

Legal protection of traditional knowledge and traditional cultural expressions under copyright laws

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The protection of Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs) has gained significant attention in international legal and policy circles due to their socio-cultural and economic importance. Despite global efforts, there remains no universally accepted framework for the protection of TK and TCEs, leading to fragmented legal approaches across countries. This research examines the protection of TK and TCEs within existing intellectual property (IP) frameworks, focusing on the role of copyright law. Analyzing different models, the research finds that clear definitions of terms such as TK, TCEs, and Expressions of Folklore (EoF) would enhance judicial clarity and improve legal enforcement, especially within frameworks like the Indian Copyright Act.

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Over the earlier decades, protecting TK and TCEs has attracted attention internationally¹. As a result, the question of how we protect the TK and TCEs has raised various concerns for policymakers in many nations. Currently, there is “no global agreement amongst the members of the international community for the protection of TK or TCEs, but they have taken a step-by-step method while discussing various other options”². Many countries have actively protected TCEs and TK within their legal framework. IP rights and protection thereof constitute a significant that has been bothering the societies wherein TCEs have a strong influence on such societies’ traditions and culture³.

In the past four decades, the international community has endeavoured to protect human and cultural rights; while doing so, the system underwent some radical changes. It is here that the “concept of traditional knowledge (TK) and Traditional Cultural Expressions (TCEs)” and protection thereof has become a vital issue. Current research thus deals with “the protection of TK and TCEs under the Copyright Law”. But before dwelling directly on the topic, we must understand these concepts to better comprehend

the research. Moreover, to ascertain the scope of concepts and the scope of their protection, it is essential to know the meaning of these terms⁴. These definitions of traditional knowledge and TCEs in any legal instrument directly affect the extent and scope of protections of knowledge and expressions received. The universally acceptable definition of these concepts has been one of the most challenging hurdles for protecting traditional knowledge and TCEs⁵.

Meaning of TK and TCEs

The term as defined by Article 8(j) of the “Convention of Biological Diversity”⁶, refers to the “knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity”⁷. Thus, it states that TK and TCEs are the knowledge which is “possessed by Indigenous and Tribal people and can take more than one form, which including”⁸, but not limited to, “art, dance and music, medicines and folk remedies, folk culture, biodiversity, knowledge and protection of plant varieties, handicrafts, designs, literature”^{9,10}.

Having faced the difficulty in defining the term the World Intellectual Property Organisation (WIPO) Secretariat through “Intergovernmental Committee on

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Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)” came up with a working definition that reflects the universal approach that is used in other international mediums¹¹. The IGC in its working document on Traditional knowledge- Operational Terms and Definitions, defined the concept as “tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the literary, scientific, or industrial fields”¹².

As TK is passed on from one generation to another, similarly TCEs are also passed down from one generation to another. It is one of the characteristics similar to the traditional knowledge and TCEs. Artistic features or characteristics of culture in the form of expressions transferred with generations in the concerned community or society¹³. TCEs are creative expressions in which the traditional culture and/or traditional knowledge are embodied or expressed therein and sometimes it is called expressions of folklore¹⁴. These expressions are the identity and heritage of indigenous and tribal communities, which are “carried on and passed from generation to generation”¹⁵. However, there is no internationally accepted definition or meaning of the term¹⁶; at the same time, the IGC has recognized various definitions in national and regional laws and in international documents. The advocates of TCEs believe that for “adequate protection of TCEs”, it is essential to have a universally acceptable definition of the term¹⁷.

IGC has given a working description of TCEs based on the “Model Provisions, 1982”¹⁸, description as the starting point. According to the working description, TCEs means “productions comprised of characteristic elements of the traditional artistic heritage” which is (a) “developed and maintained by a community of a particular country or by individuals of such community which further reflects the artistic expressions thereof”, in particular (b) “Verbal expressions, such as folktales, folk poetry, and riddles, signs, symbols, and indications”; (c) “Musical expressions, such as folk songs and instrumental music”; (d) “Expressions by actions, such as folk dances, plays, and artistic forms or rituals; whether or not reduced to a material form”; and “tangible expressions”, such as (i) “productions of folk art, in

particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalwork, jewellery, basket weaving, needlework, textiles, carpets, costumes”; (ii) “crafts”; (iii) “musical instruments”; (iv) “architectural forms”.

Protection of TK and TCEs

According to Daphne Zografos, four systems of protection are applied to TCEs at the national level. Following are these systems¹⁹: (a) *the intellectual property type of protection*: denotes that existing conventional IPRs protect TCEs. The countries that have this kind of protection for the TCEs have done so through copyright legislation. The nations, in their copyright legislation, “define TCEs, as a form of copyrightable work or by incorporating provisions specifically designed for TCEs within their Copyright law”. (b) *the sui generis type of protection of an intellectual property nature*: countries legislate a new law of intellectual property nature to protect the TCEs. It states that the TCEs are protected by a law that, by nature is similar to other IPR legislations. This new law is influenced by existing IP laws of the country. Such countries include Croatia, Panama, the Philippines and Vietnam. (c) *the sui generis type of protection of a non-intellectual-property nature*: new “law to protect TCEs of a non-intellectual property nature is created”²⁰. An example of such law is the “Indian Arts and Crafts Act, 1990” which provides “protection to Indian Craftsman by the US Department of the Interiors Indian Arts and Crafts Board” under the Act²¹. (d) *the protection by conventional intellectual property rights*: according to this system, the existing IPR framework is considered to be suitable for protection of TCEs. Some nations believe that these expressions are adequately protected through the prevailing IPR, more specifically the Copyright and related rights, trademarks, design laws, geographical indications, common law remedies, etc.²². The current development of their domestic policy is to safeguard Indigenous arts and cultural expressions within existing legal frameworks rather than by implementation of *sui generis law*²³.

The current study discusses the existing IPR regime to protect the TCEs. Although the advocates for protection of TCEs argue that the *sui generis* mechanism is the best possible option for protecting TCEs, having said that, till the time India develops a separate legislation to protect TCEs, there are forms

of expressions that can be protected under the Copyright law itself with little modifications²⁴.

Legal framework in India

Constitution of India

The Constitution of India is the *grundnorm* and all other acts, legislations and rules have to be in conformity with the Constitution. Article 21²⁵ provides for protection of life and personal liberty; it states that no one can be deprived of his life and personal liberty except by the procedure established by law. The broader interpretation of this article has benefited all the people of India²⁶. It can be seen in various recent judgments of the apex court, expanding the horizons of the article to encompass various things to protect life and personal liberty of an individual. Such an interpretation of this article can be beneficial and at the same time, provide protection to the owners of TCEs²⁷. Furthermore, the Supreme Court in *Francis Coralie vs. Union Territory of Delhi*²⁸ has stated that right to life includes right to express oneself in diverse forms. Thus, we can interpret the article to mean the rights of indigenous people to express themselves in various TCEs and the right to protect such expressions. A liberal interpretation provides protection to TCE owners.

The Constitution of India, under Article 29(1)²⁹, tries to protect the cultural rights of minorities and it is a Fundamental Right as incorporated under Part III of the Constitution. It states that any section of the citizens residing in the territory of India or any part thereof having a distinct language script or culture of its own shall have the right to conserve the same. Through this article, we can protect and safeguard the rights, TK and TCEs of distinct communities with such culture, knowledge and expression in India. At the same time, the majority of present TCEs and those misused in India belong to small communities not under above mentioned article's ambit. The fundamental right guaranteed under Article 29, is only applicable to the communities that fall within the scope of minorities protected there under which can safeguard their rights, thus, it means it tends to leave out of the scope the protection of smaller communities who are relatively more prone to the apprehension of exploitation than the prominent communities³⁰. It suggests that if we protect the culture and knowledge of communities we first have to recognize them as minorities under the constitution, which can be a hurdle to smaller communities. At the

same time, to protect their culture it is the minorities who have to come forward and vindicate their grievances at the High Court or at the Apex Court. This, too, can prove to be a hurdle as the communities with no knowledge of law and practically being strangers to outside world would not efficiently exercise such rights given under the constitution. Thus, in case of indigenous people or communities, it is the state that should take active steps in protection of their rights. Furthermore, Article 51A (f)³¹, a fundamental duty in Part IV A of the constitution imposes the duty on every citizen to value and preserve the rich heritage of our diverse culture. Thus, we have specific constitutional provisions that can be interpreted to protect the rich culture, heritage and knowledge of the communities of our country. Certain amendments have to be made under the Copyright Act to recognize the rights of such communities and similarly make such provisions that protect the expressions of their culture.

Considering the vast culture that is observed and, along with it, the vast number of tribal populations present in India, Constitution of India provides for special protection to Indigenous communities as they are scattered all over the nation, constitution has adopted a different method to safeguard their culture. As per Article 371, read in consonance with 6th Schedule, the areas where only tribal communities are present are allowed to have a separate autonomous council for self-governance as per their customary laws. Such councils can even make laws to protect their social customs and traditions. Union and State legislature will only apply to them if the community accepts them. For the parts not occupied by the tribal community, the 5th Schedule of the constitution gives power to the concerned government to create or specify an area as a scheduled area to safeguard the rights of the tribes. The laws made by the legislators for the whole of India can be prohibited from application by the approval of the head of the state if such laws are in conflict with the customs of the tribes. However, the tribes that do not fall under the above-mentioned categories are subject to the laws of the parliament or state legislatures.

Regardless of the constitutional provisions for protection of socio-cultural identity and heritage of communities, no special statute penalizes or prohibits the exploitation of TCEs or folklores without the consent of concerned communities. It is observed that various customary norms in such communities

prohibit the use of their TCEs or their folklore by people outside their community. For example, folklore is practiced by the communities specifically in social or religious ceremonies such as rituals at marriages, death, or birth ceremonies, etc. Such folklore practices are not to be used out of the purpose which they are meant to serve. In the absence of law prohibiting usage of such folklore by outsiders, increasingly, they are being used for commercial gain³². The law that deals with the rights relating to artistic and literary works, films, sound recordings and rights of performers and broadcasting organisations is the Copyright Act of 1957. Let us look at whether the Copyright Act efficiently protects TKs and TCEs.

IP Legislation -The Copyright Act

Indian Copyright Act (ICA) provides rights to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. ICA provides rights including, inter alia, rights of reproduction, communication to the public, adaptation and translation of the work³³. The Indian Copyright Act which came into effect in 1957 and has been amended several times, the most recent being in 2012, does not contain any provisions for the protection of TCEs, folklore, expressions of folklore, etc. And there is no specific legislation to fulfil this purpose. As per the Act, copyright protection automatically subsists when the work is created. Thus, the Act nowhere mentions the terms folklore or TCEs, but, the interpretation of definitions of artistic and dramatic works, engravings, Indian work, literary work, musical work, performance, and performers, which are thoroughly defined in the Act, would include works which fall within the ambit of TCEs. That is, if we interpret these definitions, we might be in a position to safeguard TCEs until we get proper *sui generis* protection for them.

Protecting and safeguarding the TCEs under the copyright law of the nation is protecting TCEs under the prevailing system of IPR which is recognized at an international level as being in conformity with the TRIPS Agreement³⁴. TRIPS Agreement in Part 2, under Article 9, provides expressions as a copyrightable intellectual property *i.e.*, you can protect expressions in the form of copyright. Copyright recognizes the right of an author, who is the creator of the work and at the same time, it restricts everyone else from using work of such an author without this permission³⁵. The realm of

Copyright protection only arises in relation to folk material³⁶, folk literature, folk art or artistic folklore, etc.³⁷. These are some of the examples by which the people of indigenous communities express their traditional knowledge. All these expressions are quite eye-catching and appeal to the market consumers, hence their popularity³⁸. The traditional and ethnic features of such folk material showcase a quality of authenticity and originality which is quite rare in the market and is why the consumers find it attractive.

Out of all the forms of TCEs, folklore is the most vulnerable to infringement. Instances of exploitation, misuse, mutilation and dilution have been seen. The instances apprehend the “*originality of expression*” thereby violating various norms and customs of indigenous people. Examples of infringement of folklore can be seen in copying the folklore or remixing it with another mainstream song, collecting items considered to be sacred, etc. Folk art is second after folklore in the list of infringed TKs or TCEs. An example of folk art being infringed on is Australian “*Aboriginal art*”³⁹. Paintings, in particular, are a main attraction in Australian continent and thus, it is also more prone to infringement. Similarly, the customs of these native aboriginal people of Australia are often infringed⁴⁰.

The above-discussed TCEs in the form of folklore, folk material, folk art, or even folk literature can be adequately protected under the Copyright Law and many countries have been doing so. The basis for such protection is nothing but these are artistic expressions of the culture and heritage of these indigenous people. Thus, the Copyright also protects such expressions. However, there are certain lacunae in the Act that we need to understand. The current Copyright Act can prove to be suitable for safeguarding modern-day TCEs. However, the “pre-existing” TCE works, which form part of public domain, are open for everyone for their usage, according to the copyright law. This can result in conflict of interest between users and the Indigenous communities’ rightful owners. According to Dwivedi and Saroha, “There are certain features of copyright law which make it inefficient to meet all the interests and needs of traditional communities; some of the requirements are identifiable author, ownership, fixation, and limited duration of protection”. On the other hand, they believe that if a purposive liberal approach is given to the Copyright law, we can protect TCEs there⁴¹. Let us look at some of these

aspects which prove to be a hurdle in enabling the Act for the protection of TCEs in detail:

Authorship/Ownership

As per section 17 of the Copyright Act, protection is made available to the owner or author of the work⁴². The TK or TCEs are in its nature a community-based and community-centric knowledge; it is shared amongst the whole community for the good of entire, and as such, it is their way of life. As such, it developed and evolved through generations. Thus, tracking the valid owner or the author in case of traditional knowledge can be difficult, if not impossible. Furthermore, TCEs owned by the entire community and not by any particular individual and such TCEs and TK being passed down from one generation to another generation makes it very old to track the starting point. These characteristics and nature of the traditional knowledge or the TCEs make the conventional Copyright protection given by the Act very difficult.

Originality and Individuality

Another important requirement of the Copyright Act is that the work in which copyright subsists should be original, in the sense that the idea from which the expression is derived can be the same but the expression of the idea should be unique or original⁴³. It can have negative consequences on the traditional communities as one can exploit their folklore, considered to be sacred by the concerned community, as being an inspiration and derive a copyrightable work out of it. This is just a hypothetical scenario, but, it cannot be disregarded as there are instances. The criteria of "originality" here mean that the work should not be copied and the author should create⁴⁴. Supreme Court held that "only a minimum degree of creativity is required for a work to be called as original"⁴⁵. It is noted here that the individuality of the author; the Act does not recognize community ownership. As discussed above TK or TCEs are community-based knowledge and are thus owned by the entire community. Even if a single member of community is practicing or expressing such knowledge, it does not mean he can get copyright protection. In such cases, as the knowledge is for the betterment of entire community, it should necessarily be owned by the entire community. Provision of such kind where we can have community ownership is not present or cannot be seen to be interpreted under the Act. Thus, Fiscor has pointed out, "*Originality* and

individuality are two principles of copyright laws which do not conform to TCE works"⁴⁶.

Duration of Copyright

Indian Copyright Act gives time-bound protection to all the copyright owners. The reason is that the work cannot be protected and monopolized for eternity to foster creativity from such work when it falls in public domain. Whenever a work becomes part of public domain, it should be utilized by the society for its betterment. This idea of public domain, although a utopian one proves to be derogatory for the indigenous people. Under Indian law "copyright protection is confined by time as it is granted for a particular term of 60 years"⁴⁷. TK is of utmost importance and should have perpetual protection rather than limited protection. If their knowledge forms part of the public domain then in such cases the people whose livelihood is based on such knowledge would starve as people with resources can make manufacturing units to make the same products that such people are creating but at an economically viable price and thereby attracting customers to buy such products rather than the authentic TK based products.

Fixed form

Protecting any work under the ICA there is a prerequisite that the work must be in a tangible form. Copyright law protects "literary, dramatic, musical, artistic work, cinematographic films and sound recording if they are original and fixed"⁴⁸. Fixed forms of TKs are hard to find. In most cases, TK is passed over from generation to generation in a community informed of folklore, stories, riddles, lullabies and folk music. This is "passed down from one generation to another in a verbal form and most of these are possessed by the coming generation just by imitating". These stories are "hardly accessible in any fixed form" and it is challenging to find remedies available in copyright acts in case of infringement. Moreover, it is equally important to understand other forms of traditional knowledge, such as plant varieties and usage of particular techniques, are to some extent protected under different spheres of IP such as patent law, trademarks geographical indications, etc.⁴⁹. However, art forms such as folk music, songs, dances, folklore and paintings can only be protected under copyright as they are artistic and literary works of indigenous people.

As per Indian Copyright Law, TK or TCEs, although "artistic expressions, fails to adhere to

requirements that are pre-requisite to enable copyright protection under the Act". Hence, the "protection can easily be denied to TK or TCEs for not fulfilling the basic requirements for copyright protection"⁵⁰. Now we look at some international laws where TK and TCEs are protected under copyright laws.

International framework for protection

At this point we will be looking at the efforts of the international community to use various international legal instruments along with various national laws to promote and protect the TK and TCEs.

International instruments

The Berne Convention, 1886

The first and foremost instrument at an international level to protect artistic, literary and dramatic works is the "Berne Convention of 1886". Berne convention 1886 defines "literary and artistic work" to include any 'literary', 'artistic' or 'scientific work' such as 'writings', 'lectures', 'sermons', 'dramatic works', 'dramatico-musical work', 'entertainment', 'dumbshow', 'choreographic works', 'cinematographic work', 'musical work', 'drawing', 'painting', 'engraving', 'sculptures', 'maps', 'art works', 'illustrations', 'architecture designs', 'sketches', '3Dmodels', and such other work⁵¹. Furthermore, "translations", "adaptations", 'arrangements of music' and alteration of literary or artistic works," which are derivative works, are also protected under the Convention. Examples of these derivative works are 'collections of literary works such as encyclopedias'⁵².

It also took the initiative to protect folklore by safeguarding anonymous authors' work and protecting unpublished works^{53,54}. By virtue of Article 15(4) of the Berne Convention it endeavours international protection for expressions of traditional knowledge⁵⁵. At the same time, we must understand that the term folklore is not defined in the convention. Thus, by Article 15.4, some of the TCEs may be interpreted to be included in the definition of "literary and artistic work, even if they are unpublished works or even if their authors are not known". Thus, here the requirement of authorship is relaxed for protection of TCEs.

"The Universal Copyright Convention, 1952"

"Universal Copyright Convention (UCC),1952", protects "literary, scientific, and artistic work" which includes 'writings', 'musicals', 'dramatic and

cinematographic work', 'paintings', 'engravings' and 'sculpture'⁵⁶. TCEs falling under these categories of work can be protected under the UCC, 1952.

Rome Convention, 1961

The Convention of 1961 gives protection to the 'producers of phonograms and Broadcasting Organizations'⁵⁷. Article 3(b) of the convention defines "Phonograms" as, "any exclusively aural fixation of sounds of a performance or of other sounds".

"Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994 (TRIPS)"

"TRIPS agreement" also protects TCEs through their provision for protection of performers' rights⁵⁸. Article 14(1) states that 'performers have certain rights to fix their unfixed performances, provide authorization to reproduce through wire or wireless means, to communicate to public and do live performances'. Thus, the word "performer" can be interpreted to include the performers of traditional expressions.

"The WIPO Performances and Phonograms Treaty (WPPT), 1996"

WPPT broadly dealt with performers and their rights in relation to TCEs. WPPT defines performers as persons who perform 'expression of folklore'. Therefore the performers have 'economic' and 'moral' rights. WPPT also protects "performances of performers and phonograms of producers". Article 2(b) of the treaty defines 'phonogram' as "fixation of the sounds of a performance or of another sound, or representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audio-visual work".

"The Tunis Model Law on Copyright for Developing Countries, 1976"

It is one of the key international instruments that was developed to provide protection to TCEs especially folklore⁵⁹. The Model Law paved the way for perpetual protection of folklore and grants economic rights and moral rights to the owners of TCEs.

The "UNESCO-WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions"

It was enacted to tackle the issue of 'misuse or misrepresentation' of culture by charging a fee for commercialization of TCEs, if found. Under these provisions "rights in relation to TCEs are given to the community as a whole".

“WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore”

It was established in late 2000, and since then, it has made significant progress in issues involving “policy and practical linkages between IP system and the queries of practitioners and custodians or the stakeholders of traditional cultures”. The Secretariat of WIPO, under the guidance of the IGC, issued a ‘questionnaire’ on “national experiences of member states”, and based on such responses it took the comprehensive initiative of studies, research and consultation. These studies undertaken by the Secretariat are basis of many international policies and have assisted the WIPO in developing practical tools.

National laws

Copyright is one of the most preferred choices of many nations to protect TCEs. Many nations have chosen copyright law to protect TCEs observed in their respective jurisdictions. For example, *Brazil* protects its TCEs through its copyright law⁶⁰. The copyright law of Brazil mentions that ‘performers’ include the performers of expressions of folklore⁶¹. Mexico protects its TCEs through its Copyright law. These expressions are protected under the Ley Federal del Derecho de Autor, 1997, the federal Copyright law. Like the Brazilian law, it also protects performers from expressions of folklore⁶². The law also protects all literary and artistic works that form part of the nation's cultural heritage and also includes those works of which authors are unknown⁶³. It also protects TCEs from distortion or prejudice to their image and reputation⁶⁴. The copyright law 1996 of Peru also grants protection to TCEs⁶⁵. The law provides protection to “both original and derivative works of TCEs” under sections 2, 5, and 6 of the Copyright Law, 1996⁶⁶. Copyright Act 1921 of Canada protects the rights of traditional artists, composers and writers by giving copyright protection for unpublished works⁶⁷.

Comparative analysis of the laws to protect TCEs

A comparative analysis of these provisions with the Indian provisions under the copyright act is done and we can observe that the Copyright Act has also recognized and tried to safeguard the rights of performers. This can be extended to include the performers of TCEs as well. Furthermore, if we can include a definition of the terms TK, TCEs, EoF etc., then in such cases it will be easier for the court to

protect such TCEs when it is brought to their attention the violations thereof. Thereafter, its perpetual protection should be considered for such TK and TCEs.

Tunisian model protects traditional knowledge and more particularly folklore. The author describes whether, in a country, the intellectual property type of protection for TCEs is efficient.” Tunisian Copyright law is crucial because Tunisia is the first country to provide protection for TCEs under its copyright legislation. Tunisia is in the northernmost part of Africa and was a French colony before attaining independence. *Samantha Sherkin*⁶⁸, in her article, states that after the end of the colonization era, it was suggested that “the best way to protect the African cultural heritage and to prevent its exploitation is for the domestic governments to adopt appropriate legislation”. Thus, post-independence, Tunis adopted its copyright law in the year 1966 which was replaced in the year 1994. Along with the copyright legislation Tunis has also adopted a *Code du Patrimoine*. Thus, becoming the first country to protect folklore and works inspired there from under its copyright law. The Copyright law, 1994 states that “the folklore is a subject matter of copyright and is thus protected under the copyright law”⁶⁹. The best part about the Tunisian model is that it defines folklore and protects it from exploitation. However, the same might not be true or similar model might not prove to be useful in case of different countries. Firstly, the Tunisian cultural heritage or traditional knowledge is part of the national heritage⁷⁰. This also finds a place under “Article 7 of the copyright law 1994 which starts with these particular words”. Moreover, this is supported by the fact that “there are no Indigenous communities in Tunisia and thereby the folklore is traditional knowledge belongs to the public domain of the state”. This model can be challenging to implement in countries like India or US where there are recognized “Indigenous communities whose cultural and economic interests are to be protected while protecting the traditional knowledge”. Secondly, under the Tunisian Copyright Law, the folklore and TCEs, being part of the national heritage are protected for an unlimited period. This can also pose a hurdle while implementing in countries with a strict copyright regime along the Berne Convention and TRIPS Agreement which specifies a time after the work would fall under public domain. Thirdly, the territorial nature of the copyright law stops to act

when another country infringes the TCEs or folklore of the country, this is the third loophole in the Tunisian model. Coming back to the article, Zografos is not able to conclude the efficiency of the intellectual property type of protection of TCEs, because of lack of cases of infringement, and thus, the author concludes by stating that it is too early to judge the efficiency of the Tunisian Model.

*Nina Mantilla*⁷¹ emphasizes the *suigeneris* mechanism to develop and evolve Hawaiian Model for protection of traditional knowledge and TCEs. Hawaiian model gives a new mechanism, different from that of existing IPR regime. It is needed to address the problem faced by natives of Hawaii, and the same can be created by borrowing selective elements from various models around the world. Therefore, developing Hawaiian has its very own *suigeneris* mechanism to protect the TCEs and specific needs of native Hawaiians. Self-determination *sui generis* mechanism allows Hawaii indigenous peoples to borrow elements their from their models while maintaining their distinct identity and autonomy. Hawaiian culture has faced a lot of cultural misappropriation, some of which are considered to be infringing their commercial rights, some violating their culture, and the natives consider it to be offensive. Such as the *Dodge Kahuna*⁷², is a cartoon car; in Hawaiian culture, “*Kahuna*” is a “person who performs religious ceremonies”. John Book, in his article, stated that the name of the new Dodge car was offensive to the Hawaiians and their culture. The huge distress among the people supported it and they considered the use of the word offensive. The misappropriation which violates the commercial and economic rights of the native Hawaiians, affects the native artists to make their living. Heidi Chang⁷³ has explained this by the market example where intimidating products are brought into the market which are way too cheap and counterfeits of the “native Hawaiian crafts, such as drums and leis etc.”. Moreover, a study conducted by the Hawaiian Tourism Industry also indicates similar results; the natives consider that tourism in Hawaii is inauthentic; thereby highlighting the problem of counterfeit products flooding the market and stating that it also distorts their culture⁷⁴.

The New Zealand *sui generis* model for protection of TCEs, *Toi Iho Cultural Trademark Program*, uses a distinct trademark to certify the traditional Maori culture. The problem with this system to be adopted is

that it is a mark of sorts that will not necessarily protect the traditional knowledge or cultural values that need the maximum protection. The success of the New Zealand model rests on the fact that it was immensely supported by the Maori master artists and the general public, their participation in the program was crucial towards its success. So, in case such a program was to be implemented in a country we have to make sure that recognized masters of traditional knowledge support the programs and the fact that master ship of a person should not be an issue. Another reason for success of this model is its emphasis on the “quality of the product rather than the ethnicity of the artist”.

Alaskan Model of IPR for protection of TK focuses on community-based rights, and provides the whole community with collective rights of ownership and cultural preservation over individual patents, recognizing the unique nature of Indigenous Knowledge systems that are deeply rooted with cultural identity rather than fitting neatly into western IPR frameworks. Alaskan model of IPR allows community benefit-sharing agreements, informed consent protocols and cultural protections. Indigenous communities prefer to maintain cultural identity, and resilience beyond just economic benefit sharing⁷⁵. Due to this model, many Alaskan native organisations have established policies and procedures to manage access to and use of traditional knowledge within their communities⁷⁶.

Findings

The study highlights that, despite significant global discourse, there is no universal agreement or cohesive international framework for protecting Traditional Knowledge (TK) and Traditional Cultural Expressions (TCEs). Various efforts, such as the Convention on Biological Diversity (CBD) and initiatives by the World Intellectual Property Organization (WIPO), have contributed to defining these concepts, but the lack of universally accepted definitions remains a key challenge in offering consistent protection. One of the most significant obstacles identified in the research is the ambiguity surrounding the definitions of TK and TCEs. While countries have made progress in framing laws to protect these cultural assets⁷⁷, variations in definitions and the scope of protection across jurisdictions create inconsistencies. The research shows that a clearly articulated definition, particularly within the context

of national legislation like the Indian Copyright Act, could improve enforcement and protection measures.

Comparative analyses of various national systems, such as Tunisia's 1994 Copyright Law and the Hawaiian sui generis model, reveal both strengths and weaknesses. The Tunisian model, which protects folklore as part of the national heritage, offers a unique approach but faces limitations in jurisdictions with established IP regimes. The Hawaiian model's emphasis on a sui generis system reflects the need for tailored protection mechanisms that account for the unique cultural, social, and economic needs of indigenous communities. The study found that, while copyright law may not have been designed to specifically protect TK and TCEs, it can still provide a viable avenue for protection with minimal modifications. Indian copyright law, for instance, already recognizes performers' rights, which could be extended to include performers of TCEs. The study suggests that minor adjustments, such as including clear definitions of TK and TCEs, could enhance the efficacy of the Indian Copyright Act in safeguarding cultural heritage. While the sui generis approach, which involves creating specific laws to protect TCEs, is widely advocated, the research points out that its implementation may not be straightforward in countries like India, where existing legal frameworks are already in place. Nonetheless, the research acknowledges that a hybrid model integrating traditional IP rights with sui generis provisions could be a more balanced solution.

Conclusion

The protection of Traditional Knowledge and Traditional Cultural Expressions is a complex, multifaceted issue that requires a nuanced approach. The research concludes that while a sui generis system may offer the most tailored solution for safeguarding TCEs, existing intellectual property frameworks, such as copyright law, can provide a practical means of protection with some adaptation. For India, the study suggests that incorporating explicit definitions of TK, TCEs, and Expressions of Folklore within the Indian Copyright Act could streamline legal processes and improve enforcement. Additionally, recognizing the rights of performers of TCEs under the current provisions of the Act could offer a more immediate form of protection. The research emphasizes the need for a flexible, hybrid approach that combines both existing IP law and

tailored protections to best safeguard the cultural heritage of indigenous and local communities. By learning from international models such as those from Tunisia and Hawaii, India could develop a robust framework for preserving and protecting diverse cultural expressions.

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Conflict of Interest

The authors declare that they have no conflict of interest.

Author Contributions

SB collected and compiled all the academic resources and existing laws and analysed the issues and challenges, and SP guided and superfine all of these activities.

Ethics Approval

Not applicable

Data Availability

The data are available upon reasonable request from the corresponding author.

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