



Traditional Cultural Expressions: Analysis of Culinary Custom

Akriti Gupta[†]

The ICFAI University, Ranchi, Jharkhand - 835 222, India

Received: 24th February 2020; accepted: 11th November 2021

The scope of the research will be on the definition of 'Traditional Cultural Expression' in the national arena along with the concurrent rights of the indigenous people in relation to misappropriation of the cultural knowledge and expressions of the community which distinguishes them from the others, along with the acknowledgement of old lost exclusive recipes and traditional methods used to make them, and increase the ambit of TCE by inculcating where our country should be recognized for its contribution and some recognition globally along with commercial benefit arising out of it. The scope is limited to complex issues of traditional expression that are relevant to India and increase the ambit of old food delicacies and protect them under current laws. The protection of indigenous culture and giving them some rights along with monetary compensation for infringement of their right to protect the tradition from being copied, which leads to the welfare of the nations.

Keywords: TRIPS, GI, Copyright, Customary Laws, TCE, Collective Marks, Traditional Cultural Expression, Extrinsic Test, Intrinsic Test, Prior Informed Consent

India is a country of diversities and various cultures which bears several colors of expression along with it. The only country where both rural and urban culture co-exist peacefully, making it a land of diversities. Tribal culture is a sign of proud traditions which India bears with its head held high. Any community which expresses its existence and identity through any means since time immemorial can be called as folklore. Such a culture distinguishes any of the community from each other. WIPO recognizes such time period as minimum of fifty years. 'Traditional Cultural Expressions' or 'expressions of folklore' are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof: Verbal expressions - folklore, stories; Musical expressions - folk-song, music; Expressions by action - drama, dance; Tangible expressions - architecture, painting, etc.

The term 'folklore' was coined by William Thomas in the year 1846. Mr. Thomas meant to include manners, customs, observations, superstitions, ballads, proverbs and so on, in the term 'folklore', which he summarized as the lore of the people.¹ Traditional knowledge comprises of tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks,

names and symbols; undisclosed information; and, all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields as defined by WIPO. Today we live in a world of instant global communication. Nobody in this world is stranger to the technological development which has transformed the whole world. The knowledge based society has replaced the material based society.

But, on the other hand, traditional communities across the world repeatedly confront issues of cultural misappropriation or/and theft of their cultural expression- which ought to be treated as collective property - be it through the fusion of traditional music with digital beats to produce chart-topping pop music albums, traditional painting techniques, and handicrafts mass-produced by non-traditional means and sold as authentic, indigenous art being replicated, on clothing, footwear, and carpets, or indigenous words and names being trademarked and used for commercial gain.² Several industries by blatantly copying the cultural aspects to make the entertainment business more profitable leaves various communities under cultural shock by distorting and mutilating the content of the literature used.

In this paper traditional recipes and old school cooking techniques has also claimed for statutory protections and recognition in 'Traditional Cultural Expression' category. Recipes into the art form which

[†]Email: akritigupta376@gmail.com

it ephemeral in nature challenging the underlying principles of copyright law that is fixation and not giving protection to the ideas. Till date work on protection of TCE's has progressed slowly and little has emerged in the way of concrete, binding law. The various international instruments proposed as solutions appear unable to meet the whole range of concerns raised by TCE holders and the culturally rich developing countries.

Understanding the Term Traditional Cultural Expression

Traditional context 'Traditional' means that the traditional knowledge or cultural expressions are developed according to the rules, protocols and customs of a certain community, and not that they are old. In other words, the adjective 'traditional' qualifies the method of creating traditional knowledge or cultural expressions and not the knowledge or expressions themselves. The term 'traditional' means that the knowledge or cultural expressions derive from or are based upon tradition, identify or are associated with an indigenous or traditional people, and may be practiced in traditional ways. 'Traditional context' refers to the way of using traditional knowledge or traditional cultural expressions in their proper artistic framework based on continuous usage by the community.³

Traditional Cultural Expressions are any forms in which a community practices and knowledge are expressed, it is the result of intellectual activity, experiences, or insights by indigenous peoples, local communities and/or other beneficiaries in or from a traditional context, and may be dynamic and evolving and comprise verbal forms, musical forms, expressions by movement, tangible or intangible forms of expression, or combinations thereof.⁴ 'Use/Utilization' means (a) where the traditional cultural expression is included in a product: (i) the manufacturing, importing, offering for sale, selling, stocking or using the product beyond the traditional context; or (ii) being in possession of the product for the purposes of offering it for sale, selling it or using it beyond the traditional context. (b) Where the traditional cultural expression is included in a process: (i) making use of the process beyond the traditional context; or (ii) carrying out the acts referred to under sub-clause (a) with respect to a product that is a direct result of the use of the process; or (c) The use of traditional cultural expression in research and

development leading to profit-making or commercial purposes.⁴

Traditional Cultural Expressions

It comprises the various dynamic forms which are created, expressed, or manifested in traditional cultures and are integral to the collective cultural and social identities of the indigenous local communities and other beneficiaries.⁵ The dances of Kathiawar like Garba, Raas, etc. Tales and Poems presented by folk artists in 'lokdayora' (kind of gathering) and even 'bhavais' (street plays) are still performed telling them the stories of our great epics and fables are still cherished by this community.⁶ Kathiawar community of Gujarat which has rich folklore like drama, folk dance and music which is about to get extinct due to lack of attention and acceptance from the people themselves. Little awareness could save the rich cultural heritage of this community.⁷ Another community which reminds the culture of India would be Ang (jawara) hunter-gatherer tribe from middle south Andaman Islands.⁷ Their hunting elements are the only available information about this tribe which is eco-friendly in nature and also shows keen observance of nature to protect themselves against all the odds of the nature.

Various fashion stylist, celebrities, music and entertainment industry easily pick up trends when they are inspired by any such design and as the being the public figure, they attract publicity leading to branding and its commercialization. Various meetings have been conducted by WIPO and the IGC committee has been discussing about the protection of TCE but till 2009 it was just a discussion on the topic and recently the 40th inter-governmental meeting on the intellectual property, genetic resources, traditional knowledge and traditional cultural expression drafted. Handlooms are dispersed in the rustic and semi-urban zones. The Handloom Industry is an imperative part in giving expansive scale work and result in the upliftment of the rural mass advancement. Handloom is maybe one of the most seasoned industries. The ancestral individuals dissipated all through the nation, produce their own fabrics with the rich structures, and one-of-a-kind shading blends. In India, in the greater part of the State Governments, there are enterprises or cooperatives for handloom items and craftsmanship things. Copyright can very well protect the art of craftsmen in the physical form when its fixed but as it doesn't seem to protect the process which is

traditionally acquired by these indigenous group to create a particular form and being in the public domain it loses its chance with patent too.

Doctrine of Substantiality

Substantial Similarity Test

Substantial similarity could be found in US Copyright laws, is a test to determine if the defendant has infringed any copyright reproduction right. Any creative work can be inspired by other creative work but it should not be so similar that steals the core essence of the work. There is no designed rule to determine if the work is substantially similar to the other protected work. The Court of Law looks at the facts, creative process of the work and the end result of the work to determine if duplication has been made. The Court may compare the likeliness of the work and rely on the expert advice to conclude if the work is similar to the protected work. If there is any similarity found then it will be called an actionable infringement and can be sued for. Substantial similarity can be determined by not the size of the work copied but if the heart of the work was copied it will be an infringement. Only when a work rises to a level of 'substantial similarity' does it infringe to the point of being legally actionable. There is no clear distinction on how much duplication is necessary to reach 'substantial similarity', the question is determined on the basis of the facts of the case on evaluation.

Total Concept and Feel Test

This test is used to determine the substantial similarity of the work through expert opinion or layman's point of view. There are two kinds of test: the 'extrinsic test,' where a complex analysis of the concept is for the underlying work; and 'intrinsic test', where the expression of the given work and judgment of a layman is compared. The differences between the two were defined in 1977 in *Sid & Marty Krofft Television Productions, Inc. v McDonald's Corp.*⁸

In this case puppeteers and television producers Sid and Marty Krofft alleged that the copyright in their H R Pufnstuf children's television program had been infringed by a series of McDonald's 'McDonaldland' advertisements. The finding introduced the concepts of extrinsic and intrinsic tests to determine substantial similarity. Early in 1970, the advertising agency Needham, Harper and Steers contacted Marty Krofft asking if the Kroffts would be willing to work with

Needham on an advertising campaign for the McDonald's hamburger chain based on the H R Pufnstuf characters. Various telephone conversations followed to discuss the concept, and on 31 August 1970 Needham sent a letter saying it was going ahead, but soon after Needham telephoned to say the campaign had been cancelled. Needham had in fact won the contract for the campaign, hired former employees of the Kroffts to work on the sets and costumes, and hired the person who supplied the H R Pufnstuf voices to make the voices for several of the McDonald land commercials, the first of which was broadcast in January 1971. The Court found that both the extrinsic and intrinsic tests showed that there was substantial similarity, rejecting the defendants' detailed list of differences, which the target audience of children would ignore.

Even a dissection of the two works reveals their similarities. The 'Living Island' locale of Pufnstuf and 'Mc Donald land' are both imaginary worlds inhabited by plants and animals and other fanciful creatures. The dominant topographical features of the locales are the same: trees, caves, a pond, a road, and a castle. Both works feature a forest with talking trees that have human faces and characteristics. The characters are also similar. Both lands are governed by mayors who have disproportionately large round heads dominated by long wide mouths. They are assisted by 'Keystone Cop' characters. Both lands feature strikingly similar crazy scientists and a multi-armed evil creature. It seems clear that such similarities go beyond merely that of the idea into the area of expression.⁸

The Ninth Circuit introduced a two-part test for substantial similarity called the extrinsic-intrinsic test. First, it used the extrinsic test to look at similarity in ideas. This included similarity in 'the type of artwork involved, the materials used, the subject matter, and the setting for the subject'. After applying the extrinsic test, the Court applied the intrinsic test, which looked at similarity in expressions. For the intrinsic test, the Court considered the overall impression 'an ordinary reasonable person' would have of the works.⁸

There is not much empirical evidence regarding the misappropriation of rights of these communities but there is the above-mentioned doctrine which helps us recognize the *prima facie* infringement. Most controversial recent Bollywood movie, Padmavat, where the community got defensive regarding the

distortion of the historical facts and also the public performance which is represented by the lead actress in the movie. The traditional cultural dance was adopted too, named 'ghoomar'. This doesn't mean liberty to express through cinema which is the right to expression should be taken away, just after applying look and feel test it appears quite evident on the face that history is being expressed and certain communities detest such distortions. This brings us to the concept of Benefit Sharing and Prior Informed Consent. The famous song 'nimbooda' is highly influenced by 'langanmanganiyar' of Rajasthani folk music sects. "Sasuralgendaphool" is a famous title track from the movie 'Delhi 6', which is famous wedding song in local Chattisgarh.⁹ The usage of the culture without the permission of the community not only makes it publicly available for misappropriation but also leads us to form an opinion about a community and the producers and directors being the puppeteers and making commercial benefit out of it. Hence, any tradition, art or culture should be open for inspiration and reproduction but with the basic idea of getting the consent from the guardian of the knowledge holder and offering them a commercial benefit as consideration for their economic advancement.

Statutory Protection

Constitution

The Constitution of India, the basic law of the land, has not directly addressed the issue of protection of the folklore. Article 29 of the Constitution recognizes as a 'Fundamental Right' (Part III) the protection of the culture of minorities. According to Article 29,¹⁰ *"any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same."* It is possible to protect the folklore of the distinct groups in India based on this provision. However, the majority of the folklore existing and misused now in India belong to small communities who do not come under the scope of the aforementioned constitutional provision. But no legislation has been enacted to protect the same. The only other general provision in the Constitution that can be identified as a source to protect folklore is Article 51A (f).¹⁰ The term itself is not mentioned in any of the statute.

Copyright

The Copyright Act 1957, covers a major part of the TCE in Section 13 which describes the ambit of the

legislation.¹¹⁻¹² A major part of TCE is covered in original, literary, dramatic, musical, artistic works, engravings and performers etc. through its wide interpretation. Certain sections of the Act like Section 31A provides copyright protection to published and unpublished works of the author performers rights are protected under Section 38. Section 58 gives protection through moral rights which save the work of the creator from any mutilations and modifications or any other changes without consent. This Act might protect the contemporary traditional art. The protection under copyright somehow is a dicey one, as it does not guarantee an unlimited protection it ends after the life of author ends, by providing extra protection for 50 or 60 years as per the law of the land and exhaust after that period lapsed. But for TCEs, the community need the right forever as not only they but their generations to come has to enjoy the right and, in this case, copyright is not the correct answer. For this the 'performers' right can be referred for protecting TCEs under this head of copyright. Hence TCE does not fit in the box of copyright. The concept of authorship is a big question because it is next to impossible to find out the actual author of the knowledge holder and it's more of a community asset than an individual author.

Trademark

Trademarks are the signs which distinguish one entity from the other entity. It further gives information about the origin of goods & services.¹³ A trademark which seems offensive to a particular community cannot be registered, on such marks there is absolute bar. For instance, in New Zealand while registering any trademark, the office takes into consideration the Maori community's artistic work so as to avoid the infringement. There an application of trademark registration can be denied on the grounds of offending 'Maori Community'. A trademark must be objected, if those mark are subject to have indigenous origin. In other words, if a mark is deceptively used and is similar to some indigenous origin then it can be objected.¹⁴

Registered trademarks of traditional goods and services can be protected Under Section 29 of the TM Act against any infringement and for non-registered goods and services; the common law provision of passing off is available.¹⁵ Collective marks can be used to create a brand image for traditional goods and service such as paintings, handlooms, weaves, etc. Certification marks can be used to protect traditional

goods, which have cultural significance. In case with trademarks, which also give rise to conflict between monopoly and collective rights of TCEs. GI and TM laws are more helpful in protecting interests and concerns of the owner of TCEs against counterfeits, but not against misappropriation and unauthorized use.

Geographical Indication

Mostly, products that are protected under Geographical Indications (hereinafter, mentioned as 'GIs') are the outcome of some traditional know how. For example, champagne, it is made traditionally in the village named champagne and named after the village only. Therefore, traditional knowledge of certain kind with uniqueness of a particular region can result into a GI.¹⁶

When a product inherits some traditional artistic heritage in it, which is found in a given region, it is known as 'traditional cultural expressions'. This applies to the existence of the tangible products, like handicrafts. Similarly, products manufactured using natural resources and holding the components having derived the quality from GI. Geographical indication is the right in perpetuity, it remains with one community until they provide the products with that one essence of their region without compromising the quality and so long, they enjoy this Intellectual Property Right. This protection is unlimited in time, and the right is collective it does not reside in one individual but within a community.² On the other hand, it takes very long span of time to establish goodwill to ask for a geographical indication for particular goods. It's not overnight so as the case of traditional cultural expression, they are not developed overnight they have been existence in from ancient times and challenge is how to protect them against all odds.¹³

Geographical Indication fails to protect the TCEs because the traditional knowledge of these is already in the public domain and misappropriation of the same can be easily done by the third party. The problem arises when this knowledge which is available to public already how to protect it? However, Government can regulate it from the day of adopting the mechanism, that from the particular day any commercial exploitation of certain community's traditional knowledge will result into infringement.¹³

Products as a result of traditional know-how can be protected under Geographical Indication but what

about the arts, performances, folk dances, martial arts, etc. which are purely performances, what about their protection? Many TCE owners rely most on the GI Act to protect products of their labour, particularly in case of handlooms and handicrafts.¹³ According to some experts, GI is a law against unfair trade practices protecting interest of consumers, rather than economic interests of traditional handicraft artisans against counterfeit.¹⁴ India does not have a sui generis law to protect TCEs and folklore and relies on existing IP laws for protection of the same. This sole dependence on IP laws has been criticised because of inherent conflicts between the nature of the IP and traditional cultural expressions. There are no provisions like 'Prior Informed Consent', as is provided in Biodiversity Act 2002 for accessing biological resources, in the case of use of TCEs.¹⁴

Traditional Culinary Recipes and Customs

"Expression is all of [recipe creation]. It's all emotion; it's all soul. It's spiritual".

- Chef Rick Tramonto, Executive Chef, TRU Restaurant, Chicago¹⁷

Origin of gourmand dates back to the times of French Revolution. Stephen Mennell reckons that in the era of revolution saw the rise of fine and luxurious dining. Elizabeth Teffler agrees that food is a mere necessity of human but to some extent this necessity becomes a savouring and enjoyment of the novelties of the food. Copyright does not give protection to any discovery, idea, procedure, concept or principle. Also in the front there are three basic requirements of copyright protection. (i) Existence of the work of authorship and not the idea or procedure; (ii) Fixation in a tangible form; (iii) Originality.¹⁷ Hence, recipes have been kept away from the protection of these legislations as it cannot fulfil any of the requirements unless some unique combination or spice is created which would give the creator any competitive advantage which too will come under the section of trade secret. Hence, the conclusions to be drawn here is the procedure of the cooking cannot be granted any protection for its impossible to differentiate the taste and give details which could be stored in a tangible form while registrations. Food exists in one of copyright's 'negative spaces'-a medium of creative expression not covered by law.¹⁸

Nimmer opines that the extension of copyright protection should not be given because that would lack the originality aspect and merely become mixture

of old ingredients or a process which does not get protection. Also, it would go against the functionality doctrine which stops monopolisation of the goods.¹⁹ Hence, following the fundamental doctrines and words of the statutes it became a common notion that recipes cannot get protection. But, the US courts has set certain development in the outlook of such recipes and considered giving some protection to the recipes if it has literary art or some innovation attached to it.

Indians have a deep association with the kitchen, which make experiences with food nothing short of valued inheritances. Food is beyond health and nutrition and has been in vogue since the Sumerians invented tablets. It has the richness of color and tradition with a valid literature to support it. Its coalescing skills bring people together into communities by creating a sense of familiarity and brotherhood. Some might go so far as to say that food is one of the major forces forging a national identity. Antecedents will pass on a food recipe with the same intensity as someone passing on a princess cut diamond ring handed down through generations!

Botiniakuri

One of the most forgotten treasures of India's culinary history is the lovely flavours of Parsi cuisine. While the Dhansak is still a recognised staple, this egg and mutton recipe is a delicacy.

Goan Clams Coconut Suke

Traditional Goan preparation of Tisryo (Clams) suke that is similar to Mangalorean khubesukka. It is made using clams and fresh coconut and is usually part of a Goan fish-curry-thali in most homes.

Parinde main Parinda

Parinde main parinda looks like this rich extravagant dish of Uttar Pradesh, which weighs down the table as you keep it. Quite a lot of work goes into the preparation of this dish. It is a rendition of the bigger roast that was basically made with whole camel, stuffed with smaller animals, one inside the other, till the smallest cavity fills with a boiled egg. It is made with duck, chicken, quail and a boiled egg. Each bird was prepared and marinated separately and differently. The flavour of each is retained while they come out beautifully in culinary nirvana.

Shufta Kanaguchhi

Here is dish which has the exclusive and precious morel mushrooms as an ingredient. This dish is

basically all dry fruits sweetened gracefully. Kashmiri Shufta is one of the few sweet dishes from Srinagar. This dish is paradise in a bowl. It is a thick concoction of cottage cheese, dry fruits, saffron, milk, desi ghee and morel mushrooms. This dish was the invasion by Taimur in 15th century that left a legacy of Kashmiri cuisine.

Tit-Koh

This is a refreshing dish of Tamil Nadu with freshness of coconut water, fish sauce and honey. It has the richness of pork and caramel. Garnished and sprinkled with red chillies on top.

Lehsun ki kheer

It is an exotic sweet dish of Rajasthan with goodness of khoya, milk, dryfruits and garlic. Absolutely, sumptuous and thick, served cold and in perfection with rich desi ghee for preparation.

Iromba (Eromba)

The dish from Manipuris mostly known for its pungent taste. Even the ingredients are unique, with fermented fish, bamboo shoots and boiled vegetables, all cooked in chilli paste.

Puducherry is also famous for blending cooking styles with French and Vietnamese. This one particular dish which is literally known to one old lady in town is a coming together of pork, reduced in jaggery and topped off with green chillies. People of the community have almost forgotten about this dish, so much so that even the name of this dish couldn't be traced!²⁰

Cooking Techniques

As we know India is a mixture of culture and we have a rich history of heritage which has given a boost to culture of culinary arts along with the recipes we have several cooking techniques which was used by the royal families and specific community which specializes on that. Few of them are already mourning over a lot of lost techniques which adds up to the flavour of the food. We have certainly not embraced our culinary culture well enough which might give us an economic boost and recognition worldwide as we are well known to be rich in culture. Few of them are already mourning over the loss of few very cherished dishes. Anuradha Joshi Medhora, who founded Charoli Foods in Mumbai, mourns a much more fantastical culinary masterpiece. In the royal households of Malwa, cooking was considered an art.

During state dinners, the khansamas outdid themselves each time. Once they served a puri, which when popped open let out a sparrow! There is no record of how they managed this feat and now we'll never know," rues the enthusiastic cook, who attempts to recreate royal Malwa meals during her opulent pop-up lunches across the city.²¹ Similarly, there are a lot of endangered gourmet customs which are being extinct and as the generation is moving rapidly towards the west our culture is losing its roots. Chef Ranveer Brar has the perfect metaphor to describe its significance. "For a tree to grow well, we need to nurture its roots," Few techniques like cooking with leaves, "Paturi" as is quite a delicacy in Bengali cuisine and it also has a huge medicinal benefit attached to it. Rajasthani's style of cooking known as khad(pit) cooking which was again very popular in royal get together, cooked in a sealed pit loaded with spices. The royal family of Mewar boasts an interesting recipe for KhadKokara, in which the chicken is cloaked specifically in Khakhra (flame of the forest) leaves and roasted in a pit.²²

Judicial Pronouncement

Fargo Mercantile Co. v Brechet & Richter Co. in this case the eight circuit bench was reviewing the case in around 1924 here the issue was regarding the manducating of fruit nectar where the plaintiff complained that the defendant copied the label that was put by defendant in the bottle.²³ There were two parts to the label: recipes and an emblem. The recipes contained detailed directions for making certain food and drinks. The emblem was colorful and included the plaintiff's name and additional advertising material. The plaintiff copyrighted the entire label and alleged the defendant infringed the label and violated the Copyright Act. In evaluating the plaintiff's claim, the court examined the recipes and emblem separately. Regarding the recipes, the Court stated, "*They are original compositions, and serve a useful purpose*". *Specifically, they served to "advance culinary art."* Importantly, the Court stated that "[i]f printed on a single sheet, or as a booklet, these recipes could undoubtedly be copyrighted, and we see no reason why this protection should be denied, simply because they are printed and used as a label." The Eighth Circuit held the recipe was copyrightable as an 'original work of authorship'. Notably, the Court did not address the argument that the recipe was merely a factual recitation of a

'procedure' or 'process' that would not be copyrightable.²⁴

Barbour v Head, 178 F. Supp. 2d 758 (S.D. Tex. 2001). The plaintiff was the author of a cookbook titled, *Cowboy Chow*, for which he held a copyright.¹⁷ The defendant published an internet magazine with recipes that were almost identical to those in the cookbook. The defendant's alleged copyright infringement, arguing what the judges concur in the case of *Publications International, Limited v Meredith Corp*, "*where a recipe or formula is accompanied by substantial literary expression in the form of an explanation or directions, there may be a basis for copyright protection.*"²⁵ The *Cowboy Chow* recipes contained various literary anecdotes, such as "*Heat oil in heavy skillet. Add sugar and let it brown and bubble. (This is the secret to the unique taste!)*," and it exclaimed that the Crazy Horse Cranberry Sauce with Raisins is 'Great with all your meats!' This 'light hearted or helpful commentary' was included throughout the cookbook. The Court found there to be a genuine issue of material fact of whether the recipes were 'sufficiently expressive' or merely 'unprotected facts'. Because the recipes were more than technical listings the case ultimately settled, so the question of whether these recipes were sufficiently expressive and thus copyrightable, was not answered. *Barbour* follows exactly what *Publications* indicated would be protected by copyright: recipes with fluff.¹⁷

The bare bones recipes, those without anecdotes or 'substantial literary expression', are not copyrightable, but recipes that contain expressive commentary may be copyrightable. The Court, if not going further than *Publications International* to support copyright in recipes, was at least more positive about the possibility. Under this decision, bare bones recipes are not likely to be copyrightable. Neither Court went far enough, however, to give any real guidelines for what amount of added commentary would cross the threshold into copyright ability. This analysis by the courts makes it difficult to copyright recipes that are not contained in cookbooks. For instance, if a restaurant has a signature dish that is a crowd-pleaser, but the restaurant does not publish a cookbook, the restaurant may not be able to copyright that recipe, and it may not want to copyright it because the restaurant would have to publish its 'secret' recipe. Presumably, the recipe would be written down in the form of a list of ingredients and the steps that would be necessary to make the dish,

and it would not include anecdotes or substantial literary expression. In such a case, that recipe likely would not be copyrightable.

Even when a restaurant's signature dish is copyrightable, business issues arise. If a restaurant has a signature dish and publishes a cookbook with enough 'fluff', the recipes themselves may be protected by copyright, but what good is that copyright? The recipes will be public and open for all to see. It will be nearly impossible to know if and when restaurants around the country put that recipe on their own menus. The solution to these business concerns is found not in copyright but in trade secret law.²⁶

Recipes can be thought of as processes which aren't suitable for patent protection because for it to be protected under patent it has to be novel, and of industrial applicability along with a new inventive step. If the recipe is published in a book of recipes, the recipe will be protected through copyright legislation. This prevents someone from reproducing the exact recipe and publishing and selling their own book containing the reproduction. However, copyright laws do not extend to prevent someone using the published recipe to prepare food or drink, giving it a new label or brand, and advertising the food or drink as their own. Copyright does not protect ideas, but rather the material form (e.g., a book) in which the ideas are expressed. As mentioned above the existing statutory provisions can protect all subject spoken about in bits and parts hence none of the statutes can give full protection to the above-mentioned areas. Another drawback of this issue is no one has the time to wait and patiently make the food as it was made in earlier days. The restaurants these days pick up any dish that gains popularity or to bring culinary revolution to the market for popularity without the consent of the knowledge holders and distort the recipes according to convenience which is also the reason for it losing its authenticity. As the celebrity chef suggests how we can prosper without watering the roots right. Food art has been criticized by a lot of food philosophers but then, aesthetics philosopher Carolyn Korsmeyer argues to the contrary that cooking and culinary dishes can only represent a 'minor art'.²⁷

"Cooking is the oldest of all arts Cooking is also of all the arts the one which has done most to advance our civilization, for the needs of the kitchen were what first taught us to use fire, and it is by fire that man has tamed Nature herself."—
J.A. Brillat-Savarin²³

Along with these issues the recent attraction of youngsters for travel blogging and food this area is more exposed for exploitation as there are various TV channels and You Tube channels that explore and find such traditional recipes and broadcast it to the entire world without any prior consent or benefit sharing concept being even known to them. Firstly, we are losing the knowledge in the form of recipes and this generation who are trying to keep it alive are unknowingly infringing the rights of such tribes and communities who holds this special knowledge and not even being recognized for the same. Various new start-ups take up the tribal cuisine and authentic cuisine for gaining popularity without even frowning upon the idea of the fact that they might be infringing IP, which can again very well be offensive to certain communities and keeping the worst conclusions behind they are not getting any economic benefit out of it which can help them improve their life standards and also represent the country in the international platform with a growth of GDP. In the United States, dining has become an increasingly popular form of leisure and entertainment, generating an estimated \$537 billion in 2007.¹⁷

Conclusion

In India TCEs are considered to be a source of creativity and innovation and it has contributed to the social and economic development of the country. India should give legal protection to its folklore not to prevent the erosion of its folklore but to further enrich it by allowing its lawful exploitation. A large aspect of community art and culture in India today is unprotected as it does not fall under the ambit of existing intellectual property laws. This is susceptible to limitations and commercial exploitation, leaving the developers of local art forms with no legal recourse. Moreover, it is proposed that the preservation of distinct cultural identities leads to cultural diversity, which is a prized value in Western countries as it gives us the recognition and its instrumental value as it fosters new ways of thinking and creativity which is beneficial to society in general. If channelized in a right way might lead to the economic benefits which can actually change the future of the country.

There are primarily two suggestions that can be forwarded in order to arrive at a conclusion after the problem has been addressed. Firstly, the main ground and basis of copyright law under which protections are

served is the term ‘art’. The term ‘art’ has not been defined under The Copyright Act, 1957 and there lies a huge gap which brings about this confusion in the first place. A clear introspection on what does the term ‘art’ mean and what all can be brought under the roof of the term is a question and must be probed further. Secondly, the doctrine of fixation is the biggest impediment before the class of ephemeral art and artists. The recognition of fixation is a must and is required but the duration as to how long of a fixation can be considered as effective under law must be probed into because of the transient nature of new art forms that is brought under the purview of the research. The arts that are of temporary nature is also put down in the material and tangible form but the lifetime of such art stands as a problem which is another suggestion that the researcher would like to keep. Hence, from the above discussion it becomes very important for the Indian laws and on an international level that the tradition holders should get the protection for their work as provided to other a work under intellectual property Regime. The discussion above was made in order to bring coherence in the protection of traditional recipe and cooking techniques which was followed up after citing certain food philosophers who consent to the fact that food can be considered to be an art and hence goes beyond calorific count. Certain judicial aspects which has shown developments in considering recipes to be copyrightable, this point was made to indicate that our long lost recipes which were followed and treasured by royal families need to be protected and hence should be included into the ambit of the IP protection. Attention was also drawn to the fact that various fashion industries and productions blatantly copy culture which could be offensive to the traditional communities.

References

- 1 Jha A, Introduction in Traditional Knowledge System in India; XII (Atlantic ed., 2009).
- 2 Goswami R & Nandi K, Naming the unnamed: Intellectual property rights of women artists from India, *Journal of Gender, Social Policy & the Law*, 2008.
- 3 WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Fortieth Session Geneva, 17 to 21 June 2019.
- 4 WIPO, The protection of traditional cultural expressions: Draft articles, wipo/grtkf/igc/40/5, 22 March 2019.
- 5 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Thirty-Fourth Session, Geneva, 12 to 16 June 2017.
- 6 Dave P I, Preservation of Kathiawar folk literature and arts, *Indian Journal of traditional Knowledge*, 8 (4) (2009) 626.
- 7 Sarkar J, Traditional Handicrafts of Ang Tribes (Jarawa) of Andaman Islands, *Indian Journal of Traditional Knowledge*, 7 (1) (2008) 37.
- 8 *Sid & Marty Krofft Television Productions, Inc. v McDonald's Corp*, U.S. Court of Appeals for the Ninth Circuit - 562 F.2d 1157 (9th Cir. 1977) (12 October 1977)<https://law.justia.com/cases/federal/appellate-courts/F2/562/1157/293262/>. Substantiality similarity, Library research guides, (10 September 2019), <https://guides.lib.umich.edu/substantial-similarity/krofft>.
- 9 Bhardwaj K, Songstresses from the dunes, *the PIONEER*, 17 October 2014.
- 10 Jain M P, Indian Constitutional Law, Fifth Edition (2005).
- 11 Section 10 of the Copyright Act 1957.
- 12 Section 31A of the Copyright (Amendment) Act 2012.
- 13 James T C & Yadav D, Protection of Traditional Cultural Expressions in India, Research and Information system for Developing countries (2019).
- 14 Lai J C, Māori Culture in the Modern World: Its Creation, Appropriation and Trade. No. 2010/02 September 2010, i-call, The Research Centre for International Communications and Art Law, University of Lucerne Hofstrasse, Switzerland.
- 15 Section 29 of the Trademark Act, 1999.
- 16 Crookston J M, Geographic indications: When is “Champagne” really a “sparkling wine”? (21February 2017), <http://www.crookston.ca/wp/2017/02/21/geographic-indications-champagne-really-sparkling-wine/>.
- 17 Broussard J A, An intellectual property food fight: Why Copyright Law should embrace culinary innovation, *Vand J Ent & Tech L*, 10 (2008) 691.
- 18 Raustiala K & Sprigman C, The Piracy Paradox: Innovation and Intellectual Property in Fashion Design, 92.
- 19 Hendon L, The definitive guide to recipes and copyright, *Virginia Law Review*, 1687 (2006) 1768, <https://paleoflourish.com/recipe-copyright/#history>.
- 20 Mishra A, Old and lost recipes of India, 8 March 2019, <https://www.triphobo.com/blog/old-recipes-of-india>.
- 21 Halim M, A handful of celebrated chefs and food writers are attempting to document and preserve dying culinary traditions and recipes, in their own ways, *India Today*, 9July 2015, <https://www.indiatoday.in/lifestyle/food/story/save-food-culture-aditya-bal-ranveer-brar-rushina-munshaw-gildhiyal-281473-2015-07-09>.
- 22 Ribeiro M, The royal cuisine of Mewar, 4 December 2012, <https://www.entraveller.in/story/royal-mewar-cuisine/>.
- 23 Buccafusco C, On the legal consequences of sauces: Should Thomas Keller's recipes be *per se* copyrightable? *Chicago-Kent Intellectual Property, Cardozo Arts & Entertainment Law Journal*, 24 (1121) 2007.
- 24 Goldman M, Cooking and copyright: When chefs and restaurateurs should receive copyright protection for recipes and aspects of their professional repertoires, 31 January 2013, https://scholarship.shu.edu/cgi/viewcontent.cgi?article=1039&context=sports_entertainment.
- 25 Peter L A & Lubin March S, Copyright laws doesn't protect ideas, 2016, 23, <https://casetext.com/case/publications-intltd-v-meredith-corp/analysis?citingPage=1&sort=relevance>.
- 26 Candidate J D, An intellectual property food fight: Why Copyright Law should embrace culinary innovation, *Vanderbilt Journal of Entertainment and Technology Law*, 10 (3) (2009) 691.
- 27 Discussing Taste: A conversation with Carolyn Korsmeyer, *The Journal of Somaesthetics*, 2 (1-2) (2016).