

# ● PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/ FOLKLORE: INTERNATIONAL AND NATIONAL PERSPECTIVES



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## **Abstract**

*Traditional Cultural Expressions (TCEs) are the creative expressions in which traditional culture and knowledge are embodied. These have deep connection with the culture, religious practices and economy of the indigenous communities. Realizing the tremendous importance of the subject matter initiatives have been taken at international level in the form of WIPO draft. Regional and national initiatives are also there. Most of these indicate that the copyright approach with some modifications has been used to protect folklore, however, copyright law has its own limitations. The proprietary rights regime assumes that an individual will possess the rights whereas in case of TCEs beneficiaries will be communities. The paper examines the international and national initiatives on the subject. It is argued that at national level establishing institutional framework having expertise on such a subject of immense diversity is a real challenge. As long as a legal framework does not come into existence the process of documentation may be the only method to ensure that some protection is provided to the TCEs of India.*

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## **Key words**

*Traditional Cultural Expressions, Folklore, Cultural heritage, Performer's Rights, Copyright, Intellectual Property Protection and Sui generis protection.*

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## **I. INTRODUCTION**

Traditional Cultural Expressions (TCEs) are described as the creative expressions in which traditional culture and knowledge are embodied or expressed and sometimes called as expressions of folklore<sup>1</sup>. These are the area which may be covered under the

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<sup>1</sup> J. Michael and Philip Schuler, *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries*(Washington: The International Bank for Reconstruction and Development / The World Bank, 2004); See also, Valerie J. Phillips, "Indigenous Rights to Traditional Knowledge and Cultural Expressions: Implementing the Millennium Development Goals", 3 *Intercultural Human Rights Law Review*, 2008, pp.191-197; Hannu Wager, "Biodiversity, Traditional Knowledge and Folklore: Work on Related IP Matters in the WTO", 3 *Intercultural Human Rights Law Review*, 2008, pp.215-227; Molly Torsen, Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues", 3 *Intercultural Human Rights Law Review*, 2008, pp.199-214;and Cathryn A. Berryman, "Toward More Universal Protection of Intangible Cultural Property", 1 *Journal of Intellectual Property Law*, 1994, pp.293-310.

heading collective rights and which apparently does not fit into the traditional understanding of intellectual property rights. TCEs reflect a community's cultural and social background and consist of characteristic elements of a community's heritage. They are often made by authors who are unknown or unidentified, or by communities or individuals recognized as having the right, responsibility or permission to create them in accordance with the customary law and practices of that community. TCEs are often evolving, developing, and being recreated within source communities<sup>2</sup>. TCEs are still subject to evolution and that these cultural endeavors do not exist in a vacuum from other considerations and aspirations in human development<sup>3</sup>. Intellectual property rights and issue of its protection have long been a concern of societies in which traditional cultural expressions have strong influence on traditions and culture<sup>4</sup>. It is relevant to mention that most of the societies have denied protection to TCEs on the ground that these do not pass the criteria of IP but have allowed patent and copyright protection for the creations based on TCEs undermining the tremendous contribution of the generations in developing the expression. The preamble of TRIPs Agreement refers to this notion by recognizing that intellectual property rights are "private rights". These are considered to be the basis of economic individual freedom and a market economy<sup>5</sup>. Harshavardhan Ganesan, however, argues that "our conception of property have been constantly evolving, engulfing many items which otherwise wouldn't have an IP right, into the property net. Why not Cultural Property as well? I find it baffling that items like folklore, folkdances, medicinal knowledge, etc. which is clearly within the confines of Copyright Law or Patent Law are ostracized and doomed to rest in The Twilight Zone of Law merely because they do not adhere to the austere requirements of the outdated statutes".<sup>6</sup>

In recent years, indigenous peoples, local communities, and governments mainly in developing countries have strongly demanded IP protection for these traditional forms of creativity and innovation, which under the conventional IP system, are generally regarded as being in the public domain, and thus free for anyone to use<sup>7</sup>. Alexander Peukert observes that in fact, the public domain is the fundamental principle from which IP rights depart. These are "islands of exclusivity in an ocean of freedom. Therefore, they

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<sup>2</sup>Janice T. Pilch, "Traditional Cultural Expression", available at: <http://www.librarycopyrightalliance.org/storage/documents/issuebrieftce.pdf>, 2009, at 2.

<sup>3</sup>Leena Desai, "Traditional Cultural Expressions", V(XI) Singh and Associates, 2012, at 13.

<sup>4</sup>Bernard Jankee, "Policy objectives for the Protection of Traditional Knowledge, Folklore/Traditional Cultural Expressions and Genetic Resources in the Caribbean: The Role of Government", available at: [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtk\\_kin\\_08/wipo\\_grtk\\_kin\\_08\\_presentation03.pdf](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtk_kin_08/wipo_grtk_kin_08_presentation03.pdf)

<sup>5</sup>Alexander Peukert, "Individual, Multiple and Collective Ownership of Intellectual Property Rights: Which Impact on Exclusivity?", in Annette Kur & Vytautas Mizaras (eds) *"The Structure of Intellectual Property Law. Can One Size Fit All?"* Aldershot, UK and Brookfield, U.S.: Edward Elgar, 2011, 195-225 available at: <http://ssrn.com/abstract=1563990>

<sup>6</sup>Harshavardhan Ganesan, Justifying Group Intellectual Property: Applying Western Normative Principles to Justify Intangible Cultural Property, available at: <http://ssrn.com/abstract=2715809>

<sup>7</sup>"Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions", World Intellectual Property Organization, 2015, at 10, available at: [http://www.wipo.int/edocs/pubdocs/en/tk/933/wipo\\_pub\\_933.pdf](http://www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf)



are limited in scope and time. Any knowledge must at some point in time become part of the public domain to fuel a free public discourse and competition. A kind of cultural conservation via IP is incompatible with this thinking. It is true that indigenous communities reject such a concept of the public domain. Since traditional knowledge was never protected under classical IP, it could not be said to have entered the public domain. They claim instead that this knowledge has been, is, and will be regulated by customary law to be recognized by governments. The problem with that attitude is that one cannot claim exclusive protection akin to classical IP without respecting the public domain, which is the other side of the coin<sup>8</sup>. Indigenous people, local communities and many countries reject a public domain status of TCEs and argue that this opens unwanted misappropriation and misuse<sup>9</sup>. National governments have enacted legislation partially based on the Model Provision for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 1982<sup>10</sup>. Further, realizing the sentiments of the member countries, in 1999, WIPO launched certain new initiatives as reflected in its Program and Budget for the biennium for exploration of the issues relating to intellectual property rights of holders of indigenous knowledge<sup>11</sup>. In India, there is a strong demand for looking towards a mechanism for the protection of folklore and it is not confined to the limited scope offered in the definition of expressions of folklore in the Model Provisions.<sup>12</sup>

## II. TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE: MEANING AND SIGNIFICANCE

As mentioned before the term traditional cultural expression refers to the work of indigenous people and the traditional communities. For examples a folk dance in which customary costumes and masks are used and are intrinsically linked to the performance. These expressions may include music, stories, handicrafts, musical instruments, words, names, performances, textile, carpet designs, etc. The most significant aspect of these expressions is that these have strong social, cultural, spiritual, economic, scientific, intellectual and educational value; these also represent the heritage of a community. Another significant aspect of TCEs is its dynamism in the sense that these are not static. These expressions pass from one generation to another, either orally or by imitation. These expressions are often primarily created for spiritual and religious purposes and constantly evolving, developing and being recreated within a community<sup>13</sup>.

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<sup>8</sup> Alexander Peukert, *supra* note 5, at 8.

<sup>9</sup> "Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions", World Intellectual Property Organization, 2015, at 10, available at: [http://www.wipo.int/edocs/pubdocs/en/tk/933/wipo\\_pub\\_933.pdf](http://www.wipo.int/edocs/pubdocs/en/tk/933/wipo_pub_933.pdf)

<sup>10</sup> In 1982, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO) adopted the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions.

<sup>11</sup> P.V. Valsala G. Kutty, "National Experiences with the Protection of Expressions of Folklore/ Traditional Cultural Expressions: India, Indonesia and the Philippines", *World Intellectual Property Organization*, at 23 available at: [http://www.wipo.int/edocs/pubdocs/en/tk/912/wipo\\_pub\\_912.pdf](http://www.wipo.int/edocs/pubdocs/en/tk/912/wipo_pub_912.pdf)

<sup>12</sup> *Ibid.*

<sup>13</sup> See, Comments and observations by the National Commission for the Development of Indigenous Peoples

The term Traditional Cultural Expressions (TCEs) in the international community is also referred to as “folklore” and some nations prefer using the term “folklore” in their national copyright laws. The term “folklore” means the traditional beliefs, myths, tales, and practices of a group of people, transmitted orally<sup>14</sup>. The term “folklore” was coined by William Thomas in the year 1846. Mr. Thomas meant to include manners, customs, observations, superstitions, ballads, proverbs and so on, in the term ‘folklore’, which he summarized as the lore of the people.<sup>15</sup>

Dan Ben-Amos notes that definitions of folklore are as many and varied as the versions of a well-known tale. Folklore became the exotic topic, the green grass on the other side of the fence, to which they were attracted but which, alas, was not in their own domain<sup>16</sup>. It is clear therefore that any discussion on TCEs requires us to travel through various disciplines including culture, language, literature, history and anthropology apart from others. According to the American Folklore Society, folklore is a broad umbrella term that encompasses traditional art, literature, knowledge, and practice disseminated largely through oral communication and behavioral example<sup>17</sup>. While folklore scholars tend to disagree about how far the scope of folklore extends, there appears to be a consensus that the term is relatively broad, and is deeply rooted in an oral tradition centered in local communities<sup>18</sup>.

The last quarter of the twentieth century witnessed an unprecedented pace of activities in the area of legal protection of folklore<sup>19</sup>. The tremendous importance of the subject led the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO) to evolve an acceptable framework at international level. This resulted in the formulation of Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions<sup>20</sup>. The draft of guidelines for WIPO defines ‘expressions of folklore’ as any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or manifested which are products of creative intellectual activity, including individual and communal creativity; characteristic of a community’s cultural

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(CDI) on “Gap Analysis on the Protection of Traditional Cultural Expressions/ Expressions of Folklore and Traditional Knowledge”, Draft Working Documents prepared by the Secretariat of the World Intellectual Property Organization (WIPO), 2008, at 4.

<sup>14</sup> Leena Desai, *supra* note 3, at 10.

<sup>15</sup> Simon J. Bronner, *Following Tradition: Folklore in the Discourse of American Culture* (Utah: Utah State University Press, 1998) at 2; The term ‘folklore’ coined by William Thomas in 1846 received wide recognition and entire popular literature, observances, practices, customs, rituals and superstitions of humans are grouped under the wide category of folklore now. See for details Archer Taylor, *Folklore and the Student of Literature*, II *The Pacific Spectator*, 1948, pp.216-221.

<sup>16</sup> Dan Ben-Amos, “Toward a Definition of Folklore in Context”, 84(331), *Journal of American Folklore*, 1971, pp.3-15.

<sup>17</sup> American Folklore Society, About Folklore, What is Folklore, available at: <http://www.afsnet.org/aboutfolklore/aboutFL.cf>. Folklore includes folk traditions ranging from planting practices, dance, and instructions on how to build an irrigation dam, and stories.

<sup>18</sup> Michael Jon Andersen, “Claiming the Glass Slipper: The Protection of Folklore as Traditional Knowledge”, *Case Western Reserve Journal of Law, Technology & the Internet*, Volume 1, Number 2 Spring 2010, at 150.

<sup>19</sup> P.V. Valsala G. Kutty, *supra* note 11, at 1.

<sup>20</sup> World Intellectual Property Organization and United Nations Educational, Scientific and Cultural



and social identity and cultural heritage; and maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community<sup>21</sup>. The definition includes a wide range of creative works and it is not only limited to tangible medium. Both individual and anonymous communal works may qualify as expressions of folklore. The forms folklore may take range from stories and oral narratives to glassware and architecture. The definition thus makes copyright, trademark, and patent regimes relevant. It is also relevant to note that indigenous expressions, heritage, and knowledge have different and sometimes interchangeable names in the legal community; it includes the intangible forms, such as oral traditions, or folkloric expressions that fall outside the traditional notions of arts and crafts<sup>22</sup>.

The foregoing suggests that the biggest challenge is defining the term folklore. Folklore is a living phenomenon which evolves over time. It is a basic element of our culture which reflects the human spirit. Folklore is thus a window to a community's cultural and social identity, its standards and values. Folklore is usually transmitted orally, by imitation or by other means. Its forms include language, literature, music, dance, games, mythology, rituals, customs, handicrafts and other arts. Folklore comprises a great many manifestations which are both extremely various and constantly evolving. Because it is group-oriented and tradition based, it is sometimes described as traditional and popular folk culture.<sup>23</sup>

Indigenous expressions, heritage, and knowledge have different and sometimes interchangeable names in the various communities<sup>24</sup>. The American Heritage Dictionary defines folklore as the "traditional beliefs, myths, tales, and practices of a people, transmitted orally."<sup>25</sup> The World Intellectual Property Organization (WIPO) has defined "expressions of folklore" as characteristic elements of traditional artistic

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Organization, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, 1985, available at: [http://www.wipo.int/tk/en/documents/pdf/1\\_982-folklore-model-provisions.pdf](http://www.wipo.int/tk/en/documents/pdf/1_982-folklore-model-provisions.pdf)

<sup>21</sup> Christoph Antons, *Traditional Knowledge, Traditional Cultural Expressions, and Intellectual Property Law in Asia-Pacific Region* (Chicago: Kluwer Law International, 2009), at 3.

<sup>22</sup> For traditional knowledge and other forms of indigenous and cultural rights, see "Traditional Knowledge, Intellectual Property, and Indigenous Culture" Symposium issue of the *Cardozo Journal of International and Comparative Law* at 11 *Cardozo J. Int'l & Comp. L.* 239 (Summer 2003). See also Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 *Am. Univ. L. Rev.* 769 (1999); Paul J. Heald, *Mowing the Playing Field: Addressing Information Distortion and Asymmetry in the TRIPs Game*, 88 *Minn. L. Rev.* 249 (Dec. 2003); Shubha Ghosh, *Globalization, Patents, and Traditional Knowledge*, 17 *Colum. J. Asian L.* 73 (Fall 2003).

<sup>23</sup> Cathryn A. Berryman, "Toward More Universal Protection of Intangible Cultural Property", 1 *Journal of Intellectual Property Law*, 1994, pp.293-310 as quoted in *Jo Carrillo*, "Protecting a Piece of American Folklore: The Example of the Gusset", 4(2) *Journal of Intellectual Property Law*, 1997, at 244.

<sup>24</sup> Paul Kuruk, "Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States", 48 *Am. Univ. L. Rev.* 769 (1999).

<sup>25</sup> Definition from the American Heritage Dictionary online edition, available at: <http://www.bartleby.com/61/72/F0227200.html>

<sup>26</sup> Rory J. Radding, "Interfaces Between Intellectual Property and Traditional Knowledge and Folklore: A U.S.

heritage developed and maintained by a community<sup>26</sup>. It also encompasses the individuals who reflect “the traditional artistic expectations of such a community” either through verbal, musical, visual, and active physical expressions such as dance<sup>27</sup>. WIPO itself notes that there are many definitions of traditional knowledge and folklore, and it may not be possible (or necessary) to develop an all-purpose term<sup>28</sup>. Thus the task to define the term remains unaccomplished. On the other hand it is argued by many that a regime of protection is not possible unless the term is defined with precision. In this context it is believed that as consensus on the definition has not evolved it is premature for us to finally evolve the protection regime<sup>29</sup>. It is also significant that this lack of consensus is not due to a lack of effort. WIPO's definition in *Model Laws* of 1982 is based on *Tunis Model Law on Copyright* of 1976. The Tunis definition of folklore included “all literary, artistic, and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage.”<sup>30</sup> Recent attempts in the direction is seen in the form of the *Bangui Agreement* of 1999, *Panama Law No. 20* of 2000, and the *South Pacific Model Laws for National Laws* in 2002. In the light of the uncertainty about the precise definition it remains to be answered whether such a wide range of knowledge can even be protected. Despite the above, literature and different national initiatives suggest that there may be two mechanisms for the protection of TCEs: (1) protection for TCEs through existing IP laws, or (2) sui generis protection.

### III. IP PROTECTION FOR TCEs: INTERNATIONAL PERSPECTIVES

Adequate protection of expressions of folklore has been claimed, discussed and tested for a much longer time than protection of other aspects of indigenous heritage, such as traditional knowledge or the traditional names, signs and insignia. It seems that an ideal solution has not yet been found.<sup>31</sup> In 1967, the Berne Convention for the Protection of

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Perspective”, available at: [http://articles.corporate.findlaw.com/articles/file/00310/008753#\\_ednref3](http://articles.corporate.findlaw.com/articles/file/00310/008753#_ednref3) (quoting WIPO's study, *WIPO/GRTKF/STUD YI*)

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.* The term, “traditional knowledge” has come to be focused narrowly on the knowledge of indigenous people regarding medicinal and usually patentable subject matter. However this term, like defining “expressions of folklore” lacks any true consensus.

<sup>29</sup> The International Intellectual Property Alliance (IIPA) noted “that the inclusion of provisions on folklore in a regional trade agreement is premature.” It went on to state the simple reality facing proponents today: “There is no international consensus on how to address this issue.” Michael N. Schlesinger, *IIPA Comments on the FTAA IPR Negotiating Text*, August 22, 2001, available at <http://www.iipa.com/rbi/2001Aug22FTAA.pdf>

<sup>30</sup> See WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Comparative Summary of Sui Generis Legislation for the Protection of Traditional Cultural Expressions*, Annex April 28, 2003, available at: <http://www.wipo.int/documents/en/meetings/2003/igc/pdf/grtkfic 5-inf3.pdf>

<sup>31</sup> Silke von Lewinski, “Adequate Protection of Folklore- A Work in Progress”, in Paul Torremans (ed.), *Copyright Law A handbook of Contemporary Research*, Edward Elgar, Cheltenham, U.K., (2007), at 207.

<sup>32</sup> The Berne Convention for the Protection of Literary and Artistic Works, 1886 as revised at Stockholm on July 14, 1967.



Literary and Artistic Works provided a mechanism for the international protection of unpublished and anonymous works<sup>32</sup>. It aims at providing international protection for expressions of TCEs.<sup>33</sup> As the background to Article 15(4) of Berne implies, at least some folklore may fall within the definition of literary or artistic works, even if they are unpublished works of unknown authorship. Some laws include folklore partially or wholly within the scope of literary and artistic works,<sup>34</sup> while others define it altogether distinctly either within copyright laws or in *sui generis* laws for protection of folklore.<sup>35</sup> The interpretation of this term from a copyright perspective can often turn on what characteristics an expression of folklore might lack, by contrast with a copyrighted work: for example, underlying originality, individual authorship, a fixed form, and clear boundaries. For instance, folklore “must be distinguished from specific works created by distinguishable persons or groups of persons at a certain time on the basis of folklore or interpreting certain folkloric elements.”<sup>36</sup>

In 1976, the Tunis Model Law on Copyright for Developing Countries was adopted. It includes *sui generis* protection for expressions of folklore.<sup>37</sup> Susanna Frederick Fischer observes that recognizing the doctrinal difficulties with protecting folklore under copyright law, the drafters of the Model Provisions preferred a *sui generis* type of protection. They chose to use the term “expressions of folklore” in the Model Provisions rather than the more typical copyright law term “works of folklore” in order to make clear that the protection was *sui generis*, not copyright.<sup>38</sup> In 1982, an expert group convened

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<sup>33</sup> *Id.*, Article 15.4: In the case of certain unpublished works of unknown authorship- (a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union and (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

<sup>34</sup> The UNESCO-WIPO Tunis Model Law on Copyright for Developing Countries defines folklore as “all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of traditional cultural heritage.” United Nations Educ., Scientific and Cultural Org. & World Intellectual Prop. Org., Tunis Model Law on Copyright for Developing Countries (1976).

<sup>35</sup> This approach is taken in numerous African laws. The Cameroon law defines folklore as: all productions involving aspects of traditional cultural heritage, produced and perpetuated by a community or by individuals who are clearly responding to the expectations of such community, comprising particularly folk tales, folk poetry, popular songs and instrumental music, folk dances and shows, as well as artistic expressions, rituals and productions of popular art. Law No. 90-010 on Copyright, Article 10, Aug. 10, 1990 (Cameroon).

<sup>36</sup> Lucas-Schoetter, A. “Folklore”, in Silke von Lewinski (ed.) *Indigenous Heritage and Intellectual Property*, The Hague, Netherlands, Kluwer at 86.

<sup>37</sup> The *Tunis Model Law on Copyright for Developing Countries*, 1976, section 6: Works of national folklore. The object of this provision is to prevent any improper exploitation and to permit adequate protection of the cultural heritage known as folklore.

<sup>38</sup> Susanna Frederick Fischer, “Dick Whittington and Creativity: From Trade to Folklore, From Folklore to Trade”, 12 *Texas Wesleyan Law Review*, 2005, at 32.

<sup>39</sup> The Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit

by WIPO and the United Nations Educational, Scientific and Cultural Organization (UNESCO) developed a sui generis Model Provisions for the IP type protection of TCEs.<sup>39</sup> In 1984, WIPO and UNESCO jointly convened a group of experts on the international protection of expressions of folklore by IP. A draft treaty based on the Model Provisions, 1982 was at their disposal. Yet, a majority of the participants believed it premature to establish an international treaty at that time.<sup>40</sup>

In December 1996, WIPO Member States adopted the WIPO Performances and Phonograms Treaty (WPPT). It provides protection for a performer of an expression of folklore and thus the concept of related rights for protection of performances of TCEs was recognized. The WPPT provides an international system of protection for performances of expressions of folklore. It gives rights in performances of literary and artistic works or expressions of folklore. The protection provided encompasses moral rights and a series of exclusive economic rights, including economic rights in their unfixed performances.

It must be stressed that only the protection of folklore is at stake. In contrast, individual works created on the basis of folklore can be protected. Only creative additions by the author are protected, rather than the elements of preexisting folklore. The producer of phonogram of folklore music gets protection in relation to the phonogram but the folklore itself does not get the protection. Performers of folklore may be protected in respect of their performance (i.e. not the folklore itself).<sup>41</sup> In most of these cases the indigenous community would not in fact benefit from such protection, since they usually do not make fixations and collections of their own folklore. However, performers of folklore will often stem from indigenous communities and therefore benefit from protection in their performance. So that in this case the communities may be protected indirectly in respect of the folklore performed.

In April 1997, the UNESCO-WIPO World Forum on the Protection of Folklore was held in Phuket, Thailand. During 1998 and 1999, WIPO conducted fact-finding missions in 28 countries to identify the IP-related needs and expectations of traditional knowledge holders (FFMs). The results of the missions were published by WIPO in a report entitled 'Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO Report on Fact-finding Missions (1998-1999).'<sup>42</sup> The recommendations unanimously specified that future work in these areas should include the development of an effective international regime for the protection of expressions of folklore.<sup>43</sup>

In late 2000, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was established. The

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Exploitation and Other Prejudicial Actions, 1982.

<sup>39</sup>"Intellectual Property and Traditional Cultural Expressions/Folklore", World Intellectual Property Organization, Booklet No. 1, at 3, available at: [http://www.wipo.int/edocs/pubdocs/en/tk/913/wipo\\_pub\\_913.pdf](http://www.wipo.int/edocs/pubdocs/en/tk/913/wipo_pub_913.pdf)

<sup>41</sup>The WPPT, Article 2(a).

<sup>42</sup>WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Comparative Summary of Sui Generis Legislation for the Protection of Traditional Cultural Expressions*.

<sup>43</sup>*Id.*, at 4.





Committee has made substantial progress in addressing both policy and practical linkages between the IP system and the concerns of practitioners and custodians of traditional cultures. Under the guidance of the Committee, the Secretariat of WIPO has issued a detailed questionnaire on national experiences, and undertaken a series of comprehensive analytical studies based on the responses to the questionnaire and other consultations and research.<sup>44</sup> It is the most prominent platform for the international discussion of this issue.<sup>45</sup> The studies have formed the basis for ongoing international policy debate and assisted in the development of practical tools.<sup>46</sup>

There is currently a growing list of countries with national laws related to traditional knowledge, cultural expressions and genetic resources.<sup>47</sup> Discussion and proposals surrounding their relationship to the TRIPs Agreement and the Convention of Biological Diversity (CBD) are ongoing. Lively discussion surrounds the many issues related to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples, which was adopted by the UN General Assembly only two months before the IP conference in Santa Clara.<sup>48</sup>

In relation to the developments which took place at international level it may be summed up that so far we have not been able to find out a solution which fits all the situations. However, it is also relevant to mention that the continued efforts of various agencies involved have ensured that maturity on the subject and likely solution may emerge. There are various other laws which touch the area of TCE indirectly. We need to be sensitive towards the objects of those laws also while evolving any long term proposal for protection of TCEs. As Article 10 of WIPO's Draft Provisions on Traditional Cultural Expressions/Expressions of Folklore puts forth that: Protection for traditional cultural expressions/expressions of folklore in accordance with these provisions does not replace and is complementary to protection applicable to traditional cultural expressions/expressions of folklore and derivatives thereof under other intellectual

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<sup>44</sup> It is a forum where WIPO member states discuss the intellectual property issues that arise in the context of access to genetic resources and benefit-sharing as well as the protection of traditional knowledge and traditional cultural expressions.

<sup>45</sup> Molly Torsen, "Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues", 3 *Intercultural Human Rights Law Review*, 2008, at 199

<sup>46</sup> *Final Report on National Experiences with the Legal Protection of Expressions of Folklore*, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Geneva, June 13 to 21, 2002.

<sup>47</sup> Shantanu Basu, Panel I Materials, *Global Legislative Efforts on Protection for Traditional Knowledge and Cultural Expressions*, (Nov. 9, 2007) (unpublished conference materials, University of Santa Clara School of Law); Gustavo Morais, Panel 1 Materials, *Access to Biodiversity- Brazilian Perspective*, (Nov. 9, 2007) (unpublished conference materials, University of Santa Clara School of Law)(on file with author); Molly Torsen, *Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues*, *infra*, at 199.

<sup>48</sup> Valerie J. Phillips, "Indigenous Rights to Traditional Knowledge and Cultural Expressions: Implementing the Millennium Development Goals", 3 *Intercultural Human Rights Law Review*, 2008 at 192.

<sup>49</sup> "The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objective and Principles", 2007, WIPO/GTRKF/IC/9/4, available at: [http://www.wipo.int/meetings/en/doc\\_details.jsp?docid-77573](http://www.wipo.int/meetings/en/doc_details.jsp?docid-77573)

property laws, laws and programs for the safeguarding, preservation and promotion of cultural heritage, and other legal and non-legal measures available for the protection and preservation of traditional cultural expressions/expressions of folklore.<sup>49</sup>

#### IV. OPTION OF SUI GENERIS PROTECTION FOR TCES

Apart from a growing acceptance of sui generis solutions to the protection of TK and TCES in international fora, in recent times, some experts have observed that in legal scholarship, the initial enthusiasm about the prospects for modifying IP laws to protect intangible heritage and expressions of folklore seem to be cooling off.<sup>50</sup> The attempt to evolve a system for protection of some elements of folklore within the regimes of copyright and neighboring rights have not been successful to fully achieve the goal of an effective mechanism for adequate protection against unauthorized exploitation and this has convinced many countries of the need for a sui generis system for the protection of folklore.<sup>51</sup> Many countries and several regional organizations have elected to protect TCES through sui generis measures. Most have done so within their copyright laws, following largely the Model Provisions, 1982 and others have elected to establish stand-alone IP-like laws and systems.<sup>52</sup> Following aspects need to be addressed in a sui generis system for the protection of TCES: Object of protection; subject matter of protection; rights and exception; criteria and procedure for registration of the subject matter; duration of protection including the question of retrospectively; Institutional framework; violation of rights and remedies. It is also relevant that influence of IP principles on any sui generis law cannot be denied. A brief mention of beneficiaries and scope of rights under Draft Provisions of WIPO and of the Model Law 2002 of the Pacific Community may help us in understanding the difficulty of the task at hand.

The draft provisions indicate an approach which integrates certain elements of customary law into legislative norms. The subject matter of protection is “traditional cultural expressions” or “expressions of folklore”.<sup>53</sup> This alternative use of both notions reflects the underlying controversy about the proper designation of the subject matter.<sup>54</sup>

While the beneficiary of the copyright is the author who creates a work, and the beneficiary of performer's protection is the performer who performs a work, the

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<sup>50</sup> “Sui Generis Protection of Traditional Cultural Expressions”, at 212, available at: [http://shodhganga.inflibnet.ac.in/bitstream/10603/14157/11/11\\_chapter%206.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/14157/11/11_chapter%206.pdf)

<sup>51</sup> P.V. Valsala G. Kutty, *supra* note 11, at 5.

<sup>52</sup> For example: The Indigenous Peoples Rights Act, 1997 (Philippines); the Bangui Agreement on the Creation of an African Intellectual Property Organization, 1999; the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge of Panama, 2000 and the related Executive Decree of 2001; and, the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002 etc.

<sup>53</sup> WIPO Draft Provisions, Article 1.

<sup>54</sup> Folklore was considered by some as having a negative connotation, stemming from colonial times, when folklore was considered as primitive. When WIPO therefore chose to use the term ‘traditional cultural expressions’, other stated to the contrary their preference for ‘expression of folklore’, which they considered as generally established term without any negative connotation.



beneficiary of expression of folklore has been proposed to be the communities rather than any individual who may have been at the start of an expression of folklore. Communities are recognized as beneficiaries only if the custody, care and safeguarding of the folklore are entrusted to them in accordance with their own customary law and practices and if they maintain, use or develop the folklore as being characteristic of their cultural and social identity and cultural heritage.<sup>55</sup>

The Model law for the Pacific Community seems to be even more precise. The beneficiaries made under Article 6 of the Model Law are the 'traditional owner' of the traditional knowledge or expression of culture who are defined in article 4 of the same Model Law, as:

- (i) the group, clan or community of people; or
- (ii) the individual who is recognized by a group, clan or community of people as the individual;

in whom the custody or the protection of traditional knowledge or expression of culture are entrusted in accordance with the customary law or practice of that group, clan or community.

This definition even takes account of the inner structure of communities where individuals are recognized by the group, clan and community as being custodians of a particular expression under customary law.<sup>56</sup>

The content and scope of protection has been designated in the Draft Provisions as 'acts of misappropriation'.<sup>57</sup> Different scopes of protection have been proposed in respect of different kinds of folklore. The broadest scope of protection would be provided for expression of folklore of particular cultural and spiritual value to a community, on the condition that they are registered or notified. In contrast the Model Law of the Pacific Community establishes a list of acts subject to prior informed consent, and specifies that prior informed consent is required only for non-customary uses, whether or not commercial, and clarifying that the traditional owners themselves are entitled to use expressions of folklore in the exercise of their traditional cultural rights without the need for prior informed consent.

## V. PROTECTION OF TCEs IN INDIA

India's intangible cultural heritage flows from her 5000 year old culture and civilization. Dr. A.L. Basham, in his authoritative "Cultural History of India", has noted that "While there are four main cradles of civilization which, moving from East to West, are China, India, the Fertile Crescent and the Mediterranean, specially Greece and Italy, India deserves a larger share of credit because she has deeply affected the cultural life of most of Asia. She has also extended her influence, directly and indirectly, to other parts of the

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<sup>55</sup>WIPO Draft Provisions, Article 2.

<sup>56</sup>Silke Von Lewinski, *supra* note 31, at 218.

<sup>57</sup>The WIPO Draft Provisions, Article 3.

<sup>58</sup>Bhaswati Mukherjee, "India's Intangible Cultural Heritage: A Civilisational Legacy to the World", available at: <http://www.mea.gov.in/in-focus-article.htm?24717/Indias+Intangible+Cultural+Heritage+A+Civilisational+Legacy+To+The+World>

World.”<sup>58</sup> Tribal communities are the primary source of traditions and culture. Rich folk literature and handicrafts, handlooms, folk painting, etc., contributed by these communities are significant components of the TCEs and folklore of India.

Despite the rich repertoire of folklore and folk traditions there is no special law to protect these traditions from unauthorized commercial use by outsiders. Some of the communities do have some customary practices to regulate the use of TCEs by outsiders but these are not sufficient to protect the folklore of India. It is in this context the following part examines the existing IP law framework for the protection of TCEs.

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. The Act has been amended a number of times with the most recent change was done in 2012.<sup>59</sup> However, it does not contain any express provisions for the protection of TCEs and folklore.

Anurag Dwivedi and Monika Saroha identify among others the following features of copyright law which make the law not suitable to meet all the needs and objectives of traditional communities viz. the identifiable author requirement, ownership requirement, fixation requirement, and limited duration of protection. They, however, argue that by adopting a purposive and liberal approach towards interpretation of copyright laws one may extend the protection of these laws to folklore.<sup>60</sup>

Under the amendment incorporated in the Copyright Act in 1994, a certain amount of protection is offered to the performers. As per the Act, 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.” Again, performance, in relation to a performer’s right, is defined as “any visual or acoustic presentation made live by one or more performers.” It is to be noted that the concept of a performer is not limited to ‘one who performs a literary or artistic work’, as per provisions of the Rome Convention, rather the performer as per the Indian Act can be any one who makes a performance. To that extent, a person who performs folklore is a performer and his rights are protected under this Act.<sup>61</sup>

The performer of a performance shall, independently of his right after assignment, either wholly or partially of his right, have moral right in the performances.<sup>62</sup> Further, Section

<sup>59</sup>P.V. Valsala G. Kutty, *supra* note 11, at 19.

<sup>60</sup> Anurag Dwivedi and Monika Saroha, “Copyright Laws as a Means of Extending Protection to Expressions to Folklore”, *Journal of Intellectual Property Rights*, Vol 10, July 2005, pp 308-314.

<sup>61</sup> P.V. Valsala G. Kutty, *supra* note 11, at 20.

<sup>62</sup> *Id.*, 38-B, Moral rights of the performer: 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 use 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. *Explanation.*- For the purposes of this clause, it is hereby clarified that mere removal of any portion of a performance for the purpose of editing, or to fit the recording within a limited duration, or any other modification required for purely technical reasons shall not be deemed to be prejudicial to the performer’s reputation.



39 deals with certain fair use provisions in relation to performer's rights and the right of broadcasting organization, like private use, and the reporting of current events. Thus, it is evident that the rights granted under the Act to the performers seek to prevent, as mentioned earlier, certain acts being undertaken without the consent of the performer. However, in the case of audiovisual fixation, the act explicitly states that as soon as the performer consents for incorporation of his performance in a cinematograph film he ceases to have any rights in the film.<sup>63</sup>

The foregoing only suggests that folklore as such is not protected under Indian law it is the performer of that folklore who gets the benefit of the provision of law. Further it is also relevant to note that the performer can be anyone and is not limited to the member of the community preserving the folklore.

## **VI. CONCLUSION**

The brief discussion of the issue only highlights that an acceptable model for protection of TCEs is yet to emerge at both international and national levels. The indigenous communities may demand for a wider definition of folklore than what WIPO provides. It is important to address the issue because the large-scale production of the folk material and use of folk traditions existing in intangible forms affect the cultural, economic and social fabric of the traditional societies. In the context of India the law makers will also have to take into account the diversity inherent in Indian folklore. Establishing

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<sup>63</sup>P.V. Valsala G. Kutty, *supra* note 11.