



Implanting Sui-Generis Regime on Folklore Protection in India: A Study from Perspective of Copyright Law

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Folklore expressions are vital to a nation's cultural heritage. In addition to being an important source for historical writing, folklore helps to preserve and comprehend a community's cultural values. The international community has been prompted by this significant achievement to address the unique needs of traditional communities and safeguard folklore expressions against exploitation and unauthorized use. For a country rich of culture, like India, it has become prominent to protect its cultural assets against the ink of commercial exploitation which not only causes economic loss but cultural loss as well. Despite the international community recognizing the urgent need to protect folklore against unauthorized use, the inadequate nature of existing legislations, such as copyright law, has been pointed out. It is noteworthy that while the global community has called for the adoption of a sui generis regime to protect folklore, India still remains yards away from adopting one such regime. In this regard, China, one of the BRICS member states, has played a remarkable role by adopting 'Law of the People's Republic of China on Intangible Cultural Heritage' (*hereinafter referred to as ICH Law*) which came into force in 2011. So far India is concerned; the country lacks a sui-generis law on the lines of Model provisions for folklore protection. With the ongoing susceptibility of folklore to exploitation, traditional community members have no choice but to rely on the existing intellectual property regime, which often fails to provide adequate protection. Herein, the need of adopting a sui-generis regime for folklore protection in India arises.

Keywords: India, China, Folklore, Exploitation, Cultural Heritage, Copyright, Sui-generis

The term 'folklore' puts forth a narrative of survival of the traditional and cultural values of a community. The various cultural beliefs, customs, and oral history of a community are all preserved through folklore. The most common features of folklore expression is such that they aid in preserving and carrying forward the cultural heritage from generation to generation, ensures the bond of the communities with their past, and, foster a sense of identity and belongingness amongst the community dwellers.¹ Since folklores are expressive, convey the values and ideas held within a community, they become an important tool of understanding the people.² They promote a sense of shared cultural identification and aid in developing an understanding of one's origins, identity, and place in the world at large. Not only this, folklore offers a platform for individuals to communicate their ideas, feelings, and experiences. Sharing folklores is a lively activity as it teaches the society about the beliefs held within a community. It includes rituals, storytelling, music, dancing, painting, and other forms of expression that helps the traditional community

dwellers to express their beliefs, feelings, and ideas.

The cultural value of folklores has been long recognized by the international community. They are undoubtedly important to all countries, especially the developing nations where folklores have become a crucial component of their cultural heritage.³ Globalization and digital development has put imminent threat to India's folklore. Oral traditions are now gradually diluting as younger generation is estranged from ancestral roots. India faces a lack of complete protection to folklore under a municipal law. Even though intellectual property laws such as Copyright Act, 1957 and Biological Diversity Act, 2002 are enacted, they fail to provide sufficient framework to folklores which are orally transmitted, communally held and often remain anonymous in public domain.

The international community, in particular, the World Intellectual Property Organization (*hereinafter referred to as WIPO*), has observed that folklore expressions of developing and under-developed countries are more vulnerable to commercial exploitation. It is observed that the rapid progression has become a looming threat to folklore expressions

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and posed them to commercial exploitation.⁴ The need to protect folklore expressions is twofold- first, to secure the cultural sanctity of folklores and second, to prevent the commercial benefits that may arise out of unauthorized usage of such expressions. With this, the need of having a sui-generis regime for folklore protection has been suggested from time to time, especially at the meeting convened by UNESCO that gave effect to the Model Provisions, 1985. While only handful countries such as China⁵, Panama⁶, Azerbaijan⁷ and Peru⁸ adopted the provisions into enforcing a sui-generis municipal law on folklore protection, many others, including India, are still steps away.

The term 'sui-generis' means "of its own kind",⁹ and it is noteworthy to mention the absence of one such law on folklore protection in India. On the unquestionable annotation that folklore expressions form part of intellectual property,¹⁰ this paper looks into the existing parameters of protection available to folklore expressions under the intellectual property regime. With this, the primary focus will be on analyzing the adequacy of copyright regime to protect folklores. The justification for choosing India is her cultural diversity from Kashmir to Kanyakumari, which India embraces, making it a hub of diverse culture. For handiness, the terms 'traditional cultural heritage' and 'expressions of folklores' have been used synonymously and interchangeably as the pattern is already followed in several international discussions surrounding folklore protection.¹¹

Concept of Traditional Cultural Expressions

Traditional Cultural Expressions are as old as mankind. They are created from time immemorial and evolve over time as the community grows. While the term 'traditional' is not equivalent to 'old', it refers to the procedure by which knowledge is passed down from one generation to other.¹² Traditional Cultural Expressions (*hereinafter referred to as TCEs*) are a product of intergenerational and creative process and often quoted as 'folklores'.¹³ Folklore is an art of the community and generally comprises of various songs, stories, proverbs, spells within the spoken language of the community. The western understanding of Indigenous Knowledge is being divided into two: traditional knowledge and traditional cultural expressions. While on one hand TK is composed of the knowledge, skills and the know-how of the indigenous communities, traditional cultural

expressions includes the music, artistic works, songs and performances generated within a community. According to World Intellectual Property Organization (*hereinafter referred to as WIPO*), traditional knowledge, including traditional cultural expressions are developed by the indigenous communities for transmission from generation to generation to preserve, protect and carry forward the cultural, historical and social values held within the traditional community. The term 'folklore' was first coined by William John Thoms to mean and include 'manners, customs, observations, superstitions, ballads, proverbs and so forth'¹⁴ wherein he used the term in one of his letters to a journal 'Athenaeum'. Being at the heart of a community, traditional cultural expressions are 'living' as they are constantly evolving and recreated by artisans bearing fresh perspectives to the work. According to WIPO, TCEs have certain common characteristics such as¹⁵:

- (i) They are passed down from generation to generation either orally or through intimation;
- (ii) Reflect the social and cultural identity of a community;
- (iii) Represent key characteristics of the heritage of a community;
- (iv) Created by authors who are often unknown but having the authority to do so;
- (v) Generally not created for commercial purpose but for driving the religious and cultural values of the community; and
- (vi) Are constantly evolving and developing within the community

While there is an absence of a specific definition to Traditional Cultural Expressions under the domestic laws of most countries (including India), WIPO has played a remarkable role in extensively defining the same, which can assist BRICS members for providing protection within their territory. WIPO allows member states to determine the specific terms for subject matter protected under Draft Provisions for the Protection of Traditional Cultural Expressions wherein Article 1(a) of WIPO/GRTKF/IC/10/4 provides a detailed definition to Traditional Cultural Expressions as follows:¹⁶

“Traditional cultural expressions” or “expressions of folklore” are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

- (i) *verbal expressions, such as: stories, epics, legends..... words, signs, names, and symbols;*
- (ii) *musical expressions, such as songs.....;*
- (iii) *expressions by action, such as dances, plays, ceremonies, rituals and other performances; whether or not reduced to a material form; and*
- (iv) *tangible expressions, such asdrawings, designs,sculptures, pottery....which are:*
 - (aa) *the products of creative intellectual activity, including individual and communal creativity;*
 - (bb) *characteristic of a community's cultural and social identity and cultural heritage; and*
 - (cc) *maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community."*

This has become a prominent step in aiding countries like China, Peru, and Panama in defining the contours of folklore expressions under their sui-generis law on folklore protection.

Importance of Traditional Cultural Expressions

Traditional cultural expressions are passed down from generation to generation, orally or through hands-on practice, creating a strong intergenerational bond and ensuring the continuity of cultural knowledge and skills. Traditional cultural expressions often encompass various forms of artistic expressions such as music, dance, crafts, storytelling, and visual arts. They represent unique artistic achievements and contribute to the diversity of global cultural heritage. Besides forming an essential part of a country's cultural heritage, TCEs form component of human culture often representing the common values held within a community.¹⁷ TCEs are integral to the identity of communities and ethnic groups. They provide a sense of belonging and continuity, connecting present generations to their ancestors and forming a basis for cultural heritage and pride. TCEs foster social cohesion by bringing communities together through shared rituals, ceremonies, and celebrations. They strengthen social bonds and promote cooperation among community members.

The protection of folklore expressions is primarily based on the notion that such expressions are essential for the survival of the ethnic heritage that reflects a community's heritage in its purest form.¹⁸ While folklore expressions perform the primary function of brining stability in cultural practices, William Bascom, a prominent anthropologist has identified the

following functions that folklore expressions fulfill in the society. These are as follows:¹⁹

- (i) **Social Function:** Bascom believed that folklore serves as a means of communication, helping to transmit shared beliefs, customs, and values from one generation to another. Through folklore, individuals learn about their cultural heritage and acquire a sense of identity and belonging within their community.
- (ii) **Entertainment and Recreation:** Folklore expressions, such as folktales, songs, and dances, often serve as a form of entertainment and leisure. They provide enjoyment and relaxation, allowing individuals to escape from the daily stresses of life.
- (iii) **Education and Morality:** Many folklore narratives contain moral lessons and ethical teachings. They serve as a medium through which cultural norms and values are passed on to younger generations, instilling in them a sense of right and wrong and guiding their behavior.
- (iv) **Psychological Function:** Folklore can serve as a coping mechanism for individuals facing life's challenges and uncertainties. It offers comfort, solace, and explanations for natural phenomena, death, and other existential questions.
- (v) **Expression of Creativity:** Bascom emphasized that folklore expressions are not static entities but are subject to creativity and innovation. People continually adapt and reinterpret folklore to suit their changing circumstances and cultural contexts, showcasing human creativity in storytelling, music, art, and more.
- (vi) **Social Commentary:** Folklore often reflects the concerns, hopes, and fears of a community. It can serve as a form of social commentary, addressing issues such as social injustices, political events, and cultural changes.
- (vii) **Group Identity and Unity:** Bascom saw folklore as a powerful force in fostering group identity and unity. It allows communities to distinguish themselves from others while also highlighting shared experiences and values.
- (viii) **Ritual and Ceremonial Function:** Many folklore expressions are closely tied to rituals and ceremonies. These rituals reinforce cultural norms, mark important life events, and facilitate social bonding within the community.

Overall, traditional cultural expressions play a vital role in preserving cultural diversity, promoting

sustainable practices, strengthening social bonds, and enhancing the overall well-being of communities around the world. Acknowledging and respecting these expressions are crucial for fostering cultural appreciation, respect, and cooperation on a global scale.

Exploitation of Traditional Cultural Expressions

TCEs have gained importance in various communities since time immemorial and form an essential part of a country's heritage.²⁰ The protection of TCEs expressions is primarily based on two major concerns: first, indigenous community dwellers, in common, share the profits generated from the folklore expressions and second, such expressions must be respected and protected from distortion by the tradition prevalent outside the community.²¹ Even though folklores were exposed to exploitation in the past as well, the spectacular technological advancement has exposed them to newer ways of exploitation.²²

The advent of globalization and modern technology has substantially exposed TCEs to commercial misappropriation at the hands of unauthorized parties through production of audiovisuals, phonograms, broadcasting, etc. Folklore expressions have been exploited since a long time by various commercial and business entities.²³ Every now and then, it is seen that traditional cultural expressions are displayed at art galleries, gift shops, souvenir stores, malls, etc. without due regard to the cultural values that such expressions hold to the community from which they originate. The exploitation of TCEs has become a primary concern not only in India but the entire globe. "Exploit" means "to unfairly make use for one's own advantage".²⁴ Exploitation of folklores can occur through commercialization, misappropriation and stereotyping. According to Merriam Webster, the term commercialization means exploitation for profit.²⁵ This means that commercialization of folklore occurs when folklore expressions are exploited for generating profits by the unauthorized entities. Commercialization of folklore expressions can take place either without making adaptations to the original work or with certain adaptations to it. Instances of commercialization without adaptations include the sale of traditional items as souvenirs, printing of tribal warli art on canvas textiles, performance of traditional dances such as Chhau at tourist events. Adaptation to folklores takes place when the original work is modified for it to be

commercialized. This can happen through two ways: spontaneous commercialization (wherein artisans make instant modifications to cater the requirements of customers)²⁶ and sponsored commercialization (where intermediaries guide artists living in remote location to modify the cultural expressions that will be sold at a remote market).²⁷

Misappropriation of folklore happens when the adoption/ exploitation of one culture takes place by another dominant culture. According to Susan Scafidi, cultural misappropriation as the unauthorized use of someone else culture is most likely to harm such minority community.²⁸ In such a way, misappropriation of folklore expression can potentially destroy the sacred objects of a minority community that are in particular sensitive. Stereotyping of folklore expressions is yet another way folklore expressions are exploited. Stereotyping of TCEs occurs when such expressions are depicted in a particular way by persons from outside the traditional community in accordance with their perceptions and ideas. Stereotyping is the most common form of cultural exploitation in recent times. The display of dream catchers in commercial shops is one such example where the sacred dream catcher originating from the Ojibwa Community has been stereotyped into a decorative item without having regard to the cultural value that it held to the traditional community.²⁹

Jurisprudential Aspect Aligning Copyright to Folklore

The foundational justification for copyright can be traced to John Locke's labour theory, which states that individuals deserve ownership over the fruits of their labour.³⁰ This idea, while being central to the copyright framework, poses difficulties when applied to folklore since such works are not typically the result of individual labour but of collective cultural evolution over time. In contrast, the utilitarian approach to copyright provides a more flexible rationale for the protection of traditional cultural knowledge. The theory aims to promote creativity for the public good. As such, several scholars have argued for adjusting legal doctrines to make room for communal ownership and the safeguarding of traditional expressions.³¹

Internationally, the WIPO has acknowledged the need to develop mechanisms to protect folklore, although no binding international treaty has yet been adopted. In the absence of comprehensive global

standards, national courts have occasionally adapted existing laws to provide some level of protection. For instance, in India, the Karnataka High Court in *Academy of General Education v B. Malini Mallya*³² held that a Yakshagana performance could qualify for copyright if it met the threshold of originality in the presentation. While the judgment did not directly address ownership of the underlying folk story, it implicitly supported the idea that expressions derived from folklore can gain legal protection if they exhibit creative input.

In jurisdictions like the United States and the United Kingdom, similar doctrinal challenges exist. The U.S. Supreme Court's decision in *Community for Creative Non-Violence v Reid*³³ emphasized the importance of identifying the author in determining copyright ownership. This presents difficulties when applied to folklore, where authorship is often collective or unknown. Nevertheless, the concept of derivative works under U.S. copyright law allows for protection of creative reinterpretations of traditional materials, provided there is sufficient originality.³⁴ This, however, results in a dichotomy where new adaptations are protected while the original traditional expressions remain vulnerable. Some countries, particularly in Africa, have taken legislative steps to address these gaps through sui generis laws. Ghana, for instance, has incorporated expressions of folklore into its copyright statute, granting the state custodial rights on behalf of the people.³⁵ The situation remains the same for China as well, wherein specific provisions on folklore protection are included under the copyright regime.

From the perspective of philosophical model proposed by Hegel, the folklores may still find inadequate protection under the copyright regime. The model emphasizes that intellectual properties should be protected because of manifestation with creator's personality.³⁶ Hegel considered property not merely as a material possession but as an expression of personal and communal will. This suggests that ownership rights may belong to the group as a whole rather than to any single individual. This interpretation also challenges the conventional fixation requirement under copyright laws, which often limits protection to works fixed in tangible form.

The case of *Bulun Bulun v R & T Textiles Pty Ltd*³⁷ from Australia illustrates this tension. The court recognized copyright in an Aboriginal artist's painting

but also acknowledged the broader cultural significance of the work for the artist's community. Justice von Doussa suggested that fiduciary obligations could be used to protect communal interests in traditional knowledge, offering an equity-based supplement to copyright law. This approach, though not widely adopted, points to a viable judicial mechanism for safeguarding folklore. In India, equitable doctrines could also be used to supplement statutory gaps. The Supreme Court in *R.G. Anand v Deluxe Films* emphasized that while ideas themselves cannot be copyrighted, the expression of those ideas can be.³⁸ When applied to folklore, however, the line between the idea and expression of idea can be ambiguous. Folk stories and performances evolve over time, with no clear distinction between form and content. Herein, the Courts must thus tread carefully in evaluating whether adaptations of folklore meet the originality requirement.

Copyright Protection to Folklore Expressions in India

Folklores are essentially an outcome of human intellect. This means that folklores are intellectual property which can seek protection under intellectual property laws. However, in certain situations, the operation of traditional IP laws has caused hindrance in protecting traditional community's rights. For example, the Indian Performing Rights Society (*hereinafter referred to as IPRS*) successfully earned the registration of the Rajasthani Folksong *Nimbooda Nimbooda* in the Bollywood movie '*Hum Dil De Chuke Sanam*'. Subsequently, the original singer of this folksong was restrained from performing his own work and no action could be taken against the IPRS as the copyright law provided no provision on looking into prior art forming part of folk tradition. The same controversy surrounded the Punjabi Folksong *Jugni*, when it was commercialized by Bollywood.³⁹ Such instances justify the inclusion of folklores under IP regime, not only for protecting them against misappropriation, but also for protecting India's rich heritage.

The Constitutional basis of intellectual property protection can be traced under Article 300A of the Constitution of India entails provides the right to property. This can be traced down to the opinion of Hon'ble Supreme Court of India in *K.T. Plantation Pvt. Ltd. & Anr v State Of Karnataka*⁴⁰ wherein the court held that the expression 'property' includes

intellectual properties such as copyright. India lacks any specific legislation for conferring protection to folklore expressions within its territory. Despite such absence, one can rely on the cultural and educational rights provided under Article 29 and 30 the Constitution of India. These articles protect the cultural and educational rights of various communities, including indigenous and tribal communities. Further, Article 51 A (f) casts a fundamental duty upon citizens to “value and preserve the rich heritage of our composite culture”. All these provisions aim to preserve and promote their unique cultural heritage and practices, which may include folklore.

Being a member of World Intellectual Property Organization (*hereinafter referred to as WIPO*), the country has taken certain measures through the existing intellectual property regime to protect folklore expressions. According to Janke Terri, the traditional communities have considered copyright regime best suited while considering an IP regime suitable for protecting their cultural expressions. Indian Copyright Act, 1957 provides for the protection of rights vested in literary, artistic, dramatic, cinematographic films, musical works and sound recordings.⁴¹ However, it is pertinent to mention that despite the hues and cries of traditional communities to protect their cultural expressions against exploitation, the Indian copyright law still lacks any mention of ‘folk songs’, ‘folk art’, etc. even after the latest amendment to the act in 2012.

While the term ‘works’ protected under the Copyright Act does not explicitly include folklores expressions, The 1967 Stockholm Revision of the Berne Convention Protocol Regarding Developing Countries has attempted to include folklore expressions under the term “literary and artistic works” defined under Article 2(1) of the Berne Convention. Further, the 1967 Amendment introduced the inclusion of Article 15(4) for extending protection to folklore expressions. Article 15(4) of Berne Convention provides that:

“(4) (a) *In the case of unpublished works where the identity of the author is unknown.... legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.*

(b) *Countries of the Union which make such designation under the terms of this provision shall notify the Director General [of WIPO]....concerning the authority thus designated.....”*

With this, the copyright regime has provided some potential for protecting folklore expressions. However, such potential remains limited as the nature of folklore stands different from the nature of copyright and the other basic requirements on which copyright is granted. With this, certain limitations of copyright regime for adequately protecting folklores are as follows:

Originality Requirement

Originality of work is a prerequisite of seeking protection under the copyright regime. While the originality requirement is explicitly not mentioned in the Berne Convention, the same becomes apparent with the conjunctive reading of Article 2(1) and Article 2(5) of the Convention which makes it clear that the work protected must be an intellectual creation.⁴² This is the reason why many countries, including India, have favored the requirement of originality of work for copyright protection. While the term originality is nowhere defined under the Convention, discretion has been provided to the courts of member states to decide so.⁴³

In India, section 13 (1) of the Copyright Act, 1957 provides that copyright subsists in original works. For defining originality, the Indian Judiciary has primarily relied upon two doctrines: ‘sweat of the brow’ and ‘modicum of creativity’. The sweat of brow doctrine completely relies on the skill and labour of the author. This doctrine was first adopted by UK court in *Walter v Lane*⁴⁴ wherein court extended copyright protection to a reporter who employs his skill and labour to make a verbatim reproduction of oral speech. This approach was disregarded by the US Courts in *Feist Publications Inc v Rural Telephone Service Company Inc*⁴⁵ and considered the “modicum of creativity” in the final product is required for a work to meet the requirement of originality.

In India, the concept of originality was reviewed in *Eastern Book Company and Ors v DB Modak and Anr*⁴⁶ before which the courts followed the English approach. As of now, for attaching the attributes of originality, the work must be novel and should have some amount of creativity attached to it. As a result, putting in labour for the sole purpose of compilation will not constitute originality in terms of copyright.

In the backdrop of originality requirement, the copyright regime can become insufficient to protect folklore expressions as such expressions may lack “sufficient originality”⁴⁷ required under copyright law. Copyright can remain insufficient when a

folkloric expression is a mere recreation of an existing folk work within the community or remains unoriginal.⁴⁸

Identifiable Author Requirement

Copyright regime requires an identifiable author of work which becomes apparent from a plain reading of Preamble of the Berne Convention. So far TCEs are concerned, the originator of traditional work is generally unknown in most cases, if not in all. This is because folklore expressions are generally passed down from generation to generation from time immemorial and practiced within the community to narrate and uphold the social, historical and cultural values within the community. This issue was also raised by the European Community in response to the WIPO questionnaire, which noted that “copyright is based on the identification of the person originating the work, whereas folklore is distinguished by the anonymity of the originator of the tradition or by the fact that the tradition is associable to a community”.⁴⁹

With time, the international community endeavored to overcome this difficulties created by identifiable author. For instance, Article 7.3 of Berne Convention provides some relief here and grants protection to anonymous or pseudonymous works for a span of 50 years after the work was made public. Accordingly, the article read as follows:

*In the case of anonymous or pseudonymous works, the term of protection granted by this Convention shall expire fifty years after the work has been lawfully made available to the public.*⁵⁰

The prerequisite of having an identifiable author is equally present in the India and the country has provided room to protect anonymous or pseudonymous such as folkloric expressions. As observed, the Indian Copyright Act of 1957, which states that “In the case of literary, dramatic, musical or artistic work (other than a photograph), which is published anonymously or pseudonymously, copyright shall subsist until [sixty years] from the beginning of the calendar year next following the year in which the work is first published”.⁵¹ Now even if folklore expressions can enjoy protection under the Indian copyright regime, the same remains limited in nature as such protection will only be provided for 60 years from the date such expression becomes public and will fall into public domain once such duration has expired, thus indicating that the protected work now can be used by anyone in an unlimited manner.⁵²

Ownership Requirement

IP laws grant an author private ownership, the term "ownership" may not always be used in the same within the traditional community. It could suggest an obligation to preserve the traditional culture rather than just the right to prevent others from utilizing certain representations of it, which is more relevant to the nature of intellectual property rights.⁵³

Copyright regime is surrounded by the concept of ‘absolute ownership’, which may not align the interest of traditional communities. Despite the fact that copyright law grants people exclusive rights, indigenous authors can have access to more complicated rights that are more analogous to the management rights of the communities they are a part of. The complex nature of TCEs viz-a-viz copyright regime has also been noticed in *Payunka, Marika and Others v Indofurn Pty Ltd*⁵⁴, wherein the court observed the following statement from the member of a traditional community:

“As an artist, while I may own the copyright in a particular artwork under western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all the other Yolngu (her clan) who have an interest whether direct or indirect in it. In this way I hold the image in trust for all the other Yolngu with an interest in the story”.

Since TCEs are fundamentally distinct from other forms of intellectual property, there is a difference between the concept of "ownership" under the copyright regime and the "communal rights" granted by customary practices. Therefore, conferring copyright protection to TCEs will stand contradictory to the customary rules and practices governing a traditional community.

The Fixation Requirement

The international standards on copyright law allow protection to both oral and written works. This becomes apparent from the standard laid down under Berne Convention which specifies that literary and artistic works includes expressions “...such as books, pamphlets lectures....”.⁵⁵ The Convention leaves it open to member states to adopt the ‘fixation’ requirement for granting protection under their copyright regime.⁵⁶ Such provision had put discretion upon the member states to make protection conditional upon meeting the fixation requirement of the work in some material form.⁵⁷

Upon the discretion enjoyed under Article 2.2 Berne Convention, India has adopted that the work

seeking protection under the Copyright Act, 1957 must be in some tangible form. Since the members of traditional communities constantly adapt, adopt, and develop new cultural expressions, mandating fixation as required by the Indian Copyright Act, would be inconsistent with the "oral" and "intangible" nature of some cultural expressions such as folk story narration which rely upon spoken words for its continued survival within the community.

Duration of Copyright Protection

The international regime does not bar perpetual protection to the subject matter of copyright. This becomes apparent from a plain reading of Berne Convention which provides for a minimum protection of 50 years and allows member states to provide protection for a longer duration.⁵⁸ In India, the copyright law extends the term of copyright protection to 60 years from the time work is made public in case of Cinematograph Films and Sound Recordings;⁵⁹ 60 years after the death of the author in case of literary/musical or artistic works.⁶⁰ In many cases, folklore is not documented in written or fixed forms. It is transmitted orally or through non-textual means. This lack of documentation can make it challenging to establish copyright or track the duration of protection. Even when the copyright regime provides for a 60 years of protection (from the date of publication) to anonymous or pseudonymous works⁶¹ it would remain insufficient to cater the needs of traditional communities as the protected folklore expression will fall in public domain after such duration has exhausted.

Folklore is usually transmitted orally or through generations over centuries. The fixed term of copyright protection may not align with the longevity and continuity of these traditions. As a result, copyright may expire before the cultural expressions cease to be relevant or valuable to the community. Further, the fixed interval of protection may remain inadequate to safeguard against the unauthorized use, misappropriation, or distortion of folklore expressions. Once the copyright protection expires, the folklore may be rendered vulnerable to exploitation without the consent of the originating community and even without sharing the commercial benefits with the communities that have preserved it.

Therefore, a time bound protection under copyright regime fails to cater the needs of traditional communities primarily on two grounds- first, failing to provide a regime that could provide protection for

perpetuity and second determining the date of creation or first publication of a pre-existing work, if at all folklore protection is sought around a copyright regime offering protection for a fixed duration.

Road Ahead

The international community has observed the challenges in protecting TCEs and suggested a Model Provisions that can pave way for sub-regional and regional protection of TCEs. Considering the importance of protecting folklore expressions and the absence of any specific law on its protection, a joint committee of UNESCO and WIPO convened a meeting at Geneva in 1982. The outcome of this committee was the adoption of 'Model Provisions For National Laws on The Protection Of Expressions Of Folklore Against Illicit Exploitation And Other Prejudicial Actions, 1985' (*hereinafter referred to as Model Provisions*) as a guide for nation states to adopt sui-generis regime for protecting folklore expressions at the national level.⁶² The key highlight of model provision is that it allows member states to constitute a separate chapter under their existing intellectual property regime in case implementing a separate law altogether is not feasible.⁶³

With this, Panama, Peru, Philippines, Vietnam became one of the first countries to adopt sui-generis that specifically regulate folklore expressions with Azerbaijan being the most recent country.⁶⁴ So far India is concerned; the country still lacks any sui-generis law on the lines of Model provisions for folklore protection. In this regard, China, being one of the BRICS member states, has played a remarkable role by adopting 'Law of the People's Republic of China on Intangible Cultural Heritage' (*hereinafter referred to as ICH Law*) which came into force in 2011. The said Law was adopted by the Standing Committee of National People's Congress of the People's Republic of China at its 19th Session.⁶⁵ According to the Chinese Ministry of Culture, ICH Law is primarily grounded on three spirits. These are as follows:

(i) The ICH Law is grounded on one aim, i.e. the inheritance and carry forward of the rich culture of Chinese civilization and preserve Intangible Cultural Heritage in furtherance of it.

(ii) The ICH Law aims to provide protection on two principles i.e. protecting authenticity of the culture and strengthening the recognition of Chinese culture in order to maintain the ethnic unity within the society.

(iii) The ICH Law focuses protection through three parameters i.e. an investigation scheme (in order to have a scheme for investigating various entities in society for ensuring compliance with regulations), preparing a representative project list system (for bring together the limited resources for protecting cultural heritage) and a dissemination system (supporting ICH representative projects for exploring cultural markets).

When a discussion on folklore protection is put forth, it becomes important to define the contours of subject matter seeking protection. Despite India being a country of rich heritage and culture, Indian legislations lack any concrete definition on folklore expressions. While keeping in mind the difficulties involved in defining 'intangible cultural heritage', China adopted an inclusive definition for the term under its law and defines the term as:⁶⁶

"(1) Traditional oral literature and the language as a carrier thereof;

(2) Traditional fine arts, calligraphy, music, dance, drama, folk art and acrobatics;

(3) Traditional artistry, medicine and calendar;

(4) Traditional rituals, festivals and other folk customs;

(5) Traditional sports and entertainment; and

(6) Other intangible cultural heritage."

An important aspect of ICH Law is such that the law does not provide an exhaustive definition to 'intangible cultural heritage' but rather an inclusive one. This becomes important in light of the difficulties involved in defining the expanding contours of folklore expressions in various traditional communities and the prejudice it may cause if one adopts an exhaustive definition to folklore expressions.

So far India is concerned; traditional community dwellers find a very limited protection to certain expressions under the copyright regime. For instance, Section 38 of the Copyright Act comes into play which can be useful in protecting the rights of the performers engaged in relation to a performance. While such protection can be useful to the members of traditional communities who perform the cultural expressions passed down from their forefathers, such protection remains inadequate due to the limited duration of protection.⁶⁷

Besides Copyright regime, the Government of India has established Traditional Knowledge Digital Library for documenting the Indian traditional medicinal knowledge and preventing its

misappropriation.⁶⁸ This database aims to prevent the misappropriation of traditional medicinal knowledge by patent offices worldwide. However, it provides no depository to other traditional expressions of indigenous communities such as folk songs, folk tales, folk poetries, folk architecture, etc. While Model Provisions has recognized the burning need of protecting folklores from exploitation, it has become pertinent for India to adopt a sui-generis regime for folklore expressions like its co-member state China under the BRICS alliance. Even when India has already taken steps towards forming organizations such as National Folklore Support Centre (NFSC) for documenting, preserving and promoting expressions of folklore, the same will remain inadequate until the legislature takes steps to adopt a law under the aegis of Model Provision.

Conclusion

Folklore expressions form significant part of a country's cultural heritage. Folklores can promote understanding and diplomacy by acting as a link between many cultures. Music, dance, and narrative exchanges between cultures can foster understanding and encourage cooperation. From the purpose of entertainment to setting moral norms in the society, folklores perform several functions but most importantly preserving historical and cultural values of a traditional community. The need of protecting these expressions has been realized from time to time especially in the light of globally advanced world where the globe has become closely knit.

As a matter of fact, the international community has observed the insufficiency of existing laws for adequately protecting folklores. The international community especially World Intellectual Property Organization (WIPO) and United Nations Educational, Scientific and Cultural Organization (UNESCO) have taken initiatives for folklore protection at the global level. The most remarkable of such is the adoption of Model Provisions to work as a guideline for countries to develop a sui-generis regime for folklore protection. Noteworthy to mention, India lacks any specific legislation to protect its folklore expressions. With this, the traditional communities are left with the option to rely upon the existing intellectual property laws, especially the copyright regime, for seeking protection. However, the same remains inadequate due to the intrinsic difference between the nature of folklore expressions and the protected subject matter under the copyright

regime. Considering the situation in India, where folklores are exploited at multiple occasions, the country needs a combination of legal measures, cultural, educational and community driven efforts towards protecting folklores. Noteworthy to mention, the country needs to review and amend existing intellectual property laws, if not adopt a separate law, probably starting from addressing the issues related to ownership, copyright, and the definition of folklore.

India's folklore deserves a system that is as dynamic, nuanced, and human as the stories themselves. By centering community voices, supporting agency and dignity, and balancing preservation with healthy sharing, a sui-generis regime offers a path to both justice and cultural continuity. Rights holders are not just protectors, but active narrators of India's ever-growing legend. Implanting a sui-generis regime is more a necessity than an option. Following are some suggestions for implementing such a system:

- (i) Recognize Community Ownership—Not Just Individual Authorship. Since the essence of folklore lies in collective creation and guardianship, the proposed law should legislate that communities—tribal groups, villages, or cultural collectives—are the primary rights holders. Rights should vest in the community as a whole, not any one person, ensuring both dignity and agency for the true custodians of the heritage.
- (ii) Dedicated Cultural Authorities should be established. For instance, a National Folklore Board along with decentralized boards at state levels can be established.
- (iii) Provisions on prior informed consent & benefit-sharing should be included in governance so as to ensure that portion of revenues flows directly to the community, supporting cultural preservation and local livelihoods.
- (iv) Unlike copyright regime, oral, non-fixed, and evolving traditions should be protected
- (v) Digital Folklore Archives should be created such as National Folklore Digital Library (like the Traditional Knowledge Digital Library for medicines) which can be accessible and managed by cultural authorities in partnership with community leaders.
- (vi) Provisions on Long-Term, Renewable Protection should be included to provide perpetual or at least renewable protection, so long as the TCE remains relevant to the source

community. This moves beyond “life plus 60 years” framework of copyright regime and acknowledges generational stewardship.

- (vii) Communities should be empowered with legal literacy and support. To ensure this, outreach programs, workshops, and translation efforts can be undertaken to build legal understanding within communities—explaining rights, documenting folklore, and helping negotiate with external users or resolve disputes.

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