TCEs in the Global Fashion Economy: A Study of Indian Craft under IP law

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***Abstract*—The traditional craft and cultural expressions are an important part of the culture of India and have been handed down through generations. The expressions include traditional clothing like Dupattas, Odhnis, cholis and lehengas, traditional jewellery like Jhumkas, nose rings, anklets and toe rings, traditional footwear like Kolhapuri Chappals, Turbans, Pagdis, Bandhani fabrics, Zardozi embroidery, Mukaish embroidery and other regional embroideries. Most of these traditional items have made their way into international fashion designs with various other names of fashion, like the Indian dupatta becoming Scandinavian scarf, without any mention of its traditional origins. That being said, the protection offered to these cultural expressions under IPR is uneven.**

The "Geographical Indications of Goods (Registration and Protection) Act, 1999" offers protection to goods that have been recognized as having any association with a specific geographical location. Even though the act has successfully protected several traditional crafts, there are other forms of traditional cultural expressions which cannot be protected by virtue of this Act. In this article, the differences between GI protected crafts and traditional expressions which are not covered by the law are analyzed along with the discussion relating to sufficiency of the current legal framework in recognizing communities and artists responsible for keeping their culture alive over the years. The issue of collective recognition, and benefit sharing from the use of traditional designs/cultural expressions in a commercial sense is particularly highlighted. Using the studies conducted by the "World Intellectual Property Organization" on traditional cultural expressions, the article highlights the importance of a broader legal approach to better recognize the traditional artisan communities.

***Index Terms*—Traditional Cultural Expressions, IP Protection, Geographical Indications, Cultural Appropriation**

I. Introduction

Indian embroidery, Indian designs, Indian jewellery and even Indian footwear are some of the examples of craft items that show the skill and creativity of those who have developed and sustained their production through the years. However, with the rising importance of traditional Indian craft, a lot of these crafts have gone beyond their place of origin to appear in international fashion collections and even high-end markets.

The problem with IP protection of traditional craftsmanship is the lack of authorship for such craft items. Since the design, pattern or technique used in these crafts have been developed and sustained through generations within the community itself, it cannot always be traced back to one person or legal entity like in case of the standard IP law. Therefore, traditional craftsmanship is characterized by collective creativity. Another example of protection under the "Geographical Indications of Goods (Registration and Protection)

Act, 1999" [1] includes the recognition of goods whose qualities, reputation or other relevant features are related to a particular geographical location.

The Act has played a crucial role in protecting many traditional Indian products and handicrafts. However, this protection is limited only to those goods which fall into the category of GI registered goods. A traditional design, pattern or ornament does not qualify as a GI just because it has been practiced or used for many generations in India. Thus, many of the traditional cultural expressions remain unprotected under the existing legal regime. Although geographical indications provide a means of recognizing and protecting traditional products, they do not directly protect the traditional cultural expressions underlying those products, leaving certain forms of traditional creativity vulnerable to misappropriation [2].

In this case, WIPO significantly defines the concept of "Traditional Cultural Expressions". TCEs are not only restricted to geographically found products but also cover a wide area of cultural expressions including traditional designs, artistic expressions, symbols and craftsmanship.
This leads to another question: Is safeguarding the geographical identity of a product enough to protect the culture, traditions and the community behind it? This article attempts to discuss the shortcomings of the GI regime, complexities of the issue of collective ownership and need for a wider legal recognition of TCEs.

II. TCEs and the Limits of Geographical Indication Protection

Cultural Expressions of the traditional kind are creations that have been developed by the community over a long period of time. Some of the types of TCEs are traditional design elements, patterns, decorations, attire and craft techniques. However, what makes these expressions important is not the way they look but what they carry in terms of cultural knowledge, identity and practices. WIPO describes traditional cultural expressions as those that belong to a traditional or indigenous community [3]. For example, Phulkari embroidery is not merely a type of embroidery but a whole fabric culture belonging to Punjab. Other well-known examples are Jhumkas, Payals and nose rings.

Section 2(1)(e) of the Act defines geographical indication as "an indication that essentially identifies the quality, reputation or other characteristics that have originated from the geographical location of those goods." This helps goods such as Phulkari embroidery and Kolhapuri Chappals to be recognized and protected because of their link with a particular geography. However, not all designs, ornaments or cultural practices qualify for protection under this law. For instance, jewellery in the form of Jhumkas cannot be portrayed as if they have always been an important part of Indian culture. More importantly, GI and cultural ownership are invested in two different interests. GI ensures the protection of the indication as it pertains to the qualifying products. This does not, however, ensure the ownership of all designs, motifs, and techniques that go into the creation of the product. This is why even if a craft is protected by the GI regime, the larger cultural expressions that go along with the same can be left outside the purview of such protection. Studies

on the protection of traditional knowledge highlight that the level of protection rarely measures up to the expectations of traditional knowledge holders [4].

III. Traditional Cultural Expressions and the Problem of Collective Ownership

One of the most difficult aspects of protecting TCEs is to determine who should have legal rights over expressions that have evolved through collective creativity. WIPO's effort on TCEs recognizes that these expressions are strongly linked to the heritage and identity of the community that sustain them in the Indian context. TCEs may encompass clothing traditions, embroidery styles and skills that belong to the communities.

For instance, Kutch Embroidery depicts the collective nature of traditional craftsmanship with its stitches, motifs and techniques preserved across generations. While individual artisans contribute the scale and creativity, the underlying cultural knowledge belongs to a wider tradition. Legal protection must therefore balance community interest with the rights of individual artisans. The issue is reinforced further if conventional expressions are used within commercial fashion industries. A designer may choose to integrate traditional expressions into his or her new collection of fashion outfits. Using traditional expressions in this manner cannot be regarded as illegal per se nor should any form of copyright law restrain such cultural interactions. However, the commercial exploitation of cultural expressions becomes problematic when the culture remains unknown and the creators of those expressions, unrecognized. Even when the misuse or lack of respect for the cultural importance of a traditional cultural expression (TCE) is unintentional, it can still have serious cultural and economic effects [5].

The commercial value of traditional design may not necessarily be reflected in the financial benefits of the artisans responsible for maintaining such design. Whereas an artisan may receive money for crafting something or a fashion company may derive a form of financial gain from the marketing and branding of the product internationally. This raises issues regarding the inconsistencies between the economic benefit obtained from the traditional craft and its cultural identity. The use of traditional patterns, motifs or design elements without proper recognition can harm cultural heritage and negatively affect the economic interests of the communities associated with them [6].

IV. Is India's Existing IP Framework Sufficient?

Under section 13 of the "Copyright Act, 1957" [7], copyright subsists in original artistic works. An artisan's independent painting, illustration or an original adaptation of a traditional motif may qualify for protection. However, Copyright Law generally requires an identifiable original work and does not automatically confer continuing exclusive rights over inherited cultural expressions. This creates difficulties where a design forms part of a long-standing community tradition.

The Designs Act, 2000 [8], is another possible form of protection. According to Section 2(d), a design is defined as any characteristic of a design by articles through shape, configuration, pattern and ornamentation. However, Section 4 prescribes that no protection will be available for designs which are neither new nor original or have previously been disclosed to the public. Traditional designs could thus pose problems when it comes to originality and novelty. Consequently, the disclosure of traditional designs in the public domain can make it difficult for artisan communities to prevent their commercial use by third parties [9].

The limits of GI protection were also considered in "**Tea Board India V. ITC Ltd (2011)" [10].** The Calcutta High Court considered the usage of the geographical indication 'Darjeeling Lounge' by ITC in a hotel. Although in this case the question was related to the usage of geographical indication for services, the Court noted that the main subject matter of the GI act was goods. However, it was acknowledged that some cross category issues might be covered by the laws on unfair competition and passing off. There was no sufficient possibility of confusion so the requested relief was denied. This case shows that it is important to consider the specific scope of protection provided by a GI and not take geographical registration as an unlimited commercial monopoly.

Furthermore, the "intergovernmental committee of WIPO on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore" [11] along with the "Model Provisions of 1982 by WIPO-UNESCO" [12] have acknowledged the need to prevent any unauthorized use of folklore expressions and have been negotiating the international way out for their protection.

It is important to know that the approach is significant in the sense that it does not criminalize all uses of a traditional expression. It simply aims at differentiating between customary cultural practice and foreign exploitation.

V. Recommendations

India should consider a dedicated legal regime that addresses the interest of those communities whose cultural expressions are employed in commercial activities. It is crucial that such a law differentiates between the collective nature of cultural custodianship and the individual rights of the artisans.

Firstly, there must be a provision for determining the communities linked to certain expressions and their representatives. This becomes crucial especially when more than one community of geographical locations shares the tradition.

There must be certain conditions for attribution and consent to be fulfilled while making use of expressions and commercial activity. For example, there must be guidelines for fashion industries employing cultural

expressions in commercial collection of clothes and, where appropriate, prior community authorization must be included.

The benefit-sharing framework should ensure that profits arising from the commercial exploitation of traditional cultural expressions are fairly shared with the communities that have preserved and maintained them. This will involve payment, production agreements, royalties or investments in the training of artisans.

Lastly, the current GI regime should be improved through increased awareness by institutional support and enforceable means so the registered owners and authorized parties are given the ability to secure their interest in domestic and international markets. A proposed framework will ensure that there is still room for estimated cultural exchange, customary practice and the freedom for artisans to interpret their cultural traditions. The protection will be aimed at preventing any form of exploitation but without converting cultural heritage into private property.

VI. Conclusion

The protection of TCEs accounts for an expanded definition of ownership in IP law. While a traditional design, jewellery shape or embroidery technique may lack a single identifiable owner, it does not mean that the cultural origin and custodians of the craft should be ignored in any way.

The Geographical Indication legislation of India has been one of the most important contributions to the protection of traditional products. Yet, while geographical protection may solve some issues in relation to the commercial exploitation of a product, it does not resolve issues of attribution or benefit sharing in relation to the traditional expressions in situations outside the registered product. The objective should not be to place every traditional expression under exclusive community control but rather, to establish a fair legal relationship between communities, the individual artisans and the commercial players. By recognizing the custodianship of the communities, demanding appropriate consent and acknowledgement and setting up systems of shared benefit, it may be possible to craft an approach that will safeguard both tradition and innovation. Traditional crafts should not have to fit within the boundaries of existing intellectual property categories before the interests of the people who sustained them are recognized.

References

[1] The Geographical Indications of Goods (Registration and Protection) Act, 1999, Act No. 48 of 1999, India.

[2] World Intellectual Property Organization, Geographical Indications: An Introduction, 2nd ed., WIPO Publ. No. 952E/2021, Geneva, Switzerland, 2021.

[3] World Intellectual Property Organization, “Traditional Cultural Expressions.” [Online].

[4] S. Singhal, "Geographical indications and traditional knowledge," Journal of Intellectual Property Law & Practice, vol. 3, no. 11, pp. 732–738, 2008.

[5] B. Vézina, Curbing Cultural Appropriation in the Fashion Industry, CIGI Paper No. 213, Centre for International Governance Innovation, 2019.

[6] B. Pozzo, "Fashion between inspiration and appropriation," Laws, vol. 9, no. 1, Art. no. 5, 2020.

[7] The Copyright Act, 1957, Act No. 14 of 1957, § 13, India.

[8] The Designs Act, 2000, Act No. 16 of 2000, § 2(d), India.

[9] S. K. Swarup and S. Rastogi, "Industrial designs and folklore: A comparative study in Indian perspective," Journal of Intellectual Property Rights, vol. 28, no. 4, pp. 273–283, 2023.

[10] Tea Board, India v. ITC Ltd., (2011) 4 Cal. C.K. 112 (Cal.).

[11] World Intellectual Property Organization, Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions, WIPO Publ. No. 933E, Geneva, Switzerland, 2020.

[12] World Intellectual Property Organization and United Nations Educational, Scientific and Cultural Organization, Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982.