



## **CORPORATE APPROPRIATION OF TRADITIONAL TRADE IDENTITIES: NEED TO PROTECT UNDER ETHOS OF INTELLECTUAL PROPERTY**

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### **Abstract**

India possesses cultural diversity such that both modern and traditional economies thrive simultaneously with their distinct identity and character developed over a period of time. This has a considerable impact on habits and preferences of consumers with respect to goods and that drive market economy. Traditional Eatries or Dhabas are extremely popular among various strata of society both village and city. Similarly, antiquated trades such as cobblers (mochi) or Tea vendors (Chai-waala) are identities which are reminiscent of age-old trades which operate on the confidence of larger Indian society in every part of the country. In the modern economy, such age-old trade identities urgently require safeguards under the property regime. These identities are susceptible to misappropriation by corporate interests. The profit seeking nature of corporations drives them to eliminate competition from the market by appropriating trade identities of economy. While it may require deep market research to establish the economic value of traditional trade identities, nevertheless the appropriation of traditional trade identities give corporations to expand their market presence thereby enabling them to maximize revenue with incremental use of financial resources and latest technology. It is of prime importance that traditional businesses greatly rely on their antiquated identity to draw consumers while corporations have greater resources to fabricate and advertise new product and services without encroaching into the territory of traditional trade identities. Further, it adversely affects the reputation of traditional business built over generations and regrettably causes irreversi-

ble damage to the community. In the above context, this paper aims to evaluate the calculated attempts by corporate entities to misappropriate the traditional trade identities for maximisation of profits. Subsequently, this paper will evaluate the need to secure trade identities and to protect the connection of larger society with traditional businesses that are untouched by corporate designs. Furthermore, the absence of comprehensive legislation aimed at safeguarding the trade identities is a pressing need of the hour. It is essential in a globalised market place to contemplate and outline the safeguard needed for traditional businesses and commercial identities under intellectual property regime. Therefore, the paper looks at the issue and proposes the legislative safeguards for traditional trade identities which are a part of society since time immemorial. Lastly, there is a long-standing requirement to formulate novel approach to put a stop to misappropriation of traditional trade identities.

**Keywords:** Appropriation, Identities, IPR, Traditional, Trade.

### **Introduction**

The corporate world deviates into appropriation through the borrowing of traditional trade identity of marginalized community who purely relies on skills or knowledge to earn livelihood. The corporate whose main aim is to earn profits attract consumers by using an established identity which has gained confidence of millions of people across India. The main concern is that the corporate dishonestly appropriate the traditional trade

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identity for maximizing profit without giving due credit to tradesman. Additionally, when it is done on a large scale, there is a risk of significant loss to the identity of traders. Another concern is how these traditional trade identities could be protected under Intellectual Property Rights (IPR). Undeniably, trade identity holds cultural significance to local traders; appropriation tends to hinder the income of economically vulnerable community. In order to avoid appropriation, traditional trade identity needs to be protected. Thus, it will not only help in promoting the identity of traders, but for the economy of the country.

Prima facie, it is difficult to find protection of traditional trade identities under the Intellectual Property (IP) laws. For example, 'DHABA' (traditional trade identity) fails to satisfy the requirements for trademark protection. So far, there is no specific law that prohibits the appropriation of traditional trade identities by corporations. This is despite the tremendous economic and social value attached to traditional trade products; the traders have little or no control over them. If such local trader has no right to control the use of her trade identity, it might result in unfair competition from corporate sector. Usually, the intention of a corporate is to appropriate the sole identity of a small trader without obtaining consent to use them for his own financial interest. Therefore, the traders must be empowered to use or control their unique business practice which is necessary for fair use and collective ownership of traditional trade identities.<sup>2</sup>

In the light of the above, Part I discusses the practice of corporate appropriation and its harmful effect on economy. Part II identifies the instances where corporate misappropriates the traditional trade identities for their own capital gain and the damage it caused to the community at large. Part III seeks to examine the challenges for protecting traditional trade identity under IP

laws. Part IV suggests the need for a comprehensive legal approach to combat corporate appropriation and protect the rights of traders and their trade identities and concludes.

## I. The Practice of Corporate Appropriation

Culture is the outlining feature of our identity, and it gives a feeling of community to the people of any specific group. It is maintained by a tradition of disseminating knowledge in the form of customs, rituals, habitus, vernacular and norms. Ironically, the dominant group of the society appropriates the aspects of local community with the intention of seeking creative inspiration and make profit without benefiting the local tradesman. The act of appropriation by dominant group can lead to false perception of the particular culture and discrimination against local traders.<sup>3</sup> The World Intellectual Property Organization describe the act of appropriation by any person of a domineering culture of acquiring a traditional expression of a native culture and exploiting it for different uses without permission, due recognition or payment which leads to erosion of identity of its actual traditional members.<sup>4</sup>

Cultural appropriation signifies the endowment of corporate to use trader's identity for his own interest.<sup>5</sup> The practice of cultural appropriation deprives the local community of its ability to attribute meaning to its cultural products, which acutely limits the preservation of their culture.<sup>6</sup>

Cultural products are valuable not only for their utility to consumers but also because their preservation is linked to sustainability. Professors Bruce Ziff and Pratima V. Rao describe cultural appropriation as acquisition of another's identity which is not the IP of appropriator, relics, cultural elements, traditional knowledge

2. Margaret Jane Radin, *Property and Personhood*, 34 STAN L. REV. 957, 968 (1982).

3. Nathaniel T. Noda, *Perpetuating Cultures: What Fan-Based Activities Can Teach Us About Intangible Cultural Property*, 44 CREIGHTON L.REV. 429, 436 (2011).

4. WIPO Definition of appropriation –“as an act by a member of a relatively dominant culture of taking a traditional cultural expression and repurposing it in a different context, without authorization, acknowledgement and/or compensation, in a way that causes harm to the traditional cultural expression holders.”

5. Rogers, Richard A. *From Cultural Exchange to Transculturation: A Review and Reconceptualization of Cultural Appropriation*, 16 COMMUN THEORY 474-503(2006).

6. Sari Sharoni, *The Mark of a Culture: The Efficiency and Propriety of Using Trademark Law to Deter Cultural Appropriation*, Stanford Law School (2016).

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and history.<sup>7</sup> The consequence of cultural appropriation is laid out by Professors Angela Riley and Carpenter, misappropriation of culture has long lasting impact on the aboriginal peoples' severally and as a society: native american appropriation had enduring and far reaching consequences, causing damages such as indignity and shame to actual violence and prejudice.<sup>8</sup> In aftermath, it reduces the economic opportunities of small traders and diminishes the sovereignty of local community but the foundation of the society as a whole.<sup>9</sup>

The corporate appropriation is form of cultural appropriation where corporate exploits the traditional trade identity for their capital gain but unfortunately at the same time causes harm to number of small traders and community at large. The concept of corporate appropriation emerges when corporation use words, symbols, phrases, etc. to earn the trust of consumers with an intentional to commercialise the traditional identity which would otherwise provide business to a large number of small tradesman for earning livelihood. The corporate in order to acquire larger market share of their goods or services, deprive the small traders of their market share by absorbing the demand of ethnic and traditional goods among consumers.

In corporate culture, the appropriation highlights the imbalance between those big companies who hold power and those marginalized by trends and fashion of the day. Moreover, corporate appropriation is the misuse of identities for the purpose of making profit and jeopardizing the community rights. The community who developed trade related skills to earn livelihood becomes vulnerable to exploitation due to limitation of resources and lack of awareness in protecting their identities. Unfortunately, they continue to suffer discrimination, marginalization and poverty because of the corporate entities that largely focus on opportunities for their own economic growth and profits. These entities usurp the identity and goodwill of traditional community which not only deprive them of their basic rights but also adversely affect their socio-economic condition and do long term damage to culture. Some

of the few examples of corporate appropriation are MOCHI, NAKLI DHABA, CHAI THELA, etc. These corporates claim to have drawn inspiration from traditional culture and marketing the economy by mainstreaming these traditional ideas or identities. However, they are earning profits out of such business and no due consideration is given to the local business communities. Nevertheless, traditional communities are determined to preserve the unique recognition and character which they gained over generations and bequeath the same to their progeny to perpetuate their identity and ensure future well-being and prosperity.

To sum up, corporate appropriation has damaged the identity of small traditional businesses. Instead of innovating with the financial and human capital in their possession to bring to the market distinct goods and services, the corporate infringes the community rights by appropriating traditional trade identities. The appropriator tends to steal the commercial worth of traditional trade identities to sell their goods or services. Ultimately, the expropriation of and profiteering from the misuse of trade identities by corporations diminishes the goodwill of local traditions and causes irreparable damage to the community. Thus, there is an urgent need to protect the trade identities of traditional communities from appropriation and promote distinctiveness and authenticity of their skills in the market and society at large.

## II. Damage Caused to Traditional Trade Identities through Corporate Appropriation

Over the years, the damage caused by commercialisation has driven the sense of ethnic and cultural identity among people into obscurity. The companies tend to capture the market with their 'inauthentic' goods or services by unscrupulously borrowing the trust established over the years in traditional trade identities. Due to collective nature of these identities, it becomes difficult to determine their ownership. The corporate community gets the advantage of the same and appropriates

7. Bruce Ziff & Pratima V. Rao, *Introduction to Cultural Appropriation: A Framework for Analysis*, in *BORROWED POWER: ESSAYS ON CULTURAL APPROPRIATION* 1(1997); Jill Koren Kelley, *Owning the Sun: Can Native Culture Be Protected Through Current Intellectual Property Law?*, 7 *J. HIGH TECH. L.* 180, 188 (2007).
8. Angela R. Riley; Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 5 *Texas Law Review* 859-932 (2016).
9. Susan Scafidi, *Intellectual Property and Cultural Products* 81 *BU L REV* 793 (2001).

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the traditional trade identities by way of advertising a new business with similar name, which ultimately harm the community at large and causes misrepresentation among consumers. The appropriation distorts the original meaning of a trade identity, and in turn compromises the traditional understanding of goods or services attached to that trade.

The old trade identity which has existed in India i.e., 'MOCHI' (cobbler) is being appropriated by a corporate entity of Bangalore for selling shoes, handbags and shoe care products. The tag line of the brand says that "They catered the young cosmopolitan Indian by offering them to their ever-changing fashion needs."<sup>10</sup> Even the texts, images, software, audio clips as depicted on the website is protected by Copyright Act as well as under the Trademarks Act by the name MOCHI which is displayed on their website. Additionally, it is clearly mentioned on their web page that the other marks, logos and service marks belongs to the respective owners and unauthorised use of marks is not allowed in any circumstances.<sup>11</sup> Ultimately, it causes the damage to the local community in an unreasonable manner.

Further, appropriation of traditional business identity is akin to taking control over the socio-economic rights because the community loses the ability to express itself and instate its own commercial identity. The corporate appropriation turns to be harmful to the traditional community because of the exploitation of professional goodwill built over antiquity by small traders who majorly relies on the goodwill established by their forbearers and themselves to obtain business and earn livelihood. Thus, the inadvertent transfer of this goodwill to large corporations poses a potential threat to the traditional trade identities.

There is another business with the name 'CHAI THELA/CHAI WAALA'. Here, the owner of CHAI WAALA used the traditional style of serving tea in earthen pots and uses the logo which depicts an old tradition of Tea stalls. They gave the Hindi name to it i.e., CHAI WAALA while the shop is in either big malls or

posh areas of metro cities. The business intentionally tries to create an impact on the consumers by selling in a traditional way.<sup>12</sup>

Next in the line is a restaurant named as 'NAKLI DHABA' by Mayfair Hotels, Bhubaneshwar, Orissa. They have opened a franchise of Nakli Dhaba in Raipur, Chhattisgarh too. The website claims that the restaurant serves "robust" North Indian Food in an aesthetically designed setting.<sup>13</sup> This beautifully crafted setting is a copy of roadside Dhaba which is quite prevalent in North India. These Dhaba are popular among truck drivers, middle income group consumers as well as other sections of society. While, the MAYFAIR Group has a registered office in London and have a registered trademark in their name. They have a successful chain of eleven luxury boutique hotels and resorts at various places, Puri, Darjeeling, Bhubaneshwar, Gangtok, Goa, Raipur etc. claiming to cater the requirement of leisure travel. Mayfair is known for royal and luxurious property across India and probably earning huge money out of those properties. Despite the fact, they have used the word 'DHABA' to divert consumers towards them. Although, the Mayfair's vision is to provide jobs to the people of the region, thus helping with socio cultural upliftment displaying a sense of responsibility and conscientious behaviour towards social groups. It is concerning to see a giant luxurious brand appropriating the identity of small businesses by using the generic name 'Dhaba'.

If one analyzes all the above examples, it can be clearly observed that capital businesses are intentionally capturing a dominant share of a market and enjoying huge profits. It is not only causing social harm but also economic harm to small traders. Therefore, it is important to safeguard our traditional trade identity from being misappropriated because for most of the small tradesman, his work is the primary source of income for his family.<sup>14</sup> They are considered as a cornerstone of cultural consciousness of the country whose identity must be legally protected from corporate who may conduct themselves unethically to maximize profit.

10. MOCHISHOES, <https://www.mochishoes.com/page/about-us> (last visited May 25, 2024).

11. MOCHISHOES, <https://www.mochishoes.com>.(last visited May 25, 2024).

12. CHAITHELA, <https://chaithele.com>. (last visited May 26, 2024).

13. MAYFAIRHOTELS, <https://mayfairhotels.com> (last visited May 26, 2024).

14. DENIS S. KARJALA, ROBERT K.PATERSON, *The Failed Case For Property Rights In Intangible Indigenous Cultural Property Intellectual Property, Cultural Property And Intangible Cultural Heritage* (Routledge 2017).

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### III. Challenges to The Protection of Traditional Trade Identities Under Intellectual Property Law

The point of determination is to ascertain the best route to guard the traditional trade identities against corporate appropriation. Does the existing IP regime provide adequate safeguard for the above purpose.

When it comes to protecting intangible trade identities, it is difficult to win any legal battle against corporate. Since, the identities which they want to exploit are most often part of a collective right that have evolved over many generations. As far as IP law is concerned, it protects the owner/author of IP against unauthorised users. But what about the protection of those identities that were developed through skills and knowledge to earn livelihood but then misappropriated by a dominant corporate for their capital gain? The trade identity is developed by traders over generations, through gradual evolution over decades and centuries. However, it is a matter of concern that our jurisprudence allows corporations to appropriate such identities, although in a non-exclusive way. Rightfully, inspiration should be used to create new marketing tactics, which is a result that IP law strives to promote. But, in the examples given above, it seems less like inspiration and more like co-opting or even stealing.<sup>15</sup>

Moreover, protection through a specific tool of IP i.e. trademark would raise practical problem. As trademark introduces the idea of ownership, which is unsuited to the particularities of these trade identities whose ownership belongs to the community.<sup>16</sup>

The absence of specified owners or inventors raises the question of who should have power of enforcement. Secondly, the major issue is that the protection of trade identities through trademark protection carries the risk of transforming these identities into mere commodities. Although denying IPRs in traditional trade identities does not deprive tradesman to continue using those skills and identity which they have built over antiquity.

Thirdly, the trade identities already accessible to the public are likely to require less legal protection. While much will depend on unique national characteristics, the scope of legislation or even a developed legislative definition of traditional trade identity.

It is pertinent to reiterate that both registered and unregistered trademark get some kind of protection under IPR, traditional trade identities fall under collective ownership of the community at large, which makes it difficult to protect from wrongful use.<sup>17</sup> If appropriator has managed to register a cultural identity for protection under the prevailing trademark law, it may bar the local community from the fruits of its own ingenuity, due to the legal protection already granted to the appropriator in relation to the concerned traditional trade identity.<sup>18</sup>

Despite the shortcomings in law to protect traditional trade identities, it is vital to prevent intangible traditional trade culture from dissolution and its identity from erosion. In order to hinder unauthorized or inappropriate uses of traditional trade identities by corporate, it is necessary to have a comprehensive strategy for the preservation of their rights. Since the community may not be able to profitably use the traditional trade identity, the legislation must protect the same and prevent corporate from acquiring IPRs in existing trade identities. To achieve the above objective, it is important to determine what portion is extracted and whether corporate took necessary precautions to ensure community interest is protected. Otherwise, it shall be incumbent upon the local community to file trademark suits and litigate in order to protect their trade identity from unauthorized appropriation.

Thus, the prevailing laws fail to adequately protect traditional trade identity from unauthorized appropriation. While creative borrowing is necessary for creative development, unauthorized appropriation of traditional culture causes considerable damage to communities by dispossession of important aspects of communal existence. In some instances, identities do not qualify for protection under trademark law and same makes room

15. Angela R. Riley, *Straight Stealing: Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 80 (2005).
16. WIPO, *The Protection of Traditional Cultural Expressions: Updated Draft Gap Analysis*, 6 July 2018, WIPO/GRTRK/IC/37/6, pp. 6-7 (“WIPO, Draft Gap Analysis”).
17. Christine Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?* 30 CONN. LAW REV. 1, 3-4 (1997).
18. *Id.*

for unauthorized appropriation. The chief concern is to ensure that trademark law effectively balances the wider social gains from appropriation against the welfare of local communities.

#### **IV. Combating Corporate Appropriation with Legal Protection**

Traditional trade identities are not static in nature, but a form of knowledge or skill set which has an antiquated origin and it is shared within a community which establishes and sustains social bonds. These communities have rich source of traditional skills and creativity, many of them remain unaware of how they could use IP law to protect their identity from undue commercial exploitation. The traders may simply use those skills or knowledge to earn livelihood, however, goods and services are often noncompetitive goods which may be easily appropriated by non-owners. The misappropriation may deteriorate and degrade certain features of the local trade identity. The cultural flavor and aroma embedded in the product or service may be diluted or eliminated altogether to make it more commercially profitable by appropriators which destroy the end user experience as the item becomes generic.<sup>19</sup> Moreover, it diminishes the innate worth of product as unauthorized users emerge in the marketplace, eliminating sincerity and honesty exercised by local business.

Thus, the law must facilitate stronger protection against appropriation. IP law, which primarily focuses on the sole owner/inventor of the tangible or intangible goods, cannot provide sufficient protection to traditional trade identity as aforementioned. Here, the 'ownership' needs to be understood in a collective sense rather than the strictly personal 'proprietary sense of ownership' that forms the basis of IP. An attempt to address corporate appropriation within the legal framework is difficult because culture identity is linked to antiquated customs and practices. A more comprehensive analysis must be undertaken to protect trade identity.

The United Nations General Assembly in the year 2007 promulgated the UN Declaration on the Rights

of Indigenous Peoples (UNDRIP). It recognized the pressing need to abide by and propagate the natural rights of indigenous peoples with respect to their land and resources.<sup>20</sup> It is well settled that indigenous people across the world have group rights which enable them to exist with and for cultural progress.

However, the actual conditions of various indigenous groups are different in different parts of the world depending on historical, geographical and cultural context. In the same context, India has different cultural products which exist to earn livelihood by local traders.

In 2021, the major step was taken by WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Project to introduce a mechanism under law to secure effective, adequate and balanced protection for know-how and manifestation based on traditions at the global level.<sup>21</sup> According to this instrument, protection may be provided to knowledge derived from traditions and expressions rooted in culture, which are begotten, nurtured, possessed and employed by indigenous groups and communities and constitute an essential part of the heritage, culture and identity of the group to be handed down to future generations. It was suggested in the draft legal instrument that 'member countries shall legally, administratively and otherwise through policy execution as feasible within the existing national framework with respect to practices and customs of native population and regional communities.'<sup>22</sup> Thus, there is an urgent need for an effective legal protection of traditional trade identities from corporate appropriation in India. The law must provide local community or small traders exclusive rights to seek redressal against misuse of traditional trade identities. Perhaps, the above legal instrument is yet to be completed. It is therefore suggested that in order to protect traditional trade identities, a new and specific regime in the form of sui generis legislation be enacted. A list must be prepared to identify the eligibility for the use of traditional trade identities for business purposes. Parameters such as capital invested, number of employees, location, etc. need to be considered to determine the right to use traditional

19. *Id.*

20. UNITED NATIONS, [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf) (last visited June 10, 2024).

21. WIPO, <https://www.wipo.int> (last visited June 10, 2024).

22. *Id.*

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trade identities. Those corporations who have the ability and comfort to devise and execute unique or new business due to high capital availability must not be allowed to take the additional advantage of using traditional trade identities. Lastly, the States should be prompted to enact laws which prohibit use of traditional trade identities by corporates and ensure that small traders are not denied their rightful opportunity to do business relating to traditional trade identities.

## Conclusion

The local communities do not overprice or degrade their cultural heritage because of local familiarity and trade ethics they possess, they attach greater value to the enterprise as it is an integral part of their cultural identity. The appropriation reduces the economic well-being of the local communities and, consequently, the welfare and sustainable future. It is therefore, important to develop a strategy to safeguard the traditional trade identities and utilize the available resources effectively. The identity of traders requires protection from appropriation by implementation of Intellectual Property (IP) laws. The legislation must be focused towards compensating the local community in case of unauthorized appropriation and degradation of trade identity. It requires a robust framework to balance the interest of local traders in safeguarding their trade contributions from violation by corporate appropriators and protecting the society's interest in maintaining access to traditional trade products and services. Hence, the corporate should be prevented from intruding into the domain of traditional small businesses which have their own distinct identity and create self-employment opportunities. The corporate must devise alternative marketing and branding strategies through capital intensive techniques to attract consumers and leave the small business enterprises based on traditional ideas to retain their own uniqueness.

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