Page 616 - 634

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Folklore and Its Protection

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ABSTRACT

The Traditional Cultural Expression (TCE) is the forward end of seeking protection of cultural and intellectual properties of indigenous people. The protection is meant for their conventional contents, writings, dialects, customs, songs and music, works of art, painstaking work, ceremonies, services, legends and fantasies. This much needed protection means some kind of fundamental justice with a perpetual ability to render protection maintaining its indigenous sanctity and character.

This paper aims to highlight the grey areas of protection in the Indian Copyright Law, due to which the indigenous communities have been victims of exploitation of their cultural expressions and traditional knowledge, more often without their knowledge. They have been turned products of commercialization and profit, by entertainment industries and other catalysts of commodifying nature. It is an endeavour to examine why Indian laws have so far failed in providing adequate and appropriate measures to protect TCEs.

I. INTRODUCTION

We live in a world of instant global communication and nobody is a stranger to the technological development that has transformed the whole world. Over the course of time there has been a drastic change in society, from knowledge based to material based. With such a transition, the traditional and indigenous communities across the world face a major issue of cultural misappropriation or/and theft of their cultural expression which for them is not a product, but part of their identity and existence and is their collective property. Example of misappropriation in recent times are the fusion of traditional folksongs with digital beats to produce chart-topping pop music albums or mass production of traditional paintings and handicrafts that are sold in the market as authentic indigenous art. Such misappropriation is done without authorization and are solely used for commercial gains with maximum impunity. Globalization which plays a pivotal role in engaging capital, labour and services across nations, has little regard for sustenance of indigenous cultures, traditions and their ethos, which are inseparably connected with their arts and music. As a subset of traditional cultural expressions, the protection of folklore is the need of the hour to preserve the cultural and traditional assets.

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 [ISSN 2581-5369]

Although not specifically defined under any law in the national and international regimes, the terms 'traditional,' 'cultural' and expressions of folklore have been attempted to be defined in a draft treaty prepared by WIPO and the UNESCO.[2]

Folklore expression is regarded as an outcome of "traditional or indigenous knowledge" of a particular community. Such expressions are intergenerational and reflect the cultural and traditional values which give the community an identity which in turn make those expressions a community asset rather than an individual property. Thus, given their distinctive existence and inherent nature, folklores require serious protection. There is an inadequacy or rather no legal protection to sustenance of folklore expression, which has paved way for devastation and extinction of a particular culture or tradition or the community itself.

The protection of folklore expressions becomes increasingly important due to their unauthorized adaptation, reproduction, alteration and mutilation disregarding its cultural significance.[3]

II. CONSTITUTIONAL PROVISIONS FOR PROTECTION OF FOLKLORE

The Constitution of India has not addressed the issue of protection of the traditional cultural expressions directly. According to Article 29[4] clause (1) of the Constitution, any group of citizens who are residing within the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right over conserving and preserving the same. If these citizens desire to preserve their own language, script or culture, the State would not stand in their way. But this drops out a lot of small communities from the picture and still their culture is subjected to misappropriation. Though Part IV of the Constitution directly refers to the traditional cultural expressions, but there are not many provisions that provide protection to the TCEs. Along with environment there is some sustenance to human existence. Article 48A[5] of the Constitution does deal with safeguarding of forest and wildlife. It is worth noting that indigenous people acquire most of their knowledge from mother nature. When one talks about safeguarding forest and wildlife, it should include protection of the traditional cultural expressions also, as that turns out to be the form of knowledge that they have acquired

[2] Article I of the Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Activities, - Expressions of Folklore- .

[3] See World Intellectual Property Organization (WIPO).

[4] The Constitution of India, Art. 29 Protection of interests of minorities-
(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

[5] The Constitution of India, Art. 48A Protection and improvement of environment and safeguarding of forest and wildlife (by the Constitution (42nd Amendment Act))- the State shall endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country.

 [ISSN 2581-5369]

from nature. Even though Article 46[6] of the Constitution contemplates to promote the educational and economic interest of Scheduled Tribes/Castes and other weaker sections, but even in cases where it provides economic benefit through folk art, folk literature and folk music, this can only happen if the traditional knowledge in general and TCEs in particular, are unambiguously protected.

Article 51A (f)[7] does confer every citizen a fundamental duty of valuing and preserving the rich heritage of our culture. Even after having such a provision, no legislation is there based on this provision for translating the constitutional objective into practice.

As India has a very complex or special cultural identity of the tribal population, the Constitution envisages special protection of such indigenous communities. Whether such communities are living together or are scattered within the territory of India, there are still approaches adopted by the Constitution to protect their cultural identity. In the area where there are only tribal communities, Article 371 read with Schedule 6 allow them to have a separate autonomous council for self-governance in accordance with their customary laws[8]. The normal laws of the land are still acceptable only if it is accepted by the community and the council which is vested with the power to make laws to protect their social customs or traditions. As for the other parts of the country they follow according to Schedule 5 of the Constitution, in which the government has the power to create schedule areas to protect the interests and beliefs of the tribes. In a scenario where the normal laws are in conflict with their customs, the head of state has the authority to prohibit it, and those tribes that do not fall in the above categories are subjected to the normal laws of the land.

Although the Constitution provides a certain blanket of protection and preservation of such complex cultural identities of these distinct cultural groups, there is no special law or provision that prohibits exploitation of the traditional cultural expressions. Instance of flagrant violation of TCE can be seen from what has been done to the traditional song 'Genda Phool,' which has gone viral, without an iota of respect for the sentimental value of the tradition which owned it. There could be many reasons for publicizing the said song, but what has been miserably failed to notice is that the said song is originated from a culture, tradition and ethos of a particular group of people. If it has been sung in the traditional way, it would have been popularizing it,

[6] The Constitution of India, Art. 46: Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections- the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.
[7] The Constitution of India, Art. 51A: Fundamental duties- it shall be the duty of every citizen of India (f) to value and preserve the rich heritage of our composite culture.
[8] Kutty Valsala G. Supra note 7.

 [ISSN 2581-5369]

but mindless mutilation to which is has been subjected, is the finest example of lack of due protection to TCEs.

III. International Debates on Protecting Folklore Expressions: Conventions and Treatises

Protection of folklore is quite a debatable topic due to its intricacies and difficulties. It has always been an accommodative choice in intellectual property. The right to protection of indigenous knowledge is a very fluid topic because of its nature and ability in the international intellectual property regime (Carpenter 2004). There are various or rather possible measures to protect the Traditional Cultural Expressions in different legal fields within international intellectual property law and other international legal systems, and therefore, they can be classified as:

1. Protection as a copyright
2. Protection as a Neighbouring Right
3. Protection under a *Sui Generis* System

(A) Protection Under Copyright

In this, the main convention and treatise which promote the notion of protection of folklore expression are the Stockholm Diplomatic Conference of 1967 for Revision of the Berne Convention (World Intellectual Property Organisation 1917b). In the Stockholm Conference the delegates from India proposed the point of protecting folklore expression under the heading of "literary and artistic works" as mentioned in Article 2(1) of the Berne Convention[9]. But there was no precise description given to folklore expressions and authorship requirement, which caused a lot of difficulty in providing protection as it turned out to be a point of contention.

Then in 1971, the Paris Act of Berne Convention brought in a new clause through Article 15(4)[10], which aimed at the protection of folklore on an international platform.

[9] Berne Convention, Article 2(1): The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings, lectures, addresses, sermons and other works of the same nature, dramatic or dramatic-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photography works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

[10] Paris Act of the Berne Convention, Article 15(4) (a) – In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume the s/he is a national of a country of the Union,

Through this Traditional Cultural Expressions were protected as anonymous work, but power was given to a competent authority to decide which work should be designated as a protectable work in all the countries (World Intellectual Property Organization 2003).

(B) Protection as Neighbouring Right

The second way of protecting the cultural expressions is through the neighbouring rights. According to Black's Law Dictionary, "neighbouring right[11]" is "an intellectual property right of a performer or of an entrepreneur such as a publisher, broadcaster, or producer, as distinguished from a moral right belonging to an author or artist as the work's creator".

Article 7(1)(a) of The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (World Intellectual Property Organization 1961) states about the 'protection of performers,' which includes 'right to perform and prevention of unauthorized broadcasting and communication to the public without the prior consent of the performer or unauthorized broadcasting or communicating the performance not originally consented by the performer'[12]. Article [7(1) (a)], provides protection of folklore expression as a performer's right and permission must be taken from the original performer to make it or fix it in a tangible medium to broadcast and communicate. This to some extent ensures the owner protection from misuse and unauthorized usage of folklore works**.** Under Article 14(1) of the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, 1994, a similar right has been recognized.

Another treaty which recognized protection of Traditional Cultural Expressions as a neighbouring right was in the WIPO Performances and Phonograms Treaty, 1996. Under this treaty, Article 2(a) of the treaty defines "Performer" and the definition of performer includes actors, singers, musicians, dancers, and other person who sing, act, declaim, deliver, play-in, interpret, or otherwise perform literary works or artistic expressions of folklore. Therefore, a conclusion can be drawn that a performer who performs any form of a folklore expression could be protected by giving it a consideration of being a neighbouring right.

(C) Protection Under *Sui Generis* System

The third way for protection of folklore expression could be through enacting a specific

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/her rights in the countries of the Union.
(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

[11] Page 1200, Black's Law Dictionary, 10th Ed; Neighbouring Rights.

[12] https://www.wipo.int/treaties/en/text.jsp?file_id=289757#P97_7400

 [ISSN 2581-5369]

legislation to deal with such problems. Thus, to think of introducing a *sui generis* system. *Sui generis* is a Latin word which means "for its own kind" and as per Black's Law Dictionary, "*the term is used in intellectual property law to describe a regime designed to protect rights that fall outside the traditional patent, trademark, copyright and trade-secret doctrines. For example, a database may not be protected by copyright law if its content is not original, but it could be protected by a sui generis statute designed for that purpose."*[13]

A perfect example of separate legal system that provides protection for folklore expression is The Tunisian Model Law on Copyright for developing countries, 1976. According to Section 18 of the Tunisian Model Law, "folklore" means the artistic, literary or scientific work that is created by the authors within the national territory and are recognized by ethnic communities, passed over generations and includes a basic element of the traditional cultural heritage.[14] This model law's main aim is to protect the expression of folklore from being misused, subjected to wrongful gains and unjust enrichment outside the community's customary practice and traditional groups. It also prohibits non-members from misrepresentation of the folklore expression (Tunis Model Law 1976: s1(5bis), s6(2), s4, s5(1)). One of the strongest points in this system or model is that it establishes a competent authority who governs protection of folklore expression and their requirements for fixation, identifies authorship requirement (Tunis Model Law 1976: s 10(2)). Thus, the term of protection given under this model is perpetual, a long-lasting one. Though the model doesn't have a very lasting or a binding character at an international level, however it has allowed countries that wish to adopt this model law to be enacted as a national legislation. Nigerian Copyright Act,1988, is such an example which deals with the protection of folklore expression as provided under the model law.

In Paris, 1984, WIPO and UNESCO convened jointly an expert group to formulate a draft for the protection of folklore expression by way of intellectual property rights. The expert group basically framed the Draft Treaty for the protection of expressions of folklore against illicit exploitation and other prejudicial actions. [15] The effort taken at the international regime for the protection of folklore expressions is highly admirable and commendable, but it was however considered to be unsuccessful. In fact, the International Bureau of WIPO came out

[13] https://www.wipo.int/tk/en/resources/glossary.html#446; Black's Law Dictionary, 10th Edition, Page 1662.
[14] Page 76, Section 18 from the Consolidated Analysis of the legal Protection of Traditional Cultural Expression/Expression of Folklore, "folklore" is defined as 'all literacy, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage.
[15] Article I of the Draft Treaty for the Protection of Expressions of Folklore Against Illicit exploitation and Other Prejudicial Activities.

with the reason that "it was thought to be premature by a majority of the participants because the experience towards protection of folklore expression was insufficient at the national level, specifically regarding implementation of the Model Provisions."[16]

There have been many *sui generis* systems, *inter alia*:

1. WIPO-UNESCO World Forum on the Protection of Folklore, 1997, drafting a plan of action recommending the need to protect folklore expression
2. WIPO-UNESCO Regional Consultations on the Protection of Expression of Folklore,1999 recommended the adoption of folklore issues to be addressed through the intellectual property
3. WIPO Fact Finding Missions during 1998-1999 focused into the needs of traditional knowledge holders including the traditional and cultural expressions in 28 countries.
4. WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources Traditional Knowledge and Folklore, in the late 2000 is also working towards developing policies and recommendations for the protection of folklore expression as a separate branch which is different from protecting traditional knowledge and genetic resources.

Article 27 of the Universal Declaration of Human Rights, 1948, also proposes protection of folklore expressions as it recognizes the right to freely participate in the cultural life of the community and the protection of interest arising from scientific, literary or artistic production.[17]

The Convention on Bio-Diversity, 1992, though does not address the issue directly[18] but it provides for the protection of traditional knowledge of indigenous communities, biodiversity and biological resources with no mention of folklore as such.

Though continuous effort is being made at international levels to protect the expression of folklore, but it is still an ongoing debate topic. Therefore, there is a requirement of bringing a *sui generis* system of protection of the Traditional Cultural Expressions, including folklore expressions.

IV. PROTECTION OF TRADITIONAL CULTURAL EXPRESSION OR FOLKLORE UNDER THE INDIAN COPYRIGHT ACT, 1957

Indian Copyright Act, 1957, takes care of all those rights that are related to literary and artistic

[16] International Bureau of WIPO (1998) - The Protection of Expressions of Folklore: The Attempts at International Level, [Online Web], URL: http://itt.nissat.tripod.com/itt9903/folklore.htm.
[17] United Nations 2015.
[18] United Nations 1992.

works, sound recordings, films and the rights of performers and broadcasting organization. Indigenous people sought to protect their expression under the framework of intellectual property, from which they considered copyright laws to be the best suited to protect their traditional cultural expressions. [19] However, the present copyright laws are still ill-equipped to serve the purpose due to fundamental differences between the understanding of western ideologies of "protection."[20] Though there is no special protection given to the expressions of indigenous communities, but it still provides some protection to it under the copyright regime.[21] Even after the latest amendment made in 2012 of the Copyright Act, there is no special mention of folk art, folk music and other forms of folklore in the statute.[22] In India we can still find blatant misappropriation evidently in fashion and music industries. In fashion industry, they present different forms of traditional attires which are used by the designers to present their seasonal collections. In music industry, they copy many traditional folk songs and mix it with new trend beats with no relevance to what the song actually stands for. These designs and songs are basically the intellectual property of the concerned traditional communities who have invested their time and energy in creating and presenting their identities to the world. The main cause of such misappropriation is inadequate protection measures under the copyright laws of the country. For example, in a dance, the person who has choreographed it has their style manifested in several ways as a sequential unique style.[23] And when the dance is removed from its main theme and song, and is incorporated, for instance, into a western music, there is no protection of the original form of dance, preventing it from being copied without permission. The sole reason being given is that the said dance is deemed to be on a public domain.[24] Similar is the case when a tribal painting is copied with minor modification. The indigenous tribes won't have any right of protection under the copyright law. Even if that painting depicts the subject in a different manner, such practices in the long run might cause adulteration of the tribal customs and their gradual dissolution. Thus what will be the actual point of the original artwork when it was a medium of the indigenous people to convey about their customs and beliefs to the world gets changed and adulterated. Protection of it from such exploitation and

[19] Janke Terri, (2003), 'Minding Culture: Case Studies on intellectual property and traditional cultural expressions', published by WIPO. Available at http://www.wipo.int/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf
[20] Supra note 4.
[21] Supra note 2.
[22] See India Copyright Act, No. 14 of 1957; India Code (1975), S.13.1 (ruling that copyright subsists in: (1) original literary; dramatic musical, and artistic works; (2) cinematograph films, and (3) sound recordings).
[23] Srividhya Ragavan, 'Protection of Traditional Knowledge', Minnesota Intellectual Property Law Review, 2001; 2(2). Available at:
http://hamilton.ou.edu/faculty/facfiles/protection_of_traditional_knowledge.pdf
[24] Ibid.

 [ISSN 2581-5369]

misappropriation is a big question.

(A) Limitation of the Copyright Act, 1957

1. Requirement of Originality

Section 13(1)(a)[25] of the Copyright Act, 1957, defines the term "original" in relation to literary, dramatic, musical and artistic work and provides protection of pre-existing expression of folklore. This Act mainly focuses on the protection of the original works and many traditional literary and artistic productions are not original. However, the statue doesn't define 'originality' in a clear manner. But considering the judicial opinions it indicates that the standard of originality in copyright relates to the expression of creative thought, and not the thought itself. The criterion of "original composition" does entail that the work should not be copied from another work and must clearly be born out of the author's intellect. Counter to this, any form of folklore is usually drawn from pre-existing tradition and, in fact, the folkloric works are fundamentally based on ideas, beliefs, customs and themes that is passed on from generation to generation. The requirement to prove or establish "originality" in copyright is significantly more complex and it is not as easy as testing novelty in patent law. There are two factors that the court determines upon. The first is that the work must arise out of an author's intellect and must not be copied.[26] The second is that the author should have exercised some amount of "skill, judgement or labour in the compilation of the work".[27] Under copyright, the expression of culture need not be as same as the traditional originality of expression.

2. Identifiable Author Requirement

Copyright is mainly related to author, but in the case of TCEs, the notion of author as required in copyright is absent. Currently, under this Act, the notion of "ownership" and "authorship" is different. 'Ownership' in copyright usually is very different from ownership of physical matter. Under the Act, the basic rule is the ownership of literary, musical or artistic property of

[25] Section 13(1)(a): Works in which copyright subsists – (1) Subject to the provision of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say:
   a. Original literary, dramatic, musical and artistic works;
   b. Cinematograph films, and
   c. Sound recordings.

[26] Univ. of London Press, Ltd., v. Univ. Tutorial Press, Ltd. [1916] 2 Ch. 601,608 (U.K.)

[27] Ladbroke (Football) Ltd. v. William Hill (Football) Ltd., [1964] 1 All E.R. 465, 469 (H.L. 1964)

the author,[28] who is the 'first owner of copyright in the work'[29]. This rule also has some exceptions,[30] but are not applicable in the case of indigenous folklore. The main requirement is that the creator(s) must be identifiable. In the case of expression of folklore (EoF) it is difficult to identify the authors as it is formed and held collectively and/or the creator(s) are unknown. In the case of pre-existing EoF there could have been an author at some point, but as it is not recognized in the copyright law, the concept of authorship cannot be undertaken.

2. Criteria for Joint Authorship

Folk creation even done by one member is usually owned by the entire tribe or group because according to customary indigenous laws it is an operation of collective ownership. Indian Copyright Act doesn't include the notion of "joint authorship"[31] and this cannot be applied to indigenous cultural property, as such work is not a collaborative effort but the contribution of the author is considered as cumulative knowledge that finds expression over generations.

3. Fixation Requirement

As the lion's share of TCEs are passed on to generations orally, it cannot have a tangible existence. Because of this peculiarity, bringing it within the ambit of a "fixed" format of copyright is difficult. Folktales and folksongs are the best examples. So, contradiction and controversy may pop up when one tries to bring such ideas, themes and artistic techniques within the limits of copyright. Innovation is the answer here, but with a specific view to protect a heritage.

4. Duration of Copyright

Chapter V of the Indian Copyright Law[32] talks about the duration of copyright which is depended upon the nature of the work and whether the author is a natural/legal person or

[28] See, Copyright Act, 1957, Section 2 (d): "Author" means:
- i. In relation to a literary or dramatic work, the author of the work;
- ii. In relation to a musical work, the composer;
- iii. In relation to the artistic work other than a photograph, the artist;
- iv. In relation to a photograph, the person taking the photograph;
- v. In relation to a cinematograph film or sound recording, the producer; and
- vi. In relation to any literary, dramatic, musical or artistic work which is computer generated, the person who causes the work to be created.

[29] See Indian Copyright Act, No. 14 of 1957, Section 17 – First Owner of Copyright.

[30] Ibid.

[31] See Indian Copyright Act, No. 14 of 1957; Section 2 (z), defining "work of joint authorship" as a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.

[32] See Indian Copyright Act, No. 14 of 1957 Chapter V, Sections 22-29, Term of Copyright.

 [ISSN 2581-5369]

whether the work is anonymous/pseudonymous.[33] As per Section 22 of the Act,[34] term of Copyright in dramatic, musical and artistic work published within the lifetime of the author, continues for sixty years from the beginning of the calendar year following the year when the author dies. In the case of pre-existing EoF the limited term of protection, i.e., the requirement of the date of the first publication is not there.

5. Moral Rights

In India, under Article 57 of the Copyright Act, the moral rights of an author who has died is considered to have the same right when the author was living and shall not be infringed by any person, which recognizes the author's moral right. But this is not same for the group-rights nature of the indigenous cultural expression.

(B) Performer's Right Under the Indian Copyright Act, 1957

Performer's Rights are known as neighbouring or related rights as they are considered to be related to copyright. These rights provide a legal protection to the interest of the person or organization who add substantial creative, technical or organizational skill in the process of making a work public. Performers (singers, dancers, actors, musicians etc.) are eligible for protection because of their creative interpretations that give life to the work. Such work merits

[33] Section 23 of Copyright Act, 1957: Term of copyright in anonymous and pseudonymous works.

(1) In the case of a literary, dramatic, musical or artistic work (other than a photograph), which is published anonymously or pseudonymously, copyright shall subsist until [sixty years] from the beginning of the calendar year next following the year in which the work is first published. Provided that where the identity of the author is disclosed before the expiry of the said period, copyright shall subsist until [sixty years] from the beginning of the calendar year next following the year in which the author dies.

(2) In sub-section (1), references to the author shall, in the case of an anonymous work of joint authorship, be construed,

(a) where the identity of one of the authors is disclosed, as references to that author;

(b) where the identity of more authors than one is disclosed, as references to the author who dies last from amongst such authors.

(3) In sub-section (1), references to the author shall, in the case of a pseudonymous work of joint authorship, be construed,

(a) where the names of one or more (but not all) of the authors are pseudonymous and his or their identity is not disclosed, as references to the author whose name is not a pseudonym, or, if the names of two or more of the authors are not pseudonyms, as references to such of those authors who dies last;

(b) where the names of one or more (but not all) of the authors are pseudonyms and the identity of one or more of them is disclosed, as references to the author who dies last from amongst the authors whose names are not pseudonyms and the authors whose names are pseudonyms and are disclosed; and

(c) where the names of all the authors are pseudonyms and the identity of one of them is disclosed, as references to the author whose identity is disclosed or if the identity of two or more of such authors is disclosed, as references to such of those authors who dies last. Explanation— For the purposes of this section, the identity of an author shall be deemed to have been disclosed, if either the identity of the author is disclosed publicly by both the author and the publisher or is otherwise established to the satisfaction of the [Appellate Board] by that author.

[34] Section 22: Term of copyright in published literary, dramatic, musical and artistic works-Except as otherwise hereinafter provided, copyright shall subsist in any literary, dramatic, musical or artistic work (other than a photograph) published within the lifetime of the author until 60 [sixty] years from the beginning of the calendar year next following the year in which the author dies. Explanation: In this Section, the reference to the author shall, in the case of a work of joint authorship, be construed as a reference to the author who dies last.

 [ISSN 2581-5369]

reward for their creativity and efforts.

The original Copyright Act of 1957 did not deal with performer's rights. In 1994 the Act was amended to confer certain special rights to the singers and other performers under Section 38[35] of the Act. This protection was still not adequate and in 2012 it was amended again to expand the protection given to the performers. The amendment added the definition of a "performer"[36] which states a performer includes a singer, actor, dancer, musician, juggler, acrobat, conjurer, snake charmer, a person delivering a lecture or any other person who performs as per Section 38B.[37] The performer has a moral right of attribution as a performer unless omission is dictated by manner of use of performance. Section 38A[38] and Section 38B widen the concept of the performer's right and this will reduce exploitation of the lyricists, singers etc. This amendment curbs exploitation by the music director and other concerned person because earlier the rights were bought by them.

Though the term performers of folklore expression has not been included in the Act, but the Australian Copyright Act which clearly mentions about the performance of EoF[39] gives a scope

[35] Sec 38: Performer's Right –

i. Where any performer appears or engages in any performance, he shall have a special right to be known as the "performer's right" in relation to such performance.

ii. The performer's right shall subsist until [fifty years] from the beginning of the calendar year next following the year in which the performance is made.

[36] Sec 2 (qq) of Indian Copyright Act, 1957: "performer" includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture, or any other person who makes a performance.

[37] Sec 38 (B): Moral rights of the performer – the performer of a performance shall, independently of his right after assignment, either wholly or partially of his right, have the right, -

a. To claim to be identified as the performer of his performance except where omission is dictated by the manner of the use of the performance; and
b. To restrain or claim damages in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.

Explanation – for the purpose of this clause, it is hereby clarified that mere removal of any portion of a performance for the purpose of editing, or to fit the recording within a limited duration, or any other modification required for purely technical reasons shall not be deemed to be prejudicial to the performer's reputation.

[38] Sec 38(A): Exclusive right of performers – (1)Without prejudice to the rights conferred on authors, the performer's right which is an exclusive right subject to the provision of this act to do or authorize for doing any of the following acts in respect of the performance or any substantial part thereof, namely: -

a. To make a sound recording or a visual recording of the performance, including –
   i. Reproduction of it in any material form including the storing of it in any medium by electronic or any other means;
   ii. Issuance of copies of it to the public not being copies already in circulation;
   iii. Communication of it to the public;
   iv. Selling or giving it on commercial rental or offer for sale or for commercial rent any copy of the recording;
b. To broadcast or communicate the performance to the public except where the performance is already broadcast.

(2) Once a performer has, by written agreement, consented to the incorporation of his performance in a cinematograph film he shall not, in the absence of any contract to the contrary, object to the enjoyment by the producer of the film of the performer's right in the same film:
Provided that, notwithstanding anything contained in this subsection, the performer shall be entitled for royalty in case of making of the performances for commercial use.

[39] Australian Copyright Act 1968 (Act No 63 of 1968) Section 84: Definitions: 'Performance' means: (a). a

that the definition of performers of EoF can be accommodated under it.

(C) Trademark Act of 1999

According to this Act, trademark[40] means a graphically represented mark which is capable of distinguishing the goods and services of one person from others and it may include shape of goods, their packaging and combination of colours.

In the course of trade, there are numerous examples of companies/persons using folklore expression belonging to the traditional communities without authorization and registering them as trademarks. Often such trademarks are deceptively similar to TCEs which falsely portray an association with or endorsement by a traditional or local community. Thus use of such indigenous signs creates an impression that the product is indigenous or has the qualities inherent of the indigenous cultures, when factually they are not. By using such symbols as trademarks of indigenous people, the trade communities form an association, which is a kind of inferior stereotype. In India, due to lack of awareness and resources, protection is very rarely seen when registration is applied for or infringement actions are taken.

(D) Geographical Indications (GI) of Goods (Registration and Protection) Act, 1999

This Act's main aim is to protect the geographical indications of goods of the country. Protection is granted to those registered GIs and to the authorised users under this Act. A range of subject matter is covered under this Act, including those works interpreted as TCEs. Example of such a creative work is the Kullu Shawl which is a wool shawl with unique geometric patterns. Since the shawl is recognised as a geographical indication, there is a cause of action on those who try to replicate it and sell it as authentic Kullu Shawls within India. Although some of the TCEs can be brought under this Act, the question remains to the ones which cannot be registered under this Act. For instance, the oral TCEs like folktales and myths

performance (including an improvisation) of a dramatic work, or part of such a work, including such a performance given with the use of puppets; or (b). a performance (including an improvisation) of a musical work or part of such work; or (c). the reading, recitation or delivery of a literary work, or part of such a work, or the recitation or delivery of an improvised literary work; or (d). a performance of a dance; or (e). a performance of a circus act or a variety act or any similar presentation or show; or (f). a performance of an expression of folklore; being a live performance, whether in the presence of an audience or otherwise.

[40] Sec 2(1) (zb): "Trademark" means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours; and –

i. In relation to Chapter XII (other than section 107), a registered trademark or a mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between goods or services, as the case maybe, and some person having the right as proprietor to use the mark; and
ii. In relation to other provisions of this act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so to indicate a connection in the course of trade between the goods or services as the case maybe, and some person having the right, either as proprietor or by way of permitted user, to use the mark whether with or without any indication of the identity of that person, and includes a certification trademark or collective mark.

 [ISSN 2581-5369]

etc. The potential to respond to the concerns of holders of TCE's is more in GI's than other IPR regimes, but even this regime has drawbacks, viz.:

- GI's are not intended to reward innovation, rather they reward members of the communities adhering to traditional practices.
- It can be only maintained if the collective tradition is maintained.
- GI's are not freely exchangeable from one owner to another.
- GI's can protect TCEs which are in a tangible form like handicrafts whose qualities are derived from geographical indications.

V. CASE LAWS EXPLAINING INDIAN SCENARIO V. INTERNATIONAL CASES

With a multitude of distinct cultures and traditional communities in India, a large aspect of this is still unprotected and does not fall within the ambit of existing intellectual property laws, making it more susceptible to commercial exploitation without any legal recourse to the local art-form developers. A major contrast to it is the Western liberal political theory, which believes in preserving distinct cultural identities, creating cultural diversity which benefits the society in general.[41] The same has been explained using examples of the cases as mentioned below:

In *Wik Peoples v. Commonwealth* (1996)[42], the *Wik* people had a distinct cultural and social life which involves traditional dance, songs, and ceremonies and are publicly performed at festivals. Without the knowledge and permission of the *Wik* people, the defendant company used pictures of one such performance for CDs and other promotional materials. Although the indigenous people were unaware of copyright and related right protection over such performances, but their customary laws believed such unauthorized representation of their performance as 'wrong' and claimed damages. The company did stop the use and commercialization of the community's art-forms, but did not pay damages.

In *Milpurrurru and Others v. Indofurn Pty Ltd and Others*[43] *("the Carpet case"* (1993)), the defendant company reproduced Australian aboriginal artistic designs in the carpets they imported without the prior consent or knowledge of the aboriginal artists, for which the artists sought copyright protection. The Federal Court of Australia awarded damages to an extent of

[41]See for e.g., the UNESCO Draft of the Universal Declaration on Cultural Diversity, 2001. http://unesdoc.unesco.org/images/0012/001237/123743e.pdf (September 1, 2002), "For a more in-depth analysis of the interrelation between these themes see W. Kymlicka Liberalism, Community and Culture (Clarendon Press Oxford 1989).

[42] Wik Peoples vs Commonwealth (1996), 187 Commonwealth Law Reports 1.

[43] Milpurrurru and Ors vs Indofurn Pty. Ltd. and Others, (1993) 130 ALR 659.

$1,50,000 for disrespecting the artwork and its "freshness," pertaining to each artwork. The court also awarded additional damages to the extent of $70000 as exemplary damages under Section 115(4) (b) of the Copyright Act, 1967 for the personal distress the transgression must have brought to the aboriginal artists, which had the potential of causing embarrassment and contempt and to the harm caused to the cultural expression. The unsold carpets were ordered to be delivered to the aboriginal artists.

In *Bulun Bulun case*[44] *("the T-Shirt Case*"), T-Shirts with the artwork of the aboriginal artist Bulun Bulun was copied and sold in shops. This case represented a success towards copyright protection where the Federal Court in Darwon ordered damages to be paid and unsold T-shirts to be delivered to the artist.

Although folklore expressions seem to be better protected under the copyright and related rights in comparison to other IP protection, it is often criticized for its insufficiencies and failures in protecting expressions of folklores.

VI. Conclusion and Suggestion

The folklore expressions and traditional communities in India are sources of creativity and innovation with great contributions to the social and economic development of the country. Therefore, necessary legal protection must be ensured to these art-forms not just to prevent its diminution, but for unjust enrichment through exploitation also. It is important for Indian laws that the performers get protection for their work as provided to any other artist under copyright law. The current IPRs are lacking in many ways for protecting the indigenous knowledge forms.

The first major mismatch is that these traditional artists are unaware of the copyright and related rights. It is the unfamiliarity of the traditional knowledge holders with the complex IPR systems and its technicalities. Moreover, it is the inaccessibility of the IP system which widens the gap between the originators of EoF and IPR system. The inaccessibility also includes the complexity of the system which relies on intensive documentation, structures and procedures. Furthermore, it also requires sound legal advice, financial resources and time, all of which could be limited or beyond the means of the traditional communities. This is termed as 'Operational Constraints'.[45]

Another impediment is termed as 'Cross Cultural Constraint', which has been put forward by the WIPO IGC in the following terms: 'understanding the interfaces between the formal

[44] Bulun Bulun vs R. & T. Textiles Pty. Ltd. (1998) 157 ALR 193.
[45] Ibid.

 [ISSN 2581-5369]

intellectual property system and customary legal systems which apply to TCEs with respect to local and indigenous communities'.[46] These arise due to the dual-governing systems which involve the informal IP regimes determined by the social and traditional construct and the formal IP systems. In simpler terms, the difference of non-indigenous notions towards intellectual property to that of indigenous beliefs and notions. This has been scathingly, yet aptly described in Part I, Article 8 of the COICA (Coordinator of Indigenous Organizations of the Amazon Basin) statement which declares that 'Prevailing intellectual property systems reflect a notion and practice that is colonialist, in that the instruments of developed countries are imposed in order to appropriate the resources of indigenous peoples; racist, in that it belittles and diminishes the value of [indigenous] knowledge systems; usurpatory, in that it is essentially a practice of theft'. [47]

The following points state the central premise of the arguments in simple terms without any counter-arguments:

Within the conventional IPR system, individual ownership is an entitled model. However, most EoF/TCEs are products of communal efforts and are community owned. Thus, the individualistic construct of the IPR does not fit into indigenous beliefs.

The notion of ownership is an attribute of commercialization and profitability, which is not the basis of art forms amongst the traditional communities. These have more of a sanctified notion, arising out of the sacred knowledge and ecological experience, which cannot be valued economically or commodified.

Conventional IPR theory emphasizes on a legal or juridical personality which falls out of the purview of the owners of the TCEs, as the ownership is not individualistic and the traditional communities are communal or collective in structure and existence.

IPR focuses on published literature, whereas TCEs are part of oral culture, often passed down to generations in the form of narratives.

Thus, it can be argued that TCEs occupy an ambiguous status, where it may or may not benefit from one or various legal branches of IP protection. This ultimately brings us to the paradox of how IPR be further modified to improve the protection it offers to TCEs. The deserved protection is still a dream!

[46] WIPO Doc. WIPO/GRTKF/IC/1/3 (March 16, 2001), pg. 22.
[47] Gangiee, Dev Saif Supra note 38.

 [ISSN 2581-5369]

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