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Protection of Traditional Cultural Expressions in India



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Contents

Introduction: Context, Rationale and Scope	1
Context	1
Rationale.....	2
Objectives and Scope	3
Research Methodology	4
Literature Survey	4
National Policy, Regulations and Institutions.....	5
Constitution of India.....	5
IP Legislations	6
Institutional Frameworks	7
Multilateral Treaties and Institutions	8
National Experiences of Select Countries	9
Issues for Further Exploration	10
Conclusion	11

List of Abbreviations

AIISI	:	American Institute for Indian Studies in India
FITM	:	Forum on Indian Traditional Medicine
GI	:	Geographical Indications
GR	:	Genetic Resources
IGC	:	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IGNCA	:	Indira Gandhi National Centre for Arts
IK	:	Indigenous Knowledge
INTACH	:	Indian National Trust for Art and Cultural Heritage
IP	:	Intellectual Property
IPR	:	Intellectual Property Rights
NFSC	:	National Folklore Support Centre
NGO	:	Non Governmental Organisation
NIPR	:	National Intellectual Property Rights Policy
NMM	:	National Mission for Manuscripts
OAPI	:	African Intellectual Property Organization
PIC	:	Prior Informed Consent
TCE	:	Traditional Cultural Expressions
TK	:	Traditional Knowledge
TKDL	:	Traditional Knowledge Digital Library
TM	:	Trade Mark
TRIPS	:	Trade Related aspects of Intellectual Property Rights
UNDRIP	:	United Nations Declaration on the Rights of Indigenous Peoples
UNO	:	United National Organization
WIPO	:	World Intellectual Property Organisation
WPPT	:	WIPO Performances and Phonogram Treaty

SCOPING PAPER

Protection of Traditional Cultural Expressions in India

This series of Scoping Papers presents a brief outline of the major components of studies that the FITM undertakes.

This Paper maps the various aspects of the study on Traditional Cultural Expressions (TCEs) such as the existing legal instruments available in India, initiatives taken by civil society and NGOs, international and intergovernmental treaties on TCEs, and legal provisions in other countries to protect TCEs and India's stance on this subject at the World Intellectual Property Organisation (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) since its inception.

The detailed follow-up study would enable identifying issues and challenges faced by TCEs that India must address domestically and during the deliberations at the WIPO IGC. It would also help generate information which would provide inputs for designing policy interventions to address identified issues.

Introduction: Context, Rationale and Scope

Context

Knowledge, culture and biological resources in traditional societies are closely linked and form a triumvirate of their heritage. They provide an identity to the society. Protection of the same from misappropriation and misuse is, therefore, a part of the preservation of the distinctiveness of the community identity. Separating the three from one another is not an easy task. When issues of misappropriation of traditional knowledge, mostly traditional medicinal

and agricultural knowledge, of the developing countries by the corporate sector in the industrialised countries came into focus in the 1990s, they generated much passionate debate essentially because they were perceived as stealing the cultural patrimony of peoples of the South, tantamounting to robbing of their identity. The concerns expressed by the aggrieved parties at the international fora led to intense discussions in and formation of an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) by the World Intellectual Property Organisation (WIPO) in the year 2000.¹

The IGC is intended to discuss intellectual property (IP) issues that arise in the context of access to genetic resources and benefit-sharing, and also for the protection of traditional knowledge and traditional cultural expressions.² The objective of the IGC is to hold formal negotiations with the aim of reaching an agreement on one or more international legal instruments, which would secure effective protection of genetic resources (GR), traditional knowledge (TK) and traditional cultural expressions (TCEs), which can be a set of recommendations to the Member-States or can be one or more formal treaties like the Berne Convention for the Protection of Literary and Artistic Works, 1886. The current discussions in the IGC on TK and TCE are based on separate draft negotiating texts.

India has been an active participant in the deliberations of the IGC, as it is a country with rich heritage of TK and TCEs and is also home to wide and varied biological resources. However, these negotiations require detailed background material for the negotiators on the existing legal protection mechanisms for TK, TCEs and GR that would bring in to fore the needed clarity on the pros and cons of India's initiatives for protection of the related sectors and for any further initiatives or legal measures that may be required in the context of domestic and international compulsions. This would serve to strengthen India's TK, TCEs and associated sectors on the one hand and, on the other hand, would provide policy outcomes.

Since the negotiations in the IGC are, at present, focussed separately on TK, TCE and GR, the study is also being carried out separately for each of the three areas. This Scoping Paper sets out the dimensions and issues related to study on the TCEs.

Rationale

TCEs are closely associated with TK and, in a way, form part of it in a manner in which they cannot be separated. The deliberations that formed the foundation of WIPO IGC admitted that the TK, folklore and GR are closely knitted together, and each cannot be addressed effectively in absence of the others.³

For example, many cultural rituals are associated with certain traditional medicine practices. They also have social, and economic values. The indigenous communities consider them as essential part of their culture and lifestyle. India's tribal and non-tribal communities are extremely rich source of cultural expressions and folklore, contributing to India's distinct cultural identity in the form of crafts, languages, rituals, health practices, customs, handicrafts, textiles, songs, hymns, religious practices, art, architectural designs, recipes, etc.

The National Intellectual Property Rights Policy (NIPR), 2016⁴ has given considerable importance to culture. It envisions an India where IP would promote advancement in arts, culture and TK, *inter alia*, while protecting public interest. The Objective 1 of the Policy necessitates reaching out to 'less- visible' IP creators and holders living in remote and rural India. It also talks about documenting oral traditional knowledge while preserving integrity of the knowledge without compromising traditions of the communities; and envisages promotion of the rich heritage of India in partnership with and with the participation of the custodians of such knowledge by giving them incentives and supporting their efforts to promote it further. This would need continued active engagement at international fora for creation of legally binding international instruments on TCEs.

Globalisation and technological developments have always had an impact on TCEs. Internet and digitalisation have either allowed TCEs to further root themselves deeply into the society or have drawn them away from their rightful owners.⁵ These developments have also led to an easy access to TCEs beyond their places of origin, thus giving opportunities of commercialisation even to those who are not their rightful custodians. Such trans-boundary misappropriations compromise and threaten economic interests of the rightful custodians of TCEs, who are mostly indigenous people and communities relying heavily on them, since time immemorial, as a source of their livelihood. In such conditions, national legislations are not sufficient; and a binding

international legal instrument would provide a stronger recourse. In this context, relevance of WIPO Intergovernmental Committee (IGC) for protection of TCEs cannot be underscored.

India has been championing the cause of TCE owners and holders by demanding IP protection for them to ensure that their economic and moral rights are not violated. In 2001, India's permanent mission to United Nations Organisation (UNO) on behalf of Asian group and China submitted a position paper supporting IGC work, acknowledging inter-relationships among TK, TCE and GR. In the context of TCEs, the paper suggested conducting national level consultations on legal systems; creation of national focal points to protect TCEs; exploration of exiting Intellectual Property Rights (IPRs) such as copyrights, design rights, trademarks, Geographical Indications (GIs) of Goods and so on by the WIPO to protect intangible property rights; explore new laws for those which cannot be protected under existing ones; and studying exploitation of intangible cultural expressions in light of new technological environment.⁶ At present, IGC is performing the critical work of developing a binding international legal instrument for protection of TCEs. There is consensus among most of stakeholders that until and unless a mutually agreed, well-defined and strict legislative structure is arrived at by the Member-States, the countries would have to rely on the national provisions to protect TCEs.

TCEs have a fragile nature, especially oral traditions, and face constant risks of being lost⁷ and misappropriated. This not only directly threatens the rich cultural heritage but also robs the rights of those who have nurtured, protected and carried them for centuries. Legal protection measures are, therefore, necessary before irreparable harm is done to the cultural heritage.

Thus, in light of incorporation of TK in NIPR, 2016, continued misappropriation and misuse of TCEs, technological changes and globalisation, which led to trans-boundary issues, and contemporary debates at the WIPO IGC accepting the interrelation among TK, TCEs and GR and India attaching utmost importance

to the work of IGC to create a dynamic framework to protect TCEs,⁸ it becomes pertinent to undertake a study of issues on protection of TCEs.

Objectives and Scope

The broad objectives of the Study would be:

- to examine the adequacy of legal provisions presently available for protecting TCEs in India, including in the digital world;
- to assess their adequacy to prevent misappropriation;
- to examine underlying relationship and any overlap between different legislations;
- to propose changes required in the existing domestic laws, if any;
- to propose broad areas of new laws and regulations, if any, required;
- to suggest policy measures, including legal instruments and guidelines;
- to analyze proposals on TCEs before the IGC from India's national interest; and
- to suggest possible negotiating positions and alternatives for consideration of the Indian delegation.

In order to achieve the objectives stated above and in the light of the background, the scope of the study is proposed as below:

- All existing Indian legislations, both Central and State, which have direct or indirect provisions relating to protection of TCEs.
- All existing Indian Rules and Regulations which have direct or indirect bearing on protection of TCEs.
- World Intellectual Property Organisation Intergovernmental Committee (WIPO IGC) documents, particularly the following:
 - » WIPO Questionnaire on TK and India's responses⁹
 - » The Protection of TCE : Draft Articles (IGC, latest Session)
- An overview of legal provisions in select countries like Brazil, China, Ecuador, Mexico, Peru, South Africa and Thailand, regarding TK, GR and TCEs.

The scope of this study would not address those aspects of cultural expressions which may not fall in the parlance of IP laws, such as preservation, safeguarding and promotion of cultural heritage, which go beyond IP protection. The study is more in the realm of intangible cultural property than tangible cultural objects and artefacts.

The benefits of the study would be as follows:

- Assessment of the adequacy of current legal provisions;
- Identification of areas of current legislative framework, which may require change;
- Propose broad areas of new laws, rules and regulations, if required;
- Identify issues which are of importance to India and need urgent attention and discussion at the WIPO-IGC forum; and
- Suggest policy measures and guidelines to protect TCEs.

This Scoping Paper, one of the deliverables under the larger “In-depth Study on Protection of Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions under the FITM,” analyzes the following:

- The existing legal instruments available in India;
- Various initiatives taken by the state, civil society and non-government organisations (NGOs) to protect TCEs;
- Various international and intergovernmental treaties and conventions on TCEs and folklore, especially one where India has been actively engaged in deliberations with a particular focus on the WIPO IGC deliberations.

It presents an overview of legal provisions of Brazil, China, Ecuador, Mexico Peru, South Africa and Thailand pertaining to TCE protection.

Research Methodology

The study would be based mostly on the literature survey and analysis of primary source material, namely, negotiations before IGC, minutes of the IGC meetings, Fact-Finding Mission reports of the WIPO,

the legal texts and governmental instructions, judicial pronouncements, international agreements and treaties, documents of international organisations. Secondary sources of reference would include published research work in the form of books, monographs, articles and papers including conference papers, discussion papers and policy briefs. Given the wide scope of this study, it is proposed to organise national consultations, conduct interviews and interact with policy-makers, including Ministry of Culture, domain-experts and stakeholders in the course of the study.

Literature Survey

The available Indian IPR legislations are a good source of information on legal provisions available for protecting TCEs. The online documents, reports, studies by WIPO-IGC and UNESCO give a good analysis and understanding of the steps initiated to safeguard them. They also provide an insight on the old and new issues that impact TCEs and folklore. However, literature on contemporary problems faced in protecting TCEs and folklore in India and by Indian indigenous people and community is insufficient.

WIPO-IGC has undertaken some important studies in the context of TCEs and folklore. In 2001, WIPO circulated a ‘*Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore*’ to elicit legal and practical information from Member-States on their experience in implementation of Model Provisions.¹⁰ In 2003, WIPO published ‘*Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*’ by Terri Janke; providing information based on case studies where the existing IP laws were used to protect TCEs and folklore.¹¹ Though limited mostly to the cases of aboriginals of Australia, there are valuable lessons for countries like India to draw from this study. A 2003 background paper on ‘*Consolidated Analyses of the Legal protection of Traditional Cultural Expressions/ Expressions of Folklore*’ provides a detailed analysis of the issues that arise in context of IP protection of TCEs and folklore.¹² But it has its limitations as the comparative analysis is between the three international instruments, *Tunis Model Law on Copyright* (1976),

UNESCO-WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1985), and *Bangui Agreement of OAPI* (as amended in 1999), and three national instruments, *Indian Arts and Crafts Act of 1990* and *Indian Arts and Crafts Enforcement Act of 2000* of USA, *Panama Law No. 20 (2000)* and *Executive Decree No. 12 (2001)*. and *south Pacific Model Law for National Laws (2002)*. IGC has identified ten key issues on protection of TCEs and folklore based on which it prepared a “Gap Analysis” report, identifying gaps existing at the international level with respect to the protection of TCEs. It also carried out a ‘Consolidated Analysis’, a review of the available IP and *sue-generis* systems or laws for protection framework for TCEs.¹³

A study was undertaken by V. Valsala G. Kutty for the WIPO, on ‘*National Experiences with The Protections of Expression of Folklore/ Traditional Cultural Expressions for India, Indonesia and the Philippines*’ in 2002 to assess the experience of these countries in context of the TCEs to identify problems and suggest solutions. However, no other similar or an India focused study has been taken up again. India in partnership with the WIPO can take up projects like the Creative Heritage Project on the Welfare of the Maasai Community,¹⁴ (2011), particularly on the tribal culture to look more deeply into the subject of protection of Indian TCEs and folklore, which could contribute to the documentation, preservation, conservation, management and an understanding of the peculiar challenges that the tribal cultural heritages may be facing in the country.

In 2010, *Intellectual Property & the Safeguard of Traditional Culture* was published, which analysed legal questions pertaining to protection of TCEs and folklore while giving examples of good practices.¹⁵ A practical guide was published in 2013 on *Intellectual Property and Folk, Arts and Cultural Festivals* with the objective of providing effective IP management for owners of cultural expressions.¹⁶ In 2013, WIPO also published *Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions/*

Folklore: A Guide for Countries in Transition, a guide on how to put legal framework in place¹⁷. During 34th IGC in 2017, *Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities* was published, explaining and giving examples how IP can be a strong tool for empowerment of indigenous communities¹⁸.

There has been a recent study on *Protection of Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2017)*, based on the background documents and the deliberations in the WIPO IGC. It is the first and so far the only comprehensive overview of the IGC’s work and includes contributions from scholars, policy makers, industry representatives, civil society groups and indigenous peoples’ representatives. However, the Indian perspective does not go into details of the particular issues of TCEs from Indian point of view.

A major limitation of the available literature is that there is very little Indian focus in these studies, papers and books, except in the one by Kutty. There is also no policy suggestions from an Indian perspective. Further, the studies have not paid attention to the cultural aspects of Traditional Medicine.

National Policy, Regulations and Institutions

India does not have in place a separate legislation for protection of TCEs. The existing laws governing TCEs directly or indirectly are explained in the following section.

Constitution of India

Article 21 of the Constitution of India provides for the Fundamental Right to life and personal liberty. A liberal interpretation of the article can provide protection to TCE owners. The Constitution of India in Article 29 (1)¹⁹ identifies protection of cultural rights of minorities as a Fundamental Right. However, only the communities falling within the ambit of minorities protected under the section can safeguard their rights, thus leaving out of the scope the protection of smaller communities relatively more vulnerable to the threat of

exploitation than the prominent communities. Article 51A (f)²⁰ puts the onus of preservation, respecting and safeguarding the rich heritage of the Indian culture on every citizen of India as their fundamental duty. The TCEs and folklore constitute heritage as well as culture.

IP Legislations

The Copyright Act, 1957 does not anywhere directly mention about the protection of TCEs. However, the interpretation of definitions of artistic work, dramatic work, engravings, Indian work, literary work, musical work, performance, and performers, as defined in the Act, would include works which fall within the ambit of TCEs. Various sections of the Copyright Act such as Section 31A,²¹ on compulsory licence provides for copyright of unpublished or published work and of unknown authors; Section 38 recognizes performer's rights; Section 57²² provides for author's special rights also called *moral rights* as per which the author has a right to claim authorship, restrain or claim damages in case of distortion, mutation, modification or any such act which is prejudicial to his honour or reputation, and can be interpreted to extend safeguards to the interests of TCE owner.

The existing Copyright Act may be useful in protecting contemporary TCEs. However, the pre-existing TCE works, which at present form part of the public domain as per the copyright law, are open for use by anyone, giving rise to a conflict of interest between the rightful owners and the users. Further, TCEs fit uncomfortably into the copyright protection scheme because of their conflicting characteristics such as their nature and centuries old ownership by the community. 'Originality' and 'individuality' are two principles of copyright laws which do not conform to TCE works (Fiscor, 1996). The Act emphasizes on 'authorship', which is primarily missing in case of traditional communities. Also, protection provided under copyright is for a limited time span. TCEs by the very nature of their existence have been there for centuries and cannot be allowed to lapse into public domain, after a limited period, unlike the case with copyright.

To comply with Article 22²³ of Agreement on Trade Related aspects of Intellectual Property Rights (TRIPS), India enacted the Geographical Indications of Goods (Registration and Protection) Act in 1999. Unlike other IPRs, the GI is a community right; as a result traditional communities often rely on GIs to safeguard certain of their rights associated with their goods which have some quality or reputation or other characteristics linked to the geographical area in which they are produced. Products like Chanderi saree, Pochampalli ikat or Madhubani painting represent cultural expressions of the communities who are engaged in their manufacturing. The Indian Act specifically provides for extending Geographical Indications Goods protection to handicrafts and handlooms which are inherent part of Indian culture, apart from food items like Bengali rasgulla. The authorized GI mark on the good helps create a brand image for the traditional good which embodies age-old culture.

Many TCE owners rely most on the GI Act to protect products of their labour, particularly in case of handlooms and handicrafts. According to some experts, GI is a law against unfair trade practices protecting interest of consumers, rather than economic interest of traditional handicraft artisans against counterfeit (Correa, 2001). Similar is the case with Trade Marks, which also give rise to conflict between monopoly and collective rights of TCEs. GI and TM laws are more helpful in protecting interests and concerns of the owner of TCEs against counterfeits, but not against misappropriation and unauthorized use.

A Trade Mark (TM) is a mark capable of distinguishing the goods and services of one person from others. TM also enables the consumer to identify the source of the goods or the services. Registered trademarks of traditional goods and services can be protected Under Section 29 of the TM Act against any infringement and for non-registered goods and services; the common law provision of passing off is available. Collective marks can be used to create a brand image for traditional goods and service such as paintings, handlooms, weaves, etc. Certification Marks

can be used to protect traditional goods, which have cultural significance.

While India has a rich heritage of TCEs, but, unlike Australia, Panama and Philippines, which have *sui generis* laws, India relies on other laws to protect the same. Even, United States of America has separate legislation for the cultural preservation of the indigenous communities, referred to above. However, at IGC, India has always championed the cause of *sui generis* laws for protection of TCEs.²⁴

Institutional Frameworks

TCEs and folklore have anchored themselves into the digital realm *via* digitalisation, online libraries and depositories. These digitalisation efforts have been made to preserve languages; and to promote open access and make information accessible online for preserving and augmenting cross cultural exchanges; for creation of databases by indigenous communities for preserving their knowledge and to fight bio piracy by outsiders.²⁵ Although the initiatives to create online libraries and digitalized databases of TCEs have witnessed a rise, yet they lack the attention and the emphasis given to other TK databases, such as the Traditional Knowledge Digital Library (TKDL), in government policies and initiatives.

Civil societies and NGOs have made some commendable contributions towards digitisation efforts for protection of TCEs in India. Some of them are mentioned briefly in the following.

The Indian National Trust for Art and Cultural Heritage (INTACH), a non-governmental organisation, set up in 1984, spearheads awareness and protection of tangible and intangible heritage of India with the aim of developing policies and regulations, and making legal interventions to protect India's heritage when necessary.²⁶ Having a stakeholder-driven structure where local volunteers directly interact with the people and communities owning the TCEs, the Intangible Cultural Heritage department at the INTACH documents and initiates programmes to safeguard cultural expressions.²⁷

The National Folklore Support Centre (NFSC) has been involved in documentation and creation of archives of tangible and intangible TCEs with the help of the communities. An important initiative of NFSC is the creation of fellowships to fill gaps in the study and research available for folklore and TCEs.

The Archives and Research Centre for Ethnomusicology at American Institute for Indian Studies in India (AIISI) has made efforts to safeguard the rights of performers by limiting the rights of the depositors of field recording and by contacting the performers of the deposited recordings to explain their rights.²⁸

The Government of India has taken a number of initiatives and come out with policies to protect TCE and interests of TCE holders. It has launched a *National Mission on Cultural Mapping of India*, which aims to converting cultural canvas of India into an objective cultural- map and designing a mechanism to fulfil aspirations of the whole artist community of the nation and preserve rich cultural heritage of India in the form of a repository of artists and art forms.²⁹ It would open direct channels of communication between the government and the artists.

The National Mission for Manuscripts (NMM), established in 2003 by the Ministry of Tourism and Culture, documents, preserves and digitalizes the vast wealth of manuscripts of India. These manuscripts have a wide range of themes, textures, aesthetics, scripts, languages, calligraphies, illuminations and illustrations.³⁰ In 2008, NMM had submitted a legal and policy framework for promoting equitable access to documentary heritage to the UNESCO. Manuscript Resource Centres have documented 31,23,000 manuscripts, and a total of 1,85,88,390 pages have been digitalized by the end of 2014.³¹

A major initiative of the government in protecting TCEs has been the establishment of the Indira Gandhi National Centre for Arts (IGNCA). This Centre, under the UNESCO Programme on Cultural Industries and Copyright Policies and Partnership, came out with a Report on Cultural Mapping of India. It is a handbook containing data on viable cultural industries needing

protection. One of the recommendations emphasizes importance of IP protection for community-based designs, patterns, meanings and shapes to preserve originality of the product and for ensuring recognition and compensation for TCE owners.³² Another initiative by the IGNCA is to digitally document expressions of traditional culture and folklore such as manuscripts, books, audio, video, art, etc. It includes projects like the National Databank on India Art and Culture; Kalasampada, a digital library resource for Indian cultural heritage project; and Cultural Informatics established with the UNDP assistance. The documented material for which copyright is available can be accessed on internet, and that with no protection can also be accessed on the intranet of the project.

Multilateral Treaties and Institutions

Although the demand for protection of the TCEs was first made in 1960's (Bannerman and Morin, 2015), it was developing countries who took initiative to get legal protection for TCEs. The Bangui Agreement of 2 March 1977, through which the African Intellectual Property Organisation (OAPI) was established, declared cultural expressions such as folklore as the cultural heritage of the nation.

The Berne Convention for the Protection of Literary and Artistic Works, 1886 was amended in 1967 in the Stockholm Conference to introduce Article 15.4.³³ in response to the demand of protection for folklore by many countries, including India. The Article states that “unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union,” thus creating a legal framework to provide copyright protection to unpublished traditional knowledge, where eligible.

The Tunis Model Law on Copyright for Developing Countries, 1976 enacted jointly by the WIPO and UNESCO, clearly states that the works of folklore are subject matters of copyright laws. According to the model law, Member-States are required to set up a competent authority to represent the author of the protected subject matter to protect his economic and moral rights.³⁴ India is one of the first countries to

setup a competent authority in communication with the WIPO.³⁵ However, the Tunis Model has been criticized for leading to national legislations, which are not coherent.³⁶

The UNESCO-WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, adopted by the WIPO and UNESCO in 1982 were an attempt to provide Member-States with a ‘model law’ that they could adopt to safeguard the TCEs and folklore. The provisions include definition of subject matter, role and duty of the competent authority, exceptions, etc. An attempt was made to transform these model provisions into a binding international treaty; however, it was not successful as many countries raised issues such as clash between national definition and the scope of international treaty and conflict arising out of trans-boundary spread of the TCEs, which could not be resolved under the model laws.

The WIPO Performances and Phonograms Treaty (WPPT), 1996 deals with the rights of performers and producers of phonograms. Article 2 of the treaty provides for protection of performances of “expressions of folklore”. India has yet not acceded to the treaty.

The UNESCO/WIPO World Forum on Protection of Folklore, 1997.³⁷ viewed existing copyright law provisions to be inadequate for protection of folklore. It recommended a plan of action for conducting regional consultations for paving a way for a *sui generis* law.

WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), was established in 2000. This was to discuss IP-related issues pertaining to TK, TCEs and GR and to reach a consensus on the international norms which can be adopted by all Member-States and also, act as a forum for cases of alleged misappropriation. The scope of the IGC negotiations includes definition of TCEs, deciding on the beneficiaries, term of protection to be granted and limitation of the rights. The IGC has, over the time, been updating Model Provisions;

actively engaging indigenous people in the discussion process to design multilateral treaty to safeguard TCEs, as recommended by UNDRIP; working on the preparation of a *sui generis* model law; and examining existing regulatory framework and customary laws. By 2010 the expression “traditional cultural expressions” (TCEs) was coined to replace “expression of folklore”, and IGC started undertaking text-based negotiations to reach consensus on an international legal instrument for effective protection of TCEs.³⁸

In March 2017, during the 33rd session, the IGC renewed deliberations on the draft text to safeguard TCEs after a gap of three years. India has been an active participant in the IGC, voicing the need for a legally binding flexible instrument for protection of the TCEs. The 34th IGC developed the next draft for legal instrument to protect TCEs. It focused on the core issues of policy, subject matter, beneficiaries, scope of protection, exceptions and definition of misappropriation.³⁹ The session also identified issues to be resolved in the next session.⁴⁰ But, despite the 2009 start towards drafting of binding legal provisions on protection of TCEs, the gap among the countries, civil society and the stakeholders has not narrowed much as there remains contention over issues such as definition of TCEs and folklore, scope of the rights and remedies available to those whose rights have been infringed.

IGC represents a platform where India can intervene on behalf of its vulnerable TCE owners and custodians to safeguard their basic human rights, right to culture, property and religion. India is an exporter of both its tangible and its intangible cultural properties. The draft articles being designed by the WIPO-IGC have a direct bearing on the Indian TCE owners, especially in the light of the technological developments, which have taken the problems of free riding, misappropriation and misrepresentation beyond borders. Thus, India should use WIPO-IGC as a platform to achieve its objective of stronger legal regime, be it IPR laws or *sui generis* laws, to protect the interest of the TCE owners and maintain a balance between the interests of the owners and the public in the ever-changing globalized world. India can utilize IGC platform to demand for PIC and access to benefit-

sharing provision for the TCE owners; emphasize on a holistic TCE definition; bring attention to customary laws; and *via* IGC attempt to resolve trans-boundary issues, which may arise by using mechanisms like dispute resolution. The WIPO- IGC has often been criticised for maintaining a *status quo* which tips the balance of power in favour of the developed countries by maintaining minimum IP standards (Drahos, 2004; Helfer, 2009). Here, India can be the voice of developing countries.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007, although not legally binding, was adopted in light of the dynamic nature of the international legal provisions and their impacts on TK and right of indigenous people attached to it. Article 11.⁴¹ of the declaration states that the indigenous people have the “right to maintain, protect and develop the past, present and future manifestations of their cultures” and can ask for provisions of redress and restitution to protect their property when taken without a prior informed consent (PIC). Article 31(1).⁴² explicitly states the right of indigenous people to “maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.” The declaration also advocates for inclusion of the indigenous people in the policy-making process, initiated by the state.

The Beijing Treaty on Audiovisual Performances.⁴³ 2012 was adopted, keeping in tandem with the digital era, to deal with IP rights of performers in the audiovisual performances. The provisions of this treaty compliment with WPPT. Article 2.⁴⁴ of the treaty, while defining performers, includes in its ambit actors and performers of the TCEs. Both WPPT and Beijing Treaty provide the same level of economic and moral rights to the performer of expression of folklore as the other performers.⁴⁵ India has not yet acceded to the treaty.

National Experiences of Select Countries

In Brazil protection of TCEs falls within the ambit of the copyright laws. Although, the Act does not mention TCEs or folklore anywhere, it was amended to comply

with Article 15.4 of the Berne Convention to recognize the rights of unknown authors and artists. The subject matter of the TCEs was covered under the Article 5 of Law No. 9.610 of February 19, 1998 on Copyright and Neighbouring Rights.⁴⁶

China does not have in place a separate law to protect TCEs. It relies on the Copyright Law to protect TCEs and derivative works. During the 34th IGC session, China informed that provisional regulations on copyright protection of folk literary and artistic work have been drafted, and would be implemented soon.

In Ecuador, TCEs are governed by the Intellectual Property Law (Consolidation No. 2006-13) law.⁴⁷ Article 7 covers subject matter and clearly defines expressions of folklore. The scope of protection covered in Article 9 states that economic and moral rights apply to creations and adaptations of expression on folklore.

The TCEs are protected under the Federal Law on Copyright in Mexico. Article 116 protects performer rights of anyone, who performs an expression of folklore, and Article 157 protects literary, artistic works, which are a manifestation of the original work forming part of the Mexican culture and heritage, including the ones where the author is not known. Article 158 and Article 160 clearly demarcate the scope of protection to include and protect cultural expressions, which have eternalized themselves in the roots of Mexico, against any prejudice. The Act also provides for public access to TCEs.⁴⁸

In Peru, the Copyright Law (Legislative Decree No. 822 of April 23, 1996).⁴⁹ protects TCEs. Sections 2, 5, and 6 provide protection to both original and derivative works of TCEs and Section 57 sets the scope of protection. After the expiration of the term of protection, these works fall into public domain.

The South African legislature amended the Copyright Act, 1978, Performers' Protection Amendment Act, 2002, and Trade Marks Act, 1993 in 2013⁵⁰ to ensure that effective provisions are in place to protect Indigenous Knowledge (IK). These amendments have provided for recognition and

protection to performances of traditional works; establishment of National Council for indigenous people under the copyright law provisions; creation of National Database for recording indigenous knowledge and works; recognition of indigenous terms and expressions as Trade Marks; and creation on National Trust and Fund for indigenous knowledge.⁵¹

South Africa in 2015 has also tabled a Traditional Knowledge Bill, which provides for a *sui generis* intellectual property approach for protection of different aspects of TK. In the bill, definition of TCEs includes language, music or different forms of expressions, which have become inherent part of the traditional and the indigenous community. The Intellectual Property Policy of the Republic of South Africa Phase I (2018) recognizes the creation of a system for protection for traditional knowledge which will guard against misappropriation and exploitation as a key reform.

The TCEs in Thailand are protected by IPR laws. However, according to the Department of Intellectual Property, a *sui generis* law bill to protect TCE's can be tabled.⁵²

Issues for Further Exploration

This section reflects on the perennial and new issues which would impact TCEs and their protection.

There is an ongoing debate that the exclusive rights given by IP laws are not sufficient to protect forms, expressions and representation of traditional culture, which have collective and, in some instances, individual features. Often the features of TCEs do not fit into the definition of various IP forms, thus raising doubts about the adequacy of IP laws to safeguard TCEs.

Some indigenous communities do not consider IP measures to be sufficient or appropriate for protecting TCEs. There is an absence of consideration of local customary laws, which have governed these age old trans-generational heritages for aeons. India provides for Prior Informed Consent (PIC) for genetic resources, however, no such provision is available for the TCEs.

Same TCEs may appear concurrently in more than one country because of geographical proximity and cultural exchanges which gives rise to trans-boundary issues among neighbouring countries. With internet and easy access, these trans-boundary issues go beyond borders and are thus bound to bring up new challenges to protect TCEs in the context of IP laws.

Technological improvement has ushered in an era of digitalisation, allowing for easy storage and preservation of TCEs and their protection from monopolistic exploitation.⁵³ However, digitalisation has also given scope for duplication and transmission of copies of various forms of TCEs, thus creating an environment where it is easy to exploit cultural heritage of the indigenous people with or without their approval.

There exists a constant conflict between the ideology of freedom of expression and public domain on the one hand and problem of free riding, privacy concerns and adequate representation of the knowledge holder on the other hand. New licensing models such as creative commons and internet protocols sensitive to the cultural issues are being offered by many service providers. Participation from the TCE holder in drafting inclusive terms and conditions for the use of traditional knowledge and TCEs can go a long way. On the other side, there is a glaring reality that most of the TCE holders do not have access to technologies like internet.

Traditional handicrafts, unlike paintings and music, have evolved due to human necessity. They also carry cultural heritage in the form of regional and traditional motifs.⁵⁴ According to the WIPO-IGC, as traditional handicrafts represent cultural and traditional values of the indigenous society, they need to be protected. The Indian traditional handicrafts are protected under the GI Act, 1999. Sixty-one per cent of the GIs registered in India during the period up to March 2018, were handicrafts.⁵⁵ The GI Act helps in securing community rights for a collective heritage. The protection, however, has not led to any innovation from the members of these communities,⁵⁶ and has no provision for individual rights. New designs based on traditional cultural expressions may get protected

under the Copyright Act and the Design Act, as the case may be.

The Indian handicraft such as woven handlooms like banarasi, pashmina shawls, carpets, embroidery, textiles, etc. based on the tradition and folklore are export revenue generator.⁵⁷ However, this sector is marred by problems of counterfeit and misrepresentation and circulation of copies of these products in the national and international markets, thus putting at risk the economic security and also the moral rights of the indigenous people to whom they belong.

Most Traditional Medicines form part of the Traditional Knowledge. However, many a time they also form part of the cultural heritage of people. For example, 'Yoga' is closely associated with Indian culture, so is the case with Ayurveda. One cannot think of Chinese culture devoid of Traditional Chinese Medicine. Limiting them to the ambit of TK only, therefore, may not be desirable. It may be necessary to consider what aspects of such medicine systems would be required to be included within the scope of the TCE.

The TCE definition has been a topic of debate. Even after years of discussion, there is a lack of consensus, and the gap, as analyzed by the WIPO, refuses to narrow. The WIPO Gap Analyses identifies this as one of the most fundamental challenges in context of protection of TCEs.⁵⁸ According to the analysis, there is no commonly acceptable definition as it differs from country to country, region to region or from one international instrument to another. The conflict is over the narrowness or broadness of the definition for TCEs. The problem arises because the stakeholders, the indigenous communities often do not agree with them.⁵⁹ Also, the developing countries and the developed countries have failed to reach a consensus since both view TCEs from different perspectives.

Conclusion

On the basis of the analysis of Indian legislations relating to TCEs, the legal provisions in Brazil, China, Chile, Mexico Peru, Thailand, and South Africa, developments at the international fora, such as WIPO-

IGC, and the issues that impact protection of TCEs, this scoping study leads to following conclusion.

- India does not have a *sui generis* law to protect TCEs and folklore and relies on existing IP laws for protection of the same. This sole dependence on IP laws has been criticised because of inherent conflicts between the nature of the IP and traditional cultural expressions. There are no provisions like Prior Informed Consent, as is provided in Biodiversity Act 2002 for accessing biological resources, in the case of use of TCEs.
- The countries mandated to be covered under the study rely directly or indirectly on IP laws to protect their TCEs and expressions of folklore. However, Ecuador, Mexico, and Peru have taken steps to provide unambiguous protection by including the terms such as TCEs, folklore, indigenous knowledge, etc. in their respective legislations. South Africa and Thailand have even tabled bills to provide for *sui generis* laws for protection of TCEs.
- There is a lack of literature and research on TCEs at the national level.
- NGOs and civil societies have made some laudable efforts toward digitalisation of TCEs, creation of libraries and databases. However, there are concerns with respect to copyright generated and associated with these digital formats as the IPR policies of these bodies are either completely absent or lack clarity.
- Internet and other forms of technological developments can have a significant impact on TCEs and their custodians
- There is an absence of consideration of customary laws governing TCEs which have given rise to questions that in addition to the customary laws in current legislative provisions, protecting TCEs would lead to more desirable results.⁶⁰
- There is no on-going effort to study from time to time the proposals regarding TCEs that are made before the WIPO-IGC and the negotiations that take place there and provide current inputs to the Indian delegations.

These issues need to be further examined and necessary policy responses developed to enable domestic law making and international negotiations, particularly in the WIPO-IGC. The study would also attempt to present review and critique of issues of TCEs raised at the IGC meetings from time-to-time, by the Indian delegation in the meetings. The study will also showcase Indian initiatives in the field. It can lead to setting of the global framework for emulation by other countries.

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- 1 Geographical indications are, for the purposes of this Agreement, indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.
- 2 In respect of geographical indications, Members shall provide the legal means for interested parties to prevent:
- (a) the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin in a manner which misleads the public as to the geographical origin of the good;
- (b) any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention (1967).
3. A Member shall, ex officio if its legislation so permits or at the request of an interested party, refuse or invalidate the registration of a trademark which contains or consists of a geographical indication with respect to goods not originating in the territory indicated, if use of the indication in the trademark for such goods in that Member is of such a nature as to mislead the public as to the true place of origin.
4. The protection under paragraphs 1, 2 and 3 shall be applicable against a geographical indication which, although literally true as to the territory, region or locality in which the goods originate, falsely represents to the public that the goods originate in another territory.
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About FITM

The Forum on Indian Traditional Medicine (FITM), set up by the Ministry of AYUSH at RIS, is a platform aimed at contributing towards creation of pro-active strategies for promotion of Indian systems of medicine.

Among others, it supports studies on the issues pertaining to traditional medicines in India and countries that India could emulate from.

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