

Protection of traditional cultural expressions or expressions of folklore

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1. The concept of traditional cultural expressions or expressions of folklore

The protection of traditional cultural expressions or expressions of folklore has been discussed for many years but still remains a challenging issue. With the advent of new technologies this matter has come to the surface raising not only legal but political concerns in the context of international organizations (1).

Traditional cultural expressions or expressions of folklore have the same meaning and identify the values, traditions and beliefs of indigenous communities. According the WIPO interpretation, they can be described as works consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of that community (2).

Expressions of folklore are divided into four groups (3) depending on the form of expression:

- a) verbal expressions, such as: folk stories, legends and poetry
- b) musical expressions, such as: folk songs and instrumental music
- c) expressions by action, such as: popular dances, plays and shows and
- d) tangible expressions, such as: productions of folk art, especially drawings, paintings, sculptures, pottery, jewels, costumes, musical instruments as well as architectural works.

2. Intellectual property protection

Intellectual property is a generic term that is used to refer not only to copyright and related rights, but also to industrial property covering patents, trademarks, designs

and geographical indications. Greek legislation includes a specific provision defining the term “intellectual property” and translated in greek by the term **διανοητική ιδιοκτησία** (art. 8 par.18 of Greek Law 2557/1997).

Intellectual property laws may play an important role by providing legal protection for traditional cultural expressions. This protection can enable communities and their members to commercialize their traditional creations, if they wish to do so, or exclude competitors from free exploitation.

Developing countries attach particular importance to the protection of expressions of folklore because they feel that their traditional heritage has been spoiled and exploited commercially without due respect for the cultural and economic interests of the communities in which it originates.(4) The major concern is to protect expressions of folklore against misappropriation or distortion that may result from their use.

Folklore is “the wisdom of the people” according the meaning given by the archeologist W.J.Thomson (5). Folklore should be protected because it is a living tradition and forms part of the universal heritage of humanity but its protection should not restrain the freedom to promote creativity and innovation.

Protection by *copyright* would seem possible because expressions of folklore take the same form as protected works. However certain characteristics of copyright conflict with the expressions of folklore and in particular the limitation in time and the identification of the creator originating the work.

Expressions of folklore are generally considered to be in the public domain because they go back much further in time than the term of legal protection granted by the international conventions. Copyright is based on the identification of the creator, but in contrast folklore is distinguished by the anonymity and by the fact that the tradition is the attribute of a community. Copyright confers the exclusive right of exploitation on the person who creates the work, which is difficult to reconcile with the diffuse nature of folklore within a community.

According Greek legislation expressions of folklore are excluded from the protection afforded by copyright (article 2 par. 5 of Greek Law 2121/1993). Expressions of folklore can however obtain the protection of copyright as derivative works, such as translations, adaptations, arrangements and other alterations (translation of folk story, adaptation of folk music compositions). Collections of expressions of folklore (digital compilation of folk songs) are also protected, provided the selection or arrangement of their content is original (art. 2 par. 2 of Greek Law

2121/1993). Expressions of folklore can be also protected by the Directive 96/9 on the legal protection of databases, implemented in Greece by specific legal provisions (art. 7 of Greek Law 2819/2000).

It should also be noted the provision concerning the preservation of moral rights. After the expiry of the term of copyright protection, the state represented by the Minister of Culture, may exercise the right relating to the acknowledgement of the author's paternity and the right relating to the protection of the integrity of the work (art. 29 par.2 of Greek Law 2121/1993). The "droit moral" occupies a place of major importance in greek law system. The ethical basis of moral right can be found in Ancient Greece and Rome. Greek philosophers and Roman writers were concerned to achieve fame and recognition and were unanimous in condemning those who sought to appropriate their works. The Roman poet Martial in one of his epigrams addressed to his rival Fidentinus said to him: "If you want my poems to be called mine, I'll send them to you for nothing, but if you want to be called yours, you'll have to buy them" (6).

At international level the Berne Convention could be regarded as taking account of the protection of expressions of folklore. According art. 15 par. 4 of the Berne Convention, in case of unpublished works where the identity of the author is unknown, but where there is a ground to presume that he is a national of a country of the Union (signatory state), it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union. It seems that no such notification has been made to the WIPO Secretariat. Similarly according art. 7 par. 3 of the Berne Convention, the term of protection of an anonymous work runs only from the time the work is made available to the public. It is stated however that signatory countries are not required to protect anonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years.

The protection granted to databases by article 5 of the WIPO Copyright Treaty covers compilations of data and therefore inventories and collections of expressions of folklore can be protected. Such protection is not to be confused by the protection of the data itself. The WIPO Performances and Phonograms Treaty extended the definition of performer (art.2) specifically to include persons performing expressions of folklore. Expressions of folklore are not works but protection is given to an artist

that performs expressions of folklore, such as stories, poetry, music, song and dance, under the concept of neighbouring rights.

Trademark Law can be used to protect some expressions of folklore, such as designs and symbols. A trademark is a form of property that gives the owner the right to prevent others from using it in relation to a specific category of goods or services. Legislation protecting distinctive signs offer opportunities for the protection of indigenous and traditional marks that are intended to be used in the course of trade. The disadvantages are the requirement of formalities in registering and renewing trademarks as well as opposition and invalidation proceedings.

The laws on *industrial designs* provide protection for expressions of folklore such as graphical marks and three dimensional plastic forms. The novelty and originality criteria are difficult to reconcile with the nature of expressions of folklore, since they can date back hundreds of years. The duration is also limited and there is also the problem of the ownership of the rights.

The laws on *geographical indications* are better suited to the protection of expressions of folklore because they can be assigned to a territory rather than a natural or legal person. This type of protection can be applied only to certain tangible folklore products such as carpets, and textiles.

The concept of *unfair competition* provides protection against wrongful commercial use and in particular against industries which profit from folklore but disregard its traditional use.

Attempts to protect expressions of folklore by a *sui generis right* led to the adoption of the UNESCO/WIPO Model Provisions (1983) intended to be incorporated into national legislation. The provisions establish the principle of the protection of expressions of folklore (art.1), give definitions of them (art.2) and make their use subject to authorization with certain exceptions (art. 3 and 4). They make compulsory to mention the source of the expression of folklore (art.5) establishing the procedure for the grant of authorization by the competent authority (art. 10). They also contain a reciprocity clause for the protection of expressions of foreign folklore (ar.14).

On the basis of the Model Provisions and the recommendation of UNESCO on the safeguarding of traditional culture and folklore (1989) several States, particularly developing countries, introduced measures for the preservation and protection of folklore.

The need of a new international instrument has been recently acknowledged by the UNESCO/WIPO world forum on the protection of folklore (Thailand 1998). The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was established (2000) and has made substantial progress in this field. The Secretariat of WIPO has issued a questionnaire on national experiences, as well as several studies on this matter and continues to undertake several activities for the legal protection of expressions of folklore. The TRIPS Council (World Trade Organization) was also instructed to review this issue.

The WIPO Intergovernmental Committee at its sixth session decided to develop an overview of policy objectives and core principles for the protection of expressions of folklore. The draft prepared by the WIPO Secretariat is now open for further comments and suggestions (before 28 October 2005) and contains the provisions for the protection of expressions of folklore, including the objectives and general principles. According to this draft beneficiaries for the protection of expressions of folklore should be the indigenous peoples and traditional or other cultural communities (art.2). The provision containing the acts of misappropriation reflects a combination of exclusive and equitable remuneration rights in respect of different forms of cultural expressions (art.3). The rights are exercised by the communities or by an agency acting at the request and on behalf of the community (art.4). Exceptions and limitations for specific purposes (teaching, research, private use, criticism, archives etc) are suggested (art. 5). Protection of expressions of folklore is not subject to any formality but a registration system is possible for expressions of folklore of particular cultural or spiritual value (art.7). In cases of breach of protection civil and criminal remedies should be available (art. 8). The protection does not replace and is complementary to protection applicable to expressions of folklore and derivatives thereof under other intellectual property laws or any other legislation (art. 10).

3. Preservation of cultural heritage

Intellectual property laws establish private property rights in creations and innovations in order to grant control over their exploitation. Traditional cultural expressions should be also protected in the context of preservation and safeguarding the cultural heritage. It is well known that intellectual property rights have a limited term of protection. When the statutory term of protection expires, the work falls into

the public domain but may be subject to the regulations applicable to cultural heritage.

In Greece, a country with rich tradition of intangible cultural heritage, the Law 3028/ 2002 on the protection of antiquities and cultural heritage provides that this concept includes elements of intangible heritage, defined as expressions, activities, knowledge and information, such as fables, customs, oral traditions, dances, music, songs or techniques that constitute testimonies of the traditional, popular and learned culture. It provides a broad definition, open to many expressions of such heritage that may arise in the future, extending protection to historical sites considered as the theatre of exceptional historical or mythical events. This protection is implemented by the Minister of Culture providing for the registration in written form and on sound or audiovisual devices, as well as the recording and documentation of elements of intangible heritage by competent services and agencies.

The right of protection of cultural environment is safeguarded by the Greek Constitution. In accordance with the case law of the Conseil d' Etat, the concept of cultural environment is broad and includes "monuments and other elements of any kind that emanate from human activity and make up the historical, artistic, technological and general cultural heritage of the country" (7). Nature and culture cannot be easily separated since both are manifestations of society.

The right of access to museums is also protected by the Greek Constitution. This protection is based on fundamental rights such as the respect of human dignity (art. 2 par.1), the right of free development of personality (art. 5 par.1), the freedom of art, science and research (art. 16 par.1) the right of information (art. 5A).

Now more than ever the public has access to the "virtual museum", the museum without walls, because of the digital technology.

Digitization of cultural content should be regarded as a new challenge permitting the exchange of different cultural experiences. Digital recording is crucial on preserving cultural heritage for future generations supporting cultural diversity and education.

The Communication from the Commission dated 30.9.2005 (COM 2005 465 final/ Brussels, 30.9.2005) outlines the vision of creating a virtual European library. The digital libraries initiative aims at making European cultural and scientific resources easier and more interesting to use in an online environment. European libraries, archives and museums contain material representing the richness of

Europe's history and its cultural and linguistic diversity. The online presence of this material from different cultures and in different languages will make it easier for citizens to appreciate their own culture heritage as well as the heritage of other European countries and use it for study, work and entertainment. Digitization can be problematic for protected material in view of intellectual property rights and in particular as it concerns copyright.

On December 2004, Google announced that it works together with five major libraries to turn their collections into digital content. For texts in the public domain, it will make the full text available, but for texts under copyright, it will work with publishers and authors to determine how much of the text will be shown.

Preservation of digital material is a very important issue because it coincides with the need underlined by the General Assembly of UNESCO in 2003 for preservation of the digital heritage.

Preserving cultural heritage is matter of immense ideological and political interest in particular for European Union faced with the challenge of absorbing non Christian nations and civilizations.

Open source software and open content models are modern philosophies developed in the context of general public licenses because of the digital technology. This movement wants to keep the copyright system in place but develops licensing models to allow the collaboration and open exploitation of digital works (8).

Open source and free software movements in varying degrees make source code available on license terms to encourage collaboration between users that can develop and maintain the software on a collaboration basis. The essential condition is that derived works or improvements to the open source software, as well as distribution, should be made open. This is the key requirement that prevents the cooption of open source code into proprietary products.

The license helping to built the public domain content on voluntary steps could be applied to some cultural or scientific content according the creative commons flexible way.

These movements are revolutionary and they conflict with rules on copyright and in particular with the authors' moral right. However this approach may help to find the balance as it concerns the protection of folklore and may play a role in the development of a digital cultural repository for some uses (education, research, tourism).

We all know that copyright stands at a crossroads and every copyright system has to find the balance between the owner and the public. Both sides of copyright are expressed in article 27 of the Declaration of Human Rights:

“Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”.

“Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author”.

4. Conclusions

Protection of traditional cultural expressions or expressions of folklore should not have only one solution fitting to all nations and communities. Effective protection may be found in multiple options for protection, such as intellectual property laws, cultural heritage preservation laws, practical measures such as digital recording and documentation of cultural expressions, establishment of registers and archives on digital cultural content (9).

International Organizations should develop a guide for lawmakers and communities describing the recommendations, guidelines, model provisions, technical assistance or other option for the protection and preservation of expressions of folklore. Inventories of expressions of folklore should be prepared on an national and international basis. The demand of new legislation and new intellectual property rights is not the only solution. The more law we have, the greater the potential for injustice.

Traditional cultural expressions should be protected by applying classical principles securing moral values, culture and education. Finding the appropriate protection of expressions of folklore is a complex balancing act. At every level the goal should be the adoption of fair regulations based on principles of mutual respect, fairness and justice in an effort to protect cultural heritage of all nations and convert the elements of cultural diversity into elements of approach and coexistence.

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Footnotes

- (1) Consolidated analysis of the legal protection of traditional cultural expressions/expressions of folklore, WIPO, 2003, p.6 –9.
- (2) Intellectual property and traditional cultural expressions/folklore, WIPO Booklet 1,p.6.
- (3) Intellectual property needs and expectations of traditional knowledge holders, WIPO, 2001, p.22.Dispositions types de legislation nationale sur la protection des expressions du folklore, Bull. du dr. d´auteur, vol. XV/ 2/1981 p. 25-28.
- (4) Shahid Alikhan, Benefits of intellectual property in Developing Countries, WIPO,2000, p.80-84.
- (5) St.Palethorpe and St. Verhulst, Report on the international protection of expressions of folklore under intellectual property law, University of Oxford, 2000, p.6.
- (6) S.M.Stewart, International Copyright and Neighbouring Rights, London 1983, p.13-14. A.Murphy, Copyright and Ethics- Are Old Virtues the Antidote to New Vices?, Culture, Copyright and Information Society, European conference in the framework of the Hellenic Presidency, 7-8 April 2003, Athens, Hellenic Ministry of Culture, 2004,p.99.
- (7) Conseil d' Etat 3146/1986, 563/1993, 2300/1997, 3478/2000 quoted in D. Voudouri, State and Museums, Athens 2003, p. 133-135.
- (8) WIPO Guide on the licensing of copyright and related rights, Chapter VI, Computer Software by. Pravin Anand, p. 99. Kamil Idris, Intellectual Property- A Power Tool for Economic Growth, WIPO, p.211-213.
- (9) Intellectual property and traditional cultural expressions/folklore, *ibid*, p.21-22.

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