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Protection against Cultural Misappropriation: Analysis of Intellectual Property Law in India and the International Scenario

ANN ROSE JOJO¹

ABSTRACT

Cultural expressions are not just mere accessories, they are an important part of the identity and uniqueness of a community and are often an integral aspect intertwined with the ethnicity of the community. Such traditions and expressions that are inherited from past generations, provide a sense of belongingness to the members of the same community, are presently misappropriated and stolen for economic benefits by multi-national companies. When appropriately safeguarded cultural expressions act as a valuable factor for empowerment and development. This paper studies the extent of protection granted to valuable traditional expressions under the intellectual property regime on an international and national level. While understanding the current scenario, the paper also looks into the suitability of protecting traditional cultural expressions under intellectual property law and the degree of compatibility between them. With regard to the Indian scenario, cultural expressions or folklores haven't been given the importance it requires and this is evident through various instances of foreign companies and individuals misappropriating Indian culture, this not only deprives the community its rightful benefits but also often perpetuates negative stereotypes. While analyzing the shortcomings of the present intellectual property law in the country for protecting traditional cultural expressions, the steps taken by other countries can be considered to amend the law without altering its fundamental features. The paper will also discuss possible modifications for improving the protection provided for cultural expressions.

I. INTRODUCTION

Cultural misappropriation is often defined as the 'taking of intellectual property, cultural expressions or artefacts, history and ways of knowledge' without permission². From the use of the swastika by the Nazis in Germany, cultural expressions in India have been widely misappropriated. Recently the issue of cultural misappropriation has been extensively

¹ Author is a student at National University of Advanced Legal Studies, India.

² Mathias Siems, *The Law And Ethics of 'Cultural Appropriation*, 15 Int'l J. L. Context 408–423 (2019).

discussed with companies such as Urban Outfitters and MAC being called out for the usage of cultural designs and patterns without consent or credit. For example in May 2019, Nike's announcement to sell special edition "Air Force 1 Puerto Rico" sneakers adorned with *mola* patterns originating in the Guna culture of Panama (and wrongly attributed by Nike to Puerto Rican culture), was fiercely opposed by representatives of the Guna people, this led to Nike cancelling the launch of the sports shoes.³ Westernized and European-centric designers have historically been accused of stealing traditional designs, music, dances and hair styles for their own use and profit, while the minority groups from whom they took receive little more than an acknowledgement.⁴

Cultural misappropriation in various industries has been a recurring issue that has resulted in numerous controversies. Some of these disputes have served to protect the intellectual property rights of the indigenous people. A popular criticism of cultural misappropriation often centers on the lack of compensation to the source community for the use of their cultural product or reputational harm due to the perpetuation of negative stereotypes.⁵ Further, cultural misappropriation often occurs as the backwash of colonization and contributes to widening existing divisions and perpetuating patterns of historic dispossession and oppression.⁶ Indigenous, local and other cultural communities have, at various instances, complained that their cultural expressions and representations are used without authority in disrespectful and inappropriate ways, causing cultural offense and harm.⁷ Meanwhile, multinational companies argue that their usage of cultural expressions and patterns is cultural appreciation or inspiration rather than misappropriation.

One of the first essays on the subject was written by Kenneth Coutts-Smith in 1976, entitled *Some General Observations from the Concept of Cultural Colonialism*. Although the article did not directly use the term cultural misappropriation, it talked about "cultural colonialism" which was used to describe the manner in which the western cultures took ownership of art forms that originated from minority groups.⁸ More recently, in the 'Glossary of key terms

³ Brigitte Vezina, *Curbing Cultural Appropriation in the Fashion Industry through Intellectual Property*, WIPO (August, 2019), https://www.wipo.int/wipo_magazine/en/2019/04/article_0002.html

⁴ Himanshu Mohan, *India : Cultural appropriation and trademark law*, MONDAQ (Aug. 14, 2019), <https://www.mondaq.com/india/trademark/836418/cultural-appropriation-and-trademark-law>

⁵ Parul Sehgal, *Is Cultural Appropriation Always Wrong?*, N.Y. TIMES MAG. (Sept. 29, 2015), <http://www.nytimes.com/2015/10/04/magazine/is-cultural-appropriation-always-wrong.html>

⁶ Siems, *supra* note 02.

⁷ *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/ Expressions of Folklore*, WIPO (May, 2003), https://www.wipo.int/edocs/pubdocs/en/tk/785/wipo_pub_785.pdf

⁸ Ash Sarkar, *Why We Need to Pause Before Claiming Cultural Appropriation*, THE GUARDIAN (Apr 29, 2019), <https://www.theguardian.com/commentisfree/2019/apr/29/cultural-appropriation-racial-oppression-exploitation-colonialism>

related to intellectual property and genetic resources, traditional knowledge and traditional cultural expressions' drafted by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, the term 'cultural expressions' has been defined as "those expressions that result from the creativity of individuals, groups and societies, and that have cultural content.", while the definition for 'misappropriation' has been taken from the Black's Law Dictionary.

The relationship between tradition, modernity and the market place is not always perceived to be a happy one. What is creativity from one perspective may erode traditional culture from another viewpoint.⁹ It is hence very important to strike a balance between the protection of Traditional Cultural Expressions (TCEs) and the freedom to use such expressions. Cultural borrowing is not inherently wrong but the appropriate and respectful use of it must be ensured. A law that completely limits the exchange of cultural expressions would hinder the growth of society as a whole.

One of the complex issues, in this case, is the inability of the current IP system in protecting TCEs and promoting access to culture. Moreover, the TCE holders find it difficult to navigate themselves through the document-intensive and stringent structures and procedures. A modified IPR system, accounting for the unique situation of the tribes, is an appropriate beginning for developing policies to protect the indigenous from further exploitation of their intellectual and genetic resources.¹⁰

The article focuses on Indian IP law with regard to the protection of its TCEs, specifically the lack of a comprehensive system to enhance the cultural knowledge and safeguard it from misappropriation. Section I will look into the nuances of protecting TCEs and whether a progressive system can protect the rights of the community including both the cultural group and the public at large. Section II will deal with developments in the International scenario and the forms of protection given by countries such as the U.S.A, Australia and South Africa. Section III will analyse how TCEs fit into the current IP system in India and the level of protection that the system can provide. Section 4 takes a modest leap into how the Indian system may be modified to bridge the gap between the TCEs owners and the IP protection system.

II. TRADITIONAL CULTURAL EXPRESSIONS AND IP PROTECTION: CHALLENGES

While considering protection, it is helpful to understand the meaning of the term in the

⁹ WIPO, *supra* note 08.

¹⁰ Jordan E. Erdos, *Intellectual Property Rights: Cure for Cultural Appropriation*, 9 LBJ J. Pub. Aff. 50 (1997).

immediate instance. Protection may include safeguarding, promoting or preventing misuse and each form requires a separate set of legal and policy measures and some need more than mere modifications to IP law. This article would be dealing only with protection which would include policies to safeguard TCEs and prevent misuse, especially with regard to cultural misappropriation. The idea is to ensure a balanced system where culture is allowed to grow and interact without being exploited.

Several questions arise while setting up a wide-ranging regime. Firstly, the law would have to determine who would own the rights conferred and how the rights can be managed by the said person or body. Some argue that the rights must be conferred upon the State or a body that is developed by the State but there is no assurance that such an appointment would empower the community and thus the right would have to be directly given to the community members. On the other hand, there are many scenarios wherein a particular community cannot claim distinct rights or instances where cultural expressions that do not have a defined origin, it would be unjust in such scenarios to confer rights to a particular community.

Another issue that the legislation would have to decide upon is what type of use of the TCEs would be given protection. A blanket prohibition on the use of a TCE may hinder its growth and even cause its end. It is necessary to allow the proper use of cultural expressions without providing leeway for its misuse. Hence, a comprehensive protection system would be better suited as it can prevent i) uses that falsely suggest a connection with a community ii) derogatory, libelous, defamatory or fallacious uses; (iii) uses of sacred and secret TCEs inappropriately¹¹

With regard to current IP laws such as copyrights, they provide protection only for a specific amount of time, hence it would be problematic to extend copyright law to literary and artistic work TCEs. The protection system that has been discussed in the article, cannot be a time-constrained one as TCEs are passed on from generation to generation within a particular community and each succeeding generation should have equal rights to prevent misappropriation. Furthermore, through the current copyright regime, appropriators, rather than source communities, have been able to acquire protection for their uses of cultural products.¹²

Cultural expressions fail to receive the protection and security that are required due to the nuances of adjusting it within the current IP system. Traditional expressions are the result of

¹¹ WIPO, *supra* Note 08.

¹² Stephanie B. Turner, *The Case of the Zia: Looking Beyond Trademark Law to Protect Sacred Symbols*, 11 CHI. KENT J. INTELL. PROP 116. 116 (2012).

cumulative knowledge and there is no recognized or individual author¹³, no single user of the product can be identified as it is shared in a community commons and often the cultural product is extremely old or of indeterminate age, and any term of protection would have already lapsed.¹⁴ Hence, many scholars have appealed that the use of intellectual property would be counterproductive for the source community. Moreover, just as defining a culture, its membership, and its product may freeze a culture, intellectual property rights in a cultural product may "insulate cultures from interaction with other communities, creating ossified and static cultures that reinforce traditions through law."¹⁵

Despite the criticism, source communities around the world are in favour of IP protections that might help them in limiting the misappropriation or commercialization of their culture. The commercialization of the source community's cultural product, notwithstanding the economic harm to the community, may by its nature be destructive to the religious or cultural use of a cultural product¹⁶. If law can be used to protect cultural products and expressions, source communities may be able to regain their ability to define the product's meaning and prevent would-be appropriators from profiting from their cultural product-potentially perpetually.¹⁷ Source communities believe that inclusion of TCEs in the IP regime would enable them to prevent insulting and offensive uses and ensure that some acknowledgement would be given while being used outside the community.

It has to be borne in mind that once a defined policy has been decided upon, the State would then have to provide and invest in supporting institutions and schemes that would bridge the gap between the legal system and the community. A system of compensation would not be enough as these communities expect recognition and a certain amount of control over its use, this can be managed only through agencies that work as databases, controlling authorities and adjudicating bodies.

III. DEVELOPMENT IN PROTECTION OF TCEs: INTERNATIONAL SCENARIO

The importance of recognizing cultural expressions have increased as countries have begun to realize the cultural and economic loss that is caused by cultural misappropriation.

¹³ Jill Koren Kelley, *Owning the Sun: Can Native Culture Be Protected Through Current Intellectual Property Law?*, 7 J. HIGH TECH. L. 180, 188 (2007).

¹⁴ K.J. Greene, *Intellectual Property at the Intersection of Race and Gender: Lady Sings the Blues*, 16 Am. U. J. GENDER Soc. POL' Y& L. 365, 383 (2007).

¹⁵ Madhavi Sunder, *Property in Personhood*, in RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 164, 168-69 (Martha M. Ertman & Joan C. Williams eds., 2005).

¹⁶ Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 Aiz. ST. L.J. 299, 300, 310 (2002).

¹⁷ Stacey L. Dogan & Mark A. Lemley, *Trademarks and Consumer Search Costs on the Internet*, 41 Hous. L. Rev. 777, 786 (2004).

Organizations like WIPO and UN have brought forth various treaties and conventions to establish an international protocol while dealing with TCEs. Moreover, countries themselves have started either adjusting their IP law or drafting fresh legislations to provide better protection for TCEs.

(A) International law

Intellectual property rights in the former colonial territories in the nineteenth and twentieth century, and until the 1960s, were used as mechanisms of misappropriation and plundering of both the colonized peoples' and the indigenous peoples' heritage for the benefit of the western colonizers.¹⁸ Rights with regard to indigenous TCEs were problematic as the system granted ownership rights to a sole artist-creator, based on the westernized notions of art.¹⁹

Due to pressure by various activists and legal scholars, international organizations intensified its efforts to protect TKs and TCEs. One of the earliest attempts being, the inclusion of Art 15(4)a in the Berne Convention for the Protection of Literary and Artistic Works in 1967 which provides for the protection of “unpublished works” within the copyright regime. This Article of the Berne Convention, according to the intentions of the revision Conference, implies the possibility of granting protection for TCEs²⁰

After the revision of the Berne Convention, the need to provide States a document with model laws, which were in adherence to the Convention's rules, that could be adjusted according to the national statutes was apparent. Hence, the Tunis Model Law on Copyright for Developing Countries was adopted by the Committee of Governmental Experts convened by the Tunisian Government in Tunis from February 23 to March 2, 1976, with the assistance of WIPO and UNESCO. The Tunis Model Law provides specific protection for works of national folklore. Such works need not be fixed in material form in order to receive protection, and their protection is without limitation in time.²¹

In late 2000, the Member States of WIPO established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the Committee) for the purpose of discussions among member states on these subjects. The committee was set up to explore in the fields of intellectual property, genetic resources,

¹⁸ John Kiggundu, "Intellectual Property Law and the Protection of Indigenous Knowledge" in Isaac Mazonde & Pradip Thomas, eds, *Indigenous Knowledge Systems and Intellectual Property in the Twenty-First Century: Perspectives from Southern Africa* (Dakar: Imprimerie Graphiplus, 2007).

¹⁹ Howard Becker, *Art Worlds: 25th Anniversary Edition, Updated and Expanded* (University of California Press, 2008).

²⁰ Berne Convention for the Protection of Literary and Artistic Works art. 1, Sept. 9, 1886, 25 U.S.T. 1341, 828 U.N.T.S. 221.

²¹ WIPO, *supra* Note 08.

traditional knowledge and folklore, with a view to drafting an international instrument reconciling governmental and indigenous peoples' interests.²² In 2003, the Committee drafted a document providing legal and policy options for the protection of traditional cultural expressions/ expressions of folklore. The options include existing intellectual property systems (including unfair competition), adapted IP rights (sui generis aspects of IP systems), and new, stand-alone sui generis systems, as well as non-IP options, such as trade practices and labeling laws, use of contracts, customary and indigenous laws and protocols, cultural heritage preservation laws and programs, common law remedies such as unjust enrichment, rights of publicity, blasphemy, and criminal law.²³ The committee advanced the view that copyright claims emanating from TK and TCEs could be protected not only through specially adapted IP norms, but also through other protective regimes, including defamation, privacy, stewardship and property rights.²⁴

'A draft gap analysis' was prepared by WIPO facilitators in 2008, to be reviewed "by the ICC and sent to Member States, indigenous peoples and other traditional and cultural communities, civil society organizations and a range of other interested parties received during several consultation processes"²⁵. The analysis was updated by the Secretariat in 2018 to reflect the recent international instruments or legislative or policy developments. The Committee also drafted a glossary of key terms related to intellectual property and genetic resources, traditional knowledge and traditional cultural expressions for references.

Over the years UNESCO managed to bring forth many conventions and resolutions. However, in practice the main UNESCO conventions that are most relevant to indigenous peoples' heritage and TCEs are those that protect cultural heritage, namely: the 1972 World Heritage Convention that was conceived to protect cultural objects, sites and monuments (tangible heritage) and the 2003 Convention for the Safeguarding of Intangible Cultural Heritage (CSICH).²⁶

In 2007, the United Nations General Assembly adopted the United Nations Declaration on the

²² Eleni Polymenopoulou, *Indigenous Cultural Heritage and Artistic Expressions: Localizing Intellectual Property Rights and UNESCO Claims*, 6 CAN. J. HUM. RTS. 87 (2017).

²³ *Traditional Cultural Expressions/Expressions of Folklore Legal And Policy Options*, WIPO (Dec ,2003), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_6/wipo_grtkf_ic_6_3.pdf

²⁴ Wend B. Wendland, "Intellectual Property and the Protection of Traditional Knowledge and Cultural Expressions" in Barbara T Hoffman, ed, *Art and Cultural Heritage: Law, Policy and Practice* (New York: Cambridge University Press, 2006) 327 at 334.

²⁵ Michael Blakeney, "Protecting The Spiritual Beliefs Of Indigenous Peoples-Australian Case Studies" (2013) 22:2 Pac Rim L & Pol'y J 391 at 404.

²⁶ Lucas Lixinski, *INTANGIBLE CULTURAL HERITAGE IN INTERNATIONAL LAW* (Oxford: Oxford University Press, 2013).

Rights of Indigenous Peoples (UNDRIP).²⁷ The Declaration considers the intellectual property rights of indigenous people. Article 31.1 of the UNDRIP specifically protects the rights of indigenous peoples and local communities to the protection of their TCEs: “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures.... They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”²⁸ Furthermore Article 31.2 states that, “[i]n conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.”

Other international IP conventions and treaties that attempt to provide protection to TCES are viz., International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961 (the “Rome Convention, 1961”), the Paris Convention for the Protection of Industrial Property, 1967 (the “Paris Convention, 1967”), the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, 1971 (the “Phonograms Convention, 1971”), the TRIPS Agreement, 1994; the WIPO Copyright Treaty, 1996 (the “WCT, 1996”), the WIPO Performances and Phonograms Treaty, 1996 (the “WPPT, 1996”) and the Beijing Treaty on Audiovisual Performances, 2012 (the “Beijing Treaty, 2012”).²⁹

(B) USA

Source/ traditional communities have limited scope under U.S. law as there is no specific statute for TCE protection. Currently, communities can use various provisions under the Lanham Act³⁰ and the Copyright Act³¹ to protect their TCEs. With regard to trademark, the Lanham Act has been considered the foundation of modern U.S. federal trademark law³², although it does not particularly provide for registration of TCEs, malicious registration can be limited. According to sec 2(a) of the Act an application for a trademark registration may be denied if the mark “[c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may *disparage* or *falsely suggest a connection* with persons, living or dead,

²⁷ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007.

²⁸ *Id.*

²⁹ *The Protection Of Traditional Cultural Expressions: Updated Draft Gap Analysis*, WIPO (July, 2018), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_37/wipo_grtkf_ic_37_7.pdf

³⁰ Trademark Act of 1946, 15 U.S.C. §§ 1051–1141 (2012).

³¹ Copyright Act of 1976, 17 U.S.C. §§ 101–113 (2012).

³² *Matal v. Tam*, 137 S. Ct. 1744, 1752 (2017).

institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.” However, the decision of the U.S Supreme Court in the *Matal v Tam* laid down that *disparagement* cannot be used by source communities for preventing registrations³³. Presently, a false connection has been accepted as a defensive protection for refusing wrongful registrations. In order to improve the protection provided under the Act, the United States Patent and Trademark Office “established a database containing the official insignia of all State and federally recognized Native American tribes which cannot be registered as trademarks.”³⁴ Refusing federal registrations by nonindigenous entities of marks that are TCEs, or derived thereof, would provide defensive protection to TCEs and prevent various kinds of misappropriation.³⁵ Although Native American tribes may be able to register their insignia and other TCEs as trademarks, many Native American tribes do not wish to register their official insignia as trademarks because they have no interest in making commercial use of them.³⁶ Instead, their interest is to stop nonindigenous entities from cultural misappropriation of symbols, names, and insignia associated with Native American tribes.³⁷

Copyright law provides little aid in preventing the misappropriation of TCEs by nonindigenous entities. U.S. copyright registrations of work containing TCEs, like trademark registrations containing TCEs, are sometimes granted.³⁸ The U.S copyright law is based on the Berne Convention but the protection given according to the Act would not allow positive protection to TCEs as most TCEs would be considered as public domain material for purposes of copyright law.³⁹ The challenges in the protection of TCEs include the “originality requirement, fixation requirement, the term of copyright, the concept of the public domain, the focus on sole authors, [and] fair use.”⁴⁰ The scope of positive protection is dependent on the level of defensive protection available, under the copyright law communities do not have defensive rights as seen in sec 2(a) of the Lanham Act and hence there is a higher chance of fraudulent copyrights being granted.

³³ Niki Kuckes, *Matal v. Tam: Free Speech Meets “Disparaging” Trademarks in the Supreme Court*, 23 Roger Williams U. L. Rev. 122, 125–26 (2018).

³⁴ Tzen Wong & Claudia Fernandini, *Traditional Cultural Expressions: Preservation and Innovation*, in *Intellectual Property and Human Development* 175, 185 (Tzen Wong & Graham Dutfield eds., 2011).

³⁵ *Id.*

³⁶ U.S. Patent & Trademark Office, *Report on the Insignia of Native American Tribes* 14 (1999)

³⁷ *Id.*

³⁸ Nina Mantilla, *The New Hawaiian Model: The Native Hawaiian Cultural Trademark Movement and the Quest for Intellectual Property Rights to Protect and Preserve Native Hawaiian Culture*, Am. U. Intell. Prop. Brief, 26 (2011).

³⁹ Molly Torsen, *Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues*, 3 Intercultural Hum. Rts. L. Rev. 199, 201 (2008).

⁴⁰ *Id.*

(C) Australian

The current Australian intellectual property laws like copyright, trademarks, designs and patents do not fully protect Indigenous culture from being misused or misappropriated. Although the Australian legal system has had a problematic relationship with the cultural knowledge of various indigenous communities⁴¹, recently efforts have been made better to protect its aboriginal communities' TCEs.⁴² One such effort being the certification marks given by National Indigenous Arts Advocacy Association to TCEs or TKs as proof of authenticity. The mark states that the particular work is created by "indigenous people who, "in compliance with the certification mark rules, have a claim to the type of style, knowledge, or information embodied in that product"⁴³

Furthermore, Australian trade practices law prevents traders from conducting themselves in a manner that would be misleading or deceptive and from misrepresenting affiliation to any community. Various protocols such as the Australia Council for the Arts protocols, Screen Australia protocols, ABC and SBS protocols, AIATSIS protocols that state the preferred conduct while using indigenous cultural material.⁴⁴

In 2003, the Australian government unveiled a Copyright Amendment Bill with a goal of developing Indigenous Communal Moral Rights (ICMR) to protect the unique cultural interests of Indigenous communities. The moral rights addressed under this bill include the rights of integrity and attribution.⁴⁵ This was the first attempt to introduce indigenous concepts into codified Western law, as it dealt solely with the intellectual property aspect of TCEs. The bill was criticized for being too onerous and impractical for effective implementation, the bill now is being reviewed in order to make the provisions more advantageous for source communities.

(D) South Africa

South Africa has made strides to protect Indigenous Knowledge from misappropriation by pushing through draft bills on Intellectual Property Rights, which aim to protect findings from public research institutions⁴⁶ One of the first attempts was to include TKs into the existing IP

⁴¹ Christoph B. Graber, *Aboriginal Self-Determination vs the Propertisation of Traditional Culture: The Case of Sacred Wanjina Sites*, *Austl. Indigenous L. Rev.*, 64 (2009).

⁴² Michael Blakeney, *Protecting the Knowledge and Cultural Expressions of Aboriginal Peoples*, 4 *U.W. Austl. L. Rev.* 180 (2015).

⁴³ *Id.*

⁴⁴ Richard Awopetu, *In Defense Of Culture: Protecting Traditional Cultural Expressions In Intellectual Property*, 69 *Emory L. J.* 745, 754-756 (2020).

⁴⁵ Molly Torsen, *Inside Views : Indigenous Communal Moral Rights*, IP-WATCH (Dec 04, 2006), <https://www.ip-watch.org/2006/12/04/inside-views-indigenous-communal-moral-rights/#note7>

⁴⁶ Lioewyde H. Berckmoes, *PROTECTING INDIGENOUS KNOWLEDGE IN SOUTH AFRICA: DEBATES ON INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT*, *Radboud University Nijmegen* 5 (2008).

regime through the Intellectual Property Laws Amendments Act (IPLAA), 2013. IPLAA provisions provide protection under the existing copyright, trademark, designs and performer's protections acts for traditional works, expressions, terms and designs, and create a national trust fund, council and database for Indigenous knowledge. The amendment was criticized for not efficiently including protective measures within the existing IP system and being counter-effective. This led to the amendment being repealed for not being compatible with the IP laws.⁴⁷

In 2018, the South African Parliament adopted The Indigenous Knowledge Protection Bill that aims to provide positive protection to indigenous knowledge. The Indigenous Knowledge Protection Bill sets forth a fairly comprehensive framework for protecting, promoting, developing and managing registered Indigenous knowledge. It provides for a registration office that would allow communities to register their knowledge and be entitled to protection. Third parties seeking to use registered Indigenous knowledge must apply for a license through NIKSO and enter into a benefit-sharing agreement with the trustee of the Indigenous knowledge holding community. The licensee must acknowledge the community by mentioning it or its geographical origin.⁴⁸ While the IPLAA was originally seen as possibly incompatible with the Indigenous Knowledge Protection Bill, it is now believed that by implementing only complementary provisions of the IPLAA, a more holistic protection system for Indigenous knowledge can be achieved than through the Indigenous Knowledge Protection Bill alone. Hence, the bill is expected to be implemented with specific IPLAA provisions.⁴⁹

IV. PROTECTION OF TCES IN INDIA UNDER CURRENT IP LAWS

In India, blatant misappropriation is evident in various industries such as fashion, music, dance etc. In the fashion industry different forms of traditional attires are used by the designers for fashion shows which are actually the intellectual property of the traditional communities. Whereas in the music industry music attributable to an indigenous community is used by mainstream composers, who copyright them without any credits to the source community. The misappropriation takes place as a consequence of the inadequate protection afforded by the IP laws of the country⁵⁰ In the absence of legislation to protect TCES, nonindigenous entities have no legal obligation to compensate the communities responsible for the development and

⁴⁷ Lee-Ann Tong, "Aligning the South African Intellectual Property System with Traditional Knowledge Protection" 12 J Intell. Prop. L. & Pol'y. 179 (2017).

⁴⁸ Margo A. Bagley, *Toward an Effective Indigenous Knowledge Protection Regime Case Study of South Africa*, CIG (Dec 2018), <https://www.cigionline.org/sites/default/files/documents/Paper%20no.207web.pdf>

⁴⁹ Id.

⁵⁰ Tabassum Iqbal, *Exploring the jurisprudence behind traditional cultural expressions in India: A juridical study*, 5 Int'l. J. Law 31-39 (2018).

preservation of such TCEs.⁵¹

The process of improving protection for TCEs in India has progressed slowly owing to the diversity of communities and its creations. Presently, no branch of IP law is designed to address pandemonium in public domain and piracy of intangible cultural heritage thereof in vested interest of private domain.⁵²

The Constitution of India under Art 29 and Art 51A provides for conservation and preservation of culture. Despite the constitutional provisions on the protection and preservation of distinct cultural groups, there is no law prohibiting the exploitation of communities' TCEs without their permission⁵³. Under the current IP regime, TCEs have little scope for defensive protection and almost no scope for positive protection. Although the initiatives to create online libraries and digitalized databases of TCEs have witnessed a rise, yet they lack the attention and the emphasis given to other TK databases, such as the Traditional Knowledge Digital Library (TKDL), in government policies and initiatives.

In India the legislation that takes care of the rights relating to literary and artistic works, sound-recordings, films, and the rights of performers and broadcasting organizations, is the Copyright Act, 1957⁵⁴. Many TCEs for which protection is desired constitute the subject matter of copyright protection. Examples include music and songs, dances, plays, stories, ceremonies and rituals, drawings, paintings, carvings, pottery, mosaic, woodwork, metal ware, jewellery, architecture, sculptures, handicrafts, poetry, and designs.⁵⁵

Most source communities have sought to protect art and literary works under the framework of intellectual property, within which they have considered copyright laws best suited to protect traditional cultural expressions. Unfortunately, the Act does not specifically provide protection for TCEs, however in certain circumstances it provides protection to work which is derivative of TCEs, it is not necessary that the creator be a member of the source community. Hence, in numerous instances copyright is claimed and acquired easily by distorting and manipulating the original form of indigenous expressions without recognising the rights, interests of and benefits to the communities holding them.⁵⁶

⁵¹ P.Y. Valsala, G. Kutty, World Intellectual Prop. Org., National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia, and the Philippines 17 (2002).

⁵² Iqbal, *supra* Note 51.

⁵³ Ruchira Goswami & Karubakee Nandi, *Naming the Unnamed: Intellectual Property Rights of Women Artists from India*, 16 Am. U. J. Gender Soc. Pol'y & L. 257, 277 (2008).

⁵⁴ Copyright Act, No. 14 of 1957, Gazette of India, Extra pt. II sec. 3 (Jan. 21, 1958).

⁵⁵ Anurag Dwivedi & Monika Saroha, Copyright Laws as a Means of Extending Protection to Expressions of Folklore 10 J. INTELLEC. PROP. RIGHTS. 308-314 (2005).

⁵⁶ Nipun Gupta, *Protection to Intangible Indigenous Cultural Expressions under Indian Copyright Act : A Means or an Obstacle*, IGNITED (2019), <http://ignited.in/a/58177>

A strict interpretation of the copyright law proves that it is inadequate to protect TCEs as the Indian copyright law in its present form is ill-equipped to serve the interests of indigenous communities due to fundamental differences between the Western understanding of “protection” and the indigenous understanding of the same⁵⁷. The copyright law is author-centric and the ‘identifiable author requirement’ of the copyright regime excludes TCEs from its scope, as such expressions are known for being attributable to a particular community not an individual. Another limitation of the current law is the originality requirement. The use of the term Original in section 13(1) (a) of the Copyright act⁵⁸ in relation to literary dramatic musical and artistic work prevents the protection of pre-existing Expressions of Folklore. Moreover even if a work comes under the purview of the Act, the protection is given only for a limited period, and limiting the protected period of cultural expressions would allow future misappropriation. Many indigenous people and traditional communities desire indefinite protection for expressions of their traditional cultures, and want their expressions to be protected in perpetuity. This demand is justified as, protecting an expression that has been unique to a community since time immemorial, for a couple of decades, serves no purpose.⁵⁹

Performers rights granted under the Act can be seen as a possible provision for protection of certain types of TCEs. During the continuance of performer's right, any person who, without the consent of the performer makes a sound or visual recording of the performance; or communicates the performance to the public in any manner shall be deemed to have infringed the performer's right⁶⁰. However this only a neighboring right and the right is given to the performer, not for the work itself.

An analysis of the copyright law would prove that the strict requirements of the law is unable to accommodate the complexities of TCEs. Copyright law should be amended to embrace cultural and economic realities connected to the use of TCEs in order to cater to the needs and concerns of indigenous people.⁶¹

Trademarks are registered under the Trademarks Act ,1999. Under which many companies falsely registering marks that are deceptively similar to cultural symbols belonging to traditional communities. Use of traditional signs as trademarks often gives consumers the impressions that such products are genuinely indigenous made or have certain traits and

⁵⁷ Id.

⁵⁸ Copyright Act, *supra* note 55.

⁵⁹ Dwivedi *supra* Note 56.

⁶⁰ Id.

⁶¹ Gupta *supra* Note 57.

qualities that are inherent to the indigenous cultures when they are not.⁶² However, due to lack of awareness and resources, very rarely is registration applied for or action taken against infringement.

The Geographical Indications of Goods (Registration and Protection) Act, 1999 intends to protect the GIs registered under the act and its users. Although the purview of protection provided under the Act is wide and has the potential to protect the work more effectively than other IPR regimes⁶³, only a minor amount of TCEs can be brought under the Act. GI's can protect TCEs only which tangible like handicrafts which have qualities derive from their geographical origin.

V. AMENDMENTS RECOMMENDED TO WIDEN THE SCOPE OF THE PRESENT IP REGIME

Many scholars have held that conventional IPRs and TCEs are contradictory in nature and if the IPR regime attempts to protect such expressions it would lead to operational constraints. It has been argued that TCEs can only be protected by a fresh regime that provides sui generis protection. On the other hand, it has been contended that a comprehensive adaption of IP law taking into account the specifics of TCEs would be better implanted and more effective. In the current scenario, the commercialization of TK and protection against its unauthorized use outside of India would be best protected via intellectual property mechanisms until, at least, the introduction of international treaties demanding reciprocity of rights.⁶⁴ Moreover, copyright, which includes artistic works (like clothing designs), and trade marks for pattern and ornamentation, might assist in protecting cultural expressions that find application in the fashion industry⁶⁵.

There are several changes required in the current regime, this article only focuses only on two humble and effective changes. Firstly, an IP system wherein it recognizes the need for collective ownership. The law should not be restricted strictly to the individualistic constructs of property.⁶⁶ Presently the GI Act recognizes the same but it should be extended to copyright and trademark law as well. Allowing ownership would not mean absolute bar on usage by outsiders rather it would permit the source community to provide guidelines and regulations on the usage of the expression. It would provide a legal right against misappropriation or

⁶² Iqbal *supra* Note 51.

⁶³ *Id.*

⁶⁴ Kim Rampersadh, *What Role do IP Rights have in Discouraging Cultural Appropriation*, LEXOLOGY, (2018), <https://www.lexology.com/library/detail.aspx?g=69c25aa1-9009-48e5-b2f1-eeaef126231b>

⁶⁵ *Id.*

⁶⁶ Iqbal *supra* Note 51.

misuse.

Several international and local laws have adopted the concept of “collective ownership”. For example: the Panama Law allows for “collective rights of the indigenous communities”, The South Pacific Law vests ‘traditional cultural rights’ in ‘traditional owners’, who may be a group or an individual in whom the custody of the expressions of culture are entrusted in accordance with the customary law and practices of that group⁶⁷, the guiding principles given by the IGC state that custody and protection of the TCE should be entrusted on the source community.

Secondly the maximum protection period for copyrights with regard to TCEs should be extended to be able to provide safeguards indefinitely. Many international IP regimes sanctions indefinite protection such as the Berne Convention which stipulates 50years as the minimum period for protection and does not specify a maximum limit. Moreover, the intergovernmental committee has also resolved that protection of any traditional cultural expression should endure for as long as it continues to be maintained and used by, and is characteristic of, the cultural identity and traditional heritage of the relevant indigenous people⁶⁸

Thus with some contributions of flexibility and a liberal construction of existing laws traditional cultural expressions may meet all the requirements to the grant of IP protection and can be efficiently protected against cultural misappropriation.

VI. CONCLUSION

The rampant misuse of cultural expressions have made indigenous and traditional communities feel destitute and helpless. There is a certain expectation from them to give up their rights to the public domain due to the lack of a legal system that states otherwise. However, multinational companies have been able to manipulate such cultural work to be able to obtain IP protection to their ‘adaptations’ of cultural expressions. Requests and appeals by communities to provide protection have been declined stating that IP law is incapable of adjusting the complexities of TCEs. This article is a humble proposition that although a sui-generis legislation may allow better protection until the nuances of the same are figured out, a couple of effective changes can be brought forth in the current IP regime to give the source communities atleast a minimum level of protection.

To understand the issues surrounding the relationship between IP and TCEs. The second section dealt with contradictory points between TCEs and the requirements for protection under IP law. The conventional forms of IP law have strict needs such as an identifiable author , a

⁶⁷ Dwivedi *supra* Note 56.

⁶⁸ Id.

fixed period of protection and individual ownership. Cultural expressions belong to the community as a whole and it would be difficult to identify authors or owners from them. Despite such differences various communities and scholars believe that certain amendments to the IP law would allow protection for TCEs without altering the fundamental aspects of IPR.

To identify the required changes and how they can be introduced, the third section studied the developments made in international law and the recommendations given by various treaties and conventions. The section also studied the level of protection granted to TCEs by three other countries namely U.S.A , Australia and South Africa. A similarity that can be noticed in all three countries is that while working on sui-generis legislations and learning the needs of the indigenous communities of their country, they have amended and modified their IP law to include TCEs within the ambit of IPR safeguards. Having a diverse range of communities and traditions, it is more important for India to study its ethnic and cultural diversity to introduce all-encompassing and apt law and while this process must begin at the earliest communities must not be left distraught till the completion of the process. Hence, amendments similar to the countries discussed in the section can be brought forth in India as well.

The fourth section analyzed the level of protection granted to TCEs under the current IPR regime and the lack of safeguards against misappropriation were evident as none of the legislations were wide enough to include TCEs within their scope. Hence, the fifth section was a modest attempt to recommend a couple of effective changes that would allow the communities immediate defenses against misappropriations and misuses without being too heavy on the framework or institutions working under it.

Intellectual property has time and again proved itself flexible and accommodating to new inventions and innovations. Taking into account this nature of IPRs, it is not farfetched to assume that amendments and modifications to the current IP law would be sufficient to protect traditional cultural expressions and its source communities from wrongful actions.
