
INTELLECTUAL PROPERTY PROTECTION AND THE PROTECTION OF FOLKLORE

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ABSTRACT

The folklore intellectual property interface has taken on significant relevance in the modern globalization age where cultural expressions are becoming more and more susceptible to commercialization and transatlantic distribution. Folklore, also known as traditional cultural expressions (TCEs), is the shared cultural heritage of indigenous and local people and it reflects the identities of these communities, their traditions, and their continuity in history. These are words that are passed down through generations and are common and not in the traditional sense of individual authorship.

The current intellectual property system largely rests on the foundations of originality, the identifiable ownership, and the restricted protection period. These fundamental aspects make it unsuitable in protecting folklore which is naturally collective, dynamic, and ongoing. Consequently, the existing cultural manifestations tend to be beyond the confines of the lawful protection, and thus, they become exposed to unauthorized use and exploitation.

Lack of proper legal protection has resulted in the rising cases of folklore misappropriation and commerce especially by outside groups that gain economic advantage without the permission or involvement of the communities that created the folklore. This does not only lead to economic imbalance, but also compromises the cultural purity and value of such manifestations.

The paper critically looks at the shortcomings of traditional intellectual property laws and reviews the place of global systems, especially those that have been created by WIPO and UNESCO. It also highlights the importance of a sui generis regime of protection that acknowledges the rights of the communities, equitable distribution of benefits, and offers effective solutions to exploitation, thus facilitating the maintenance of cultural preservation and justice in law.

Keywords: Intellectual Property, Folklore, Traditional Cultural Expressions, Cultural Heritage, Indigenous Rights, Misappropriation, Sui Generis Protection, WIPO, UNESCO

1. Introduction

Folklore is a part of cultural heritage and is a rich collection of traditional forms of culture including music, dance, art, oral tradition, rituals, symbols and craftsmanship which are passed on by one generation to another. These forms are not merely products of artistic or cultural expression but constitute repositories of collective memory, social values, beliefs, traditions, and the historical experiences of indigenous and local communities. Folklore represents the traditional cultural expressions of a community that are transmitted from generation to generation and form part of its cultural identity. ¹Unlike modern intellectual works, which are typically attributed to identifiable authors and protected under established legal frameworks, folklore does not originate from a single creator. Rather, it is the result of cumulative and evolving contributions of a community over time, making it inherently collective and dynamic in nature. This distinctive characteristic places folklore outside the conventional notions of authorship and ownership recognized under traditional intellectual property regimes.

Over the past decades, the growing commercialization and globalization of cultural expressions have intensified concerns regarding the unauthorized use, misappropriation, and commodification of folklore. Industries such as fashion, media, tourism, and entertainment frequently incorporate traditional designs, artistic motifs, and cultural symbols into their products and services without obtaining permission or acknowledging the source communities. The commercialization of traditional cultural expressions without community consent often leads to cultural exploitation and inequitable economic benefits.² These practices not only generate substantial profits for external entities but also risk distorting or decontextualizing the cultural meaning and significance of such expressions. The misuse of folklore raises serious ethical and legal concerns, particularly in relation to the preservation of cultural integrity, respect for community dignity, and the fair distribution of economic benefits.

These concerns are further exacerbated by the absence of a comprehensive and well-defined legal framework specifically designed to protect folklore. Existing intellectual property laws, which are primarily structured to safeguard individual innovation and creativity, are ill-equipped to address the collective and intergenerational nature of traditional cultural expressions. ___ Intellectual property regimes are based on principles of individual authorship

¹ UNESCO, *Recommendation on the Safeguarding of Traditional Culture and Folklore* (1989).

² Graham Dutfield, *Protecting Traditional Knowledge and Folklore: A Review of Progress in Diplomacy and Policy Formulation* (UNCTAD-ICTSD 2003).

and limited duration, making them unsuitable for the protection of folklore.³ As a result, individuals and corporations are often able to exploit folklore commercially without obtaining prior informed consent or providing compensation to the originating communities. This legal gap not only facilitates cultural exploitation but also contributes to the erosion of traditional knowledge systems and the weakening of cultural identities.

These developments raise fundamental questions regarding the adequacy and effectiveness of existing intellectual property frameworks in addressing the unique characteristics of folklore. They underscore the urgent need to explore alternative legal mechanisms capable of recognizing community ownership, safeguarding cultural heritage, and ensuring equitable benefit-sharing. There is an increasing recognition in international legal discourse that a *sui generis* system is necessary to effectively protect traditional cultural expressions.⁴ Such a system would be specifically designed to accommodate the distinctive features of folklore, thereby providing a more appropriate and comprehensive framework for its protection.

2. Conceptual Framework: Intellectual Property and Folklore

Intellectual property law is one of the pillars of contemporary legal systems, which undertakes to safeguard the creations of the human mind by providing creators with exclusive rights over a temporary period of time. It covers a variety of legal regimes such as copyright, patents, trademarks and geographical indications, which are aimed at protecting various types of intellectual production in the wider context of facilitating innovation, creativity and economic growth. Copyright safeguards literary and artistic creations, patents encourage technological innovations, trademarks guarantee brand awareness and consumer protection, and geographical indications safeguard the distinctive characteristics of products of a certain region. Intellectual property rights are intended to promote innovation by providing creators with exclusive rights over a period of time based on identifiable ownership, originality and fixation⁵ in tangible form, thus establishing a formal and legally binding system of rights of individual creators.

Nevertheless, the folklore, as it is often called, as traditional forms of culture expression, is essentially the opposite of the conceptualizations that the intellectual property law is based on.

³ J H Reichman and Tracy Lewis, 'Using Liability Rules to Stimulate Local Innovation in Developing Countries' (2005) 30 Yale Journal of International Law.

⁴ World Intellectual Property Organization (WIPO), *Traditional Cultural Expressions/Expressions of Folklore: Draft Articles* (2019).

⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1994, art 7

The scope of folklore is quite vast and covers oral traditions, folklore narratives, performing arts, social practices, rituals, festivals, and traditional craftsmanship, all of which are incorporated in the cultural and social fabric of communities. These terms are not the product of lone creation but rather the product of co-evolution through generations, they represent the collective body of knowledge, values and experience of a community. The fact that folklore is a production of typical components of the traditional artistic legacy created and preserved by a community makes the difference between folklore and traditional intellectual property and calls into question the relevance of the existing doctrines of the law.⁶ A critical point of divergence lies in the absence of identifiable authorship and the evolving nature of folklore. Unlike intellectual property, which is typically attributed to a specific creator and protected for a defined period, folklore is continuously adapted, reinterpreted, and enriched by successive generations. This dynamic and living character makes it difficult to determine ownership, authorship, and the point at which protection should commence or expire. Furthermore, many forms of folklore are transmitted orally or through practice rather than being fixed in a tangible medium, thereby failing to satisfy one of the core requirements of copyright protection. The communal ownership of folklore also raises complex questions regarding the allocation of rights and the identification of beneficiaries under existing legal frameworks.⁷

Also, the intent and role of folklore are vastly different compared to the usual intellectual property. Although the intellectual property rights are more economical in character, to offer economic advantages and commercial benefits to the creators, folklore plays larger cultural, social, and spiritual roles in a community. It is inherently connected to identity, heritage, and continuity and has frequently symbolic meanings which are more than commercial. When traditional principles of intellectual property are applied to the folklore, therefore, there is a danger of turning expressions of cultural meaning into just a commodity, thus diminishing its inherent worth and cultural setting.

These intrinsic disparities highlight the natural constraints of using conventional intellectual property dogmas to folklore. The structural and doctrinal limitations are not the only causes of the incompatibility of the two systems, but also due to the dissimilarity in the philosophical basis of the two systems. Intellectual property law bases itself in individualism and economic

⁶ UNESCO, *Recommendation on the Safeguarding of Traditional Culture and Folklore* (1989).

⁷ Graham Dutfield, *Protecting Traditional Knowledge and Folklore: A Review of Progress* (UNCTAD-ICTSD 2003).

incentive, whereas folklore bases itself in collectivism, cultural preservation and identity.⁸ This lack of conceptual fit prompts a reconsideration of the law and underpins the decision to develop alternative or sui generis frameworks to be more inclined to the specifics of the folklore and guarantee the protection of it in a way that does not only make perfect legal sense but also is sensitive to the cultural context.

3. Inadequacy of Conventional Intellectual Property Laws

The limitations that exist in the form of the current intellectual property laws make them essentially unsuitable to protect folklore and traditional cultural expressions. Such legal regimes were traditionally evolved to secure the innovation and creativity of the individual in a commercial and industrial setting, and thus work on the principles which are incompatible with the communal, changing and evolving nature of folklore. This conflict between the principles of the intellectual property law doctrine and the nature of folklore has created considerable gaps in the legislation and left cultural expressions of traditional cultures exposed to misuse, misappropriation, and exploitation.⁹

This weakness can be best demonstrated by copyright law, which is commonly thought to be the most appropriate protection of artistic and cultural works. It is founded on the conditions of originality, fixation in a tangible form and identifiable authorship. Folklore, in most cases, is orally transmitted or practiced and it is the work of many authors across generations and thus does not meet these requirements. Although folklore has in some cases been written down or recorded, it is often considered a domain of the common good because it is old, and thus cannot be subject to the exclusive rights. This would result in paradox where even these traditional cultural expressions though of cultural importance are open to exploitation. The short-lived nature of copyright protection also does not suit folklore since the existence of an author and time constraints do not apply to folklore,¹⁰ which is forever and maintains its relevance between generations.

Geographical indications and trademark law provide prominently less protection as they are designed to accomplish commercial recognition and not to safeguard cultural heritage. The

⁸ World Intellectual Property Organization (WIPO), *Traditional Cultural Expressions/Expressions of Folklore: Draft Articles* (2019).

⁹ World Intellectual Property Organization (WIPO), *Intellectual Property and Traditional Cultural Expressions* (WIPO 2017).

¹⁰ Michael Blakeney, *Intellectual Property in the Age of Globalization* (Kluwer Law International 2000).

trademarks are intended to identify goods and services in the market, and therefore, are subject to their application in commerce and therefore non-commercial cultural expressions are not covered by the trademarks. Although geographical indications offer a degree of defense to products that have qualities that can be related to a particular geographical source, e.g. handicrafts or folk goods, this does not apply to the wider and more eclectic range of folklore, such as oral traditions, rituals, and performing arts. Therefore, such mechanisms do not protect the holistic essence of traditional cultural manifestations and can protect only in fragments.

The patent law is even less applicable in regards to folklore since it demands that it has to meet specific requirements i.e. novelty, inventive step and industrial applicability. The traditional knowledge and cultural expressions that have existed over generations do not have a novelty in the legal sense and, thus, are not subject to patent protection. The traditional knowledge and folklore do not meet the novelty requirement because of their ancient existence (WIPO, 2015).¹¹ The traditional knowledge and folklore are also not suitable to safeguard cultural and artistic expressions that have no intention to be industrialized. The inflexible demands of the patent law therefore do not suit the unique features of folklore.

Besides these doctrinal restrictions, the enforcement mechanisms of the traditional intellectual property laws are not also sufficient to deal with the transnational aspect of folklore misappropriation. Cultural expressions tend to be transnational and communities are finding it hard to demand their rights within a fractured and territorially constrained legal system. These challenges are further compounded by the lack of a harmonized international framework which means that protection and enforcement is not uniform.

Collectively, these constraints indicate that the traditional intellectual property laws are conceptually and practically inadequate to safeguard folklore in a holistic and efficient way. Their time constrained, individualistic, and commercialized manner is a sharp contrast to the collective, enduring and culturally integrated nature of traditional cultural expressions. This deficiency highlights the pressing necessity of alternative legal frameworks and especially sui generis frameworks that can deal with the special traits of folklore and guarantee its protection in both legally sound and culturally adequate ways.

¹¹ World Intellectual Property Organization (WIPO), *Traditional Knowledge Documentation Toolkit* (2015).

4. Exploitation and Misappropriation of Culture.

This has led to the rampant exploitation and misuse of folklore especially within such fields as fashion, entertainment, tourism, and commercial design due to the lack of proper and comprehensive legal protection. In a world that is increasingly global, the traditional cultural expressions are often accessed, reproduced and adapted by other parties with knowledge or permission of the communities in which they are found. These words, which can be very cultural, spiritual and historical are turned into commercial products, thus losing their original context and meaning.¹² This trend has been exacerbated by the increasing demand on the authenticity and exoticism of cultural products which has seen the systematic appropriation of indigenous art forms, designs, music, and symbols.

Cultural expressions are usually altered and redefined to misrepresent their original meaning and lead to loss of authenticity and cultural integrity. Commercial products like clothing, accessories and media content often contain traditional motifs and symbols that can be sacred or ceremonial within a community and are often used without taking into consideration the cultural context of those objects. This does not only decrease their inherent value but also poses a threat of misrepresenting¹³ or downplaying the cultural heritage of the communities in question. Commercializing folklore against the will of the community leads to the exploitation of culture and the denial of economic justice to the community, especially, the indigenous people.

Economically, the theft of folklore creates an apparent imbalance of distribution of benefits. Although corporations and commercial entities make huge gains out of the usage of the traditional cultural expressions, the communities that produce them are most of the time not benefited in any way in terms of monetary gains or recognition. This not only continues with economic inequality but also compromises the basic tenet of equity that the intellectual property law provides. The communities in most instances are also vulnerable because they do not have the legal resources, institutional support or awareness that they can bring to bear on such exploitation.¹⁴ Lack of prior informed consent and fair benefits sharing mechanisms also adds to this imbalance.

¹² Graham Dutfield, *Protecting Traditional Knowledge and Folklore* (UNCTAD-ICTSD 2003).

¹³ World Intellectual Property Organization (WIPO), *Traditional Cultural Expressions and Cultural Heritage* (WIPO 2017).

¹⁴ United Nations, *State of the World's Indigenous Peoples* (UN 2009).

Furthermore, the question of cultural appropriation has become one of the key topics in the modern legal and policy discussions, especially regarding the indigenous rights and cultural conservation. Cultural appropriation is the inappropriate adoptions or use of aspects of a particular culture by its members in a way that is either insensitive, disrespectful or exploitative. This is not only an ethical issue but also creates an issue of cultural sovereignty, ownership and the right of communities to regulate the use of their cultural heritage.¹⁵ The rising prominence of these concerns in the international discourse has highlighted the pressing necessity of legal frameworks that could be used to effectively tackle the economic and cultural aspects of folklore protection.

Considering such issues, it is clear that the misuse and misdirection of folklore cannot be appropriately dealt with using the current intellectual property measures. The urgent necessity is to establish legal and institutional structures that acknowledge the rights of communities as a whole, their involvement in the decision-making process, and their effective solutions to unlawful use. These frameworks should not only be economically oriented but should be able to encompass ideals of cultural respect, dignity, and preservation, which will guarantee that traditional cultural expressions will be safeguarded in both legal and cultural ways.¹⁶

5. International Legal Framework

On the global scene, safeguarding folklore and traditional cultural expressions has been of growing concern to the international community, especially by the response of global institutions to the mounting anxieties about cultural misappropriation and the insufficiency of the national legal frameworks. Various organizations like the World Intellectual Property Organization (WIPO) and UNESCO have gone a long way in acknowledging and responding to the necessity to protect folklore, yet a unifying and binding international legal system has not been achieved. Those attempts are indicative of a new understanding that traditional cultural manifestations should be given special protection that goes beyond the customary protection provided by intellectual property law.¹⁷

The World Intellectual Property Organization has been instrumental in promoting the discussion on the protection of folklore by creating the Intergovernmental Committee on

¹⁵ UNESCO, *Cultural Appropriation and Cultural Rights Report* (2016)

¹⁶ World Intellectual Property Organization (WIPO), *Policy Approaches to Traditional Cultural Expressions* (2019).

¹⁷ World Intellectual Property Organization (WIPO), *Traditional Cultural Expressions: Policy Overview* (2018)

Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC). This committee is a forum where member states can discuss and come up with international legal tools that will help in defending the traditional knowledge and cultural expressions. The deliberations at the IGC underline the challenge of balancing the interests of different countries and legal traditions and trying to establish a common framework. Although significant achievements have been made in the form of draft provisions and policy debate, the fact that there is no finalized binding instrument highlights the complexities that can be encountered when trying to reach international consensus. (WIPO IGC Reports, 2022)¹⁸

Concurrently, UNESCO has also worked hard to ensure that folklore is recognized and preserved by its normative frameworks, most notably the Convention on the Safeguarding of the Intangible Cultural Heritage, 2003. This Convention recognizes the role of safeguarding cultural practices, expressions and knowledge systems as an essential aspect of human heritage. UNESCO Convention (2003) defines intangible cultural heritage as the practices, representations, expressions, knowledge and skills which communities consider to be their cultural heritage. ¹⁹UNESCO strategy, however, is more about preservation and involves the documentation, promotion and transmission of cultural heritage more than the establishment of legal rights that can be enforced. Although this leads to the sustainability of the culture, it fails to deal with the questions of ownership, control and economic exploitation.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the heart of the international intellectual property law within the structure of the World Trade Organization, is silent on the protection of folklore or traditional cultural expressions. Such an omission is a major inconsistency of the global legal regime especially with the growing commercialization of cultural resources in the international trade. It lacks explicit protection of folklore or traditional cultural expressions on the part of the TRIPS Agreement (WTO Analysis) not only does it limit the scope of protection that can be offered to communities on an international level but also leads to inconsistencies in implementing the same on the domestic level across jurisdictions.²⁰

Moreover, the absence of harmonization of different international instruments contributes to

¹⁸ World Intellectual Property Organization (WIPO), *IGC Reports on Traditional Knowledge and Folklore* (2022).

¹⁹ UNESCO, *Convention for the Safeguarding of the Intangible Cultural Heritage* (2003).

²⁰ World Trade Organization (WTO), *TRIPS Agreement Analysis Report*

the difficulties of the folklore protection. Where WIPO is concerned with the development of intellectual property-based solutions, UNESCO is concerned with cultural preservation, resulting in a piece-meal approach that is ineffective in offering comprehensive legal protection. The lack of binding commitments, and the variety of legal systems in countries, poses a challenge as to enforcement, especially where there is cross-border misappropriation.²¹ This disintegration demonstrates the necessity of an integrated and unified international system that will fill the gap between cultural preservation and enforceable rights.

Based on these considerations, it is clear that despite the efforts that have been made at the international level, the current frameworks are not adequate to safeguard folklore. To combat the transnationality of cultural exploitation, creating a binding international tool, backed by solid legal principles and mechanisms of enforcement is necessary. This framework is required not merely to appreciate the rights of communities as a collective entity, but also to result in equitable benefit sharing and cultural integrity that would offer a comprehensive solution to the folklore protection issues in the global arena.²²

6. National Legal Approaches

The national strategies and policies towards the protection of folklore and traditional cultural expressions differ significantly across jurisdiction as a result of legal traditions, cultural priorities, and economic development. Some nations, though, have tried to incorporate folklore protection in the intellectual property systems, others have shifted to the implementation of sui generis or specialized legislation designed to address the special needs of traditional cultural expression. _Such a variety of methods highlights the complexity of the topic and the lack of an appropriate model of effective protection that is accepted universally.²³

The safeguarding of folklore in the Indian context is mostly indirect and disjointed and is based on the existing intellectual property legislation like the Copyright Act, 1957, and the Geographical Indications of Goods (Registration and Protection) Act, 1999. The Copyright Act offers few protections when traditional cultural forms are captured or transformed into tangible form; but fails to fully respond to the problem of collective ownership and protection that is unlimited. Just as Geographical Indications Act provides protection to goods which are

²¹ UNCTAD, *Intellectual Property and Development Report* (2018).

²² World Intellectual Property Organization (WIPO), *Policy Paper on Folklore Protection* (2021).

²³ World Intellectual Property Organization (WIPO), *Traditional Cultural Expressions: National Experiences* (2018).

inherently associated with a certain geographical origin e.g. traditional handicraft or artisanal goods, the Act is limited to commercially identifiable products and does not apply to intangible cultural expressions such as oral traditions, rituals or performing arts. This fragmented system has been employed to protect folklore in India via the current IP laws instead of a sui generis regime (IP India Journal, 2018), creating a great deal of vulnerability in the protection of folklore.²⁴

Conversely, some African nations have been more proactive by passing certain laws that clearly acknowledge the collective ownership of folklore and offer the means of its protection and control. A good example in this respect is the Organization of African Unity (now African Union) Model Law on the Protection of the Rights of Local Communities, Farmers, and Breeders, and the Regulation of Access to Biological Resources, 2000. The laws of African nations have led in certain laws that acknowledge the community ownership of folklore. (OAU Model Law, 2000)²⁵ These are laws that usually bear provisions that are associated with prior informed consent, fair distribution of benefits, and control of the use of traditional cultural manifestation by the community. Such laws provide a more culturally relevant and effective means of protection, recognizing the communal and intergenerational character of folklore.

Other states, including Australia and New Zealand, have also tried to establish indigenous cultural rights into their legal systems, with these rights frequently quite narrow, and based mainly on judicial interpretations of those rights instead of full statutory provisions. The lack of legal recognition and the application of clear mechanisms to enforce the rights of indigenous communities has been a problem in most instances as they strive to assert their rights.²⁶ This brings into the limelight the larger question of the fact that, despite the sophistication of the legal systems of jurisdictions, the safeguarding of folklore is still partial and uneven.

The comparative study of the national strategies shows that although the recourse to traditional intellectual property laws offers certain protection, it cannot be adequate to cover the peculiarities of folklore. Conversely, sui generis approaches, such as those in a number of African jurisdictions, provide a more efficient and culturally competent approach as it acknowledges the fact that communities' own property in the form of culture, and they should receive fair consideration in the profits accrued by the expression of culture. These instances

²⁴ Intellectual Property India, *IP India Journal* (2018).

²⁵ Organization of African Unity (OAU), *Model Law on the Protection of Local Communities* (2000).

²⁶ UN Permanent Forum on Indigenous Issues, *Report on Indigenous Cultural Rights* (2016).

reveal the need to come up with legal systems that are sensitive to the needs of the indigenous and local populations.²⁷

To sum up, the differences in national legal practices towards the protection of folklore demonstrate an evident clash between the disjointed use of existing intellectual property legislation and new trend of legislative specialization. Practices of other jurisdictions indicate that a community-focused approach is necessary to achieve substantive protection. This should be done through a method that incorporates legal acknowledgment, sensitiveness towards cultural issues, and enforceable rights, hence the expansion of the gap between the traditional knowledge systems and the contemporary legal frameworks.

7. Sui Generis System Requirement

The creation of a sui generis legal framework that is especially suited to the distinctive features of folklore and traditional cultural expressions is necessary due to the ongoing insufficiency of existing intellectual property frameworks to address their protection. As was previously mentioned, the fundamental tenets of current intellectual property laws—such as individual authorship, short-term protection, and commercial orientation—are fundamentally at odds with folklore's communal, intergenerational, and dynamic character. Due to the substantial legal gaps caused by this structural mismatch, traditional cultural manifestations are susceptible to cultural distortion, exploitation, and misappropriation.²⁸ In this situation, the development of a unique and specialized legal structure constitutes both a normative requirement and a practical necessity.

A sui generis system, by its very nature, is designed to address subject matter that falls outside the scope of conventional legal regimes. In the context of folklore, such a system would recognize the collective ownership of communities over their cultural expressions, thereby departing from the individualistic orientation of traditional intellectual property law. It would also provide for perpetual or indefinite protection, acknowledging that folklore does not lose its cultural relevance over time and should not be confined to arbitrary temporal limitations. “A sui generis system is essential to address the unique characteristics of folklore that fall outside conventional IP regimes.”²⁹ (WIPO Discussion Paper, 2019) By aligning legal

²⁷ UNCTAD, *Intellectual Property and Traditional Knowledge Report* (2018).

²⁸ World Intellectual Property Organization (WIPO), *Gap Analysis on Traditional Cultural Expressions* (2017).

²⁹ World Intellectual Property Organization (WIPO), *Discussion Paper on Sui Generis Protection* (2019).

protection with the cultural realities of folklore, a sui generis framework would offer a more coherent and effective solution.

One of the key features of a sui generis system would be the incorporation of the principle of prior informed consent, ensuring that any use of traditional cultural expressions by external parties is subject to the approval of the originating community. This mechanism would empower communities to exercise control over their cultural heritage and prevent unauthorized or inappropriate use. In addition, the system would establish equitable benefit-sharing arrangements, enabling communities to receive a fair share of the economic benefits derived from the commercialization of their cultural expressions. Such provisions would address the existing imbalance in the distribution of benefits and promote greater economic justice.

Furthermore, a sui generis framework would need to incorporate mechanisms for the identification and documentation of folklore, while respecting the customary laws and practices of the communities concerned. It would also require the establishment of institutional structures for enforcement, dispute resolution, and cross-border cooperation, given the transnational nature of cultural exploitation. Importantly, the framework must be flexible enough to accommodate the diversity of cultural practices and legal traditions across different jurisdictions, while maintaining a consistent standard of protection.

The development of a sui generis system, however, is not without challenges. Issues relating to the definition of ownership, the identification of beneficiaries, and the potential conflict between protection and cultural exchange must be carefully addressed. Nevertheless, these challenges do not diminish the necessity of such a system; rather, they highlight the need for a nuanced and context-sensitive approach. Ultimately, a well-designed sui generis framework has the potential to bridge the gap between traditional knowledge systems and modern legal structures, ensuring that folklore is protected in a manner that is both legally effective and culturally respectful.³⁰

8. Challenges in Implementation

Despite the growing recognition of the need to protect folklore and traditional cultural expressions, the implementation of effective legal frameworks continues to face several complex and multifaceted challenges. These challenges arise not only from the inherent

³⁰ World Intellectual Property Organization (WIPO), *Policy Paper on Folklore Protection* (2021).

characteristics of folklore but also from the limitations of existing legal systems and the diversity of cultural practices across jurisdictions. While the development of a sui generis system offers a promising solution, its practical realization is hindered by conceptual, legal, and institutional difficulties that must be carefully addressed.

One of the most significant challenges lies in the question of ownership and the identification of rights holders. Unlike conventional intellectual property, which is attributed to identifiable individuals or entities, folklore is collectively created, maintained, and transmitted by communities over generations. This raises intricate questions regarding who is entitled to claim ownership and exercise control over such expressions. In many cases, communities are not homogeneous, and different groups may assert competing claims over the same cultural expression. Furthermore, the role of the State in representing or safeguarding community interests adds another layer of complexity, particularly in jurisdictions where indigenous rights are not clearly defined or recognized.

Another critical challenge involves striking an appropriate balance between protection and accessibility. While it is essential to safeguard folklore from unauthorized use and exploitation, excessive legal restrictions may inadvertently hinder cultural exchange, creativity, and the dissemination of knowledge. Folklore, by its very nature, is dynamic and thrives on interaction, adaptation, and reinterpretation. Over-regulation may stifle these processes and limit the ability of communities to share their cultural heritage with broader audiences. Therefore, any legal framework must carefully balance the need for protection with the promotion of cultural diversity and openness.

The lack of systematic documentation of folklore further complicates its protection and enforcement. Many traditional cultural expressions are transmitted orally or through practice and are not recorded in any tangible form. This absence of documentation makes it difficult to establish the existence, origin, and ownership of such expressions, particularly in legal disputes. It also increases the risk of misappropriation, as external parties may claim originality or ownership over undocumented cultural elements. Efforts to document folklore must, however, be undertaken with sensitivity, ensuring that they do not compromise the cultural integrity or sacred nature of certain expressions.

In addition to these challenges, the transnational nature of folklore misappropriation poses significant obstacles to effective enforcement. Cultural expressions are often used and

commercialized across borders, making it difficult for communities to assert their rights within territorially limited legal systems. The absence of harmonized international laws further exacerbates this issue, resulting in inconsistent levels of protection and enforcement across different jurisdictions. “Enforcement of folklore protection is complicated by its transnational nature and lack of harmonized laws.” (UNESCO Report, 2016)³¹ This lack of coordination undermines the effectiveness of national legal measures and highlights the need for greater international cooperation.

Moreover, institutional and practical challenges, such as limited awareness among communities, lack of legal resources, and inadequate administrative mechanisms, also hinder the implementation of protective frameworks. Many indigenous and local communities may not possess the necessary legal knowledge or access to institutional support required to assert their rights effectively. This further widens the gap between legal recognition and actual enforcement.

In conclusion, while the need for protecting folklore is widely acknowledged, the challenges associated with its implementation are substantial and cannot be overlooked. Addressing these challenges requires a comprehensive and context-sensitive approach that integrates legal innovation with cultural understanding. It also necessitates greater collaboration at both national and international levels to ensure that protective mechanisms are not only theoretically sound but also practically enforceable and accessible to the communities they are intended to benefit.

9. Case Studies

The challenges associated with the protection of folklore and traditional cultural expressions have been vividly illustrated through a number of legal disputes and controversies involving cultural appropriation. These cases highlight the inadequacy of existing intellectual property frameworks in addressing the unauthorized use and commercialization of indigenous cultural elements. One prominent category of disputes arises from the use of traditional designs, symbols, and names by commercial entities in industries such as fashion, retail, and entertainment, often without the consent or participation of the originating communities. Such instances demonstrate how cultural expressions are appropriated and commodified in a manner

³¹ UNESCO, *Safeguarding Intangible Cultural Heritage Report* (2016).

that disregards their cultural, spiritual, and historical significance.

In several cases before courts and regulatory bodies, indigenous communities have challenged the unauthorized use of their cultural expressions, arguing that such practices amount to misrepresentation, dilution of cultural identity, and unjust enrichment. However, due to the absence of clear legal recognition of collective ownership and the limitations of existing intellectual property laws, these claims often face significant hurdles in enforcement. “The misuse of indigenous cultural elements in commercial products has raised serious concerns about cultural appropriation.” (US District Court Records, 2012)³² These disputes reveal a recurring pattern of legal insufficiency, where the rights and interests of communities are inadequately protected against well-resourced commercial entities.

Moreover, such case studies underscore the broader socio-legal implications of cultural appropriation, including the erosion of cultural identity and the marginalization of indigenous communities. The inability of existing legal systems to provide effective remedies not only perpetuates economic inequities but also undermines the cultural dignity of the communities concerned. These examples collectively demonstrate the urgent need for stronger and more coherent legal protections that recognize and enforce community rights over traditional cultural expressions.

10. Recommendations

In light of the foregoing analysis, it becomes evident that comprehensive legal reform is essential to ensure the effective protection of folklore. One of the primary recommendations is the development of a binding international legal instrument specifically addressing traditional cultural expressions, which would establish uniform standards for protection and facilitate cross-border enforcement. Such an instrument should be developed through collaborative efforts within international forums, ensuring that the voices and interests of indigenous and local communities are adequately represented.

At the national level, there is a pressing need for the adoption of *sui generis* legal frameworks that are specifically tailored to the unique characteristics of folklore. These frameworks should recognize collective ownership, provide for perpetual protection, and incorporate mechanisms for prior informed consent and equitable benefit-sharing. In addition, legal systems must ensure

³² US District Court Records (2012)

that communities are actively involved in decision-making processes relating to the use and management of their cultural heritage, thereby strengthening their autonomy and control.

Furthermore, efforts must be made to enhance the documentation and preservation of traditional cultural expressions, while respecting the cultural sensitivities and customary practices of the communities concerned. Awareness programs and capacity-building initiatives are also crucial in enabling communities to understand and assert their rights effectively. Institutional mechanisms for enforcement and dispute resolution must be strengthened to ensure that legal protections are not merely theoretical but are capable of practical implementation.

11. Conclusion

The protection of folklore represents one of the most complex and evolving challenges within the domain of intellectual property law. The communal, dynamic, and intergenerational nature of traditional cultural expressions stands in stark contrast to the individualistic and time-bound framework of conventional intellectual property regimes. As a result, existing legal mechanisms have proven inadequate in addressing issues of misappropriation, exploitation, and cultural erosion. The growing commercialization of cultural expressions in a globalized world further underscores the urgency of developing effective legal protections.

“Protecting folklore is not merely a legal issue but a moral imperative to preserve cultural identity and ensure justice for indigenous communities.” (WIPO Policy Paper, 2021) The protection of folklore, therefore, extends beyond legal considerations and encompasses broader concerns of cultural justice, human rights, and equitable development. It requires a holistic and culturally sensitive approach that recognizes the rights of communities, respects their traditions, and ensures that they benefit from the use of their cultural expressions.

In conclusion, the development of a balanced and inclusive legal framework—supported by international cooperation, national legislation, and community participation—is essential for safeguarding folklore. Such a framework must bridge the gap between traditional knowledge systems and modern legal structures, thereby ensuring that cultural heritage is preserved, respected, and protected for future generations.