

# Folklore Protection – A Perusal Within the Current IP Regime

-Chandni Ghatak\*

## ABSTRACT

*The protection of cultural heritage has been an important aspect discussed in several international forums. Protection of traditional knowledge has also garnered much attention from a socio-legal perspective, especially within countries which boast of a high indigenous population. However, there is still a dearth of discourse about the protection of cultural heritage, specifically folklore, particularly in the context of Intellectual Property (IP). Despite the World Intellectual Property Organisation (WIPO) undertaking efforts to facilitate such discourse, little progress has been made. The author has sought to clearly distinguish between concepts of folklore and traditional knowledge, terms that are often used interchangeably, further impeding the process of specific protection. This paper seeks to identify and clarify what constitutes folklore, the issues involved in its protection and the possible suggestions which may be adopted to further this goal.*

---

\* Chandni is a 5<sup>th</sup> year undergraduate law student of the National Law University, Jodhpur. The author may be contacted at [chandnighatak26@gmail.com](mailto:chandnighatak26@gmail.com).

## INTRODUCTION

Earlier this year, I read William Dalrymple's book titled '*Nine Lives*' which explores nine unique stories coming from across the vast boundaries of India, in order to discern how varied the perception of religion, spirituality etc., is through the narration of unique practices of various communities within the country. One of the lives he explores is that of a traditional Phad singer, the sole person in his family carrying on the tradition of regaling the villagers with lengthy recitations of songs glorifying the local deity Pabuji, on a fortnightly basis. While Dalrymple shares his marvel with the reader on the beauty of this long-held tradition, I explored certain other questions, unearthed through Dalrymple's story. What could possibly happen if, in case, someone in the audience recorded the singer's performance and had it recreated before an ignorant urban audience? What would be the singer's remedy given the lyrics of such songs were known and transmitted through generations of his family, alone? Could he authorise such person in the audience, if his consent had been sought? Would this consent bear any legal significance? Could the singer also claim any relief if, in case, a painter was to steal the artwork illustrated on the long fabric which he uses as a prop to recreate the story to his audience every fortnight? As these questions emerged, I have chosen to provide some observations in light of this story. This paper seeks to study the status of folklore under the ambit of intellectual property rights, given its uncertainty due to the lack of available discourse on such topic. I have examined the meaning of folklore and the kind of protection which may be rendered to it, if the IP regime was tailored both domestically and globally to accommodate these ancient forms of art, etc. Through this paper I attempt to highlight the challenges faced by national and international IP instruments in granting protection to folklore, in order to carve out focal areas which need to be addressed in this process. Lastly, based upon the research presented, I provide plausible suggestions which may be adopted in order to give effect to an IP regime suitable for accommodating such specific communitarian needs.

## UNDERSTANDING FOLKLORE

Folklore, in the technical sense, does not have a simplistic or straightforward meaning as it happens to have in common parlance. More often than not, people try to elaborate upon the idea of folklore by citing examples of the popular Raas-Leela performances in Vrindavan, the Phad storytelling of Rajasthan, etc. However, understanding folklore for the purposes of its legal protection has been a complex task, given that it's often mistakenly understood as a subset of traditional knowledge. The understanding of traditional knowledge certainly reflects the importance of preserving the uniqueness of a community. Traditional knowledge in its technical sense constitutes knowledge resulting from intellectual activities within a traditional context.<sup>1</sup> This includes know-how, practices, skills and innovations.<sup>2</sup> Naturally, when one reads the definition, it becomes clear that the outcomes of traditional knowledge usually desire more protection under the ambit of geographical indications, patents and trademarks. However, in the case of folklore the kind of protection to be rendered does not necessarily fit within these classical categories of protection, intellectual property regimes have to offer.

Thus, the reason to distinguish between this concept and that of folklore is only because the level of protection required by the latter, if provided by a more specific instrument, may prove to be more effective.<sup>3</sup> As experience has demonstrated, by creating specific instruments, the awareness, focus and enforcement by the policy makers, authorities and the public in general with regard to protection of objects and works become a less ambiguous task. To understand the aforesaid, let us peruse some specific definitions of folklore.

The Oxford Dictionary defines 'folklore' as a set of traditional beliefs, customs and stories of a community, passed through the generations by word of mouth.<sup>4</sup> Similarly, Jonas Balys, a folklore scholar, defines it as the traditional creation of peoples, primitive and civilised.<sup>5</sup> It is achieved through the usage of sound, words, metric form and prose. Further includes folk beliefs or superstitions, customs and performances, dances and plays. He also states that folklore is not a science about a folk but instead, traditional folk science and folk poetry.<sup>6</sup>

---

<sup>1</sup> TRADITIONAL KNOWLEDGE, WORLD INTELLECTUAL PROPERTY ORGANISATION, (1<sup>st</sup> April, 2018) <http://www.wipo.int/tk/en/tk/>.

<sup>2</sup> *Id.*

<sup>3</sup> INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE, WORLD INTELLECTUAL PROPERTY ORGANISATION, 8 (31<sup>st</sup> Mar, 2018) [http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/110817wipo1\\_0.pdf](http://pmg-assets.s3-website-eu-west-1.amazonaws.com/docs/110817wipo1_0.pdf).

<sup>4</sup> OXFORD LIVING DICTIONARY, (1<sup>st</sup> April, 2018) <https://en.oxforddictionaries.com/definition/folklore>.

<sup>5</sup> *Definitions of Folklore*, JOURNAL OF FOLKLORE RESEARCH, 255, VOL. 33, (Indiana University Press, 1996). [Hereinafter Definitions].

<sup>6</sup> Definitions, *supra* note 5.

Additionally, perhaps in a first of its kind attempt, the United Nations Educational, Scientific and Cultural Organization (UNESCO) in 1989 sought to offer a definition to folklore by extending its ambit further to include language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.<sup>7</sup>

By studying these three said definitions, one can understand three crucial elements i.e.:

- a) The definitions indicate that folklore may be both tangible and intangible work.
- b) Folklore is usually conveyed through generations, thereby indicating that these works are usually created within communities or families. However, a cautious approach must be made here. There is no express indication of this being restricted to a certain geographical territory. There is nothing to say that if a Phad story is recited before an audience in a place outside Rajasthan by the same community that has learned it for generations, it becomes undeserving of protection. Therefore, this gives rise to the question whether folklore is a right arising out of the need of protecting the geographical roots of the concerned work, or the creators and communities practising such art forms instead.
- c) The works described within these definitions indicate more the need of protection under copyright.

It is important at this stage, to note that folklore is also more formally referred to as ‘Traditional Cultural Expressions.’[“TCE”]. Arguably, due to the usage of the term ‘expression’ in its title, it may be said that the creativity of the community is what is being targeted as a possible subject matter of protection. This again brings us to the circular point of whether IP protection must be directed only as far as copyright protection is concerned, or should it move beyond the same.

The forthcoming parts of this paper shall peruse the copyright question and shall also address the general problems encountered in the protection of such TCEs’.

---

<sup>7</sup> Recommendations on the Safeguarding of Traditional Culture and Folklore, UNESCO (15 Nov, 1989) [http://portal.unesco.org/en/ev.php-URL\\_ID=13141&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_TOPIC&URL_SECTION=201.html).

**THE COPYRIGHT SHIELD – THE ONLY WAY OF PROTECTION?**

As illustrated by the definitions discussed, it appears that copyright protection would best serve the interest of such communities. This is evidenced by the point that its definitions clearly indicate that a certain work, in whatever form, has been created by someone, and has over the years been associated with a certain community, thereby being a crucial element in signifying that community's uniqueness to the society. This clarifies that a certain "work", "created" by an "author" is sought to be protected from any kind of exploitation, namely its unauthorised reproduction. Due to this, it becomes logical to conclude that TCEs require protection under copyright laws. However, the conclusion drawn is not bereft of challenges. The copyright regime is essentially based on the idea that there is an identifiable author; there is a pre-decided fixation requirement, a fixed duration in most jurisdictions and a fair use exception.<sup>8</sup> The biggest problem occurring here is that of satisfying the "author" requirement. First, the works which are included under the ambit of the definitions perused earlier clearly indicate that they, by virtue of being passed from one generation to another, do not have the exact knowledge of the actual author who had created the concerned work. In most cases, due to the long passage of time the community sees itself as a collective owner of the work. Usually, the work is improvised upon by consecutive contributions of each generation and thus, this task of attributing a single author becomes even more challenging.<sup>9</sup> This is probably why; nations often identify these works as part of their cultural heritage, to be held in common respect by all of its citizenry. However, this remains a half-hearted solution as far as exploitation or misappropriation is concerned.

Ownership as a concept is one which operates very differently in the context of communities. These indigenous communities giving rise to such folklore do not view ownership in the strict sense which correlates to the concept of ownership in a commercial or economic sense. They view it more as part of their value system i.e. how it concerns the community's behaviour toward such work. For instance, if a community is creating a song related to a certain religious symbol, or a plant or fellow human being, the crucial matter is whether the community is attributing respect to the element to which the work is related.<sup>10</sup> It is a matter of embodying

---

<sup>8</sup> Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer*, 17, Vol 30 Conn. L. Rev (1997).

<sup>9</sup> Dr. Mihaly Ficsor, *Protection of Folklore*, WIPO NATIONAL SEMINAR ON INTELLECTUAL PROPERTY, (2003) WIPO/TIP/03/12.

<sup>10</sup> E.I. Daes, *Discrimination Against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, U.N. COMMISSION ON HUMAN RIGHTS, SUB COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES, ¶ 26, 45th Sess.

respect and other values, rather than building further on economic rights. This understanding is clearly lacking in the current IP regime available, which is in turn enhancing the ownership problem.

Defining authorship becomes even more crucial in the case of a performer, especially in the context of the Rome Convention, which restricts itself to covering any person who performs some literary or artistic work.<sup>11</sup> This interpretation is a dangerous one in the folklore context, given that it would render protection to someone who performs the work after gathering the community's knowledge in an unauthorised manner. However, in India, as per the provisions of the Copyright Act-1957, a performer is anyone who makes the said work.<sup>12</sup> This undoubtedly seems to be a more desirable interpretation as it indirectly recognises the actual person of the concerned community who may have created the work in question. The problem however, may be said to arise in striking a balance between the community's right and that of this individual performer. Once the knowledge of who this individual performer was, who actually formulated the said work, for the community to subsequently protect it may become difficult under a legal regime, especially in the international platform, given restrictive interpretations of the Rome Convention still continue to persist.

Also, to what extent is there a liability? In the context of cultural property, in the United States, an antiques art dealer was sentenced as he was found to be illegally trading in some Egyptian antiques, under the relevant Egyptian Law. Therefore, the Court of Appeal found the person guilty and charged him under the relevant cultural property statute in the US.<sup>13</sup> There was no question of the rights of the indigenous community itself, which may have contributed to the making of these objects. The liability was concluded, merely on the fact that the Egyptian Government had recognised it as cultural property theft and the US obliged.

Let us take the same situation with the additional participation of the concerned community. If the community were part of the proceeding, would the Court have assessed its claim of authorship? Would damages be in order? These, at the time of the decision, may not have seem as persistent questions since only the claim of the Egyptian Government was being considered,

---

<sup>11</sup> Art. 3(a), INTERNATIONAL CONVENTION FOR THE PROTECTION OF PERFORMERS, PRODUCERS OF PHONOGRAMS AND BROADCASTING ORGANISATIONS, 1961.

<sup>12</sup> The Copyright Act, 1957, § 2(qq).

<sup>13</sup> U.S. v. Frederick Schultz (2003 U.S. App. Lexis 12834); See also Molly Torsen, *Cultural Property Protection: International and US Affairs*, (2<sup>nd</sup> April, 2018), <https://cyber.harvard.edu/bold/devel03/torsentk.html>.

but this, in general, represents the universal practice of a lack of participation of the indigenous community in enforcing any legal rights, let alone any IP rights that they may have.

A further challenge which emerges within copyright protection is that of derivative works. Derivative works, be it in the Indian context or otherwise, do receive protection by themselves if shown to be otherwise substantially different from the main work, inspiring such derivation. Could this then mean, that if in case an individual artist bases his/her entire collection of paintings on a particular style actually carried on through a community, the copyright held first by the said indigenous community would be nullified? The situation wherein authors are sufficiently aware of their rights, derivative works and related rights do not pose a threat. However, as far as a community's work is concerned, what would be the situation given that tracing the original author is difficult and there is a less likelihood of there even being a formal recognition of their own ownership by the community? Would the artist then need to take formal, legal permission? Or would giving due recognition to the said community suffice? What would be the correct course of action? When would there be a question of infringement? This concern of not seeking authorisation has been a repeated one<sup>14</sup> and certainly deserves more attention, if we see it through the lens of copyright law.

These are some of the questions which cause the formation of doubt over the proposition of general copyright principles being the sole answer. However, perhaps what makes copyright a suitable mechanism of protection for folklore is the availability of the moral rights argument. The forthcoming sub-section will peruse this part of the issue, in greater detail.

### *Moral Rights for Folklore*

Despite the problem of identifying the actual author of all works of TCEs', moral rights may still be a tool through which the integrity of the work may be protected.<sup>15</sup> Further, it may also solve the problem of attribution.<sup>16</sup> Section 57 of the Copyright Act-1957 recognises moral rights as reiterated in the Berne Convention.<sup>17</sup> This allows the author of a work to prevent the distortion of his/her work. Why this is relevant in the case of folklore is because most of the times the struggle of communities against the usage of their work is based more on a moral argument rather than a statutory one of infringement, given that the former usually does not

---

<sup>14</sup>*The Protection of Traditional Knowledge and Folklore, Summary of Issues Raised and Points Made*, COUNCIL FOR TRIPS, WTO, 3, IP/C/W370/Rev.1 (2006) [Hereinafter W370 Report].

<sup>15</sup> Mira T. SundaraRajan, *Moral Rights: Principles, Practice and New Technology*, 466, (Oxford, 2011) [Hereinafter "Moral Rights"].

<sup>16</sup>*Id.*

<sup>17</sup>The Copyright Act, 1957, § 57 (India).

have clearly defined rights within the IP regime. However, even with the assertion of such rights, an important consideration regarding locus-standi does emerge. The Indian Law currently makes the claim for moral rights applicable, only in the sense that the ‘author’, i.e. who creates the work, may enforce such right.<sup>18</sup> The law in its current form does not recognise the collective rights of communities. This clarification is vital, given that the identity of the actual author of such folklore in most cases is lost. An example worth noting, in this regard, is the attempt made by the Government of Australia in 2003, to introduce the Indigenous Communities Moral Rights (Bill) [ICMR].<sup>19</sup> Home to several indigenous communities, the Australian Government tried to create a copyright law which would help further the interests of these communities with regards to works of folklore, etc. However, the ICMR has been regarded as a flawed legislation, specifically because it laid down the requirement of an agreement subsisting between the community and the subsequent author of a work, authorising the latter for using such work of folklore.<sup>20</sup> This is the biggest flaw in the ICMR, as there is no guarantee that this agreement requirement is going to create an equal bargaining ground. Instead, there is a likelihood of the creation of a zero-sum game situation, since the latter party may be able to manipulate the former, when it comes to the technical legalese concerning contract. Additionally, as discussed earlier, the idea of ownership in these communities regarding their heritage is very different from the modern man’s concept of ownership. By imposing the requirement of an agreement, this gap only gets further enhanced, ultimately serving no purpose.

Instead, as discussed in Prof. Rajan’s book,<sup>21</sup> following the Russian copyright solution seems to be more feasible. Under this, a community’s right is impliedly recognised to collectively seek relief on account of moral rights, since the law provides locus standi to ‘any interested person’ in the work.<sup>22</sup> This would allow the said community to approach the Courts, at any point, thereby asserting their ownership in an even more concrete manner. Naturally, worry exists with regard to whether the said community would be aware of such provision(s), how would they engage with a legal counsel, etc. The solution obviously does not end with the creation of the statement of law but also extends to the point that the Government must also interact with such communities through awareness measures, to educate them about their

---

<sup>18</sup> Art. 6, BERNE CONVENTION.

<sup>19</sup>MORAL RIGHTS AND INDIGENOUS COMMUNITIES, ARTS LAW CENTRE AUSTRALIA, (2<sup>nd</sup> Apr, 2018) <https://www.artslaw.com.au/articles/entry/moral-rights-and-indigenous-communities/>.

<sup>20</sup>*Id.*

<sup>21</sup> Moral Rights, *supra* note 13 at 468.

<sup>22</sup> Moral Rights, *supra* note 13 at 467-68.

rights. This ground level interaction may be achieved through collaboration between IP academicians and the Government in conducting workshops, etc.; which seek to educate these communities. Without such engagement, even creating space for locus standi would prove to be futile. Further, another issue concerning the application of moral rights is that of perpetuity. Given that folklore spans generations and that it is envisaged in this case as a right which may be claimed by a community centuries later, this question has to be resolved.

In the forthcoming section, the author shall examine the various international instruments which exist, and can possibly aid in the larger goal of granting folklore protection worldwide.

### **INTERNATIONAL INSTRUMENTS ASSISTING FOLKLORE PROTECTION**

For the purposes of this paper, the author has chosen to focus majorly on the effectiveness of the TRIPS Agreement with respect to the protection of folklore. This is mainly because post 1995, the world has looked at TRIPS whenever it has engaged in establishing any type of IP Regime. This brings us to the discussion revolving around Article 27 of the TRIPS Agreement. Article 27(3) (b) specifically permits member states to establish *sui generis* regimes for the protection of plant varieties.<sup>23</sup> This was further extended to include the discussion of protection of folklore and traditional knowledge, as enunciated through the Doha Declaration of 2001.<sup>24</sup> However, there has been considerable focus on reviewing the *sui generis* regime of protecting plant varieties along with the protection it entitles farming methods of indigenous communities, under the heading of traditional knowledge.<sup>25</sup> While this is a positive step, there still lacks a discourse specific to the protection of folklore through the working of Article 27. However, in another review report issued in 2006, several member states appear to agree that defining rights within the TRIPS through the discussions mandated by the TRIPS Council is a better solution, rather than passing the burden on the WIPO and its committees alone.<sup>26</sup> This is a correct approach given that the major concern behind indigenous communities even seeking such protection is mainly in light of the unlawful trading which takes place, in relation to objects constituting their folklore. Additionally, as suggested by the TRIPS Council itself, parallel work of intergovernmental organisations is more effective than having a single document on the issue, given that each addresses the issues differently.<sup>27</sup> This also supports the proposition

---

<sup>23</sup> Art. 27(3)(b), Trade Related Aspects of Intellectual Property Rights ( Hereinafter TRIPS).

<sup>24</sup> ¶ 19, Doha Declaration (2001).

<sup>25</sup> Review of the Provisions of Article 27(3)(B): Summary of Issues made and Points raised, 4, TRIPS Council, WTO, IP/C/W/369/Rev.1 (2006).

<sup>26</sup> W370 Report, *supra* note 12 at 9.

<sup>27</sup> W370 Report, *supra* note 12.

that given the diverse questions involving copyright law applicability, the issue of unlawful trading, if WTO and WIPO would work in parallel fronts, arriving at solutions in a holistic manner may be possible,<sup>28</sup> making it easier for member states to formulate legislations accordingly.

In addition to TRIPS, there have been several attempts made at discussing the issue of folklore protection, more specifically rights of indigenous communities to intellectual property protection, globally. Be it the WIPO's Inter governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge & Folklore, which conducts seminars regularly for assessing national regimes and presenting other solutions,<sup>29</sup> to the UN's Working Group on Indigenous Communities which was one of the first to recognise the need for IP protection being granted to such communities<sup>30</sup> – there has been a universal agreement in regard to this need.

However, the efficacy of these instruments is still a long way from testing, simply because the discourse on the issue continues to be somewhat preliminary. There is a need for the review points to be taken into consideration, in order to even facilitate national regimes in incorporating these principles of protection, within their own domestic laws.

In the forthcoming part, the author shall identify possible suggestions to establishing proper mechanisms for ensuring adequate protection of folklore.

### CREATING SOLUTIONS

As discussed in the earlier parts of this paper, the discussion revolving around this issue is still nascent. Despite the recognition of the need for protection, little has been done to address the question of granting IP protection, both on domestic and international fronts. Following are the few broad challenges and the suggestions which may be adopted in order to address the issue.

#### 1. *The definition issue*

Arriving at mechanisms to solve the issue of granting protection is naturally exacerbated when the subject matter of such protection is not unanimously agreed upon. This is evidenced by the

---

<sup>28</sup>Peter K Yu, *Four Neglected Issues in the Traditional Knowledge Debate*, 2, (1<sup>st</sup> April, 2018) [http://www.peteryu.com/tk\\_src.pdf](http://www.peteryu.com/tk_src.pdf). [Hereinafter Peter K Yu]

<sup>29</sup> Catherine Saez, *WIPO Seminar looks at Protection of Folklore*, INTELLECTUAL PROPERTY WATCH, (1<sup>st</sup> April, 2018) <https://www.ip-watch.org/2017/06/12/wipo-seminar-looks-protection-folklore/>.

<sup>30</sup>Michael Davis, *Indigenous People and Intellectual Property*, PARLIAMENT OF AUSTRALIA (2<sup>nd</sup> April, 2018) [https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/RP9697/97rp20#POSSIBLE](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/RP9697/97rp20#POSSIBLE).

fact that in this very paper itself, the author had to rely on definitions provided by scholars, etc in order to build onto the other issues for consideration. The lack of a universally provided definition causes legislative confusion. Instead of relying solely on TRIPS or other recommendations of the WIPO for discerning the exact meaning of the term folklore, it is far easier to formulate a common, universal definition through a specific instrument. While this approach may be refuted by the argument that the perception of folklore may differ within communities, etc; there requires to be an exercise through which these contrasting understandings are diluted down to their common traits in order to form a single definition. For instance, if we peruse once again the definitions taken into account in this paper itself, certain common features such as it constituting of stories, beliefs; which may be orally transmitted through generations, etc do exist. By expanding on such study of various other definitions as well, there is a rewarding possibility of arriving at a definition which satisfactorily identifies common traits, thereby not contravening community standards blatantly. This can sufficiently clarify questions of distinguishing between subject matter of geographical indications, traditional knowledge, etc; thereby channelizing effort toward forming protection measures in a more focused manner.

2. *The codification of customary laws of indigenous communities*

The ideas of ownership, cultural heritage usage, etc; as discussed earlier, are heavily motivated from the manner in which the customary laws of such communities regulate these matters. For instance, the Galpu Clan of Australia is known to allow individuals to use symbols, etc as uniquely created by the Clan only by having the said individual take part in ceremonies, etc.<sup>31</sup> This was a decisive consideration even in the case of *Yumbulul v. Reserve Bank of Australia*,<sup>32</sup> which found that there would have been a case against the defendant, in case there was adequate recognition of aboriginal groups' rights over their cultural works within the relevant Copyright Act.<sup>33</sup> This goes onto support the need for a codification of customary laws, in this case the relevance and the recognition of rights of usage which come with the authorisation granted after the performance of ceremonies.

---

<sup>31</sup> Megan M. Carpenter, *Intellectual Property Law and Indigenous Peoples: Adapting Copyright Laws to the Needs of a Global Community*, YALE HUMAN RIGHTS AND DEVELOPMENT L.J, 65, Vol 7 (2004).

<sup>32</sup> *Yumbulul v. Reserve Bank of Australia* (1991), 21 I.P.R. 481 (Austl.)

<sup>33</sup> *Id.*

Another instance to support this idea of codification would be the examination of the Indigenous Peoples Right Act of 1997, as existing in Philippines.<sup>34</sup> Besides the other relevant provisions laying down the full ownership rights of the concerned indigenous committee, etc the most important aspect is that of using the relevant customary laws of the community in question, to manage and protect related intellectual property rights accordingly.<sup>35</sup> Further, since it is a mammoth task to document this diverse range of customary laws, the concerned nodal agency has attempted to do so by engaging expert study groups to assist in the documentation of such laws, in order to create a reference base for the legal regime to rely upon.<sup>36</sup> By incorporating such practical measures, this not only would provide legal recognition to the unique practices of the said community but also allow for the community itself to develop its awareness of its own rights, being recognised within the concerned legal regime. Further, as illustrated in the *US v. Schultz*<sup>37</sup> case, the fact that the country of origin had the requisite statutory protection in order to prevent illegal smuggling of such goods, by identifying such practices, protection was given. This would be the same application of laws made, if such codification were to formally take place, thereby improving the state of IP rights being granted to such communities.

### 3. The recognition of such rights even in Bilateral Investment Treaties or Regional Trade Agreements

There is an erroneous notion that IP as a subject matter under regional trading instruments or BITS is an occurrence of recent times. Reference may be made to the time when the US had negotiated a Friendship Commerce and Navigation treaty with China that included copyright protection way back in 1903.<sup>38</sup> These investment treaties, although largely regulating matters of trade, provided due recognition to goods consisting of elements of folklore as a possible subject matter to be included within its scope. Such treaties can go a long way in asserting intellectual property rights for this subject matter within such treaties as these instruments come with a readymade recourse to dispute settlement mechanisms, which work more efficaciously than usual forums such as the WTO-DSU etc.

---

<sup>34</sup> P.V. Vatsala G Kutty, National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and Philippines, 33 WIPO, (2<sup>nd</sup> April, 2018) [http://www.wipo.int/edocs/pubdocs/en/tk/912/wipo\\_pub\\_912.pdf](http://www.wipo.int/edocs/pubdocs/en/tk/912/wipo_pub_912.pdf). [Hereinafter “G Kutty”].

<sup>35</sup> G Kutty, *supra* note 32.

<sup>36</sup> G Kutty, *supra* note 32.

<sup>37</sup> *U.S. v. Frederick Schultz* (2003 U.S. App. Lexis 12834) (US).

<sup>38</sup> INTELLECTUAL PROPERTY PROVISIONS IN INTERNATIONAL INVESTMENT ARRANGEMENTS, UNCTAD/WEB/ITE/IIA/2007/1, [http://unctad.org/en/docs/webiteia20071\\_en.pdf](http://unctad.org/en/docs/webiteia20071_en.pdf).

4. *Increasing representation of indigenous communities in such IP related discourse*

A recurring and universally identified problem in addressing this issue is the lack of involvement of concerned stakeholders in formulating measures of IP protection.<sup>39</sup> This absence of involvement also gives rise to complex questions of how such communities may be empowered to assert their rights in a Court of law. This makes it necessary for domestic legislations to incorporate community empowerment provisions, which allow for them to plead in cases of infringement etc. Having the government or the concerned nodal agency, does little to incentivise communities themselves to be more vigilant when it comes to preventing exploitation. This narrow approach must be appropriately amended.

An example of how such communities may be formalised is by referring to the Rirratjingu Aboriginal Corporation [RAC]. The Corporation was established in order to fight claims of the said indigenous community with regard to the mining of their traditional lands, in 1984.<sup>40</sup> Although its mandate currently does not actively focus on protecting traditional folklore, if hypothetically there was an unauthorised usage of its folklore by a third party, the RAC could actively pursue a suit. The RAC is run by the descendants of those belonging to the clan, thereby showing the inter-generational involvement in the daily affairs of the community, an element which is also applicable in the context of folklore.<sup>41</sup> If clans and other such groups, which although due to fragmentation may not still practice such folklore, the protection could still be sought through a representative body, created on the lines of the RAC. This is a solution which is worth pursuing, which can incentivise not only the community but also the Courts to rightfully give recognition and contribute to the growing jurisprudence of cultural rights.

**CONCLUSION**

There persist challenges as far as protection of folklore within the international and national regime is concerned. Through each passing year, we witness several initiatives taken by specialised UN agencies, WIPO, etc in order to study the challenges presented through this ambiguous situation. Similarly, there are private studies being conducted even in the academic world to identify lacunae in the protection regime which may be offered to folklore. However, the reason behind the discourse not moving forward or beyond the preliminary issues of definition, is simply because there is a lack of clarity on how one must go about accommodating

---

<sup>39</sup> Peter K Yu, *supra* note 26.

<sup>40</sup> ABOUT US, RIRRATJINGU ABORIGINAL CORPORATION, (3<sup>rd</sup> April, 2018) <http://www.rirratjingu.com/about-us/>.

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

these traditional societies and their rights within the regimes created for those within the modern spectrum of society. This lack of clarity has impeded the growth of discourse and action in this matter, to a very large extent. The only mechanism through which development in this issue may be obtained, is by developing a specific international instrument which provides clarity on certain issues, namely the definition issue, the kind of rights to be granted etc. The success of Article 27 of TRIPS with regard to protection of plant varieties was affected with the support of the Convention on Bio Diversity and the UPOV.

These instruments already provided clarity on the basic issues of definition, etc thereby smoothly solving the initial hurdles of nations in tailoring their domestic regimes of protection. The same approach has to necessarily be adopted even in the instance of protecting folklore. By simply reiterating recommendations and concerns, year after year, the international and national institutions both fail and lengthen the period of risk for the folklore held by such communities. Therefore, there is a serious need for international instruments to be drafted, to guide nations rather than listing down recommendations as is being done through the Inter-governmental Committee etc; which would only lead to further ambiguity and ineffectiveness as is being witnessed in case of WIPO's Development Agenda.

Additionally, while copyright protection seems like the foundational form of protection which may be granted to folklore generally, there also needs to be a detailed and informed study undertaken on the efficacy of other forms of IP protection in effectuating protection for folklore. For instance, consideration must also be made to how protection may be guaranteed through the legislations on Design, Trademark etc.

\*\*\*