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PROTECTION OF THE INTEREST OF ARTISANS OF KASUTI HANDICRAFT WITH RESPECT TO GEOGRAPHICAL INDICATION: A CRITICAL ANALYSIS

MS. NIDHI SRIVATSA* & MS. GOWRI MURALI BELWADI**

ABSTRACT

“Creative, but protectively creative.” Women, since time immemorial, have immersed themselves in various kinds of traditional art, specifically handicrafts for a vast range of purposes, be it for financial stability or, at the most, to preserve and propagate their traditional art form. This paper aims at exploring the handicraft of ‘Kasuti embroidery’ which is extensively practiced by the women of the North Canara district of Karnataka. The raison d’être of choosing this traditional art form is to establish the importance of women in the field of ‘Traditional Handicraft’, thereby summing up the protection in intellectual property rights. Often, it can be noticed that this form of artwork gets appreciated verbally instead of being protected in IPR, which results in an ‘all talk, no work’ scenario. Furthermore, this paper aims at striking a balance between the protection of the traditional handicraft of Kasuti work and the protection that is required to be provided to the women involved in this handicraft. To protect the authenticity of Kasuti and safeguard the interest of the people who practice the same, a geographical indication tag was extended to it in the year 2006. This paper aims to analyse whether geographical indication sufficiently protects the interests of the artisans along with that of the art. It further goes on to identify how intellectual property protection can be extended not only to Kasuti work but also to the makers of the same. This paper shall employ various checks and balances enabled under the Indian intellectual property scenario. Financial and stability-based differentiation shall be established when geographical indication protection is enabled in the field of handicraft when compared to traditional knowledge protection, traditional cultural expression protection and the implication of the same on the creators, herein, the women involved in the creation of ‘Kasuti embroidery’.

I. INTRODUCTION

Draped in a traditional Ilkal saree, the Finance Minister of India, Smt. Nirmala Sitharaman presented the budget for the year 2023.¹ What caught the eyes of fashion lovers was the beautiful and intricate hand-embroidered motifs that added to the richness of the saree. “Kasuti”, a hand embroidery technique that dates to the Chalukya period is a household name in Dharwad, a district in North Karnataka.² Something that used to be a hobby has now turned into a source of livelihood; Kasuti

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¹ Amit Upadhye, *Saree worn by Nirmala Sitharaman on Budget day was hand-woven in Karnataka*, THE NEW INDIAN EXPRESS (Feb. 1, 2023), <https://www.newindianexpress.com/states/karnataka/2023/feb/01/saree-worn-by-nirmala-sitharaman-on-budget-day-was-hand-woven-in-karnataka-2543431.html>.

² Raju Vijapur, *A heritage of craftsmanship*, DECCAN HERALD (24 May, 2016), <https://www.deccanherald.com/content/546828/a-heritage-craftsmanship.html>.

handicraft is empowering women by allowing them to be self-employed. The raw materials required are creativity and patience with some threads and needles. With minimal investment, these women create symmetrical geometric designs on fabrics that can be used for apparel, bedding, bags, cushion covers, etc. Inspired by the local culture and tradition, there are around 700 designs that are practiced by these women.³ All in all, Kasuti handicrafts represent the heritage of Karnataka and the contribution of women to the field of art.

In today's world, where fast fashion rules the market, handwoven clothes have seen a setback. Machine-made goods require less time and labour and are sold at a cheaper price, and this attracts consumers. As brands produce counterfeits of products that require days of effort, the handicraft industry is plodding a way through. In this process, the most affected are the poor artisans who are completely dependent on the art and are yet underpaid.

When an art like Kasuti, which is practiced by an all-women community, does not get its due attention, the consequences are more than merely economic. For these women who come from patriarchal households, Kasuti is a means of liberation. To the community that lacks education and exposure, the art form brings self-reliance.⁴ Recognizing the importance of the art to the community at large, a Geographical Indication tag was awarded to Kasuti in the year 2006.⁵ This paper tries to critically analyze whether geographical indication is an effective intellectual property tool to protect the interests of Kasuti artisans.

In the first part, the paper analyses the Geographical Indication [“GI”] law that protects the art of Kasuti. For this, a brief description of the evolution, purpose, and features of the *Geographical Indication of Goods (Registration and Protection) Act, 1999* is given.⁶ Further, this paper goes on to analyze whether GI sufficiently addresses the problems of the artisans in its first phase.

A. Statement of Problem

The legal issue in the current scenario is that the protection extended to Kasuti handicraft is merely GI, which protects the work ‘per se’. However, there is no protection extended to the artisans

³ Direct Create Community, *Kasuti Embroidery from Karnataka*, DIRECT CREATE (Oct. 8, 2016), <https://www.directcreate.com/craft/kasuti-embroidery>.

⁴ Re Nu et al., *Revival of Kasuti Embroidery Motifs as Hand Painting*, 7 INT.J.CURR.MICROBIOL.APP.SCI 3409 (2018), <https://www.ijcmas.com/abstractview.php?ID=10944&vol=7-11-2018&SNo=391>.

⁵ *Geographical Indications*, INTELLECTUAL PROPERTY INDIA, https://ipindia.gov.in/IPIndiaAdmin/writereaddata/Portal/Images/pdf/Registered_GI_of_India_31-12-2024.pdf.

⁶ Geographical Indications of Goods Act, 1999, No. 48, Acts of Parliament, 1999 (India).

involved in this work which leads to a legal lacuna of intellectual property rights [“IPR”] protection extended to the women involved in this handicraft.

B. Research Questions

The research will try to answer the following questions:

- Whether Geographical Indication Protection extended to Kasuti handicraft sufficiently protects the art and the artisans?
- Whether the artisans of Kasuti Handicraft can be protected under Traditional Knowledge?
- Whether the identity of artisans of Kasuti Handicraft be protected under Traditional Cultural Expression?

C. Objectives of the Study

The objective of this research is as follows:

- To examine the legal framework of GI in Kasuti embroidery
- To analyse the legal structure of traditional knowledge protection in India
- To study the requirements for protection of Traditional Cultural Expression in India.

II. LEGAL FRAMEWORK OF GEOGRAPHICAL INDICATION IN INDIA

An intellectual property law tool that is highly preferred for the protection of traditional art forms and handicrafts is GI. Many experts in the field endorse systematic GI laws for the protection and preservation of the production culture.⁷ This bundle of rights is often called as the “Poor Man’s Intellectual Property Rights” due to its compatibility with traditional knowledge.⁸

GIs identify a “good” as originating from a specific territory, where its quality, reputation and other characteristics are attributable to its geographical origin.⁹ The specialty of GI is that it creates a link between the region and the peculiarity of the good. There have been studies that show how GI results in greater economic returns, protection and promotion of unique goods and equitable benefit sharing for the rural community at large.¹⁰ There are many other advantages of GIs, like

⁷ Tomer Broude, *Taking “Trade and Culture” Seriously: Geographical Indications and Cultural Protection in WTO Law*, 26 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW 623 (2005).

⁸ Amit Basole, *Authenticity, Innovation, and the Geographical Indication in an Artisanal Industry: The Case of the Banarasi Sari*, 18 THE JOURNAL OF WORLD INTELLECTUAL PROPERTY 127 (2015).

⁹ Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 22, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

¹⁰ Mohsin Shafi, *Geographical indications and sustainable development of handicraft communities in developing countries*, 25 THE JOURNAL OF WORLD INTELLECTUAL PROPERTY 122 (2022).

protection of consumers from fake products, safeguarding the interests of the producers, and conservation of cultural and biological diversity.¹¹

The Trade-Related Aspects of Intellectual Property Rights [“**TRIPS**”] provides minimum standards of protection for geographical indication, which are supposed to be complied with by World Trade Organization [“**WTO**”] member nations.¹² In lieu of the same, a sui generis legislation for the registration and protection of GI was enacted in India in the year 1999. This law came as a ray of hope for the prevention of piracy and the protection of traditional knowledge.¹³

Once a GI is registered, it will empower the right holder to prevent unauthorized use by filing a civil suit or a criminal complaint. There are two types of registration under the GI Act. Part A provides for the registration of GI, and Part B for the registration of an authorized user.¹⁴ Any person who is a proprietor of the registered GI can become an authorized user under Section 17 of the Act.¹⁵ Both registrations are valid for a period of 10 years and could be renewed thereafter.¹⁶ After making an application to the Registrar of GI in a prescribed format, an initial scrutiny is done.¹⁷ The GI is published in the journal, and in the absence of any opposition, it gets registered.¹⁸

The handicraft category forms more than 55% of the total GIs registered in India and as of March 2022, 231 out of 417 registered GIs are handicrafts.¹⁹ The Karnataka State Handicrafts Development Corporation filed for the registration of Kasuti as a GI in the year 2005.²⁰ After scrutiny, GI was granted in the year 2006.

The registration of Kasuti as a GI has undoubtedly added importance to the art form and yet, the artisans are slogging. This is because of the multiple loopholes in the formation and application of the law of Geographical Indication.

¹¹ Delphine Marie-Vivien, *The Role of the State in the Protection of Geographical Indications: From Disengagement in France/Europe to Significant Involvement in India*, 13 THE JOURNAL OF WORLD INTELLECTUAL PROPERTY 121 (2010).

¹² Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

¹³ Sayantani Datta, Padmavati Manchikanti & Niharika S. Bhattacharya, *Enhancing Geographical Indications Protection in India for Community Relevance*, 24 THE JOURNAL OF WORLD INTELLECTUAL PROPERTY 420 (2021), <https://onlinelibrary.wiley.com/doi/abs/10.1111/jwip.12202> (last visited Aug 13, 2022).

¹⁴ Geographical Indications of Goods Act, 1999, § 7, No. 48, Acts of Parliament, 1999 (India).

¹⁵ Geographical Indications of Goods Act, 1999, § 17, No. 48, Acts of Parliament, 1999 (India).

¹⁶ Geographical Indications of Goods Act, 1999, § 18, No. 48, Acts of Parliament, 1999 (India).

¹⁷ Geographical Indications of Goods Act, 1999, § 28, No. 48, Acts of Parliament, 1999 (India).

¹⁸ *Id.*

¹⁹ Meghna Chaudhary, Bhawna Agarwal & Meena Bhatia, *Geographical indications in India: A case of Handicraft industry in Uttar Pradesh*, 25 THE JOURNAL OF WORLD INTELLECTUAL PROPERTY 617 (2022).

²⁰ Re nu et al., *supra* note 4, at 2.

A. Shortcomings of the Law

The Geographical Indications Law plays an important role in popularizing and authenticating original goods that belong to a definite place. Nonetheless, it is insufficient to safeguard the interests of the artisans who are involved in producing the good.

First of all, the registration process is tedious and expensive. Many artisans refrain from getting a registration as they are either unaware of the process or find it extremely complex. According to a World Intellectual Property Organization [“WIPO”] report, handicraft producers find it difficult to afford the registration and maintenance of intellectual property.²¹

Most of the time, it is the state or state agency that applies for the registration of GI. This shows that the involvement of artisans in the registration process is negligent. A governmental body may file for the GI for the betterment of the artisans, but the ownership being in the hands of the government seems unfair. Even when we look at Kasuti, the application was filed by the Karnataka Handicrafts Development Corporation,²² a governmental body. There is no record to show whether the artisans were consulted before setting the standard through the application. The GI should not only safeguard the knowledge of the weavers but also allow space for innovation. When the artisans don't primarily participate in the registration process, a particular production method gets frozen in the name of preservation. Any artisan who involves innovation will be punished. Another important question to be answered is whether the artisans have benefitted from GI registration. A well-implemented GI can up the market but will not guarantee the upliftment of the artisans involved. A study regarding the handloom sector of India says that there exists a ratio of 1:70 between the wages of the artisans and retail prices.²³ The traders and agents end up taking maximum benefit from the registration.²⁴

It is true that there is protection available for authorized users under the Act. But the definition of “authorized user” under Section 2(b) of the Act is vague, and hence the production and use of the GI are in the hands of people who are not appropriately defined under the Act.²⁵ This ambiguity

²¹ Wipo International Trade Centre, *Marketing Crafts and Visual Arts: The Role of Intellectual Property*, WIPO, <https://www.wipo.int/publications/en/details.jsp?id=281>.

²² *Supra* note 5.

²³ Maureen Liebl & Tirthankar Roy, *Handmade in India: Preliminary Analysis of Crafts Producers and Crafts Production*, 38 ECONOMIC AND POLITICAL WEEKLY 5366 (2013).

²⁴ Kasturi Das, *Socioeconomic Implications of Protecting Geographical Indications in India*, SSRN (2009), <https://papers.ssrn.com/abstract=1587352>.

²⁵ Geographical Indications of Goods Act, 1999, § 2, No. 48, Acts of Parliament, 1999 (India).

can not only encourage counterfeiting and false representation but also exclude many eligible users from coming under the purview of the Act.

A geographical indication should be essentially attributable to its geographical origin.²⁶ It makes the scope of the protection restrictive, and if the women artisans happen to relocate, they end up losing the right to benefit from the geographical indication.

Another main disadvantage is that of counterfeits. The registration of an authorized user is not compulsory under the Act but is encouraged. But most people are unaware of the existence of “authorized user” registration under Part B. Kasuti is a registered GI and is practiced by the women of North Karnataka. GI is area-centric and any producer, whether a member of the community or not, can become an authorized user if he produces the art in a specific area. Such a producer may end up using fraudulent methods of production. This results in low-quality goods replacing the handwoven pieces in the market. It is important to note that there is a huge community of women that practices Kasuti but only 68 of them are registered as authorized users.²⁷

The benefit of the GI should flow to the artisan community apart from protecting the art in itself. Unfortunately, the law of Geographical Indication fails to safeguard the interests of the people who are supposed to be the actual knowledge holders. A strong community-centered law is essential to protect the rights of these traditional knowledge holders.

III. INTRODUCTION TO TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSION

Indian Intellectual Property Framework covers various credit worthy framework be it Geographical Indication or Traditional Knowledge (to name a few). This research specifically focuses on Traditional Cultural Expression being protected per se. Additionally, it focuses on Kasuti Embroidery being a part and parcel of the Traditional Cultural Expression, if it fulfills the eligibility norms, post the study. It becomes important to note that in order to delve into the concept of Traditional Cultural Expression, the very purpose of traditional knowledge is to be addressed to get an entire image of the research. Traditional Knowledge refers to the know-how,

²⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994), art. 22.

²⁷ Ranjani Govind, *Usha J Pawar's Stitch in Time Could Revive the Legacy of Kasuti Work*, THE HINDU (Mar. 7, 2024), <https://www.thehindu.com/life-and-style/usha-pawars-stitch-in-time-attempts-to-preserve-the-legacy-of-kasuti-work/article67912484.ece>.

skills and practices that are developed and are passed on from generation to generation.²⁸ The reason why Traditional Knowledge is being considered before addressing Traditional Cultural Expression is because World Intellectual Property Organization, being 'THE' international source for the above said reads Traditional Knowledge on par with Traditional Cultural Expression in most of its studies.²⁹

A. Protection of Handicrafts as Traditional Knowledge

Handicrafts and art are considered to be a boon to a nation's economic growth. Various traditional art forms are passed on from generation to generation. Some pure art forms survive only on a heritage basis, being passed on from the family lineage.

In the Mithila region of Bihar, the art of Madhubani is well known, both in the form of print and in the form of painting.³⁰ This form of art is showcased for the emphasis on the rich cultural heritage of Indian folk and tribal tradition. Originally, Madhubani paintings were done specifically by the women community.³¹ The painting started as a gender-specific activity yet contained various ritualistic practices. However, despite it being a gender-specific activity, the women community of Mithila received no specific traditional knowledge protection as such.

Another example of women-based handicraft is that of Ilkal Saree which is woven by women of the Bagalkot District of Karnataka.³² This is a purely handcrafted saree which holds significant value of Karnataka's native tradition in every stitch. Despite this being a solely women-based handicraft, this community of women weaving Ilkal sarees is not protected as such.

The conclusion from the abovesaid hand-crafted work is that although the work per se is protected via geographical indication, the community involved behind the curation of such craft stands unprotected on a practical note. The community in this regard no doubt receives royalties for the product; however, receives no protective incentive to carry on its native culture. Thus, traditional knowledge protection is not extended to communities involved in producing the said handicrafts.

²⁸ *Traditional Knowledge*, WIPO, <https://www.wipo.int/en/web/traditional-knowledge/tk/index>.

²⁹ *Traditional Knowledge and Traditional Cultural Expression*, WIPO, <https://www.wipo.int/edocs/pubdocs/en/wipo-pub-rn2023-5-9-en-documentation-of-traditional-knowledge-and-traditional-cultural-expressions.pdf>.

³⁰ *Application for Geographical Indication for Madhubani Paintings*, GEOGRAPHICAL INDICATIONS REGISTRY (Feb. 6, 2007), <https://search.ipindia.gov.in/GIRPublic/Application/Details/37>.

³¹ *Madhubani Paintings*, INDIAN CULTURE, <https://indianculture.gov.in/paintings/madhubani-paintings>.

³² *Application for Geographical Indication for Ilkal Sarees*, GEOGRAPHICAL INDICATIONS REGISTRY (June 20, 2007), <https://search.ipindia.gov.in/girpublic/application/details/76>.

B. Protection of Handicrafts and Traditional Cultural Expression

Traditional cultural expressions [“TCEs”], also called “expressions of folklore”, may include music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions.³³ Thus, from this well-known definition of WIPO, it is clear that ‘art’ including this research’s focus of ‘Handicraft’ stands protected as expressions of cultural significance. However, ‘Traditional Cultural Expression’ is slightly narrow when compared to that of ‘Traditional Knowledge, mainly because, in Traditional Knowledge, the indigenous community involved in creating the product of benefit seems to be protected however, in TCE, The Identify of the indigenous community stands protected [which is a part of the whole].

C. International Protection Extended to Traditional Knowledge

WIPO, to which India is a signatory, states that traditional knowledge forms an important part of intellectual property. In furtherance of the same, WIPO has constituted the “Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore”³⁴ which majorly focuses on

- Genetic resources as Traditional Knowledge
- Cultural Expressions as Traditional Knowledge
- Inclusivity of Folklore as Traditional Knowledge.

Furthermore, the TRIPS Agreement, to which India is a signatory, states that every individual who is the owner of the IPR is required to be credited and provided monetary benefit for the created work containing Intellectual Property.³⁵ CBD, to which India is a signatory, aims at protecting the traditional genetic resources native to the nation.³⁶ Compiling the abovementioned conventions and committees, it is evident that India is in consensus with the world perspective on the protection of traditional knowledge and the communities responsible for creating this traditional knowledge. Additionally, India is known to have created Traditional Knowledge Digital Library which provides public awareness concerning Traditional Knowledge.³⁷

³³ Traditional Cultural Expression, WIPO, <https://www.wipo.int/en/web/traditional-knowledge/traditional-cultural-expressions/index>.

³⁴ *Intergovernmental Committee (IGC)*, WIPO, https://www.wipo.int/pressroom/en/briefs/tk_ip.html.

³⁵ Ranjani Govind, *supra* note 27.

³⁶ Convention on Biodiversity, June 5, 1992, 31 ILM 818.

³⁷ *Traditional Knowledge Digital Library*, WIPO, https://www.wipo.int/meetings/en/2011/wipo_tkdl_del_11/about_tkdl.html.

D. International Protection Extended to Traditional Cultural Expression

WIPO, to which India is a signatory, states that traditional cultural expression forms an important part of intellectual property. The requirement of a product (here, handicraft) to be protected as a traditional cultural expression is that:³⁸

- may be considered as the forms in which traditional culture is expressed.
- form part of the identity and heritage of a traditional or indigenous community.
- are passed down from generation to generation.

From this, it can be seen that although, WIPO focuses on the abovementioned, India nowhere specifically mentions the protection for Traditional Cultural Expression. However, with India's support to creation of a global database such as TKDL,³⁹ shows its support towards traditional cultural expression (derived from India's take on Traditional Knowledge) covertly although not expressed in an overt manner.

E. Relationship between Kasuti Work with respect to Traditional Knowledge and Traditional Cultural Expression.

Kasuti embroidery, as stated earlier, is woven according to the region's flora and fauna. This not only exhibits the geographical identity of the embroidery but also exhibits and explores the 'cultural expression' of multicolored woven embroidery symbolizing objects of daily use in the culture of Karnataka. Furthermore, this form of embroidery is not just practiced by everyone and anyone; it is specifically practiced by the 'Women of Uttar Karnataka', who have been trained in this handicraft since time immemorial and pass it on to generations not just via an ancestral basis but also via spreading awareness regarding the art form and its significance.

Considering the abovementioned aspects, it can be noticed that the following criterion required for an artwork to be considered traditional knowledge is fulfilled by Kasuti embroidery.

- TRIPS, read with CBD, supports traditional knowledge by stating that genetic resources shall be protected as traditional knowledge, thereby emphasising the protection of nativity. Although Kasuti embroidery does not protect 'genetic resources' per se, it does protect the native culture and the artisans/the indigenous community who earn their square meal from this traditional handicraft of Kasuti work. Thereby, the ulterior motive and aim with which traditional knowledge is spoken of are fulfilled by the nativity of Kasuti embroidery as such.

³⁸ Traditional Knowledge, *supra* note 33.

³⁹ Traditional Knowledge Digital Library, *supra* note 37.

In furtherance of the same, after comparing the national domestic laws of India with respect to traditional knowledge and the protection of women artisans to that of the international legal structure, there exists the possibility of protection being extended to Kasuti embroidery not merely on technical grounds but also based on the aims and agendas of the legal norms that Kasuti embroidery fulfils. That way, not only does the art stand protected but the women artisans also get their due share, as the community involved in Kasuti work shall receive protection under Traditional Knowledge.

Further, with respect to Traditional Cultural Expression and Kasuti Embroidery, it can be seen that

- Kasuti being woven by women of Uttar Karnataka can be considered as community *per se*
- Kasuti embroidery is a part and parcel of the 'Identity' of the native women of Uttar Karnataka
- As established earlier, this handicraft has been handed over from generation to generation as a part of their rich cultural heritage.

This signifies that Kasuti embroidery being done by the natives are to be protected *per se* for making Kasuti as a part and parcel of their identity. This amounts to Kasuti being protected under Traditional Cultural Expression too.

IV. CONCLUSIONS AND SUGGESTIONS

To summarize, it can be seen that Kasuti embroidery here was addressed to understand whether 'the art' and the 'artisan' can be sufficiently protected and catered to under the Indian Intellectual Property Framework.

From the above-mentioned analysis, the following conclusions can be drawn

- Geographical Indication in India protects the 'geographical location' / place of origin of the product.
- Traditional Knowledge is supported by India as it protects indigenous communities *per se*.
- Traditional Cultural Expression protects the 'identity of the indigenous community *per se*'

Having differentiated the legal frameworks available for protection of native goods, it can be seen that the area of address here being Kasuti Embroidery too can fall under the said category in the following ways:

- Kasuti is in itself protected as a Geographical Indication of Karnataka

- Artisans of Kasuti Handicraft alternatively be granted protection under Traditional Knowledge as it governs protection for artisans.
- Artisans Identity (pursuing Kasuti Handicraft) be protected under Traditional Cultural Expression.

Kasuti embroidery here is taken as a face for handicrafts in India when the aspect of geographical indication and traditional knowledge is concerned. Here, the focus is not merely on the protection of the 'work of traditional knowledge' but on the protection of the 'community' or the 'indigenous community' or 'the creators of the art' who are the reason for the existence of the art per se.

As explored and stated earlier, there exists a requirement for strengthening the Geographical Indication Law in India with a specific focus on protection with respect to 'artisans' producing the handicraft of Kasuti and not merely the work per se.

Furthermore, the alternate solution to protect women artisans involved in Kasuti embroidery (or any handicraft for that matter) and the area of protection as suggested will be that of traditional knowledge protection. The Indian legal framework of traditional knowledge stands scattered and untamed in this regard. There is no specific legality addressing Traditional Knowledge in India except the fact that India provided TKDL to WIPO.

Furthermore, considering the international conventions and committees of WIPO, TRIPS, and CBD as stated earlier, Kasuti embroidery/handicraft clearly fits into the aspect of 'traditional cultural expression' because of its nativity and because of the women artisans who are involved in the creation of this traditional work. Thus, the artisans performing Kasuti embroidery are required to be protected under 'Traditional Knowledge' per se.

Further, with respect to Traditional Cultural Expression, it was seen that India being a signatory to WIPO is the connection provided as a bridge between TCE and Indian Handicrafts (here, Kasuti work). As explained earlier, the artisans of Kasuti require not only protection in the form of Traditional Knowledge as a community but also as their identity. This identity protection to the said community that weaves Kasuti/is a part of the embroidery in Uttar Karnataka Region require protection under Traditional Cultural Expression as a whole.

This inclusion of Traditional Cultural Expression nowhere prohibits the protection of Geographical Indication but is only an alternative protection suggested in order to strengthen the

artisans in any means possible. This kind of protection boosts the identity of the Kasuti weavers and their community which inherently boosts their productivity in the said handicraft ensuring its global outreach. This is suggested on the Utilitarian approach of ‘greatest happiness of greatest number’⁴⁰ which states that the more benefit and credit provided to the creators, the more they produce, which inherently increases the productivity. However, this is not the only reason TCE is included and suggested. Instead, TCE is suggested here to include an overall protection to the ‘artisans’ i.e. the indigenous community involved in weaving Kasuti and not merely the art of Kasuti. Further, TCE protection strengthens the protection of ‘interest’ and ‘identity’ of the native artisans involved in the weaving of Kasuti.

Summing the abovesaid and narrowing down to the concept of ‘Kasuti embroidery’, it is stated that mere protection of this form of handicraft of Kasuti embroidery as Geographical Indication in India is insufficient and there is a strong requirement of protection of the ‘community of women artisans’ who are involved in the creation of this Kasuti handicraft which thereby requires and calls for stringent protective legal framework concerning the art and the artisan i.e. the work of Kasuti and the workers involved in creating Kasuti Embroidery. Further, this research concludes on the note of understanding that more than one Intellectual Property protection cannot be extended to one form of work of IPR. However, the suggestion here is to ensure that Kasuti be protected as a Geographical Indication and further include the protection of ‘Artisans’ under Geographical Indication of India. Alternatively, the handicraft of Kasuti be protected under ‘Traditional Knowledge’ primarily, in order to ensure that ‘indigenous community’ stands protected with that of the primary protection of Kasuti Handicraft. Additionally, Traditional Cultural Expression co-exists and can protect the ‘identity’ of the artisans of Kasuti Handicraft providing them further opportunity to create. Traditional Knowledge and Traditional Cultural Expression is suggested to co-exist in the said research.

Lastly, it is not suggested to bring in a new legal framework to protect Kasuti Handicraft alone. Instead, this research suggests a inclusive approach for India to adapt TK and TCE in its protection or to expand the legality of GI to protect its artisans which therefore provides a wholesome way of protecting Kasuti Handicraft in India.

⁴⁰ William Fisher, *Theories Of Intellectual Property*, PRESSBOOKS, IOWA <https://pressbooks.uiowa.edu/intro-ip/chapter/theories-of-intellectual-property/>.

COPYRIGHT CONSIDERATIONS FOR IMPERMANENT ART: PROTECTING TRANSIENT CREATIONS

PALAK DWIVEDI*

ABSTRACT

Copyright, as a form of intellectual property rights, plays a crucial role in safeguarding artistic creations by granting creators exclusive economic rights and economic rights over their works. However, the criteria laid down by copyright laws often present challenges for certain forms of art, particularly “ephemeral”, “impermanent” or “transient” art. Ephemeral art, characterized by its transient or developmental nature, is a rapidly growing sector of contemporary art and engages a diverse audience, unlike traditional static forms of art. Therefore, the author aims to determine that ephemeral art must receive copyright protection as an original artistic work under Section 2(c) of the Copyright Act, 1957. The requirements stipulated by copyright laws, such as expression, fixation, and originality, pose limitations on the protection of impermanent art. While traditional art forms are inherently static and easily preserved, ephemeral art, by its very nature, defies traditional notions of permanence. The issue of fixation is particularly pertinent in the realm of ephemeral art. Fixation, as mandated by copyright laws in various jurisdictions, raises questions regarding the degree of permanence required for a work to be considered fixed and eligible for protection. By striking a balance between acknowledging the tangible nature of artistic expression and accommodating the transient characteristics of impermanent art, a more inclusive copyright regime can be established. In order to understand the practical issues related to the traditional notion of copyright law, the author shall explore the case studies of mandap (wedding decoration) and culinary art. The author aims to offer solutions to include modern forms of art within the ambit of copyright protection.

I. INTRODUCTION

Modern art often sparks fresh perspectives on past, present and future, influencing both art and society. Artists frequently draw inspiration from others’ work, yet, using parts of existing works to create something new can raise copyright concerns. Copyright protects the original expression of ideas in various forms of art, literature and more. The idea-expression dichotomy allows others to express similar ideas, as long as their expression is original.

Work in the copyright regime is often accompanied by an attribute that points in a specific direction: “original”, “individual”, “created”, “independent”, or “unique”. It has often been critiqued that the traditional copyright law is heavily technique-centric rather than being more

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dynamic in its approach. This paper examines whether impermanent artworks such as mandap decorations and culinary art satisfy the requirements for the subsistence of copyright.

The Copyright Act, 1957 [“**1957 Act**”] sets out key conditions for copyright protection, granting authors and owners exclusive economic and moral rights. To qualify for protection, the creation must fit within a specified “type of work” such as “literary, dramatic, musical, cinematograph film, and sound recording,” and demonstrate a minimum level of creativity, defined as being “original” according to the 1957 Act.¹

Uptil now, the issue of impermanent art being an artistic work has not been appropriately addressed by the Indian judiciary, but with the evolving nature of copyright, it is pertinent to address transient art. Ephemeral art is a form of transient or developmental art and a growing sector of modern art, currently recognised as one of the most audience-engaging art form as well. Ephemeral art, found in temporary installations or created with transient materials like flowers or food, poses unique challenges in copyright law.²

In various jurisdictions, the concept of “fixation” is crucial for determining eligibility for copyright protection. This raises questions about the level of permanence necessary for a work to be considered fixed and thus eligible for protection. The analysis will explore Indian copyright law, alongside international developments, to understand how these factors impact the legal landscape for ephemeral art.³ As the legal landscape evolves, re-evaluating the concept of fixation is crucial to accommodate impermanent art within the framework of copyright protection. By balancing tangible expression with the transient nature of impermanent art, a more inclusive copyright regime can emerge that preserves artists’ creativity across diverse forms of expression. Through case studies like wedding decoration and culinary art, the author aims to understand practical issues within traditional copyright law and propose solutions to encompass modern art forms within copyright protection.

II. UNDERSTANDING THE LEGISLATIVE FRAMEWORK

Section 13 of the 1957 Act provides that copyright can only subsist in an “original literary, dramatic, musical or artistic work.”⁴ Of these four categories of works, wedding decorations fall

¹ The Copyright Act, 1957, Act No. 14 of 1957, § 2(y).

² Peter J. Karol, *The Threat of Termination in a Dematerialized Art Market*, 64 J.COPYRIGHT SOC’Y U.S.A. 187 (2017).

³ David M. Cummings, *Creative Expression and the Human Canvas: An Examination of Tattoos as a Copyrightable Art Form*, 2013 U. ILL. L. REV. 279 (2013).

⁴ The Copyright Act, 1957, Act No. 14 of 1957, §13.

under the category of artistic work. Section 13 provides that copyright can only subsist in “original” works and imposes a requirement of originality, however, the 1957 Act is silent on the requirement of fixation for artistic works. A decoration must satisfy the following requirement for copyright to subsist in an artistic work as per Section 2(c) of the 1957 Act, which defines an artistic work as:

- “a painting, a sculpture, an engraving or a photograph, whether or not any such work possesses artistic quality;
- a work of architecture; and
- any other work of artistic craftsmanship.”⁵

For a work to qualify as a work of artistic craftsmanship, there are essentially two ingredients that need to be satisfied, namely-⁶

- Work of a craftsman; and
- possession of artistic character.

Undoubtedly, work of artistic craftsmanship has been given inadequate protection and there is a strict need to evolve a standard for determining the artistic character of a work.

A. Relevance of the Intent of the Creator

In international jurisdictions, there has been a debate as to whether the author’s intent or the artistic quality must be the determining factor for a work of artistic craftsmanship.⁷

In the case of *Burge v. Swarbrick*, the Australian High Court observed that “A work of craftsmanship presupposes skill and knowledge for its production”.⁸ Lord Simon noted that if a work is reflective of the author’s intent, aim and impact, it would amount to work of a craftsmanship. Evidently, “real or substantial artistic effort” must be seen at the author’s end to decide whether it’s a work of artistic craftsmanship or not.

The presence of craftsmanship must be looked into with what was the “intent of the creator”, because if we read into the legislative language of Section 2(c) of the 1957 Act, it states that work means “a work of artistic craftsmanship”, and the phrase “whether of artistic quality or not”, is intentionally excluded from this category, suggesting that artistic quality is relevant in works of

⁵ *Id* at § 2(c).

⁶ ALKA CHAWLA, ALKA CHAWLA: LAW OF COPYRIGHT 45 (1st Ed. 2013).

⁷ Patrick Masiyakurima, *Copyright in Works of Artistic Craftsmanship: An Analysis*, 36 OXFORD J. LEGAL STUD. 505 (2016).

⁸ *Burge v. Swarbrick* [2007] HCA 17 (Austl.).

artistic craftsmanship.⁹ Therefore, the artist's intent to create a work of art though relevant is not determinative.¹⁰

Furthermore, Section 51 of the 1957 Act addresses infringement of copyright.¹¹ In *Cadbury India Ltd. v. S.M. Dyechem Ltd.*,¹² the Court determined if there is an infringement of an artistic work and evolved the "lay observer test", observing that, "it is based on the assumption that if the lay observer, one who is not an expert in artistic work, sees the visual and if it appears to him that the work is the reproduction of some other work then it would amount to the infringement of the artistic copyright." The Indian Courts are yet to decide on the relevance of intent in the context of artistic craftsmanship, however, reliance can be placed on foreign courts, to arrive at a settled position and a test to determine artistic craftsmanship.

B. Problems Eclipsing the Statutory Understanding of Artistic Works

1. Absence of a Clear Statutory Definition

Indian copyright law has long protected works of artistic craftsmanship, yet it has never explicitly defined 'artistic craftsmanship' in statute. This intentional flexibility aims to reduce the risk of arbitrary judgments. Accordingly, courts have emphasized that works of artistic craftsmanship must exhibit elements of both 'craftsmanship' and 'artistic quality' in their execution. However, due to the absence of a clear statutory or judicial definition of 'artistic craftsmanship', the concepts of 'artistic quality' and 'craftsmanship' remain areas of considerable uncertainty and subjectivity. In *Hayuk v. Starbucks Corporation*,¹³ the difficulties that a graffiti artist may face in trying to prove seemingly simple elements were highlighted due to a lack of statutory clarity. It was observed that "as Congress has never legislated the appropriate standard-and the Supreme Court itself has not weighed in to give definition to the field, so all the decisions.... that work to define a test for substantial similarity emanate from the inferior courts."¹⁴

2. Lack of Judicially Agreed Formula

There is no universally accepted judicial formula for determining whether a work qualifies as one of artistic craftsmanship under Indian copyright law. The term 'artistic' is interpreted according to

⁹ David M. Cummings, *supra* note 3.

¹⁰ Peter J. Karol, *supra* note 2, at pg. 11.

¹¹ *supra* note 1, at § 51.

¹² *Cadbury India Ltd. v. S.M. Dyechem Ltd.*, (2000) 1 RAJ 125.

¹³ *Hayuk v. Starbucks Corp.*, 157 F. Supp. 3d 285, 289 (S.D.N.Y. 2016).

¹⁴ *Streetwise Maps Inc. v. VanDam Inc.*, 159 F.3d 739 (2nd Cir. 1998).

its ordinary and natural meaning,¹⁵ and it is the role of the court to assess the evidence in each specific case to determine whether a work meets the criteria of artistic craftsmanship.

3. *Absence of Copyrightability to Impermanent Artworks*

The absence of copyright protection for temporary artworks creates challenges in addressing infringement, particularly due to the inability to claim such artworks under copyright law. This lack of clarity in the 1957 Act means that artists cannot prevent the recreation, restoration, or outright theft of their temporary artworks, as these works do not meet the criteria for copyright protection.

III. UNFOLDING THE FIXATION AND ORIGINALITY REQUIREMENTS UNDER COPYRIGHT LAW FOR IMPERMANENT ART

A. Understanding the Issue of Fixation

It is important to clarify that Indian copyright law does not explicitly exclude the protection of ephemeral artworks. There is no statutory provision in Indian copyright law that limits protection based on the form of fixation. Section 14(c) of the 1957 Act grants the exclusive right to commercially utilize various creative forms in “any material form” as long as the work can be perceived and reproduced by any means.¹⁶ Therefore, the key criterion for availing copyright protection in India is the requirement of “fixation” - that is, the work must be recorded or captured in a tangible form that allows for perception and reproduction through various means.

Practice and Procedure Manual of Artistic Works 2018 [**Copyright Manual**] defines artistic work as “Any work which is an original creation of an author or an owner fixed in a tangible form, is capable of being entered into the Register of Copyrights, irrespective of the fact that whether such work possess any artistic quality or not.”¹⁷

Indian courts have not directly addressed the issue of fixation specifically in relation to impermanent art. However, they have expressed the view in the case of *Emergent Genetics India Pvt. Ltd v. Shailendra Shivam*,¹⁸ wherein it was observed that “‘fixation’ (i.e. the existence of a literary or copyrightable work in tangible form) is not a pre-condition for a copyright to subsist in a work in India.”¹⁹

¹⁵ *Rajendra Kumar Sethia v. Wealth-Tax Officer* (1982) 2 ITD 394.

¹⁶ *supra* note 1, at § 14(c).

¹⁷ Practice and Procedure Manual of Artistic Works 2018, § 2.

¹⁸ *Emergent Genetics India Pvt. Ltd v. Shailendra Shivam*, (2011) 125 DRJ 173.

¹⁹ *Id* at para 11.

It is noteworthy that Indian courts have adopted a very liberal approach towards the interpretation of artistic works.²⁰ In the case of *Sartaj Singh Pannu v. Gurbani Media Pvt Ltd & Anr.*,²¹ the court observed that “what constitutes a work of art has evolved over time. We are in an age of multimedia art installations, where an artist might work on several media, in a single comprehensive presentation, to express or convey a creative moment or feeling or emotion.”²² Thereby, providing broader scope of copyright protection to contemporary arts.

Further, the court also observed that “When it comes to directing or making a film, the “directorial touches” that a director imparts to the film cannot be confined to any particular oeuvre. The expression of artistic craftsmanship is wide enough to accommodate the effort of a film maker director who brings to the final product a distinctive style, an “artistic touch” so as to qualify for acknowledgment as an “artist” in relation to an “artistic work”.²³

At the same time, it is not every directorial effort that can qualify for being considered an “artistic work”. That will again depend on an evaluation or assessment of the work, by experts, based upon some objective criteria. The most apposite analogy would be the work of juries in film festivals. Whether the work of a director in a particular film can be stated to be a work of artistic craftsmanship will be a matter for evidence. In the case on hand, it is difficult for the Court at the present stage to form even a *prima facie* opinion that Pannu’s directorial effort in the film is a work of artistic craftsmanship.”²⁴

A closer view of the United Kingdom’s [“**U.K**”] judicial approach indicates that fixation is a non-requirement for artistic works, much like India. In the landmark case of *Islestar Holdings Ltd. v. Aldi Stores Ltd.*,²⁵ the U.K High Court granted copyright protection to a make-up palette in spite of its ephemeral nature and made an interesting observation that the content of artistic work must be given prime importance and not the medium used to capture/ record the work.

The United States of America [“**U.S.A**”] judiciary appears to rely on a very restrictive meaning of authorship and fixation, for instance, in the case of *Kelley v. Chicago Park District*,²⁶ the court

²⁰ *Amar Nath Sehgal v. Union of India*, (2002) SCC OnLine Del 390.

²¹ *Sartaj Singh Pannu v. Gurbani Media Pvt Ltd & Anr.*, (2015) 220 DLT 527.

²² *Id.*

²³ *Id* at para 48.

²⁴ *Id* at para 49.

²⁵ *Islestar Holdings Ltd. v. Aldi Stores Ltd.* [2019] EWHC 1473 (Ch).

²⁶ *Kelley v. Chicago Park District*, 635 F.3d 290, 292 (7th Cir. 2011).

denied copyright protection to a “planned garden with natural and inherently changeable objects” due to lack of fixation and authorship. It included intricate motifs installed in Chicago’s Park District; the court of appeals ruled that the artwork was primarily influenced by ‘natural forces’ rather than human authorship. The court emphasised that plants being “inherently changing organisms,” contributed significantly to the evolving nature of the garden, raising questions about the degree of human creativity and control involved in the work, which means they grow at their own rate and way. To identify the artist as the ‘author’ of a work that changes shape, size, and quality over time, would go beyond the legal definition of an ‘author’.

In Indian copyright law, the requirement of fixation is interpreted more flexibly compared to many European countries.²⁷ This flexibility allows for the potential protection of temporary or impermanent artworks under Indian copyright law, as there is ambiguity surrounding the exact scope and criteria of fixation in Indian legal interpretations.

In contrast, countries like the U.S.A. have a more stringent definition of fixation. Fixation in the U.S.A. is defined as the representation of a work that is stored or contained in a tangible medium, which must be sufficiently permanent and exist for a longer duration of time.²⁸

The argument emphasises the fundamental purpose of copyright protection: to safeguard artists’ original creative expressions. It challenges the traditional emphasis on the permanence of artistic vehicles, such as tangible mediums, suggesting that this focus can undermine the core principle of protecting creativity itself. Drawing from Hegelian philosophy, the expression of art often embodies the artist’s personality, feelings, and innovative perspectives on the world.²⁹ However, the fixation requirement in copyright law tends to exclude impermanent art forms and improvisational works like sketches, freestyle songs, and unrehearsed choreography from full commercial exploitation by their creators.

The lack of clear judicial interpretations and remedies for ephemeral art contributes to a global problem where artists are left without legal recourse when their works are subject to unauthorized alteration or exploitation. Excluding certain forms of creativity based on their ephemeral nature limits the scope of intellectual property and fails to account for the potential impact and cultural

²⁷ *Id* at para 14.

²⁸ Tabrez Ahmad and Snehil Soumya, *Significance of Fixation in Copyright Law*, SSRN (May 12, 2011), <https://ssrn.com/abstract=1839527>.

²⁹ Cheng-chi (Kirin) Chang, *The Clash of Theories: Semiotic Democracy and Personality Theory in Intellectual Property Law*, 9 LAW AND WORLD 20 (2023).

significance of impermanent artworks. While complete abandonment of the fixation requirement may not be ideal, there is merit in reevaluating its application to foster greater motivation for artistic innovation. By refining the concept of fixation, copyright law can contribute to a more vibrant artistic landscape, encouraging creativity without arbitrary limitations based on the duration of an artwork's existence.³⁰

In the context of Indian law, the frustration lies in the lack of clarity and definition surrounding the scope of fixation as an essential element of copyright protection. Despite acknowledging fixation as integral, the legislature and the judiciary have not provided clear guidelines, thereby leaving artists and creators without adequate legal recourse and protection for their works. This ambiguity underscores the urgency for legal reforms that align with international standards and support the rights and interests of artists in the evolving creative landscape.

B. Decoding the Originality Criteria

The essence of copyright protection for artistic creations hinges on the presence of inherent originality. It's important to clarify that this threshold of originality in Indian law is characterised by the “modicum of creativity” and “skill and judgment” tests.³¹ Although the 1957 Act does not provide a specific definition of “original,” it is generally understood that copyright can only protect an idea once it has been put into any form of words, or any form of expression and reduced into writing, or into some tangible form, or capable of sensory perception by the audience.³² The courts have tried to ascertain originality through various judgments, the most important being *University of London Press Ltd. v. University Tutorial Press Ltd.*³³ In this case, the Court relied on the ‘Sweat of the Brow’ doctrine and observed that the “work need not be original in a revolutionary way. However, it should not be of a trivial nature either. Certain efforts must be made to ascertain whether it is original.”³⁴ Further, the “Modicum of Creativity” test stipulates that the work must involve minimal originality to be authentic and copyrightable, as laid down in the case of *Feist Publications, Inc. v. Rural Tel. Serv. Co.*,³⁵ originality requires independent creation plus a modicum of creativity, which translates into the work being a fruit of intellectual labour.

³⁰ Minelli E. Manoukian, *Graffiti on Cities's Forgotten Landscapes: An Application of Adverse Possession Law to the Visual Artists Rights Act*, 32 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 592 (2022).

³¹ *Eastern Book Company v. D.B Modak & Navin Desai*, (2008) AIR SC 809.

³² *R.G.Anand v. Deluxe Films*, (1978) AIR SC 1614; *Zee Telefilms Limited v. Sundial Communications Private Limited*, (2003) (5) BOM CR 404.

³³ *London Press Ltd. v. University Tutorial Press Ltd.* (1916) 2 Ch. 601.

³⁴ *Id.*

³⁵ *Feist Publications, Inc. v. Rural Tel. Serv. Co* 499 U.S. 340 (1991).

In the case of *Macmillan & Co. Ltd. v. K&J Cooper*, it was decided that “sufficient labour, skill and capital that have been put to the product possess quality or character that the original raw material didn’t possess. The work is original only if the author has applied some labour or skill.”³⁶ This case was also relied upon in the case of *A. Sirkar and Co. (Jewellers) Pvt. Ltd. v. B. Sirkar Jahuree Pvt. Ltd.*, wherein, it was observed that, “To qualify for copyright protection an artistic work must be original i.e. it must originate from the author. In respect of painting, scripture, drawing, or work need not any artistic quality but author must have to store skill, judgment and efforts upon the work. The required skill, the Judgment and effort is minimum. Copyright protection is given to the work and not idea and that it is not originality of thought that has to be established to obtain copyright protection to but original skill and labour in execution.”³⁷

Copyright protection applies only to original works, so installations incorporating ready-made or natural objects may initially seem to lack the required originality. In the U.S.A., courts have grappled with determining whether artistic elements can be conceptually separated from the utilitarian aspects of an article to qualify for copyright protection. If the aesthetic component can exist independently from the functional aspect, the work may be classified as an ‘artistic work’. Conversely, if the aesthetic and utilitarian aspects are intertwined, the work may not be considered artistic.³⁸ In the case of *Star Athletica, L.L.C v. Varsity Brands Inc.*,³⁹ it was observed that “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. It therefore cannot be copyrighted.”⁴⁰ The Court in this case upheld that copyright extends only to “solely artistic” features of articles.

In *Kieselstein-Cord v. Accessories by Pearl, Inc.*, the Second Circuit Court of Appeals highlighted Christo’s *Running Fence* as an example of conceptual art meeting the originality requirement. Although the physical sculptural features were inseparable from the utilitarian aspect (the fence), the artistic value was conceptually separable.⁴¹

In India, the 1957 Act does not explicitly define “originality”, but judicial precedents suggest that it pertains to the expression rather than the underlying ideas. The term “original” in this context refers to the work originating from the author and their effort and intellectual labour, not

³⁶ *Macmillan & Co. Ltd. v. K&J Cooper*, (1924) 26 BOM LR 292.

³⁷ *A. Sirkar and Co. (Jewellers) Pvt. Ltd. v. B. Sirkar Jahuree Pvt. Ltd.*, (2021) MANU/OT/0018/2021.

³⁸ Angelo Marchesini, *Thin Separability: An Answer to Star Athletica*, 43 SEATTLE U. L.REV. 1087 (2020).

³⁹ *Star Athletica, L.L.C v. Varsity Brands Inc.* 137 S. Ct. 1002 (2017).

⁴⁰ *Id* at para 12.

⁴¹ *Kieselstein- Cord v. Accessories by Pearl Inc*, 632 F.2d 989.

necessarily implying novelty or uniqueness in the conventional sense. In contrast, in the U.S.A, courts distinguish between artistic and utilitarian elements, with only purely artistic features qualifying for copyright protection.

IV. APPLICABILITY OF THE DOCTRINE OF DE MINIMIS AND MORAL RIGHTS TO IMPERMANENT ART

The concept of moral rights represents a personal and reputational connection between an artist and their creative work, existing alongside economic rights protected by copyright law in many countries worldwide. Moral rights are often incorporated into copyright statutes and afford creators a degree of control over how their art is used, beyond mere economic exploitation. The right of integrity, a key aspect of moral rights, empowers artists to oppose treatment of their work that could damage their honour or reputation, such as mutilation or distortion.⁴² The Right of Integrity allows creators to oppose any modifications that could harm their work's reputation. The Right of Attribution ensures creators are recognised as the authors of their work. The Right of Communication to the Public gives creators control over how their work is presented publicly. Lastly, the Right of Withdrawal or Circulation allows creators to withdraw their work from circulation when necessary, safeguarding their moral interests beyond economic rights granted by copyright law.⁴³

Notably, the Agreement on Trade-Related Aspects of Intellectual Property Right [“**TRIPS**”], which obliges World Trade Organization [“**WTO**”] members to adhere to the Berne Convention's substantive provisions, explicitly excludes Article 6bis, the moral rights provision.⁴⁴

Importantly, limitations and exceptions to copyright law must account for moral rights. Even the acts falling under the ambit of statutory limitation of fair use or dealing must honour the moral rights of authors. Moral rights thus serve as a vital safeguard for creators, ensuring their artistic integrity and reputation are preserved regardless of economic exploitation or assignment of copyright. These rights grant creators of copyright-protected works a certain level of control over how their art is used, not only by the owners of the physical medium but also by the general public.

⁴² Gerald Dworkin, *The Moral Right of the Author: Moral Rights and the Common Law Countries*, 19 COLUM.-VLA J.L. & ARTS 229 (1994).

⁴³ Anand Patwardhan v. Director General Doordarshan, (2006) INSC 558.

⁴⁴ Berne Convention for the Protection of Literary and Artistic Works, art. 6-bis, Sept. 9, 1886, 828 U.N.T.S. 221.

The moral right of integrity is especially significant in this context. It enables artists to object to treatments of their works, such as mutilation or distortion that could harm their honour or reputation. This right empowers artists to preserve the integrity of their creations and ensure that they are presented and treated in a manner consistent with their artistic vision and personal values.⁴⁵

In the case of *Amarnath Sehgal v. Union of India*,⁴⁶ the Delhi High Court, while declaring the sculpture as part of the cultural heritage of the nation observed that the “destruction of the work to be ‘an extreme form of mutilation’,”⁴⁷ which by reducing the volume of the author’s creative corpus, affected his reputation prejudicially.”⁴⁸ The Court’s decision broadened the scope of interpretation of Section 57 of the Act. While the law explicitly prohibited certain acts like “distortion, mutilation, modification, and other acts”, it did not explicitly mention ‘destruction’. The Court recognised the special relationship between the artists and their creations, even after economic rights have been transferred. This case has since been a guiding precedent for the judiciary’s dedication to upholding moral rights and advocating for the respectful treatment of the nation’s cultural assets.⁴⁹ In the landmark judgment of *Raj Rewal v. Union of India*, The Court clarified the law regarding the protection of moral rights for architectural works.⁵⁰ The case involved a building that was considered a copyrighted work of architecture. Although classified as an artistic work under the Act, the Court distinguished it from other works in this category by carving out an exception based on the nature of architectural works. In reaching this conclusion, the Court examined the inherent differences between architectural works and other types of copyrighted works such as paintings, sculptures, and drawings. This analysis led to a nuanced understanding of how moral rights should be applied specifically to architectural creations, recognising the unique considerations and challenges posed by this particular form of artistic expression within the framework of copyright law. The Court observed that “land being a subject-matter of multiple independent legislations, a straitjacket application of moral rights without due consideration of the laws affecting the land (on which the building stands) cannot confer proper justice.”⁵¹

⁴⁵ *Id.*

⁴⁶ *Amar Nath Sehgal v. Union of India*, (2002) SCC OnLine Del 390

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Mira T S Rajan, *Moral Rights and the Protection of Cultural Heritage: Amar Nath Sehgal v Union of India* , 10(1) INT’L J CULTURAL PROP. 79 (2001).

⁵⁰ *Raj Rewal v. Union of India &Ors*, (2018) CS (COMM) 3/2018.

⁵¹ *Id* at para 15.

The Court balanced the constitutional and basic human right to property against the moral rights of an architect, which are statutory rights without a basis in common law and are considered to be of lesser significance. It was held that “the moral rights are pre-empted by property rights. Unless any specific provision in law is made, the Act cannot be interpreted to triumph over the right of the owner of certain property to deal with it as they like.”

The Court’s decision to prioritise property rights over the moral rights of architects in cases where they are not the owners of the buildings they designed, echoes a similar approach seen in certain foreign jurisdictions regarding impermanent art. In context of impermanent art, legal frameworks often struggle to fully empower artists with absolute rights against the destruction or alteration of their works. In the context of transient creations, moral rights still play a crucial role. These creations, despite their impermanence, reflect the author’s original expression. Therefore, protecting the integrity of the work and ensuring proper attribution remain important, even if the work is not intended to last or be commercially exploited in the long term.

In addressing these issues, it becomes essential for legal systems to evolve and develop nuanced statutory provisions that recognise and protect the moral rights of creators, regardless of the permanence or ownership status of their artworks.⁵² This entails establishing a framework that upholds the integrity and attribution rights of artists while also respecting the legitimate property interests of owners or custodians of public spaces where impermanent art is displayed. Such a balanced approach would contribute to the fair and equitable treatment of creators of impermanent art within the broader scope of intellectual property and cultural heritage preservation.

A. Takeaways from the Visual Artists Rights Act [“VARA”]

The U.S.A stands out as a jurisdiction that explicitly protects visual artists, including street artists, through the VARA of 1990,⁵³ which grants them the right to oppose the destruction of their works if they have “recognised stature.”⁵⁴ Further, it is a significant piece of legislation in the realm of visual arts, particularly in granting artists certain moral rights that go beyond economic

⁵² Anjali Raj, *Moral Rights of the Author in Copyright Laws in India: A Paradigm Shift*, 4 INDIAN J.L. & LEGAL RSCH. 1 (2022).

⁵³ The Visual Artists Rights Act, 1990, 17 U.S.C. §106A.

⁵⁴ *Id* at § 104A(a)(3)(B).

considerations associated with copyright law. It provides for the right of attribution, and the right of integrity.⁵⁵

These moral rights granted by VARA aim to protect artists' connections to their creations and the inherent dignity of their work beyond merely financial interests. They recognise the personal and emotional investment that artists have in their creations and seek to preserve the authenticity and integrity of those creations.

These provisions act as a gatekeeping mechanism, offering protection only to artworks considered to have artistic merit by art experts, the art community, or society at large, as clarified in legal cases such as *Carter v. Helmsley-Spear Inc.*⁵⁶ This case establishes a two-part test requiring evidence that: (1) the visual art in question is deemed meritorious or possesses "stature," and (2) this stature is acknowledged or "recognised" by art experts, members of the artistic community or a broader cross-section of society.

In the case of *Cohen v. G&M Realty* related to the demolition of the 5Pointz mural complex in New York, the court granted twenty-one graffiti and street artists a landmark award of \$6.7 million in statutory damages.⁵⁷ This ruling marked a historic moment, as it was the first time such protection was extended to graffiti and street art in the U.S.A. under VARA. Judge Block determined that the whitewashed artworks at 5Pointz met the criteria of "recognized stature" and found that the property owner had wilfully and illegally destroyed them without proper notice under VARA.

The court's decision in this case rejected a restrictive interpretation of "recognized stature" proposed by the property owner's expert, emphasising the importance of professional achievement, media coverage, academic recognition, and community support as evidence to meet this standard.⁵⁸ Additionally, Judge Block highlighted the artistic and social significance of 5Pointz, acknowledging its role as a cultural attraction and the impact of curator Meres One in its preservation efforts. However, the 5Pointz case signifies a shift in attitude toward preservation within communities, with artists and advocates rallying to protect their work from destruction.

⁵⁵ Drew Thornley, *The Visual Artists Rights Act's Recognized Stature Provision: A Case for Repeal*, 67 CLEV. ST. L. REV. 351 (2019).

⁵⁶ *Carter v. Helmsley-Spear Inc.*, 861 F Supp 303 (S.D.N.Y. 1994).

⁵⁷ *Cohen et al. v. G&M Realty L.P. et al.*, Case No. 13-CV-05612(FB) (RLM).

⁵⁸ Enrico Bonadio, *Street art, graffiti and the moral right of integrity*, 1 NUART JOURNAL 17-22 (2018).

Despite these efforts, challenges persist in balancing preservation with impermanence within urban environments. The outcome ultimately underscores the complexities of preserving ephemeral art amid urban development. It calls attention to the delicate balance between artistic expression and property rights, emphasizing the cultural significance of these temporary artworks in contemporary society.⁵⁹ Judges are urged to consider the delicate balance between artistic expression and property rights, recognising the cultural significance of these transient works.

V. EXPLORING CASES: IN-DEPTH STUDIES OF IMPERMANENT ART

In this chapter, we delve into detailed case studies examining the complexities of impermanent art. Through in-depth analysis, we explore the legal and practical considerations surrounding the protection and recognition of impermanent artistic expressions within copyright frameworks.

A. Mandap Decoration

A mandap is traditionally a ceremonial structure in Indian weddings, typically a canopy-like framework, decorated with flowers, fabrics and other ornamental elements. Mandaps are customised to portray the emotions of the wedded couple through a creative moment, leading to a comprehensive presentation that represents the couple. Thus, the intent of the creator of the wedding decorations can be inferred to be to create something artistry in nature, which would make it a work of artistic craftsmanship, the conscious intention of the craftsman was the primary test,⁶⁰ as reiterated in the case of *George Hensher v. Restawile Upholster*.⁶¹ Furthermore, Lord Simon noted that if a work is reflective of the author's intent, aim and impact, it would amount to a work of craftsmanship.

For wedding decorations to qualify as artistic craftsmanship, they must be looked into with the help of the following factors-

- The purpose behind such creation of work; and
- Some objective criteria and evidence.⁶²

It's a growing trend to have installation art as mandap. Installation art is a contemporary art form that involves creating immersive, three-dimensional artworks in a specific space. At a wedding, the

⁵⁹ *Id* at pg 18.

⁶⁰ David Tan and Yong Neng Chan, *Copyright Subsistence in Contemporary Times: A dead shark, an unmade bed and bright lights in an empty room*, SINGAPORE JOURNAL OF LEGAL STUDIES 402 (2013).

⁶¹ *George Hensher v. Restawile Upholster* (1976) AC 64.

⁶² Justine Pila, *Works of Artistic Craftsmanship in the High Court of Australia: The Exception as Paradigm Copyright Work*, 36 FED. L. REV. 365 (2008).

theme, venue and overall aesthetic of the event are aligned to create an impactful experience evoking emotions. Let's understand this with the help of a case study; the picture below is of "Embracing Petals", it is an installation of silver threaded columns reached from floor to ceiling. It created a sense of illusion of floating stairs as the bride walked down. Further, modern geometrical cloud formations were used to create a dramatic sky over the landscape. Using installation art as wedding decoration can add a unique and artistic touch to the event.



Project Embracing Petals⁶³

If we look at "embracing petals" it involves some degree of production by hand that is guided by special training or skill and implies a manifestation of pride in "sound workmanship". The clouds' white colour created a surreal atmosphere as they contrasted with the dark architectural backdrop of a fog-covered palace. By looking into the picture objectively, the purpose was to create something aesthetic and a creative moment to represent emotions possessing artistic quality. The work required specific artistic skills and would arguably be a work of artistic craftsmanship.⁶⁴

Furthermore, setting up of a mandap involves floral arrangement which is a floral art in itself. The author shall seek reference of the Ikebana Art, wherein flowers are used as an artistic expression, which is termed as a fine art,⁶⁵ with its own historical traditions, and precepts of composition.⁶⁶ Moreover, it is also seen that floral artists' eyes are trained to measure spaces and recognize the harmonies of rhythm which make design decorative. This is indicative of the fact that the floral

⁶³ *Project Embracing Petals*, DESIGNLAB EXPERIENCE (2019), <https://www.designlabexperience.com/projects/embracing-petals>.

⁶⁴ Masson Douglas, *Fixation on Fixation: Why Imposing Old Copyright Law on New Technology Will Not Work*, INDIANA LAW JOURNAL 1066 (1996).

⁶⁵ Dorothy Meigs, *Flower Arrangement as a Fine Art*, 27(9), THE AMERICAN MAGAZINE OF ART (1934).

⁶⁶ *Ansehl v. Puritan Pharmaceutical Co*, 61 F.2d 131 (8th Cir.).

decorators at a wedding use their skill and judgment to make an intellectual effort in decorating a wedding.

For mandap decorations to be eligible for copyright protection, it is pertinent to understand the craftsman's aim and intent. In the case of *Lucasfilm Ltd v. Ainsworth*,⁶⁷ it was held that the craftsman's intent is of prime importance and noted that "the artwork must have, as part of its purpose, a visual appeal in the sense that it might be enjoyed for that purpose alone, whether or not it might have another purpose well".⁶⁸ Conceptual artworks like that of Mandaps encourage an audience experience that may create a degree of coherence among audience experiences. If the elements of a conceptual artwork that create coherence among audience experiences are decided and implemented by an author, the work may be fixed in terms of Section 101.⁶⁹ Hence, the coherence among user experiences may be an indicator of fixation, if it indicates authorship.

It must be seen that while arranging or displaying natural objects in an artistic manner can involve some creative decisions and judgment, the arrangement itself must exhibit a sufficient degree of originality to be eligible for copyright protection.⁷⁰ Notably, mandap decorations satisfy the minimum level of originality, thus, a copyright can subsist in mandap decorations.⁷¹ As discussed earlier, a mandap is aligned with the overall aesthetic of the event to create an emotional experience, which is a form of visual appeal with a clear artistic purpose, thereby, satisfying the primary test of the craftsman's intent to create a work of artistic craftsmanship.

The author concludes by claiming that the mandap decorations would qualify as an artistic work as per the 1957 Act by looking into the skill and technical knowledge of craftsmen and the artistic intent and purpose behind the art.⁷² Mandap decorations satisfy the minimum threshold of being original, therefore, making them an original work of artistic craftsmanship.

B. Food Art

Food art refers to the meticulous preparation and presentation of food on a plate, designed to be visually appealing and enjoyable for diners in a restaurant. When a chef creates food art, they craft each dish with intricate arrangements of colours, textures, and shapes, aiming to stimulate diners'

⁶⁷ *Lucasfilm Ltd v. Ainsworth* [2011] UKSC 39.

⁶⁸ *Id.*

⁶⁹ William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Stud (1989).

⁷⁰ Chloe Francis, *The Protection of Contemporary Art under UK Copyright Law*, 23 ART ANTIQUITY & L. 289 (2018).

⁷¹ Alka Chawla, *supra* note 6, at pg 115.

⁷² Robert Brauneis, *How Much Should Being Accommodate Becoming? Copyright in Dynamic and Permeable Art*, 43 COLUM. J.L. & ARTS 381 (2020).

aesthetic senses. This creative plating not only enhances the visual appeal of the dish but also contributes to the overall dining experience. Diners often appreciate and critique the artistic presentation of food as a delightful expression of both visual and flavourful artistry. Importantly, food art serves a practical purpose beyond aesthetics; by influencing the taste of the dish and elevating the restaurant's quality and reputation by offering a unique culinary experience.

While the 1957 Act in India provides protection for original artistic works, including works of artistic craftsmanship, the applicability of these provisions to the presentation of food on a plate remains a complex issue.⁷³ The 1957 Act does not define the standard of originality. However, after *EBC v. D.B. Modak*,⁷⁴ the originality standard in India is situated between the two extremes of 'Sweat of the Brow' and the 'Modicum of Creativity' tests. The understanding is that a work is original if the author has put his/her mind, skill and labour into the work and further upheld "the principle that anyone who by his or her own skill and labour creates an original work of whatever character, shall enjoy an exclusive right to copy that work and no one else would be permitted to reap the crop what the copyright owner had sown."⁷⁵

The above standard would not be the ideal standard to follow in the current case. There is a strong tradition in the culinary industry of drawing inspiration from each other's work in the same cuisine, and many works are derivative. Then there are certain cuisines that are innately presented in a particular way. By current standards, a chef who makes only a minimal change to create a 'somewhat different' presentation of such cuisine than the existing ones, would easily satisfy the criteria for originality. However, this would allow the creation of a monopoly in that cuisine and cause its appropriation.

The second requirement is for the original creation to be a 'work' as required under section 13 of the Act.⁷⁶ One such category of work is artistic work, as defined under section 2(c). Food presentations can find protection under this category as works of 'artistic craftsmanship'. They are always seen as artwork in the industry. Artistic Craftsmanship under this Section can be understood as the quality of being artistic. There are two essential ingredients of this sub-clause. First, the work has to be of a craftsman and secondly, it has to be of artistic value.⁷⁷

⁷³ Nikhitha Naveen Kumar & Chiranthana N. Yadav, *Copyright Protection to Culinary Presentations: An Analysis*, 5 INDIAN J.L. & LEGAL RSCH. 1 (2023).

⁷⁴ *EBC v. D.B. Modak*, (1916) 2 Ch. 601.

⁷⁵ *Id* at para 40.

⁷⁶ *Supra* note 1, at § 13.

⁷⁷ Alka Chawla, *supra* note 6.

It is largely understood as a work that “owes its origin to the author”, i.e. the work must originate from the skill and labour of the author and must not be a copy of any other work. Another prerequisite of copyright protection is the fixation of work in a tangible form.

The question of whether the arrangement or presentation of food can be copyrighted in India delves into the realm of culinary arts, challenging conventional perceptions of artistic expression and intellectual property rights. Plating a dish involves more than just culinary preparation; it requires meticulous attention to detail, combining ingredients in aesthetically pleasing ways to enhance visual appeal. This creative process raises intriguing questions about the distinction between functional and artistic aspects of food presentation.

In *Kim Seng Company v. J&A Importers, Inc.*,⁷⁸ the Court examined whether a “bowl-of-food” sculpture was original enough to be entitled to copyright protection. J&A Importers created this sculpture in 1998 as part of an advertising campaign. Kim Seng alleged that J&A had copied the sculpture, thereby infringing its copyright. The court examined whether the bowl-of-food sculpture met the criteria for copyright protection. To qualify for copyright, a work must be original, meaning it must possess a sufficient degree of creativity. The court analysed whether the arrangement of rice sticks, egg rolls, meat, and garnishes in the bowl constituted a sufficiently creative expression. It was also contended by the Plaintiff that one of its employees “chose the foods (depicted in the sculpture) out of thousands of possibilities and directed their arrangement to be in a certain fashion out of infinite possibilities.” The court, however, held that “the combination of a common bowl with the contents of a common Vietnamese dish indicated a “lack of originality,” and was therefore not eligible for copyright protection.”

The U.S. Supreme Court case of *Baker v. Selden* was detrimental to the idea that recipes are copyrightable.⁷⁹ In *Baker*, the Court held that “if, on being copyrighted, a monopoly ensues, not only of the piece itself but also of the process upon which it is based, then copyright should not be enforced.” This holding could have been narrowly applied, but scholars and some courts have interpreted *Baker* to mean instead that “because recipes are traditionally reproduced to be used for cooking rather than for their literary or artistic value, they are not considered susceptible to

⁷⁸ *Kim Seng Company v. J&A Importers, Inc.* 810 F. Supp. 2d 1046.

⁷⁹ *Baker v. Selden*, 101 U.S. 99 (1880).

copyright protection.” But this argument, that a dish’s artistic merit is secondary to the artistic value, is not supported by the current canons of cultural and artistic interpretation.⁸⁰

The above decisions seem to emerge from the fact that under the US Copyright regime, ‘fixation in a tangible medium’ is an expressly provided requirement and a work can be said to be fixed if its copy is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. It must be noted, that there are no corresponding provisions under the 1957 Act. Though the requirement of fixation is parallel, as copyright subsists in expression and not mere idea, the term ‘fixation’ has not been defined in such narrow terms. In fact, there is no definition of ‘fixation’ given under the Act. Therefore, under the Indian regime, a broader interpretation of ‘fixation’ is conceivable.⁸¹

Plating is an expression of a chef’s particular idea to present the dish in a manner that enhances the overall experience of eating and brings out the natural flavors. The fact that the dish is intended to be eaten, or that the food by its very nature is perishable, does not mean that its presentation isn’t fixated. The presentation of a dish which is an original artwork oozed out of the chef’s intellect and which can be exactly re-created, can be said to be fixated. Hence, in case a question arises as to the copyrightability of a presentation of food, the court can find the presentation of food to be an ‘original work of authorship’ and to be ‘fixed in a tangible medium’, and thus, copyright can be bestowed on the same.

In the author’s opinion, the plating of a dish requires precision, with chefs strategically placing colours for aesthetic appeal. It demands creativity and culinary skill to arrange items on a plate, akin to creating a piece of artwork. Dish presentation is comparable to painting or artistic creation, elevating culinary experiences to visual artistry.

The analysis of culinary works under the works of artistic craftsmanship category reflects potential challenges in judicial determination due to subjective interpretations of artistic merit.⁸² Consequently, courts are likely to set a low threshold for artistic classification, focusing more on unconstrained artistic expression than on aesthetic appeal. Culinary creations, crafted skilfully by

⁸⁰ Britney Karim, *The Right to Create Art in a World Owned by Others - Protecting Street Art and Graffiti under Intellectual Property Law*, 23 INTELL. PROP. & TECH. L. J. 53 (2019).

⁸¹ Caroline M. Reebs, *Sweet or Sour: Extending Copyright Protection to Food Art*, 22 DEPAUL J. ART, TECH. & INTELL. PROP. L. 41 (2011).

⁸² Roscoe Moore, *Copyright in Culinary Works: Can the Copyright Act 1994 Accommodate Culinary Creations?*, 17 OTAGO L. REV. 185 (2021).

chefs, often exhibit artistic qualities, although not all dishes may appeal aesthetically. The works of artistic craftsmanship category thus presents a framework where culinary works could be recognized as art, acknowledging the complexities of subjective interpretation. The categorisation of culinary works as works of artistic craftsmanship involves consideration of function alongside artistic quality, potentially leading to subjective assessments of culinary merit by the court. Despite the functional nature of food, characteristics of culinary creations—such as innovative appearance and visual focus—can counterbalance utility concerns. Modern chefs prioritize aesthetic presentation, demonstrating separate aesthetic features warranting copyright protection distinct from utilitarian aspects.⁸³

Some authors argue that granting copyright protection to food art could undermine the culinary industry's culture of openness and sharing knowledge.⁸⁴ However, others believe that such protection would foster innovation, leading to new dishes and presentations.⁸⁵ With the growing significance of food art, expanding intellectual property protections, especially through judicial interpretations in India, becomes increasingly important.⁸⁶ Therefore, it is very important to grant adequate copyright protection to such creations in the culinary industry to chefs and restaurants mainly because of the economic aspects.

In the forthcoming chapter, we explore several proposed solutions aimed at addressing challenges in protecting impermanent art, including expert evaluation, copyright law amendments, copyright society establishment, and adoption of VARA-inspired legislation.

VI. SUGGESTIONS AND FINDINGS

The evaluation of originality in impermanent art involves applying criteria similar to those established in copyright law. Like any copyrightable work, impermanent art must demonstrate a level of creativity that exceeds de minimis content—content lacking a discernible creative spark. Drawing from the judicial precedents, the originality of impermanent art hinges on its ability to exhibit at least a basic degree of creativity.

⁸³ *Id* at pg 200.

⁸⁴ J. Auston Broussard, *An Intellectual Property Food Fight: Why Copyright Law Should Embrace Culinary Innovation*, 10 VAND. J. ENT. & TECH. L. 691 (2008).

⁸⁵ *Id* at pg 707.

⁸⁶ Anuttama Ghose and S M Aamir Ali, *Protection of Cuisine under Intellectual Property Law: A Global Perspective*, 27 JIPR 171 (2022).

Coming to the issue of fixation across jurisdictions, it can be seen that while fixation plays a different role in copyright law between the UK and the U.S.A., both jurisdictions aim to protect creative works by establishing authorial control and categorising works as eligible for copyright protection based on defined criteria. The UK's approach emphasises artistic categorisation and recognises the potential for temporary works to be protected, whereas the US prioritizes tangible fixation to establish authorial control over the work. These differences underscore the nuanced interpretations of copyright law across different legal systems. Regarding the notion of works of artistic craftsmanship, there has been a conventional view, exemplified in legal discourse such as the *Burge* case, that these works possess exceptional status due to their artistic quality requirements. However, a more nuanced perspective challenges this notion by asserting that works of artistic craftsmanship should be considered paradigmatic rather than exceptional within copyright law frameworks. Furthermore, the acknowledgment of functional constraints on copyright entitlement underscores the court's role in respecting established categories of copyright works. This stance suggests that judicial intervention to broaden copyright protection for specific objects deemed deserving is not appropriate. Instead, the courts should adhere to existing legal frameworks that balance creativity and functionality within copyright law.

The goal of copyright, whether applied to traditional or unconventional forms of art like graffiti, is to foster the spread of knowledge and encourage learning, this is also envisioned in the U.S. Constitution, which empowers Congress to promote the progress of science and the arts by securing exclusive rights to authors and inventors.⁸⁷ Granting copyright protection to graffiti would expand the scope of non-conventional subject matter eligible for copyright. Under the Indian Constitution, freedom of expression is a fundamental right, ensuring that diverse forms of artistic expression, regardless of medium, should be protected.⁸⁸ Aligning intellectual property rules with constitutional principles is essential to accommodate these expressions. In the coming section, there are certain solutions to remedy the problem of the inclusion of impermanent art.

A. Unlocking Solutions: Pioneering Approaches to Copyrightability of Impermanent Art

1. Amendment to Copyright Act, 1957

It is clear from the discussion that there's a need to settle the dust surrounding the scope of copyright protection and for that, we need another amendment to the 1957 Act. The Copyright

⁸⁷ U.S. CONST. art. I, § 8, cl. 8.

⁸⁸ INDIA CONST, art. 19(1)(a).

(Amendment) Act, 2012, brought much-needed relief to original authors of literary and artistic works by granting them the right to receive a royalty. Similarly, an amendment can be made to Section 2 (c) of the 1957 Act to include impermanent art in artistic works due to growing relevance of works like Art Shanty Projects that create ephemeral art on a frozen lake in Minneapolis and seek contribution for their art,⁸⁹ and “The Impermanent Strip of Light by Angela Shaffer”.⁹⁰ Furthermore, there is a critical need to harmonise the national copyright regime, as the 1957 Act is silent on the fixation requirement.

However, the Copyright Manual specifies that an artistic work, when “fixed in a tangible form,” is eligible for entry into the Register of Copyrights. This disparity creates inconsistency and confusion within the copyright framework thus, legislative enquiry is required in this aspect. Therefore, an amendment to the 1957 Act is the need of the hour to address various grey areas such as artificial intelligence-generated works and contemporary forms of art, to provide more clarity and safeguards to the stakeholders.

2. *Appointment of an Expert*

It is suggested that the courts while deciding the subsistence of copyright, must be guided by the theories of art. There are primarily institutional theory and aesthetic definition theory of art that can be used as a guiding force. Aesthetic definition theory defines artworks as works that aim at creating an aesthetic experience for the audience, whereas, the institutional theory focuses on the “agents of art” such as philosophers, curators, and audiences. Impermanent art is created with the aim of creating an aesthetic experience for the audience, therefore, the author is of the opinion that if the expert evidence on the basis of the theories of art and agents, such as curators and audiences,⁹¹ is taken into consideration, objectively, impermanent art would be perceived as original artistic works.

The Indian Patent system provides ample provisions for the procurement of specialised “technical” expertise in the courts, adjudicating patent disputes,⁹² however, the 1957 Act is silent on the appointment of experts to adjudicate copyright disputes. A temporary expert an ad-hoc set of experts with a diverse range of technological expertise would ensure that courts are able to draw on the appropriate expert for a particular patent case involving a specific technological domain.

⁸⁹ *ArtShanty Projects*, <https://artshantyprojects.org>.

⁹⁰ Angela Shaffer, *The Impermanent Strip of Light*, PHMUSEUM (2021), <https://phmuseum.com/projects/the-impermanent-strip-of-light>.

⁹¹ Alka Chawla, *supra* note 6, at pg 406.

⁹² The Patents Act, 1970, 39 of 1970, §115.

3. *Lessons from other Creative Industries*

The suggestion proposed draws an analogy from the requirement for restaurants to pay license fees for publicly performing music, even if it's just playing a CD, highlighting the need for similar compensation in the culinary realm. The argument posits that akin to music being incidental in restaurants where cuisine is the primary product, compensating recipe inventors for the use of their creations is fair and logical. Given the significance and centrality of recipes to the culinary industry, the originators deserve recompense or, at the very least, recognition through attribution. This framework aims to acknowledge the value of culinary creativity and ensure equitable treatment for recipe creators within the food industry.

For instance, in the case involving Night Fever Club and Lounge and Indian Singers Rights Association [“**ISRA**”], where the defendant used songs from ISRA without obtaining a license. ISRA, the plaintiff, sought an injunction and compensation for this infringement. The Delhi High Court not only ordered the defendants to cease using ISRA members’ songs but also required them to provide a detailed account of the earnings generated from playing these songs. This ruling highlights the importance of respecting intellectual property rights and emphasises the consequences of the unauthorised use of copyrighted material.⁹³

4. *Establishment of Copyright Societies*

The concept of collective administration of copyrights, as outlined under Section 33 of the 1957 Act,⁹⁴ offers a strategic framework for managing and protecting copyright works across diverse fields under a single society comprised of original work producers as members. Such societies streamline the process of copyright distribution by serving as centralized entities through which interested parties can purchase copyrights for original songs, books, and other creative works. Copyright societies are empowered to grant licenses for works where copyright subsists and administer other related rights under the 1957 Act. Their primary function is to administer these rights on behalf of their members, issuing licenses for commercial exploitation and collecting royalties or license fees, which are then distributed among members after deducting administrative expenses.

In light of this, the establishment of a copyright society tailored to industries dealing with impermanent art, such as the culinary industry, could significantly enhance the protection and

⁹³ The Indian Singers Rights Association v. Night Fever Club & Lounge, CS (OS) 3958/2014.

⁹⁴ *Supra* note 1, at § 33.

recognition of creators' rights.⁹⁵ By initiating such an effort within the culinary sector, chefs and restaurants could benefit from greater copyright protection for their culinary creations, acknowledging the effort and creativity invested in their work. This collective approach would enable culinary professionals to assert their rights more effectively, ensuring fair compensation and recognition for their contributions to the culinary arts. Ultimately, a copyright society dedicated to impermanent art industries like culinary arts would contribute to fostering a culture of respect and protection for creative endeavours in these specialised fields.

5. *Change in Judicial Approach*

The current approach in judicial interpretation of copyright protection for artistic works highlights a pressing need for reform. Under the existing framework, particularly in the absence of specific definitions within the 1957 Act, courts are compelled to resort to the ordinary meanings of terms.⁹⁶ This reliance on literal interpretations can present significant challenges, particularly for unconventional or non-traditional works seeking recognition as artistic creations.

The crux of the issue lies in the ambiguity surrounding what constitutes an “artistic work” within the confines of the law. Without explicit definitions or guidelines, the scope of protection becomes constrained by interpretations that may not adequately account for evolving forms of artistic expression. Consequently, artistic endeavours that diverge from conventional norms or established categories often face hurdles when seeking recognition and protection under copyright law.

This inherent limitation is particularly notable in the context of contemporary art, where the boundaries of artistic expression continually expand to encompass new mediums, styles, and interpretations. Works that defy traditional definitions of artistry—such as digital art, conceptual installations, or experimental performances—may struggle to fit neatly into preconceived legal categories, potentially depriving creators of the recognition and rights they deserve. To address this challenge effectively, there is a compelling need for a more adaptive and nuanced approach within the judicial system.

6. *Adoption of a Model Similar to the U.S.A.'s VARA*

The lack of existing literature and legal precedents in certain art forms calls for judicial activism beyond established norms, possibly through the creation of legislation like the VARA, as an

⁹⁵ Prashant Reddy, *The Fortunes of Indian Copyright Societies*, SPICYIP, <https://spicyip.com/2020/07/the-fortunes-of-indian-copyright-societies.html>.

⁹⁶ *Metix v. Maughan*, [1997] FSR 718.

alternative to the inability to make an amendment to the 1957 Act. This act addresses moral and economic rights arising from evolving art forms and the interests of creative individuals. It grants artists lifetime rights of integrity and attribution for original visual artworks created after its enactment. The emergence of Conceptual art during this period, known for its transient nature and reliance on external factors, coincided with the expansion of legal protection for art under VARA.

The primary goal of VARA is to preserve clearly defined original works of art for future generations, emphasising the importance of tangible and lasting records of human expression in visual arts. VARA's inclusion of moral rights, such as attribution and integrity, has received widespread praise in discussions about artist rights in the U.S.A. This legislation broadened copyright protection by acknowledging the moral rights of artists who create specific copyrightable physical works of visual art, ensuring the preservation of their artistic integrity and contributions. Implementing a VARA-like model could facilitate enhanced copyright protection for contemporary art through distinct legislation.

VII. CONCLUSION

It is essential to adopt a nuanced approach that considers the intrinsic creativity and cultural significance of these transient artworks. While traditional copyright law emphasises fixation in a tangible medium, a more expansive interpretation is warranted to accommodate impermanent art forms like street art, mandaps, and culinary art. The focus should shift towards recognizing the effort and originality embedded within impermanent artistic expressions, rather than solely emphasising tangible outcomes. Courts can play a pivotal role by acknowledging alternative forms of fixation that capture the essence and impact of impermanent art on societal discourse. In the interim, based on the provisions discussed, impermanent works such as impermanent art may potentially qualify for copyright protection in a limited sense. This interpretation acknowledges the evolving nature of art forms and seeks to provide some level of protection within the current legal framework. Based on the arguments presented, it is evident that the courts have emphasised the importance of the tangibility of artistic works rather than fixation, suggesting a legislative intent that prioritises the actual expression of the work. However, for the 1957 Act to be fully effective and to provide comprehensive protection for existing and evolving art forms, there is a critical need for a holistic understanding of copyright law. Therefore, it is imperative for both the legislation and the judiciary to address the existing gaps in the law.

STATE PROPRIETORSHIP UNDER THE GI GOVERNANCE IN INDIA:

ISSUES AND CHALLENGES:

DR. DEBASIS PODDAR* & MS. BIPASHA SAIKIA**

ABSTRACT

While the ‘individual dimension’ is commonplace in intellectual property discourse to the credit of individuals, Geographical Indication is a unique form of intellectual property that is characterized by the ‘collective dimension’ of goods/products. Governance of GI necessitates a collaborative/community approach with multiple stakeholders, including actors/producers, state authorities, traders, distributors, retailers, consumers etc. In India, state authorities play an important role either at the forefront, driving the GI governance mechanism or as a mediator/facilitator, encouraging producer associations to take charge. The authors in this article explore the role of state authorities as registered proprietors of GIs in addressing the concerns/interests of the producers, the real actors of the GI supply chain. An attempt has been made to characterize these state institutional authorities vis-à-vis their powers and functions—either as overarching/monopolistic, welfarist or preservation-centric, depending on the extent of involvement on their part in the concerned GI regime. The authorial intent lies in the engagement of an inquiry into whether and how far these state institutional applicants “represent the interests of the producers” as mandated in the Indian GI legal regime under the Geographical Indications of Goods (Registration and Protection) Act of 1999 and to interpret the legislative terms like ‘producer’, ‘registered proprietor’, etc., toward justification of these state institutional authorities as registered proprietors and decipher whether their statutory powers and functions commensurate with the legislative objectives associated with the Indian GI regime. After the performance appraisal of these state institutional authorities as registered proprietors, the authors conclude this treatise with a few suggestions for better performance of these authorities in the time ahead.

I. INTRODUCTION

Geographical Indications [“GIs”] are characterized by a “collective dimension”. They are community rights, i.e. commodities produced by local actors in geographically defined areas but marketed globally. They are multifunctional instruments that conform to ‘product specifications.’ ‘Product specifications’ are code of practices outlining uniform standards regarding method of producing the GI good and quality considerations to be maintained. The document is an output

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of negotiations among producers/local actors, designed to protect the essence of the place, like natural resources and indigenous knowledge used in producing GI goods.¹

In recent times, GI products have seen greater expansion of their markets despite GIs being local goods, crossing domestic borders even. There thus exists a “local-global dichotomy” in GIs.² Managing this requires the creation of collaborative networks involving many stakeholders, with state institutional authorities being one of them.³ Complicated challenges arise on deciding factors like product specifications, delimitation of the production area of the GI, control/inspection functions that ensure conformity with product specifications at various levels and most significantly, accommodating and representing the interests of all producers of the GI concerned, which is the cornerstone of the Indian GI system, governed by the Geographical Indications of Goods (Registration and Protection) Act, 1999 [“**GI Act**”].⁴

GIs being collective goods with several stakeholders; their management requires an organized system designed to govern GIs so that there can be maximum utilization of their value. Governance in the context of GIs refer to an elaborate set-up, comprising GI producers, bodies that register GIs, bodies that engage in market-related activities of these GIs or their promotion and brand building exercises and the enforcement mechanism that reinforce GI protection upon instances of misappropriation. Thus, GI governance is a collaborative process, hinged on the cooperation and coordination among multiple actors. Broadly, two approaches drive GI governance globally – the producer-led model and the state-led model.⁵ From the filing of GI applications to measures adopted post-registration, the extent of involvement of state authorities differs across jurisdictions. GIs originated in the European Union [“**EU**”] which has century-old laws governing them.⁶ But in the developing world, their arrival is fairly recent. On account of differences in economies, the role of the state varies across countries.⁷ To illustrate, in France, GI applications for the purposes of registering the GI products are filed and submitted by the producers who produce the GI products. But in India along with countries like Vietnam and

¹ Barbara Pick & Delphine Marie-Vivien, *Representativeness in GIs: A Comparison between the State-Driven and Producer-Driven Systems in Vietnam and France*, 13 SUSTAINABILITY 5056 (2021).

² Sarah Bowen, *Development from within: The Potential for GIs in the Global South*, 13 J. WORLD INTELL. PROP. 233 (2010).

³ Cerkia Bramley, Estelle Biénabe & Johann Kirsten, *The economics of geographical indications: Towards a conceptual framework for Geographical Indication Research in Developing Countries*, 1 THE ECONOMICS OF INTELLECTUAL PROPERTY 111 (2009).

⁴ *Id.*

⁵ Pick & Marie-Vivien, *supra* note 1.

⁶ Kasturi Das, *Geographical Indications at the WTO: An Unfinished Agenda*, 4-6 (East Asian Bureau of Economic Research, Working Paper No. 162, 2010).

⁷ Karl M. Rich, *Trajectories of Value Chain Governance and GIs: Issues for Upgrading Handicraft Goods in India*, 1-10 (CUTS CITEE, Working Paper No. 1/2011, 2011).

Indonesia and other developing economies, it is the state authorities that lead when it comes to filing GI applications for registration.⁸ For example- Patent Information Centre of Assam Science Technology and Environment Council [“ASTEC”] under the Department of Science and Technology of the Government of Assam, a state body, had filed the GI application for the registration of “Muga Silk” and its logo in 2007 and 2014 respectively.⁹

The objectives of GI protection include socio-economic benefits to the producers and the overall development of the region. In this regard, the role of the state assumes significance as GIs work on the spirit of cooperative entrepreneurship, and the state becomes the adhesive that brings all the stakeholders together. The objectives of GI require unification of purpose of all along the supply chain to a common goal of development. Part IV of the Indian Constitution elaborates on *Directive Principles of State Policy* [“DPSPs”]. They are guidelines based on the foundation of social and economic justice and are concrete socio-economic goals whose purpose is to guide the government in the establishment of a welfare state. DPSPs thus, are not mere rhetoric but executable guidelines for ‘social, economic and political justice’ of the citizenry.¹⁰ Thus, Part IV is the fount for the justification of the involvement of the state in GI governance. GIs being tools of socio-economic development and state being one the stakeholders in their management; by engaging in GI-related activities, the state is fulfilling its mandate under Part IV of the Indian Constitution.

In developing countries, the primary objectives of GIs are preserving the traditions associated with the GI, uplifting the producers’ community, and developing rural areas as a whole.¹¹ Accordingly, the GI governance mechanism is designed. For instance, handicraft GIs primarily have the objective of ensuring the welfare of the artisans and protecting the rich cultural heritage so that the art form does not decline. This requires state intervention too. But agricultural GIs do not share similar concerns like handicraft GIs. This is so because agricultural GIs are produced by farmers whose very livelihood depend on their earnings from their produce. This statement can be substantiated considering that we are still largely an agriculture-based economy. Handicraft GIs apart from commercial considerations are ruled by the relatively emotional component of

⁸ Pick & Marie-Vivien, *supra* note 1.

⁹ *Application for GI for Muga Silk of Assam*, GEOGRAPHICAL INDICATIONS REGISTRY (April 9, 2007), <https://search.ipindia.gov.in/GIRPublic/Application/Details/55>.

¹⁰ Berihun Adugna Gebeye, *The Potential of Directive Principles of State Policy for the Judicial Enforcement of Socio-Economic Rights, A Comparative Study of Ethiopia and India*, 10 VIENNA JOURNAL ON INTERNATIONAL CONSTITUTIONAL LAW 4 (2016).

¹¹ Bramley, *supra* note 3, at 114.

maintaining a tradition and has significant cultural considerations as well. Agricultural GIs are expected to fulfil market expectations requiring active involvement of state authorities like Department of Agriculture/Horticulture or other marketing bodies that necessitate a more aggressive different kind of state involvement when compared to handicraft GIs.¹² The Indian law, based on the objectives of the Agreement on Trade-Related Aspects of Intellectual Property Rights, 1995 [“TRIPS”], has the interests of the producers and consumers as its primary objective,¹³ which must be reflected in the decisions and actions of the state GI applicant. TRIPS was the first international agreement having an exclusive chapter on GIs replete with enforcement mechanism and was instrumental in ensuring a universal protection for GIs by means of TRIPS-compliant national laws. TRIPS clarified GI-related concepts along with providing detailed provisions on misappropriation of GIs.¹⁴

The functioning of the GI applicant must not be autocratic, sidelining the concerns of the producers that have largely diversified in recent times. From socio-economic concerns like livelihood, better revenues, and preservation of tradition to dealing with threats from middlemen and outsiders, misappropriation and overall development of the region along with sustainability of production methods due to climate change; concerns of producers are varied. In recent times, concerns of producers are not confined simply to improved socio-economic returns, which is definitely overarching and pervasive, but more than that, enhanced representation in the decision-making process of GI governance and a stronger voice and improved position in the negotiating table. Producers as a community must no longer be relegated to the background. Accommodating these concerns is the primary role of the registered proprietor whose actions must result in ensuring equitable distribution of benefits (of all kinds) down to the real producers.

Prior to TRIPS was the Lisbon System that clarified only on “Appellations of Origin”.¹⁵ TRIPS, the Lisbon Agreement, 1958 and the Geneva Act, 2015 are silent as to who can be a GI applicant.¹⁶ Countries have framed their own laws on this. Section 11(1) of the GI Act, 1999, states that GI application can be filed by “any association of persons or producers or any organization or

¹² Delphine Marie-Vivien & Estelle Bienabe, *Geographical Indications for Agricultural and Handicraft Goods: The Strength of the Link to the Origin as a Criterion*, 17 PERSPECTIVE 1-4 (2012).

¹³ Agreement on Trade Related Aspects of Intellectual Property Rights, art. 7, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

¹⁴ *Id* at art 22.

¹⁵ Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, art. 2, Oct. 31, 1958, U.N.T.S. 923.

¹⁶ Latha Nair, *Should India Join the Geneva Act of the Lisbon Agreement, 2015?*, SPICYIP (March 12, 2020), <https://spicyip.com/2020/03/should-india-join-the-geneva-act-of-the-lisbon-agreement-2015.html>.

authority established by or under any law for the time being in force representing the interest of the producers of the concerned goods, who are desirous of registering a geographical indication.” Statutory bodies as an extension of the term “any organization or authority established by or under any law for the time being in force” are entrusted with the power to file for GI registration under this Section. Naturally, this can extend to mean even state authorities are entrusted with the power to file GI applications for registration. Thus, analysis of Section 11(1) clarifies the right given to varied state authorities in India to furnish GI applications.

Against this backdrop, after having outlined the collective dimension aspect of GIs necessitating a different method of governing them, the role of state in GI governance and the fact that state authorities have the statutory right to file GI applications provided they “represent the interest of producers”; the paper makes an honest attempt at analyzing the state-driven approach of GI governance in India with a special focus on state authorities as registered proprietors and how well they fulfil the claim of “representing the interests of the producers” as mandated in the GI Act, 1999. After an elaborate analysis of the Indian experience, the authors conclude that producers/local associations in India, despite being registered as GI applicants for some GIs require more space to voice their opinions on decisions like product characterization, delimitation of the geographical territory, production processes, quality standards, and most significantly post-registration measures, covering the entire spectrum of GI governance. Even as GI applicants, they are heavily dependent on state support in crucial decision-making matters involving funds and market linkages. As for state-registered proprietors, they need to enhance their engagement with the real producers to achieve the desired objectives of GIs if they truly intend to “represent the interests of the producers”. However, this paper has only provided a brief study of this issue, thereby provoking ideas for further research and analysis.

II. STATEHOOD UNDER THE GI REGIME IN INDIA

A. State Institutions as Registered Proprietors

The GI Act provides that “registered proprietor”, in relation to a GI, means “any association of persons or of producers or any organization for the time being entered in the register as proprietor of the GI”.¹⁷ Section 11(1) clarifies who can file the GI application, including in its ambit “any association of persons or producers or any organization or authority established by or under any law for the time being in force representing the interest of the producers of the concerned goods,

¹⁷ Geographical Indications (Registration and Protection) Act, No. 48 of 1999, § 2(1)(n) (Ind.). (*Hereinafter* referred to as “GI Act 1999”)

who are desirous of registering a geographical indication in relation to such goods.” From these two provisions and the terminology used (general definition of “proprietor” means holder/owner), along with a bare reading of the GI Act, it is sufficiently clear that registered proprietor and GI applicant refer to the same bodies. Browsing the GI Section on the IPIndia website helps in understanding the ongoing trend of GI proprietorship in India. For instance, Tea Board of India which has filed for GI registration of “Darjeeling Tea” is its GI applicant body, also referred to as registered proprietor, as per the GI Act. Another such body which had registered several GIs under its belt is Northeastern Regional Agricultural Marketing Corporation Ltd. [“**NERAMAC**”], a Government of India enterprise, which is the GI applicant body/registered proprietor for several agricultural and horticultural products from the Northeast. This way, proprietors in India are diverse in character, ranging from statutory bodies to government departments to even State Agricultural Universities.

Section 21 (a) of the GI Act enumerates the rights conferred on registration of a GI. With respect to a registered proprietor, it provides the right to obtain relief in respect of infringement of the GI.¹⁸ This is relevant as a factor in assessing how well-suited state GI applicant bodies are in “representing the interests of producers” and determines their activeness.

In India, state agencies are active in filing GI applications even when they do not produce the goods. This might be justified by the lack of strong producer organizations in India.¹⁹ The GI Rules, 2002, provide the registered proprietors with the rights to manage the GI. The rights of use of the GI are granted to the producers registered as authorized users (AUs).²⁰ The role of the state ranges from filing the GI applications to marketing/branding and ensuring enforcement with varying degrees of involvement, specific to the type of goods being protected. The GI Act allows for the protection of specific goods from agricultural, handicrafts, manufactured and foodstuffs.²¹

The GI Registry records reveal that most registrations are done by “organizations or authorities established by or under any law, representing the interest of the producers” and not by “producers, associations of producers...representing the interest of the producers”.²² Both these expressions are mentioned in Section 11(1) of the GI Act. In Europe, GI applications can be put forth only

¹⁸ GI Act 1999, § 21.

¹⁹ DELPHINE MARIE-VIVIEN, *THE PROTECTION OF GEOGRAPHICAL INDICATIONS IN INDIA: A NEW PERSPECTIVE ON THE FRENCH AND EUROPEAN EXPERIENCE* 179 (Sage Publications, 2015).

²⁰ GI Act 1999, § 21(1)(b).

²¹ GI Act 1999, § 2(1)(2).

²² GI Act 1999, § 11(1).

by an ‘applicant producer group’, meaning “an association, irrespective of its legal form, composed of producers of the same product the name of which is proposed for registration”.²³ But a closer observation of the definition reflects the intent of giving a bigger role to producers with the use of the word only which is not so in India. Trend shows that majority of GIs in India involve the state as an applicant claiming proprietorship under the terms “organizations or authorities established by or under any law” under Section 11(1) that in practice includes commodity boards (for coffee, coir, tea, spice etc), statutory bodies (like Agricultural and Processed Food Products Export Development Authority, [“**APEDA**”] (for Basmati rice), government bodies (State Handicraft Development Corporation for handicrafts) government cooperatives (like Department of Handloom and Textiles of Tamil Nadu for Kancheepuram silk), state’s IP agencies (like Patent Information Centre, PICs like Muga silk), institutes under the government (like Craft Development Institute for Pashmina silk) or state departments (like Department of Horticulture for Coorg Orange), universities (mainly agricultural universities like Karnataka Agricultural University), government companies, trust, or various forms of state undertakings offering support or acting as facilitator to producer groups.

Though various state government agencies are found to be actively engaged in the exercise, there is no homogeneity in these processes within and even across states. Each of these agencies has functions that have subtle differences. For instance, Commodity Boards, being marketing boards, are export-oriented and focused on market expansion, whereas institutes emphasize supporting artisans or reviving dying traditions.²⁴ This trend has been ongoing without any opposition, so it might be safe to assume that the state indeed falls under the definition of “registered proprietor” and is a body qualified to apply for GI registration under Section 11(1) of the GI Act.

Moving to the second part of the definition in Section 11(1) requires the applicant to show how it proposes to “represent the interests of the producers”, i.e. how actively these state GI applicants are working to address the myriad concerns of these producers. “Producer” has a wide definition under the GI Act, including traders, exploiters and dealers of the GI product, and the same shall be dealt with in the next sections of this paper.²⁵

²³ Council Regulation (EU) 2024/1143, of the European Parliament and of the Council of 11 April 2024 on geographical indications for wine, spirit drinks and agricultural products, as well as traditional specialties guaranteed and optional quality terms for agricultural products and amending Regulations (EU) No 1308/2013, (EU) 2019/787 and (EU) 2019/1753 and repealing Regulation (EU) No 1151/2012, art 9(1), O.J. 1143.

²⁴ Marie-Vivien, *supra* note 18, at 132.

²⁵ GI Act 1999, § 2(1)(k).

B. Statal Engagement before the GI-Registration

The existence of a qualitative link between the product and its geographical origin is the hallmark of a sui generis GI system, as in India, for a potential GI to earn the coveted GI tag, which is done by the GI Registry. In this exercise, the involvement of state bodies as applicants can be understood by examining how they carry out the preliminary work of identification of potential GIs and unifying the producers.

Producer associations normally pre-exist registration, and they often make preliminary efforts to acquire the GI tag with necessary support from state authorities. It is generally one or a group of individuals who make the initial efforts and then form an association keeping the welfare of the producers as their objective. For application and documentation, even state universities extend help to the producer associations.²⁶ For Rasgolla GI, West Bengal and Odisha governments were engaged in a legal battle but the efforts of the respective state governments in justifying their demand for GI recognition are commendable. In 2015, the Odisha government set up three committees to study the origin of the Odiya Rasagolla, examined grounds on which other states lay claim to it, and collected historical documents as evidence when the GI tag for the popular sweet was first given to West Bengal. Such activeness on the part of state authorities is crucial for ensuring the interests of manufacturers who have been in this business for years and finally, Odisha secured the GI tag as well.²⁷

For Tirupati Laddu, the Tirumala Tirupati Devasthanams [“TTD”], comprising members appointed by the government, that administers the affairs of the temple was instrumental in securing the GI tag when complaints on poor quality of the laddu came to notice from pilgrims.²⁸ The trust saw the opportunity and filed for GI registration. Organizations like “NERAMAC” identify potential GIs through consultations and recommendations from State Governments, local producers or their own assessments. A preliminary analysis of the origin and uniqueness is conducted by the organization before finalizing the list for GI tagging.²⁹ As already seen, for

²⁶ T. Appala Naidu, *Andhra Pradesh: GI tag for 'Atreyapuram Pootharekulu'*, THE HINDU (June 15, 2023), <https://www.thehindu.com/news/national/andhra-pradesh/andhra-pradesh-gi-tag-for-atreyapuram-pootharekulu/article66973048.ece>

²⁷ Satyasundar Barik, *'Odisha Rasagola' finally gets GI tag*, THE HINDU (July 30, 2019), <https://www.thehindu.com/news/national/its-official-odisha-is-the-organ-of-rasagola/article61589932.ece#:~:text=“Happy%20to%20share%20that%20%23Odisha,tweeted%20Chief%20Minister%20Naveen%20Patnaik.”>

²⁸ Srinivasa Rao Apparasu, *Tirupati laddu: A centuries-old tradition in the eye of the storm*, HINDUSTAN TIMES (Sept 30, 2024), <https://www.hindustantimes.com/india-news/tirupati-laddu-a-centuries-old-tradition-in-the-eye-of-the-storm-101727636408238.html>.

²⁹ Priyanka Chakrabarty, *Championing Northeast's Unique Identity Through GI Tagging*, BUSINESS NORTHEAST (Dec. 30, 2024), <https://www.business-northeast.com/northeast-identity-gi-tagging-NERAMAC>

“association of producers”, the Act defines ‘producer’ wide enough to include processors or packagers of agricultural goods, exploiters of natural goods, along with traders or dealers of manufacturing goods.

Bringing the producers together is a challenge for the state bodies and they resort to help from local actors working in unison. There are several instances of GI producers being unified by the efforts of some local non-state bodies, but sometimes they are not deemed qualified for some reason or the other by the GI Registry for being the GI applicant, thus making way for a state body to step in. For specialty coffees, the Coffee Board of India had managed to secure GI registration. However, the identification of a unique local blend of coffee, promotion and even a failed attempt at GI registration was done by a cooperative body named Girijan Cooperative Corporation [“GCC”] for “Araku Coffee” several years before the Coffee Board stepped in.³⁰ Thus, at the pre-registration stage, the GI governance operates from a place of convenience and whichever body has the best interests of the producers can initiate the registration process but the final call for decision-making is taken by the GI Registry with cognizance of the fact situation.

C. State Proprietorship after the GI-Registration: Issues and Challenges

This section aims to discuss the proprietorship of state bodies across different GI categories like handicrafts, agricultural, manufactured and foodstuffs once the GI registration is obtained by examining some concrete issues and concerns. A sector-wise overview of challenges is examined first before delving into each issue individually.

1. A Sector-Wise Overview

a) Handicrafts

Handicraft GIs in India are threatened by the arrival of power looms. After agriculture, the handloom industry is the second-largest employer. If only power looms ensuring great production capacity and quicker sales could be controlled, GIs in the handicrafts sector would be a boon for the artisans concerned. The handicrafts products have the potential to create niche markets because of exquisite craftsmanship.³¹ India has around 350 handicraft GIs registered as of December 31, 2024, excluding foreign GIs.³² GI registrations have been granted to the handloom segment primarily to protect the artists, maintain the authenticity of the manufacturing process

³⁰ Nivedita Ganguly, *Behind Araku Valley coffee's GI Tag*, THE HINDU (April 11, 2019), <https://www.thehindu.com/life-and-style/food/araku-coffee-gi-tag-araku-arabica-geographical-indication/article26805219.ece>.

³¹ Pushpam Singh & Sukanta Kumar Baral, *Unraveling the Impact of Geographical Indication on Consumer Preferences for Handloom Products*, 24 ASIAN JOURNAL OF ECONOMICS, BUSINESS AND ACCOUNTING 547 (2024).

³² *Handicraft Applications*, GEOGRAPHICAL INDICATIONS REGISTRY, <https://search.ipindia.gov.in/GIRPublic/Application/ViewDocument>.

and preserve and revive dying traditions.³³ Looking at the list of applicants for these GI products – it is established that more than fifty per cent of them have a state body as a GI applicant³⁴ in forms like state handicraft institutes, state IP agencies like Patent Information Centre and other state departments. There exist cooperative societies and weavers' associations, too, that are producer-dominant, but all are heavily assisted by the state. The government involvement in this sector is intensive and multi-pronged. The underlying challenge for the Indian handicrafts sector is the gradual death of traditional ways of craftsmanship, the decline in the number of weavers, the abandoning of the art form by the younger generation of artisans, rising cost of raw materials - all with the arrival of power looms and cheaper substitutes from neighboring countries coupled with lack of effective government support.³⁵

b) Agricultural GIs

A detailed analysis of the registered proprietors for agricultural GIs reflects that more than fifty percent of them are farmer producer companies [“**FPCs**”] and growers' associations, which is a satisfactory trend.³⁶ FPCs, registered under the Companies Act are a hybrid between cooperatives and private companies that function on dual considerations of ‘welfare’ and ‘business’ and are an endeavor of farmers coalescing for their overall progress and growth.³⁷ All GI producers are members of some FPC or the other. In the process of registration, they are heavily assisted and facilitated by respective state agricultural universities or other state departments like the Department of Horticulture/Agriculture. In fact, Kerala Agricultural University tops the list of government institutions that was successful in assisting the GI registration of 17 GIs of the state.³⁸ As it happens in India, most agricultural GIs engage in production for the purpose of foreign trade with respective target production to maintain the cost-benefit viability of export business vis-à-vis the concerned agricultural products.

³³ Singh, *supra* note 31.

³⁴ *Details of GI (Geographical Indications) registered Handloom Products under GI ACT, 1999*, HANDLOOMS (June 10, 2024), [https://handlooms.nic.in/assets/img/information_handlooms/Details%20of%20103%20GI%20registered%20Handloom%20Products%20under%20GI%20ACT,%201999%20\(as%20on%2015.03.2023%20\(1\).pdf](https://handlooms.nic.in/assets/img/information_handlooms/Details%20of%20103%20GI%20registered%20Handloom%20Products%20under%20GI%20ACT,%201999%20(as%20on%2015.03.2023%20(1).pdf).

³⁵ Singh, *supra* note 31.

³⁶ *Handicraft Applications*, GEOGRAPHICAL INDICATIONS REGISTRY, <https://search.ipindia.gov.in/GIRPublic/Application/ViewDocument>.

³⁷ B. K. Paty & K. C. Gummagolmath, *Farmer Producer Companies: Issues and Challenges*, 1 EXTENSION DIGEST 1-36 (2018).

³⁸ *GI recognition. Kerala tops GI tag list in FY 2022-23*, BUSINESS LINE (April 5, 2023), <https://www.thehindubusinessline.com/economy/agri-business/kerala-tops-gi-tag-list-in-fy-2022-23/article66702026.ece#:~:text=Accordingly%2C%20between%20April%202022%20and,two%20of%20them%20from%20overseas&text=Kerala%20has%20topped%20the%20list,GI%20Registry%20said%20on%20Wednesday>.

After handicrafts, India has the greatest number of agricultural GIs. Agricultural belts where these GIs are produced generally face challenges like lack of processing centers, transportation challenges (for Northeastern GIs), imparting farmer training programmes, and facilitating discussions/negotiations between FPCs and exporters. In GIs with state bodies as direct applicants like NERAMAC, Coffee Board, Spice Board, Tea Board of India, and Directorate of Horticulture of different states, there is a lack of direct connection with the producers. Some form of farmers' organizations exists to facilitate the connection, otherwise, the concerns of the producers cannot be reflected in the actions of the registered proprietor. For GIs having producers/growers' welfare associations or FPCs as GI applicants, connection with the producers is stronger as producers themselves are direct members of such applicant bodies.

c) Manufactured GIs

India has a total of 21 manufactured GIs as of December 31, 2024, excluding foreign GIs and more than half of them have manufacturers associations as registered proprietors and maintain the trend, with some sort of technical or financial assistance from the state. Products range from beverages (rice wine like Judima, Nashik Valley wine, Feni, etc) to articles like Meerut Scissors, Coimbatore wet grinders, Agra Leather, oil, soaps etc. The emphasis of these GI products is on entrepreneurship for their manufacturers, securing the interests of the manufacturers. For the beverages, the aim is to increase exports and establish a reputation along the lines of Napa Valley in the United States.³⁹

d) Foodstuffs

India has a total of 46 GI foodstuffs as of December 31, 2024, excluding foreign GIs.⁴⁰ Applicants for foodstuffs are societies, NGOs or even state departments filing on behalf of manufacturers. Imitations abound for all kinds of GIs, including foodstuffs. Foodstuff GIs suffer from a lack of product standardization with several unregistered users preparing the GI foodstuff without following the standard rules of preparation. For instance, Goan "Bebinca", a unique dessert, is available everywhere in Goa, but it is not authentic, and uninformed consumers get duped, and the reputation of the product is compromised.⁴¹

³⁹ Namrata Sahu, *Decoding the Enhanced Protection for Wine and Spirit GIs*, 4(1) JOURNAL OF INFORMATICS EDUCATION AND RESEARCH 1429 (2024).

⁴⁰ *Supra* note 34.

⁴¹ Joanna Lobo, *A history of Goa's Bebinca which recently received the GI tag*, THE HINDU (Sept 1, 2023), <https://www.thehindu.com/food/features/a-history-of-goas-bebinca-which-recently-received-the-gi-tag/article67233958.ece>.

2. *Examining the Concerns of Producers*

a) *Exclusion of Small-Scale Producers*

Small-scale producers are at a position of disadvantage owing to their placement in the supply chain. This prevents them from better negotiation and reaping economies of scale while dominant downstream players control the means of production and the output and capture most of the value in the supply chain. GI was seen as a solution to this problem. GIs are tools that allow producers to bypass mass commodity markets by exploiting growing niche markets. While the above statement encapsulates the desired outcome of a GI tag, but reality differs. Not all the producers of a specific GI product participate in the GI process as some producers see no incentives to join the GI club due to lack of awareness of the benefits of GI registration and other factors like unsatisfactory access to institutional support although the Draft GI Rules are proposing changes.⁴² For some, meeting product specifications associated with GIs without an adequate support system is a hindrance to effective and adequate production. Also, many small producers can feel excluded and when compared to scientific experts/professionals, they find themselves placed far below in the supply chain, their voices stifled.⁴³ Unlike the EU that has an established, mature GI system, with well-defined producer relations and good market reputation of the GI product; India has a nascent, developing system, in which producers are not well connected to each other and thus, relations are fragile, and the reputation of the GI product is minimum or localized.⁴⁴ As a result, many are vulnerable to exclusion from mainstream supply chains.

For handicraft GIs, where decentralization writs large, state intervention is pervasive. To explain, handlooms work in clusters (groups of villages) wherein workers are spread about unevenly. Because of their low placement in the supply chain, they cannot actively partake in or take adequate advantage of economies of scale. As a result, there is a disproportionate sharing of benefits, and a bigger share goes to the traders and master weavers who are in a stronger negotiating position in the supply chain.⁴⁵ Weavers of various GI products of India face multi-pronged challenges, and a justified GI applicant is one who has protected the GI from all challenges. 'Bhavani Jamakkalam Carpets' of Tamil Nadu are facing stiff competition from power-loom-produced carpets.

⁴² *Relaxed geographical indication to motivate producers*, INDIA BUSINESS LAW JOURNAL (Jan. 11, 2024), <https://law.asia/dpiit-relaxed-geographical-indication-rules/#:~:text=Proposed%20amendments%20to%20the%20Geographical,a%20fifth%20of%20previous%20amounts>.

⁴³ Rubén Boga & Valerià Paül, *'Because of its size, it's not worth it!': The viability of small-scale geographical indication schemes*, 121 FOOD POLICY 121 (2023).

⁴⁴ Angela Tregear, Áron Török & Matthew Gorton, *Geographical indications and upgrading of small-scale producers in global agro-food chains: A case study of the Makó Onion Protected Designation of Origin*, 48(2) ENVIRONMENT AND PLANNING 435 (2016)

⁴⁵ Singh, *supra* note 30.

According to many weavers, power looms outside the geographical region are used to create fake GI-tagged “jamakkalams”. Cooperatives had come to the rescue and taken the initiative to revive the age-old craft.⁴⁶ Such stories abound for many GIs of India.⁴⁷

Despite state bodies as applicants for the GI registration, most of these handicraft GIs have failed to alleviate *bona fide* concerns of small craftsmen of the GIs with the onslaught of power looms, lack of access to the organized market, dwindling government support, declining demand, rising cost of raw materials, pushing them out of business. Most of these applicant bodies file handicraft GIs to restore pride in the dying art forms and to revive it among the younger generations. While GIs are going for swift registrations; because of institutional lacunae, their post-registration mechanism (discussed later) is mostly unsatisfactory. Although state support exists, but the same is insufficient compared to the challenges faced by weavers like monopoly of big traders who often treat the small weavers as laborers and not craftspeople.⁴⁸

Awarding of GI implies maintaining the traditional process; any form of compromise is a violation of quality- one of the indispensable aspects of a GI. Similar tales of counterfeiting echo for ‘Patan Patola’, an iconic GI from Gujarat facing an existential crisis,⁴⁹ ‘Kullu shawls’ of Himachal that witnessed imitations flooding markets with inferior varieties from Ludhiana or ‘Madhubani Paintings GI’.⁵⁰ Owing to the indifference of the state government to improve the status of the artists and preserve their artform, the trade of Madhubani paintings has been dominated by middlemen engrossed in making money and doing nothing to preserve this artform, affecting the

⁴⁶ Pranay Jain, *Did You Know About the Bhavani Jamakkalam Carpets Of Tamil Nadu?* OUTLOOK TRAVELLER (Sept 15, 2024), <https://www.outlooktraveller.com/experiences/heritage/all-about-the-gi-tagged-bhavani-jamakkalam-carpets-of-tamil-nadu>.

⁴⁷ Mallik Thattipali, *The Custodian of Royal Weave of Venkatagiri sarees*, THE NEW INDIAN EXPRESS (Nov. 5, 2022), <https://www.newindianexpress.com/magazine/2022/Nov/05/the-custodian-of-royal-weave-of-venkatagiris-sarees-2514643.html> ; Appaji Reddem, *Far from a happy toy story: Traditional toy makers face Chinese goods, high GST and lack of funds*, THE HINDU, (Oct. 17, 2020), <https://www.thehindu.com/news/national/far-from-a-happy-toy-story-traditional-toy-makers-face-chinese-goods-high-gst-and-lack-of-funds/article32876129.ece>; P. Samuel Jonathan, *Durgi stone sculptors stare at a dying art*, THE HINDU (Feb. 28, 2019), <https://www.thehindu.com/news/cities/Visakhapatnam/durgi-stone-sculptors-stare-at-a-dying-art/article26394513.ece>; SNV Sudhir, *Survival crisis: Glory days over for the Bobbili veena as young people turn away*, THE SOUTH FIRST (April 28, 2023), <https://thesouthfirst.com/andhrapradesh/survival-crisis-glory-days-over-for-the-bobbili-veena-as-young-people-turn-away/>.

⁴⁸ Amit Bhelari, *In Bihar's Bhagalpur, weavers face a Silk Slub*, THE HINDU (March 18, 2024), <https://www.thehindu.com/news/national/in-bihars-bhagalpur-weavers-face-a-silk-slub/article67954736.ece>.

⁴⁹ Shramana Ganguly, *GI tag given to Patan Patola saree weavers will safeguard their craft from imitations*, THE ECONOMIC TIMES (March 1, 2014), <https://economictimes.indiatimes.com/industry/cons-products/garments/-textiles/gi-tag-given-to-patan-patola-saree-weavers-will-safeguard-their-craft-from-imitations/articleshow/31188079.cms?from=mdr>.

⁵⁰ Vikas Sharma, *Kullu Cottage Industry gets Community Patent*, BUSINESS STANDARD, (January 19, 2025) https://www.business-standard.com/article/sme/kullu-cottage-industry-gets-community-patent-108060501084_1.html.

integrity of the artists. The court cautioned on the “lack of regular inspection of GI rights of original artists.”⁵¹

It is noteworthy that many handicraft GIs are facing the threat of extinction, and the younger generation is contemplating alternate professions. The growing presence of unsatisfied producers justifies state involvement in remedying the situation.⁵² For instance, Karnataka Silk Industries Corporation Limited [“**KSIC**”], fully owned by the state government and the GI applicant for ‘Mysore silk’, had given the names of some company directors in the place of producers, establishing itself as the sole producer and not representative of the interests of producers, thereby monopolizing the collective good. In defence, KSIC justifies its action on grounds of defending the GI as its registered proprietor and not as the owner of the GI.⁵³

The commendable efforts of the Tea Board of India once witnessed the skyrise of “Darjeeling Tea” as a world-renowned GI.⁵⁴ But in myriad cases, the Commodity Boards have mentioned a mere intention of encompassing the concerns of their producers to the Registry without specifying how they intend to promote the product. These Boards are not the manufacturers of the products but work under the Ministry of Commerce i.e. the state; thus, assumption lies that they are producer centric. They engage in the activities toward commercialization of products and have sufficient legal strength to defend these GIs.⁵⁵

However isolated instances of small producers excluded from this set-up are numerous. For instance, the Tea Board has restricted the use of the Darjeeling name and logo only to tea coming from the 87 tea gardens that have entered into a license agreement with it. Such stringent measures are devised to keep counterfeiting in check, but small farmers jeopardized have lodged complaints of monopolization of Darjeeling tea. Rather, the Board should have facilitated the registration of such small-scale tea growers.⁵⁶

⁵¹ *Patna High Court takes cognizance of plight of Madhubani Painting Artists*, THE TIMES OF INDIA (March 14, 2023), <https://timesofindia.indiatimes.com/city/patna/hc-takes-cognizance-of-plight-of-madhubani-painting-artists/articleshow/98620295.cms>.

⁵² Ankita Anand, *Tangled Threads: The Uncertain Future of Sualkuchi Silk Weaving*, THE WIRE (June 4, 2016), <https://thewire.in/uncategorised/tangled-threads-the-uncertain-future-of-sualkuchi-silk-weaving>.

⁵³ Marie-Vivien, *supra* note 18, at 225.

⁵⁴ Sudhir Ravindran and Arya Mathew, *The Protection of Geographical Indication in India – Case Study on ‘Darjeeling Tea’*, ALTACIT GLOBAL (2009), <https://www.altacit.com/wp-content/uploads/2021/09/The-Protection-of-Geographical-Indication-in-India-Case-Study-on-Darjeeling-Tea.pdf>.

⁵⁵ *Id.*, at 131.

⁵⁶ Manisha Pande, *Discontent Brews over Darjeeling Tea Label*, BUSINESS STANDARD, https://www.business-standard.com/article/beyond-business/discontent-brews-over-darjeeling-tea-label-111011200053_1.html.

Darjeeling was granted the GI tag in 2004, but the living standards of the tea growers have deteriorated over the years, as per some literature,⁵⁷ as the GI tag did not make any significant improvement in their working conditions. The benefits of the GI tag are taken over by the exporters mostly, and these tea growers are working in the fields of these exporters on a daily wage basis, even when the demand for Darjeeling tea is high. All of this when the state government itself gives these estates on lease. Moreover, the conflict between the Darjeeling Tea Association [“**DTA**”], a body of producers with the Tea Board, calls for synergy among all stakeholders involved. All concerned state departments, like the labour department’s interference, are called for. Otherwise, there is an imbalance of objectives.

Thus, state proprietors need to invest more and accommodate the concerns of the small producers and have detailed policies for their greater inclusion in the supply chain trajectory. These policies can be designed in cooperation with the FPCs, in case of agricultural GIs, which mainly cater to the needs of small producers or other local bodies working closely with the small-scale producers for other GIs like handicraft GIs, to better identify their special concerns. These could be in the lines of better negotiating capacity, non-disruptive access to the market or strengthening market linkages, elimination of middlemen, financial assistance by relevant institutions like State Agricultural Department or National Bank for Agriculture and Rural Development [“**NABARD**”] to mention a few. The implementation of such policies depends on the will of their respective registered proprietors and how seriously they consider the statutory mandate of “representing the interests of producers” under Section 11(1) of the GI Act, 1999.

b) Authorized Users

Section 17 of the GI Act empowers producers of the GIs to register themselves at the GI Registry as an authorized user [“**AU**”], a category of persons with specific rights to use the GI. Such a provision means that the concerns of the producers are primary in the GI law. Registering producers as AUs desiring to use the GI tag serves two purposes: it prevents any random producer outside the demarcated geographical area from using the GI tag, and thus free ride on the reputation and goodwill associated with the GI and having an inventory of AUs facilitates easier monitoring of all who are using the GI tag to check malpractices.⁵⁸

⁵⁷ *Techno-Economic Survey of Darjeeling Tea Industry*, TEA BOARD OF INDIA (2001), *techno_economic_darjeeling-2001.tif*.

⁵⁸ Sayantani Datta, Padmavati Manchikanti & Niharika S. Bhattacharya, *Enhancing Geographical Indications Protection in India for Community Relevance*, 24 J. WORLD INTELL. PROP, 420 (November 2021).

However, this provision comes with challenges as many producers are unaware of it, and the rate of registration is low. This is possibly due to a lack of financial resources or the know-how to file GI applications. There is the possibility that the actual commercial benefit goes to the middlemen and not the real producers, although the latter has the statutory right to oppose GI applications on grounds of non-representation of their interests.⁵⁹ User authorization drives are carried out by state institutes by organizing workshops. Since the supply chain of handicraft GIs is highly heterogeneous, the intervention of the state is instrumental in bringing all stakeholders together. Individual handloom GIs might suffer from different concerns, but mostly, all handloom GIs have the same underlying challenges, as already mentioned. Without state support, GIs languish. For instance, the IPR Cell of Tezpur University organized a workshop on ‘Muga Silk’ that despite registration in 2007, had mere 2 AUs till 2014 for reasons like low levels of awareness of the significance of GI, non-availability of reliable quality monitoring systems to differentiate “genuine Muga” from “adulterated Muga”, insignificant organizational support across the entire value chain including nonexistence of enforcement mechanisms in Assam against adulteration and difficulties in making and sending error-free applications.⁶⁰ Occasionally NERAMAC carries out workshops focusing on AUs registrations for products under its belt in collaboration with different state departments.⁶¹

Currently, India has a total of 29,624 AUs for 643 registered GI products. Agricultural GIs, having almost 200 registered products, have the greatest number of AUs. In contrast, it is 44 per cent of the total number of AUs for handicraft GIs with 342 registered GIs. This disparity reflects non-uniformity in the AU registrations across different GI categories. Post an amendment of the GI Rules in August 2020, the requirement of filing joint applications for an AU with its registered proprietor was removed, and that led to an increase in the AU registrations from 6,935 before the

⁵⁹ Meenal Garg, *Critical Analysis of the Need for “Authorised User Registration” and “Quality Monitoring” under GI Law*, SCC TIMES, <https://www.sconline.com/blog/post/2021/09/27/need-for-authorised-user-registration-and-quality-monitoring-under-gi-law/>.

⁶⁰ With the funding support of the MHRD Chair Professor; Kiran George, *When the Tezpur University came to GI tagged Muga Silk of Assam’s rescue*, SPICYIP (April 29, 2015), <https://spicyip.com/2015/04/when-the-tezpur-university-came-to-gi-tagged-muga-silk-of-assams-rescue.html>.

⁶¹ *State-level workshop held for NERAMAC GI products in Karbi Anglong*, THE HILLS TIMES (November 14, 2024), <https://www.google.com/search?client=safari&rls=en&q=State-level+workshop+held+for+NERAMAC+GI+products+in+Karbi+Anglong%2C+THE+HILLS+TIMES&ie=UTF-8&oe=UTF-8>; *Neramac’s GI Initiative to User Authorize 300 Tripura Queen*, TRIPURANEWSLIVE (May 27, 2023), <https://tripuranewslive.com/neramacs-gi-initiative-to-user-authorize-300-tripura-queen/#:~:text=In%20continuation%20to%20NERAMACs%20endeavors,of%20the%20NERAMAC%20processed%20certification;Bikash%20Singh,NERAMAC’S%20Initiative%20to%20authorize%20800%20North%20East%20Region%20farmers%20to%20use%20GI%20tagging%20of%20its%20processed%20certifications,THE%20ECONOMIC%20TIMES,May%209%2C2023,https://m.economictimes.com/industry/miscellaneous/neramacs-initiative-to-authorize-800-north-east-region-farmers-to-use-gi-tagging-of-its-processed-certifications/articleshow/100102853.cms>.

amendment to 22,689, taking the total number of AUs to 29,624 as on August 12, 2024.⁶² Gathering these producers for registration as AUs is also challenging because they lack the incentive to join the GI club for reasons like conformity costs, as traditional methods of production are resource intensive. An active and invested proprietor can navigate such challenges to unify producers into a coherent association.⁶³

c) Standards

In Asia, product control systems are nascent; they sometimes exist theoretically in legal frameworks but are rarely implemented in practice. Indian law states that every GI application shall contain “the particulars of the mechanism to ensure that the standards, quality, integrity, and consistency or other special characteristic are maintained by the producers, maker or manufacturers of the goods, as the case may be; and shall include particulars of the inspection structure, if any, to regulate the use of the GI.” Although Form GI-1 mandates an inspection body formation, there is no corresponding provision in the GI Act. There is a disparity between the procedural and the substantive law here. The inspection body, formed by the proprietor, is important for post-registration. Thus, in practice, legally speaking, there is no proper mechanism that ensures quality control of GI post-registration.⁶⁴

With the state as a registered proprietor, consumers might be assured of the quality of GI goods and have confidence in the system because of the overall perception of the state as the custodian of its people.⁶⁵ States are in a better position, financially and technically, to manage and defend GIs. Decisions related to the enforcement of GIs on foreign shores or taking care of exports require the expertise of state officials and funding. Producers however must be represented in the any decision-making process that concerns them.

Quality being the factor of attraction of a GI is susceptible to compromise. What this means is that consumers value premium goods like GI because of their place of origin that is believed to impart unique qualities to the product that are non-transferable and thus, cannot be replicated

⁶² Mohit Sharma, *How India can reap the benefits of Geographical Indication: A Relook at Post-Registration Framework*, DOWN TO EARTH (Oct. 7, 2024), <https://www.downtoearth.org.in/agriculture/how-india-can-reap-the-benefits-of-geographical-identification-a-relook-at-post-registration-framework>.

⁶³ Cardoso VA, Lourenzani AEBS, Caldas MM, Bernardo CHC, Bernardo R, *The Benefits and Barriers of Geographical Indications to Producers: A Review*, 37 RENEWABLE AGRICULTURE AND FOOD SYSTEMS 707–719 (2022).

⁶⁴ Delphine Marie-Vivien, *Protection of Geographical Indications in ASEAN Countries: Convergences and Challenges to Awakening Sleeping Geographical Indications*, 23 J. WORLD INTELL. PROP. 328 (July 2020).

⁶⁵ Claire Durand & Stéphane Fournie, *Can Geographical Indications Modernize Indonesian and Vietnamese Agriculture? Analysing the Role of National and Local Governments and Producers' Strategies*, 98 WORLD DEVELOPMENT 93-104 (2017).

elsewhere. And often such products have a favorable reputation in the market and are thus chosen and favored by consumers. For instance, Pashmina Shawls are available in various places across the country, but a genuine authentic Pashmina Shawl comes from a particular place in Kashmir from Himalayan goats whose wool is of a different quality, and it is this exclusivity of a GI that some people attempt to exploit by misusing the brand value of the GI product.

3. Menace of Misappropriation

Section 22 of the GI Act provides that infringement arise when a registered GI is used by a person who is not the AU and “by any means in the designations or presentation of goods that indicates or suggests that such goods originate in a geographical area other than the true place of origin of such goods in a manner which misleads the persons as to the geographical origin of such goods” or “uses any geographical indication in such manner which constitutes an act of unfair competition including passing off in respect of registered geographical indication.” Explained further that “act of unfair competition” means “any act of competition contrary to honest practices in industrial or commercial matters”.⁶⁶

The case of ‘Sanganeri GIs’ is interesting. Sabyasachi Mukherjee, a famous Indian fashion designer received open letters from 15 Indian crafts associations as the prints used in one of his collections were very similar/identical and were very “reminiscent of the original” to the GI-protected Sanganeri prints and the artisans and who had proprietary rights to these designs were not credited in any manner. Section 22 defines infringement as not having any provision on whether “drawing inspiration” or craft which is “reminiscent of the original” carries any consequences. Also, the collection does not make any outright claims on its origin from Sanganer. As such, there is no direct infringement here, and consumers are possibly not misled. As a response, the artisans’ side may claim that a case of infringement may be made out via the mere implication or suggestion of a connection with the GI, and that principles of ‘passing off’ and unfair trade/colorable imitations may apply.⁶⁷ The law, however, is unclear on this.

‘Banarasi saree’ GI, despite having five inspection bodies, face threats from those within the producer community opting for quick production with power loom sarees with cheap silk

⁶⁶ GI Act 1999, § 22.

⁶⁷ Vikrant Rana & Pranit Biswas, *The Viewpoint - The Sanganeri GI dispute: Cultural misappropriation and the need for benefit sharing*, BAR AND BENCH (Oct. 25, 2021), <https://www.barandbench.com/law-firms/view-point/the-sanganeri-gi-dispute-cultural-misappropriation-and-the-need-for-benefit-sharing>.

imported from China and manufactured in Surat.⁶⁸ The distinctive ‘Toda embroidery’ designs suffer from blatant copying of their designs by other producers for quick sales and misleading descriptions by big brands. The absence of a single overarching body, despite Tamil Nadu Handicrafts Development Corporation as the GI co-applicant to address these concerns, has perpetuated the suffering of the Toda weavers.⁶⁹ There is sufficient cause for a case of infringement, but as observed, GI infringement cases are rarely filed in India.

For tea GIs like Assam (Orthodox), Kangra, Nilgiris (orthodox tea), and Darjeeling Tea, the Tea Board of India is battling infringement with illegal import of Nepal tea into the Indian domestic market, harming the reputation of this appellation⁷⁰ and is one of the most active state proprietors.⁷¹

Spice Board has issued directions to include GI registration details on all spice items branded and out for delivery. This step has been taken to control instances of misappropriation and demonstrate the activeness of the Board in securing the welfare of producers.⁷² ‘Kashmir Saffron’ is adulterated with cheaper alternatives and sold off by middlemen as authentic Kashmir Saffron affecting sales.⁷³ But the intervention of the government here (through Spice Board) is laudable with initiatives like the establishment of a Saffron Park that has facilities for testing, drying and marketing and giving the GI tag, aiding growers and traders alike.⁷⁴ Spurious products affecting sales are the case for most GIs be they handicrafts, agricultural, manufactured or food stuffs. It is thus observed that enforcement is not stringent in India.

Also, regulation of misappropriation that happens online goes unchecked as India has no specific law for this. EU has Regulation (EU) 2024/1143 having provisions for checking GI infringement

⁶⁸ Yogesh Pai & Tania Singla, “Vanity GIs”: India’s Legislation on Geographical Indications and the Missing Regulatory Framework, in GEOGRAPHICAL INDICATIONS AT THE CROSSROADS OF TRADE, DEVELOPMENT, AND CULTURE 333-358, (Irene Calboli, Wee Loon Ng-Loy eds. 2017).

⁶⁹ Priti David, ‘Copying our designs is not correct,’ PEOPLE’S ARCHIVE OF RURAL INDIA (May 17, 2019), <https://ruralindiaonline.org/article/copying-our-designs-is-not-correct>.

⁷⁰ Niloy Bhattacharjee, *Assam Tea in Jeopardy as Producers Express Concerns Over Illegal Import of Nepal Tea into Country*, NEWS18 (June 3, 2022), <https://www.news18.com/news/india/assam-tea-in-jeopardy-as-producers-express-concerns-over-illegal-import-of-nepal-tea-into-country-5301697.html>.

⁷¹ S.C. Srivastava, *Protecting the Geographical Indication for Darjeeling Tea*, WORLD TRADE ORGANIZATION, WTO, https://www.wto.org/english/res_e/booksp_e/casestudies_e/case16_e.htm.

⁷² Pramod Thomas, *Spices Board pushes exporters to use GI tags*, THE NEW INDIAN EXPRESS (July 21, 2016), <https://www.newindianexpress.com/business/2016/Jul/21/spices-board-pushes-exporters-to-use-gi-tags-942737.html>.

⁷³ Avantika Bhuyan, *Kashmiri saffron gets the GI tag. Is this the boost that the spice badly needed?* THE MINT (July 30, 2020), <https://www.livemint.com/mint-lounge/food/kashmiri-saffron-gets-the-gi-tag-is-this-the-boost-that-the-spice-badly-needed-111634479702936.html>.

⁷⁴ *Id.*

happening online.⁷⁵ It can be thus concluded that state-registered proprietors are not active in battling misappropriation that affects the rights of genuine producers.

Non-state registered proprietors, too, sometimes file infringement suits. The registered proprietor of 'Bikaneri Bhujia' had filed a case against Defendants alleging 'unauthorized use' and alleging that the overall look of their product 'Pitaara Bikaneri Bhujia' infringes upon their product even though the true place of origin is mentioned.⁷⁶ "The non-GI product cannot be permitted to encroach upon the goodwill and reputation of the GI product by using an identical or similar packaging for both sets of products."⁷⁷

The role of the GI Registry in this regard needs to be looked into. In some instances, the Registry has been mired in allegations of biases in facilitating the GI application of a state body over private bodies despite adequate grounds of opposition from the private party, as in the case of APEDA favoured as an applicant for GI for Basmati rice over Heritage, an NGO;⁷⁸ probably because the Registry considers APEDA, being a government body to be better representative to producers' concerns. For Araku Coffee too, questions arise on why the GCC's attempts for the GI registration failed, its claims dismissed by the GI Registry and proprietorship status given to the Coffee Board. Whether and how far the Registry is biased towards state bodies raises a moot point of concern. The GI Act enumerates the Registrar's role related to the application for registration and confers the Registrar with the powers of a civil court. However, the Registrar's decision is not final, and appeals are allowed. The Act confers the Registrar with powers related to GI registration only, but is silent on post-registration issues. There is a need for the development of an institutional mechanism in this regard. The functions of GI authorities should be clearly laid out either in the statute or by the Registry, making it easier for the producers to reach the authorities.⁷⁹ NABARD not only supports GI registration of a product but also focuses on post-registration activities, such as registration of AUS, renewal of existing registration, marketing support, consumer awareness and training programmes, among others. NABARD has sanctioned projects for the registration of 15,820 producers/manufacturers of GI products as AUs, providing them with the exclusive right to use registered GI.⁸⁰

⁷⁵ *Supra* note 23, at art. 13(4), art. 42.

⁷⁶ *M/S Bikaji Foods Int. Ltd vs M/S Desai Brothers Limited & Anr*, (2023) CS (Comm) 695/2023 .

⁷⁷ *Id.*

⁷⁸ Marie-Vivien, *supra* note 18, at 239.

⁷⁹ Datta, *supra* note 58.

⁸⁰ Sangeetha Kandavel, *NABARD sanctions study to evaluate impact of GI certified products*, THE HINDU (April 30, 2024), <https://www.thehindu.com/news/national/tamil-nadu/nabard-sanctions-study-to-evaluate-impact-of-gi-certified-products/article68118320.ece>.

4. *Promotion and Brand Building*

State-registered proprietors need to introduce innovative ways of establishing and even sustaining brand value. For most GIs, brand value is negligible as consumers are unaware of such GIs even in their own state. Registered proprietors must have detailed plans on how to create brand value in the minds of consumers. Such functions are not mandatorily prescribed in the law. Government involvement is exclusively emphasized for struggling GIs with immense potential having global recognition, like 'Mithila Makhana' of Bihar, facing issues like negligible AUs (67) for a commodity which has about 70,000 primary producers.⁸¹

5. *GI and Climate Change*

Muga silk is a famed GI from Assam, but in recent times, the productivity of the silkworm and, thereby its quantity and quality has been affected on account of factors like fungal diseases in the host plants of these silkworms, increasing temperatures and uneven rainfall patterns, groundwater reduction and the use of chemical fertilizers in the neighboring tea plantations that affects the host plants and the silkworm, affecting the production of authentic Muga Silk. While Muga Silk was bestowed with a GI tag in 2007, much before this challenge arose, the same needs to be used to the best advantage to remedy the situation. Conservation and commercialization of a GI product must happen simultaneously. 'Kanniyakumari Matti banana' and Kashmir's saffron are among several other GI products found to be vulnerable to the impacts of climate change, jeopardizing the livelihoods of many farmers and traders.⁸² While misappropriation is the biggest challenge confronting producers, they are prone to new challenges affecting traditional methods of production necessitating a revisit on product standardization. Kashmir's saffron farming has come under threat from global warming, affecting production, leading to significant sustainability and livelihood issues, and falling short of demand.⁸³ But the law or the Registry has, to date, not devised suitable policies/measures to navigate such challenges that threaten the very integrity of the GI.

6. *Characterizing the GI Applicants*

As discussed, the GI proprietorship in India is diverse. Statutory bodies, Commodity Boards (like

⁸¹ Mohit Sharma, 'Instead of heavy 'attention', makhana needs some 'space', DOWN TO EARTH (Dec. 10, 2024), <https://www.downtoearth.org.in/agriculture/instead-of-heavy-attention-makhana-needs-some-space>.

⁸² C. Palanivel Rajan, *GI-tagged agricultural products face challenges due to climate change*, THE HINDU (Dec. 1, 2023), <https://www.thehindu.com/news/cities/Madurai/gi-tagged-agricultural-products-face-challenges-due-to-climate-change/article67594454.ece>.

⁸³ *Kashmir's saffron comes under threat due to rising global warming*, THE ECONOMIC TIMES (Sept. 1, 2024), <https://economictimes.indiatimes.com/news/india/kashmirs-saffron-comes-under-threat-due-to-rising-global-warming/articleshow/113544676.cms?from=mdr#:~:text=Kashmir's%20saffron%20farming%20has%20come,balance%20required%20for%20saffron%20cultivation.>

tea, spice, coffee, etc.), Agricultural Universities, Societies/Cooperatives, FPCs, Producer Associations are all qualified to be registered proprietors of GIs in India. Based on the intent behind their establishment, their function or rather their approach towards GI regulation differs. This section aims to better understand and appreciate the nature and features of such proprietors and their approach towards GIs alike.

a) Overarching/Monopolistic Approach

State registered proprietors in India perform a range of functions. And some perform overarching functions having monopolistic tendencies. For instance, the Tea Board made immense efforts to get the Darjeeling tea logo registered, a logo exclusively used by producers, packagers and exporters. Also, the word 'Darjeeling' has been registered as a Certification Trademark ["**CTM**"] in India and overseas. Licenses are issued by the Tea Board to AUs of Darjeeling tea and certificates of origin are issued to all exporters. Also, they got a watchdog agency appointed to inspect overseas infringements.⁸⁴

Craft Development Institute ["**CDI**"] Kashmir has been mired in allegations of monopolizing the GIs under its ambit ('Sozani embroidery' and 'Pashmina') in disregard of the actual artisans on grounds of the latter being incapable of protecting their interests as CDI comprises experts, researchers and high-ranking officials. These allegations have been refuted, stating that being a government agency, they were better placed to uplift the artisans, and CDI's role was limited to a catalyst of GI protection and 'Tahafuz', an association of artisans, was most suitable.⁸⁵

For 'Chanderi Sarees', many government agencies started contributing to the cause of the weavers and providing them with marketing and quality-control opportunities. The state-run textile institute is also involved in checking quality, standardization, promotion etc. They have specific rules in this respect which are still in force.⁸⁶ The Government of Madhya Pradesh had collaborated with the United Nations Industrial Development Organization ["**UNIDO**"], a specialized agency of the UN to promote industrial development, using a cluster development approach with the object of arming the weavers and making the artisans of Chanderi more dynamic.⁸⁷

⁸⁴ Tea Board, *supra* note 58.

⁸⁵ Marie-Vivien, *supra* note 18, at 237.

⁸⁶ *Id.* at 219.

⁸⁷ Kasturi Das, *Prospects and Challenges of Geographical Indications in India*, 13 THE JOURNAL OF WORLD INTELLECTUAL PROPERTY 148-201 (March, 2010).

Tirupati Tirumala Devasthanam [**“TTD”**] as the applicant for ‘Tirupati Laddu’ has garnered accusations of being monopolistic and commercial by securing GI tag for Tirupati Laddus and depriving other laddu producers of the famous temple town to sell these laddus, making it an exclusive product of the trust body, only benefitting their employees. Opposition was asserted on the basis of GI being a collective property and not the exclusive possession of a single producer. Moreover, the fulfilment of *terroir* here is questionable. Where is the specific geographical area delimitation? Is it only the temple? However, TTD has averred that the laddu is the effort of all its employees and not one sole manufacturer.⁸⁸

For ‘Feni’, a GI product from Goa, all the concerned players coalescing to arrive at a consensus on “club rules” saw the overarching support of the Goa Government, resulting in the state being a co-applicant. For ‘Jaynagar moa’, the Joynagar Moa Nirmankari Society became the applicant and was also a watchdog to conduct thorough examinations before authorizing any outlet to make the sweet. Moa is subjected to imitations with many unregistered users manufacturing and selling the sweet.⁸⁹ The GI has been subjected to checks by a panel of experts to ensure that manufacturers do not deviate from product specifications.⁹⁰ Herein, the applicant is functioning as an inspection body too.

b) Woes of Local Artists: Welfarist Approach of GI Applicants

There are some GI applicants whose primary focus lies in securing the lives of their producers. Kashmir Handmade Pashmina Product Trust [**“KHPPT”**] was a collective effort of Pashmina shawl artisans to combat fakes and preserve Pashmina products. Later, this work was taken over by the CDI, the Kashmir Chamber of Commerce and Industry [**“KCCI”**], and the Directorate of Handicrafts and current registered proprietor is Tahafuz Society (comprising artisans). Before CDI took over, the intent behind the formation of KHPPT was welfarist, putting the concerns of the workforce at the centre. These bodies, based on mutual understanding, have adopted means like good labelling practices to curb fakes. The textile minister has also targeted to increase Ladakh’s population of Pashmina goats to 500,000 and Merino sheep to 1 million by 2030 to ensure a

⁸⁸ Madabhushi Sridhar, *GI for Tirupathi Laddu: Whose Interests are Protected?* BANANAIP (March 16, 2010), <https://bananaip.com/gi-for-tirupathi-laddu-whose-interests/>.

⁸⁹ *Will Joynagarer Moa become extinct soon due to a lack of raw materials?* - *GetBengal story*, GET BENGAL (Dec. 28, 2024), <https://www.getbengal.com/details/will-joynagarer-moa-become-extinct-soon-due-to-a-lack-of-raw-materials-getbengal-story>.

⁹⁰ Kinsuk Basu, *Panel of university professors, scientists and government officials to check Joynagar Moa*, THE TELEGRAPH (Jan. 22, 2024), <https://www.telegraphindia.com/my-kolkata/news/panel-of-university-professors-scientists-and-government-officials-to-check-joynagar-moa/cid/1995366>.

sustainable supply of high-quality wool for the booming industry.⁹¹ For Kashmiri Pashminas, we see greater participation of the local artisans in the decision-making process, like implementing Minimum Support Price [“MSP”] and focusing on women entrepreneurship.⁹²

c) Conservation and Preservation-Centric Approach

Some GIs are in dire need of preservation for reasons like climate change, as discussed. Recent GI literature speaks about challenges that current legal frameworks on GIs face vis-à-vis climate change. Climate change threatens traditional methods of production due to altered climatic conditions. Since GI talks about product standardization, the question arises- how to alter (if possible) production techniques without compromising the integrity of the GI? In the context of India, these upcoming challenges do not find any place in GI policy or law. The examples of Muga Silk and Kashmir Saffron are of relevance here. Producers alone cannot combat such challenges that are multi-layered and active intervention of state bodies is inevitable. Kanniyakumari matti banana farmers are suffering because of climate-induced changes affecting the inherent characteristics of the plant.⁹³

Some proprietors take up the mandate of GI registration to revive lost traditions. Central ‘Travancore Jaggery’ embodies hundreds of years old agricultural tradition involving sugar canes. This practice declined after independence with the establishment of sugar mills in the region. State Agricultural University was instrumental in reviving the age-old practice.⁹⁴

III. PRODUCERS’ INTERESTS: RAMBLINGS WITH RAMIFICATIONS

There is much debate as to how GI applicants can demonstrate that they genuinely “represent the interests of the producers” and the meaning associated with this phrase. The deeper the connection between the registered proprietor and the producers, the better the former’s justification for being the applicant for that GI. Although the question regarding the ability to “represent the interests of

⁹¹ *Ladakh Pashmina wool officially gets GI tag; Kashmir Pashmina products get boost*, ZIRAT TIMES (Oct. 6, 2024), <https://ziraattimes.com/2024/10/ladakh-pashmina-wool-officially-gets-gi-tag-kashmir-pashmina-products-get-boost/#:~:text=Leh%2C%20Oct%206%3A%20In%20a,officially%20awarded%20to%20the%20region.>

⁹² *MSP for hand spun, hand woven Pashmina fixed*, GREATER KASHMIR (Aug. 21, 2021), <https://www.greaterkashmir.com/uncategorized/msp-for-hand-spun-hand-woven-pashmina-fixed/#:~:text=After%20discussions%20and%20considering%20various,woven%20Shawl%2C%20the%20statement%20states.>

⁹³ C Palanivel Rajan, *GI-tagged agricultural products face challenges due to climate change*, THE HINDU (Dec. 1, 2023), <https://www.thehindu.com/news/cities/Madurai/gi-tagged-agricultural-products-face-challenges-due-to-climate-change/article67594454.ece>.

⁹⁴ U. Hiran, *Taste tradition of central Travancore makes a sweet revival*, THE HINDU (Aug. 10, 2024), <https://www.thehindu.com/news/national/kerala/taste-tradition-of-central-travancore-makes-a-sweet-revival/article68501431.ece>.

producers” can be answered using an empirical form of research, the authors here make an honest attempt to arrive at an answer based on the functioning of state proprietorship of the Indian GIs. Producers are the foremost stakeholder of any GI. GIs are the output of a producer’s toil, and it is justified to say that it is they who must be the primary recipient of the benefits that a GI is capable of generating. But the GI Act has an extensive understanding of who can be a producer. The definition of ‘producer’ is wide enough to include traders and dealers, the interests here are referred to in the context of actual producers of GI. A thorough analysis of the GI applicant was pertinent because once registered, the applicant shoulders a host of responsibilities associated with the GI. Therefore, examining the locus standi of the applicant is crucial.

A reading of the GI Rules, 2002 establishes that the Indian regime mandates furnishing details on how the applicant intends to represent the interests of producers by filing an affidavit,⁹⁵ i.e. justifying their right to be the GI applicant. They need to have the particulars of all genuine producers proposed at the time of registration, which is the least the applicant can do. The Intellectual Property Appellate Board [“**IPAB**”] in a significant case had ruled that “Even though the definition can include businessmen, the vulnerable groups viz., artisans, actual craftsmen and growers who are the real interested persons cannot be left out. The main object of the Act is to protect those persons who are directly engaged in...making or manufacturing the goods. If the creators or makers prove that the application has been made without their knowledge, the registration will have to be removed. The application shall adduce credible evidence to show that the producers are desirous of coming together to protect the Geographical Indication.” In other words, “the targeted group under the Act cannot be left unaware about the filing of any application which affects them.”⁹⁶

Rule 33 of the GI Rules, 2002 states that a Consultative Group comprising seven members “well versed in the varied intricacies of this law or field” shall be constituted for examining the application presented before the Registrar. In the light of the Rules, a person with expertise shall be a member of the Consultative Group to lend credibility to the proceedings. The resulting Report shall be a complete document helping the Registrar in arriving at his/her conclusion.

In the case of *Subhash Jewellery v. Payyannur Pavithra Ring Artisans*,⁹⁷ the IPAB also concluded that “a mere claim that the society is called Payyannur Pavithra Ring Artisans and Development

⁹⁵ The Geographical Indications of Goods (Registration and Protection) Rules (2002), 32(1)(6).

⁹⁶ *Subhash Jewellery v. Payyannur Pavithra Ring Artisans*, (2013) (55) PTC 197 IPAB.

⁹⁷ *Id.*

Society would not suffice. It was observed that the applicant failed to set out the particulars such as names of producers, the nature of their involvement (whether they manufacture the ring or whether they trade/deal in the manufacture of rings), place of production etc... “Further, it was noted that none in the Consultative Group constituted pursuant to Rule 33 of GI Rules, 2002 was familiar with the craftsmanship of gold/ jewelry”.

While the definition of ‘producer’ is wide and includes traders and dealers, it is actually the most vulnerable – the real producers (the ones actually manufacturing the GI good)- who need protection, as the aim of the GI Act is to empower the disadvantaged lot. The legitimacy of the state as a GI applicant under the GI Act can still be disputed on the grounds of inadequate/non-representation of the interests of producers.

The involvement of state-registered proprietors is deeply rooted in India. The efforts of some of these state bodies as applicants are commendable. For some GIs, although the GI is registered in the name of a state body, groundwork like unifying the producers is done by other bodies like cooperatives, FPCs, societies, manufacturer’s associations, etc.

With regard to Araku Coffee, as discussed earlier, the question arises that, having worked with the local farmers for years, was GCC not more representative of the interests of producers than Coffee Board if its claims of empowering tribal coffee growers, offering market access, eliminating middlemen and enhancing productivity are considered?⁹⁸ Similarly, as discussed, an NGO named Heritage saw denial of their GI application for ‘Basmati’ despite being a farmer’s body and instead the tag was awarded to APEDA, a statutory body.⁹⁹

There is literature supporting the idea that even after acquiring GI status with the help of state proprietorship, actual producers have not benefitted. Rather, intermediaries who are marketing the GI products are appropriating undue profits by diluting the GI’s reputation, and they have no one controlling them.¹⁰⁰ ‘Lucknow Zardozi’ obtained GI in 2013, but the situation of the weavers remains grim as most fashion designers and retailers exploit their products at cheap rates, with

⁹⁸ *Id.*

⁹⁹ Marie-Vivien, *supra* note 18, at 213.

¹⁰⁰ VITÓRIA APARECIDA CARDOSO ET AL., THE BENEFITS AND BARRIERS OF GEOGRAPHICAL INDICATIONS TO PRODUCERS: A REVIEW 714-716 (Cambridge University Press, 2022)

“lack of government apathy” being a major concern.¹⁰¹ Producers, too, are powerless as they lack organizational capacity and also due to inefficient post-production management.

The GI Act has no provision for producers of the GI product to mandatorily be members of any producer association or such an association to pre-exist registration. However, the Registry’s responses to GI applications reflect their intent to foresee not only the establishment of such producer associations but also conferring post-registration internal watchdog responsibilities on them.¹⁰² In the EU, the law is affirmative with respect to producer associations. And as discussed, their formation is mandatory. Actually, questions on producer membership does not much arise in India because of double registration. Section 17 provides for registration of AUs if they wish to use the GI tag. This automatically confirms their association with the registered proprietor. Thus, the question remains – is membership really a necessity when the producer concerned has already registered at the GI Registry? What if a producer is a member to an association but has not registered as an authorized user? Meaning thereby, that there are several producers who have been producing the GI good before the status of GI was conferred on that product, and if some such producers did not register themselves at the GI Registry but they are members of some other producer associations, what can be said of their status? There seems to be no clear answers.

It is thus clearly established that statal authorities play a significant part in the GI governance system of India. They file applications, engage in promotion and brand-building exercises to advance the GI and offer all kind of assistance as required. However, in the near future, the intervention or rather involvement of the state in GI management in India may change. It may become ‘transitional’ in the future as the government might wait for the increasing capacity of producers from active to passive. In some instances, the state considers itself to be the guardian of GIs and not their sole registered proprietors. Department of Horticulture, Government of Karnataka does not claim itself to be the owner of GI ‘Coorg Orange’ but simply the guardian.¹⁰³ Understanding the functioning of state-registered proprietors is crucial as it allows us to understand how they are catering to the concerns of the producers. However, there are no established legal rules on how these proprietor bodies should function with regard to exercises like product specifications or ensuring post-registration management, obliquing the manner of their functioning.

¹⁰¹ Hasan Zia Rizvi, *Lucknow Zardozi Artisans Are Hanging by A Thread*, TWO CIRCLES (May 25, 2023), <https://twocircles.net/2023may25/449031.html>.

¹⁰² *Supra* note 24.

¹⁰³ Marie-Vivien, *supra* note 18, at 237.

In India, for registered proprietors, as observed across different GI categories, there is an overlapping of functions. Protecting GIs is a daunting task. One registered proprietor addressing all issues arising post-registration of a GI is a big challenge and involves resources. It becomes more expensive when the GI applicant seeks registration and protection in the overseas market due to the lack of a single coherent uniform approach.¹⁰⁴

In the case of handloom, the producer communities are largely from remote rural areas. Without adequate institutional support, these producers are not equipped to fight their myriad challenges. Thus, handloom sector GIs need active assistance of state-run institutions for their continuity and revival and also considering GIs are premium goods, to penetrate high-end markets. But lack of empirical data on the functioning of these GI applicants prevents us from forming any concrete conclusion. We see less participation of the producer communities in the decision-making process as most of these GIs are registered for “revival” purposes. As for state GI applicants, more than 30 percent of India’s GIs are registered by government agencies, which has not effectively benefited the local communities.¹⁰⁵ Therefore, the government is playing an overarching role in GI governance, trying its best to act in a democratic fashion, taking note of producers’ concerns, but the same is not seeing the desired effect.

IV. THE GI PERFORMANCE APPRAISAL: PRESCRIPTIONS AND PROSCRIPTIONS

The existing GI regulatory framework lacks transparency and accountability on many fronts. For instance, the Registry’s requirement from the applicants on post-registration quality control and inspection bodies violates the natural justice principle of ‘Nemo judex in causa sua,’ no one should be a judge in one’s case. This is so because registered proprietors themselves are required to provide details of the inspection structure appointed by them, if any, to ensure quality control post-registration, along with reporting the same to the GI Registry but whether the same is implemented, there is no way to know. In place of a registered proprietor of a GI checking the quality of its self-registered goods, why not there be a neutral agency for monitoring purposes? For better understanding, if NERAMAC, being the registered proprietor for several agricultural GIs of the Northeast appoints an inspection mechanism for quality monitoring and there is no

¹⁰⁴ Giovannucci, Daniele & Josling, Timothy & Kerr, William & O’Connor, Bernard and Yeung, May T., *Guide to Geographical Indications: Linking Products and Their Origins (Summary)*, INTERNATIONAL TRADE CENTRE (2009), <https://ssrn.com/abstract=1736713>.

¹⁰⁵ Neha Raj, *Unlocking Potential: India looks to Reform Geographical Indications Law for Greater Impact*, PUNE NEWS (Oct. 1, 2024), <https://pune.news/government/unlocking-potential-india-looks-to-reform-geographical-indications-law-for-greater-impact-242383/>.

accountability for its functioning to any other party, specifically the GI Registry; how does one determine whether NERAMAC has indeed appointed such an inspection mechanism? In other words, it is the duty of registered proprietors to engage in quality control and they themselves are appointing bodies for quality control purposes. The function is theirs and so is the inspection body checking whether the function is performed or not.

This situation also highlights the GI Registry's inability to govern the authenticity of GI goods post-registration. Legally speaking, there is no strict accountability for producers to follow the quality standards, and there are no legal measures for an independent authority to conduct regular inspections of these quality standards, and even if there is, the failure to do so has no major ramifications.¹⁰⁶

The issue is not about what kind of body is applying for GI, as they all have the legitimacy to do so, but their functioning and corresponding roles and responsibilities. GI governance in India, from pre-registration to post-registration, lacks uniformity. Standardization of quality and proper post-registration quality control are the core aspects of good GI governance. One single registered proprietor managing all aspects of a GI post-registration in a way that represents the concerns of all genuine producers is a mammoth task.

The authors hereby propose that the intervention of a neutral agency at this point is paramount for the division of responsibilities, but no such agency exists to date. With the GI Registry located in Chennai, without any branches elsewhere in the country, and the roles and responsibilities of every other stakeholder defined; it would augur well for the registered proprietor to be divested of its responsibility of quality monitoring as it is already burdened with other responsibilities. Quality being a non-negotiable aspect of a GI need special attention and for this, an independent neutral body or agency would be suitable to fulfil this function. The EU has special bodies called "Control Bodies" and their main function is quality control monitoring.¹⁰⁷ Control by an External Body is recommended here. They perform no other function. Such a set-up would necessitate more funding but would be a wise step towards enhancing the value of GIs in the minds of consumers. Also, the GI Act does not clarify satisfactorily the powers and functions of registered proprietors and AUs. Both can take infringement actions, but exclusive use is restricted to AUs only. Roles

¹⁰⁶ Pai, *supra* note 67.

¹⁰⁷ David Thual et al., *Q&A Manual European Legislation on Geographical Indications*, IPKEY, <https://ipkey.eu/sites/default/files/legacy-ipkey-docs/qa-manual-european-legislation-on-gis-en.pdf>.

and responsibilities of registered proprietors on quality control aspects that would have a significant impact on producers' welfare by keeping infringements in check are glaringly missing. The approach of the Indian government toward GI governance is largely welfarist, and thus, a spate of schemes has been launched, keeping the GI producers at the forefront. A common GI logo was created under the aegis of the Department for the Promotion of Industry and Internal Trade ["**DPIT**"], which, despite detailed instructions on usage, lacks implementation.¹⁰⁸ Thus, unlike PDO and PGI labels used in the EU,¹⁰⁹ India's GI logo lacks consumer recognition due to its non-usage. Also, given the increasing significance of e-commerce and digital protection, it is essential that the amended Act includes provisions facilitating and regulating the online marketing of GI products.¹¹⁰

The analysis of the Indian experience has shown that there is a danger of vesting complete control upon state authorities as the same might lead to the monopolization of GIs, weakening the 'collective dimension' aspect mentioned earlier, and complete commercialization of GIs at the cost of excluding genuine producers, as their voices might be lost in the chaos of the supply chain trajectory. To mitigate the risk of inequitable distribution of benefits, many scholars argue for greater participation and eventual empowerment of producer communities to construct an enabling institutional environment for which necessary institutional frameworks are missing. A question arises- can there be transcendental set-up to provide the producers a meaningful voice in course of the GI negotiations with state involvement but without sidelining neutrality concerns that arise with the same?

With the highest level of state involvement, as seen, the Tea Board has been able to ensure a global reputation for Darjeeling tea GI. However, since many actors are involved in the supply chain, it is essential to ensure that benefits actually percolate down to the genuine producers at the grassroots level. Has such extensive state engagement ensured benefits to all the producers? A GI

¹⁰⁸ Ministry Of Commerce & Industry, Department For Promotion Of Industry And Internal Trade, *Guidelines For Permitting The Use Of Geographical Indication (Gi) Logo And Tagline*, WIPO, https://ipindia.gov.in/writeraddata/Portal/News/536_1_GI_Guideline_Finalised.Pdf.

¹⁰⁹ *Geographical Indications And Quality Schemes Explained*, EUROPEAN COMMISSION, https://agriculture.ec.europa.eu/farming/geographical-indications-and-quality-schemes/geographical-indications-and-quality-schemes-explained_en.

¹¹⁰ *Strengthen Quality Control Mechanisms in GI-tagged Products: Experts to Govt*, OUTLOOK BUSINESS (Oct. 9, 2024), <https://economictimes.indiatimes.com/news/economy/policy/strengthen-quality-control-mechanisms-in-gi-tagged-products-experts-to-government/articleshow/114078183.cms?from=mdr#:~:text=Strengthen%20quality%20control%20mechanisms%20in%20GI%20tagged%20products%3A%20Experts%20to%20Government,-Agencies&text=Experts%20urge%20the%20government%20to,oversight%20body%2C%20and%20quality%20checks.>

cannot be said to be a success if the overall interests of all its producers are not secured. Tea Board has been able to script sufficient success for Darjeeling tea due to adequate financial resources¹¹¹ but as observed, that is not the full picture, as not all producer groups are equally placed. As seen, small scale producers' concerns need exclusive focus and active state support is unquestionable for their upliftment, till their status reaches a certain pedestal and they can negotiate for themselves. State involvement is needed for trust-building among all the stakeholders as it is not an easy task with opportunistic behavior rampant in markets.¹¹² And if there is a state agency already, they will need to engage actively with all the producers and coordinate with concerned state departments like labour, for instance. Can the state be entirely trusted in defining the common interests or best interests of all the producers of a GI product? Should the state continue to play an active role in the GI governance or be a facilitator/mediator, allowing producer associations to take complete charge with the passage of time?

Instead of the main applicant, the state body may function as the mediator, for instance, it can set up consultations, bringing all stakeholders together. For several GIs, state authorities play the role of a facilitator by launching schemes and helping producers with registration and financing, but the problem lies in low awareness among producers.¹¹³ State measures like One District One Produce [“**ODOP**”], Product Action Reports, buyer-seller meets, training of workers, etc., are laudable to take care of the same.¹¹⁴

Regarding the GI Registry, it is recommended that the GI Act should provide for a local institutional mechanism for GI management purposes. This is especially so for Part B registration of the GI Register that requires entering the details of the AUs; if some form of local filing can be facilitated, it would help facilitate swifter registration of AUs, who generally struggle with a lack of awareness and language-related problems. A single Registry in one corner of the country hampers accessibility between the producers and the authorities, resulting in delays and making the process expensive. A feasible solution would be the establishment of regional offices, making the registration process decentralized.¹¹⁵ Also, a state body with tentative nomenclature like National

¹¹¹ *Id.*

¹¹² Jupi Gogoi, *Proprietorship of GI in India with Special Focus on the State of Assam*, 25 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, 151 (2020).

¹¹³ Ranjana Sundaresan, *GI-Tags for Food and Drinks: A Complex Web of Determining Origins and Authenticity in India*, THE LOCATORE (Feb. 8, 2024), <https://thelocavore.in/2024/02/08/gi-tags-for-food-and-drinks-a-complex-web-of-determining-origins-and-authenticity-in-india/>.

¹¹⁴ *Centre takes proactive steps to promote the GI tagged products in the global market*, MINISTRY OF COMMERCE AND INDUSTRY, <https://pib.gov.in/PressReleasePage.aspx?PRID=1898020>.

¹¹⁵ Datta, *supra* note 58.

GI Board may be constituted that could assist producers/artisans in effective management of their GIs as despite the potential of over 10,000 GIs; India, as of 2025, has only 643 GIs registered and fares much lower when compared to countries like France and China.¹¹⁶ Rather than being a co-applicant, the Government is better placed in the role of enabling participation. For instance, the handicrafts sector of India is highly unorganized, necessitating state involvement. Regulated state intervention has been instrumental in the success of GIs like Pochampally Ikat and Chanderi fabric.¹¹⁷

The GI Registry must act in a neutral manner while reviewing GI applications with consultative groups. They must establish and function on clear guidelines necessitating some form of mandatory representativeness of producers to be more democratic in their functioning. Producers unifying themselves to get a GI registered would be preferable and ideal, and such a measure would bring the Indian GI regime closer to the producer-led model of GI governance, at least at the grassroots level.

In India, however, even when GIs have been registered, producer groups or state proprietors are largely seen to be inactive. The authors propose two ideal situations. First, the GI Registry can set a mandate that some form of active producer association is a must for the registration process to be initiated, and the state can join as a co-applicant/facilitator. Second, after the GI registration, the state proprietors can facilitate the formation of an association of producers (if not already in existence), take measures to empower them, and eventually transfer the responsibility to such an association.

GIs are largely public goods and capture the spirit of cooperative entrepreneurship; thus, they can never be either the monopoly of the state or producer associations. They work on a delicate balance between the two. For successful GIs, equitable participation among local producers and the state is required in all GI-related aspects.

V. CONCLUSION

GIs are public goods and meant for public good, symbolizing shared heritage and have the power of differentiation and to command premiums. Thus, they are exclusive and ubiquitous forms of

¹¹⁶ *Govt proposes to amend Geographical Indications law, seeks comments*, BUSINESS STANDARD (Oct. 1, 2024) https://www.business-standard.com/economy/news/govt-proposes-to-amend-geographical-indications-law-seeks-comments-124100100750_1.html.

¹¹⁷ Das, *supra* note 87.

IP, having a network of stakeholders in their management. Thus, GI good governance necessitates a complete reorganization of the supply chain to adhere to product quality standards and ensure that benefits percolate down to all alike in the supply chain, the producer communities in particular. For smooth coordination, trust-building among all stakeholders is of paramount importance.¹¹⁸ State involvement in GI management is established from the fact that GIs correspond mainly to geographical place names that are under the control of the state, and it being public goods, it becomes the duty of the state to preserve the shared heritage and towards that, state as a registered proprietor has a huge responsibility towards producer communities.¹¹⁹

In developing countries like India, it is difficult for local producers of GI products in rural areas to understand or even have access to the GI mechanism necessitating state penetration to uplift the local producers. Thus, the legitimacy of state involvement cannot be denied owing to the low level of producer awareness and activeness. However, a direct involvement of the state is not proposed only as the role of the state must not be mere handholding but allowing enough space for producers to flourish as a community. The Indian experience has revealed a new objective for the protection of GIs: the protection of the national identity of a country conferring the GI Act and the status of a welfare legislation through the ownership of the rights conferred to the state. Undoubtedly, this requires state support, but GI is mainly about the welfare of producers for which this community must be offered space at the forefront - a meaningful platform to voice their concerns.

With state involvement in GI governance, the question of monopolization of GIs arises along with unsatisfactory representation of interests of producers, but as established, state involvement is inevitable for a developing economy like India. Depending on which GI objective is in focus, the state's involvement needs to be assessed accordingly. For instance, if promotion and brand building are needed, then inspection and quality control checks need to be strengthened, for which state involvement is undeniable as it is a resource-intensive exercise. On the other hand, if community-level changes like employment or better revenues or deciding on product specifications are the focus, then producers must be included in the GI governance model, and it is the role of the registered proprietor to do so.

¹¹⁸ Sunil Sudhakar Varnekar & Dr. Upankar Chutia, *Critical analysis on the implementing of the geographical indications Act in handloom sector*, 2 INTERNATIONAL JOURNAL OF LAW JUSTICE AND JURISPRUDENCE 107-111 (2022).

¹¹⁹ Marie-Vivien, *supra* note 63.

A perfect combination of globalization and localization, the Indian GI regime is a classic case of 'glocalization'; a fusion with global and local features reflected by means of its performance so far. For a subcontinent-like country like India, a primarily producer-driven approach at the grassroots with necessary statal support is qualified with sui generis potential to secure the object and purpose of the GI-registered goods, meant to market the public goods for public good; for those producers in the grassroots in particular whose intellectual labour culminates into the material commodity with endorsement of the GI Registry.

REDEFINING CO-CREATION IN THE DIGITAL ERA: PAPARAZZI PHOTOGRAPHY AS A COLLABORATIVE ART

TEESHA ARORA* & MANAV PAMNANI**

“The celebrity-making machine – photographers, paparazzi, press and stuff like that can be ruthless.”

Catherine Keener

ABSTRACT

In the increasingly globalized twenty-first century with widespread digitalization becoming the norm across the world, paparazzi photography and its corresponding implications is a significant area that must be explored. The dynamic interplay between celebrity privacy and paparazzi practices has sparked critical discussions around legal, ethical, and financial considerations in the media and entertainment sectors. This article explores the intricate balance between safeguarding individual privacy and upholding press freedom, emphasizing the need for comprehensive legal protections for public figures. It delves into the ethical dilemmas posed by paparazzi techniques, such as the use of advanced technology to intrude upon personal moments and the ensuing toxic culture that monetizes vulnerability and invades private spaces. With a comparative analysis of international frameworks, like the European Union’s [“EU”] privacy rights, the paper proposes legislative reforms in India, aligning copyright and privacy laws to create a consent-based model that limits excessive interference. The conceptualization of a co-authorship framework forms a key proposal, detailing guidelines for shared authorship between celebrities and photographers to foster equitable financial arrangements and ethical content creation. The paper further investigates the financial incentives driving media practices, examining traditional revenue models and advocating for innovative solutions, such as non-profit journalism, community-supported initiatives, and partnerships with academic institutions. Technology’s transformative influence on media, from social platforms to AI-driven photography, raises new concerns, underscoring the need for legal systems to evolve and balance press freedoms with individual rights. Ultimately, the article argues for a regulatory paradigm that respects personal autonomy, promotes ethical journalism, and adapts to technological advancements, paving the way for a more responsible and collaborative media environment. The geographical scope of the paper is largely limited to India, with references to other jurisdictions such as the EU and the United States of America [“U.S.A”] to present a comprehensive analysis. Lastly, the structure of the paper can be divided into two parts: The first one is introductory and comprises the introduction, and the literature review, and the second one is expository and analytical, detailing substantive aspects that build on the introductory elements, thus forming the crux of this article.

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I. INTRODUCTION

A divisive feature of the media environment for a long time has been paparazzi photography, which frequently records celebrities' private moments without their permission. There have been instances where celebrities have sued paparazzi for violating their privacy rights.¹ The paparazzi sell these images to the media houses for economic benefits, but there have been instances where celebrities post photographs taken by paparazzi photographers.² The spread of technology in the digital age has changed the paparazzi photography industry and introduced issues pertaining to image ownership, authorship, and collaboration. New visual technologies and media convergence have made paparazzi agencies significant players in the entertainment sector. It is because these organizations are able to produce and disseminate exclusive stories that the globalization of paparazzi content has more and more implications for emerging information-based entertainment genres.³ Recently, there has been an emphasis on more typical, ordinary experiences, providing a more approachable view of celebrities. This change is indicative of larger shifts in the way people consume celebrity culture, especially in the age of digitalization where social media and quick material rule the scene. This further leads to complicated ethical issues surrounding paparazzi photography, such as consent, privacy, and exploitation, especially in light of the growing usage of cutting-edge technology, which will be subsequently analyzed in the paper.⁴

The evolving field of paparazzi photography poses important issues in law and ethics as far as authorship and ownership of celebrity photographs are concerned. In the past, paparazzi had exclusive copyright of the pictures they took. However, the increased participation of celebrities in public images is raising questions on whether or not they could be considered as co-authors of the photographs taken. This paper seeks to understand the question of whether paparazzi and celebrities ought to be considered as joint authors of the images, especially with the advent of digital technologies that allow photographs to be produced and altered collaboratively. It further investigates whether any legal systems in place adequately address co-authorship and explores the outcomes of the artistic integrity of the paparazzi's work under a specified legal system of shared

¹ Khushboo Parek et al., *Caught in the Flash: Navigating the Paparazzi's Lens & The Right to Privacy in India*, MONDAQ (Sept. 6, 2024), <https://www.mondaq.com/india/privacy-protection/1514278/caught-in-the-flash-navigating-the-paparazzis-lens-the-right-to-privacy-in-india#:~:text=For%20instance%2C%20Bollywood%20actress%20Alia,court%20recognizing%20the%20privacy%20breach.>

² Emma Perot, *The Conflict between the Copyright of Paparazzi and the Right of Publicity of Celebrities*, 30 TEX. INTELL. PROP. L.J. 135 (2022).

³ Kim McNamara, *The Paparazzi Industry and New Media: The Evolving Production and Consumption of Celebrity News and Gossip Websites*, INT'L J. CULTURAL STUD. 1 (2011).

⁴ Gurinder Kaur, *Paparazzi Trend in Photography: Shaping Celebrity Culture and Media in the Digital Age*, 9 INT'L J. RES. CULTURE SOC'Y (2025)

ownership. The discussion goes further to consider economic consequences; whether or not paparazzi ought to share the profits from the sale of the pictures with the persons featured in the photographs. The goal of this paper thus is to gather reflection on how authorship, artistic value and financial interests mix in this era of digital media.

Therefore, the idea of changing co-authorship for paparazzi photographs has been examined in this research, which also looks at how digital technologies disrupt conventional ideas of authorship and influence collaborative practices.

II. LITERATURE REVIEW

This paper has had access to a plethora of diverse resources including detailed journal articles, research papers, books and other forms of academic literature, which has fostered the presentation of a comprehensive analysis. Although it relies on several existing sources, there are a few parameters that set this paper aside from the existing literature. The area of paparazzi photography is itself underdeveloped with very few articles discussing the same. Even the articles that deal with the issue of copyright within the broader ambit of paparazzi photography fail to examine the broader picture of ethical and financial implications and majorly focus on its legalities, thus adopting a restricted thematic lens. The novel idea of co-authorship as an effective solution does not feature within these papers, except for an occasional mention of the same. This paper effectively amalgamates these considerations and discusses them comprehensively, thus filling an important void in the existing literature. It not only presents an enriched analysis but also evolves a model which enlists certain important guidelines or suggestions that can be followed while dealing with copyright issues in paparazzi photography cases, particularly about co-authorship. Four important articles have been identified below which discuss the subject matter explored in this paper. Although increasingly credible and noteworthy, they fall short in terms of analytical expression and the comprehensiveness of the subject matter, thus creating a void that this paper aims to fill, as mentioned above. These articles include:

1. Kelley Bregenzer, *Modifying Co-Authorship for the Digital Age: Paparazzi Photographs as Joint Works*.⁵ This study analyses a modified interpretation of joint works under the 1976 U.S.A Copyright Act that would allow a photographer to keep all the ownership and transfer rights of their work while allowing celebrities to post the photographs taken on social media. This modified interpretation

⁵ Kelley Bregenzer, *Modifying Co-Authorship for the Digital Age: Paparazzi Photographs as Joint Works*, 13 DREXEL L. REV. 449 (2021).

of co-authorship is based on the right to publicity's incidental use doctrine; the research gap elaborates the scenarios in different countries, particularly the U.S.A. and the parameters required accordingly.

2. Dylan B. Reich, *"Gigi, over Here!": Celebrity Use of Copyrighted Paparazzi Photographs*.⁶ This study analyses the interests of celebrities under the current doctrine, including authorship and joint authorship, the theory of implied license, fair use, and the right to privacy. It also analyses how the current doctrine should be construed to provide sufficient protection and rights to celebrities using images of themselves. The gap is a narrow scope in which a celebrity should be allowed to use images depicting their likeness for non-commercial purposes.

3. Joshua Azriel, *Paparazzi Lawsuits against Celebrities: Ongoing Litigation*.⁷ This study examines the types of litigations and discusses the explicit authority a photographer possesses to avoid the use of their name as the author of the work of visual art if the work is altered, mutilated, or otherwise modified. A twenty-first-century alteration could include putting an electronic copy of the original on a social media platform. This study looks at copyright law concerning the legal rights of paparazzi to have their creative works protected, particularly while using social media channels for communication. Although paparazzi work may not always be respected by celebrities or the public, there exists a complex relationship between paparazzi and celebrities, marked by both mutual dependence and tension.

4. Himanshu Kalwani, *The Price of Fame: Celebrity Privacy Rights*.⁸ To comprehend the paparazzi's limits, this study analyses celebrities' rights to privacy. As publicity rights gained more acceptance, "privacy rights" as a safeguard against invasions of personal space done solely for financial gain also developed. It was encouraging to see that the celebrities initially received compensation in damages under the publicity rules. However, at the same time, the owner's (photographer's) rights were not explicitly considered and analyzed.

III. CRITICAL ANALYSIS

⁶ Dylan B. Reich, *"Gigi, Over Here!": Celebrity Use of Copyrighted Paparazzi Photographs*, 39 CARDOZO ARTS & ENT. L.J. 793 (2021).

⁷ Joshua Azriel, *Paparazzi Lawsuits Against Celebrities: Ongoing Litigation*, 37 ENT. & SPORTS LAW. 13 (2021).

⁸ Himanshu Kalwani, *The Price of Fame: Celebrity Privacy Rights*, 3 INDIAN J. INTEGRATED RSCH. L. 501 (2023).

Everyone wants to be credited for their creations in this modern digital era. Patently, the creator of the photo is the photographer himself, but the photograph's subject matter is the celebrity, who should ideally own that photo jointly. Under Section 52 of the Copyright Act of 1957,⁹ a celebrity cannot claim fair use regarding the copyrighted photograph, even though the said provision says, "private and personal use." This is because the photograph is for commercial use and goes beyond the scope of just public communication. Private communication is when it is made to a limited audience, but the social media post of a celebrity goes beyond that and is considered public interest.¹⁰ The owner of the copyrighted photograph (generally the media outlet or employer of the photographer in paparazzi photography cases) has the right to make public communication of the photograph.¹¹ As per law, the author of the copyright (the photographer in paparazzi photography cases) is distinct from the owner of the photograph.¹² Under Section 2(d)(iv) of the Copyright Act, 1957,¹³ the person taking a photograph is the author, and copyright for the same is provided under Section 17.¹⁴ The photograph is considered an artistic work under Section 2(c)(i).¹⁵ The Information Technology Act of 2000 includes provisions for privacy protection, making unauthorized access and sharing of personal information illegal.¹⁶ This has been added to privacy legislation and is now subject to tort law penalties, including the recovery of damages.¹⁷

The news personality Rajat Sharma was granted an injunction against Zee Television in 2019 by the Delhi High Court for publishing, posting, or erecting hoardings of him without his consent. Zee Television attempted to discredit the news television personality in front of viewers and persuade them to stop watching his show by using his name untruthfully in their advertisement.¹⁸ The Court while reaching its decision relied upon well-established precedents, including *Titan Industries v. Ramkumar Jewelers* wherein Titan claimed that Ramkumar Jewelers used exact replicas of Titan's advertisements with the Bachchans to erect hoardings.¹⁹ Titan asserted that deceiving the public into thinking Ramkumar Jewelers is connected to TANISHQ violates their

⁹ The Copyright Act, No. 14 of 1957, Acts of Parliament, § 52 (Ind.).

¹⁰ Howard L Berkman, *The Right of Publicity – Protection for Public Figures and Celebrities*, 42 BROOK. L. REV. 527 (1976).

¹¹ Vikrant Rana & Pranit Biswas, *Could Virat Kohli have been bowled over by copyright misuse?*, BAR AND BENCH (Jul. 7, 2022, 10:55 AM), <https://www.barandbench.com/law-firms/view-point/virat-kohli-bowled-over-by-copyright-misuse>.

¹² Vivek Verma & Ankit Rastogi, *'Authorship' and 'Ownership' of Copyright in a Photograph in India*, INDIAN CASE LAW (July 30, 2020), <https://indiancaselaw.in/authorship-and-ownership-of-copyright-in-a-photograph-in-india/>.

¹³ The Copyright Act, No. 14 of 1957, Acts of Parliament, § 2(d)(iv) (Ind.).

¹⁴ The Copyright Act, No. 14 of 1957, Acts of Parliament, § 17 (Ind.).

¹⁵ The Copyright Act, No. 14 of 1957, Acts of Parliament, § 21(i) (Ind.).

¹⁶ The Information Technology Act, No. 21 of 2000, Acts of Parliament (Ind.).

¹⁷ Leon Trakman et al., *Tort and Data Protection: Are there any lessons to be learnt?*, 5 EDPR REV. 1, 1-20 (2019).

¹⁸ Aditi Verma Thakur & Pooja Nair, *Zee Violates Personality Rights of Editor-in-Chief of IndiaTV*, INDUSLAW (Feb. 2019), <https://induslaw.com/app/webroot/publications/pdf/alerts-2019/Infolex-Zee-Violates-Personality-Rights-of-Rajat-Sharma.pdf>.

¹⁹ *Titan Industries v. Ramkumar Jewellers*, (2012) 50 PTC 486 (Del.).

copyright and amounts to passing off. They therefore sued for a permanent injunction to prevent copyright violations, passing off, personality rights infringement, damages, etc. The Court ruled that when a well-known person's identity is utilized in an advertisement without their consent, the issue is not that their identity should not be commercialized, but rather that they should have the authority to decide when, when, and how their identity is used. It further relied upon *Shivaji Rao Gaekwad v. Varsha Productions*,²⁰ which also discussed tenets of defamation and the unauthorized use of pictures. The Indian Court acknowledged the tort component of the right to privacy in the *Raja Gopal v. State of Tamil Nadu* case,²¹ which led to the payment of damages for unauthorized invasions of private spaces.²²

In the global scenario, the fair use doctrine has a broader applicability, as compared to India. A plethora of factors are considered, including the purpose, nature, amount, substantiality, effect of the use upon the potential market and commercial purpose for which the copyrighted work is used.²³ In the case of *Xclusive-Lee, Inc. v. Gigi Hadid*,²⁴ involving a celebrity winning the copyright battle against the paparazzi,²⁵ it was argued that the photograph was posted for private use, the photograph clicked by paparazzi is factual and not creative work, it was cropped, and only some part of it was posted. Additionally, it was contended that the photograph had already been posted, and no economic loss was caused to the photographer. The court pronounced the judgment in favor of Gigi Hadid, as the copyright for that photograph was not registered. However, the same was a little out of the purview of automatic protection, especially because the copyright was already in the registration process. The decision did not distinguish between personality rights and photograph copyright.

Furthermore, France has a proper civil code that recognizes the right to privacy.²⁶ This recognizes the rights of the celebrity even if they are standing in public and their photos are clicked. Article 8 of the European Convention on Human Rights [“**ECHR**”] grants the right to public figures to

²⁰ *Shivaji Rao Gaekwad v. Varsha Productions*, (2015) 62 PTC 351 (Madras).

²¹ *Raja Gopal v. State of Tamil Nadu*, (1995) A.I.R. 1995 S.C. 264.

²² Mudita Gairola, *Protection of Celebrity Rights/ Personality Rights in India*, MONDAQ (Apr. 30, 2019), <https://www.mondaq.com/india/privacy-protection/801764/protection-of-celebrity-rights-personality-rights-in-india>.

²³ *Measuring Fair Use: The Four Factors*, STANFORD LIBRARIES – STANFORD UNIVERSITY, <https://fairuse.stanford.edu/overview/fair-use/four-factors/>.

²⁴ *Xclusive-Lee, Inc. v. Hadid*, (2019) 19-CV-520 PKC CLP E.D.N.Y.

²⁵ Ashley Cullins, *Gigi Hadid Beats Instagram Post Copyright Lawsuit*, THE HOLLYWOOD REPORTER (Jul. 18, 2019, 12:17 PM), <https://www.hollywoodreporter.com/thr-esq/gigi-hadid-beats-instagram-post-copyright-lawsuit-1225393>.

²⁶ Code civil [C. civ.] [Civil Code] art. 9 (Fr.).

keep their life private.²⁷ In the case of *Von Hannover v. Germany*,²⁸ the photograph of Princess Caroline was posted when she was in the setting for non-official purposes. The court held that the celebrities even made known to the public have a legitimate expectation that their private life would be protected. Thus, the photograph's object, the celebrity, is protected in the EU and can result in the co-authorship of the photograph when posted for commercial purposes.²⁹

The dilemma is solved from the author's point of view through the analysis of whether the setting of the photograph is public or private and whether permission was taken for the photograph or not,³⁰ as in some cases, the celebrity might shy away and say no to clicking pictures; this will indeed protect their personality rights. Personality rights, which include the right to privacy and publicity, allow celebrities to control the commercial and personal use of their image, particularly in contexts wherein they have not consented to public exposure.³¹ Courts in various jurisdictions, such as India and the EU, as noted above, have recognized that even public figures have a reasonable expectation of privacy in non-official settings. Invasive paparazzi practices that disregard consent can lead to legal consequences, as seen in cases where celebrities have sought injunctions against unauthorized photography and publication.

When the question of monetary value being shared comes into the picture, it should be considered that the picture has a high monetary value in the current events happening in the lives of celebrities.³² An example of this is the wedding pictures of Katrina Kaif and Vicky Kaushal which were sold at an extremely high price to an international magazine, similar to the pictures of other celebrity weddings including that of Priyanka Chopra and Nick Jonas.³³ If celebrity photographers collaborated with their well-known subjects or, at the very least, did so in legal harmony, perhaps they might find themselves in a better position.³⁴ As in the current scenario, these legislations have

²⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

²⁸ *Von Hannover v. Germany*, (2004) ECHR 59320/00.

²⁹ Barbara McDonald, *Privacy, Princesses, and Paparazzi*, 50 N. Y. L. SCH. L. REV. 205 (2005).

³⁰ L Lee Byrd, *Privacy Rights of Entertainers and Other Celebrities: A Need for Change*, 5 ENT & SPORTS LJ 95 (1988).

³¹ Veena Chandra & Kriti Sood, *Personality Rights: Protection under IP Laws*, LAKSHMIKUMARAN & SRIDHARAN ATTORNEYS (Feb. 15, 2024), <https://www.lakshmisri.com/insights/articles/personality-rights-protection-under-ip-laws/>.

³² Lucy Rana & Pranit Biswas, *Copyright Regarding Paparazzi Photos: Where does the liability lie?*, SS RANA & CO. ADVOCATES (Feb. 21, 2022), <https://ssrana.in/articles/copyright-paparazzi-photos-where-does-the-liability-lie/>.

³³ Taru Bhatia, *Katrina Kaif-Vicky Kaushal to Sell Wedding Photos Rights to International Magazine for a Whopping Price?*, INDIA.COM (Dec. 3, 2021, 12:27 PM), <https://www.india.com/entertainment/bollywood-news-katrina-kaif-vicky-kaushal-to-sell-wedding-photos-rights-to-international-magazine-for-a-whopping-price-5121661/>.

³⁴ *Childress v. Taylor*, 945 F.2d 500, 507 (2d Cir. 1991).

not been laid down, especially in India. In that case, the above pointers can be taken as a useful matrix to determine the same.

A. Digital Platforms and Co-Creation

The rise in digital platforms has transformed the arena of paparazzi photography and celebrity culture. Under the Indian Copyright Act, as mentioned above, the photographer is the sole author of the picture. However, nuances arise when the subject matter involves celebrities, especially as they use social media to post pictures, thereby engaging copyrighted material in the public domain. Under the Information Technology Act, celebrities may seek protection in digital spaces to safeguard their likeness, and this protection can extend to the unauthorized use of their images without their explicit consent. This relates to the right to privacy enshrined under Article 21 of the Indian Constitution, which emphasizes the protection of these celebrities across digital realms.³⁵

The interaction between digital platforms and paparazzi photography highlights the need for legal provisions to adapt to modern trends. Celebrities who started using social media as their regular mode of self-portrayal have become architects of images, and therefore, the control of power traditionally held by paparazzi is gradually dwindling.³⁶ This change calls for a broader approach towards authorship of pictures; celebrities should be identified as co-authors of the images in they are the objects, significantly when they contribute contexts, captions, or narratives. Besides, the digital age also brings issues of transparency. The possibility of the non-consensual use of images uploaded by celebrities creates a framework for re-evaluating the margins of fair use. For example, if a celebrity uploads an image captured by a paparazzi photographer, does that constitute an implied license for redistribution or commercialization? The vagueness leads to the necessity of more exact rules that can defend copyrights while the people living in public life can manage their representatives in public.

Finally, digital platforms also replace the traditional modes of interaction between people and photographers, thereby giving way to the emergence of entirely new forms of creative expression. Like stories, these arrangements are conducive to the adoption of ethical paradigms in the paparazzi business because both parties are in good bargaining positions and, further, can ensure that the privacy and dignity of celebrities are upheld. Nevertheless, this additionally entails a legal

³⁵ INDIA CONST. art. 21.

³⁶ Aryan Bhat & Yashendra, *Whose Photo is it Really?: Dichotomy of rights and copyrightability of paparazzi photographs*, THE RMNLU LAW REVIEW BLOG (Sept. 20, 2021), <https://rmlnlulawreview.com/2021/09/20/copyrightability-of-paparazzi-photographs/>.

infrastructure that is sensitive to and practically promotes such agreements, overturning an old pattern of exploitation to foster beneficial interactions for both sides.

The whole concept of paparazzi photography revolves around this question – “If the photograph’s author is the photographer, what about the rights of the subject matter, especially when it’s a living being?” The answer to this question lies in the simple observation that while photographers are recognized as the authors of their images, celebrities’ personality rights must also be considered. As the nature of celebrity pictures is changing with the advent of the digital age, the concept of paparazzi photography as a cooperative, creative approach is also gaining currency. This section looks at both the legal and practical implications of these changes, which will be elaborated upon further in the next section. Specifically, it will deal with how a nuanced understanding of paparazzi photography can affect copyright law and ethical standards in the industry. In various countries, such as India, copyright law embraces the moral rights of authors.³⁷ This is contained within Section 57 of the Indian Copyright Act.³⁸ The rights mentioned herein consist of the right to be identified as the author and the right to be protected from distorted uses of the work.³⁹ Understanding the collaborative potential between celebrities and paparazzi could encourage a broader application of moral rights, aligning with an international practice that respects the rights and responsibilities of both parties regarding the images and their use.⁴⁰ Creating contracts between the two will indicate the cooperative characteristic of the condominium. Such arrangements provide a legitimate framework that not only establishes the rights and obligations of both parties but also helps in resolving disputes over authorship, profit-sharing, and permitted usages. By defining the scope of commercial use, revenue-sharing models, and ethical obligations, contracts prevent unauthorized exploitation and ensure that photographers retain creative recognition while celebrities maintain control over the commercial use of their likeness.⁴¹ This aligns with principles seen in endorsement agreements, influencer-brand partnerships, and licensing arrangements in intellectual property law, where consent and compensation are key considerations.⁴² Although the

³⁷ Sana Singh, *Moral Rights under Copyright Law*, SINGHANIA & PARTNERS (Feb. 17, 2021), <https://singhania.in/blog/moral-rights-under-copyright-law>.

³⁸ The Copyright Act, No. 14 of 1957, Acts of Parliament, § 57 (Ind.).

³⁹ *Moral Rights of Owner in Copyright Law of India – A Paradigm Shift*, SS RANA & CO. ADVOCATES (Aug. 27, 2019), <https://ssrana.in/articles/moral-rights-of-owner-in-copyright-law-of-india-a-paradigm-shift/>.

⁴⁰ *Amar Nath Sehgal v Union of India*, (2005) 30 PTC 253 (DEL).

⁴¹ Sterling Miller, *Contracts and IP Ownership*, THOMSON REUTERS (May. 5, 2022), <https://legal.thomsonreuters.com/en/insights/articles/contracts-and-intellectual-property-ownership>.

⁴² *Agreements with influencers and social media marketing agencies*, HOGAN LOVELLS, <https://digital-client-solutions.hoganlovells.com/influencer/tool/influencers-tool-contracting-agreements-with-influencers-and-social-media-marketing-agencies>.

above-mentioned ethical guidelines, as explained in cases such as *Raj Rewal v. Union of India*,⁴³ *Pee Pee Publishers & Distributors v. Dr. Neena Khanna*,⁴⁴ and *Sartaj Singh Pannu v. Gurbani Media Private Limited*,⁴⁵ are not legally obligatory, they can potentially prescribe the moral rules applicable to such situations to which the photojournalists' collaboration with celebrities should adhere. The guidelines include, amongst others, responsible conduct from both the photographers and the celebrities, which can be used to enhance teamwork.

Understanding paparazzi photography as a form of collaborative art goes against the general perspective of viewing photographers as sole creators. This could lead to an equitable distribution of rights and revenues to benefit both the artist and the subject. The growing awareness among celebrities to collaborate with photographers could elevate industry standards, encouraging more ethical practices in capturing and sharing images.⁴⁶

Yet, this overall shift also poses considerable challenges. Co-authorship can complicate matters from a legal standpoint, especially concerning copyright registration and licensing agreements.⁴⁷ In spontaneous paparazzi scenarios, questions about what qualifies as true collaboration may arise. To mitigate potential conflicts, precise legal language and clear, unambiguous definitions are essential for navigating these challenging situations. Additionally, while collaboration is an issue that might raise ethical standards, a balance must be maintained between the rights of the individual and the alternative of journalistic freedoms. This balance is crucial, as overly restricting paparazzi activities could reduce the press' ability to report on public figures, thereby limiting the diversity and interest of public discourse. Therefore, with the shifting paradigms of celebrity and media in the digital age, it is of severe legal and practical import for paparazzi photographs to be recast as an exquisite form of collaborative art, wherein both the photographer and the paparazzi work together to shape the final output, sharing artistic and intellectual contributions.⁴⁸ Examples of collaborative art, except paparazzi photography include artistic portraits, co-created digital media projects, and so on. The art collaboration between Andy Warhol and Jean-Michael Basquiat, and Pablo Picasso and Gjon Mili are the epitome of this phenomenon.⁴⁹ Therefore, this extends

⁴³ *Raj Rewal v. Union of India*, (2019) A.I.R. Online Del. 911.

⁴⁴ *Pee Pee Publishers & Distributors v Dr. Neena Khanna*, (2010) S.C.C. OnLine Del 2433.

⁴⁵ *Sartaj Singh Pannu v Gurbani Media Private Limited*, (2015) S.C.C. OnLine Del 9627.

⁴⁶ SANNA NISSINEN, *HUMANITARIAN PHOTOGRAPHY: A HISTORY*, Chapter 12 – Dilemmas of Ethical Practice in the Production of Contemporary Humanitarian Photography (eds. Heide Fehrenbach & Davide Rodogno, Cambridge University Press) (2015).

⁴⁷ M. Hosseini et. al., *Group authorship, an excellent opportunity laced with ethical, legal and technical challenges*, TAYLOR AND FRANCIS (2024), <https://www.tandfonline.com/doi/epdf/10.1080/08989621.2024.2322557?needAccess=true>.

⁴⁸ Anne Jerslev & Mette Mortensen, *Taking the Extra out of the Extraordinary: Paparazzi photography as an online celebrity news genre*, 17 INT. J. OF CULT. STUD 619 (2014).

⁴⁹ Nadja Bozovic, *Famous Art Collaborations*, AGI FINE ART BLOG, <https://agifineart.com/advice/famous-art-collaborations/>.

beyond current copyright frameworks, moving towards provisions that acknowledge the collaborative nature of modern image-making and respect the rights and contributions of all parties involved, ultimately benefiting both artists and subjects.

Having comprehensively explored the intricacies of copyright protection in instances of paparazzi photography, this section aims to elucidate the legal and practical implications of extending copyright ownership to celebrities. These implications are manifold and comprise both positive and negative aspects. However, they have been analyzed under two broad sub-headings to facilitate the presentation of an enhanced and systematic structural framework.

1. Copyright and Authorship Issues

Granting co-authorship rights to celebrities in paparazzi photography would represent a substantial shift in copyright law, with complex implications for intellectual property, privacy, and the commercial media landscape. One of the major legal implications pertains to the realm of copyright and authorship issues. As mentioned previously, under Section 2(d)(iv) of the Copyright Act, 1957, the photographer is the sole author of the photographic work and retains all rights unless explicitly transferred, with exceptions for derivative works or substantial transformations of the image. A natural implication of extending this right to celebrities includes significantly revamping the current copyright law regime to define specific parameters for co-authorship, such as the context, purpose, and intended use of the photograph.⁵⁰ This would consequently introduce complexities in determining authorship at the point of capture due to the inherent legislative inability to provide for a rigid norm that equally applies to all situations. Therefore, a set of standardized guidelines can be prescribed with subjective application and implementation depending on the circumstances of a particular case. An example of such an amendment includes the expansion of the definition of an “author” which has to be accorded a broad connotation to encompass celebrities within its purview, subject to the prescribed conditions being met.⁵¹

Since the issue being discussed is also largely a personality issue, the extension of co-authorship would not only improve the existing legal regime in India but would also align India’s legal framework with personality rights protections in other countries such as the U.S.A and Europe, particularly under the ECHR (article 8), which acknowledge celebrities’ right to privacy and control

⁵⁰ Lucy Rana & Pranit Biswas, *supra* note 32.

⁵¹ The Copyright Act, No. 14 of 1957, Acts of Parliament, § 2(d) (Ind.).

over their public personas.⁵² This would help realize the true potential of India's media and entertainment industry from an international perspective through cross-border collaboration and greater participation of international celebrities, artists and public figures who would view India as a jurisdiction that respects global privacy standards, thus increasing its appeal and fostering the development of trust and confidence, alongside the acquisition of increased revenue. Furthermore, this amendment would necessitate corresponding changes pertaining to revenue-sharing models, permissions for public or commercial use, and the necessity of royalty frameworks for image sales. A structured revenue-sharing model would ensure that both the photographer and the celebrity receive fair compensation when paparazzi images are monetized, such as through media publications, advertisements, or merchandise.⁵³ Additionally, explicit permissions would be required before an image could be commercially exploited, preventing unauthorized usage and ensuring compliance with personality rights. Introducing a royalty framework, similar to licensing agreements in intellectual property law would further allow celebrities to earn a percentage from the continued commercial use of their likeness in photographs, balancing the rights of photographers with the autonomy of public figures over their own image.⁵⁴ Additionally, granting co-authorship to celebrities would transform the paparazzi industry by potentially dis-incentivizing unconsented photograph captures or incentivizing cooperative, pre-arranged photograph shoots where celebrities consent to appearances, thereby enhancing ethical practices, which will be discussed in the succeeding paragraphs, alongside elucidating the requisite commercial aspects.

Positively, co-authorship would empower celebrities to manage and benefit from the commercial capital of their image, curtailing unauthorized or harassing activity by photographers and instead developing a more considerate industry standard. It might also democratize profits coming from celebrity photographs, fostering equitable revenue distribution, which is crucial, especially at a time when individual personas have become valuable digital assets in an increasingly interconnected globalized digital world. However, just like every coin has two sides, granting co-authorship also experiences certain downsides.

First, it would potentially serve as an instrument to curtail press freedom by restricting the rights of journalists and photographers to photograph public events in which celebrities are involved,

⁵² Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

⁵³ *Royalties and Revenue Sharing in Licensing Agreements: Legal Frameworks*, MICHAEL EDWARDS, <https://michaelledwards.uk/royalties-and-revenue-sharing-in-licensing-agreements-legal-frameworks/>.

⁵⁴ *Id.*

thus raising potential First Amendment disputes in jurisdictions such as the United States,⁵⁵ and Article 19 concerns in a country like India.⁵⁶ Article 19 of the Constitution of India grants every citizen the fundamental right to freedom of speech and expression. Its ambit has been extended to press and media houses more than seven decades ago itself in *Romesh Thappar v. State of Madras*⁵⁷ and the *Indian Express Newspapers v. Union of India* decision.⁵⁸ In the *Romesh Thappar* decision, the SC struck down a government-imposed ban on a political journal, affirming that freedom of speech and expression under Article 19(1)(a) includes the right to circulate information. Similarly, the *Indian Express Newspapers* case held that economic burdens, such as excessive taxation on newspapers, could not be used to suppress press freedom, reinforcing the press's crucial role in democracy. Although this right is subject to "reasonable restrictions," explicitly defining the contours of this phrase in cases of paparazzi photography is difficult and subject to wavering judicial interpretation.

Additionally, protracted legal disputes over the scope of public interest, particularly regarding the reporting of the acts of public figures are bound to arise. This would, in turn, overload copyright litigation systems because courts would be faced with disputes over consent, context, and the question revolving around whether an image qualifies for joint authorship - a heavy burden in the paparazzi context where impromptu captures are the current norm and the principled way forward. Furthermore, co-authorship rights will limit access to paparazzi images for media use because celebrities can exercise their rights to prevent the use of unflattering or intrusive images. The paparazzi industry would also need to renegotiate licensing fees and copyright royalties, as explained in the previous section, thereby limiting the high-stakes competition in the tabloid industry and increasing content costs for publishers. Currently, tabloids and media houses acquire paparazzi images at competitive rates due to the absence of revenue-sharing obligations with the photographed celebrities.⁵⁹ If co-authorship or stronger publicity rights were introduced, photographers would be required to negotiate licensing agreements with celebrities, leading to higher costs per image. This would create a shift from the existing model, where paparazzi agencies profit solely from selling exclusive shots, to one where a percentage of the revenue is shared with public figures.⁶⁰ Consequently, media houses would face

⁵⁵*Invasions of Privacy*, LEGAL INFORMATION INSTITUTE – CORNELL LAW SCHOOL, <https://www.law.cornell.edu/constitution-conan/amendment-1/invasions-of-privacy#:~:text=First%20Amendment%3A,for%20a%20redress%20of%20grievances>.

⁵⁶ INDIA CONST. art. 19.

⁵⁷ *Romesh Thappar v. State of Madras*, (1950) A.I.R. 1950 S.C. 124.

⁵⁸ *Indian Express Newspapers v. Union of India*, (1985) 2 S.C.R. 287.

⁵⁹ Anne Jerslev & Mette Mortensen, *supra* note 48.

⁶⁰ *Id.*

increased operational costs, potentially leading to fewer spontaneous and candid images being published. Additionally, high licensing fees could push tabloids toward sourcing controlled and pre-approved images from celebrity-endorsed sources, such as social media or Public Relation agencies.⁶¹ This would gradually alter the dynamics of the paparazzi-driven media industry. As a result, the paparazzi industry would have fewer “candid” shots but instead controlled and negotiated images, which could weaken the spontaneous appeal that usually draws the public. Such a comprehensive change will redefine the lines of both privacy and authorship by ushering in a new horizon of celebrity image rights which will also challenge journalistic liberties, copyright enforcement, as well as content accessibility at a digitally driven media stage.

2. *Privacy Concerns and Legal Protection*

The recognition of privacy concerns in paparazzi photography through heightened legal protections for celebrities and public figures will create new boundaries in media and entertainment law, particularly by formalizing the right of personal privacy in public spaces. It will therefore serve as a significant shift, especially in jurisdictions where the rights of photographers to capture public images are well-established. Such amendments may involve the introduction of legislative provisions that extend the right of celebrities to limit or control unauthorized photographs taken in certain contexts, including private moments or in locations where they have a reasonable expectation of privacy, even if in a public setting. Such reforms in India’s intellectual property regime could be modelled on frameworks such as the European Union’s robust privacy rights, especially Article 8 of the ECHR, referenced previously, which recognizes the right to respect for private life, irrespective of public status.⁶² This would allow the Indian legal system to expand tort protections against intrusive photography beyond traditional defamation or harassment laws, providing celebrities with a legal remedy for unauthorized image captures or dissemination that breaches privacy expectations. This would not only bolster India’s privacy regime by aligning copyright legislations with the fundamental right to life enshrined under Article 21 of the Constitution of India (The K.S. Puttuswamy v. Union of India decision explicitly read the right to privacy into the right to life under Article 21 of the Constitution),⁶³ but also enhance India’s reputation in the international arena as a country that effectively balances copyright authorship with privacy protection. Effecting this change would also uphold the dignity of public figures who would have reasonable assurance of living a dignified life without excessive public

⁶¹ Alexander Schouten et. al., *Celebrity vs. Influencer endorsements in advertising: the role of identification, credibility, and Product-Endorser fit*, 39 INT. J. OF ADVERT. 1, 1-24 (2019).

⁶² Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

⁶³ K.S. Puttuswamy v. Union of India, (2018) A.I.R. OnLine 2018 S.C. 237.

interference, thus further protecting their fundamental right to life which encompasses the right to dignity, as held in the *Maneka Gandhi v. Union of India* decision.⁶⁴

Establishing these legal protections would also promote ethical media practices, creating deterrents against intrusive paparazzi behavior and encouraging photographers to obtain consent before capturing or distributing images, especially in sensitive and privacy-intensive contexts. Enhanced privacy rights would allow celebrities to protect their private lives from commercial exploitation, thereby enabling them to redress wrongs done through damages or injunctions to photographers who violated their rights. This would lead to a more respectable media that respects the dignity and personal boundaries of an individual as much as the public fame of the celebrity. On the other hand, stricter privacy protections would be a challenge to freedom of the press, as seen above, because journalists and media outlets would find it difficult to capture or report on public figures' activities, especially those deemed to be of public interest. This may lead to intense legal battles over just where to draw the line between the public's need to know and a star's right to privacy with courts potentially being overwhelmed with an increase in privacy claims.⁶⁵ From a commercial point of view, media houses may lose spontaneous, newsworthy content due to the potential legal risks of publishing unauthorized images, thereby decreasing the value of paparazzi-driven media coverage and possibly shifting content toward more curated, controlled depictions of celebrities.⁶⁶

Growing rights in public spaces may give birth to more restrictive regulations surrounding the taking of photos on public property, restricting access not only to paparazzi but also to journalistic and citizen reporting. Evolution, then, would redefine notions of privacy and media liberties but requires a delicate equilibrium that preserves ethical standards for journalism and personal autonomy. The parameters discussed in this paragraph, including ethical and financial considerations, have been explored in much more detail.

B. Ethical Considerations of Paparazzi Practice

The ethical considerations surrounding paparazzi practices reflect a deeper conflict between freedom of the press and individual privacy, upholding several nuanced concerns that both challenge media norms and the expectations of society. Some people consider the paparazzi to be

⁶⁴ *Maneka Gandhi v. Union of India*, (1978) A.I.R. 1978 S.C. 597.

⁶⁵ *Times Face-off: Should an individual's right to privacy prevail over press freedom?*, TIMES OF INDIA (Aug. 13, 2021, 08:10 AM), <https://timesofindia.indiatimes.com/india/times-face-off-should-an-individuals-right-to-privacy-prevail-over-press-freedom/articleshow/85291186.cms>.

⁶⁶ Andrej Miklosik et. al., *Privacy Protection versus Advertising Revenues: The Case of Content Publishers*, 54 CONN. ISTANBUL UNIV. J. OF COMM. SCIENCES 117 (2018).

the champions of free expression and public interest but still maintain questionable views of how they gather content.⁶⁷ Often paparazzi use techniques that violate the personal privacy of the person being photographed. These techniques range across a wide horizon of advanced tools and include sophisticated gadgets such as telephoto lenses, drones, and concealed microphones to capture pictures even during personal, unguarded and vulnerable moments.⁶⁸ These acts infringe and interfere with the personal spaces of the public figures being snapped but their implications extend beyond merely an immediate consequence. The increased utilization of photographic tools to capture personal moments promotes a toxic culture with no respect for individual privacy, alongside vulnerability being monetized as a currency. The financial incentives driving the paparazzi industry frequently expose celebrities and their families, particularly children, to constant scrutiny, creating an atmosphere in which personal boundaries blur in the name of public entitlement.⁶⁹ A new ethical consideration is the mental health effect on those who are perpetually covered, leading to increased stress, anxiety, and even withdrawal from public life. This mental toll on celebrities due to paparazzi culture arises from constant surveillance, loss of privacy, and public scrutiny, which can lead to stress, anxiety, and self-image issues. The relentless pursuit by photographers, sensationalized media coverage, and invasive reporting create a pressure-filled environment, forcing celebrities to manage unrealistic expectations and often retreat from public life to protect their mental well-being.⁷⁰ An extremely contemporary example of this is the attack on Saif Ali Khan in his apartment in Mumbai. Each and every detail was covered and reported by the media, including the whereabouts of his minor children, the vehicle used for rushing him to the hospital, the exact injuries he suffered, visuals of his house, and so on.⁷¹ This is unsafe especially in the aftermath of an attack and is bound to affect the actor's mental health due to invasive reporting and a clear invasion of privacy. On a more philosophical level, there may be societal implications by unobtrusively developing voyeurism and eroding empathy due to the viewer's tendency to become gradually desensitized by considering the coverage of personal lives as public entertainment. Lilie Chouliaraki, in her book *'The Spectatorship of Suffering,'* examines how representations of suffering can lead to viewer desensitization. She argues that repetitive exposure

⁶⁷ STEPHEN WHITTLE & GLENDA COOPER, *PRIVACY, PROBITY AND PUBLIC INTEREST* (Reuters Institute for the Study of Journalism, Oxford University Press, 2009).

⁶⁸ Alan Phelps, *Camera Technology that Helps Paparazzi get Good Photos*, LAUREN HARRISON (Oct. 17, 2024), <https://laurenharrison.org/tech/camera-technology-that-helps-paparazzi-get-good-photos/>.

⁶⁹ Seong Choul Hong, *Kids Sell: Celebrity Kids' Right to Privacy*, 5 DEPT. OF JOURN. & COMM., KYONGGI UNIV. (2016).

⁷⁰ Britney Elyse, *Paparazzi Culture's Impact on Celebrity Mental Health*, CARRARA TREATMENT WELLNESS & SPA (Jan. 16, 2025), <https://carraratreatment.com/paparazzi-cultures-impact-on-celebrity-mental-health/>.

⁷¹ *Timeline on Saif Ali Khan's attack: From how the attacker stabbed him to why Taimur accompanied him to the hospital – Here's all you need to know!*, TIMES OF INDIA (Feb. 11, 2025, 09:11 AM), <https://timesofindia.indiatimes.com/entertainment/hindi/bollywood/news/timeline-on-saif-ali-khans-attack-from-how-the-attacker-stabbed-him-to-why-taimur-accompanied-him-to-the-hospital-heres-all-you-need-to-know/articleshow/118110413.cms>.

to mediated suffering can create a sense of detachment among audiences, reducing their empathetic responses. This detachment is exacerbated when personal media tragedies are commodified as entertainment, leading to a voyeuristic consumption of others' pain.⁷²

Furthermore, an example of this tendency is the fiasco concerning the Princess of Wales Kate's video update on her cancer treatment, exemplifying the modern demand for authenticity and personal disclosure from leaders and celebrities. This "tyranny of intimacy" imposes undue burdens on public figures and blurs the line between public and private spheres, potentially leading to viewer desensitization and diminished empathy.⁷³

The Legislature should ethically re-evaluate paparazzi practice by amending Indian copyright and privacy laws and aligning provisions to meet the objectives of creating safe places where celebrities as well as their family would be accorded privacy. The extent of these zones has to be given a broad interpretation such that they not only relate to areas around their residences and working places but specific public locations, such as parks and schools.⁷⁴ Additionally, another approach that has to be implemented is the reinforcement and corresponding strengthening of consent requirements that would, for example, mandate getting permission before taking photographs and publishing them, especially those involving children and covering intimate, personal spaces of celebrities.⁷⁵ Furthermore, ethical requirements may nudge news organizations to tell their stories in greater depth, in a way that does not rely on sensationalism to capture attention, but rather responsible, context-enriched storytelling that educates rather than intrudes. The harsh reality that persists in Indian journalism is the determination of viewership based on the Television Rating Point ["**TRP**"] of a particular channel or media house.⁷⁶ Alongside financial considerations, this propels media houses to cover exclusive content, even if it infringes the privacy of the individuals being covered. This incentive mechanism exists because of the choice of content that the Indian audience prefers which more often than not includes interference in the private spaces of public figures. Therefore, a non-negotiable ethical standard about this industry that has to be implemented includes forming associations with advocacy groups to spread the much-required awareness to the public of the widespread damage caused by invasive journalism and enabling

⁷² LILIE CHOULLARAKI, *THE SPECTATORSHIP OF SUFFERING* (Sage Publications, 2006).

⁷³ James Marriott, *Kate's Video and the Tyranny of Intimacy*, THE TIMES (Sept. 12, 2024), <https://www.thetimes.com/comment/columnists/article/kates-video-and-the-tyranny-of-intimacy-wkzsd9599>.

⁷⁴ Sakshi Mehta et. al., *Protection of Celebrity Rights under IPR Regime in India*, 29 JIPR 540, 540-550 (2024).

⁷⁵ Sonu Nigam v Amrik Singh, (2014) S.C.C. OnLine Bom 5133.

⁷⁶ *What is TRP and how it is calculated*, INDIA TODAY (Oct. 9, 2020), <https://www.indiatoday.in/information/story/what-is-trp-and-how-it-is-calculated-check-here-1729909-2020-10-09>.

consumers to question and resist such content.⁷⁷ Moreover, steps towards self-regulation for media outlets may include not printing certain types of images or having more stringent editorial standards.⁷⁸ It is only if these measures are implemented by inculcating a culture of respect, consent and responsibility that the industry can adhere to modern ethical standards, fostering a healthy, positive relationship between public figures and their audience.

C. Financial Considerations of The Media Houses

As mentioned above, there is a direct relationship between revenue generation and the TRP of media houses - the higher the TRP, the greater the viewership and the more the revenue.⁷⁹ If this simple equation is followed, covering content that appeals to the general public is extremely profitable to these organizations. The glamour and fascination that the audience derives from keeping themselves updated with the latest trends in the entertainment industry comparatively exceeds other intellectual domains. It is due to this character trait of the audience that media houses increasingly emphasize coverage of even the private lives of public figures. Since there are no other means to gain inroads into the life of celebrities, the viewership of the general public reaches the pinnacle and correspondingly increases the revenue of media houses.⁸⁰

However, the revenue generation is not as simple in reality and there are multiple intricacies associated with content and reporting. The financial concerns of media houses are becoming more complicated as they try to deal with the pressure of sustaining revenue while ensuring ethical and unbiased reporting in an era where competition is on the rise and traditional sources of revenue are dwindling.⁸¹ Traditionally, media houses have heavily relied on print subscriptions, advertising revenue, and single-copy sales. However, digital transformation and the fast rise of social media have dramatically altered the landscape.⁸² With print profits dwindling, many media organizations made a shift to online advertisement revenue and paywalls, but that also brings along a whole host of ethical implications: relying on advertisement revenue means making content sensational or polarized to drive very high engagement metrics, appealing to algorithms rather than the integrity

⁷⁷ Haseeb Ahmed Shabbir et. al., *Exploring Perceptions of Advertising Ethics: An Informant-Derived Approach*, 159 JOURN. OF BUSS. ETHICS 727, 727-744 (2019).

⁷⁸ Meera Mathew, *Media Self-Regulation in India: A Critical Analysis*, ILI LAW REV. (2016).

⁷⁹ India Today, *supra* note 76.

⁸⁰ Zeenat Riaz, *The Role of Media in Promotion of Glamour*, CENTRE FOR MED. AND COMM. STUDIES, UNIV. OF GUJ. (2021).

⁸¹ Committee of Experts on increasing resilience of Media, *Good practices for sustainable news media financing*, COUNCIL OF EUROPE (Oct. 26, 2023), <https://www.unav.edu/documents/10174/11264174/informe-sostenibilidad-medios.pdf>.

⁸² Centre for Media Transition, *The Impact of Digital Platforms on News and Journalistic Content*, UTS, [https://www.accc.gov.au/system/files/ACCC+commissioned+report+-+The+impact+of+digital+platforms+on+news+and+journalistic+content,+Centre+for+Media+Transition+\(2\).pdf](https://www.accc.gov.au/system/files/ACCC+commissioned+report+-+The+impact+of+digital+platforms+on+news+and+journalistic+content,+Centre+for+Media+Transition+(2).pdf).

of journalism.⁸³ This risks bringing about reduced depth, accuracy, and objectivity of coverage since editors might be pressured to print stories that maximize clicks over responsible informing and education of the public.

An innovative response to this growing menace will be the adoption of diversified, multi-layered revenue models that combine the best of traditional methods with new solutions, grounded in the principle of editorial independence. The non-profit journalism models provide a sturdy framework with philanthropy and grants from foundations focused on public interest journalism being the primary sources of revenue. It allows media houses to invest in broad, impactful investigations without necessarily being forced to make them profitable.⁸⁴ Additionally, integrating subscription models, like those implemented by The New York Times and The Guardian, has signaled that audiences will pay for quality journalism when they understand how the subscription revenue will be used.⁸⁵ This “subscriber-powered” model also forces reader trust through a direct relationship of public accountability and service tied to publication financial sustainability.

Community-supported journalism would represent another avenue that would comprise obtaining money through crowdfunding. This would support the individual investigative or local journalism project, hence empowering the communities to raise funds and address issues closest to their heart.⁸⁶ Finally, micro-transactions based on blockchain technologies can be undertaken where individuals will contribute small sums of money toward specific articles and, most importantly, be able to decentralize revenues to account for differences in readers’ preferences and budgets.⁸⁷ This can be supplemented by licensing content to other platforms and aggregators, enabling smaller publications to tap a wider audience with increased financial support without compromising editorial standards.⁸⁸

⁸³ Manudeep Bhuller, *How the Internet Changed the Market for Print Media – Working Paper 30939*, NATIONAL BUREAU OF ECONOMIC RESEARCH (Feb. 2023), https://www.nber.org/system/files/working_papers/w30939/w30939.pdf.

⁸⁴ Nikki Usher & Sanghoon Kim-Leffingwell, *How Loud Does the Watchdog Bark? A Reconsideration of Losing Local Journalism, News Nonprofits, and Political Corruption*, 29 IJPP 960, 960-82 (2024).

⁸⁵ Nic Newman, *Journalism, media, and technology trends and predictions 2022*, REUTERS INSTITUTE FOR THE STUDY OF JOURNALISM & UNIVERSITY OF OXFORD (Jan. 10, 2022), <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-01/Newman%20-%20Trends%20and%20Predictions%202022%20FINAL.pdf>.

⁸⁶ Nikki Usher & Sanghoon Kim-Leffingwell, *supra* note 84.

⁸⁷ S.A. Jayalath et. al., *A Microtransaction model based on blockchain technology to improve service levels in public transport sector in Sri Lanka*, International Research Conference on Smart Computing and Systems Engineering, IEEE 82, 82-89 (2020).

⁸⁸ Jeena Moon, *What is Content Licensing?: The Ultimate Guide*, THE NEW YORK TIMES, <https://nytlicensing.com/latest/our-brand/what-is-content-licensing/>.

Another innovative option is the exploration of partnerships with academic institutions for co-produced investigative research that combines journalistic reach with scholarly rigour. This diverse portfolio of revenue streams allows media houses to break out of their dependence on the revenues from advertisements and public-appealing content coverage, thereby creating an environment that nurtures qualitative, in-depth journalism.⁸⁹ When these elements are combined, media organizations are steered towards a solution that would make them both fiscally sound and revitalized in their pursuit of the ethical responsibilities of the democratic press, an equation critically needed in this profit-oriented landscape.

However, it is not easy to implement these utopian solutions in the Indian contextual landscape, especially in the entertainment industry, wherein the sole purpose of content coverage is to serve as a respite from the monotonous intellectual work-life of an average Indian adult and not to further educate and inform the audience about important contemporary topics.⁹⁰ Therefore, the only method to solve the problem of invasive journalism is by granting co-authorship rights to celebrities, which would introduce a revenue-sharing model wherein public persona and media houses collaborate to restrict the extent of their coverage to the public life of celebrities without any undesirable excessive interference. This would bring about a consent-based mechanism wherein consent would be required for indulging in content coverage, thus upholding individual privacy while maintaining the profession of media houses by merely limiting it to the public sphere and not restricting it completely. The model developed below will further elaborate on this balanced framework.

IV. CONCEPTUALISATION OF A COMPREHENSIVE CO-AUTHORSHIP MODEL

This section conceptualizes a detailed and coherent co-authorship model, discussing the implementation guidelines, alongside exploring the circumstances necessitating co-authorship. The purpose of this model is to analyze the practicalities of the theoretical framework developed above. To establish this model, comprehensive guidelines must be put in place. First, a clear definition of contributions is essential; both parties should articulate their roles, with photographers capturing the visual narrative and celebrities potentially influencing the portrayal through their engagement and input. Second, a contractual agreement should be formalized before any photographic collaboration, detailing the scope of work, rights granted, and financial arrangements, including

⁸⁹ Jens Barland, *Innovation of New Revenue Streams in Digital Media: Journalism as Customer Relationship*, 34 NORDICOM REV. 99 (2013).

⁹⁰ Aindrila Mitra, *Watch Television to relieve Tension*, THE TIMES OF INDIA (Apr. 18, 2003, 07:00 AM), <https://timesofindia.indiatimes.com/calcutta-times/watch-television-to-relieve-tension/articleshow/43729220.cms>.

revenue-sharing models that ensure both parties are compensated fairly for their contributions. Third, rights and usage clauses within the contract should explicitly define how the photographs can be used, covering aspects such as commercial exploitation and social media sharing while also stipulating credit attribution in promotional materials. Fourth, since ethical considerations are paramount, photographers should respect the privacy rights of celebrities, avoiding intrusive practices, especially in personal contexts, while celebrities should acknowledge the photographers' professional rights to document their public personas. Additionally, establishing transparency in intent is crucial, requiring both parties to communicate openly about their objectives regarding the photographs' usage and potential marketing strategies. Fifth, a robust conflict resolution mechanism should be included in the agreement to address any disputes over authorship, rights, or revenue sharing, including mediation or arbitration procedures, which have gained immense prominence in the increasingly globalized twenty-first century. Lastly, the acknowledgement of collaborative efforts is important for projects that involve significant creative input from both sides, ensuring that both the celebrity and the photographer receive appropriate recognition in promotions and credits, thus fostering a spirit of collaboration.

The list of the circumstances necessitating co-authorship can vary widely but often centers around specific projects and marketing strategies. In cases of collaborative projects, such as film or album releases, co-authorship becomes vital when the photographs are intended to align with the creative vision of the project, ensuring that both the visual representation and the artist's narrative are in harmony. Brand endorsements and marketing campaigns further underscore the need for co-authorship; when a celebrity's image is integral to a brand's identity, recognizing both the celebrity and photographer as co-authors fosters a partnership that respects their contributions and enhances promotional authenticity. Additionally, in artistic collaborations, where both parties contribute creatively to the photographic output, co-authorship ensures mutual recognition of artistic influence. Finally, the implications of legal protections surrounding publicity rights are significant because co-authorship agreements can serve as a safeguard against unauthorized use of a celebrity's image, providing legal clarity on the consent required for various applications. Publicity rights, which protect individuals from the commercial exploitation of their likeness without consent, are well established in jurisdictions such as the United States under the Right of Publicity doctrine⁹¹ and in Europe through Article 8 of the ECHR,⁹² which safeguards an individual's right

⁹¹ Robert C. Post & Jennifer E. Rothman, *The First Amendment and the Right(s) of Publicity*, 130 YALE LAW JOURNAL 1-275 (2020).

⁹² Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, 213 U.N.T.S. 221.

to privacy and personal autonomy. In India, while there is no explicit statutory recognition of publicity rights, courts have acknowledged them in cases such as *ICC Development (International) Ltd. v. Arvee Enterprises*⁹³ and *Titan Industries v. Ramkumar Jewellers*,⁹⁴ where the unauthorized commercial use of a celebrity's image was restricted. This thus necessitates the introduction of co-authorship as it allows celebrities to retain control over their image while ensuring that photographers' creative contributions are acknowledged. By outlining these circumstances, the model reinforces the necessity of co-authorship, promoting a balanced and ethical framework within the paparazzi photography landscape that benefits both the celebrity and the photographer.

A key inspiration for this model comes from joint authorship principles in copyright law, particularly the U.S. Copyright Act, 1976, which considers collaborative contributions when determining authorship.⁹⁵ Additionally, the European Union's General Data Protection Regulation [**"GDPR"**] under Chapter II, provides a strong precedent for consent-based frameworks, requiring explicit permission before processing or using personal data, which can be extended to visual likenesses.⁹⁶

Furthermore, ethical standards guiding responsible journalism and photography, such as those outlined by the National Press Photographers Association [**"NPPA"**] Code of Ethics, emphasize the need for transparency, fairness, and respect for individuals' rights.⁹⁷ These international standards, along with judicial precedents and statutory provisions, provide a strong foundation for a legally and ethically sound co-authorship framework. Incorporating such principles within paparazzi photography would ensure that both parties, celebrities and photographers, have clearly defined rights and responsibilities, facilitating a more equitable and regulated approach to image ownership in the digital era.

V. TECHNOLOGY AS A DEVELOPING INFLUENCER

Today, communication, culture, and commerce, among other spheres, are being influenced and transformed by advanced technology, especially considering the quick pace at which society is changing. This section will emphasize the effects of technology on culture and social interaction as an agent of change within the media context, with a significant focus on the idea of 'celebrity.'

⁹³ *ICC Development (International) Ltd. v Arvee Enterprises*, (2003) 26 PTC 245 (Del).

⁹⁴ *Titan Industries v Ramkumar Jewellers*, *supra* note 19.

⁹⁵ The United States Copyright Act of 1976, 17 U.S.C., Pub. L. No. 94-553, 90 Stat. 2541.

⁹⁶ General Data Protection Regulation, European Union, 2016/679, Chapter II.

⁹⁷ *NPPA Code of Ethics*, THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, <https://nppa.org/resources/ethics>.

All individuals and brands have become audiences, and there is no turning back. Instagram, TikTok, and Twitter, among others, allow not only content consumption but also content creation. As a result of this trend, the media has become accessible to everyone, enabling anyone, especially celebrities, to tell their stories without the need for gatekeepers in the entertainment industry.⁹⁸ Stars can communicate with their fans while controlling the set of images and messages in the communication space, thus increasing the degree of involvement and loyalty. Furthermore, they can limit their exposure to the adverse effects of negative publicity or reputation attacks.⁹⁹ Through personalizing the content they post, celebrities can interact directly with their fans, increasing engagement and loyalty. They can manage their public relations and decrease the adverse effects of scandalous tabloids.¹⁰⁰

Social media influencers represent another phenomenon that has blurred the distinction between celebrities and mere active social media users. Individuals with many followers can act in such a way that they become commodities in the marketing mix.¹⁰¹ However, despite all the advantages that modern technology offers, some of its aspects present problems concerning public information and individual privacy. While the public is free to take and share images of themselves and other individuals as they wish, seeking consent and commercializing their relationships with them is necessary. The previous discussion regarding ethical considerations, privacy rights, and legal frameworks clearly justifies the same because seeking consent is crucial to respecting privacy rights of celebrities, while commercializing the relationship by granting co-authorship rights and evolving revenue-generation models is important to uphold fair compensation and ethical parameters.

Photography has entirely changed with the invention of modern cameras, drones, and artificial intelligence. High-quality images are now possible to shoot from positions that were once hard or impossible to reach, and the credit for this development is attributable to the work of the paparazzi and other photographers who have radically changed the way such images of even lesser-known celebrities are produced and distributed.¹⁰² The advantages that accompany the account of

⁹⁸ Gillian Brooks et. al., *Influencer Celebrityfication: How Social Media Influencers Acquire Celebrity Capital*, 50 JOURN. OF ADVERT. 528 (2021).

⁹⁹ Meizhi Pan et. al., *Influencer Marketing Effectiveness: A meta-analytic view*, 53 JOURN. OF THE ACAD. OF MARK. SCIENCE 52, 52-78 (2025).

¹⁰⁰ *Id.*

¹⁰¹ Gaëlle Ouvrein, *The web of influencers. A marketing-audience classification of (potential) social media influencers*, 37 JOURN. OF MARKETING MANAG. 1313 (2021).

¹⁰² Jamie E. Nordhaus, *Celebrities' Rights to Privacy: How Far Should the Paparazzi be Allowed to go?*, 18 REV. LITIG. 285 (1999).

everyday activities can be detrimental to some individuals but showcase the vast possibilities offered in creative arts regarding celebrity-related issues. Call it the vicious circle or the critical concern, the principle of ethics in these technologies embraces or impinges upon the presentation of public figures. The rise of AI in photography has brought forth ethical dilemmas, highlighting the urgent need for regulations to protect individuals' images. AI-driven tools, such as deep fake technology and automated image enhancement, allow for the creation, modification, and distribution of images without the subject's consent. This raises concerns about unauthorized image manipulation, misrepresentation, and the potential for reputational harm.¹⁰³ In the context of paparazzi photography, AI can be used to alter or generate hyper-realistic images of celebrities, blurring the line between authenticity and fabrication.¹⁰⁴ Without clear legal frameworks, individuals may have little recourse against the misuse of their likeness, thus necessitating the establishment of regulations that govern AI-generated content, ensure accountability, and protect personality rights.¹⁰⁵

In our digital age, current legal and regulatory frameworks often fall short of safeguarding public image. Additional issues, such as copyright, privacy, and laws, struggle to keep pace with the evolving state of creative industries, especially given the ubiquity of new media in content production. The challenge in developing laws that address individuals' rights to control their images and narratives while balancing freedom of expression and the press lies in finding the right equilibrium. In this regard, considering both perspectives will be crucial in the future. Technology is an emerging force that alters how content is produced, shared, and consumed. However, it is necessary to point out that its involvement in the culture of celebrities and media dynamics has brought key questions of analyzing privacy, ethics, and law into the core discussions. As society attempts to strike a balance between this dichotomy, maintaining social order and ensuring a fair playing field that respects individual rights will be vital, with technological advancements being balanced against the protection of those rights.

VI. CONCLUSION AND WAY FORWARD

In conclusion, copyright law, privacy rights, and the celebrity-image relationship represent a growing concern in the current and upcoming digital age. There is a pressing need for the

¹⁰³ Patrick Pan, "Deepfakes" and the End of the Photographic Age, 21 J. APORIA. UNIV. OF ST. ANDREWS 52 (2021).

¹⁰⁴ *Id.*

¹⁰⁵ Sabeeh Akhter & Tehreem Shamsi, *The Legal Odyssey of AI-Generated Works: Who truly owns creativity?*, MANUPATRA (Oct. 29, 2024), <https://articles.manupatra.com/article-details/The-Legal-Odyssey-of-AI-Generated-Works-Who-truly-owns-creativity>.

introduction of a clear legislative formulation to regulate and govern this landscape. In the rising digital age, several issues can potentially arise regarding the type of picture clicked, edited and A.I. generated photographs, among others.¹⁰⁶ The epitome of this is the recent instances of deepfakes being on the rise with celebrity images being morphed or edited.¹⁰⁷ A possible solution to these problems lies in granting co-authorship of paparazzi images, as has been explained in this article, through answering the several research questions formulated at the beginning. This should be governed by the model that has been conceptualized above which justifies not a blanket grant of co-authorship but a detailed examination of specific facts and circumstances. The ownership of copyright is not the primary issue, although extremely important. Instead, the angle pertaining to the outline of personality rights should be dealt with in detail. A holistic approach should be adopted to create a mutually beneficial scenario. References to both Indian and global contexts can be used to drive change, as the fundamental issue remains the same: celebrities are the subjects of the images, and while they are using these images, there is an ongoing conflict under current legislation regarding who holds ownership rights. The above analysis offers an approach to address this situation through the evolution of the model and the examination of several factors, but ultimately, a legislative change is necessary and non-negotiable.

¹⁰⁶ Melissa Eckhause, *Fighting Image Piracy or Copyright Trolling? An Empirical Study of Photography Copyright Infringement Lawsuits*, 86 ALB. L. REV. 111 (2022).

¹⁰⁷ Shubho Sengupta, *Digital Gadfly. The rise and rise of deepfakes in India*, THE HINDU (May 12, 2024, 02:44 PM), <https://www.thehindubusinessline.com/catalyst/the-rise-and-rise-of-deepfakes-in-india/article68161008.ece>.

BIOTECHNOLOGY PATENTS: UNTANGLING THE DOUBLE HELIX OF INNOVATION, ETHICS AND LEGAL CHALLENGES

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ABSTRACT

This essay delves into the intricate intersection of biotechnology patents and the associated ethical and legal challenges, with a specific focus on the TRIPS agreement. It aims to unpack the consequences of patenting living organisms and biotechnological innovations, while critically assessing the patent laws in fostering innovation versus protecting ethical standards. The article explores the nuanced distinctions between discoveries and inventions with respect to the Indian Patents Act. Further, ethical debates surrounding gene patents, and the manipulation of life forms are scrutinized through various theoretical lenses, including the doctrine of product of nature, moral utility doctrine, property rights, and the sacredness of life. Furthermore, the article addresses two emerging challenges in the field of biotechnology which are: i) the potential patenting of de-extinct species and the ethical considerations involved in their revival and ii) the implications of the 2024 WIPO Treaty on Intellectual Property, Genetic Resources, and Associated Traditional Knowledge, highlighting its potential impact on the global patenting landscape while pointing out its inherent flaws, particularly in regard to non-disclosure penalties. The findings suggest that while biotechnology patents foster innovation and increase the incentive for research, they raise significant moral and legal concerns. The evolving legal landscape requires a delicate balance between protecting intellectual property and ensuring ethical responsibility, with the potential for ongoing legal reforms to address these complexities. The article ultimately calls for continuous evaluation of biotechnology patent laws to ensure alignment with both international standards and national interests.

I. INTRODUCTION

From converting ordinary crops into superfoods¹ to developing engineered immune cells that cure cancer,² creating biofuel and other sustainable material,³ and promising the creation of plants which can survive in ex-situ or unnatural environments, biotechnology is truly catapulting us into a new era of scientific marvels solving some of humanity's most pressing concerns meticulously.⁴ This interdisciplinary field leverages the strength of living beings and is poised to make advancements in health, innovation and sustainability across various industries like space, food, and agriculture.

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¹ Sarah Garland & Helen Anne Curry, *Turning Promise into Practice: Crop Biotechnology for Increasing Genetic Diversity and Climate Resilience*, PLOS BIOL. (2022).

² Sharon Reynolds, *Stealing Strategies from Cancerous T-Cells May Boost Immunotherapy*, NAT'L CANCER INST. (2024).

³ *Advanced Biofuel and Sustainability*, DEPT OF BIOTECHNOLOGY, MINISTRY OF SCI. & TECH., <https://dbtindia.gov.in/scientific-directorates/advanced-biofuels-sustainability-ner/advanced-biofuels-sustainability>

⁴ Ntombikhona Koza, *Microorganisms in Plant Growth and Development: Roles in Abiotic Stress Tolerance and Secondary Metabolites Secretion*, NAT'L LIBR. MED. (2022).

The cruise of biotechnology has sailed all the way from solving the mystery of DNA by giving it a structural model, a “double helix model”⁵ to the use of a gene therapy Luxturna®⁶ for treating a rare inherited form of blindness: Leber congenital amaurosis.⁷ Recently, a news headline which captivated the attention of many was the accomplished feat of Moderna against Pfizer and BioNTech with the European Patent Authority maintaining the validity of Moderna’s patent⁸ which protects “specific alterations to mRNA molecules designed to lower its immunogenicity and identify the potential uses of the same.”⁹ With such developments taking place rapidly, it becomes important to understand the stance of biotechnological protection in the backdrop of Trade - Related Aspects of Intellectual Property Rights [“**TRIPS**”] agreement in India. The first step includes unfolding the very meaning of biotechnology which refers to the conduction of biological processes and manipulation of the genes of microorganisms for myriad purposes for instance manufacturing drugs, and antibiotics. The United Nations Convention on Biological Diversity, 1992 defines it as “any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific uses.”¹⁰ Further, a microorganism is defined as “any organism too small to be visible to the naked eye which include bacteria, some fungi, mycoplasmas, protozoa, rickettsia and viruses.”¹¹ This biotechnological protection is governed by the Indian Patents Act, 1970. The second step necessitates not only grasping the definitions and standards set forth by international agreements but also critically evaluating the broader implications of patenting life forms. As biotechnology continues to push the boundaries of what is possible, its patent protection remains dynamic and a crucial area of discourse.

⁵ Ashish Swarup, Shishir, Shruti & Anchal, *Biotechnology in the Realm of History*, J. Pharm. Bioallied Sci., NAT’L LIBR. MED. 3(3) (2011).

⁶ *Luxturna (Voretigene Neparvovec)*, EUR. MEDICINES AGENCY, SCI. MED. HEALTH (2024), <https://www.ema.europa.eu/en/medicines/human/EPAR/luxturna#:~:text=Luxturna%20consists%20of%20a%20virus,the%20progression%20of%20the%20disease>.

⁷ *Leber Congenital Amaurosis*, UNIV. OF CAL., S.F., [https://www.ucsfhealth.org/conditions/leber-congenital-amaurosis-lca#:~:text=Leber%20congenital%20amaurosis%20\(LCA\)%20is,out%20of%20every%20100%2C000%20babies](https://www.ucsfhealth.org/conditions/leber-congenital-amaurosis-lca#:~:text=Leber%20congenital%20amaurosis%20(LCA)%20is,out%20of%20every%20100%2C000%20babies).

⁸ *Moderna Wins COVID Shot Patent Case Against Pfizer-BioNTech in Europe*, REUTERS (MAY 17, 2024), <https://www.reuters.com/business/healthcare-pharmaceuticals/moderna-wins-case-patent-dispute-with-pfizer-biontech-over-covid-shot-ft-reports-2024-05-17/>.

⁹ Ian Johnston & Oliver Barnes, *Moderna Wins Covid Jab Patent Dispute Over Pfizer and BioNTech*, FINANCIAL TIMES (2024), <https://www.ft.com/content/50c5078c-c9f0-4b35-b916-3475b641c773>.

¹⁰ *Technology and Innovation to Improve Our Quality of Life*, REPSOL (Sept. 11, 2023), <https://www.repsol.com/en/energy-and-the-future/technology-and-innovation/biotechnology/index.cshmtl#:~:text=Thanks%20to%20recent%20developments%20and,vaccines%2C%20among%20many%20other%20examples>.

¹¹ J. LAW & E.A. MARTIN, CONCISE MEDICAL DICTIONARY (Oxford Univ. Press, 2010).

Part I of the essay explores the eligibility of biotechnological inventions, especially living organisms for patent protection under the Indian Patents Act. Part II delves into the various theoretical frameworks addressing the ethical dilemmas associated with patenting biotechnological inventions. Subsequent sections examine two contemporary challenges in the realm of biotechnological patents: the revival of extinct species and the implications of the latest World Intellectual Property Organization [“WIPO”] treaty, which, despite appearing commendable, reveals underlying arbitrariness.

II. NATURE’S FINDS, HUMAN MINDS: DISCOVERIES Vs. INVENTIONS

Firstly, there has been a deep contention on whether discoveries should be considered patentable and what is the underlying distinction between discoveries and inventions. As per the Indian stance, according to Section 2 (1)(j)¹² read with Section 3 of the Indian Patents Act, 2005¹³, only those “inventions” are patentable which satisfy the three tests of: novelty, non-obviousness and utility while being new products or processes or developing an inventive step capable of industrial application. However, the international treaties and agreements, including the TRIPS agreement, do not define what exactly inventions and discoveries are. But as observed in India, anything which is created including non-natural living beings comes under the purview of the former whereas the latter constitutes something which already existed before but was not known to humankind. The rationale behind this distinction is evident from Section 3(d) that the sole discovery of a new form of a substance which does not amplify its known efficacy can’t be termed as an invention and thus made patentable. However, there exists ambiguity related to the concept of efficacy and the process of proving its enhancement. Back in 2006, the Mashelkar Committee set up under the Ministry of Health and Family Welfare, was tasked with the responsibility of analyzing whether excluding micro-organisms from the subject matter of patents would violate the TRIPS agreement.¹⁴ After its reports being revised in 2009 on grounds of technical inaccuracy, the committee submitted in the context of Article 27.3,¹⁵ with respect to the latter issue, that such exclusion would indeed violate the TRIPS agreement and further stated, “micro-organisms involving human intervention and utility are patentable subject matter under the TRIPS Agreement, provided they meet the prescribed patentability criteria.”¹⁶

¹² The Patents (Amendment) Act, No. 15 of 2005, India Code (2005) §2(1)(j).

¹³ *Id.* at §3.

¹⁴ Aditi Nadkarni & Gowree Golhale, *Revised Mashelkar Committee Report on Patent Law Issues Accepted by the Government*, PHARMA & HEALTHCARE UPDATE, NISHITH DESAI UPDATES (2009).

¹⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 27, Apr. 15, 1994, Marrakesh Agreement Establishing World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

¹⁶ *Supra* note 5.

This debate of differentiating between discoveries and inventions is pertinently controversial in the field of biotechnology where one aspect of the subject matter relates to living beings. It is an accepted fact that something which is found in nature, a discovery, becomes an invention with human intervention or aptitude altering its traits and features. Biotechnology's involvement in manipulating and altering living organisms to meet various industrial demands raises questions regarding the status of its products. Given the changing matrix of patentable subject matter, living beings which form a part of the common culture or common heritage under international law are starting to become eligible for patents highlighting the antique philosophy of the US Supreme Court, "anything under the sun made by man to be patentable".

III. ANALYZING THE MORAL DILEMMAS IN BIOTECH PATENTS: A GENETIC TUG OF WAR

Tracing the roots of biotechnological patents, the doctrine of product of nature earlier formed the rational grounds specifically in the US when the issue for patenting a natural object was contended but it later came into limelight when the honorable US Supreme court in the landmark case of *Diamond v. Chakrabarty* affirmed the decision of the court of customs and patent appeals, which had overturned the board of patent appeals and interferences, which had affirmed the rejection of the patent by the examiner at the USPTO.¹⁷ It stated that it constitutes a "composition of matter" and is thus covered under the subject matter of patents.¹⁸ Chakrabarty had altered the bacteria by inserting plasmid (new DNA rings) making it capable of breaking down crude oil. Such cases evoked strong opinions from almost every category of sceptics while triggering an elementary traditional response which is the center of the objection: A gene can't be patented! The doctrine of product of nature, as the name suggests, is a legal principle which states that anything which is a product of nature or a natural phenomenon can't be patented because it is not an invention but a discovery.¹⁹ The product of nature doctrine established its initial foundation in *Ex parte Latimer*.²⁰ The patentee attempted to acquire both the end product and the manufacturing method for extracting Australian pine needle cellular tissue fibres into flexible filaments. The Commissioner explained in his opinion that the extraction method did not change the fibre because it kept its original structure and composition intact. The Commissioner illustrated this principle by comparing the situation to identifying tree characteristics or qualities in a forest which

¹⁷ *Diamond v. Chakrabarty*, 477 U.S. 303 (1980).

¹⁸ *IJLSI, Patenting: Product of Nature*, INT'L J. LEGAL SCI. & INNOVATION (June 27, 2019), <https://ijlsi.com/patenting-product-of-nature/>.

¹⁹ Krishna Ravi Srinivas, *Patents and Products of Nature Doctrine*, in A GUIDE TO PHARMACEUTICAL PATENTS, Vol. 2, Carlos M. Correa ed., Ch. 1, at 1-16 (South Ctr., 2008).

²⁰ *Ex parte Latimer*, 1889 DEC. COMM'R PAT. 123.

does not qualify as patentable invention just like discovering new earth gems would not establish patent ownership rights for all similar gems. It was determined that extracted fibre counts as a natural product similar to wheat harvested by reapers. The interpretation of this doctrine had undergone a major change in the case of *Merck & Co. v. Olin Mathieson Chemical Corp.* where it was stated that according to the Act's language, there is no restriction on granting patents for natural products when they demonstrate both new and useful composition of matter status and fulfil patent requirements.²¹ Later, it was agreed that in case a natural product undergoes human intervention with it being altered or manipulated in such a way that the new product is substantially different from the original one, the doctrine will not be able to act as a shield of prevention for patents. Another set of arguments is based on the genes becoming fungible meaning "freely exchangeable or replaceable for one another of like nature or kind", so considering a living being as inanimate should be discouraged.²² The concept of sacred which constitutes two aspects: respect for life and protection of human spirit²³ is up in arms with its own explanation stating if patenting human genes chips away the essence of sacredness from life then it is immoral.²⁴ Another view states that in order to decide whether a gene patent is moral or not, one should take a look at the purpose for which the research was done.²⁵ So if the research objective was against public morality and welfare, the patent should not be permitted but this stance does not find a solid place in the embedded debate because it is quite difficult to interpret what exactly does the public policy and welfare include, thanks to its dynamic nature. It is important to note that Article 27 of the TRIPS agreement states that patents are available in all fields of technology but the member countries can refuse to grant patents in cases where "it is necessary to protect public order or morality, including the need to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law."²⁶

Contrary to the above opinions is the theory of property rights propounded by John Locke which acknowledges the divine providence and natural creation of organisms. However, at the same time it affirms that labour is the best way to appropriate nature for use and once labour is infused to

²¹ *Merck & Co. v. Olin Mathieson Chemical Corp.*, 253 F.2d 156 (4th Cir. 1958).

²² Himangshu Rathee, *Patentability of Human Genes: Scaling an Indian Perspective*, MANUPATRA (2015) https://docs.manupatra.in/newsline/articles/Upload/4CF9BD16-CD9B-4358-9F66-D2411B49322B.2-b_IPR.pdf.

²³ M. Somerville, *Making Health, Not War - Musings on Global Disparities in Health and Human Rights: A Critical Commentary by Solomon R. Benatar*, 88 AM. J. PUB. HEALTH 295 (1998).

²⁴ JOHANNA GIBSON, *PATENTING LIVES: LIFE PATENTS, CULTURE & DEV.*, 34-37 (Routledge, Sept. 28, 2008).

²⁵ S. Thambisetty, *Understanding Morality as a Ground for Exclusion from Patentability Under European Law*, 6 EU BIO SCI. J., ASIAN INT. BIOETHICS 46-52 (2002); see also TRIPS, Art. 27(2).

²⁶ *Supra* note 6.

create something out of the gifts of nature, it is only logical to provide the person with exclusive rights over the results.²⁷ So, if Locke were to judge the matter of the patent application by LG Life Sciences Ltd. in 2014, he would have probably granted the patent to the gene family - LBFL₃₁₃ which in reality was rejected by the court.²⁸ In this case, the human gene described in the invention had shown differential expression between pancreatic cancer tissues and normal pancreatic tissues along with additional malignant neoplasms. Due to the involvement of labor to manipulate the tissues, Locke would have not resisted to grant a patent in this case.

Another point of discord is the utilitarian theory which in this case is at odds with the moral utility doctrine. While the utilitarian theory by Jeremy Bentham argues that every society should function to achieve “maximum happiness of maximum members”, it is clear that biotechnology techniques have myriad benefits which include medical advancement, gene therapy to cure diseases, better food production in the field of agriculture and many more. However, the moral utility doctrine brings us back to the base question: Isn’t patenting living organisms morally flawed as it corrupts the intrinsic values for instance dignity, sustenance and self-preservation attached to life?²⁹ Critics argue that patenting in biotechnology, for instance, human genes is a form of “modern slavery” as it constitutes dismemberment of people for commercial profits.³⁰ However, it is important to ensure that the lines of demarcation between patents and legal ownership are not blurred. Moreover, patent rights don’t confer any kind of ownership to the applicant which means that a person might have a patent right over a car brand without owning one.³¹ This is what Pilar Ossorio, Associate Professor of Law and Bioethics at Wisconsin Law School also tries to justify by saying, “A human gene patent cannot be identified with legal ownership of human bodies, not simply because human gene patents confer no rights over naturally occurring genes, but because patent rights confer none of the positive rights to possess and use in which ownership typically consists.”³² It is also affirmed that those who criticize biotechnology related patents are ungrateful and hesitant to give those people their due reward who have worked to make great advancements

²⁷ DONALD S. CHISUM ET AL., CASES & MATERIALS: PRINCIPLES OF PATENT LAW, 35-36 (N.Y. Found. Press, 1998).

²⁸ Hetal Patel & Sandesh Lodha, *Case Study on Rejected Patents in India*, in CASE STUDY ON REJECTED PATENTS IN INDIA, INTECHOPEN (2020), <https://www.intechopen.com/chapters/72054>

²⁹ A.H. Chrost, *Introduction to Aquinas*, 19 AM. J. JURIS. 1 (1974).

³⁰ *Bioethics & Patent Law: The Relaxin Case*, WIPO MAGAZINE, Apr. 14, 2006, https://www.wipo.int/wipo_magazine/en/2006/02/article_0009.html.

³¹ Annabelle Lever, *Is It Ethical to Patent Human Genes?*, in INTELLECTUAL PROPERTY & THEORIES OF JUSTICE (Axel Gosseries et al. eds. 2008).

³² Gabriel Ben-Dor, *Ethics of Gene Patenting: Moral, Legal, and Practical Perspectives*, STANFORD-BROWN IGEN (2012), https://static.igem.org/mediawiki/2012/d/dc/Gene_Ethics.pdf

in the field of medicine and science because such inventions usually demand skills and human endeavors.³³

While it is often claimed in patent applications that such protection fosters a positive environment for more research and development, there is no way to ensure that the real latent motive behind such applications is not creating a monopoly and promoting a materialistic perception of life for commercial valuation.³⁴ The idea of enjoying royalties by patenting human genes sounds immoral on its face. However, a comprehensive outlook reveals that there is a high chance of productive knowledge becoming trade secrets if not patented and such an invention will never enter the public domain of knowledge restricting further advancement in this field.³⁵ When considering this argument another question arises which is more general in nature: do patents actually increase the innovation we often associate it with? Though this may result in an increase in patenting,³⁶ which can be studied by referring to the incremental advancement in science, there is a lack of any empirical evidence to show that a rise in patents leads to higher innovative activity³⁷ which is far more fostered by lead-time and branding.³⁸

IV. FROM GENOME TO RESURRECTING SPECIES: A REVOLUTIONARY LEAP?

Another buzzworthy topic in biotechnology is the patenting of de-extinct animals which is hitherto not explored by India or any other country. Bringing back an organism which either resembles or is extinct was something which humans could not even think about but the last few years witnessed technology achieving the unattainable. This can be achieved using a range of techniques like “selective breeding”, “genome editing” and “cloning”.³⁹ Selective breeding refers to choosing parents with certain traits to subsequently make them breed together to produce offsprings of the desirable characteristics. Genome editing refers to changing the DNA of organisms by adding, removing or modifying the DNA. Lastly, cloning refers to the process of making individuals with identical genes. This can be achieved either naturally or using artificial methods. Beth Shapiro, an

³³ P. Ossorio, *Legal and Ethical Issues in Patenting Human DNA*, in A COMPANION TO GENETHICS: PHILOSOPHY AND THE GENETIC REVOLUTION 418 (J. Burley & J. Harris eds. 2002).

³⁴ Darryl R. J. Macer & Makina Kato, *Biotechnology, Patents, and Bioethics*, INST. OF BIOLOGICAL SCIENCES, UNIV. OF TSUKUBA, https://www.iatp.org/sites/default/files/Biotechnology_Patents_and_Bioethics.htm

³⁵ *Discussion Paper on the Interplay between patents and trade secrets in medical technologies*, WIPO (October 2023), https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=621851.

³⁶ Bronwyn Hall, *Patents and Patent Policy*, 23 OXFORD REV. ECON. POL'Y 568, 574 (2007).

³⁷ Jeremy De Beer, *Evidence-Based Intellectual Property Policymaking: An Integrated Review of Methods and Conclusions*, 19 J. WORLD INTELL. PROP. 150, 169 (2016).

³⁸ JAMES BESSEN & MICHAEL JAMES MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS AND LAWYERS PUT INNOVATORS TO RISK* 98, (Princeton Univ. Press 2009).

³⁹ Aisling McMahon & David M Doyle, *Patentability and de-extinct animals in Europe: the patented woolly mammoth?*, 7(1) J. L. & BIOSCIENCES (2020).

evolutionary biologist who is also the chief scientific officer of Colossal Biosciences, had affirmed her intentions to bring back the genome of extinct animals mainly dodo birds and woolly mammoths.⁴⁰ She expressed that the reason why her team has decided to take such a big step by tweaking the DNA of live animals to bring back the dead is “because while traditional approaches to conservation are great and have had some successes, we still have this exceptionally high rate of extinction. We should be thinking about how to grow our conservation toolkit as we move forward.”⁴¹ India does not have any specific legal framework to confront this new area as there is lack of any explicit provision or interpretation of Section 3(j) of the Patents Act for the same. So, to assess the potential implications of patent laws on the de-extinction of animals, one needs to understand the need behind it. Firstly, the scope and pace of de-extinction are conditional on the resources that its supporters will attract.⁴² Secondly, the significant investment⁴³ that de-extinction requires in terms of capital, time and research can only be compensated by some sort of protection in the form of patents⁴⁴ because they are considered to be “the most important way in which researchers can protect the income that might come from ideas or technologies they have developed.”⁴⁵ But at the same time, this protection can also be used to generate lump sum of money for instance displaying the “revived” animals in a zoo.⁴⁶ Well, who would not pay to see, let’s say, a woolly mammoth once in their lifetime?⁴⁷ Thirdly, due to the polarizing nature of such patents, the scientists conscious of ethical principles would want to have control over the revived animals⁴⁸ to prevent others from using the technology inadvertently.⁴⁹ The ethical questions discussed earlier are also applicable to de-extinction of animals attacking the possibility of their patenting on the grounds of ecological impact, health concerns,⁵⁰ and the plausibility of this paving the path for revival of extinct human species.⁵¹ From a human rights perspective, it can be claimed that the right to life and health will be severely affected by the treatment of animals as “moral

⁴⁰ Nicholas Fleur, *Q&A: What de-extinction of woolly mammoths can teach us with evolutionary biologist Beth Shapiro*, STAT (Apr. 4, 2024), <https://www.statnews.com/2024/04/04/de-extinction-woolly-mammoths-biologist-beth-shapiro/>.

⁴¹ *Ibid*.

⁴² J. Donlan, *De-extinction in a Crisis Discipline*, 6(1) FRONTIERS OF BIOGEOGRAPHY 25–8 (2014).

⁴³ BETH SHAPIRO, *HOW TO CLONE A MAMMOTH: THE SCIENCE OF DE-EXTINCTION*, (Princeton Sci. Libr., (2015).

⁴⁴ *Supra* note 29.

⁴⁵ Angad Singh, Sharanabasava Hallihosur & Lastha Rangen, *Changing Landscape in Biotechnology Patenting*, 31 WORLD PAT. INF. 219–225 (2009).

⁴⁶ D. M. Doyle, S. Mccorristine & A. McMahon, *De-Extinction, Regulation and Nature Conservation*, 32(2) J. ENVTL. L. (2020).

⁴⁷ Tori Herridge, *Mammoths are a huge part of my life. But cloning them is wrong*, THE GUARDIAN, (Nov. 18, 2014) <https://www.theguardian.com/commentisfree/2014/nov/18/mammoth-cloning-wrong-save-endangered-elephants>

⁴⁸ J. Sherkow, *Patent Protection for Crispr: An Elsi Review*, 4(3) J. L. BIOSCI. 565–576 (2017).

⁴⁹ Aisling McMahon, *Biotechnology, Patents and Licensing for ‘Ethical Use’: A Regulatory Opportunity?* J. INTELL. PROP. STUDIES (2020),.

⁵⁰ R. Sandler, *The Ethics of Reviving Long Extinct Species*, 28(2) CONSERV. BIOL. 354–360 (2014).

⁵¹ *Id.* note 48.

patients”⁵² raising doubts about the well-being of donors and surrogates in the process of regenerating species.⁵³ Even if the de-extinction of animals surpasses the moral test, what is novel here? The whole purpose of de-extinction lies in bringing back something which already existed in nature,⁵⁴ thus, the animals were already “available to the public” earlier.⁵⁵ Hence, it ultimately depends on which is more fundamental in determining the test of novelty: “surface similarity or the underlying genetic distinctiveness.”⁵⁶ “Raising the dead” has turned out to be “raising a raft of legal and regulatory uncertainties.”⁵⁷ As advancements in biotechnology continue to push the boundaries of innovation, nations worldwide are grappling with the challenge of balancing scientific progress with ethical and legal considerations. India will also have to face the conundrum of deciding the scope of patents in biotechnology sooner or later while creating a plausible path for patents law such that it embodies the ethical standards and responsibilities in the post-grant stage.

V. THE NEW WIPO TREATY: ALL RHYME BUT NO RHYTHM?

On May 24, 2024, the World Intellectual Property Organization finally adopted a treaty on IP, Genetic Resources and Associated Traditional Knowledge after years of negotiation.⁵⁸ The main provision of the treaty is the mandatory disclosure requirements of the source of those inventions which use generic resources and traditional knowledge. In case the invention is related to genetic resources [“GR”], the applicant is required to disclose the origin country and if it’s based on traditional knowledge [“TK”], the indigenous community associated with it has to be disclosed. Articles 3.1 (b) and 3.2 (b) read with Article 2 specify that in case neither of the aforesaid information is available with the applicant, he has to reveal any source from which the relevant resource was obtained.⁵⁹ Such patent disclosure requirements prevent misappropriation⁶⁰ of that knowledge which is used without any authorization weakening the free-riding incentive to take

⁵² W. M. Adams, *Geographies of Conservation 1: De-Extinction and Precision Conservation*, 41(4) PROG. HUM. GEOG. 534–545 (2017).

⁵³ C. Friese & C. Marris, *Making De-Extinction Mundane?*, 12(3) PLOS BIOLOGY 1–3 (2014).

⁵⁴ *Supra* note 29.

⁵⁵ *Supra* note 42.

⁵⁶ N.F. Carlin, Ilan Wurman & Tamara Zakim, *How to Permit Your Mammoth: Some Legal Implications Of “De-Extinction”*, 33(1) STANF. ENVTL. LAW J. 3–57, 51 (2013).

⁵⁷ *Supra* note 44.

⁵⁸ Wipo Treaty On Intellectual Property, Genetic Resources And Associated Traditional Knowledge, GRATK/DC/7, May 24, 2024, Diplomatic Conference to Conclude an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources.

⁵⁹ *Ibid.*

⁶⁰ Sarnoff & Correa, *Analysis of Options for Implementing Disclosure of Origin Requirements in Intellectual Property Applications*, United Nations Conference on Trade and Development, (2006).

advantage of someone else's GR or TK without prior consent or deserved compensation.⁶¹ This practice increases the transparency and efficiency of patenting reducing the scope of erroneous patents while making it consonant with the Nagoya Protocol under the Convention of Biological Diversity, the objective of which is "the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies."⁶² According to Article 15 read with Article 5 of the Nagoya Protocol On Access to Genetic Resources and The Fair and Equitable Sharing On of Benefits Arising from Their Utilization,⁶³ the protocol demands compliance of the domestic legislation in sharing the benefits, monetary or non-monetary, due to use of genetic resources and traditional knowledge in a fair and equitable manner. Coming back to the WIPO treaty, in case the applicant is not aware of the source, a declaration has to be submitted affirming that the content is true to the best of his knowledge but this creates a sideway for applicants to claim naivety and submitting the declaration without any rigorous research.⁶⁴ Another point to note is the urge of developing countries for greater protection of traditional knowledge at an international level which can be attributed to the intellectual property regime favoring the developed,⁶⁵ and large emerging countries.⁶⁶ As suggested by Peter K. Yu, "strategic inconsistencies" may act as the last resort for developing countries to recover the foregone policy room in the IPR regime so they continue to demand more exceptions and differential treatment at the international level.⁶⁷ Such instability has a great probability of hampering the creation of international treaties and agreements. This WIPO treaty was no exception to loopholes however there is no evidence as to whether the reason for the same was the inconsistency pointed out above or whether there exist other latent irregularities. Talking about this ambiguity in the treaty, Article 5.3 specifies that a patent can't be revoked, invalidated or rendered unenforceable solely on the grounds of non-disclosure of the relevant information which is quite ironical as it is clearly against the reason why this treaty came into force.⁶⁸ The only exception to this is a case where the non-disclosure is based on fraudulent intent according to Article 5.3 read with Article 5.4.⁶⁹ So the next step is to verify the authenticity of

⁶¹ Claudio Chiarolla & Burcu Kılıç, *Developing Patent Disclosure Requirements Related To Genetic Resources And Traditional Knowledge – Key Questions*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, (2017).

⁶² Nagoya Protocol on Access to Genetic Resources and The Fair and Equitable Sharing On of Benefits Arising from Their Utilization, Art. 1, Oct. 29, 2010, Convention on Biological Diversity United Nations.

⁶³ *Id* at art. 5.

⁶⁴ Dr. Anson C. J., *WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge: Concerns of India and Developing Nations- Part I*, SPICYIP (June 3, 2024), <https://spicyip.com/2024/06/wipo-treaty-on-intellectual-property-genetic-resources-and-associated-traditional-knowledge-concerns-of-india-and-developing-nations.html>.

⁶⁵ Daniel Gervais & Peter K. Yu, *TRIPS and the Stratification of Intellectual Property*, in ROUTLEDGE HANDBOOK ON INTERNATIONAL ECONOMIC LAW (David Collins & Valentina Vadi eds. 2024).

⁶⁶ Peter K. Yu, *TRIPS and Its Contents*, 60 IDEA 149 (2020).

⁶⁷ Kal Raustiala, *Density & Conflict in International Intellectual Property Law*, 40 U.C. DAVIS L. REV. 1021 (2007).

⁶⁸ *Supra* note 18.

⁶⁹ *Id*.

patent applications but to the surprise of many,⁷⁰ Article 3.5 states that the contracting Parties shall not place any obligation on the offices to corroborate the genuineness of patents making this provision a weak adversary.⁷¹ So, the treaty outfoxed in the end and delivered the final blow of allowing the contracting parties to provide post-grant sanctions or remedies in case of fraudulent intent with no mechanism to determine it. If India decides to sign this, it will have to let go of the permissible opposition for the patent application to the Controller if “the complete specification does not disclose or wrongly mentions the source or geographical origin of biological material used for the invention” as per Section 25 (1) (j) of the Patents Act⁷² and a patent can also be revoked on the same grounds according to Section 64 (1) (p) resulting in the loss of safeguards against spurious applications.⁷³ Hence, this treaty has the potential to transform the field of biotechnology by increasing a fair benefit-sharing practice but India despite calling it “a win for the global south”⁷⁴ faces a challenge of incongruity between its domestic legislation and international law.⁷⁵

VI. CONCLUSION

As biotechnology continues to push boundaries, it is important to balance innovation with ethical responsibility, ensuring that patent laws evolve in a manner that aligns with both international standards and national interests. India’s approach to biotechnology protection, specifically under the TRIPS agreement, illustrates a complex legal landscape. Ethical considerations such as the sanctity of life and the potential for modern slavery contrast with theories supporting property rights and utilitarian benefits. Further, the WIPO treaty despite its aim for transparency and benefit-sharing has loopholes that may hinder its effectiveness, particularly concerning non-disclosure penalties. India needs to develop its legal framework strategically, taking into consideration its quickly expanding biotechnology industry, while maintaining its dedication to advancing innovation and public well-being. With better legal clarity, India has the opportunity to become a global leader in the field of biotechnology. Thus, the future of biotechnology patents will undoubtedly be dynamic requiring constant evaluation and adaptation to uphold the principles of fairness, morality and scientific progress.

⁷⁰ Praharsh Gour, *Finally, WIPO Adopts a Treaty on IP, Genetic Resources and Associated TK! But at What Cost?*, SPICYIP, (May 25, 2024), <https://spicyip.com/2024/05/wipo-adopts-a-treaty-on-ip-genetic-resources-and-associated-tk-finally-but-at-what-cost.html>.

⁷¹ *Supra* note 27.

⁷² The Patents Act, 1970, §25 (1) (j).

⁷³ The Patents Act, 1970, §64 (1) (p).

⁷⁴ Rajeev Jayaswal, *India says WIPO Treaty a significant win for Global South*, THE HINDUSTAN TIMES (May 26, 2024), <https://www.hindustantimes.com/india-news/india-says-wipo-treaty-a-significant-win-for-global-south-101716734414688.html>.

⁷⁵ Viviane Kunisawa, *The Biotechnology Revolution: The Impact of the New WIPO Treaty on Genetic Resources*, IP WATCHDOG (June 07, 2024), <https://ipwatchdog.com/2024/06/07/biotechnology-revolution-impact-new-wipo-treaty/id=177647/>.

**LEGAL ISSUES AND MODELS OF OWNERSHIP FOR INTELLECTUAL PROPERTY
MATERIALS WITHIN BLOCKCHAIN SYSTEMS.**

PRAKASH JOHRI*

ABSTRACT

Blockchain presents IP rights with a radical opportunity for effective decentralized form of registration, licensing and protection of their assets. These features to create indestructible ledgers, to execute smart contracts and for decentralized compliance could redefine how IP is managed. Though, with emerging technologies like the use of block chain there lies some legal issues, including jurisdiction issues, legal ambiguities and issues to do with ownership and enforcement. This paper seeks to explore these challenges and some pertinent problems that are associated with them such as the identification of use of aliases by the participants within the blockchain system, interface of dib territorially bounded IP laws and the global facet of blockchain and lack of legal recognition of blockchain generated evidence. These problems raise questions about ownership claims, possession of rights, and settlement of transnational disputes. In order to overcome these challenges, this paper recommends the accreditation of blockchain records as well as fair contracts, using smart contracts for mitigating IP transactions, and building global guidelines that can align jurisdictional rules. It promotes the adoption of the security technology that shields its intellectual property information and the legal experimentation area of the blockchain called the regulatory sandbox. Synergistic relationship between technologists and lawyers is underlined as crucial in developing dynamic regulations that capture technology. Lastly, this paper suggests how the use of blockchain technology can be incorporated into current and developing IP legal systems to support a sustainable system of innovation protection and creators' rights. With the help of effective and innovative approaches and with calming the IP environment by promoting cooperations globally, a true potential of blockchain in transforming the IP management for the better can be defined.

I. INTRODUCTION

Blockchain is an open, distributed register that can be used as a more secure method of recording and sharing of information. Blockchain was developed by Satoshi Nakamoto in the year 2008 as the public ledger that supports Bitcoin; a system where transactions are approved and recorded in a system of computers shared by all users of the network. The decentralization also leads to the elimination of middlemen as centralizing authorities which helps also in minimizing the risks of such manipulations or frauds and increases the rate of trust in transactions.¹

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¹ Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, BITCOIN (2008), <https://bitcoin.org/bitcoin.pdf>.

These features – and especially a system of separate blocks’ invariance and timestamping – imply a number of benefits necessary for the effective functioning of complex IP applications. IP management was for a long time based on centrally located registries which recorded ownership, licenses and cases of conflict. Blockchain presents itself as an innovative solution since it enables creators to register their work, assert and protect their ownership and perform IP transactions using smart contracts.²

Some of the blockchain solutions in IP are as follows Digital copyright registration, this is where a creator can timestamp its work on the blockchain with an aim of providing evidence on the date of creation.³ Such systems on Ethereum mean that the smart contract handles royalties to eliminate middlemen in protecting the rights of creators. Blockchain can also play a role in licensing agreements of patented products and also supply chain tracking in case of patented product.⁴

However, blockchain being decentralized and offer anonymity in addressing identity further complicate legal concerns of ownership, rights and jurisdictions. These challenges underline a very important reason for the adjustment of the existing laws to accommodate the adaptation of blockchain technology in the already existent IP system in a very proper manner.⁵

Blockchain remains more pertinent to IP registration, licensing and enforcement due to the following: (i) characteristics; (ii) decentralization, (iii) immutability and (iv) transparency. It provides a stable environment to safely document ownership of IPs and to promote the transactions and to prevent infringements of license agreements.

With IP registration, blockchain is the distributed ledger that offers certainty of ownership through the use of hash functions and timestamps. In contrast to conventional IP regimes, which depend on a centralized authority to register a user’s IP, blockchain can facilitate autonomous registration through smart contracts, the authenticity of which can be checked by anyone. For instance, to make sure that one’s creation is acknowledged, creators can store their content on Ethereum or other industries-specific IP blockchains. Several voices of research argue that blockchain can

² PRIMAVERA DE FILIPPI & AARON WRIGHT, *BLOCKCHAIN AND THE LAW: THE RULE OF CODE* 101-05 (Harvard University Press, 2018).

³ Mark Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. Rev. 460, (2015).

⁴ Primavera De Filippi, *Blockchain Technology and Decentralized Governance: The Pitfalls of a Trustless Dream*, 20 WIPO J. 97 (2019).

⁵ David Gervais, *The Regulation of Blockchain in Intellectual Property*, 23 WIPO J. 45, 47-49 (2020).

specifically contribute to cutting back the bureaucracy, increasing the transparency of the processes and preventing fraud in IP systems.⁶

Smart contracts, such as self-executing agreements and terms of licensing, help also to overcomplicate licensing of IP on blockchain. These contracts cut across royalty payments for usage rights that are inserted directly into the blockchain.⁷ This shifts the reliance from intermediaries and lowers the transaction costs in IP transactions hence making them more effective and easier. Nevertheless, legal issues are critical when it comes to smart contracts – how and to what extent such contracts can be enforced, especially when a conflict emerges or when an event affects provisions of the contracts.⁸

Last but not least, blockchain aids enforcement through making it easier to monitor, in real-time, the use of IPs and infringement of the same. Blockchain in combination with Decentralized Identifiers [“**DIDs**”] makes it possible to establish accountability for rights ownership and usage in the international digital market that is essential for many industries. However, there are still troubles connected to enforcement both because of the problems concerning competence of jurisdictions and because of the absence of the use of the records created by blockchain protocols in different legal systems.

II. CHALLENGES REGARDING IP OWNERSHIP ON BLOCKCHAIN PLATFORMS

Blockchain technology being disjointed and indelible hinders efforts to recognize, define, and protect rights to ownership of intellectual properties. Although blockchain has presented innovative approaches to IP registration and management, its characteristics cause legal uncertainties as well as enforcement issues. This section presents challenges such as concerning authorship attribution, ownership disputes, and legal jurisdiction concerns.

A. Identifying Ownership

The very architecture of the blockchain, where large numbers of contributors provide pseudonymous input into art or some other type of product, complicates who owns the work. The conventional frameworks of IP like copyright or patent are established based on identifying one or several individuals, who would be stakeholders. Blockchain transactions, however, occur under

⁶ Primavera De Filippi & Aaron Wright, *supra* note 2.

⁷ Nick Szabo, *Smart Contracts: Building Blocks for Digital Markets*, TRUE VALUE METRICS (1997), <https://www.truevaluemetrics.org/DBpdfs/BlockChain/Nick-Szabo-Smart-Contracts-Building-Blocks-for-Digital-Markets-1996-14591.pdf>.

⁸ Kevin Werbach & Nicolas Cornell, *Contracts Ex Machina*, 67 DUKE L.J. 313 (2017).

the ledger's cryptographic keys and not through the real-life identities, which makes it challenging to identify who owns them rightfully. Also, decentralized applications (dApps)/ non-fungible tokens (NFT) based on the blockchain require work from different parties. Present laws still have difficulty in addressing such dispersed participation and increasing questions can be posed regarding common ownership and individual claims.⁹

For instance, self-executing code on incorporated blockchain that is known by smart contracts may provide automatic ownership after the specific set of conditions have been met. However, such rules are straightforward, and they lack sophistication in huge, jointed projects where the issue of possession arises, as De Filippi and Wright have pointed out, blockchain offers technological solutions for keeping records of contributions, but it does not elucidate the problem of authorship as a legal matter.¹⁰

B. Establishing Ownership

Blockchain's decentralized and secure setting also enables timestamping and the provision of a form of cryptographic proof of authorship, the lack of which would constitute a *prima facie* case against the owner. Nevertheless, most jurisdictions still do not accept records from a blockchain as the proof of ownership of an IP. For instance, in respect of Berne Convention, copyright is automatic, and it arises at the time of work creation; however, in most cases proving a specific time of creation in a court depends on the manuscript or electronic file. Yet, records based on blockchain technologies guarantee the information's authenticity and quality though their admissibility as evidence becomes an issue since those are not integrated into existing legal frameworks.¹¹

Smart contracts take the ownership establishment to new and higher levels of complexity. These are normally used where the licensing terms and royalties are stated but the structure is deliberately unyielding. They may not protect against such events like late delivery of goods, defaulting of payment or disagreements. In their paper, Werbach and Cornell state that the "code is law"

⁹ Jane K. Winn, *Blockchain and the Future of Commercial Transactions*, 22 STAN. J.L. BUS. & FIN. 157, 160-64 (2017); Marta Belcher, *The Intersection of Blockchain Technology and Copyright Law*, 28 FORDHAM INTEL. PROP. MEDIA & ENT. L.J. 529, 542-45 (2018).

¹⁰ Primavera De Filippi & Aaron Wright, *supra* note 2; Shlomit Yanisky-Ravid & Xiaoqiong (Jackie) Liu, *When Artificial Intelligence Systems Produce Inventions: The 3A Era and an Alternative Model for Patent Law*, 39 CARDOZO L. REV. 2215, 2230-35 (2018).

¹¹ Michèle Finck, *Blockchain Regulation and Governance in Europe*, 39 OXFORD J. LEGAL STUD. 160, 172-75 (2019); Joshua Fairfield, *BitProperty*, 88 S. CAL. L. REV. 805 (2015).

approach embedded in smart contracts can be inapposite with other legal tenets including the doctrine of especial remedy in contract.¹²

C. Enforcing Ownership

One of the major problems in enforcing the operations on blockchain platforms is the fact that they function at the global level and are distributed. An IP law is country-relative as blockchain is cross-border; sometimes the legal system used as a reference is not clear. For instance, a blockchain IP sensitivity, related to contributors from several nations and disseminating in different countries, may lead to different judgements which may be contrary in nature.¹³

Furthermore, since blockchain entails the distribution of identity, it makes it difficult to protect one's IP. When transactions are pseudonymous then it becomes very hard to identify infringers. Even where infringers can be identified the mechanisms for enforcement such as injunctions or takedown notices cannot be affected on the decentralized platforms since there is no central authority through which enforcement can be affected. Gervais also says that blockchain is lawless and needs new methods of governance that will be decentralized other than being a lawless enforcer.¹⁴

D. Legal Ambiguities

The first of them is the conflict and confusion in legal regulation of the interaction between blockchain and IP law, resulting from the absence of uniform international legislation for software-linked to blockchain technology. Whereas, through blockchain a secure and an unblemished record of ownership is maintained, the legal acceptance of such records is not uniform in different jurisdictions. With innovations of various forms and uses of the underlying technology, some countries have started adopting the blockchain by allowing records from blockchain to be admitted as evidence of ownership while others are still skeptical of the technology.¹⁵

Furthermore, it is murky who owns/takes responsibility for blockchain as it runs on pseudonymity in a legal way. This greatly throws a spanner in the works of appropriate identification of the parties to a conflict, which is especially important for putting forward or counteracting an infringement of IP rights. Adding to the confusion is the term "code is law" typically tied to block-chain.

¹² Kevin Werbach & Nicolas Cornell, *supra* note 8; Shaanan Cohney et al., *Coin-Operated Capitalism*, 119 COLUM. L. REV. 591 (2019).

¹³ David Gervais, *supra* note 5; Angela Walch, *The Path of the Blockchain Lexicon (and the Law)*, 36 REV. BANKING & FIN. L. 713 (2017).

¹⁴ DAVID GERARD, *ATTACK OF THE 50 FOOT BLOCKCHAIN: BITCOIN, BLOCKCHAIN, ETHEREUM & SMART CONTRACTS* 201-05 (Amazon Kindle Edition, 2017).

¹⁵ Primavera De Filippi, *supra* note 4.

However, as smart contracts eliminate control by legal professionals and carry out transactions and agreements as programmed, than they are not capable of adapting to circumstances where equitable relief or contingencies surface, thereby triggering conflicts as related to different legal doctrines.¹⁶

E. Jurisdictional Complexities

As blockchain works on the decentralized model, having no central authority, it brings a twist while deciding concerning jurisdiction when it comes to solving disputes. Conventional IP litigation is often determined depending on the place of the parties or in the territory in which the alleged infringement was recorded. As in blockchain, the transactions happen across the distributed ledger connecting different nodes located in several countries; therefore, there is uncertainty regarding the governing law.¹⁷

This cross-border characteristic in the blockchain platform can thus result in two different legal frameworks' application and enforcement issues. For instance, when two parties are engaged in a dispute involving use of non-fungible tokens minted within a particular blockchain, and the contributors to the said blockchain hail from different jurisdictions, the legal proceedings, together with the IP laws regulating rights over such tokens and ways of enforcing such rights, will not be the same. This is decision-making that has to be done internationally because the laws have not been harmonized to support such matters.¹⁸

III. ANALYSIS OF HOW BLOCKCHAIN IMPACTS TRADITIONAL LEGAL FRAMEWORK FOR IP OWNERSHIP

A. Smart Contracts and Licensing Agreement

Licensing procedures and royalty management are two areas where smart contracts, self-executing agreements based on blockchain technology, help. Max Raskin mentions in his article, "The Law and Legality of Smart Contracts", that processing these transactions automates paperwork and increases transparency.¹⁹ Yet, smart contracts are rigid in ways. As it was mentioned previously, traditional law provides ways to interpret and change the contracting party's agreements in the case of unforeseen conditions, but smart contracts do not offer such opportunities. Problems arise

¹⁶ Kevin Werbach, *Trust, But Verify: Why the Blockchain Needs the Law*, 33 BERKELEY TECH. L.J. 487 (2018).

¹⁷ Angela Walch, *supra* note 14.

¹⁸ Michèle Finck, *supra* note 12.

¹⁹ Max Raskin, *The Law and Legality of Smart Contracts*, 1 GEO. L. TECH. REV. 305 (2017).

generally where a party needs to rely on either equitable remedies or corrections to errors made in the contract code.

B. Effects Relevant to Creative Industries

Blockchain changes the way creative industries conduct matters of ownership, use, and commercialization of assets through offering ownership portals to creators for direct relations with the audience. This does away with middlemen like publishers, agents, or record labels and other structures of marketing. Artists can utilize blockchain platforms to mint tokens that represent their artwork, being opposed to conventional coins, and giving a guarantee that the items being sold are original. As Casey and Vigna stressed in *The Truth Machine* this democratization decreases cost and further increases revenues for share-for-share models.²⁰ Still, decentralization also means that creators are more exposed and have to work on enforcing their rights as well as operating in sophisticated blockchain systems. Furthermore, the immutability of records on the Blockchain could pose problems to artists who intend to recall or edit their works circulating on the Blockchain because of emerging reputation issues.

As per Indian legislation, Copyright is contained under the Copyright Act of 1957 regarding protection of IPs on creative work.²¹ On the one hand, blockchain provides the data on creation and ownership, which go directly to independent evidence on the other hand, there are several issues that may be potentially problematic: First, Indian evidentiary rules are not using the concept of the blockchain timestamp as such. Internationally, The Berne Convention enables the rights-holder uniform protection in the member countries but has not figured out NFTs or any technical advancements at the moment.

C. Tokenization of Intellectual Property

Tokenization enables IP assets to be represented through tokens which are swappable, licensable or can be fractioned. It brings the ownership of IP asset investments within reach of smaller investors who can now acquire fractional interest in a patent or trademark. However, Tapscott and Tapscott in *Blockchain Revolution* explain that the same function of tokenization also provides liquidity where there used to be none, and this includes patents or copyrighted works.²² However, tokenization has raised new legal issues on its own. For example, who and how will decide on the

²⁰ Michael J. Casey & Paul Vigna, *The Truth Machine: The Blockchain and the Future of Everything* (St. Martin's Press 2018).

²¹ The Copyright Act, No.14 of 1957.

²² Don Tapscott & Alex Tapscott, *Blockchain Revolution: How the Technology Behind Bitcoin and Other Cryptocurrencies is Changing the World* (Portfolio 2016).

allocation of a tokenized asset or solve a conflict connected to it? Are these digital representations covered by IP laws or are they subject to securities regulation or both? Tokenization also has issues of transparency; while the fractionalization of an asset means that there could be different parties with different access rights to an asset, there are problems with enforcement and compliance.

In India's securities law, this kind of tokenized IP assets could fall under securities under the Securities Contracts (Regulation) Act, 1956, despite this fact that would entail strict regulation. Globally, countries such as the United States of America and the European union are struggling with regarding tokenized IP as securities or intellectual property.²³

D. Redefining Enforcement Mechanisms

Right from the nature of the technology, its transparency and traceability enhance the protection of IPs since the proprietors can track the use and transfer of their works in real time. For instance, the DTC (Digital Termination Code) of NFT marketplaces such as OpenSea shows how blockchain can create ownership and history, thus preventing fakes and misuse. In "IP in a World Without Scarcity" Lemley explains how blockchain may also contribute to re-imagining enforcement thinking through real time monitoring and traceability.²⁴ However, such enforcement mechanisms via the blockchain come with fresh forms of unfairness. On-chain or smart contracts tools may be used by 'end-users' to 'exempt themselves from liabilities' thereby negatively impacting the inexperienced creators. Furthermore, decentralized platforms do not have assigned authorities and many times, there is no hierarchical structure to report someone to or to enforce take down request or more severe measures.

India had exceptions for fair use in the Copyright Act, but with blockchain's autonomous removal process, it raises questions whether those who use this technology are considering fair uses.²⁵ On the international front, the World Intellectual Property Organization has only recently begun to direction the discussion toward the usage of blockchain in enforcing IP rights but has not offered authoritative guidance on this subject.

IV. IDENTIFICATION OF POTENTIAL LEGAL REFORMS

Blockchain technology has completely changed the way of thinking in the legal framework governing the protection of IP. Even though it has the potential to promote IP registration, licensing, and enforcement, the application of the blockchain technology involved is completely

²³ SEC v. Ripple Labs, Inc., No. 20-cv-10832, 2023 WL 4407071 (S.D.N.Y. July 13, 2023).

²⁴ Mark Lemley, *supra* note 3.

²⁵ The Copyright Act, No.14 of 1957, § 52 (Ind.).

decentralized, unmodifiable and facilitates cross-border transactions. Solving these problems requires complex legal improvements and the creation of new systems that align capabilities of the blockchain with corresponding IP systems. It is against this background that this discussion seeks to assess some of the possible reform measures to meet the increasing legal problems as they evolve.

A. Admittance of the Blockchain System as an Evidence in Intellectual Property Disputes

Among all the difficulties that can be encountered on the way to the widespread implementation of blockchain technology, one of the most significant is the non-acknowledgment of records produced by blockchain applications as legal evidence. Because of the use of cryptographic timestamping system, as well as the properties of block chain²⁶ that make it very difficult to alter once it has been created, blockchain can offer reliable proof of authorship and ownership. Nevertheless, national laws regarding IP tend not to provide provisions for the acceptance of such electronic evidence.

Proposed Reform:

Revise evidence acts to incorporate the recognition of records that use blockchain technology as proof of authorship or ownership as well as history of transactions. For example, Article 25²⁷ of the UNCITRAL Model Law on Electronic Commerce could be used as a reference in providing for particular provisions of blockchain.

B. For efficient decentralization of IP management and their standardization, smart contracts are a feasible approach

Automated contracts,²⁸ such that execute themselves, have the potential to efficiently manage IP licensing as well as royalty collection. Again, their legal enforceability under conventional contract law has not been settled. As factors that impede their adoption some of the challenges include, jurisdiction, interpretation and dispute.²⁹

Proposed Reform:

Create best practices smart contracts for IP transactions to conform to national and international law. Unlike contractual clauses, standard contract provisions or templates could be developed by

²⁶ Primavera De Filippi & Aaron Wright, *supra* note 2.

²⁷ U.N. Comm'n on Int'l Trade Law, Model Law on Electronic Commerce, U.N. Doc. A/RES/51/162 (1996).

²⁸ Nick Szabo, *supra* note 7.

²⁹ Kevin Werbach & Nicolas Cornell, *supra* note 8.

the International Chamber of Commerce [“ICC”] in cooperation with specific blockchain consortia. It felt necessary to set rules regarding the arbitration of smart contracts, such as fallback plans for the presence of humans.

C. In ensuring that membership-based organizations are fostered, jurisdictional frameworks need to be harmonized

Blockchain is transnational, and that means there are issues of which country or jurisdictions, an IP owner can go to have his or her rights enforced.³⁰ There are cases where one transaction or dispute is covered by the laws of at least two states.

Proposed Reform:

Create an international treaty or framework to cover the blockchain based IP systems. This treaty should provide jurisdictional sovereignty, conflict solving provisions and how the agreement is to be enforced. Amend current agreements, for instance the Agreement on Trade-Related Aspects of Intellectual Property Rights [“TRIPS”]³¹, to provide for block chain related provisions

D. When it comes to ownership, it is necessary to mention the collaborative and pseudonymous ownership.

Another challenge of decentralized platforms is that many are based on blockchain technologies involving collective creation,³² and even when there is an author, participants can act pseudonymously.

Proposed Reform:

Reform the rules of protection for copyrights in contexts of distributed collaboration³³. For instance, provisions could indicate how ownership is partitioned according to the records of contributions embedded on blockchains. New regulations should be aimed at making blockchain platforms verify the identity of their contributors based on the IP regulations and privacy standards.

³⁰ DAN SVANTESSON, LAW BEYOND BORDERS: JURISPRUDENCE FOR A DIGITAL WORLD 44–48 (2019).

³¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

³² Jeanne C. Fromer, *Expressive Incentives in Intellectual Property*, 98 VA. L. REV. 1745 (2012).

³³ Mark Lemley, *supra* note 3.

E. Establishing Third Party Resolution Systems

One would also have thought that traditional litigation is slow, costly and not fit for agile blockchain contractualism. Conflicts as to who owns an idea or whether or not a deal signed has favorable terms, impede advancement³⁴.

Proposed Reform:

Set up special blockchain-approved ADR instruments with the help of online arbitration³⁵. These mechanisms could engage smart contracts to execute an arbitration award as agreed by the contract terms. Organize common decentralized autonomous organizations for solving controversies, controlled by legal organizations in different countries.

F. Making up for the Lack of Interaction Between Technologists and Legislators

One of the biggest challenges that stand in the way of reform is the short distance between technologists and legislators. Due to the technical characteristics, the legal responses provided tend to run contrary to the goal,³⁶ when it comes to Blockchain.

Proposed Reform:

Hold cross-disciplinary weekly meetings with technologists, legal scholars and policymakers to write effective flexible regulation. Encourage the implementation of blockchain education programs to lawmakers in order to help sharpen their knowledge on blockchain and its associations with IP law.

G. Paving The Way for Improved Privacy and Security

In as much as the integration of blockchain tries to bring about transparency, it ends up revealing information on the proprietary nature of the IP information. Transparency thrives with privacy³⁷ in today's society and challenges must be met in the middle.

Proposed Reform:

Set legal requirements for the execution of IP-related transactions utilizing block-chain technology such that all associated information is safeguarded behind encryption codes recoverable only by

³⁴ ETHAN KATSH & ORNA RABINOVICH-EINY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES 112–15 (2017).

³⁵ Claudia Prömmner, *Decentralized Dispute Resolution and Blockchain Arbitration*, 23 INT'L ARB. L. REV. 211 (2020).

³⁶ PRIMAVERA DE FILIPPI ET AL., BLOCKCHAIN TECHNOLOGY AND GOVERNANCE: ADDRESSING THE LEGAL AND POLICY CHALLENGES 1–3 (2018).

³⁷ WOODROW HARTZOG, PRIVACY'S BLUEPRINT: THE BATTLE TO CONTROL THE DESIGN OF NEW TECHNOLOGIES 75–79 (2018).

the allowed parties. Force blockchain platforms to adhere to the international laws of data privacy including the GDPRs³⁸.

H. Promoting Innovation by Use of Regulatory Sandboxes

Numerous regulatory FLT's degrade most blockchain based IP systems and slow down innovation due to uncertainty.

Proposed Reform:

Establish regulatory sandboxes³⁹ in which those behind blockchains can experiment new IP management systems under legal safe havens. With appropriate initial conditions and instruments, these sandboxes can offer some insights that would appear useful when establishing the adaptable regulations. Promote Public Private Partnerships ["PPAs"] to provide funding for blockchain innovation concentrated on using IAMs.

V. CONCLUSION

Solving legal issues connected with the deployment of blockchain-based IP systems can only be achieved through several approaches that include; the passing of sufficient legislation, improvement of technologies, as well as collaboration among countries. In this regard, legal systems should include blockchain-generated records, establish the criteria for smart contracts, synchronize the legal requirements of different jurisdictions, and promote interdisciplinary co-operation to enhance innovations while preserving the IH assets. Such changes will guarantee that the benefits of blockchain in increasing the efficiency of the management of IP will be developed to the extent, and the rights of creators and innovators will be protected.

In addition, forming a worldwide consensus in enforcing IP through treaties and cooperation can bring consistency and anticipation to laws governing the same all over the world. It is in this context that the commitment from the international organizations- WIPO and WTO; will be instrumental in the pursuit of these endeavors.

Finally, it is all about the role of proactive as the initiative will help to build up the new technologies before facing challenges and at the same time flexible in order to overcome all the challenges in the times of technology. It is imperative that future laws do more than 'fill the void' but foster a

³⁸ Regulation (EU) 2016/679, General Data Protection Regulation, 2016 O.J. (L 119) 1.

³⁹ Financial Conduct Authority, *Regulatory Sandbox Lessons Learned Report* (2017).

sound and competitive environment in the blockchain/IP space for all relevant participants. The roles of law and technology have to be corresponding such that the regulations should start advancing as technology to depend on Blockchain before reaching the potential of transforming Intellectual property management.

GLOBAL PERSPECTIVES ON THE IDEA-EXPRESSION DICHOTOMY: COMPARATIVE ANALYSIS OF FILM COPYRIGHT LAWS

SHREYA SINGH & DEV PRATAP SINGH*

ABSTRACT

The idea vs. expression dichotomy is the defining boundary of the copyrights law, that aids in delineating that which constitutes protectable intellectual property and that which remains in the public domain. This paper will analyse the doctrine of the idea vs. expression and how it is interpreted across the world and in various legal systems, with a particular focus on the film industry. By examining the laws of the various countries, the study sheds light on how different countries balance the right to protection of creative works with the need to maintain a vibrant public domain. In the United States, the “idea vs. expression” dichotomy is an established principle; it follows that the principle of expression of an idea, and not the idea itself, is subject to copyright protection. In contrast to this, laws of the United Kingdom have developed a nuanced approach to the doctrine of the “idea vs expression” dichotomy. The approach of the United Kingdom was initially somewhat inspired from the United States but now has distinct applications of the doctrine in some of the cases. Additionally, the Court of Justice of the European Union (CJEU), has emphasized the importance of protecting the unique expression of creative work while recognizing the need for creativity. The Indian understanding of this dichotomy is significantly varied, particularly due to its unique taste in storytelling that is often presented through several mediums such as dancing, cinema or plays. Therefore, it faces unique challenges in applying the doctrine of idea vs expression dichotomy. Indian courts have tried to strike a balance between the need to protect the filmmaker’s rights while ensuring the underlying ideas and themes of work remain accessible for reinterpretation and innovation. On the other hand, Japan’s approach is mixed with the Western approach and cultural heritage while fostering innovation in its burgeoning film industry. This paper will further go on to explore the impact of technological advancements and artificial intelligence enforcements of the idea-expression dichotomy. In conclusion, the study argues that while the idea-expression dichotomy remains a vital component of copyright law, its application in the film industry requires continuous adaptation to address the complexities of an increasingly evolving global media landscape.

I. INTRODUCTION

The main aim of the existence of copyright law is to protect intellectual property by ensuring that the original work of the authors, and artists, is secured from unauthorized use.¹ This law has given exclusive rights to the creators over its creation, which includes the ability to reproduce, distribute,

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¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 9(2), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299.

or display their works, thus offering an economic incentive for creativity and innovation. The subject matter covered under this law includes various categories like literary work, music, drama, choreography and particularly relevant to this paper, motion pictures and audiovisual works. The copyright law provides for a crucial distinction between the ideas and the expression. Expression is the creative way of presenting an idea whereas the idea is just a thought. Under this law, the expression has been given protection, but the ideas themselves are not, and this difference is the foundation of the idea-expression dichotomy.²

The main objective of this doctrine is to strike a balance between the rights of creators to their expression of an idea, and the general public's right to not be excluded from the subsequent usage of such idea in a different form. Once the work is in the public domain, the public can benefit from the idea and gain some knowledge, but no one has the right to reproduce the same expression of the ideas. This kind of balance is important, especially in the film industry, where storytelling, visuals, and sound can be both highly innovative and vulnerable to infringement. Without the protection, the original expressions, such as scripts, cinematography, and character portrayals, are likely to get copied. In consequence, the law ensures that the idea behind these expressions remains free for others to rebuild along with their creativity in different ways.³

The idea vs. expression dichotomy is considered to be the cornerstone of copyright law, especially when it comes to defining the work that can be protected. This principle's broader concept is that the idea cannot be protected under this law, but the creative way in which the ideas are being expressed, i.e., the expression of the idea, is being protected.⁴ This ensures that while creative expressions are shielded from theft, the basic building blocks of creativity—ideas—remain open to all.

The doctrine has been applied in different ways in various legal systems. The United States has strongly enforced this doctrine under its Copyright Act, with its court holding that an idea cannot be protected under this law, but the expression of the idea can be protected.⁵ For instance, the plot of the film is just an idea, but its dialogue and character development fall under this concept. On the other hand, the courts in the United Kingdom evaluate whether the expression of an idea is “substantial” enough to merit copyright protection.⁶ In countries like India and Japan, the

² Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321 (1989).

³ Ang S, *The Idea-Expression Dichotomy and Merger Doctrine in the Copyright Laws of the US and the UK*, 2 INTERNATIONAL JOURNAL OF LAW AND INFORMATION TECHNOLOGY (IJLIT) 111–153 (1994).

⁴ Siegel v. Warner Bros. Entertainment Inc, 542 F. Supp. 2d 1098 (C.D. Cal. 2008)

⁵ H.R. Rt:P. No. 94-1476, 94th Cong., 2d Sess. 61 (1976); S. Rt: P. No. 94-473, 94th Cong., 1st Sess. 58 (1975) (emphasis added).

⁶ Collins, *Some Obsolescent Doctrines of the Law of Copyright*, 16 CAL. L. REV. 127 (1928).

interpretation of the dichotomy depends upon the cultural and legal nuances,⁷ especially in film copyright cases.

In India, the rich tradition of storytelling exists by virtue of dance form, cinema or theatre and has had to maintain the balance between the protection of the artistic work and the need to allow the free expression of culture. Similarly, Japan, like India has its unique combination of mediums for expression, and faces challenges in adopting this doctrine while also promoting creativity in the film industry. There exist variances in the interpretation of the idea vs. expression across the globe, which highlights the need for a comparative analysis to understand how different legal systems interpret and apply the idea-expression dichotomy in the context of films.

As films are made and shared around the world, it is essential to understand the interpretation of the idea vs. expression dichotomy around the world in relation to the film industry. In this connected world, films are produced and distributed across the world, and filmmakers often take inspiration from someone else's film, making the boundaries of copyright protection both important and complex.

In many cases, the idea of the film or the plot of the film can entirely appear similar to that of the other film which leads to the potential question of infringement but in actuality, it is not infringement as mere similarities in theme or ideas do not amount to copyright violation—only the replication of specific expressions does. This principle is important, especially in film industries such as Hollywood, Bollywood, and Japanese cinema, where cultural exchange and creative borrowing are common.

Objective of the Study

The primary objective of this paper is to draw a comparative analysis between the interpretation of the idea-expression dichotomy and its application across the globe in the context of the film industry, primarily focusing on the laws of the United Nations, United States, Japan and India. The study will explore how legal systems around the globe balance the protection of creativity and how these creativities are open to access to the general public. Adding on, this paper will also include the impact of technological advancements, including the role of artificial intelligence, in shaping copyright law enforcement in the global film industry.

It begins with the historical evolution of the idea-expression dichotomy, followed by an in-depth analysis of the interpretation of the idea-expression dichotomy in the U.S., U.K., Japan, and India, along with significant case laws. The next chapter of this paper is dedicated to the impact of

⁷ KENNETH R. STUNKEL, *IDEAS AND ART IN ASIAN CIVILIZATIONS: INDIA, CHINA AND JAPAN* (1st ed. 2012).

technology and artificial intelligence on copyright law in the film industry, and the paper will conclude with recommendations and reflections on the future of film copyright law in the global media landscape.

II. HISTORICAL EVOLUTION OF THE IDEA-EXPRESSION DICHOTOMY

The idea vs. expression dichotomy is the fundamental principle of copyright law that distinguishes between what can be protected and what cannot be protected. The basic interpretation behind this principle is that the idea cannot be protected but the way the idea is being expressed is to be protected.

The US Supreme Court established the foundation of this principle in the landmark case of *Baker vs. Selden* (1879)⁸. In this case, Selden developed a bookkeeping system while Baker adapted it in a different format. The court held that while Selden's book is copyrighted, the bookkeeping system itself is not since copyright protects expression and not ideas. The court emphasized that copyright protection is applied to the way in which an idea is expressed and not the idea itself. This judgement led to the development of the idea vs. expression dichotomy, where the idea is in the public domain and is free for all, but the way the idea is expressed is protected. This ruling is considered important as it seeks to prevent the monopolization of ideas and ensure that the copyright will not affect innovation and creativity. The distinction made in *Baker vs. Selden* between uncopyrightable ideas and copyrightable expressions continues to shape the legal landscape of copyright protection.

One of the most significant cases is that of *Nichols vs. Universal Pictures Corp* (1930)⁹. This case was one of the first leading precedents in United States copyright law dealing with the alleged infringement of the playwright's work by a film studio. Judge Learned Hand articulated the distinction of idea vs. expression. In this case, plaintiff Nicholas felt that her play, using family conflict and romance, was used without permission.¹⁰ The court had to determine whether Universal Pictures Corp infringed upon the idea of the play or its specific expression. Hand clarified that abstract ideas such as family conflict are not protected, but details such as plot, characters, or dialogue are protected.

He famously said that in any work, especially in a play, one can strip away more and more detail, but at a certain point, what remains is just a basic idea, which is not protected by copyright. The

⁸ *Baker vs. Selden*, 101 U.S. 99 (1879).

⁹ *Nichols vs. Universal Pictures Corp.*, 45 F.2d 119.

¹⁰ *Id.*

more general the work becomes, the less it can be protected. This ruling in the Nichols case helped courts understand how to separate ideas that anyone can use from expressions that can be copyrighted.

Over the years the court has given a clearer and more refined interpretation of the principle, and its applications. Creative works often consist of both - broad themes (ideas) and specific details (expressions), and distinguishing between the two is not always straightforward. For example, while a broad concept like a romantic comedy or a hero's journey would be considered an unprotectable idea, the specific dialogues, scenes, and character's development in a particular film or book could be copyrighted.¹¹ Despite these challenges, the core principle of the idea-expression dichotomy has remained intact.

III. THE IDEA-EXPRESSION DICHOTOMY IN THE U.S. FILM INDUSTRY

For decades the idea vs. expression dichotomy has been a fundamental part of the U.S. copyright laws. The Copyright Act 1976 is designed to protect the creative expressions of the idea, while ensuring that the idea itself is available for use by the general public.

The idea vs. expression dichotomy in U.S. Copyright Law is not a modern invention; it has been rooted in philosophy for centuries, particularly the work of Plato, Aristotle, and John Locke. These philosophers, through their work, have given the difference between ideas that are conceptual and expressions that are tangible and perceptible.

As per Plato, art is the imagination and the abstract idea or imagination, and its representation is the true essence of reality and reflection of the deeper thoughts, which is expression. Aristotle argued that art should show the universal view and reality, and each artist has a personal way of representing the same. The idea in a modern way is different from the specific way it is expressed.¹²

John Locke, in his work on human understanding, further defines this distinction.¹³ Locke argued that ideas are derived from experiences and exist in the mind, while expressions are the words, symbols, or other tangible means used to communicate these ideas. This separation between the intangible and the tangible has had a lasting influence on copyright law, where only the specific,

¹¹ Sid & Marty Krofft Television Productions Inc. v. McDonald's Corporation, 562 F.2d 1157 (9th Cir. 1977).

¹² ARISTOTLE, THE COMPLETE WORKS OF ARISTOTLE (1984).

¹³ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287-89 (Peter Laslett ed., Cambridge Univ. Press).

tangible expression of an idea can be protected, while the underlying idea remains free for others to use.¹⁴

The Copyright Act of 1976 made major changes in the copyright laws in the U.S. It was federal law as the state law could not provide the same protection.¹⁵ This Act was important when people felt that ideas had been stolen after they had shared them with networks or production companies. Before the Act, the creators could rely on state laws in cases such as of breach of implied contract or misappropriation. However, through the Act, the federal copyright law became the main source of protection, thus reducing the options the creators had for legal recourse.¹⁶

This philosophical understanding is reflected in the U.S. Supreme Court judgements, including in the case of *White-Smith Music Publishing Co. vs. Apollo Co.* (1907).¹⁷ The Court ruled that the idea of the music composition is not copyrightable, and the specific expression of the composition is to be protected.

In the case of NBC and FOX, both the networks developed reality television shows with similar boxing competition formats. NBC's "The Contender" and Fox's "The Next Great Champ"¹⁸ were based on a similar concept. In this case, the court ruled that the similarity was not copyright infringement because the general idea of a boxing show is not protected; what is protected is the specific expression. This is quite often the case in film and TV, where creators may pitch ideas but have them produced as similar shows with different plots or characters by producers or filmmakers.

In the case of *Berge vs. Board of Trustees of the University of Alabama*, the plaintiff claims that her ideas and methods had been stolen;¹⁹ they applied the pre-emption principle, dismissed the claim and stated that her expression of those ideas is protected under copyright acts.

In the case of *Kalem Co. vs. Harper Bros*, the court ruled that the making of the movies out of someone else's novels is infringement of the copyright, even though the film is a different medium as compared to the books.²⁰ As technology is developing, new forms of expression are also

¹⁴ JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING (P. Nidditch ed., 4th ed. 1700, 1975).

¹⁵ Copyright Act of 1909, 17 U.S.C. §§ 101-914 (2000).

¹⁶ The Copyright Act of 1976, 17 U.S.C. § 106 (2000).

¹⁷ *White-Smith Music Publishing Co. vs. Apollo Co.*, 209 U.S. 1 (1908).

¹⁸ Wade Paulsen, *Fox's 'The Next Great Champ' Faces New Lawsuit Alleging Idea Theft*, REALITY TV WORLD (2004), <https://www.realitytvworld.com/news/fox-the-next-great-champ-faces-new-lawsuit-alleging-idea-theft-2868.php>.

¹⁹ *Berge vs. Bd. of Trs. of the Univ. of Ala.*, (104 F.3d 1453, 1463).

²⁰ *Kalem Co. vs. Harper Bros*, 222 U.S. 55 (1911).

developing. This ruling expanded the scope of copyright protection to include not only literal copies but also adaptations into different formats.

This case is one of the examples which elaborates the broader concept of the expression that developed over time. Similarly, in the case of *King Features Syndicate vs. Fleischer*, the court ruled that making three-dimensional toys out of the cartoon characters was an infringement of the copyright, even though the medium had changed.²¹ The task of the courts is to ensure that copyright protection does not go too far to stifle creativity and competition. However, courts are also responsible for protecting original expressions for the purpose of rewarding creativity and innovation. Much of the time, this will demand delicate judgments, and this is where the courts developed specific tests to guide the process.

The two-step test, which is also known as the “Arnstein test,” was given by the US court in its landmark case of *Arnstein v. Porte*.²² The court created this test to determine whether the defendant committed copyright infringement first requires a finding of access by the defendant to the plaintiff's work. If access is shown, then the court must find some “substantial similarity” between the two works. But this test, itself, is fraught with difficulty because “substantial similarity” must be in the protectable expression, not just in the unprotectable idea.²³

One such case is *Universal City Studios vs. Film Ventures International*,²⁴ wherein the Supreme Court ruled that while the theme of a town being terrorized by a shark was unprotectable, the unique parallels of plot, characters, and events were sufficient to constitute copyright infringement because the expression of the idea was too similar to be a mere unprotected concept.

Courts, thus, distinguish between unprotected ideas and protectable creative expressions and decide whether elements are common to a genre or unique contributions. It delimits the boundaries of intellectual property, prevents the monopolistic use of common ideas, and at the same time, protects original work.

IV. UK LAWS ON IDEA VS EXPRESSION IN THE FILM INDUSTRY

Idea vs. expression is the core principle of the U.K. copyright laws, especially within the film industry. This principle differentiates between the idea that is unprotected and the expression that is protected in a legal context.

²¹ *King Features Syndicate vs. Fleischer*, 299 F 533 (2d Cir. 1924).

²² *Arnstein v. Porte*, 154 F.2d 464 (2d Cir. 1946)

²³ Shyamkrishna Balganes, *The Questionable Origins of the Copyright Infringement Analysis*, 68 U. PA. L. REV. 1591 (2016).

²⁴ *Universal City Studios, Inc. vs. Film Ventures International, Inc.*, 543 F. Supp. 1134 (C.D. Cal. 1982).

This principle of idea vs. expression has always been in the U.K. laws. In 1911, the parliament passed the copyright act and stated that the idea is not to be protected but the protection to be granted to the expression over this idea. Before 1911 as well the laws in the U.K. mostly focused towards the protection of expression and did not extend towards the idea and it was emphasized in the case of *Millar vs. Taylor* that ideas are free of the public but the expression in those ideas through tangible forms like text or film could be protected under copyright.²⁵

Before 1911, UK courts held that copyright protected only the expression of an idea, not the idea itself. Copying the exact expression was infringement, but using the idea differently was not.²⁶ After the 1911 act was passed by the parliament, the U.K. courts developed the principle of “distinguishing between general ideas and detailed expressions,” where they stated that just taking the inspiration from the idea of any artistic work is not an infringement of the copyright, but copying the detailed or the specific expression is an infringement of the copyright and that may be subject to legal action. The U.K. court has given this decision in several cases, including in the case of *Baigent vs. The Random House Group*,²⁷ where the court was of the opinion, that copying themes or ideas without reproducing the specific expression did not amount to copyright infringement.

Whether the case of copyright infringement has been committed depends much in ascertaining whether a “substantial part” has been copied. The U.K. courts consider whether the part of the work taken is also considered an integral part of the original work. It is not about the amount copied but about its importance or significance that is weighed. For instance, a general plotline in a movie has no copyright protection, but the detailed storyline, specific dialogue lines, or unique stylistic elements can be important enough to have copyright protection.

The U.S. courts are less willing than their U.K. counterparts to grant copyright protection to non-textual elements, especially to films and creative work. The U.S. draws a stricter line between the idea and expression, while the U.K. is more flexible and provides a wider area for this principle. In the case of *Kenrick vs. Lawrence*,²⁸ the court rejected the request to grant protection to the simple drawing because the idea was too basic. Such flexibility is necessary for the film industry as filmmaking is a highly visual medium wherein the originality extends beyond mere script and

²⁵ *Millar vs. Taylor* [1769] 4 Burrow 2303.

²⁶ Sankalp Jain, *The Principle of Idea-Expression Dichotomy: A Comparative Study of US, UK & Indian Jurisdictions*, SSRN (Mar. 26, 2012), <https://ssrn.com/abstract=2229628>.

²⁷ *Baigent vs. The Random House Group* [2007] EWCA Civ 247.

²⁸ *Kenrick vs. Lawrence* [1890] 25 QBD 99.

dialogue. Elements such as cinematography, camera movements, lighting, and visual composition contribute to the uniqueness and artistic value of a film. If copyright law does not account for these aspects, it may leave filmmakers vulnerable to imitation, discouraging innovation and creativity. In cases where the filmmakers play a significant role in creating original cinematographic techniques or unique visual style, the greater willingness is shown by the U.K. courts in copyright protection beyond script and dialogue.²⁹

Norowzian vs. Arks Ltd. (1999) is one of the more important cases in U.K. copyright law, particularly concerning the film industry.³⁰ The question was whether a new film editing style could be copyrighted. It was on appeal that Norowzian argued that his three-minute short film “Joy,” which featured innovative jump cuts and fast motion in telling its story, had been copied in the Guinness commercial, “Anticipation,” produced by Arks Ltd.

At the first instance ruling, it was held that Norowzian’s editing style could not be copyrighted as an editing technique and style formed part of the methods, and hence was not copyrightable. However, the Court of Appeal reversed this decision by holding that the film itself is a dramatic work, and hence, copyrightable in its own right. For instance, in cases where one cannot clearly distinguish the unprotected idea, namely the editing style, from its protectable expression, which is the final film. Highlighting the broader approach to copyright protection in the U.K., where rather than individual aspects, the holistic creative output can be protected.

This case in filmmaking understands the point that even if methods or processes, such as styles of editing, may not be copyrightable, the expression of that final work is capable of copyright. In line with this, the broader interpretation by the U.K. courts on what qualifies as copyrightable expression in creative works is shared.

The relationship between copyright and freedom of expression in media law is one of the main issues in the U.K. and many countries. U.S.A. in the case of *Harper & Row*, declared that copyright is the “engine of free speech,” which reflects this perspective.³¹ However, this perspective was criticized in the U.K. as it argues that by strengthening the copyright laws, it has to restrict the freedom of expression. This restriction in the digital world makes it difficult to engage the existing work without infringing the laws. This problem becomes particularly relevant in the context of

²⁹ L.T.C. Harms, *The Hedgehog, the Fox and Copyright - A Diversion*, 1 EUROPEAN INTELLECTUAL PROPERTY REVIEW 35 (2013).

³⁰ *Norowzian vs. Arks Ltd* [1999] EWCA Civ 3018.

³¹ *Harper & Row* 471 U.S. 539, 589 (1985).

UGC (User Generated Content) applications, where many users tend to remix or transform existing films and videos, other kinds of media, and so forth.³²

With the U.K. copyright law having no statutory provisions for works such as parodies or mashups, the conundrum is broadened. Where these forms of expression have real value for satire and cultural critique, they are often left unprotected by the law. Reform has been called for, with some urging for the introduction of new exceptions that would grant more licenses to represent copyrighted materials, especially in the film industry.

Public policy is clearly involved in making the “idea-expression” distinction in the U.K. copyright law. Some Legal scholars describe the idea-expression dichotomy not only as a legal principle but also as a means to extend the public policy underlying freedom of speech and the progress of creative works. In that respect, U.K. copyright law prevents the ideas from leaving the public domain; no creator can claim a monopoly in broad concepts or themes. This is particularly important in filmmaking where creativity often develops from previously created ideas and genres.

The U.K. courts have accordingly taken a very broad approach regarding what constitutes “expression,” more significantly in the non-text elements of the film, its visual and audio components.³³ This has produced some concern amongst critics that there is over-protection of copyright. Critics fear that this may lead to the nebulous division between ideas and expression,³⁴ thereby resulting in inconsistent decisions by the courts, thus increasingly making it harder for filmmakers to identify what aspects of their work come under copyright protection.³⁵

When it comes to protecting the expression of the idea, the European Union laws, primarily InfoSoc Directive 2001/29/EC and the Berne Convention,³⁶ which all EU member states, including the U.K. (pre-Brexit) adhered to, upheld the concept that the idea itself cannot be copyrighted but the creative expression of those ideas can be copyrighted. Article 2 of the Berne Convention States that protection is granted to the original work in a fixed form or format.³⁷

³² K.P. Abinava Sankar, *The Idea-Expression Dichotomy*, JOURNAL OF INTERNATIONAL COMMERCIAL LAW AND TECHNOLOGY (2008).

³³ Sankalp Jain, *The Principle of Idea-Expression Dichotomy: A Comparative Study of US, UK & Indian Jurisdictions* (Mar. 26, 2012) (unpublished manuscript), available at SSRN.

³⁴ Patrick Masiyakurima, *The Futility of the Idea/Expression Dichotomy in UK Copyright Law*, 38 IIC 548, 548 (2007).

³⁵ Patrick Croskery, *Institutional Utilitarianism and Intellectual Property*, 68 CHI.-KENT L. REV. 631 (1993).

³⁶ Francisco Javier Cabrera Blázquez et al., Copyright Licensing Rules in the EU, IRIS Plus, Eur. Audiovisual Observatory, July 2020.

³⁷ Berne Convention for the Protection of Literary and Artistic Works, art. 2, Sept. 9, 1886, 828 U.N.T.S. 221.

Article 11 of the EU Charter of Fundamental Rights ensures freedom of expression and all in the free circulation of ideas in integration to copyright laws, “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.” However, the InfoSoc Directive 2001/29/EC provides exclusive rights to the authors and the creative workers, thus limiting the usage and copying of the same expression.

V. JAPAN’S COPYRIGHT LAW OVERVIEW

The Japanese copyright law is a blend of Japanese tradition and Western legal frameworks with the goal of promoting cultural development while protecting creative works. Japanese copyright law’s essence can be found in Article 2, paragraph 1 of the Japanese copyright law,³⁸ which gives the definition of copyright as “An expression of thoughts or feelings that is creatively expressed” in the area of literature, academia, art, or music. This portrays the idea-expression dichotomy, the principle which protects only specific expressions of the idea while the idea itself stays open for others to use.³⁹

The Japanese copyright law highlights the point that even if the ideas, theories, and concepts, are original or novel, they will not find protection under the copyright. For example, the Mathematical Science Paper Incident showcases that even the creative expression existing inside of the scientific writing may be protected by copyright, but the underlying broader ideas and equations, which are essential for academic advancement, are not granted protection.⁴⁰ This differentiation makes sure that Japan’s copyright law does not come in the way of the free flow of ideas imperative for innovation and cultural growth.

In the context of the Japanese film industry. The application of the idea-expression dichotomy creates new challenges because of the rich cultural heritage of the Country. Japan’s film industry is deeply impacted by the traditional art forms like Kabuki theatre and Noh plays, which often reinterprets historical themes and cultural narratives. In various creative industries, the filmmakers often take inspiration from common cultural ideas, but the specific and unique expression through characters, dialogue, and visual elements is the distinguishing factor which receives copyright protection.

³⁸ Japanese Copyright Act, art. 2, ¶ 1, No. 39, Acts of Parliament, 1899 (JP).

³⁹ *Can Copyrights Be Granted to Ideas? The Boundary Between Expression and Idea*, MONOLITH LAW (Nov. 28, 2023), <https://monolith.law/en/general-corporate/idea-copyright-admit-expression>.

⁴⁰ [Osaka High Court], Feb. 25, 1994, Heisei 10 (o) 364 (of 1998), (Japan)

In the Esashi Oiwake Incident, the plaintiff, a composer, sued Japan Broadcasting Corporation (JBC) for allegedly using the prologue of his musical composition in a TV program without authorization, claiming a violation of his adaptation and broadcasting rights under Japan's Copyright Act.⁴¹ The courts faced the challenge of differentiating between a filmmaker's expression and the public domain idea of a local festival. The plaintiff argued that a television program's narration mirrored the prologue of his book. While lower courts initially sided with the plaintiff, the Supreme Court of Japan ultimately ruled that the similarities between the works existed in factual content and not in protectable expressions. This case highlights the difficulty of applying copyright law to creative works that are deeply rooted in shared cultural knowledge.⁴²

However, Japan's focus on preserving cultural heritage and promoting communal values may lead to a more nuanced approach when dealing with cultural works. While Western copyright law, particularly in the U.S., often emphasizes individual ownership, Japan's legal framework seeks a balance that protects creative rights while maintaining cultural continuity. This cultural emphasis means that even when creators use shared narratives, their specific artistic contributions are valued and protected, ensuring a fluid integration of tradition and modernity.

VI. INDIA: BALANCING CREATIVITY AND PROTECTION

The diverse and rich cultural heritage of India has had an impact on the legal approach to copyright. The Indian storytelling traditions, cinema, theatre, dance, and literature, all are embedded in the very culture. India's creative film industry, better known as Bollywood, thrives through the narration of ancient Indian epics, folklore, and classical narratives, blending traditional and modern elements, leading to frequent overlaps in themes like love triangles, familial duty, and revenge. This has resulted in frequent overlaps in the themes, ideas, and plots of different films and has presented new and unique challenges to the idea-expression dichotomy in copyright law.⁴³

Indian copyright law, such as that relevant to the film industry, seeks to strike a balance between rights of creators and access by the public to cultural materials. This is perhaps best reflected in the richness of India's storytelling traditions, considering the amendment of the Copyright Act of 1957. Indian courts hardly boast of leading case precedents on the type of issues arising in the film

⁴¹ [Tokyo District Court], 1999 (Ju) 922, Minshu Vol.55, No.4 at 837 (Japan)

⁴² *Id.*

⁴³ K.P. Abinava Sankar, *The Idea-Expression Dichotomy*, 3 J. INT'L COM. L. & TECH. 111 (2008).

industry, but have made outstanding judgments clarifying how these principles apply to the creative industries like film.

Copyright law in India is governed by the Copyright Act of 1957. However, that Act does not define the idea-expression dichotomy. It just protects literary, dramatic, musical, and artistic works that are original, films, and sound recordings in writing but remains silent with regards to protection for mere ideas. Copyright extends only to expressions that have been given a tangible form. This is essential in the film industry because filmmakers may create similar concepts but will still find a way to express them uniquely. Copyright is often employed in such cases.

As per the provision of Section 13 of the Copyright Act,⁴⁴ it provides that the original works receive protection under this act. However, the legislation does not consist of any provisions for the protection of ideas, plots, or themes in their basic abstract form. It means that the filmmaker's specific way expression of the idea—through dialogues, screenplay, and character development, etc.—can be copyrighted, but the basic concept or the theme of the film will remain unprotected.

The Courts in India have attempted to deal with many cases which deal with the application of the idea-expression dichotomy in relation to the film industry. These judgements showcase the judiciary's approach in attempting to balance the rights of creators with the public access to cultural materials.

A. R.G. Anand vs. Deluxe Films (1978)⁴⁵

The landmark case of Copyright law dealing with the idea-expression dichotomy in Indian copyright law is the case of R.G. Anand vs. Deluxe Films. In this particular case, R.G. Anand was a playwright, and he had claimed that the defendants in the case had copied some substantial portions of his play named Hum Hindustani in order to make the film New Delhi. He sought an injunction on the grounds of copyright infringement and argued that the film was made as an unauthorized adaptation of his work. The Hon'ble Supreme Court of India had ruled, stating that copyright cannot exist for ideas, themes, or plots. It stated that even though the similarities in the broad themes of the films cannot be avoided at the time when dealing with similar subject matter, protection under copyright is given only to the specific expression of those ideas.

This judgement cleared the ambiguity and clarified that under the Indian copyright law, the protection does not extend to general ideas or themes but only to their unique expression, and

⁴⁴ Copyright Act, § 13, No. 14, Acts of Parliament, 1957.

⁴⁵ R.G. Anand vs. Deluxe Films, (1978) AIR 1613.

therefore, stands as a crucial precedent for the film industry, allowing filmmakers to often work on similar themes in new creative ways.

B. Anil Gupta vs. Kunal Dasgupta (2002)⁴⁶

This case is also famously known as the Swayamvar Case, where the Delhi High Court went on to address the idea-expression dichotomy in relation to television formats. Anil Gupta, the plaintiff in the present case, had developed a reality matchmaking TV show, and in order to televise it, he had approached Kunal Dasgupta and had later raised an allegation saying that Dasgupta copied the idea and made a similar show without any authorization from him.

The Delhi High Court held that even though an idea cannot be copyrighted, the structured concept and details of the show, which were reduced in writing, shall be constituted as protectable expression under the Copyright law. The Court had said that if the defendant used the concept originally developed by the plaintiff, it would result in copyright infringement, even if the idea of the show is solely copied. The case highlighted the necessity to convert the ideas into written, concrete, tangible format in order to bring them under the purview of the copyright law.

C. Barbara Taylor Bradford vs. Sahara Media Entertainment (2004)⁴⁷

The Calcutta High Court decided this issue of literary works adaptation in films. Author Barbara Taylor Bradford accused Sahara Media of planning a TV series based on her novels without her consent. The defendant urged that her books only inspired the show and asserted they did not use any of her original expressions.

The High Court had ruled in favor of Bradford, highlighting the point that the ideas existing in the books may also exist in the public domain, but the specific expression of those ideas by her via her unique plots, narrative structures and characters were entitled to protection under the copyright law. In this case, the principle was reiterated that copyright protection in the context of the Indian legal system covers the expression of ideas only and not the very idea itself.

D. Beyond Dreams Entertainment Pvt. Ltd. vs. Zee Entertainment Enterprises Ltd. (2015)⁴⁸

This case of the Bombay High Court was dealing with the issue of protection of a concept for a television show. Beyond Dreams Entertainment were the plaintiffs in the instant case who had come up with a concept of a TV show, which was also shared with Zee Entertainment. It was

⁴⁶ Anil Gupta vs. Kunal Dasgupta, (2002) AIR 2002 DELHI 379.

⁴⁷ Barbara Taylor Bradford vs. Sahara Media Entertainment, (2004) (1) CHN 448.

⁴⁸ Beyond Dreams Entertainment Pvt. Ltd. vs. Zee Entertainment Enterprises Ltd., 2015(4) ALLMR 518.

alleged by the plaintiff that Zee had produced a show which was based on the concept note of the plaintiff, because of which the plaintiff had filed a copyright infringement suit.

It was held by the court that while the basic plots and ideas were not copyrightable, the concept notes of the plaintiff containing detailed specific elements, such as the character relationships, storylines, and sequences of events, were expressions protectable expressions under the Copyright law. The use of the detailed elements by the defendant had amounted to copyright infringement, emphasizing that the Courts in India will grant protection to the detailed expression of the ideas, even if there is no protection of the general idea.

These judgments have significantly shaped India's creative industries by reinforcing the idea-expression dichotomy, ensuring that while ideas remain in the public domain, their unique expressions are protected. This has encouraged innovation in films, television, and literature, allowing creators to draw inspiration from common themes while safeguarding their original expressions. It has also provided clarity for copyright disputes, balancing artistic freedom with intellectual property rights.

E. How the approach of India is different from USA, UK and Japan.

One of the major key differences lies in the cultural context between India and other countries like the U.S.A., U.K., and Japan, which have a major influence on the idea vs. expression dichotomy. India has a deep-rooted account for storytelling in various cultural and traditional ways, which frequently overlap themes across artistic works. Many filmmakers use various traditional tales and historical events that border cultural ideas and specific interpretations. Those ideas, through unique visual elements, dialogue, and plot structures, can still be protected.

Unlike the U.S.A. and the U.K., which accord more importance to individual ownership and whose tests of copyright infringement are stricter, India has adopted an approach that is flexible and balanced between the protection of original contributions to a work against public access to shared cultural narratives. The Supreme Court in *R.G. Anand vs. Deluxe Films* adopted a comparative approach, applying the audience perception test to determine infringement, for it would amount to an action for infringement if a spectator believes that the work is a copy.⁴⁹ This test has been considered more practical than the substantial similarity test followed in the US, which looks at the comparison of protectable elements of the works.

F. Similarities with Global Practices

⁴⁹ *Supra* note 45.

Despite the numerous differences, the protection is given to the expressions that have been reduced to a tangible form via copyright laws in countries like India, U.S.A., U.K. and Japan. The need for creators to put their ideas in a script, screenplay, or visual representation is a globally adopted practice. In the case of Anil Gupta vs. Kunal Dasgupta, the court ruled that the idea must be reduced to the concert format to receive protection under copyright laws. Indian law mirrors the approach taken in other jurisdictions, which require specificity in order to qualify for copyright.

Another similarity lies in the protection of non-literal elements like e structure, sequence, organization, screen displays, menu structure and user interfaces of a software, these are the aspects of creative work that may not be directly textual or literally expressed and may include a structure, sequence, organization, and overall arrangement of work.⁵⁰ But they still embody the creator's originality and creativity. Although the Indian film industry does not frequently test the boundaries of copyright law concerning visual style or editing techniques to the same extent as in the U.K., the judiciary has demonstrated a willingness to protect such expressions when necessary. For example, in the Beyond Dreams Entertainment vs. Zee Entertainment case,⁵¹ the court acknowledged that specific concept notes and sequences of events—non-literal elements—could be protected as expressions. This reflects a shared understanding with other countries that even non-verbal creative contributions can be subject to copyright protection.

India's copyright laws, though in principle like those of other countries, are formed and molded according to the specific cultural scenario that it is in. Courts in India weigh the creativity of individual minds against the access to information related to culturally significant ideas. Indian laws are much more nuanced than in rigid systems such as that of the U.S.A. However, it doesn't mean that India is an exception to the international norms. India also faces challenges in adapting its copyright laws to the digital age just like other countries.

VII. IMPACT OF TECHNOLOGY AND ARTIFICIAL INTELLIGENCE

Advancements in technology, particularly in Artificial intelligence (AI), have majorly impacted the film industry around the globe. It has disturbed the traditional style of filmmaking and copyright protection of the film. Now automated tools assist in script writing, editing, and even directing, changing the dynamics of film production. AI is also an issue for the film industry, as the content

⁵⁰ Ivin George, *Protection of Non-Literal Elements of a Computer Program Under Copyright*, 5 COMMONWEALTH L. REV. J. 117 (2019).

⁵¹ *Supra* note 48.

generated by the deepfake or virtual actors is an actual threat to copyright law, especially when it comes to distinguishing between the original ideas and their expressions.⁵²

AI has really been helpful in the creative process, especially for a film. Automated tools now assist at various stages of the production process:

- **Scriptwriting:** AI can analyze existing scripts and generate new ones based on familiar narrative structures and will mimic the stylistic choices of human writers.
- **Editing:** AI-based tools speed up the post-production process by identifying patterns in footage and suggesting edits or doing them entirely on their own.
- **Directing:** While entirely mechanical, AI has already begun to influence some of the creative choices at the shot and scene level in film-making.

These tools have changed the old model of filmmaking, where human creators were solely responsible for the creative expressions which copyright law is applied for. The involvement of AI in content creation has blurred the lines between contributions from the human mindset and machine-generated output, specifically in defining what constitutes an original expression.

As discussed, multiple times in this paper, idea vs. expression is the fundamental concept in copyright law, stating that while ideas are free for all to use, the specific expression of those ideas can be protected by copyright. However, AI-generated content is a challenge to this principle.⁵³ AI can generate content that is highly creative, and to a larger extent, it mimics human expression, which blurs the line between idea vs. expression. As noted by Clark D. Asay, “AI has the potential to independently create works that are strikingly similar to existing ones, raising questions about authorship and infringement.” In the film industry, it raises the critical question about who owns the copyright over AI-generated films, or whether they can be copyrighted. The role of the human creator diminishes when AI handles substantial parts of the creative process, challenging traditional notions of originality.⁵⁴

One of the most important questions about AI-generated films is who owns the copyright over that film. Traditionally, under copyright laws, it was assumed that the creator of the original work or the filmmaker would have the copyright, exclusive rights to reproduce, distribute, and perform

⁵² Yoshinori Okamoto, *Is Japan Still a Machine Learning Paradise?*, YUASA AND HARA (Apr. 18, 2024), <https://www.yuasa-hara.co.jp/english/publication/2608/>.

⁵³ Katherine Lee et al., *Talkin’ About AI Generation: Copyright and the Generative AI Supply Chain*, 13 J. COPYRIGHT SOC’Y WORKING PAPER (2024).

⁵⁴ Clark D. Asay, *An Empirical Study of Copyright’s Substantial Similarity Test*, 13 U.C. IRVINE L. REV. 35, 75 (2022).

the work. Now, when AI has the main role in creating the film, then this assumption becomes complicated.⁵⁵

Copyright, in essence, tends to favor the filmmaker in terms of editing or even scriptwriting; however, in the case of AI doing a significant part of the creative process, the question of ownership becomes relevant. Japan and the U.S.A. don't recognize AI as a creator under copyright laws since it classically requires a human component of creativity or originality.

Although current legislation for copyright does not recognize AI as the creator, legal reforms are necessary to address the increasing role of AI in creative industries. Countries like the U.S.A. have introduced a provision under their copyright laws for computer-generated work which states that the person who arranges the creation of work is the author. However, this approach is insufficient to resolve the issue of AI-generated works that are produced with minimal human intervention.⁵⁶

Indian copyright law does not mention anything specifically about AI-generated content. The Indian copyright regime does not protect ideas but only expressions related to them, in a similar pattern followed by other jurisdictions. What India's legal system is unable to determine relates to the positioning of AI-generated works under this distinction. For instance, with respect to scenes where AI-generated content closely resembles preexisting works, Indian courts may need to devise new tests for originality and infringement as regards how AI fits into the framework of idea expression.

Global developments have defined the approach of India to idea-expression dichotomy, for example, where developments in the U.S.A. and U.K. are shaping the discussions on the creative roles of AI. As developments of AI become increasingly stronger in film productions, India's vibrant film industry will be under greater pressure since it has always been an industry with cultural narratives used repetitively. This will be what is ultimately crucial in terms of making the public domain accessible but ensuring human creativity is protected: determining the point at which AI generates fit into traditional storytelling structures.⁵⁷

⁵⁵ Daryl Lim, *AI & IP: Innovation & Creativity in an Age of Accelerated Change*, 52 AKRON L. REV. 813 (2018).

⁵⁶ Kalin Hristov, *Artificial Intelligence and the Copyright Dilemma*, 57 IDEA 431 (2017).

⁵⁷ Ashna Shah, Akanksha Choudhary & Sarthak Sadd, *Artificial Intelligence and Automated Content Creation: Copyright Scenario in India*, 4 INT'L J. LEGAL SCI. & INNOVATION 1 (2022).

VIII. CONCLUSION AND SUGGESTIONS

The idea-expression dichotomy is a universal cornerstone of copyright law but is applied very differently in the light of regional legal frames of reference and cultural influences. Every country would experience pain in seeking a balance between protection for creativity and openness to the flow of ideas for further innovation in any film industry. The comparative analysis of the U.S., U.K., India, Japan, and the EU would outline points of similarity and divergence in how they support copyright protection.

Clearly delineated in the U.S. in seminal cases such as *Baker vs. Selden* and *Nichols vs. Universal Pictures Corp*, the idea-expression dichotomy is one which concerns itself with justifying protection for expressions of ideas as broad concepts are left in the public domain. Such strong delimitation between idea and expression does prevent it from hindering creativity but challenges other areas such as cinema. Conversely, U.K. law applies this distinction between thought and expression but, with considerable ease, extends the protection to non-textual aspects, such as visual and stylistic elements of the film. For instance, in *Norowzian vs. Arks Ltd.*, the U.K. demonstrates their tendency to liberally interpret protectable expression, especially in the case of films.⁵⁸

India and Japan, too, follow the idea-expression dichotomy but have been imbued with unique cultural considerations. In India, rich storytelling traditions often blur between public domain ideas and original expressions like the case of *R.G. Anand vs. Deluxe Films*.⁵⁹ In a culture that encapsulates Western copyright law and its rich cultural heritage, Japan has its share of challenges, which were well demonstrated in the *Esashi Oiwake Incident*, where facts in a song were being held separately from protected expression.⁶⁰

Although these states typically adhere to this idea-expression dichotomy, it has several drawbacks. A major problem is that the limits of the boundary between ideas and expression are vague and uncertain. HLA Hart argues that such “open texture” of the law gives rise to inconsistent application with regard to cases where the line between what is an idea and what is an expression is unclear⁶¹. For example, the *Lucas film* decision in the U.K. Raised concerns when the scope of copyright protection for artistic works was narrowed to require that they have an “artistic purpose”

⁵⁸ *Supra* notes 24.

⁵⁹ *Supra* notes 35.

⁶⁰ *Supra* notes 42.

⁶¹ Andrew Hadjigeorgiou, *Hart and the Oxford Jurisprudence Circle*, (2021), https://pure.rug.nl/ws/portalfiles/portal/149301104/Title_and_contents.pdf.

to be entitled to protection and has created uncertainty in the copyright regime, particularly concerning what protects expression under the Copyright Act.⁶²

Another drawback of the idea vs expression dichotomy is adequately protected creators, particularly in the film industry where idea and expression are closely related. In the film industry, the concept of the films is often copied in a way that is within the boundary of copyright infringement, as in cases like *Beyond Dreams Entertainment Pvt. Ltd. vs. Zee Entertainment*,⁶³ the protection of the detailed expression rather than the border idea is the vulnerable exploitation of the creators.

To overcome these drawbacks, certain corrective measures have been suggested by many scholars. The first is to have greater clarity and consistency in defining the boundary in defining the clear boundary between idea and expression. Legislative and judiciary to provide a more structured approach to defining, possibly creating guidelines or criteria that help determine when an idea crosses the line into protectable expression. This will legal proceedings and offer creators clearer protection.

Second, expansion in copyright exceptions, the laws should provide more exceptions so that people can take up the existing work and transform it into something new, like parodies and remixes, especially in digital and user-generated content, which would encourage creativity while maintaining protection for original expressions.

Countries around the world are also suffering from these legal challenges in one way or the other. United States copyright laws require human authorship; the AI-generated content is not easily copyrightable under the present regulation in the U.S.A. However, some argue that AI should be considered employment, and that AI-generated work should be considered as work made for an heir, with copyright assigned to the entity that owns the AI system. In contrast, the U.K. is more progressive. Its provision allows protection to be granted to computer-generated work, granting copyright to the person making the necessary arrangements for the creation of the work. EU, Japan, and other nations are still in the process of developing a framework that can address computer-generated work.

Lastly, technological advancements, AI is the new challenge to the idea vss expression dichotomy, and it is becoming increasingly capable of generating new content. The legal framework must

⁶² *Lucasfilm Limited and others (Appellants) v Ainsworth and another (Respondents)*[2011] UKSC 39.

⁶³ *Supra* note 47.

involve the provisions to deal with this issue. One solution is to establish a separate category for AI-generated content, with clear rules on how copyright can be assigned to the content generated by it.⁶⁴

In conclusion, technological advancements like AI are reshaping the global film industry and presenting unprecedented challenges to copyright law. These developments necessitate amendments to traditional legal frameworks, particularly the idea-expression dichotomy, as countries seek to balance the protection of creativity with the realities of AI-driven content creation.

⁶⁴ Khanuengnit Khaosaeng, *Wands, Sandals and the Wind: Creativity as a Copyright Leapfrog*, 36 E.I.P.R. 238 (2014).