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## Presentation: Naming The Unnamed: Intellectual Property Rights of Women Artists from India

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# NAMING THE UNNAMED: INTELLECTUAL PROPERTY RIGHTS OF WOMEN ARTISTS FROM INDIA

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## I. INTRODUCTION

During the opening ceremony of the 1996 Atlanta Olympics, the popular German-American world music band Enigma performed the theme song for the event, “Return to Innocence.” As the song resounded in millions of homes worldwide, members of the Amis tribe in Taiwan identified it as resembling a folk song that formed an integral part of their upbringing and culture. Consequently, Enigma, Capitol-EMI Music, and Virgin Records were sued collectively for a hefty amount in royalties in U.S. district court. Eventually the parties reached an out of court settlement compelling Enigma to acknowledge the Amis people’s contribution to the song.<sup>1</sup>

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However, this is only a single fortunate case among hundreds of instances of cultural misappropriation that traditional communities suffer every day.

Over the last two decades, the cultural rights of indigenous peoples have received increasing attention from the United Nations and, with the adoption of the Declaration on the Rights of Indigenous Peoples,<sup>2</sup> have been recognized internationally as fundamental human rights.<sup>3</sup> Traditional communities around the world regularly confront issues of cultural appropriation and cultural theft—be it through the fusion of traditional music with digital beats to produce chart-topping pop music albums, traditional painting techniques, and handicrafts mass-produced by non-traditional means and sold as authentic, indigenous art being replicated on clothing, footwear, and carpets, or indigenous words and names being trademarked and used commercially. The protection against such exploitation of traditional writings, languages, customs, songs, paintings, handicrafts, rituals and ceremonies, traditional medical knowledge, legends and myths, referred to collectively as traditional cultural expressions (“TCE”) or “folklore,”<sup>4</sup> has emerged as an aspect of the cultural and intellectual property rights of indigenous people and is a key issue in the international arena.

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1. See Nancy Guy, Abstract, *Regaining Their Voices: Music, Cultural Ownership, and the Amis’ Copyright Struggle*, in *COPYRIGHT: WHAT DOES IT MEAN TO OWN THE MUSIC?*, available at <http://orpheus.tamu.edu/pmssem/copyright.html> (noting that Enigma initially neither mentioned the tribe’s contribution nor paid any of its huge profits to the tribe).

2. See U.N. Declaration on the Rights of Indigenous Peoples, Hum. Rts. Council Res. 2006/2 (recognizing and reaffirming collective, indispensable rights that indigenous peoples possess, including the right to protect their cultural traditions).

3. *Id.* art. 12.

4. United Nations Educational, Scientific, and Cultural Organization General Conference, Oct. 17 – Nov. 15, 1989, *Recommendation on the Safeguarding of Traditional Culture and Folklore*, 239, available at [http://www.unesco.org/culture/laws/paris/html\\_eng/page1.shtml](http://www.unesco.org/culture/laws/paris/html_eng/page1.shtml), 25 C/Resolutions + CORR. [hereinafter UNESCO Recommendation] (explaining that

[f]olklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.

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Developments in technology and the ease with which mass reproduction, broadcast, and distribution can be carried out in the digital era greatly increase the exploitation of folklore, which is expropriated blatantly and commercialized to suit the needs of the market. The economic interests of indigenous communities suffer because no monetary returns from commercial exploitation of the cultural property are given to the traditional groups that develop and maintain it.<sup>5</sup> The impact of such action is heightened further regarding developing countries, which are very rich in folklore but have particularly weak systems of intellectual and cultural property protection.<sup>6</sup> The situation in India is particularly complex, as the Indian government refuses to recognize traditional artisan communities or custodians of traditional knowledge and folklore as “indigenous” peoples.<sup>7</sup>

India’s labor-intensive handicrafts trade, basically a cottage industry, is dispersed widely—located mainly in rural areas—and is the largest employer in the unorganized labor sector. Behind the huge industry are millions of artisans who create the Indian handicrafts that are unique and immediately identifiable in the global market. In this paper, the authors study three specific cultural expressions generated by women in traditional communities located in the eastern part of India and the exploitation suffered by each. The first is the case of the *kantha*-stitch industry in West Bengal<sup>8</sup> and Bangladesh, which is a specific kind of decorative embroidery done only by the women of Bengal.<sup>9</sup> The *kantha*-stitch industry has emerged as a highly lucrative industry, operating as an informal sector in India.<sup>10</sup> However, over time fashion designers have come to stylize and innovatively apply the *kantha* technique on all kinds of apparel and accessories that are immensely popular in the market, thus, grossing millions for the fashion industry. The women who create the exquisite patterns, after laboring for days, however, receive meager remuneration and no recognition for their art. This is a classic instance of exploitation of traditional cultural expression that brings into sharp focus the issues of

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5. P. Kher, *Towards Folklore Protection* 2005 (30) PTC J-9 at J-10.

6. *Id.*

7. See Virginius Xaxa, *Tribes as Indigenous People of India*, 34 *ECON. & POL. WKLY.* 3589, 3590 (1999) (discussing the indifference of the Indian government to the use of the term “indigenous” prior to the international recognition of the rights of indigenous people, and stating that the government now only approves of the term “indigenous” in rare circumstances, when referring to “people that have been subjected to domination and subjugation”).

8. A state located in the east of India, sharing borders with Bangladesh.

9. After the Partition of India in 1947, the Province of Bengal was divided into East Bengal (which later became the country of Bangladesh) and West Bengal, a state in the Union of India.

10. See generally Ulan Switucha, *Nakshi Kantha: A Study Group Presentation*, 12 *TEXTILE SOCIETY OF HONG KONG* 7 (2004).

ownership and authorship of indigenous intellectual property.

The second TCE this Article analyzes is the *Madhubani* painting—one of the most widely exported art products from India. The *Madhubani* is a distinctive kind of painting using line drawings and vegetable dyes created by rural women from the Chota Nagpur Plateau and Chattisgarh areas in the state of Bihar located in eastern India.<sup>11</sup> Apart from the problem of artistic non-recognition, as in the case of the *kantha* industry, the threat of fakes is paramount in this instance because cheap imitations flood both domestic and international markets.

Finally, this Article explores the issue of commercial exploitation of TCE in the area of folk music, illustrating the problem by focusing on contemporary Bengali pop, which is based largely on blatant misappropriation of folk tunes and songs. The core of the problem in the case of folk music protection, unlike in folk art, is the absence of fixation, leading to mutilation and distortion of folk music apart from non-recognition of folk artists. Issues of moral rights and duration of protection are problems that find relevance in each of the areas described above.

This Article argues that the existing regime of intellectual property is grossly inadequate for protecting traditional cultural expressions, and must be suitably expanded to incorporate a human rights understanding to fully accommodate the interests of traditional and indigenous communities. Secondly, although the protection of intellectual property rights for indigenous communities has been read into indigenous peoples' rights in international human rights instruments, and has also been addressed by specific declarations of indigenous peoples,<sup>12</sup> these protections are not suitable for the Indian experience because the Indian government does not recognize traditional Indian artisan communities as indigenous peoples. Finally, even if intellectual property laws granted TCEs appropriate protection, the traditional knowledge and cultural expressions of women within patriarchal traditional communities would still remain unrecognized and unrewarded. Therefore, this Article asserts that any legal or

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11. See generally Jagdish J. Chavda, *The Narrative Paintings of India's Jitwarपुरi Women*, 11 WOMAN'S ART J. 26 (1990).

12. See John Hunter & Chris Jones, *Bioprospecting and Indigenous Knowledge in Australia: Valuing Indigenous Spiritual Knowledge and Its Implications for Integrated Legal Regimes*, WASHINGTON UNIVERSITY IN ST. LOUIS, WASHINGTON UNIVERSITY LAW, available at <http://law.wustl.edu/centeris/Papers/Biodiversity/PDFWrdDoc/HunterJonesfinaldraft.doc> (quoting the Julayinbul Statement on Indigenous Intellectual Property Rights (1993)); see also HUM. RTS. COUNCIL RES. 2006/2, *supra* note 2; International Consultation on Intellectual Property Rights and Biodiversity, Sept. 30, 1994, available at <http://www.austlii.edu.au/au/journals/AILR/2001/11.html> [hereinafter ICIPRB]; First Int'l Conference on the Cultural & Intellectual Property Rights of Indigenous Peoples, Whakatane, N.Z., June 12-18, 1993, *The Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples*, preamble [hereinafter *Mataatua Declaration*].

institutional framework developed to address this issue must accord due recognition to the contribution of women within the community towards their own creations.

## II. LOCATING CULTURAL RIGHTS OF INDIGENOUS PEOPLE WITHIN THE HUMAN RIGHTS FRAMEWORK

### A. *International Human Rights Law and the Indigenous*

The issue of cultural and intellectual property rights of indigenous communities has received increasing global attention due to a focus by the United Nations on this area in the last twenty-five years.<sup>13</sup> The area of TCE protection is of particular significance because this is the only form of intellectual property for which protection has been sought under the human rights framework as well. The United Nations Educational, Scientific and Cultural Organization (“UNESCO”) and the World Intellectual Property Organization (“WIPO”) have been addressing the ways in which the art and cultural expressions of indigenous peoples can be granted international protection by modifying the international intellectual property regime. In addition, the right of indigenous peoples to protect and own their cultural property has been read into a number of associated human rights addressed in various international instruments.

**Cultural Rights of Minorities**—The first of these is the Cultural Rights of Minorities, recognized under the International Covenant on Civil and Political Rights, enacted in 1966, which provides that: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be deprived of the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion or to use their own language.”<sup>14</sup>

**Right to Self-Identification**—The International Labor Organization (“ILO”) Convention Concerning Indigenous and Tribal Peoples in Independent Countries,<sup>15</sup> adopted in 1991, called attention to the distinctive

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13. The United Nations has made a series of efforts to address this issue since it set up the Working Group on Indigenous Peoples in 1982. *See, e.g.*, MODEL PROVISIONS FOR NATIONAL LAWS ON THE PROTECTION OF EXPRESSION OF FOLKLORE AGAINST ILLICIT EXPLOITATION AND OTHER PREJUDICIAL ACTIONS (United Nations Educational, Scientific and Cultural Org. & World Intellectual Property Org. 1985), *available at* <http://unesdoc.unesco.org/images/0006/000637/063799eb.pdf> [hereinafter UNESCO-WIPO Model Provisions]; Hum. Rts. Council Res. 2006/2, *supra* note 2.

14. International Covenant on Civil and Political Rights, art. 27, Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

15. *See* Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO Conv. 169, *entered into force* Sept. 5, 1991, art. 8, *reprinted in* 28 I.L.M. 1382 (1989), *available at* <http://www1.umn.edu/humanrts/instree/r1c1tp.htm>.

contribution of indigenous peoples to cultural diversity<sup>16</sup> and affirmed the indigenous peoples' right to self-identification.<sup>17</sup> The Convention asserted that this right to self-identification includes the rights of indigenous peoples to their intangible cultural, scientific, and intellectual resources.<sup>18</sup>

**Right of Indigenous People to Self-Determination**—The First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, convened by the nine Tribes of Mataatua in New Zealand in 1993, resulted in the Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples (“Declaration”).<sup>19</sup> This instrument asserted that protection of the rights of indigenous peoples with respect to their traditional knowledge, cultural expressions, and all other forms of cultural property was an aspect of the right to self-determination.<sup>20</sup>

The Declaration affirmed that indigenous populations have the fundamental right to define and control their traditional and cultural knowledge, but provided that as long as the international community guaranteed and upheld this right, they will offer the benefits of their traditional knowledge to all humanity.<sup>21</sup>

**Right to Practice Cultural Traditions**—The promulgation of a Declaration on the Rights of Indigenous Peoples resulted from the United Nations International Year for the World's Indigenous Peoples. Article 12 of the Declaration recognizes the right of indigenous peoples to practice and revitalize their cultural traditions and customs, including the right

... to maintain, protect and develop the past, present and future manifestations of their cultures, such as... artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.<sup>22</sup>

Article 29 of the Declaration further recognizes the entitlement of indigenous peoples “to the full ownership, control and protection of their cultural and intellectual property.”<sup>23</sup> This is the first international

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16. *Id.* preamble.

17. *Id.* art. 1(2).

18. *Id.* art. 23 (recognizing that the right of indigenous peoples to maintain their culture and to achieve economic self-reliance and development is a fundamental human right).

19. *Mataatua Declaration*, *supra* note 12 (listing Japan, Australia, Cook Islands, Fiji, India, Panama, Peru, Philippines, Surinam, and the United States as attendees).

20. *Id.* preamble.

21. *Id.*

22. U.N. Econ. & Soc. Council [ECOSOC], Working Group on Indigenous Populations, *Draft Declaration on the Rights of Indigenous Peoples*, art. 12, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994).

23. *Id.* art. 29.

convention to specifically articulate the cultural rights of indigenous people as integral human rights.

The recognition of cultural rights of indigenous peoples in international human rights documents represents the global shift in perception, acknowledging the dangers of distorting indigenous cultural systems by adjusting them to the prevailing intellectual property regime. Further, it reflects the significance of adequate protection of cultural property to the social and economic lives of indigenous communities. However, despite these efforts to recognize the cultural integrity and cultural autonomy of indigenous peoples as human rights, and parallel attempts by UNESCO and WIPO to protect TCEs through international conventions, the intellectual property of indigenous peoples continues to be vulnerable to misappropriation. This failure of existing intellectual property regimes to protect indigenous interests may be attributed to the fact that intellectual property laws in general, and copyright laws in particular, do not incorporate a human rights understanding in their present form—especially in relation to indigenous populations—and are, in fact, antithetical to a human rights paradigm in many respects.

#### *B. The “Indigenous” in India*

The term “indigenous” describes tribes or semi-tribal populations in independent countries who lived in the country prior to colonization or conquest by immigrants from outside the country or geographical region in question.<sup>24</sup> These populations became increasingly marginalized after the conquest, which gradually led these people to develop particular social, economic, and cultural lifestyles distinct from those of the national mainstream. Due to these distinctive traits, the application of generic domestic legislation does not suit such populations in the present day. Conceptualized in such terms, locating the indigenous in India is difficult. Many *adivasis*,<sup>25</sup> as the indigenous are understood in India, were not the original settlers of the regions in which they are found now. It is also difficult to make the claim that they were the only original inhabitants of India prior to the arrival of Aryans and that they have never migrated.<sup>26</sup> Furthermore, not all of these communities have been marginalized or subjugated by the mainstream population, and the immigrant colonial populations that initially dominated some of these groups are no longer present. Hence there exists significant academic debate in India regarding the usage of the term “indigenous” and corresponding non-recognition of

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24. Xaxa, *supra* note 7, at 3590.

25. The term literally means “the first settlers” in Hindi—the national language of India.

26. Xaxa, *supra* note 7, at 3591.

the same under domestic law. As a result, despite the cultural and intellectual property rights of indigenous peoples finding recognition in international human rights instruments and in specific declarations of indigenous people, the application of these instruments in the Indian context is problematic.

### III. COMMUNITY INTERESTS V. THE COPYRIGHT REGIME: A CLASH OF IDEOLOGIES

In the understanding of aboriginal, indigenous, or native peoples, or the “Fourth World” as some have collectively christened them,<sup>27</sup> intellectual property rights are rooted in a concept of collective or communal intellectual property existing in perpetuity.<sup>28</sup> In other words, such rights are not limited to the life of an individual creator plus some arbitrary number of years after his or her death. To the indigenous peoples, a song, story, icon, or artwork does not belong to an individual but to the group as a collective whole determined by the customary laws of collective ownership of cultural property.<sup>29</sup> Unlike the Western system, regulation of intellectual property creation and use within indigenous groups is not based on notions of individual talent and expression, but instead stems from a system of inherited rights and obligations.

Unlike the Third World, indigenous nations do not constitute “States,” and as a result, they seldom participate on the international stage. Nonetheless, in 1994, indigenous peoples made efforts on an international platform to draft an instrument for the protection of these groups in the form of the *International Covenant on the Rights of Indigenous Nations*, which attempted to articulate a distinctive Fourth World approach to intellectual property rights. Despite this attempt, folkloric rights continue to have no standing in the international courts.<sup>30</sup> Typically, therefore, indigenous peoples have sought to protect folklore under the framework of intellectual property, within which they have considered copyright laws best suited to protect traditional cultural expressions.<sup>31</sup> However, as several

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27. See generally GEORGE MANUEL, *THE FOURTH WORLD: AN INDIAN REALITY* (1974) (using for the first time the term “Fourth World” to define “the indigenous peoples descended from a country’s aboriginal population and who today are completely or partly deprived of the right to their own territories and its riches”).

28. Harry Hillman Chartrand, *Intellectual Property in the Global Village*, 1 *GOV’T INFO. IN CAN.*, 1995, available at <http://library2.usask.ca/gic/v1n4/chartrand/chartrand.html>.

29. *Id.*

30. Posting of Harry Hillman Chartrand to Intellectual Property Law Server, *Copyright And The New World Economic Order*, <http://www.intelproplaw.com/Copyright/Forum/msg/498.shtml> (last visited July 3, 1999).

31. See, e.g., KAMIL IDRIS, *WORLD INTELLECTUAL PROPERTY ORGANIZATION [WIPO], MINDING CULTURE: CASE-STUDIES ON INTELLECTUAL PROPERTY AND*

authors have argued, the copyright regime in its present form is ill-equipped to serve the interests of indigenous communities due to fundamental differences between the Western understanding of “protection” and the indigenous understanding of the same.<sup>32</sup> While indigenous works are not excluded entirely from protection under the present copyright regime, it does not give them any kind of special protection either. As of now, folk music, folk art, and other forms of folklore do not find special mention in any copyright statute in the world.<sup>33</sup> The Indian Copyright Act of 1957 is no different in this regard. As illustrated below, the interests of traditional Indian communities in protecting their folklore clearly differ from the underlying precepts of the existing copyright law.

#### *A. Authorship and Ownership*

Authorship and ownership are distinct concepts under copyright law and ownership of copyright in a work is independent of the ownership of the physical material in which the work is fixed. The basic rule of ownership of literary, musical, or artistic property is that the author<sup>34</sup> is the first owner of copyright in the work.<sup>35</sup> This rule is subject to certain exceptions,<sup>36</sup> none

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TRADITIONAL CULTURAL EXPRESSIONS 10 (2003), available at <http://www.wipo.int/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>; see also *Yumbulul v. Aboriginal Artists Agency Ltd.* (1991) 21 I.P.R. 481. See generally *Milpurrurru v. Indofurn Party Ltd.* (1994) 54 F.C.R. 240 (Austl.).

32. See generally Kamal Puri, *Preservation and Conservation of Expression of Folklore*, in 4 *INTELLECTUAL PROPERTY RIGHTS: CRITICAL CONCEPTS IN LAW* 511 (David Vaver ed., Routledge 2006); Kher, *supra* note 5; G.C. O'Donnell, *A Short Note on Anti-Copyright*, AUSTRALIAN COPYRIGHT COUNCIL (1985).

33. See India Copyright Act, No. 14 of 1957; India Code (1957), § 13.1 (ruling that copyright subsists in: (1) original literary, dramatic, musical, and artistic works; (2) cinematograph films; and (3) sound recordings).

34. See *id.* § 2(d) (defining “author:” (1) in relation to literary or dramatic work, the author of the work; (2) in relation to musical work, the composer; (3) in relation to artistic work, other than a photograph, the artist; (4) in relation to cinematograph film, the producer; (5) in relation to photograph, the person who takes the photograph; (6) in relation to sound recording, the producer; and (7) in relation to any literary, dramatic, musical, or artistic work, which is computer-generated, the person who causes the work to be created); see also 9 HALSBURY’S LAWS OF ENGLAND 548 (Butterworths, 4th ed. 1973) (defining “author” as the person who actually writes, compiles, composes, or draws the work in question, although the idea of the work may have been suggested by another).

35. India Copyright Act, No. 14 of 1957; India Code (1957) § 17.

36. See *id.* § 17(a)-(c) (stating the following exceptions to the author as first owner of copyright rule: (1) literary, dramatic, musical or artistic works made in the course of employment under a contract of service or a contract for service; (2) artistic works and cinematographic films made at the instance of any person or as against valuable consideration; (3) speeches delivered in public; and (4) government works and public works); see also *Vicco Labs v. Art Commerica Adver. Pvt. Ltd.* (2001) 7 S.C.C. 81, 93 (India) (asserting that, in India, copyright or ownership rights in respect of any work created by another can be claimed only when the author creates it either in the course of employment, as an agent, at the instance of the claimant, or if the claimant has paid

of which apply in the case of indigenous folklore. This basic rule is in stark contrast to customary practices of native artisan communities because indigenous artists traditionally do not sign their work.<sup>37</sup> According to customary indigenous laws, a work created by one member usually is owned by the entire tribe or group, through an operation of collective ownership.<sup>38</sup> The concept of “joint authorship” does exist in Indian copyright law,<sup>39</sup> but one cannot apply it in the case of indigenous cultural property because such works are usually not a collaborative effort in which the contribution of one author can be separated from the other, but instead, it is something of a cumulative knowledge that finds expression over generations.

In India, one example of blatant misappropriation of traditional communities’ intellectual property is that of clothing and draperies made by rural women using the *kantha* needlework. The misappropriation takes place as a consequence of the inadequate protection afforded by the copyright laws of the country. The *kantha* originated as a form of rough embroidery on blankets made of varying sizes and pieces of cloth held together by the simple running stitch for wrapping or laying down new born babies or as a wrap for adults. Rural women outline patterns in black chain stitch and then fill in with running stitch in a different color.<sup>40</sup> *Kantha* motifs traditionally reflect rural scenes, such as birds, flowers, wedding ceremonies, mythologies, and legends. The variation in style comes with the different ways in which the artists embroider the running stitch. Even today the stitching pattern and embroidery styles of *kantha* weavers in Bangladesh and West Bengal are significantly unique and identifiable. That speaks for the levels of sophistication of the art.<sup>41</sup> A cultural expression generated exclusively by women, *kantha* was never made for money, and its commercial use is a recent phenomenon.<sup>42</sup> Gradually, entrepreneurs from urban Bengal recognized the market for such ethnic goods and started buying the products from rural households. Several urban groups trained rural women in this craft who had little or no urban education and, over the course of time, it became a form of gainful

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valuable consideration for the said work).

37. Puri, *supra* note 32, at 522.

38. *Id.*

39. See India Copyright Act, No. 14 of 1957; India Code (1957), Preliminary § 2(z) (defining “work of joint authorship” as a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of other author or authors).

40. JOHN GILLOW & BRYAN SENTANCE, *WORLD TEXTILES* 163 (2005).

41. See generally Ulan Switucha, *Nakshi Kantha – A Study Group Presentation*, 12 *TEXTILE SOC’Y OF HONG KONG* 7 (Summer 2004).

42. SashaWorld.com, *Kantha*, <http://www.sashaworld.com/family/kantha.htm> (last visited Oct. 31, 2007).

economic employment for these women.<sup>43</sup>

The flip side of this development, however, is that women have lost control over the entire craft of *kantha*. It gradually has emerged as an industry wherein urban designers and traders determine virtually every detail from designs and color schemes to marketing. Women now produce on a mass scale and also cater to specific demands made by an urban upper middle class clientele. *Kantha* embroidered apparel and artifacts exported on a global scale by government agencies and private entrepreneurs showcase Indian culture, but with heavy costs. Women producers not only receive a mere fraction of the huge profits, but traditional motifs and styles of stitching that typified *kantha* are giving way rapidly to urban designs. Fortunately, the art does not run the risk of dying. On the contrary, *kantha* products remain extremely popular. In this case, the crux of the problem is that the women who produce the products do not sign their work, in accordance with tradition. With the author of the work unknown, it becomes impossible to protect the interests of such authors under the existing copyright regime because first ownership of copyright devolves upon the author of the work, to whom all economic rights flowing from the copyright then accrue. As a result of this artistic non-recognition, *kantha* artisans are reduced to mere trained weavers producing made-to-order products. Under the existing copyright regime, women of rural Bengal cannot conceive of claiming ownership rights over this artistic expression and have to be satisfied with minimal economic gains.

### B. Originality of Expression

The requirement of originality that exists in copyright law<sup>44</sup> creates another hurdle for the protection of traditional cultural expressions within this system. Indian copyright statutes do not define the term “originality;” however, judicial opinions indicate that copyright’s standard of originality relates to the expression of creative thought, and not to the thought itself.<sup>45</sup> While qualification as an “original composition” does not entail confining the work to a field that has not been traversed hitherto by any other person, such work must not appear to be copied from another work, and must clearly originate from the author.<sup>46</sup>

However, any form of folklore usually draws from pre-existing tradition

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43. *Id.*

44. India Copyright Act, No. 14 of 1957; India Code (1957) § 13.1.

45. See 9 HALSBURY’S LAWS OF ENGLAND ¶ 831 (Butterworths, 4th ed. 1973) (“Copyright Acts are not concerned with the originality of ideas, but with the expression of thought”); see also *R.G. Anand v. M/S. Deluxe Films*, A.I.R. 1978 S.C. 1613, 1618; *Univ. of London Press, Ltd. v. Univ. Tutorial Press, Ltd.* [1916] 2 Ch. 601, 608 (U.K.).

46. *Univ. of London Press*, [1916] 2 Ch. at 609.

and, in fact, folkloric works fundamentally are based on, and gain value from, the transmission of themes from one generation to another. Unlike the testing for novelty in patent law, the requirement of originality for copyright protection is significantly more complex to establish. Generally, courts seek to determine two factors: first, the work must emanate from the author and not be a copy,<sup>47</sup> and second, the author must have exercised a modicum of “skill, judgment or labor in making the compilation.”<sup>48</sup>

Nonetheless, these tests cannot be applied universally, and the requirement of originality operates differently in the context of artistic works, where it would be “palpably erroneous” to apply the “skill, labor and judgment” standard.<sup>49</sup> When measured against the foregoing analysis, it appears that indigenous cultural expressions may not meet the traditional requirement of originality of expression as it is understood under classic copyright law. For instance, depictions of events and characters drawn from Hindu mythology form recurring themes in most *Madhubani* paintings in India. The expression of these themes, for which protection is sought under copyright law, involves the use of specific techniques common to all *Madhubani* artists, techniques that characterize *Madhubani* art and impart to it its exotic uniqueness.

*Madhubani*, which literally means “forest of honey,” is a small village in India in the northern part of the eastern state of Bihar. The distinctive painting style developed by local indigenous artists from that area came to be known by the same name.<sup>50</sup> The painters use a completely natural process involving paper treated with cow dung and natural colors.

Most *Madhubani* painters are women, and it is through these paintings that they keep alive their unique local customs, folklore, and traditions.<sup>51</sup> Women across castes create these paintings, which has given rise to distinctive schools within the *Madhubani* community—such as Brahmin, Kayasth, and Tatoo, each of which has its peculiar color schemes, motifs, and formats.<sup>52</sup>

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47. See *id.* (explaining that the Copyright Acts require that a work originates from the author).

48. *Ladbroke (Football) Ltd. v. William Hill (Football) Ltd.*, [1964] 1 All E.R. 465, 469 (H.L. 1964).

49. *Interlego A.G. v. Tyco Indus. Inc.*, [1989] A.C. 217 (P.C. 1988) (appeal taken from H.K.).

50. See generally YVES VÉQUAUD, *THE WOMEN PAINTERS OF MITHILA* (Thames & Hudson 1977) (providing a detailed history of *Madhubani* art); MULK RAJ ANAND, *MADHUBANI PAINTING* (Ministry of Information & Broadcasting, Gov't of India 1984).

51. See JYOTINDRA JAIN, *GANGA DEVI: TRADITION AND EXPRESSION IN MITHILA PAINTING 9* (Grantha Corp. 1997) (discussing prominent women artists who gained repute for creating *Madhubani* paintings on paper including Ganga Devi, Mahasundari Devi, Sita Devi, and Bani Devi).

52. See VÉQUAUD, *supra* note 50, at 25-31 (noting the differential use of colors that distinguishes the work of women from different castes). The tradition of one Indian

The art is intertwined with the religious beliefs of the communities as the paintings originally were created exclusively by women on the mud walls and floors of their homes during various auspicious occasions, mainly wedding ceremonies. It was only later, around 1966-1968, that women began to commercialize their art.<sup>53</sup> Women started painting on handmade paper, which was easily available, and the commercial potential of *Madhubani* gradually was realized.<sup>54</sup>

Because the *Madhubani* technique primarily involves the use of line drawings filled in with natural dyes, such designs are comparatively easy to replicate. For this reason, cheap copies of such paintings made on plain paper with chemical color have flooded the market, to the extent that they are now even replicated on a variety of household goods and apparel. These copies are painted by anyone but the authentic *Madhubani* women painters, and in some cases are machine-printed and mass-produced. Yet even as their cultural expressions are expropriated and exploited in the market, the original *Madhubani* women remain unknown, with no legal claim over their intellectual property and no legal recourse to prevent the wrongful commercial exploitation thereof.

### C. Fixation and Moral Rights

Copyright laws preclude copyright protection for oral works, which can only be granted when the work is “fixed” in material or tangible form.<sup>55</sup> But many forms of TCEs exist only in the form of the collective memory of indigenous groups—e.g., folk songs and folktales. Although the real

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caste, the Kayastha, consists of paintings in just black or deep red, which is the unique feature of this school. *Id.* The Kayastha style basically emerged from the practice of creating elaborate wall paintings in nuptial chambers. *Id.* Traditional motifs include representations of the lotus plant, bamboo grove, fish, tortoises, parrots, birds, and all that symbolize fertility. *Id.* Even when conceived on paper, single color line work continues to define the Kayastha style of painting today. *Id.* Unlike the Kayastha, the Brahmin style of painting deals lavishly with a rich variety of colors. *Id.* As the uppermost caste, their easy access to sacred Hindu literature enables the rich portrayal of Hindu iconography and mythology. *Id.* The Brahmin tradition mainly deals with themes of gods and goddesses and magical symbols connected with deities. *Id.* This school usually uses pigments on paper for their art. *Id.* The Tattoo-based paintings reflect a more primitive art and create impact by a serial replication of the same image. *Id.* The painting is originally in the form of a line-drawing and is divided into several horizontal margins. *Id.*

53. See JAIN, *supra* note 51, at 24.

54. *Id.* at 31.

55. See, e.g., India Copyright Act, No. 14 (1957); India Code ch. 1 § 2(h) (1957) (recognizing a fixation requirement by implication in defining “dramatic work” as “any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is *fixed in writing* or otherwise . . .”) (emphasis added); see also *id.* Ch. 1 § 2(p) (defining “musical work” as “a work consisting of music and includes any graphical notation of such work but *does not include any words or any action intended to be sung, spoken or performed with the music*”) (emphasis added).

content of the song or stories is relatively unchanged through generations, it does not have any fixed form. These oral works present another inherent contradiction with modern copyright because one of the central tenets of copyright law is that ideas and themes are not protected, but only the expression thereof.<sup>56</sup> Nor are artistic techniques protected by copyright.<sup>57</sup> The *Madhubani* painting style or the special stitching technique of the *kantha* weavers cannot be afforded copyright protection under the domestic copyright law of India.

The problems posed by the fixation requirement in the copyright regime are illustrated most starkly through cases of folk music expropriation. In 1954, the International Folk Music Council defined folk music on the basis of three principles identified by Cecil Sharp, evolving from the properties of oral transmission. The factors that determine the tradition of folk music are (1) continuity of the present with the past, (2) variation emanating from the creativity of the individual or group, and (3) selection by the community that determines the forms in which the music develops.<sup>58</sup>

India has a rich repertoire of folk music, evident from the sheer variety of musical forms in each region of India. Nearly all of the traditional and indigenous Indian communities have their own distinct musical genre, deriving unique characteristics from language, specific expressions, themes, use of musical instruments, and musical styles. The distinctiveness of folk songs derives from their regional specificity. Particular ethnic groups within a geographical location have their own dialect, intonation, and music style. Folk songs are created most often by the community as a whole and are not authored by an individual.

There are two distinctive features of folk music: first, the lyrics and the music of a song are set by the same person, and second, the music is essentially communitarian. Folk songs are ever changing, but this change must be brought about by the community itself, not by urban outsiders, because the latter might lead to the distortion of such music. For example, folk music uses certain instruments, and if they are changed to render the

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56. This principle can be traced back to the decision of the U.S. Supreme Court in *Baker v. Selden*, 101 U.S. 99 (1880), and is embodied today in the U.S. COPYRIGHT ACT, 17 U.S.C. § 102(a) (2006). On this point, the Supreme Court of India observed that there can be no copyright protection for an idea, subject matter, thesis, plot, or historical or legendary facts, and infringement of copyright in such cases is confined to the form, manner, arrangement, and expression of the idea by the author of the copyright protected work. See *R.G. Anand v. M/S. Deluxe Films*, A.I.R. 1978 S.C. 1613.

57. See *Interlego A.G. v. Tyco Indus. Inc.*, [1989] A.C. 217 (P.C. 1988) (appeal taken from H.K.) (holding that a piece must emanate from the author, and bear a minimum amount of skill, labor, or judgment in order to meet the requirements of “originality”).

58. H. BISWAS, *LOK SANGIT SAMIKSHA: BANGLA O ASSAM* 33 (A. Mukherjee & Company Private Ltd. 1978).

music urban and sophisticated, the rural flavor of such songs is distorted.<sup>59</sup> While each region has distinctive forms, there is no watertight divide and, more often than not, songs sung in one part of the region spread over time to other neighboring areas. Various subtle changes occur in this process of cultural exchange and assimilation, as most folk songs do not follow strict codes of grammar and composition. Folk music thus reflects peoples' lives in all its shades, as well as the fluidity of culture.

*Baul*, *Bhatiali*, *Bhawaiya*, *Jhumur*, and *Chotka* are just a few among the many musical forms that exist in the region of Bengal alone, and further stylistic variations are found within each form. *Baul* songs are some of the most popular folk songs prevalent in West Bengal and Bangladesh. *Bauls* are a syncretic religious sect and come from the lower castes of Bengal. Their songs use symbolism and have mainly a devotional character. The *Baul* is like a wandering mendicant who goes around for alms. The songs reflect spiritual quests and are a medium through which the *Baul* seeks salvation. Even the love songs express more spiritual, rather than sensual, love.<sup>60</sup>

Primarily the fishing communities of Bengal and Bangladesh sing *Bhatiali*. They are songs of everyday joys and woes. Though it is sung in these areas, the form, style, and intonation of the singing vary from one locality to another, exemplifying the rich variation that exists in each genre of folk music.<sup>61</sup>

*Bhawaiya* is prevalent in the Goalpara district of Assam, a northeastern state of India; Jalpaiguri, Cooch Bihar, and West Dinajpur of West Bengal; and the Rongpur, Dinajpur, and Mymensingh districts of Bangladesh. Sorrow and pain of separation from loved ones are the central themes of *Bhawaiya* songs. The rhythm of *Bhawaiya* is always very slow, and the tune reflects the heart-wrenching pain of a woman separated from her lover, which becomes the identifiable feature of these kinds of songs. While most songs revolve around extramarital love, some songs also reflect the woman's love for her husband.

Like most folk music, the songs spread and develop through oral transmission. Parts of one song are added to another, or a particular song is changed or expanded.<sup>62</sup> *Jhumur* songs, originally evolving from the Oraon and Munda tribal communities of the Chotanagpur region of eastern India, are very popular. *Jhumur* is also sung by the Oraon, Munda, Bhumija, and Santhal tribals who worked as plantation laborers in the tea gardens of

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59. *Id.* at 17-21.

60. Sanat Kumar Bose, *Bāul Songs of Bengal*, 1 *FOLKMUSIC & FOLKLORE* 46, 48 (1967).

61. BISWAS, *supra* note 58, at 19.

62. *See generally* H. PAL, *UTTAR BANGLAR LOKGEETI* (Sanyal & Company 1973).

Assam in eastern India, established by the British during the colonial period. Accompanied by dance, these songs, with their fast rhythms, are very popular even today, and many different variations of *Jhumur* are prevalent.<sup>63</sup> *Chotka* songs are based on fast rhythms and the themes are mainly of humor, satire, and fun. They have a huge appeal in traditional communities.<sup>64</sup>

Folk music is a reflection of the culture and development of any society. For example, in patriarchal societies, women have very little say in decision-making. Their interests and opinions are marginalized continuously. A number of folk songs in eastern India often reflect these conditions. Sung from the perspective of a woman, these songs of love, separation, and desire to fulfill an extramarital love affair protest against patriarchal norms.<sup>65</sup> The extramarital relations symbolize freedom from strict social constraints.

While they are not a direct criticism of patriarchy, the love songs, in both their erotic and non-erotic forms, are definitely a subversion of established social normative values. However, few songs directly criticize the Hindu female mythical figures of *Sita*, *Sati*, and *Savitri*, who are held in high esteem for their archetypal roles as the ideal wife. Furthermore, not all love songs sung by women in this region of India revolve around extramarital love. There are some very passionate songs that reflect a wife's deep love for her husband.<sup>66</sup>

Though both women and men practice folk music, there are specific songs sung only by women during various festivals and ceremonies. Wedding ceremonies are a major occasion when women in groups create songs. Women also create lyrics, set the tune, and sing various songs during harvest seasons; these harvest season songs are mainly religious, invoking the nature gods for better fertility and harvest. Songs of *Hukum Deo*, or "worship," are sung to invoke the rain god during times of drought when women congregate in open fields and dance nude, their gestures symbolic of the acts of sexual intercourse. The *KatiPuja* worship is another ceremony to pray to the gods for begetting male sons as well as a better harvest. Women exclusively perform all of these songs and male entry is barred.<sup>67</sup> A number of songs also reflect women's protest against the practice of giving dowry to the bridegroom during a wedding. The articulation of protest by women against the institution of marriage takes

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63. BISWAS, *supra* note 58, at 85.

64. H. Chakraborty, *Introduction* to H. Pal, *supra* note 62, xiv.

65. J. BAGCHI, ITIHASHER BIKKHANE: COOCH BIHAR O GOALPARAR LOKSANGEET 162 (Raktakarabi 2001).

66. K. DASGUPTA, MOR BANDHU KAJALBHOMRA 10-16 (Thema 2007).

67. BAGCHI, *supra* note 65, at 162-64.

the form of complaints and condemnation of the bride against her parents, the pain of being separated from the natal family on marriage, the sense of being cheated when a young girl is married off to an old man, the distress of a newly wed bride in her new home.<sup>68</sup> Mainstream culture realizes the enormous market potential for such music and the folk music industry now has quite a lucrative market in India. While both men and women folk singers are not given their due recognition, the plight of women singers is far more pervasive. Several singers and music bands collect these songs, and within a short span of time they are on the market with glossy CDs and funky visual albums. Copyright laws in India provide no protection against such misappropriation.<sup>69</sup> Phrases are changed, new rhythms are set, modifications are made, and the original music is repackaged in a new but identifiable form.

While similar processes of exchange and fusion of music take place the world over, the case of folk music misappropriation is significantly different because of the multiple levels at which exploitation takes place. Like several other TCEs in India, folk music originated in agrarian economies, reflecting the lifestyles and concerns of the laboring masses. While modern capitalism is not regarded as the ideal context for folk music to develop and prosper, the folk music industry today seems to have a strong hold in popular culture. From mainstream cinema to the urban folk bands, the use of folk themes and music is made blatantly without any recognition to the communities who developed the same. This has led to the generation of what Eisler calls the “false folk music.”<sup>70</sup> While the genuine folk music was created several centuries ago by people themselves, the false folk music arose much later in capitalism, and failed to reflect the pleasure, pain, and struggle of the masses. Rather, the modern entertainment industry “borrowed” the idiom of such music and presented it in a coarser and distorted form.<sup>71</sup> Not only is this new form kitsch, most

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68. BAGCHI, *supra* note 65, at 165-67; *see also* DASGUPTA, *supra* note 65, at 10-16.

69. *See* Star India Pvt. Ltd. v. Leo Burnett (India) Pvt. Ltd., (2003) 27 PTC 81, 94 (India) (holding that while in the case of reproduction of copyright-protected literary, dramatic or artistic works, the existence of minor alterations or additions by the defendant will not defeat the plaintiff’s claim of infringement). However, the High Court of Bombay has held that the making of a film or sound recording despite resembling completely a copyright-protected film or sound recording, would not infringe copyright in the latter, provided it has not been made by a process of duplication, that is, by using mechanical contrivance. *Id.* Therefore, if a sound recording has been made by a person, mere resemblance to an earlier recording would not amount to infringement of the latter. *Id.*

70. *See* HANNS EISLER, A REBEL IN MUSIC 98-99 (1978) (noting that there are two types of folk songs, genuine and false, and that the genuine folk songs have extreme value to a society’s culture).

71. *See* Chaplin v. Leslie Frewin (Publishers), Ltd., [1965] 3 All E.R. 764 (Ct. of App.) (finding that the author’s right to prevent unauthorized derivations of the work or adaptations that go beyond what was authorized, the “right of integrity,” has been

new urban folk music has destroyed the basic philosophy and spirit of the genuine folk music. Several folk songs reflected struggles in addition to direct and indirect protests of the working populace against exploitation by landlords or middlemen. Recognizing its mass appeal and commercial worth, the urban entertainment industry has appropriated such music. Changes in lyrics and rhythms suited to the urban audience strip most of the songs of their histories and politics of struggle. This hybridization fossilizes folk music because songs are no longer meant to reflect concerns of the traditional communities, but only to entertain.

The point is not to oppose creativity and borrowing of musical resources by musicians and to reach out to a new audience in urban India. The question is at what cost this is done? While the music industry reaps substantial profits with reinventing folk music, there is absolutely no recognition and acknowledgement of its sources. Music albums often cite only the traditional musical form and there are no details of the community, artist(s), or folk history of the songs or music. However, because the original folk tune or song is rarely, if ever, recorded or embodied in any material form, besides in the collective memory of the community that created it, no action can be brought under the presently existing copyright law of India. In keeping with international norms, copyright law in India also requires that in order to be eligible for copyright protection the work must be fixed in material or tangible form. Therefore, despite identifying the problem, folkloric rights of indigenous musicians in India cannot be safeguarded under the existing regime.

This leads us to the second level of misappropriation after non-acknowledgement, which is the absence of any economic returns to the community. One could argue that because the community generates folk music, it is difficult if not impossible to locate specific recipients of any economic returns. For example, *Bhatiali* is a particular genre of folk song that originated from the traditional fishing communities of West Bengal and Bangladesh. If such a song is sung by an urban folk band or used as a musical score in a film, is it possible to duly distribute economic returns to the several fishing communities that developed it? Understanding that, while determination of the community or specific recipients within it might be an uphill task, hardly any such effort has been evidenced in India. Thus, as folk music is put to commercial use in the entertainment industry, the traditional and indigenous communities who are the owners of the specific cultural expression remain unrecognized and devoid of any material

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judicially recognized in the United Kingdom); *see also* Pasterfield v. Denham, [1999] F.S.R. 168, 179 (CC (Plymouth)) (U.K.) (stating that to succeed in a claim for derogatory treatment of a work, the author must establish that the treatment accorded to the work was a distortion or mutilation that prejudices the reputation of the author; it is insufficient that the author is merely aggrieved by such treatment).

returns.

Finally, at the third level is the question of moral rights violation.<sup>72</sup> It is not enough to pay monetary compensation to the community—which is hardly ever done, in any case—and then use their music indiscriminately. There is a need to delineate the difference between improvisation of folk and its distortion. As discussed earlier, to de-historicize and deny the fluidity of folk music is tantamount to distortion. The urban middle class audience appreciates such music as presented to them in its new form and package but they hardly have any links, a sense of belonging or resonance, with the traditional communities who evolved the music. Thus, traditional or indigenous communities remain the exotic “other,” the faceless masses with whom the urban elite or middle class have no connection. This disjunction between people and their culture is dehumanizing and raises ethical questions. Is it not an imperative on the part of the music industry to protect the cultural and intellectual property of traditional and indigenous communities, and to morally and materially recognize their contribution to our rich musical folklore notwithstanding the several hurdles in the social and legal determination of such communities?

#### *D. Duration of Protection*

In determining the duration of protection, copyright law seeks to balance two public interests. The first is encouraging innovation through the creation of new works, while the second involves making such works accessible to the public to the widest possible extent, thus implying that the work in due course should fall into the public domain.<sup>73</sup> Traditionally, the term of copyright protection for a work covered by the law varies among jurisdictions, but is normally life and an additional fifty to seventy years.<sup>74</sup> It is pertinent to note that the period of protection as well as the way in which the term of protection is calculated changes according to the nature

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72. See India Copyright Act, No. 14 of 1957; India Code (1957), § 57(a)-(b) (recognizing the moral rights of the author of a work, through the rights of paternity and integrity, and allowing an author: (1) to claim authorship of the work; and (2) to restrain or claim damages in respect of any distortion, mutilation, modification, or other act in relation to the work which is done before the expiration of the term of the copyright, if such distortion is prejudicial to the honor or reputation of such author).

73. See LIONEL BENTLEY & BRAD SHERMAN, INTELLECTUAL PROPERTY LAW 142-46 (2d ed. 2004).

74. See India Copyright Act, No. 14 of 1957; India Code (1957), §§ 22-29 (prescribing the term of protection for each kind of work: in case of literary, dramatic, musical, or artistic work (other than a photograph), when published within the lifetime of the author, copyright subsists during the lifetime of the author until sixty years from the beginning of the calendar year next following the year in which the author dies; in cases of anonymous works and posthumous works, the term is sixty years from the beginning of the calendar year next following the year in which the work is first published).

of the work in question. This is a reflection of the fact that different interests and policy concerns arise with different categories of works. However, considering the cultural and religious significance of ancestral indigenous designs and folklore, which have been created through thousands of years of accumulated knowledge, this is an entirely insignificant duration. As a consequence of this limitation in copyright law, members of traditional communities responsible for developing and sustaining expressions of folklore like *kantha*-stitch, *Madhubani* art, or folk music, who in the traditional context would be the owner of such cultural property, gradually are becoming culturally dispossessed and impoverished to the point that they may even need to seek permission to use or have access to traditional cultural expressions once owned or created by their ancestors.<sup>75</sup> Therefore, it is apparent that the existing regime of intellectual property protection is insufficient to safeguard traditional cultural expressions, keeping in mind the socio-cultural variations between the Western and indigenous communities in mind.

#### IV. RECOGNIZING WOMEN'S INTERESTS WITHIN TRADITIONAL COMMUNITIES: THE INDIAN CONTEXT

This section analyzes the extent to which intellectual property and human rights laws protect interests, rights, and control of women over their cultural property. Cultural feminism argues that there are differences between the masculine and feminine ways of reasoning.<sup>76</sup> According to Donovan, contemporary cultural feminists believe that women's world views create the basis for a more humane collective world view that can resist destructive and individualistic masculine ideologies.<sup>77</sup> Shiva argues that women in India are connected intrinsically to nature and are the providers of sustenance. Their role in preserving nature and acting as caregivers to the community has a historical and cultural, not merely a biological, basis.<sup>78</sup> Contemporary cultural feminism is far more sophisticated and has moved far beyond the assumption of a reformist and pacifist nature of women as understood by the nineteenth century cultural feminists.<sup>79</sup> In the legal context, cultural feminism calls for the

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75. See, e.g., Puri, *supra* note 32, at 526-27 (highlighting the problems caused by the limited copyright protection that dispossesses descendants of their ancestors' creations as a reason to extend copyright protection in perpetuity).

76. REBECCA COOK, HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 5-6 (1994).

77. See JOSEPHINE DONOVAN, FEMINIST THEORY: THE INTELLECTUAL TRADITIONS 77 (Continuum Int'l Publishing, 3d ed. 2000) (1985).

78. VANDANA SHIVA, THE WOMEN, GENDER AND DEVELOPMENT READER 62 (Nalini Visvanathan ed., Zed Books 1997).

79. See DONOVAN, *supra* note 77, at 77.

identification of a distinctive women's voice and a re-evaluation of the contribution it can make to legal doctrine.<sup>80</sup> Such an approach enables the law to move beyond a formal non-discrimination model and recognize women's differential location in society. This celebration of differences, however, may lead to a marginalization of women's rights. On one hand it can lead to a reassertion of women's location in the private sphere, but on the other it can mean that their needs are different from men and hence entitled to lesser resources. The creation of a specialized branch of "women's rights" within human rights discourse has also led to a ghettoization of women's rights as "mainstream" human rights law tends to ignore a gendered understanding of human rights violations or fails to apply human rights norms to condemn atrocities against women.<sup>81</sup>

The previous sections have demonstrated the lack of any domestic legal regime in India that could protect the cultural rights of traditional and indigenous communities. It is further argued that even if the intellectual property rights regime protected TCEs, traditional knowledge and cultural expressions of women would still remain unrecognized. The reason is two-fold. A feminist understanding of traditional and rural Indian communities would reveal their patriarchal nature. Elderly males represent most communities in India, silencing women's voices and undermining their contributions. Women's cultural expressions have no specific recognition within the communities. Within the traditional communities of eastern India, the *kantha* industry is conceived merely as a workable employment avenue and not necessarily a cultural expression protected and developed by women. On the other hand, *Madhubani* and women's folk music is simply symbolic of women's participation in the religious and cultural life of the community and considered as a "natural" extension of their gendered roles. Communities may be unprepared to accord the status of artists to their women. Coupled with a patriarchal social set up, the world view of a communitarian existence is in conflict with the idea of individual recognition, more so when the recipients of such recognition are women. This is not to deny that over a course of time, with some state intervention to protect the rich cultural heritage of several communities in India, a few women have been recognized as *Madhubani* artists or folk singers. But on the whole women's contribution to the protection and maintenance of

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80. Hilary Charlesworth, *What Are "Women's International Human Rights"?*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 65 (Rebecca Cook ed., 1994) (stating that this area of legal feminism is the counterpart for other disciplines, such as feminist theology and women's literature).

81. See HILARY CHARLESWORTH & CHRISTINE CHINKIN, *THE BOUNDARIES OF INTERNATIONAL LAW: A FEMINIST ANALYSIS* 218 (2000) (highlighting that the specialization of women's rights within the field of human rights has made protection of women a lower priority in the mainstream human rights discourse).

cultural heritage is not given its due recognition. In such a scenario, if intellectual property rights seem to be a solution, the feasibility and suitability of such a regime does remain a question. Even if the intellectual property rights regime ensured economic returns to the community, women would have little control over the economic benefits in a deeply hierarchical and patriarchal society.

Secondly, intellectual property regimes are often based on values of individualism and competition operating primarily in a market economy. Often understood as masculine values, most women, especially in rural India, would hardly subscribe to these values and would not possibly think of using the law upholding individual or corporate claims to protect their individual rights. To use a cultural feminist approach, in a cultural context where women's lives are primarily relational, an individualistic claim over resources is perhaps not the ideal mechanism to acknowledge and safeguard the contributions and interests of women within their communities. Presently there is no recognition of authorship, authenticity, and economic returns to the community within the existing intellectual property regime in India. Even if India created a workable intellectual property regime protecting such traditional cultural expressions by establishing a moral obligation on part of individuals and companies that use TCEs, it is doubtful whether women would benefit from such legal developments. Even if we assume that a strong intellectual property regime would ensure economic returns to the community, there is little guarantee that women would be able to control the process.

A human rights perspective is better equipped to recognize the economic, social, and cultural rights of indigenous peoples and traditional artisan communities than a narrow framework of intellectual property rights. Traditional and indigenous communities in India face double marginalization due to the lack of any intellectual property regime protecting traditional knowledge and cultural expressions and the non-recognition of indigenous populations by the Indian state. For women, the marginalization greatly increases. While the intellectual property regime has limited applicability in the protection of women's cultural expressions, the mainstream human rights framework also fails to reflect a gender perspective; as a result the interests of women in indigenous communities are neglected even further. Traditional human rights law is based on a formal non-discrimination model that does not take the structural disadvantages of women into account. Human rights law has been primarily operative in the public sphere while most women's lives take place in the private sphere where significant human rights violations take place, resulting in a lack of understanding of the systemic nature of subordination of women in human rights law. This failure to characterize the subordination of women as a human rights violation leads to a

lackadaisical approach on the part of the State to condemn discrimination against women.<sup>82</sup> Feminists have argued that while advocacy and campaigns for legal rights is an important strategy, it is imperative to go beyond this demand and address structural inequalities of power. Charlesworth argues

women's experiences and concerns are not easily translated in to the narrow, individualistic language of rights; rights discourse overly simplifies complex power relations and their promise may be thwarted by structural inequalities of power; the balancing of "competing" rights by decision-making bodies often reduces women's power . . . .<sup>83</sup>

According to Coomaraswamy, the women's rights discourse in south Asia is weak. Poor implementation coupled with a lack of awareness prevents the rights machinery from becoming a viable tool for the empowerment of women.<sup>84</sup> More importantly, rights discourse is often considered to be a Western hegemonizing dialogue and has little resonance in the cultural context of south Asian societies. International debates over universality of rights language between the global north and certain countries of south Coomaraswamy warns us against the "orientalist trap" of two kinds of binaries—the first is that of the progressive, individualistic West vis-à-vis the backward East and the second is the reverse argument of the communitarian, non-adversarial and therefore superior Eastern cultures that do not uphold individualistic concepts of rights. Coomaraswamy asserts that the prevalence of both traditions of mediation and reconciliation, as well as adversarial systems in South Asian societies<sup>85</sup> go a long way to strengthen a culture of women's rights. However, in a context where there is ideological and social resistance to "rights culture," articulating social and economic demands in terms of rights might be extremely difficult for women. All these factors are impediments in claiming moral and material returns for cultural creativity of women. For women who create the *kantha*, *Madhubani*, or folk music, these expressions are intrinsic to their survival as a community. Individual

82. See DONOVAN, *supra* note 77, at 4-15; see also Charlesworth, *supra* note 80, at 60-64 (arguing that the formulation of equal rights may be a useful first step towards improving the position of women).

83. See Charlesworth, *supra* note 80, at 61 (stating that a continuing focus on achieving more rights may not be beneficial to women due to androcentric construction).

84. See Radhika Coomaraswamy, *To Bellow Like a Cow: Women, Ethnicity, and the Discourse of Rights*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 41-42 (Rebecca J. Cook ed., 1994) (remarking that it is important to adapt international conventions so they resonate with the anthropological reality in Asian societies so they can be used to improve the rights of women).

85. See *id.* (identifying that the approach to women's rights is often couched in ambiguity in the Asian world by both assuming and denying responsibility for the mistreatment of women at the same time).

recognition as artists is often inconceivable for these women. The point is not to argue for individual artistic recognition, but to realize the worth and potential of women as chief custodians and creators of traditional cultural expressions that is undermined by the patriarchal societal structures of the family and community, the market that expropriates traditional knowledge and cultural expressions, and finally the mainstream legal system that remain gender insensitive in its garb of gender neutrality.

For many poor indigenous communities in India, life is an everyday struggle for survival. In a situation of complete absence of intellectual property laws, expropriation of their knowledge and cultural expressions has absolutely no legal remedy. Establishing an intellectual property regime that would adequately protect these communities is necessary. But a mere set of new laws would be of little relevance without an in-depth understanding of the power dynamics in society. An intellectual property regime tailor-made for the benefit of corporations is incapable of protecting indigenous rights. Incorporation of a human rights perspective within the intellectual property regime is essential if the rights of traditional and indigenous communities are to be upheld. However, as argued earlier, neither regime reflect a gendered understanding. While some feminist critiques of the rights discourse are available,<sup>86</sup> “mapping the connections”<sup>87</sup> between gender and intellectual property is rare. Therefore, it is not enough to simply argue for the creation of an intellectual property regime in India, but to first assess its ability to adequately protect rights of traditional and indigenous communities. It is also important to understand the multiple layers of exploitation within the family, the community, by the state, and by the market that prevent women from claiming social, economic, and cultural rights. This is not to imply that rural and indigenous women are victims without any agency, but to recognize the wide gap between the existing intellectual property and human rights regimes, and their dissonance with the experiences in which women live their lives.

## V. CONCLUSION

The international intellectual property regime in place today reflects a purely Western understanding of authorship and ownership of intellectual property, valuing individual rights above collective or group rights. It is based entirely on Anglo-Saxon principles, consequently seeking to ensure economic interests at the cost of cultural interests. Domestic legislations

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86. See generally HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES, *supra* note 84; GENDER AND HUMAN RIGHTS (Karen Knop ed., 2004).

87. See “IP/Gender: The Unmapped Connections,” Conference held by the American University, Washington College of Law (Mar. 2007).

based on this system are similarly ill-equipped at ensuring the protection of TCEs within the national framework. In the Indian context, the Copyright Act of 1957 is conceptually inadequate to secure the intellectual property rights of traditional communities that are repositories of folklore, and is failing miserably in protecting these communities from daily expropriation of their cultural and intellectual property. In light of the blank canvas that presently exists in the area of statutory protection of folklore in India, specific legislation to safeguard traditional knowledge and traditional cultural expressions is essential.

However, the creation of a regulatory framework in the statute books is merely the first step of many. The establishment of an effective institutional framework accompanied by widespread societal change is needed if traditional communities like the *kantha* weavers, *Madhubani* painters, or custodians of folk music are to be accorded meaningful protection within the Indian legal system, particularly in cases where the rights of women are at stake. For this, there is an urgent need to set up an autonomous institution in India with members ranging from art experts, academicians, policy consultants, lawyers, women, and human rights activists to members from civil society who could draw up a holistic plan with a gender focus to protect economic and cultural rights of traditional communities, with specific reference to women. Neither the state nor the private players in the national and global markets could be expected to honestly and efficiently uphold and entrench such rights.

Guaranteeing economic and social rights for women is crucial to the survival of traditional artisan communities and the folkloric works they develop and maintain. Further, it is important to make the linkages between the intellectual property rights of authorship and recognition of TCEs specifically created and sustained by women and the economic benefits that could accrue to women through such recognition. As has emerged clearly from this paper, neither the intellectual property regime nor the human rights discourse can, in isolation, provide a tailor-made solution to prevent exploitation of traditional communities. The intellectual property regime in its present form entirely excludes the human rights paradigm, while the human rights discourse, in turn, remains male-centric, thereby failing to protect the interests of women within indigenous communities. It is essential, therefore, to develop an intellectual property regime that incorporates a gendered human rights discourse to ensure the economic and social empowerment of women in such communities.