 May 2021.



Suggestions

(I) Sui Generis: Conventional IP system is not sufficient to cater to the wide and unique nature of Traditional Cultural Expression, thus making it important to have a Sui generis measure to protect the TCEs. Sui Generis Measures are specialized, which exclusively aims at addressing the peculiarities of TCEs.

It can mold itself to accommodate the special character if needed. In addition to this, it would also provide a positive protection of traditional cultural expression so that the communities feel empowered to promote, share, control their knowledge and expressions. It will also limit the third party in claiming the rights over the TCEs and can act as a defensive protection.

(II) International Protection is needed: The impact of national and regional laws in order to protect the traditional cultural expressions are very confined, as its scope is limited to only that particular country in which the laws have been enacted; and does not extend to the other countries where such legislation does not exist. The only way to extend its scope of protection is either by an agreement between the countries having common intention towards protection of the traditional cultural expression or having an international law protecting it.

Having a strong international agreement would protect the unauthorized use of traditional cultural expression in international levels and also protect it from false IP claims by third parties, most importantly it will provide a protection beyond national borders and promote international cooperation among the countries. Implementation or establishment of an international regime for safeguarding needs careful curation of defined objectives and policies and a solid foundation to develop an effective safeguarding system. It should also provide national flexibility to some extent so that it is easy for a nation to implement it.

(III) Public awareness and education: It is essential to promote indigenous art and culture to the public, so that they are aware of the traditional cultural expressions. Educational programs should also be conducted for indigenous community, in order for them to get acquainted and understand the rights and remedies available to protect their cultural heritage.



It is of utmost importance that indigenous tribes whose rights are being violated, get acknowledgment and benefit arising out of their works. One of the major lacunae in this case is the pre-requisite condition for patents and the cost of registration and maintenance of patent also serve as an underlying problem for indigenous community; as most of the TCE holders do not have ready access to technologies like internet which makes them aware of the current scenario and the exploitation. Hence, it is important to educate them about the same through programs.

(IV) Need of Legislation Action: Although India has taken effective steps to promote and protect traditional cultural expression there is still a lacuna which is prevalent. Hence there is a dire need to reinforce legislation and refine existing folklore laws, else any efforts to protect the traditional cultural expression goes in vain. Moral rights can be given to the indigenous community for better protection. Effective and efficient implementation and enforcement of TCE can only be achieved when there are stringent laws to protect them, in addition to this levying of heavy compensation and harsher punishment can also be adopted in order to protect the same.



Conclusion

In the era of globalization and dynamic environment, rapid change in technology, making folklore accessible to everyone, has made it difficult to protect the Traditional cultural expression of India. India doesn't have any sui generis law to protect TCE'S and folklore and relies on existing IP laws for protection, though some positive initiative has been taken by NGO and Civil societies towards the digitalization and protection of folklore, but that has not given the desired results. There is a strong need for a legal framework in order to protect folklore in India, which views "folk-lore" as the Cultural wealth of a Nation.

Prior consent from the indigenous community should be availed before manufacturing or marketing of any traditional knowledge for commercial purposes. India can also take inspiration from Ghana's Laws on folklore for making strict policies. The WIPO Intergovernmental Committee on Intellectual property and Genetic Resources, Traditional Knowledge and Folklore on its recent mandate for year 2020-2021 has put up the Work Program to address the various issues of Traditional Knowledge including focusing on Traditional cultural expressions, unresolved issues and to draft the legal instruments for the same.⁵⁴

⁵⁴ The World Intellectual Property Organization, 'Report on The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge And Folklore (IGC)' (2019), https://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_2020-2021.pdf, accessed 28 May 2021.