

Protection of Traditional Handicrafts under Indian Intellectual Property Laws

J Sai Deepak[†]

Rajiv Gandhi School of Intellectual Property Law, IIT Kharagpur, West Bengal 721 302

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This paper discusses protection of collective rights and individual innovations in traditional handicrafts, in view of their importance to the cultural heritage of traditional groups native to India. Further, inadequacies of the Indian intellectual property laws, specifically, the Geographical Indications of Goods (Registration and Protection) Act 1999, Designs Act 2000 and Copyright Act 1957 in protecting traditional handicrafts and rewarding individual creativity have been discussed in detail. Parallels have been drawn with the initiatives launched by China and a few other nations to protect their traditional handicrafts. Finally, a blend of Geographical Indications and ancillary rights has been suggested as a way of encouraging ingenuity in traditional arts.

Keywords: Geographical indications, copyrights, designs, traditional handicrafts

Handicrafts, like antiques, appeal to the aesthetics of the observer and yet may be put to good use. They need not necessarily serve a physical purpose; but a clear demarcation, where use and aesthetics depart, does not exist. In fact, the hallmark of good craftsmanship is when the object serves a 'functional' purpose and yet appeals to subtler forms of intellection. Most forms of fine art, unlike traditional handicrafts, have evolved out of the need to fulfill sublime aspirations, which may be traced either to the submission to the Supreme soul or a pursuit in a higher plane of intellectual activity. Traditional handicrafts, on the other hand, have evolved out of basic human necessity, and not from an abrupt astral need. The evolution of handicrafts has utilitarian roots, unlike painting or music which predominantly cater to the intelligentsia. Interestingly, the first object to receive man's artistic attention was his weapon and not his abode. This artistic element in a predominantly utilitarian activity, such as, handicrafts, serves as an index of a society's cultural refinement in its mundane activities and reflects the sensitivity in the society's cultural response to material changes. In other words, handicrafts carry a cultural heritage through the use of regional and traditional motifs.¹ They may be perceived as attempts at elevating human nature which has been at the core of man's endeavour ever since he left behind his beastly existence.

Every object is a design of geometric shapes before it attains a shape or a form. When these designs are worked out on a surface, a form emerges through rhythmic composition. Relating the size of the motif with reference to the surface by alternating positive-negative space or varying the size of the motif, works out a rhythm.² Neither physical appearance nor concept alone add lustre to a handicraft. It is the totality of this ultimate conception which imparts artistic value and significance to the final object. It is the synergy of both that gives it the beauty. Ancient Indian craftsmen had an innate sense of comprehension on the use of various elements of art, such as, design, colour, texture and their interplay since, no single art form is insulated from the influence of other forms. This cultivated sense of abstraction of Indian craftsmen may be attributed to their inherent spirituality and religiosity, which is evidenced by the fact that stone sculptures witnessed an unprecedented spur during Emperor Ashoka's reign when they were used to propagate Buddhism.³ Irrespective of religious affiliations, even today our artisans, who engage in making handicrafts, observe a ceremonial vow or invariably a ritual associated with the craft.² These traditions in Indian handicrafts, which are still being adhered to by practitioners in their original form despite the ravages of time and history, may be attributed to three principal sources- the royal courts, religious arts and folk arts.⁴ This is an interesting paradox considering the utilitarian roots of the art. However, adherence to age-old traditions by practitioners of traditional handicrafts should not blind

[†]Email: jsaideepak@gmail.com

us to the fact that it is their latent power of assimilation which has helped traditional Indian handicrafts survive and flourish even today. With such religiosity and tradition being associated with handicrafts, one may ask if the concept of property in traditional handicrafts holds water. When reduced to its most fundamental form, the question is can cultural traditions be commoditized or treated as economic resources? When viewed in isolation, this question seems perplexing, but ironically the success of some of the most popular and replenishable economic reservoirs may be attributed to the traditions which have spawned them. Cuisine is the easiest of examples one can think of since it represents the culinary habits of a society which influence the community's way of living i.e. its culture, in multifarious ways. Yet, today we find ourselves struggling to etch the contours of proprietary jurisprudence of cultural property. Just as cuisine, traditional handicrafts continue to be the means of livelihood for a sea of humanity which makes their creation essentially an economic activity followed by a cultural activity.⁵ It may also be noted that the tools used in making handicrafts, following the Hegelian concept of property, were and still are considered to be an extension of the personality of the craftsman to help him surmount mortal limitations and to make him and his craft immortal.⁶ So the concept of property in handicrafts is not new. However, one would need to investigate if traditional handicrafts which form part of Traditional Cultural Expressions (TCEs) enjoy protection under Indian intellectual property laws.

Need for Protection of Traditional Handicrafts

Before delving into the provisions of the law which provide for protection of traditional handicrafts, one needs to make a case for their protection. However, definition of the problem precedes protection and so one needs to define handicrafts in the first place. Not surprisingly, defining handicrafts is probably a greater problem than protecting it. The gravity of the problem is best expressed as follows:

“One general problem that we face in studying this sector is the fact that there is really no separate product classification for handicrafts... Because there is no universally accepted definition of the term ‘handicraft’, it has been used to refer to a very wide range of items, including a broad spectrum of ‘gift items’, house ware, home furnishings, products of craft industries, and fashion accessories.”⁷

This definition does not distinguish between ‘industrial handicrafts/handicrafts’ and ‘traditional handicrafts’. Accordingly, the UNESCO/ITC International symposium on ‘crafts and the international market’ defined ‘artisanal products’ as follows:

“ Artisanal products are those produced by artisans, either completely by hand, or with the help of hand-tools or even mechanical means, as long as the direct manual contribution of the artisan remains the most substantial component of the finished product. These are produced without restriction in terms of quantity and using raw materials from sustainable resources. The special nature of artisanal products derives from their distinctive features, which can be utilitarian, aesthetic, artistic, creative, culturally attached, decorative, functional, traditional, religiously and socially symbolic and significant.”⁸

This definition probably comes closest in bringing out the essential features that are characteristic of traditional handicrafts, and the dialectics involved in the current discussion: (1) aesthetic representation which is symbolic of the culture of the artisans⁹ and (2) substantially distinctive manual contribution reflecting individual innovation. Though there exists a plethora of literature expounding the symbiotic and symbolic relationship between traditional handicrafts and culture; however, very few commentators have recognized the need to provide a mechanism for incentives, to reward individual innovation and creativity in a predominantly collective activity.

It has been widely acknowledged that the symbolic relationship between handicrafts and a particular culture is what distinguishes ‘traditional handicrafts’ from other ‘industrial handicrafts’. According to the Intergovernmental Committee Report on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, traditional handicrafts come within the scope of ‘folklore’, now better known as TCEs¹⁰ since, the former term was deemed derogatory. ‘Expressions of folklore’ is also a phrase used to convey the same theme. According to the sixth report of the Committee, TCEs such as, traditional handicrafts, reflect the value systems of indigenous groups and help reinforce their heritage and world-view. Such expressions act as sources of inspiration for practitioners of traditional arts and crafts and hence they need to be protected. However,

'protection' should be distinguished from 'preservation' since the former refers to either authorizing or excluding one from exercising any rights in respect of such expressions; whereas the latter refers to mobilizing resources to ensure their continued survival and perpetuation.¹⁰

Protection means protection against injury and more importantly, against derogatory and offensive use. The injury to a community's cultural expression may be on account of various reasons such as intrusion into their privacy, passing off their identity, stereotyping their customs¹¹, accessing their literature without their consent, etc. Such cultural expressions fall within the penumbras of a much wider concept of 'cultural rights'.¹² Though such rights are deemed to inhere in such groups, the necessity for their assertion arises when indigenous groups interact with the rest of the world, outside their community. This interaction raises a few pertinent questions with regard to cultural rights in traditional handicrafts.

Firstly, if indigenous groups decide to allow themselves and their craft to be subject to scrutiny by the rest of the world, does it prevent them from seeking isolation again? In other words, is the change in their status irreversible? Such a conclusion would be draconian and would defeat the very objective for which protection of groups is sought since they need much more protection during interaction. The reason being that indigenous groups could be taken for a ride on account of their ignorance of the law, in which case the party which accrues benefits would go scot-free taking undue advantage of the groups since, ignorance of law is no excuse.¹³ Accordingly, not only should indigenous groups have the liberty to choose if they seek interaction, but also the limits and mode of interaction would have to be left to their discretion with generous help from the law.¹³ This means that besides the right to object to commercial use by others and the right to commoditization of the self by oneself, it includes a right to be 'left alone'.¹⁴ Some might argue, that this would mean encouraging preferential treatment of such groups to the detriment of others. It has to be understood, that though law is meant for 'greatest good of greatest number', it in no way means that the minority has to perish for the benefit of the majority. In fact, law should facilitate accommodating behaviour on the part of the majority towards welfare of marginalized groups since a misery heaped upon one section of the society is a crime against the society.

Secondly, what is the scope and extent of cultural rights of the groups in traditional handicrafts, which law deems fit for recognition. In other words, how small is small and how big is big an injury for redressal in a court of law? This is a very tricky question since it involves a lot of subjectivity and is best left to the facts of a particular case. Prescribing a minimum limit would be arbitrary. The third issue is the most pertinent of all. Can the State decide upon the criteria for defining rights of groups without taking into account the customs of the groups? When custom has the force of law in commercial practices, can customary laws form the basis for jurisprudence on traditional cultural expressions such as handicrafts?¹² Can we coerce the groups into accepting our definition of their personality? For instance, confidentiality can arise from customary laws even without the presence of an explicit provision to that effect, in a contract between the groups and a third party. Violation of such customary laws could be said to be a form of intrusion upon the privacy of the group, which no amount of compensation in the form of damages can make good. This applies all the more since if damages were a way out of such cases, every corporation with heaps of greenbacks would violate with impunity thanks to its financial clout.¹⁵ Hence, ideally, imposing criminal liability is the best deterrent.

Finally, it is to be noted that the law which deals with reputation and cultural rights in cultural expressions, such as, handicrafts, does not have a fixed boundary and to delimit it would be self-defeating.¹² On one hand, we have the question of privacy of an individual and on the other; there is the question of public interest. In the case of indigenous groups, it is an incongruous mix of both since privacy of the group is a matter of right, and protection and control over their intellectual property raises questions of public interest. IPRs are a combination of private monopoly and public interest. If one focuses solely on the former, it becomes opportunistic and individual-centric and if one focuses too much on the latter, the individual loses his right. The emphasis on the character of the rights depends on the nature of the recipient of the benefits. Rights such as design rights, patents and copyrights have a predominantly individualistic character whereas geographical indication has a tilt towards public interest for protection of property that has evolved out of a community's collective heritage. Flexibility is an

important prerequisite to protect traditional expressions since such expressions are distinctive on account of their centrality to the lives of the groups. The protection of one such cultural expression, namely, traditional handicrafts, under Indian intellectual property laws is explained below:

Protection for Handicrafts under Indian Intellectual Property Laws

Protection under Geographical Indications of Goods (Registration and Protection) Act, 1999

The following deductions have been arrived at assuming that there exists a distinction between 'handicrafts' and 'traditional handicrafts' since not all kinds of handicrafts are traditional in nature. Until the promulgation of the Geographical Indications of Goods (Registration and Protection) Act, 1999, the working definition for 'traditional handicrafts' in India was the one prescribed by Task Force on Handicrafts in 1989 as:

'Handicrafts are items made by hand, often with the use of simple tools, and are generally artistic and/or traditional in nature. They include objects of utility and objects of decoration.'¹⁶

Subsequently, 'traditional handicrafts' were sought to be protected by way of Geographical Indications (GIs) under national laws as provided by TRIPS Agreement.¹⁷ GIs are defined as indications which identify goods originating from a geographic region where a given quality, reputation or other characteristic is essentially attributable to that geographic region. GIs are a way of securing community rights, some may call them brand rights, in the community's collective heritage; they protect consumers' interests as well. But do GIs accrue any benefit or recognition to an individual from the community who has made a particularly notable improvement to an existing product; say handicrafts, on which GIs exist? In other words, do GIs preclude simultaneous existence of individual IPRs in the form of copyrights or industrial designs, in traditional handicrafts? The GI Act, 1999, which came in force on 15 September 2003, provides a mechanism for registration of GIs and elucidates on the concept of authorized user and registered proprietor, both of whom can initiate action for infringement.

Under Section 2(f) of the Act, 'goods' have been defined to include handicrafts and Section 2(k) (iii) defines 'producer' in relation to handicrafts as:

' any person, who makes or manufactures such goods, and includes any person who trades or deals in such production, exploitation, making or manufacturing of the goods.'

The criteria for an indication to qualify under the Act are same as the ones mentioned in Article 22.1 of TRIPS Agreement. In addition, in 2006 the Standing Committee on Labour of the Lower House of the Parliament, Lok Sabha, initiated a nation-wide registration of crafts under the GI Act in collaboration with National Institute of Fashion Technology and Development Commissioner for Handicrafts, which covers 28 States of the country.¹⁸ The Act supposedly envisages higher level of protection and remedies, both civil and criminal, against infringement of notified goods. Accordingly, 30 GIs of Indian origin, including traditional handicrafts such as, Kondapalli toys, have already been registered with the GI registry.¹⁹ However, nowhere does the Act restrict an authorized user from seeking simultaneous protection under Designs Act, 2000 or Copyright Act, 1957.

Combined Interpretation of Designs Act, 2000 and Copyright Act, 1957

Section 2 (a) of the Designs Act defines 'article' as:

' any article of manufacture and any substance, artificial, or partly artificial, and partly natural and includes any part of an article capable of being made and sold separately.'

Both 'handicrafts' and 'traditional handicrafts' fall within the scope of this definition. The right given under Section 2(c) of the Designs Act in India is a design copyright which is not the same as the one given under Copyright Act, 1957. Henceforth to avoid confusion reference to design copyright will be made as design right. The design right which is defined in Section 2(c) of the Designs Act gives:

'the exclusive right to apply a design to any article in any class in which the design is registered.'

This design right is granted only to the design of an object and not the object itself. This means one has to know what constitutes a 'design' under the Designs Act.

Section 2(d) of the Designs Act defines 'design' as:

'..... only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the final article appeal to and are judged solely by the eye; but does not includeany artistic work as defined in clause (c) of Section 2 of the Copyright Act, 1957.'

The first part of the definition may bring both 'handicrafts' and 'traditional handicrafts', within its satellite meanings but it has to be borne that the Designs Act grants design right only to non-functional aspects of the design. So if a particular design is predominantly functional, it cannot qualify for a design right.²⁰ If it has both functional and aesthetic aspects to it, then the latter may be granted a design right.

Section 2(c) of the Copyright Act, 1957 defines 'artistic works' to mean:

- (i) A painting, a sculpture, a drawing (including a diagram, map, chart or plan) on engraving or a photograph, whether or not such work possesses artistic quality,
- (ii) A work of architecture
- (iii) Any other work of artistic craftsmanship

The scope and extent of what constitutes 'artistic craftsmanship' is to be investigated. The Copyright Act does not define the term, artistic craftsmanship.²¹ The rationale behind bestowing copyright on a work of artistic craftsmanship is to protect the man who puts on to the market articles which are the products of his own handicraft, from reproduction whether by hand, machine or otherwise.²¹ Courts have elaborated on what constitutes 'artistic craftsmanship', which according to them is a composite phrase²¹ and may be considered to be 'work of art', which in the usual sense is applied to fine arts like painting. However, a distinction was sought to be drawn between 'artistic work of craftsmanship' and 'work of artistic craftsmanship'²¹ and 'work of art' was accordingly imputed the latter meaning. This means that artistic quality of the work is irrelevant and so Section 2(c) of the Copyright Act includes 'handicrafts'.²¹

'Work of art' includes an object and/or the features of an object. Handicrafts may have utility or 'functional features' in addition to aesthetic features. On one hand, English Courts have held that the 'functional features' of handicrafts are not protected by copyrights since; copyrights protect only the expression of an idea and not the idea or the rationale behind the idea.²² On the other hand, a few Indian Courts have erroneously held that copyright law is meant to protect 'artistic works' which are 'functional' in nature!²³ This goes against the very grain of copyright jurisprudence.

So, 'artistic craftsmanship' under Section 2(c) of the Copyright Act includes 'handicrafts' and their non-functional features. But does it include 'traditional handicrafts'? The answer is an emphatic no since; the greatest hurdle of all in obtaining a copyright in 'traditional handicrafts' is to trace their authorship to one individual author's originality and the imprint of his personality.²⁴ Although originality has not been defined in the Copyright Act, since 'traditional handicrafts' are acknowledged to be the products of a communal activity, no individual may lay sole claim over it. If one decides to grant copyright under the Copyright Act to everyone in the community, then it would result in 'tragedy of anti-commons'²⁵ as described by Michael Heller i.e. multiple owners would end up excluding each other of the ownership which would require every new user to obtain licenses from every owner making it exorbitantly expensive. This means that 'traditional handicrafts' are not subject-matter of protection under Section 2(c) of the Copyright Act, 1957.

The interesting conclusion which one reaches is that under Section 2(d) of the Designs Act, both 'handicrafts' and their designs are precluded from getting design rights since they are subject-matter of the Copyright Act; however, 'traditional handicrafts' may qualify for protection under Designs Act since they are not eligible subject-matter under Copyright Act. This conclusion too does hold water in the light of the provisions of Section 4 of the Designs Act.

Section 4 of the Designs Act prohibits the registration of a design which:

- (a) is not 'new' or 'original'; or
- (b) which has been disclosed to the public anywhere in India or in any other country by publication in tangible form or by use or in any other way prior to the filing date, or where applicable, the priority date of application for registration; or

(c) is not significantly distinguishable from known designs or combination of known designs; or

(d) comprises or contains scandalous or obscene matter.

Accordingly, Section 4(b) of the Designs Act bars the grant of design rights to 'traditional handicrafts' which already exist in public domain. But has the Act defined what is 'new' or 'original'? Though 'new' has not been defined, Section 2(g) of the Designs Act defines 'original' in relation to a design as:

'...originating from the author of such design and includes the cases which though old in themselves yet are new in application'

So, though designs of 'traditional handicrafts' do not enjoy protection under Designs Act, their 'new use' may get design rights. This virtually leaves traditional designs wide open for exploitation. Summing up the deductions arrived at in the preceding sections:

- 1 'Handicrafts' differ from 'traditional handicrafts', both of which fall within the scope of Section 2(a) of the Designs Act.
- 2 Since 'handicrafts' are subject-matter of Section 2(c) of Copyright Act, they are not eligible for protection under Section 2(d) of Designs Act. 'Traditional handicrafts' may get design rights since they are not subject-matter of Copyright Act.
- 3 However, Section 4(b) of Designs Act bars grant of design rights to 'traditional handicrafts' since they already exist in public domain; but Section 2(g) of Designs Act grants design rights to any person for 'new use' of traditional designs, to the prejudice of the indigenous groups

It must be pointed out that assuming the conclusion is accurate, it stands in stark contrast to the contemporary practice of giving design registration to handicrafts, specifically, industrial handicrafts. Considering all the aforementioned reasons, one may conclude that individual creativity of indigenous groups in traditional handicrafts cannot be protected under Copyright Act, 1957 or the Designs Act, 2000. Only separate related rights concept for traditional handicrafts or a *sui generis* system may help protect individual innovations in traditional handicrafts. In China and a few other nations the idea of protecting 'expressions of folklore' or 'traditional cultural expressions' by means of copyrights was toyed with for sometime.

Lessons from the Chinese Exercise and other Nations in Protection of Traditional Handicrafts and TCEs

It was widely felt that the term folklore had negative connotations of being associated with something inferior and was hence replaced by traditional knowledge or 'cultural expressions of indigenous people'. Article 1 of WIPO Intergovernmental Committee's draft provisions for protection of 'traditional cultural expressions' or 'expressions of folklore' are:

(a) 'Traditional cultural expressions' or 'expressions of folklore' are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

(i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;

(ii) musical expressions, such as, songs and instrumental music;

(iii) expressions by action, such as, dances, plays, ceremonies, rituals and other performances, whether or not reduced to a material form; and,

(iv) tangible expressions, such as, production of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms;

which are:

(aa) the products of creative intellectual activity, including individual and communal creativity;

(bb) characteristic of a community's cultural and social identity and cultural heritage; and

(cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

(b) The specific choice of terms to denote the protected subject matter should be determined at the national and regional levels.²⁶

This definition includes handicrafts and is sufficiently broad to encompass within its penumbras other TCEs as well. Further, the freedom given to nation states to choose their own terminologies goes down well with the contextual nature of traditional knowledge. In the light of this definition, it would be beneficial to review in brief, the initiatives undertaken by similarly placed nations to protect TCEs. Let us first consider the Chinese manoeuvres to protect indigenous folklore by way of copyrights as explained by Deming Liu.²⁷ This particular example has been chosen on account of cultural and historical similarities between India and China. Both have nearly 5000-year recorded history and a pre-recorded history that dates back even further. Both have suffered colonial rule under the same master and both are now being touted as 'The Asian Tigers'. Chinese folklore reflects China's cultural heritage and identity; however, it faces a clear and present threat of extinction, the causes for which are manifold. Massive and rapid industrialization is one primary reason and since economic activity is State-sponsored in China with unbounded energy from private players, any opposition to it has the danger of being interpreted as disobedience or worse, rebellion. In India too, massive hydel power projects, such as, the Sardar Sarovar Dam over the Narmada River, which involves large scale exodus of people from their native lands imitate the situation at dragon land. In China, folk arts were attacked by the Red Guards as 'feudal superstitions' and as 'continuing influences of traditional religions and philosophies and reverence for past imperial dynasties',²⁸ which entailed wholesale destruction of heritage sites on a massive scale.²⁸ Closer home in India, the Self-Respect and Dravidian movements in the South and rise of Communism in Bengal are near-perfect counterparts to the Chinese revolution. In China, there are other 'modern' reasons for waning of interest in folk arts. Liu says that 'diversification of cultural forms' combined with a glut of choices and a change in aesthetic perceptions have led people to view their own arts and culture as backward and devoid of sophistication.²⁹ So, pop culture has replaced the local shadow puppet plays.³⁰ The deathblow was dealt when the successors of such traditions developed a sense of inferiority and decided to pursue other 'modern' professions leaving their traditions to die a slow and painful death.³¹ Same is the case in India; so the Chinese example is perfectly justified in its selection but for obvious yet important differences in the type of governments and quality of governance.

China, however, realized the importance of what Professor Richard Rye called 'soft power' and is now aggressively selling its past with astrology and Confucius featuring prominently in the Chinese charm offensive. In particular, with respect to positive protection of traditional handicrafts, the Chinese have promulgated the Regulations for the Protection of Traditional Arts and Handicrafts (1997)³² which acts as a deterrent since infringement entails criminal liability. Disciplinary action is initiated in cases of theft or leak of traditional arts and handicrafts secrets, illegal exploration, theft or sale of mine-valued mineral resources used for making traditional arts and handicrafts and smuggling treasure to foreign country. In general, Chinese lawmakers have proposed copyrights as a mode of protection of TCEs. A distinction is sought to be drawn between expressions of folklore and works of folklore according to which former requires *sui generis* protection and the latter, copyright.³³ Hence works of folklore must conform to the statutory provisions of Chinese Copyright Act, which has its basis in the western concept of copyright.³⁴ Again, this is where works of folklore fail to past muster under the present Chinese Copyright Act. Copyrights are generally granted to individuals for their creations³⁵ and it might seem incongruous to extend the same privilege to the collective work of a community.³⁶ For copyright protection, Chinese law too seeks originality which bears an imprint of the author's personality. Though, the personality criterion may be satisfied, as the work is distinctive of the group, originality is a key stumbling block since traditional knowledge is 'the result of an impersonal, continuous, and slow process of creative activity exercised in a given community by consecutive imitation'.²⁶ Most groups are particular about retaining the traditions by replication, which fail the test of originality.³⁷ Notwithstanding the fact that copyright protects the expression of an idea and not the idea itself, logic says that there is 'idea in an expression' which gives that expression a distinct quality. Copyright law needs to recognize this distinction since, only then can it truly distinguish original work from adaptations and imitations.

This thorny question of 'idea vs expression' and the blurred lines between the two make copyright seem less attractive a proposition. However, international covenants and a few other nations have proactively expanded the scope of copyright to accommodate the work of indigenous groups. For

instance, Article 15 (4) of the Berne Convention has provided for protection of anonymous works which may do away with the question of originality in collective works.³⁸ The Tunis Model Law has exempted works of indigenous groups from the requirement of fixation in a material form.³⁹ Also, Australian judicial pronouncements involving Aboriginal works have been trendsetters for other similarly placed nations.⁴⁰ Despite these encouraging developments, copyright's obsession with individual authors is the greatest stumbling block in its use for protection of collective rights.⁴¹ Even if copyrights were to be granted to certain works which are representative of a particular culture, those works may not be sole representative of all the attributes which are distinctive of that culture.⁴¹ In any case, the value of expressions of folklore is far beyond the period of protection granted by copyright, which makes it less attractive. So copyrights *per se* cannot be the solution to this problem which makes the case for a *sui generis* protection all the more strong. But then what exactly do we refer to when we talk of a *sui generis* protection?

Sui generis protection is a customized form of protection which not only recognizes the inadequacies of the existing forms of intellectual property protection, but goes a step further to create another form which effectively protects a particular class or form of IPR. Under the draft provisions of a *sui generis* system in the erstwhile WIPO/UNESCO Model Law of 1982, there were no limits on the term of protection of expressions of folklore.⁴² Yet there always lurked the danger of communities being taken for a ride by multi-national corporations, who would in turn take perpetual licences.⁴³ Also, the important question of ownership was left open ended.⁴² This gave room for arbitrariness since the State could lay claim to the resources at will. The Model Law also suggested that resources be kept outside the purview of customs of traditional knowledge groups.⁴² This effectively left the groups powerless and defeated the very purpose of protection regime. The basic idea was to empower the groups to determine their destinies, which was so fashionably called 'self-determination'. Accordingly, a *sui generis* protection for TCEs seemed absolutely perfect in theory⁴⁴, but on ground abuses by the State itself were well nigh possible.⁴² This conjecture was further strengthened in view of the political dynamics of a supposedly Communist nation like

China, which traditionally abhorred any kind of private property. Interestingly, the private property bill, which was approved recently after being under the drafting table for the past fourteen years and having undergone seven readings instead of the customary three readings, is bound to add spice to the debate.

Refreshingly, the revised WIPO Inter-governmental Committee draft provisions on a *sui generis* protection are much more progressive and have attempted to fill the legal vacuum. All-embracing tone of the draft provisions is evidenced from the latitude provided in definition of TCEs under Article 1. It is heartening to note that this proposed *sui generis* system recognizes that not only does it need to acknowledge and hence protect the product of traditional knowledge such as traditional handicrafts, but also the process and customs which impart TCEs their unique characteristics. Accordingly, Article 5 provides for communication and transaction of such TCEs in accordance with the customary laws. It recognizes the relevance of customary laws in all sorts of contractual obligations to which traditional groups are a party. As regards the term of protection, Article 6 states that TCEs shall retain the status of TCEs as long as they conform to the definition under Article 1, which, is of particular relevance to GIs. Article 6 further takes into account another possibility. In most forms of traditional knowledge, the knowledge pertaining to the craft is a closely guarded secret and is not known outside the community. Such a craft will be treated as TCE only so long as the knowledge remains guarded. This means that such knowledge is not *in public domain*. If so, what is the consequence if a person reveals such a 'unique design', which was not in public domain earlier? Is he/she entitled to receive protection under the Designs or Copyright Act since in such cases it is possible to determine the 'author'? The design would be 'new' since it was not in 'public domain'. Such a situation puts the entire community at a disadvantage by excluding all others including the community from using the design.⁴⁵ Precisely to avoid this, most countries have adopted GIs apart from proscribing registration of such designs. However, neither the IGC draft provisions in general nor GIs in particular make a provision for rewarding individual creativity in traditional handicrafts.

According to the draft provisions, since TCEs bear a strong imprint of the community and its traditions,

‘...even where an individual has developed a tradition-based creation within his or her customary context, it is regarded from a community perspective as the product of social and communal creative processes. Accordingly, the creation is, therefore, not ‘owned’ by the individual but ‘controlled’ by the community, according to indigenous and customary legal systems and practices.’

It is assumed that since individuals comprise a community, communal control would ultimately benefit the individual. Though such an assumption sounds altruistic, it is not entirely fair and to a certain extent has fallen prey to the gross sin of oversimplification. The underlying premise is that it is impossible or undesirable to create a system which is capable of protecting collective rights on the traditions as a whole and flexible enough to respect exclusive property of individuals on certain additions to such traditions. This is an escapist’s way of shying away from attempting to face, leave alone answer, tough questions. If so, one may ask, is there a better way of protecting collective rights and simultaneously providing incentives to creative individuals? Taking a cue from the law of patents, when patents of addition may be granted on an existing patent or utility patents may be granted for innovations, why should one deprive artisans, who make modifications to existing forms of traditional art, from some form of protection? Giving a sole individual a right of authorship on account of a modification may be prejudicial to the interests of the entire community. But this may be resolved by formulating a *sui generis* system which may be a combination of GIs and ancillary rights in traditional handicrafts. The nature of these ancillary rights may be similar to copyright. On one hand, GIs will ensure that the community does not lose out on its identity and its sole claim over the craft and on the other, ancillary rights will encourage innovation within the community.

The concept of ancillary rights is not a new one, but its extension to traditional handicrafts has not been tested hitherto. If an individual seeks to derive individual benefits out of GI protected products such as traditional handicrafts, a solution on the following

lines may be worked out. A database of prior art or certain characteristics of prior art in traditional handicrafts, on the lines of the UNESCO seal programme⁴⁶, may be identified and compiled. This will help acknowledge and appreciate the quantum of contribution made by individual artists. A calibrated scale of rights may be created and the duration of such rights may range from 5-50 years i.e. the lower limit being less than the duration of design rights and upper limit being less than the period of duration of copyright from the date of the grant. However, the solution is not as simple as it sounds, for when one speaks of quantum of contribution; it refers to the value added over and above the traditional pattern. If so, the innovation may depart from the traditional art. Can such an innovation which is based on tradition and yet departs from the pattern, continue to enjoy GI protection regardless of such departure? Can any such departure be considered worthy of half-a-century of protection? These questions need to be answered for GI recognizes the characteristic features of GI-protected products. Under a broad interpretation of Article 5, it appears that this predicament may be resolved to a limited extent if the groups are given a say in evolving the criteria for evaluating such contribution. In addition, Article 2 is very clear when it states that the moment TCEs such as traditional handicrafts move beyond the definition of Article 1, they shall cease to be TCEs and hence may lose GI protection.

It may be noted that evaluation of the quantum of creativity for the grant of ancillary rights distinguishes such rights from the usual form of copyright since merit or quality is not essential for grant of copyrights. Interestingly, the *de minimis* principle which is slowly but surely finding its way into our judicial pronouncements may negate this assumption as well. The idea is to perpetuate the life and richness of traditional art forms in order to prevent decay on account of stagnation. Such an incentive may spur even non-indigenous people to take up traditional art forms. If an appropriate mechanism for recognizing and rewarding individual creativity is not devised, GIs might just end up creating a rigid iron cage stifling all vitality in traditional handicrafts. In other words, an overtly regulated and unimaginative market is not exactly the best substitute to a chaotic and lawless market. The absence of such a mechanism may buttress the arguments of those who feel that imitation of traditional designs is a better way of retaining

people's interest in such designs and the culture which they represent. Such a line of argument goes against the fundamental premise which forms the bedrock of traditional knowledge jurisprudence, which is the right of traditional groups to a fair deal. One is not against commercial appropriation but only against unfair commercial appropriation without the revenues flowing into communities, which have preserved such knowledge for centuries.

It has to be borne that even if India brings in a *sui generis* law to strongly protect traditional knowledge or TCEs, its efforts are bound to go futile unless there are internationally binding norms in place; fortunately the WIPO IGC draft provisions envisage reciprocity among nations. All the legality aside, we must provide meaningful protection to our indigenous knowledge. Today, when India has a booming economy and is exploring various avenues of sustaining its pace, it is surprising that the potential of traditional handicrafts has not been fully appreciated. The crafts sector is the largest decentralized and unorganized sector of the Indian economy, and is among India's largest foreign exchange earners.⁴⁷ The number of people involved in the making of handicrafts is about twenty-three million making it the second largest employment sector, next only to agriculture.⁴⁸ That apart, traditionally in India, cottage industries like handicrafts have served to alleviate poverty by promoting rural entrepreneurship.⁴⁹ The greatest advantage is that the craft sector contributes the least to cultural and social imbalance.⁵⁰ Rapid mechanization in the manufacture of handicrafts is slowly edging out traditional methods of making them and only legislative solutions combined with smart marketing initiatives can save the day.

Conclusion

The traditional craft skill, however beautiful, needs sensitive adaptation, proper quality control, correct sizing and accurate costing, if it is going to win and keep a place in the market. Though a GI regime in India has been reasonably successful in the protection of traditional handicrafts, it has not helped in encouraging innovation from members within the indigenous groups, which is necessary in order to prevent stunted imagination and creativity within the groups to ensure that traditional handicrafts remain competitive in the market. Hence, a separate form of property which provides incentives for innovations in TCEs such as the one discussed in this paper is

necessary and it would do well if the powers that be, come up with suitable mechanisms to tap the potential of the modern descendants of traditional groups for the perpetuation of traditional art forms.

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