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FOLKLORE EXPRESSIONS: COPYRIGHT PROTECTION OR NEED FOR A SUI-GENERIS LAW?

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Understanding ‘Folklore Expressions’

Indigenous communities’ creative works, immensely contributes to the growth and development of historical, cultural and traditional fields of modern societies. Such works are precious source of information and proof of social evolution of mankind. ‘Globalisation’ which is the term used to define modern societies is seen to have an eroding effect on such works of aboriginals (Kaul 2012). Such contributions to the various fields of art, literature, etc... needs to be protected and preserved for generations, owing not only to their anthropological, social, cultural and economic importance but also, for their relevance to the development of modern societies. According to the IUCN Inter-Commission Task Force on indigenous people, “*cultures are dying out faster than the people associated with them.*” (Dwivedi and Saroha). The protection of folklore expressions as a subset of ‘traditional cultural expressions (TCE)’ is the need of the hour to preserve and retain intact the cultural and traditional assets. The term “Folklore” was first coined by William Thomas in 1846 and it essentially means stories, tales or songs of the ancient folk communities (Chamyal 2017). The term is split as “*Folk + Lore*”.

The term ‘traditional cultural expressions’ is not specifically defined under any law in the national and international regime, however, a draft treaty jointly prepared by WIPO and the UNESCO to protect the expressions of folklore have attempted to define “expressions of folklore”.² The folklore expressions can be regarded as an outcome of

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

““*Expressions of folklore*” means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of the country] or by individuals reflecting the traditional artistic expectations of such a community, in particular:
(i) Verbal expressions, such as folk tales, folk poetry and riddles;

“traditional knowledge” or “indigenous knowledge” of a particular community. The main characteristics of such expressions are that they are intergenerational and they reflect the cultural and traditional values which form the identity of a community, making it a community asset rather than an individual property. This inherent nature of folklore expressions warrants a serious protection, as they have distinctive existence that furthers community protection when compared to other art forms. Hence, inadequate or no legal protection to folklore expressions would lead to the devastation and extinction of the existence of a particular culture or tradition or the community itself. Further, on a practical note, the protection of folklore expressions becomes increasingly important due to their unauthorized adaptation, reproduction, alteration and mutilation giving no regard to its cultural significance.³

India is a land of cultural and traditional diversity, hosting a large and vivid tribal population situated in the north-eastern, central and southern part of the country.⁴ Several cottage and handicraft industries in the country have been selling locally produced items, art works, prints, fabrics, of such communities. They also contribute in textiles, floor coverings, pile carpets, jewelry, cane furniture, ritual crafts, etc. According to the Constitution of India, folklore expressions are not explicitly protected. Even though, Article 29(1)⁵ and 51A (f)⁶, protects the works and cultural interests of

(ii) Musical expressions, such as folk songs and instrumental music;

(iii) Expressions by actions, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and

(iv) Tangible expressions, such as:

(a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal-ware, jewelry, basket weaving, needlework, textiles, carpets, costumes;

(b) Musical instruments;

(c) [Architectural forms].”

³ See World Intellectual Property Organisation (WIPO).

⁴ “The NorthEasterners are the tribes like Lepcha, Daflas, Mikir, Naga, Khasi, Garos, Kuki and so on. The Central region tribes include the Santhals, Oraons, Hos, Juang, Gonds, Baiga and the Bhil. The Southern tribes include the Chenchus, Todas, Kadars, Kanis and Badaga, etc...” (Kutty 2002).

⁵ Article 29(1) of the Constitution reads-

“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.”

⁶ Article 51A(f) of the Constitution reads-

minorities, there is no law which specifically protects the interests of tribal communities and their folklore expressions.

The protection of culturally significant works, of folklore expressions is commonly debated and found to be inappropriately protected because they are freely available in the public domain. A thing available in the public domain is free to be accessed and used, without any reward to be paid to the right holder (Wagner 2003). The folklore expressions are an outcome of their association to the particular community glorifying a particular culture. This perhaps exists for a very long time, for time immemorial. In such cases, their protection is questionable to the extent that they are part of the public domain. Yet, their protection under some legal system would ensure continuous existence as they help in preserving the works in the long run.

International Debates on Protecting Folklore Expressions: Conventions and Treatises

The form of protection of folklore expressions is quite debatable due to their natural intricacies and difficulties. Protection of folklore expressions under the intellectual property system can be seen as an accommodative choice. The growing concern over indigenous peoples' right to protection of indigenous knowledge has led to an intense debate on the nature of the international intellectual property regime and its ability to protect indigenous knowledge (Carpenter 2004). There has been a search for possible measures to protect TCEs under different legal fields within international intellectual property law and other international legal systems. They can be broadly classified as-

- Protection as a Copyright
- Protection as a Neighbouring/Related right
- Protection under a sui-generis system

The first being protection under the Copyright system. The main conventions and treatises which facilitate the protection of folklore expressions are the *Stockholm Diplomatic Conference of 1967 for Revision of the Berne Convention* (World Intellectual Property Organization 1971b) and the *Paris Act of the Berne Convention in 1971* (World Intellectual Property Organization 1971b). In the Stockholm conference the Indian delegates have mooted the need for protecting folklore expressions under the

"It shall be the duty of every citizen of India to value and preserve the rich heritage of our composite culture."

head of “literary and artistic works” as given in Article 2(1) of the Berne Convention. However, lack of precise definition for “folklore expressions” and authorship requirements has caused difficulty in their protection. In 1971, the Paris Act of Berne Convention inserted a new clause Article 15(4), which aims at international protection of folklore expressions.⁷ Thus, the TCEs could be protected as an anonymous work provided the competent authority has to declare the work to be designated as a protectable work in all the countries (World Intellectual Property Organization 2003).

The second means of protection of TCEs could be by way of related or neighbouring right protection. *The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (World Intellectual Property Organization 1961) under Article 7(1)(a) deals with protection of Performers’ 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. There is a scope for protection of folklore expressions as a performer right and the permission must be taken from the original performer to fix it in a tangible medium to broadcast and communicate. This prevents misuse and unauthorized usage of folklore works.⁸

Another breakthrough treaty which directly recognized the protection of TCEs as a related right is *the WIPO Performances and Phonograms Treaty, 1996* (World Intellectual Property Organization 1996). Article 2(a) of the treaty defines “Performer” and accordingly they are actors, singers, musicians, dancers, and other person who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or *expressions of folklore* (World Intellectual Property Organization 1996). Thus a

⁷ Paris Act of the Berne Convention,

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 that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.*

(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.*

⁸ A similar right is being recognized under Article 14(1) of the *Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, 1994* (hereinafter TRIPS Agreement) (World Trade Organisation 1994).

performer performing something which is of a folklore expression could be protected as a related right.

The third means of protecting folklore expressions could be by enacting a specific legislation to deal with them. Uniformity is not achieved although could address certain peculiar and distinctive character of folklore expressions. Countries have to adopt laws suitable to their social and cultural climate to extend worthy protection and not a mere formality protection.

Sui-generis systems have been developed under few legal systems and attempts have been made jointly by WIPO and the UNESCO in drafting a model law for protecting folklore expressions. *The Tunisian Model Law on Copyright for developing countries, 1976* is a perfect example for protecting folklore expressions under a separate legal system (Tunis Model Law on Copyright 1976). According to Section 18 of the Tunis Model Law "folklore" is defined as "*all literary, 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*". The model law seeks to protect the expressions of folklore from misuse, wrongful gain and unjust enrichment outside the community's customary and traditional group and also prohibits them to be misrepresented by non-members as expressions of folklore (Tunis Model Law 1976: s 1(5bis), s 6(2), s 4, s 5(1)). The model law also establishes a competent authority to govern the protection of folklore expressions and their fixation requirements, identified authorship requirements are done away with (Tunis Model Law 1976: s 10(2)). Further the term of protection is perpetual which helps in providing long-lasting protection. The model law is not having a binding character at the international level however countries which wish to protect their traditional and cultural expressions may adopt this model law to be enacted as a national legislation. One such example is the *Nigerian Copyright Act, 1988* which deals with the protection of folklore expressions as provided under the model law.

WIPO and UNESCO jointly convened an expert group to formulate a draft treaty for the protection of folklore expressions by Intellectual property held in Paris in 1984. The expert group frame worked the *Draft Treaty for the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions*.⁹ The commendable

⁹ Article I of the Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Activities.

efforts taken at the international regime for the protection of folklore expressions were however considered to be unsuccessful because of “*the great majority of the participants considered it premature to establish an international treaty since there was insufficient experience available as regards to the protection of expressions of folklore at the national level and in particular concerning the implementation of the Model Provisions.*” (International Bureau of WIPO 1998).

WIPO-UNESCO World Forum on the Protection of Folklore, 1997 which drafted a plan of action recommending the need to protect folklore expressions through a sui-generis system. Following which, *the WIPO-UNESCO Regional Consultations on the Protection of Expressions of Folklore, 1999* recommended for the adoption of folklore issues to be addressed through the intellectual property system. *WIPO Fact Finding Missions* during 1998-1999 looked into the needs of traditional knowledge holders including the traditional and cultural expressions in 28 countries (International Bureau of WIPO 1998).

WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, in late 2000 is also working towards developing policies and recommendations for the protection of folklore expressions as a separate branch apart from protecting traditional knowledge and genetic resources.

The protection of folklore expressions has also importance with the proposition of Article 27 of the *Universal Declaration of Human Rights, 1948* which recognizes the right to freely participate in the cultural life of the community and the protection of interests arising from scientific, literary or artistic production (United Nations 2015). More so, the *Convention on Bio-diversity, 1992* does not directly address the protection of expressions of folklore (United Nations 1992). However it provides for the protection of traditional knowledge of indigenous communities, biodiversity and biological resources with no mention of folklore as such.

The continuous efforts taken at the international regime to protect the expressions of folklore is an on-going debate and there is a need to bring a sui-generis system of protection of TCEs including folklore expressions.

Copyright to Protect Folklore Expressions

The culture and traditions are deeply embedded in every expressions of the community. The protection of such expressions is essential for the development and growth of the

‘culture’ itself whether they are national, regional or global, parochial or cosmopolitan, traditional or non-traditional (Yu 2012). Intellectual property rights, especially the copyright system could extend protection to TCEs including folklore expressions in the literary form, artistic, or musical or even when captured as a cinematograph film or as a sound recording. The unrecorded expressions of folklore can also be protected as a related right or neighbouring right such as ‘performer right’. The neighbouring/ related rights are dependent on a copyrightable work, so a performer who communicates such cultural expressions, can be protected as a ‘related right’ although it is not same as copyright.

In *Wik Peoples vs Commonwealth* (1996), the Wik people had a distinct cultural and social life involving traditional dance, songs and ceremonies and they publicly performed at several festivals. One of such performance was photographed by the defendant company and it was used for sale in CDs, as pictures, etc... without the permission of the Wik people. The indigenous people were not aware of copyright protection over dance and related right protection over such performance. However, according to their customary law, the unauthorized usage of their photographs was a ‘wrong’ and they claimed to stop the usage of their photographs and demanded damages. The company did not pay damages, however, stopped the commercialization of the photographs portraying the community’s traditional attire and dance forms.

Copyright system is best suited to protect TCEs as compared to the other forms of intellectual property system such as the trademarks, geographical indications (GI) protection. The reasons being, trademark and GI system requires compliance to various procedures such as registration and renewal, by paying prescribed fees. The indigenous communities lack awareness in these aspects. For the sake of registration and protection under other IP systems, for instance, extending design protection, they face huge challenge from counterfeit products.

In *Milpurrruru and Others vs Indofurn Pty Ltd and Others ("the Carpet case")* (1993), the artistic designs of Australian aboriginal artists were reproduced in the carpets imported by the defendant company. It was done without the prior consent of the aboriginal artists. The aboriginal artists sought for copyright protection. The Federal Court of Australia awarded damages to an extent of \$1, 50,000 in respect of each artwork for the diminution of reputation of the artwork and its “freshness”. Further the court held that the infringement has caused personal distress to the aboriginal artists and had the potential to expose the artists to embarrassment and contempt within their communities. Hence additional damages to the extent of \$70000 were awarded as

exemplary damages under Section 115(4) (b) of the Copyright Act, 1967 for the harm caused to the cultural expression. The importer company was also ordered to deliver the unsold carpets to the aboriginal artists.

In *Bulun Bulun case*¹⁰ (“*the T-Shirt Case*”), the art work of aboriginal artist Bulun Bulun was copied and incorporated in a t-Shirt which was sold in shops. The Federal Court in Darwin ordered damages to be paid and also delivery of unsold t-shirts to the artist. Copyright protection was successful in this case. Copyright and related rights protection seem to provide better protection to expressions of folklore as compared to other IP protection, however it is criticized to provide insufficient protection and is a failure in protecting folklore expressions.

Failure of Copyright Law to Protect Folklore Expressions

The requirement under Copyright law is a major cause for its failure to protect traditional cultural expressions and folklore. Copyright law protects original expressions and it is required that they be fixed in some tangible medium to seek protection. According to Article 9 of the TRIPS Agreement, copyright seeks to protect ‘original expressions of ideas’. ‘Originality’ is not defined anywhere in the copyright law, but in the light of judicial pronouncements (*University of London Press Ltd. Case* 1916), it generally connotes the term that which originate from the author’s ingenuity and is not copied from elsewhere. In case of traditional and cultural expressions including folklore expressions, the outcome of the work is based on their association to the culture itself and authorship over the work cannot be attributed to a single member (Ferley 2004). The ‘originality’ as to the work is not necessarily originally generating from the author and a single member cannot claim ownership over a community asset (Anderson 2010).

Copyright does not give community protection and in the case of *Bulun Bulun v R & T Textiles Pty Ltd* (1998), Bulun Bulun was an artist who got permission from a particular clan *Ganalbingu* to incorporate a sacred image of that clan to one of his work. However, Bulun Bulun’s work was altered and copied to a fabric, imported to Australia and was sold nationally by the textile company without seeking his permission and also the clans’ permission. The Court held that copyright infringement would subsist in the case of altering and copying Bulun’s work but, this

¹⁰ The Bulun Bulun case was unreported as the proceedings were settled out of court (Golvan 1989; Golvan 1992).

does not create an equitable right to the clan to claim copyright protection. The court further held that the work cannot constitute joint ownership, and quoted,

“A person who supplies an artistic idea to an artist who then executes the work is not, on that ground alone, a joint author with the artist. Joint authorship envisages the contribution of skill and labour to the production of the work itself” (Fylde Microsystems Ltd. case 1998).

Community copyright protection was denied in the Australian case, *Yumbulal v. Reserve Bank of Australia* (Yumbulal case 1991), where the aboriginal artist work was printed in the currency note. The court held that it is difficult to reconcile the individual's interest with indigenous interests. In this case, the Court stated that the Copyright Act did not provide adequate protection to the community to regulate works that were essentially communal in origin.

Often the works of folklore are spoken, enacted, exhibited rather than being fixed in some tangible form such as written, carved, engraved, etc. Lack of *fixation* especially in case of folklore literary, artistic and musical works makes it difficult to be protected as a copyright. Even if the work is to be protected by copyright, *the term of protection* is minimal and cannot give extended protection beyond the term of sixty years after the life of author. The expressions of works of such traditional communities protected by copyright, comes into public domain beyond the prescribed term of protection. The nature of traditional and cultural expressions are such that they have to be protected for a long-term, at times eternally, as it is a matter of preserving and promoting the art, culture and tradition. The copyright law also fails to provide defensive mechanisms to prevent unauthorized usage of traditional works. This proves that copyright is an inadequate field of law to protect the traditional and cultural expressions.

Conclusion and Suggestions

Copyright provides inadequate protection to ‘Traditional Cultural Expressions’ due to the inherent hardships in defining the nature of such expressions. Lack of fixation and authorship requirements make it difficult to extend protection for long-lasting period. Hence there is a need to protect such traditional cultural expressions including the folklore expressions under a *sui-generis* system. There is also another branch of intellectual property system which is most widely discussed across the globe to protect ‘traditional and cultural expressions’. The works originating from the cultural and traditional knowledge of the indigenous communities could be protected as a

“traditional knowledge”. However, the definition of ‘traditional knowledge’ poses certain threats in protecting ‘traditional cultural expressions’.

The “traditional knowledge (TK)” as defined by WIPO refers to *traditional-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information and all other tradition-based innovations and creation resulting from intellectual activity in the industrial, scientific, literary or artistic fields. Categories of traditional knowledge could include agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medical knowledge, including related medicines and remedies; and bio-diversity related knowledge.* The definition does not specifically cover ‘traditional cultural/folklore expressions’, however, it is capable of being covered under ‘*all other tradition-based innovations and creations*’. Traditional knowledge is not protected so far under a *sui-generis* system and need be folklore expressions could be accommodated under the TK. However, a plain reading of the definition of TK creates an impression that it seeks to cover tradition based innovations and creations which are an outcome of industrial activity related to science, medicine, ecology and bio-diversity. This may create ambiguities as to protection of traditional cultural and folklore works effectively and efficiently under the traditional knowledge regime.

Some countries have attempted to frame *sui-generis* law to deal with the traditional and cultural expressions such as the Indigenous Peoples Rights Act, 1997 in Philippines, the Bangui Agreement on the Creation of an African Intellectual Property Organization (OAPI), as revised in 1999, the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge of Panama, 2000 and the related Executive Decree of 2001; and, the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002 (World Intellectual Property Organization 2013).

The model laws framed by the UNESCO and WIPO have been drafted concerning the interests of traditional communities. However, any such form of protection requires consensus amongst the developed and developing nations and should be of concurring and non-conflicting nature.

The law proposing the protection of TCEs including folklore expressions may incorporate the following suggestions-

- Folklore expressions or knowledge relating to folklore works has to be archived under a central depository system at the regional, national and at the international level.
- Folklore communities are distinctive hence an umbrella framework to protect all their expressions would be impractical. However, the Government should identify the folklore communities within the state or the country level and suitably frame law in this regard.
- Folklore expressions are out of community intellect hence they may be protected as a separate branch of intellectual property apart from traditional knowledge.
- In case of traditional knowledge protection to cover folklore expressions, they must be specifically included to provide stronger protection.
- The law which proposes protection to folklore expressions must provide perpetual protection. Authorship and originality requirements must be done away with and the community must be provided a wholesome protection.
- Certain defensive protection must be incorporated so as to prevent unauthorized use of community knowledge or expressions, misuse and unjust enrichment by third parties.
- Active protection must also be incorporated against persons within the community exploiting the folklore works in an unauthorized manner.
- The law should also propose formation of a competent authority and he should maintain a database of available folklore works and expressions of indigenous community to maintain the inter-generative access and response.

Protecting 'traditional cultural expressions' including the folklore works is the need of the hour, however, it warrants 'continuous' and 'anti-dilution' protection against the existing globalization and modernization system. A *sui-generis* system could entitle strong protection provided, it takes into account the needs and requirements of the contributing communities.

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Briefs

Crime Victims' Right to Compensation: Historical Retrospect

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