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## Exploring the jurisprudence behind traditional cultural expressions in India: A juridical study

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### Abstract

The protection against such exploitation of traditional script, literature, languages, customs, songs, paintings, handicrafts, rituals and ceremonies, traditional medicinal knowledge, legends and myths, referred to collectively as traditional cultural expressions (“TCE”) has emerged as an aspect of the cultural and intellectual property rights of indigenous people and is a key issue in the international arena. For indigenous people, the rationale for protecting expressions of folklore centres on questions of fundamental justice and the ability to protect, preserve and develop one's cultural heritage. There is also a concomitant expectation, albeit arguably, to receive fair return of what community develops out of collective intelligence. The article is mainly carried out to address the; fact that, Indian societies have been suffering from the exploitation of their existing cultural expression and their associated traditional knowledge by the western multinational corporations and also the entertainment industries. The author therefore endeavors to examine why the Indian laws till date fails to provide an adequate and appropriate and put forward the reasons as to why these regimes fails to provide sufficient protection to TCEs.

**Keywords:** traditional cultural expressions (TCE), traditional knowledge, indigenous people, folklore

### Introduction

According to United States Declaration on the Rights of Indigenous Peoples (USDRIP), Article 31, 2007 <sup>[1]</sup> today we live in a world of instant global communication. Nobody in this world is stranger to the technological development which has transformed the whole world. The knowledge based society has replaced the material based society. But, on the other hand, traditional communities across the world repeatedly confront issues of cultural (MIS) appropriation or/and theft of their cultural expression- which ought to be treated as collective property- be it through the fusion of traditional music with digital beats to produce chart-topping pop music albums, traditional painting techniques, and handicrafts mass-produced by non-traditional means and sold as authentic, indigenous art being replicated, albeit sans authorization, on clothing, footwear, and carpets, or indigenous words and names being trademarked and used for commercial gain <sup>[2]</sup>.

But with the passage of time there is influx of migrant settlers in their territory and they were forced to leave their original habitat they have previously inhabited and started sharing it with the outsiders. Most indigenous peoples have been subject to experiences of subjugation, marginalization, dispossession, exclusion or discrimination by the mainstream societies that became dominant through conquest, occupation or settlement <sup>[3]</sup>.

The discussion protecting the TCEs will be rendered meaningless if in the first place, there is no justification for its legal protection. For indigenous people, the rationale for protecting expressions of folklore centres on questions of fundamental justice and the ability to protect, preserve and develop one's cultural heritage. There is also a concomitant expectation, albeit arguably, to receive fair return of what community develops out of collective intelligence <sup>[4]</sup>. This concern is further magnified by the debate that TCEs and traditional forms of creativity and innovation are not adequately protected by existing intellectual property regime though “Traditional Cultural Expression” which is probably the most important and well-acclaimed cog of the cultural heritage of a community <sup>[5]</sup>.

Thus, the article is mainly carried out to address the fact that, Indian societies have been suffering from the exploitation of their existing cultural expression and their associated TK

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by the western multinational corporations and also the entertainment industries. The author therefore endeavours to examine why the Indian laws till date fails to provide an adequate and appropriate and put forward the reasons as to why these regimes fails to provide sufficient protection to TCEs.

The development of legal safeguards for traditional cultural expressions at the international level faces many contradictions. Adequate means and ways to protect TCEs have been claimed discussed and tested over a long period, with the first important step made in the framework of the 1967/1971 revision of Berne convention <sup>[6]</sup>. Yet, it seems that ideal solution has not been yet found. Till date work on protection of TCE's has progressed slowly and little has emerged in the way of concrete, binding law. The various international instruments proposed as solutions appear unable to meet the whole range of concerns raised by TCE holders and the culturally rich developing countries.

### **Protection of traditional cultural expressions under various Legislations in India**

India the land of diverse cultures and religions has rich artistic and literary creations of its own which exists from time immemorial. But the fast developing technology especially after the colonization has affected the arts and crafts culture in India. So far as traditional knowledge in general- and TCE in particular- is concerned, state of affairs in the affairs of state resembles gross lawlessness in India <sup>[7-8]</sup>. No branch of IP law- be the same copyright or patent- is designed to address such pandemonium in public domain and piracy of intangible cultural heritage thereof in vested interest of private domain. Forget remedy, IP law is yet to bridge the gap and thereby Cover a hinterland between idea and expression lying between patent law and copyright law respectively. Consequently IP law is yet to grapple with the underlying conundrum vis-à-vis TCE related matter. TCEs are both cultural and economic assets of the peoples and communities who are their creators, practitioners and custodians. TCEs can be economic resources that concretely contribute to providing livelihoods and easing poverty and socio-economic disadvantage for these communities, for example, through craft marketing.

#### **A: Constitutional Provisions and TCEs**

The Constitution of India, the supreme law of the land, has not yet directly addressed the issue of protection of TCEs. Article 29 <sup>[9]</sup> of the Constitution recognises protection of culture of minorities as a fundamental right. According to this article 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. Therefore, folklore of distinct group is protected. However the folklore of the small communities is still not in the scene and their culture is misappropriated largely. In the Part IV of the constitution though reference has been made directly about protection of TCEs, yet there are some provisions under which protection can be provided to TCEs. Culture has some role as environment in providing sustenance to the human existence and Article 48A <sup>[10]</sup> of the Constitution deals with protection and improvement of environment and safeguarding of forests and wild life. The indigenous people acquire most of their knowledge from the nature or woodland. When one talks about the improvement of forest and wildlife, protection of TCEs implied. Article

46 <sup>[11]</sup> of the Constitution contemplates to promote educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections. Though Cultural activities like folk art, folk literature, folk music significant section of the society may gain economic benefit. But this will happen only when the traditional knowledge in general-and TCEs in particular, will be protected. Article 51A (f) <sup>[12]</sup> confers a fundamental duty on every citizen of India to value and preserve the rich heritage of our composite culture. Though the provision is there, no legislation is based on this provision for translating the constitutional objective into practice.

Taking into consideration the special cultural identity of the tribal population in India, the Constitution envisages special protection of the indigenous communities. Since they are scattered all over India, some living separately and others along with other sections of the society, the Constitution adopted different approaches to protect their cultural identity. The areas where there are only tribal communities, as per Article 371 read with the Schedule 6 of the Constitution, are permitted to have separate Autonomous Councils for self-governance in accordance with their customary laws <sup>[13]</sup>. The normal laws of the land are applicable only if accepted by the community and the Council has the power to make laws even to protect their social customs. For other parts of the country, as per Schedule 5 of the Constitution, the government has the power to create scheduled areas to protect the interests of the tribes. The application of the normal laws, if they are in conflict with their customs, can be prohibited by the head of the State. The tribes not falling in the above categories are subjected to the normal laws of the land.

Irrespective of the constitutional provisions envisaging protection and preservation of distinct cultural groups, there is no special law prohibiting the exploitation of TCEs of these communities without permission. There are many customary norms in these communities prohibiting the use of some of their TCEs by outsiders and of those that are confined only to customary practices. For example, some of the folklore practiced by the communities are confined to religious or social occasions such as marriages, death rituals, or birth ceremonies, etc. These are not to be used out of the definite context. As there is no law prohibiting the use of such folklore by outsiders, increasingly they are being used for commercial gain.

#### **B: TCEs under different intellectual property regimes of India**

**B.1: Copyright Act of India:** In India the legislation that takes care of the rights relating to literary and artistic works, sound-recordings, films, and the rights of performers and broadcasting organizations, is the Copyright Act, 1957. Indigenous peoples have sought to protect folklore under the framework of intellectual property, within which they have considered copyright laws best suited to protect traditional cultural expressions <sup>[14]</sup>. However, the Indian Copyright right in its present form is ill-equipped to serve the interests of indigenous communities due to fundamental differences between the Western understanding of "protection" and the indigenous understanding of the same <sup>[15]</sup>. While indigenous works are not excluded entirely from protection under the present copyright regime, it does not give them any kind of special protection either <sup>[16]</sup>. As of now, folk music, folk art, and other forms of folklore do not find special mention in

the copyright statute in India even after the latest amendment of 2012.<sup>[17]</sup> In India, blatant misappropriation is evident in the fashion industries where different forms of traditional attires are used by the designers for fashion shows which are actually the intellectual property of the traditional communities. The misappropriation takes place as a consequence of the inadequate protection afforded by the copyright laws of the country.

The Indian Copyright act is inadequate to protect arts of the indigenous people. For example, in a dance, the performer has a style manifested in several ways but as a sequential unique style over several performances<sup>[18]</sup>. Where the dance is removed from the main theme and song, and incorporated, for example, into western music, there is no protection if the dance was copied without permission, as the dance will be deemed to be in the public domain<sup>[19]</sup>. Similarly, where a tribal painting is copied with minor modifications, the indigenous tribes will have no rights under copyright law. The copy can depict a subject in a different manner, thereby conveying a meaning different from what was intended. In the long run, such activity will dilute the tribal custom.

Limitation of the Copyright Act, 1957:

**Originality requirement:** The use of the term Original in section 13(1) (a)<sup>[20]</sup> of the Copyright act in relation to literary dramatic musical and artistic work prevents the protection of pre-existing Expressions of Folklore. The Act protects only the original works and many traditional literary and artistic productions are not original. Moreover the statute doesn't define the term "originality". However, judicial opinions indicate that copyright's standard of originality relates to the expression of creative thought, and not to the thought itself while qualification as an "original composition" does not entail confining the work to a field that has not been traversed thus far by any other person, such work must not appear to be copied from another work, and must clearly originate from the author. Conversely, any form of folklore usually draws from pre-existing tradition and, in fact, folkloric works fundamentally are based on, and gain value from, the transmission of themes from one generation to another. Unlike the testing for novelty in patent law, the requirement of originality for copyright protection is significantly more complex to establish. Usually, courts seek to determine two factors: first, the work must emanate from the author and not be a copy<sup>[21]</sup>, and second, the author must have exercised a degree of "skill, judgment or labour in making the compilation<sup>[22]</sup>." However an expression of culture does not meet the traditional requirement of originality of expression as it is understood under classic copyright law.

**The identifiable author requirement:** Copyright is author-centric and, in the case of TCEs an author - at least in the way in which the notion of "author" is conceived in the field of copyright - is absent. Under the present Act 'authorship' and 'ownership' are distinct concepts and ownership of copyright in a work is independent of the ownership of the physical material in which the work is fixed. The basic rule of ownership of literary, musical, or artistic property is that the author<sup>[23]</sup> is the first owner<sup>[24]</sup> of copyright in the work. This rule is subject to certain exceptions,<sup>[25]</sup> but none of these exceptions apply in the case of indigenous folklore. Further the Act requires that that the creator(s) be

identifiable but in case of EoF it is difficult, if not impossible, to identify authors since they are communally created and held and/or because the creator (s) are simply unknown, In case of some pre-existing EoF there may have been an author at some stage and the whole context of authorship may not be sufficiently determinate to be anchored in the Copyright law.

**Joint Authorship Requirement:** Any folk creation done by one member usually is owned by the entire tribe or group, through an operation of collective ownership according to customary indigenous laws. The concept of "joint authorship" does exist in Indian copyright law,<sup>[26]</sup> but one cannot apply it in the case of indigenous cultural property because such works are usually not a collaborative effort in which the contribution of one author can be separated from the other, but instead, it is something of a cumulative knowledge that finds expression over generations.

**Fixation requirement:** The fixation requirement poses a problem for intangible TCE. The copyright laws preclude copyright protection for oral works, which can only be granted when the work is "fixed" in material or tangible form<sup>[27]</sup>. But many forms of TCEs exist only in the form of the collective memory of indigenous groups-e.g., folk songs and folktales. Although the real content of the song or stories is relatively unchanged through generations, it does not have any fixed form. These oral works present another inherent contradiction with modern copyright because one of the central tenets of copyright law is that neither ideas, themes and nor artistic techniques are not protected.

**Duration of Copyright:** Chapter V<sup>[28]</sup> of the Copyright act of India deals with the duration of Copyright which varies according to the nature of the work and whether the author is a natural person or a legal person or whether the work is anonymous or pseudonymous<sup>[29]</sup>. According to Section 22<sup>[30]</sup> of the Act, the term of Copyright in published, dramatic, musical and artistic work published within the lifetime of the author and continues for sixty years from the beginning of the calendar year next following the year in which the author dies.

The limited term of protection requires certainty as to the date of the work's creation or first publication, which is often unknown in case of pre-existing EoF.

**Moral rights:** Moral right that is generally contemplated under the Copyright act is also a big hurdle for applying to TCEs. In India, under Article 57 of the Copyright Act, the moral rights of an author who has died or been extinguished shall be deemed to be the same as when the author was living or in existence and shall not be infringed upon by any person, which recognizes the author's moral rights that does not exist in the group-rights nature of the indigenous cultural expression.

**Performers' rights under the Copyright Act 1957:** Performer's Rights are type of Intellectual Property rights known as neighbouring or related rights as these rights are neighbours to or are considered related to Copyright. Neighbouring Rights provide legal protection to the interest of the persons or organizations that add substantial creative, technical or organizational skill in the process of bringing a work available to public. Performers

(singers, actors, dancers, musicians etc.) in particular are eligible for protection because of their creative interpretations giving life to the work and need to be rewarded for their creativity and efforts.

In India the rights of the performers were not dealt with by the original Copyright act of 1957. For the first time in 1994, the Copyright act was amended to confer certain special right to the singers and other performances called 'Performers Right' under section 38<sup>[31]</sup> of the act. However such protection was not adequate and therefore the act was again amended in 2012 in order to expand the protection given to performers. The new act insert the definition of a "performer"<sup>[32]</sup> which states that a performer includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance and as per section 38B<sup>[33]</sup>, the performer shall have moral right of attribution as a performer unless omission is dictated by manner of use of performance. The insertion of sections 38A<sup>[34]</sup> and 38B seeks to widen the concept of the performer's rights. This widening is very much justified as this will reduce the exploitation of the lyricists, singers etc. Earlier the rights were bought by the music director or any other concerned person and were exploited but this can be curbed by bringing this amendment.

Despite of the fact that the term performers of expressions of folklore have not been used in the act like the Australian copyright Act which explicitly mention about performance of expression of folklore<sup>[35]</sup>, yet it is evident from the definition that the performers of EoF can be accommodated under it.

B.2: Trademark act of 1999: According to the Trademark Act of 1999, trademark<sup>[36]</sup> means a mark capable of being represented graphically and which is capable of distinguishing the goods and services of one person from those of others and may include shape of goods, their packaging and combination of colours.

In the course of trade one finds numerous examples of companies and persons unauthorizedly using folklore expressions belonging to traditional communities and registering them as trademarks whether designs, symbols or other distinctive signs. Often these types of trademarks are deceptively similar to that of some TCEs which falsely suggests an association with or endorsement by a traditional or local community. Use of traditional signs as trademarks often gives consumers the impressions that such products are genuinely indigenous made or have certain traits and qualities that are inherent to the indigenous cultures when they are not. On the other hand through use by others of their symbols, words and so on as Trademark, indigenous peoples and trade communities became associated with products that may be inferior stereotyped or associated with certain lifestyles. However, due to lack of awareness and resources, especially in India, very rarely is registration applied for or action taken against infringement.

B.3: Geographical Indications of Goods (Registration and Protection) Act, 1999: This act primarily intends to protect the valuable GI's of our country. The protection under this act is available only to the GI's registered under this act and to the authorised users.

The act covers a range of subject matter, including works that could be construed as TCEs. One such creative work is the Kullu shawl, a wool shawl with unique geometric patterns. With the recognition of the shawl as a geographic

indication, there is now a cause of action against "Kullu-like" shawls that are passed off as authentic Kullu shawls within India's borders.

No doubt that some of the TCEs can be brought under this act but what about the remaining ones which cannot be registered under this act. For instance the oral TCEs like the folktales, myths etc. Although GI's has potential to respond to the concerns of holders of TCEs, more effectively than other IPR regimes and have great relevance, yet this regime is also not free from drawbacks. GI's are not intended to reward innovation, but rather to reward members of the community adhering to traditional practices. GI's can be maintained only as long as the collective tradition is maintained and moreover GI's are not freely transferrable from one owner to another. GI's can protect TCEs only which tangible like handicrafts which have qualities derive from their geographical origin.

### 3.3 Concluding remarks

In India EoF/TCEs are considered to be a source of creativity and innovation and it has contributed to the social and economic development of the country. India should give legal protection to its folklore not to prevent the erosion of its folklore but to further enrich it by allowing its lawful exploitation. A large aspect of community art and culture in India today is unprotected as it does not fall under the ambit of existing intellectual property laws. This is susceptible to limitations and commercial exploitation, leaving the developers of local art forms with no legal recourse. Moreover it is proposed that the preservation of distinct cultural identities leads to cultural diversity, which is a prized value in Western liberal political theory, both for its intrinsic, and its instrumental value as it fosters new ways of thinking and creativity which is beneficial to society in general<sup>[37]</sup>. Hence, from the above discussion it becomes very important for the Indian laws and on an international level that the performers should get the protection for their work as provided to other artistic work under copyright law. There are several ways in which conventional IPRs are said to be a mismatch for indigenous knowledge forms. If IPR is considered as a mechanism for protection of TCEs, the first obstacle which arises can be termed as 'operational constraints'<sup>[38]</sup>. It generally stems from the common unfamiliarity, amongst traditional knowledge holders, with IPR systems and their multitude technicalities. Traditional communities rightly anticipated that the existing IP system is inaccessible to the originators of expressions of folklore. Existing IP systems are typically based on complex, document intensive, expensive, codified and governmentally administered structures and procedures. Furthermore, once IPRs are acquired they must be defended which requires access to information, sound legal advice, and financial resources, all of which may be beyond the reach of traditional communities. Essentially the creators and custodians of TCEs often lack the know-how and financial resources to take advantage of the IP system in its present form and would require support even if it evolved to accommodate them. The second obstacle which arises in protecting TCEs through IPR regimes can be termed as 'Cross cultural constraints'. This impediment has been put forwarded by the WIPO IGC in the following terms: 'understanding the interfaces between the formal intellectual property system and customary legal systems which apply to TCEs in local and indigenous communities'.<sup>[39]</sup> The 'cross-

cultural' constraints arise because the needs of holders of TCEs are simultaneously governed by the formal IP systems and the informal IP regimes that prevail in their societies and communities.

According to Terri Janke <sup>[40]</sup>: '[i]ntellectual property laws are generally inadequate in recognizing and protecting Indigenous Cultural and Intellectual Property rights because non-Indigenous notions of intellectual property differ significantly from Indigenous beliefs.' <sup>[41]</sup> Though Janke wrote it in the Australian context yet it appears to be true for the rest of the globe as well <sup>[42]</sup>. The foremost criticism is that modern IPR doctrine is constructed around certain notions such as 'romantic authorship', which simply cannot be stretched to accommodate traditional knowledge concerns <sup>[43]</sup>. Thus this new subject matter cannot be incorporated without an entire paradigm shift. The *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples* in one of its recommendation notes that 'existing protection mechanisms are insufficient for the protection of Indigenous Peoples Intellectual and Cultural Property Rights' <sup>[44]</sup>. Coordinator of Indigenous Organizations of the Amazon Basin (COICA) is radically critical of the dominant Western conception of IP. The summit makes perhaps the most scathing remarks yet regarding conventional IPRs.

In part I, Article 8 of the COICA statement declares that: Prevailing intellectual property systems reflect a conception and practice that is: colonialist, in that the instruments of developed countries are imposed in order to appropriate the resources of indigenous peoples; racist, in that it belittles and minimizes the value of [indigenous] knowledge systems; usurpatory, in that it is essentially a practice of theft <sup>[45]</sup>.

However none of the arguments are absolute, i.e. each argument has its counter arguments. For the present purpose, this research states the central premises of the arguments in very simple terms excluding deliberately the counter arguments.

**1. Collective vs. Individual:** Generally, individual ownership is the model for entitlement to IPR within the conventional system <sup>[46]</sup> which stands opposed to collective character of TCEs. TCE, in its essence, is community property derived from communal effort <sup>[47]</sup> and thus the whole community is entitled to share in it. As in conventional IPR regimes a person can exercise an exclusive claim, the same is not applicable in case of TCEs as none may exercise an exclusive claim <sup>[48]</sup>. An ownership structure based on the community stands in sharp contrast to a Knowledge-protection scheme that conceptualizes the individual as the primary of intellectual advancement. Strict individualistic constructs of property in the Western mould do not fit into indigenous ideals.

**2. Commodifying TCEs:** Culture is embodied in the GATT Agreement as the subject of international trade <sup>[49]</sup>. Therefore there is a general belief that the "Western" concept of property treats culture as a commodity. However the traditional communities do not treat their TCEs to be 'commodity' <sup>[50]</sup> and therefore the notion of ownership over TCE is alien to most traditional communities. For indigenous peoples, the tendency to commodify and commercialize, as facilitated by IPRs, is not an acceptable way of dealing with their sacred knowledge and ecological

experience. For them, the sanctified communion and experience that they share with other living beings or partners cannot be subjected to an economic scale of values through commodification.

The Special Rapporteur <sup>[51]</sup> of the Sub-Commission on Prevention of Discrimination and Protection of Minorities provides an example stating that a folkloric song "is not a "commodity", a "good," or a form of "property," but one of the manifestations of an ancient and continuing relationship between the people and their territory. [I]t is inconceivable that a song, or any other element of the people's collective identity, could be alienated permanently or completely <sup>[52]</sup>." This statement demonstrates the intimate connection between a community and its TCEs.

**3. Absence of Juridical Personality:** The indigenous societies who are the custodians of TCEs are communal or collective organizational in structure which prevents them from the becoming a legal or juridical personality which is regarded as one of the basis for holding IPR. Under conventional IPR theory, juristic persons in the form of natural and corporate entities are the only appropriate holders of rights in knowledge <sup>[53]</sup>.

**4. Orator in lieu of Literature:** TCEs is usually operative as part of oral culture which is usually difficult to transform into written form. But to be a part of IPR, TCEs must be published in a written form. For instance in the process of granting a patent, prior art is determined not by oral narrative, but by publication in written form.

**5. Capitalist ideology v. indigenous ideology:** Most objections over the applicability of IPRs to indigenous knowledge are based on the concept or theoretical foundation of conventional IPRs. Intellectual property is a market instrument most suited to capitalist ideology. The capitalist orientation of conventional IPRs is in apparent conflict with the collective nature of ownership and the socio-cultural structure of indigenous societies. Chiefly, IPRs are capitalist creations, designed to serve the market economy and advance commercial interests as a matter of priority over cultural sensitivities <sup>[54]</sup>.

**6. Eternal vs. Ephemeral:** Except few exceptions, all IP regimes are determined for fixed period. However, TCEs are usually operative since time immemorial and trans-generational experience that evolves incrementally. In reality, indigenous knowledge in general and TCE in particular is the antithesis of tenured knowledge or property. When and where it begin and ends are indeterminate.

The aptitude of IPRs to interpret, intercede and ultimately define our globalized world or perceived social reality becomes increasingly evident after the evolution of the society from industrial to information. Intellectual property laws have the sanction to regulate widely contrasting realms of conduct - whether they ought to be applied in particular situations is a question that is increasingly echoing through IPR scholarship and TCEs is in the thick of this debate. The application of these laws may accommodate some of the concerns of the creators and sustainers of TCEs, but may concurrently stray from the incentivizing rationale or 'moral' justifications of intellectual property laws <sup>[55]</sup> as well as fail to appreciate the nature of indigenous art and creativity. The rights and obligations that a community

might assert in relation to a collection might not map easily onto IP definitions of who constitutes an “owner,” “author,” “creator” or a “user.” Such a disjuncture requires innovative and creative thinking, and importantly, presents an unprecedented opportunity to develop new equitable relationships that take into consideration past histories, legal gaps and future partnerships. This brings us to complex questions associated with how TCEs are or should be protected by IP. On the whole TCEs occupy an ambiguous legal status; they may or may not benefit from one or several branches of IP protection.

## References

1. Article 31, United States Declaration on the Rights of Indigenous Peoples. Available at [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) retrieved on 01/07/2017
2. Goswami, Ruchira & Nandi, Karubakee. (2008). ‘Naming the Unnamed: Intellectual Property Rights Of Women Artists from India’ *Journal of Gender, Social Policy & the Law* [vol. 16:2]. Available at: <http://www.wcl.american.edu/journal/genderlaw/16/2nandi.pdf> retrieved on 25/07/2017
3. Anna Poschung (2009). ‘The protection of indigenous peoples’ traditional knowledge through an international regime on access and benefit sharing.’ University of Bern. Available at [http://www.iew.unibe.ch/unibe/rechtswissenschaft/dwr/iew/content/e3911/e4043/e6182/poschung\\_anna\\_ger.pdf](http://www.iew.unibe.ch/unibe/rechtswissenschaft/dwr/iew/content/e3911/e4043/e6182/poschung_anna_ger.pdf). Retrieved on 21/09/2017
4. The intellectual aspect of the TCEs cannot be denied because TCEs are human creations and developed through successive generations. Further culture is an important and indispensable aspect of traditional society which has been recognised as a intellectual property. However, the urgency of intellectual property protection to TCEs arose as a direct consequence of economic exploitation of TCEs by the outsiders. Technological development during the late twentieth century, especially in the field of sound and audio visual recording, broadcasting, cable television and cinematography posed a global threat to the world of cultural heritage. During that period, commercially viable expressions of Folklore were subject to widespread commercial exploitation without any economic benefit flowing to the community who were the creators and preservers of folklores. Available at <https://lawlib.wlu.edu/lexopus/works/984-1.pdf>. Retrieved on 19/09/2017
5. Dawnes RD, Sarha A Larid. ‘Community Registries of Biodiversity-Related Knowledge: The Role of Intellectual property in Managing Access and Benefit’, prepared for UNCTAD Biotrade Initiative, 1999, 1. available at <http://www.ciel.org/Publications/CommunityRegistries.pdf>. Retrieved on 28/07/2017
6. During 1970’s, for the first time in the international forum, discussions concerning legal protection of traditional cultural expressions (TCEs) has started. In the United Nations the issue gain importance in the early 1970s, and thereafter it began to consider options for protection, ranging from the customary law of indigenous peoples, to guidelines and recommendations, national laws, regional agreements, protection within the multilateral copyright system, or under a Sui Generis i.e. special type of protection, that would be compatible to the nature of TCEs. Several multilateral institutions and programmes are engaged in the protection of indigenous peoples’ cultural heritage and intellectual property (IP), including the United Nations Environment Programme (UNEP), the Convention on Biological Diversity (CBD), the Food and Agriculture Organization of the United States (FAO), the United Nations Working Group on Indigenous Populations, UNESCO, the International Labour Organization (ILO), the World Health Organization (WHO), the United Nations Conference on Trade and Development (UNCTAD), the World Trade Organization (WTO), the United Nations Development Program (UNDP), the Open-ended Ad Hoc Intergovernmental Panel on Forests and WIPO.
7. Irrespective of the constitutional provisions envisaging protection and preservation of distinct cultural groups (Articles 51A(f) and 371, read with Schedules V and VI), there is no special law prohibiting the exploitation of folklore of these communities without permission. There are many customary norms in these communities prohibiting the use of some of their folklore by outsiders and of those that are confined only to customary practices. ... As there is no law prohibiting use of such folklore by outsiders, increasingly they are being used for commercial gain.... ... The Indian Copyright Act does not contain any provision for protection of folklore or expressions of folklore. There is also no separate legislation along the lines of the Model Provisions, to serve the purpose of offering legal protection to expressions of folklore. P. V. Vasala G. Kutty, 2002.
8. In the absence of any law to protect the intellectual property contents of the cultural heritage, there is no obligation from a purely legal perspective to reward or compensate the communities responsible for development and maintenance of such heritage. Business in folklore-based industries is considered profitable with little or no investment, and have high returns. The beneficiary communities are either not rewarded or are compensated at proportions grossly inadequate with regard to the returns. Ibid, p. 2.
9. Protection of interests of minorities
  - A. 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
  - B. No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them
10. 48A. Protection and improvement of environment and safeguarding of forests and wild life The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country.
11. Art. 46: Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections. The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and

- shall protect them from social injustice and all forms of exploitation.
12. 51A. Fundamental duties: It shall be the duty of every citizen of India (f) to value and preserve the rich heritage of our composite culture;
  13. Kutty Valsala G. Supra note 7
  14. Janke Terri. (2003). 'Minding culture: case-studies on intellectual property and Traditional Cultural Expressions' published by WIPO. Available at <http://www.wipo.int/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>. Retrieved on 24/09/2017.
  15. Supra note 4
  16. Supra note 2
  17. See India Copyright Act, No. 14 of 1957; India Code (1957), S. 13.1 (ruling that copyright subsists in: (1) original literary, dramatic, musical, and artistic works; (2) cinematograph films; and (3) sound recordings)
  18. Srividhya Ragavan, (2001) 'Protection of Traditional Knowledge' Minnesota Intellectual Property Law Review, Vol. 2, No. 2, 2001, Available at [http://hamilton.ou.edu/faculty/facfiles/protection\\_of\\_traditional\\_knowledge.pdf](http://hamilton.ou.edu/faculty/facfiles/protection_of_traditional_knowledge.pdf). retrieved on 24/09/2017.
  19. Ibid.
  20. Section 13(1) (a): Works in which copyright subsists.-  
(1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,-  
(2). original literary, dramatic, musical and artistic works;
  21. Univ. of London Press, Ltd. v. Univ. Tutorial Press, Ltd. [1916] 2 Ch. 601, 608 (U.K.)
  22. Ladbroke (Football) Ltd. v. William Hill (Football) Ltd., [1964] 1 All E.R. 465, 469 (H.L. 1964)
  23. See, Copyright act, 1957 Section 2.(d): "author' means,-  
in relation to a literary or dramatic work, the author of the work;  
A. in relation to a musical work, the composer;  
B. in relation to an artistic work other than a photograph, the artist;  
C. in relation to a photograph, the person taking the photograph;  
D. in relation to a cinematograph or sound recording the producer; and  
E. in relation to [any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created;]
  24. See Indian Copyright Act, No. 14 of 1957; India code (1957), Section 17
  25. Ibid
  26. See India Copyright Act, No. 14 of 1957; Preliminary Section 2(z) (defining "work of joint authorship" as a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of other author or authors).
  27. India Copyright Act, No. 14 Section 2(h) & (p) 1957, 1
  28. See India Copyright Act, No. 14 Of 1957 Sections 22-29(term of copyright)
  29. Section 23 of Copyright Act, 1957: Term of copyright in anonymous and pseudonymous works.-(1) In the case of a literary, dramatic, musical or artistic work (other than a photograph), which is published anonymously or pseudonymously, copyright shall subsist until 63[sixty] years from the beginning of the calendar year next following the year in which the work is first published :  
Provided that where the identity of the author is disclosed before the expiry of the said period, copyright shall subsist until 64[sixty] years from the beginning of the calendar year next following the year in which the author dies.  
(2) In sub-section (1), references to the author shall, in the case of an anonymous work of joint authorship, be construed,-  
A. where the identity of one of the authors is disclosed, as references to that author;  
B. Where the identity of more authors than one is disclosed, as references to the author who dies last from amongst such authors.  
(3) In sub-section (1) references to the author shall, in the case of a pseudonymous work of joint authorship, be construed,-  
A. where the names of one or more (but not all) of the authors are pseudonymous and his or their identity is not disclosed, as references to the author whose name is not a pseudonym, or, if the names of two or more of the authors are not pseudonyms, as references to such of those authors who dies last;  
B. where the names of one or more (but not all) of the authors are pseudonyms and the identity of one or more of them is disclosed, as references to the author who dies last from amongst the authors whose names are not pseudonyms and the authors whose names are pseudonyms and are disclosed; and  
C. where the names of all the authors are pseudonyms and the identity of one of them is disclosed, as references to the author whose identity is disclosed or if the identity of two or more of such authors is disclosed, as references to such of those authors who dies last.
  30. Section 22: Term of copyright in published literary, dramatic, musical and artistic works.-Except as otherwise hereinafter provided, copyright shall subsist in any literary, dramatic, musical or artistic work (other than a photograph) published within the lifetime of the author until 62[sixty] years from the beginning of the calendar year next following the year in which the author dies.
  31. 38. Performer's right -  
A. Where any performer appears or engages in any performance, he shall have a special right to be known as the "performer's right" in relation to such performance.  
B. The performer's right shall subsist until twenty-five years from the beginning of the calendar year next following the year in which the performance is made.  
C. During the continuance of performer's right in relation to any performance, any person who, without the consent of the performer, does any of the following acts in respect of the performance or any substantial part thereof, namely;-  
• Makes a sound recording or visual recording of the performance, or  
• Reproduces a sound recording or visual recording of the performance, which sound recording or visual recording was-  
• Made without the performer's consent, or

- A. Made for purposes different from those for which the performer gave his consent, or
- B. (ii) Made for purposes different from those referred to in Section 39 from a sound recording or visual recording which was made in accordance with Section 39, or
- Broadcasts the performance except where the broadcast is made from a sound recording or visual recording other than one made in accordance with Section 39, or is a rebroadcast by the same broadcasting organisation of an earlier broadcast which did not infringe the performer's right, or
  - Communicates the performance to the public otherwise than by broadcast, except where such communication to the public is made from a sound recording or visual recording or a broadcast.
- Shall, subject to the provisions of section 39, be deemed to have infringed the performer's right.
- C. Once a performer has consented to the incorporation of his performance in a cinematograph film, the provision of sub sections (1), (2) and (3) shall have no further application to such performance.
32. S. 2(qq) of Copyright Act: "performer" includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance;
33. S. 38B. The performer of a performance shall, independently of his right after assignment, either wholly or partially of his right, have the right, (a) to claim to be identified as the performer of his performance except where omission is dictated by the manner of the of the performance; and (b) to restrain or claim damages in respect of any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.
34. Section 38A provides for performer's right as an exclusive right to do or authorize the doing of any of the acts in respect of the performance without prejudice to the rights conferred on authors. The proviso to the section enables performers to be entitled for royalties in case their performances are subjected to commercial use.
35. Australian Copyright Act 1968 (Act No. 63 of 1968 ) Section 84: Definitions: 'Performance' means: (a) a performance (including an improvisation) of a dramatic work, or part of such a work, including such a performance given with the use of puppets; or (b) a performance (including an improvisation) of a musical work or part of such a work; or (c) the reading, recitation or delivery of a literary work, or part of such a work, or the recitation or delivery of an improvised literary work; or (d) a performance of a dance; or (e) a performance of a circus act or a variety act or any similar presentation or show; or (f) a performance of an expression of folklore; being a live performance, whether in the presence of an audience or otherwise.
36. Section 2(1): in this act, unless the context otherwise requires: (zb) "trade mark" means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours: and--
- A. in relation to Chapter XII (other than section 107), a registered trade mark or a mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right as proprietor to use the mark: and
- B. in relation to other provision of this Act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so to indicate a connection in the course of trade between the goods or services as the case may be, and some person having the right, either as proprietor or by way of permitted user, to use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark or collective mark
37. See for e.g. the UNESCO Draft of the Universal Declaration on Cultural Diversity 2001 [http://unesdoc.unesco.org/images/0012/001237/123743\\_e.pdf](http://unesdoc.unesco.org/images/0012/001237/123743_e.pdf) (1 September 2002). For a more in-depth analysis of the interrelation between these themes see W Kymlicka Liberalism, Community and Culture (Clarendon Press Oxford 1989).
38. Ibid
39. WIPO Doc. WIPO/GRTKF/IC/1/3 (March 16, 2001), p.22.
40. Janke, Terri (1999). Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights, Michael Frankel and Company, Sydney, p. 112
41. E.g. in traditional communities, the emphasis may be on regulating who can or cannot create certain works depending upon the artists role and status within the community and whether the artist has undergone the appropriate initiations. Creative expressions often function as records of history or spiritual beliefs and maintaining and propagating a particular meaning is essential to cultural continuity.
42. This concurs with the findings of the four WIPO Regional Consultations in 1999 for Africa (WIPO-UNESCO/FOLK/AFR/99/1), Asia and the Pacific Region (WIPO-UNESCO/FOLK/ASIA/99/1), Arab Countries (WIPO-UNESCO/FOLK/ARAB/99/1) and Latin America and the Caribbean (WIPO-UNESCO/FOLK/LAC/99/1).
43. The problematic cornerstone of the Romantic Author is a central tenet of the Bellagio Declaration, reproduced as Annex B in Boyle (n 99).
44. The Matatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples June 1993, recommendation 1.2. Available at <http://www.ipcb.org/resolutions/htmls/mataatua.html>
45. Gangjee, Dev Saif. Supra note 38
46. See Marci Hamilton, The TRIPS Agreement: Imperialistic, Outdated, and Overprotective, 29 VAND. J. TRAN NAT'L L. 613, 617, 1996.
47. See Christine Haight Farley, Protecting Folklore of indigenous Peoples: Is Intellectual Property the Answer?, 30 CONN. L. REV. 1, 30 & n.1 17, 1997
48. Intellectual property involves the practice of taking public goods and information into the private domain, or what is described as imposing "private toll-gates" or "fences" around knowledge and information that belongs to the public domain. See Rosemary J.

- Coombe, 'Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and The Conservation of Biological Diversity', 6 IND. J. GLOBAL LEGAL STUD. 59 (1998) p. 92-93.
49. Article III of the GATT, together with its corollary Articles V and XI, requires governments to treat all imports "no less favourably" than locally produced goods and bans restrictions on imports. Victor Menotti writes of how this feature of GATT "prevents any government from favouring or protecting its own local industries, or farmers or cultures that might otherwise be overwhelmed by globe-spanning corporations bringing vast amounts of cheap imports that make local or indigenous economies non-viable". See Victor Menotti. How the World Trade Organization (WTO) Diminishes Native Sovereignty. In *Paradigm Wars* 48. (Jerry Mander and Victoria Tauli-Corpuz, eds., 2005).
  50. According to Oxford dictionary 'Commodity' means raw material or primary agricultural product that can be bought and sold, such as copper or coffee.
  51. In 1971, Mr. José R. Martínez Cobo (Ecuador) was appointed Special Rapporteur of Sub-Commission on Prevention of Discrimination and Protection of Minorities in order to suggest national and international measures for eliminating such discrimination.
  52. "Study of the problem of discrimination against indigenous populations", issued in consolidated form in five volumes as document E/CN.4/Sub.2/1986/7 and Add.1-4. Volume V, Conclusions, Proposals and Recommendations, was issued as a separate publication (Sales No. E.86.XIV.3)
  53. See Ikechi Mgbeoji, 'Patents and Plants: Re-thinking the Role of International Law in Relation to the Appropriation of Traditional Knowledge of Uses of Plants' 373 (2001)
  54. According to David Vaver, "[t]he underlying aim is to protect ideas of 'practical application in industry, trade and commerce.'" See David Vaver, *Intellectual Property Law: Copyrights, Patents, Trademark* 119, 1997.
  55. Gangjee, Dev Saif. "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>. Retrieved on 25/09/2017.