

# PROTECTION OF TRADITIONAL (TRIBAL) CULTURAL EXPRESSIONS IN INDIA VIS-À-VIS INDIAN COPYRIGHT REGIME

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## Abstract

This article explores the existing copyright law in India and goes on to study India's international obligations in protecting indigenous people's rights and traditional cultural expressions. It discusses India's unique stand for non-adaptation of the term "indigenous peoples" at global platform and focuses on upholding the protections guaranteed under Constitution of India for its scheduled tribes. The article focuses on several important elements of copyright law in attempt to protect traditional cultural expressions and questions relating to subject matter of copyright law, concepts like authorship and ownership, test of originality, requirement of fixation for copyright protection, limited period of copyright protection and the possible overlap between copyright law and over intellectual property (IP) laws are also highlighted. The article subsequently discusses case studies to highlight the possible concerns for policy makers in India while trying to adapt the Copyright Act for protection of traditional cultural expressions.

**Keywords:** Traditional Cultural Expressions, Copyright, India, Tribal People, Cultural Heritage.

- I. Introduction**
- II. Indian Position in International Deliberations Regarding Protection of TK and TCEs**
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## I. Introduction

*Colonialism is alive and well strengthened by the illusion that colonization is no longer practiced. Even where the colonizers have withdrawn, political colonization persists.*<sup>1</sup>

The Colonies of the British Empire had undergone massive political and governmental challenges to achieve decolonization and exercise self-determination. In this process of state building after colonial rule for decades, countries like India had adopted strategies in governance and policy making where the status of such people are categorized as tribal based

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<sup>1</sup> Paul Nicolas Cormier, "British Colonialism and Indigenous Peoples: The Law of Resistance – Response – Change" 49:2 *Peace Research* 39-60, (2017).

on their ethnicity and linguistic practice, though more than 75% of the population from South Asian countries are indigenous peoples. Thus, such indigenous peoples had missed the train of local autonomy and self-determination even after the colonizers had left their lands. It can be rightly said:

*State building almost everywhere in the third world has meant policies aimed at assimilating national and minority peoples, restraining their historical autonomy, and extracting their resources, revenues, and labor for the use of the state.*<sup>2</sup>

Many tribes of India till date live a life of extreme poverty and in relative isolation from modern India. Traditionally their style of living was subsistence based and in the harsh conditions of their natural environment they have adapted to a style of living which is premised on symbiotic relation between the local communities there and the fauna and flora of such regions. While many members of these tribal communities have moved into rural and urban India societies in search of employment, better means of life and modernity, they have increasingly lost their strong links with community, nature and evolving traditional knowledge and practices. This mobility from natural habitats to modern societies has led to a two prolong consequences:

- a) Outsiders have discovered such knowledge, heritage and practices and have recorded them, published them, pirated them and/or commercialized them without attributions and,
- b) The demand for such traditional knowledge (in broadest terms) has stupendously increased in the global marketplace for their original nature of being tribal/native/indigenous and somehow qualifying to be exotic to an otherwise increasingly mechanized, homogenized products/services orientated world.<sup>3</sup>

Indeed, it is paradoxical that traditional craftsmen, who choose to continue in their practices and earn a living, have also faced challenges of their specialized expertise being told off as not economically viable for trade and thus making meager earnings and living in poverty.

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<sup>2</sup>MuzafferErcan Yilmaz, "Intra-State Conflicts in The Post-Cold War Era", 24:4 *International Journal on World Peace* 11-33 (Dec. 2007).

<sup>3</sup> Anil K. Gupta, "From Sink to Source: The Honey Bee Network Documents Indigenous Knowledge and Innovations in India", 1(3) *Innovations: Technology, Governance, Globalization* 49 (2006).

This might be because of middlemen exploitation or commercial costs and the timing process of making a traditional artefact. In comparison, cheap knockoffs of the same artefacts from domestic markets of China or other South Asian countries are sold for billions of businesses in the international market.<sup>4</sup> Thus, the questions of exploitation of tribal people are not limited to recognition and preservation of their cultural heritage only but also possibility of commercialization without consent which rip no benefit for such communities.

The Constitution of India under Article 51 (Promotion of international peace and security) recognizes India's obligation to "*foster respect for international law and treaty obligations in the dealings of organized peoples with one another*". Therefore, India's participation at global platform in issues relating to indigenous peoples and ratifying the same through domestic legislations at national level is a constitutional requirement as per Article 51 (c). Part II of this article deals with India's stand in international forums in regards to traditional knowledge, cultural expressions and the term "indigenous people". Part III shows how "scheduled tribes" as recognized in India is a limited recognition of all tribal people of India and traditional cultural expressions from India is a far-reaching concept.

Part IV of this article is an elaboration of the relationship between the Constitution of India and intellectual property laws in India. While discussing traditional cultural heritage, it is important to explore if such cultural heritage and cultural expressions in India can be limited only to tribal communities of India or it expands beyond and includes in broad sense the traditional expressions from mainstream population. This article in Part V discusses through case-studies the challenges in attempting to protect India traditional cultural expressions in a broad sense through the present Copyright Act in India.

## **II. Indian Position in International Deliberations Regarding Protection of TK and TCEs**

India's role in WIPO and its international instruments:

India is a member of WIPO from 1975, However, India has ratified major WIPO-administered Copyright related treaties like Berne Convention from 1928, Rome Convention from 1961, Phonograms Convention from 1971 prior to signing the WIPO Convention in

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<sup>4</sup> J. Michael Finger and Philip Schuler (eds.), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (The World Bank and Oxford University Press 2004).

1975 along with various other WIPO instruments relating to IP.<sup>5</sup> Recently, India also became a member of the “*WIPO Copyright Treaty*” and “*WIPO Performances and Phonograms Treaty*” in 2018.<sup>6</sup> India has fulfilled its obligations relating to Copyright Laws by legislating the Copyright Act, 1957 and subsequent amendments in 1983, 1984, 1992, 1994, 1999 and 2012 bringing its domestic laws in conformity with its international obligations at WIPO.<sup>7</sup>

WIPO and India have a longstanding international harmonious relation and in 2002, WIPO commissioned a study titled “*National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines*” which was reported by Valsala G. Kutty.<sup>8</sup> In her report, Ms. Kutty highlights an important unique characteristic of Indian Folklore or Traditional Cultural Expression. She says: “*The tribal communities in India are the primary source of folk culture and folk tradition.*”<sup>9</sup> There is a prevalent notion that cultural traditions of India are solely because of tribes in India. Calling it a misconception which can be easily shattered and recognizing the fact that non-tribal communities being so diverse in India have both qualitative and quantitative contributions towards the cultural heritage of India.<sup>10</sup> In her words:

*Folklore traditions in India bear testimony to the co-existence of tribal, non-tribal and even urban culture, many times influencing each other and developing into a common culture.*<sup>11</sup>

Her report as archived in WIPO’s official website, highlights the dearth of legislative framework for protection of folklore and also brings up a discussion through questionnaire whereby the cultural mindset of oriental belt like India is augmented as knowledge is believed to be for communal use and not for trade or monetary gains.<sup>12</sup>

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<sup>5</sup> WIPO-Administered Treaties, available at: <https://wipolex.wipo.int/en/treaties/ShowResults?code=IN> (last visited on June 20, 2024).

<sup>6</sup> *Ibid.*

<sup>7</sup> Official Website of Copyright Office, Government Of India, available at: <https://copyright.gov.in/> (last visited on June 23, 2024).

<sup>8</sup> P.V. Valsala G. Kutty, “National Experiences with The Protection Of expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and The Philippines”, 20 *WIPO* 33, available at: [https://www.wipo.int/edocs/pubdocs/en/tk/912/wipo\\_pub\\_912.pdf](https://www.wipo.int/edocs/pubdocs/en/tk/912/wipo_pub_912.pdf) (last visited on June 29, 2024).

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

Predominantly due to commonality of culture and socio-economic challenges, WIPO and SAARC (herein referred as South Asian Association for Regional Cooperation) countries met for “SAARC-WIPO Sub-Regional Forum for Intellectual Property Cooperation 1998”<sup>13</sup>. In particular to TK and TCEs, WIPO organized the “WIPO-SAARC Expert Workshop on Intellectual Property, Traditional Knowledge and Genetic Resources” in 2003 which happened at Delhi (India) in cooperation with the Ministry of Human Resource Development, Government of India.<sup>14</sup> Based on the prior SAARC Forum for Intellectual Property Cooperation (Thimphu, October 2002) session, the *Expert Workshop* in Delhi focused a regional action plan that will help in developing “a consensus on legal and policy mechanisms” among SAARC countries.

This WIPO-SAARC Expert Workshop discussed the possibility of better use of the existing intellectual property laws and adapting and refocusing the same as a legal and policy option for protection of TK and recognition and enforcement of IP relating to TK of holders. Where required, there may be the creation of new national or regional sui generis TK instruments. Such policies may have overlapping arenas of legal, practical needs and capacity building needs.<sup>15</sup>

While TK in a broader sense is always holistically viewed, IP protection can be determined for TK based on, firstly Protection of Content (like know-how), Protection of form (like expressions, representations), Protection of Reputation and distinct patterns or styles. Thus, the Sui Generis Protection for TK/ TCEs envisaged by WIPO-SAARC experts rested on the legal foundations or popular rights which can help in IP like protection of such content, form and reputation.

India has adopted policies like the “Biodiversity Act, 2002” and the “Biological Diversity Rules, 2004” which embody similar principles as illustrated in the recommendations of the SAARC-WIPO Expert Workshop and the Biodiversity Act along with the mechanism

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<sup>13</sup> WIPO-SAARC, “Sub-Regional Forum for Intellectual Property Cooperation Among the Countries of the South Asian Association for Regional Cooperation (SAARC)”, *WIPO/IP/CMB/98*, available at: [https://www.wipo.int/meetings/en/details.jsp?meeting\\_id=3635](https://www.wipo.int/meetings/en/details.jsp?meeting_id=3635) (last visited on June 29, 2024). .

<sup>14</sup> WIPO-SAARC, “Summary of Discussions and Consultations, WIPO/South Asian Association for Regional Cooperation (SAARC) Expert Workshop on Intellectual Property, Traditional Knowledge and Genetic Resources”(WIPO, WIPO-SAARC/GRTK/DEL/03/XX), Observers’ Comments and Experiences, available at: <https://www.wipo.int/tk/en/igc/ngo/> (last visited on June 29, 2024).

<sup>15</sup> *Id.* at 4.

elaborated within its provisions and Rules are often used in asserting rights of communities over traditional knowledge embodied in natural resources of India. However, it is to be examined whether such/similar laws exist in India for protection of traditional cultural heritage.

### III. Scheduled Tribes (STs) Under Constitution of India

To recognize Adivasis of India, the easiest way is to refer to the List of Scheduled Tribes as recognized by the Government of India and updated from time to time. Under Article 342 of the Indian Constitution, the President of India has power to specify by public notification which tribes or tribal communities or parts or groups thereof such tribes and communities shall be recognized officially as Scheduled Tribes of India. The President also has power to include or exclude by way of law any tribes or tribal community from such List.<sup>16</sup> It is in exercise of this power under Article 342 (1) of the Constitution of India that the “Constitution (Schedule Tribes) Order, 1950”<sup>17</sup> and the “Constitution (Scheduled Tribes) [(Union Territories)] Order, 1951” were first issued which specified a list of scheduled tribes as recognized in relation to States / Union Territory, their District / any territorial division within the States. Such similar orders have been issued from time to time to amend the list of Scheduled Tribes by Presidential Order like in 1959 (Andaman and Nicobar Islands), 1962 (Dadra and Nagar Haveli), 1967 (Uttar Pradesh), 1970 (Nagaland)<sup>18</sup> and many more, the recent being passed in April 5<sup>th</sup>, 2022 to include certain communities in the list of Scheduled Tribes in Jharkhand.<sup>19</sup> Thus the List of Schedule Tribes is specific to each State and such recognition as ST of the same community is not valid beyond the jurisdiction of that State or Union Territory.

According to Census 2011, there are presently 705 ethnic groups notified as STs in India which constitute 8.6 percent of the country’s population and Madhya Pradesh has the highest recorded number of such population while Meghalaya records lowest of ST population.<sup>20</sup> It is

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<sup>16</sup> Constitution of India, art. 342, cl. 2.

<sup>17</sup> Constitution (Schedule Tribes) Order, 1950, *Ministry of Law Notification*. NO. S.R.O. 510 (Sep. 6, 1950) Gazette of India, Extraordinary, 1950, Part II, Section 3, at 597.

<sup>18</sup> Official website of Legislative Department, Govt. of India, *available at*: <https://legislative.gov.in/part-3> (last visited on June 3, 2024).

<sup>19</sup> The Constitution (Scheduled Castes and Scheduled Tribes) Orders (Amendment) Bill, 2022, Ministry of Tribal Affairs, *available at*: <https://prsindia.org/billtrack/the-constitution-scheduled-castes-and-scheduled-tribes-orders-amendment-bill-2022> (last visited on June 3, 2024).

<sup>20</sup> Scheduled Tribe Population - Census 2011, *available at*: <https://www.census2011.co.in/scheduled-tribes.php> (last visited on June 3, 2024).

important here to state that in India there is a subset of Tribes or tribal communities called “Primitive Tribal Groups” renamed as “Particularly vulnerable tribal group”. The first “National Commission on Scheduled Areas and Scheduled Tribes” under the chairmanship of Shri U. N. Dhebar (1960-1961) a separate category under Scheduled Tribe known as “Primitive Tribal Groups” (PTGs).<sup>21</sup>

According to the Dhebar Commission report’s findings the PTGs were:

*“in an extremely underdeveloped stage and at the topmost level amongst the tribals .... a layer that can very well afford to forgo any further help. We feel that this lowest layer needs the utmost consideration at the hands of the Government”*<sup>22</sup>.

These PTGs were also recommended as “heritage groups” in the “Scheduled Areas and Scheduled Tribes Commission, 2002” under chairmanship of Shri. Dileep Singh Bhuria.<sup>23</sup> The Government of India originally identified 52 in 1975 such groups and added 23 more groups to such categories in 1993.<sup>24</sup> In 2006, PTGs were renamed as “*Particularly Vulnerable Tribal Groups*” (PVTG) by the Government of India.<sup>25</sup>

According to the Constitution of India, there are 705 Scheduled Tribes. But many native communities have contended they are not given the status of scheduled tribe under constitution and in some cases, communities are denied such status in a particular State though they are categorized as Scheduled Tribes in others. These contenders challenge the definition of tribe as developed by the “*Advisory Committee Report on the Revision of the Lists of Scheduled Castes and Scheduled Tribes*” i.e., “*indications of primitive traits, distinctive culture, geographic isolation, shyness of contact with community at large and backwardness*” and the exclusion of to be flawed and problematic as many natives are left out from official recognition as Adivasis or scheduled tribes.

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<sup>21</sup>Laboni Das, “Trends of Change among the Particularly Vulnerable Tribal Group: An Account of the Hill Korwas of Chhattisgarh”, X:1 *Journal of Adivasi and Indigenous Studies* (JAIS) 87–96, 85 (2020).

<sup>22</sup>Scheme of Development of Particularly Vulnerable Tribal Groups (PVTGs), Ministry Of Tribal Affairs, available at: <https://tribal.nic.in/DivisionsFiles/GuidelinesofPVTGs17092019.pdf> (last visited on June 3, 2024).

<sup>23</sup>*Id.*

<sup>24</sup>Das, *Supra* note 21.

<sup>25</sup>Das, *Supra* note 21.

This shows that scheduled tribes cannot be an encompassing term to include all Adivasis of India. Rather scheduled tribes refer to only those Adivasi people who have been given a certain formal degree of acknowledgement by the national legislations in India and Constitution of India. There can be the existence of TCEs and TK in a strict sense beyond the communities of listed scheduled tribes in India.

#### **IV. Interface between Constitutional Law and IP Laws in India**

The framers of the Constitution of India resolved to make India sovereign, socialist, secular, democratic and republic and ensuring to all its citizen “*social, economic and political justice, liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all fraternity assuring the dignity of the individual*”<sup>26</sup>. The Constitution protects individual interests in the form of fundamental rights enforceable against the State.

From a human rights angle, the Civil and Political Rights (like “*Right to Equality*”, “*Right against Exploitation*”, “*Right to Freedom of Religion, Educational and Cultural rights*” and “*Right to Constitutional remedies*”) are clubbed in the Part III of the Constitution which is the chapter on fundamental rights. While the Social and Economic Rights are interspersed in Chapter III and Chapter IV which deals with “*Directive Principles of State policy*” and are not enforceable in Court of Law.<sup>27</sup>

The citizens of India are entitled to Cultural Rights which can range from a wide array of activities like practicing culture, preserving culture, participating in cultural activities, and expressing one's own culture. This right can be sourced under *Article 19(1) (a) of the Constitution* which bestows on every citizen “*right to freedom of speech and expression*”. The same Article 19 (1) (a) is the foundation for justification of moral rights for authors and performers in a conjoint reading with Article 14 and Article 21.<sup>28</sup> The connection between Creator's (whether author or performer) right to speech and expression and cultural heritage is reflected through the creator's work which is a mirror to the culture of the community or region he is from. Thus, protection of moral rights not only attributes the work to the author, but it forms part of the larger cultural heritage of the country. This is best elaborated by Justice P Nandrajog in the famous *Amar Nath Sehgal Case*:

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<sup>26</sup> Constitution of India, Preamble.

<sup>27</sup> Constitution of India, Chapter III and Chapter IV.

<sup>28</sup> Uday Shankar and Saurabh Bindal, *Constitutionalizing Intellectual Property* 147 (Satyam Law International, 2013).



*Authorship is a matter of fact. It is history. Knowledge about authorship not only identifies the creator, it also identifies his contribution to national culture. It also makes it possible to understand the course of cultural development in a country. Linked to each other, one flowing out from the other, the right of integrity ultimately contributes to the overall integrity of the cultural domain of a nation. Language of Section 57 does not exclude the right of integrity in relation to cultural heritage. The cultural heritage would include the artist whose creativity and ingenuity is amongst the valuable cultural resources of a nation. Through the telescope of section 57 it is possible to legally protect the cultural heritage of India through the moral rights of the artist.*<sup>29</sup>

Thus, this fundamental rights in India not only justifies the national provisions under copyright law in India but also fulfill India's international obligations under:

- human rights-based instruments like participation in cultural life and protection of moral and material interest under Article 27 (2) of Universal Declaration on Human Rights and Article 15 of International Covenant on Socio-Economic-Cultural Rights.
- IP law-based instruments like moral rights under Article 6bis of “*Berne Convention 1886*”, Article 5 of WPPT, etc.

The Intellectual Property Laws in India are legislated under entry 49 and entry 97 in list 1 schedule 7 of the Constitution by Parliament as per power under Article 246. Particularly copyright law, patent law, design and trademark laws are drafted under Entry 49 of List 1, Schedule 7. Thus, the intellectual property regime demands close scrutiny in light of ever-expanding jurisprudence of constitutional law in India.<sup>30</sup>

It is pertinent to note here, there has been attempts made in 2016 to introduce a Bill on protection of TK which failed to materialize into law<sup>31</sup>. Recently, “*The Protection of Traditional Knowledge Bill, 2022 (Traditional Knowledge Bill)*” has been introduced in Lok

<sup>29</sup> *Amar Nath Sehgal v. Union of India*, (30) PTC 253 Del (2005).

<sup>30</sup> Shankar & Bindal, *Supra* note 28.

<sup>31</sup> Dr. Shashi Tharoor, M.P, The Protection of Traditional Knowledge Bill, 2016, available at: <http://164.100.47.4/BillsTexts/LSBillTexts/Aintroduced/3013.pdf> (last visited on June 23, 2024).

Sabha. It focuses on non-proprietary and non-IP protection for TK originating in India where the Union holds absolute right over such TK and TK holders can be recognized as “*knowledge society*” and have deemed license to use. TCEs can come within the wider ambit of TK and therefore the aforementioned 2022 Bill can also set the tone for protection of TCEs in India<sup>32</sup>.

## **V. Copyright Laws in India and Protection Over Traditional Cultural Expressions**

In India, the Copyright Act 1957 has undergone several amendments until the recent one in 2012. The Act does not contain any provision specifically for protection of folklore or traditional cultural expressions and India has not implemented the provisions of “Tunis UNESCO/WIPO Model Copyright Law for Developing Countries 1976” or “WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions 1982” which are sui generis intellectual property styled model laws. Therefore, this section will evaluate how the existing copyright regime is capable of protecting traditional cultural expressions and folklore in India.

### **Subject matter that qualifies for copyright protection in India**

“The Copyright Act, 1950” is restrictive in subject matters on which copyright subsists. According to Section 13 and Section 2 (y) of the Act, Copyright subsists in primary works like original literary, dramatic, musical or artistic work and in secondary works like cinematograph films and sound recording.<sup>33</sup> Further, Section 16 of the Act mentions that “no copyright except as provided in this Act” but does not restrain a suit for breach of confidence or trust. This means whether over published or unpublished works, copyright exists only on fulfillment of provisions of the Copyright Act in India. This also ascertains the territoriality of copyright law.

### **Case Study: Ajanta caves as subject matter for copyright protection.**

For example, if we take cultural heritage of India in broad sense, the Ajanta Caves dating back to 2<sup>nd</sup> century BCE- 5<sup>th</sup> century CE have been declared as World Heritage by UNESCO for their various mural paintings and sculptures made by Buddhist monks depicting many

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<sup>32</sup> Vinson Kurian, Traditional Knowledge is beyond realm of patent, IPR regime, says Bill, *The Hindu*, Apr. 06, 2022, available at: <https://www.thehindubusinessline.com/news/science/traditional-knowledge-is-beyond-realm-of-patent-ipr-regime-says-bill/article65295653.ece> (last visited on June 23, 2024).

<sup>33</sup> The Copyright Act, 1957 (Act 14 of 1957), s. 13 and s. 2 (y).

Buddhists folklore<sup>34</sup>. Ajanta Caves are a perfect classic example of ancient architectural heritage of India. Taking up the question, whether the sculptures and mural paintings can qualify as TCEs of India is to be answered in positive as per WIPO Drafts on TK and TCEs discussed in earlier chapters though they might not be categorized as tribal heritage. Barring other questions for now like term of protection, authorship, ownership; sculptures, mural paintings and the carving of the caves like rock-cut temples Chaityagrihas and Vihara as work of architecture come within the scope of artistic work as per Section 2 (c) (i) of the Copyright Act, 1957.

Thus many (not all) traditional cultural expressions can fit within the brackets of subject matter for copyright protection. Processes, knowledge per se cannot however fit within such subject matters and can only be indirectly protected if objects embodying them fit the category of subject matters illustrated under Section 13 of the Act.

### **Test of originality**

The word “original” is not defined in Indian Copyright Legislation. So, the Courts in India are often faced with facts where they have to decide the work is original or otherwise based on formulated tests like author’s “*skill, labour and judgement*”<sup>35</sup>. Indian Courts has repeatedly clarified that original copyrightable work need not be novel or non-obvious as required under patent law but it cannot be a mere product of skills and labour (like trivial variations of other’s work) and must have a flavor of creativity specially for works created by use of works which had entered public domain.<sup>36</sup> Thus though the Indian legislature has not mandated the quantum of skill and labour to make a work original enough to be copyrightable, it is understood from judicial interpretation that the work must owe its origin to the author in essence.

To fit tribal works within this understanding of originality is a two-faced issue. Any new work of people belonging to tribal communities is original and copyrightable. However, newer adaptations of old works belonging to tribal communities are also copyrightable as the criteria of originality is low and not as strict as novelty under patent laws. Thus, as long as newer adaptations or derivatives are made by members of the tribal community who are

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<sup>34</sup>Ajanta Caves, UNESCO, available at: <https://whc.unesco.org/en/list/242> (last visited on June 23, 2024).

<sup>35</sup>*Eastern Book Co. v. Navin J. Desai*, PTC 57 (Del) 94, 95 (2001).

<sup>36</sup>*Eastern Book Company v. D. B. Modak*, (36) PTC SC (2002).

communally entrusted with such work, the copyright can stay within members of the community.

Problems can arise when such derivatives are made without permission by outsiders or when a member of the community who is not traditionally authorized or entrusted with such a task, adapts a tribal work into a new work. The copyright legislation in India has no remedy against such outsider or member of tribal community as such works are also original except perhaps under the author's special right provisions

An example of how copyright can facilitate member of tribal community to successfully channelize his work in this modern economy can be elaborated through the role of Jangarh Singh Shyam, a Gond artist who is said to have “*brought folk art to the forefront of urban consciousness*”<sup>37</sup>.

Gonds are scheduled tribes from Central and South-Central India having a population of about two million<sup>38</sup> and they particularly belong to the Deccan peninsula of India thus commonly referred as “hill people”<sup>39</sup>. The storytellers and hereditary bards of the Gond community are known as Pradhans and they are traditionally in charge of spreading the tales of Gond legends and myths.<sup>40</sup> Jangarh Singh Shyam belonged to this Pradhan community of Gond tribals<sup>41</sup> and he over his career span of more than two decades translated Gond Art with his self-expression as well as inspiration from stories about Gond cult deities on various mediums like “simple pen and ink drawings, small terracotta figures, acrylic paintings on canvas, silkscreen prints and large-scale murals”.<sup>42</sup>

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<sup>37</sup> Vandana Kalra, “Imagine a forest: The art of Gond artist Jangarh Singh Shyam and its enduring legacy twenty years after his death”, *Indian Express* April 24, 2022, available at: <https://indianexpress.com/article/express-sunday-eye/imagine-a-forest-art-gond-artist-jangarh-singh-shyam-enduring-legacy-7883266/> (last visited 12 Jan. 2024).

<sup>38</sup> Gond People, Britannica, available at: <https://www.britannica.com/topic/Gond> (last visited 12 Jan. 2024).

<sup>39</sup> Gonds, Encyclopedia, available at: <https://www.encyclopedia.com/social-sciences-and-law/anthropology-and-archaeology/people/gond> (last visited 12 Jan. 2024).

<sup>40</sup> *Id.*

<sup>41</sup> Famous Gond Painting and The Story of Jangarh Singh Shyam, MP Tourism (Mar. 25, 2022), available at: <https://www.mptourism.com/gond-painting-and-the-story-of-jangarh-singh-shyam.html> (last visited 12 Jan. 2024).

<sup>42</sup> Jaya Bhattacharji Rose, “Celebrating the oeuvre of Jangarh, Gond path-breaker”, *Deccan Chronicle* (Feb. 10, 2019), available at: <https://www.deccanchronicle.com/lifestyle/books-and-art/100219/celebrating-the-oeuvre-of-jangarh-gond-path-breaker.html> (last visited 12 Jan. 2024).

His Gond paintings were popular not only within India domestically but also won international acclaim like his painting titled “Landscape with Spider” which got sold at auction by Sotheby’s for \$31,250. Like any other author in India, Jangarh Singh Shyam’s works are automatically protected under the Copyright Act in India and the rights ensured under the Act enabled not only effective commercial rewards for Jangarh but also protection against any other person claiming such artistic works as theirs. At a community level, gond paintings having gained its popularity through such acclaimed artists like Jangarh have become the source of livelihood for many in Jangarh’s village in Patangarh and many more Gond Pradhans have moved to Bhopal for working on his art.<sup>43</sup>

### **Derivative works from traditional cultural expressions.**

A derivative work is a representation of the original work through recasting, adapting, transforming by annotation, abridgement, translation, dramatization, fictionalization. The nature of derivatives may vary depending on the category of subject matter in the original work. For example: Conversion of a dramatic work into a non-dramatic work, conversion of a literary work into a dramatic work being performed in public, any transcription of a musical work, etc. will all lead to newer derivative works.<sup>44</sup> While original term is not added to sound recordings and cinematographic works as they themselves are derivatives<sup>45</sup>, it is important that authorization for making such a derivative is taken from copyright holders of prior works for copyright to exist in derivatives. Thus, derivatives may be protectable not on mere selection and arrangement satisfying “sweat of brow” test, but when there is enough skill, labour and judgement in creation of the derivative work satisfying “modicum of creativity” test.<sup>46</sup>

Creation of derivative works from traditional cultural expressions of India is happening fast and rapidly across the country due to the emergence of technology which makes copying or imitation easier. Looking at many instances of adaptation and commercialization of tribal heritage voluntarily by tribal people of India one can conclude that these tribal people are ready to adapt to modern technologies, modern societies’ rules of trade and business for earning their livelihood and meeting their needs. These tribal communities being more open

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<sup>43</sup>*Id.*

<sup>44</sup> The Copyright (Amendment) Act, 1994 (Act 38 of 1994), s. 2(a); P. Narayanan, *Law of Copyright and Industrial Design* 111 (4ed., Eastern Law House 2010).

<sup>45</sup> Alka Chawla, *Law of Copyright* 4 (LexisNexis, 2013).

<sup>46</sup>*Supra* note 39.

and exposed to modern influences than ever, may choose to share their cultural heritage and participate in evolution of newer art and culture in the modern era where such newer categories of works are protectable as derivatives of prior/ original works. However, what justifies such a move is that the people do so on their own terms with proper prior information of implications of such sharing. As Ms. Rebecca Adamson said: <sup>47</sup>

*In every Indigenous community I've been in, they absolutely do want community infrastructure and they do want development, but they want it on their own terms. They want to be able to use their natural resources and their assets in a way that protects and sustains them. Our territories are our wealth, the major assets we have. And Indigenous people use and steward this properly so that they can achieve and maintain a livelihood and achieve and maintain that same livelihood for future generations.*<sup>48</sup>

A contemporary folk-art movement is being spearheaded by 2022 Padma Shri awardee (one of highest civilian award in India) and Pradhan Gond artist DurgabaiVyam<sup>49</sup>. Durgabai is a protégée of Gond artwork pioneer, Jangarh Singh Shyam and her works are themed around folklore stories she has heard from family or daily life in her Burbaspur, Madhya Pradesh.<sup>50</sup>

Traditionally Gond Pradhans are oral historians who sing and narrate stories and Gond is derived from “kond” which means green mountains in Dravidian language<sup>51</sup>. With inculcation in the mainstream population, Gond Pradhan artists have started depicting flora and fauna according to these folktales and this adaptation from oral songs and narration to artistic work on paper is a classic example of adaptation of tribal cultural expressions into

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<sup>47</sup> Rebecca Adamson, “American Indian Rights Activist and Founder of the First Nations Development Institute & First People's Worldwide”, *Facebook*, available at: <https://www.facebook.com/redfeatherdevelopment/posts/our-territories-are-our-wealth-the-major-assets-we-have-and-indigenous-people-us/10159568221777801/> (last visited on Jun. 12, 2024).

<sup>48</sup> *Ibid.*

<sup>49</sup> Avantika Shankar, “Padma Shri awardee DurgabaiVyam represents a shift in the way folk art is perceived”, *Vogue* (Feb.4, 2022), available at: <https://www.vogue.in/culture-and-living/content/padma-shri-awardee-durgabai-vyam-sees-the-world-in-stories-folk-art-gond> (last visited on Jun. 12, 2024).

<sup>50</sup> Durga Bai, “Touch the Gond”, available at: [https://gondart-india.com/en/artists/durga\\_bai/](https://gondart-india.com/en/artists/durga_bai/) (last visited on Jun. 12, 2024).

<sup>51</sup> Surekha Kadapa-Bose, available at:

“The Man Who Took Gond Art from Tribal Huts to The World's Top Museums”, *Better India* (Jan. 29, 2022), <https://www.thebetterindia.com/274494/gond-artist-artwork-museums-france-usa-uk/> (last visited on Jun. 12, 2024).

contemporary tribal works. While describing Durgabai's process of work, Gita Wolf (founder of Tara Books) for whom Durgabai has worked as illustrator for many books said, "She is a great storyteller [...] She thinks in narrative."<sup>52</sup>

Durgabai along with her co-illustrators have won Bologna Ragazzi Award in Italy for Tara Book's bestselling title "The Night Life of Tree".<sup>53</sup> Artists like Durgabai who are reinventing traditional folklores through their works are proof how traditional cultural expressions are not stagnant but ever evolving and since each derivative work based on folklore is capable of original copyright protection, these cases show how with proper awareness and training even modern copyright principles can serve the interests of contemporary tribal artists in India.

#### **Unknown Author/ artist and/or unpublished folklore-based work.**

India, being a Berne Convention and a TRIPs compliant country has already implemented Article 15 of the Berne Convention which deals with protection of works of anonymous or pseudonymous authors and unpublished work of unknown authors. This provision is one of its kind as it allows national legislations to designate "competent authority" to represent "unpublished works" having "unknown authors" by notice to the Direct General of WIPO and India is the only country which has designated such authority.<sup>54</sup> This designation of competent authority is beneficial as tribal unpublished works whose authors are not known can also claim protection through this competent authority.

Section 54 of the Copyright Act, 1967 in India while defining the "owner of copyright" refers to the publisher of the work as the owner of copyright for purposes of exercising civil remedies under the Act in cases where the author of a literary, artistic, musical or dramatic work is anonymous or pseudonymous.<sup>55</sup> The Section says publishers continue to be owners in the eyes of law until the identity of author/s are publicly disclosed by themselves and publishers. This provision can be helpful for protecting rights of traditional communities where there is no recognition of the concept of individual authorship as such communities can represent the author to be anonymous or under a pseudonym and exercise ownership through contractual bindings on publisher who in law continues to be the owner of work. Though utilizing such a mechanism, the protection over work will last only for sixty years

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<sup>52</sup>*Supra* note 48.

<sup>53</sup>*Supra* note 48.

<sup>54</sup>*Supra* note 15.

<sup>55</sup>*Supra* note 33, at s. 54.

from the date of first publication unless the author/s discloses his identity then the term will last sixty years from the date of author's death or when the last author dies.<sup>56</sup>

### **Case Study: Bengal Pata-Chitra With Folk Songs As Shared Cultural Heritage**

The Competent Authority can seek protection over narrative folk songs sung along with Bengal 'Pata-Chitra'. 'Pata-chitra' is miniature paintings depicting village lifestyle, mythological stories drawn on long paper scroll in vertical order so that it can be rolled open<sup>57</sup>. Traditionally, Potuas, a community who supposedly had dual religious identity between Hindu and Muslims, did these paintings on scroll and as they travelled to different villages in rural Bengal, they would unravel these scrolls slowly and sing folk songs which narrated scene by scene the paintings.<sup>58</sup> The process happened simultaneously rolling with one hand and unrolling with another the scroll as the Potuas sang songs describing the scenes from paintings. In words of Majumdar:<sup>59</sup>

*Apparently, Pata paintings were not for sale in the past, but by the turn of twentieth-century collectors started to collect these Pata paintings for their artistic values; and now today one can buy an authentic 'Pata' from a Potua at a bargaining cost while the songs- the rich oral tradition that passed from generation to generation get lost in the way as no-one is concerned to learn a song for themselves.*<sup>60</sup>

These narrative songs which accompanied 'Pata-Chitra' are disappearing with time and they being age-old, it is hard to identify the authors of lyrics or compositions. Such folk songs can be protected through competent authority as unpublished works whose author/s not known or in case published but author anonymous, a sui generis system model can be developed for protection of such work where publisher exercises the rights on behalf of community. These situations are examples of the need for twisting traditional copyright principles to fit the intellectual and creative interests of traditional artists.

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<sup>56</sup>Supra note 33, at s. 23.

<sup>57</sup> Rahul Majumdar, "Disappearing Traditions: The Narrative Songs of Bengal Pata Paintings", IV:2 *Kalakalpa-IGNCA Journal of Arts* 28 (2020).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*



## **Term of Copyright over Traditional Cultural Expressions**

The Copyright Act in India protects copyright over all primary categories of works for sixty years from the next calendar year that the author dies and in case of “work of joint authorship”, sixty years is counted from the next calendar year of the author who dies last.<sup>61</sup>

The term of protection for anonymous and pseudonymous works have already been discussed above. The period of protection being limited by statutory intervention makes it a challenge for protection of traditional works. India can take inspiration from countries like Ghana where folklores are protected for perpetuity under the Copyright Law of 2005 or Taiwan where rights of intellectual creations of indigenous people are transferred to the community on death of exclusive users and such rights do not enter public domain.

## **Scope of Economic Rights and Resale rights**

Copyright is an exclusive bundle of rights different from subject matter to subject matter<sup>62</sup> and is of importance for tribal societies or traditional communities only if they are interested in commercialization of their cultural expressions. There is no concept of exercise by community of these bundle of rights, but representatives might exercise it with due permission on behalf of such community.

An interesting inclusion of *Droit De Suite* within the Indian copyright regime is as a result of being a Berne Convention member state. India has included Section 53A in implementation of *Article 14 ter of the Berne Convention*. Resale share right<sup>63</sup> in India allows the author who was first owner of work share in resale price in cases where such reselling of original copies exceeds more than ten thousand rupees from original price till the expiry of copyright. This right is important as traditional societies, particularly, tribal communities may not have bargaining power to pitch price at the time of first sale but can get benefitted from share in resale price for subsequent sales of original copies of their works.

## **Protection of moral rights of creators of TCEs**

In India, right to attribution as author of work and right against mutilation, modification and distortion of work which is prejudicial to author’s honor is guaranteed under the recognized ‘author’s special right’<sup>64</sup> separately. The nature of this right is:

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<sup>61</sup>The Copyright (Amendment) Act, 2012 (Act 27 of 2012), s. 22.

<sup>62</sup>See generally *Id.* at s. 14.

<sup>63</sup>*Supra* note 33, s. 53A.

<sup>64</sup>*Supra* note 33, s. 57.

- i. Independent of the author's copyright,
- ii. Even after assignment (Wholly/Partially) and
- iii. Exercisable by Legal Representative<sup>65</sup>

However, the concept is limited to authors or authors of a work and not available as a right to a community. This provision is of importance only when there is a recognizable single author or co-authorships where the right can be attributed to.

### **Case Study: Bengali Folk Song: “Boroloker Biti Lo” controversy**

When Indian Bollywood popular singer rapper Badshah lifted lines from Bengali Folk-singer Ratan Kahar and used it as a catchy phrase with no credits to the lyricist. When there was huge public outrage claiming Badshah for plagiarism, in his defense he tweeted that his team had done proper due diligence prior release and found no credits being given to the Ratan Kahar in previous reprises or versions of the song, rather his team found it mentioned as “*Bengali folk*”<sup>66</sup> and later went on to pay 5 lakh rupees to Ratan Kahar.<sup>67</sup> Interestingly, the attribution to Ratan Kahar as the original lyricist of the Bengali folk song is still not done.

Though Kahar who is more than eighty years old and poverty stricken was happy to get the monetary help from Badshah<sup>68</sup>, this shows the power dimensions between modern copyright laws in the commercialized world and folk artists where attribution even to a living lyricist can be lost in legal complexities.

Further, ‘Author’s special right’ would not be suitable for tribal societies where the cultural expressions are communally owned and practiced. This is a major loophole of the provision and the same extends to moral rights of performers.<sup>69</sup>

The close connection between right to claim authorship and protection of cultural heritage of nation is rightly elaborated in:<sup>70</sup>

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<sup>65</sup> *Supra* note 33, s. 57 cl.1-2.

<sup>66</sup> Official Twitter Handle of Badshah, *Twitter* (Mar. 31, 2020), available at: [https://twitter.com/Its\\_Badshah/status/1245014731552772097](https://twitter.com/Its_Badshah/status/1245014731552772097) (Last visited on Jan. 2021).

<sup>67</sup> “Genda Phool Row: Badshah Gives Rs 5 Lakh to Folk Artiste RatanKahar as Promised”, *News18* (April 07, 2020), available at: <https://www.news18.com/amp/news/buzz/badshah-promises-due-credit-to-folk-artiste-ratan-kahar-following-genda-phool-row-2568397.html> (Last visited on Jan. 2021).

<sup>68</sup> *Id.*

<sup>69</sup> *Supra* note 59, at s. 38B.

<sup>70</sup> *Supra* note 29, at para 38.

*Authorship is a matter of fact. It is history. Knowledge about authorship not only identifies the creator, it also identifies his contribution to national culture. It also makes it possible to understand the course of cultural development in a country. Linked to each other, one flowing out from the other, the right of integrity ultimately contributes to the overall integrity of the cultural domain of a nation. Language of Section 57 does not exclude the right of integrity in relation to cultural heritage. The cultural heritage would include the artist whose creativity and ingenuity are amongst the valuable cultural resources of a nation. Through the telescope of section 57 it is possible to legally protect the cultural heritage of India through the moral rights of the artist.*<sup>71</sup>

Thus, India needs to amend its moral rights provisions to revise the system similar to “communal moral rights” as contemplated under Australia’s “Draft Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003” to better protect the cultural diversity of India.

### **Concept of Performer and Performer Rights**

India recognizes performer’s rights under the Copyright Act, 1957 for fifty years from “the next calendar year in which the performance is made”<sup>72</sup>. The exclusive rights available to a performer for his performance includes fixation of performance, reproduction of such fixation, issuance of copies and communicating to the public such performance, broadcasting live performance, etc.<sup>73</sup> This provision is the significant as the definition of performer is open to include “any other person making a visual or acoustic live presentation” apart from traditional actor, singer, acrobat, juggler, snake charmer<sup>74</sup>, etc... and it means folk based performances can also be included within its scope.

### **Case Study: Theyyam performance, Kerala**

Theyyam is a sacred folk-dance from North Malabar, Kerala where performers wear headdresses, traditional makeup and dances to the beats of chenda.<sup>75</sup> Theyyam is of cultural

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<sup>71</sup>Supra note 29, at para 38.

<sup>72</sup>Supra note 59, at s.38.

<sup>73</sup>Supra note 59, s.38A.

<sup>74</sup>Supra note 33, s. 2 (qq).

<sup>75</sup>Shagil Kannur, CC BY-SA 4.0 (Jul. 26, 2022) available at:<https://creativecommons.org/licenses/by-sa/4.0/>, via Wikimedia Commons (last visited on Jan. 23, 2024).

and societal relevance as Kotharis- the Theyyam performers are primarily Dalit untouchables who only during the performance of Theyyam when they are dressed up as fierce God can touch the other castes<sup>76</sup>.

Theyyam performers can claim performer's right protection under the Copyright Act in India. The only problem being de-contextualized performance of Theyyam in name of protection and preservation of the traditional dance form; the governmental institutions, the tourism, fashion and advertising industries, media makes sure Theyyam is "packaged, customized and fetishized into a cafeteria format so as to cater to the demands of the customer"<sup>77</sup>. While one may argue that performing Theyyam publicly at places will break the bounds of social discrimination, such promotion of decontextualized performance also devalues the traditional sacredness of the Theyyam events, Performer's right as guaranteed in present form in India has no solution for such traditional dance forms.

Important to note there Dalit comes under Scheduled Caste categories and not Schedules Tribes of India. Thus, traditional cultural expressions of India can originate beyond the categorization of tribes of India.

## VI. CONCLUSION

The main problem identified through the various case studies discussed in reference to Indian cultural heritage and traditional cultural expressions is that commercialization of such traditional artefacts or expressions has happened to such heights that it has degraded the cultural or religious significance of most of these traditional arts or expressions. They have become mere objects of commodification in public memory and have fallen from the status of sacred or secret or limited to traditional communities only. Several examples can be seen where tribal arts or practices are being rampantly reproduced and sold as souvenirs, craft items, made part of the advertising or entertainment world without permission, sold as cheaper reproductions on commodities like cards, T-shirts etc. These kinds of

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<sup>76</sup> C.P. Sajit, "When Theyyam breaks bounds of sacred grove", *The Hindu* (NOV. 19, 2019), available at: <https://www.thehindu.com/news/cities/kozhikode/when-theyyam-breaks-bounds-of-sacred-grove/article30011143.ece> (last visited on Jan. 23, 2024).

<sup>77</sup> Surabhi K. & Ajaya K. Sahoo, "Performing arts, diaspora and identity: The Case of Theyyam Performances in The Indian Diaspora", available at: [https://ebrary.net/173957/education/performing\\_arts\\_diaspora\\_identity\\_case\\_theyyam\\_performances\\_indian\\_diaspora](https://ebrary.net/173957/education/performing_arts_diaspora_identity_case_theyyam_performances_indian_diaspora) (last visited on Jan. 23, 2024).

commodification have defeated the spiritual link between cultural expressions and their land and communities for most traditional communities in India barring few isolated cases.

The second conclusion that can be drawn is that India needs more of a system which protects victims of paternity or integrity violations rather than strict copyright on traditional cultural expressions. In India the traditional communities have traded on many of their cultural expressions willingly and the challenge they face is more of dilution because of trade by outsiders or unauthorized people in works relating to or which are imitations of their traditional cultural heritage and knowledge. While the geographical indications law or the certificate or collective trademark laws can address these issues of authenticity or paternity parallel to the copyright regime, integrity of the work can be best protected through moral rights like the model as exists under Copyright Law.

An excellent example of how tribal people of India can be accommodated in their own merit and status in modern society is what Honey Bee Network in India proposes in their objective. Their founder Anil K. Gupta talks through the allegory of honeybees pollinate one flower to other during process of nectar collection without harming any flower; how tribal people of India can be viewed as “source of inventions and innovations” and creativity rather than “a sink for aid and advice”.<sup>78</sup> He recognizes a model to “overcome the asymmetries in knowledge, recognition and reward” where Honey Bee Network works on principle of attribution, prior informed consent, participation in local language and reasonable benefit sharing.<sup>79</sup>

India’s attempt on framing laws relating to TCEs, whether through copyright regime or *sui generis*, should include focus on Indian diversity and the best possible indigenous ways for empowerment the tribal people and ensure participatory governance. It is even echoed in words of eminent Professor of Law Peter Drahos who noted, “[t]he dangers of central command and loss of liberty flow from the relentless global expansion of intellectual property systems rather than individual possession of an intellectual property right”.<sup>80</sup>

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<sup>78</sup> *Supra* note 3, at 50.

<sup>79</sup> Gupta, *supra* note 3, at 50.

<sup>80</sup> Peter Drahos and John Braithwaite, *Information Feudalism: Who Owns the Knowledge Economy?* 5 (Routledge, 2002).

It is dangerous to apply the generality of intellectual property discussions to a particular social and political context and adopt and utilize such within national laws without consideration of local indigenous issues. It is rightly said:

*“knowledge diplomacy is being conducted with participation from nearly all the world’s states. But the state's interests and goals differ widely because of variations in levels of wealth, economic structure, technological capability, governmental form and cultural tradition”.*<sup>81</sup>

Therefore, while inspiration can be taken from the international obligations, India should draft laws relating to traditional cultural expressions taking into consideration its national concerns and even if this might destabilize the universality approach of intellectual property standards, in the long run, it is more suited to indigenous knowledge and expressions as a special category.

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<sup>81</sup>M. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property* 191 (Brookings Institution Press: Washington D.C. 1998).