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**OLD IS GOLD: PROTECTION, PRESERVATION AND
PROMOTION OF TRADITIONAL CULTURAL EXPRESSIONS
THROUGH A SUI GENERIS LEGISLATION IN INDIA**

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ABSTRACT

Recently, the protection of Traditional Cultural Expressions (TCEs) has garnered the attention of the international community and has become a practical concern for national-policy makers in many countries. India, being one of the oldest societies of the world, has a very large repository of literature, music, art forms, designs, marks, etc. This article addresses the lack of debate on TCEs, which is a great economic and cultural asset of the country and analyses the adequacy of the present legal framework to protect TCEs. The article presents case studies of Banarasi Saree, Warli painting and Bhojpuri folk-music as examples of limitations of copyright law, and how grossly each has been commercially appropriated and exploited. The article further discusses the need for a sui generis legislation of an intellectual property nature by presenting the example of sui generis legislations of developing countries like Kenya, Philippines, and Panama. As an overall outcome, it is concluded that a sui generis legislation of an intellectual property nature

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would be able to protect TCEs in a diverse & culturally rich country like India and it further suggests some modifications to the Traditional Knowledge Bill, 2016 in order to be more effective.

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I. INTRODUCTION

‘Traditional cultural expressions’ [*hereinafter* referred to as “**TCEs**”] or ‘expressions of folklore’ [*hereinafter* referred to as “**EoF**”] refer to artistic or cultural expressions that form part of the identity and heritage of a traditional or indigenous community and are passed on from generation to generation.¹ The TCEs are “*the only form of intellectual property for which protection has been sought under human rights framework as well*”.² There have been many attempts at the international level to grant protection to TCEs within Intellectual Property Rights [*hereinafter* referred to as “**IPR**”], beginning from Berne Convention³ in 1971 followed by the Paris Act⁴ and Tunis Model.⁵ In 1999, World Intellectual Property Organisation’s [*hereinafter* referred to as “**WIPO**”] Roundtable on Intellectual Property and Traditional Knowledge [*hereinafter* referred to as “**TK**”] changed the focus from copyright law to other areas of IP law; these discussions have continued since 2001 through the work of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions [*hereinafter* referred to as

¹*Traditional Cultural Expressions*, WORLD INTELLECTUAL PROPERTY ORGANISATION, <https://www.wipo.int/tk/en/folklore/> (last visited July 16, 2020).

² Ruchira Goswami & Karubakee Nandi, *Naming the Unnamed: Intellectual Property Rights of Women Artists from India*, 16 AM. U. J. GENDER SOC. POL’Y & L. 257 (2008) (*hereinafter* “**Goswami et al**”).

³ Berne Convention for the Protection of Literary and Artistic Works 1971, art. 15 cl. (4), Sep. 9, 1886, 25 U.S.T. 1341, 1161 U.N.T.S. 3.

⁴ WORLD INTELLECTUAL PROPERTY ORGANISATION, GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971) 39 (1978).

⁵ UNESCO AND WIPO, TUNIS MODEL LAW ON COPYRIGHT (FOR DEVELOPING COUNTRIES) (1976).

“IGC”].⁶ The recent work of IGC attempts to analyse “*gaps*” that already exist at the international level to provide protection for TCEs.⁷ However, till date, no international consensus has been achieved to grant protection to TCEs.

Moreover, there is no internationally settled or accepted definition of ‘indigenous’ or ‘folklore’ or ‘traditional cultural expressions’ even after more than 50 years of working⁸ toward an international framework to provide protection to TCEs. WIPO considers it as one of the most fundamental challenges associated with the protection of TCEs.⁹ The WIPO draft does not seek to suggest a particular definition because of the different views of the countries. However, it summarises certain important characteristics to distinguish or identify TCEs of a community.¹⁰

TCEs include a wide range of tangible, intangible and mixed forms of creative expression and these forms are not exhaustive and may include any other form and elements of the intangible cultural heritage of a community.¹¹ Development in digital technology and media has further

⁶ *Intergovernmental Committee*, WORLD INTELLECTUAL PROPERTY ORGANISATION, <https://www.wipo.int/tk/en/igc/> (last visited July 16, 2020) (*hereinafter* “**Intergovernmental Committee**”).

⁷ Meeting on Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Thirty-Eighth Session, WIPO/GRTKF/IC/38 (December 2018), https://www.wipo.int/meetings/en/details.jsp?meeting_id=46446 (*hereinafter* “**WIPO**”).

⁸ Berne Convention for the Protection of Literary and Artistic Works 1971, art. 15 cl. (4), Sep. 9, 1886, 25 U.S.T. 1341, 1161 U.N.T.S. 3.

⁹ WIPO, *supra* note 7.

¹⁰ *Id.* ¶ 5.

¹¹ Intergovernmental Committee, *supra* note 6.

made it easy for commercial exploitation and appropriation. India is one of the oldest societies in the world and one of the largest repositories of literature, music, art forms, designs, marks, etc., including a wide range of TCEs. Such knowledge and resources are often misappropriated and exploited by industries that have recognized the potential of such resources. India is the only country to implement the necessary designation under Article 15(4) of Berne Convention¹² which mandates States to vest work of unknown author or group of authors in a national authority, subject to a declaration made to WIPO.¹³ Despite this field having a great economic and cultural significance for the country, it presently lacks the requisite attention of the Government. The Protection of Traditional Knowledge Bill, 2016 [*hereinafter* referred to as “**TK Bill, 2016**”]¹⁴ was introduced by Dr. Shashi Tharoor in an attempt to protect TCEs. The introduction of the TK Bill, 2016 is applaudable as it is a major step in the direction of protection of traditional knowledge resources and addresses the lack of discussion and a comprehensive system to protect TCEs. However, even though the TK Bill, 2016 is a stride in the right direction, it carries various lacunae.

¹² Berne Convention for the Protection of Literary and Artistic Works 1971, art. 15 cl. (4), Sep. 9, 1886, 25 U.S.T. 1341, 1161 U.N.T.S. 3.

¹³ *Berne Notification No. 108: Berne Convention for the Protection of Literary and Artistic Works*, WORLD INTELLECTUAL PROPERTY ORGANISATION (February 1984), https://www.wipo.int/treaties/en/notifications/berne/treaty_berne_108.html.

¹⁴ The Protection of Traditional Knowledge Bill, No. 282 of 2016 (2016).

At the national level, countries have developed various systems for the protection of TCEs.¹⁵ Majorly, the countries try to protect TCEs by bringing it within the purview of existing intellectual property rights¹⁶ or by enacting a *sui generis* law.¹⁷ The TK Bill, 2016 argues that TCEs cannot be considered as ‘intellectual property’, hence a *sui generis* legislation of non-intellectual property nature is drafted. Thus, the article examines the adequacy of the existing intellectual property regime to protect the TCEs in India and analyses the sufficiency of the TK Bill, 2016. Part I of the article analyses the adequacy of present mechanisms for the protection of TCEs in India. It briefly describes how the present regime is inadequate for the protection of TCEs. Part II specifically focuses on copyright law and present three specific cases of TCEs in India and the exploitation suffered by each one of them. The first is the case of Banarasi saree known for their intricately woven designs in luxurious silk cloth; the second case study is about Warli art, a cultural and religious tradition of Warli people which is now commercially appropriated to feed present consumer demands; and the third case study presents the inadequacy of present copyright law to protect intangible medium of expression in the area of folk music through the example of Bhojpuri folksong. Part III discusses the need for a *sui generis* law in India by assessing the *sui generis* legislation of Kenya,

¹⁵ Daphne Zografos, *The Legal Protection of Traditional Cultural Expressions: The Tunisian Example*, 7 J. WORLD INTELL. PROP. 229 (2004).

¹⁶ Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Third Session, WIPO/GRTKF/IC/3/10, 40 (June 21, 2019), https://www.wipo.int/meetings/en/details.jsp?meeting_id=50424.

¹⁷ The Special System for the Collective Intellectual Property Rights of Indigenous Peoples Act, No. 20 of 2000 (Panama); The Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 of 2016 (Kenya); The Indigenous Peoples Rights Act, No. 8371 of 1997 (Phil.).

Philippines and Panama. In conclusion, the article analyses the TK Bill, 2016 and suggests that a *sui-generis* legislation of intellectual property nature would be more suited to India and discusses certain measures that can make the legislation more effective.

II. CURRENT LEGAL & INSTITUTIONAL FRAMEWORKS IN INDIA

India's heritage is vast and diverse, owing to a plethora of communities and indigenous people living in various parts of the nation. Deliberations have been made to put a separate legislation in place for the protection of traditional cultural expressions, which have been dealt with in the latter part of the paper. In this part, the author throws light over the existing legal framework in India for governing the TCEs.

A. CONSTITUTION OF INDIA

The Constitution identifies the protection of interests of minorities in Article 29 under Part III of the Constitution. Article 29(1) of the Constitution of India reads as “[a]ny section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of their own shall have the right to conserve the same”. The provision does not refer to any religion per se, but protects interests of those minorities who have a distinct language, script or culture, even if they are practising different religions.¹⁸ Furthermore, Article 51A(f)¹⁹ bestows a fundamental duty on every citizen of India to value and preserve the rich heritage of our composite culture as their fundamental duty.

¹⁸ T.M.A. Pai Foundation v. State of Karnataka, (2002) 8 SCC 481 (India), ¶ 89.

¹⁹ INDIA CONST. art. 51A cl. f.

Therefore, while the Indian Constitution confers rights on the minorities to protect and conserve their traditions, it cannot be effectively protected unless there is an appropriate legislation in place which ensures such protection of their cultures and traditions.

B. GEOGRAPHICAL INDICATION

India enacted a sui generis legislation for the protection and preservation of Geographical Indications [*hereinafter* referred to as “**GIs**”] with the enactment of Geographical Indications of Goods (Registration & Protection) Act, 1999.²⁰ It was intended to bring the Indian intellectual property law framework in consonance with the Trade-Related Aspects of Intellectual Property Rights [*hereinafter* referred to as “**TRIPS**”] Agreement which mandated all its signatories to provide legal means to ensure the protection of GIs and to prevent misleading of the public as to the origin of such GIs.²¹ So far, 370 GIs have been successfully registered,²² but that does not leave these products out of the challenges that plague this field of Intellectual Property Rights. However, there are a lot of fallacies in the GI Act, which makes it insufficient for TCEs. The fallacies are:

i. Registered Proprietor

²⁰ The Geographical Indications of Goods (Registration & Protection) Act, No. 48 of 1999 INDIA CODE (1999).

²¹ Agreement on Trade Related Aspects of Intellectual Property, World Trade Organization art. 22, cl. 2, Apr. 15, 1994, 1869 U.N.T.S. 299.

²² OFFICE OF THE CONTROLLER GENERAL OF PATENTS, DESIGNS & TRADE MARKS, Registered Geographical Indications, http://www.ipindia.nic.in/writereaddata/Portal/Images/pdf/GI_Application_Register_10-09-2019.pdf (last visited July 16, 2020) (*hereinafter* “**OFFICE OF THE CONTROLLER GENERAL**”).

According to the Act, the registered proprietor of a GI in India has to be an “*association of persons or producers or any organisation*”.²³ This requires collective action, thereby requiring reorganization and governance of supply chains.²⁴ In order for a GI to be successfully implemented, it is necessary that there is cooperation amongst all the actors along the supply chain. Therefore, any opportunistic behaviour on the part of a single producer in respect of degrading quality in order to increase their profit margins would have an impact on the collective reputation of that GI.²⁵

ii. Foreign Registration

Another problem with the GIs is that of foreign registration as the Indian legislation only affords protection to GIs in India. The WTO Secretariat²⁶ has classified the diverse means of protection available for GIs in different WTO member nations into three categories.²⁷ Regardless of the kind of protection available in foreign countries, all these types of protections are most of the times unaffordable means for the registered

²³ The Geographical Indications of Goods (Registration and Protection) Act, No. 48 of 1999 INDIA CODE (1999), § 2.

²⁴ Dwijen Rangnekar, *The Socio-Economics of Geographical Indications: A Review of Empirical Evidence from Europe*, UNCTAD-ICTSD PROJECT ON IPRS & SUSTAINABLE DEVELOPMENT, (May, 2004).

²⁵ Kasturi Das, *Prospects and Challenges of Geographical Indications in India*, 13(2) J WORLD INTELLECT PROP. 148, 156 (2010) (*hereinafter* “**Das**”).

²⁶ WTO Secretariat, *Review Under Article 24.2 of the Application of the Provisions of the Section of the TRIPS Agreement on Geographical Indications*, WORLD TRADE ORGANISATION (Nov. 24, 2003), https://www.wto.org/english/tratop_e/tratop_e/trips_e/ta_docs_e/5_3_ipcw253rev1_e.pdf.

²⁷ Kasturi Das, *Select Issues and Debates around Geographical Indications with Particular Reference to India*, 42(3) J. WORLD TRADE 461 (2008).

proprietor.²⁸ In Europe for instance, a one-time effort for GI Protection can cost around the US \$20,000.²⁹

iii. Cheap Imitations

GIs in India also suffer from gross misuse and poor and cheaper counterfeits. This can be demonstrated through ‘Banarasi Brocades and sarees’,³⁰ which have suffered due to Chinese imitations and poor quality imitations in the Indian market, costing only one-tenth of the price of an original ‘Banarasi’ saree.³¹ Therefore, such acts make vigilance on standard quality GIs much more cumbersome.

Another task posed with GIs in developing countries is to build consumer perceptions through effective marketing and promotional efforts. In a country where poverty is a major issue, it becomes a herculean task to vouch for products that guarantee quality over economical pricing.³² The downside of stringent standardization and quality control of GIs to avoid counterfeit is that it hinders innovations and experimentations with changing technology and consumer taste.³³ It is also observed that stricter

²⁸ Das, *supra* note 25, ¶ 158.

²⁹ Wagle, S., *Geographical Indications as Trade-Related Intellectual Property*, UNDP REGIONAL CENTRE (Colombo, Sri Lanka) (2007).

³⁰ Ministry of Textiles, *List of Craft Registered under Geographical Indication Handicrafts*, Government of India, http://handicrafts.nic.in/pdf/LIST_OF_CRAFT_REGISTERED_UNDER_GEOGRAPHICAL_INDICATION_HANDICRAFTS.pdf (last visited July 16, 2020).

³¹ Das, *supra* note 25, ¶ 159.

³² *The World Bank, Data: India*, THE WORLD BANK, <https://data.worldbank.org/country/india> (last visited July 16, 2020).

³³ Das, *supra* note 25, ¶ 168.

laws have failed to benefit Indian producers, despite the registration of GIs under the relevant legislation.³⁴

iv. Ownership of GIs

Another shortcoming of GI is that the ownership generally belongs to the traders of such handicrafts and handloom products. Most of the Asian countries include traders in the definition of producers within the legislations concerning GIs and allow them to be treated as owners of such GI products.³⁵ Since traders tend to have more capital and also greater market power in most traditional industries, ownership is usually attributed to such traders.³⁶ As a result, the ordinary artisans, who weave the fabric, are left in poverty and destitution and are exploited for menial wages by the traders.³⁷

Therefore, while the registration of GIs is praiseworthy, this legal mechanism alone is not sufficient.³⁸ There is a need for more active involvement of the quasi-public institutions that work for the welfare and preservation of such age-old traditions in the form of handicrafts and artisanal products. Moreover, GIs only work for tangible creations that indicate the source of origin and significance of such goods in that region.

³⁴ Kasturi Das, *Socio-economic Implications of Protecting Geographical Indications in India*, (August 2009) http://wtocentre.iift.ac.in/papers/gi_paper_cws_august%2009_revised.pdf (hereinafter “Das II”).

³⁵ Gopalakrishnan, N.S. et al, *Exploring the Relationship between GIs and TK: An Analysis of the Legal Tools for the Protection of GIs in Asia*, ICTSD PROGRAMME ON INTELL. PROP. RTS. & SUSTAINABLE DEV. (2007).

³⁶ *Id.*

³⁷ N. Ahmad, *Globalization and the Indigenous Artisan Economy: A Case Study of the Varanasi Silk Sari Industry*, ALL IND. ARTISANS & CRAFTWORKS ASS'N (2007).

³⁸ Das, *supra* note 25, ¶ 179.

This leaves out intangible traditions which have been passed on in the form of oral expressions. Hence, it is insufficient for the protection and preservation of TCEs.

C. TRADITIONAL KNOWLEDGE DIGITAL LIBRARY

Tradition Knowledge Digital Library [*hereinafter* referred to as “TKDL”] is an initiative by the Indian Government to protect Indian medicinal knowledge and prevent its misappropriation at the International Patents Office.³⁹ This initiative was introduced to counter the acts of other countries granting patents to wound-healing properties of plants such as turmeric and neem⁴⁰ which have been part of India’s traditional medicinal knowledge since time immemorial. Although it seems like a viable solution for traditional knowledge related to patents and Ayurveda, it still remains far from the protection of traditional cultural expressions, and is problematic on many fronts. TKDL ensures accessibility only by patent offices that sign non-disclosure agreements. This defies the purpose of the objective of TKDL which was “*to translate and digitise knowledge that existed in the form of written scriptures and hymns*”.⁴¹

Therefore, while TKDL is very narrow in the sense that it only protects traditional knowledge with respect to traditional medicinal

³⁹ About Traditional Knowledge Digital Library, <http://www.tkdil.res.in/tkdil/langdefault/common/Abouttkdil.asp?GL=Eng> (last visited July 16, 2020).

⁴⁰ BBC News, *India Wins Landmark Patent Battle*, (Mar., 2005) <http://news.bbc.co.uk/2/hi/science/nature/4333627.stm>.

⁴¹ Swaraj Paul Barooah, *Questioning the Fallacy of a Closed-Access TKDL*, SpicyIP (Jan., 2015), <https://spicyip.com/2015/01/guest-post-questioning-the-fallacy-of-a-closed-access-tkdil.html>.

knowledge, its implementation and practical implications are a failed venture.

Some civil societies and NGOs, such as the Indian National Trust for Art and Cultural Heritage⁴² and the National Folklore Support Centre, have been fundamental in raising awareness of tangible and intangible heritage. They have also been integral in the documentation of these TCEs. However, they have not been so sufficient to preserve, protect and promote these traditional cultural expressions.

D. COPYRIGHT

The various institutions that govern IPR apart from copyright law have been discussed above along with their failure in providing protection to TCEs. There is certainly a lack of proper representation from indigenous communities at the international level to address their concern as they do not constitute 'State'. However, in 1994 an effort was made by indigenous people at an international platform to draft an International Covenant on the Rights of Indigenous Nations to which sought protection under IPR, within which they considered copyright laws to be best suited to protect TCEs.⁴³ The present article further illustrates that how even copyright law is ill-suited to grant protection to TCEs in India despite the fact that the international covenants and many other nations have expanded the scope

⁴² *Mission*, IND. NAT'L TRUST FOR ART & CULTURAL HERITAGE, <http://www.intach.org/about-mission.php> (last visited July 16, 2020).

⁴³ Terri Jenke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, WORLD INTELLECTUAL PROPERTY ORGANISATION (2003) (*hereinafter* "Jenke").

of copyright law to accommodate the work of indigenous people. The further discussion elucidates that the present copyright regime in India is inadequate to protect TCEs and it, per se, cannot be the solution for giving protection to the TCEs.

There have been long debates over philosophical underpinnings of copyright law.⁴⁴ Copyright law can be primarily seen as striving to achieve an optimal balance between fostering incentives for the creation of literary and artistic works and the optimal use and dissemination of such works.⁴⁵ The most significant doctrine limiting the copyrightability of works is that it protects expression over any idea or theme and form over any substance. The major shortcomings present under the copyright regime for granting protection to TCEs have been discussed below through the case studies of Banarasi sarees, Warli painting, and Bhojpuri folksongs.

i. Authorship & Ownership

The concept of copyright protection is based on individuality as opposed to a collective one.⁴⁶ In the case of TCEs however, attribution of a particular expression cannot be associated with an individual author or a group of authors. This is because TCEs are communally created⁴⁷ which is contradictory to the attributes required for a work to be protected under copyright law in India. The provision of “*joint authorship*”⁴⁸ in Indian

⁴⁴ ROBERT P. MERGES ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 495 (4th ed., Aspen Publications 2007).

⁴⁵ *Id.*

⁴⁶ WIPO, *supra* note 7.

⁴⁷ Intergovernmental Committee, *supra* note 6.

⁴⁸ The Copyright Act, No. 14 of 1957 INDIA CODE (1957), § 2.

copyright law also does not provide any remedy to the situation, as one of the main characteristics of TCEs is that it is passed on from one generation to another reflecting community's cultural and social identity. Moreover, according to customary indigenous laws, a work created by one member is usually owned by the entire tribe or group, through operation of collective ownership.

The issue of authorship and ownership of TK and TCEs has also become more crucial due to the cultural misappropriation of such works. There has been a rampant misuse of many Indian traditional handicrafts such as the Kashmiri Pashmina Shawls and the Banarasi brocades and sarees. For the purpose of this paper however, we will focus only on the Banarasi sarees that has its roots embedded in the sacred city of Banaras (now known as Varanasi). The Banarasi silk sarees have been famous for centuries for their intricately woven designs in luxurious silk cloth. This rich handicraft has suffered misappropriation and abuse from within as well as outside the country. Chinese imitations of these sarees have flooded the Indian market in the past few decades as these power loom produced imitations costs only one-tenth of the price of the original Banarasi saree thereby giving tough competition to the indigenous craftsmen.⁴⁹ Poor quality imitations are also being produced within India in the Surat region of Gujarat.⁵⁰ Objects are considered to be ethnographically authentic if “*they*

⁴⁹ Das, *supra* note 25, ¶ 25.

⁵⁰ *Id.*

accurately represent a bounded, named culture, cultural group, or cultural identity”.⁵¹ These non-regional imitations and power-loom made products threaten the cultural and regional significance of such TCEs and also pose serious threats to the survival of the local artisans that are the true custodians of these arts and expressions. “*Banarasi is what the people of Banaras do*”.⁵² The essence of the Banarasi saree lies in the region in which it is produced and the texture that is created out of the silk fabric. Therefore, this kind of abuse exploits the Banarasi saree artisans who, due to the unrecognised authorship, fail to protect their interest and enjoy the economic rights flowing out of such work.

Another shortcoming of ownership in the copyright law regarding TCEs is that the ownership generally belongs to the traders of such handicrafts and handloom products. Thus, under the existing copyright legislation, these artisans are powerless and unaware of their rights to claim ownership over their traditional cultural expressions and are instead exploited economically for stingy wages.

ii. Originality

The requirement of originality has been emphasized as “*sine qua non*” to grant protection of copyright.⁵³ The Indian Copyright Act, 1957 [hereinafter referred to as “**Indian Copyright Act**”] provides copyright

⁵¹ L. Field, *Four Kinds of Authenticity? Regarding Nicaraguan Pottery in Scandinavian Museums*, 36(3) AM. ANTHROPOLOG. 507 (2009).

⁵² Amit Basole, *Authenticity, Innovation, and the Geographical Indication in an Artisanal Industry: The Case of the Banarasi Sari*, 18 J. WORLD INTELL. PROP. 127 (2015).

⁵³ Feist Publications, Inc. v. Rural Telephone Service, 499 U.S. 340 (1991).

protection to “*original literary, dramatic, musical and artistic works*”.⁵⁴ The term “*originality*” has not been defined in the statute; however, it has been settled in the case of *E.B.C. v. DB Modak*⁵⁵ that originality entails independent work of an author created by his own labour, skill and investment of capital featuring a certain degree of creativity. The work should not be creative in the sense that it is novel or non-obvious, but at the same time, it should not be merely a product of labour and capital.⁵⁶

To fulfil the requirement of ‘originality’, a minimal degree of creativity is required in the work to get copyright protection.⁵⁷ The salient feature of folklore is that it passes on from one generation to another. TCEs are fundamentally based on and gain value from the previous generations. Therefore, the present set standard cannot be applied in the case of TCEs because of its hereditary nature which encourages new iterations of prior creative works. This shortcoming can be best explained with the example of Warli art which has lost its essence and origins because of heavy commercialisation by the industries.

In India, Warli painting is an art form that symbolises the actual beliefs and consciousness of Warli people.⁵⁸ The Warlis have lived long along with other tribes in Thane, Maharashtra. The origin of Warlis is little

⁵⁴ The Copyright Act, No. 14 of 1957 INDIA CODE (1957), § 13 cl. 1.

⁵⁵ *Eastern Book Company & Ors. v. D.B. Modak & Anr.*, (2008) 1 SCC 1 (India).

⁵⁶ *Id.* ¶ 57.

⁵⁷ *Eastern Book Company & Ors. v. D.B. Modak & Anr.*, (2008) 1 SCC 1 (India).

⁵⁸ Nisha Khandekar, *Globalisation and Its Effects on the Warli Art*, 5(2) J. OF SOCIAL INCLUSION STUDIES (February 2020) (*hereinafter* “**Khandekar**”).

known “*except that they had fled from the north, southwards*”.⁵⁹ According to the census of 1972, there were about two lakh fifty-thousand Warlis in the Thane area, mostly dispersed in the districts of Dhanu and Talaseri.⁶⁰ Unfortunately, most of them are now travelling to other places for education and in search of jobs.⁶¹ The Warli area consists of *chawks*, a sacred area where all the ritual are performed, made by woman artists or *sabvasinis*.⁶² Warli paintings were originally made on the walls made of bamboo sticks and were painted with mud and rice paste on huts of Warli community. Presently, the medium of paintings has changed from rice paste and bamboo twig to poster colour and brush. The major appropriation of Warli art today can be seen on textiles. Interestingly, Bata used the motifs of Warli paintings on its slippers while stating “*prints on your company footwear are Warli painting, which is a famous traditional art of tribal people of Maharashtra*”.⁶³ The Warli painting which was known for its simplicity and reflected true culture and tradition of the community is now made according to feed the present consumer demands by introducing new motifs of airplane, car, school building and factory.⁶⁴

⁵⁹ Yashodhara Dalmia, *The Warli Chawk: A World-View*, 11(4) I.I.C.Q. 79, 5 (1984) (*hereinafter* “**Dalmia**”).

⁶⁰ *Id.*

⁶¹ Khandekar, *supra* note 58, ¶ 3.

⁶² Dalmia, *supra* note 59, ¶ 7.

⁶³ Adiwasi Yuva Shakti, *Appropriation and insult of tribal culture: BATA uses Warli art on its footwear*, ADIVASI RESURGENCE (2018) <http://www.adivasiresurgence.com/appropriation-and-insult-of-tribal-culture-bata-uses-warli-art-on-its-footwear/> (last visited Feb. 19, 2020).

⁶⁴ Khandekar, *supra* note 58, ¶ 3.

Unfortunately, the Warlis have lost the originality and essence over their paintings because of the urban influence and is being commercially appropriated at the whims and fancies of traders and private entrepreneurs. The ignorance of the Indian Government towards recognition of TCEs is costing heavily to indigenous people. Because of the ‘originality’ requirement with a certain degree of creativity in the author’s work, the copyright protection, under the present statute, cannot be extended to the Warli paintings which are iterations of previous work of their tribe. Hence, despite GI being given to the Warli paintings,⁶⁵ it is being exploited and the present copyright regime is insufficient to protect the interest of Warli community from incessant copying by the industries.

In an Australian case of John Bulun,⁶⁶ where the Petitioner was a leading Aboriginal artist had his bark painting altered and copied on a fabric, imported into Australia and sold nationally. The Court held it as an infringement of copyright as a substantial part of the painting was copied on the fabric design. Moreover, the Judge used a remedy based on rules of equity by recognising the fiduciary obligation of the individual artist to the community for the spiritual lore from which the art was developed.⁶⁷ However, in terms of copyright, the Bulun case has its limitation as a precedent in the case of TCEs as the author of the painting, Mr. Bulun was recognised as the owner of his painting and it incorporated his imagery, and depicted an original art form, thereby, keeping his work within the purview

⁶⁵ OFFICE OF THE CONTROLLER GENERAL, *supra* note 22.

⁶⁶ *Bulun Bulun & Anr. v. R & T Textiles Pty. Ltd.* (1998) 3 A.I.L.R. 547 (Austl.).

⁶⁷ Jenke, *supra* note 43.

of the Australian Copyright Act⁶⁸. Whereas in the present case of *Warli* art or similar traditional art forms, attribution can't be made to a single or group of artisans as it is usually copied from previous generations.

iii. Fixation and Moral Rights

The characteristics defined by WIPO of TCEs clearly states that it can be in tangible, intangible and mixed forms.⁶⁹ Indian Copyright Act sets 'fixation' as a pre-requisite to providing copyright protection to oral works.⁷⁰ Considering the wide range and evolving nature of TCEs which include tangible, intangible and mixed forms of expressions, it is not possible to have it in any fixed form. The problem of fixation requirement in the present copyright regime can be best presented through the example of folksongs. International Folk Music Council in 1954 identified three factors that determine the tradition of folk music: firstly, continuity of the present with the past, secondly, variation emanating from the creativity of the individual or group, and lastly, selection by the community that determines the forms in which the music develops.⁷¹

Folk songs are mostly region specific and they spread from one region to another. Folk songs are ever-evolving but this change is supposed to be brought by the community itself. Folk songs are an expression of the sentiments, aspirations, culture, fears and belief of the community. The best

⁶⁸ The Copyright Act, No. 63 of 1968, § 35 (Austl.).

⁶⁹ Intergovernmental Committee, *supra* note 6.

⁷⁰ The Copyright Act, No. 14 of 1957 INDIA CODE (1957), § 2.

⁷¹ GOSWAMI ET AL., *supra* note 2, ¶ 15.

example of commercial transformation of folk songs is the Bhojpuri music industry which has expanded its horizons to cinema as well.

The name of the dialect 'Bhojpuri' has been taken from the name of the town Bhojpur, in the District of Shahabad in Bihar.⁷² The town had the honour of being the capital of the Ujjaini Rajput Kings in ancient times.⁷³ The Bhojpuri songs are famously sung during various Hindu rites and traditions. For example, *Gauna* and *Sobar* are sung during marriage and birth respectively, *Jubumar* songs are sung in chorus by female members for dance in functions and *Gauna* represents the inner sentiments of parents at the departure of their daughter after marriage. Similarly, there are various songs sung according to the various seasons of the Hindu calendar like *Kajali*, *Falgun or Fag*, *Jhals* and *Ghanto*. There are also songs like *Birba* and *Dusadhas*, reflecting inner sentiments of the depressed caste of the community.⁷⁴ In fact, a new form of folk song tradition, *Bidesia*, developed when a huge population of Bhojpuri people left the Indian shores to work in Caribbean countries owned by Europeans.⁷⁵ *Bidesia* songs reflected the pain and sufferings of mother and wives when migrant workers left their native land during the British Raj.⁷⁶ Bhojpuri songs also use certain instruments, like *dholak*, *harmonium*, *kartaal*, *manjra*, *jhanjh*, *naal* etc., to give it

⁷² Krishna Deva Upadhyaya, *An Introduction to Bhojpuri Folksongs and Ballads*, 7(2) Midwest Folklore 85, 2 (1957).

⁷³ *Id.*

⁷⁴ GOSWAMI ET AL., *supra* note 2 at 15.

⁷⁵ Neha Singh, *Addressing pain of women through folk culture: A case study of Bhojpuri diaspora in Mauritius*, 2(12) I.J.A.R. 523 (2016).

⁷⁶ *Id.*

a rural flavour.⁷⁷ Presently, the Bhojpuri cinema and music industry has affected the content and performance of original Bhojpuri songs in rural Bhojpuri region which were purely devoted to day to day happenings and sentiments of people.

There are both producers and consumers of vernacular Bhojpuri music industry in the metropolitan cities of Mumbai and Delhi. Today, around Rs. 80 lakhs to Rs. 1 crore is spent on a Bhojpuri movie.⁷⁸ A big Delhi based company may release 5,00,000 CDs more in comparison to a company in Patna, Bihar escalating the commercial appropriation.⁷⁹ The journey of folksongs has moved from rural landscape to the commercial stage of CDs, YouTube, cassettes and mobile phones. Hence, folksongs are blatantly commercially misappropriated without giving any due recognition to the community.

Folksongs can be protected under the Indian Copyright Act if it is performed or audio/video-recorded.⁸⁰ However, the essence of these folk songs lies in the original performance by the community itself during various rites, activities and traditions. Moreover, these songs are often created by the whole community rather than an individual. Therefore, these cannot be fixed to a tangible medium and attributed to a single author

⁷⁷ GOSWAMI ET AL., *supra* note 2, ¶ 15.

⁷⁸ Kamal Narayan, *Bhojpuri film industry may shift base*, THE HINDUSTAN TIMES, (Nov. 02, 2008), <https://www.hindustantimes.com/patna/bhojpuri-film-industry-may-shift-base/story-u6pD6D4SMJCAmlOIY4wHgJ.html>.

⁷⁹ Ratnakar Tripathy, *Music Mania in Small-town Bihar: Emergence of Vernacular Identities*, 47(22) ECON. POL. WKLY. 58 (2012).

⁸⁰ The Copyright Act, No. 14 of 1957 INDIA CODE (1957), § 14.

reflecting the shortcoming of ‘fixation’ of the present copyright act. Hence, folksongs are commercially misappropriated by industries which have recognised its commercial worth and mass appeal.

After the economic compensation comes to the issue of moral rights. An author is said to have the moral right to control her work. Moral rights protect the personal, reputational and monetary value of a work.⁸¹ Moral rights are very crucial for avoiding any kind of mutilation, distortion or debasement of cultural works. The present Indian Copyright Act grants moral right composite of paternity, integrity and modification rights of the author. Because of the existing shortcomings of the present copyright regime, moral rights cannot be attributed to the traditional communities.⁸² There exists gross misappropriation of acknowledgement and economic returns to the community. It is hard, if not impossible to locate specific recipients of a community whose TCEs have been constantly misappropriated to give economic compensation or due recognition, for which no efforts have been made in India. The heavy commercialisation of Bhojpuri songs itself portrays a picture of how expressions of traditional communities that represent their culture are being distorted and misrepresented without being given any due recognition. TCEs hold economic as well as cultural value, hence, it is particularly important that along with monetary compensation, their work should be duly recognised. Therefore, protection of moral rights is significant to prevent distortion or

⁸¹ Betsy Rosenblatt, *Moral Rights Basics*, HARVARD LIBRARY (March 1998), <https://cyber.harvard.edu/property/library/moralprimer.html>.

⁸² The Copyright Act, No. 14 of 1957 INDIA CODE (1957), § 57.

mutilation and to maintain the essence and authenticity of the expressions of the traditional communities.

iv. Duration

As discussed above, considering the nature of TCEs, granting a finite term would be inadequate for their protection. The present copyright regime provides protection for the lifetime of the author and sixty years counted from the year following the death of the author.⁸³ By implication of this provision, once the term of sixty years ends, the work will fall under the category of 'public domain', making it more vulnerable for further exploitation as it is passed on from generation to generation. Therefore, once the protection expires, such TCEs fall an easy prey to enterprising persons who may use these without constraints or limitations.

This restriction may render the indigenous communities dispossessed of their work which are created through thousands of years of accumulated knowledge. Folklore is passed from generation to generation in an unfixed form and even if it is fixed in a tangible medium, the present requirement will prevent providing copyright protection, considering the evolving nature of the TCEs as the expressions may change with time. Hence, because of the existing limitation of the copyright, the original cultural expressions of traditional communities, such as the *Banarasi sari*, *Warli* art and *Bhojpuri* folksongs are diminishing and are being heavily commercialised and misappropriated without attributing any due recognition to the community. Therefore, from the above discussion, it is

⁸³ *Id.* §§ 22-29.

clear that the present copyright regime in India fails to provide adequate protection to TCEs.

III. INITIATIVES BY DEVELOPING COUNTRIES ON PROTECTION OF TCEs

As previously discussed, we feel that the protection of traditional cultural expressions is an independent issue as the current IPR regime in India fails to serve the purpose. Therefore, in this part, we seek to look at some of the *sui generis* legislations that developing countries such as Kenya, Philippines and Panama have introduced and how the specific legislations on TCEs have helped them in protecting the rights of their indigenous people [*hereinafter* referred to as “IPs”) and indigenous cultural communities [*hereinafter* referred to as “ICCs”].

A. KENYA

Kenya introduced the ‘Protection of Traditional Knowledge and Cultural Expressions Act’ in 2016 through Article 11 of their Constitution, which necessitated them to enact a legislation to promote culture and cultural heritage of the nation.⁸⁴ The Act comprises of the key legal framework which is drafted to protect as well as to promote traditional knowledge and traditional cultural expressions.⁸⁵

⁸⁴ KENYA CONST. art. 11 cl. 3.

⁸⁵ Mathlide Pavis, *Kenyan Reform on Traditional Knowledge and Traditional Cultural Expressions: Two Year On*, IPKITTEN, <http://ipkitten.blogspot.com/2019/02/kenyan-reform-on-traditional-knowledge.html> (last visited July 14, 2020).

The legislation has been carefully drafted to define terms such as community, cultural expressions (both tangible and intangible expressions), cultural heritage (both tangible and intangible heritage), customary laws and practices, derogatory treatment, exploitation and other terms and phrases which are required to ensure proper protection of their cultural heritage, expressions, traditional knowledge and genetic resources.⁸⁶ The Act sets up a concrete system to make sure that the rights are effectively protected and criminalizes⁸⁷ the misuse and exploitation⁸⁸ of TK and TCEs. This Act was enacted to prevent excessive exploitation of the culture of the indigenous Maasai community, which had become widespread in the last two decades.⁸⁹

This Act puts the onus on the Central Government through the Kenya Copyright Board to establish and maintain a ‘Traditional Knowledge Digital Repository’ (TKDR), that shall contain information relating to tangible and intangible TK and TCEs registered by the Government.⁹⁰ The registration process shall be undertaken willingly by the owners of the TK and TCEs,⁹¹ which shall not be subjected to public disclosure and the exclusive rights of authorization of such TK are given to the communities.⁹² The Act also confers moral rights to the owners of TK or TCEs.⁹³ The

⁸⁶ The Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 of 2016 (Kenya), § 2.

⁸⁷ *Id.* § 37.

⁸⁸ *Id.* §18.

⁸⁹ Edward B. Bruner & Barbara Kirshenblatt, *Maasai on the Lawn: Tourist Realism in East Africa*, 9(4) Cultural Anthropology 435 (1994).

⁹⁰ The Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 of 2016 (Kenya), § 4, cl. 1 and § 8, cl. 3.

⁹¹ *Id.* §§ 7, cl. 3 and 15, cl. 3.

⁹² *Id.* § 10, cl. 1.

⁹³ *Id.* §§ 21-24.

process of authorization is also subject to strict scrutiny along with necessary documentation required under the rules framed for this Act.

Although this Act is not wholesome, however, it is a brilliant attempt and provides a structured framework that could benefit the Maasai community, if it is implemented properly.⁹⁴ For the Act to be fully realised, it will require continuing organization within the Maasai community and cooperation at the local level.

B. PHILIPPINES

The Philippines consists of 7,107 islands and islets spanning 1,854 kilometres from north to south ensuring that this archipelago is endowed with abundant natural resources, diverse cultures, rich history and numerous ethnolinguistic communities.⁹⁵ Of the 102.9 million population, about 10-20% of them are IPs and ICCs⁹⁶. Therefore, it was imperative on the part of the Government to introduce Indigenous Peoples' Rights Act, 1997 [*hereinafter* referred to as "**IPRA**"]. Although this Act primarily focuses on recognizing, protecting and promoting the rights of the ICCs, it has enumerated provisions regarding protection and preservation of TK and TCEs. One of the declarations of State policies stated that the "*State shall recognize, respect and protect the rights of Indigenous Peoples to preserve and develop their*

⁹⁴ Naomi Lanoy Leleto, *Maasai Resistance to Cultural Appropriation in Tourism*, 5(1) I.P.J.L.C.R. 21, (2019).

⁹⁵ Jose Mencion Molintas, *The Philippine Indigenous Peoples' Struggle For Land and Life: Challenging Legal Texts*, ARIZONA JOURNAL, <http://arizonajournal.org/wp-content/uploads/2015/11/Molintas.pdf> (last visited July 14, 2020).

⁹⁶ IWGIA, *Indigenous Peoples in Philippines*, <https://www.iwgia.org/en/philippines> (last visited July 14, 2020).

cultures, traditions and institutions” and “*shall consider these rights in the formulation of national laws and policies*”.⁹⁷ It also puts an obligation on the State to take measures to guarantee respect for their cultural integrity.⁹⁸

The provisions relating to their intellectual property rights are contained in Chapter VI and the Rules framed under the IPRA.⁹⁹ This includes community intellectual rights,¹⁰⁰ right to indigenous knowledge systems and practices to develop their own sciences and technologies,¹⁰¹ and the norms regarding access to biological and genetic resources. IPRA also necessitates free and prior informed consent of the communities in consonance with their customary laws in order to safeguard the rights of Ips/ICCs to their indigenous knowledge systems and practices. The Rules define free and prior informed consent as “*consensus of all members of the indigenous communities to be determined in accordance with their customary laws and practices*”.¹⁰² “*It must be free from all external manipulations, interference, and coercion and must be obtained after fully disclosing the intent and scope of the activity.*”¹⁰³

Throughout the provisions of the IPRA, the predominance of the community as the owner of various rights under the Act is reflected

⁹⁷ The Indigenous Peoples’ Rights Act, No. 8371 of 1997 (Phil.), § 2 cl. C.

⁹⁸ *Id.* § 2, cl. e.

⁹⁹ The Indigenous Peoples’ Rights Act, No. 8371 of 1997 (Phil.).

¹⁰⁰ *Id.* § 32.

¹⁰¹ *Id.* § 34.

¹⁰² P.V. Valsala G. Kutty, *National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines*, WORLD INTELLECTUAL PROPERTY ORGANISATION (1999), https://www.wipo.int/edocs/pubdoc/s/en/tk/912/wipo_pub_912.pdf. (*hereinafter* “**Valsala**”)

¹⁰³ *Id.*

effectively and in clear and unambiguous terms.¹⁰⁴ An exemplary feature of the Act is that it places importance on the customary laws of ICC/Ips, which shall be the determining reason for the protection and management of rights bestowed upon them under the Act. For the implementation of the Act, the National Commission on Indigenous Peoples (NCIP), an independent agency under the Office of the President,¹⁰⁵ acts as the primary government agency.¹⁰⁶

With the introduction of the IPRA, the Republic of Philippines has fortified their objective to recognize, respect, and promote the rights of the indigenous cultural communities/indigenous people. ICCs/Ips have been granted recognition of full ownership, not only over their land but also over their intellectual property rights related to cultural heritage and tradition¹⁰⁷.

C. PANAMA

Panama enacted a *sui generis* legislation for TK and TCEs in 2000. ‘Special System for the Collective Intellectual Property Rights of Indigenous Peoples’¹⁰⁸ was enacted to protect the collective intellectual property rights and traditional knowledge of indigenous peoples as well as

¹⁰⁴ *Id.*

¹⁰⁵ The Indigenous Peoples’ Rights Act, No. 8371 of 1997 (Phil.), § 40.

¹⁰⁶ *Id.* § 38.

¹⁰⁷ Valsala, *supra* note 102.

¹⁰⁸ The Special System for the Collective Intellectual Property Rights of Indigenous Peoples Act, No. 20 of 2000 (Panama); The Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 of 2016 (Kenya).

traditional forms of artistic expressions through a special system to register and promote their rights and to ensure social justice for them.¹⁰⁹

The registration of collective rights is unlimited in time, and neither requires any payment nor any lawyer.¹¹⁰ The protection by collective rights is granted upon registration with the National Copyright Office of the Ministry of Education or where applicable, the Directorate General of the Register of Industrial Property (*hereinafter* referred to as “**DIGERPI**”).¹¹¹

This legislation focuses on making the recognition of existing customary law of indigenous communities mandatory, after the approval of either the DIGERPI or the National Copyright Office. In substance, the protection, which consists of exploitation rights regarding the TCEs, based on the culture and tradition of the indigenous peoples must be governed by the regulation of each Indigenous Community.¹¹² This obligation may also be questioned since customary laws of these indigenous communities are also evolving with time and might suffer by being stagnant in a register.¹¹³

This law does not offer a reprieve in a case where there is a conflict in the relationship between customary law and intellectual property law.¹¹⁴ Moreover, establishing a register can be a lengthy process as indigenous

¹⁰⁹ The Special System for the Collective Intellectual Property Rights of Indigenous Peoples Act, No. 20 of 2000 (Panama), art. 1.

¹¹⁰ *Id.* art. 8.

¹¹¹ *Id.* art. 4.

¹¹² *Id.* art. 15.

¹¹³ WIPO, *supra* note 7.

¹¹⁴ WIPO, *supra* note 7.

people are required to understand the importance of such registration, which necessitates a series of workshops and conversations to demonstrate the advantages of such registration.¹¹⁵

While the enactment of the law was a breakthrough, the Government of Panama had to take up initiatives to ensure successful implementation of this law. Between 2006 and 2008, the Department of Collective Rights and Folklore Expressions developed a program known nationally as “*Project Rescue*” to encourage collective rights records.¹¹⁶ During this period, the Project carried out intensive work with indigenous communities and conducted various trainings, workshops, events and meetings with the objective of safeguarding the intangible heritage of traditional cultures and providing technical support for the cultivation of natural fibres used in traditional handicrafts and other cultural items.¹¹⁷ The outcome of this Project was quite successful as it yielded excellent results in various local and indigenous communities who were interested in recording and registering their traditional knowledge.¹¹⁸

Thus, a *sui generis* legislation along with initiatives at the local level helped Panama to protect, preserve and promote the traditional cultural expressions and biodiversity of indigenous communities.

¹¹⁵ Yahelys Arenas, *Project Rescue: Protecting Traditional Knowledge and Biodiversity in Panama*, 4(2) *Biores* (2010).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

IV. CONCLUSION

In India, groups and communities described as ‘indigenous tribes’ have been enumerated at over 104 million as per the 2011 Census of India. They constitute 8.6 per cent of the total population of the country.¹¹⁹ However, India still refuses to recognize them as ‘indigenous’ and holds to the colonial usage of the category ‘tribe’, a category that has now been widely discredited over the world.¹²⁰ Therefore, the introduction of The Protection of Traditional Knowledge Bill, 2016¹²¹ is applaudable as it is a major step in the direction of protection of traditional knowledge resources and addresses the lack of discussion and a comprehensive system to protect TK/TCEs. However, the Bill had lapsed after the 16th Lok Sabha was dissolved and after that, no discussion or debate has taken place to date to protect the rights of the indigenous communities by the Government.

The Bill has tried to make an effort to recognize the contribution of specific local communities by giving them rights in consonance with Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples recognising human rights of the indigenous communities.¹²² The Bill also needs to be lauded for creating databases at

¹¹⁹ Virginius Xaxa, *The Global Indigenous Peoples Movement: It's Stirring in India*, 2 J.L. Prop. & Soc'y (2016).

¹²⁰ *Id.*

¹²¹ The Protection of Traditional Knowledge Bill, No. 282 of 2016 (2016).

¹²² *The Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples*, WORLD INTELLECTUAL PROPERTY ORGANISATION (19-30 July 1993), https://www.wipo.int/export/sites/www/tk/en/databases/creative_heritage/docs/mataatua.pdf (*hereinafter* “**Mataatua Declaration**”).

state and national level to manage traditional knowledge resources¹²³ and to make an attempt to actively involve the consent of the custodians of the traditional knowledge in the use of their resources.¹²⁴ It has also created a National Authority and State Authority vested with the power of civil courts to settle disputes regarding the communities as custodians of traditional knowledge.¹²⁵ The Bill also talks about the establishment of Traditional Knowledge Docketing System (TKDS) along with the TKDL that would contain the details of the registered communities with their respective traditional knowledge.¹²⁶ Although the Traditional Knowledge Bill, 2016 paves way for the protection of TCEs as well but there are still some lacunae left in the Bill which are required to be addressed by the Government in any future legislation in order to be effective, which are as follows;

- a) *First*, the Bill should be taken to be a *sui generis* scheme within the scope of IPR. The statement of objects and reasons of the Bill specifies that they do not consider this Bill as a school of IPR. However, the authors are of the opinion that TK/TCEs are well within the scope of IPR as Intellectual Property refers to creations of the mind, “*such as inventions; literary and artistic works; designs; and symbols, names and images used in commerce*”.¹²⁷

¹²³ The Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 of 2016 (Kenya), § 2, cl. xii and xiii.

¹²⁴ *Id.* § 4, cl. 4, § 35 and § 37, cl. 3 and cl. 6.

¹²⁵ See Mataatua Declaration, *supra* note 122, § 23, cl. 1 and § 34, cl. 44.

¹²⁶ *Id.* § 2, cl. xiii.

¹²⁷ *What is intellectual property?*, WORLD INTELLECTUAL PROPERTY ORGANISATION, <https://www.wipo.int/about-ip/en/> (last visited July 14, 2020).

- b) *Second*, there is no distinction between TK and TCEs and the latter is left to be construed within the meaning of the former. The law exploring TCEs should be expanded and addressed holistically under a different chapter which focuses on preservation through innovative approach in the evolution of TCEs.¹²⁸
- c) *Third*, the Bill does not mention the need for compensating the communities who have suffered cultural misappropriation while their cultural expressions are feeding the greed of capitalists. Basole¹²⁹ has highlighted that in the case of handicrafts, similar to the case of Banarasi sarees, the traditional methods can only be reinforced and power looms are excluded when the TCEs are used to safeguard the livelihood of the craftsmen and weavers.¹³⁰
- d) *Last*, the legal regime should be a voluntary code wherein the Government should not be made a custodian of the TK/TCEs and it should be left on the discretion of the communities to register their TK/TCEs. The Government should also ensure that the registration process is not a cumbersome task for the communities. This will ensure the fluidity of these traditional forms where the communities have the power to determine the status (public/private) of their TK/TCEs. Moreover, the Government should specifically delineate authorities each for the promotion, preservation and protection of TK/TCEs.

¹²⁸ Surinder Kaur Verma, *Protecting Traditional Knowledge: Is a Sui Generis System an Answer*, 7 J. WORLD INTELL. PROP. 765, 800 (2004).

¹²⁹ Feist Publications, Inc. v. Rural Telephone Service, 499 U.S. 340 (1991).

¹³⁰ Das, *supra* note 25.

For any legislation to be effective, it must have a viable enforcement mechanism. In India, considering the socio-economic background of indigenous communities, the Government must ensure that the legislation is implemented as it is laid down. Hence, there should be a monitoring system to closely observe the effectiveness and implementation of the proposed *sui generis* legislation. There should be a sensitization scheme in place which makes the communities aware of the rights they possess concerning TCEs. This sensitization must include workshops, which help them in preserving, promoting as well as marketing the TCEs in the right manner if it is agreeable to the whole of the community. Besides taking into account these suggestions, the legislature also needs to actively involve the representatives of the indigenous communities in the process of formulation of the policy, as this would ultimately affect the culture and customs of the indigenous people. Presently, a necessary political will is required to take into account, the deteriorating state of the cultural expressions of the indigenous lives in India. A *sui generis* legislation on TCEs is the need of the hour to ensure the preservation, protection and promotion of the cultural and traditional assets of these indigenous communities.