

Protection to Intangible Indigenous Cultural Expressions under Indian Copyright Act: A Means or an Obstacle

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Abstract – Traditional Cultural expressions form an instinctive part of our lives. Our identity is associated with their existence. It is a symbol of dignity and integrity. It helps in maintaining social stability and communal relationships. Inspires the entire human world to move forward and offer the humanity with its valuable property. But, these valuable undefined belongings of a community are in endangered condition due to modern techniques of copying and reproduction. That has resulted in cultural crises as many traditional/indigenous/folk culture are gradually being obliterated. As their purity, originality, identity and dignity is passing into oblivion. This has been made possible by justifying and protecting the creations based on these expressions under existing copyright regime. Thereby, affecting the economic social and cultural aspects of claimant's rights for traditional cultural expressions.

The researcher in the given paper tends to discuss the possibilities of 'Copyright laws', with reference to India, as a means of protection for "intangible folklores" or TCEs. To what extent the current framework of copyright gratifies the claims and concerns of holders of TCEs in the protection of "intangible folklores" against misappropriation and inappropriate use or is there any need to develop a sui-generis system for the protection of TCEs.

Keywords: Traditional cultural expressions or Expression of folklore (TCEs/EoF), Indigenous people, Copyright law.

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INTRODUCTION

Culture is a significant part of any domain and is found in the various cultural groups. That has a lot related to the social life of its people and inspires the entire human world to move forward and offer the humanity with its valuable property. Individuals of such identifiable indigenous groups/ communities produce and reproduce the communities' folklore for the benefit of all as per their artistic abilities through the cultural integration. Such creations are not attributable to any individual authorship and represent their benefaction to the community they belong to.

"Culture" traditionally developed in the form of folk music, folk dance, folk tale and folk religion, traditional methods of agriculture and production for the sustenance of a life. That defines the culture, social values, traditions, customs and practices of its people and thus, plays an important role in building social structure, national integrity and communal harmony. But, these valuable undefined belongings

of a community are in endangered condition due to modern techniques of copying and reproduction. Thus, are currently undergoing major changes irrespective of country of origin due to seen and unforeseen factors of technological advancement and globalisation (Torkornoo, 2017).

The concern of indigenous people for their TCEs, *tangible or intangible* form, begins when people outside the community starts creating, technically speaking, the *original* work based on their traditional form of music, stories, art work, handicrafts, dances etc. with the application of modern technology such as photography, audio and video recordings; and film production. Thereafter, obtain copyrights in such creations and becoming the author or owner of the creations based on cultural knowledge instead of designating the holders as rightful owners (Sredharan, 2010). Hence, affecting, the integrity and dignity; economic and moral rights; social and cultural identity of holders of TCEs expressed in different forms by indigenous groups.[3] Additionally,

raising, legal and operational problems[4] for the stakeholders, in the protection for TCEs, from unnecessary exploitation by outsiders claiming copyright protection under the contemporary IP system (Kothari, 2004).

These problems subsist because of the complicated relationship between TCEs and IP laws. That raises not only complex and challenging issues, but, also limitations invited by the current IP system. For instance, claim of TCEs holder for the protection for unlimited duration, recognising the whole community as the owner or holder of TCEs i.e community ownership, protection against contemporary adaptations of folklore, tangibility of work, and identity of author (Sredharan, 2010). These issues and claims of indigenous people are not addressed by the current IP system. For the reason, the foundational work of TCEs being of communal and aged nature and indeterminate authorship, making them insufficient and inappropriate for effective protection (Torkornoo, 2013). Also, that the subject-matter of cultural and IP rights of "indigenous people" is the main concern of Indigenous peoples, all over the world that challenges the validity of contemporary legal framework of IP law (Das, 2004).

The researcher shall turn her discussion to the possibilities of 'Copyright laws' as a means of protection for "intangible folklores" or TCEs. Wherein, the researcher will explore the nature of copyright law and to what extent the current framework of copyright gratifies the claims and concerns of holders of TCEs, in the protection of "intangible folklores" against misappropriation and inappropriate use in the world of digitization. As even, the legal framework of copyright law throws daunting challenges in the subject-matter of protection to TCEs.

What is copyright?

Copyright is a legal right granted to the creator of the work[9], such as literary[10], artistic[11], musical[12], dramatic[13], cinematographic[14], sound recordings[15] work ranging from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings, who is an author[16] of the work within the meaning of the statute[17]. In this century, the scope of copyright has been expanded by adding certain analogous rights, namely, performs, phonograms and broadcasting rights. The ambit has been exponentially expanded by imparting valuable non-economic moral rights to the performers in addition to their economic rights.[18]

Further, copyright are the exclusionary rights that are granted to the owner of the copyright (Llewelyn and Aplin, 2010). The Copyright laws are considered to be both positive as well as negative rights. As they allow its owner to exploit their work and at the same time to prevent others from exploiting them. As a result, any original work or forms of adaptation,

derivative works or transformation of already existing work are protected from exploitation from others, even, if the owner of such new work, adaptation, derivation or translation is not capable of exploiting that new material himself/herself (Mony, 2014).

TCE AND COPYRIGHT: A CRITICAL RELATIONSHIP

Copyright law is a different branch of IPR that protects the original work of musical, artistic, literary and dramatic nature, including cinematographic films, sound recordings. There are many instances, where TCEs are reproduced and documented in different forms and manner by non-indigenous people and have been protected under copyright law as 'original work'. For Instance: (Discussed in details in chapter IV-National regime in India)

- Indigenous paintings are reproduced by non-indigenous people in various forms for sale and distribution. Such as on cloths (printed fabric, T-shirts, dresses and other garments), carpets etc.[21]
- Folk songs and music have also been recorded and reproduced; adapted and arranged; transferred and converted into new compilations and compositions; publicly performed and communicated to the public without the knowledge of the performers. This exploitation has been facilitated through modern digital and internet age. Where, with the click of the mouse it is easily possible to freely cache and download from internet and storage indigenous music in different modes.[22]
- Oral indigenous and traditional stories, tales and poetry are narrated and presented in form of dance and plays; are written down in literature, translated and published by non-indigenous or non-traditional persons.[23]
- Transforming, renaming and commercialising traditional musical instruments into modern instruments by non-indigenous people, for the purpose of giving new form to music and performances. These traditional musical instruments are even used unethically for the purposes of tourism in the form of souvenir items.[24]
- Protection under copyright is also sought on the photographs taken in the live performances of songs and dances by indigenous persons and subsequently reproducing and publicising them on CDs, tape cassettes, postcards and on the

Internet, has also raised similar concerns for protection under copyright.

On all these forms as mentioned above copyright is claimed and acquired easily, thereby, distorting and manipulating the original form of indigenous expressions without recognising the rights, interests of and benefits to the communities holding them. This raises question of testing protection of TCEs under modern copyright regime, as well, as the subject-matter of copyright. Also, the notion behind copyright system is not to protect form, style, ideas, procedure or method of manufacture, operation or mathematical concepts but their expressions. Thus, leaving the question of creations based on TCEs unanswered and allowing imitation of elements, ideas and concepts drawn from TCEs under the concept of “originality”. [25]

This is because; copyright and folklores are two powerful means of communication and expression in different scenario. The only affinity and connection between the two is the creativity based on intellect otherwise the relationship between them is not of ease or harmony. Certain characteristics of copyright conflict with the very nature of folklore can be summaries as under [26].

Copyright	Folklores
Copyright applies for the protection of “authors” rights and requires the identification of the person originating the work	Whereas under folklore the originator is anonymous and traditions are considered to be an attribute of a community
Copyright entrust author or the originator with monopoly rights of exploitation	Whereas in case of folklore no one individual is given monopoly rights and is difficult to diffuse because of the nature of folklore, explicit, indeterminate population
In order to be protected, a work has to be original-work originates from author and not copied.	Author is unidentified and originality cannot be determined as folklores are considered to be collective efforts of the members of community.
Copyright is provided to an author for a limited duration to exploit the work in question.	Expression of folklore cannot be assigned for limited duration as they are the constant result of traditional behaviour, based on repetition from one generation to another or on imitation

Additionally, copyright law draws a distinction between pre-existing traditional culture and folklores in strict sense (*stricto sensu*) and productions based on these pre-existing traditional cultures. Where, pre-existing traditional cultures, such as the so-called folk tales, folk music, folk dances, folk designs or patterns, may often not fit into the notion of literacy and artistic works. This is evident from the provision of Berne convention that makes protection for pre-existing folklores less relevant under Article 7.3.[27] Thus, TCEs are generally not protected by current copyright regime as they are very old (trans-generational); collectively ‘owned’ by one or more groups or communities, are handed down to generations and often do not have an identifiable ‘author’ i.e are of anonymous origin (Bosse, 2017).

To say, TCEs does not comfortably fit in the requirements of copyright. As for “a ‘work’ to be protected by copyright law must bear a mark of ‘individual originality’, as it is ‘author-centric’ and the expression must be in tangible form”. This is the reason why, contemporary productions, such as, new interpretation, arrangement, adaptation, collection or re-packaging in the form of digital enhancement, colorization and the like, created by current generations of society are considered to be ‘original’ work under copyright statute and are sufficiently protected. Even, if the work is based upon or derived from or inspired by pre-existing traditional culture leading to the unwarranted exploitation of TCEs.[29]

Henceforth, the protection of TCEs faces serious difficulty when it comes to seeking protection via copyright laws. **Limitations** that exist in the modern system of copyright law can be discussed as below under the following heads.

a. Limitations in protection of TCEs under the concept of Authorship and Ownership

The rationale behind copyright law is to protect the rights of the author who is the first owner/beneficiary of the work under the copyright law. Further, it is on the basis of “*authorship*” that the originality of the work and the period of protection for the work are decided. As copyright protection is given for a work having “*originality*”, i.e. it should originate from the author and must have minimum degree of creativity (Chawla, 2013).

But the concept itself is not free from contradictions as the term ‘*authorship*’ includes ‘*ownership*’ in the form of assignee, a legal entity, government authorities, international organisation, a licensee, a employer even though they are not defined anywhere but as a general rule of copyright law, they shall have right to exploit the work to their benefit, for the reason of investments being made in the reproduction, distribution, communication of the work.[31] This situation differentiates ‘*authorship*’ with ‘*ownership*’. As “author” is the

creator of the work but the “owner of the copyright” is the person who has the control over the work[32].

Considering these situations, inference can be drawn that the concept of authorship under copyright is unique in the extent to which its exploitation involves not uniplanar, but bi-planner, linkages that confers ‘private property rights’ in individuals. That include the relationship between creative author and the entrepreneur who undertakes exploitation of the material i.e. a copyright is the shared sword of author and owner as they march forth against potential users; at the same time each appropriate such copyright for profits shares, payments for work and artistic integrity. Seen this way, the concept of authorship and ownership provides a fundamental contradiction between collective market economics of commercialization and the individual prerogatives of an author to exercise complete control over how the work is used.[33] Henceforth, for Copyright protection “identification of a known individual creator(s)” is a pre-requisite.

Whereas, in the case of TCEs it is a complex issue, if not impossible, as they are communally created and held by the community as whole in which situation the creator(s) are simply unknown if not identifiable. Hence, the concept of “author” as conceived under copyright is absent in the case of folklores.[34] To say, the notion of copyright is contrary to and incompatible with basic attribute of indigenous culture and their customary laws and system. Where the art belongs to community and not to individual and indigenous authors are subject to intricate policy, rules and responsibilities relating to usage or management rights, which are communal in nature. Further, among indigenous people to ‘own’ does not necessarily or only mean ‘ownership’, as understood in western non-indigenous sense but conveys a sense of stewardship or responsibility for the preservation and safeguarding traditional culture, rather than the right to exclude others from exhausting traditional cultural expressions, which is more analogous to the nature of many IP laws.[35]

From the above discussion it is analysed that copyright law does not recognise pre-existing traditional culture as “work”. As the author is mostly unidentifiable in case of TCEs as they belong to community and not to individuals. Whereas, for “work” to get copyright protection must originate from author, as “the rationale behind copyright law is to protect the rights of the author”, who is an individual, and not communal rights. Because of these reasons the modern structure of copyright protection is not considered to be adequate for the protection of folklore and the attention turned to the possibilities of a *sui generis* solution being the major concern for the stakeholders of TCEs[36].

b. Limitations in protection of TCEs under the concept of Tangibility

It is believed, particularly by common law countries that fixation is an important aspect as it proves the existence of the work, and provides for a clearer and more definite basis for rights. Tangibility is one of the requirements and rationale for protection under copyright law. It is this requirement that leaves intangible and oral expressions of culture, such as oral narratives, tales, dances, rituals, songs or sacred wisdom that are not written down instead passed down to generations through memory, unprotected under copyright law unless and until they are fixed in some material form (Pilch, 2016).

However, Article 2.1 of the Berne Convention provides that copyright protection is also extended to “lectures, addresses, sermons and other works of the same nature” that are basically narratives in nature. But, again the phrase ‘of the same nature’ may restrict the range of oral works that may be protected. From this, it can be inferred that, as general international principle, copyright protection is available for both oral and written works to some extent. Further, Article 2.2 of the Convention makes it clear that it is not a treaty requirement for municipal laws to provide that fixation in some material form is an essential requirement for protection under copyright system. Thus, fixation is not a compulsory international standard for protection under copyright law. Municipal states are, hence, open to provide that works in general or TCEs in particular need not to be fixed in tangible form for the purpose of protection.[38] Yet, as a general rule it is the expression that may be in the form of documentation or recordings or any form, which is required for stronger protection under copyright law. Whereas, most of the forms of TCEs are not documented or recorded by the holders, due to lack of knowledge or ignorance of its value and means of doing so. Hence, make TCEs stand outside the scope of protection under modern copyright regime.

c. Limitations in protection of TCEs under the concept of Originality

Understanding the concept of “originality” is elementary for deciding the question of protection of “work” under copyright law. Though, it is not easy to define it and has not been defined under any jurisprudence, but, has been interpreted differently in different jurisdictions. Nevertheless, “originality” of the work is interpreted to mean that the work flows from author and has not been copied from anywhere. To say, it is the original work of author that has been created by putting in labour, skill, judgment and capital.[39] It has been left to courts to decide whether a work have an element of originality or not and is, thus, interpreted very loosely in a way that the work need not be unique, or even particularly meritorious. This means the concept of ‘originality’ in common law jurisdiction requires low level of creativity i.e., if some new expression, beyond merely reproducing

the traditional form or expression is added, will entitle the “work” for the copyright protection.[40]

This implies that protection can easily be extended to contemporary form of TCEs without any intractable obstacles. Such as, author being subject to customary rules and regulations, concerning, how, when and for what purpose the work could be created, as new and original creations. Further, satisfy the pertinent criteria of “originality” and “authorship”, making no distinction based on ‘authenticity’ or the ‘identity of the author’. In other words, the originality requirement could be met even by a person (author) who is not a member of the relevant cultural community, wherein, the concerned traditional expression originated.[41]

Thus, copyright protects only “original works” wherein many “traditional literary and artistic” productions are not considered to be “original” within the criteria as prescribed under the law of copyright because of its age-old nature. Further, are believed to be in public domain for this reason. To say, the requirement of “originality” not only restricts the copyright protection to TCEs but also hinders, even, the general form of protection to TCEs, by acknowledging the works based on them as “original”. Considering this, several nations, specially developing states, justifies their stand for development of a *sui generis* system, instead of, relying on existing system of copyright law.[42]

d. Limitations in protection of TCEs under the concept of Limited time period

A copyright is given for the limited time period, which differs according to national laws. This is generally life of the author plus sixty years (in India). After which the work falls in public domain. The limitation of time period under copyright law is claimed to be unsuitable for protection of TCEs. Firstly, it fails to meet the claims and needs of indigenous people to protect the expressions of folklore in perpetuity. Secondly, to decide the limited term of protection the date of work’s creation or first publication must be certain and definite, which is unknown in the case of pre-existing TCEs due to their old-age nature. Thirdly, if at all protection is accorded under copyright system the requirement of limited time period would after its expiry place TCEs in the public domain and this would defeat the very purpose of protecting and preserving cultural expressions[43].

e. Limitations in protection of TCEs under the concept of anonymous work

With respect to anonymity the Indian Copyright Act, 1957 under section-23 provides protection to unpublished works whose author(s) is unknown but who can be presumed to be a national of a state.[44] Further, under section 31A in case of unpublished work where an author(s) is unknown or dead or cannot be traced any person may apply to copyright

board (in India) for licence to use the work for the purpose of publication, communication or translation, which is mostly the case in the matter of expressions of folklore.[45] This aspect justifies the protection of TCEs as anonymous work under copyright law. [46] Contrarily, this notion cannot be completely applicable or well suited to the protection of TCE as the holder in the community under certain circumstances and cases are identifiable. Therefore it cannot be said that TCEs are always the work of anonymity (Pilch, 2016). However, these different opinions create contradictions for the protection of TCE under copyright regime for lack of clarity on the concept and scope of TCEs with respect to ‘identity of author’ for deciding the ownership rights in TCEs.

f. Limitations in protection of TCEs under the concept of Derivatives, Adaptations and transformations

“Adaptation is the act of altering a pre-existing work in a way that a new work comes into being”.[48] The argument of the supporters of TCEs is that the protection of *adaptations, derivatives or transformations* created on the basis of TCEs is justified by the modern copyright system. By considering even a trivial change in the format without taking into consideration the aspect of adding significant amount of new material to the work created i.e. a copyrighted work is converted from one format to another such as the conversion of a novel into a screenplay, a play into a novel, for eg: borrowing the opening musical tag and the words, but not the melody, from the first line of the song with completely different lyrics and the music. The same is protected under the current legal regime of copyright law as new and original work. Though, in case of adaptation and derivation, to some extent the work created could be considered as infringing the original work, if the work is created in the absence of a licence from the owner of the copyright and if it is substantially based on the original work of the author. Further, protection does not extend to such part of the work in which the material has been used unlawfully, in fact, extends only to the material contributed by the author not being the pre-existing material that is included in the work. Whereas, a transformation would not infringe the copyright in the original work and as it would not require any licence to be obtained from the owner of the copyright in the original work. This because, the transformation would only use raw data, idea in this context, in the original work, that are not protectable under the law of copyright. Furthermore, in regard to protection of adaptation as copyrighted work there are different views. One opinion is that a person is given no right in an adaptation of the original work by prohibiting, prima facie, the use of the original work. This argument supports the prevention of unwarranted exploitation of TCEs under copyright system. The other argument is to give protection to adaptations under copyright law to the extent of the

“new” and original material contained in the adaptation which was not present in the original work. To say, the material is existing and standing alone if separated from the original work and is independent of the original work for its existence. In which case there may be possibility of misappropriation of TCEs by the outsiders (Sikia, 2018).

As a general rule of copyright law it is the second opinion that is adopted for the copyright protection of a work. Thus, from the notion behind the copyright law it can be inferred that it validates the misappropriation of traditional cultures and, also, disregards the multi-cultural notions of communal authorship and creativity, with no economic benefits to the community of origin. Thereby, undermining an important source of creation to the pool of knowledge and substantially diminishing the development of the global marketplace.[50]

TCES UNDER FAIR USE DOCTRINE

The object of modern IP system is to balance the exclusive rights of copyright owners with public access to protected works. This rationale permits the use of copyrighted work for certain purposes. Such as for criticism, review or comment; teaching, in libraries, non-commercial research or private study; reporting news or current events; use in the course of legal proceedings. This is referred to as “fair use doctrine”, which is an exception to the general rules of copyright law.[51] According to this exception, some cases of exploitation outside the traditional community and customary context, only if they fall within defined acts of ‘fair practice or use’, will not amount to misappropriation of TCEs. It can also extend to the making of recordings and other reproductions of TCEs for the purposes of their inclusion in an archive or inventory as well for the non-commercial cultural heritage safeguarding purposes. Further, the relevant community is acknowledged as the source of the TCEs/EoF where practicable and possible.[52]

From the above discussion, it can be opined that exploitation of TCEs would not be considered as offensive use outside the defined boundaries of the concerned community provided the motive behind exploitation is purely for purposes other than “commercial gain”. Though, keeping the valuable information protected is one of the important concerns, but, at the same time it must be born in mind that the more knowledge and information is disseminated to other, more we can assure its preservation and one must not, also, forget to acknowledge and share benefits with the source of this knowledge i.e. indigenous community.

In this regard protagonists have suggested that a new *sui generis* right for the protection of TCEs ‘would have to balance the subjective rights of indigenous peoples or national states, with the public

interest in a public domain’. Further, such right ‘should provide for a legal regime of access and benefit-sharing that may be drawn on the basic scheme of intellectual property law, granting the stakeholder holders a bundle of rights according to their claims, while at the same time providing exception of fair use in order to protect the public interest’.[53]

POSSIBILITY FOR PROTECTION OF TCES UNDER COPYRIGHT

The supporters of copyright law consider it (including the provision of economic rights and the moral rights) to be well suited law and means for the protection of intangible TCEs, and meeting the claims and concerns of indigenous people and traditional communities. This is because, as per the proponents, it is only the system of IPRs which is capable of ensuring incentives and benefits, for the dissemination of new intellectual creations and innovations, if their full potential is explored. It is also believed, that such protection will motivate indigenous people to create and innovate on the basis of their cultural traditions. Additionally, will stimulate contribution, not only, to their but also to nations economic development.[54]

Besides this, it is asserted that the existing rights must be adapted in a way favourable to the claims, objects and needs of indigenous people. Further, special measures for the protection and remedies for the infringement, specially, culturally offensive acts, must be laid down depending upon the nature of the work. For instance, in case of oral transmission (work that are not fixed in any form) providing the remedy of compensation for use of TCEs must be taken into consideration either through receiving royalties or through damages for infringement under copyright law.[55]

However, the path of protecting TCEs/folklores in their “pure form” through copyright system is still debatable and unresolved. Further, efficient step has yet not been streamlined in this direction and lacks proper execution of any law even by the authorities. This is because, in order to provide protection to TCEs one need to locate the author, which again give rise to practical difficulties as author is not identifiable. Though, ‘moral rights’ are to some extent, seen as possible solution to the problem of protection to TCEs/ folklores considering its basic nature and characteristics.

Protection as Moral rights: The Berne convention developed the concept of non-transferable (inalienable) moral rights. The author shall have a right to claim the authorship of the work and to object to derogatory treatment of the work prejudicial to the author’s honour and reputation (Article 6 *bis*). These rights are independent of author’s copyright and the remedies open to the

author, as it reflects non-economic interests of the author. These rights are available to the author even though he/she is no longer the owner of the physical form in which the work was first created and copyright claimed (MacQueen, et. al., 2007). To say, moral rights are the additional rights on the author of a literary work in contrast to the owner of a copyright. The special protection of moral rights can be claimed “even after the assignment either wholly or partially of the said copyright”. It, thus, overrides the terms of the contract of assignment of the copyright. To put it differently, the contract of assignment would be read subject to the provisions of moral rights and the terms of contract cannot negate, but instead be consistent with, these special rights.[57] However, it has been believed that protecting TCEs as a moral right works best if we imagine that indigenous peoples have lived in, roughly, the same area for hundreds, if not, thousands of years and that its language, culture, and practices have remained largely constant (Munzer and Raustiala, 2016)

From the above characteristics it can be analysed and argued that moral rights relate to the non-economic rights of the author, specially, with respect to artistic creations. Thus, limiting the scope of protection to TCEs/ folklore’s under the copyright system with respect to the specific subject-matter (artistic creations) and by not meeting up the claim of ‘economic benefit sharing’. Further, right to exploitation remains with the owner and not with the author which again creates practical hurdles for indigenous people to sustain their claims and needs.

Protection as Performer’s right: Another legal vehicle, wherein protections to TCEs are justified, is through indirect protection by means of neighbouring Rights (performers[59], broadcasting and phonograms right[60]). Where-under, if the protection of performers’ right is extended to the performers of such expressions of folklore the performances will also enjoy protection as EoF. Neighbouring rights are considered to be derivatives and, in general, it is the investment in technical and organisational skill that is being protected rather than the creative efforts. For few authors ‘performers rights’ are considered to be ‘related rights’ as the rights conferred to performers are ancillary to and independent of any copyright in any work created. Whereas, for few, the introduction of the concept of ‘moral rights’ for both, copyright and performers right, the analogy between the two has become even closer (Bhattacharjee, 2005). However, under national law performers rights are considered to be related rights and this stream of law is read as “copyright and related rights”. Thus, in any case, as per the concept of “copyright and related rights” TCEs, if covered, will fall under “related rights” and not as “copyright” over a work or creation.

Also, according to Article 2(a) of the WIPO Performances and Phonograms Treaty, 1996 (WPPT) IP protection is extended to performers of EoFs i.e. they receive protection for the aural aspect

of their performances. There are, also, international provisions relating to this aspect, such as, Tunis Model Law, Model Provisions etc.[62] Since, India is not a signatory to WPPT or has adopted these model laws and provisions in her national laws, she is not bound by their mandates. Though, India has introduced amendments to performer’s right by inserting provisions for ‘moral rights’ of the performers under section 38B of the Act, 1957. Yet, there is no direct reference to the protection of TCEs under current copyright Act, 1957 nor there is any special provision or separate legislation along the lines of the ‘Model Provisions, 1985’ for the purpose of protection to EoF/TCEs.

The EoFs/TCEs may be included as ‘performers right’, but not as ‘work’, as understood under copyright law and does not prevent copying of EoFs in the same manner as a ‘work’ is protect from being copied under copyright law. To say, the protection is given only to the performers, producers of phonograms or broadcasting organisations of expressions of folklore as performances, fixations or broadcasts under the concept of neighbouring rights as understood generally in most of the cases and not as that of author or owner.[63] This implies that the said protection of “related rights” cannot be truly called protection of folklore because, explicitly, there is no mention of the term ‘folklore’. Also anyone can perform EoFs and claim protection over such performances. It is also, considered as just an additional clause(s) to the Copyright Act (Chothazo, 2016) Further, folk art falls outside the scope of protection by means of “neighbouring rights” or “related rights”, thus limiting the ambit of subject-matter to be protected. Furthermore, neighbouring rights are protected for limited duration as copyrights are. Henceforth, the protection of folklore does not fit and fully satisfy the need for legal protection against inappropriate exploitation of TCEs, even, under the concept of neighbouring rights, as under the law of copyright.[65]

These reasons formulate the grounds for discussion to establish a *sui-generis* system (i) for the protection of the IP aspects of EoFs considering the performances as performance of “literary and artistic work”; (ii)for an adequate protection against unauthorized exploitation; (iii) for the protection of rights of producers of phonograms containing recordings of performances of recitals of folk tales, folk poetry, folk songs, instrumental folk music or folk plays; (iv) for the protection of rights of the broadcasting organizations that broadcast an expression of folklore; (vii) for establishing certain laws aimed at the preservation and protection of moving images of folklores, for example, cinematographic, television or video-graphic productions of expressions of folklore.[66]

However, the step to establish a *sui generis* system[67] would be a successful endeavour only if

adopted by amending the provisions of copyright to suit the requirements of stakeholders and without treating TCEs as a part of public domain. This includes, firstly, extending protection without considering their old age nature and other requirements under copyright law, namely, originality, authorship and tangibility.[68] Secondly, protection for indefinite period considering the special nature of indigenous groups, that would face dire threats to their cultural vitality if the duration is not made to be indefinite. As after the expiry of stipulated time period, prescribed for the protection of creations, the work would eventually fall into the public domain for exploitation by everyone.[69] Further, countries like U.S.A. stated that, "it is practically not viable to afford 'full' protection for TCEs only by amending the law of copyright, as copyright law by its basic nature and characteristics is not suitable to protect TCEs, as it protects only original expressions, leaving works that have become an intrinsic part of our history and culture to be in public domain".[70]

Conversely, having a *sui generis* system is, by few authors, believed to be an impractical solution due to the varied nature of TCEs world-wide. Yet many proponents support the establishment of *sui generis* system as the potential solution to the problem of misuse and inappropriate commercial exploitation of cultural expressions.

ANALYSIS

The supporters of TCEs considered the protection of folklore/TCEs necessary not only to prevent illicit commercial exploitation but also as a means of ensuring the integrity of communal and national identity. With the advancement in technology and digitalisation the current generation is undergoing drastic changes. That not only offers challenges but also means to deal with the problems relating to exploitation of TCEs. To say, it can be treated as an opportunity that facilitates conservation and preservation of expression of folklores (through documentation of expressions of folklores/TCEs) as well as an impending threat in the procedure for safeguarding of TCEs/folklores in their "original and pure form". This is because modern IP regime treats TCEs as a part of the public domain. That facilitates non-indigenous and non-traditional persons (as well as indigenous and traditional persons) to obtain copyright over, so-called, 'new' work rooted in cultural expressions or on one incorporated in derivative works, such as adaptations and arrangements of music, plays, and dramas.[71]

Further, it is possible that the general exceptions under copyright system, namely fair use doctrine, is misused by the outsiders as this doctrine allows exploitation of contemporary, tradition-based TCEs for different purposes (as already discussed). Though, the use may be initially for non-commercial exploitation but possibly the end result would amount

to commercial gains to the user from the work build upon indigenous knowledge, by claiming copyright protection and undermining the indigenous people's customary rights under their customary laws and protocols.[72] This is because the "balance of interests" under the current copyright regime is in favour of the protection of author's right in the creations. This implies that outsiders are free to create and innovate on the basis of cultural traditions and acquire economic benefits out of their exploitation. Additionally, because of, ineffective remedies and inequivalent reparation for the cultural, economic and non-economic damages caused to EoFs, modern copyright system is not considered to be an effective means of deterring infringing use of cultural expression in an offensive manner. These notions trouble the cultural communities who may desire to refute or at least limit the ability of an outsider from enjoying copyright in creations derived from TCEs of that community[73].

Thus, measures under copyright law are considered to be insufficient for protection to and preservation of TCEs. Considering, the limitations as discussed in the paper in controlling the commercial exploitation of cultural expressions. To say, if tested under the requirements of copyright law, explicitly-individuality, originality, tangibility, fixed duration etc. it fails to be the right kind of law. As, already discussed, TCEs are age-old traditions that are the outcome of imitation, slowly passed down to generation, with no individual identity or author but a collective work of community whose protection cannot be fixed for a particular duration.

Hence, copyright law should instead embrace cultural and economic realities connected to the use of TCEs in order to cater to the needs and concerns of indigenous people. Accordingly, national law should be modified considering unauthorised commercialisation and commodification of cultural expressions everywhere today or to establish a well- balanced *sui generis* system incorporating provisions compatible with indigenous people, specially, concerning ownership vesting with the community for perpetuity or to develop licensing guides for audiovisual fixations of expressions of folklore held by existing archives and research institutions, in favour of stakeholders of indigenous knowledge or establishing national institutions for the purpose of preservation and protection of TCEs.

Another important step that can be taken at national levels is to identify and document the existing TCEs to ensure effective protection and preservation. For this a nation must establish 'Traditional cultural committees' entrusted exclusively with the function of identification, documentation and archiving of folklores existing in different part of the nation with the authority to penalise for unwarranted commercial exploitation. Hence, to construct an ideal situation we need to

come up with new rules of copyright protection or 'alike *sui generis*' system without which the situation remain an imaginary world.

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21. For instance: The Olympic museum posted three Australian Aboriginal artwork on the web without the permission of aboriginal people and encouraged downloading of artwork for use as wallpaper , to accord with the Sydney Olympic Games of 2000. The artwork was directed to be removed from the web page on ground of offensive use. It was regraded as the infringement of both copyright and moral rights. As the mode of settlement the compensation was granted along with a written letter of apology endorsed by the President of the Olympic Museum Foundation.
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