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USING EXISTING INTELLECTUAL PROPERTY SYSTEMS  
FOR THE PROTECTION OF FOLKLORE

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## Introduction

Intellectual property may be generally described as a set of legally enforceable rights emanating from intellectual creativity. Intellectual property is traditionally divided into two sections – industrial property and copyright. Industrial property encompasses the rights relating to intellectual property objects such as inventions, distinctive signs, industrial designs and rules against unfair competition. Whereas copyright protects the rights of the authors of original literary and artistic works, the rights of the performers, the producers of sound recording and broadcasting organizations are called neighboring rights or related rights.

Inventions are protected under the patents system. A patent is granted to an invention which is new, involves an inventive step and is industrially applicable. An invention – a solution to a specific problem in technology – may relate either to a product or process. An invention is new if it is not anticipated by prior art. Prior art includes everything disclosed to the public by any means anywhere in the world. An industrial design is a design which gives a new appearance to a useful article in industry or handicraft. Only a new industrial design is protected under the law. A new industrial design means an industrial design which has not been made available to the public anywhere through any means. A trademark means a visible sign serving to distinguish the goods of one enterprise from those of other enterprises whereas a service mark means any visible sign serving to distinguish the services of one enterprise from those of other enterprises. A commercial name is a name or designation identifying the enterprise of a person. Any act contrary to honest practices in industry or business is made unlawful under the law of the protection against unfair competition. A geographical indication is an indication which identifies a good as originating in a country or a region or locality in that country, where a given quality, reputation or other characteristics of the good is essentially attributable to its geographical origin. Such geographical indications are protected under the law of geographical indications. Information is protected under the law of undisclosed information so long as such information is secret, has commercial value because it is secret, and is kept secret. The rights of the authors of original literary and artistic works are protected under copyright law. The law of related rights protects the rights of the performing artists to their performances, the producers of sound recording to their sound recordings, and of broadcasting organizations to their broadcasts.

The Oxford Advanced Learners Dictionary describes folklore as "the traditions, stories, customs etc. of a community". In substance, folklore is the "wisdom of the people". According to the UNESCO/WIPO Model Provisions (1982), expressions of folklore are understood as productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community. Thus folklore has received different descriptions or definitions covering a broad range of subjects, activities and practices such as "literary, artistic, religious, scientific, technical and other traditions and productions which are transmitted from one generation to another". Folklore does not have a known or specific creator or owner but belongs collectively to a particular nation or community.

The issue whether folklore can be duly protected within the existing intellectual property system attracts a lot of debate and demands careful consideration. This discussion paper attempts to highlight certain relevant areas in order to facilitate a session of constructive deliberation.

### **Some Fundamental Issues**

In analysing the existing intellectual property system in the context of the protection of folklore, a few fundamental issues concerning the subject necessarily arise. The existing intellectual property system is based on individual or private ownership and centres around commercial purposes. On the contrary, folklore is something in community or common ownership and in many cases commercial purposes are traditionally unknown to folklore. It is therefore uncertain whether the existing intellectual property system has any application to the protection of folklore. The issue as to whether the particular nation or community is the owner of folklore within the meaning of the present legal definition of ownership is important and may result in other related legal issues. It is arguable that they are not actually the owners of folklore but merely the holders or possessors of folklore. In the case of community or common ownership the question as to who actually constitutes that community or nation demands careful examination. The nature and the scope of the legally enforceable rights that the owners of folklore are entitled to, and the enforcement of such rights, would be some other crucial issues. The persons who have the status to go to Court, the nature of desirable remedies, and in the case of payment of compensation, those who are actually entitled to such compensation, need careful attention. Certain items embraced within the meaning of folklore may spread through many national boundaries as well as through a whole region. In such a case, the ownership and the enforcement of rights relating to folklore would be further complicated. The term of protection for most intellectual property rights currently lasts only for a limited period of time. The rights relating to folklore cannot be so restricted to a limited term of protection. Folklore has been in the public domain for centuries. The formation and enforcement of legal norms and practices in respect of creations in the public domain are bound to be a hard exercise. The question is whether the innovations involving or based on folklore can be measured with the standards of the western concept of innovation. The protection and management of folklore may be subject to different legal and customary norms in different communities who own the folklore. Such diverse approaches would make the task of producing a reasonable harmonized legal mechanism more difficult. The actual effectiveness of national laws as an instrument for the protection of folklore in the absence of recognized and respected international norms should be properly tested.

### **Application of the objects of existing intellectual property system**

On the one hand, the application of various objects of intellectual property to the protection of folklore faces certain difficulties common to many of these objects or peculiar to a particular object. On the other hand, certain objects have some potential as an active mechanism for the protection of folklore. The following observations can be made in this regard.

#### **COPYRIGHT**

Copyright law cannot be the correct mechanism for the protection of folklore. It concerns the economic and moral rights of the individual authors or the owners of original literary and artistic works which are protectable for a specified period of time whereas folklore is the result of a continuous and impersonal process of creativity in a community. Folklore belongs to a community in common.

Article 15(4) of the Berne Convention indicates the possibility of granting protection for expressions of folklore. However, the efficacy of this article is to be tested and the outcome is doubtful. Moreover, the Berne Convention concerns the protection of works within the copyright system. The regime of folklore extends beyond the ambit of copyright law.

Copyright protection may have indirect application to the protection of folklore to a certain extent as far as collections and compilations of expressions of folklore are concerned. The rights relating to these productions may belong to the person who has created such productions using his intellectual skills. However, such protection is also not free from complications. For example, the folklore belongs to a community in common and compilation or collection of folklore may belong to the individual who creates it. Achieving a compromise between these two ends may be an interesting task. Similarly, the authorization of the acts of such collection and compilation, a abuse of such productions, and benefit sharing will be some other crucial issues.

### Related Rights

It is possible to argue that expressions of folklore may be protected under the law of related rights and therefore the protection of the rights of performing artists, phonogram producers and broadcasting organizations may be achieved through the mechanism of related rights. The protection accorded under this area of law is indirect in the sense that protection is not extended to folklore proper. Related rights do not protect expressions of folklore against unauthorized performances, fixations, reproductions, broadcasting or other communication to the public. Thus national laws as well as the Rome Convention, the Phonograms Convention and the Satellite Convention cannot offer a viable protection within their parameters. Protection under related rights involves some other complications as well. For example, folklore is not limited to the areas that may be protected under the concept of related rights.

### Industrial Designs

The law of industrial design does not protect traditional designs in the traditional arts and crafts because they are not new as required under the law. Community ownership and the protection for a limited period of time are some other issues which are hard to overcome. However, the design of traditional artisans and handicraft producers who build upon folklore traditions but introduce their own original elements into these traditions may be protected under industrial design law.

### Geographical Indications

The law relating to geographical indications protects indications which identify a good as originating in a particular territory or a region or locality in that territory, where the given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin. The productions involving folklore which fall within the ambit of geographical indications may be protected under the law of geographical indications. However, this law may not cover the whole range of subjects coming under the purview of folklore.

Undisclosed Information

The law of undisclosed information protects information which is secret, has commercial value because it is secret and is kept secret. There may be certain instances where undisclosed information can accord protection to certain areas of traditional knowledge of the communities. However, this protection may be very limited in scope because much of the information in the folklore regime is not secret. Moreover the legal framework of undisclosed information is purely based on private ownership and commercial interest. Certain holders of traditional knowledge, for example, do not use their knowledge for commercial purposes at all.

Unfair Competition

Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition. Unfair competition law may counter unfair trade and industrial activities involving folklore so long as such activities fall within the ambit of unfair competition. As this law concerns the unfair acts in industry or commerce only, it does not protect folklore properly.

Distinctive Signs and Names

Even though individual marks may not be in a position to offer any protection to folklore, certification marks and collective marks may be useful as a protective device. The genuine holders of folklore may certify that the goods concerned satisfy the prescribed standards relating to origin, material, mode of manufacture, quality, accuracy or other characteristics. By way of collective marks, an association of traders show that a member belongs to the association. These marks may offer some kind of indirect protection in trade activities involving folklore but such protection is not capable of offering a satisfactory solution. The law of trade names does not also accord any kind of protection to folklore.

## PATENTS

The law of patents cannot provide a full solution for the protection of the scientific heritage of communities because such knowledge is not patentable as it is already known and part of prior art. On the contrary, the inventions based on or related to or derived from traditional scientific heritage may be protected under the patent law upon the fulfillment of the conditions of patentability.

## UNESCO/WIPOMODEL PROVISIONS

Under the UNESCO/WIPO Model Provisions expressions of folklore are understood as productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community. These provisions may offer some sort of protection within the national boundaries but their competence as a viable means of protection is doubtful. The Model Provisions concern only traditional artistic heritage and not other areas such as scientific heritage. The Competent Authority, its constitution, its authority and power and the execution of the given powers may run into difficulties. The exceptions to authorization are also complicated. For example, the concept of borrowing of expressions of folklore is something which is not very clear. The establishment and proof of infringement of folklore

rights is difficult due to various practical difficulties. The difficulties include that often the expressions of folklore are not properly documented and the documentation, if any, is not properly authenticated. The folklore may be illicitly used by outside forces merely by naming the act of illicit use "an innovation" or a created original work. Moreover, thenationallaws will be ineffective if the international community do not respect the rights of the holders of traditional knowledge, including folklore.

### **Negative Protection**

Certain objects of intellectual property protected under existing law may help the holders of folklore to stop or discourage others from encroaching upon their rights and interests. For example, any attempt to patent traditional knowledge may be opposed under the patent law on the ground that the invention is not new. The law of industrial design may be used to defeat the attempt to register traditional designs as new industrial designs. The law relating to geographical indications may counter the attempt to misuse such geographical indications. However, it should be noted that the opposition proceedings in intellectual property offices and Courts are expensive and time consuming. The poor holders of traditional knowledge do not have competence and resources to take legal action against infringers of their rights and interests mainly in foreign lands where the acts of infringement are common.

### **Practical Issues in the Acquisition and Enforcement of Intellectual Property Rights with and without Formalities**

The acquisition and enforcement of intellectual property rights in folklore is rather complicated and demands careful attention both nationally and internationally. Folklore is, as far as the existing intellectual property regime is concerned, in the public domain. It belongs to a community. It is developed and maintained by a community without any formal requirement. However, introduction of some kind of formality, nationally and probably internationally, would facilitate the identification of the actual holders of folklore and the enforcement process. Issues such as the nature of the rights of the persons or groups who own or possess folklore and the persons or groups who can acquire such rights would be some examples of practical as well as theoretical difficulties. Required formalities are a hard issue. Collection and documentation is not an easy exercise. Certain rituals and arts are associated with religions and are not expected to be performed or used in all contexts. They cannot be acquired, developed and enforced by everybody. The developments based on or related to folklore would create another series of theoretical and practical difficulties. One such major issue is whether the western concept of innovation can have application to the innovations involving folklore.

### **Practical Issues in the Exercise and Collective Management of Intellectual Property Rights in Folklore**

As indicated above, the exercise of intellectual property rights in folklore is surrounded by many practical issues and difficulties. The determination of actual owners or holders of folklore, the nature of the enforceable rights, proof of ownership, lack of awareness and proper education, financial constraints and poverty, difficulties in enforcing such rights in foreign lands, misuse of poverty and ignorance of the holders of folklore by outsiders,

inadequate state participation, absence of proper mechanisms for preservation, absence of an organized commercial environment in many developing countries and new challenges posed by information technology are among those difficulties and issues. The collective management system of copyright in its present form may not be directly applicable to the exercise and management of folklore rights. The current system of collective management is based on individual ownership whereas the folklore rights are based on common or collective ownership or trusteeship. Without first resolving the basic issues involving the protection of folklore, the attempt to introduce a collective management system would fail to achieve the desired objectives. Folklore rights are actually exercised and managed collectively by the holders of such rights. The collective exercise and management of such rights by different owners or holders of folklore in a country or in a region would be a desirable process. The emphasis should be placed on collective exercise and management of such rights regionally and internationally. The individual communities or groups of people who hold the folklore mainly in developing countries do not have financial or any other resources to challenge the violation of their rights mainly in foreign countries. The establishment of a collective management system would be a practical answer to this issue. Many of the issues referred to above in respect of the exercise of folklore rights are equally relevant to collective management as well.

### **Preservation and Conservation**

Traditional knowledge, including folklore, is fast disappearing due to many reasons. Such knowledge may belong to a particular country or nation or community but

is of great importance to the entire human society. Traditional knowledge may belong to a particular community or to a particular region that its holders can offer to mankind. It should therefore be preserved and conserved for the benefit of not only its holders but also the human family as a whole. Legal protection would be meaningless if at least the existing knowledge is not preserved and conserved.

### **Collection and Documentation**

The collection and documentation of folklore could be considered a prerequisite to a successful program of protection and conservation. The collection and documentation of folklore would facilitate *inter alia* identification of the actual owners and folklore proper, proof of ownership or trusteeship, enforcement process and promotion and development of existing folklore. For example, the collection and documentation of traditional designs would enable the owners and the Courts to identify the existing designs and other designs independently created or derived from or based on folklore. The documentation may be done by way of photographs, drawing and electronic media including the compilation of databases. In the case of geographical indications, it is necessary to identify, for example, the characteristics which are essentially attributable to the geographical origin of the concerned good in the area concerned. The collection and documentation of scientific heritage would provide a database consisting of prior art involving traditional knowledge. It should be observed that collection and documentation entail a number of practical issues and difficulties involving areas such as the appropriate persons or authorities who can document it and who can authorize documentation, the need of a competent authority for authorization of collection, compilation and documentation, the nature, constitution and powers etc. of such competent authority, the collection of fees or royalties and the use of collected royalties.

The process of collection and documentation is hampered in many countries due to a lack of financial and human resources, proper education, awareness, programs for conservation and preservation and facilities in modern technology. In certain instances the holders of traditional knowledge are reluctant to divulge their knowledge to outsiders for many reasons such as fear of misuse of their knowledge and lack of mechanisms to share benefits.

### **Concluding Remarks**

The protection of both the economic and moral rights of the holders of folklore should receive due attention in law as well as in practice. The existing intellectual property regime may not have the capacity and ability to offer a viable and practical solution to all the issues involving the protection of folklore. All the same, some of the norms in the current intellectual property regime appear to have application to the protection of various aspects of folklore. It would be advisable to make attempts to use the current intellectual property system and to put it to test in the process of finding suitable protective mechanisms. The present system can be examined in order to find out *inter alia* how effective and efficient it is. Such an attempt would demonstrate where the shortcomings of the existing system are and how they can be remedied and improved. The current system already embraces sound legal norms, effective enforcement and administrative mechanisms as well as appropriate international arrangements. However, the introduction of a new regime would involve the development of new norms (both substantial and procedural) and enforcement and administrative mechanisms. The human and financial resources would be another complicated issue. On the other hand, where the existing norms are not satisfactory, the introduction and implementation of new principles, including mechanisms for effective enforcement and management, seems necessary. The public domain legislation of a country can be seen as a progressive effort, but such legislation does not have application beyond the boundaries of the country. The protection should be accorded nationally and internationally. The international cooperation and collaboration in monitoring infringement of folklore rights, benefit monitoring and sharing, dissemination and development of folklore should be promoted. A global information network such as WIPONet could be of much use. The exploitation of traditional knowledge including folklore only with the consent of its holders, benefit sharing arrangements and active participation of the holders of traditional knowledge in its management, as well as development and promotional activities are certain areas which need constructive attention. The access to and use of traditional knowledge should be rationalized where the unauthorized access and uses should be prohibited, where necessary. At the same time, active measures should be taken to conserve and promote existing traditional knowledge, including folklore.

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