

Protection of Traditional Cultural Expressions (TCEs) by means of IP Rights

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Abstract

The protection of traditional cultural expressions through the intellectual property (IP) regime tends to prevent third parties from using the knowledge inappropriately. The regime, however, does not necessarily assure the preservation or safeguarding the knowledge except for most of traditional knowledge (TK) holders. Indigenous peoples and local communities concerns unwanted use by others particularly offensive and mortifying use. Then others have also illicitly exploited from their Traditional Cultural Expressions (TCEs) for commercial advantages without their consent and without sharing of benefit. In order to protect and prevent the in appropriate use and commercialization, TK holders may wish to gain certain protection for their knowledge, to prevent erosion and disappearance of traditions, to promote the innovation based upon TK and the respecting of the dignity and moral rights of traditional innovators, and to conserve the cultural and biological diversity. Sometimes it can be found that some of TK and TCEs are protected through existing IP system in national level. Various holders have already used conventional IP law at the international level. TCEs can sometimes be protected by existing IP systems, such as copyright and related rights, geographical indications (GIs), trademarks and certification and collective marks. For the protection of TCEs by using Intellectual Property Rights, it can be seen that firstly, in most cases conventional IP systems and adaptations thereof are not considered to be sufficient for protection of TCEs, secondly, IP rights is for individual but TK is collective in nature. Thirdly, the time limit or restricted time for protection in the IP regime, which reflects that falls within the public domain and this, is problematic for TK holders as well.

Key words: Indigenous peoples, local communities, Traditional Cultural Expressions, Traditional Knowledge, Intellectual property rights.

Introduction

Local communities and indigenous people love their traditional knowledge as their cultural identities. The knowledge, innovations and practices of indigenous people and local communities are important for the benefits of our societies and for the development of sustainable agricultural practices, medicine, improvement of culture, and other areas. By preserving their different knowledge systems, traditional knowledge can be vibrant for their future generations and it can be for sustainable development and for their cultural liveliness.

In order to fulfill the necessities of life for the local communities, TK is necessary for a practical component. The technologies in the present day are based on the knowledge innovated in the past. In applying the ecological, medicinal and cultural field with such knowledge, there is used with not only adaptation to the original TK but also originally. In such a case, it leads to have no respect and there is no benefit sharing to the TK holders and local communities.

Since some exploited from TK for commercial advantages, TK holders concern that their knowledge has been misappropriated and misused without the consent of the TK holders. In addition, traditional communities call for strengthening, respecting and nurturing the origins of their TK. Therefore, they want to increase and develop means of protection in accordance with their own values and interests.

The loss of TK is very important condition because of human activities. It is necessary to protect and preserve TK. In the aspect of protection of traditional cultural expressions

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(TCEs) cultural heritage of one country express the level of the civilization of that country. So each and every country has love and respect of their culture and their cultural heritage.

In order to protect TCEs, there is neither convention in international level nor enacted law in national level directly other than related laws based on existing intellectual property and customary law and conventions such as International Convention for the Safeguarding of Intangible Cultural Heritage, Convention on the Protection and Promotion of Diversity of Cultural Expressions and Convention on Biological Diversity as well.

Importance of TCEs Protection

Indigenous and local communities have called for various forms of protection; these include:

- protection of traditional literary and artistic productions against unauthorized reproduction, adaptation, distribution, performance and other such acts, as well as prevention of insulting, derogatory and/ or culturally and spiritually offensive uses;
- protection of handicrafts, particularly their ‘style’;– prevention of false and misleading claims to authenticity and origin/failure to acknowledge source; and
- defensive protection of traditional signs and symbols.¹

Development of Protection of TCEs

Legal and cultural policy considerations and main legal options, based upon national, regional and international trends, relating to the protection of TCEs. A brief historical perspective is presented.

In 1967, in Article 15.4 of an amendment to the Berne Convention for the Protection of Literary and Artistic Works, it aims at providing international protection for expressions of folklore/TCEs. In 1976, the Tunis Model Law on Copyright for Developing Countries was adopted to provide *sui generis* protection for expressions of folklore. In 1982, an expert group met by WIPO and UNESCO established the WPO-UNESCO Model Provisions as a *sui generis* model for the IP type protection of TCEs. In 1984, WIPO and UNESCO jointly convened a group of experts on the international protection of expressions of folklore by IP. In December 1996, WIPO Members States adopted the WIPO Performances and Phonograms Treaty (WPPT), which provide protection also for a performer of an expression of folklore. In April 1997, the UNESCO-WIPO World Forum on the Protection of Folklore was held in Phuket, Thailand.² In 1999, WIPO organized Nine Facts Finding Missions for regional consultations on the protection of expressions of folklore. In 2000, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established. The Committee has made substantial progress in addressing both policy and practical linkages between the IP system and the concerns of practitioners and custodians of traditional cultures.³ In October 20, 2005, Convention on the Protection and Promotion of the Diversity of Cultural Expressions was adopted and that will enter into force three months after

¹ WIPO Publication No. 913(E), *Intellectual Property and Traditional Cultural Expressions/Folklore*, ISBN 92-805-1366-4, p. 13.

² WIPO Publication No. 913(E), *Intellectual Property and Traditional Cultural Expressions/Folklore*, ISBN 92-805-1366-4, p. 3, 4.

³ *Ibid*, p. 3, 4.

its ratification by thirtieth states. The IGC may be taking decisions that directly impact the interests of these communities and that seek to address their concerns.⁴

The Intergovernmental Committee constitutes a Forum for discussions among Member States on intellectual property issues arising in the context of (1) access to genetic resources and benefit sharing (2) protection of TK, whether or not associated with those resources, and (3) protection of folklore.⁵

UNESCO is also engaged in several other activities relating to the protection of cultural heritage and diversity. These include the Convention on Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Diversity of Cultural Property, 1970, the Convention Concerning the Protection of the World Cultural and National Heritage, 1972, and Declaration in the Principles of International Cultural Cooperation, 1966⁶ and UNESCO Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954.⁷ In 2003, Member States of UNESCO adopted an International Convention for the Safeguarding of Intangible Cultural Heritage. This Convention is designed to ensure respect for intangible cultural heritage and to raise awareness about its importance.

Protection of Traditional Cultural Expressions in the International Level

According to Article 27 of the Universal Declaration of Human Rights which was adopted by the United Nations in 1948, Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits; and the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Under the Article 29 of Draft Declaration on Indigenous Rights provides that 'Indigenous peoples have the right to promote and protect their cultural life and other genetic resources, medicines, literatures, designs and performing arts.

Under Article 8(j) of Conventions on the Biological Diversity, each contracting Party shall, as far as possible and as appropriate: subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.

In 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples. Under Article 2 of the Declaration, indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

⁴ WIPO Publication No. 936(E), *A Stronger Voice for Indigenous and Local Communities in WIPO's Work on Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources: The KLLPO Voluntary Fund*, ISBN: 978-92-805-1669-2, Geneva, 2007, p. 4.

⁵ Sophia Twarog and promila Kapoor, Editors, *Protecting and Promoting TK Systems, National Experiences and International Dimensions*, United Nations Conference on Trade and Development, New York and Geneva, 2004, p. 124.

⁶ WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), *Intellectual Property Needs and Expressions of Traditional Knowledge Holders*, Geneva, 2001, p. 52.

⁷ *Ibid*, p. 168.

Article 31 of such Declaration provides that indigenous peoples “have the right to maintain, control, protect and develop their Intellectual Property over such cultural heritage, traditional knowledge and traditional cultural expressions.”

Intellectual Property, Traditional Knowledge and Traditional Cultural Expressions (TCEs)

For the protection of TK⁸ and TCEs from the inappropriate or misuse and illicit exploitation, it needs the respecting of the culture and preserving of their environment and genetic resources and associated TK. There are many issues relating to the protection of TK such as whether the methods of defensive protection or positive protection.

The two approaches among indigenous and local communities were identified during the fact-finding missions and consultations conducted by WIPO since 1998:

- IP⁹ protection to support economic development: some communities wish to gain and exercise IP in their tradition based creations and innovations to enable them to exploit their creations and innovations commercially as a contribution to their economic development.
- IP protection to prevent unwanted use by others: communities may wish to gain IP protection in order to actively exercise IP rights to prevent the use and commercialization of their cultural heritage and TCEs by others, including culturally offensive or demeaning use.¹⁰

Intellectual property rights comprise generally exclusive rights to prevent or authorize the reproduction, adaptation, use, sale, importation and other forms of exploitation of the creation or innovation that is the subject of the rights.¹¹ There is no official or agreed definition of traditional knowledge (TK). The Convention on Biological Diversity (CBD) avoids a definition altogether, adopting the long-winded phrase “knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles”.¹²

WIPO commenced using the more neutral term 'traditional cultural expressions in parallel with the synonym, expression of folklore.¹³ Expressions of traditional culture (or expressions of folklore) may be either intangible, or tangible or most usually, combinations of the two—an example of such a mixed expression of folklore would be a woven rug (a tangible expressions) that expresses elements of a traditional story (an intangible expression). Examples of TCEs/Eof are as follows:

⁸ Under Article 3 (2) of the *Draft TK Instrument*, 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 systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations.

⁹ According to Article 1 (2) of the *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994)*, Intellectual Property refers to all categories of intellectual property, namely, copyright and neighboring right, trademarks, geographical indications, industrial designs, patents, layout design of integrated circuits and undisclosed information”.

¹⁰ WIPO Publication No. 913(E), *Intellectual Property and Traditional Cultural Expressions/Folklore*, ISBN 92-805-1366-4, p. 13.

¹¹ WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), *Intellectual Property Needs and Expectations of Traditional Knowledge Holders*, Geneva, 2001, p. 31, p. 32.

¹² Twarog, Sophia., and Kapoor, Promila., Editors, (2004), *Protecting and Promoting Traditional Knowledge Systems, National Experiences and International Dimensions*, United Nations Conference on Trade and Development, New York and Geneva, p. 141.

¹³ Bernard O' Connor, *Protecting Traditional Knowledge: An Overview of a Developing Area of Intellectual Property Law*, <http://www.oconnor.be>, p. 3.

- verbal expressions, such as folk tales, folk poetry and riddles signs, words, symbols and indications;
- musical expressions, such as folk songs and instrumental music;
- expressions by actions, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and
- tangible expressions, such as:-productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, basket weaving, needlework, textiles, carpets, costumes;
- crafts;
- musical instruments;
- architectural forms.¹⁴

So it may be considered that IP, TK and TCEs are based intellect and knowledge. The Difference is tradition. TK and TCEs are the knowledge based tradition of descendent. Therefore, they are connecting to with each other. The relationship between TCEs and IP increases complex and challenging issues. TCEs/ EoF identify and reflect the traditions, values and beliefs of indigenous and local communities.

Using IPR on the Protection of TCEs

There are many issues relating to the protection of TK such as whether the methods of defensive protection or positive protection. Defensive protection means preventing others from seeking IPR to one's TK¹⁵ as well as safeguarding against illegitimate IP rights over TK or to prevent third parties from obtaining or exercising invalid IP rights over TK. The main focus of defensive protection measure has been in the patent system.¹⁶

Positive protection means establishing IPR to one's TK with the resulting possibility of preventing others from using the TK without permission¹⁷. The options for positive protection include existing IP Laws and legal systems, extended or adapted IP rights specifically focused on TK (*sui generis* aspects of IP Laws), and new, stand alone *sui generis* system which gives rights in TK as such. Other non IP options can form part of the use of contracts, customary and indigenous laws and protocols, regulation of access to genetic resources and associated TK¹⁸.

Patents

A patent is an exclusive right granted for an invention– a product or process that provides a new way of doing something, or that offers a new technical solution to a problem. A patent provides patent owners with protection for their inventions. Protection is granted for a limited period, generally 20 years.¹⁹

Inventions and innovations are new designs or methods for performing a task or the introduction of new uses for an already existing object. Inventions and innovations are typically discovered through some form of experimentation. In order for an invention or innovation to be patentable, it generally must meet three criteria: novelty, non obviousness, and

¹⁴ WIPO Publication No. 913(E), *Intellectual Property and Traditional Cultural Expressions/Folklore*, ISBN 92-805-1366-4, p. 6.

¹⁵ Twarog, Sophia., and Kapoor, Promila., Editors, (2004), *Protecting and Promoting Traditional Knowledge Systems, National Experiences and International Dimensions*, United Nations Conference on Trade and Development, New York and Geneva, p. 65.

¹⁶ WIPO Publication No. 920 (E), *Intellectual Property and Traditional Knowledge*, ISBN 92-805-1366-4, p. 26.

¹⁷ Ibid, p. 65.

¹⁸ Ibid, p. 17.

¹⁹ WIPO Publication No. 450, *What is Intellectual property?*, ISBN 978-92-805-1555-0, p. 5.

industrial application. It must meet all of these three criteria, and if one can be disproved, the patent cannot be approved. Novelty refers to the “newness” of an established invention.²⁰

There are several potentially negative aspects of patents. First, applying for a patent requires full disclosure (making public) of the invention or innovation. Secondly, the invention or innovation must be novel according to patent office standards. The patent applicant must prove that the invention or innovation is not part of the current prior art (Prior art is the existing knowledge base before the invention was discovered or before the invention was disclosed by filing a patent application) base as defined by each country’s novelty definition in patent law. In many countries, TK may be considered *de facto* part of the prior art base. Thirdly, it is important to note that the application process for obtaining a patent can be timely and expensive.²¹

It is also notable that patent law’s requirement of naming an inventor can be an obstacle for TK applicants. The complication arises from the fact that traditional creativity is marked by a dynamic interplay between collective and individual creativity.²²

Industrial Design

An industrial design refers to the ornamental or aesthetic aspects of an article. Industrial designs are applied to a wide variety of industrial products and handicrafts: from technical and medical instruments to watches, jewelry and other luxury items; from house wares and electrical appliances to vehicles and architectural structures; from textile designs to leisure goods.²³

WIPO delegation met expressed a need to control the undesirable exploitation of folk designs, including by means of industrial design protection. For example, they reported that sari’ embodying traditional folk designs being made and sold for commercial purposes both nationally and abroad without the consent of the TK holders. Reference was made to Section 4 of Part II of the TRIPS Agreement, which provides for the protection of independently created industrial designs that are produced by TK holders might qualify for such protection, while some might not. For the former group of traditional industrial designs, participants suggested three steps for an improved protection of TK based designs under existing industrial design systems: (1) standard for the documentation of tradition based designs should take into account the minimum documentation requirements of industrial designs under the TRIPS Agreement and the Hague Agreement Concerning the International Deposit of Industrial Designs; (2) the industrial property offices should incorporate standardized documentation of traditional designs into their search files for examination of the substantive examination of application for industrial design titles; (3) relevant classes or subclass for TK-based designs should be established under the Locarno Agreement Establishing an International Classification for Industrial Designs (1979).²⁴

²⁰ Stephen A. Hansen and Justin W. Vanfleet, (2003), *Traditional Knowledge and Intellectual Property: A Handbook on Issues and Option for Traditional Knowledge Holders in Protecting their Intellectual Property and Maintaining Biological Diversity*, United State of America, ISBN: 0-87168-690-2, p. 9

²¹ Stephen A. Hansen and Justin W. Vanfleet, (2003), *Traditional Knowledge and Intellectual Property: A Handbook on Issues and Option for Traditional Knowledge Holders in Protecting their Intellectual Property and Maintaining Biological Diversity*, United State of America, ISBN: 0-87168-690-2, p. 10.

²² Andanda, Pamela., (2012), *Striking a balance between Intellectual Property Protection of Traditional Knowledge, Cultural Preservation and Access to Knowledge*, the Journal of intellectual Property Rights, vol.17, p. 549.

²³ Ibid, p. 12.

²⁴ WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), *Protecting Traditional Knowledge: An Overview of a Developing Area of Intellectual Property Law*, <http://www.oconnor.be>, p. 110.

Trademarks

A trademark is a distinctive sign that identifies certain goods or services produced or provided by an individual or a company.²⁵ Trademarks are based on two principles: distinctiveness and avoiding confusion. Avoiding confusion as to the source of product is important for consumers purchasing these products. Trademarks distinguish products in order not to mislead consumers into thinking that a product is something that it is not or comes from another source.²⁶

An indigenous community in the Andes, the original knowledge holders of *maca*'s uses, may also want to sell *maca* or profit from their own natural resources and knowledge. Now the indigenous group has two new options:

1. If there are no patents preventing the sale of *maca* for specific purposes, the indigenous group can register the above trademark and sell *maca* using this symbol to distinguish their brand.

2. If a patent prohibits the indigenous group from selling the product, they could register the above trademark and subsequently license out the use of the trademark in order to allow companies to ensure authenticity. It is a value added to the original product with the addition of this seal of approval. By placing this symbol on packages of *maca*, the consumer knows that the original knowledge holders approve of the brand. It may also be possible for the community to sell *maca* without making claims for its use as prohibited under the patent.²⁷

Trademarks, including certification marks, are used by Indigenous people to identify a wide specter of goods and services, ranging from traditional art and artwork to food products, clothing, tourist services and enterprises run by First Nations. Many Indigenous businesses and organizations have registered trademarks relating to traditional symbols and names.²⁸

Australia identified several cases which demonstrated the ability of the Australian intellectual property regime to protect traditional knowledge. For example, *Foster v Munford*²⁹, a case which involved the importation of carpets, manufactured in Vietnam, which reproduced (without permission) either all or parts of well-known works, created by Aboriginal artists. The Australian artists successfully claimed infringement of copyright as well as unfair trade practices, for the labels attached to the carpets claimed that the carpets had been designed by Aboriginal artists and that royalties were paid to the artists on every carpet sold. In awarding damages to the plaintiffs, the judgment recognized the concepts of "cultural harm" and "aggregated damages".³⁰ Australian Trade Practices Act 1974 justifiably prohibits misrepresentation by outsiders that their crafts, designs, and other folkloric works are made by Aborigines.³¹ As to certification marks, which are also sometimes called authentication marks, Australian law protects the folklore of Tiwi artists by an "authenticity label."³²

²⁵ WIPO Publication No. 450, *What is Intellectual property?*, ISBN 978-92-805-1555-0, p. 8.

²⁶ Stephen A. Hansen and Justin W. Vanfleet, (2003), *Traditional Knowledge and Intellectual Property: A Handbook on Issues and Option for Traditional Knowledge Holders in Protecting their Intellectual Property and Maintaining Biological Diversity*, United State of America, ISBN: 0-87168-690-2, p. 20.

²⁷ Ibid, pp. 20-21.

²⁸ Bernard O' Connor, *Protecting Traditional Knowledge: An Overview of a Developing Area of Intellectual Property Law*, <http://www.oconnor.be>, p. 22.

²⁹ 1976, 29 FLR 233

³⁰ Bernard O' Connor, *Protecting Traditional Knowledge: An Overview of a Developing Area of Intellectual Property Law*, <http://www.oconnor.be>, pp. 21-22.

³¹ Munzer, Stephen, R., and Raustiala, Kal., (2009), *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, Center for International Relations, p. 88.

³² Ibid, p. 87.

Geographical Indications

A geographical indication is a sign used on goods that have a specific geographical origin and possess qualities or a reputation due to that place of origin. Most commonly, a geographical indication consists of the name of the place of origin of the goods.³³ TCEs often have a strong link with a specific region or locality. This means that GIs can be used, in particular for tangible products such as handicrafts that have qualities or characteristics derived from their geographical origin.³⁴ Many countries call for that the geographical indications (GIs) could be possible way of protecting products based on TK especially from the perspective of a developing country like India (GI for protection of cashmere (pashmina)) under the Geographical Indications of Goods (Registration & Protection) Act, 1999.

Copyright

Copyright laws grant authors, artists and other creators' protection for their literary and artistic creations, generally referred to as "works". Works covered by copyright include, but are not limited to: novels, poems, plays, reference works, newspapers, advertisements, computer programs, databases, films, musical compositions, choreography, paintings, drawings, photographs, sculpture, architecture, maps and technical drawings.³⁵

The elements and principles of the copyright system are particularly relevant to the Protection of TCEs because many are literary and artistic productions and therefore already or potentially the subject matter of copyright protection. This is why many countries already protect folklore within copyright law. Rights related to copyright, particularly the right of performers, are also directly useful.³⁶ Also, under Article 15(4) of the Berne Convention, anonymous and unpolished work (like much folklore) can be protected.³⁷

Article 7 of the Copyright Act of Tunisia in 1994 provided that the means of protection and preservation of the folklore from commercial exploitation. And also Folklore is deemed to be State owned, not granted for free use and it must bring the cultivation of Ministry of Culture if there is going to exploit for commercial use of a work of folklore. Tunisia has actually applied and implemented the provisions relating to the protection and preservation of folklore.

Case Study

The Australian government is conscious of the need to protect Indigenous Intellectual and Cultural Property (ICIP) within Australia. Australian copyright laws have provided effective protection for indigenous design illegally reproduced on T-shirts, carpets and other commercial products.³⁸

There is precedent in Australia relating to protect the rights and interest of indigenous Australians under copyright law for artistic creations. Australia Copyright Act 1968 stated that to protect the indigenous rights and interest in artistic creations.

- (1) In the case of *Bulan Bulan and Milpurrurru V.R. and T Textile Pty Ltd*, 1998³⁹, although *Bulan Bulan*, the Aboriginal artist and *Mr. Milpurrurru*, both members of

³³ WIPO Publication No. 450, *What is Intellectual property?*, ISBN 978-92-805-1555-0, p. 15.

³⁴ *Ibid*, p. 26.

³⁵ WIPO Publication No. 450, *What is Intellectual property?*, ISBN 978-92-805-1555-0, p. 18.

³⁶ WIPO Publication No. 913(E), *Intellectual Property and Traditional Cultural Expressions/Folklore*, ISBN 92-805-1366-4, p. 10.

³⁷ *Ibid*, p. 16.

³⁸ Anil, K Gupta., WIPO and UNESCO, *WIPO-UNEP, Study on the Role of Intellectual Property Rights in the Sharing of Benefits Arising from the Use of Biological Resources and Associated Traditional Knowledge*, Ahmedabad, India, p. 63.

³⁹ 1998, 41 IPR 513

the Ganalbingu people sued as a legal owner of the copyright, only Mr. Bulan Bulan had successfully enforced his copyright against third party infringers. Mr. Milpurruru, representative of Galnabingu has no right for commercial interests of traditional Aboriginal owners in cultural artworks, recognized under Aboriginal Law, created binding legal or equitable obligations on person outside the relevant Aboriginal community.

- (2) In the case of *George M*, Payunka, Marika & Others Vs Indofurn Pty Ltd*, (1994) 54 FCR 240.⁴⁰ It should be noted, however, that the artists did not receive the total awarded damages. Firstly, the two non-executive directors appealed successfully against their part of the award, and Indofurn was wound up and the active director was declared bankrupt. The artists got some monies from a sum paid into Court and also from the sales of some of the carpets organized by National Indigenous Arts Advocacy Association (NIAAA) for their benefit. Whilst the judgment is a precedent in the recognition of Indigenous rights within the copyright law framework, significant expressions of Indigenous cultures will not meet the requirements of copyright to benefit from these laws.⁴¹
- (3) In the case of *Wik Peoples Vs Commonwealth*, 1996⁴², indigenous performances and ceremonies are important expressions of Indigenous cultures. Indigenous people exhibit and publicly perform their work at festivals attended by non-Indigenous and Indigenous people. The performance of Indigenous dance, song and ceremony raise some pertinent issues with respect to the ability of intellectual property laws being able to protect cultural expressions. The case points to a deficiency in the current Australian law of performer's rights protection under the Copyright Act which extends to aural and audiovisual recordings and broadcasting. There have been instances where Indigenous persons in Australia have been photographed without their consent and the image commercially exploited in an entirely different context. Trade practices and passing off laws also have their limitations as the applicant must establish a reputation in order to stop the exploitation of their cultural material. The absence of protection of rights for traditional dance performance under intellectual property laws has left Indigenous peoples no other choice but to look elsewhere for protection.⁴³

Protection of Myanmar Traditional Cultural Expressions

There are traditional cultural expressions in every country. These are the essence of that country. So every country has to protect and preserve their cultural heritage.

In Myanmar, there are many traditional cultural expressions as well as tangible cultural expressions such as folk tales, and riddles, folk songs and dance, folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, jewelry, basket weaving and so on. Today, Myanmar traditional handicrafts and other cultures can attract the tourism which can give the interest of our country. There may be misappropriation and misusing of our own traditional culture without permission by others. Nowadays in Myanmar, there is still drafting the Intellectual Property Protection Laws. However there have already been indirectly enacted laws for the protection of TCEs such as of the Protection and Preservation of Cultural Heritage Regions Law, 1998, Myanmar Copyright Act (1914). Therefore, it should be enacted

⁴⁰ <<http://www.wipo.int/globalissues/studies/cultural/minding-culture/carpetscase/index.html>>.

⁴¹ Terri, Janke. Ms., (2003) *MINDING CULTURE, Case Studies on Intellectual Property and Traditional Cultural Expressions prepared for the World Intellectual Property Organization*, Geneva p. 21, 22

⁴² 187 Commonwealth Law Reports 1, 1996

⁴³ Opcit, p. 96

a *sui generis* law system based on reciprocal promises or mutual agreements based on mutual respect. To practice this respect, mutual agreements should be made between two countries, among different regions or through internationally.

There is an interesting incident in Myanmar. U Sein Bo Tint's widow Vs Producers of the Documentary film "Mystic Ball" case; in this incident, U Sein Bo Tint's widow is suing the producers of the Documentary film "Mystic Ball" for the infringement of the copyright contained in the theme song of the said film. The music of the theme song was originally composed by U Sein Bo Tint as the song "Yaung Daw Bwint" and has been used in the documentary film without the permission of U Sein Bo Tint's widow, the present owner of the copyright. In this incident, U Sein Bo Tint's music, Myanmar Traditional Music should be protected by Copyright as an individual. And then the method of playing cane ball should be preserved by the appropriate law as community.

In Daw Wadam Khaunnin Vs Daw Khann Yin, Daw Nwe Oo and U Min Nyo(a) U Htinn Phu⁴⁴ case, the plaintiff sued to pay damages for making imitation of her design about 7500,000 Kyats in each under Myanmar Copyright Act 1914. And then in accordance with the Burke and Margot Burke Ltd Vs. Spicers Dress Designs⁴⁵ and Designs Guild Ltd Vs Russell Williams (Textiles) Ltd⁴⁶ cases, the Plaintiff made the new design to be cherished by the Rawan Lady. She had registered, and distributed and sold it. This creative work can be called the derivative works creations upon the ethnic marks or traditional cultural expressions. Under Section 35 (1) of Myanmar Copyright Act 1914 artistic works include works of painting, drawing, sculpture and artistic craftsmanship, and architectural works of art engravings and photograph. Thus it can be considered that she had the right to make the derivative work without prejudice the act of another and her dignity. So it can be said that her registration is legal and she has entitled as the owner of Copyright. Held that the court decided to pay the damages 2000,000 Kyats in each to the plaintiff.

In the protection of traditional cultural expressions, it may be used as a collective human right and use of existing or novel *sui generis* measures in accordance with the suggestion of WTO and WIPO and UNESCO's Model provisions.

⁴⁴ 2009, Civil Special Appeal Case No.37,38,39

⁴⁵ 1936, 1-Ch 400.

⁴⁶ 2000,1-W.L.R 2416, UK House of Lord.

Evaluation

IP Protection	Criteria	Advantages	Disadvantages	Possible / Impossible
Patent	-Novelty -Non obviousness -Industrial application	-Monopoly over sale, use, and production, - Potential profit	-Full disclosure is required -Temporary monopoly -Will be placed in the public domain -Application process can be timely and expensive	Impossible
Industrial Design	the design must be “new” or “original”	-industrial products and handicrafts: from textile designs to leisure goods	-Not easy to define the original designer in TK community -Limited Scope of protection	Impossible
Trademark	-Must be a word, symbol, phrase, etc. -Must identify and distinguish a good without creating confusion	-Can distinguish products based on TK -Can serve as “value-added” and certify TK authenticity -Establishes a competitive advantage over similar products not TK-based	Does not prohibit use of TK	Possible (sui generis system based on existing IP system)
Geographical Indication	Must be distinct due to geographical location	Distinguishes TK-based product by location. Proves authenticity when claiming superiority based on traditional location	TK not claiming geographical name	Possible (sui generis system based on existing IP system)
Copyright	Copyright laws grant authors, artists and other creators protection for their literary and artistic creations, generally referred to as “works”.	grant authors, artists and other creators protection for their literary and artistic creations The creators of works protected by copyright, and their heirs and successors (generally referred to as right holders”)	Copyright are of limited duration And Individual only not community	Possible (sui generis system based on existing IP system)

Conclusion

In summation of my research paper, it may be considered that practically all types of intellectual property are not enough to use for protection of traditional knowledge or traditional cultural expressions because existing intellectual property systems are to a large extent based on individual intellectual achievements. But protection of TCEs by IP may not absolutely exist. For the reason that firstly in patent system, it needs to express the name of inventor, systematic inventive steps and new invention which are difficulties for TK applicants. The IP system is aimed at more on individual creations while, in copyright law, notion of authorship is a problematic concept in many traditional societies and qualified person. Such requirement is practically not convenient to collective groups of TCEs protection. Secondly, in the IP system that it is ‘based on document-intensive, codified and governmentally administered structures

and procedures.’ This element of the IP system makes it difficult to get TK holders who may wish to protect their knowledge comply with such element and the costs may likewise be prohibitive. If TK is documented and governmental IP offices are granted access to the database so that the information can be used for protecting the rights of TK holders against misuse by third parties. It may take avoiding that TK holder may follow with the formal IP system, for instance, elements of incompatibility and high-priced costs of filing their own applications.

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