ISSN 3139-8839 (Online)

Copyright's Colonial Blindness: Protecting Traditional Cultural Expressions in India Through Sui Generis Rights

By *Mohd Sufiyan Ahmad*

VOLUME I | ISSUE II | ARTICLE IV
APRIL 2026
The Legalis IP Quarterly

ABSTRACT

India's traditional cultural expressions (TCEs), including the Warli paintings, Baul songs, and Sohrai folk art, signify the collective, orally-transmitted heritage with profound cultural and economic value. However, India's Copyright Act of 1957, an archaic legislation intended for individual creators and works fixed in a physical form for a certain period, cannot protect such TCEs in any way. The Act's conditions of identification of the author, the work's originality, and fixation of the latter in the physical form are contradictory to the nature of the TCEs mentioned above. There is no possibility of invoking section 57 moral rights by communities to avoid the distortion and exploitation of their cultural heritage.

The Traditional Knowledge Digital Library, which is India's most significant measure for protecting traditional knowledge, deals with patent misuse and does not tackle copyright violations. The nature of this database, which concentrates on knowledge that is medicinal and scientific in character, and its very defensive nature of avoiding false patents, makes it totally irrelevant in the context of the exploitation of folk music, art, and rituals through recordings by music recorders and publishers. Even the provisions of the Biological Diversity Act of 2002 regarding collective ownership are insufficient for TCEs.

Using a case study of Baul Music of West Bengal, the paper illustrates how the absence of authorship, lack of fixation, and communal ownership expose such traditions to exploitation in the absence of any benefit sharing or moral justification. Based on the Swakopmund Protocol of the African Regional Intellectual Property Organisation and WIPO Draft Provisions, the paper sets forth a detailed sui generis regime that includes such elements as communal trusteeship, lack of any requirement of fixation and formality, prior informed consent, mandatory benefit-sharing, perpetual protection, and recognition of customary law. The paper takes into account some of the challenges posed by the constitution, including the issue of striking a balance between the right to property and freedom of trade under Article 19(1)(g).

Keywords: Traditional Cultural Expressions, Sui Generis Protection, Communal Custodianship, Prior Informed Consent, Traditional Knowledge Digital Library (TKDL)

I. Introduction

The rich and extensive cultural tradition of India is marked by a rich pool of Traditional Cultural Expressions (TCEs) in the form of folk songs, epic tales, rituals, indigenous artistry and crafts that have been preserved over several generations. TCEs like Warli paintings, Baul songs, Sohrai art and the Jagannath Temple ritual are not only part of a dying cultural tradition but have continued to preserve the community identity, spiritual belief system and the local economy. The irony lies in the fact that even as these cultural resources become increasingly valuable in the international markets through their use in fashion, film, and recordings, they become increasingly vulnerable to exploitation[1].

Such weakness arises due to the basic incompatibility between the structures of the intellectual property regime in India and those of TCEs. The Indian Copyright Act of 1957, which is essentially a product of colonial law based on the traditions of English law, was meant to protect individual, fixed, and temporal works of authorship. These basic tenets of the law, authorship, originality, fixation in a tangible medium, and temporality are directly opposed to TCEs.

The Act first necessitates the existence of a known "author" under Section 2(d)[2], whether individual or joint, and then bestows ownership upon such an author under Section 17. However, expressions of traditional culture that arise from communities over centuries are either anonymous or attributed to some mythical being, making it difficult to identify a specific creator. Second, Section 13 states that the work should be "original", which, according to the interpretation of Indian courts, is done using the "modicum of creativity" test, which involves individual skill and judgment[3]. This requirement is not met by TCEs as they are traditional and repetitive. Third, fixation in "material form" is the requirement for the applicability of copyright protection. Folk songs, stories, and rituals that are orally performed do not fall within the scope of the act. Finally, Section 22 – 24 provides for a time limit, generally the life of the author plus sixty years, after which the works go into the public domain. For those communities that consider their cultural expressions sacred and perpetual, the concept of time limitation does not fit in well.

The inadequacy is also present in moral rights under Section 57, which confer rights of paternity and integrity upon individual "authors" alone; communities cannot claim these rights to stop the distortion of their culture and traditions. Even when the performances in question are recorded, the performer's rights under Section 38 can be claimed only for that particular

[1] World Intell. Prop. Org., *Intellectual Property and Traditional Cultural Expressions/Folklore*, WIPO Booklet No. 1 (2005), https://www.wipo.int/edocs/pubdocs/en/tk/913/wipo_pub_913.pdf.

[2] Copyright Act, No. 14 of 1957, § 2(d), India Code (1957).

[3] Copyright Act, No. 14 of 1957, § 13, India Code (1957); *Eastern Book Co. v. D.B. Modak*, (2008) 1 S.C.C. 1, ¶ 38 (India).

performance alone and not the traditional musical work behind it, irrespective of whether the performer is from the original community or an outsider. The Act thus fails to protect the "base work" while providing protection to the "derivative works."

Additionally, the Traditional Knowledge Digital Library (TKDL), which is the primary defence strategy adopted by India in regard to the protection of traditional knowledge, is essentially a patent tool and not a copyright protection mechanism. Created in 2001 after the controversies involving patents on turmeric and neem[4], TKDL contains the information on traditional medicinal formulations of more than 515,788 such formulations from Ayurveda, Unani, Siddha, Sowa Rigpa and Yoga[5], in a total of five international languages, in order to help in rejecting incorrect patent applications. This system has resulted in the rejection, modification or withdrawal of 375 such patent applications[6]. However, TKDL is not applicable to any copyright claim on folk art, music or ceremonies, since its database consists of only medicinal and scientific knowledge and not TCEs, and is accessible only by patent examiners through non-disclosure agreements.

In this paper, we suggest an urgent need for India to formulate a sui generis system, which is independent of the Copyright Act and suited to the nature of Traditional Cultural Expressions. With reference to some comparative approaches, especially the Swakopmund Protocol of the African Regional Intellectual Property Organization (ARIPO)[7], and the proposed provisions formulated under the aegis of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) in World Intellectual Property Organization (WIPO), this paper presents a proposed legal framework recognizing the concept of custodianship, providing procedures of prior informed consent, making benefit sharing mandatory, and guaranteeing perpetual protection. By examining the case of Baul music from West Bengal, as well as critically analysing the existing laws, this paper shows how legislative reform becomes a necessity.

II. The Inadequacy of the Indian Copyright Act, 1957

The Indian Copyright Act of 1957, a product of the colonial era and rooted in the tradition of English law, is crafted to safeguard individual, concrete and finite creations. The essential elements that are the bedrock of such an act, namely, identifiable authorship, originality, fixation in a tangible medium, and temporal limitation, etc., are inherently at odds with the very essence of Traditional Cultural Expressions (TCEs). Such a mismatch makes the act ineffective in protecting India's precious intangible heritage. As documented by the World Intellectual Property Organisation, existing intellectual property frameworks were designed for individual creators producing fixed, original works and are structurally ill-suited to protect traditional

[4] Traditional Knowledge Digital Library, *About TKDL*, https://www.tkdl.res.in (last visited July 1, 2026).
[5] *Id.*
[6] Traditional Knowledge Digital Library, *Achievements*, http://www.tkdl.res.in (last visited July 2, 2026).
[7] *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore* art. 2, Aug. 9, 2010, ARIPO, https://www.wipo.int/wipolex/en/treaties/details/294.

cultural expressions, which are characterised by communal creation, oral transmission, and perpetual evolution[8]. provisions. This section carefully analyses each such doctrinal failure.

A. The Individual Authorship Requirement

Section 2(d) of the Copyright Act gives a definition of "author" separately for each type of work, like a composer for musical works, an artist for artistic works. Section 17 gives the first owner of the copyright as the identifiable author or the person or organisation commissioning the work. However, TCEs have no identifiable author; instead, they are created, adapted, and passed down anonymously through generations. This difficulty is recognised in the Swakopmund Protocol, which defines expressions of folklore as "products of creative and cumulative intellectual activity such as collective creativity or individual creativity when the identity of the individual is unknown"[9]. Even in cases where a certain folk tradition is associated with some identified personality, like the Baul songs of West Bengal, which were composed by Lalon Fakir, the fundamental traditional element of this folk creation is communal in origin. The Act does not provide for such an arrangement. Furthermore, the "originality" requirement under the Act, in the interpretation of the Indian courts in Eastern Book Company v. D.B. Modak, demands "skill and judgment" of the individual creator[10], which cannot be met by TCEs.

B. The Fixation and Formalities Requirement

Section 14 assumes a "material form" in which the work is fixed for the copyright to exist. TCEs that are orally conveyed, including folk songs, oral histories, and rituals that are performed live, have no place within the jurisdiction of the Act whatsoever. In sharp contrast, the Swakopmund Protocol states that the "expressions of folklore" include "musical expressions, such as but not limited to songs and instrumental music" and "expressions by movement, such as but not limited to dances, plays, rituals and other performances; whether or not reduced to a material form". Even when folk songs are recorded, copyright only applies to the recording itself as a sound recording under Section 27, which has a 60-year term, and not to the song itself as a traditional composition. The performer's rights under Section 38 may offer some degree of protection for the individual performers themselves, but not for the community that produced and maintained the tradition. As scholars have noted, the fixation requirement is the primary structural barrier preventing oral traditions and Intangible Cultural Heritage from qualifying for copyright protection under Indian law[11].

---

[8] WIPO Intergovernmental Comm. on Intell. Prop. & Genetic Res., Traditional Knowledge & Folklore, *Draft Provisions for the Protection of Traditional Cultural Expressions* (rev. 2004), https://www.wipo.int/en/web/igc/draft_provisions.

[9] *Swakopmund Protocol*, *supra* note 7, art. 2.

[10] *E. Book Co. v. D.B. Modak, supra* note 3, ¶ 38.

[11] Mira T. Sundara Rajan, Moral Rights: Principles, Practice and New Technology 214–17 (2011); Debmita Mondal, *Protection of Traditional (Tribal) Cultural Expressions in India vis-à-vis Indian Copyright Regime*, 2024 ILI L. Rev. 111.http://www.ili.ac.in/pdf/7sum24.pdf.

C. The Limited Term of Protection

Sections 22-24 grant a copyright duration of life + 60 years[12] or, in the case of anonymous works, 60 years after the date of their first publication. However, TCEs are inter-generational and timeless and hence will always be characteristic of the cultural identity of a particular community. Indeed, the Swakopmund Protocol takes into consideration this truth by granting indefinite protection for expressions of folklore "as long as they remain characteristic of a community's cultural identity and traditional heritage and maintained, used or developed by such community". The limited nature of the term provided in the Indian Act means that any folk song registered is bound to expire and become part of the public domain.

D. The Absence of Communal Moral Rights

Section 57 grants[13] moral rights of paternity and integrity, but to "individual authors" alone. The community cannot exercise these rights to protect against any distortion, misrepresentation, or derogatory treatment of its cultural heritage. The practical effect of this lacuna is demonstrated by the fact that in 2023, two prominent Indian music producers, Saregama and T-Series, released songs composed by the late Bangladeshi Baul singer, Shah Abdul Karim, without authorisation and labelled them as "traditional" folk music—a misappropriation that the family of Shah is contesting. Under Indian laws, the family may be able to seek performers' rights or copyright for the particular recording, but not for the underlying traditional composition.

E. The Failure of Judicial Interpretation

The structural inadequacy of Indian copyright law for protecting TCEs is not merely a domestic observation. Farida Shaheed, UN Special Rapporteur in the Field of Cultural Rights, in her landmark report to the Human Rights Council, found that copyright frameworks built on individual authorship systematically fail to accommodate collective and community-based forms of cultural expression[14], and recommended that states consider sui generis or complementary legal regimes for indigenous and traditional cultural heritage. The Genda Phool controversy (2020)[15] further illustrates the judicial void: when rapper Badshah commercially exploited Ratan Kahar's Bengali folk composition "Boroloker Biti Lo" without credit or compensation, Kahar—living in poverty in Birbhum—stated he had "no money to drag anyone to court."[16] No case was ever filed. This is not a failure of litigation strategy; it is a structural consequence of a copyright law that never recognised Kahar's folk composition as protectable

[12] Copyright Act, No. 14 of 1957, §§ 22–24, India Code (1957).
[13] Copyright Act, No. 14 of 1957, § 57, India Code (1957).
[14] Human Rights Council, Rep. of the Special Rapporteur in the Field of Cultural Rights, Farida Shaheed, U.N. Doc. A/HRC/28/57, ¶¶ 22–25 (Dec. 24, 2014).
[15] Anupriya Dhonchak, *Badshah's Genda Phool Controversy – Cultural Appropriation, Cumulative Creativity and Copyright Law*, (Apr. 7, 2020),https://spicyip.com/2020/04/spicyip-fellowship-badshahs-genda-phool-controversy-cultural-appropriation-cumulative-creativity-and-copyright-law.html.
[16] *Id.*

in the first place, since it was orally transmitted, collectively evolved, and never registered in his name.

III. Why the Traditional Knowledge Digital Library (TKDL) Is Irrelevant to TCE Copyright Protection

A. Origins and Purpose of TKDL: A Defensive Patent Database

The TKDL was founded in 2001 as an effort from both the Council of Scientific and Industrial Research (CSIR) and the Department of Indian Systems of Medicine and Homoeopathy (now AYUSH). Its foundation was the direct consequence of the misappropriation of Indian traditional knowledge through patents granted on the basis of wrong information; the three instances include the turmeric (revoked USPTO patent on its wound healing property)[17], neem (patent revoked by the EPO on its fungicidal property)[18], and basmati rice (withdrawal of claims made by RiceTec) cases[19]. These examples proved that the documented traditional knowledge of India was not being used as prior art by patent offices because of its documentation in the local languages of India, including Sanskrit, Hindi, Arabic, Persian, Urdu, and Tamil.

TKDL has been created precisely for bridging this gap. As a prior art database, it has encoded data from ancient writings of Ayurveda, Unani, Siddha, Sowa Rigpa and Yoga into five international languages – English, German, Spanish, French, and Japanese, totalling more than 515,788 formulations and methods. This database uses a novel classification system called the Traditional Knowledge Resource Classification (TKRC), making concordance with the International Patent Classification (IPC) in order to make searches easy and effective for the patent examiners. Access to the TKDL has been granted to all patent offices in the world that entered into a non-disclosure agreement for access with CSIR; presently, there are 17 such patent offices, including the EPO, USPTO, JPO, and UKIPO. So far, 375 patent applications have been rejected, withdrawn or amended based on TKDL evidence.

B. The Fundamental Distinction: Defensive Patent Protection vs. Positive Copyright Protection

The efficacy of the TKDL in the patent arena masks an important restriction, since TKDL is a tool for defensive protection, which aims at preventing third parties from claiming IP rights on the existing information, rather than a system for providing positive protection that offers exclusive rights and facilitates benefit-sharing. In accordance with CSIR-TKDL Unit, "defensive protection through codification will help in preventing third-party claims of IP ownership rights;" however, "in the absence of such provisions, the fears of unethical use of

[17] U.S. Patent No. 5,401,504 (issued Mar. 28, 1995), *re-examination certificate cancelling all claims* (Aug. 13, 1997).
[18] European Patent No. 0436257 (revoked by EPO Opposition Div. May 2000).
[19] U.S. Patent No. 5,663,484 (issued Sept. 2, 1997) (claims narrowed following USPTO re-examination, 2001).

oral and undocumented TK persist". The relevance of TKDL is limited to patent applications; it is unable to stop the exploitation of TK by record labels, publishers, or fashion brands.
The difference between TKDL and the traditional knowledge becomes apparent from an analysis of the legal grounds for TKDL's functioning. TKDL contains the information about the traditional knowledge gathered, compiled, transcribed, and translated by researchers. Although CSIR can have copyright over the database as a compilation (organisation and selection of materials), it does not own the traditional knowledge contained within. The information contained in the TKDL cannot be used for the purpose of patenting any products, but it can be freely used for making audio records of traditional folklore, designing fashion lines inspired by tribal ornaments, and publishing coffee table books with illustrations of Warli paintings. The Traditional Knowledge Digital Library, in its current form, serves no commercial interests of the indigenous people and provides no opportunity for proper use of the traditional knowledge in return for money.

C. The Subject-Matter Gap: TKDL's Focus on Medicinal and Scientific Knowledge

The subject matter in the TKDL is limited to Indian Systems of Medicine (ISM) only, such as Ayurveda, Unani, Siddha, Sowa Rigpa, and Yoga practice and related medicinal plants information. It includes formulations, techniques and surgery of these systems. For example, the database of the Unani medicine alone consists of more than 264,196 formulations obtained from 14 classic Unani books. The concept itself of TKDL ignores Traditional Cultural Expressions, which comprise folk music, dance, oral literature, rituals, tribal paintings, textile technology and craftsmanship—the whole gamut of intangible culture of India. The WIPO distinction between the TK and TCEs is thus operational in the design of the TKDL, protecting one and completely ignoring the other. TK may include "know-how, practices, skills and innovations", whereas TCEs cover "artistic or cultural expressions such as music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives". There is no provision in the TKDL for documentation and preservation of any oral musical traditions that form the very identity of the indigenous groups who are threatened by their commodification, misuse and cultural misappropriation.

D. The Fixation Paradox: TKDL as Unintentional Facilitator of Misappropriation

One very alarming feature of the irrelevance of the TKDL for the protection of the TCEs is the requirement for fixation in the Copyright Act, 1957. Section 14 assumes that the work should be "fixed in material form" in order for copyright to arise. Oral folk songs, stories, and rituals, which are performed orally, have traditionally not been under the ambit of the Act. Ironically, if the TKDL were to document the TCEs within its mandate, it might unintentionally fix the works, leading to claims of copyright in respect of such documentation made by third parties. This poses a big problem with folk music, where the record labels have traditionally considered the traditional songs to be "public domain" and copyrighted the recording, and the source community gets nothing in return.

E. The Access Restriction: Public Exclusion and Benefit-Sharing Deficit

However, the TKDL is not open to the public. It contains information available only to patent examiners who have signed confidentiality agreements. In the process of ensuring protection from misappropriation via patents, the TKDL denies the communities an opportunity to access the database and claim their rights. As documented by Abraham and Marda in their analysis published by the Global Information Society Watch, "in the present scenario, the working of the TKDL system lacks commercial advantages. It was not meant to benefit the indigenous communities commercially, nor could it facilitate the use of the information through monetary exchange".[20] Since there's no access and benefit sharing mechanism within the framework of TKDL, the commercial exploitation of documented traditional knowledge in any form generates no income for the holders of that knowledge. The Biological Diversity Act, 2002, which provides access and benefit-sharing mechanisms regarding biological resources and traditional knowledge related to them, does not apply to TCEs, thereby leaving a legal gap.

IV. Case Study: Baul Music of West Bengal

A. Background and Cultural Significance

Baul music constitutes a living and syncretic musical tradition of Bangladesh and West Bengal of India that embodies a philosophy which is beyond caste, creed, and the physical world. It is an embodiment of mysticism, in which Baul songs stress the importance of finding the divine essence within man through poetry. Baul is a mystical singer who lives near a village or moves from one place to another singing his songs accompanied by the string instrument known as ektara, the lute dotara, and dubki, a drum. The religious songs of Bauls have a long history dating back to the fifteenth century when they were first composed in Bengali literature. In 2008, UNESCO listed Baul songs[21] as part of the Representative List of the Intangible Cultural Heritage of Humanity due to their impact on Bengali culture, including the works of Rabindranath Tagore, the Nobel laureate.

B. The Fluid Nature of Authorship and Transmission

The Baul tradition throws down some basic challenges to the notions of authorship in copyright law. Baul music is passed on orally through a guru-sadhak relationship, performed in a context that is both personal and community-based. The language in which the music is written undergoes constant renewal, thus rendering it relevant to the contemporary world. Such an oral

[20] Sunil Abraham & Vidushi Marda, *The Digital Protection of Traditional Knowledge: Questions Raised by the TKDL in India*, in Global Info. Soc'y Watch (2016), https://www.giswatch.org/en/economic-social-and-cultural-rights-escrs/digital-protection-traditional-knowledge-questions-rais.

[21] UNESCO, *Baul Songs*, Intangible Cultural Heritage Lists, https://ich.unesco.org/en/RL/baul-songs-00107 (last visited July 1, 2026).

transmission of the music cannot help but give rise to variations, since each performer would give their own interpretation of the music based on the social environment of transmission.
The notion of authorship in Baul music is an extremely flexible and complicated matter. Indeed, the Bhanita inscribed within Baul songs is "far from being a definite signature ascribed to a historical person or a fixed identity." For example, the name of the Fakir Lalon was often employed as the signature by other people, when the signature functioned rather as the "authority than authorship." As one of the scholars has mentioned, "whoever hears and interprets a Baul song is the co-author with the lyricist and co-composer with the composer." Thus, "folk songs have texts but no text, tunes but no tune."

C. The Commodification and Legal Void

With the entry of Baul music into the commercial records business, there has emerged "an unprecedented awareness about authorship and copyright". The followers of the Baul gurus have started realising the need for preserving the compositions of their gurus as property rights. However, the law of copyright does not address this situation well.
The basic problem is apparent from the recent case of Inreco Entertainment Private Limited v. Bhikari Bal Foundation and Anr[22]. Here, the plaintiff claimed rights in the literary, musical and sound recording of the Odissi devotional song, "Sathi Pauti Bhoga," by virtue of assignments made by the original singer-composer, Bhikari Bal. However, the respondents denied these claims, stating forgery of signatures, as well as claiming that the agreement had been for a limited period only. It should be noted here that the court did not look at the issue of traditional ownership; nonetheless, the case shows us how copyright infringement cases for folk music are always fought by commercial organisations and never by the source community.

D. The "Traditional Music" Misappropriation

Perhaps the worst instance of the misuse of Baul music lies in the appropriation of Shah Abdul Karim, an acclaimed Baul composer from Bangladesh who passed away in 2009. It emerged in October 2023 that two major Indian music labels, namely Saregama and T-Series[23], were releasing the songs of Karim on YouTube, Spotify, and other social media channels without seeking approval from his family members for many years. Particularly, T-Series marketed the song "Agey Ki Shundor Din Kataitam"[24] as a "traditional" folk song without even mentioning the name of Karim, who composed it originally. The son of Karim, Shah Nur Jalal, who copyrighted the song in Bangladesh, filed complaints to the Bangladesh Copyright Office against the two labels.
Copyright experts view this as a form of "theft" and "terrible crime," emphasising that "releasing songs without taking permission from the copyright owner is indeed called 'theft'[25].

---

[22] *Inerco Ent. Pvt. Ltd. v. Bhikari Bal Found.*, IP-COM/51/2024 (Cal. H.C. Sept. 22, 2025) (India).
[23] *Folksong: Shah Abdul Karim's Songs Passed Off as 'Traditional Music'*, Prothom Alo (Eng. ed.) (Oct. 6, 2023), https://en.prothomalo.com/entertainment/music/lvxs10hubh.
[24] *Id.*
[25] *Id.*

According to an expert, "The fact that it's a song created by Shah Abdul Karim doesn't need any more proof. The song has Shah Abdul Karim's name in it. He performed the song for decades throughout his lifetime".
However, this phenomenon is not restricted to just Shah Abdul Karim. Folk singer from Kolkata, Pousali Banerjee said, "Similarly, the songs of Lalon, Radharaman Dutta, or Hason Raja have also been passed as traditional music"[26]. In this regard, she said, "It is wrong to pass any folk song as 'traditional music' as if folk songs are some orphan children without their parents. Before distributing any folk song, one should find out its parent."

E. The Inadequacy of Performer's Rights

According to the Copyright Act, 1957, the Baul singer gets the rights of a performer and moral rights rather than copyrights. Sections 38, 38A, and 38B[27] have laid down that performers' rights "are parallel to those enjoyed by copyright but are weaker neighbours." It is essential to note here that the rights of performers are applicable only in case of live performances, while after incorporating the live performance into a sound recording or a visual-audio production, the performance ceases to be a live one. Therefore, a performer is entitled to any fee that has been fixed for their performance, but is not entitled to any royalty for playing the record of the performance.
As per Section 2(d)(a), "performer" means "actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance." This definition of 'performer' is individualistic as it only protects the individual performer rather than the whole community, which created and nurtured the particular tradition. In addition to this, the amendment of 2012 has included a proviso excluding "any person whose performance is casual or incidental in nature in a cinematograph film."

F. The Community as an Invisible Rights-Holder

Despite having legal protection for copyrights, the Baul community continues to be invisible in terms of the law as a repository of their music. Despite obtaining copyright registration for their music on behalf of his father's music by Shah Nur Jalal, the actual traditional music itself continues to be left without any protection whatsoever. The HIPAMSINDIA project (Heritage Sensitive Intellectual Property and Marketing Strategies, India)[28] has worked with the Baul and Fakiri music traditions, Chau dance and Patachitra traditions "to explore the potential for developing 'heritage-sensitive' IP protection strategies to give communities more control over the commercialisation of their heritage". However, the traditional intellectual property system provides "limited protection for authors of original works or inventions that cannot be readily used to provide protection for cultural expressions whose authors are unknown and which have been developed through the generations."[29]

---

[26] *Id.*
[27] Copyright Act, No. 14 of 1957, §§ 38, 38A, 38B, India Code (1957).
[28] *About HIPAMSIndia*, HIPAMS India, https://hipamsindia.org/about/ (last visited July 5, 2026).
[29] *Id.*

Thus, the example of the Bauls shows the actual insufficiency of the legislation regarding copyright laws in practice. Unnamed authors, fluid transmission, non-fixation, and no community ownership make Bauls' music prone to appropriation by commercial companies without sharing profits, attribution, or any other moral consideration. As the article in Prothom Alo noted, resolving the problem of such misappropriations is possible only through collaboration[30]; in particular, the Bangladesh Copyright Office could file a complaint to the Copyright Office of India, and they could handle the issue according to the Universal Copyright Convention. But this tedious process solves particular cases of infringement rather than the legislative issue as such.

V. Comparative Analysis: The Swakopmund Protocol and WIPO Draft Provisions

A. The Swakopmund Protocol: A Sui Generis Model from the African Regional IP Framework

ARIPO adopted the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore on August 9, 2010[31], after years of consultations between member states. The Protocol came into force on May 11, 2015, after meeting the requirements for ratification. According to WIPO Director General Francis Gurry, the Protocol marked "a significant milestone in the evolution of intellectual property"[32].

The Protocol stands out because of its departure from the individualist, fixation-centred, and temporal paradigm of intellectual property law. It is a sui generis approach that takes into account the "specificities of traditional knowledge and expressions of folklore, including their collective and communal aspect, their intergenerational development, preservation and transmission, their relationship to the identity and integrity of a community's culture and social life, and their spiritual or moral significance and values". The Preamble recognizes the need for protection of "the continuing customary use, development, exchange and transmission" of TCEs and the need to recognize "customary custodianship". By 2025, nine ARIPO member states had become parties to the Protocol: Botswana, The Gambia, Liberia, Malawi, Namibia, Rwanda, Zambia, and Zimbabwe[33].

---

[30] *Prothom Alo*, *supra* note 23.

[31] ARIPO, *Entry into Force of the ARIPO Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore* (2015), http://www.aripo.org/news-events-publications/news/item/54-entry-into-force-of-the-aripo-swakopmund-protocol-on-the-protection-of-traditional-knowledge-and-expressions-of-folklore.

[32] Emmanuel Sackey, *A New Dawn for Custodians of TK in Africa*, WIPO Magazine (2010), https://www.wipo.int/en/web/wipo-magazine/articles/a-new-dawn-for-custodians-of-tk-in-africa-37546.

[33] *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore* pmbl., art. 2, Aug. 9, 2010, ARIPO, wipo.int; *see also* Office of the Special Adviser on Africa, *Policy Brief: Unlocking the Value of Africa's Intangible Assets*, United Nations, 13 n.34 (Mar. 15, 2023), https://www.un.org/osaa/sites/default/files/2026-04/policy_brief_unlocking_the_value_of_intangible_assets_in_africa.pdf (confirming the nine specific contracting states party to the regional framework)

B. Key Provisions: A Comparative Analysis

The Protocol states in Section 2.1[34] that "expressions of folklore shall mean any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested". These include verbal expressions such as stories, epics, poetry, riddles, words, signs, names, and symbols; musical expressions in the form of songs and instrumental music; expressions through movement, including dances, plays and rituals; and tangible expressions in the form of drawings, paintings, carvings, sculptures, pottery, textile work, and costumes. Importantly, oral traditions are included here—songs that are not "reduced to a material form" are protectable under this definition.

Under Section 16[35], TCEs should:

(i) be "generated, preserved and transmitted in a traditional and intergenerational context";

(ii) be "distinctively associated with a local or traditional community"; and

(iii) be "integral to the cultural identity of a community that holds the knowledge through custodianship, guardianship or collective and cultural ownership or responsibility as determined formally or informally by customary practices, laws or protocols". This is a sharp contrast to the Copyright Act requirement of individual authorship and originality.

Additionally**,** Section 18[36] refers to the beneficiaries as "the local and traditional communities, and recognised individuals within such communities, who create, preserve and transmit" TCEs. This transfers the ownership of TCEs from the individual to the community, which is one of the primary flaws with the Copyright Act. Section 17.1[37] provides that "protection of expressions of folklore shall not be subject to any formality." This is a significant change from the fixation requirement of copyright law. Under section 19.2, "the beneficiaries of a protected expression of folklore have exclusive rights to prevent anyone from exploiting the expression without prior informed consent". Section 9.1 obligates the beneficiaries to share 'benefits arising from the commercial or industrial use' of TCEs[38]. Section 21[39] provides indefinite protection: "TCEs are protected for as long as they remain characteristic of the community's cultural identity and traditional heritage." Section 8.1[40] specifies that "traditional knowledge belonging to a local or traditional community may not be assigned."

C. WIPO Draft Provisions: Complementary International Framework

[34] Swakopmund Protocol, *supra* note 7, § 2.1.
[35] Swakopmund Protocol, *supra* note 7, § 16.
[36] Swakopmund Protocol, *supra* note 7, § 18.
[37] Swakopmund Protocol, *supra* note 7, § 17.1.
[38] Swakopmund Protocol, *supra* note 7, §§ 19.2, 9.1.
[39] Swakopmund Protocol, *supra* note 7, § 21.
[40] Swakopmund Protocol, *supra* note 7, § 8.1.

WIPO IGC on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC) has formulated Draft Articles on TCE protection through various sessions. During IGC 50 (March 2025), the IGC reviewed consolidated texts, but it failed to establish any consensus[41]. However, the Draft Provisions present important guidelines.

Draft Article 1: "Any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested", constitute TCEs[42].

Draft Article 3: It provides for three different options for TCE protection: TCEs that have great value and are registered; Protection from general uses without PIC; protection from distortion; and does not allow IP rights without authorisation[43].

Other TCEs: Regulation of use by third parties with appropriate attribution and remuneration in case of commercial use.

Secret TCEs: Protection from their unauthorised disclosure and subsequent uses.

Draft Article 10 (Complementarity): The sui generis protection is "complementary" to copyright—communities may make use of copyright for derivatives, but traditional components are under sui generis protection[44].

D. Significance for India

The Swakopmund Protocol clearly illustrates the feasibility of a sui generis system both legally and institutionally. There is a ready-made model that can be used by India through institutional arrangements (Section 3—National Competent Authority), community representation mechanisms, and procedures for PIC and benefit-sharing. The Protocol's acceptance of customary law and community custodianship effectively solves the problems inherent in the Copyright Act that are individual authorship, fixation, limited duration, and lack of community rights.

VI. Proposed Sui Generis Framework for India

A. Guiding Principles and Constitutional Foundation

The proposed framework needs to be constructed around seven basic principles arising out of the Swakopmund Protocol and WIPO Draft Provisions: communal ownership, no fixation requirement, no formalities, prior informed consent (PIC), compulsory benefit-sharing, perpetual protection, and recognition of customary laws. All these principles specifically respond to the structural weaknesses in the Copyright Act. The proposed framework is constitutionally sanctioned through Articles 29 (right to protect cultural rights), 51A(f) (duty

[41] WIPO INTERGOVERNMENTAL COMM. ON INTELL. PROP. & GENETIC RES., TRADITIONAL KNOWLEDGE & FOLKLORE, Fiftieth Session, WIPO/GRTKF/IC/50 (Mar. 3–7, 2025), https://www.wipo.int/meetings/en/details.jsp?meeting_id=85308.

[42] WIPO Draft Provisions, *supra* note 8, art. 1.

[43] WIPO Draft Provisions, *supra* note 13, art. 3.

[44] WIPO Draft Provisions, *supra* note 13, art. 10.

to preserve heritage), and 49 (right to protect monuments)[45]. Nevertheless, there are certain constitutional issues that need to be considered. First of all, Article 19(1)(g) provides for freedom of trade and can be used against any commercial use of TCEs. Therefore, the proposed framework should prove that these restrictions constitute "reasonable restrictions" under Article 19(6)[46].

B. Legislative Structure: Proposed "Traditional Cultural Expressions Protection Act"

The Act should provide for a broad definition of "Traditional Cultural Expression" in line with WIPO Draft Article 1, including verbal, musical, action-related, and tangible forms of expression, specifically mentioning the inclusion of oral tradition, which is not "reduced to material form." "Community" should include Scheduled Tribes, traditional communities, and folk artist groups recognised by custom, which are based on categories already used in the Forest Rights Act, 2006, and PESA, 1996[47]. Section 3 should define that TCEs are communally owned meaning that no individual may claim exclusive copyright in the traditional elements, only the contemporary modifications can be separately copyrighted (Copyright Act). Guardianship in relation to TCE would involve: the custom dictates the guardianship; in its absence, the Gram Sabha determines ownership. In case of legal disputes, the representatives of the community will be: (i) Chairperson of Gram Sabha; (ii) Registered Society; or (iii) Customary Council. This ensures administrative efficacy by relying on existing institutions.
Section 4 must ensure that without community PIC, TCEs are not reproduced, published, adapted, performed, broadcast, distributed, sold or exported for commercial or non-traditional use. Increased protection for TCEs regarded as sacred/secret involves the prohibition of mere disclosure. Exceptions include non-commercial uses in education and fair dealing as defined under Section 52. Section 5 must make it obligatory to seek PIC in writing and in a language understood by the community. Benefit-sharing must involve commercial users paying equitable royalties into a National TCE Fund or Community Trust as provided for in the Swakopmund Protocol Section 9.1. Community moral rights include rights to attribution and integrity, which are not addressed under individualist Section 57. Section 6 has to give indefinite protection until the community continues to possess the TCE, keeping in view the limited period in Sections 22–24. No formalities are needed. The National TCE Register is an optional mechanism for registration with prima facie evidence of ownership with community-controlled limitations on access to sacred TCEs. Section 7 will have civil remedies (injunctions, damages, and account of profit) and criminal sanctions (maximum 3 years imprisonment for misuse of sacred TCEs)—jurisdiction: Commercial Courts or TCE Tribunals. Communities have locus standi under Gram Sabha, registered societies, or customary councils. Section 8 will specify that the Act is sui generis, the communities can have copyright in the derivative work,

[45] India Const. arts. 29, 49, 51A(f).
[46] India Const. art. 19(1)(g), (6).
[47] Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, No. 2 of 2007, *India Code*(2007), indiacode.nic.in; Provisions of the Panchayats (Extension to the Scheduled Areas) Act, No. 40 of 1996, *India Code* (1996), indiacode.nic.in.

but the traditional element will be protected. This Act prevails over the Copyright Act in case of inconsistency in relation to TCEs.

C. Institutional Mechanisms

The framework demands that (i) the National Authority for TCE Protection under the Ministry of Culture, which will maintain the Register, address disputes and set the benefit sharing rate; (ii) State-level TCE Committee having representation of Scheduled Tribes and folk artists; and (iii) TCE Fund from benefit sharing and government grant. The existing institutional architecture, such as the Ministry of Tribal Affairs, the National Commission for Scheduled Tribes, and the PESA, can help in implementing the same.

D. Addressing Counterarguments

However, these counterarguments should be dealt with in the proposal. Firstly, sui generis protection discourages creativity and cultural exchange as the framework regulates only commercial utilisation without the consent and not non-commercial, customary and educational purposes. Secondly, "Community" is hard to define as Indian law itself acknowledges Gram Sabhas, Scheduled Tribes, and traditional communities through the Forest Rights Act, 2006, and PESA, 1996. Thirdly, an indefinite term violates the principle of public domain as the TCEs are cultural heritage and not "inventions". The public domain argument itself is based on the presuppositions of the Western intellectual property system, which the TCE holders do not agree with. In customary law itself, the external usage is restricted forever, and this framework gives legal effect to those customs. Fourthly, some argue that India can address these gaps through amendments to the existing Copyright Act rather than a standalone sui generis statute. This argument underestimates the architectural constraints imposed by India's Berne Convention obligations. As a Berne signatory, India cannot remove the requirements of individual authorship, originality, and a fixed term of protection from its copyright law without violating treaty obligations. These are not gaps to be filled but foundational pillars of the convention that India has ratified. Only a sui generis framework, operating outside the Copyright Act's Berne-mandated structure, can provide perpetual protection, recognise communal authorship, and eliminate fixation requirements. This is precisely what the Swakopmund Protocol accomplishes and why it is a sui generis rather than an amendment-based instrument.

VII. Conclusion and Recommendations

The Indian Copyright Act, 1957, has been critically analysed and proven ineffective in protecting TCEs in terms of structure. This is because the fundamental requisites of this legislation, which include individual authorship (Section 2 (d)), originality (Section 13), fixation in tangible form (Section 14), and limited period (Sections 22-24), are fundamentally inapplicable to communal, oral and inter-generational cultural expressions. Section 57, which

provides for moral rights to individual authors, provides no help in protecting TCEs in preventing distortion or misappropriation by any community.

As an excellent example of a defensive database for patents, the Traditional Knowledge Digital Library (TKDL) has absolutely nothing to do with any issue regarding copyright misappropriation. This is because of its focus on medicinal and scientific information, and its defensive purpose of avoiding erroneous patent awards does not in any way provide any protection to folk arts, music and rituals. The case study on Baul music proves this point beyond doubt, as anonymity of authorship, flexibility of transmission, non-fixation and absence of community ownership leave such traditions at the mercy of record labels with no benefit sharing or credit.

A comparison of the Swakopmund Protocol with WIPO Draft Provisions shows that a sui generis approach is not only legally sound but also administratively practicable. The issues of communal custodianship, absence of fixation, prior informed consent, compulsory benefit sharing, and indefinite protection found in the Protocol effectively counteract the deficiencies of copyright law.

India needs to adopt a sui generis legislation for the protection of TCEs based on the Swakopmund Protocol and the WIPO draft provisions. This legislation should incorporate principles of communal property rights, no fixation and formality, prior informed consent, benefit sharing in case of commercialisation, and perpetual protection. It should clearly be identified as sui generis, complementary but not substitutive to the Copyright Act for any derivative work. India should set up a National Authority for TCE Protection, institute a National TCE Registry with restricted access control by communities, conduct a national survey of vulnerable TCEs, and adopt mandatory PIC for any commercial exploitation. Evaluate existing copyright registration with regard to TCEs and remove any invalid claims. Heritage-sensitive IP policy approaches adopted by the HIPAMSINDIA project can serve as a model. India should participate actively in IGC negotiations at WIPO despite the deadlock at IGC 50 and enter into bilateral treaties with countries like Bangladesh, Nepal and Sri Lanka for the international protection of common TCEs such as Baul songs.

If there is no legislative change on an urgent basis, the intangible cultural heritage of India will continue to be misappropriated, and the traditional communities of India will continue to remain invisible in law. The provisions of the Copyright Act, with its colonial perspective, do not allow for such collective, oral and generational forms of expression. The TKDL concerns itself with the matter of patents and not that of TCEs. The Swakopmund Protocol clearly indicates that a sui generis regime can indeed be adopted and put into practice. It is time that India adopted the Traditional Cultural Expressions Protection Act.