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Comparative Examination of Traditional Cultural Expressions: International and Indian Perspectives

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ABSTRACT

This study offers a comparative analysis of traditional cultural expressions (TCEs) from both international and Indian perspectives, focusing on their intersection with Intellectual Property Rights (IPR). TCEs encompass a diverse array of indigenous knowledge, folklore, artistic creations, and traditional practices that have been nurtured by communities over generations. Their preservation and protection have become paramount in the context of globalized cultural exchanges and the commodification of cultural heritage.

From an international standpoint, this research examines the legal frameworks and mechanisms for safeguarding TCEs under IPR regimes, drawing attention to global conventions such as the World Intellectual Property Organization (WIPO) and UNESCO's initiatives. It evaluates the effectiveness of these international instruments in recognizing and protecting TCEs, addressing issues of misappropriation, and fostering equitable sharing of benefits. Additionally, the study explores case studies from different countries to discern best practices in integrating TCEs within the IPR framework.

Shifting to an Indian perspective, the research delves into the multifaceted nature of traditional cultural expressions within the country's rich cultural tapestry. It assesses how India's IPR laws and regulations accommodate and protect TCEs while acknowledging the complexities arising from the country's cultural diversity. The study investigates the roles played by Indian institutions, such as the National IPR Policy and traditional knowledge digital libraries, in the preservation and promotion of TCEs.

Furthermore, this comparative examination underscores the challenges and opportunities at the crossroads of international and Indian perspectives on TCEs within IPR. It explores issues related to prior informed consent, benefit-sharing mechanisms, and the need for a balance between protecting cultural heritage and fostering innovation.

By adopting a multidisciplinary approach encompassing law, anthropology, cultural studies, and ethics, this research offers valuable insights into the evolving landscape of TCEs within the framework of IPR. It contributes to the ongoing discourse surrounding the protection of cultural heritage, the rights of indigenous communities, and the development

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of inclusive policies that respect the unique nature of traditional cultural expressions in both global and Indian contexts.

Keywords: *Traditional cultural expressions, Intellectual Property Rights (IPR), World Intellectual Property Organization.*

I. INTRODUCTION

Traditional cultural expressions (TCEs) have been the subject of intense debate in the international community over the past few decades. TCE owners and national policy-makers in many different countries have become increasingly concerned about the practical implications of whether and how TCEs should be protected by intellectual property rights (IPRs). Over the years, various terms have been used to describe the subject matter of TCE. These include, but are not limited to, 'folklore', 'traditional cultural expressions', 'expressions of folklore', 'indigenous cultural and intellectual property', 'indigenous heritage' and 'traditional knowledge'. The terminology used varies depending on the region and/or the traditional communities using it.

Currently, there is no accepted legal definition of TCEs. Determining what constitutes a TCE is a difficult and individualised undertaking that varies by location and the traditional group or entity from whence the concept originates. TCEs may include a vast range of customs, traditions, artistic expressions, body of knowledge, worldview, objects, and methods of production that come from numerous communities around the globe. Traditional cultural expressions (TCEs), also called "expressions of folklore", may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions. Through this article, we primarily aim to try and define TCE, the subject matter and standards if possible, then whether it fits in the IP regimes and types of protection measure around the world and finally in India. We will also look into whether TCE helps in development through certain real life examples and case studies. By doing so, we will also briefly look into cultural appropriation.

II. HISTORY OF TCE IN THE INTERNATIONAL SPHERE

A system for the international protection of unpublished and anonymous works was introduced by a 1967 modification to the Berne Convention for the Protection of Literary and Artistic Works. The goal of this modification, as stated by those who drafted it, is to provide TCEs and expressions of folklore with worldwide protection.³ 1976 saw the adoption of the Tunis Model

³ Berne Convention for the Protection of Literary and Artistic Works, 1886 art 15.4

Law on Copyright for Developing Countries. Folklore expressions are to be given *sui generis* protection according to this.⁴

The WIPO-UNESCO Model Provisions, 1982, were created in 1982 by an expert panel that WIPO and the United Nations Educational, Scientific, and Cultural Organization (UNESCO) brought together. A panel of specialists on the international protection of traditional expressions by IP was assembled in 1984 by WIPO and UNESCO. They had access to a draft treaty based on the Model Provisions, 1982. However, the majority of the participants thought it was too early to create a global agreement at that time.

In December 1996, WIPO Member States adopted the WPPT⁵, which provides protection also for a performer of an expression of folklore, wherein the protection of indigenous performers were accorded. The "UNESCO-WIPO World Forum on the Protection of Folklore" took place in Phuket, Thailand, in April 1997.

WIPO carried out fact-finding missions in 28 countries in 1998 and 1999 to ascertain the IP needs and expectations of traditional knowledge holders (referred to as "FFMs"). TCEs were considered a subset of "traditional knowledge" for the purposes of these missions. Over 3000 people were consulted for these missions, including members of indigenous and local communities, non-governmental organisations, government leaders, academics, researchers, and commercial sector representatives. In a study titled "Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions (1998-1999)," WIPO released the findings of the missions (FFM Report).

For the continents of Africa (March 1999), Asia and the Pacific (April 1999), Arab nations (May 1999), and Latin America and the Caribbean (June 1999), WIPO hosted regional consultations on the preservation of folkloric expressions (June 1999). Every consultation issued resolutions or suggestions, one of which called for WIPO and UNESCO to step up and intensify their efforts to safeguard folklore. The construction of an efficient international system for the protection of folkloric expressions was specifically mentioned in the recommendations as something that should be included in future work in these fields.

The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore of the World Intellectual Property Organization was founded in late 2000. The Committee has made significant strides in resolving the connections between the IP system and the worries of practitioners and guardians of traditional cultures on both a policy

⁴ Tunis Model Law on Copyright for Developing Countries, 1976

⁵ WIPO Performances and Phonograms Treaty, 1996

and practical level. In accordance with the Committee's directives, the WIPO Secretariat developed a detailed questionnaire on country experiences and conducted a number of in-depth analytical studies based on the questionnaire's replies as well as further consultations and research. The studies served as the foundation for ongoing discussions about global policy and contributed to the creation of useful instruments.

In 2005 the WIPO Revised Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore was brought out which is followed by a lot of countries. According to the Convention on the Protection and Promotion of the Diversity of Cultural Expressions of UNESCO, 2005, "cultural expressions" are "expressions that result from the creativity of individuals, groups and societies, and which have cultural content.". Then came The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007, Article 11 which essentially spelled out the rights of indigenous people to protect their cultural property. After this came the Protection of traditional cultural expression/expressions of folklore: revised objectives and principles, 2010, which can be seen as a guiding document for nations establishing sui generis systems.

III. DEFINING TRADITIONAL CULTURAL EXPRESSIONS

(A) Folklore:

The oral tradition serves as a vehicle for the dissemination of the essential components of culture in societies where the majority of people lack literacy. In such a society, scholars used the term "folklore" to refer to the people's language, their mode of subsistence (such as farming or hunting), their traditions (such as those surrounding marriage, death, and other life events), and their fundamental code of conduct, all of which are passed down orally. Scholars claim that any knowledge transmitted orally within a culture from one generation to the next falls under the category of folklore.

It would not be a good idea to classify everything that is passed down orally as folklore, though. Instead of referring just to the mode of transmission, whether written or oral, it may be more reasonable to define folklore as the creative aspects of a culture as expressed in its daily existence and expressed in material or non-material forms. Since a variety of things, besides folklore, are passed down orally, the oral transmission criterion cannot be used to separate folklore from non-folklore.

Many of the folk songs, tales, poems, riddles, and even many of the stories found in great epics like The Ramayana, The Mahabharata, the Panchatantra, and Betal stories—all of which are a part of the rich heritage of folklore—are found in Indian literature but are primarily expressed

and transmitted through writing. It is absurd to disqualify these manifestations from being considered folklore only because they are preserved in writing. Ballads, folktales, and folk music have been passed down through oral and written traditions in India, much like in other regions of the world. Folklore that is neither oral nor written is yet another genre. Folk dances, folk arts and crafts, folk paintings, sculptures, etc. are passed down visually, via imitation, observation, training, and performances rather than orally or through written means.

Thus, folklore is a creation of human ingenuity, produced by individuals who share a certain geographic location, language, culture, means of subsistence, and living circumstances. The way of life and customs of the people are united by a shared identity. Folklore is the result of the imaginative ideas that people express verbally, artistically, or materially. It is then passed down orally, in writing, or through some other medium from one generation to the next, whether they are members of literate or illiterate societies, tribal or non-tribal, rural or urban people.

(B) Traditional Cultural Expressions:

The suggested definition of TCEs has been continuously revised and improved over the past few years by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore. The Substantive Provisions of the WIPO Revised Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore 2010 contain its most recent version, which is described as such:

“Traditional cultural expressions or ‘expressions of folklore’ are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

- i. Verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
- ii. musical expressions, such as songs and instrumental music;
- iii. expressions by action, such as dances, plays, ceremonies, rituals and other performances; whether or not reduced to a material form; and
- iv. tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical Instruments; and architectural forms; which are:

- a. the product of creative intellectual activity, including individual and communal activity; characteristic of a community's cultural and social identity and cultural heritage; and
 - b. maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.
- v. The specific choice of terms to denote the protected subject matter should be determined at the national and regional levels.”⁶

According to my understanding of the definition above, Traditional cultural expressions reflect and characterize a community's history, cultural and social identity, and values. These expressions are frequently the result of intergenerational and flexible social and communal creative processes.

Generally speaking, certain characteristics for TCEs and folklore can be envisaged;

1. TCE are passed on orally or by imitation from one generation to the next.
2. It contains distinctive components of a community's legacy and represents the cultural and social identity of that community.
3. TCEs are created by "unknown authors," and replicated by people who have been acknowledged by their community as having the authority, responsibility, or authorization to do so.
4. In essence, they were developed as platforms for religious and cultural expression rather than for financial gain.
5. They are dynamic and fluid in nature, to the effect that TCEs are constantly evolving, developing and being recreated within the community.
6. Collective in nature. It has a communal ownership rather than conventional notions of private ownership.

So the major characters of TCE are that they are ever-changing and dynamic, it is passed down through generation to generation, the original creator remains unknown due to the intergenerational transmission and finally they are not created originally for profit, but as an expression of religious or cultural significance. These characters can be identified as standards when it is being considered for protection under a system. But before we accept this, we have

⁶ The Substantive Provisions of the WIPO Revised Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore 2010 art 1

to see if it resonates with the concerns of the TCE holders.

IV. CONCERNS OF TCE HOLDERS

The major concerns of any TCE holder can be identified as Economic Interests and Commercial Use, Inappropriate or Offensive Use, Attribution and finally Identification, Preservation and Promotion.⁷

1. Economic Interests and Commercial Use

TCE owners emphasise the challenges they have in avoiding and/or managing the commercial usage of their TCEs by third parties and in reaping the rewards of this commercialization. It is widely acknowledged that TCEs significantly contribute to the economy in a variety of industries, including arts and crafts, tourism, advertising, music, cinema, television, and the export industry, despite the fact that there is a lack of statistical and economic data on the valuation of TCEs. TCEs are an important source of revenue for many traditional communities. They fear that allowing knockoff items to compete in the market may rob them of a steady stream of income and that others' commercial use of TCEs on consumer products might prevent them from using those TCEs in the future.

2. Inappropriate or Offensive Use

Inappropriate or offensive use may take various forms.

Distortion: distortions of TCEs often occur when TCEs are adapted for marketing purposes without the consent of traditional communities. Such distortions are often considered inappropriate, disrespectful, and at times offensive.

Disclosure and sacred nature: TCEs holders emphasise the often sacred and cultural value of TCEs as well as the risk of serious offence and damage to traditional communities' social structures when TCEs are used outside of their traditional context and in ways that are against customary laws. TCEs pertaining to sacred places, things, designs, religious events, and initiation rituals are frequently a key component of the social dynamics in traditional communities. The social structure of such groups may be weakened by the public exposure of such documents, which may reach people whose cultures forbid them from knowing about or viewing such items.

False connection: Using indigenous or traditional names or signs as brand names, trademarks, or corporate names to promote non-indigenous products and businesses has become standard

⁷ The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis, <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=410365 > accessed on 10 October 2022

practise in various industries. TCE owners are worried that this technique deceives customers by falsely implying a relationship with the community, giving them the impression that the company is owned and operated by indigenous people or that profits go to indigenous or traditional groups. Additionally, independent of their significance to the beliefs of the originating culture, TCEs as such are frequently included into souvenirs and other domestic consumer products like apparel, wall hangings, etc.

Derogatory, libelous, defamatory or fallacious uses: TCEs holders wish to object to any derogatory, libelous, defamatory or fallacious use of their TCEs.

3. Attribution

Traditional communities want the ability to claim ownership of their TCEs and the right to contest any erroneous attribution. The latter problem, for instance, appears when counterfeit goods are sold in the marketplace as real TCEs. This phenomena has been more prevalent recently as a result of increased interest in traditional communities' cultures, a rise in the market for their cultural goods, and the expansion of international travel and tourism.

4. Identification, Preservation and Promotion.

The owners of TCEs want to guarantee the recognition, preservation, promotion, distribution, and ongoing evolution of TCEs that already exist. They worry that the gradual appropriation of TCEs into other cultures and their alteration from their original forms could have negative consequences on their own culture and halt its development. Additionally, they believe that TCEs should be retained since they are an important tool for fostering a feeling of community and identity.

V. INTERNATIONAL PERSPECTIVE OF TRADITIONAL CULTURAL EXPRESSIONS

The preservation of folklore expressions created and preserved in the country in question against illegal exploitation and other legally prohibited detrimental actions is provided for in 'UNESCO-WIPO MODEL PROVISIONS on the protection of expressions of folklore against illicit exploitation and other prejudicial actions 1982'. It lists "illicit exploitation" and "other detrimental actions" as the actions that the folkloric expressions have been safeguarded from.⁸

"Expressions of folklore" is defined in the Model Provisions. It should be noticed that it is not listed under "works."⁹The Model Provisions' takes care to provide an illustration and list of the

⁸ UNESCO-WIPO MODEL PROVISIONS on the protection of expressions of folklore against illicit exploitation and other prejudicial actions, 1982 s1

⁹ UNESCO-WIPO MODEL PROVISIONS on the protection of expressions of folklore against illicit exploitation and other prejudicial actions, 1982 s2

various folkloric idioms that are frequently used. Four categories are used to categorise these forms, including verbal expression (expression by words), musical expression, expression by actions and expression in tangible forms. Furthermore, the model provisions goes onto to provide for utilization subject to authorization¹⁰, exceptions¹¹ and acknowledgement of source.¹²

The United Nations Declaration on the Rights of Indigenous Peoples, 2007 is also a significant document which protects the rights of indigenous people. According to it, indigenous people have the right to continue and practise their cultural practices. This includes the freedom to preserve, safeguard, and advance the historical and archaeological sites, artefacts, rituals, technology, literary works, and other past, present, and emerging manifestations of their cultures.¹³ Furthermore, the States shall provide redress through efficient mechanisms, which may include restitution, developed in conjunction with indigenous peoples if cultural, intellectual, religious, and spiritual property are taken without their free, prior, and informed consent or in violation of their laws, traditions, and customs.¹⁴

VI. TRADITIONAL CULTURAL EXPRESSIONS AND ECONOMIC DEVELOPMENT

While a community's creative heritage plays important social, spiritual, and cultural roles, it can also contribute to economic development as a source of creativity and innovation. The establishment of community enterprises, the creation of local jobs, the development of skills, appropriate tourism, and foreign sales of community products are all ways that the use of traditional cultural materials as a source of contemporary creativity can aid in the economic development of traditional communities.

The Australian market for indigenous visual arts and crafts is thought to be worth over US\$130 million. It is undeniable that TCE has a part to play in a country's development now more than ever. The level of copyright and other IP protection that Indigenous artists and communities in Australia enjoy is extremely important to them as it is a significant source of income. Indigenous people in Australia are thought to get about \$30 million of the projected \$130 million in annual revenue generated by the indigenous visual arts and crafts sector.¹⁵

¹⁰ UNESCO-WIPO MODEL PROVISIONS on the protection of expressions of folklore against illicit exploitation and other prejudicial actions, 1982 s3

¹¹ UNESCO-WIPO MODEL PROVISIONS on the protection of expressions of folklore against illicit exploitation and other prejudicial actions, 1982 s4

¹² UNESCO-WIPO MODEL PROVISIONS on the protection of expressions of folklore against illicit exploitation and other prejudicial actions, 1982 s5

¹³ The United Nations Declaration on the Rights of Indigenous Peoples, 2007 art 11(1)

¹⁴ The United Nations Declaration on the Rights of Indigenous Peoples, 2007 art 11(2)

¹⁵ INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE, WIPO

The national organisation in Colombia responsible for the growth and promotion of the handicrafts industry is called "Artesanias de Colombia." Craft items are frequently the only commercial goods produced by tiny communities in Colombia. The majority of women employed in the handicrafts industry are thought to play a significant role in the wealth distribution in low-income or single-parent families.¹⁶

The South African Khomani San community's poverty reduction initiative "Investing in Culture" is an illustration of a cultural development project. This programme is reviving local craft production and giving the neighbourhood its first opportunity to produce its own revenue.¹⁷ So the essential issue is with respect to the economic value of the expressions of folklores. This is where Intellectual Property Rights comes in.

VII. SCOPE OF PROTECTION OF TCE UNDER INTELLECTUAL PROPERTY

Numerous countries like Panama¹⁸, Kenya¹⁹ and Philippines²⁰ have their own sui generis laws to protect TCE. Mostly it can be seen that least developed and developing nations resort to sui generis systems as their economies depend a lot on TCE. These Sui Generis laws puts an obligation on the State to take measures to guarantee respect cultural integrity. Aside from this, IP regimes are used most widely by nations.

IPR is one of the many method by which TCE is protected. Other strategies are being employed as Indigenous people assert their rights to own and control their traditional knowledge and arts. These include:

- the use of contracts;
- the establishment of collective management systems;
- the drafting of cultural protocols;
- the use of knowledge management systems; and
- the strengthening of Indigenous customary laws.

(A) TCE and Copyright:

The rights to prevent or authorise, the reproduction, adaptation, transmission to the public and

Pub, 913(E), <https://www.wipo.int/edocs/pubdocs/en/tk/913/wipo_pub_913.pdf > accessed on 7 October 2023

¹⁶ https://artesaniasdecolombia.com.co/PortalAC/General/template_index.jsf accessed on 7 October 2023

¹⁷ POVERTY ALLEVIATION PROGRAMME "INVESTING IN CULTURE" <<https://static.pmg.org.za/docs/2002/appendices/020507culture.htm>> accessed on 7 October 2023

¹⁸ Special System for the Collective Intellectual Property Rights of Indigenous Peoples, 2000

¹⁹ Protection of Traditional Knowledge and Cultural Expressions Act, 2016

²⁰ Indigenous Peoples' Rights Act, 1997

others, and the moral rights of attribution and integrity are the types of protection offered by copyright. Many of the interests and goals of indigenous people and traditional communities with respect to TCE seem to be effectively served by this. Many TCEs for which protection is desired constitute the subject matter of copyright protection. Examples include music and songs, dances, plays, stories, drawings, paintings, carvings, architecture, sculptures, handicrafts, poetry, and designs. The Indian Copyright Act provides for performer's right whereby the performers can protect their performances for 50 years. Performances can include indigenous or traditional art forms.²¹ There are major issues regarding protecting TCE under copyright, as in there are major gaps.

The first issue is with regard to the term of protection. TCE are ethereal in nature. A set term for protection will not be acceptable to those who practice and profess the same. Due to its inter-generational character the term of protection given to copyright cannot be extended to TCE. The next major issue is the originality requirement. No TCE can be called as original in its basic form. A derivative from TCE can be protected as an original work under copyright but not the TCE itself.

Another significant issue is that while copyright confers exclusive, private property rights in individuals, at times indigenous creators are subject to complex rules, regulations and responsibilities. The property rights vest collectively. This issue can be seen from the case of *Payunka, Marika and Others v Indofurn Pty Ltd*²², an Australian case which dealt with a sacred painting being used commercially as a carpet design. Finally, the most deviant gap I find is with respect to the authorship requirement of copyright and the unknown authorship character of TCE. Copyright requires the identification of a known individual creator or creators and the creators of traditional cultural expressions are often unknown.

In India, various provisions of the Copyright Act such as on compulsory license provides for copyright of unpublished or published work of unknown authors²³; performer's rights²⁴, author's special rights also called moral rights the author has a right to claim authorship, restrain or claim damages just in case of distortion, mutation, modification or any such act which is in honour or reputation²⁵, and might be interpreted to extend assurance to the interests of TCE owner.

In spite of all these issues, the majority of the nations which protect TCE protect it under the

²¹ Indian Copyright Act, 1957 s38(2)

²² FCA 1544

²³ Indian Copyright Act, 1957 s31A

²⁴ Indian Copyright Act, 1957 s38

²⁵ Indian Copyright Act, 1957 s57

vestige of Copyright regimes. I believe this is due to the relatable nature of the subject matters of TCE and copyright.

(B) TCE and Trademarks:

As far as my knowledge goes, only New Zealand²⁶ protects TCE of Maori Tribe under their trademark regime as marks that cannot be registered. Apart from that, trademarks have a role to play in cultural appropriation issues. We have witnessed several situations where there was a significant public outcry when businesses produced goods that "borrowed" design cues from various cultures. The term "cultural appropriation" refers to the action of a member of a relatively dominant culture taking a traditional cultural expression and using it in a different context without the traditional, cultural expression's owners' consent, acknowledgment, or payment.

Collective Marks and Certification Marks under trademark law, can be considered as weapons for preventing cultural appropriation. A collective mark is one that's used by a group or organization's members to signify membership in the group or organisation as well as the goods or services the organisation offers. Indigenous groups can register their marks under law as collective and seek infringement actions. The Samoan Tribe's tattoos can be an example for this. A certification mark can be used to mark indigenous products so as to give an authenticity. Aside from this, I do not find any similarity as to the essential subject matters of TCE and trademarks. The protection offered under trademark can be used although it is limited to answer the concerns of the collective owners.

(C) TCE and GI:

A GI (Geographical Indication) is a sign used on goods that have a specific geographical origin and possess qualities or a reputation that is due to that origin. Geographical Indications protect agricultural products and drinks. India extends the GI subject matter to include handicrafts within this protection mechanism. Moreover it can be called a collective property. In a way it is a means to protect handicrafts that originate from a tribe. Yet the protection is limited as the subject matter relating to TCE is wide. Moreover TCEs cannot be restricted to a particular geographical areas in all cases. This essentially is a rift in considering TCE under scope of GI. Furthermore, the qualities and reputation of a TCE is mostly due to the community which practices or creates it and not due to the geographical area.

²⁶ New Zealand Trade Marks Act, 2002 s17(1)c

VIII. ISSUES IDENTIFIED WITH REGARDS TO TCE

- In order to identify the owners of the IP rights, formal IP protection frequently calls for the identification of a known individual creators or inventors. Indigenous ideas of "ownership" of Indigenous knowledge and cultural manifestations may differ from the very definition of "ownership" used in the context of intellectual property.
- It might not meet the requirements for "originality" under copyright laws or "novelty" under patent laws, among other IP criteria.
- Intangible Indigenous knowledge and cultural expressions that are communicated orally may not be protected under current copyright laws since they must take on a definite form in order to be protected.
- Innovations built on Indigenous knowledge may also qualify for protection under current intellectual property laws, but not the knowledge itself.
- Indigenous knowledge and cultural expressions wouldn't be protected permanently due to the short duration of protection for some IP.
- The expenses and complex procedures involved in registration, renewal, and enforcement.
- Indigenous knowledge and cultural expressions may not be appropriate for the exceptions and restrictions that are frequently found in IP rules, especially if they are regarded as sacred

IX. COMMUNAL INTELLECTUAL PROPERTY: A NEW SUBTYPE OF IP

A community ownership right over one's intellectual property is known as communal intellectual property. We can equate this concept to Traditional Cultural expressions as well. These rights are necessary because intellectual property related to cultural expressions is created, maintained, improved, and transformed by the community as a whole. Individuals are the physical agents in the formation of collective intellectual property, notwithstanding the right's shared nature. Nevertheless, such contribution occurs in the framework of shared values and frequently under the direction, control, and authority of the community. This is accurate of TCE.

Everyone acknowledges the existence of collective works of art and knowledge. A claim that a community has exclusive rights over the goods and procedures that are produced as a result of these innovations and discoveries, however, is another story. The states are most suited to

provide the answer. But this paradox is what causes TCE's status to be unstable. The main problem is that once intellectual property takes on a common form, it loses its distinctively individualistic essence, which is seen both in TRIPS and across the rest of the globe.

The idea of communal intellectual property can be derived from the collective property rights enshrined in some Constitutions of the world. The Ecuador Constitution recognizes a number of collective rights of indigenous communes, people, and nations that include a right to uphold, protect, and develop their collective knowledge, science, technologies, ancestral wisdom, and genetic resources; and it prohibits all forms of appropriation of such knowledge, innovations, and practices.²⁷ Similarly, the Political Constitution of the Plurinational State of Bolivia protects the collective rights of the indigenous people of Bolivia.²⁸ In this regard, India has also taken certain steps.

X. PROTECTION OF TRADITIONAL KNOWLEDGE BILL, 2022

“TK is neither an innovation nor held by any single person. Rather it is passed down and refined over several generations and thus may not be considered as ‘intellectual property.’”

This is an extract from the introduction provided in the house by the Member of Parliament, Mr. Shashi Tharoor. Traditional knowledge (TK) is exempt from the purview of a patent or intellectual property law, according to the Protection of Traditional Knowledge Bill, 2022 (Traditional Knowledge Bill), which Shashi Tharoor tabled in the Lok Sabha on April 1 2022.

The Bill defines a knowledge society as a family or group of people living within the national territory, whether they are indigenous, tribal, or otherwise, who may be distinguished from other groups or other members of the society due to their exclusive ties to one or more forms of traditional knowledge. The Bill places the Central government as custodians of all TCE. But a major issue is that it does not differentiate between TCE and TK, although TCE is covered as a subset of TK.²⁹

According to the Bill, “ ‘traditional knowledge’ means knowledge and 'expression of culture, which may subsist in codified or oral or other forms, whether publically available or not, that is dynamic and evolving and is passed on from generation to generation, for at least 3 generations, whether consecutively or not, which is associated with group or groups who are maintaining, practicing or developing it in traditional cultural context and includes know-how, skills, innovations, practices, learning, medicinal preparations, method of treatment, literature, music,

²⁷ Ecuador Constitution, 2008 art 58

²⁸ The Political Constitution of the Plurinational State of Bolivia, 2009

²⁹ Protection of Traditional Knowledge Bill, 2022 s2(ix)

art forms, designs and marks but does not include any traditional knowledge covered by any law for the time being in force providing for its preservation, promotion, management or unauthorized commercial exploitation.”

XI. CONCLUSION

TCEs refer to products of creative intellectual activity. It is generally accepted that TCEs have been handed down from one generation to another, reflect a community’s history, values and cultural and social identity, and consist of characteristic elements of a community’s heritage.

From a purely legal standpoint, there is no responsibility to reward or recompense the communities in charge of creating and maintaining such heritage in the absence of any laws protecting its intellectual property elements. Folklore-based businesses are thought to be highly successful and require little to no investment. The recipient communities either receive no compensation at all or compensation that is wholly insufficient given the returns.

This fosters a need for a sui generis system which considers TCE and TK separate from the system of IP. The major complications arise when we mix IP and TCE. But in my humble opinion, once you separate the two as two distinct regimes, and balancing the areas where they overlap, it becomes possible to protect the communities interest and by doing so, protect the culture and traditional identity of a country.

A humble opinion of mine is to create a sui generis system making TCE a ‘Communal Intellectual Property’. This will help the countries to protect the same without equating it to the different nature of intellectual property. Making TCE a communal intellectual property will help it become a new form of IP as what was done with GI. The countries have to protect TCE but not to the level that it is detrimental to public domain as well as the development of the general public.

Easier said than done, yet efforts like that of Kenya, Philippines and various other nations which have sui generis system, and that of India by introducing the bill, is the right step in finding a balance between the interests of the community and that of the users of IP and the enrichment of public domain.

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