

**TRADITIONAL KNOWLEDGE AND INDIA'S BACKBEND ON YOGA***RASHMI RAGHAVAN\****ABSTRACT**

One of the biggest global trends of the 21<sup>st</sup> Century is that of practising Yoga, due to its physical, mental and spiritual benefits. Developed in India almost two millennia ago, its spread to the West has increased the number of practitioners as well as made it a commercially successful business. Any business can grow only in a strong intellectual property regime. The appropriate categorization of Yoga in any IP regime is highly disputed when it becomes the subject of copyright and trademark infringement lawsuits. Yoga, by and large is traditional knowledge, as it is an informational system giving a well-defined procedure in terms of postures, breathing techniques and a holistic philosophy to raise the standard of mankind. However, the law in terms of traditional knowledge has been *sui generis* because the WIPO Negotiations of the Intergovernmental Committee ('IGC') on Traditional Knowledge ('TK') has been unable to create an international instrument for the protection and exercise of rights of indigenous communities who claim to be collective owners of these types of TK. The situation becomes extremely precarious when knowledge like Yoga becomes widely diffused outside the community where it originated to claim monetary or moral rights over them.

The author argues that Yoga as a comprehensive system fits well within the current definition of Traditional Knowledge as an Intellectual Property. However, due to its widespread nature and easy accessibility, it cannot gain as high a ground for protection as secret or sacred traditional knowledge is currently granted. It's defensive protection in terms of injuncting private persons from claiming exclusive copyrights over Yoga is justifiable in the interests of a vibrant public domain, but this domain is highly exhausted if the State itself tries to gain positive protection by asserting moral rights of attribution and integrity over new forms of yoga or its commercialization or demands economic incentives for its stride in protecting TK through a centralized database. Furthermore, that such protection has a huge effect of diminishing the public domain and the natural process of hybridization and development of trends and cultures with respect to Yoga. Finally, the author feels that such extreme protection for an IP by a State in the absence of any

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indigenous community to represent Yoga, is a mockery of the social justice movement of appropriation of cultural identities being led by various African and Asian countries at the global level.

## I. INTRODUCTION

Yoga was developed up to 2,500 years ago in India as a comprehensive system to go beyond worldly desires. This was attained by training the wavering mind to reach a state of pure consciousness.<sup>1</sup> While Yoga is often equated with *Hatha Yoga*, the well-known system of postures and breathing techniques, Hatha Yoga is only a part of the overall discipline of Yoga. Other popular forms include Iyengar Yoga, Vinyasa flows, Power Yoga and even the sweat inducing Pilates Yoga.<sup>2</sup> Today, millions of people use various aspects of Yoga to help raise their quality of life in diverse areas such as fitness, stress relief, wellness, vitality, mental clarity, healing, peace of mind and spiritual growth. The current number of Yoga practitioners is estimated at 200 million people and the market has the potential to reach almost 80 billion dollars by 2020.<sup>3</sup> Everything from Yoga mats, belts, bricks to Yoga wear have helped make this ancient spiritual exercise a commercially successful business. For instance, Lululemon, the internationally popular yoga athleisure brand sells yoga beads for about \$108.<sup>4</sup>

At the outset it seems ridiculous to believe that something so spiritual as Yoga can come under the ambit of Intellectual Property (“IP”) Law. However, as our Prime Minister, Mr. Narendra Modi, remarked at a speech in the US Congress rather jovially, “*No, Mr. Speaker; India has not yet claimed IP rights over Yoga.*”<sup>5</sup> Although made lightheartedly, India is trying its best to get its traditional knowledge (“TK”) protected through its Traditional Knowledge Digital Library (“TKDL”) to prevent mishaps like the turmeric and basmati rice

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<sup>1</sup> Satischandra Chatterjee, Dhiredranath Dutta, *An Introduction to Indian Philosophy*, (12<sup>th</sup> ed., 2015)

<sup>2</sup> Michelle Fakjus, *24 Popular styles of Yoga*, available at <https://www.elephantjournal.com/2013/11/a-glossary-of-24-popular-yoga-styles-lineages/>, (last visited on 28/12/2018).

<sup>3</sup> Upasana Jain, *Not just mind and body, yoga is good for economy too*, available at <https://www.indiatoday.in/business/story/craze-for-yoga-turns-into-source-of-income-for-many-1265172-2018-06-20>, (last visited on 28/12/2018).

<sup>4</sup> Bridget Delaney, *The yoga industry is booming – but does it make you a better person?* Available at <https://www.theguardian.com/lifeandstyle/2017/sep/17/yoga-better-person-lifestyle-exercise>, (last visited on 28/12/2018).

<sup>5</sup> *India has not claimed intellectual property rights on yoga: Modi to US Congress*, available at <https://www.hindustantimes.com/india-news/india-has-not-claimed-intellectual-property-rights-on-yoga-modi-to-us-congress/story-fWJSwUV3EmwhCZR4B8tYON.html>, (last visited on 28/12/2018).

patenting incident.<sup>6</sup> It has documented Ayurveda, Siddha and Unani medicinal plants, as well as almost 900 yoga, poses in this library to protect them from being wrongfully exploited.<sup>7</sup>

Yoga being such a dynamic storehouse of information, this paper tries to locate it within the domain of Traditional Knowledge. This also warrants a discussion about whether Yoga can be called to be a part of the Public domain and whether India, as a State, can have any controlling rights over it. This paper also draws in various terms from the current negotiations for an international instrument for the Protection of Traditional Knowledge and Traditional Cultural Expressions by the Intergovernmental Committee (hereinafter “IGC”) at WIPO and tries to locate whether India, as the State can claim to be a valid beneficiary under the proposed instrument for such widely spread TK. It finally tries to locate the effect of such claims of new and emerging forms of Yoga in our world of cultural assimilation and on the richness of the public domain.

## II. YOGA AS TRADITIONAL KNOWLEDGE

The Western IP regime has since its inception attached value of raw materials at 0 whilst building the ground for innovation in terms of Patents, Copyrights and the like.<sup>8</sup> Thus, the debate in many IP circles from the turn of the 21<sup>st</sup> century is to try and recognize the rights of indigenous communities in preserving this resourceful traditional knowledge and build systems where benefits acquired from their commercial exploitation could be shared with such communities.<sup>9</sup> However, the WIPO itself has been unclear as to how far the domain of traditional knowledge extends. It defines “Traditional knowledge,” as *including the intellectual and intangible cultural heritage, practices and knowledge systems of traditional communities, including indigenous and local communities. It includes skills, know-how, practices and innovations. This knowledge should have been preserved by communities and should be passed on in an inter-generational context.*<sup>10</sup> Currently, WIPO

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<sup>6</sup> Saipriya Balasubramaniam, *India: Traditional Knowledge And Patent Issues: An Overview of Turmeric, Basmati, Neem Cases*, available at <http://www.mondaq.com/india/x/586384/Patent/Traditional+Knowledge+And+Patent+Issues+An+Overview+Of+Turmeric+Basmati+Neem+Cases>, (last visited on 28/12/2018).

<sup>7</sup> See Traditional Knowledge Digital Library (India), available at <http://www.tkdil.res.in>.

<sup>8</sup> See Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 LAW & CONTEMP. PROBS. 97, 103 (2007).

<sup>9</sup> *Id.*

<sup>10</sup> See Glossary of key terms related to Intellectual Property and Genetic Resources, Traditional knowledge and Traditional Cultural Expressions, available at WIPO/GRTKF/IC/37/INF/7.

discussions conclude that this knowledge should be at least 50 years old.<sup>11</sup>

The origins of yoga can be traced back to Patanjali's *Yogasturas* written almost in the 4<sup>th</sup> BCE.<sup>12</sup> Decoding the current although debated definition, Yoga can be recognized as a knowledge system; as it includes *asanas*, *pranayams* and a rich philosophy for sustained well-being. This system has been passed on for centuries among Indians and even outsiders who have sought the trove of this knowledge. Thus, Yoga perfectly ticks all the boxes in the context of traditional knowledge. Since traditional knowledge usually encompasses all the traditional domains of IP law; a system like Yoga; which has the possibility of being patented, trademarked or copyrighted ought to fit within the scope of Traditional Knowledge.<sup>13</sup>

### III. YOGA AND THE PUBLIC DOMAIN

It is a firm belief that not all IPs are entirely products of the mind and that they derive their inspiration from a rich and vibrant public domain. For instance, although patents are inventions which are novel and have never seen the light of day before, in actuality, a lot of them derive inspiration from their surroundings to better pre-existing systems in order to bring about efficiency in the present society. Thus, IP survives not only on the basis of creative minds but also on a robust public domain because people are free to copy from these sources and keep the cycle of innovation alive.<sup>14</sup> Thus, the Public domain can be roughly categorized into three parts:

- *IP Free Material*: Products which couldn't claim intellectual property rights due to lack of sufficient novelty or originality. E.g. adaptations similar to Macbeth or Othello.
- *Material unavailable for Private Ownership*: Those things which IP law does not protect by Policy e.g. plants, scientific elements etc.
- *Material that is available and accessible*: This includes products which form the common heritage of man and are free for use by all. It also includes those products

<sup>11</sup> See The Protection of Traditional Knowledge: Draft Articles, available at WIPO/GRTKF/IC/37/4.

<sup>12</sup> See Edwin Bryant, *The Yoga Sutras of Patanjali*, available at <http://www.iep.utm.edu>, (last visited on 10/03/19).

<sup>13</sup> See Ruth Okediji, *Traditional Knowledge*, available at <https://www.youtube.com/watch?v=OKmyMvCe9ss&feature=youtu.be>, (last visited on 25/12/2018).

<sup>14</sup> See Note on the Meanings of the Term "Public Domain" in the Intellectual Property System with special reference to the Protection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore, available at WIPO/GRTKF/IC/17/INF/8.

over whose IP rights expire, e.g. patents post 20 years, copyrights post 60 years etc.<sup>15</sup>

However, during the IGC negotiations, there was a huge uproar over what knowledge already existed in the public domain and whether it ought to be protected. Indigenous communities debated that the current viewpoint by Western countries where the public domain is that knowledge which does not already have IP protection and therefore is freely accessible to build on has led to a huge appropriation of the cultures and practices of the natives.<sup>16</sup> Thus, in the famous case of *Quassia Amara* (bitterroot), researchers patented the molecules of the said plant which had a cure for Malaria by justifying traditional doctrines of Patent law which grants patents for an inventive step on the existing stock of knowledge. Following this incident, the local Paliku people of French Guiana were highly offended at the misappropriation of the traditional knowledge that they so tightly held for generations. They also claim that this has led to a blatant disregard towards their voice in how this knowledge should be utilized or their shares in their commercialization.<sup>17</sup> Usage of their knowledge to claim IP rights like in the case of *Tibetan rugs*, which have become commercially successful home décor, is a sign of injustice towards such communities.<sup>18</sup> Thus, these communities claim that even though in status quo, such skills are in the public domain, such knowledge should not be freely accessible to all. These systems must constitute protected TK, and cannot be exploited by the loopholes in the current IP regime.

Therefore, indigenous communities argue that not all knowledge that is in the public domain is automatically free for use by all. This has given rise to the concept of “Publicly available” which separates TK in the public domain versus that which is publicly accessible. This includes traditional knowledge that has lost its distinctive association with any indigenous community and that as such has become generic or stock knowledge, notwithstanding that its historic origin may be known to the public.<sup>19</sup> This concept tries to separate those forms of knowledge that are secretly or sacredly held among such aboriginal communities to those which have widely dispersed into the global culture.

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<sup>15</sup> *Id.*

<sup>16</sup> See William Fisher, *The Puzzle of Traditional Knowledge*, available at <https://scholarship.law.duke.edu/dlj/vol67/iss7/4/>.

<sup>17</sup> *Id.*, at 4.

<sup>18</sup> *Id.*, at 17.

<sup>19</sup> *Supra*, note 14.

Turning back to Yoga, firstly, there are no descendants of Patanjali who can solely claim that they are an indigenous community (unlike the Paliku people) who are the only ones with the know-how of Yoga and that it is essential for this system to be secret for their community's spiritual and cultural well-being. Secondly, Yoga is not closeted knowledge. It is accessible in a multitude of ways. To the ones who want to learn this practice and can afford the fees, it is a Bikram Yoga or Iyengar Yoga tutorial; whereas for others it is reference to yoga journals or magazines and for the ones who want to spend the least, it is special Yoga channels curated on YouTube by urban and elite millennials which surprisingly do the trick too. Thus, although the historic origin of Yoga can be traced back to India and it has great spiritual value in our philosophy, due to its geographical expanse and its lack of touch with any indigenous community in India, it cannot come under the strict sense of protected traditional knowledge. This system of information is publicly accessible and is indeed a part of our vibrant public domain.

#### IV. DEFENSIVE PROTECTION OF YOGA

Since there hasn't been an international framework governing the exchange of TK within communities, lawmakers have created *sui generis* regimes governing traditional knowledge. Examples include the Indigenous Peoples Rights Act of the Philippines and Guatemala's Cultural Heritage Protection Act.<sup>20</sup> For instance, in New Zealand, all Maori art is excluded from the domain of Trademark law.<sup>21</sup> In India, TK and its derivations are denied patent protection by virtue of Section 3(p) of the Patents Act, 1970.<sup>22</sup>

For the most part, these rules only apply within the countries setting them. The net result is that, globally, the treatment of traditional knowledge varies radically by jurisdiction, and the governments of nations from which traditional knowledge is taken have little or no power to control uses of that knowledge in other nations. In this respect, the law governing traditional knowledge today resembles the law governing patents and copyrights in the mid-nineteenth century, when each country set the rules applicable in its own territory—

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<sup>20</sup> Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefore, and for Other Purposes, Rep. Act 8371 (Oct. 29, 1997) (Phil.).

<sup>21</sup> *Supra*, note 16.

<sup>22</sup> Section 3: What are not inventions:

The following are not inventions within the meaning of this Act,

(p) An invention which in effect, is traditional knowledge or which is an aggregation or duplication of known properties of traditionally known component or components.

and, in shaping those rules, typically favoured its own citizens and incorporated locally dominant ideologies.<sup>23</sup> In this view, India has set up a defensive protection mechanism to safeguard the exploitation of Yoga by IP rich countries. Since Yoga cannot be attributed to a single community, it is India as the State which takes upon itself the responsibility for protection of its TK compared to indigenous communities who take upon this stance by themselves without any government intervention for the protection of their rights.

This defensive stance can be attributed to the outcome in the *Bikram Yoga Copyright*<sup>24</sup> case. Bikram Choudhury, who is one of the most successful Yoga instructors in the U.S, runs his business by replicating the temperature conditions in India. Thus, his yoga classes ran at a temperature of 40°C designed in a manner to improve the results of traditional yogic poses. Bikram tried to assert Copyright over a sequence of 26 *asanas* and 2 breathing postures as a compilation of his original choreographic authorship based on his book 'Bikram's Beginning Yoga Class'. When he tried to injunct fellow competitors (Evolution Yoga) from applying the same technique and asserted his copyright, the Court held that while copyright to a sequence of yoga poses was unheard of; it was "theoretically possible". After this judgment, the US Copyright Office had to come out with an official clarification that Yoga and other exercise routines were not envisioned to be a part of the ambit of Copyright Law by Congress.<sup>25</sup> On appeal, the Court of Appeals held that the sequence was not protected by copyright as it was a system designed to develop the health of individuals.<sup>26</sup> Secondly it held that the subsisting copyright existed only to the book and not the sequence of poses 'compiled' in that book. Moreover, copyright law protected the expression of ideas, i.e., the manner of their expression and not the ideas themselves and everyone was free to develop on them. Although Bikram Yoga claimed that the sequence had grace and an aesthetic appeal attached to it, the Court found it to be different from a choreographic work because such a work requires dance movements and patterns to be presented as an organic whole. Bikram's sequence was fairly simplistic and did not meet the threshold of choreographic authorship in the Court's eyes.<sup>27</sup> Finally, it was held that Bikram's claims over the 26 *asanas* and 2 breathing techniques were areas that were

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<sup>23</sup> *Supra*, note 16.

<sup>24</sup> *Bikram's Yoga College v. Evolution Yoga*, No. 13-55763 (9th Cir. 2015).

<sup>25</sup> See *Statement of Policy, Registration of Compilations*, available at <https://www.gpo.gov/fdsys/pkg/FR-2012-06-22/html/2012-15235.htm>, (last visited on 29/12/2018).

<sup>26</sup> *Supra*, note 24.

<sup>27</sup> *Supra*, note 25.

excluded from copyright protection.

As if this wasn't enough, in the *Charlotte Anderson* case,<sup>28</sup> the plaintiffs sought to restrain the defendants from teaching techniques of Pranic Healing as they claimed to have inherited the copyright over the book on the same subject. Here, the Delhi High court applied that the copyright claim extended only to the manner in which the Pranic Healing techniques were expressed in the book and not to their practice in daily life. It also clarified that such poses do not rise to the level of dramatic works under Indian Copyright law, because, to constitute a dramatic work, the work must not only have a capacity of being performed but also should be done with the intention of being performed. Yoga and Pranic Healing have been considered to be simplistic in nature and due to lack of sufficient choreography; they do not fit into protected areas of dramatic works. Moreover, the Court clarified that names like Pranic Healing found their source in ancient Indian Yogic texts, and thus lacked the distinctiveness for granting of trademark. Such terms were *publici juris* in the eyes of law and did not distinguish the maker's products from the rest.

Thus, the Courts have continuously ruled for the need to keep Yoga outside the reach of existing IP regimes unless sufficient novelty or originality can be proved. All of these untoward developments towards the encroachment of Yoga led the Indian Government to maintain a public database of almost over 900 yoga poses in the TKDL to prevent them from being trademarked or patented. However, the Indian government has not stopped at this point and is pushing for positive protection in the field of TK.

## V. POSITIVE PROTECTION FOR YOGA

Apart from ensuring that researchers, artists or conglomerates do not encroach on the practices that are sacred to them; indigenous communities have also sought to confer certain positive rights over works that belong to them. The UN Declaration on the Rights of Indigenous People bears evidence to this. Article 31 of this Declaration states "*Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures,*

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<sup>28</sup> Institute of Inner Studies v. Charlotte Anderson, 2014 SCC Online Del 136.



*designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*"<sup>29</sup>

Although there is no binding value of such an instrument, it recognizes the right of such communities to positively assert control over knowledge that originated from them and attain any intellectual properties over such fields. Thus, the defensive stance of maintaining the vibrancy of the public domain goes away when nations like India can assert the right to control the manner of dissemination of such information. The larger looming threat is that of the State itself claiming IP over such knowledge which it sought to prevent against people who wanted to gain wrongfully off the conservation efforts of natives. The question of whether one would need a license to have a Yoga studio because of its commercial aspect is scary because traditional knowledge rights cover the entire domain of a particular art and thus effectively restrict the entry of any new practitioners and innovators.<sup>30</sup> This would effectively mean that the entire branch and not just one *asana* or one *pranayama* could come under the control of the state. No other IP protection poses the threat of diminishing the public domain as far as this right does, especially when for generations this knowledge has been widely disseminated and the benefits have been enjoyed by all. Although this provision of exclusive control for widely disseminated knowledge has not been entirely upheld for Yoga by the Draft Articles because it is neither secret nor is it narrowly diffused, the threat of economic benefits in the form of royalties for knowledge that may be publicly available looms over the WIPO discussions where no consensus has yet been reached.<sup>31</sup>

The second issue is that of attribution and integrity or moral rights claimed by the communities for knowledge that is widely disseminated yet, it holds spiritual significance for them. Moral rights can be claimed over works that damage the reputation of the original work or against their destruction or selective portrayal.<sup>32</sup> This right was effectively exercised by the *Mowanjum* tribe over the *Wandjina* spirit image. The tribe believed that the Wandjina were spirits that descended onto the Earth and created all forms of human life making them highly sacred amongst them. Gradually, when an artist

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<sup>29</sup> United Nations Declaration on the Rights of Indigenous People, available at [https://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf), (last visited on 29/12/2018).

<sup>30</sup> *Supra*, note 13.

<sup>31</sup> See Initial Draft Report, available at WIPO/GRTKF/IC/37/17 PROV.

<sup>32</sup> *Amar Nath Sehgal v. Union of India*, 2002 SCC Online Del 390.

started painting graffiti of the Wandjina image along the walls of Perth and another commissioned its statues for public display, the community was outraged as it was disrespectful to their beliefs to portray such images in public and photograph them. Under pressure from the tribe, the artist then agreed to stop making the graffiti and the statue commissioned was taken away by a litigation proceeding.<sup>33</sup>

Considering the case of Yoga, Indian philosophy already values it as highly sacred as it is essentially a way to attain consciousness and meet God.<sup>34</sup> The physical postures and breathing techniques are designed to control and discipline the mind, thereby keeping it away from any distractions.<sup>35</sup> Apart from this, Yoga adds a huge value to our rich cultural heritage when hundreds of foreigners, including the Beatles, came to India to seek the bliss of *Nirvana* from ancient and wandering yogis.<sup>36</sup> Contrasting this to the new and upcoming forms of yoga, like Pot-Yoga, Beer-Yoga and Nude-Yoga,<sup>37</sup> India could affirmatively restrict such people in different lands from teaching and earning off of such type of Yoga if it does not fit within the philosophical doctrines and cultural overtones surrounding its practice.

The effect of moral rights should also be evaluated from their effect on the possible natural course of evolution of such knowledge and democratic cultural hybridization.<sup>38</sup> The popular dance form Tango, actually sees its origins in African slave migrants to Latin America during the 18<sup>th</sup> Century. This dance form called *Cadombe* was very aggressive and violent then, but post the slavery movement, its popularity among the natives declined. The poor whites living in the slums mixed Cadombe with other dance forms calling it '*Canyengue*'. Canyengue then faded in the 1930s and the revival of this dance by wealthy

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<sup>33</sup> *Protecting the Sacred Wandjina: The Land and Environment Court Goes to the Blue Mountains*, ARTS L. CTR. AUSTL., (June 22, 2011), available at <https://www.artslaw.com.au/art-law/entry/protecting-the-sacred-wandjina-the-land-and-environment-court-goes-to-the-b/>

<sup>34</sup> Chatterjee, *supra*, note 1.

<sup>35</sup> See Stefanie Syman, *The Subtle Body: The Story of Yoga in America* 4, (2010).

<sup>36</sup> Janel Chatraw, *Did the Beatles introduce yoga to the Western world?*, (last visited on 29/12/2018), <https://people.howstuffworks.com/beatles-yoga.htm>.

<sup>37</sup> See Andrea Rice, *Ayurveda's Take on All the Recent Mixing of Marijuana and Asana*, <https://www.yogajournal.com/lifestyle/ayurvedic-perspective-on-mixing-marijuana-and-asana>, *Have you got the bottle for 'beer yoga'*, <https://www.bbc.com/news/av/world-asia-39711513/have-you-got-the-bottle-for-beer-yoga>,

*Naked yoga is the latest body positive trend on the wellness scene – would you try it?*, (last visited on 29/12/2018), <https://www.irishexaminer.com/breakingnews/lifestyle/naked-yoga-is-the-latest-body-positive-trend-on-the-wellness-scene-would-you-try-it-866878.html>.

<sup>38</sup> World Intellectual Property Organization, *supra*, note 14.

Uruguayans is what we call Tango today.<sup>39</sup> This tells us that cultural assimilation and hybridization plays a huge role in the evolution of any traditional practice. Similarly, Yoga in itself is not the same as it was 2000 years ago. For instance, Iyengar Yoga introduced the concept of artificial instruments like belts and blocks, to extend stretches in poses which could not be done by only the limbs of the body.<sup>40</sup> Vinyasa flows are a type that evolved in the 1980s that involve yogasanas not in stances but in flows with the aim of improving agility, whereas Power Yoga and Pilates Yoga combine aspects of Cardio workouts and Pilates to strengthen the body's core.<sup>41</sup> Therefore, the evolution of Yoga to what it is today has been dependent on the free flow of the knowledge of Yoga among different people and their ability to improvise on this traditional practice to make it an interesting workout choice for most youngsters. Thus, India practically cannot claim rights over a practice which has seen much innovation in terms of the aim of practice as well as the method of performing it. Moreover, in countries like the U.S, Yoga is also treated as a lifestyle choice. Thus, yoga, veganism, minimalism and other such values go hand in hand and have become a part of the daily routine of many Americans.<sup>42</sup> Giving moral rights over such areas where a state could determine which practices of an exercise are morally correct or incorrect and which ones are allowed is subjective and will depend on what levels of mutilation, selective portrayal or offensive depiction of this form would harm the sentiments of the State. Given the intermingling of Yoga with politics in India, Yogic leaders or Parliamentarians could very well dictate terms of morality that the State should follow. This could mean a chest-thumping approval for *Sattvik* (moral) Yoga and prosecution for *Tamasic* (immoral) types of Yoga practised abroad. Such subjective stances could very well stifle the knowledge we as Indians so freely disseminated.

## VI. INDIA'S CLAIMS AT THE IGC

The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was formed by the WIPO in the year 2000, to facilitate

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<sup>39</sup> Simon Collier, ET AL., *Tango: The Dance, The Song, The Story* (1995) (tracing tango's history); Robert Farris Thompson, *Tango: The Art History of Love* (2005) (exploring tango's evolution and expression through its global representations).

<sup>40</sup> Kristen McGee, *11 Types of Yoga: a Breakdown of the Major Styles*, (last visited on 29/12/2018), <https://www.mindbodygreen.com/articles/the-11-major-types-of-yoga-explained-simply>.

<sup>41</sup> *Id.*

<sup>42</sup> *Minimalism: When less is more*, available at, <https://www.yogamatters.com/blog/minimalism-when-less-is-more/> and Emma Henry, *Jivamukti: Where yoga and veganism meet*, (last visited on 28/12/2018), <https://www.veganfoodandliving.com/jivamukti-yoga-veganism-meet/>.

negotiations between countries to build a binding international instrument to protect traditional knowledge, traditional cultural expressions and genetic resources. While turning to India, it is important to understand the context surrounding India's past with traditional knowledge. Apart from the specific debacles with respect to Yoga by Bikram Choudhury and Charlotte Anderson - household items like *Turmeric* and *Neem* were also sought to be patented for their medicinal uses. Here, India had to spend a lot of time and resources proving the benefits of such items to be a part of India are TK and passed down knowledge making the patent claims fall for being non-novel and non-inventive. Thus, India has demands to protect knowledge that is publicly available but finds its origins in and is a part of the everyday life of its citizens. This is reflected by India's statement to the UN which reads as "*India welcomes the incremental progress made in the work of IGC and looks forward to an early finalization of an International legal instrument for effective protection of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources. India would like disclosure, prior informed consent and equitable access and benefit sharing based on mutually agreed terms to be included in the international instrument/instruments. From India's perspective it is important to find adequate ways to protect freely available traditional knowledge and traditional cultural expression, which may subsist in codified and non-codified forms.*"<sup>43</sup> Thus, India's demands range from Prior Informed Consent ("PIC"), Mutually Agreed Terms ("MAT") and equitable benefit-sharing for people who want to exploit their traditional know-how's. India's patent system already requires that prior disclosure of any use of traditional elements should be made to the patent office.<sup>44</sup> However, PIC, MAT and equitable access give it an opportunity to claim remuneration similar to license fees over any new intellectual properties built on the basis of its documented or undocumented TK.

The justification that India provides is that, although many indigenous communities have built and improved various skills that form today's TK, the State has made a major stride by documenting most of them.<sup>45</sup> Thus, even if the local communities have died down or aren't locatable; the State must be rewarded as a beneficiary like any other community.

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<sup>43</sup> Statement by India, Delivered by H.E. Mr. Ajit Kumar, Ambassador/Permanent Representative of India to the United Nations Offices in Geneva, on the occasion of 56th Series of the Meetings of the Member States of WIPO.

<sup>44</sup> See Guidelines for Processing of Patent Applications Relating to Traditional knowledge and Biological Material, last seen on 29/12/2018), [http://www.ipindia.nic.in/writereaddata/Portal/IPOGuidelinesManuals/1\\_39\\_1\\_5-tk-guidelines.pdf](http://www.ipindia.nic.in/writereaddata/Portal/IPOGuidelinesManuals/1_39_1_5-tk-guidelines.pdf).

<sup>45</sup> World Intellectual Property Organization, *supra*, note 31.

This argument runs on the basis of Locke's labor theory, which rewards man for efforts put into creating a socially beneficial product. However, this does not have a strong foundational ground in terms of the effort put into "preservation" rather than "creation". The original authors of such intellectual property like Yoga have already created the property and others have already built it into different forms resulting in its form as today. Therefore, the State's claim for reward for their documentation and subsequent preservation seems like asking for a reward for a merely manual exercise.

This concern was equally shared by other nations at the negotiations. They believed that rewards to the State for documentation of know-how's of, say pizza which was traditional to Italy, could create an anti-IP atmosphere, where every commercial entity could end up asking for prior permission and paying compensation to Italy. This would ultimately mean that there could be an IP-Tax for something that was earlier common and free.<sup>46</sup> Thus, almost every practice could end up asking for PIC & MAT, like Greece for the use of the Pythagoras Theorem, even though it is widely available because it was documented as TK in Greece's database as an informational system of mathematics. Thus, although protection and benefits seem viable for knowledge that is closely restricted to certain communities, rewards to nations for practices originating there and documented by them would end up creating a hostile environment for any IP to grow and flourish.

## VII. CONCLUSION

The IP system has always tried to balance innovator's rights for their beneficial contributions to society with the rights of access to such contributions to the people at large. In this process, while recognizing innovators, a lot of their research which depended on researching the lifestyle of tribal people and learning about their medicinal herbs and arts came across as merely a preliminary stage in the ultimate process of innovation. Thus, towards the 21<sup>st</sup> century, there was a prominent campaign in the international community to recognize the rights of these poor and deprived tribes. Prior disclosure and benefit sharing were seen as measures to alleviate the conditions of the global poor. Now indigenous communities have also demanded to have the right to restrict access to any of their systems and injunctions and damages for violations of the same. Even if these demands are considered justifiable for closely-knit TK, the allocation of rights for widely

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<sup>46</sup> *Id.*

spread TK to nations seems unjustified when these rights are being thought of to alleviate poverty and as a means of social justice. Monetary claims by states like India in the absence of such communities seems like an overstretch to compensate someone (here, the State) instead of those who may have deserved them if they were still around. A claim to benefits from TK seems overdone when no specific efforts can be attributed to the State in terms of revival and rejuvenation of systems other than those of documenting them into a database. Even if it is conceded that such digitization takes a lot of decoding of ancient literature and texts, it cannot justify why the benefits for such efforts become automatically transferable to the State for digitization of previously scattered traditional knowledge.

As discussed in one of the negotiations at the IGC, the level of dissemination of the knowledge to the outside world would be a decisive factor when TK became a part of the public domain.<sup>47</sup> In this sense, Yoga has not been confined to any native community in India, and its practices have been widely accessible to others by means of other practitioners, publications and the internet. The public domain character of Yoga is valuable as it allows for its regeneration and revitalization. Neither members of an indigenous community nor others would be able to create or innovate based on the intangible cultural heritage if exclusive private property rights were to be established over it. These property rights could be claimed by Yogis like Bikram Choudhury or even states like India by demanding rights of attribution and integrity for Yoga commercialized by third persons. By overprotecting cultural expression, the public domain diminishes, leaving fewer works to build on. Therefore, indigenous artists wishing to develop their artistic traditions by reinterpreting traditional motifs in non-traditional ways, and wanting to compete in the creative arts markets, may be inhibited by these regimes.<sup>48</sup> The same goes for Yoga when the sentiments of a State, say their opinions on the “correct” way to perform Yoga would depend upon political views and agendas, which could be backed by certain yogic gurus. Thus, popular sentinels like Baba Ramdev could influence the government on their stand towards modern Yoga. This could inhibit further research and improvisation to this age-old system to improve health and general wellbeing because it does not conform to their ideas of morality or cultural pride. The consequence is that these

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<sup>47</sup> See The Protection of Traditional Knowledge: Revised Objectives and Principles (WIPO/GRTKF/IC/17/5), page 25 of Annex.<sup>[1]</sup>

<sup>48</sup> See Expressions of Folklore, document submitted by the European Community (WIPO/GRTKF/IC/3/11.). See also Haight Farley, C. *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?* 30 CONN. L. REV. 1, 1997, and Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, document WIPO/GRTKF/IC/5/3.

rights to States may freeze the culture in a historic moment and deny the modern generation a contemporary voice.

Yoga today hardly confines to the doctrines of Maharishi Patanjali. Yoga poses, done either in flows or by holding a pose for several minutes, using of high-quality yoga wear and yoga gear accompanied by Sanskrit incantations, nature music and lit candles are prominent features of modern-day Yoga. In the contemporary world, traditional knowledge techniques survive only in this way, not as static but as continuously evolving as humans innovate around them to meet current needs and solve contemporary problems. Knowledge requires constant human ingenuity to sustain it. Traditional knowledge, WIPO tells us, “is being created every day and evolves as individuals and communities respond to the challenges posed by their social environment”.<sup>49</sup> Today’s Yoga tries to combat modern evils like obesity, PCOD, hyper stress, heart disease and the like by either conforming to traditional forms like Hatha Yoga while many others try experimental forms like Weed-Yoga and Beer-Yoga. Thus, traditional knowledge in Yoga has become a part of the evolution of culture and lifestyle of people across the world. Asking for a fee for commercializing Yoga, seems like being penalized for reviving, modernizing and running a successful business out of traditional knowledge. Yoga is a system for everyone’s benefit, even commercially successful entities. It must be freely left to be and grow as a part and parcel of 21st century traditions without any State trying to monopolize it on the claims of heritage or culture.

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<sup>49</sup> See WIPO Booklet No. 2, Intellectual Property and Traditional Knowledge, (last seen on 29/12/2018), [http://www.wipo.org/freepublications/en/tk/920/wipo\\_pub\\_920.pdf](http://www.wipo.org/freepublications/en/tk/920/wipo_pub_920.pdf).