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# IPR REGIME: COPYRIGHTING TRADITION AND CULTURE!

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## ABSTRACT

The protection of technology, trade secrets and designs has always been *the priority* for every nation and their government, because of obvious economic and development reasons. Be as it may, the last few decades have witnessed a shift in the traditional Intellectual Property Regime. Traditional Cultural Expression is one the many subject-matters that has become a part of IPR regime after a persistent effort of the activists. The custodians or the community members of the Traditional Cultural Expression have struggled for the protection of their cultural folklores, music, dance forms, folk tales, etc.

This article aims to highlight the changes that the IPR regime has undergone in the last few decades with respect to TCEs. In doing so, the article focuses on the meaning of TCEs and the reasons for which community members desire protection of their traditional heritage. Moving further, it will shed light on the struggle and efforts made by the guardians of TCEs and their expectations for the standard of protection, rights and privileges that should be granted. Furthermore, it gives a glimpse of the changes incorporated in international protection regime of IPR in respect to TCEs. The article will conclude with an analysis of the protection provided to the TCEs and certain recommendations.

**Keywords:** TCEs (Traditional Cultural Expression), IPR Regime, Traditional Heritage, International protection.

## INTRODUCTION

The custodians of the TCEs, demanding better and stronger IP protection argues that indigenous artworks, hand-woven designs, dance forms, music and best-selling albums have become prey to the modern and globalised world, where the copies are being sold as “authentic” worldwide and the originals are camouflaged.

It is believed that amalgamation of diverse cultural into one society and emergence of multi-diverse society is not the only factor responsible for degradation of traditional and cultural heritage. The technological advancement during the period of globalisation such as audio-visual recording, cable television, cinematography, broadcasting and sound recording posed a threat to the cultural and traditional heritage. The presence of diverse societies has consigned to oblivion the difference between adaption of one’s culture and copying it.

In this 21<sup>st</sup> century, where the MNCs and related protections (patents and trademarks) are given priority for the obvious economic and developmental reasons, the awareness regarding the conservation of tradition has also bloomed. The primary focus of government of every nation is to maintain economic stability however, the efforts of the custodians of TCEs have kept the governments on their toes for promoting and extending protection to TCEs like any other copyrightable work, as to support and preserve the ancient and prevailing customary laws and cultural expressions against possible annihilation.

At the international level, the last few decades have witnessed a shift in the traditional Intellectual Property Regime. Traditional Cultural Expression is one the many subject-matters that has become a part of IPR regime after a persistent effort of the activists. Over the years, WIPO has observed, examined, and analysed the link between TCEs and Intellectual Property and has recommended and introduced various conventions, policies, amendments in the existing treaties for extending protection to TCEs along with traditional IP subject matters. The establishment of such new protective measure has swept off several problems yet, a pile of them in this ever-evolving world continues.

It can, however, be said with certainty that the coming few decades will mark the significant development in preserving the TCEs and granting rights, respect, and incentives to the cultural communities.

## TRADITIONAL CULTURAL EXPRESSION (TCEs)

The phrase “Traditional Cultural Expression” doesn’t have any precise or single definition. It is generally used to indicate the works of indigenous people and traditional communities. TCEs have been in existence since the dawn of humanity and have been passed down to generations either through sculptures or words. Every civilisation, tribe, religion have different TCEs (such as customary laws, dances, recitals, folk tales, etc.) resulting in oodles of TCEs worldwide.<sup>1</sup>

The absence of any single precise definition for determining the TCEs lead to ambiguity as to which practice or work will be considered TCEs and should be given protection. Thus, to resolve such issue the identification by the cultural community is an essential guiding principle.

According to the Model Provisions<sup>2</sup>, “TCEs are tangible and intangible forms in which traditional culture and knowledge are expressed, communicated, appear, or manifested. They include:

1. Musical articulations (like melodies, instrumental music)
2. Verbal articulations or images (for instance stories, sagas, legends, stories, verse, questions, and so on)
3. Architectural structures
4. Tangible articulations (counting drawings, plans, works of art, carvings, models, earthenware, earthenware, mosaic, woodwork, metal ware, adornments, bushels, embroidery, materials, dishes, floor coverings, ensembles, instruments)
5. Intangible articulations reflecting conventional idea structures
6. Expressions by activity (like moves, plays, services, ceremonies, different exhibitions)”

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<sup>1</sup> Mrs. P.V. Valsala G. Kutty, “National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and The Philippines” 3 WIPO (1999)

<sup>2</sup> WIPO’s Model Provisions for National Laws on the Protection of Expression of the Folklore Against Illicit Exploitation and Other Prejudicial Actions (1982)

### **Characteristics of traditional cultural expressions (TCEs)/folklore**

1. Passed down from previous generations
2. Either orally or through imitation
3. contain community folklore
4. the author or community is unknown
5. are religious and cultural expression, having sentimental values more than economic
6. constantly reviving within the community<sup>3</sup>
7. product of intellectual creation
8. tangible, intangible, and mixed expression of culture

### **TCEs Subject Matters**

1. secret TCEs
2. performances of TCEs
3. literary and creative creations like conventional music and visual craftsmanship
4. indigenous and conventional names, words, and images
5. designs

### **STRUGGLE AND DESIRE FOR PROTECTION**

Unlike other copyright subject matters, Traditional Cultural Expression may not have much economic worth but have noteworthy sentimental value and deserve respect and sanctuary. The indigenous people are anxious when it comes to the protection of their cultural heritage because it forms part of the legacy that it, passed down to the future generations. TCEs forms integral

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<sup>3</sup> “INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE, BOOKLET NO. 1” 5 WIPO

part for survival and existence of few communities and tribes thus, the desiccation of the heritage would mean the extinction of their tradition, culture, and community.<sup>4</sup>

The traditional cultural expression like folklore, dance, music, tales, hand-woven carpets, sheets, or indigenous artworks, are the creative effort of an individual or community, which reflects the unique feature, culture, and history of such community. Therefore, the indigenous population seek protection against exploitation of such creative work and contribution towards the economic prosperity of the creator and community.<sup>5</sup>

The TCEs have been misappropriated across the globe without being given any due recognition, value or credit to the creator or the concerned community. They, as discussed above, are commercially exploited without sharing the benefits with the rightful owner.

Example of misappropriation includes- Recording and distributing traditional songs, reproduction of indigenous paintings on carpets, clothes and their subsequent distribution, publication of orally narrated tradition folktales in the form of poetry, poses, without the consent of the creator or the concerned indigenous population, etc.

These factors steer the indigenous people to fight and struggle to shield and find a sanctuary for cultural heritage.

The custodians of TCEs desires protection against unauthorised or offensive use, prevention of misleading claims of authenticity, defensive protection of TCEs, prevention against failure to acknowledgment and protection against unauthorised disclosure of secret TCEs.

## **DIFFICULTY IN GRANTING COPYRIGHT PROTECTION TO TCEs**

Within the current copyright regime, there are a variety of explicit challenges to copyright security. Fixation in a physical form of expression is a requirement for copyright protection under many local laws. In these countries, there are no legal protections for works like oral histories, dances, rituals, or spiritual knowledge from ancestors that have been handed down

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<sup>4</sup> “CONSOLIDATED ANALYSIS OF THE LEGAL PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/ EXPRESSIONS OF FOLKLORE” 29 WIPO (2003)

<sup>5</sup> *ibid*

but not recorded.<sup>6</sup>

Additionally, to be eligible for legal protection under copyright, a piece of work must be one of a kind and completely original, according to the universally accepted criteria. This implies that the work should comprise a creator's own scholarly creation. Generally, TCE is based upon custom and is crafted by an aggregate voice that has advanced over the long run; questions emerge concerning how the innovation prerequisite could be met inside the current copyright framework.<sup>7</sup>

Further, the ownership is also an issue. This is because, generally, TCEs are the creation of an unknown author or community members thus; causing the ambiguity as to who should be given the ownership, an individual or the whole community which is represented by such TCEs.

The difficulty in granting protection also lies in the fact the term and the formality of protection is debatable. The custodians on one hand are of the view that the period for protection should be indefinite, as the traditions and cultural heritage continuous until the very existence of the community. On the other hand, the views are that such a long term of protection may not be justifies for other.

## **INTERNATIONAL REGIME FOR PROTECTION OF TCEs**

The traditional subject matter of the copyright law included original literary (such as novels, books, poems, poses, etc.), dramatic (recitations, actions for dumb shows), artistic, musical works along with cinematograph films and sound recordings. Later, computer programmes were also given copyright protection under the head of literary works.

Nonetheless, the IPR regime is a dynamic field having and introducing yet new subject matters under its ambit, every now and then. The new subject matters of IP laws include the protection to medicinal formula (such as vaccines), the new plant variety (breeding) and TCEs.

The timeline consisting of the amendments, conventions, treaties prepared over the decades for the sole purpose of protecting the TCEs is as follows-

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<sup>6</sup> Janice T. Pilch, "ISSUE BREIF TRADITIONAL CULTURAL EXPRESSION" 3 Library Copyright Alliance (1999)

<sup>7</sup> *ibid*

1. First, in 1967, an amendment to the Berne Convention established a system for the worldwide protection of previously unpublished or nameless works. Traditional cultural expressions (TCEs) may be safeguarded in this manner since their creators are often unknown.
2. The Tunis Model Law on Copyright for Developing Countries was adopted on 1976. It incorporates *sui generis* assurance for articulations of fables.<sup>8</sup>
3. The 1982 “WIPO’s Model Provisions for National Laws on the Protection of Expression of the Folklore against Illicit Exploitation and Other Prejudicial Actions” was adopted, which was a joint action of WIPO and UNESCO.<sup>9</sup>
4. In 1996, “WIPO Performances and Phonograms Treaty” (WPPT), was adopted by the WIPO member states which contain provisions for the protection of the performer of an expression of folklore. In other words, WPPT provided for the neighbouring rights.<sup>10</sup>
5. In the year 1997, the "UNESCO-WIPO World Forum on the Protection of Folklore" took place in Phuket, Thailand.
6. In 28 nations, WIPO carried out fact finding trips in 1998 and 1999 to identify the IP-related needs and presumptions for TCEs caretakers.<sup>11</sup>
7. In 1999, WIPO organised provincial interviews on fable protection in African, Asian and the Pacific, Arab, and Latin America and the Caribbean countries. Every one of the conferences embraced goals or proposals, which incorporated the suggestion that WIPO and UNESCO increment and increase their work in the field of old stories insurance. The proposals collectively determined that future work here ought to incorporate the advancement of a powerful global system for the insurance of articulations of fables.<sup>12</sup>
8. In 21<sup>st</sup> century, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established. The

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<sup>8</sup> *supra* note 3

<sup>9</sup> *supra* note 2

<sup>10</sup> WIPO Performances and Phonograms Treat (1996) *available at*: WIPO Lex

<sup>11</sup> *supra* note 3

<sup>12</sup> *ibid*

Committee established a relationship between IP and TCEs and analysed the policy and protection measures. These policy analyses and the finding form the basis of today's ongoing debate for stronger protection of TCEs.

9. As a feature of its more extensive program on TCEs, WIPO additionally puts together studios and classes, master and truth discovering missions, commissions contextual analyses, and completes and gives authoritative drafting, exhortation, schooling, and preparing.<sup>13</sup>

## ANALYSIS

WIPO's secretariat prepared a draft pertaining to the thirteenth session of the IGC "Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore", which outlines-

1. commitments, arrangements, and potential outcomes that subsists at the global level to protect TCEs
2. the loopholes or gaps that exist in instruments that set out such obligations, provisions.
3. Consideration whether the loopholes are to be addressed<sup>14</sup>

According to this report, the conventional abstract and imaginative creations, and related work are subject matters of copyright and protected under the provisions of Berne Convention, the TRIPS Agreement, the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty. Therefore, the ownership shall be economically benefitted from the profits and use of his work for at least a period of 50 years. He shall have the right to sue for copyright infringement in case of any irregularity in use of his work. Other rights like, the right to adaptation, translation, communicate to public, storage and reproduction of work in any form shall subsists with the owner. The issue of *Fixation* is insignificant for protection at international level this is because fixation is not an essential for granting Intellectual Property

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<sup>13</sup> *ibid*

<sup>14</sup> WIPO's Secretariat, "THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS: UPDATED DRAFT GAP ANALYSIS" WIPO (2018)



Rights at global level. Similarly, the designs and the symbols of TCEs are also protected though not under any explicit treaty or convention but through common law in certain jurisdiction.

In relation to the provisions that are available internationally for the protection of TCEs, there also subsist various gaps or loopholes that are yet to be resolved by the IGC for better protection standards of TCEs. The first and foremost gap is of originality. The TCEs are nothing but the recreation of the age-old traditions prevailing in the community and thus, it is difficult to consider them the original work of an author. Moreover, the expression originality includes a minimum degree of creativity. It might be possible that the author who creatively expressed the tradition does not belong to the community of tradition. Further, the non-uniform term of protection is also a gap that is also required to be addressed.

The protection with respect to secret TCEs is not certain and definite, as the answer to what constitute secret TCEs is vague. This implies that not every secret TCEs may be viewed as privileged and would not require the consent of the owner for disclosure.

The loopholes or gaps that exist in the present TCEs protection instruments are at all levels, international, national, and local levels. Thus, it is upon the concerned authorities to tackle the issue at the appropriate level so as avoid the ambiguities and raise the standards for protection.