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Traditional knowledge protection through the existing Copyright Regime - Experience in India and Australia

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ABSTRACT

This paper deals with the definition of traditional knowledge and need to protect it reflecting on to the ways in which it could be protected. Under the umbrella of intellectual property rights recognised by Trade-Related Intellectual Property Rights Agreement (TRIPS) and governed by the World Trade Organisation (WTO) , this paper specifically deals with the protection under existing copyright regime and limitations attached to it, that if the protection served is sufficient or there is a need to recognise a separate protection regime for the same purpose so that the protection could be extended to the traditional culture and expressions . This paper specifically discusses the experience in protection of traditional knowledge through the existing copyright regime in India and Australia.

TRADITIONAL KNOWLEDGE

As per the official definition of WIPO traditional knowledge is tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. Traditional knowledge as a part of cultural identity is something which has been passed on from generation to generation. Intertwined within practical solution, they transmit history, beliefs, aesthetics, ethics and traditions of particular people.[1] According to Russel Barsh, an indigenous peoples scholar and representative: Indigenous peoples possess their own locally specific systems of jurisprudence with respect to the classification of different types of knowledge, proper procedures for acquiring and sharing knowledge, and the nature of the rights and responsibilities which attach to possessing knowledge.[2]

REASONS FOR PROTECTION OF TRADITIONAL KNOWLEDGE

To prohibit the use of the knowledge of the community or saving it from the risk of misappropriation by third party the traditional knowledge is suffice to be protected. Others regard protection as a tool to preserve traditional knowledge from uses that may erode it or negatively affect the life or culture of the communities that have developed and applied it. Thus, to protect it IPR regime is seen as one of the ways inclusive of which are internationally recognised are those identified by the Trade-Related Intellectual Property Rights Agreement (TRIPS) and are governed by the World Trade Organization (WTO) are

a) patents

b) copyrights

c) trademarks

d) geographical indications

e) protection of undisclosed information

f) layout designs of integrated circuits

g) industrial designs

[1] Information note on traditional knowledge prepared by International Bureau of WIPO available @WIPO/IPTK/MCT/02//INF/3

[2] Russel Lawrence Barsh, *Indigenous Knowledge and Biodiversity, in Indigenous Peoples, Their Environments and Territories, in CULTURAL AND SPIRITUAL VALUES OF BIODIVERSITY* (Darrell A. Posey ed., 1999) 73, 74-75

But in this paper, we will be specifically discussing the experience in protection of traditional knowledge under copyright regime in India and Australia. However, the main reasons for granting protection to TK include: Benefit sharing for the greater good and promotion of use of such knowledge and its importance; conservation of the traditional knowledge into the community; the preservation of traditional practices and culture and prevention of misappropriation by third party from any kind of misuse.

PROTECTION THROUGH THE EXISTING COPYRIGHT REGIME

EXPERIENCE IN INDIA:

In India copyright can be used to protect the artistic manifestations of TK holders, especially artists who belong to indigenous and native communities, against unauthorised reproduction and exploitation. It could include works such as: literary works, eg tales, legends and myths, traditions, poems; theatrical works; pictorial works; textile works, eg, fabrics, garments, textile compositions, tapestries, carpets; musical works; and, three-dimensional works, eg, pottery and ceramics, sculptures, wood and stone carvings, artifacts of various kinds. Related rights to copyright, such as performing rights, could be used for the protection of the performances of singers and dancers and presentations of stage plays, puppet shows and other comparable performances as provided under Section 38 and Section 39 of Copyright Act, 1957. The emphasis on "original" works would clearly remove the possibility of protecting pre-existing traditional cultural expressions, although the scope for derivative works remains open. The Act affirms the meaning of "literary work" given in common law, which is to cover work expressed in print or writing, irrespective of the question whether the quality or style is high.[3]At the international level, the idea of applying copyright law to protect intangible cultural expressions, including those of traditional peoples and communities, dates back to the 1960s also termed as folklore.At the Diplomatic Conference of Stockholm in 1967 for the revision of the Berne Convention[4], the issue of protection of folklore by means of copyright was raised.The conventions raised included the provisions that covered the author's unpublished work where her identity is unknown is authorised under 15.4(a) if he is under where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority who shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union and such countries of the Union which make such designation under the terms of this provision shall notify

[3] *University of London Press Ltd. vs. University Tutorial Press Ltd.*, [1916], 2 ch.d. 601
[4] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221

the Director General [of WIPO] by means of a written declaration giving full information regarding the authority thus designated and this information should be communicated by Director General to all other countries under 15.4(b) of Berne Convention in this regard. Also the major problems faced by the traditional societies over the years regarding their fixed and unfixed art form, designs, handicrafts, music and dramatic performance includes the intervention of the outsiders without their permission to neglect to ask for their permission before reproducing their work, and not only the third part pass on their work but also fail to acknowledge the source of creativity. It becomes difficult to prevent such problems and misappropriations faced by traditional communities and proper protection regime lacks in India. Although there are no proper cases recorded till ow in India to demonstrate the real scenario.[5]

EXPERIENCE IN AUSTRALIA:

In Australia, Aboriginal artists have on a few occasions successfully sued on the basis of copyright infringement. Copyright law also being used by the Dene of Canada, as well as several other indigenous groups worldwide, to control use by others of compilations of their TK. This suggests that as developing countries fully comply with the levels of enforcement required by TRIPS, more and more peoples and communities will be able to avail themselves of copyright protection.[6] The example to such cases are mentioned below that reflects the glimpse of copyright protection in Traditional Knowledge as experienced by Australia.[7] "The claim of communal proprietorship in sacred images was rejected by the Federal Court in Yumbulul v. Reserve Bank of Australia. That case concerned an attempt by representatives of the Galpu Clan to prevent the reproduction by the Reserve Bank, of the design of a Morning Star Pole on a commemorative banknote. The pole had been created by a member of the clan who had obtained his authority and knowledge to create the pole through initiation and revelatory ceremonies. The Galpu asserted that the communal obligation of the artist was such that he owed an obligation to the clan to prevent the design of the pole from being used in any way which was culturally offensive. Although sympathetic to this argument, the trial Judge considered that the artist who had created the pole had successfully

[5] Kutty, P.V. Valsala G 'National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Experiences: India, Indonesia and the Philippines', (2002), <www.wipo.int/tk/en/studies/cultural/expressions/study/kutty.pdf> accessed 7 July 2014

[6] In Australia, the Government owns copyright in any work, film or sound recording made by or under the direction or control of the Government, and any work first published by or under its direction. (Australia Copyright Act of 1968, Part VII.) A current recommendation by the Australian Copyright Law Review Committee is that the Crown relinquishes its unique position of gaining copyright over material simply because it publishes first. <Copyright Law Review Committee, Crown Copyright Report, Jan. 2005, http://www.clrc.gov.au/agd/WWW/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~6+APRIL+full+version+crown+cop yright.pdf/$file> accessed March 18, 2010

[7] *M*, Payunka, Marika & Others v. Indofurn Pty Ltd*, 30 IPR 209 often dubbed the "Carpets case"

disposed of his intellectual property rights through a legally binding agreement. He lamented that Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin and concluded by recommending that the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators." In another case of Milphurrurru v. Indofurn Pry Ltd (1995) the court awarded damages for breach of copyright to a number of Aboriginal artists whose designs were wrongfully reproduced on carpets. The court agreed that this was a particularly egregious breach of copyright, involving a culturally demeaning use of the infringed works. However, the court considered itself unable to compensate the communities whose images were used in culturally inappropriate ways, as "the statutory remedies do not recognise the infringement of ownership rights of the kind which reside under Aboriginal law in the traditional owners of the dreaming stories". The Australian Aboriginal artists successfully invoked claims of copyrights and unfair trade practices against carpets imported from Vietnam that replicated Aboriginal arts[8]. In resolving the dispute that arose, the Federal Court of Australia granted compensatory damages for "personal suffering" to take account of cultural aspects. It decided that even though only individuals could be recognised as copyright owners there may be a scope for the distribution of the proceeds of the action to those traditional owners who have legitimate entitlements, according to Aboriginal law, to share the compensation paid by someone who has, without permission, reproduced the artwork of an Aboriginal artist. The jurisprudence developed from this and similar cases have generally helped to introduce the issue of TK into the Australian IPRs establishment.[9] For example, the National Indigenous Arts Advocacy Association in Australia adopted the Indigenous Label of Authenticity in 1999 to help promote the marketing of the art and cultural products, and to deter the sale of products that are falsely labeled as originating from Aboriginal peoples. The result of the certification of authenticity in this manner, however, has not proved fruitful and thus, the initiative has been abandoned.[10] Thus there have been a number of cases in Australia that depicts its scenario

[8] *Michael Blakeney, Milpurrurru and Others v Indofurn Pty Ltd and Others* [1994] 130 ALR 659, 129 (Austl.)

[9] *Foster v Mountford* [1976] 29 FLR 233 (Austl.). An attempt to disclose information of religious and cultural significance to particular Aboriginal people, supplied in confidence to the author, was enjoined as a breach of confidence. In *Foster v. Mountford* (1976) 29 FLR 233 (Austl.); A third party recipient of protected confidential information can be readily enjoined so long as the information is still relatively secret. However, the particular proceeding concerned copyright infringement. The case, *Bulun Bulun*, concerned a painting "Magpie Geese and Water Lilies at the Water Hole" created in accordance with the customary law of the traditional community (the Ganalbingu people). The Aboriginal artist of the painting that had been infringed was bound by the customary law of his community to not exploit the painting in a manner contrary to the community's customary law. This was sufficient for the artist to be under a fiduciary obligation to the community requiring him to take reasonable steps to remedy any infringement by a third party. However, the court rejected finding a "native title", a "community title", an "equitable title" or an express trust in favor of the community. *Bulun Bulun v. R & T Textiles Pty. Ltd.* (1998), 157 ALR 193 (Austl.)

[10] Peter Drahos 'Towards an International Framework for the Protection of Traditional Group Knowledge and Practice', [2004] UNCTAD 32–33

which does not provide with whole relief but do provide the glimpse of relief through enactments, compensation for personal suffering and establishment of issue relating to Traditional Knowledge protection and the experience of Australia is in a long run but needs to be improved.[11]

LIMITATIONS TO EXISTING COPYRIGHT REGIME

Copyright law has some fundamental limitations to it inclusive of which , firstly, copyright requires an identifiable author, the notion of authorship is a problematic concept in many traditional communities. Secondly, copyright has a time limit, rather than having a permanent protection, and thirdly, existing copyright regime requires to be fixed chichis a problematic factor for the traditional knowledge which has been passed on from generation to generation orally. Illustratively:

(1) Tracing Authorship Issues :

This point was made earlier and was articulated very coherently in a statement issued by a group of academics and activists at a Stockholm conference on "cultural agency/cultural authority, politics and poetics of intellectual property in the post colonial era under intellectual property regime."[12] The Ballegio Declaration,[13] argues that IPRs, and the copyright law emphasised the unauthorised work and copyright law especially, the role of individuals in knowledge creation and consequently fail to reward those who are knowledgeable communities that provided the intellectual raw material that formed the true basis of formation of copyrighted work or patented invention.[14]

(2) Time period for the protection of traditional folklore:

Copyright protection as provided in the existing regime is highlighted to be not the right approach for the protection here as the folklore expression as desired by the traditional societies is not something to be out in public domain or have a time limit. Copyright just gives temporary protection and has a time limit.But for many communities their knowledge is an important element of their identity and history.

(3) Requirement under copyright to be in the fixed form:

Since communities often do not have the means of recording their cultural expressions, they cannot acquire copyright protection as their work is not in a fixed format conventionally. This bar

[11] Terri Janke, Beyond guarding ground- the case for a National Indigenous Cultural Authority, <http://www.australiacouncil.gov.au/research/aboriginal_and_torres_strait_islander_arts/reports_and_publications/beyondguardingground> accessed March 10, 2010

[12] James Boyle ,Shamans Softwares and Spleens: Law and the construction of society [1996] 192

[13] The Bellagio Declaration, Conference on Cultural Authority, 11 March 1993

[14] Peter Jaszi & Martha Woodmansee, The Ethical Research ofAuthorship, [1996] 95 THES.ATLANT'CQ.947

to protection can be removed if the will exists to do so. Countries have inculcated protection of folkloric expressions into their national copyright laws. These include Tunisia in 1967, Bolivia in 1968, and Kenya in 1975. [15] Given the way copyright has been transformed to, for example, treat computer programs as literary works, it hardly seems radical to extend the definition of copyrightable subject matter to unfixed cultural expressions or even to create a new IPR based on copyright for such an end. However, the most powerful actors in international IPR negotiations are still resistant to the idea of modifying international copyright rules to more effectively protect folklore.

[15] World Intellectual Property Organisation., Intellectual Property Reading Material 53 (2"d ed. 1998)

CONCLUSION

Today, the existing copyright regime for the protection of traditional knowledge is not capable of providing adequate remedy as it has its limitation of time period, fixation of work and authorship problems which have been raised in the paper, thus the indigenous people are in the need of sui generis regime for the better protection of their community to get rid of the exploitation leading to misuse of their traditional knowledge and also preventing the third parties gaining undue benefits out of it.[16]The Morning Star Case discussed above is a classic example of the courts' insensitivity toward community rights pointing out that even though Australia is taking up number of cases in its day to day routine, still it is not having a sensitive approach towards this issue. It is also difficult to inculcate that the international conventions, declarations and organisations that includes, Berne Convention WTO WIPO, UN are keeping their eyes shut from the mere fact of the standing of the traditional knowledge protection and also doing something for the same and are reluctant from modifying the existing copyright regime to prevent the disparity happening to the knowledge holders. Thus Sui generis system will provide for a better protection regime giving relief to the fixed form of protection to unfixed form of TK and therefore the international conventions must gear themselves up to provide remedies to the traditional knowledge holders for the fairer use of the knowledge passed from generation to generation so that not only India and Australia but other countries also suffering from such drawbacks could adopt the changing regime for their traditional knowledge protection laws. If they mould in definite ways, intellectual property systems may have an essential role through Sui genres system in the preservation of the cultural identity of traditional societies and, consequently, in the empowerment of knowledge holders, in the sense that they will be attributed the crucial right of saying "no" to third parties that engage in the misappropriation or distorting use of their traditional knowledge, regardless of its commercial nature.[17] In other words, even those communities that believe their knowledge or specific portion, should remain outside the commercial channels, may benefit from intellectual property protection, as it will give them the power to prevent their knowledge from being misused in an insensitive manner.

[16] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Second Session, Report, adopted by the Committee, WIPO document WIPO/GRTKF/IC/2/16, of December 14, 2001

[17] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Third Session, Report, adopted by the Committee, WIPO document WIPO/GRTKF/IC/3/02, of Geneva, June 13 to 21, 2002, at paragraph 20