
PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS UNDER THE INTELLECTUAL PROPERTY LAWS, WITH A SPECIAL FOCUS ON COPYRIGHT LAWS

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ABSTRACT

With a change in time and development of technology, evolution of new digital and broadcasting technologies, there has been a widespread commercialization of the traditional cultural expressions, often without the consent of the communities that the particular traditional cultural expression belongs to and been protected by them for generations, which calls for an urgent need for the protection and preservation of these expressions. This commercial exploitation, has resulted in the communities from which these cultural expressions originated, being denied their cultural and economic interests in these expressions and this places an obligation on the national governments as well as international organizations to look at intellectual property in a completely new role, i.e. there is a shift in the purpose that intellectual property rights had been serving as an economic incentives for creativity and now intellectual property rights are being viewed as a tool to promote and protect cultures and the cultural autonomy of various groups and communities.

Thus, Traditional Knowledge was incorporated in the National Intellectual Property Rights Policy, 2016, and its constant misappropriation and misuse mainly accelerated by technological changes and globalisation, has led to trans-boundary issues, and contemporary debates across the globe and in India, demanding for the creation of a legal framework to protect Traditional Cultural Expressions. In the light of the same, it becomes pertinent to undertake a study of issues on protection of these Traditional Cultural Expressions.

Keywords: Copyright Laws, Traditional Cultural Expressions, Misappropriation, Adequate Protection

An Introduction to Traditional Cultural Expressions and the Need for its Protection

Traditional Cultural Expressions assume a multitude of forms and is perceived differently among various communities spread over different parts of the world and thus it is difficult to come up with a single definition for the term. However, there are three characteristics of Traditional Cultural Expressions, that are common, irrespective of the community that it belongs to:

- i. it is passed on from generation to generation;
- ii. it may not be attributable to any individual author or set of authors;
- iii. it is being continuously utilized and developed within the indigenous community.¹

Traditional Cultural Expressions, also known as ‘expressions of folklore’, includes within its definition, folk tales, songs, paintings, drawings, musical compositions, dances, architectural forms, sacred and secret tribal knowledge, rituals and artisan arts and crafts, etc.²

The claim for the protection of indigenous cultural heritage can be broadly categorized into the following arguments:

1. Traditional cultural expressions, or some aspects of them, constitute copyrightable subject-matter and failure to treat them as such is in fact a form of discrimination against indigenous and tribal peoples;
2. The protection of indigenous and tribal cultural heritage is in fact a form of reparation for past wrongs against the communities; and
3. The protection of traditional cultural expressions is imperative for the cultural survival of indigenous and tribal peoples and the protection of their cultural identities; therefore, the right to the protection of traditional cultural expressions is supported by various international human rights instruments and is also an extension of the right to self-determination of indigenous and tribal peoples.³

¹ Megha Jandhyala, *The Protection of Indigenous and Tribal Culture in Developing Countries*, University of Toronto (2007), available at <https://search.proquest.com/docview/304755742?accountid=38885> (Jul. 18, 2019, last visited on 01:08 PM).

² *Id.*

³ *Supra note 1* at page 2.

Due to the digitalization of all content, it makes it much easier to upload the TCEs in various accessible forms. The ease of availability of information and the anonymity provided by the online platform gives rise to the assumption that the usage of the material so available is free and without being detected by any other person and thus increases the possibility of further violations through the ease of copying, borrowing, sharing online etc. Moreover, those instruments that are proposed as solutions to this problem, appear to be insufficient to meet the range of concerns raised by TCEs holders, i.e., the community that has been enjoying, protecting and passing on from generation to generations, their respective traditional knowledge and culture.

The present inadequate legal recognition and, ultimately, insufficient international recognition and protection of TCEs has arranged the misappropriation of such works for the benefit of the entertainment industry and other economic sectors as well. Some of the major concerns of the TCE custodians include preservation of their cultural values in the TCEs; entitlement to part of the royalties generated from usage; and the right of attribution.⁴ Indigenous knowledge, including traditional cultural expressions, has been subject to misappropriation and exploitation by third-party interests resulting in spiritual, cultural and economic loss for Indigenous and local communities.⁵

Concerns raised by TCEs holders can be classified into four main categories:⁶

1. the difficulties they encounter in preventing and/or controlling the commercial use of their TCEs by third parties and in benefiting from this commercial usage themselves;
2. the inappropriate and offensive use of their TCEs;
3. to be attributed or given due credit for their TCEs as well as have the possibility to object to any false attribution;
4. the need to ensure the identification and preservation of existing TCEs as well as their promotion, dissemination and continued evolution.

⁴ Anthony C.K. Kakooza, *The Cultural Divide: Traditional Cultural Expressions and the Entertainment Industry in Developing Economies*, University of Illinois at Urbana (2014).

⁵ Natalie P Stoianoff and others, *Recognising and Protecting Aboriginal Knowledge Associated with Natural Resource Management – White Paper for the Office of Environment and Heritage*, UTS – Indigenous Knowledge Forum & North West Local Land Services, NSW (2014).

⁶ Zografos, D., *Origin Related Intellectual Property Rights as Best Policy Option for the Protection of Traditional Cultural Expressions*, (2008), available at <https://search.proquest.com/docview/1819200092?accountid=38885> (Dec. 21, 2019, last visited on 03:32 PM).

Apart from the above classification, the additional problems faced by the indigenous bodies and need to be tackled by the respective States are:⁷

- a) To decide who should be given access to the TCEs and how the benefit should be shared or equally distributed among the people of that community;
- b) To be aware of the illicit actions against their TCEs. This can be ensured by the State by creating institutions that would monitor the same and spread awareness among the members of the community;
- c) Once there are institutions established to create awareness, it is essential to ensure that there are mechanisms in place to address the issues that might arise within the community;
- d) There must be a system in place to monitor the exploitation and have a proper mechanism to take proper actions against the exploiters.

The communal nature of ownership and difficulty in defining TCEs, has contributed to their abuse by all users, thus, to understand the laws that are better suited to provide protection to the TCEs, it is essential to first look into what TCEs are and their importance and value to the respective community that have been enjoying the same since time immemorial.

In order to look into the central issue of the protection that is to be granted, it becomes essential to establish the identity of the owners of TCEs, bearers or custodians, who are usually the community that has passed them on from generation to generation. These communities are the indigenous peoples and the local communities that develop, maintain and identify culturally with the TCEs and seek to pass them on between generations, thus, they are the most entitled to benefit from the protection that is sought to be provided. Issue with respect to the protection of TCEs under copyright laws arises mainly since the TCEs are regarded as collectively originated and held by the community as a whole, rather than an individual member of the community, which makes it impossible to determine the one author or owner who can exercise copyright protection against that particular TCEs. Yet, there are instances where the beneficiaries may also include recognized individuals within the communities, such as certain traditional healers or individual farmers working within the community. Typically, this

⁷ Smarika Azad, *Scope of Traditional Cultural Expressions in India*, *Young Arena Litigators*, available at <http://youngarenalitigators.blogspot.com/2016/09/scope-of-traditional-cultural.html> (Feb. 03, 2020, last visited on 05:05 PM).

recognition arises through customary understandings, protocols, laws or practices.⁸ Another issue that arises is that certain TCEs are jointly owned by more than one community, who might be sharing the TCEs and so one community out of the several cannot be granted the right to enjoy protection of the same and these communities might be from various parts of the globe. If the communities are unaware of each other sharing the TCEs and one of them communities is granted such protection, the others might lose out on their right to get protection over their TCEs. The ownership over the TCEs is the criteria that is quite difficult to define and yet is essential to move forward towards granting protection.

Once TCEs are identified and the ownership over it is established, the duty of providing protection arises. The objective of such protection should be to make sure that the intellectual innovation, creativity and any other effort that is put in by the respective owners are respected and subsequently the TCEs are not wrongly used. Protection under intellectual property laws can be provided in form of recognizing the TCEs and the owners and then entrusting with the owners the exclusive rights over their respective TCEs, which is mainly excluding others from carrying out certain acts. Intellectual property protection can also include non-proprietary forms of protection like moral rights, equitable compensation schemes and protection against unfair competition.⁹

Why Intellectual Property Laws are best suited to protect TCEs

Using intellectual property laws to protect TCEs, under positive protection would mean making use of these TCEs only for the holders' own purposes and under defensive protection, in contrast, would mean preventing anyone else from having access to the TCEs, when it would go against the interests of the TCEs holders.¹⁰ Thus, the positive protection grants the exclusive rights of usage to the holders, whereas the defensive protective is restrictive i.e., it imposes a restriction on non-holder people who wish to make use of the TCEs.

Since TCEs cannot be provided protection under the current intellectual property laws, as they do not confirm to the standards specified under therein, the documentation of such traditional

⁸ Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expression, WIPO (2015).

⁹ *Id.*

¹⁰ Dev Saif Gangjee, *Geographical Indications Protection for Handicrafts under Trips*, M.Phil Dissertation, University of Oxford (2002), available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.194.9134&rep=rep1&type=pdf> (Feb. 01, 2020, last visited on 03:34 PM).

cultural expressions may be helpful in providing a better protection. The documentation would reduce the TCEs into a tangible form, instead of being just an expression. Tangible expressions can be provided better protection under the Copyright Act, 1957. Documentation would also provide a confidential or a secret record of that traditional knowledge or expression, which can be reserved to the specific community that it belongs to.

The protection of TCEs, at the outset was to be by the copyright laws, since the subject matter of TCEs and copyright laws are similar. However, although copyright law seems to be the most suited to meet some of the needs and objectives of TCEs holders, it is however, inadequate in its capacity for protecting TCEs. It can be argued that laws of copyright appear to be conceptually best suited for the protection of TCEs, because of their specific nature and characteristics. Such characteristics include the fact that they are usually produced within a community, which is often linked to a specific place, and according to traditional methods and know how transmitted from generation to generation, often using raw material from sustainable resources. In addition, this method of protection also seems to accommodate the fact that TCEs are usually already in the public domain, due to them being already widespread and to take into consideration some of the aims of TCEs holders such as the fact that they would like a protection that is unlimited in time. The proposed approach will admittedly not address all the concerns of TCEs holders, but it will provide a balanced and workable compromise solution that could satisfy most of their concerns and policy objectives.¹¹

The existing copyright system, however, does not provide adequate protection for Indigenous knowledge and cultural expressions that are collectively generated and held by an Indigenous or local community.¹² Even where protection does extend to traditional cultural expressions as a copyright work, the existing exceptions and limitations established under the copyright system do not take into account the special relationship between Indigenous communities and their cultural production.¹³ Any exception or limitation to copyright must take into account this special relationship, as any use of traditional cultural expressions by a third party may be

¹¹ *Supra note 1* at page 2.

¹² Natalie P Stoianoff and Alpana Roy, *Indigenous Knowledge and Culture in Australia – The Case for Sui Generis Legislation* 41(3) Mon LR 746 (2015).

¹³ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources (IGC) Traditional Knowledge and Folklore, *The Protection of Traditional Cultural Expressions: Draft Gap Analysis* WIPO/GRTKF/IC/13/5(b) Rev, XIII (2008) at 13–17, available at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_37/wipo_grtkf_ic_37_6.pdf (Feb. 02, 2020, last visited on 12:35 PM).

considered an affront to that community's culture and law.

Position in India

India has a culmination of diverse cultures and religions, that have been in existence since time immemorial, which brings along with it a rich artistic and literary creations of its own. But, with the development and digitalization, the doors to such creations have been opened to the entire globe, by allowing easy access to the arts and crafts culture in India, which has often resulted in affecting them negatively. So far as traditional knowledge in general, and Traditional Cultural Expression in particular, is concerned, state of affairs in the affairs of state resembles gross lawlessness in India¹⁴. Despite the increase in the number of issues that have arisen due to such developments like globalization and digitalization, the intellectual property laws in India, be it Copyright or Patent, are still not adequate to cater to the needs that such TCEs demand¹⁵. The main issue that arises is the conflict that arises because of the works being in public domain, which paves way for an ease in its privacy or the lack thereof and the vested interest of private domain. The intellectual property law is yet to bridge the gap and thereby cover a hinterland between idea and expression lying between patent law and copyright law respectively.¹⁶ Consequently, intellectual property law is yet to grapple with the underlying conundrum vis-à-vis TCEs related matter, since TCEs are both cultural and economic assets of the peoples and communities who are their creators, practitioners and custodians¹⁷.

Irrespective of the supreme law of the land providing constitutional provisions, under Articles 29, 46, 48A and 51A(f), though not directly, but may be interpreted to pave way for the protection and preservation of the diverse cultural groups, yet there is no special law that specifically lays down any prohibition on the exploitation of TCEs¹⁸.

Further, it can also be seen that if the Copyright laws seems insufficient, there are other Intellectual Property Laws that can be invoked to ensure the protection of the Traditional Cultural Expression and Traditional Knowledge, such as, geographical indications, trademarks

¹⁴ P.V. Valsala G. Kutty, *National Experiences with the Protection of Expressions of Folklore / Traditional Cultural Expressions: India, Indonesia and the Philippines*, WIPO (2002), available at <http://www.wipo.int/tk/en/studies/cultural/expressions/study/kutty.pdf> (Jul. 20, 2019, last visited on 06:23 PM).

¹⁵ *Id.*

¹⁶ Tabassum Iqbal, *Exploring the Jurisprudence behind Traditional Cultural Expressions in India: A Juridical Study*, 4 International Journal of Law 31, (2018), available at <http://www.lawjournals.org/> (Feb. 03, 2020, last visited on 03:19 PM).

¹⁷ *Id.*

¹⁸ *Supra note 16* at page 7.

etc. For example, contemporary adaptations of folklore are copyrightable, while performances of traditional songs and music may come under the WIPO Performances and Phonograms Treaty and Beijing Treaty on Audio-visual Performances.¹⁹

Conclusion

The Intellectual Property Rights has the ability to interpret, intervene and formulate and eventually deal with the world existing post globalization or the evolution that occurs after the evolution of the society from industrial to information²⁰. This intervention and subsequent formulation of new, modified laws have in a way succeeded in addressing the concerns of the holders of TCEs, but at the same time it has also concurrently strayed from the original idea behind the intellectual property laws and also fails to appreciate the nature of indigenous art and creativity²¹.

TCEs have been under the threat of misappropriation for a long time and the number of violations against them and the stakeholders of the same are so rampant now, as evident from the numerous products that are available, in the market to the public, in various forms like music, dance, handicrafts etc., to name a few.

Another issue, being equally important, that needs to be looked into is the lack of education that these indigenous communities have, which renders them more prone to the violations that are being committed against them. This education is not merely limited to the formal education, but also extends to their lack of access to the modern world, including technology, which is the main source of their violations. This lack of access to the world, prevents them from even realizing that their TCEs are being used without permission by an outsider, which means they will not be able to raise any complaints against such misuse. By educating the members of the community and making them aware of their rights and any violations that might be taking place, they will be able to utilize their TCEs, themselves, for their livelihood. Since the members of such communities are mostly backward and are often in the state of poverty, helping them establish their TCEs into business, instead of the profit-motivated organization misusing them, these communities will be able to come out of their poverty and have an alternative means of livelihood. Being passed on, one generation to another, there is a

¹⁹ WIPO, Traditional Cultural Expressions and Intellectual property, available at: <http://www.wipo.int/tk/en/folklore/> (Feb. 02, 2020, last visited on 02:42 PM).

²⁰ *Id.*

²¹ *Supra note 10* at page 5.

sentimental value attached to such TCEs and thus the members of the communities are also affected when alterations are made to the TCEs, to make them more appealing to the targeted audience, but when they themselves are made capable enough to utilize their TCEs for their own livelihood, it will be guaranteed that the authenticity of the same is maintained and the targeted audience can be assured that the original products or materials are being made available to them.

In India, as in various other countries, TCEs are considered to be a source of the creativity and innovation of the members of the communities, which has contributed to the social and economic development of the country²² and yet we see that the legal recognition given to the same is nil. Despite the rampant existent misuse of the TCEs, the stakeholders are not able to get any redressal due to the lack of protection provided by the laws. A huge part of the communities' art and culture, forming part of their TCEs, in India today is unprotected as it does not fulfil the conditions that are laid down under the existing intellectual property laws, thus it becomes essential that the laws in our country be amended so as to give legal protection to its folklore and at the same time prevent the erosion of its folklore, vis-à-vis attempt to enrich the same by allowing its lawful exploitation²³, ideally by the communities themselves or if by an outside entity, then with the permission of the respective community. This is necessary because this lack of protection give rise to limitless commercial exploitations, which is worsened by the fact that there is no legal recourse available. Another aspect that causes difficulty to the stakeholders is that the IP protection is not granted easily to the applicants and once granted, the IP protection holder will have to defend it, for which he/she must have access to information, such as the usage or misuse of it, which will lead to them needing legal advice to approach the appropriate redressal forum and all this requires financial resources, all of which, as discussed earlier, are beyond the range of such communities.

Looking into the various international organizations and the numerous efforts that are taken by them in form of the above-mentioned conventions and treaties, it can be seen that the realization that the TCEs are better protected under the intellectual property laws, especially copyright laws has dawned to the makers of the same and has consequently resulted in providing some kind of remedy, if not fully sufficient enough, to the stakeholders of such TCEs and has also helped in ensuring that the same are being protected from any misappropriation that they are

²² *Supra note 19* at page 8.

²³ *Id.*

prone to. Efforts have also been taken to see that the communities themselves are being educated about the ways in which they themselves can utilize their own TCEs by introducing them to the public. It is evident from such initiatives that it is also essential that the same be introduced in India and this can be done by amending the Copyright Act, 1957, so that the TCEs are included within the ambit of protection granted under the Act.