

Copyright Protection of Traditional Folk Performing Art Forms

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Abstract

Transmitted over the ages through various generations, traditional folk performing art forms are an integral part of the cultural identity of a nation. Even though regarded as “*creative expressions of the common past*”¹, the legal protection of traditional cultural expressions (TCE) still remains an unsettled issue thereby exposing them to various challenges which threaten its very survival in this globalizing world. While modern art forms are given legal protection in every country, traditional performing art forms remain one of the most neglected areas by law-makers, especially in India. Despite being an abode of innumerable diverse cultural expressions, India has not yet passed even a single legislation on this matter albeit the need to protect these expressions of folklore has been recognized as an international issue.

With the alarming level of illicit exploitations of folklore expressions, it is high time that our nation takes immediate steps to protect, promote and preserve its valuable cultural heritage at least within the existing framework of laws for the time being. Since traditional folk performing art forms are considered as products of intellectual creativity of traditional communities,² it seems that the laws on the intellectual property might have the potential to protect them within its purview. This paper, therefore, intends to evaluate the scope for protection of traditional performing art forms under the Indian intellectual property laws with specific reference to the Indian Copyright Act, 1957. The paper will examine the extent of copyright protection available to traditional folk performing arts in India and analyze its adequacy. Based on the observations made, the paper will also suggest necessary reforms.

KEYWORDS: Copyright protection, Traditional folk performing art forms, traditional cultural expressions, folklore expressions, Traditional Knowledge

Introduction

“It is my firm opinion that no culture has treasures so rich as ours has. We have not known it, we have been made even to deprecate its study and depreciate its value.”

-Mahatma Gandhi³

India is a land of diverse cultures and rich traditions where numerous traditional cultural expressions have been in existence for centuries in varied forms. These cultural expressions are regarded as a major component of the nation’s cultural heritage as they are considered to be creative manifestations through which the traditional communities shared their wisdom among themselves. Traditional performing art forms such as dance, theatre, and music, is one such “creative expression of the common past”⁴ which has facilitated the transmission of traditional

knowledge over the generations and has eventually become an integral part of their culture.

Besides being a reflection of the traditional community's social and cultural identity, these traditional cultural expressions are in fact products of the intellectual creativity of the local or indigenous community and hence of invaluable nature. Though they have been religiously passed down from generations to generations, the local/indigenous communities used to recreate these art forms as per the changing needs of time whilst preserving their essence thereby constantly evolving them. Traditional Performing art forms are hence not static but 'traditional' only as regards its roots.

However, with increasing globalisation, the exploitation of traditional cultural expressions, particularly traditional performing arts, has been on the rise. Consequent to the modern day's standardization of cultural practices, several traditional practices have been abandoned and many traditional cultural expressions are facing the threat of extinction. While modern-day art forms are assiduously protected under various laws, this is not the case with traditional folk performing art forms. Hence, it is high time that immediate measures are taken to protect these invaluable creative expressions at par with modern art forms and safeguard them from being evanesced forever.

A Glimpse of Traditional Knowledge (TK) and Traditional Cultural Expressions (TCE)

The term 'Traditional folk performing art forms' needs to be understood in the light of related terms such as 'Traditional Cultural Expressions' and 'Traditional Knowledge' because traditional performing art forms is a type of traditional cultural expression, which is, in turn, a subset of the broader concept of Traditional Knowledge. Even though there is no universally acknowledged definition of the term 'Traditional Knowledge', WIPO defines this term in two ways. In a broad sense, Traditional Knowledge refers to the knowledge systems, practices etc. of the traditional communities, including their intangible and intellectual cultural heritage. In a narrow sense, Traditional Knowledge (TK) refers to knowledge, know-how, skills, practices, innovations, formed out of the intellectual creativity of the traditional communities and are integral to their identity. Thus, even though Traditional Knowledge is an all-encompassing term in itself, for practical purposes WIPO has distinguished Traditional Knowledge (TK) from Traditional Cultural Expressions (TCE) so that the former term is limited to more scientific knowledge while the latter refers to distinctive symbols, expressions of folklore etc.⁵ But it must be noted that TK is 'traditional' only to the extent that it is rooted in the culture of that community as it a living body of knowledge which is developed, sustained, passed on among generations.⁶

Traditional Cultural Expressions are also known as Expressions of Folklore (EoF) and lack a universally accepted definition. However, TCEs were given various definitions/interpretations at different occasions, one notable among them is the definition given by WIPO's Intergovernmental Committee (IGC) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, which reads as follows:

“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, poetry, riddles and other narratives; words, signs, names, and symbols;

(ii) musical expressions, such as songs and instrumental music;

(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 as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms;

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.⁷

This is a very broad definition that not only describes the characteristics of TCE/ EoF but also lists down its categories with examples – all together under one provision.

Traditional Performing Art Forms as a Type of 'TCE'

In the light of the above categorisation, Traditional Folk Performing Arts can be regarded as a type of TCE in the form of Musical Expressions, Expressions by action, Verbal Expression, or their combination. Traditional Folk Performing Arts mainly includes traditional music/ songs, dances, and theatre. Traditional music refers to both vocal as well as instrumental music and is considered the most universal among traditional performing art forms as they are present in every society. Traditional dances are another major form of TCE wherein rhythmic bodily movements/steps along with various gestures and expressions are used to convey some stories. Traditional theatre performances are a combination of singing, dancing, acting etc. and are regarded as a major vehicle of expression of the culture and society of traditional communities.

However, irrespective of the category to which it belongs to, all Traditional Cultural Expressions are regarded as products of intellectual creativity of the traditional community.

The Need for Protection of Traditional Performing Art Forms

Though traditional folk performing art forms have been developed, maintained, transmitted and most importantly well-preserved by the indigenous/ local communities within their particular society to the exclusion of others over several generations, with the rapid development of technology and increased commercialization, there have been instances of encroachments made by the modern man towards these cultural expressions. Traditional Cultural Expressions, being invaluable traditional knowledge systems, have been targets of illicit exploitation⁸ by outsiders especially in developing countries which are known for its rich and varied

heritage. Traditional performing arts, for instance, have been misappropriated and exploited without the knowledge/ authorization of its right-holders for purely commercial purposes stripping them off their unique identity. In many occasions, the expressions of folklore were reproduced without acknowledging the actual right-holders thereby denying them of a fair share in the benefits accrued from the use of their intellectual creations and affecting their very sustenance. Consequently, many traditional art forms are being abandoned at present as the availability of other lucrative jobs coupled with notions of modernisation seeps in the minds of the local communities.

Therefore, the need of the hour is to address the issues surrounding the concept of TCEs such as its protection from unauthorized exploitation, misappropriation, and other prejudicial acts; preservation of traditions against its erosion/ disappearance; safeguarding the dignity of the traditional community's by protecting its cultural and moral rights; promotion of creative innovations based on TK/ TCEs etc.

International Efforts

The need to protect traditional cultural expressions, or folklore as it was previously known, has been recognized by the international community since the 1970s. Being products of human intellect and creativity, various efforts were taken to include folklore expressions within the international intellectual property regimes. The first of these efforts took place in the 1967 Stockholm Diplomatic Conference for revision of the Berne Convention for the Protection of Literary and Artistic Works which marked the commencement of positive protection measures regarding expressions of folklore.⁹ During this conference an Indian delegate raised concerns on lack of folklore protection and suggested the inclusion of "works of folklore" under Art. 2 (1) of the Convention which defines 'protected works', thereby reflecting the aspirations of developing countries to protect their folklore expressions.¹⁰ However, this suggestion was rejected owing to the difficulty in reaching a proper definition of the term 'folklore'. Later the 1971 amendment to the Berne Convention inserted clause (4) to Art. 15 thereby indirectly entitling works of folklore to protection under this Convention. Art. 15 (4) (a) empowers the Member countries to adopt adequate protection measures with regard to their works of folklore so long as they can be identified with that Member State.¹¹ However, this provision is limited in nature as it deals with only anonymous and unpublished works. Furthermore, this provision permits the member States to designate a 'competent authority' in this regard but, India was the only country that acted in furtherance to this provision and designated a competent authority.¹² In short, even though the Berne Convention did instigate the protective measures for traditional cultural expressions Art.15 (4) soon became a dead letter as it avoided some important issues and left it unanswered. One such important concern was the applicability of limited term of copyright protection to folklore, which has been transmitted over several generations.

In 1976, the Government of Tunisia along with the assistance of UNESCO and WIPO drafted the Tunis Model Law on Copyright for Developing Countries¹³ which not only defined 'folklore' (S.18) but also made certain reconciliation between copyright principles and TCEs. For instance, Section 2 which deals with derivative works expressly states that "*works derived from national folklore are also protected as original works*"¹⁴ albeit folklore has been recreated over generations. Then again, the optional provision Section 5 calls for an exemption from the fixation requirement to

suit the needs of traditional communities. Furthermore, the model law stated that “*work(s) of national folklore are protected by all means...without limitation in time*”¹⁵, thereby resolving the issue of copyright’s limited term protection of folklore. Even though the Model reiterated the mention of a ‘competent authority’, it expressly mentioned that the national folklore de facto belongs to these competent authorities designated by the national Government thereby totally ignoring any say of relevant traditional communities in this matter.

With the accelerated technological developments, the potential for commercial exploitation of traditional cultural expressions rose thereby threatening to distort the national identity of various developing countries. Hence, to offer guidance to these countries the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions was drafted in 1982.¹⁶ This Model Provisions became the second major milestone in the efforts for the protection of folkloristic expressions after the Berne Convention of 1967. Unlike its forerunners which centred on copyright protection of folklore, the Model Provisions suggests a *sui generis* regime to safeguard traditional cultural expressions that not only offers unlimited term of protection to expressions of folklore but also safeguards them from two major types of activities (as specified in Section 1), i.e. illegal exploitation¹⁷ and other prejudicial actions¹⁸. Notably, the role of local/indigenous communities in the protection of their folklore expressions was acknowledged by mandating preliminary authorization from a ‘competent authority’ or ‘community concerned’, even though there is no mention as to the absolute vesting of control over the folklore with the traditional community that created it.¹⁹ However, sensitive areas of regulation were left to be decided by the concerned nations to tailor laws suiting their needs.

Even though the Tunis Model Law and the WIPO-UNESCO Model Provisions were adopted by a few developing countries, they didn’t make the necessary impact on the international front. Hence in 1984, a Draft Treaty for the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions was prepared by WIPO and UNESCO.²⁰ However, the draft did not turn into an international treaty due to lack of workable mechanisms that can be uniformly applied to all countries in settling the issues surrounding expressions of folklore.

Later, the discussions on TCE protection gained momentum only by 1996 with the adoption of WIPO Performances and Phonograms Treaty (WPPT), which provides, inter alia, the protection of rights of a performer of such folklore expressions.²¹ Subsequently, WIPO also conducted several fact-finding missions after the WIPO-UNESCO World Forum on the Protection of Folklore in 1997²² to understand the needs and concerns of TK- holders wherein TCE was treated as a subset of Traditional Knowledge.

WIPO’s continuous efforts to protect expressions of folklore finally led to the creation of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) in 2000.²³ Over the years, the IGC has conducted numerous sessions and has drafted several principles for the protection of “Genetic Resources (GR), Traditional Knowledge (TK) and Traditional Cultural Expressions (TCE)”²⁴ which serve as a guiding text for the international community. Concurrently, WIPO has also undertaken ‘text-based negotiations’ as an effort to reach a consensus as regards the text of an international legal document.²⁵

The Draft Provisions are regarded as a quasi-treaty effort by WIPO which even though non-binding serves as great references in the international, national and even regional policy discussions on possible frameworks for TCE protection.

While the international community mainly concentrated on developing positive rights mechanisms to protect TCE, many jurisdictions have come up with defensive protection mechanisms especially to prevent third parties from unjustly obtaining IP rights over TCE. One of the primary examples of such defensive measures is India's Traditional Knowledge Digital Library (TKDL) which is an online database of its traditional medicines that serve as prior art reference for patent examiners. However, while TKDL is lauded as a great defensive mechanism to protect its TK, it is saddening to know that no such measures have been taken for the protection of its TCE till date in India.

Indian Scenario: The Scope for Copyright Protection

Even though various efforts have taken place in the international arena to protect Traditional Cultural Expressions, the lack of an international instrument on this matter has consequently driven various nations (especially developing countries) to draft their own *sui generis* legislations or resort to protection under their respective intellectual property laws. Many traditional communities have taken refuge under the provisions of intellectual property laws of their nation to uphold their communal interests. For instance, in *Wik Peoples vs. Commonwealth*,²⁶ the Wik Apalech dancers from Aurukun resorted to performer's rights under the Copyright Act to prevent the commercial circulation of the unauthorized images from their performance at one of the Laura Aboriginal Dance and Cultural Festivals.²⁷

India, despite its rich cultural heritage, has not yet come up with an exclusive legislation²⁸ for protecting its diverse traditional cultural expressions, many of which are internationally acknowledged. While such recognition might benefit the lives of associated communities, the fact remains that the traditional communities are still in need of a legal instrument for protecting their cultural expressions. As the efforts for safeguarding and preserving TCEs are still at a nascent stage in India, the only practical means to accord protection of these expressions, for the time being, seems to be under its Intellectual Property laws, whose provisions seems to have a potential scope for the same. But the question as to how exactly it can be ensured remains to be analyzed further.

Protection under Copyright Act, 1957

The unsuccessful attempts to form an international treaty or an exclusive national legislation on the protection of the traditional cultural expression imply that this domain is still mainly under the control of the intellectual property law regime. While there are certain provisions under various enactments that touch upon the subject of Traditional Knowledge (in the strict sense)²⁹, the domain of TCE has been mostly ignored. Even the Indian Copyright Act, 1957, which deals with literary, artistic and dramatic works, etc., does not contain express provisions on Traditional Cultural Expressions though certain provisions do seem to have a bearing on its protection.³⁰ Thus, Traditional Cultural Expressions cannot be presumed to be totally excluded from the purview of the Indian copyright law.

Traditional performing art forms, being a type of tradition-based cultural expressions, are considered as “*products of creative intellectual activity, including individual and communal creativity*”. Conversely, the term ‘Intellectual Property’, as Dratler defines it, means “*intangible personal property in creations of the mind*”.³¹ From a conjoined reading of both the definitions of TCE and IP, it can be construed that Traditional folk performing art form do qualify as Intellectual Property and hence, may be covered under the sphere of existing IP laws. Further, according to S.13 r/w S.14 of the Copyright Act, a copyrightable work refers to the following subject-matters: literary work, dramatic work, artistic work, musical work, cinematographic film, sound recording and computer programs. Even though the Indian Copyright Act, 1957 does not expressly state Traditional Cultural Expressions as a protectable subject-matter, most of the TCEs are in the form of ‘literary, dramatic, musical and artistic works’ and hence within the scope of section 13 of the Act.³²

However, since the concept of traditional performing art forms and other such cultural expressions precede the Western notions of Copyright, it is doubtful whether the following requirements to claim copyright protection can be satisfied by these art forms.

AUTHORSHIP

Copyright subsists in intellectual creations and hence it goes without saying that there must be an identifiable author(s) behind the work. However, most of the Traditional Cultural Expressions have unknown authors since they have been transmitted over generations as part of the community’s identity. Moreover, usually, these traditional cultural expressions (such as the traditional folk performing art forms) are the result of an evolutionary process and are communal in nature which makes it all the more difficult to pinpoint specific individual(s) as authors of the work.³³ The Copyright Act, 1957 recognizes multiple authorship and joint-authorship³⁴ but does not recognise the concept of community authorship. In short, Copyright’s author-centric approach does pose a difficulty in the legal protection of the community-centric TCEs.

Though contemporary TCEs may not face such a problem as they usually have identifiable authors, the pre-existing TCEs that are on the verge of extinction are denied copyright protection due to their unknown origins. However, Clause (4) of Art. 15 of the Berne Convention, added via the 1971 amendment, states that “*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.*”³⁵ Acting in pursuance to Art. 15 (4), which was also incorporated into the TRIPS Agreement later, India designated the Registrar of the Copyrights of India as a ‘competent authority’ thereby leaving room for copyright protection to expressions of folklore, despite being the only country to do so.³⁶ Even though this means that Traditional Cultural Expressions can claim copyright protection in India just like other contemporary works even if they have an unidentifiable author(s), the fact that this provision is not incorporated into the Indian Copyright Act poses a huge problem.

ORIGINALITY

As per S.13 of the Act, copyright will subsist only in original works, i.e. only if there is originality in the way the work is expressed. This originality criterion poses another major challenge for protection of TCEs given the fact that the term ‘originality’ hasn’t been properly defined for this purpose and has been left to the interpretation of courts. In India, the Supreme Court has laid down that “*For a work to be original, the work must not be copied from another work – that it should originate from the author.*”³⁷ Even though contemporary TCEs manage to claim originality, this is not the case with pre-existing TCEs as they are generally regarded as works already in the ‘public domain’ from the strict copyright perspective. However, it must be noted that “folklore is the result of a constant and slow impersonal process of creative activity exercised by means of consecutive imitation within an ethnic community”,³⁸ which indicates that an originality factor is always imbibed in it. Thus, since the level of originality required is very low under the common law system³⁹, with the support of liberal court interpretations traditional cultural expressions can overcome this requirement.

FIXATION

Even though both oral and written works are protected as per the general international principles,⁴⁰ the Indian Copyright Act, 1957 makes both explicit as well as implicit mention to the fixation criterion for a claim of copyright protection. While dramatic works, cinematographic works, and sound recordings are expressly required to be fixed in some form or the other, it is implicit in the case of literary, musical and artistic works.⁴¹

Although not a treaty requirement, this criterion which basically aims to prove the existence of the work, however, raises another obstacle for intangible TCEs like folk tales, traditional dances or songs as they are mostly oral in nature and not fixed in any particular medium. Nevertheless, with many TCEs facing the threat of extinction, efforts are being made to document/ record them so as to make them eligible for copyright protection.

Thus, the requirements of authorship, originality, fixation and the subsequent conferring of a ‘limited period’ of protection do pose some basic challenges to the protection of TCEs which came into existence much before these modern notions of ‘copyright’ set in.

PERFORMER’S RIGHTS

While the copyright protection of traditional performing art forms remains challenging, an alternate efficient way in which they can be protected from misappropriation and illicit exploitation is by means of protecting its performer’s rights. The recognition of the rights of a performer will not only ensure that he is acknowledged for his contribution to the performance, but it also prevents others from commercially exploiting his performance. Since traditional performing art forms owing to its peculiar characteristics cannot be copyrighted, the most practical way to protect and preserve these cultural expressions today is by safeguarding the rights of its performers.

The Indian Copyright Act, 1957 recognizes and discusses performer's rights mainly under five provisions- Sections 38, 38 A, 38B, 39 and 39 A. According to the definitions given to the terms 'performance'⁴² and performer⁴³, the Act can be applied to any traditional performing art form which was so far cast aside from the purview of the Copyright Act.

Section 38 of the Copyright Act recognizes the concept of performer's rights and prescribes its duration of protection as fifty years.⁴⁴ By the Copyright Amendment Act, 2012 significant changes were brought to the protection of performer's rights with the introduction of S.38 A that deals with 'Exclusive right of Performers' and S.38 B on 'Moral Rights of the performer'.

The new provision, S.38A confers on the performers an exclusive right to authorize certain actions with reference to his performance whereas previously they could only prohibit 'fixation' of their live performance.⁴⁵ Moreover, they are raised to a better position as they are entitled to royalties in their performance which were hitherto not available to them.

Another major change brought in by the 2012 amendment is Section 38B, which recognizes the 'Moral Rights' of performers. Till now only authors were conferred with moral rights (though the term used in Section 57 is 'special rights') under the Copyright Act, 1957; but with the introduction of Section 38B even performers can now enjoy moral rights on their performances.⁴⁶ This is a very significant development as the contributions – skill, labour and time- made by a performer are recognized at par with the authors of the performance. In fact, this extension of moral rights to performers definitely puts them in an advantageous position in this digital era where constant digital alterations of performances are taking place.

But the Copyright Act, through Section 39 indicates that rights given to the performers under the previous provisions are not absolute in nature as it allows for 'fair use' of the performance (such as for teaching, research etc.) and lists out certain actions which will not be considered as 'infringing' performer's rights. However, proper acknowledgement of the sources must be made even if it is a work of 'fair use'.

The final provision on performer's rights, Section 39A⁴⁷ deals with the application of few specific provisions (such as those related to the assignment, license, copyright society etc.) to performer's rights with necessary modifications. It lays down that a performer does not have right in those performances which infringe the copyright in any work. Further, this provision states that performer's rights do not affect the copyright existing in a work on which the performance is made. On the whole, the 2012 Amendment to the Copyright Act made extensive contributions to the protection of rights of performers.

As a final point, the legal recognition given to 'performer's rights', in the form of exclusive rights and moral rights, is really advantageous to performers of traditional art forms who spend years of training in preparation for their performance. However ironically, while the performers of traditional performing art forms are vested with certain rights under the Copyright Act, the traditional cultural performances in themselves are denied copyright protection.

Conclusion

The protection of traditional performing art forms, being vehicles of cultural expressions of a community, was recognized as a global issue and efforts have been going on for quite some time to draft an appropriate international treaty. However, tired of the long wait for such an international legal instrument, many countries have already come up with their own national policies to safeguard their valuable cultural expressions. India, unfortunately, is not one among them despite being an abode of diverse cultures. In spite of the importance attached to them, India still hasn't come up with any sort of legal instrument to protect its numerous traditional performing art forms from the various challenges they are facing in today's world.

There are two possible solutions to this problem. First, India could follow the path of countries like Philippine⁴⁸ and enact an exclusive legislation on Traditional Cultural Expressions. Such an Act shall contain provisions suitable to the characteristics of TCEs and will give prominence to customary practices and interests of the traditional communities. Proper definitions should be given to the terms such as traditional cultural expressions, local community etc in light of the WIPO-UNESCO Model Provisions. Further, the main aim of such legislation must be not only to recognize, promote and preserve traditional cultural expressions but also to protect the interests of traditional communities. However, while this could be the best solution possible, the process to draft and implement such a law would be time-consuming and complex. Therefore, in the current scenario where there is an urgent need for protection of traditional performing art forms, the next possible solution is to incorporate TCE-friendly provisions in the existing copyright legislation. It is a fact that traditional cultural expressions, unlike the contemporary art forms, do not typically fit into the square-pegged Western notion of 'Copyright'; but leaving aside few technicalities, the Copyright law does have the potential to protect traditional performing arts. Hence, considering the present state of affairs, it would be more sensible and convenient to introduce *sui generis* provisions for expressions of folklore within the copyright framework.

Suggestions and Recommendations

The current copyright legislation needs few amendments to exploit its potential in providing protection to traditional performs arts forms. But first of all, it is necessary to have a representative body for all persons related to traditional performing art forms so as to ensure their effective protection.

(1) Formation of representative bodies

An association for each traditional performing art form could be formed under the auspices of respective State Governments wherein all persons connected to that art form such as actors/dancers, singers etc., will be represented. Further, a traditional artists' society akin to a copyright society must be registered as per S.33 r/w S.39A of the 1957 Act for administration of rights in traditional performing art forms.

(2) Introduction of sui generis provisions to Copyright Act, 1957

The following are the suggested modifications to the current Copyright law:

- First, provide definitions for Traditional Cultural Expressions and related terms preferably in similar lines to that given by WIPO's IGC.
- Prepare a schedule of TCEs that are officially recognized by the Government of India and/ or the respective State Governments.
- Insert a separate Chapter on protection of traditional cultural expressions in the Copyright Act, 1957 which will *inter alia* include provisions regarding:

a. Recognition of community authorship

Though in pursuance to Art.15(4) of Berne Convention, India designated the Registrar of Copyrights as a 'competent authority' to act as a representative of unknown authors of unpublished works believed to be its national, there was no provision corresponding to this made in the Copyright law. Hence, it is suggested that the Act gives recognition to 'community authorship' for TCEs with every 'association' acting as the representative body of traditional communities.

b. Presumption of 'originality' for Traditional cultural expressions

The 'originality' requirement in the Copyright Act basically intends to ensure that the work originates from the author and is not copied from others. Therefore, so long as the traditional cultural expressions are official recognized by the Government, they must be presumed to have satisfied this requirement under the Act.

c. Relaxation of the requirement of fixation for Traditional cultural expressions

Since many traditional cultural expressions exist in oral form, the requirement for 'fixation' must be relaxed exclusively for the notified traditional cultural expressions. Also, efforts must be promoted to reduce these expressions in tangible forms.

d. Providing unlimited protection to notified TCEs with necessary conditions to ensure balance of interests.

Unlimited protection must be conferred on the notified TCEs provided adequate fair use provisions are also laid down to ensure balance of interests.

e. Mandatory requirement for obtaining consent from the association.

For any use of traditional performing art forms by third parties (except 'fair use' activities), the 'prior informed consent' of the concerned community should be obtained mandatorily. Adequate provisions on relief/ damages against such contraventions of the Act must also be introduced.

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- ²⁵ CHRISTOPH ANTONS, *Intellectual Property Rights in Indigenous Cultural Heritage: Basic Concepts and Continuing Controversies* in INTERNATIONAL TRADE IN INDIGENOUS AND CULTURAL HERITAGE 144-174 (Christoph B. Graber et. al. eds., Edward Elgar, 2012)
- ²⁶ (1996) 187 Commonwealth Law Reports 1
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- ²⁸ Leena Desai, *Traditional Cultural Expressions*, LEXOLOGY, (Nov.30, 2012), <http://www.lexology.com/library/detail.aspx?g=a806fd78-711e-4811-a881-ed269533b635>
- ²⁹ The Patent's (Amendment) Act, 2005, the protection of plant varieties and farmers rights Act, 2001 (PPVFR Act), and the Biological Diversity Act, 2002.
- ³⁰ *Id.*
- ³¹ George P. Nicholas, Kelly P. Bannister, *Copyrighting the Past? Emerging Intellectual Property Rights Issues in Archaeology*, 45 No.3 CURRENT ANTHROPOLOGY 327, (June 2004), <http://www.jstor.org/stable/10.1086/382251>
- ³² Section 13 : Works in which Copyright subsists - “(1) Subject to the provisions of this section and the other provisions of this Act, copyright shall subsist throughout India in the following classes of works, that is to say,—
(a) original literary, dramatic, musical and artistic works; (b) cinematograph films; and (c) sound recording.”
- ³³ DAPHNE ZOGRAFOS, *INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS* 47 (Edward Elgar, 2010)
- ³⁴ s.2(z) of the Indian Copyright Act, 1957 defines ‘work of joint authorship’ and it was amended in 2012
- ³⁵ *Id.*
- ³⁶ *Notification Provisions of Intellectual Property Conventions incorporated by Reference into the TRIPS Agreement but not explicitly referred to in it*, WTO, (last accessed on June 5, 2016, 5:00 PM), https://www.wto.org/english/tratop_e/trips_e/ipcw15_e.doc
- ³⁷ *Eastern Book Company & Ors vs. D.B. Modak & Ors*, (2008) 1 SCC 1 It is a landmark case on ‘originality’.
- ³⁸ Claude Masouye, *The Protection of Expressions of Folklore*, No. 115 R.I.D.A 10, (1983)
- ³⁹ FIONA MACMILLAN, *NEW DIRECTIONS IN COPYRIGHT LAW, VOLUME 2*, 184 (Edward Elgar, 2006)
- ⁴⁰ For example, refer Art 2.2 of the Berne Convention.. *Id.* at 312.
- ⁴¹ Ghayur Alam, *Qualifications of Copyright Candidate in India*, 1 NLIU JOURNAL OF INTELLECTUAL PROPERTY LAW 17, 56 (2012)
- ⁴² The Copyright Act, 1957, § 2(q)
- ⁴³ The Copyright Act, 1957, §.2(qq)– it was recently amended in 2012
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⁴⁶ *The Copyright (Amendment) Act, 2012*, MHRD.GOV, (last modified on Oct.24, 2013),

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⁴⁷ The Copyright Act, 1957, §.39A : Certain provisions to apply in case of broadcast reproduction rights and performer's rights

⁴⁸ The Philippines Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples (No. 8371, of 28 July 1997)