

Industrial Designs and Folklore: A Comparative Study in Indian perspective

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The Traditional Cultural Expressions (TCEs), Folklore, as part of a nation's cultural legacy, is seen as a vital component of its identity. Traditional Cultural Expressions, the Folklore, may be described as knowledge that has been produced over the time, perpetuated, and passed down from generation to generation within a community, and which has become a part of that group's identity. Both emerging and developed nations recognise the value of TCEs and Folklores. However, the rights of those who preserve these cultural expressions/ folklores are not adequately safeguarded. The present paper compares the protection of Folklore in India to those of other major countries. With reference to folklore, the paper also analyses probable IPR overlaps in the context of industrial designs, copyrights, trademarks and other IPRs. The strategies and means of protecting folklore in the present IPR regime in India and other major countries are also discussed in this paper.

Keywords: Industrial Designs, Folklore, Traditional Cultural Expressions, Expressions of Folklore, Design Act, 2000, Copyright Act, 1957

The intellectual property rights (IPRs) are a set of rights that include patents, designs, trademarks, copyright, GIs, semiconductor layouts designs, trade secret so on so forth. Since these rights are the creation of human mind or human Intellect, they are growing with the growth of this human intellect as the boundaries of the human intellect are ever expanding thereby creating an ever-increasing demand for their protection. The more diverse the human brain gets; the more diverse and new fields of intellectual property comes into shape. There is always a possibility of creation of a new intellectual property and there is even a greater possibility of overlapping of the current and growing IP rights. The conventional and most common IP rights i.e., patents, industrial designs, trademarks, copyrights, utility models etc., are well defined and protected under the various IP laws. However, there is another creation of the human intellect which carries the traditions of the community and passes it on from one generation to another. This is termed as the 'folklore' and like other IPRs, this also needs to be protected. Folklore is the cultural and social identity of a country.

Industrial Designs

The industrial design is a production of a creative mind where the product's appearance is boosted by creative patterns or embellishment which is applied on

to the product thereby increasing its eye-appeal. As the artistic work is applied to the article or product, it provides a fresh aesthetic appearance to the article that can boost its economic worth. The 'Design' as per the Design Act, 2000 is defined as 'only the features of shape, configuration, pattern etc. which are applied to the 'article' and 'which in the finished article appeal to and are judged solely by the eye'.¹ However, under the Designs Act, 2000, a piece of 'artistic craftsmanship' is eligible for protection as the 'artistic craftsmanship' refers to the product of handicrafts reproduced by the hands or machine or otherwise.

As Lord Reid said, "work of art" is generally associated with the fine arts than with craftsmanship and maybe setting too high a standard. The whole conception of artistic craftsmanship appears to me to be to produce things which are both useful and artistic in the belief that being artistic does not make them any less useful."²

Folklore

Folklore is a term used to describe a cultural legacy that is a vital and integral component of a country. It carries the tradition of the community which is passed on from one generation to another. Both the developing and developed countries recognise this folklore as their 'cultural' and 'social' identity. Even in emerging nations, folklore is nevertheless regarded as a tradition

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rather than a simple relic of the past by the organisations and groups that have preserved it.³

The recent development in the communication and digital technologies such as Internet and wide distribution of the programs through broadcasting network, have resulted in creating more and more awareness about the traditions and culture which earlier remained confined to a particular strata of the society. Public at large, is now getting aware about cultural diversity available in our country. On the one hand, technological advancements have made these cultural diversities more accessible to the general public, but on the other hand, they have also exploited folklore and tradition by misrepresenting the presentation and expression of traditional artwork, or by monetizing the artwork and folklore without giving the group that is intended to be the custodian, the credit or benefit they are entitled to get⁴.

In this context, the phrases "traditional cultural expressions" (TCEs) and "expression of folklore" are interchangeable⁵. However, many communities have raised qualms about the negative context of the term folklore in international talks, and as a result, the 'expression of folklore' is generally replaced by the word 'traditional cultural expressions'.⁶

Traditional knowledge, culture and folklore are effectively contributing towards the economy of the communities and also social and cultural identities of indigenous and local communities. Many traditional communities are able to earn income using their community made products, tradition-based creative products so on so forth. As a result, revenues from tourism have soared and thus contribute to economic benefits of the communities. Since the traditional products are getting recognized, it becomes all the more important to have some bigger protection for these tradition based activities and thereby exclude spurious products appearing in market. In this scenario, trademarks and unfair competition laws can be used to identify the origin of art and craft products or to tackle the "passing-off" of counterfeit goods as genuine. Many businesses, including fashion, craft, and others, are influenced by traditional cultural manifestations. The indigenous communities in Australia have earned huge amount of money for their visual art and crafts, attributable to the Copyright protection and IP protection accessible to them.⁷

Protection of Folklore through IP Laws

From the above definitions of the folklore or expressions of folklore, it can be seen that most of the

folklore can be protected under the copyright laws as there are many similarities between the expressions of the folklore and the subject matter of copyright. Similarly, the 'tangible expressions' like the 'carvings' on the tools and implement may be covered under the trademark regime. Further various other things like garments, designer artefacts, sculptures, pottery, woodwork, jewellery, textiles, carpets, musical instruments etc may be protected under the design registration. The folklores involving the technological processes including weaving, metal working etc may be covered under the ambit of patents.

However, it is easier said than done to include folklore or representations of folklore under the intellectual property regime. There are several intrinsic criteria for registering intellectual property rights. However, the basic issue is 'Who is the owner of the right?'. The other criterion is the uniqueness, novelty, and inventiveness. And lastly, the length of the monopoly over intellectual property rights.

Protection of Folklore

The Stockholm Act

Folklore, often known as "expressions of folklore" or "traditional cultural expressions," is an important part of traditional knowledge. Efforts on the protection of traditional cultural expressions began in 1967 with the 'Stockholm Act'⁸ which was basically an amendment to the 'Berne Convention' towards the Protection of Literary as well as Artistic Works.

In order to recognise the work as a folklore, following three conditions were laid in the Stockholm Act⁹:

1. *there should be an unpublished work;*
2. *the author of the work must be unknown;*
3. *there must be sufficient reason to believe that the unknown author belongs to a particular country."*

Even though 'Folklore' was recognised as a work under the 1967 Berne Convention modifications, the length of protection for the creation was not precisely stated, and it was presumed that it would be protected for 50 years after it was made legitimately available to the public. Folklore artwork was preserved under the category of anonymous or pseudonymous material.

Tunis Model Law on Copyright for Developing Countries

The "Tunis Model Law on Copyright for Developing Countries" was adopted in the year 1976 with an aim to provide protection to the expressions

of folklore and traditional expressions. The term 'Folklore' has been specified under Section 18 (iv) of the Tunis Model Law¹⁰.

According to Section 18(iv), "*folklore means all literary, artistic and scientific work created on the national territory by authors presumed to be national of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage;*" . Section 1(3) defines '*folklore*' as '*protected works*'. Furthermore, the protection of the 'national folklore' is defined under Section 6 of the Tunis Model Law.

One of the significant features of the Tunis Model was the 'benefit sharing' mechanism which established a benefit-sharing clause to benefit the writers, performers and to safeguard and disseminate folklore.¹¹ As a result, the Tunis Model gave a larger definition of folklore as well as unrestricted safeguarding of folklore across time¹², which is extremely important in terms of folklore protection, along with the provisions for a benefit sharing clause.

UNESCO WIPO Model provisions¹³ for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions

In the year 1978, WIPO and the UNESCO collaborated to explore the protection of the 'expression of folklore'.¹⁴ This led to creation of "Model provisions for national laws on the protection of expressions of folklore against illicit exploitation and other prejudicial actions" in year 1985 by UNESCO and WIPO. The purpose of the Model Provisions was to strike a balance between protecting folklore expressions and encouraging further growth of folklore. Rather than adopting a separate legislation, the Model Provisions were drafted with the goal of preserving and promoting national folklore. These Model Provisions were intended to enable national legislation to adopt the system of protection that was most appropriate to their respective needs.

During the period from 1985 to 2000, many treaties were adopted like WIPO Performances and Phonograms Treaty (WPPT) in the year 1996, UNESCO-WIPO World forum on the Protection of Folklore in the year 1997, along with various WIPO led fact-finding missions in many countries to ascertain the traditional knowledge holders' IP-related needs and aspirations.¹⁵

WIPO Inter-Governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)

Historically, the protection of the Traditional Cultural Expressions (TCEs) started way back in the year 1960 with the developing countries, realizing the fact that the folklore also has a creativity and cultural identity of the indigenous people and therefore needs IP protection since these were exploited or misused by the outsiders. The indigenous people have always expressed their concern regarding the formalization of the legal status of the traditional knowledge and the cultural expressions amidst the fear of 'misappropriation and misuse'. The concern raised by these people is valid as the holders of the traditional knowledge and their cultural heritage can derive benefits by using their indigenous knowledge for their economic gains. However, in the year 1996, the WIPO Performances and Phonogram Treaty¹⁶ succeeded in providing for the protection of the rights of the performers of *expressions of folklore*.

Working forward in this direction, in the year 2000, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and folklore¹⁷ was established with an aim of better understanding the requirements and concepts for TCE protection.

The forum explored intellectual property challenges that occur when genetic resources are accessed, benefits are shared, and traditional knowledge and traditional cultural expressions (TCEs) or folklore are protected. The committee conducts formal discussions and negotiations with the goal of 'agreeing across one or more legal frameworks that will effectively preserve genetic resources, traditional knowledge (TK), and traditional cultural expressions (TCE)'.

The first session of the Intergovernmental Committee on Intellectual property and Genetic Resources, Traditional Knowledge and Folklore, was held in Geneva in the year 2001. The agenda for this meeting included the following:

- (i) Access to the Genetic Resources and Benefit-Sharing
- (ii) Protection of Traditional Knowledge
- (iii) Protection of the Expressions of the Folklore.

During the first session of the IGC, the prevalent definitions of the terms Genetic Resources, Traditional Knowledge and Expressions of folklore

were also defined by the international fora working on the specific theme.

The IGC has been working for a long time to come up with a draft law. However, nothing has been approved unanimously, and talks to complete the article's content are still ongoing. At the IGC's most recent meeting (WIPO/GRTKF/IC/40), a revised article on the protection of traditional knowledge was once again provided for discussion by WIPO members¹⁸.

As can be seen from the above, the WIPO IGC is still working on codifying an IP system that is sensitive to the concerns of indigenous peoples who are the creators/holders of traditional cultural expressions, traditional knowledge, and other cultural resources. As a result, the WIPO is still in need of a mechanism to protect TK, TCEs, and GR. Of course, after the WIPO has come up with a solution, it must be ratified by WIPO members in order to take effect in member nations.

Protection of Folklore: The Indian Perspective

India's IP system is well-defined and dynamic. India's intellectual property laws date back to 1856 and have evolved in response to society's needs. Patents, trademarks, copyrights, industrial designs, geographical indications, semiconductors and integrated circuits, and other areas of law are all well-defined and have been amended from time to time or re-enacted or newly enacted. However, the Indian IP law does not seem to have defined 'Folklore'.

India's history may be traced back over 5000 years and even farther. Indian customs and culture are centuries old and have been passed down through the generations to their current forms. However, many of these customs and cultural values have diminished over time.

Rapid industrialization has had a huge impact on traditional knowledge in the previous few decades. Traditional jobs have suffered as a result of the shift to automated processes, higher output, and improved wages. The rich cultural legacy, traditional wisdom, and traditional cultural manifestations must be safeguarded so that people can benefit from them and that they can be maintained and passed down to future generations.

The preservation of these historic and cultural heritages, on the other hand, is a difficult task. It must be recognized that on the one hand, TKs and TCEs must be promoted so that they do not get lost, and on the other hand, they must be protected against

misappropriation and misuse by unauthorized users. As a result, in order to preserve the cultural legacy from exploitation and misappropriation, it must be protected as an intellectual work.

As far as the traditional knowledge is concerned, the Indian Government has taken steps to protect the ancient *traditional knowledge* by creating a 'Traditional Knowledge Digital Library' (TKDL) so that the ancient knowledge about the Ayurveda, herbs, ancient medicine system etc. gets recorded and is not lost. The TKDL includes more than 36000 formulations which have been translated into five different languages which themselves are disclosed in writing in the ancient Sanskrit scriptures. The TKDL prevents the grant of frivolous patents on products whose properties have been known for many centuries in India, by making such information available in documented form. The access to such TKDL database has been provided to 13 IP offices worldwide for conducting search and examination. However, much needs to be done in respect of the traditionally known Cultural expressions (TCEs).

The Traditional Cultural expressions include the production of folk art viz. drawings, paintings, sculptures, pottery, jewelry, traditional costumes, musical instruments, traditional handicrafts, traditionally made toys and many more tangible items.

Protecting TCEs under the Designs Act, 2000

In case of the industrial designs, the features of the shape, its configuration, colour etc., if it is applied to any article in two or three dimensions, then it can be protected under the Designs Act, 2000¹⁹. The term 'Article' under the Designs Act, 2000 means: "means *any article of manufacture and any substance, artificial, or partly artificial and partly natural and includes any part of an article capable of being made and sold separately.*"²⁰

Therefore, if the Traditional cultural expressions, for example, traditional artistic works, drawings, paintings etc., are applied to the products or articles, then those articles may qualify for protection under the Designs Act, 2000. However, the Designs Act prohibits the registration of designs which are not novel i.e., not new or original, or publicly disclosed prior to the filing of the design application, or not significantly distinguishable from the existing designs.²¹ The analysis of Section 4(a) and 4(b) reveals that the TCEs does not enjoy protection under the Designs Act, 2000 as they are already in the

public domain and therefore fall under subsection (b) of Section 4 of the Designs Act.

Protecting TCEs under the Copyright Act, 1957

If we analyse the other remaining TCEs like drawings, paintings, costume designs, folk stories, legends, poetry, folk songs, folk dances, etc., it appears that these TCEs may get protection under the Copyright Act.

Accordingly, the '*work*'²² under the Copyright Act, 1957, can be an original work which is literary, dramatic, artistic or musical. It can also be film, or sound recordings as the case may be. Further, the word '*author*'²³ defined under the Copyright Act can be a composer, author of the work, the artist, the photographer, the producer, the composer or any other person who creates the work.

Thus, the TCEs under the consideration may lay claims over a Copyright as per Section 13(1) of the Copyright Act since the word '*original*' has not been described under the act. However, to lay such a claim under the Copyright Act, the '*authorship*' of the work is required to be identified as per Section 2(d) of the Copyright Act, where in the author for every work has been defined. Since, the originality is not defined, and further since the cultural expression may not be able to identify its author, it becomes difficult to protect the TCEs under the Copyright Act.

Protecting TCEs under the Geographical Indications of Goods (Registration and Protection) Act, 1999²⁴

India has a unique legacy and culture that has been passed down from generation to generation as traditional knowledge and cultural heritage throughout centuries. The cultural legacy bequeathed to us is vast, ranging from Ayurvedic and Unani medical knowledge to diverse ways for creating artefacts, crafts, utensils, and architecture, among other things. Agriculture, water collection, building construction, and other technologies are all part of our past and culture. However, this knowledge had never been adequately codified and had always been passed down verbally from generation to generation. Because of a lack of codification, many of these valuable information contributions have been lost.

There are many cultural expressions which have been kept alive and have been transferred from one generation to the other generation. There are group of people who are the custodian of such expressions and helping us in saving such traditions. Many such

tangible expressions, artefacts for example, the 'Madhubani Paintings'²⁵ from Bihar, 'Patta-chira Paintings'²⁶ from Odisha, 'Blue Pottery'²⁷ from Jaipur in Rajasthan etc., have been associated with some geographical qualities and have acquired their importance because of the reason of their geographical properties. These may include artefacts, work of art, work on artefacts and so on. However, such tangible expressions as mentioned above are not the property of some single person, but they have been protected and carried forward by some group of people who specialise in such work and there are some tangible expressions which are associated with the particular geography.

The Geographical Indications of goods (Registration and Protection) Act of 1999, in accordance with the Article 22.1 of the TRIPS agreement, envisages protection of the GIs related to the 'goods'. The term 'goods' refers to an indication identifying the goods under *natural, agricultural or manufactured categories*.²⁸ The important thing here is that the 'goods' should 'originate' from or should be manufactured within the territory or within the locality in the territory, which is known for the quality of the product or the characteristics of the product which is essentially present because of its geographical origin. However, in case of the manufactured 'goods' at least one of the activities pertaining either to production or processing of such goods should be associated with that region or locality.²⁹

In case of the protection of the GIs, the owner of the GI can be 'any association of person or of producers or any organisation' and are known as 'registered proprietor'. Thus, the tangible TCEs such as traditional handicrafts, traditional artefact, traditional toys with engravings, traditional jewellery etc., can therefore seek some protection under the GI, Act. Although the owner of such rights /protection shall be an organisation or a group of people who have been entrusted with the protection and dissemination of such folklore or tradition, from one generation to another. The term of protection for a registered GI is initially for a period of 10 years however, renewals can be done every 10 years till perpetuity.

Many of the above-mentioned TCEs /TK may very well appear to qualify for protection under the Patents/ Designs/ Copyright laws, but since they lack the novelty i.e., they are available in public domain,

they cannot be considered for the same. Thus, the protection of aforementioned TCEs/TKs (like traditional handicrafts, traditional artefact, traditional toys with engravings, traditional jewellery etc.) through GI presently appears to be the best way to reduce the misappropriation and abuse of such TCEs / TKs.

Protecting Folklore/TCEs in Greece

Protection through the Copyright Regime

Many countries have attempted to address the issue of TCE protection through the copyright regime. The Law 2121/1993³⁰ of Greece, is the main statute on Copyright and related rights. The expressions of folklore or TCEs are not included in the definition of the "work" linked with the Copyright.³¹ However, under Law 2121/1993, the word "adaptations and other modifications of works or expressions and their collection.." is defined.³²

Thus, the "Adaptation of Folklore/TCEs expressions" can be protected under Copyright Law. Furthermore, it has been stated that the "pre-existing work" on which the alteration/adaptation was performed "shall in no manner damage rights in the pre-existing works."³³

Protection through Industrial Designs

The Greek civilization is well known for the use of various artifacts for functional purposes such as Jars, vases of different varieties, tablets with inscriptions, jewelry and many other things. However, technological limitations prohibited the copying of these objects in large quantities.

Also, there appears to be no reference to the protection of industrial designs till 1975 barring only one case i.e. 3654/1962, which referred to the plastic reproduction of known pictures.³⁴ However, the first important Copyright Law, Law 2387/1920, was passed in 1920 and was in effect until 1993. This statute, 2387 of 1920, broadened the protection to include 'original works' as well as works based on modification, duplication, or translation.³⁵ But with the ratification of the 'Hague Agreement' in 1996, the law required that the 'external form' of the product must be 'new' and have an 'individual' character.

Therefore, in case of Industrial designs also, since they are required to be 'new' and have an 'individual' character, it becomes difficult for the TCEs to be protected under the Design Laws as the folklores/TCEs have been passed from generation to

generations and therefore cannot be considered as new and original.

Protecting the Folklore/TCEs in New Zealand

The mention of the protection of the TCEs in New Zealand is incomplete without the reference to the 'Maoris'. The indigenous people of the New Zealand are called as 'Maori' or '*tangatawhenua*'. Maoris came to the New Zealand more than a thousand years ago from what is known as the mythical Polynesian land called Hawaiki. The Maoris, as of today, constitute about 14% of the total population. The traditions of the Maoris, their language is therefore very important to New Zealand's identity.³⁶

The folklore or the TCEs includes the work of art, symbols, work of artistic craftsmanship, folk songs, folk dances and any other dance form or art which identifies any community through its history and provides them with a social and cultural identity. These art forms may also be means for the economic benefits to the community artisans. However, it is very clear that these art forms and the artisans are the key persons in the preservation and the continuation and expansion of these indigenous cultures and tribes. Protecting the TCEs and the Traditional knowledge of the indigenous people is a challenging task since they are capable of benefiting the community commercially and if it is left unprotected, then there is a likelihood of these TCEs being used inappropriately or abused.

Although the legal system of most of the countries provides the protection for intellectual property like, copyrights, trademarks, designs, patents etc., the legal systems, in most of the countries are not apt to protect such concepts like communal ownership because of the reason that the knowledge is already in public domain and is therefore available to the public. As a result, most of the criterion listed in the conventional intellectual property regime cannot be met by the indigenous people.³⁷

The fact that the 'Maoris' are very much concerned about their traditional culture and values, can be observed from the fact that their concerns got culminated into the 'Mataatua Declarations'.³⁸ These declarations states about the right to self-determination by the indigenous people, right to be recognized as the sole owner of their cultural and intellectual property and so on.

The cultural expressions of the Maoris have gained popularity not only in the country itself but also in the

other parts of the world where the Maori Cultural expressions in the form of 'Maori Dance' or 'Maori Artwork' are being used by the non-indigenous persons throughout the world. Not only the use of these traditional art forms is reaping financial benefits, they are also getting popular throughout. However, the art forms have been used inappropriately by the non-indigenous people and the protocols to use such indigenous knowledge have not been followed properly which has led to a resentment and anger in the indigenous people.

The Maori war dance 'Ka Mate Haka'³⁹ performed by the indigenous people of the New Zealand is one such example of the traditional dance which has been inappropriately used by the people outside New Zealand⁴⁰ for commercial gains without the consent of the Maoris. However, such sort of infringements cannot be protected through the present IPR laws.

The same is true for the Maori Art form 'Koru', which represents a pattern of the spiral shape. This shape has been of a great significance to the Maoris but it is now being used outside of New Zealand, again without the consent of the Maoris and cannot be protected through the present IPR laws.

To protect the interests of the indigenous communities of the New Zealand, the 'Waitangi Tribunal', which is a permanent body, was setup. This tribunal gives recommendations regarding the claims presented by the 'Maoris' relating to the policies, acts or the omissions of the crown against the violation of the treaty of Waitangi. Especially, the WAI 262⁴¹ claim brought by the Maoris, for the protection of their knowledge, identity and their culture.

Amendments in the IPR Legislation of the New Zealand

The Waitangi Tribunal recommends creation of a committee of Maori's. The Tribunal recommends that in case of any Patent application affecting the Maori's interest, the committee shall engage with the commissioner of patents for such applications. The tribunal also recommends mandatory disclosure of the Maori species or Maori traditional knowledge, by the applicant, if it is used in any of the patent application, failing which the patent could be invalidated for reason of non-disclosure. This essentially means that the indigenous communities shall be a part of the patent proceedings and shall have the powers to negotiate the commercial gains out of the commercialization of such patents.⁴²

Similarly, the New Zealand's Trademarks Act was amended in the year 2001 and enacted in 2002 to "address Maori concern regarding the registration of the trademarks that contain a Maori sign, including sign and text".⁴³ The amendment gives the commissioner of Trademarks, "Absolute Grounds for not registering trademarks,"⁴⁴ if its use or registration may disturb the feelings of a Maori.⁴⁵

The Act likewise requires the appointment of an Advisory board^{46,47} to notify the commissioner if the use or registration of a trademark that seems to be derived from a Maori sign, including text and images, is objectionable to Maori.⁴⁸ Further, the amendments in the Patents Act, 2013 provides for the exclusions from patentability. Under Section 15 (3) of the Patents Act 2013, "the Commissioner may seek advice from the Maori advisory committee or any person as the commissioner thinks appropriate to make a decision about the morality exclusion of the invention".⁴⁹

Protection of Folklore/TCEs in Australia

Protecting the TCEs in Australia is also not much different because of the obvious reasons of the novelty and the authorship. The copyright laws in the Australia have also been engaged to protect the indigenous culture, however, there is a legal requirement of the '*Work to be original, to be reduced to the tangible form and should have an identifiable author.*' However, the indigenous authors can rarely meet these criteria as the Australian law does not authorize the 'Communal Ownership'.⁵⁰ Moreover, Australian copyright law protects the physical medium instead of the idea or notion.⁵¹ Another important factor is the time period of the Copyright which extends to 70 years from the date of the death of the Author. Thus, the protection is limited one. Further, the indigenous community also does not get the proceeds of the commercialization of the indigenous culture in the commercial world. As a result of the current incompatibilities in Australia's IP legislation, the TCEs generated by Aboriginals are not protected.

The IP lawyers from Australia as well as the indigenous communities have made numerous recommendations regarding the establishment of a *sui-generis* system for the protection of the Indigenous knowledge,⁵² however, anything concrete in these matters is yet to be recognized. Some of the recommendations as proposed by the lawyers and indigenous communities include defining indigenous

intellectual property, perpetual nature of the indigenous folklore, exemption from originality, etc.

Protection of TCEs in South Africa

The indigenous people of South Africa, like that of the New Zealand and Australia, have been using their traditional medicines, traditional agricultural techniques, artwork, folklore etc. These traditional know how has been transferred orally from one generation to another. However, the traditional knowledge of these indigenous people of South Africa has been misused/ abused by the non-indigenous people since there is no way of protecting this knowledge from abuse or misuse.

The current IPR laws worldwide are not capable of addressing the issues related to the protection of the indigenous knowledge. The laws relating to the protection of IP rights in South Africa were also the same i.e., the IP Rights/ laws were not capable of protecting the indigenous knowledge /traditional work etc. because the same issues relating to the novelty and authorship existed. The Design Act, 1993⁵³, Section 14 required the design to be “new or original”⁵⁴ and similarly in copyrights, the ‘work’ was required to be original. However, indigenous work cannot be new or original as it is passed on from one generation to another. Further, the ‘author’ in case of Industrial Designs as well as the Copyrights⁵⁵ cannot be defined as the work has been transferred from one generation to the other generation.

The South African Government, recognizing the importance of the IP, started creating the awareness program amongst their citizens about the protection of their national assets i.e., their indigenous knowledge, traditional works and other indigenous resources. These reforms were in line with their National Development Plan and National Industrial Policy Framework.⁵⁶ In order to protect the indigenous knowledge, the South African Government came out with a unique way of protecting the indigenous/traditional knowledge through their IP systems. The ‘Intellectual Property Laws Amendment Act, 2013’ (IPLA), adopted by the South African Government is unique way of protecting the traditional / indigenous knowledge from abuse or misuse. Some of the interesting features of the IPLA, 2013, incorporating the mechanism to protect the traditional knowledge /indigenous knowledge are as follows:

- (i) Under the ‘Copyrights Act’, the definition of ‘Derivative indigenous work’ has been added and

‘Author’ in relation to the ‘derivative indigenous work’ has also been defined as ‘the person who first made or created the work, *the substantial part of which was derived from indigenous work*’. Similarly, the definition of the ‘indigenous community’ has been defined.

- (ii) Creation of a National Database⁵⁷ at each office i.e. Patents, copyrights, trademarks and designs, to register indigenous knowledge as part of the existing intellectual property register.
- (iii) Similarly, the traditional works have been made eligible for the copyright protection, provided the ‘traditional work’ is a ‘derivative indigenous work’.⁵⁸
- (iv) The indigenous community has also been defined as a ‘Juristic Person’. If the author of the indigenous work cannot be determined or the indigenous community is no longer in existence, in such cases, the Authorship vests with the National Trust established under the Act.⁵⁹
- (v) The term of protection in such cases is perpetuity.

Similar provisions have been added under the Designs Act, 1993, to incorporate the ‘traditional designs’ under the design protection. The definition of the ‘derivative indigenous designs’⁶⁰ has been incorporated which includes the designs recognised by an indigenous community as having an indigenous or traditional design and a substantial part of which was derived from the indigenous cultural expression or knowledge. The definition of ‘Design’ itself now includes ‘traditional design’. The term ‘traditional design’ includes the ‘indigenous design’ and ‘derivative indigenous design’.

The period of protection⁶¹ for example in case of the ‘aesthetic derivative indigenous designs’ has been limited to 15 years from the date of registration. In case of the functional ‘derivative indigenous designs’ the term has been limited to 10 years. However, the protection for the ‘indigenous design’⁶² shall be in perpetuity.

Under the Trademarks Act, similar provisions have been made to protect the ‘traditional terms or expressions. The indigenous community, in these cases, can act as a juristic person to apply for the registration of the traditional terms or expressions.

Conclusion

The folklore or the cultural heritage is an important and integral part of every nation. The protection and preservation of the cultural heritage has been the

nation's prime objective as it makes a significant contribution in making the civilization culturally rich and diverse.⁶³ As can be seen from the above discussions, the intellectual property laws of the major countries are incompatible when it comes to protecting TCEs or folkloric expressions. The major reason being the non-fulfilment of the essential conditions of "uniqueness" and "ownership". Many nations, on the other hand, have devised or are in the process of devising novel measures to preserve these TCEs.

In Greece, for example, the adaptation of the "expression of folklores" may be protected by Copyright laws, although this will not affect the rights of pre-existing works. TCEs, on the other hand, are ineligible for protection under the Design laws since they lack uniqueness and distinctiveness of character.

Similarly, in New Zealand, the Maoris, or indigenous people of New Zealand, are the primary custodians of the country's traditional and cultural legacy. The protection of these art forms is a problem as the existing IP laws are not compatible to protect such artforms. However, the New Zealand has made some amendments in the IP laws to accommodate the possibility of protecting or at least regulating such unauthorized or abusive usage of the indigenous art form.

The situation in Australia is also the same. There is no protection to the TCEs by the aboriginal Australians as the requirements of 'originality' and 'authorship' cannot be satisfied in terms of the indigenous work. Despite the fact that several Australian courts have acknowledged the necessity of preserving TCEs, nothing definitive has emerged in these cases.

The situation in India is also the same. The TCEs may not get protection under the Indian Copyright Act, 1957, as the 'authorship' of the work is required to be identified as per section 2(d) of the Copyright Act. However, identification of the author for a TCE becomes very difficult. The protection of TCEs may also be sought under the Geographical Indications of Goods (Registration and Protection) Act of 1999. Since the GIs belong to group of persons and the protection is available till perpetuity (extensions after every 10 years), the TCEs may get some protection from passing-off or misappropriations through this *sui-generis* Law.

Similarly, in case of designs, under the Indian Designs Act, 2000, the TCEs may not enjoy the protection as they are already in public domain and

also not new or original. However, the TCEs may get design registration for the new use or new application of the design on an article. Further, there is also a possibility that a derivative TCE may be protected under the Designs Act and the individual who has created the derivative work from the existing TCE may take the ownership of that Design registration with a mechanism to share the remunerations within the community from where the TCEs have been derived.

However, the model adopted by the Government of South Africa, i.e. 'The Intellectual Property Laws Amendment Act, 2013 (IPLA) is of great significance as it tends to protect the traditional knowledge as well the indigenous and traditional expressions. The inclusion of the derivative traditional expressions in the form of the designs, trademarks or copyrights is an example how the traditional and indigenous expressions, knowledge, although being already available in public domain, can still be protected under the IP laws.

The IPLA shows the possibility of protecting the traditional and indigenous knowledge, expressions by suitably amending the IP laws as well as by creating certain agencies which can look after the commercialization of the knowledge and also the benefit sharing amongst the indigenous community.

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