

**PROTECTION OF INDIGENOUS CULTURAL EXPRESSIONS OF MUSIC IN INDIA:  
NEED FOR AN ACCESS AND BENEFIT SHARING SYSTEM**

JEEVAN S. HARI\* AND JAYSHREE S. SHET\*\*

**Abstract**

*The expansion of the domain of intellectual property gave rise to its many different classifications, one of which constitutes traditional knowledge [“TK”] and cultural expressions. As a separate subset designed to accommodate the skills and findings of indigenous communities of a region, it includes a plethora of artistic works passed on from founding generations to the next. Such indigenous knowledge, however, is severely mismanaged and subject to various kinds of infringement and intellectual trespassing. Various instances of misappropriation of traditional knowledge have been reported with regard to advancements in music, dance, medicine, etc. Thus, a need to enforce a robust and accommodative veil of protection for these indigenous inventions becomes a necessity in order to strengthen the realm of intellectual property in its entirety. Such protection will also need to ensure the sustained innovation of such cultural expressions by ensuring the safety of ownership and accruing benefits thereof to the rightful indigenous creators. The Indian legal framework is in special and swift need of such a system as it is currently in an unappreciated war with biopiracy. Controversies around the unauthorized acquisition of patents over TK such as turmeric, basmati rice, neem, etc. highlight the impact of the absence of such a protective system.*

*The authors have formulated the creation of a separate body established to administer all problems concerning indigenous expressions, which shall be titled the Board for Indigenous Cultural Expressions (BICE). The proposal for the setup of BICE is targeted towards the primary function of monitoring the warranted use of cultural musical expressions and the redressal of any infringement in favour of the aggrieved community. The framework has been devised in a manner that accounts for the social, cultural and economic interests of its benefactors. The principal mode of redressal is potentially designed at the obtaining and allocation of royalties in favour of the indigenous community, thereby ensuring the accomplishment of its primary purpose.*

---

\* Law student at School of Law, CHRIST (Deemed to be University).

\*\* Law student at School of Law, CHRIST (Deemed to be University).

## I. INTRODUCTION

In recent years, two broad categories of indigenous knowledge have evolved: traditional knowledge and traditional cultural expressions. Traditional knowledge (TK) includes knowledge, innovation, and skills of the indigenous and local communities, which are associated with the patent law system. Traditional cultural expressions, on the other hand, include the artistic works, music, and performances that have been produced collectively and handed down from one generation to another. Due to rapid globalization and increasing demand for commercialization of traditional knowledge, the expressions of culture, sustainable management of natural resources, land-use practices, and medicinal properties of local species of the indigenous society is being infringed upon.<sup>1</sup> There have been serious concerns about the misappropriation of such traditional cultural expressions and calls for their preservation as well as the protection of the rights of such people. The principal argument revolves around recognizing the property rights over such indigenous knowledge by creating a regulatory framework based on the notion of collective property rights. The protection of such TK can be realized in two ways. Firstly, by adopting a defensive protection theory to restrict outsiders from acquiring rights over the TK of a particular community.<sup>2</sup> Secondly, through positive protection theory which allows the TK holders to exercise their rights to promote and benefit from such commercial exploitation.<sup>3</sup>

An efficient system of intellectual property for the protection of TK is crucial to promote innovation of such knowledge. Although the Constitution of India, under Articles 48A and 51A(g), imposes a mandatory obligation on the States and a duty on the citizens respectively, to promote and enrich the natural environment and safeguard forests and wildlife, this does not directly address the issue of protection of TK. It also recognizes the fundamental right of the citizens of India to conserve their language, script, and culture.<sup>4</sup> One of the primary issues of such indigenous knowledge is its vulnerability to biopiracy. India has faced many struggles in

---

<sup>1</sup> CHARLES LAWSON, *WIPO, Genetic Resources and TK: The Evolution of a Formal Intellectual Property Agreement Protecting TK Associated with Genetic Resources*, in GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE, 31, 48 (Tania Bubela & E. Richard Gold et al. eds., 2012).

<sup>2</sup> WIPO Media Center, *Background Brief on Traditional Knowledge and Intellectual Property*, [https://www.wipo.int/pressroom/en/briefs/tk\\_ip.html](https://www.wipo.int/pressroom/en/briefs/tk_ip.html) (last visited Feb. 28, 2020).

<sup>3</sup> *Id.*

<sup>4</sup> INDIA CONST. art 29, cl.1.

trying to protect her traditional knowledge. There are have been serious controversies around the unauthorized acquisition of patents over TK such as turmeric, basmati rice, neem, etc. Such TK has translated itself to prove beneficial to mankind through various commercial uses with an insignificant amount of investment in time, money, and research. If such knowledge is overprotected, it will hinder future innovation and discoveries as indigenous people do not have the means to conduct such research. But, if it is unprotected, it would lead to overexploitation and deprive the holders of such knowledge from receiving their due share of compensation. Hence, it is indispensable that the intellectual property rights of these native people must be protected, and just compensation should be guaranteed to curb the mining of the riches of such indigenous knowledge.

## II. THE GENESIS OF A TRADITIONAL EXPRESSION

The terminology 'traditional expression' has been coined to denote the work of any collection of individuals hailing from a particular community differentiable either on grounds of ethnicity, language, etc. However, it is imperative to understand the process through which a traditional cultural expression originates. Can the simple reason that the creator of a work belongs to an indigenous community suffice to classify an artistic work as traditional knowledge? Unfortunately, a conclusion cannot be drawn on such simple grounds. Various factors such as the period of time, the contribution by the community and the unique nature of the work play a key role in deciding as to the qualification of a work as traditional cultural expression. In order to attain a better interpretation of the subject, one can view traditional expressions as a matter of 'commons', similar to that of the tales told by a wandering storyteller.<sup>5</sup> It must subsist in the form of a work originating from a community for the use of the community itself. The absence of individuality provides a distinction between a normal artistic work and a cultural expression. The existence of such a condition must not lead to the notion that tradition as such is the property of all.<sup>6</sup> While they contribute to the heritage of a state of a nation, no party can step forward and claim free use of that work if it can be identified that a certain community has invested work and resources into its creation or if such work stems from the efforts of their

---

<sup>5</sup> Diarmuid Ó Giolláin, *Who Owns Folklore? From Collective Creation to Collective Ownership*, 79 BÉALOIDEAS 44, 45 (2011).

<sup>6</sup> *Id.* at 46.

predecessors. In the seminal discussions of Roman Jakobson and Piotr Bogatyrev,<sup>7</sup> the aspect of balance of creator and communal rights has been discussed wherein they state that while an individual might create the folkloric work, it exists only insofar as a particular community has accepted it and made it its own.<sup>8</sup> Unlike a written work, neither an individual nor a community would be capable of creating folklore in isolation.<sup>9</sup> The next factor to be taken into consideration would be the period of time taken for it to be considered an ‘expression of tradition’. An indigenous cultural expression cannot stem within a night. Rather, it must be attributable to the conscious effort of one or more generations of a community as a means of establishing its existence as a timeless piece. A traditional expression must obtain a distinct character of identification, prevalent to such a level wherein it is commonly identifiable by a layman as to its origin or style dwelling from a particular community’s work. Such a mark of identification can only be obtained through a reasonable passage of time and the existence of that work during said efflux. The final ingredient required to denote a work as a traditional expression would be the unique element or flavour provided by the community to highlight a distinction in their work, thereby separating it from other similar music forms. Instances of many existing works and their highlights can be taken to elucidate upon the matter. Beats originating from indigenous groups of Tamil Nadu make use of a severely bass-oriented beat in their musical works, thereby attributing uniqueness to the sounds apart from the type of instrumentation employed. Similarly, Kerala folk music makes use of a tempered mid-treble sound in its beats to mark its point of distinction. Punjabi music relies on its line-up of instruments to produce a distinct style of music altogether by way of producing elements through the Dhol, Ektara and the Dilruba. Examples of International traditional expressions include the African vocal choir and the unique instruments used by the African tribes such as the Djembe and the Kalimba. The sound production must either be so distinct or unique that one can easily attribute the style to a certain indigenous community through means of audial perception alone.

---

<sup>7</sup> Roman Jakobson & Petyr Bogatyrev, *Le Folklore: Forme Spécifique De Création*, in QUESTIONS DE POÉTIQUE, 59-72 (1973).

<sup>8</sup> *Id.*

<sup>9</sup> GIOLLÁIN, *supra* note 5, at 44, 47.

### III. CURRENT INTERNATIONAL FRAMEWORK ON THE PROTECTION OF RIGHTS OF THE INDIGENOUS COMMUNITY

The primary purpose of any law is to direct its efforts to satisfy the existing needs of TK holders, which includes the promotion and preservation of TK, as well as the sustained development and usage of TK systems. Assuming the existence of an entitlement to TK by a given group, that entitlement may be protected through any of the following four mechanisms.<sup>10</sup> Firstly, a property regime that makes it mandatory to obtain consent for the use of TK. Secondly, a liability regime requiring no form of permission or sanction but inclusive of compensation payable to the indigenous right holders. Thirdly, an inalienability regime barring the ‘transferable’ component of TK. Fourthly, a combination of any of the above systems. The protection of the rights of indigenous communities in some international instruments is as follows:

- a) Article 27 of the Universal Declaration of Human Rights;<sup>11</sup>
- b) Article 27 of the International Covenant on Civil and Political Rights;<sup>12</sup>
- c) Article 15(1)(c) of the International Covenant on Economic, Social and Civil Rights;<sup>13</sup>
- d) Article 8(j) of the Convention on Biological Diversity;<sup>14</sup>
- e) Articles 13, 15 and 23 of the International Labour Organization Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries;<sup>15</sup>
- f) Berne Convention for the Protection of Literary and Artistic Works;<sup>16</sup>
- g) Agreement on Trade-Related Aspects of Intellectual Property Rights;<sup>17</sup>
- h) Principle 22 of the Rio Declaration on Environment and Development;<sup>18</sup> and
- i) Articles 11 and 31 of the Declaration on the Rights of Indigenous Peoples.<sup>19</sup>

---

<sup>10</sup> Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One view of the Cathedral*, 85 HARV. L. REV. 1089, 1090 (1972).

<sup>11</sup> Universal Declaration of Human Rights, art 27(2), Dec.10,1948, G.A Res. 217 (III) A.

<sup>12</sup> International Covenant on Civil and Political Rights, art. 27, Dec. 16, 1966, 999 U.N.T.S 171.

<sup>13</sup> International Covenant on Economic, Social and Civil Rights, art. 15(1)(c), Dec. 16, 1966, 993 U.N.T.S 3.

<sup>14</sup> Convention on Biological Diversity, art. 8(j), June 4, 1993 1760 U.N.T.S 69.

<sup>15</sup> International Labour Organization Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries, Sept. 5, 1991, 1650 U.N.T.S 383.

<sup>16</sup> Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S 221.

<sup>17</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S 299.

<sup>18</sup> Rio Declaration on Environment and Development, June 14, 1992, UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874.

<sup>19</sup> United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, A/RES/61/295, (2007)(hereinafter UNDRIP).

Demands for the protection of folklore were first made at WIPO and UNESCO in the 1960s.<sup>20</sup> The failure of the Berne Convention in ensuring adequate protection to traditional cultural expressions led to the commencement of several discussions by the WIPO Governing Bodies in 1978, thereby convening the meetings of the Committee of Governmental Experts. In the mid-1990s, there was a renewed interest in the international protection of folklore. This led to the adoption of the Model Provisions for National Laws<sup>21</sup> to protect and maintain expressions of folklore against unauthorized exploitation. The Plan of Action Committee of the World Forum on Protection of Folklore<sup>22</sup> suggested the drafting of an agreement on the *sui generis* protection of folklore as the current copyright regime was not adequate to ensure such protection.

The growing concerns of 'biopiracy' led to the increased international interests in the relationship between intellectual property, traditional knowledge and genetic resources which acquired the form of the Convention of Biological Diversity.<sup>23</sup> Pursuant to these recommendations, the WIPO General Assembly established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) in 2000.<sup>24</sup> The Fact Finding Mission (FFM)<sup>25</sup> cemented the bleak hopes of the indigenous community that their concerns about the rapacious exploitation of their knowledge and natural resources would be controlled through the IGC process and their rights recognized and traditional knowledge protected. However, even after the passage of 19 years, there has not been any substantial fulfillment of the aims of these indigenous communities. In 1982, a Working Group was established to look into the discrimination and oppression being faced by the members of the indigenous community. The Working Group presented to the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities with a preliminary draft of the declaration on indigenous peoples' rights, which was later accepted in 1994. However, several issues raised by the States with respect

---

<sup>20</sup> AHMED ABDEL-LATIF, *Revisiting the Creation of the IGC: the limits of constructive ambiguity? in* PROTECTING TRADITIONAL KNOWLEDGE: THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, 10, 11 (Daniel F. Robinson, Ahmed Abdel-Latif and Pedro Roffe et al. eds., 2017).

<sup>21</sup> WIPO, MODEL PROVISIONS FOR NATIONAL LAWS ON THE PROTECTION OF EXPRESSIONS OF FOLKLORE AGAINST ILLICIT EXPLOITATION AND OTHER PREJUDICIAL ACTIONS (1985), <https://www.wipo.int/export/sites/www/tk/en/folklore/1982-folklore-model-provisions.pdf>.

<sup>22</sup> WORLD FORUM ON THE PROTECTION OF FOLKLORE, Apr. 1997, UNESCO-WIPO/FOLK/PKT/97.

<sup>23</sup> LAWSON, *supra* note 1, at 40.

<sup>24</sup> WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, April 2000, WIPO/GRTKF/IC/1.

<sup>25</sup> WIPO Fact Finding Missions on Traditional Knowledge, Innovations and Practices of Indigenous and Local Communities: Progress Report, May 3, 1999, [https://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=994](https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=994).

to the provisions of the 1994 Declaration led to the setting up of an intersessional working group to consider the same. It was much later in 2007, that the UN General Assembly passed the Declaration on the Rights of Indigenous Peoples.<sup>26</sup> The States under this Declaration “*shall consult and cooperate in good faith... to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them*”<sup>27</sup>. Article 31 grants the right to ‘maintain, control, protect and develop their intellectual property’<sup>28</sup> over traditional knowledge and traditional cultural expressions to the indigenous people.

The WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions, 1982 (Model Provisions) were incorporated to prevent ‘illicit exploitation’ which can be detrimental to the interests linked with the use of expressions of folklore. They recognize mainly, four forms of expressions of folklore, i.e., verbal, musical, tangible expressions and expressions by actions.<sup>29</sup> Section 10 provides for the setting up of a competent authority to grant authorizations for certain kinds of utilizations of expressions of folklore, to receive applications for authorization of such utilizations, to decide on such applications and, where authorization is granted, to fix and collect a fee—if required by law.<sup>30</sup> It makes it mandatory to comply with the requirement of acknowledgement of the source in printed publications and treats any unwarranted utilization of an expression of folklore where authorization is required, as an offence. These provisions brought in place a *sui generis* type of law in order to protect the indigenous community against illicit exploitation.

#### IV. CURRENT FRAMEWORK ON ACCESS AND BENEFIT SHARING

The global framework for access and benefit sharing (ABS) is set up by the Convention on Biological Diversity (CBD) and the Nagoya Protocol. The CBD was one of the multilateral treaties signed at the Rio Earth Summit in 1992 which aims at conservation of bio-diversity as well as the fair and equitable sharing of the benefits resulting from the utilization of genetic resources.<sup>31</sup> Such a system of ABS rests on the principle of prior informed consent (PIC) which is granted by a provider to the user and deliberations between the parties to develop mutually

---

<sup>26</sup> UNDRIP, *supra* note 19.

<sup>27</sup> UNDRIP, *supra* note 19, art. 19.

<sup>28</sup> *Id.* at 9.

<sup>29</sup> WIPO, *supra* note 21, §2.

<sup>30</sup> WIPO, *supra* note 21, §10.

<sup>31</sup> THE CONVENTION ON BIOLOGICAL DIVERSITY AND NAGOYA PROTOCOL: INTELLECTUAL PROPERTY IMPLICATIONS, UNCTAD/DIAE/PCB/2014/3, (2014).

agreed terms (MAT). Article 8(j) states that *“Each Contracting Party shall...Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities.... and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising therefrom.”*<sup>32</sup>

Article 15 deals with access to genetic resources, while Article 16 recognizes the impact of intellectual property on access and benefit sharing. It recognizes the sovereign rights that each State shall have over its natural resources and works towards providing access on mutually agreed terms and with prior informed consent. It also provides for laying down administrative, legislative and policy measures to ensure access to genetic resources and transfer of technology to use the same.

The Nagoya Protocol, adopted under the CBD lays down the mechanism for access to genetic resources and associated TK, thereby encouraging the fair and equitable sharing of benefits. It institutes the setting up of the compliance mechanism for the ABS System by allowing access to genetic resources based on the PIC and MAT of the country of origin or the indigenous local communities. It also provides for the setting up of a national competent authority to register ABS agreements, grant permits for access and also to investigate claims where ABS regulations have not been followed. The competent national authorities will also be responsible for converting the national permits to internationally recognized certificates through the ABS Clearing House.<sup>33</sup> India ratified the CBD in the year 1994 and further went on to enact the Biological Diversity Act (BDA) in order to take cognizance of the provisions of the CBD. The ABS mechanism under the BDA is implemented through the National Biodiversity Authority, which shall regulate activities of commercial utilization, research, bio-survey and bio-utilization of biological resources in India.<sup>34</sup>

In pursuance of the provisions of the Nagoya Protocol, the Ministry of Environment, Forest and Climate Change notified the ‘Guidelines on Access to Biological Resources and Associated Knowledge and Benefit Sharing Regulations’ (“ABS Regulations”) in 2014<sup>35</sup>. They were issued in

---

<sup>32</sup> *Supra* note 14, art. 8.

<sup>33</sup> UNCTAD, *supra* note 31.

<sup>34</sup> NATIONAL BIODIVERSITY ACADEMY, ABS MECHANISM UNDER THE BIOLOGICAL DIVERSITY ACT, 2002: GUIDANCE MANUAL, <http://nbaindia.org/unep-gef/pub1/Guidance.pdf>(last visited Feb. 28,2020).

<sup>35</sup> NATIONAL BIODIVERSITY ACADEMY, GUIDELINES ON ACCESS TO BIOLOGICAL RESOURCES AND ASSOCIATED KNOWLEDGE AND BENEFIT SHARING REGULATIONS, 2014, [http://nbaindia.org/uploaded/pdf/Gazette\\_Notification\\_of\\_ABS\\_Guidelines.pdf](http://nbaindia.org/uploaded/pdf/Gazette_Notification_of_ABS_Guidelines.pdf).



order to curb the drawbacks of the ABS system under the BDA and to protect Indian genetic resources from exploitation. It lays down the process for access to biological resources and the mode of benefit sharing in cases of commercial utilization, research or bio-survey. It also permits the granting of intellectual property rights for inventions that are based on such biological resources.

## V. THE BASIS OF PROTECTION AND INFRINGEMENT OF MUSICAL WORKS

The dominion of music and its commensurate copyright mechanism has posed various challenges to the legal machinery with regard to adjudicating upon cases of potential infringement. The theoretical foundation of music, coupled with its aural perception and rhythmic progression provides for a complex bundle of sounds that make it difficult to ascertain as to whether a certain part of a tune has been inspired or blatantly ripped from another protected source. While the twelve notes of a musical scale can be arranged in potentially infinite ways, only some of them may sound pleasant enough to pass off as a work of art.<sup>36</sup> Moreover, the efflux of time has led to the exhaustion of a major segment of creativity and originality in the field of music. A large number of upcoming works can have their roots traced back to certain classical pieces.<sup>37</sup> Judge Irving Goldberg also held that the mere placement of two works side-by-side would not suffice to test for infringement if they can be traced back to a work of Bach.<sup>38</sup> The tools of originality in musical composition comprise of three elements – rhythm, melody and harmony.<sup>39</sup> It is essential for a musical work to be unique or originally expressed in all these forms to constitute an original work. It is, however, not the sole grounds for adding flavours of uniqueness and variance. Musicians can also choose to diversify or increase the range of instrumentation used in their works to bring about originality in their tune.<sup>40</sup> The protection granted under copyright law for works of music may not be accurate or true at all times, as it would be impossible for any authority to scourge through a vast repository of musical works to ensure originality of expression. Barring classical works, other works are subject to absolute constraints in order to ensure that two musical pieces do not share any form of major similarity with one another. It is vital for both composers and the copyright society to impose upon

---

<sup>36</sup> PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* (3rd ed. 2008).

<sup>37</sup> Jose Bellido, *Popular Music and Copyright Law in the Sixties*, 40 J. OF L. AND SOC'Y 570, 573 (2013).

<sup>38</sup> *Ferguson v. National Broad Co.*, 584 F.2d 111, 114 (1978).

<sup>39</sup> GOLDSTEIN, *supra* note 36.

<sup>40</sup> *Id.*

themselves a duty of care and responsibility to ensure that the work in question is true in its form and has not been substantially ripped off of another source. While certain relaxations can be provided through the means of sampling and the use of royalty-free sounds, the scope for error is still highly minimal due to the limited vocabulary provided by the element of music.<sup>41</sup>

In order to constitute an act of ‘copying’, there must be substantial proof of striking similarities between two works coupled with the access by one party to the work of another. The existence of these two criteria is imperative in order to adjudge the situation and frame solutions for it. However, a suit for infringement cannot be brought before the court where the claim lies with one work being a common or unprotected source. While the composer would still be considered to have ‘copied’ the track, it will be warranted by the legal provisions of that open source. The most prominent precedent for the deduction of an act of copying is the case of *Selle v. Gibb*,<sup>42</sup> where the court held the act to be an infringement on the grounds that the two songs had “such striking similarities that they could not have been written independent of one another”<sup>43</sup>. The use of an expert testimony was also present in this case, although it attracted criticism as only one expert testimony was produced wherein two or more could be obtained to strengthen the observations of the court. Modern precedents commonly make use of expert testimonies to decide on the matter of copying, but its admissibility has a divided view. While a court can accommodate for it, various instances of appellate courts have held that a lower court would not be in error only because it has refused to adopt such measures to adjudge the situation.<sup>44</sup>

## VI. ACCESS AND BENEFIT SHARING SYSTEM IN INDIGENOUS EXPRESSIONS OF MUSIC

India is a citadel of rich and diverse cultures and religions.<sup>45</sup> Indigenous cultural expressions of music are “expressions of folklore” which consist of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals signifying the customary artistic expectations of such a community.<sup>46</sup> Folklore traditions in India consist of contributions made by the co-existence of tribal, non-tribal and even urban culture,

---

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

<sup>42</sup> *Selle v. Gibb*, 741 F.2d 896, 223 (1984).

<sup>43</sup> *Id.*

<sup>44</sup> *Overman v. Loesser*, 205 F.2d 521, 524 (1953).

<sup>45</sup> NATALIE P STOIANOFF AND EVANA WRIGHT, *Fair Use and Traditional Cultural Expressions*, in *MAKING COPYRIGHT WORK FOR THE ASIAN PACIFIC: JUXTAPOSING HARMONISATION WITH FLEXIBILITY* (Susan Corbett & Jessica A Lai et al. eds., 2018).

<sup>46</sup> WIPO, *supra* note 21, § 2.

which has evolved into a common culture. However, with modern developments in technology, there has been unauthorized reproduction and commercialization of such traditional cultural expressions without any sharing of benefits and have been exploited to the detriment of those to whom they belong. Traditional songs and music can be recorded, publicly performed and downloaded from any free music archives and stored as digital information that can then be transferred into other sound files and new compositions.<sup>47</sup>

In India, such traditional cultural expressions of music form the subject matter of copyright under the Copyright Act, 1957. It grants a special right to artists who engage in performances for a period of 60 years.<sup>48</sup> Indigenous artists can be protected under this section as any sound recording or visual recording of their works requires their consent. Section 31-A makes provisions for compulsory licensing in the case of unpublished works or in cases where the author cannot be traced, by allowing the finder of any knowledge to apply for copyright.<sup>49</sup> However, the system of protection would change majorly with regard to traditional cultural expression as it does not co-exist with any existing conventional Intellectual Property right. On the outset, one may argue that some of the characteristics of indigenous knowledge are incompatible with the basic requirements of copyright protection.<sup>50</sup> To counter this line of argument, it is first necessary to break down the veil of traditional knowledge itself and look into the true nature of the work in question. While the work may be a rendition of the efforts of various members of a community based on the knowledge and experience of their collectiveness, the ultimate nature of the work formed would still be an artistic work of sound or vision. Every cultural musical expression consists of a bunch of sounds that are unique in nature in either form: instrumentation or arrangement. Therefore, it would not be an outlandish theory to try and include the element of traditional cultural expression within the realm of copyright protection. However, it is also vital to cautiously ensure that the entirety of copyright regulation is not made applicable to cultural musical expressions. Certain elements of copyright protection would be detrimental to the preservation of traditional musical expressions if made applicable to them. One such element would be the limitation of duration of a copyright that is granted to a

---

<sup>47</sup>Anurag Dwivedi & Monika Saroha, *Copyright Laws as a Means of Extending Protection to Expressions of Folklore*, 10 J.INTELL. PROP. RIGHTS, 308,310 (2005).

<sup>48</sup> Copyright Act, 1957, § 22, No. 14, Acts of Parliament, 1957(India).

<sup>49</sup> Copyright Act, 1957, § 31A, No. 14, Acts of Parliament, 1957(India).

<sup>50</sup> Jacob L. Simet, *Copyrighting Traditional Tolai Knowledge?*, ANU Press 62, 63 (2013).

person. It is common knowledge that a copyright holder has an absolute interest over his work for only a limited period of time, passing which such resource would be made available to the public as free access.<sup>51</sup> However, the implementation of a similar system would prove to be harmful to the interests of the local community that has actively worked over a period of time to create such an instance of art. The transfer of intellectual ownership of that work from the hands of their community would effectively hinder the interests of future generations that would be rendered unable to reap the benefits of the works of their ancestors. The very aspect of copyright is concerned with the creative output of people who enrich the cultural and intellectual dimensions of life.<sup>52</sup> The primary and unspoken purpose of a copyright system is to ensure that copyrighted works are created and disseminated as widely as possible, keeping in mind the benefits and interests of all parties concerned.<sup>53</sup>

The indigenous musical expressions are undeniably the creations of human intellect and hence require adequate protection under the intellectual property system in order to meet the needs of indigenous people and traditional communities. The best approach is to set up a copyright society under Section 33 of the Copyright Act, 1957 in order to collectively administer the work of protecting the copyrights of these indigenous communities.<sup>54</sup> The composition of such a copyright society shall be open to individuals who are well-informed about the traditional and cultural heritage of India, individuals having adequate knowledge about music and representatives from various indigenous local communities across India. This society will undertake the task of issuing and granting licenses pertaining to the musical works of the indigenous communities in which copyright subsists or in respect of any other right given by the Copyright Act. It is essential that the term of copyright over the musical works of such communities shall not be restricted to a fixed period of time as this would defeat the purpose of providing such protection. Such works reflect the characteristic elements of the traditional artistic heritage developed and maintained by the community as a whole and hence, it is unfair to grant such protections to a particular individual and impose limitations regarding the term of protection.

---

<sup>51</sup> Copyright Act, 1957, § 22, 23, No. 14, Acts of Parliament, 1957(India).

<sup>52</sup> Denis De Freitas, *Copyright and Music*, 114 J. OF THE ROYAL MUSICAL ASS'N 69, 69 (1989).

<sup>53</sup> *Id.*

<sup>54</sup> Copyright Act, 1957, § 33, No. 14, Acts of Parliament, 1957(India).

Broadly, the mechanism for granting protection to such indigenous and local communities can be classified into two:

Firstly, when such communities have already obtained a registration of their works from the Copyright society;

Secondly, when such communities have not obtained any copyright protection over their works. The first category also recognizes those communities who have published their musical work in any form, i.e., those who have obtained copyright protection over their works through de-facto publication. Any composer or singer who wishes to use the works of such a community will have to obtain a license from the copyright society. It is of utmost importance that such communities receive a fair and equitable share in the benefits arising therefrom. This demands the setting up of the 'Board of Indigenous Cultural Expressions (BICE)' in order to facilitate the system of access and benefit sharing. Any producer or composer who obtains a license from the copyright society for the purpose of commercial utilization shall be required to comply with the requirements of the BICE in order to operationalize fair and equitable sharing of benefits. Any producer who intends to acquire an intellectual property right for any musical composition involving the musical expression of the indigenous local communities will be required to pay such monetary benefit as agreed between the applicant and BICE. However, when there is no evidence which points to the origin of any musical work to a certain indigenous community, any producer who uses any such traditional music will be required to deposit such amount to a common fund created under the BICE. The purpose of such a fund would be to develop the Traditional Knowledge Digital Library (TKDL) in order to create a database for traditional and cultural expressions of music of the indigenous and local communities of various parts of India.

The composition of BICE shall be similar to that of the copyright society and it shall be vested with the powers to look into the infringement of the copyrights of the indigenous local communities and effective implementation of the ABS mechanism. It is therefore expedient to introduce such a mechanism under the aegis of the current copyright framework to ensure protection against biopiracy of their musical works.

The proposed system of Access-Benefit Sharing would ensure that the needs and interests of the traditional communities are secured at all points of time. In many cases, artists often take advantage of the resources provided by them due to their inability to legally challenge the infringement or their complete lack of knowledge of such infringement. The most popular case

of the 21<sup>st</sup> Century with regard to the infringement of traditional knowledge is the controversy that arose due to pop artist Shakira's *Waka Waka*. The song's hook was blatantly taken from a Cameroonian song recorded around 30 years before the creation of the female pop artist's song. The song was considered to be inspired from the 1986 global hit "*Zangalewa*" by the group Golden Sounds of Cameroon. The song features Zolani Mahola of the South African group 'Freshlyground' singing in Xhosa, one of the official languages of South Africa.<sup>55</sup> In this case, the artists were not able to approach a forum of relief on their own account in the initial part of the legal battle. Such would be the case of many other local communities that would be left helpless in the case of any infringement by a third party. Therefore, there is an underlying need to place a *suo moto* duty on the part of a dedicated institution to combat this lacuna. The law must accommodate for the setup of a body specialized in dealing with such issues of infringement in order to give effect to the propositions of the authors. The creators of traditional knowledge require a more complex and variegated system of norms for the protection of their interests as opposed to harmonized global IP regime.<sup>56</sup>

## VII. CONCLUSION

The realm of copyright and its intertwining with the aspect of traditional knowledge poses numerous challenges, the traversing of which are essential in order to ensure a proper mechanism for the preservation of the interests of local indigenous communities. The collection of traditional knowledge provided by various communities of India is extensive and numerous, thus subjecting the aspect of protection to various hardships. Moreover, various socio-cultural perceptions also serve as additional obstacles to the upholding of the rights and interests of indigenous communities. The consideration of indigenous knowledge as a sub-category of heritage as under the WIPO glossary<sup>57</sup> also opens the door of thought to consider it as a public resource as opposed to its existence as a community product. It is imperative that the legal provision for the countering of these problems is sound and equipped with the powers and functions required to effectively settle disputes and monitor the use of traditional knowledge resources. The proposal for the setup of a Board for Indigenous Cultural Expressions (BICE) is

---

<sup>55</sup> *Shakira Used Cameroonian Pop Song for World Cup Anthem Without Asking*, THE OBSERVERS (May 13, 2010) <https://observers.france24.com/en/20100513-shakira-used-cameroon-pop-song-world-cup-anthem-without-asking>.

<sup>56</sup> William Fisher, *Two Thoughts about Traditional Knowledge*, 70 L. AND CONTEMPORARY PROBS 131, 132 (2007).

<sup>57</sup> Christoph Antons, *Asian Borderlands and the Legal Protection of Traditional Knowledge and Traditional Cultural Expressions*, 47 MOD. ASIAN STUD. 1403, 1407 (2013).

targeted towards the primary function of monitoring the warranted use of cultural musical expressions and the redressal of any infringement in favour of the aggrieved community. The framework has been devised in a manner accommodating of the social, cultural and economic interests of its benefactors. The primary mode of redressal must be set towards the obtaining and allocation of royalties in favour of the indigenous community as it is the penultimate interest of the creators, owing to the numerous advantages that can be derived from such compensation. The setup of such a Board is also instrumental in redressing the inadequacies of the copyright societies as their purview does not extend to the protection and consideration of traditional knowledge sources. While the facet of the proposition may be a constraint on the existing legal machinery with respect to financial and redrafting grounds, its success or failure must not be based on short-term performance. The plethora of records of indigenous cultural expressions would make it exceedingly difficult for the Board to accurately identify a potential infringement in its early stage. Adequate temporal development must be allowed for the development of the TKDL repository to serve as a means of referencing for the Board to carry out its activities. In the long run, the interests of indigenous communities must be preserved with the synergies of copyright law and traditional knowledge dominion.