

CONVERTING CULTURAL PROPERTY INTO MONOPOLISTIC INTELLECTUAL PROPERTY – A CRITICAL DISCUSSION RELATING TO THE DECAY OF CULTURAL IDENTITY OF INDIGENOUS PEOPLE

Abstract

An important contemporary issue confronting indigenous people is the appropriation of their intangible cultural property. While, modern indigenous artists have been able to resort to traditional property rights concerning movable cultural properties, many native people have found their claims to ownership of their intangible cultural property such as motifs, songs, prayers, sermons, music legends and folklore frustrated by the limits of intellectual property and other legal regimes. Treating intangible cultural property under the intellectual property regime would raise practical problems as well. Copyright has a great potential for the private right over the cultural expression, in case of derivative works, the original owner of the cultural expression leaves with nothing. Indeed, cultural property is found to constitute property for grouphood not for mere individual authors. Appropriating or misappropriating cultural property through intellectual property rights considerably restricts the concept and practice of grouphood. As the intangible cultural properties are the properties of the group or the community faced a paradigm shift towards individualistic ownership. The derivative works done by outsiders or other nationals from the original traditional cultural expression belonged to the indigenous community always faces distortion of their respective works. These kinds of activities by the non-indigenous people in many ways pose a serious threat to the cultural identity of the community as well. Protecting cultural identity through intellectual property laws is not adequate and rather causing the decay of cultural significance over the intangible cultural property. This will affect sustainable use of intangible cultural properties and the researcher feels that the gap should be filled only with positive legal frameworks.

I Introduction

THE INTANGIBLE cultural property is one of prominent inquisitive area for a diverse group of stakeholders in the contemporaneous era. Among the principal reasons for this increasing interest, the embrace of culture is the significant aspect to know the recent development strategies, the emergence of cultural industries and heritage tourism. Heritage can be deemed as the intangible type which includes economic, moral, cultural and social values for a diverse group of people that ranging from regional and national development planners to the representatives of indigenous peoples and other tribal minorities. Intangible cultural properties are heritage; it is

safeguard for showing the precursor of culture of the country and simultaneously practicing in the society. Traditionally, the cultural properties were used for the benefit of the entire society in large level, which include products existed in the local marketplaces. Significantly, these kinds of knowledge-based intangible cultural properties played a pivotal role in the production of the domestic economy in different dimensions. Simultaneously, contemporary issue confronting indigenous people is the appropriation of their intangible cultural properties by non-indigenous people. In addition to, modern indigenous artists mitigated with resort to attain traditional property rights, that may concern movable cultural properties like motifs, songs, prayers, music, folklore, distinctive designs, images, wooden and other hand-created craftworks etc. through intellectual property rights. In this aspect commodification can be defined as the 'conversion of intangible cultural property into products of economic worth that can be treated for commercial gain'. The problem here is if independent ownership is conferred through the system of intellectual property protection, the collectiveness of the original right holders will leave with nothing. This kind of misappropriation may cause the decay of the cultural identity of the particular indigenous community. Maintaining and protecting their cultural identity is an inherent right of the indigenous people but many times they are losing their identity because of such kind of misappropriation. This in turn creates a serious issue pertaining to the rights of indigenous people in different ways.

Apart from this, developing countries are presently investing the contemporary repository of creativity by using traditional sayings and materials to contribute to their economic development. This investment is seen to support job creation, skill development, tourism and revenue from cultural properties. In the case of intangible cultural heritage, the skills, knowledge, crafts and performances of local people are often seems to be attractive, then that is marketed in addition to the natural and cultural values of the property itself. There are numerable intangible cultural heritage festivals and performances inscribed on the representative list of the intangible cultural heritage of humanity. Moreover, international discourses promoting culture and intellectual property have been influential in developing countries. Currently, traditional knowledge and traditional cultural expressions are regarded as intangible forms of cultural properties. The shifting of intangible cultural property into intellectual property creates many legal as well as social issues. Individual monopoly over the long existed cultural property, directly and indirectly, affects the community in which the cultural property has been rooted. This practice makes them empty hands and attain the nihilistic treasure. The fast movement of intellectual properties across the national boundaries and it brings more foreign direct investment. As a result, multinational corporations meticulously focused on the cultural properties of other jurisdictions with the help of their sophisticated technological advancement to appropriate the

valuable intangible cultural properties through the intellectual property system. The interests of the original owners of this intangible cultural property will lose their natural right to hold or possess ownership and also the indigenous community will lose their self-identity. Hence, this research mainly focused the crux and it proposes feasible recommendations for the protection and preservation of the intangible cultural property.

Definition and concept of cultural property

Artistic and cultural objects began to take on national identities during the enlightenment period with the rise of Nationalism and the creation of modern nature.¹ Based on the historical perspective, after the French revolution monuments were praised for their artistic, historical and scientific features. People began to conceive of monuments as the “cultural heritage” of a nation, as evidence of historical tradition and as historical identity.² This new function of the work of arts is influenced the nation’s attitude towards the heritage and the protection of cultural property became a goal set by various societies.

The Hague Convention was the first International Treaty on “Cultural Property”³ defined under Article 1, as “property which on religious or secular grounds is specifically designated by each state as being of important for archaeology, prehistory, history, art, literature or science”.⁴ Cultural property implies that an artefact is of such significance to a particular civilisation as to be an inalienable birthright of its descendants. For example, Greek nationalists often claim that the Elgin Marbles in the British museum are the cultural property of Greece.

“Cultural objects are also referred to as ‘cultural property’, ‘cultural good’, ‘cultural patrimony’ or ‘national treasures’. Some definition of cultural property is extremely

1 Anthony D’ Amato and Doris Estelle Long, *International Intellectual property Law*, 110(Cambridge University Press, New York, 1st edn., 2007).

2 *Ibid.*

3 Hague Convention on Cultural Property, 1970.

4 *Id.* art.1

broad including any object that has both property attributes and cultural significance.⁵ Despite the relatively broad definition of ‘Cultural property’, all the traditional forms of Intellectual property are aptly fit into the ambit or circuit. While many novels, paintings, artefacts, unique designs, distinctive images, names, signs, sculptures, inscriptions, wooden design products and certain architectural works may contain the artistic significance to qualify for treatment as an object of cultural value generally associated with the traditional works of cultural properties.

Moreover, the cultural property is an object that of cultural significance. The first and foremost aspect in this regard is the property aspect, which derives from the idea of the cultural property consumption of tangible movable objects. The implication of calling something as “property” suggests that it can be owned at least possessed and controlled. The next aspect is “cultural attribution” which derives from the cultural significance of the object. The most effective way for demonstrate the two aspects of cultural property is to consider an example of specific items of cultural property. For example, the war God of the *Zuni* people, a native the American tribe of the South Western United States are carved wooden idols usually two or three feet tall. These *‘Abayu Da’* carved by the tribe’s Bear clan appear to be simple rather abstract faces. These objects are rare because the clan only carves two per year. The commercial value for these sculptures sets between US \$ 5000 and the US \$ 10000. These facts

5 The 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer Ownership of Cultural Property; art. 1

For the purpose of the Convention, the term “cultural property” means property which on religious or secular grounds is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art⁷ or science and which belongs to the following categories;

- (a) Rare collections and specimens of fauna and flora, minerals and anatomy and objects of palaeontological interest.
- (b) property relating to history including the history of science and technology and military and social history to the life of national leaders, thinkers, scientists and artists and to events of national importance.
- (c) products of archaeological excavations or of archaeological discoveries.
- (d) elements of artistic or historical monuments or archaeological sites which have been dismembered.
- (e) antiquities more than one hundred years old such as inscriptions, coins and engraved seals.
- (f) objects of ethnological interest.
- (g) property of artistic interest such as pictures, paintings and drawings produced entirely by hand on any support and in any material original artistic assemblages and montages in any material
- (h) rare manuscripts and incunabula, old books, documents and publications of special interest singly or in collections
- (I) postage, revenue and similar stamps singly or in collections
- (j) archives including sound photographic and cinematographic archives
- (k) articles of furniture more than one hundred years old and old musical instruments

very clearly demonstrate the aspect of cultural property. The objects tangible and movable are described in terms of shape, size, rarity and commercial value.

The cultural aspects of cultural property are demonstrated in the cultural significance of such items to the people who created them. The “*Abayn Da*” was placed in a shrine where their powers were invoked to protect the tribe. Cultural properties were integral to the esteems that people hold for themselves and their bondage to the past. It is also an integral to their identity. Cultural importance gives particular that is cultural value. Cultural property stripped of cultural significance would be merely property more or beautiful or rare and more or less valuable based on that beauty or rarity only.

In addition to that there is no internationally accepted definition of a traditional cultural expression as an example of intangible cultural property. The term traditional cultural expression can be understood as the tangible and intangible forms in which communities express their cultures.⁶ The traditional cultural expressions includes various things such as music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives. These expressions form part of the identity and heritage of a traditional or indigenous community and are passed down across generations. Thus, it is obvious that the definition of cultural property is not so clear but the ambit of cultural property cannot easily be limited for the sake of any work.

II Cultural property significance and identity of indigenous people

The identity of indigenous people is construed by reference to their traditional homelands *i.e.* their countries. Indigenous groups gain knowledge about their culture as it is transmitted from their ancestors. The aboriginal cultural property takes many forms including the images of dreaming of ancestral past that is preserved in tribal “lore”⁷ and periodically recreated in artworks of various kinds.⁸ This cultural property includes objects found at archaeological sites which provide insights into earlier civilisations and artworks produced by members of a culture that are thought to embody or represent that culture distinctively. The best example of this aspect is to find in a place called ‘*Keeladi*’ in the State of Tamil Nadu, where the antiquarians found hundreds of different varieties of artistic works and distinctively designed products showing that the people were living by close association with their culture

6 Richard Awopetu, “In Defense of Culture. Protecting Traditional cultural Expression in IP”, 69(1-4) *Emory Law Journal* 2020, available at: <http://scholarlycommons.law.emory.edu/elj> (last visited on Dec. 4, 2023).

7 It means all the facts and traditions about a particular subject that have been accumulated over time through education or experience.

8 Rajath Ranaf, “Indigenous culture and Intellectual Property Rights”, available at: <https://nopr.nispr.res.in/bit...PDF> (last visited on Dec. 12, 2023).

and the products are known as cultural properties of the State. Based on these experiences, it is the evidence that past cultural practices and products bring mere insights into the significance of cultural properties presently.

The most influential idea is that particular indigenous people have a right to possession of their cultural property because possession of cultural property is important to the dignity of the people.⁹ More so, the cultural property makes the people a great bond with the past. Artistic practice in the context of indigenous heritage acted as the community's "social element" and created invisible bonds that enabled social and spiritual contact. Indigenous cultural heritage and practice have significant for intangible functions that happens within indigenous communities.

Objects of cultural property cannot be stripped of their cultural significance. In fact, they are not merely items of property anything more than children are the property of divorcing parents.¹⁰ Recognition of cultural significance is an integral part of determining the best means of protecting cultural property. Specifically, there are two schools of thought concerning the cultural property. The first school articulates concerning the cultural objects as properties. The second school gives prominence to cultural dignity and cultural self-determination as significant elements of cultural property.

Tradition as a 'source' of creativity

It is often thought that tradition is only about imitation and reproduction. It is also about the innovation and creation within the traditional framework.¹¹ Tradition is not immutable. Cultural property is a permanent process of production and it is cumulative as well as innovative. Culture is organic and in order for it to survive growth and development necessary tradition thus builds the future. As the Japanese industrial designer Sori Yanagi has stated that incorporating the element of traditional folk craft into modern design can be more valuable than imitating folk craft itself. Tradition creates value only when it progresses it should go forward together with society.¹² Thus, it is clear that traditional artists and practitioners continually bring new properties and experiences to their work, and traditionally it can be considered important source of creativity and innovation as well.

Indeed, the recreation and replication of traditional works is not necessarily the best way of preserving the cultural identity of the indigenous communities. In the

9 Urmil Sandipan, *Cultural Property*, 160 (Bookleaf Pub.Ltd, New Delhi 1st edn., 2013).

10 *Ibid.*

11 WIPO Secretariat, Consolidated Analysis of the Legal Protection of Traditional Cultural Expression/ Expression of Folklore, *available at: <https://www.wipo.int>* (last visited on Dec. 19, 2023).

12 *Japan Times*, June 30, 2002, *available at: <http://www.japantimes.co.jp/national>*. (last visited on Nov. 18, 2023).

recognition of the link between cultural property and economic development is now being more appreciated by the national as well as international institutions. For example, India, South Africa, Indonesia, Malaysia, and Brazil like countries have already taken some supportive initiatives and particularly an international organisation and World Bank have begun to support cultural development projects that treat traditional culture as an economic resource that can contribute poverty alleviation, local job creation and earning of foreign exchange to.¹³ Handicrafts is a form of tangible cultural property exemplify the benefits of combining tradition with creativity. Handicrafts are viewed as both traditional and contemporary in keeping with the view that traditional cultural expression reflects a living culture and evolve despite being based on traditional form and know-how. Furthermore, the manifestations of cultural property are also inevitable sources of inspiration and creativity for the cultural industries. This is acting as a powerful engine of economic growth generating considerable income, and employment fuelled by growing demand for cultural goods and services in an expanding marketplace.¹⁴ Thus, it is understood that tradition becomes a source of creativity in many aspects.

Commercial value of cultural property

A thing or a substance that can be simply called as property because of its commercial value. Cultural property both tangible and intangible are having more commercial value. In recent times, national as well as international markets are considerably flooded with different varieties of cultural properties. It is based on the unique and distinctive characteristics of the cultural property decides the commercial value in the market.

Cultural property both tangible and intangible is often a source of creativity and innovation and the adequate and the appropriate legal protection of traditional cultures can contribute to a traditional creator's prosperity or a community's economic development. Most importantly, tradition-based innovations and creations are important parts of a community's heritage and cultural patrimony can also act as inputs into other markets such as entertainment, art, tourism, designs, handicrafts, architecture and fashion.¹⁵ This type of knowledge assets have been largely overlooked in the intellectual property community until quite recently and in this sense, they are traditional but new intellectual assets. For example, the commercial value of the

13 Charles P. Kindleberger, *International Capital Movements -World Bank 99* (Cambridge University Press, Newyork, 1st edn.1987).

14 Mary Elizabeth Terry, "The Economic and Social Significance of Handicraft Industry", available at <https://eprints.soas.ac.uk>>pdf. (last visited on Dec. 3, 2023).

15 UNESCO's Study on International Flows of Cultural Goods, Paris, 2000, available at: <http://www.unesco.org/cultura/industries/trade/html-eng/questuin3.shtml>> (last visited on Nov. 27, 2023).

traditional cultural expression to cultural industries tends to be concentrated in the arts and crafts, cultural tourism, music, multi-media and publishing architecture and fashion. According to an Australian Report,¹⁶ the arts visual arts and crafts are an important source of income for indigenous artists and communities. It has been estimated that the indigenous visual arts and crafts industry has a turnover of approximately US \$130 million in Australia of which indigenous people receive approximately US \$30 million in return.

Traditional music has in recent years captured the public imagination evidenced by the successful emergence of world music. But due to the development of technology only some music industries are getting huge profits. Tribal people in India, China, Indonesia, South Africa and Brazil like countries, they are practising distinctive music plays and performances to get their livelihoods.

Most importantly, many cultural products deeply rooted in the cultural heritage of developing countries have crossed borders and established significant market riches in industrialised countries.¹⁷ However, the commercialisation of these cultural transfers has often not benefited the countries of origin. This kind of commercialisation is happening through the intellectual property system that makes a lot of trans-border issues with the commercialisation of cultural properties.

Intangible cultural property as an identity of indigenous people

Intangible cultural properties are important elements of the cultural ‘heritage’ and ‘identity’ of many indigenous people, local communities as well as many countries and regions.¹⁸ They may contribute to the welfare, sustainable development and cultural vitality of those communities. Moreover, tangible cultural properties were historically and sometimes still it recognised as part of the ‘common heritage of humanity’ meaning that their benefits belong to all mankind. Article 8 of the Universal Declaration on Cultural Diversity describes “cultural goods and services as vectors of identity, values and meaning which must not be treated as mere commodities or consumer goods”.¹⁹ For example, within the WTO, Brazil has highlighted the role of audio-visual services in the transmission and diffusion of cultural values and ideas.²⁰ On the other hand, the economic significance of cultural property cannot be forgotten

16 Rupert Myer, “Report of the Contemporary Visual Arts and Enquiry”, *Australia*, 116 (2002), available at: <http://apo.org.au> (last visited on Dec. 2, 2023).

17 George Mergos and Nikolas Patsavos (eds); *Cultural Heritage as Economic Value* (2017), available at: https://ec.europa.eu>E1_At...pdf. (last visited on May 2, 2022).

18 WIPO’s work on Intellectual Property, TK and TCE/Folklore, available at <http://www/wipo/export/sites/www/tk/en/html>. (last visited on Dec. 8, 2023).

19 Universal Declaration on Cultural Diversity. art. 8.

20 WTO Council for Trade in Services Communication from Brazil- Audiovisual services s/css/w/99(9 July 2001(6)).

in evaluating justification for trade - restrictive cultural policy measures to protect the identity of the indigenous people.²¹ It is an evidence that, whenever the cultural properties enter into the market place they also carry the distinctiveness and identity of the indigenous people. This may obviously makes many cultural tribes or the creators of the traditional cultural goods more visible to the world.²²

The cultural identity of the indigenous people and the country or the region have a direct linkage between them. Some countries' cultural goods are flooding in the international market and establishing self-identity at the market. Preserving and protecting their 'identity' itself is the birthright of the creators of cultural properties. The state has many interests in claiming ownership over intangible cultural heritage and regulating them within its territory. Heritage is an economic asset like minerals that lie in the ground valueless until a marketable use is identified for them. The identification of a place's artefacts, traditional cultural expressions or knowledge or practices as heritage gives them cultural value and also establishes identity. Many geographical indications tagged goods in India in fact is making the cultural identity of the indigenous community more visible in the local as well as international markets.

Similarly, that traditional cultural expression gradually increases the identity of not only the indigenous people but also the regions as well. For example, *Kathakali* is the famous cultural expression of the State of Kerala; Mayillattam, Oyilattam and Bharathanatyam in the State of Tamil Nadu; and *Chang Lo* or *Sua Lua* is a famous traditional dance of the Chang tribe of Nagaland. These examples show how the regions are getting their own identity because of their traditional cultural expressions.

Moreover, the community focus found in the native community that bears the conception of rights and defined communal-based notions of property. For indigenous peoples, cultural property and tribal ways are constructive to the group's collective identity. This signifies the worldview of most tribal people who define their identity largely which is based on their identification with the group. Every ethnic group folklore has its identity for a country and, it is the root of the nation's cultural tradition for all mankind. For a number of years, now the problem of legal protection of folklore has been discussed within the mere general framework of the preservation of indigenous resources particularly of traditional cultural expressions.²³

Based on the UNESCO convention²⁴ the given definition does not contemplate the designation of indigenous people of objects sacred to them as cultural property. The

21 Tania Voon, *Cultural Products and the WTO*, 39 (Cambridge University Press, New York, 1st edn., 2001).

22 *Ibid.*

23 Federico Lenzerini; Intangible Cultural Heritage, The Living Culture of People, 12(12011)*EJ INTL*, available at: <https://doi.org/101093/enil/chr006> (last visited on Nov. 14, 2023).

24 UNESCO Convention on Cultural Property 1970, art. 1.

state-centric element is also apparent in that the cultural significance of objects that determined by their importance for archaeology, and prehistory. Literature, art or science, are not important to the cultural identity of a people group.²⁵ The United Nations Declaration on the Rights of Indigenous People²⁶ recognises that the indigenous people and individuals are free and equal to all other people and individuals and have the right to be free from any kind of discrimination. The exercise of their right in particular that based on their indigenous origin or identity. It also provides that indigenous people have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expression.²⁷

Traditional cultural properties as traditional intellectual properties

It is common to say that while the modern economy is purely associated with knowledge-based oriented and the society is purely associated with resource based oriented.²⁸ But really it is not the symbol knowledge, but the technology and resources are the basic components and quintessence of all economics including those of traditional societies. For example, traditional knowledge living body of knowledge that is developed sustained and passed on from generation to generation within a community and often forms part of its cultural and spiritual identity. Indeed, there is growing appreciation that traditional knowledge-based technologies and traditional cultural expressions are not just old obsolete and maladaptive; they can be highly evolutionary, adaptive, creative and even novel.²⁹

World Intellectual Property Organisation has used the term traditional knowledge to refer the traditional based literary, artistic or scientific words, performances, inventions, scientific discoveries, designs, marks, names and symbols, undisclosed informations and all other tradition-based innovations. Moreover it creates the consequence from the intellectual activity in the industrial, scientific, literary, artistic fields simultaneously. The notion 'tradition-based' refers to knowledge systems, creations, innovations and cultural expressions which have been generally transmitted from generation to generation. These are generally regarded as pertaining to a particular people in its territory that have generally been developed in a non-systematic way and that are consistently evolving in response to changing environments.³⁰ Under the revised draft

25 *Id.* at 113.

26 UN Declaration on the Rights of Indigenous People. 2007. art. 2.

27 *Id.*, art. 31.

28 Graham Dutfield: *Global Intellectual Property Law*, 327 (Edward Elgar publication. Ltd, Massachusetts, 1st edn 2008).

29 Jonathan Curci, *The Protection of Bio Diversity and Traditional Knowledge in International Law of Intellectual Property* 91, (Cambridge Pub, New York, 1st edn, 2010).

30 WIPO/GTRK/IC/3/9.

objectives and principles article 3(2) sets out that the term traditional knowledge refers to the content or substance of knowledge resulting from intellectual activity in a traditional context and includes the know-how skills, innovations, practices and learning that form part of traditional knowledge system and knowledge embodying traditional lifestyles of indigenous and local communities or contained in codified knowledge system passed between generations.³¹ Moreover, it must be highlighted that according to CBD, traditional knowledge refers to the knowledge, innovations and practices of indigenous and local communities around the world, developed from experience gained over the centuries and adapted to the local culture and environment.³² Traditional knowledge evolves over the period of time by the contribution of members of a particular society. Traditional knowledge is not static, it is inherently dynamic.

Traditional cultural expression is very significant to the forms of cultural manifestation. It can be expressed through dances, songs, handicrafts, designs, ceremonies, tales or many other artistic and cultural notions. They are consistently evolving developing and recreating traditional cultural expressions that may be either tangible or intangible or most usually combination of the two. The 'adjective' traditional qualifies as a form of knowledge or an expression which has a traditional link with the community, it is developed, sustained and passed on within a community.³³

The expression of folklore is understood as productions consisting of characteristic elements of the traditional artistic heritage developed by a community reflecting the traditional artistic expressions of such a community. There are various forms of expression include folk tales, folk poetry and riddles folk songs and instrumental music, folk dances, plays and artistic form of rituals and drawings, paintings, carvings, sculptures, pottery, wooden works, jewellery, basket weaving needlework, textiles, carpets and architectural forms.³⁴

In the above discussion, all these tangible and intangible products and performances are having their traditional cultural significance and also property character.

Converting cultural property into monopolistic intellectual property and its consequential implications

There is an interesting interrelation between a nations culture and the protection that gives to intellectual property. The intellectual property system aims to recognising the

31 WIPO/GRTKF/IC/11/5(c) Apr 26, 2007, art 3.

32 CBD 1992. art. 8(j).

33 Secretariat, WIPO, "Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expression", *available at*: <https://policy.nl.go.kr>>cmmn (last visited on Dec 12, 2021).

34 Shatid Alikhan; *IP and Competition Strategies in the 21st Century*, 70 (Adithya Bokks Pvt.Ltd. New Delhi, 1st edn., 2008).

property rights of creators over their creations. Protection of intellectual property right is considered to be reward to the creators for their creativity. From the same perspective, it is significant to consider traditional creations that are not protected under the existing intellectual property system.³⁵ The intellectual property system makes to know the creative and innovative output of society and registers it within its system of recording and regulating the dissemination of that information in which cultural patrimony occupies at best the periphery.³⁶ The Intellectual property system always protects creations and innovations and encourages successful commodification.

Today, intellectual property laws reflect an increasing emphasis on depicting knowledge and culture within a property rights paradigm.³⁷ This emphasis is most evident in approaches to intellectual property that treat cultural materials as primarily constituting a valuable asset. Intellectual property may protect cultural creations and the transmission of culture both contemporaneously.

The intellectual property system can be approached from two different angles to ensure the protection of cultural property. These two approaches generally referred to as positive as well as defensive protection can be undertaken together in a complementary way. Under the first approach, in the positive protection, the intellectual property system is designed to enable holders to acquire and assert intellectual property rights in their cultural properties. This can allow them to prevent unwanted, unauthorised or inappropriate uses by third parties and to exploit the cultural property commercially. Positive protection is the granting of rights that empower communities to promote their tangible and intangible cultural properties and control their uses by third parties and benefit from their commercial exploitation. Defensive protection is designed to prevent the illegitimate acquisition or maintenance of intellectual property rights by third parties. At most importantly, defensive protection aims to prevent people outside the community from acquiring intellectual property rights over cultural properties. For example, India has compiled a searchable database of traditional medicinal knowledge in the Traditional Knowledge Digital Library (TKDL) that can be used as evidence of prior art by patent examiners when they are examining patent applications. Most significantly, defensive protection might also be used to protect sacred cultural manifestations such as sacred symbols or words from being registered as trademarks³⁸ and industrial designs.³⁹

35 Dr. Tshimanga Kongola, *Unsettled Inter-National IP issues*, 29 (Walter Kluwar, New York, 1st edn., 2008).

36 Guido Westkemp(ed), *Emerging Issues in IP*, 310 (Edward Elgar Pub.Ltd, Massachusei, 1st edn., 2007).

37 Mark. A. Lemley, "Property, IP and Free Riding" (85).*Tex.L., Rev.*1031 (2005).

38 Trade Marks Act 1999, s. 9.

39 Design Act 2000, s. 9.

Intellectual property refers to the creation of the mind such as inventions, designs, literary, and artistic works, symbols, names, images and performances. Intellectual property is typically protected by law that establishes private property rights in creations are innovations in order to grant control over the exploitation particularly commercial exploitation and to provide incentives for further creativity. Copyright for example protects the products of creativity in the form of original literary and artistic works against certain uses such as reproduction, adaptation, public performance, broadcasting and other forms of communications to the public. The goals of copyright protection are largely to encourage further creativity and public dissemination to control commercial exploitation. It can also provide protection against demeaning or degrading the use of a work and issue that is often of concern in relation to traditional cultural materials.⁴⁰ Intellectual property protection is focused directly on innovation and creation particularly the law of distinctive marks, indications and signs.

The elements and principles of the copyright system are particularly relevant to the protection of traditional cultural products because many are literary and artistic works, so that which are becoming subject matters of copyright. This is the way many countries already protect folklore within copyright laws. The economic, as well as moral rights of the performers, are also recognised by copyright law.⁴¹ Thus the performers of traditional cultural expression can also entitle neighbouring rights protection for their respective performances.

Traditional cultural properties often have a strong link with a specific region or locality. This means that geographical indications can be used for tangible cultural products such as handicrafts that have specific qualities or characteristics derived from their geographical origin. In India majority of the geographical indication tags were given on handicraft goods.

The design, shape and visual characteristics of textiles, carvings, pottery, woodworks, metal works, jewellery or other handicrafts would be protected as industrial designs. Distinctive names, signs and symbols associated with traditional knowledge and cultural expression can be protected under trademark law and safeguarded against third-party claims. In the context of interface between cultural property and intellectual property, there is an evidence to state that intellectual property continues to enrich tangible and intangible cultural properties and supplement fresh blood into the cultural property. Moreover, intellectual property absorbs nutrients from diverse cultural properties. One of the consequences of the assertion of intellectual property right over cultural property is the resultant commodification of intangible cultural property.

40 WIPO; Consolidated Analysis of the Legal Protection of TCE and Expression of Folklore, *available at:* <https://www.wipo.int/pubdocs>, (last visited on Dec. 12, 2023).

41 Indian Copyright (Amendment) Act 1957, s. 38.

The process of commodification can be seen as the “rectification”⁴² of intangible property and the exploitation of this rectified intangible is often referred to as commercialisation. The commercial value of cultural properties attracts non-indigenous people, corporations within a country and also multinational corporations in certain cases, for further entry into the cultural domain of indigenous communities for their commercial goals.

III Misappropriation and hybridization of cultural properties

It is an important contemporary issue confronting indigenous people is the appropriation of their intangible cultural property. Several times misappropriation of intangible cultural properties leaves the indigenous community helpless and also creates adverse consequences for their social and economic interest⁴³. Modern indigenous artists have been able to resort to traditional property rights concerning movable cultural property, many native people have found their claims to ownership and their intangible cultural property such as motifs, songs, prayers, sermons, music legends and folklore frustrated by the limits of intellectual property regimes⁴⁴. Misappropriation happens when the use of indigenous knowledge to develop commercial products, especially valuable drugs. If an indigenous community first discovers a medicinal use of a plant and conveys that knowledge to outside researchers, later it serves as a basis for a new pharmaceutical invention. There is a possibility for acquiring the kind of intangible cultural property by fraudulently or deceptive ways of obtaining patents on new drugs. For example, the natives of Madagascar knew ‘rosy periwinkle’ had medical properties, leading pharmaceutical giant Eli Lilly to research it deeply thereby finding treatments for Hodgkin’s disease, childhood leukaemia and malaria.⁴⁵ This is obviously known as misappropriation.

Moreover, originality in the context of traditional cultural properties either tangible or intangible raises certain issues. The intangible cultural properties become the subject matter for copyright protection only if they are expressed or converted into tangible products as original works. ‘Originality’ in this sense means that there is a causative link between the author’s mental concept and the works that he or she he has

42 “Rectification” means the transformation of a natural language statement into a form in which its actions and evens are quantifiable variables.

43 Sun Thathong, “Lost in Fragmentation, The Traditional Knowledge Debate Revisited”, 4(4) *Journal of Int’l Law*, available at: <https://www.cambridge.org/article> (last visited on Dec. 8, 2023).

44 R. K. Peterson, “Looking Beyond IP in Resolving Protection of the Intangible Cultural heritage of Indigenous People”, 11 *Cardozo Journal of International and Comparative Law* 633 (2003), available at: <https://heinonline.org/get-pdf.cji>; (last visited on Dec. 7, 2023).

45 Katie Bates, “A Penny for your Thoughts; Private and Collective Contracting for Traditional Medicinal Knowledge Modeled on Bioprospecting Contracts in Costa Rica”, 41 *G.A. L.Rev.* 961, (2007).

produced with the help of his or her hands.⁴⁶ Contemporary forms and practices can be protected as works provided they are considered original works under copyright law. There are also some forms of adaptations or derivative works, which are works based on one or more existing works. Examples include translation, motion pictures, versions of oral stories and original reproduction of artworks so on and so forth.

The main problem here is to identify if any outsider or non-indigenous person creates an artistic work or literary work based on traditional cultural expressions or folklore. It can positively entitle copyright protection over his creations, this may be based on already existing works. This is the way traditional intangible cultural properties are misappropriated by non-indigenous people outside the community or in certain cases outside the country also. In a famous Australian case,⁴⁷ where carpets were produced for the high-end market. These carpets reproduced the artworks of several prominent Australian artists. The carpets were being imported into Australia from Vietnam and sold with tags that labelled them as “aboriginal carpets”. Several carpets were direct copies of the original artworks while others carried designs that had been significantly simplified and therefore were not direct copies. The aboriginal artists argued that all of the carpets constituted copyright infringement. In arguing, the simplified carpets did not constitute a original or derivative works and at the same time the copying was an infringement because it distorted the cultural meanings within the works. Finally, the court accepted this reasoning and found that under Australian copyright law all the carpets infringed the copyright of the aboriginal artists in their works. The court noted these specific cultural dimensions that because the community also had important relationship with the artworks its members too had suffered anger and distress from the infringement. This case is so important because the judge looked into account how the infringing works. After all, the simplifications and alterations done by the infringer had disrupted, damaged the significant cultural meaning designs. This act is referred to as misuse or misappropriation of traditional cultural properties; this also reflects the customisation of traditional cultural expression in India is not illegal and non- indigenous entities who extract from the traditional cultural expression of tribal communities.⁴⁸ It is the practice as that leads exploitation of materials available in public domain. The misappropriation of communities’ traditional cultural expression permeates several industries in India.

Historically discussing, some countries have been protecting their traditional cultural expression through the customary laws of the indigenous communities. For example,

46 Peter J. Groves; *Source Book on Intellectual Property Law* 284 (Cavendish. Pub.Ltd, London, 1st edn,1997).

47 *M.Payanka Manka v. Inofurn*, 30 IPR, 2009. 2020, *EMORY Law Journal*, available at:<http://scholarlycommons.law.emory.edu/elj>. (last visited on Dec. 9, 2021).

48 (1992) 175 CLR 1.

Australia is one of the countries that has taken a step towards recognising the customary laws of the indigenous communities. *Mabo v. Queensland*,⁴⁹ was one of the landmark cases in Australian law as it recognised the customary law and the native title of the Aboriginal and Torres Strait Islanders over the land that they lived for thousands of years.

Although this can be considered as a breakthrough for incorporating customary laws into national laws, it is not enough to protect traditional cultural expression. In *Bulun Bulun v. R and T Textiles Pty Ltd.*,⁵⁰ the Galanbingu clan did not get any sort of remedy when Mr. Bulun Bulun's artwork "Magpie Geese and Water Lilies at the Waterhole", containing sacred images of the clan was blatantly copied onto t-shirts without their consent since their rights aren't protected in the existing copyright regime. From the arguments of the clan and Mr. Bulun Bulun it can be understood that the clan "are the traditional owners of the body of ritual knowledge from which the artistic work is derived, including the subject matter of the artistic work and the artistic work itself".⁵¹ Bulun Bulun had further elucidated this fact by stating that "To produce [the painting] without strict observance of the law governing its production diminishes its importance and interferes adversely with the relationship and trust established between myself, my ancestors, and Barnda [the long-neck tortoise, a creator being]"⁵² and "A painting such as this is not separate from my rights in my land. It is a part of my bundle of rights in the land and must be produced in accordance with Ganalbingu custom and law."

A blatant infringement of the rights of the communities not only causes monetary loss, which is not even considered as important by the people but disrespects their cultural identity that defines them. The sacred symbols which they believe to be their source of contact to their ancestors and creators, are being tarnished by people who aren't aware of their significance. The right over the traditional cultural expression in this case runs with the land of the people and is considered to be belonging to all. Thus its infringement is going to affect all not one. This concept of collectivism is not recognised in the traditional intellectual property laws which will lead to misuse and misappropriation of traditional cultural expression.

In the Indian music industry, artists tend to mix pop music with traditional music extracted from indigenous tribal communities. The original music often cannot be copyrighted because they have been passed down orally or in a transient form. An artist can however derive the benefits of copyright law by recording mixes of pop

49 (1998) 41 IPR 513.

50 *Ibid.*

51 *Ibid.*

52 Molly Torson and Jane Anderson; IP and Safeguarding of Traditional Cultures (2012), *available at*: <https://www.sfu.ca/output>, (last visited on Dec. 4, 2021).

music with traditional music and ‘fixing’ it in a tangible medium. The requirement of fixation is mandatory for getting copyright protection but many lots of cultural properties are intangible in nature and not in a fixed form. Taking into advantage, the musical, cinematographic and publication, industries are exploiting the works of indigenous communities. The fixation requirement perhaps plays an important role to obtain copyright protection rather than originality. This raises serious challenges in the protection of traditional intangible cultural properties under the copyright law. For instance, in the shamanic incantations complex therapeutic rituals including poetics, healing, performances in songs, musicotherapy, sand painting and so on, could often take spontaneous terms and not be readily amenable as a tangible form.⁵³ In many cases, it is impossible to separate intangible cultural property and intangible symbolism, spiritualism and belief system that fixation entails.

Indian films are also tends to use stories from tribal settlements and also including tribal people as performers. Moreover, the big textile industries are also able to replicate the artistic creations of the community without compensating these communities. This way of misappropriation is continuously happening. Moreover, works based on adaptation and derivative works are recognised as copyrightable subjects. Adaptations or works based one or several pre-existing works or upon material from the public domain. They include any form in which the work may be recast, adapted or transformed. Even works can derived from materials in the public domain that benefit the copyright protection because a new interpretation, arrangement, adaptation or collection of public domain. Digitalisation, enhancement, and colourisation can also become protectable if it is original.

For this reason, contemporary, literary or autistic productions derived from the traditional culture or traditional cultural expression that incorporates new elements or expression may be considered original work and thus can be protected by copyright.⁵⁴ The recording of adaptations and public performances of indigenous stories plays and dances such as the Sierra dance of Peru and the Hake dance of the Maori people of New Zealand has raised questions about the protection of the rights of the indigenous community in these expressions of their culture.⁵⁵ Moreover, the distinctive and unique handicrafts are vulnerable to imitation and misappropriation. In fact the cheap imitation often jeopardize the sale of traditional handicrafts and the quality of original products.⁵⁶

53 *Id.* at 31.

54 WIPO; Traditional Cultural Expression, *available at*: <http://www.wipo.int>.> (last visited on Dec. 10, 2023).

55 Chante Westmorland, “An Analysis of Protection for Intangible Tribal Property in the Digital Age” 106(3) *Calif.L. Ren.* June 2018, *available at*: <https://www.jstor.org/stable/26577735>, (last visited on Sep. 23, 2023).

56 The apology was also reproduced on the Olympic Museum Website. Apology is published at <https://www.olympic.org/uk/passion/museum/home-uk.asp>.

The hybridisation of cultural properties is happening through digitalisation. Many artistic and literary works are being replicated in an electronic form. With the help of new technology, addition, modification, alteration and distortion are easily possible. Thus, using intangible cultural properties in the digital or electronic form itself is kind of misappropriation. An example, was the Olympic Museum in Lausanne posted three Australian aboriginal artworks on its websites to coincide with the Sydney Olympic games in 2000 without seeking the consent of the artists. It also encourages people to download the artwork as ‘wallpaper’. This was challenged by the artist very strongly and they contended that their copyright and moral rights were infringed by the Olympic Museum Foundation and also caused cultural harm. On accepting this, the content was removed from the website and accepted to pay the compensation with an apology letter too.⁵⁷

Indigenous people and traditional communities have expressed the need to be able to protect designs embodied in hand-woven or handmade textiles, weavings and garments that have been copied and commercialised by non-indigenous people. Examples would include the ‘amuti’ in Canada, ‘Saris’ in South Asia, the ‘tie and dye’ cloth in Nigeria and ‘Mali’ traditional caps in Tunisia, *etc.* The imitation of traditional textile designs causes not only economic prejudice but also destroy cultural identity of indigenous people.

In another important event, in early 2018, a Chicago-based restaurant chain called ‘Aloha Poke Co’ sent cease and desist letters to several small businesses with names containing some variation of ‘Aloha poke’ for which the chain owned trademark registrations. Native Hawaiians ran many of the businesses that received the letters ‘Aloha Poke Co’ was not owned by native Hawaiians. The letters created an uproar because of the association that ‘Aloha Poke’ has with a traditional Hawaiian heritage. A Hawaiian activist posted a viral video in which she spoke about how important the idea of Aloha was for Hawaiian culture noting that it was being completely commercialised and denigrated. The office of Hawaiian affairs strongly represented the matter to the trademark authorities.

Similarly, strong pressure has been building on the Walt Disney Company to abandon its trademark on the phrase “Hakuna Matata” made famous in the blockbuster ‘Lion King’ franchise. An online petition with over 1,38,000 signatures as of January 2018 contended the registration predicated purely on greed as an insult not only to the spirit of the ‘Swahili’ people but also to the entire Africa.

Thus it is very clear that the perceived misappropriation of ‘Aloha’ and ‘Hakuna Matata’ has focused public attention on the issue of whether Federal Trademark Registrations should be granted for marks that are associated with a traditional heritage.

57 *Navajo v. Urban Outfitters Inc.* 935 F Supp. 2d.1147 (D.N.M 2013).

The misappropriation of traditional cultural property has a long history. In addition to, there are many trans-borders problems arising and the issues are yet to be settled. These misappropriations of cultural properties lead to creating a lot of problems for traditional cultural property owners.

Most notably, the “Navajo Tribe” sued Urban Outfitters for using the tribal name to market certain clothing such as apparel, jewellery, accessories and bottles under the geometric “Navajo” designs. The *Navajo* claimed trademark infringement and dilution because they manufactured and sold their own tribal goods. In response to the dilution lawsuit, Urban Outfitters argued that the term “Navajo” is not an “enforceable trademark” because it is a generic term used to describe a particular style of clothing. The lawsuit is currently settled, but in May 2016, a New Mexico federal district court dismissed the trademark dilution lawsuit, ruling that the term “Navajo” was “not well-known” enough to be diluted by Urban Outfitters’ use.⁵⁸ This case illustrates the difficulties even the largest tribes face in protecting their cultural property. The “Zia tribe” is also trying to protect the sacred sun symbol through its trademark. The tribe claims that New Mexico appropriated the symbol and has left it without a permit since 1925. New Mexico uses the sun symbol on its state flag, licence plates, and other products. The sun symbol has religious and cultural significance for the *Zia* people. However, because the tribe did not use the symbol for commercial purposes and the symbol was used on the state flag, the symbol did not qualify for trademark protection. Still, the tribe was able to use social pressure to persuade certain organisations to negotiate compensation in the form of donations.⁵⁹

IV Authorship and ownership issues

Based on the natural law principle the creator of a property is an author and also the owner. According to this principle the authorship and ownership rights are naturally or inherently derived. The persons or people who have created a culture, or cultural products can positively claim both authors as well as the owner of that cultural property. Thus, it is clear that the creators of cultural properties are the original authors and owners. Contemporary intellectual property law is constructed around a notion of the author as an original creator. Those who do not fix these model custodians of tribal culture, traditional knowledge, traditional artistic, literary and musical works, and public performances based on traditional cultural expressions are denied intellectual property protection.⁶⁰

58 Stephanie. B. Turner, “The Case of the Zia Looking Beyond Trademark Law to Protect Sacred Symbols”, 11(2) *Cbi Kent J. Intell. Pro.*, 116 (2012), available at: <https://scholarship.ketlaw.iit.edu/ckjip/vol11/iss2/2>. (last visited on Jan 23, 2024).

59 *Id.* at 123.

60 Srividhya Ragavan, “Protection of TK”, 2 *Minn. Intell. Prop. Rev.* 35,45 (2001).

Copyright is author centric, in the sense that it requires an identifiable author or joint author of cultural property. In the case of contemporary traditional cultural expression, this particular requirement is generally met as it is relatively easier to identify the author and the owner. Several commentators have attributed the inability of copyright to deal with problems of cultural property protection to a supposed copyright focus on the individual author⁶¹. Intangible traditional cultural properties are concerned, which have a long history, so the identification of the original creator is not easily possible and the knowledge has been passed from generation to generation. According to the supporters of indigenous people and their right to control, maintain and protect cultural properties claim that the authorship and ownership will also pass their generations as an inalienable right. The problem here is an intellectual property owners cannot claim or entitle to perpetual rights over their creations or properties. It is also significant to note that the copyright law has the most obvious potential as a modality for securing new claims in old culture has evolved around the idea of authorship to favour individual claims, which are original and relatively imaginative. Currently, non-indigenous people and industries are producing a lot of copyrightable subject matter based on already existing both tangible and intangible cultural properties and claiming authorship and ownership. These works are having old roots but new rights and no way these are beneficial to the original cultural property owners *i.e.*, the indigenous communities. The proliferation of more numbers of derivative and adaptive works, the indigenous communities are gradually losing right over their properties. It is like sowing by the original creator and reaping by another person through the sword of intellectual property rights.

The majority of the traditional cultural properties are existing in oral forms only, which are not materialised so far. To obtain copyright protection these intangible forms should be converted into materials or fixed. So that the creators can entitle both authorship and ownership.⁶² More so, in the State of Tamil Nadu while at the time of cultivation and harvest particularly in the paddy fields, the indigenous farm-workers used to sing folk songs which consist of aplenty of informations which are now converted as a folksong books by the publishers without giving even a little of fruits. Denying copyright protection to the works not fixed in tangible medium results in the devastating exclusion of an entire realm of indigenous creations as the use of oral traditions spans almost every native community in existence.⁶³ For example, folklore, since it emanates from a community is identified with the traditional values

61 Sterling, *World Copyright Law*, 247 (Sweet and Maxwell, London, 1st edn., 1999).

62 Angela Riley, "Reserving collectivity, Group rights to Intellectual Property in Indigenous Communities" 18(1)*Cordozo Arts and Entertainment Law Journal* 195(2001), available at: <https://papers.ssrn.com>2013>papers>. (last visited on Dec. 8, 2023).

63 Pari, "Copyright Protection of Folklore a New Zealand Perspective". 22(3)*Cop.Bull.*, 23(1998) available at: <https://natlib.gov.vz>>. (last visited on Nov. 10, 2023).

of that community imitation and reproduction are its earmarks as distinct from originality viewed as the expression of a single author⁶⁴. Moreover, the development of recording and broadcasting technologies and then of television and cinema have over the years led to a commercialisation of expressions of folklore on a global scale.⁶⁵ Importantly, without due respect being given to the cultural or economic interests of the communities from which they originate and without any of the revenue from such exploitations of folklore benefiting the peoples who are its authors. Moreover, current digital technology uses numerous intangible cultural properties that are usually converted into electronic forms and obtained copyright protection by the non-indigenous communities. They are selling these kinds of hybrid cultural products through the internet,⁶⁶ but the original authors and owners have left with nothing.

V Issues relating to group rights

It is significant to note that cultural objects nourish a sense of community of participation in a common human enterprise.⁶⁷ The nexus between a cultural object and a group are the key essential measurements for determining whether group rights in the cultural property will be holding continuously. The Indigenous community as a group, they have every right to create, protect, control, develop and commercialise the cultural properties. To entitle a group right over the cultural property 'group identity' is a substantial element. By recognising that groups have rights in some cultural property, a law and economic perspective risk offending group identities by its willingness to compromise constitutive incident of group hood in the market under the guise of moving cultural objects. Many commentators used to say that cultural property is a common heritage of mankind.⁶⁸

Intellectual property rights are individuals' private property rights and the owner can commercialise his property in the market. Except for geographical indication, almost all kinds of intellectual property laws focus on individual rights over the property that he or she has created. The problem here is if an individual non-indigenous person creates a derivative work based on traditional cultural expression, positively

64 Dr. Silke Von Lewinski, *Indigenous Heritage and IP, Genetic Resources, TK and Folklore*, 340 (Walters Kluwer, New York, 2nd edn., 2007).

65 Mira Burri; Digital Technologies and CE; A Positive look at a difficult Relationship, *available at*: <https://doc.ero.ch.files>. (last visited on Dec. 20, 2023).

66 John Moustakas, "Group Rights in Cultural Property – Justifying Strict Inalienability", 74 *Cornell Law Review* (Sep1989), *available at*: <https://scholarship.lam.cornell.edu/clr/vol.74/iss.6/5>, (last visited on Dec. 14, 2023).

67 Sharon A Williams, *The International and National Protection of Movable Cultural Property A Comparative Study*, 302 (Oceana Publication, Newyork, 1st edn., 1978).

68 Ana Filipa Vrdoljak, "Indigenous Peoples World Heritage and Human Rights", 25(3) *International Journal of Cultural Property*, *available at*: <https://www.cambridge.org/article>, (last visited on Dec. 12, 2023).

he will become the owner and can entitle property rights. It will cause the prejudice which is against the indigenous community as a group. Individual rights can easily be transferred whereas group rights cannot easily be transferred because it has their limitations. For example, the geographical indication cannot be transferred by way of licence, because the goods or the subject- matter is directly connected with the particular group or community.

VI Destruction of cultural identity and cultural values

Every culture and cultural property is nourished and will nourish only by cultural identity and the identity of indigenous people. Tribal people or indigenous communities are identified only with cultural products and cultural performances followed by the said community. The cultural value is also measured only with the help of cultural significance and long-time practice of the people. The natural custodians of the cultural property is also having the right to protect paternity and integrity. Tangible or intangible cultural properties are helped to rise for giving a good name and fame to the entire indigenous community.

Due to a large number of misappropriations of cultural properties and the conversion of cultural property into monopolistic intellectual property, the cultural identity is destroyed by the non-indigenous people or persons from other jurisdictions too. For example, some distinctive musical work of indigenous or tribal community is mixed with pop music or other kinds of music mixture or mash up which lead to the decay of the cultural identity of that community. Similarly, many literary, artistic, and traditional cultural expressions and folklore are corrupted with addition, alteration, abridgement, mutilation and distortion by the persons not at all connected to the original owners of all these cultural properties of the indigenous communities. The visibility of the indigenous communities is determined by their cultural identity and the value of their products they have possessed.

For indigenous people, cultural property and tribal ways are constitutive of the group's collective identity.⁶⁹ This signifies the world view of most tribal people, who define their identity largely based on their identification with the group. For individuals within those distinct groups, flourishing in the world as a person is intimately related to cultural identity.⁷⁰ This identity helps the community to nurture and nourish their cultural properties but the misappropriation of cultural property causes adverse consequences and leads to devastating of the groups' cultural identity. Cultural identity is the backbone of the indigenous community in the context of their continuous linkage with the past and they promote them for their future generation in order to

69 John. S.Harbison, "The Broken Promise Land; An essay on Native American Tribal Sovereignty over resources", 14. *Stan.Emil.L.J.* 347 (1996).

70 *Ibid.*

establish inter-generational justice.⁷¹ Most significantly, the divine nature of the linkage of past and obligation towards future generations, the chain is also broken because of such kind of conversion of cultural property into intellectual property.

History shows that the guard against encroachment upon indigenous cultures and any legal protections that have existed focus on the rights of the individual. The hybrid Western scheme a mix of individualistic and utilitarian perspectives struggle to balance societal rights against individual rights.⁷² By positioning individuals' interests against the interest of the state, indeed identity, integrity and sanctity of the historically too old cultural properties. This will gradually diminish some cultural practices in the community. Furthermore, the individualistic perspective implicit in the western jurisprudence influenced intellectual property system does not fully address concerns of those intent on preserving the integrity of their group identity. These types of laws are inadequate to ensure the survival of indigenous cultures. As a result, many kinds of highly valuable cultural properties and practices have been disappearing from the indigenous communities. For decades indigenous communities have been demanding the recognition of their rights on cultural properties so as to maintain their cultural identity. The 1976 Australian case shows the seriousness of the issue. In this case the Pitjantjara people and aboriginal sought an order from the court to prevent the sale of a book written by the anthropologist Dr Mountford, contains details of their tribal objects, communal legends and totemic geography. The court held that the publication of this information which had deep religious and cultural significance for the aboriginals amounted to breach of confidence and that the publication of the book would lead to the revealing of secrets, that undermine the social and religious stability of their hard-pressed society.⁷³

It is significant to say that collectivity and collective property, itself is the identity of the community *per se*. For a tribe determining the destiny of collective property, particularly that which is sacred and intended solely for use and practice within the collective is a crucial element of self-determination. Invasion of non indigenous people into indigenous culture amounts to cultural trespass and causes irreparable damage to the indigenous communities. Thus, western hybridisation leads to the decay of the cultural, social and sacred identity of the indigenous people.

71 Angela R. Riley; "Covering Collectivity: Group Rights to Intellectual Property in Indigenous Communities", available at: <https://heinonline.org>, (Last visited on Dec. 8, 2023).

72 *Foster v. Mountford* 1976, 14 ALR.

73 United Nations Declaration on the Rights of Indigenous People. Art. 12 reads as; "Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious tradition, customs and ceremonies, the right to maintain protect and have access the right to the use and control of their ceremonial objects and the right to be the repatriation of their human remains".

VII Creating 'generation gap' as the crucial issue

Intangible cultural expressions, a tradition-based highly useful knowledge insights and folklore are passed from generation to generation. The majority of the transmission is happening around in both ways orally or in a transient form. Historically speaking this particular process and practice has been understood as a holy obligation and a sacred one. The social bondage with past, present and future also continues without breaking the chain. The hybridization and appropriation of cultural properties on many occasions have broken the chain because of the rigid requirements for getting monopoly rights. Creating tangible objects, recording, fixation, adaptation, translation and inventions create a 'solid gap' between generations. This process affects the learning potentiality of the younger generations belonging to the indigenous communities as well. This generation gap is a highly dangerous one and gradually it leads to displacement and scattering of indigenous communities. Many scholars argue that intellectual property-based globalisation creates a situation that in many ways forward to the decay of the culture of a particular community, region and state and also diminishes intangible cultural products and practices. For example, some distinct religious practices, sermons, rituals, and holy objects are gradually losing their significance because of the generation gap which has been created by misappropriation. This will definitely affect the vision of 'our culture which is our future'. Moreover, some secret at the same time sacred religious prayers, sermons and rituals are reproduced and adopted by the non-indigenous people are also creating a generation gap, which will become an obstacle to the promotion and preservation of tangible and intangible cultural properties. Most importantly, the United Nations Declaration on the Rights of Indigenous People and its resolution on 2007, which has effectively enshrined the right of indigenous people to teach and protect their cultural religious ceremonies and the unique products used for the same.⁷⁴

VIII Public domain doctrine of cultural properties

The public domain is used in the copyright context as cultural properties are available in the public domain for use by any member of the public. For example, traditional cultural expressions, folklore and knowledge about genetic resources are available in public as a common property. The traditional cultural expression holders interrogates whether the public domain status of cultural heritage offers the greatest opportunities for creation and development. Ethically, providing intellectual property protection for contemporary tradition base cultural expression is an inappropriate survival of the fittest approach that does not obviously serve cultural property holders.

74 Ulrich; Protection of Adaptation and Collection of Expression of Folklore, *available at*: <https://www/wipo.int/mdocs>.(last visited on Dec. 20, 2023).

The public domain status of cultural heritage has also tied to its role as a source of creativity and innovation. It is argued that it is through sharing and adaptation and arrangement that cultural heritage is kept alive and transmitted to future generations.⁷⁵ In the case of folklore, the majority part is available in the public domain and the current copyright law protects the works which are derived from the elements of folklore. In such a way, non-indigenous persons are commercially exploiting the cultural properties by using the pre-existing cultural properties. This is why copyright law is an element of inability to protect traditional cultural properties. Moreover, cultural institutions are free not only to reproduce material from the public domain on the internet but also on commercial goods and commercial purposes. This practice will affect the economic interest of the indigenous right holders and also diminishes the great value of the cultural properties in all dimensions.

IX Inability of copyright to protect the traditional cultural properties

Copyright protects only original works and many traditional literary and artistic productions are not original. For example, in Hungary “An expression of folklore can never be a work of authorship”.⁷⁶ The basic aspect is the main characteristics of folklore that has not been included in the reflection of the distinct personality of an author. Moreover, copyright requires for the identification of a known individual creator or creators, it is difficult, if not impossible to identify the creators of traditional cultural expressions because they are communally created or because the creators are simply unknown. In respect of contemporary tradition-based cultural expression, there is almost always an identifiable creator or creators and this requirement is generally met. It is true that the current copyright law has shortcomings that limit the capacity of indigenous and traditional persons to prevent the use of their literary and artistic production by others. While the copyright system treats traditional cultural expression as part of the public domain non-indigenous people can acquire copyright over new expression incorporated in derivative works, adaptation and arrangement in musical works etc. Thus, it is accepted that copyright is not an effective device to protect traditional cultural properties.

X Biopiracy threat

Indeed, indigenous people are having long acquaintance with flora and fauna, plants and all biological resources. They have acquired a great knowledge about the components of plants and their medicinal utilities. Plants are complex chemical storehouses that hold many undiscovered biodiverse compounds with unrealized potential for use in modern medicine. Much of the potential is known by indigenous

75 WIPO; Traditional Cultural Expression, *available at*: <https://www.wipo.int>. (last visited on Dec. 17, 2023).

76 Emily Marden, “The Neem Tree Patent, International Conflict over the Commodification of Life”, 22. *BC. Int'l and Comp. L. Rev.* 279(1999).

people throughout the world. This knowledge has given value of pharmaceutical industries as well as for many other industries. Researchers are constantly developing new technologies to assess the chemical makeup of plants and realise that using medicinal plant identified by native people makes researchers more efficient and less expensive. Sometimes this knowledge forms foundation for further discovers by narrowing research efforts to plants which are rich in medical properties. The process of appropriating indigenous peoples' knowledge without compensation is referred to as biopiracy. Indigenous people feel states that this is theft of their property arguing that they made the discovery but simply lacked the resources to patent invention themselves.

Biotechnology industries currently gain the commercial potential from scouring the globe for rich source material and active compound that can be turned into a commercial product.⁷⁷ Compared to the pharmaceutical industries, indigenous people have been cultivating and improving their local plant life for centuries. In fact plant life is not patentable but pharmaceutical and agrochemical companies have found way to patent these sources through innovative approaches. They used to extract the elements of the plant's genes and patent the active ingredients. The biotechnology industries have been able to extract, improve and patent genes from these plants.⁷⁸ In this way corporations continue to get rich while the indigenous people continue to struggle for survival.⁷⁹

Most significantly, the communal knowledge from an indigenous people perspective allows for mutual benefits for the sake of group without the need for individualised reward. Many indigenous people feel the benefit to the community as a reward in itself. On the other hand, Western view does not look into the community rewards as an end result but rather the other way around, if one person is given the incentive to create the community will be benefited.⁸⁰

Indigenous communities over the centuries have identified and classified plants native to their lands and found healing and spiritual uses for them. They have already discovered the plants assessed their healing and medicinal properties and cultivated them for their use and they are not expecting profit from the plants like Western approach. Though the Patent law prevents the patentability of traditional knowledge based inventions in India⁸¹, corporations from developed countries are able to obtain

77 Marcie Ellen; "The Appropriation of Indigenous Peoples Cultural Knowledge", *available at*: <https://www.culturalsurvival.org>, (last visited on Dec. 2, 2023).

78 *Ibid.*

79 *Ibid.*

80 Indian Patent Act 1970 (as amended in the year 2005) s. 3(p).

patent based on their respective patent laws. This practice left the indigenous people who belong to an empty hand.

Safeguarding of cultural properties- international legal frameworks

Although the demand for protection of traditional cultural expression as first made in 1960, it was developing countries that took initiative to get legal protection for traditional cultural expression. The Bangui Agreement 1977⁸² was established, through which the African Intellectual Property Organisation was also established and declared that cultural expressions such as folklore is considered as the cultural heritage of the nation.

The Berne Convention⁸³ for the protection of literary and artistic works 1886 was amended in 1967 in the Stockholm Convention to introduce article 15.4 in respect to the demand of the protection of folklore. 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 Unions, thus creating a legal framework to provide copyright protection to unpublished traditional knowledge, where eligible.⁸⁴

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. According to the model law, the 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. India is one of the first countries to set up a competent authority in communication with the WIPO. However, the Tunis model law has been criticised for leading to national legislation which is not coherent.

The UNESCO-WIPO model provisions for National Laws In The Protection Of Expression Of Folklore Against Illicit Exploitation And Other Prejudicial Actions was adopted by the WIPO-UNESCO in 1982 was an attempt to provide member states with a model law that they could adopt to safeguard the traditional cultural expression and Folklore. The provisions include the definitions 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 conceptual matters, and transborder disputes relating to traditional cultural expression, which could not be resolved under the model law.

81 Bangui Agreement, Mar.2, 1977.

82 Berne Convention was revised at Stockholm in 1967.

83 Berne Convention 1969.(revision) art. 15.4

84 WIPO Performers and Phonograms Treaty 1996.

The WIPO Performers and Phonograms Treaty⁸⁵ deals with the rights of the performers and the producers of phonograms. This Treaty protects performances of expression of folklore.⁸⁶ The UNESCO-WIPO World Forum On Protection Of Folklore⁸⁷ viewed existing copyright law provisions to be inadequate for the protection of folklore. It recommended a plan affection for conducting regional consultations for paving the way for a sui generis form of law. Subsequently, WIPO Inter-Government Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore⁸⁸ was established. This was to discuss intellectual property-related issues pertaining to conventional knowledge, genetic resources and folklore and it reaches 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 negotiation includes a definition of traditional cultural expressions, deciding on the beneficiaries, the term of protection to be granted and limitations of the right. The IGC has over time been updating model provisions, actually engaging indigenous people in the discussion process to design a multilateral treaty to safeguard traditional cultural expression. Moreover, IGC started undertaking text-based negotiations to reach a consensus on the international legal instrument for the effective protection of traditional cultural expression.⁸⁹

In March 2017 during the 33rd Session, the IGC renewed deliberations on the draft text to safeguard traditional cultural expressions after a gap of three years. India has been an active participant in the IGC, voicing the need for a legally binding flexible instrument to protect traditional cultural expressions. The 34th Session of the IGC developed the next draft of the legal instruments to protect traditional cultural expressions. It focuses on the various core issues of policy, subject matter, beneficiaries, the scope of protection, exceptions and definitions of misappropriation.⁹⁰ IGC represents a platform where India can play a crucial role on behalf of its vulnerable traditional cultural expression owners and custodians to safeguard basic human rights, right to culture, property and religion. India is an exporter of both its tangible and intangible cultural properties. The draft articles being designed by the WIPO-IGC have some measures to prevent misappropriation. Thus India should use WIPO-IGC as a platform to achieve its objectives of a stronger legal regime to protect the interest of the cultural property owners and maintain a balance between the interest of the owners.

85 WPPT, 1996. art. 2.

86 UNESCO-WIPO World Forum on Protection of Folklore 1997.

87 WIPO-IGC on IP, GR, TK and Folklore 2000.

88 Information Note for IGC-33, *available at*: <https://www.wipo.int/edocs/HC/en/wipo-grtkf-ic-33-ref-information-note-pdf>. (last visited on Dec. 22, 2023).

89 Information Note for IGC-34, *available at*: <https://www.wipo.int/edocs/HC/en/wipo-grtkf-ic-34-ref-information-note-pdf>. (last visited on Dec. 19, 2023).

90 UNDRIP 2007.

Moreover, the UN Declaration on the Rights of Indigenous People⁹¹ was adopted in light of the dynamic nature of the international legal provisions and their impacts on traditional knowledge and the right of the indigenous people attached to it. It states that the indigenous people have the right to maintain, protect and develop the past, present and future manifestations of their cultures and it depends upon for prevention of redress and restitutions to protect their property when taken without prior informed consent.⁹² It also explicitly states the right of the indigenous people to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.⁹³

The Beijing Treaty⁹⁴ was adopted keeping in tandem with the digital era, to deal with intellectual property rights of performers in audiovisual performances. The provisions of this treaty complement article 2 of the Treaty, while defining performers including in its ambit actors and performers of traditional cultural expression. 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. India has not yet accepted the treaty.

It is noted that for a decade WIPO has been continuously doing some home works so as to create a conducive environment to protect tangible and intangible cultural properties from misappropriation and hybridisation. Currently there is no effective international legal frameworks to safeguard the cultural properties from decay, which are happening through Western hybridisation.

The Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture⁹⁵ was developed to assist Pacific Island countries to legally protect their traditional knowledge and expression of culture. Importantly this framework emphasises a Model Law establishing a suitable generic rights for traditional owners of the expression of culture that have to be implemented by the Pacific Island countries. The rights created by the Model Law fall into two categories, traditional cultural rights and moral rights. The existence of these rights do not depend upon registration or other formalities. The moral rights are the right of attribution, the right against false attribution and the right against derogatory treatment in respect of traditional knowledge and expression of culture. Traditional cultural rights are exclusive rights in respect of a range of uses that are of a non customary nature. The holders of the traditional cultural rights are the traditional owners defined as the group, clan

91 UNDRIP 2007. art. 11

92 *Id.*, art. 31

93 Beijing Treaty on Audio Visual Performances, 2012.

94 The Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture 2002.

95 Brazil Copyright Act 1998.

or community of people, (a) as the individual who is recognised by a group, clan or community of people as the individual, (b) in whom the custody or the protection of the traditional knowledge or Expression of culture are entrusted in accordance with the customary law and the practices of the group, clan, or community. Moreover, clause 7(2) of the framework lists the types of uses of traditional knowledge or Expression of culture for which the prior and informed consent of traditional owners is required including the use for the making of new creations and innovations based thereon. Clause 11 is very interesting providing as it does that traditional cultural rights existing in addition to and do not affect any rights that may subsist under any law relating to intellectual property. This, this clause implements the policy that the new rights established by Model Law supplement and do not override intellectual property rights.

Position in national jurisdictions

In Brazil, the protection of traditional cultural expression falls within the work of copyright law.⁹⁶ Although the Act does not mention traditional cultural expression or folklore anywhere, it was amended to comply with article 15.4 of the Berne Convention to recognise the rights of unknown authors and artists.

In Ecuador, traditional cultural expressions are governed by intellectual property law.⁹⁷ It covers the meticulous subject matters and clearly defines what the expression and folklore.⁹⁸ The scope of protection states that economic and moral rights apply to the creation and adaptation of the expression of folklore.⁹⁹

The traditional cultural expressions are protected under the Federal law on copyright in Mexico.¹⁰⁰ It protects the performers' rights of anyone, who performs an expression of folklore¹⁰¹ and also protects literary, and artistic works which are a manifestation of the original work forming part of the Mexican culture and heritage including one where the author is not known.¹⁰² The Act further clearly demarcates the scope of protection to include and protect cultural expression, which has eternalised itself in the roots of Mexico against any prejudice.¹⁰³

96 Ecuador International Property Law, May 8, 1998.

97 *Id.* art. 7.

98 *Id.* art. 9.

99 Federal Copyright Law, Dec.24.1997.

100 *Id.*, art. 116.

101 *Id.*, art. 157.

102 *Id.*, arts. 158 and 160.

103 Protection of Traditional Knowledge Bill 2013, *available at*: <https://www.gov.za/files>. (last visited on Dec. 11, 2023).

In South Africa 2015 tabled a Traditional Knowledge Bill,¹⁰⁴ which provides for a *sui generis* intellectual property approach for the protection of different aspects of traditional knowledge. In the Bill, the definition of traditional cultural expression includes language or different forms of expressions which have been an inherent part of the traditional and Indigenous community. The Intellectual Property Policy of the Republic of South Africa¹⁰⁵ recognises the creation of a system for the protection of traditional knowledge which will guard against misappropriation and exploitation as a key reform.

The Indian position is concerned we have no adequate legal provisions to protect cultural properties and the Geographical Indication Act plays a pivotal role in protecting some kinds of cultural properties. The Copyright Act 1957, does not anywhere directly mention the protection of traditional cultural expression or folklore. However, the interpretation of the definition of artistic works, drawing, engraving, literary and musical works. The work of performances and performers' economic rights and moral rights are also recognised under Indian Copyright Act.¹⁰⁶ This also gives compulsory licence for the copyright of unpublished or published works of unknown authors.¹⁰⁷ Copyright Act also gives moral rights protection to the authors from derogatory treatment of their works and also to claim authorship over their work though transferred.¹⁰⁸ Thus, it is clear that copyright law is not an adequate one to protect cultural properties in India.

Unlike other intellectual properties geographical indication is a community's right and its consequence of traditional communities often rely on geographical indication protection to safeguard their cultural products. Chanderi Saree, Kanchipuram silk, Pochampally ikat, Madhubani painting pathamadai mat etc represent the cultural expression of the communities who are engaged in their manufacturing. The GI Act extends protection for handicrafts, handlooms which are inherent parts of Indian culture. Thus India is concerned we have no *sui generis* laws to effectively protect and safeguard cultural properties of indigenous communities. Though India has established several institutions to promote both tangible and intangible cultural properties, it is lacking to make laws to protect cultural properties from misappropriation and Western hybridisation. Even after making India's new Intellectual property policy,¹⁰⁹ the year 2016 has given considerable importance to the arts, culture and traditional knowledge there is no positive steps taken to date.

104 Intellectual Property Policy of the Republic of South Africa Phase 1 2018, *available at*: <https://www.gov.za>201808>, (last visited on Dec. 11, 2023).

105 Indian Copyright Act as Amended in 2012. s. 38

106 *Id.*, s. 31-A.

107 *Id.* s. 57.

108 India's IP Policy, May 2016.

XI Conclusion

The researcher after making a through research on this work would like to conclude the following important aspects and also suggested that some feasible recommendations for the better protection of the owners of traditional cultural properties. It is found that the cultural properties make people a great bond with past. In fact the objects of cultural property cannot be stripped of their cultural significance because the indigenous communities have been producing and preserving these properties from time immemorial. Cultural properties are giving innumerable aspects of knowledge to the society and in turn this knowledge becomes the source of creativity. The link between cultural property and economic impact is now got a great appreciation in the national as well as international market. The commercial potential of the cultural properties can not be easily denied. In reality, cultural properties are giving bread and butter to many indigenous communities in the world. The tradition based cultural properties are getting more commercial value in the international market due to the industrialisation and globalisation. Certainly, intangible cultural properties are the significant elements of cultural heritage and identity of many indigenous groups. It is true that whenever these cultural properties are entering into the market which are also carrying the rich tradition of a group, community, region and country to the world. The geographical indication is the best carrier of tradition and culture of the region. The influence of intellectual property protection in the cultural property really created a lot of legal as well as social issues. It is evident to note that while converting cultural property into monopolistic intellectual property, it is noteworthy that the indigenous communities, collective rights, their grouphoodness are overtaken by individual centric monopoly right given by the intellectual property laws.

Currently, the internet and digitalisation have either allowed intangible cultural properties like traditional cultural expressions and folklores to further root themselves deeply into society or have drawn them away from the rightful owners. *i.e.*, the traditional and indigenous communities. The technological developments have also led to easy access to cultural properties beyond their places of origin. The misappropriation either within the country *i.e.*, outside the indigenous community or transborder in fact compromise and threaten the economic interests of the rightful owner. Commercialisation through the intellectual property system definitely creates authorship and ownership issues, like sowing is one and reaping is another. It is utterly against the natural right principles. Misappropriation and hybridisation of cultural properties cause decay of the cultural identity of the property as well as the community. The rigid requirements of intellectual property protection like fixation, tangible expression and recording, introduce a foreign practice into the native indigenous communities. Moreover, the transmission of oral knowledge is also not happening because of the breakup of the chain between the generations and creating a generation gap. This will lead to a gradual diminishing of the significance of culture and long duration cultural

practices. Thus commercialisation of cultural properties through intellectual property regimes causes heavy damage to the culture itself. The unauthorised appropriation of indigenous medicinal knowledge for creating patentable invention always leads to biopiracy. The existing intellectual property laws are not really helpful to the indigenous communities to protect their cultural properties. The western ideology is completely based on intellectual property laws are encouraging monopoly rather than protecting the interest of the indigenous communities, the real creators. For example the copyright law is not an adequate tool to protect the rightful owners of traditional cultural properties. The patent law does not give patent protection to the cultural properties as not novel products but it encourages the industries to improve, innovate and add something with the traditional cultural knowledge so as to get patent protection. The international instruments dealing with this matter is also not working as in the expected level. Though some international conventions addressed the significance of cultural identity of the indigenous people in turn no domestic reaction happened positively.

Finally, the researcher ferrets out the effective *sui generis* law to safeguard tangible and intangible cultural properties from Western hybridisation and misappropriation. As India has a plethora of tangible and intangible cultural properties should make the strong legal measures to protect the interests of indigenous people from unauthorised appropriation by setting up of regulatory authorities. Moreover, India should make a defensive approach like declaring cultural properties as “protected properties” so that no one can appropriate these properties and also should introduce the mandatory practice of obtaining “prior informed consent” from the original right holders before appropriating the cultural properties under the umbrella of intellectual property rights. In this regard, to protect and promote the cultural properties from unauthorised appropriation the developing countries should make all the right initiatives to make a better cooperation from the international community.

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