Heritage Protection: Unveiling the Legal Tapestry of Folklore Protection under Indian Copyright Law

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Introduction

The expressions of folklore mean the product of inter-generational, "fluid social and communal creative processes which reflect a community's history, cultural and social identity, and values. In particular, verbal expressions, such as folk tales, folk poetry and riddles, signs, indications, words, and symbols; musical expressions such as folk songs and instrumental music, expressions by actions, such as folk dances, plays and rituals artistic forms; tangible expressions, such as productions of folk art and many more form parts of folklores. It is expressed through means of creativity, tends to be passed on from generation to generation within a community from memory, by word of mouth, or visually reflects a community's cultural and social identity, consists of characteristic elements of a community's heritage, is made by authors unknown' and/or by communities and/or by individuals communally recognized as having the right responsibility or permission to do so, is often not created for commercial purposes but as vehicles for religious and cultural expression and is constantly evolving developing and being recreated within the community."

Folklore expressions act as a witness for a community's history and ethnicity.[1] It is crucial to protect folklore expressions as they not only reflect cultural heritage of a country but also holds commercial value. Misappropriation of folklore has become so common these days that we often see sale of cultural items such as dream catchers as commercial items in the markets. Many at times it is also seen that not only private parties, but governments also indulge in activities which lead to exploitation of traditional expressions. In times like this, the need of protecting expressions of folklore has become paramount. Currently, most countries do not

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[1] LI LUO, INTELLECTUAL PROPERTY PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS: FOLKLORE IN CHINA 20 (Springer Nature, 2014).

have a separate law for protecting folklore expressions and protection is often granted under traditional laws such as Copyright, Trade Marks, Patents etc. However, since the nature of folklore is different from other forms of intellectual properties, such traditional IP laws fail to extend adequate protection.

The protection of folklore expression is important to any country; be it in East or West. The initial efforts of international community in recognizing the need of protecting folklore expressions can be traced back to August 1963 which witnessed the first African Working Party on Copyright wherein the problems regarding protection of folklore expressions were identified and certain recommendations were provided.[2]

India, a country situated in the South Asia, has been a country of vast culture ever since. The country is commonly known for her cultural diversity in form of the cultural practices performed and observed in various parts of the country. From Kashmir to Kanyakumari, India is a blend of various folklores which are practiced by the traditional communities within. Despite the heavy influence of cultural values in India, she lacks any specific legislations for the protection of folklore expressions. In this regard, Tunisia emerges as a torch bearer which became the first nation to adopt the recommendations of Brazzaville meeting and inscribe protection to folklore expressions under its copyright regime.[3] As several countries are providing protection to folklore expressions under their copyright regime, the sole objective of choosing Tunisia over any other country is to select the country having the oldest law in this field so as to provide an analysis of a law which has prevailed over a longer duration.

With this, the scope of this paper is limited to looking into the extent of protection that folklores can seek under the copyright regime of India and Tunisia. Here, an attempt is made to investigate the adequacy of copyright regimes of these countries and the need of having a sui-generis regime will be suggested in case such fails to provide adequate protection to folklores. This paper aims to call upon the Indian policymakers to adopt a sui-generis regime for accommodating the specific interests of traditional communities and adequately protect folklores in India under the aegis of Model Provisions.

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[2] Daphne Zografos, *The Legal Protection of Traditional Cultural Expressions - The Tunisian Example*, 7 J WORLD INTELL. PROP., 229, 230-231 (2004).
[3] *Id*. at 231.

Meaning of Folklore

World Intellectual Property Organization "(*hereinafter referred to as WIPO)* has interchangeably used the terms 'traditional cultural expressions' and 'expressions of folklore'.[4] Folklore expressions are defined as 'a living phenomenon'.[5] These are the expressions which are created within a community and passed down from one generation to another for preserving their cultural, social and historical identity. Traditional Cultural Expressions includes intellectual property such as traditional rituals, crafts, dances, music etc.[6] WIPO has put forth the important characteristics of folklore expressions which include the following:

are that these expressions (WIPO, Intellectual Property and Traditional Cultural Expressions/ Folklore 2017):

(a) Often created by authors which remain unknown or individuals which are recognized by the community bearing right and responsibility to create so,
(b) Passed down from one generation to anther either in oral form or through imitation,
(c) Reflect the cultural and social values of a community,
(d) Reflect the key characteristics of a community's heritage,
(e) Most frequently not created for commercial purpose,
(f) Created for preserving and carry forwarding the cultural value of the community, and
(g) Constantly evolving and developing from time to time.

United Nations Educational, Scientific and Cultural Organization (*hereinafter referred to as UNESCO)* has played an important role in protection of cultural values of a nation. Here, 'Model Provisions for National Laws on the Protection of Expressions Against Illicit Exploitation and Other Prejudicial Actions, 1982' as enacted in 1985 defines folklore expressions as:[7]

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[4] WORLD INTELLECTUAL PROPERTY ORGANIZATION, Traditional Cultural Expressions, https://www.wipo.int/tk/en/folklore/ (last visited Feb. 5, 2023).
[5] Juan Andres Fuentes, *Protecting The Rights Of Indigenous Cultures Under The Current Intellectual Property System: Is It A Good Idea?*, 3 J. MARSHALL REV. INTELL. PROP. L. 88, 88- 92 (2003).
[6] Veronica Gordon, *Appropriation Without Representation? The Limited Role of Indigenous Groups in WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore*, 16 VNDRBILT J ENT & TECH LAW 629, 635-637 (2020).
[7] Model Provisions For National Laws on the Protection of Expressions Against Illicit Exploitation and Other Prejudicial Actions' 1982, Section 2 (1982)

> *"Productions consisting of .....traditional artistic heritage developed and maintained by a community ……reflecting the traditional artistic expectations of such community …"*

Regarding folklore protection, UNESCO General Conference as held on 17 October 2003 is another remarkable step which led to the adoption of Convention for the Safeguarding of the Intangible Cultural Heritage. The Convention pertains to safeguarding intangible cultural heritage by raising awareness at local, national and international level.

The 2003 Convention defines intangible cultural expressions to mean:

> *"the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage"*[8]

While there exists no substantive definition of 'expression of folklore' or 'traditional cultural expressions' under Indian law, the copyright protection act of Tunisia provides a general definition of folklore to include "any artistic heritage bequeathed by preceding generations and bound up with customs and traditions and any aspect of folk creation such as folk stories, writings, music and dance"[9].

Other than this, the definition of the term 'folklore' can be found under certain international and national instruments. For instance, the Tunis Model Law on Copyright for Developing Countries defines it to include *"all literary, artistic and scientific works created on national territory by authors presumed to the nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage"*[10]. Further, the Copyright Act of Samoa interprets the term 'expression of folklore' to mean:

> "*a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its*

[8] Convention for the Safeguarding of the Intangible Cultural Heritage, 2003, Article 2(1) (2003).
[9] Law No . 94 — 36 of February 24 , 1994 , on Literary and Artistic Property, 1994, Article 18(iv) (1994).
[10] Tunis Model Law on Copyright for Developing Countries, 1976, Section 18(v) (1976).

> *cultural and social identity…. transmitted orally, by imitation or by other means, including folktales…. folk songs… folk dances…..*"[11]

Further, the law in Niger defines '*expression of folklore'* to:

> *"mean productions of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of a community, including folk tales, folk poetry, folk songs, instrumental folk music, folk dances and plays, artistic expressions of rituals and productions of folk art"*[12]

Rationale behind Folklore Protection

According to WIPO, expressions of folklore reflect the heritage developed by a community collectively or by individuals of such communities and contains expressions in particular expressions such as folktales, folk songs, folk dances, folk poetry, etc.[13] Folklores reflect cultural heritage of a country and undoubtedly hold cultural importance to a country as they are the most common form in which traditional communities residing in a country reflect their cultural and historical values. Folklore, according to Sims and Stephens, is a means of understanding people. Before getting into the extent to which existing laws provide protection to folklore expressions, it is crucial for one to understand the need of protecting such expressions.

Every form of folklore is expressive, creatively expressing ideas, values, and customs.[14] In several developing countries, folklore expressions form a significant part of Gross Domestic Product.[15] Folklores contribute significantly to the economy by boosting tourism industry, fashion and music industry[16] which further highlights the importance of folklore. Globalization has led to the blurring of physical boundaries of a nation, has opened the economies of nations to international market and has introduced the usage of internet. In the wake of globalization,

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[11] Samoa Copyright Act, 1998, Section 2 (1998).
[12] Decree No. 93-027 of March 30, 1993 on Copyright, Related Rights Expressions of Folklore, 1993, Article 1(ix) (1993).
[13] WORLD INTELLECTUAL PROPERTY ORGANIZATION, Intellectual Property and Traditional Cultural Expressions/ Folklore 2017, https://www.wipo.int/edocs/pubdocs/en/tk/913/wipo_pub_913.pdf (last visited Jan. 10, 2023).
[14] Crinuta Popescu, *The Importance of Regional Folklore In Ascertaining Aspects Of World View*, 3 GEOPOLITICS HIST & INT'L RELATIONS, 266, 267 (2011).
[15] LUO, *supra* note 1 at 27.
[16] *Id.* at 28.

folklores have faced the threat of commercial exploitation by unauthorized parties. In fact, it is observed that the advancement in technology has fanned this fire.[17] This is because technology has made folklore expressions more vulnerable to exploitation. Every now and then, we see display and sale of traditional works outside the traditional settings in commercial setups such as commercial malls, art galleries, gift shops, etc which result in reduction of value that these artefacts hold in the traditional communities from which they originate.

The commercialization of dream catchers is one such example. Dream catcher are often sold at airports, gift shops, souvenir shops, commercially run museum shops etc. The legend behind the origin of dream catchers can be traced down to Ojibwa community where the community used 'dream catchers' as a device to capture bad dreams, allowing only the good dreams to find their way to the dreamer. However, the increased production, marketing and commercialization of dream catchers has rendered reduced its value merely to fashion items such as earrings and ornamental items for homes and vehicles.[18] With this, it has now become too common for us to find dream catchers hung in drawing rooms, behind rear view of vehicles, or as office decorative. This has not only hurt the sentiments of Ojibwa community and sacredness of dream catchers but also has resulted in commercial misappropriation of dream catchers by unauthorized persons who most often are from outside the traditional communities.

It has been observed that not only the individuals, but at times governments also stand responsible in cultural misappropriation. "Song of Joy" or "Return to Innocence" is one such instance where the Ministries of Culture of Taiwan and France invited a Taiwanese folk singer from Ami tribal community to perform Ami songs across Europe, recorded his songs without authorization and later on sold the license to use the music to a German music producer.[19] Most common are the incidents of biopiracy by multinational corporations which enjoy patent protection over drugs without sharing any benefit and in most scenarios without even recognizing the tribal communities who are the source of the traditional knowledge used in

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[17] Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 AMER UNI WA COLL OF LAW, 1, 7-10 (1997).

[18] Cath Oberholtzer, *The Re-Invention of Tradition and the Marketing of Cultural Values*, 37 CASCA, 144, 144-145 (1995).

[19] Bryan Bachner, *Facing the Music: Traditional Knowledge and Copyright*, 12 HUM RIGHTS BRIEF, 9, 10-11 (2005).

developing the patented drug.[20] The use of medicinal qualities of India's neem tree for developing a patented product Margosan-O by Robert Larson is one such instance.[21]

In India, there is blatant misappropriation of cultural expressions. Music industry, in particular, is often the culprit in misappropriation of traditional expressions. Music industry is often indulged in misappropriating cultural expressions of traditional communities. Many traditional folk songs are plagiarised and blended with contemporary beats without regard for the sacred value of the original song. These artworks and musical compositions are essentially the intellectual property of the relevant traditional groups, which have expended time and resources on forging and showcasing their identities to the outside world. Many Indian singers are often surrounded by controversies for making unauthorized usage of folk songs in their works. Recently, for example, an Indian singer and rapper Badshah was caught in controversy in his latest song *Sasural Genda Phool* over his alleged misappropriation and plagiarism of a Bengali folk song *Boroloker biti lo* sung by a folk artist Ratan Kahar.[22]

Early Attempts in Folklore Protection

The international community has from time to time highlighted the importance of folklore as a nation's cultural heritage. With this, protection of folklore has found a prominent space in several discussions. The most iconic effort in the field of copyright is Berne Convention. Berne Convention for Protection of Literary and Artistic Works, also known as Berne Convention, is an outcome of an international assembly organized in the year 1886 at Swiss, Berne. Berne Convention stands as the most important treaty laying down standards for the protection of original works. Under the Convention, several rights such as right to translate, make adaptations, perform in public, recite, communicate to public, make reproductions, etc[23] are granted to the authors of original works, which most often are referred to as 'copyright' in such original work. With this, Berne Convention stands as the oldest treaty in the field of copyright

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[20] Caroline Joan S. Picart & Marlowe Fox, *Beyond Unbridled Optimism and Fear: Indigenous Peoples, Intellectual Property, Human Rights and the Globalisation of Traditional Knowledge and Expressions of Folklore: Part I*, 15 Int'l Comm Law Rev, 319, 333- 334 (2013).

[21] *India Wins Neem Patent*, TOI (Apr. 01, 2005), https://timesofindia.indiatimes.com/business/international-business/india-wins-neem-patent/articleshow/1067104.cms.

[22] Arushi Jain, *Here's Everything to Know About Badshah's Genda Phool Controversy*, Ind Exp (Apr. 4, 2020), https://indianexpress.com/article/entertainment/music/everything-to-know-about-badshah-genda-phool-controversy-ratan-kahar-6346801/.

[23] World Intellectual Property Organization, Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886), https://www.wipo.int/treaties/en/ip/berne/summary_berne.html (last visited Apr. 4, 2023).

protection. The rationale behind Berne Convention is promotion of culture while protecting the rights of authors in their literary and artistic works.[24] To increase the scope of protection, the Convention includes 'literary, dramatic, choreographic, musical, cinematographic, photographic' within the expression "literary and artistic works" to envisage the scope of protection.[25] Not only this, the Convention extends protection to "derivative works" as well.[26]

Berne Convention, 1886 had certain limitations. The initial draft of Berne Convention provided no room for folklores to have protection under the contours of the Convention. However, in the year 1967, the delegates from India, Pakistan and Bangladesh made a representation at the Stockholm Diplomatic Conference to revise the Convention in order to provide room for folklore protection at an international level. Here, the Indian delegate made a submission that the term "literary and artistic works" as "defined under Article 2 of Berne Convention" must include "works of folklore".[27] Other than this, in the provision defining the term of protection for anonymous and pseudonymous works i.e. Article 7(3), the Indian delegate made the submission that after the words "*in the case of anonymous or pseudonymous works*," the term "*other than works of folklore*" should be added in order to provide a wider scope of protection to such works.[28]

The discussions at Stockholm conference led to the amendment of Article 15 of Berne Convention, thus taking a step towards protection folklore expressions. With this, Article 15(4) was amended to include the following provisions:

> *"(4)(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for 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] by means of a written declaration giving full information concerning the authority thus*

[24] Berne Convention for the Protection of Literary and Artistic Works, 1886, Preamble.
[25] Berne Convention for the Protection of Literary and Artistic Works, 1886, Article 2(1).
[26] Berne Convention for the Protection of Literary and Artistic Works, 1886, Article 2(3).

[27] World Intellectual Property Organization, *Records of the Intellectual Property Conference on Stockholm- June 11 to July 14, 1967: Volume 1* (1971).
[28] *Id*. at 691.

designated. The Director General shall at once communicate this declaration to all other countries of the Union."

From the perspective of protecting folklore expressions through the lens of culture heritage, the Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity as developed by UNESCO is of relevance. The Proclamation encouraged the governments and NGOs for protecting and identifying the intangible heritage in their territory and consider them as a depository of the memories of traditional community.[29] However, the Proclamation's largest shortcoming fell upon its non-binding nature amongst the nation states.

Convention for Safeguarding of the Intangible Cultural Heritage (hereinafter referred to as ICH) is another major remarkable effort by the international community in ensuring protection of folklore expressions. The Convention is an outcome of the General Conference held by UNESCO in 2003. The primary objective of the Convention is to protect the 'intangible cultural heritage' while ensuring respect for such heritage and raising awareness at all levels of governance i.e. local, national international. With this, the Convention focuses on providing a mechanism to secure international cooperation amongst nations to secure intangible cultural heritage.[30] For promoting the objective, Convention provides for the establishment of an Intergovernmental Committee that would undertake the task of promoting the objectives of the Convention and encouraging its implementation thereof,[31] "providing best practices and guidance to nations for protection of cultural heritage", and even granting assistance in certain cases for meeting the objective of Convention.[32]

In addition to this, the Convention provides for the state parties to identify the different elements of ICH within their territories and look into the extent to which communities, groups, NGOs participate in such heritage[33] and ensure the implementation of measures to safeguard such heritage[34]. For this, the Convention has provided for State Parties to undertake the task of adopting such policies, within their territories, which are focused on promoting the importance of ICH[35] and designate competent authorities within their boundaries to safeguard such

[29] UNESCO, Proclamation of Masterpieces of the Oral and Intangible Heritage of Humanity 2001- 2005, https://ich.unesco.org/en/proclamation-of-masterpieces-00103 (last visited Apr. 7, 2023).
[30] Convention for Safeguarding of the Intangible Cultural Heritage, 2003, Article 1.
[31] Convention for Safeguarding of the Intangible Cultural Heritage, 2003, Article 7(a)
[32] Convention for Safeguarding of the Intangible Cultural Heritage, 2003, Article 7(g)(II).
[33] Convention for Safeguarding of the Intangible Cultural Heritage, 2003, Article 11(b).
[34] Convention for Safeguarding of the Intangible Cultural Heritage, 2003, Article 11(a).
[35] Convention for Safeguarding of the Intangible Cultural Heritage, 2003, Article 13(a).

expressions.[36] Not only this, the Convention has also laid emphasis on the importance of education, awareness raising and capacity building.[37]

Folklore protection under Tunisian Copyright Law

One of the central apprehensions of Tunisia in relation to its folklore is the escaping of its disappearance. The aim of the law, as far as folklore is concerned, is therefore to protect it. On the other hand, Tunisia also considers folklore to be a source of creativity and invention and believes that folklore has contributed to the country's social and economic development. Tunisia considers that there is a link between the necessity to safeguard and protect folklore and encouraging its development by enriching it and exploiting it. As a consequence, the dual aim of the Law is to protecting folklore against illicit exploitation as well as keep it alive and ongoing by encouraging its lawful and fashionable use. [38]

Mohamed Kheireddine Abdel Ali, the Managing Director of the Tunisia Body for the Protection of Author's Rights quoted as follows:"

> *"To protect Tunisia's cultural heritage doesn't mean to freeze it for this cultural heritage should be able to be exploited to develop and to evolve also. We inherited it but this legacy should not be frozen. It is important that the memory of our cultural heritage be protected as it is in its original form but it is also important that we let it develop."*[39]

This idea is further reflected in an observation made by President Ben Ali, wherein he quoted as follows:

> *"We have brought the preservation of our heritage and its revitalization together to create a key factor for social progress and development and a fundamental inspiration for cultural production."*[40]

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[36] Convention for Safeguarding of the Intangible Cultural Heritage, 2003, Article 13(b).

[37] Convention for Safeguarding of the Intangible Cultural Heritage, 2003, Article 14.

[38] World Intellectual Property Organization, *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Third Session Geneva*, WIPO/GRTKF/IC/3/10, https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_10.pdf (last visited Apr.9, 2023).

[39] ZOGRAFOS, *supra* note 2 at 233.

[40] *Id.* at 234.

The subject matter protected under the Tunisian copyright law is provided under Article 1 of the 1994 Law. It provides for the subsistence of Copyright to all original literary, scientific or artistic works irrespective of the value, purpose, mode or form of expression. The act also provides for protection to the title of works.

The Article provides for an extensive list of works protected under the act which includes but is not limited to the following category of works:

- *Written and printed works, among which are books, publications and others.*
- *Innovated works for the stage or for radio broadcasting (audio or visual), whether they are merely of a play-type, musical or dance plays, or pantomimes.*
- *Music accompanied or unaccompanied with words.*
- *Works of photography and the like which are considered by this Law similar to photography*
- *Cinematic works and the like which are considered by this Law works similar to movies in visual expression.*
- *Oil paintings, drawings, lithography and metal engravings by nitric acid, wood engravings and similar artistic productions.*
- *Sculpture in all its types.*
- *Translations and arrangements or adaptations of the aforementioned works."*[41]

According to Mezghani, the list of works protected under Article 1 is neither exhaustive nor restrictive. Such works may be broadly classified into three categories:[42]

- Works customarily covered under the definition of works eligible for copyright protection;
- Works connected with the tradition of Tunisian; and
- Works resultant from the advancement of modern technology.

It becomes pertinent to note that the second group of works includes folklore, paintings, and items made by artists by hand, including both the work itself and the sketches or models.

In Tunisia, folklore expressions are commonly labelled with the following characteristics:

i. Passing on from generation to generation in an unfixed form;

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[41] Law No. (36) for 1994 in Respect of Literary & Artistic Property, 1994, Article 1 (Tunisia).

[42] Nebila Mezghani, *A New Tunisian Law Relating to Literary and Artistic Property*, 29 COPYRIGHT BULLETIN, 31, 31-32 (1995).

ii. A community-oriented formation which is controlled by local traditions, standards and expectations;
iii. Expressions often not attributable to distinct/individual authors;
iv. Continuously utilized, developed and innovated by the communities from which it emerges.

TCEs are referred to in Tunisia as cultural heritage and folklore. Given that both the 1966 and the 1994 Laws engage with an entire provision to protect folklore, it is even more important to consider why the legislator chose to use the phrase "works inspired by folklore" rather than "works of folklore" under the category of works protected under Article 1 of the Tunisian Copyright Act.

Commentators on these Laws have interpreted the intention behind using the phrase "works influenced by folklore" in various ways. According to Claude Joubert, the inclusion of the phrase "works influenced by folklore" under the category of protected works is only an acknowledgement of traditional cultural patrimony rather than a reference to folklore as a whole. He claims that the policymaker wished to draw attention to the value they placed on their traditional cultural inheritance by making it clear that "original works inspired by folklore" might benefit from copyright protection as long as they were "original works".

- ***The Protection of Folklore in Tunisian Copyright Law***

Folklore protection under the Tunisian Copyright Law is extensively dealt under Article 7 of the 1994 Act. Article 7 of the Act provides that:

> *"Folklore forms part of the national heritage and any transcription of folklore with a view to exploitation for profit shall require authorization from the Ministry responsible for culture against payment of a fee for the benefit of the welfare fund of the copyright Protection Agency established pursuant to this Law.*
>
> *Authorization from the Ministry responsible for culture shall also be required for the production of works inspired by folklore for the full or partial assignment of copyright in a work inspired by folklore or for an exclusive licence with respect to such work.*

> *Folklore within the meaning of this Law shall be any artistic heritage bequeathed by preceding generations and bound up with customs and traditions and any aspect of folk creation such as folk stories writings music and dance."*

First Paragraph of Article 7 provides that folklore are an essential part of a country's heritage. Since there is an absence of indigenous communities in Tunisia, the folklore expressions belong to 'le domaine public de L'Etat' i.e. "public domain of the state" which should not be mistaken for 'le domaine public' i.e. "the public domain". It is pertinent to note that, works that are in the public domain can be seized by the collective memory of Tunisians, meaning that they are preserved in perpetuity and cannot be appropriated by an individual.

In light of this, public national organizations with the status of legal entities, such as the Tunisian film and television industries, are exempt from the authorization system under the 1966 Law. The exclusion, though, was that copyright royalties were not collected and each case was evaluated holistically. Folklore works are typically exploited for 20 dinars per year, renewable annually for an indefinite amount of time. As observed by Mr. Abdel Ali commented: "We didn't want this fee to be too high so that people would be able to access the works of folklore. This is practical aspect of the system." Many works may be included in one application for authorization. Different people may simultaneously receive authorizations for the same piece of folklore because the authorizations are not mutually exclusive.

According to paragraph two of Article 7, permission from the Ministry of Culture is needed in order to produce works that are inspired by folklore, assign copyright in such works, in whole or in part, or to obtain an exclusive license for such works. This is an extension of the 1966 Law, which only required permission for the whole or partial assignment of works inspired by folklore or for the granting of an exclusive license pertaining to such works, rather than for the "production" of such works. The 1994 provision makes logical sense because the source of the work, folklore, cannot be fixed for commercial exploitation without the prior approval of the Ministry in charge of culture.

Finally, third paragraph lays down a non-restrictive definition of folklore as any artistic legacy left behind by prior generations and connected to customs and traditions, as well as any aspect of folk creation such as folk stories, writings, music, and dance. This is in contrast to the 1966 Law which defined the phrase "a work inspired by folklore" as work composed with the aid of "elements borrowed from the cultural traditional patrimony" of the Tunisian Republic. This

extremely broad description offers space for elucidation, thus extending protection to folklore expressions.

Folklore Protection under Copyright Act in India

Unlike Tunisia, the Indian copyright regime lacks any specific provisions of folklore protection. Under Copyright Act, 1957, the subject matter of protection can be extended to original literary, artistic, dramatic, musical, cinematographic works and sound recordings.[43] This means that, many expressions of folklore such as folksongs, folkdances, folk-paintings, folk-carvings, etc. can form subject matter of copyright under the Copyright Act (*hereinafter referred to as the Act)*. The kind of protection under the Act involves the right to prevent other from reproducing, making copies, performing in public, making translations and adaptations of the work.[44] This appears to encompass the requirements and objectives of traditional communities. Other than this, certain traditional cultural forms are given particular protection under Act. Furter, the Act includes a provision on performer's rights as well. Under this provision, every performer who engages in a performance has a unique right known as the performer's right with regard to that performance, which lasts for fifty years from the year the calendar in which the performance is made.[45] This right can be granted to traditional communities, especially in scenarios involving folk songs and folk dance performances. With such a kind of protection, anyone who, without the performer's permission, captures a sound/ visual recording of the performance, or conveys the enactment to the public in any way, will be considered to have violated the performer's right for the duration of that right.

Folklores are creations of traditional communities from time immemorial and are constantly evolving. This means that certain folk expressions can be performed with a little variation from the work originally created by the author of such work. With this, a question can arise as to whether the performer of such folk expression with variation will enjoy protection or not. The response to this is affirmative and can be found under Section 38A of the Act which provides exclusive right to the performer of work without prejudice to the rights conferred upon the author. As under this, for example, the performer of a folksong, folk dance enjoys an exclusive right to prevent or authorize a person to make reproduction, communicate to public, issue

[43] The Copyright Act (14 of 1957), Section 13(1) (1957).
[44] The Copyright Act (14 of 1957), Section 14(1)(a) (1957).
[45] The Copyright Act (14 of 1957), Section 38 (1957).

copies to the public, sell or offer on rent any copy or broadcast or communicate such performance.[46] This can be useful to those traditional communities who make performance of such work which are an outcome of the creations by their ancestors since time immemorial.

Analysing the adequacy of existing Copyright Regime

The primary question that arises is looking into whether the traditional communities can rely upon intellectual property rights for folklore protection. Here, there arise two divergent views in this regard. The first view focuses on the willingness of traditional communities to rely upon the traditional intellectual property regime for seeking protection to their traditional culture. This step is seen in terms of the desire of traditional communities to restrict the flow of their cultural work while enjoying the ability to authorize their traditional work for certain uses and enjoy royalty rights over such work.[47] However, there is another view in this regard which is more prominent than the former. According to this, the traditional communities rely upon intellectual property rights to prevent cultural harm due to unauthorized usage of their art. With this, the dwellers of indigenous communities view intellectual property as a tool of controlling the circulation of their traditional expressions.

While it is evident that the traditional communities are not flattered with unauthorized usage of their cultural expressions, the outcry for protection of such expressions has arisen. As already discussed, India and Tunisia, both, lack any sui-generis regime for folklore protection. The international community has from time to time highlighted the need of having a sui-generis regime for protecting expressions of folklore. The paramount effort in this regard is The Model Provisions which paved a way for nations to adopt sui-generis law for folklore protection. According to Merriam Webster, sui-generis means "consisting a class alone".[48] Legal Information Institute of Cornell Law School defines sui-generis as a Latin expression, meaning "of its own kind".[49]

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[46] The Copyright Act (14 of 1957), Section 38 A (1) (1957).

[47] FARLEY, *supra* note 17 at 7.

[48] Merriam Webster, *SUI-GENERIS*, https://www.merriam-webster.com/dictionary/sui%20generis#:~:text=ris%5C%20%E2%80%A2%20adjective-,%3A%20constituting%20a%20class%20alone%20%3A%20unique%2C%20peculiar,never%20see%20his%20like%20again.%20%22 (last visited Feb. 27, 2023).

[49] Cornell Law School, *Sui-Generis*, https://www.law.cornell.edu/wex/sui_generis (last visited Feb. 27, 2023).

The need of sui-generis regime has arisen in the light of inadequacy of existing laws in protecting folklores. One such instance, as pointed out by international community is the joint organization of "UNESCO/WIPO World Forum on the Protection of Folklore" which took place in June 1996 at Thailand. At the end of the meeting, an Action of Plan was adopted where the following was observed:

> "*The participants were of the view that at present there is no international standard protection for folklore and that the copyright regime is not adequate to ensure such protection"*[50]

In light of this, the shortcomings of copyright regime in providing adequate protection to expressions of folklore are discussed as follows:

1. *The ownership requirement:* An essential characteristic of folklore expression is such that they are created for preserving the cultural, historical, social values of the traditional community and held in common ownership within the community. On the other hand, traditional intellectual property rights including the copyright regime function around the concept of asserting ownership. This means that the concept of ownership under the copyright regime is at odds with the cultural expressions of the traditional communities. [51]

   Considering the very nature of folklore expressions, at the first instinct, the existing IP regime is a blatant instrument for adequately protecting folklore expressions. The copyright regime's concept of ownership differs significantly from the traditional/indigenous communities' customary rules and customs. While IP laws grant an author private ownership, the term "ownership" may not always be used in the same sense in a traditional community. It might imply a duty to preserve traditional culture as opposed to only having the right to forbid others from utilising particular expressions of it, which is more in line with the nature of IP rights. The moot issue that arises in exploring copyright protection to folklore revolves around the collective therapeutic nature of folklore expressions for a traditional community. In contrast to the nature of traditional communities who hold cultural expressions as a communal right amongst

[50] UNESCO, orum Mondial UNESCO-OMPI Sur la Protection Du Folklore, 1998, https://unesdoc.unesco.org/ark:/48223/pf0000125858 (Last Visited Apr. 5, 2023)

[51] Brigitte Vézina, *Ensuring Respect for Indigenous Cultures: A Moral Rights Approach*, Centre for International Governance Innovation (2020).

the community, the copyright regime would focus on identifying an author in order to confer the rights for preventing unauthorized usage of the copyrighted subject matter. Copyright law matured in an era of liberalism where the notion of an individual freely enjoying his right to own property was celebrated.[52] This is well reflected in copyright regime which provides exclusive right to certain identifiable individuals. The basis of copyright law is the idea of "absolute ownership", which is undoubtedly at odds with some customary laws and the way traditional communities coexist. Even though copyright law grants 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. Because of the fundamentally distinct character of TECs, there is a difference between "ownership" under the copyright regime and the "community rights" granted by customary practises.

Therefore, safeguarding TECs under a copyright regime will result in significant conflicts with the traditional laws that govern traditional communities. A sui generis system that might manage the relationship between the type of protection being granted under IP regime and customary obligations within the members of the community is called for by the ownership requirement under the copyright regime.

2. *Limited duration of protection:* While Tunisia become the first country to modify its copyright law to encompass protection to expressions of folklore, it failed to take into account the true motives of traditional communities seeking protection for their folklores. While traditional communities would be largely interested in seeking a perpetual protection, the copyright regime of Tunisia and India fails to address their concerns but granting protection only for a limited period. The international instruments do not provide for any maximum duration of copyright protection. The Berne Convention also does not specify any maximum duration of protection and instead provides for a minimum of 50 years of protection, thus allowing the countries to grant protection for larger span.[53] With this, the copyright regime of Tunisia grants protection for 50 years.[54] Other than this, the act extends protection only for 50 years even in the

[52] JOAN & FOX, *supra* note 20 at 335.

[53] The Berne Convention for the Protection of Literary and Artistic Works, 1886, Article 7.

[54] Decree No. 93-027 of March 30, 1993 on Copyright, Related Rights and Expressions of Folklore, Article 50 (1993).

cases where the work is published anonymously or pseudonymously from the date of publication, after which, the work will fall in public domain.

Similarly, in India, copyright protection can be extended to a maximum of 60 years from the date the work is published and Cinematograph Films and Sound Recordings; 60 years after the death of the author in case of literary/musical or artistic works[55] and 60 years from the date of publication of anonymous or pseudonymous works.[56] The existing copyright regime of both Tunisia and India provides no room for folklores to seek a perpetual protection and as of now render them public domain and vulnerable to exploitation once the specified duration of protection is lapsed.

3. *The originality requirement*: The mandate that the work should be original is one of the requirements for obtaining copyright protection. Although the Berne Convention does not specifically state this condition, it is clear from a straightforward reading of Article 2.1, which states that works protected by the Convention must be original works of authorship and which supports the same principle in Article 2.5. This is why many nations, including India[57] and Tunisia[58], support the demand for originality before providing copyright protection.

   Within a traditional community, folklore expressions are an instrument for recording their culture and history. With this, it is implicit that artists cannot random their inspirations. This means that various folklores might get deprived of the element of 'originality' as they are created by the ancestors of a traditional community and passed down from one generation to another from time immemorial.

   TECs are believed to be sufficiently distinct to deserve protection under copyright law, but if the originality criterion is met by an author who does not come from the traditional community where traditional work originated, it could have major repercussions. For indigenous communities that may want to prohibit some individuals who do not belong to these traditional/indigenous communities from benefiting from the exploitation of their rights, this could pose major issues.

[55] The Copyright Act (14 of 1957), Section 22 (1957).
[56] The Copyright Act (14 of 1957), Section 23 (1957).
[57] The Copyright Act (14 of 1957), Section 13 (1957).
[58] Decree No. 93-027 of March 30, 1993 on Copyright, Related Rights and Expressions of Folklore, Article 4 (1993).

It can get increasingly trickier when protection is requested for unoriginal material or a replication of already existent folklore, which most certainly won't satisfy the "originality standard." Such works will continue to be in the public domain and hence not be covered by the copyright law because this condition was not met.

4. *The identifiable author requirement:* The two most consistent and prominent features of folklore expressions are anonymity and oral transmission.[59] According to WIPO, an important characteristic of folklore expression is such that they are created by unknown authors. This is because folklore expressions are created from time immemorial and it becomes impossible to identify a particular person as an author of such expressions, thus recognizing a certain community as the owner of folklore expressions.

   The copyright regime mandates that the creator or creators of a work be identified. However, the originator of traditional idioms is generally unknown, if not always. Since the author of current cultural manifestations can be easily identified, they differ greatly from historic cultural expressions in nature. The European Community also made note of this drawback in its response to the WIPO questionnaire, noting 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 associated with a community".[60]

   Copyright regime grants authors or joint authors the right to ownership over the copyrighted subject matter. While one may propagate the idea of providing joint ownership in folklore expressions to a traditional community, the same may not be feasible. This is because the individuals who are involved in the creation of folklores in real sense can only claim authorship over such expression and not the entire community or other individuals who did not create such expression.[61] Further, as already been pointed in the *Bulun Bulun case*[62], where a person executes a folklore expression after having it inherited from previous generations, such person cannot claim joint authorship merely on the ground that such folklore expressions were performed by him/her.

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[59] JOAN & FOX, *supra* note 20 at 335.

[60] Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Intergovernmental Committee, 2021).

[61] LUO, *supra* note 1 at 29.

[62] John Bulun Bulun & Anor v R & T Textiles Pty Ltd, 86 FCR 244, 157 A.L.R. 193 (1998)

In certain instances, the copyright regime attempted to get around the need of having an identifiable author. The Berne Convention offers some, but not complete, relief in this regard. This is because the protection for anonymous or pseudonymous works ends after the expiry of 50 years when the work is made public, in accordance with Article 7.3 of the Convention. The principle of requiring an identifiable author can also be traced in the copyright regime of both the countries- India and Tunisia. For instance, The 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"[63]. A similar provision is provided under the copyright regime of Tunisia where works published anonymously or pseudonymously fall in public domain after 50 years from the date of publication.[64]

5. *The Fixation Requirement:* Copyright protects the 'expression of idea' and not the idea itself.[65] For putting forth an idea into some form of expression, it must be attached to some medium though which the idea can be expressed. This has given rise to the requirement of fixation under the copyright regime. Fixation requirement is an obstacle to folklore protection under the copyright regime. This is because most folklore expressions are transmitted orally from one generation to other. As a matter of fact, most of the folk songs, legends and folk dances are performed by the traditional community without any form of material fixation.[66] With this, the verbal manifestation of folk songs or folk legends, for example, cannot satisfy the requirement of fixation as mandated under the copyright regime.

   The urgency of ruling out the fixation requirement for folklore expressions was realized by the international community from time to time. This can be seen in the attempts of drafters of Tunis Model Law, 1976 who realized that the expressions of folklore were most often in oral form or not recorded, and to have a fixation requirement for such expressions will jeopardize the interest of traditional communities. Accordingly, the

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[63] *Supra* note 57.

[64] Decree No. 93-027 of March 30, 1993 on Copyright, Related Rights and Expressions of Folklore, Article 24 (1993).

[65] Agreement on Trade Related Aspects of Intellectual Property Rights 1995, Article 9.2.

[66] LUO, *supra* note 1 at 65.

1976 Model Law discards the fixation requirement for folklore. It can further be noted that fixation of work is also not a requirement under the 1982 Model Provisions. Despite such initiatives, both India and Tunisia function around fulfilling the requirement of fixation for providing protection under their copyright regime.

This clearly indicates that the copyright regime of India and Tunisia is not equipped enough to take into account the special nature of folklores and thus fails to provide a blanket adequate protection.

Conclusion

Expressions of folklore hold importance to every country. Such expressions not only form part of rich heritage of a country but are also important to traditional communities because they represent a community's social, cultural, and historical values. Misappropriation of folklores is a serious concern that has risen drastically since the advent of globalization. The commercialization of these manifestations has occasionally been seen without any benefit sharing with the communities from where they first arose. Every region of the world has experienced the inescapable misuse of TCEs, from the mimicry of folk music to the mass commercialization of dreamcatchers are just a few examples. The internationally community has long ago recognized the need of protecting folklores. One such iconic instance is that of Berne Convention which was amended at the Stockholm Conference to pave a way for folklore protection.[67]

The primary concern remains to decide upon whether or not the current Intellectual Property laws can suffice in folklore protection, or if a sui generis approach is necessary to prevent unlawful use of folklore expressions. While most countries lack any specific law to protect expressions of folklores, traditional communities have no other recourse but to seek protection under existing IP laws. As discussed earlier, the nature of folklore expressions is different from other forms of intellectual properties. This is because folk expressions are created within a community to preserve their cultural and social value, instead of creating such expressions for commercial purpose. With this, the needs of traditional communities are different from the creators of other intellectual properties.

[67] Berne Convention for the Protection of Literary and Artistic Works art. 15(4)(a).

As of now, both India and Tunisia lack a sui-generis law for protecting folklores. With this, traditional communities are bound to seek protection under existing intellectual property regimes, for example, copyright, which intrinsically fails to offer adequate protection to such expressions. Even though the copyright regime of Tunisia has certain specific provisions on protection of folklore, the same does not provide an absolute protection to folklores due various shortcomings. Largely custodial in nature, the protection does not grant communities ownership rights or control over the use of their traditional cultural expressions. Further, the Tunisian law considers folklore to be in the public domain of the state, and the state may provide a license for its use.[68] However, this approach does not effectively address appropriation, misuse, or commercial exploitation by third parties without the community's consent or benefit-sharing. In addition to these, the Tunisian and Indian Copyright regime provides protection for limited duration, stresses upon the requirement of originality, fixation of subject matter in tangible form, identifiable author requirement are some other limitations making it difficult to adequately protect folklores under the ambit of copyright regime. In times like this, it is high need for nation states to adopt a sui-generis law keeping in mind the Model Provisions proposed by the international community.

[68] First Paragraph of Article 7, Law No. (36) for 1994 in Respect of Literary & Artistic Property, 1994, Article 1 (Tunisia).