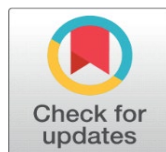
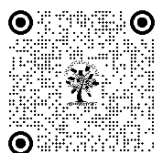


INTELLECTUAL PROPERTY PROTECTION OF SHARED CULTURAL HERITAGE THROUGH TRADITIONAL CULTURAL EXPRESSIONS (TCES) IN INDIA: MISSING LEGISLATIVE FRAMEWORK?"

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ABSTRACT

The discussion also occupies prominence in contemporary times with increased emphasis on rights of indigenous peoples occupying the centre-stage at International treaties at global forums such as the Indigenous and Tribal Peoples Convention (1989) (the fore-runner of the subsequent UN declaration of 2007 on indigenous peoples), Universal Declaration of Human Rights (UDHR), UN Declaration of the Rights of Indigenous Peoples (2007). India has ratified the latter two instruments and remains duty-bound to fulfil its obligations there- under.

The experiences of absence of legislation and its potential implication in Indian scenario along with policy prescriptions were yet to be documented in any scholarly writings and this paper intends to fill this gap. The general public as well as academic discourse in India pertaining to traditional cultural expressions/folk-lore in this aspect has been wholly muted, if not absent.

1. INTRODUCTION

The question of subjecting intangible cultural heritage to Intellectual property (*hereafter IP*) law protection has largely been elusive for scholars, policy makers, representatives of the holders of that intangible heritage, users of those amongst other stakeholders. The testimony to this fact can be easily gauged from the fact the entire World Intellectual Property Organization (WIPO) negotiations for a draft treaty on folklore, traditional knowledge and genetic resources took more than a decade of talks to see real progress, from chairing of its first session in 2001.¹ Whilst the negotiations were underway, a large number of nations were bereft of a national legislation to protect their traditional cultural

¹Intellectual Property Watch, WIPO sees first real progress in text for protection of folklore in 10 years, <https://www.ip-watch.org/2010/07/26/wipo-sees-first-real-progress-on-text-for-protection-of-folklore-in-10-years-2/> (Dec 4, 2019, 5:30 PM)

expressions (*hereinafter TCEs*), including the likes of South-Asian countries with rich biodiversity hotspots such as India. The illustrations of the wide-spread misappropriation on-going in comparatively developed IP jurisdictions such as the United States (US) have received wide-spread attention, ranging from Hollywood films like *Lone Ranger*, *Twilight* being in news for cultural theft and appropriation of Native American heritage., to singers such as Pharell Williams facing wide-spread criticism for capping a Native American feather headdress in 2014 amongst a whole lot of other examples.

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The experiences of absence of legislation and its potential implication in Indian scenario along with policy prescriptions were yet to be documented in any scholarly writings and this paper intends to fill this gap. The general public as well as academic discourse in India pertaining to traditional cultural expressions/folk-lore in this aspect has been wholly muted, if not absent.

The aim of this paper is to contribute to this TCE debate going on at WIPO IGC negotiations from the Indian perspective in the following ways; *First*, it seeks to diagnose the problem, hitherto unappreciated in Indian context, and moving beyond just the conventional acknowledgement of the problem, by bringing out through examples, where there might have been misappropriation of TCEs, but went unreported or were innocuously deemed to be non-appropriation or worse as promotion of those TCEs on national/international forums. *Second*, after having diagnosed the problem, it seeks to bring out the opinions of the stake-holders from the grass-root levels, such as the indigenous peoples, the NGOs working with them, what it means to their cultural heritage sans legal protection and what it could potentially culminate to for them. *Thirdly*, having diagnosed the issue, there needs to be a careful scrutiny of the way forward by navigation of broad normative prescriptions advocated by scholars through existing academic literature. Along with this exercise, bearing in mind the doctrinal prescriptions and the facts of Indian experience at hand, the author will offer his comments by looking into the progress WIPO has made of late through; a) in the form of *Draft gap analysis report prepared by IGC on Genetic Resources, Traditional Knowledge and Folklore* (March 18-22, 2019)⁵, b) in the form of *Facilitators text on Traditional Cultural expressions* (June 19, 2019)⁶. The purpose of all of this academic exercise will culminate in *fourth part* of this paper, in developing broad areas of thought for Indian policy-makers to contemplate on while developing a regime on protection of TCEs. *Lastly*, the author before concluding will rest his arguments by offering few caveats in the form of limitations for policy makers while treading this maze of regulation, given that India is overly regulated⁷ and regulations have been questioned more often than not for their inefficacy.⁸

2. CURRENT MEANING OF TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE , SUBJECT-MATTER AND SCOPE OF PROTECTION

The draft TCE treaty, which was being discussed in the earlier pages of this piece and applies specifically to traditional cultural expressions and defines it as “*any form of artistic and literary, creative and other spiritual expression*” which is quite broad⁹. Additionally, the draft treaties on Traditional Knowledge (TK) and TCEs (Traditional Cultural Expressions)

² Art. 5 of the Indigenous and Tribal Peoples Convention (1989).

³Art. 27 of the Universal Declaration of the Human Rights(1948) at https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (last visited 3 Dec.2019, 10:00PM)

⁴Art. 12, Art. 13 and Art. 14 of the UN Declaration on the rights of the Indigenous peoples at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf (last visited 3 Dec.2019, 10:00PM)

⁵ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore 39th session Geneva March 18-22, 2019, https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_39/wipo_grtkf_ic_39_7.pdf (last visited 3 Dec.2019, 10:00PM)

⁶WIPO, Protection of Traditional Knowledge draft Articles, https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=439126 (last visited 3 Dec.2019, 10:00PM)

⁷India is most over-regulated country in the world: Survey, ECONOMIC TIMES, (Jan. 27, 2011) <https://economictimes.indiatimes.com/news/politics-and-nation/india-is-most-over-regulated-country-in-the-world-survey/articleshow/7366213.cms?from=mdr>.

⁸ Devesh Kapur and Madhav Khosla, *State Regulation in India –the art of rolling over rather than rolling back*, THE PRINT,(April 4, 2019), <https://theprint.in/opinion/state-regulation-in-india-the-art-of-rolling-over-rather-than-rolling-back/216647/>

⁹ Art. 1, TCE treaty.

employ the same standard of what is meant by “traditional”.¹⁰ Both of the treaties stipulate that the knowledge, cultural expressions should be as;

- (a) “created and maintained in a collective context by indigenous peoples and local communities or nations”;
- (b) “distinctively associated with cultural heritage or social identity” of the (source community)”
- (c) “transmitted from generation to generation, whether consecutively or not”;

The draft WIPO facilitators text on TCEs released recently, enumerates TCEs a bit more elaborately as “*any forms* under which traditional cultural practices and knowledge are expressed or (manifested or appear to be manifested) as a result of intellectual activity/insights/experiences by the indigenous peoples, local communities, other beneficiaries in or from traditional context, which may be dynamic or evolving and comprising the verbal forms, musical forms, expressions by movements, tangible or intangible forms of expression or combinations thereof(enlisting the subject matter of protection of traditional cultural expressions)”

Besides this, the draft treaties also draw a rough sketch that the beneficiaries could be, such as “*indigenous peoples*” or “*local communities*” as determined by national law or treaty, who “*develop, maintain, use or hold*” the traditional cultural expressions.¹¹

The focus is on proving the IP protection only to those source communities associated with the respective traditions, who have used or held the intangible expressions (within the subject matter proposed) which can be granted protection. The question of how and by what means protection (whether positive protection in terms of conferring proprietary rights or negative rights in terms of injunctions to prevent misappropriations) will not be tackled here and will be a subject matter of discussion in subsequent paper. The present discussion will only facilitate in identifying the key normative framework which will form the analysis of the facts and the basis of discussion in Indian context.

SCOPE OF PROTECTION

Besides the defining the subject matter to be protected, it is also crucial to list the scope of protection and the draft treaty on TCE is handy to that purpose (which remains our area of concern) .It lists out the scope which form the basis for granting of protection as; (a) use, (b) informed consent/misappropriation, (c) attribution and (d) compensation.¹²

A. USE

The source communities are given the right to “maintain, control and develop” their traditions and to prevent the use by others beyond the traditional context.¹³Further, the draft TCE treaty also prohibit the “use/modification which distorts or mutilated a protected TCE or that is otherwise offensive, derogatory or diminishes the cultural significance to the beneficiary”¹⁴

B. INFORMED CONSENT AND MISAPPROPRIATION

The access to and use of the covered traditions should be “based on prior and informed consent/approval and involvement and on mutually agreed terms”.¹⁵Additionally, misappropriation is also defined as “access or use of the traditional knowledge without prior informed consent”.¹⁶

C. ATTRIBUTION

The treaty On TCE, insists on attribution of the tradition to their source communities and prohibits thereby “any false or misleading use of protected tradition that suggests endorsement by or linkage with the beneficiaries”¹⁷

D. COMPENSATION

The treaty On TCE lastly, requires users to properly attribute the traditions and preventing any false, misleading use of the TCEs.¹⁸ The negotiations have also considered the need for offering the source communities their due compensation for use of their traditional folk-lore.

¹⁰ Art. 1., TK treaty and Art. 1, TCE Treaty.

¹¹ Art. 2, TCE treaty,

¹² Art.3.1, 3.2, 3.3, TCE Treaty

¹³ Art.3.1(a)(i)-(iii), TCE Treaty,

¹⁴ Art.3.1(a)(iv), TCE Treaty,

¹⁵ Art.3.1(a)(iii), 3.2(d) TCE treaty.

¹⁶ Terms of Use of use, TK treaty

¹⁷ Art. 3.1 (a)(iv) Of TK Treaty

¹⁸ Art.3.1.(a)(iv) Of TCE Treaty,

DIAGNOSIS OF THE PROBLEM IN INDIAN PERSPECTIVE

The understanding of the conceptual framework (as having grounded earlier in draft TCE treaties and negotiation texts) remains the key to appreciating the facts and the researcher found the following instances, which could well be said to be falling squarely within the meaning of a Traditional Cultural Expression and within the head of defined subject matter of a TCE, which were potentially used outside their defined scope of protection according to the draft treaties on TCE. The table with the details is enlisted below:

NAME OF TCE (IF TCE WITHIN THE DEFINITION OF A TCE IN THE DRAFT TREATY) ¹⁹	TYPE OF TCE AND THE NAME OF THE INDIGENOUS COMMUNITIES ²⁰	POTENTIAL INSTANCE OF APPROPRIATION BY THIRD PARTY	VIOLATION OF SCOPE OF PROTECTION ²¹	CURRENT LEGAL STATUS OF IP PROTECTION
1. Koli;	Folk-Dance (from Maharashtra); Koli community/fisher folkmen and women of Maharashtra.	Bollywood Dance in the film "Dil Hai ke Manta Nahin" (1991) in the song 'Galyan Sakli Sonyachi'. ²² Official Music Partner- T series Music	No Attribution, Use outside traditional context, no data on compensation	No IP protection
2. Kalbeliya ²³	Folk-dance and song. (from Rajasthan); Kalbeliya, a nomadic tribe from Rajasthan	Bollywood film "Lamhe"(1991) in the song 'Morni Baga me' ²⁴ Official Music Partner- Saregama Recording Co.	No attribution, data absent for informed consent and compensation	No IP protection.
3. Lavani	Folk-dance (from Rajasthan);Dhangars/Shepherd community from Sholapur District of Maharashtra, dance form however not restricted to them, popular forms are widespread in Maharashtra	Two Bollywood films;1)"Ferrari ki Sawari"(2012) song- 'Mala Jau de' ²⁵ Official Music Partner- T series Music 2)"Baji Rao Mastani"(2015) Song- 'Pinga' ²⁶ Official Music Partner- Eros Now Music Co.	No attribution, use out of traditional context, and no data on compensation	No IP protection
4. Ghoomar	Folk-dance of Rajasthan; Indigenous community- Bhils Tribe from Marwar in Rajasthan	Bollywood film "Padmavat"(2018) Song 'Ghoomar' ²⁷ Official Music Partner- T series Music	No attribution, no data available on compensation	No IP protection

¹⁹ *Supra* note 11

²⁰ Art. 2 Of TCE treaty. Although the treaty does not define on what constitutes a source community or traditional community.

²¹ The essential parameters used in evaluation of the TCE in question was the protectable scope of protection under Article 3.1 Of TCE treaty. Data pertaining to attribution and use in appropriate traditional context or not was verified from official Youtube channels of these recording companies such as T-series, Eros Now, Times Music, SareGama music co. etc.

²² Galyan Sankli Sonyachi- Film Dil Hai Ke Manta Nahi, YOUTUBE, (Apr. 20,2011), <https://www.youtube.com/watch?v=KGdtqG1vlvE>

²³ The song and dance is a part Of 13 items from India in UNESCO's representative list of intangible cultural heritage of humanity published in 2010. United Nations Education, Cultural and Scientific Organization, Kalbeliya Folk songs and dances of Rajasthan, <https://ich.unesco.org/en/RL/kalbeliya-folk-songs-and-dances-of-rajasthan-00340>(last visited 3 Dec.2019, 10:00PM)

²⁴ Morni Baga ma Bole- Saregama Pa Music, Lamhe, YOUTUBE, (Jan.2,2017) <https://www.youtube.com/watch?v=7PBpaR9Skhk>

²⁵ Mala Jau De Song- ferrari ki savari, YOUTUBE, (Jul.10,2012) <https://www.youtube.com/watch?v=FIYglGWe0TY>

²⁶ Pinga video song- Baji rao Mastani, YOUTUBE, (May 3,2019) <https://www.youtube.com/watch?v=tzRFLMn4kpM>

²⁷ Ghoomar- Padvamavat, YOUTUBE, (Mar.19,2018), https://www.youtube.com/watch?v=CU1tFtk_NFY

5.	Chau ²⁸	Folk-dance from West Bengal, Jharkhand and Orissa.	Bollywood film "Barfi"(2011), song- 'Itni si Khushi' ²⁹ Official Music Partner- Sony Music Entertainment	NO attribution, Use is outside traditional context. No data on compensation	No IP protection.
6.	Dumhal	Folk-dance from Jammu and Kashmir, Indigenous Community- Wattal Tribe	Bollywood Film- "Haider"(2014) Song-'Bismil' ³⁰ , Official Music Partner- Times Music	No attribution, No data on compensation	No IP protection
7.	Nimbooda	Folk-song from Rajasthan; Indigenous Community- Manganiyar Community	Bollywood Film "Hum Dil De Chuke Sanam"(1999) Song-Nimbooda ³¹ Official Music Partner- Eros Now	No attribution, no data on compensation.	No IP protection. However copyright owned by Eros Now for Bollywood version. ³²

ANALYSIS OF THE TABLE ON INDIA'S PROBLEMS WITH TCEs

A cursory look at the table above would be enough to divulge that;

- India does have a large number of folk-lore/cultural expressions which are currently without any legal protection within the fold of Intellectual Property Laws. The numbers of such TCEs along with their source communities are yet to be ascertained by any governmental/independent authority.
- In the absence of legal protection to these TCEs, mass misappropriation has been on-going by Bollywood production houses and large music recording companies.
- Due recognition in the form of moral attribution to their folk-songs/dances as well compensation has not been afforded to the source communities/indigenous communities in the absence of a legal framework on Intellectual property in India.

REPORTS IN MEDIA

These inferences are not just mere deductions of the researcher during the course of research but in fact are corroborated by independent media reports as well as case-studies (which will be discussed a bit later from here) that there is a silent ongoing large scale piracy of Indian traditional cultural expressions

The media reports state that- *"Rajasthani folk-musicians are not getting due recognition from Bollywood. It goes on to state further that "while folk-music from Rajasthan and other places has been often finding its way in Bollywood films for a long time and they cash on their credit, however the folk-artists do not get any due recognition or money out of it."*

To make things worse, the report states that *"Copyright is claimed over the traditional music sung and produced by large music recording companies and these traditional folk-artists are expected to get licenses to perform their very own traditional music, which has now been copyrighted by music companies"*

Lastly, the folk-artists rue the absence of some legal rules/mechanism to prevent this, along with drawing an analogy of getting copyright over TCEs to very much getting patent over traditional knowledge like neem, haldi etc. They also state a number of Rajasthani folk-music which have found their way into Bollywood songs without due recognition to folk-artists like (Anjun) Engineen ki Seeti (in Bollywood film Khubsoorat(2014)), Pallo Latke (Bollywood Film Nauker (1979)), Banna re Bagho me (in Bollywood film Ganga ki Kasam (1999)) are to name just a few.³³

²⁸ This dance is also a part of 13 items from India in UNESCO's representative list of intangible cultural heritage of humanity published in 2010. See United Nations Education, Cultural and Scientific Organization, Chauu Dance, <https://ich.unesco.org/en/RL/chhau-dance-00337> (last visited 7 Dec., 2019, 5:00 PM)

²⁹ Ashiyan Itni si Khushi, YOUTUBE, (OCT.5, 2012), https://www.youtube.com/watch?v=jLS4CAIK_8

³⁰ Bismil- Haider, YOUTUBE, (Aug.20, 2014), https://www.youtube.com/watch?v=p6Zx15_A69M

³¹ Nimbooda nimbooda- film Hum dil de chuke sanam, YOUTUBE, (NOV.13, 2009) <https://www.youtube.com/watch?v=YJzT1KMjQ0k>

³² The problem with this TCE escalated to a whole new level when Manganiyar community, which has been traditionally singing this folk-music had to seek the license permission of a recreated version of the popular folk-music Nimbooda in the movie "Hum dil de Chuke Sanam". Richa Shukla, *Not getting due credit from B-wood : Rajasthani folk artists*, ECONOMIC TIMES, (Aug.25, 2014) <https://timesofindia.indiatimes.com/entertainment/hindi/music/news/Not-getting-due-credit-from-B-wood-Rajasthani-folk-artists/articleshow/40870564.cms>

³³ *Id.*

Folk-artists from states such as Odisha have also protested against appropriation and usage of out of traditional context of Sambalpuri folklore "O Rangabati" by mainstream singers like Sona Mahapatra, recorded by large studio houses such as Coke-Studio.³⁴

CASE -STUDIES

I. "ANAHAD FOUNDATION (an NGO)"

Anahad Foundation is a grass-root level Non-Governmental Organization which works for the recognition and preservation cultural, classical folk music with traditional folk artists (such as the Manganiyar Community of Rajasthan) for the contemporary masses in several Indian states such as Rajasthan, Punjab, Jharkhand, Himachal Pradesh etc.³⁵ They list their objectives to; a) converting artists' intellectual property into a tangible form so that they can proceed further by selling it, b) creating a self-sustainable economic environment where artists are able to communicate directly with the customers, c) To promote the evolution and documentation of art forms to protect them from fading away due to socio-economic reasons, d) To protect the original composition of the artists from use without permission.³⁶ By doing this they intend to uplift the socio-economic status of the folk-communities by generating a steady source of income for them.

The researcher chose to interact with the founding members of this NGO, since they have closely worked with about 28-30 communities of folk-artists in five Indian states. The information gathered during the course of interviews by the researcher will be laid down in this section. The issues found out by the researcher are that and corroborated by the assertions by this NGO, which has worked with these communities at grass-root levels; is that *Folk-art communities are struggling for their socio-economic survival due to several reasons mentioned as;* (i) The absence of their art in a tangible art-form makes it inconvenient for them to showcase their skills to wider audience. (ii) The art forms are spread across different groups which are separated by cultural and physical traits across different geographical regions. (iii) There is an exploitation of folk-artists by middle-men who hire them for events and don't pay them well for their work. (iv) There is a lack of awareness regarding the ownership of their own work and (v) the issue that these work of these artists are not legally protected and exists in public domain due to which they cannot earn any performance royalties.³⁷

The ground work done by them has also seen some tangible results, which they enlist in their report; the resolution of the problems facing the traditional artists they say revolves around the artist's identity and a staggering 88% of the artists feel that due recognition and respect is more important than the money they receive. The foundation works to develop their digital identity for these artists on the internet, which leads to a progressive increase in self-esteem, recognition as well as financial conditions.³⁸

Also, a whopping all of the artists respondents in one of the surveys conducted by the NGO agree that *forming an artist union is imperative to promote standardization of artist show rates and preventing of exploitation of artists*. Every artist also agrees to *use their money earned through royalties to construct community studios so that artists are able to record their own compositions* as well collaborating with other artists at national/international level to promote their music. The modus operandi through which this foundation has worked is through reaching out to these communities with recording instruments, creating music videos and their own individual websites for community/group as well filing copyright applications on their behalf for their recorded songs. As a result of this intervention, communities have seen significant uptick in their income, the number of shows performed and the fees they have received from their shows.³⁹ The interview with Mrs. Shuchi Roy, legal manager of the NGO revealed that there is a large scale misappropriation of the traditional folk-songs of folk-artists across the country. Since, their songs lack any form of legal protection including under existing Intellectual Property law system, they have fallen back to getting copyrights for the recordings individual artists and applying copyright application for the same and this has created a relatively small change in their lives with ownership vesting back to them and online presence generating monetary income for them. Also, it was stated that the issue of what constitutes a "public domain" under the existing Intellectual property regime also needed clarity as a lot

³⁴ Anuj Kumar, *The tweaking of taste*, THE HINDU, (Jul.23, 2015), <https://www.thehindu.com/features/friday-review/the-tweaking-of-taste/article7456381.ece>

³⁵ Corporate Social Responsibility Proposal 2017-20 report of Anahad Foundation at <https://anahad.ngo/> (last accessed 5 Dec.,2019, 10:00 PM)

³⁶ *Id.*

³⁷ *Id.*

³⁸ Page 13 of the Annual Report 2017-18 of the Anahad Foundation at <https://anahad.ngo/> (last visited 5 Dec.,2019, 10:00 PM)

³⁹ *Id.* The report states a seven fold increase in family income, a fourfold increase in number of shows and a three time increase in the fees per show.

of artists were being denied copyright protection due to this alongside their traditional folk-music being appropriated by outsiders in the garb of reasoning that 'these folk-songs were already in public domain'.⁴⁰

II. "HEART FOR ART"⁴¹ and "SAHAJ"⁴²(NGOs)

These Non-governmental Organizations manage the promotion of traditional art and craft of artisans in some of the states in India such as Gujarat, Maharashtra, Rajasthan etc. The interviews with the founding members of these NGOs reveal that there is a poor awareness at grass-root levels about any form of IP protection around their craft. Few crafts which they help for promotion and marketing such as Bidri Silver Ware items from Bidar in Karnataka have obtained GI status tag as means of protecting their cultural heritage. There is also a popular misconception amongst the artists, wherein appropriation is thought to be promotion especially, who think that if popular Bollywood films, noted organizations use their art and craft, it is for the promotion of the handicrafts. Many artisans remain unsure about what benefits might ensue to them in the form of legal protection (IP protection of any kind).

3. EXISTING LEGAL FRAMEWORK ON REGULATION OF TCEs

I. THEORETICAL FRAMEWORK

a) RATIONALE FOR PROTECTION OF TCEs

A reading of the facts in the table drawn and case-studies presented that, the justification for protection of TCEs in India, much like other jurisdictions (as discussed by a number of scholars) rest on two planks viz. a) *protection of cultural integrity of these TCEs*;⁴³ in the sense the cultural harm which might ensue to the indigenous communities by usage of folk-lore/cultural expression beyond the traditional context and b) *promoting economic justice to these indigenous people* who have the sole rights to commercially exploit their TK and enjoy the economic benefits.⁴⁴ Scholars have stated that addressing the cultural integrity rationale of preventing cultural injuries to indigenous communities can take place through the use of injunctions and that requires a property based rights IP regime, wherein the rights and obligations of the user, owner of these rights are clearly delineated.⁴⁵ On the other hand, addressing the economic injustice concerns academics say has to be resolved using monetary transfers as a tool, through a liability based regime, without the need for injunctive relief and hence compensation can be provided to the wronged indigenous communities. However, it will be beyond legal reasoning to declare that a legal system which can only address economic injustices can in totality prevent the harms arising from cultural in appropriations. Also vice-versa a legal regime like which addresses just the cultural integrity or culturally appropriate use will not possibly take into account of who is benefitting financially at the expense of whom. It has also been advocated that a liability based regime is seen to be a more prudent method of garnering economic justice through development.

It is through these minefields, that I argue, a policy maker has to navigate carefully. In the Indian context, with a large number of traditional cultural expressions spread across vast landmasses, it might not be possible to define the rights and liabilities for each of the TCEs and use injunctions through formal process of courts of law. I have highlighted in part III of this paper instances of potential appropriation which have been going on, especially in India's hinterlands wherein traditional folk music fostered by poor artisans (like the Manganiyar Community of Rajasthan) have been tried to appropriated by large recording houses with deep pockets. Imposing liabilities on these artisans to report the instances

⁴⁰ These assertions were obtained by the researcher in an exclusive telephonic interview with Mrs. Shuchi Roy who has worked as one of the founding members of Anahad Foundation, often travelling to far off places in the interior of India to work with these traditional artists.

⁴¹ HEART FOR ART ONLINE-NGO, <https://www.heartforartonline.com/> (last visited 5 Dec.,2019, 10:00 PM)

⁴² SAHAJ INDIA-NGO, <https://www.sahajindia.org/> (last visited 5 Dec.,2019, 10:00 PM)

⁴³ TOM GREAVES, INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES, A SOURCEBOOK, as discussed in Sean pager, *Traditional Rights and Wrongs*, 20 Va. J. L.&Tech.82(2016),

⁴⁴ Rebecca Tsosie, *Reclaiming Native Stories: An essay on Cultural Appropriation and Cultural Rights*, 34 ARIZ. ST. L.J. 299 (2002); Paul Kuruk, *Protecting Folklore under Modern Intellectual Property Regimes: A reappraisal of the Tensions between Individual and Communal Rights in Africa and the United States*, 48 AM. U.L. Rev.769, 770 (1999) by describing folklore commercialization as "short-changing" traditional societies who fail to deliver economic benefits from such exploitation.

⁴⁵ Sean pager, *Traditional Rights and Wrongs*, 20 Va. J. L.&Tech.124,125 (2016)

and ask for formal remedy of injunction through courts of law will be a double blow for them, given that they at this moment, even the minimum compensation/remuneration is hard for them to come by.

B) GOVERNANCE REGIMES

Further, a look into the nature of governance regimes to administer the TK/TCE rights with each of these IP regimes for TCEs has to be scrutinized along with rationale for protection of TCEs. Academics have argued that protecting the cultural integrity rationale will require more of management exercise than economic justice. Indigenous communities will differ in their size, some communities have established protocols of regulating the access and use of these TCEs while others don't. The meaning of tradition in the core notion of "traditional context" has also seen to be static and a dynamic understanding of this tradition as something which evolves organically over a period of time has to be appreciated in the context of creating a regulatory structure for addressing cultural integrity rationale. Also the opinions/inputs along with the ascertainment of the number of stake-holders (including source communities) in large number of TCEs will have to be taken into account. All of this is a clearly resource intensive process, in contrast to a standard property regime where rights and liabilities are vested in clearly identifiable "owners", cultural integrity regime requires what has been labelled as a hands-on, resource intensive form of "thick governance".⁴⁶ On the other hand, the compensatory mechanism operate on a stream-line processes with no need to delve into questions over the particulars of the source-community, their contents or what would constitute as traditional context are not needed to be thought of. It remains as said by Prof. Sean Pager as largely a "*question of money and accounting*".

In the Indian context, this will remain a key area of concern remaining to be seen for the policy-makers as to how they reconcile with both of these seemingly conflicting areas with the priority of having to not only address the protection of cultural integrity by ascertaining by documenting the number of TCEs in India, the source-communities who practise these cultural expressions, the meaning of their traditions in traditional context as well as the notion of access /use of these expressions (*all of which as has been argued is a resource-intensive process*) on the one hand and on the other hand, developing a system where wronged communities are offered remuneration/compensation in a manner where a fair determination can be made based on evidence of the harm incurred/profits reaped by the offenders just like in the case of those folk-artisans from Rajasthan who rue that their cultural integrity(right to recognition as source communities) and the economic prospects(in the form of economic injustices) have been marred by large-scale cultural misappropriation by third parties.

Finally, having talked about the regulatory structure it is imperative to discuss the adjudicatory structure, where in there seems to be no need to invest in formal court-structured adjudication system as both the source-communities as well as the external appropriators would want to prefer a quick, certain and speedy settlement of the dispute as well as compensation instead of a long process which squanders the resources of both the source-community as well as the appropriators.

C. GEOGRAPHICAL SCOPE

The question of how and where governance regimes will be applied in a vast country like India is also a matter of challenge. Certain questions which are likely to come up during the creation of such a regulatory and governance regime will be to what extent of administration of the standards proposed in the draft WIPO treaties, whether a centralized authority will be empowered to apply such standards or it shall be subjected to delegation to local authorities(*similar to the one India has with respect to the Biodiversity Act,2002 which mandates the creation of State Biodiversity Boards and the Biodiversity Management Committees(BMCs) in the states of India*), to what extent protection can be accorded to the source communities in geographically remote areas. Possible suggestions have been offered by academics to devolve these decisions to local levels, making adjudication as close to the source communities as possible where access to relevant evidence can be made to while rendering decisions in consonance to local traditions and customs.⁴⁷

II. REGULATORY FRAMEWORK

a) WIPO IGC ON GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLK-LORE (MARCH 18-22, 2019)

⁴⁶ *Id.* at 131

⁴⁷ *Id.* at 132.

The discussion made earlier in this paper is reflective of the way ongoing negotiations are made in the recent 39th WIPO Intergovernmental committee of Genetic Resources, Traditional Knowledge and Folk-lore.⁴⁸ The scope and conditions of protection of genetic resources under Article 5 of the draft text urges member states to protect the moral and economic rights of the beneficiaries by legal/administrative measures taking into consideration a) the exclusive rights to use/access of the traditional cultural expressions and preventing access/utilization of traditional knowledge *with fair and equitable benefit sharing rights of beneficiaries*; b) Beneficiaries have the *moral rights of attribution and use of moral right of use of traditional cultural expressions* respectful of cultural integrity of the people. The need for *prior and informed consent* in usage of such traditional knowledge is maintained all through. Special mention is also put forth for *use of secret and sacred traditional cultural expressions* and how member states are urged to protect these of the indigenous communities through legal/administrative/policy measures. Certain exceptions in the form of fair use exemptions are carved inside of draft Article 5 as well as Article 7 for archival purposes in libraries, museums as well as for learning/teaching, research purposes etc., which will form the subject matter of thought in Part V of this paper.

Further, the administration of rights are provided under Article VI of the draft text through creation of a competent authority that works in close co-ordination and consultation with after securing the consent/conjunction of these indigenous communities (beneficiaries)⁴⁹.

Clearly, all of the above discussions made in the WIPO forum are relevant in the Indian context, given that indigenous communities need to be identified, rights of usage have to be vested in them, the authority/(ies) for governing of rights and liabilities under this regime has to be worked out at the local levels with the co-ordination of these indigenous communities in different states of India, principles of fair and equitable access and benefit sharing have to be chalked out. All of this has to happen by recognizing and attributing moral and economic rights to these indigenous communities, who potentially might be living in distant places.

III. BROAD AREAS OF THOUGHT FOR INDIA'S POLICY -MAKERS

This part of the paper will sum-up the discussions made previously in a more coherent manner such that it is prescriptive in nature of the broad areas of thought, that Indian policy makers and negotiators at the WIPO could possibly conceive while deliberating over the issue of regulating traditional cultural expressions in India.

- a) The first and foremost step that is to be undertaken is to ascertain in the state level basis, what could potentially qualify as a traditional cultural expression and their respective 'source communities', and the documentation of this data pertaining to those of TCEs in electronic/non-electronic databases with the respective state governments.
- b) The ascertainment of potential secret and sacred traditional cultural expressions with their respective source communities also at the state level has to be undertaken and the documentation of this data in electronic/non-electronic databases with the respective state governments.
- c) The ascertainment of what information with respect of TCE in public domain is to be undertaken by taking into consideration the feedback from respective stake-holders such as the 'indigenous communities', 'appropriators' on a case to case basis. This will help in framing/deciding what could constitute as a 'public domain' and 'private domain' of TCEs, thus providing a better understanding of the public domain of TCEs.
- d) The creating of local authorities in conjunction with the consent of the indigenous communities to decide upon the rights and obligations amicable to all the stake-holders.
- e) The vesting of exclusive moral and economic rights with these indigenous peoples along with ingraining of important principles of 'Prior Informed Use' and 'Fair and Equitable Benefit Sharing' in adjudication of disputes by competent local authority on a case to case basis is imperative.
- f) The ascertainment of exceptions to the use of those of TCEs, such as use of derivative TCEs, archival purposes in libraries and museums, creation of creative works such as adaptations for the purpose of fair uses of these TCEs.

4. LIMITATIONS

The entire discussion above threw forth a lot of pointers for thought from the Indian perspective with respect to Traditional Cultural Expressions and of WIPO draft treaty articles have in fact provided some head start as to from where

⁴⁸ The draft articles of protection of traditional cultural expressions in the report of Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Genetic Resources, 39th session at https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_39/wipo_grtkf_ic_39_5.pdf

⁴⁹ *Id.*

could policy makers could engage the debate. However, there are certain areas which should be taken note of in order to prevent over-regulation or under-regulation to create a balanced TCE regime .Firstly, it is not a matter of disagreement that the scope of protection contemplated by draft WIPO treaties is comprehensive and the beneficiaries remain uncertain/unknown, making it prone to conflicts with respect to allocation of resources and control of traditional cultural expressions. The laying down of subject matter of protection Of these TCEs in conciliation to matters existing in public domain also will be a matter of challenge.⁵⁰

5. CONCLUSION

This article has tried to fill in the ongoing debate pertaining to traditional cultural expressions by offering facts and situations from Indian perspective which has hitherto remained absent. By doing so, this article brings forth the grounds why protection to TCEs should be accorded. Subsequently, it investigates the theoretical framework on TCEs and analyses the facts in light of the theoretical propositions. Having justified the rationale for protection, the article investigates into the existing regulatory framework to offer suggestions for the policy maker from India., which aids and assists in creation of a robust regime for protection of TCE. Suggestions in the form of steps needed to be taken in that direction have been offered by the researcher. Lastly, the researcher cautions against few of the pitfalls which clearly need to be avoided by policymakers to create Indian TCE regime. The likely outcome in the form of devolution of adjudication at grass-root levels by bringing in the source-communities as an important stake-holder in the process to determine the rights and liabilities is also advocated. This article has albeit made a modest attempt to offer a road-map from Indian TCE scenario.

CONFLICT OF INTERESTS

None.

ACKNOWLEDGMENTS

None.

⁵⁰ *Id.* at 106