

Legal Issues in IP & Culture

Issue: Whether Traditional Cultural Expressions Can Be Protected Under Law?

Definition

❖ Traditional Cultural Expressions

"Expressions of folklore" means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of ... or by individuals reflecting the artistic expectations of such a community, in particular:

- (i) verbal expressions such as folk tales, folk poetry and riddles;
- (ii) musical expressions, such as folk songs and instrumental music;
- (iii) expressions by action, such as folk dances, plays and artistic forms or rituals;

whether or not reduced to a material form; and

- (iv) tangible expressions, such as:
 - (a) productions of folk art, in particular drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes;
 - (b) musical instruments;
 - (c) architectural forms.

Traditional Cultural Expressions and the Need to Protect Them

❖ The need to protection these expressions -

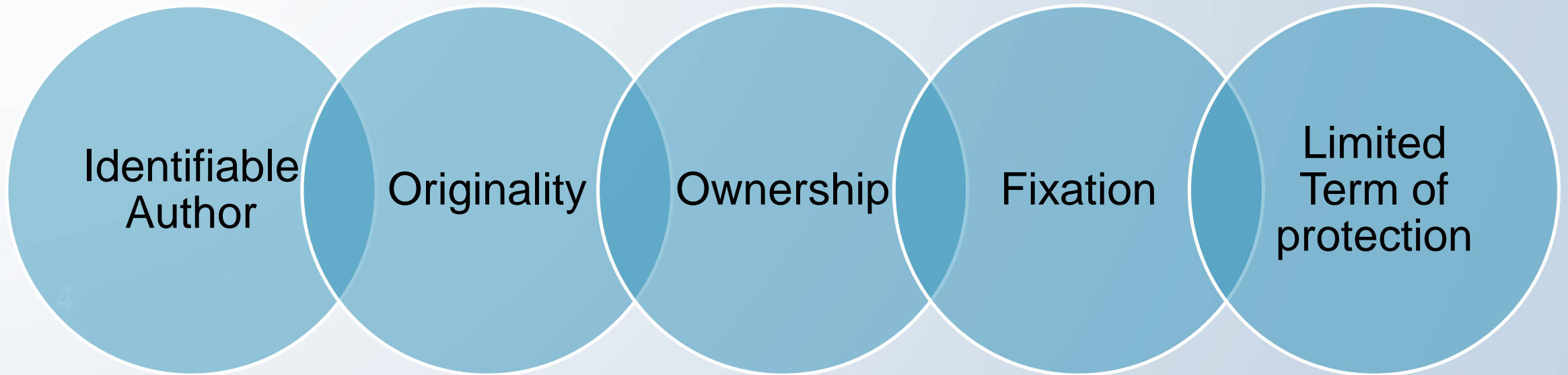
- Identity to the society
- Misappropriation and misuse (used in ways that are insulting, degrading and/or culturally offensive)
- Preservation of the distinctiveness of the community identity
- Commercialization without sharing of economic benefits

❖ International Efforts

- WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore- established in 2000
- UNESCO-WIPO Model Provisions, 1982
- The Berne Convention for the Protection of Literary and Artistic Works, 1886 was amended in 1967 to introduce Article 15.4
- The Tunis Model Law on Copyright for Developing Countries, 1976 enacted jointly by the WIPO and UNESCO.
- The WIPO Performances and Phonograms Treaty (WPPT), 1996

Copyright Law as a Means to Extend the Protection of TCEs

- ❖ TCEs for which protection is desired constitute the subject matter of copyright protection.
- ❖ **Requirements under Copyright Law:**



Copyright Law as a Means to Extend the Protection of TCEs (Contd.)

❖ Relevant legal provisions from the Berne Convention, 1886:

- **Article 7(3):** *“The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years.”*
- **Article 2(1)** provides that protected works must be intellectual creations.”
- **Article 7(1):** *“The term of protection granted by this Convention shall be the life of the author and fifty years after his death.”*
- **Article 7(6):** *“The countries of the Union may grant a term of protection in excess of those provided by the preceding paragraphs.”*
- **Article 2(2):** *“It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.”*
- **Article 15(4) :** *“...unpublished works where the identity of the author is unknown...designate the competent authority who shall represent the author...”*
- **Article 17:** *“The provisions of this Convention cannot in any way affect the right of the Government.”*

Copyright Law as a Means to Extend the Protection of TCEs (Contd.)

❖ Relevant legal provisions from the Copyright Act, 1957:

- **Section 2** - Definition of artistic work, dramatic work, engravings, literary work, musical work, work of sculpture.
- **Section 13** - Works in which copyright subsists.
- **Section 14 (c)** - Meaning of copyright.
- **Section 17** - First owner of copyright.
- **Section 22 and 23** - Term of copyright.
- **Section 51** - Copyright when infringed.
- **Section 55** - Civil remedies for infringement of copyright.

Relevant Judicial Decisions

- ❖ ***Periyambadi Narasimha Gopalan v. Secretary to Government, Tourism, Culture and Religious Endowments Department and Ors.*** [MANU/TN/4081/2021]
 - Temples, murals to paintings, sculptures to scriptures, made of lime mortar to clay bricks, from stones to rocks- “*symbols of cultural expressions*”.
- ❖ ***Eastern Book Company and Ors. v. D.B. Modak and Anr.*** [AIR 2008 SC 809]
 - Principle of a minimal degree of creativity.
- ❖ ***R.G. Anand v. Deluxe Films and Ors.*** [[1979] 1 SCR 218]
 - Originality only in form but not in idea.
- ❖ ***The Academy of General Education and Ors. v. B. Malini Mallya*** [2009 (2) KCCRSN 58]
 - “*In order to obtain copyright for literary, dramatic, musical and artistic works, the subject dealt with need not be original nor the idea expressed be something novel, but what is required is the expenditure of original skill or labour in execution and not originality of thought.*”

Relevant Judicial Decisions (Contd.)

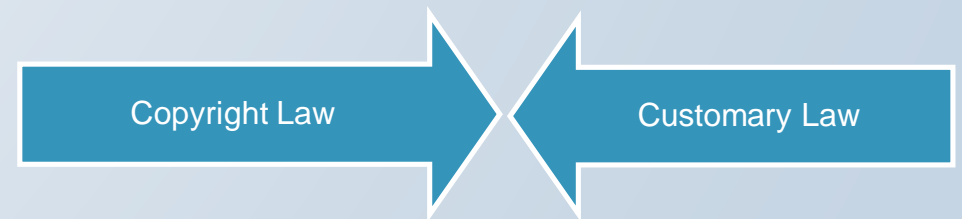
❖ *Milpurrurru, Payunka, Marika & Others v. Indofurn Pty Ltd* [30 IPR 209 at 210] *a.k.a Carpet Case*

- Aboriginal artists including Banduk Marika
- Her work was copied directly from an educational portfolio produced by the National Australian Gallery.
- Commercialisation of Traditional Knowledge
- Communal Ownership - Customary laws - Decision-making and Consent
- Infringement –
 - i) Did copyright subsist in the Indigenous artworks?
 - ii) Were the carpets infringing copies of the Indigenous artworks?
- Court ordered –
 - i) Damages
 - ii) Delivery up



Alternative Protection?

- ❖ Protecting neighboring rights.
 - **Section 38 & 39 of the Copyright Act, 1957** - Performer's rights
- ❖ Protecting expressions of underlying ideas of TCEs?
- ❖ Geographical Indications of Goods (Registration and Protection) Act, 1999.
- ❖ Constitution of India under Article 29 (1) states that *“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.”*
- ❖ Sui generis system?



THANK YOU!

Questions?

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