

LEGISLATIVE MOVE TOWARDS  
PROTECTION OF TRADITIONAL  
KNOWLEDGE AND FOLKLORE:  
A GLOBAL PERSPECTIVE AND  
INDIAN FRAMEWORK

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*Abstract*—Traditional knowledge under intellectual property regime is usually protected in two way i.e. positive and defensive protection. Positive protection is the act of providing protection to traditional knowledge holders with right to take necessary action and seek remedies against misuse of knowledge base products. This paper provides a general outline and insight of the legislations and policies of the countries pertaining to intellectual property protection for traditional knowledge and folklore also appraises the applicability of the existing laws for artistic handicraft products, as their traditional creativity exists in various forms. In this order this paper suggest that how intellectual property laws may accommodate such creativity by adding more measures within the existing framework to protect traditional knowledge and folklore within the flexibility and diversity of the intellectual property system.

**Keywords:** Traditional Knowledge, Folklore, Intellectual Property, Protection.

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## I. INTRODUCTION

Traditional knowledge<sup>1</sup> (TK) is valuable for its creators or holders, and for the world community at large, that's why it needs to foster, preserve and protect. Now traditional knowledge has also started gaining recognition in international forums such as the World Trade Organization (WTO)<sup>2</sup> which is the only global international organization dealing with rules of trade between nations with objectives to help producers of goods and services, exporters and importers to conduct their business effortlessly. World Intellectual Property Organization (WIPO)<sup>3</sup> is a global forum for intellectual property services, policy, information and cooperation. Convention on Biological Diversity (CBD)<sup>4</sup> dedicated to promoting sustainable development, and the Food and Agriculture Organization (FAO)<sup>5</sup> of the United Nations constitute key regimes of international law to protect traditional knowledge in the areas directly relate to intellectual property law and policy.

This paper briefly outlines some important milestones that lead to the development of Intellectual Property and the protection of traditional knowledge and folklore of the developed and developing nations. The objective of the paper is to explore and analyze the efficacy of the existing legal framework for the protection of traditional knowledge and folklore and suggest some measures. The methodology for the completion of the paper has opted is pure doctrinal in nature in this order author has surveyed the material available in libraries and on the internet for the collection of information.

## II. INTERNATIONAL CONVENTIONS AND OTHER INITIATIVES FOR THE PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE

International legal protection for traditional knowledge and folklore has gained significant attention in recent years due to concerns about the misappropriation and exploitation of the cultural heritage of indigenous communities. That's why various international initiatives have been taken to address these issues and provide safeguards such as the Paris<sup>6</sup> and Berne Convention<sup>7</sup> which

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<sup>1</sup> Bernard O'Connor, Protecting Traditional Knowledge: An Overview of a Developing Area of Intellectual Property Law, 6 *Journal of World Intellectual Property*; 2005 pp. 677-698.

<sup>2</sup> Hereinafter mentioned as WTO.

<sup>3</sup> Hereinafter mentioned as WIPO.

<sup>4</sup> Hereinafter mentioned as CBD.

<sup>5</sup> Hereinafter mentioned as FAO.

<sup>6</sup> Paris Convention for the Protection of Industrial Property, hereinafter mentioned as Paris Convention. *WIPO Intellectual Property Handbook*, [https://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo\\_pub\\_489.pdf](https://www.wipo.int/edocs/pubdocs/en/intproperty/489/wipo_pub_489.pdf) (last visited on February 3, 2022).

<sup>7</sup> Berne Convention for the Protection of Literary and Artistic Works, hereinafter mentioned as Berne Convention WIPO (2012) WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO), WIPO

are the prime conventions containing exclusive definitions, of what constitutes ‘inventions’, ‘industrial designs’, or ‘literary and artistic works. The significance of traditional knowledge is well recognized in intellectual property conventions and a distinctive approach for the protection of expressions of folklore<sup>8</sup> also exists in the Bearn convention and other forums<sup>9</sup>. The protection of traditional knowledge has been addressed as part of their mission in specific areas as they are not inherently related to intellectual property law and policy, such as in the year 1981 a WIPO-UNESCO Model Law on Folklore<sup>10</sup> was adopted, and in 1989 concept of ‘Farmers Rights’ was introduced in the Food and Agriculture Organization of the United Nations (FAO)<sup>11</sup>.

Convention on Biological Diversity (CBD)<sup>12</sup> held in the year 1992 that specifically addressed<sup>13</sup> traditional knowledge issues,<sup>14</sup> in 2000 under Intergovernmental Committee (IGC)<sup>15</sup> on Intellectual Property and Genetic Resources. It provides an in-depth consideration of the key, thematic areas within WIPO discussions – genetic resources (GRs), traditional knowledge (TK) and traditional cultural expressions (TCEs) through the perspectives of a broad range of experts and stakeholders, including indigenous peoples and local communities<sup>16</sup>. As folklore is not static and evolves over time and adapts to changing societal conditions while preserving its core elements and serves as a means of connecting generations, fostering a sense of belonging and keeping cultural traditions alive and plays a vital role in shaping the community’s heritage by providing insights into its history, values, and world view, which is currently facing challenges, like misappropriation and exploitation by external entities. Therefore, many countries have enacted laws and regulations to protect and preserve their traditional knowledge and folklore from unauthorized use and commercial exploitation.

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Lex, [http://www.wipo.int/treaties/en/text.jsp?file\\_id=283698](http://www.wipo.int/treaties/en/text.jsp?file_id=283698) (last visited on December 2, 2022).

<sup>8</sup> Traditional and Cultural Expressions.

<sup>9</sup> LEWINSKI, S. VON, *INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY: GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE* (The Hague: Kluwer Law International 2012).

<sup>10</sup> Folklore refers to the traditional beliefs, customs, stories, songs, and practices passed down orally or through cultural expressions within a particular community or group. It encompasses the collective knowledge, wisdom, and cultural heritage of a society, often transmitted from one generation to another. Folklore is an integral part of a community’s identity, shaping its values, norms, and understanding of the world.

<sup>11</sup> Hereinafter mentioned as FAO, is also a source of knowledge and information, and helps developing countries and countries in transition modernize and improve agriculture, forestry and fisheries practices, ensuring good nutrition and food security for all.

<sup>12</sup> Hereinafter mentioned as CBD.

<sup>13</sup> UN Secretary General, *the Intellectual Property of Indigenous Peoples*, 1992.

<sup>14</sup> Art. 8(j) of CBD.

<sup>15</sup> Hereinafter mentioned as IGC.

<sup>16</sup> ROBINSON, D.F. *et al.*, *PROTECTING TRADITIONAL KNOWLEDGE: THE WIPO INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE and FOLKLORE* (London: Taylor and Francis 2017).

## 1. African Regional Instrument to Protect Traditional Knowledge and Folklore:

The draft instrument was adopted against a backdrop of various international initiatives aimed at finding ways and means for the protection of TK and the expression of folklore. At the same time, ARIPO Members also began exploring means and options for the protection of traditional knowledge at the national level, a process that continues today. The importance of TK and folklore in Africa is widely recognized, and African countries have repeatedly called for further protection at the international, regional and national levels.

### 1.1 Analysis of the African Regional Intellectual Property Organization Draft (ARIPO):

The preamble of the draft instrument lays out the general aspirations of the ARIPO members and the rationale for protection. Inclusion in preamble shows recognition of the intrinsic value of TK and expressions of folklore; acknowledgment of the need to respect TK systems and expressions of folklore; and a stated desire to encourage, reward and protect the authentic tradition-based creativity of traditional and cultural communities. From the outset, traditional knowledge and expressions of folklore are treated separately in the draft; the instrument provides different criteria for the protection of each. This is clear from Article 1, which stipulates that the purpose of the draft instrument is twofold:

- a. to protect TK holders against any infringement of their rights; and
- b. to protect expressions of folklore against misappropriation, misuse and exploitation beyond their traditional context.

A distinction is made between infringement and misappropriation, misuse and exploitation.

## III. THE PHILIPPINES LEGISLATION

The Philippines<sup>17</sup> in 1997 exercised an alternative to legislate *sui generis* protection of TCEs owing to certain special features in its socio-political, cultural and economic life. The Philippines have music and unique textile designs of the *minority* cultural communities such as the *abaca* clothes decorated with resist-dye techniques; the use of tapestry techniques and appliqué embroidery decoration is also seen among others. The onset of technological advancement in communication has however resulted in the commercial misappropriation of traditional medicinal knowledge and widespread copying of textiles designs by both Western and local industrialists. In 1987 Philippine Constitution mandates

<sup>17</sup> The Philippines has one of the most diverse ecosystems in the world and a wealth of TK and folkloric expressions. The indigenous people of the Philippines roughly form ten per cent of its population of approximately 60 million people. There are 110 tribes in the groups of islands that constitute the Republic of the Philippines.

the recognition, respect and protection of the rights of the indigenous cultural communities and indigenous peoples<sup>18</sup>.

This mandate was realized with the passage of the Indigenous Peoples Rights Act<sup>19</sup> in October 1997, which shows the desire of the Republic of Philippines in mitigating the effects of colonization experienced by indigenous peoples and communities and to this end shows its commitment to protecting “ancestral domains”<sup>20</sup> and make efforts to recognize and protect the rights of ICCs/IPs within the framework of national unity<sup>21</sup>. The Act makes references to terms such as sustainable traditional resource rights<sup>22</sup> and the importance of free and prior informed consent of indigenous peoples and communities in all cultural and development activities and also envisages the role of a Memorandum of Agreement (MOA) between proponent, host ICC/IP community and the National Commission on Indigenous People (NCIP)<sup>23</sup>. The Philippines’ Law provides protection for community intellectual rights<sup>24</sup>, with ICC/IPs having the right to practice and revitalize their own cultural traditions and customs.

#### IV. THE UNITED STATES LEGISLATION

United States of America has established specific measures to “protect and preserve cultural heritage and to prevent commercial interests from falsely associating their goods or services with indigenous peoples” Within the US, the Omnibus Trade and Competitiveness Act (OTCA) of 1988 and the Indian Arts and Crafts Act (IACA) of 1999 are considered crucial for the protection of certain expressions of folklore. There is a mechanism for protecting<sup>25</sup> “national” folk culture through a 1976 Act of Congress, The American Folk Life Preservation Act<sup>26</sup>, which created an American Folk Life Center within

<sup>18</sup> Referred to as ICCs/Ips.

<sup>19</sup> Republic Act No. 8371.

<sup>20</sup> Ss. 2(b), 3(a) and 3(h).

<sup>21</sup> The right of the indigenous peoples to their indigenous knowledge systems and practices and to develop their own science and technologies is provided by Section 34 of the Philippine Republic Act, 8371 which states: “ICCs/IP are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights”.

<sup>22</sup> The Indigenous Peoples Right Act, s. 3(o).

<sup>23</sup> For the purposes of the Act, “free and prior informed consent” is defined as “the consensus of all members of the ICCs/IPs to be determined in accordance with their customary laws and practices”, s. 3(g).

<sup>24</sup> The Indigenous Peoples Right Act, s. 32.

<sup>25</sup> *H.R.6673 - 94th Congress (1975-1976): An Act to provide for the...*, <https://www.congress.gov/bill/94th-congress/house-bill/6673> (last visited on January 5, 2023).

<sup>26</sup> An Act, to provide for the establishment of an American Folklife Center in the Library of Congress, and for other purposes. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, this Act may be cited as the “American Folklife Preservation Act”.

the Library of Congress.<sup>27</sup> The American Folk Life Centre<sup>28</sup> reveals that much of the ethnographic material available in its collection is dependent upon the permission of “peoples whose lives, ideas and creativity are documented” therein. On one occasion regarding the process of identification of these “peoples”, Judith Gral<sup>29</sup>, said, that, “We look for individual names, different collectors have gathered information in different ways over the decades, so the amount of information we have about individuals varies considerably and, in some cases, songs may not belong to the singers”.

The US Indian Arts and Crafts Act (IACA)<sup>30</sup>, in cohort to other US legislations pertaining to cultural property and native indigenous claims, is a federal “truth-in-marketing” law that prevents the marketing of products as “Indian made” when the products are not made by Indians as defined by the Act. The Act prohibits<sup>31</sup> the offering or displaying for sale or selling of any good, in a manner that falsely suggests it is Indian produced, of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the U.S. Armed with severe penalties, the courts can impose fines of up to US \$250,000 and up to five years in prison for fraud and civil action as obtain an injunction or equitable relief and recover damages<sup>32</sup>. It expands liability to include “indirect” marketers it seems to significantly narrow the scope for non-Indians to exploit the knowledge base products of the Native American community.<sup>33</sup> It must be under Section 2(a) of the US Trademark Act, 1946 as amended, a proposed trademark may be refused registration or cancelled (at any time) if the mark consists of or comprises matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.

<sup>27</sup> The term “American folklife” means the traditional expressive culture shared within the various groups in the United States: familial, ethnic, occupational, religious, regional; expressive culture includes a wide range of creative and symbolic forms such as custom, belief, technical skill, language, literature, art, architecture, music, play, dance, drama, ritual, pageantry, handicraft; these expressions are mainly learned orally, by imitation, or in performance, and are generally maintained without benefit of formal instruction or institutional direction.

<sup>28</sup> About this Reading Room: American Folklife Center: Research Centers: Library of Congress (no date) The Library of Congress. Available at <https://www.loc.gov/folklife/aboutafc.html> (last visited on December 12, 2022).

<sup>29</sup> Reference specialist at the American Folklife Center, at the Library of Congress.

<sup>30</sup> *The Indian Arts and Crafts Act of 1990* (2023) *U.S. Department of the Interior*. Available at <https://www.doi.gov/iacb/act> (last visited on 10 June 2023).

<sup>31</sup> S. 104(a) office, P.L. 101-644 of Indian Arts and Crafts Act (IACA).

<sup>32</sup> Ss. 6(a)(1) and (2) of Indian Arts and Crafts Act (IACA).

<sup>33</sup> The US legislation in Section 309.4, P.L. 101-497 shows how an individual can be certified as an Indian artisan. In order for an individual to be certified by an Indian tribe as a non-member Indian artisan for the purposes of the law, the individual must be of Indian lineage of one or more members of such tribe; and the certification must be documented in writing by the governing body of an Indian tribe or by a certifying body delegated for the task by the Indian tribe. As provided in Section 107 Thus under US law, the right-holders include American Indians; Native Alaskans; State recognized Indian tribes Section 309.2(e), I, 2, 3 for definition of Indian tribe); and an Indian artisan as certified by an Indian tribe as a non-member of the IACA (1990), a tribe may not impose a fee for certifying an Indian artisan.

## V. TRADITIONAL KNOWLEDGE AND FOLKLORE PROTECTION LEGISLATION IN INDIA

India does not have any specific law to protect traditional knowledge and folklore. However, there are certain provisions within existing laws that address the protection of traditional knowledge and folklore to some extent. The primary laws for the protection are Indian Copyright Act 1957, Biological Diversity Act, 2002 and Geographical Indications Act, 1999.

1. **Indian Copyright Act, 1957:** The Copyright Act, in its original form, offers protection to traditional cultural expressions, including folklore and traditional knowledge through copyright. However, this protection is limited to the expression of folklore that exists in tangible forms like books, paintings, or recordings. That is not effectively able to cover traditional knowledge and expressions. But there are certain provisions within the Act that can be applied to protect folklore and traditional knowledge to some point and also provides definition of “Work of Folklore” as The Copyright (Amendment) Act, 2012, introduced a new clause (ffc) in Section 2 of the Copyright Act, which defines “work of folklore” as “any work of a traditional and cultural nature created, preserved, and developed by a community or by individuals reflecting the traditional artistic, literary or cultural heritage.”

On rights of the author in a work of folklore<sup>34</sup> says, shall be deemed to be the community or the individuals who created the work, rather than a specific individual author as rights to works of folklore remain with the community or individuals representing the cultural heritage and prohibition on infringement<sup>35</sup>. The protection provided by the Copyright Act does not fully cover the broader issues of cultural appropriation, misappropriation and commercial exploitation.

2. **Biological Diversity Act, 2002:** This Act is aimed to prevent the misappropriation of traditional knowledge of indigenous and local communities related to biological resources and focused on protection of biological resources and traditional knowledge associated with them. The Act set ups National Biodiversity Authority (NBA) and the State Biodiversity Boards (SBBs) to regulate access to biological resources and linked traditional knowledge. This provides access and benefit sharing (ABS)<sup>36</sup>, if any person or organization seeking access to these resources or knowledge must obtain prior approval from the National Biodiversity Authority (NBA) or State Biodiversity Board it also manage the fair and equitable sharing of benefits arising from the utilization of biological resources and traditional knowledge<sup>37</sup>.

<sup>34</sup> Copyright (Amendment) Act, 2012, s. 38-A.

<sup>35</sup> Copyright (Amendment) Act, 2012, s. 51.

<sup>36</sup> Biological Diversity Act, 2002, ss. 3,4 and 6.

<sup>37</sup> Dr Sangam, S. (2020) ‘Protection of Traditional Knowledge under Intellectual Property Regime in India’, *Creative Space: International Journal*, ISSN 229-7871 Vol. 8(2) pp. 138–145.

Prior Informed Consent (PIC)<sup>38</sup> ensures the rights and interests of traditional knowledge holders must be respected and Biodiversity Management Committees (BMCs)<sup>39</sup> shall be established at the local level for documentation, conservation, and sustainable use of biological resources and associated traditional knowledge within their jurisdiction. Benefit-Sharing Mechanism<sup>40</sup> establishes a process for the fair and equitable sharing of benefits and prevents the misappropriation with insurance that unauthorized use or commercial exploitation of such knowledge is prohibited<sup>41</sup> by imposing penalties<sup>42</sup> for non-compliance with its provisions to discourage exploitation or misuse of traditional knowledge.

- 3. The Geographical Indications (GI) Act, 1999:** This is significant legislation for the protection of traditional knowledge and folklore-associated products originating from specific geographical regions. These are signs used on products that have specific geographical origins and possess qualities, reputations, or characteristics which are essentially attributable to that place of origin. The Act defines “geographical indication”<sup>43</sup> and provides registration<sup>44</sup> to protect products that have specific geographical origins and unique qualities due to their geographical environment or traditional knowledge associated with the production process against unauthorized use and misuse of the geographical indication. The Act prohibits<sup>45</sup> the use of any false or misleading indication concerning the geographical origin of goods and ensures that traditional knowledge and reputation associated with the product should not be exploited or misused<sup>46</sup>.

In the present time the Geographical Indications Act, of 1999, by recognizing the unique qualities and cultural significance of these products helps to promote and preserve traditional knowledge and heritage of the local communities with insurance that benefits derived from the commercial use of geographical indications will be shared with the communities and individuals who have nurtured, safeguarded and associated with traditional knowledge and cultural expressions.

## VI. JUDICIAL ATTITUDE TOWARDS PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE

Judicial attitude towards the protection of TK and folklore varies in different countries there are several landmark judgments in India and other countries

<sup>38</sup> Biological Diversity Act, 2002, s. 6.

<sup>39</sup> Biological Diversity Act, 2002, ss. 22-29.

<sup>40</sup> Biological Diversity Act, 2002, ss. 21 and 41.

<sup>41</sup> Biological Diversity Act, 2002, s. 40.

<sup>42</sup> Biological Diversity Act, 2002, ss. 55-58.

<sup>43</sup> Geographical Indications (GI) Act, 1999, s. 2(1)(e).

<sup>44</sup> Geographical Indications (GI) Act, 1999, s. 11.

<sup>45</sup> Geographical Indications (GI) Act, 1999, s. 22.

<sup>46</sup> Geographical Indications (GI) Act, 1999, s. 24.



had played a significant role in determining the legal framework and understanding of traditional knowledge and folklore.

**Neem Patent Case (India)**<sup>47</sup>: In 1995, European Patent Office (EPO) granted a patent to W.R. Grace and the Department of Agriculture, USA, for a method of controlling fungi using Neem oil. India's government and several NGOs challenged the patent, on use of Neem as a pesticide had been part of India's traditional knowledge for centuries. The EPO revoked the patent, recognizing the prior existence of the knowledge.

**Turmeric Patent Case (India)**<sup>48</sup>: In 1995, a patent was awarded in United States to University of Mississippi medical center for the wound-healing properties of turmeric. India's Council of Scientific and Industrial Research (CSIR) challenged and were invalidated.

**Basmati Patent Case (India)**<sup>49</sup>: In 1997 US patent office granted a patent to 'RiceTec' for a strain of Basmati rice, aromatic rice grown in India and Pakistan for centuries. Rice is the staple food of people in most parts of Asia, especially India and Pakistan farmers in this region developed, nurtured and conserved over a hundred thousand distinct varieties of rice to suit different tastes and needs, The Indian Government had pursued to appeal only 3 claims out of 20 claims made in the original patent application of RiceTec Inc. What were being challenged were only claims regarding certain characteristics of Basmati<sup>50</sup>, RiceTec altered the strain through crossing with the Western strain of grain and successfully claimed it as their invention was revoked.

**Jeevani Case (India)**<sup>51</sup>: In 1997, an US company patented an antifungal product called "Jeevani" derived from a Himalayan fungus. India's CSIR challenged the patent, claiming that the knowledge of using the fungus for medicinal purposes was part of traditional knowledge. The patent was eventually revoked.

**Ngati Apa Case (New Zealand)**<sup>52</sup>: In 2003, the New Zealand Court of Appeal ruled that certain traditional Maori names and symbols could not be

<sup>47</sup> PTI *India Wins Neem Patent*, TOI, 1 April 2005 available at India wins Neem, [http://time-sofindia.indiatimes.com/articleshow/1067104.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](http://time-sofindia.indiatimes.com/articleshow/1067104.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst) (last visited on July 22, 2023).

<sup>48</sup> Jayaraman, K., *US Patent Office Withdraws Patent on Indian Herb*, 6(389) *NATURE* (1997), <https://doi.org/10.1038/37838> (last visited on July 22, 2023).

<sup>49</sup> WORLD TRADE ORGANIZATION, *Intellectual Property Rights and Basmati Rice*, [https://www.delhibusinessreview.org/v\\_7n2/v7n2i.pdf](https://www.delhibusinessreview.org/v_7n2/v7n2i.pdf) (last visited on July 30, 2023).

<sup>50</sup> Specifically starch index, aroma, and grain dimensions.

<sup>51</sup> T. Nandakumar, *Jeevani to Fetch Benefits for Kani Tribe*, 3 October 2015 available at <https://www.thehindu.com/news/national/kerala/jeevani-to-fetch-benefits-for-kani-tribe/article7718163.ece> (last visited on July 30, 2023).

<sup>52</sup> New Zealand Court of Appeal (2003) *Ngati Apa V Attorney-General* [2003] NZCA 117; [2003] 3 NZLR 643 (19 June New Zealand Legal Information Institute, Court of Appeal of

registered as trademarks. Court emphasized cultural significance of these symbols and their association with the Maori people.

**Hoodia Plant Case (South Africa)**<sup>53</sup>: In 2010, South Africa's Council for Scientific and Industrial Research (CSIR) challenged a patent granted to a UK company for an appetite suppressant derived from the Hoodia plant, which was used traditionally by the San people. The patent was invalidated, recognizing the traditional knowledge associated with the plant.

These judgments show the increasing recognition and importance of traditional knowledge, folklore and their protection with need to prevent misappropriation and commercial exploitation, that how judiciary has contributed a lot to shaping legal principles and policies related to the preservation and safeguarding of cultural heritage and traditional knowledge.

## VII. RESTRICTIONS IN EXISTING FORMS OF IP FOR PROTECTING TRADITIONAL KNOWLEDGE AND FOLKLORE

Traditional knowledge and folklore embraces enormous cultural and historical significance for indigenous and local communities worldwide they passed down their skills and knowledge through generations, which forms an intangible heritage including a vast collection of knowledge, practices, and artistic expressions. However, protecting traditional knowledge and folklore within the existing intellectual property (IP) frameworks has been proven to be an intimidating task and Indigenous communities are still facing restraints and challenges when they are attempting to safeguard traditional knowledge and folklore by using conventional IP mechanisms such as-

- (1) Fragmentation of protection and a failure to address the protection of TK holistically;
- (2) The high transaction costs that are often entailed in securing these forms of protection<sup>54</sup>

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New Zealand Volume 117 of NZCA, New Zealand Court of Appeal, [https://books.google.co.in/books/about/Ngati\\_Apa\\_V\\_Attorney\\_General\\_2003\\_NZCA\\_1.html?id=kA6JswEACAA-J&redir\\_esc=y](https://books.google.co.in/books/about/Ngati_Apa_V_Attorney_General_2003_NZCA_1.html?id=kA6JswEACAA-J&redir_esc=y) (last visited on July 30, 2023)

<sup>53</sup> Kapepiso, F.S. and Higgs, R., *Tracing the Curation of Indigenous Knowledge in a Biopiracy Case*, 16(1) ALTERNATIVE: AN INTERNATIONAL JOURNAL OF INDIGENOUS PEOPLES, pp. 38-44 (2020). doi:10.1177/1177180120903502.

<sup>54</sup> One means of lowering the cost of IP protection would be to adopt a lower fee structure for indigenous communities and other TK holders, somewhat analogous to the discounted fees that the United States Patent office follows.

- (3) The unavailability of competent and affordable legal counsel to represent the interests of TK holders in securing such protection;<sup>55</sup> and
- (4) The complications generated by the fact that TK is often shared widely among communities, making it difficult, if not impossible, to identify (or even define) true or legitimate owners or to obtain PIC from the same.

There is an inherent limitation in the use of IP tools such as patents and copyright which are the primary or sole means of protecting TK and TCs. As pointed by the UNDP Human Development Report 2004<sup>56</sup> on ‘Cultural Liberty in Today’s Diverse World’ emphasizes that, ‘If current intellectual property standards cannot accommodate commonly known traditional knowledge or its attributes of group ownership, the rules will need to be revised<sup>57</sup>.

## VIII. CONCLUSION

The shackles in existing forms of intellectual property legislation for the protection of traditional knowledge and folklore draw attention to the urgent need for more culturally sensitive and equitable mechanisms. Preserving and safeguarding traditional knowledge is not exclusively a matter of legal protection only it needs a broader understanding of its cultural perspective and importance that needs collaborative efforts with the involvement of indigenous and local communities, policymakers, researchers, and legal experts, to develop an innovative and inclusive solution for respect and protect traditional knowledge and folklore with the communities rights while promoting cultural diversity and heritage, which is possible through recognizing and addressing these fetters and by adopting a more comprehensive and respectful approach for the preservation and transmission of invaluable intangible heritage.

For the protection of TK and TCEs efforts have been made such as, modifying IPRs are still ongoing, some countries have chosen to frame sui generis laws for the purpose of protecting their TCEs. Some countries have referred Tunis Model Law and 1982 WIPO-UNESCO Model Provisions for the protection of their TCEs in this order overbroad emphasis is on access, lack of protection for derivative works and a lack of a holistic understanding of that, what constitutes “expressions of folklore” are some of the reasons for developing countries to deviate from these “model” laws and create their own legislation

<sup>55</sup> This limitation, and to a certain extent the previous two limitations as well, can be ameliorated by appropriate legal capacity building, as represented by the activities of PIIPA. Gollin 2007 and McManis 2007, who, respectively, discuss an existing network of pro bono IP lawyers and an existing IP legal clinic that have the capacity to provide IP legal services to TK holders.

<sup>56</sup> CULTURAL LIBERTY IN TODAY’S DIVERSE WORLD, Publication UN HUMAN DEVELOPMENT (2004), <https://hdr.undp.org/content/human-development-report-2004> (last visited on May 24, 2022).

<sup>57</sup> UNDP 2004, p. 11.

in conformity with their local needs. In this regard, a working group of indigenous experts on the TK of the Andean Community have notably elaborated a proposal for the *sui generis* protection of TK from the indigenous perspective, taking into account the customary laws and Cultural practices of the indigenous peoples of the member countries of the Andean Community.<sup>58</sup>

As pointed out in a paper by the Call of the Earth (2007), ‘While IP debates relevant to TK, cultural expressions and human genetic resources are all about Indigenous Peoples and directly affect their cultural integrity and livelihoods, Indigenous Peoples have only limited participatory rights in the international policy-making forum where decisions are made’.<sup>59</sup> Referring to the ‘Way Forward’, this paper emphasizes that ‘full and effective participation of Indigenous Peoples in all policy-making processes that affect them, is a necessary pre-cursor to appropriate policy making’ and that ‘in a number of different for umindigenous peoples.

The effective participation of indigenous peoples and local communities in policymaking regarding the protection of TK requires significant capacity building, including training on these legal issues<sup>60</sup>. As Laird and Wynberg<sup>61</sup> point out, there is ‘an urgent need to introduce new forms of protection for traditional knowledge that not only give communities rights over their knowledge but also enable the wider preservation and promotion of such knowledge systems’<sup>62</sup>.

Recommendations for the protection of ICEs include that there is a need to develop and regularly update an identification system for traditional knowledge, folk culture and folklore; establishment of organizations for public

<sup>58</sup> Grupo de Trabajo de Expertos Indígenas sobre Conocimientos Tradicionales de la Comunidad Andina de Naciones 2004, Elementos para la Protección Sui Generis de los Conocimientos Tradicionales Colectivos e Integrales desde la Perspectiva Indígena, Documentos Informativos, Comunidad Andina, SG/di 724, (last visited on December 24, 2022), available at <http://www.comunidadandina.org>.

<sup>59</sup> United Nations Economic and Social Council 2007, REPORT ON THE INTERNATIONAL EXPERT GROUP MEETING ON THE CONVENTION ON BIOLOGICAL DIVERSITY’S INTERNATIONAL REGIME ON ACCESS AND BENEFIT-SHARING AND INDIGENOUS PEOPLES’ HUMAN RIGHTS. The report emphasizes the need to further enhance indigenous peoples’ rights to participate in CBD meetings, <https://www.un.org/development/desa/indigenouspeoples/about-us/permanent-forum-on-indigenous-issues.html> (last visited on December 11, 2022). See also POTENTIAL THREATS TO INDIGENOUS PEOPLES’ RIGHTS BY THE CONVENTION ON BIOLOGICAL DIVERSITY’S PROPOSED INTERNATIONAL REGIME ON ACCESS AND BENEFIT SHARING (2007), [https://www.un.org/esa/socdev/unpfi/documents/workshop\\_CBDABS\\_harry\\_kanehe\\_castro\\_en.doc](https://www.un.org/esa/socdev/unpfi/documents/workshop_CBDABS_harry_kanehe_castro_en.doc) (last visited on December 11, 2022).

<sup>60</sup> One practical option would be to establish a database with the contact information of indigenous peoples’ representatives who are dealing with critical issues relating to TK and ABS.

<sup>61</sup> Laird and Wynberg note that although more than 75 Contracting Parties have been involved in ABS law and policy development, only 26 of the 188 Contracting Parties to the CBD have adopted ABS laws and procedures.

<sup>62</sup> Sarah A. Laird & Rachel Wynberg, *Biodiversity Prospecting & Access and Benefit Sharing* (2003), <https://portals.iucn.org/library/sites/library/files/documents/2003-025.pdf> (last visited on January 30, 2023).

administration of copyright and neighbouring rights which would deal with ICEs, or, if necessary, extending the powers of existing organizations to cover this area as well; and raising awareness amongst the creators of traditional, folk, culture that includes folk artists, performers, artisans, etc. and traditional knowledge holders about their rights in the vicinity of intellectual property against abuse and devaluation by reward and motivation for emphasizing their cultural and educational value to the general public use; and also participation and encouraging educational institutions and schools to introduce classes in traditional folk culture and folklore as a subject or even optional for the students.

In this regard, WIPO's ongoing efforts at norm-setting may perhaps help for the protection of TCEs, as developing countries have a set of choices or options to choose and create *sui generis* protection for TK and TCEs immediately.