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Re-Examining Section 13 of the Copyright Act, 1957 in the Context of Oral Traditional Cultural Expressions

Nivya Anil

LLM Student (IPR),

Amity Law School, Amity University, Bengaluru

Dr. Ajoy Jose

Assistant Professor,

Amity Law School, Amity University, Bengaluru

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Re-Examining Section 13 of the Copyright Act, 1957 in the Context of Oral Traditional Cultural Expressions

ABSTRACT

Section 13 of the Copyright Act, 1957 outlines the classes of works in which copyright exists in India, and this is done in the form of a template, which is designed for the individual, fixed and dated work of authorship. Oral traditional cultural expressions (OTCEs) that are folk songs, oral epics, ritual chants, dance-narratives, and community storytelling traditions are almost by definition outside that template – they are communally authored, intergenerationally transmitted, often not fixed, and without a determinate date of creation or living identifiable author. This paper provides a doctrinal analysis of Section 13 to see if, and how, oral TCEs can be incorporated into the statutory framework. It discusses the fixation and originality requirements in Section 13, in conjunction with Sections 2, 17 and 22 of the Act and how the courts in India, namely, the Academy of General Education v. Malini Mallya, have viewed derivative or reinterpreted traditional forms. It places the Indian position in the international debate regarding the WIPO Intergovernmental Committee, WIPO Treaty on the Rights of Traditional Knowledge and Associated Traditional Cultural Expressions (2024) and other Indian mechanisms like Section 31A, and the Traditional Knowledge Digital Library. The paper concludes that the concept of authorship and fixation as it is currently drafted does not have the capacity to meaningfully protect oral TCEs, and that a sui generis system must be created, which is outside the copyright framework.

KEYWORDS

Copyright Act 1957, Section 13, traditional cultural expressions, folklore, oral tradition, sui generis protection, WIPO IGC, fixation, originality, cultural heritage law

1. INTRODUCTION

India's living oral heritage – from the Baul music of Bengal, the Yakshagana ballet of the coastal Karnataka, Warli pictorial narration, the stories of the Gond and the many other unrecorded lullabies, harvest songs and origin myths of tribal and rural communities – is one of the world's greatest quantities of unprotected cultural production. In its current form, almost nothing of it is protected by the Copyright Act, 1957, since the Act was never created to protect such material. The gateway

provision of Indian copyright law is Section 13 of the Act, which defines those works in which copyright subsists and requires that certain conditions be met before the copyright can attach to the work in question.

It gives protection to three general categories of works: literary, dramatic, musical and artistic works; cinematograph works; and sound recordings, which is to say works that are fixed in a material medium, created by the person who originally fixed it, and traceable to the original author.

In turn, these are conditions that oral traditional cultural expressions (“TCEs”) resist. They are by definition oral, not fixed, and cumulative across generations, not coming from any identifiable, determinate time in a single author; and they belong, in the sense that matters to the communities that sustain them, to the collective rather than to any individual. This result is not a marginal exclusion but a structural one: a whole field of cultural production, part of India's national heritage, is, de facto, in the public domain, and open to any appropriation, decontextualisation, commercial exploitation – by anyone, and not rarely by third parties completely outside the community from which it originates.¹

In this paper we revisit Section 13 in this context. It poses three related questions. Firstly, what aspect(s) of Section 13 and the statutory structure around it have a material impact on whether oral TCEs can be excluded or not? and why? Secondly, how have Indian courts resolved conflicts between traditional works and copyrightable derivative works and what does this jurisprudence tell you about the elasticity of the existing framework? Third, whether India should go for reform in Section 13 or have an independent sui generis instrument for TK and expression given the international journey towards enacting a separate legal framework for TK and expression, the 2024 WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge. The paper continues in 8 more parts. Part II theorises oral TCEs and differentiates them from the related but separate group of traditional knowledge. Part III elaborates on the statutory structure of Section 13 in detail. Part IV identifies the specific structural limitations that the provision represents to oral TCEs. Indian Case law is discussed in Part V. Part VI reviews the international framework. Part VII outlines the current Indian law in the non-copy legal field. Recommendations are outlined in Part VIII and Part IX concludes.

2. LITERATURE REVIEW

¹ The Copyright Act, 1957, s. 13(1) and s. 13(2), read with s. 2(y) (definition of “work”) and s. 17 (first ownership); Copyright Act, 1957, Bare Act text, Government of India, available at <https://www.copyright.gov.in/Documents/Copyrightrules1957.pdf>.

The literature for this paper can be divided into four interconnected strands namely: (i) Commentary on Section 13 of the TRIPs Act, copyright subsistence in India; (ii) Scholarship on Traditional Cultural Expressions (TCEs) and folklore; (iii) Judicial commentary on cases involving traditional cultural material; and (iv) international literature on WIPO Intergovernmental Committee (IGC) process.² These collections of documents are useful, but do not answer the question of how Section 13 of the Copyright Act, 1957, works with TCEs.³

Current commentary on Section 13 focuses on it as the bedrock of copyright subsistence; to determine what is a work, and what it can be protected as.⁴ Originality has been well covered in the literature, including the shift from the "modicum of creativity" to the "skill and judgment" standard, and the territorial requirement in Section 13(2). These analyses, however, tend to give the lion's share to conventional works (literary, artistic, musical, software), almost ignoring other modes of creation.⁵ Little sustained attention is given to traditional craft, or communally produced culture, and no consideration is given to whether Section 13 can be interpreted as having any lack of author, or fix of creation. This paper attempts to fill the doctrinal void.⁶

Another body of scholarship, heavily shaped by the WIPO IGC process, looks at the incompatibility between traditional IP law and TCEs.⁷ Collective authorship, intergenerational development, and lack of fixation are always cited as key obstacles to copyright protection in TCEs. There are those who differentiate TK from traditional knowledge, and say that traditional knowledge has been protected in some ways, for instance the TKDL, but expressive cultural heritage is not adequately protected.⁸ Indian scholarship also holds that folklore, in general, cannot

² Martinet L. Traditional Cultural Expressions and International Intellectual Property Law. *International Journal of Legal Information*. 2019;47(1):6-12. doi:10.1017/jli.2019.8

³ Kuek Chee Ying, Protection of Expressions of Folklore/Traditional Cultural Expressions: To What Extent Is Copyright Law the Solution?, 32 *J. Malaysian & Comp. L.* 31 (2005).

⁴ Chutia, Upankar, Ananya Mandal, and Gyanashree Dutta. "Community Rights and Benefit Sharing of Folklore in India: A Critical Legal Study." *International Conference on Law and Technology (ICLT 2025)*. Atlantis Press, 2025.

⁵ Navin Kumar, Copyright Protection for Folk Songs, Rural Performances, and Cultural Expressions in India: Legal Challenges, Gaps, and the Road to a Sui Generis Framework, 92 *Sci. & Culture* 114 (2026).

⁶ Michael P. Goodyear, Adapting Indian Copyright: Bollywood, Indian Cultural Adaptation, and the Path to Economic Development, 23 *Vand. J. Ent. & Tech. L.* 517 (2020).

⁷ P.V. Valsala Kutty, *National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines* (WIPO, Vol. 912, 2002).

⁸ Nipun Gupta, *An Analytical Study of Legal Regime on Traditional Cultural Expressions under Intellectual Property Rights in India* (2020) (Ph.D. dissertation, Mewar University),

be subject to copyright as it is not documented and cannot be attributed to any identifiable author.⁹ These studies recognize the problem and seldom engage in a specific doctrinal interpretation of Section 13 itself, which is the subject of this paper.

The judgment in the *Academy of General Education v Malini Mallya* case has been interpreted by judicial commentaries in general to have specific reference to literary and dramatic works and the ambit of the 'fair dealing' defence under section 52.¹⁰ A narrower body of scholarship, however, reads the case as an illustration of the flaws of the individualistic copyright model's approach to collectively created cultural traditions.¹¹ The present paper extends this latter line of reasoning, however, to conclude that the decision was made at the outer edges of Section 13 and only because it was an original contribution, and not the underlying traditional expression.

The last strand is the literature created by WIPO, states, and international scholars documenting the WIPO IGC negotiations leading up to the 2024 Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge. This literature offers valuable insights into the international norms developed and the current negotiation process over TCEs, but the attention is mainly on institutional and diplomatic processes. It therefore does not explore the current state of copyright law as it applies to TCEs in the oral and community sphere in India. This paper seeks to do that, placing the detailed doctrinal analysis of section 13 in context.

3. RESEARCH GAP

When read together, the four strands create a certain gap. The Section 13 literature does not examine originality and subsistence in relation to communal, unanchored subject matter. The TCE literature points out the structural obstacles at a general level, but does not engage in detailed statutory interpretation of the individual sub-sections of Section 13. The traditional-form dimension is treated as an incidental in the case commentary in *Malini Mallya*. The international literature, of course, can

Shodhganga, <http://hdl.handle.net/10603/319601>.

⁹ Sumitro Banerjee, *Cinematic Adaptations of Rabindranath Tagore: A Socio-Cultural Analysis of Select Texts* (2019) (Ph.D. dissertation, Banaras Hindu University), Shodhganga, <http://hdl.handle.net/10603/374084>.

¹⁰ Manas Kumar Ganguli, *Protection and Preservation of Baul Songs of West Bengal as Traditional Cultural Expressions (TCEs) in the Light of Intellectual Property Rights (IPR)* (2022) (Ph.D. dissertation, University of Calcutta), <http://hdl.handle.net/10603/461083>.

¹¹ Prasanna Kumar, *Rani Abbakka Chowta: Balancing Historical Authenticity and Creative Adaptations in Indian Literature* (2024), <https://ssrn.com/abstract=5436494>.

never be at the same level as any one piece of domestic law. This paper's contribution is to make sense of Section 13 provision by provision, using this general structural critique developed in the TCE literature as an interpretive lens, and to situate the domestic diagnosis within the current international treaty landscape, informed by the one Indian precedent that comes close to the issue.

4. RESEARCH OBJECTIVES

- To understand the legal provisions for copyright subsistence in India and the statutory framework of Section 13 of the Copyright Act, 1957.
- To Investigate structural impediments to the copyright protection of oral Traditional Cultural Expressions (TCEs).
- To explore the international legal landscape of TCEs, the Berne Convention, UNESCO-WIPO Model Provisions, the WIPO Intergovernmental Committee (IGC) process, and the WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge (IPGR TK) 2024.
- To suggest the legal changes, such as amendment to the Copyright Act, 1957 or the implementation of a sui generis approach for the effective protection of oral Traditional Cultural Expressions in India.

5. CONCEPTUALISING ORAL TRADITIONAL CULTURAL EXPRESSIONS

The World Intellectual Property Organization (WIPO) defines TCE as the creations of traditional communities and indigenous peoples that are an integral part of their cultural and social life, and includes music, dance, art, designs, names and symbols, performances, ceremonies, architectural forms, handicrafts and narratives. The term “folklore” is a term used by national legislation that has had precedents in the international vocabulary, and also by a number of national laws that continue to use obsolete terms.¹² Here, in this paper, the term “oral TCEs” is used to refer to TCEs in which the oral or performative mode of existence, both sung and recited, danced and enacted, is primary and often the only mode of existence, as opposed to those which are only tangibly expressed, such as textile motifs or carved artefacts. The oral component is analytically significant because it is the lack of a written or otherwise inscribed form which lends the greatest conflict to the principles of copyright doctrine that traditionally favor the written or

¹² “Key Characteristics of Traditional Cultural Expressions,” TheLaw.Institute (Feb. 24, 2026), available at <https://thelaw.institute/trade-secrets-competition-law-and-protection-of-tce/traditional-cultural-expressions-characteristics-preserving-heritage/>, drawing on WIPO's working definition.

otherwise recorded text.¹³

The three features that are repeated throughout the literature that are of interest to the TCEs and are worth restating are all represented by a point of failure in Section 13. Each of these features is associated with a point of failure in Section 13, and they are repeated throughout the literature that is relevant to the TCEs. TCEs tend to be found and used within a community, and do not fit into the Anglo-American and Indian copyright doctrine, which is centered around the concept of individual authorship. They are intergenerational and cumulative: no one performance or telling is “the” work, and there is no fixed point of origin or completion to the tradition, a departure from the copyright assumption of a discrete moment of creation. Often these are not set, not fixed in any physical medium, but remain in memory and performance, and where a recording or transcription does exist it is likely to have captured one realization of an evolving practice and not the practice itself.¹⁴

To briefly explain the differences between TCEs and traditional knowledge (“TK”) which are sometimes grouped together in international instruments. In general, TK, as an ownership category, is that of knowledge systems that are functional, often utilitarian, and that are more easily encountered in the context of patent law and the Traditional Knowledge Digital Library. The TCEs, on the other hand, are expressive and aesthetic in nature, and are just outside the door of copyright, but as this paper will show, they are not allowed inside. India's Traditional Knowledge Digital Library, which aimed to capture TK in formats open to the patent examiner, to prevent patents for material already in the public domain, was therefore a TK instrument, rather than a TCE instrument, and does not concern itself with the copyright status of oral cultural expressions.¹⁵

6. SECTION 13 OF THE COPYRIGHT ACT, 1957: STATUTORY ARCHITECTURE

¹³ “Globalized Folklore: Legal Means to Protect Traditional Cultural Expressions,” Nyayashastra (Nov. 18, 2023), available at <https://www.nyayashastra.in/post/globalized-folklore-legal-means-to-protect-traditional-cultural-expressions>.

¹⁴ “Traditional Knowledge And Cultural Expressions: The Missing Link In India's IP Regime,” Mondaq (July 22, 2025), available at <https://www.mondaq.com/india/trademark/1654104/traditional-knowledge-and-cultural-expressions-the-missing-link-in-indias-ip-regime>.

¹⁵ “Traditional Knowledge and Public Domain in India: Protecting Cultural Assets,” Lexology (Aug. 16, 2025), available at <https://www.lexology.com/library/detail.aspx?g=b706ddc2-cce5-4c0a-a1a8-ddb62c9f70c0>.

6.1 The Enumerated Categories

Under Section 13(1) of the Copyright Act, 1957, original literary, dramatic and musical works, artistic works, cinematograph films and sound recordings are to be protected against copyright violation throughout India. Oral folk narration and unrecorded song are not easily categorized in any of the three heads, nor is unscripted ritual performance¹⁶. If they could be reduced to writing, they could be called “dramatic” or “literary” works; if they are reduced to a “sound recording” or “cinematograph film” they may be called “sound recording” or “cinematograph film” but, in either of these cases, it is the fixed recording that is being protected, and not the oral traditions themselves, and the “author” of that record is really the collector, ethnographer or broadcaster, not the community whose traditions are being recorded.

6.2 Originality

S.13(1)(a) only covers literary, dramatic, musical and artistic works. Indian courts have historically taken a very narrow view of originality, which is not original material simply copied and is limited to a requirement that the work embody some independent skill, labour or judgment on the part of the author, and does not require novelty or inventive skill. In *Eastern Book Company v. D.B. Modak*, the Supreme Court rejected a “modicum of creativity” standard, instead defining “original” as work created through an author's own skill and judgment, and not a copy of another work. Even generous towards derivative and compiled works, this standard requires a discernible author and/or group of joint authors with skill and judgment to be called into account.¹⁷ There is no place to point to for skill and judgment in an oral tradition that's been modified over many generations by people who have never been named or numbered. The originality investigation which makes sense in the case of one creator simply doesn't make sense in the context of an oral tradition as a whole.

6.3 Fixation

In contrast to the United States Copyright Act, the Copyright Act, 1957 does not have an explicit and separated fixation requirement for all works; however, it is implicit in the framework of Section 13 in

¹⁶ The Copyright Act, 1957, s. 13(1)(a)–(c); text reproduced at Indian Kanoon, Section 13(1) in The Copyright Act, 1957, available at <https://indiankanoon.org/doc/196539054/>.

¹⁷ *Eastern Book Company v. D.B. Modak*, (2008) 1 SCC 1; see “Copyright Subsistence in India: Analyzing Section 13 of the Act,” Studocu (Feb. 18, 2026), available at <https://www.studocu.com/in/document/gopaldas-jhamatmal-advani-law-college/contract-drafting/copyright-subsistence-in-india-analyzing-section-13-of-the-act/153704135>.

conjunction with the other provisions of the Act. Fixed Media are, by definition, sound recordings and cinematograph films. Although Section 13(1)(a) does not expressly require a work to be in some material or recorded form “that can be examined, dated and compared”, this requirement is implied, in practice, in literary, dramatic, musical and artistic works. If a musical work is never written down, recorded or otherwise made permanent, there is nothing that can be copyrighted or that a court will have a basis for determining infringement.

6.4 Authorship, First Ownership, and Term

The first owner, writing, and term of a work. The original owner, writer, and duration of a work. First ownership of copyright in the “author” of a work is conferred by Section 17, and Section 2(d) defines an “author” in terms of the composer, artist or author of a work. The time an author is protected under Section 22 is counted from the date of his or her death plus 60 years, or, if the work is anonymous or pseudonymous or a work of joint authorship, from a dateable event relating to the author(s). Each of the ownership and term requirements is thus subject to an ascertainment of a person or a time. In the case of oral TCEs, neither can be said: “sixty years from the life of one author” cannot hold true, and no “making” moment can be identified, because the tradition is being made, collectively, forever.¹⁸

7. THE STRUCTURAL MISMATCH: WHY SECTION 13 FAILS ORAL TCEs

When examining both parts, two additional barriers can be seen, bringing the total to four specific, cumulative barriers. If there is no written record of the spoken text, there is no fixed subject matter upon which to make a determination of originality, authorship, or infringement to establish a copyright claim. As long as a performance is captured by a third party, whether folklorist, broadcaster, or a tourism board, copyright in the resulting sound recording or film belongs to the third party, the recorder of the performance, and not to the community whose tradition was captured. The recording is protected; the tradition is not, nor does the community that carries on the tradition thereby gain any rights simply by being the subject of someone else's copyrightable fixation. In the event that the oral tradition is recorded or transcribed, the originality question is who is the author? Copyright does not exist in the underlying tradition itself, but rather, only in the arrangement or compilation options of the particular fixed version made by the person

¹⁸ The Copyright Act, 1957, ss. 2(d), 17; see Academy of General Edu., Manipal & Anr. v. B. Malini Mallya, (2009) 4 SCC 256, discussing the definition of “author” under Section 2(d).

who fixed the tradition.

In the very special case of a revival or adaptation of a traditional form by one person, the protection (as in the Yakshagana litigation discussed below) lasts for sixty years after the person who adapted the form dies. Even if not a single one of these is identifiable as such, a tradition many centuries old is already, and continues to be, in the public domain.

In fact, the Indian delegation to the Berne Convention negotiations in 1967 proposed introducing the concept of folklore into the international copyright framework, which was not accepted as such; the compromise that was introduced instead was the narrower category of “unpublished works of unknown authorship” in Article 15(4) of the Berne Convention, which allows a country of origin to designate a competent authority to represent the interests of an unknown author, but it does not create a substantive property right in all the communities of origin; in practice, it has never been operationalised anywhere, including in India.

Put another way, under any circumstances, no matter how the oral tradition is documented, it can never be protected by the oral tradition itself – because every way in which it can be protected is a way in which it is converted into a different form, the form of a recording, the form of a compilation, the form of a derivative dramatic work, and the form of a copyrighted oral tradition, and each of those ways results in a different owner of the copyrighted tradition, an owner who is not the community of origin.¹⁹

8. JUDICIAL ENGAGEMENT: CASE LAW ANALYSIS

8.1 Academy of General Education, Manipal V. B. Malini Mallya

The most obvious example of a conflict between the traditional form and copyrightable derivative work in Indian law is the Yakshagana litigation. Dr. Kota Shivarama Karanth, an Academy of General Education Associate, Jnanpith awardee, created a unique variation of the traditional Yakshagana ballet called “Yaksharanga,” which incorporates the traditional raga, tala, scenic arrangement and costume, while also creating seven new verses (prasangas). In his will, he left his literary works to Ms. B. Malini Mallya, who then pursued Academy for copyright violation for its staging one of the Yaksharanga ballets without her consent. The traditional dance form itself was centuries old and

¹⁹ Documenting Indigenous oral traditions: Copyright for control, International Journal of Cultural Property (Cambridge University Press, Nov. 11, 2022), available at <https://www.cambridge.org/core/journals/international-journal-of-cultural-property/article/documenting-indigenous-oral-traditions-copyright-for-control/02C8DC70BE6C16A8547AB93266D03454>; Berne Convention for the Protection of Literary and Artistic Works, art. 15(4).

traditional and whether the changes made by Dr. Karanth in the traditional form constituted an original work with copyrightability under Section 13 was one of the issues before the Supreme Court.²⁰

Before the Supreme Court, counsel for the Academy eventually accepted that the threshold of originality required under Section 13(a) was met and that Dr. Karanth's creative additions to the traditional form of the Yakshagana – the Academy's new prasangas and his alterations to raga, tala, and staging – were properly attributable to him individually, though they were constructed on and inseparable from the pre-existing form of the Yakshagana. The case is instructive, just because it does, and doesn't, decide. It establishes that a person who makes a “meaningful contribution, based on skill and judgment, to a traditional form” can have a copyright claim to the contribution, a small step, but one that certainly doesn't mean that, in principle, all traditional forms are forever and for all purposes out of reach of copyright claims for all purposes. However, it has no effect on the traditional form itself.

The underlying centuries-old Yakshagana tradition, pre- and post-litigation, was unprotected and unprotectable; only the copyrightable, identifiable additions of Dr. Karanth were protected, and even those additions will expire sixty years after his death in 1997. All the Yakshagana community of practitioners gained from this litigation was a right to benefit from a private legatee under the will of an individual; no rights were won in the name of the community.

9 THE INTERNATIONAL FRAMEWORK AND INDIA'S POSITION

9.1 *The Berne Convention and the 1982 Model Provisions*

As noted in Part IV, India's own diplomatic history places it at the origin of the international debate: the 1967 Indian proposal to bring folklore within the Berne Convention was the proximate cause of the eventual, narrower Article 15(4) compromise. The insufficiency of that compromise led UNESCO and WIPO to jointly develop the 1982 Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, followed by a 1984 draft treaty on the same subject, neither of which achieved binding multilateral force, though the Model Provisions influenced a number of national sui generis folklore statutes, particularly in Africa and the Pacific.²¹

²⁰ Academy of General Edu., Manipal & Anr. v. B. Malini Malliya, (2009) 4 SCC 256; judgment available at Indian Kanoon, <https://indiankanoon.org/doc/184940/>.

²¹ Documenting Indigenous oral traditions: Copyright for control, International Journal of Cultural Property (Cambridge University Press, Nov. 11, 2022), available at

9.2 *The Wipo Intergovernmental Committee And The 2024 Treaty*

The modern institutional home of this debate is the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("IGC"), established in 2000, which has since 2009 conducted parallel text-based negotiations on, first, an instrument for genetic resources and associated traditional knowledge, and second, a separate instrument covering traditional knowledge more broadly and traditional cultural expressions.²² India has been a consistently active participant in the IGC, and has specifically pressed for a legally binding instrument on TCEs.

On 24 May 2024, after more than two decades of negotiation, the WIPO Diplomatic Conference in Geneva adopted, by consensus of over 150 member states, the Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge ("GRATK Treaty") – the first WIPO treaty to address genetic resources and traditional knowledge, and the first to contain provisions specifically for indigenous peoples and local communities.²³ The Treaty, once in force, will require patent applicants whose inventions are based on genetic resources or associated traditional knowledge to disclose the country of origin and, where applicable, the indigenous peoples or local community that provided the knowledge. Its scope, however, is expressly confined to the genetic-resources/traditional-knowledge interface relevant to patent law; it does not extend to traditional cultural expressions, and negotiations on a separate instrument covering TK more broadly and TCEs specifically were, at the time of the Treaty's adoption, deferred to resume under the ongoing IGC process.²⁴ As of the end of 2024, only a single state had ratified the GRATK Treaty, and it requires fifteen

<https://www.cambridge.org/core/journals/international-journal-of-cultural-property/article/documenting-indigenous-oral-traditions-copyright-for-control/02C8DC70BE6C16A8547AB93266D03454>.

²² WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, Wikipedia, available at

https://en.wikipedia.org/wiki/WIPO_Treaty_on_Intellectual_Property,_Genetic_Resources_and_Associated_Traditional_Knowledge, summarising the IGC's mandate and history.

²³ ESIL Reflection – WIPO's New Treaty on Intellectual Property, Genetic Resources and Traditional Knowledge, European Society of International Law (Oct. 10, 2024), available at <https://esil-sedi.eu/esil-reflection-wipos-new-treaty-on-intellectual-property-genetic-resources-and-traditional-knowledge-a-turning-point-for-indigenous-heritage/>.

²⁴ The New WIPO Genetic Resources and Associated Traditional Knowledge Treaty: A Symbolic and Modest Step, Chidi Oguamanam (May 24, 2024), available at <https://www.oguamanam.com/publications/new-wipo-treaty>; Frequently Asked Questions: 2024 WIPO Diplomatic Conference, WIPO, available at <https://www.wipo.int/diplomatic-conferences/en/genetic-resources/faq-genetic-resources.html>.

ratifications to enter into force, underscoring that even this comparatively modest instrument remains a long way from operative effect, let alone the broader and more contentious TCE-specific instrument that India and other developing countries continue to press for.

9.3 Comparative Sui Generis Approaches

A number of jurisdictions have concluded, in effect, that copyright is the wrong vehicle for TCE protection altogether, and have instead legislated dedicated sui generis regimes recognising communal, often perpetual rights over designated traditional expressions, subject to registries administered by cultural or indigenous authorities rather than conventional copyright offices. The African Regional Intellectual Property Organization's Swakopmund Protocol and various national folklore statutes drafted along the lines of the 1982 Model Provisions exemplify this approach. The common structural feature of such regimes – vesting rights in a community or a designated custodian body, dispensing with fixed terms, and dispensing with any requirement that the expression be reduced to a single fixed version – is precisely what distinguishes them from, and allows them to succeed where, conventional copyright's Section-13-style architecture fails.

10. THE EXISTING INDIAN LEGAL PATCHWORK OUTSIDE SECTION 13

India has not left oral TCEs entirely unaddressed at the level of adjacent legal instruments, even though none of these instruments amounts to a genuine substitute for copyright protection of the tradition itself.

10.1 Section 31A: Compulsory Licensing of Unpublished and Orphan Works

Section 31A of the Act, introduced by the 1994 amendment and substantially recast by the Copyright (Amendment) Act, 2012, permits any person to apply to the statutory tribunal (now the Commercial Court, following the abolition of the Copyright Board in 2017) for a compulsory licence to publish or communicate an unpublished work, or a published work withheld from the Indian public, where the author is dead, unknown, or untraceable, or the copyright owner cannot be found.²⁵ This provision presupposes, however, that copyright already subsists in a fixed work whose owner has simply become untraceable – it is a mechanism for orphan works, not a mechanism for creating rights in

²⁵ The Copyright Act, 1957, s. 31A, as amended by the Copyright (Amendment) Act, 2012 (Act 27 of 2012); see also *Super Cassettes Industries Ltd. v. Hamar Television Network Pvt. Ltd.*, (2012) 50 PTC 1 (Del); summary at Lawgist, <https://lawgist.in/copyright-act/31A>.

material that was never protected in the first instance. It therefore offers no assistance for oral TCEs, in which no copyright arose to begin with because no fixed, individually-authored work ever existed.

10.2 Traditional Knowledge Digital Library, the Biological Diversity Act, and Geographical Indications

As noted in Part II, the Traditional Knowledge Digital Library addresses patent-related misappropriation of documented TK, principally in the field of traditional medicine, and has no bearing on the copyright status of oral cultural expressions. The Biological Diversity Act, 2002 and the Geographical Indications of Goods (Registration and Protection) Act, 1999 similarly protect adjacent but distinct subject matter – access to biological resources and associated knowledge, and place-based product reputations, respectively – neither of which was designed to, or can, protect an oral narrative tradition, a song form, or a ritual performance as such. The result is that India possesses a reasonably developed statutory apparatus for traditional narrowly conceived, principally to guard against biopiracy and patent misappropriation, but no comparable apparatus for traditional cultural

10.3 The Constitutional Backdrop

Article 51A(f) of the Constitution of India imposes a fundamental duty on every citizen to value and preserve the rich heritage of the country's composite culture, and this constitutional commitment is frequently invoked in the literature as underscoring the anomaly of leaving the primary vehicles of that composite culture – oral traditions – without any dedicated statutory protection.²⁶ A fundamental duty of this kind is not, of course, independently enforceable or self-executing, but it supplies an interpretive and policy anchor for legislative reform of the kind proposed in Part VIII.

11. CONCLUSION AND RECOMMENDATIONS

The analysis shows that there was no basis for the exclusion of oral Traditional Cultural Expressions (TCEs) from protection under copyright law except due to the structure of the Copyright Act, 1957. As is the nature of the collective, intergenerational, and evolving oral TCEs, it is fundamentally incompatible with Section 13 as well as the identifiable authorship, originality, and fixation requirements. As a result, "traditional expressions" are not afforded any copyright if a derivative adaptation or published version is developed, and the

²⁶ Constitution of India, art. 51A(f); see "The Future of Indian Folklore," Lex Localis, available at <https://lex-localis.org/index.php/LexLocalis/article/download/801419/1931/22909>.

communities that develop and preserve them are ignored by copyright law and get no economic value.

While India has been a trailblazer in promoting international protection of folklore, it is yet to have a regulatory framework on TCEs in its own country. Further, the WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge of 2024 does not provide any protection to TCEs, thus further underscoring the need for legislative development at home.

The preferred long-term solution is therefore the adoption of a law on TCEs which will establish a regime of community ownership, perpetual protection, equitable benefit sharing and protection against unauthorised commercial exploitation of TCEs (a "sui generis" law). While waiting for such legislation, there should be a targeted amendment to the Copyright Act to acknowledge community custodianship of documented TCEs, an appropriate framework for communally created cultural expressions, and the lack of the term of protection.

The protection of the "documentation paradox", which involves the need for free, prior and informed consent of the originating community before third parties record or document oral traditions, and the need for the community to own the rights in the documentation, should also be included in the reform. Lastly, the reform should be accompanied by an institutional mechanism to keep TCE registers, identify the community custodians, resolve conflicts and ensure easy enforcement. An integrated approach would help in the maintenance of the living cultural heritage of India and give the traditional communities legal recognition and appropriate participation in the commercialization of their cultural expressions.

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