

Module 12: Expressions of folklore and copyright

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Objectives

When you complete this module, you should be able to

- define and explain the concept of expressions of folklore and traditional cultural expressions;
- demonstrate how copyright can, in a limited way, offer protection for traditional cultural expressions;
- demonstrate why copyright cannot fully protect traditional cultural expressions and where changes impose themselves; and
- find out the relationship of the WIPO Development Agenda with expressions of folklore and copyright.

Study note

This module will take you around four hours.

Introduction

This module introduces you to the problems raised by the protection of expressions of folklore or traditional cultural expressions. We are going to look at this from a copyright perspective in particular. In the first stage, we will define the subject matter under discussion. We will then move from the concept of folklore to the definitions of expressions of folklore/traditional cultural expressions and we will look at why and to what extent these should or could be protected. We will then consider how and to what extent copyright is suited to offering such protection. In the final stage, we will look at the points where copyright is not suitable and where either copyright needs to be amended if it is to offer suitable protection for traditional cultural expressions or a sui generis regime of protection needs to be agreed.

1.0 Introduction to folklore

1.1 Expressions of folklore and traditional cultural expressions: the concept identified

In an intellectual property (IP) context, and in the copyright context in particular, folklore is best understood as 'expressions of folklore'. If copyright is able to offer protection for folklore, it will be for these 'expressions'. This will sound familiar to the copyright community as we are used to protecting original expressions of underlying ideas that remain unprotected.

Folklore refers to traditional culture. It is a culture bound to a certain geographical area and the people who live in that area. In most scenarios, these people are part of the same ethnicity. That culture is a traditional culture in the sense that it is the culture that the people living in that area and forming part of that group have developed themselves over a long period of time and that they have passed on from generation to generation. It is their culture and, in a sense, it is free-standing, i.e. it developed on its own in the community. Folklore is therefore integral to the cultural and social identities of indigenous and local communities. For these indigenous and local communities, it embodies their know-how and skills and, at the same time, it transmits their heritage as a community and, more specifically, their core values and beliefs. For the purpose of IP protection, they are now classified as expressions of folklore or traditional cultural expressions and traditional knowledge.

If we now turn to the expressions of folklore and look at them in a bit more detail, we should start by mentioning that they are also often referred to as traditional cultural expressions (TCEs). These expressions may include music, dance, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts, narratives and many other artistic or cultural expressions. This is an open-ended list, as we are concerned with any form in which

traditional culture is expressed. Further guidance and what may be an expression of folklore or a TCE can be derived from the fact that it forms part of the identity and heritage of a traditional or indigenous community and that it has been passed down from generation to generation. The concept of culture can, after all, be broad, but here one sees the impact of two meanings of the concept of 'tradition'. They turn these cultural expressions into TCEs and represent the strong link with the community involved and the fact that these expressions find their roots in previous generations who have passed them down.

SAQ 1: What are the three key components of the definition of TCEs?

Type your answer here

SAQ 2: Please give five examples of TCEs.

Type your answer here

1.2 Why do we (wish to) protect expressions of folklore or traditional cultural expressions?

The focus of IP is on the protection and promotion of creativity and innovation. This also applies when it comes to expressions of folklore or TCEs. Part of the aim of any form of IP protection

is the promotion of creativity. In copyright terms, one wants to protect the originality in a particular TCE. The focus may not be on the creation of the underlying traditional culture, but the aim is to preserve its various forms of expression and to encourage new forms of expression. That can be done by granting an exclusive right to the expression of folklore, thus allowing the protection of its integrity, but also allowing those who preserve the culture and create its traditional expressions to benefit financially from their activities, thus allowing them to continue the effort and pass both the traditional culture and its traditional expressions down to the next generations.

Looking at it in a broader context, these efforts and exclusive IP rights will enhance cultural diversity. By strengthening and preserving the TCEs of a traditional or indigenous community and by granting an exclusive IP right that allows them to control the appropriate or inappropriate use and exploitation of their TCEs, one enhances cultural diversity. Rather than be absorbed into or be overrun by other (more dominant) cultures, their traditional cultures and their expressions will be able to survive and flourish and thus cultural diversity will be enhanced. This is a second powerful reason to offer protection for TCEs.

Thirdly, protection for TCEs will also contribute to the preservation of cultural heritage. An exclusive right will enable its owner to gain an income by exploiting TCEs, thus making it worthwhile and sustainable to preserve the underlying cultural heritage that is expressed in these TCEs.

SAQ 3 What are the three main reasons why we may wish to protect TCEs?

Type your answer here

1.3 One heritage or separate expressions?

For many traditional or indigenous communities, TCEs, traditional knowledge, such as elements of traditional medicine or the use of plants and seeds, and associated genetic resources form part of a single integrated heritage. For them it is all part of their identity. Sometimes they also see sacred aspects to it. From an IP perspective, things are different.

We are looking for elements that can be protected. One therefore looks not at the single integrated heritage, but at separate TCEs. The work of the World Intellectual Property Organization (WIPO) therefore separates it into TCEs and traditional knowledge. The TCEs raise some particular legal and policy questions in IP and they therefore receive a distinct focus in many national and regional IP laws and in WIPO's work.

TCEs can sometimes be protected by existing IP systems, such as copyright and related rights, geographical indications, appellations of origin and trademarks. For example, contemporary adaptations of expressions of folklore are copyrightable, while performances of traditional songs and music may come under the WIPO Performances and Phonograms Treaty (WPPT) and under the Beijing Treaty on Audiovisual Performances.

Trademarks can be used to identify authentic indigenous arts, as the Māori Arts Board in New Zealand, Te Waka Toi, has done. Some countries also have special legislation for the protection of expressions of folklore. In addition, WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) is negotiating the international legal protection of TCEs. With that in mind, we will now turn to the relationship between copyright and traditional cultural expressions.

2.0 Protection of expressions of folklore under copyright

2.1 Adaptations of traditional cultural expressions

Let us start with an easy example with which many of us are familiar. We have all seen t-shirts with a print on them that is based on an expression of folklore. They are on sale in souvenir shops at various destinations and online. However, this is just one example of what are de facto contemporary adaptations of expressions of folklore or TCEs. They are neither the TCE itself nor an exact copy of it. Instead, their creators stay close to the original TCE, but to make an adaptation of it. By doing so, the author of the adaptation creates their own personal expression of the idea, which is in this case the underlying cultural heritage or, if one wishes, the TCE in its traditional format. Other examples of such adaptations are paintings, sculptures, prints and motifs on scarfs and other textiles, tapestries, carpets, musical works, three-dimensional works like pottery and ceramics, wood and stone carvings, artifacts of various kinds and so on. All of these are literary and artistic works for the purposes of the Berne Convention for the Protection of Literary and Artistic Works and, as their author's own personal expression, they also meet the originality requirement. That means that they can be protected as copyright works. One should, of course, add that the beneficiary of the copyright protection

will be the creator of the adaptation, rather than the traditional or indigenous community whose TCE is being adapted, and that creator is not even necessarily a member of that traditional or indigenous community and neither is there a guarantee that the adaptation can be reconciled with the culture, traditions and heritage of that traditional or indigenous community. Leaving that aside for now, the copyright will have its normal scope in terms of exclusive rights and exceptions and limitations and it will run for the normal term of copyright. Copyright will therefore offer protection against unauthorized reproduction and exploitation of the adaptation of cultural expressions but not the cultural expression as such.

Traditional knowledge, such as know-how, skill, traditional medicines, and the use of plants and seeds, which is another part of folklore, can also be written down or recorded in any other way. The literary work that is the result of such an effort will again be original and will benefit from the normal protection offered by copyright. Other examples of literary works are poems, tales, legends and myths.

2.2 Performances

Songs, music and dance are other examples of TCEs, as are presentations of stage plays, puppet shows and other comparable performances. Performances of such traditional songs, music and so on can attract protection under the terms of the WPPT. Article 2 of the WPPT makes that clear by including expressions of folklore in the way it defines performers as

“actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore”.

Audio 1 *How do expressions of folklore relate to related rights*

Expressions of folklore are now explicitly among the works that can be performed. This clearly signals that related rights can play an important role in protecting the unrecorded cultural expression of many developing countries, which is part of their folklore. Performers do indeed play a vital role in communicating these expressions to the public. The protection of their performances and any recordings thereof also indirectly protects and safeguards the underlying folklore. Such folklore is closely linked to ancient and invaluable cultural expressions and heritage, which is a metaphor for these countries' own existence and cultural identity.

Producers of phonograms, as well as broadcasting organizations, play a vital role in establishing the foundations for national industries that are capable of disseminating that

national heritage and folklore. They will only be able to fulfill that role if their efforts are adequately protected. The current popularity of what is called “world music” clearly shows that a market for products rooted in expressions of folklore exists, even if in the current system the country where the expressions originated is not always in receipt of the economic benefits that flow from their exploitation.

SAQ 4 How do related rights assist in the protection of folklore?

Type your answer here

In this sense, related rights are a useful tool for preserving the expression of folklore and national culture and to allow for its exploitation in the international market.

Apart from the moral rights of paternity and integrity, performers are granted the exclusive right of authorizing, as regards their performance, the broadcasting and communication to the public of their unfixed performances, except where the performance is already a broadcast performance, and the fixation of their unfixed performances. Added to that are the right of reproduction, i.e. the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form, the right of distribution, the right of rental and the right of making available of fixed performances in Articles 7 to 10 of the WPPT. Articles 2 to 11 of the Beijing Treaty on Audiovisual Performances offer protection under a similar scheme for audiovisual performances through their audiovisual fixation as the embodiment of moving images, whether or not they are accompanied by sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device. However, it is to be remembered that performers need not necessarily be from the community that is responsible for originating and preserving the expression of folklore. In such cases, it is not possible for the community to prevent such persons from performing the expressions of folklore without their permission. This problem in copyright law is discussed below.

SAQ 5 Why can performances of TCEs be protected under the terms of the WPPT?

Type your answer here

3.0 Limits of copyright law to protect expressions of folklore

3.1 The lack of an author

A first point to discuss here is the fact that copyright in the adaptations is given to the creator of the adaptation. That does not address the issue that the item with the real value is the underlying cultural tradition and its adapted forms of TCE. The creator of the adaptation is neither the author of the underlying cultural tradition nor the person who deserves protection for the TCEs. Giving that person this wider protection would be the equivalent of giving the author of a literary work protection for all of their inspirations and for the works they benefitted from in their education and training as a writer. However, more fundamentally, the real item for which protection is sought is not the adaptation, but the original TCE. That is not merely the underlying idea. It goes beyond that and there is a traditional form of expression. However, that is not protected through the adaptation.

The problem with the original traditional expression or the TCE in its original form of expression is that it does not tend to have an individual author or that the author cannot be identified. Copyright, on the other hand, needs an individual author for each expression that is to be protected as a copyright work. The originality is that of the author, moral rights are given to an author, the term of protection is based on the life of the author, the author is the first owner of the copyright in the work and so on. TCEs have their roots in their community. They develop gradually as they are passed down from generation to generation. If there is an author, in most cases it is the community over the various generations. That does not fit in with copyright.

3.2 The public domain

Development over the generations has another major disadvantage. Copyright has a very long term, even if one sticks to the Berne Convention minimum of the life of the author plus 50 years, but that still means that most (original) TCEs are older than that and will no longer be protected. From a copyright perspective, they are in the public domain and can be used freely by all parties.

3.3 The broader interests of the community and its culture

That means that the adaptations that we discussed earlier can be made without authorization. To make matters worse, there can be major adaptations that depict the subject matter out of context, thereby distorting the meaning that it has in a traditional cultural context. There is, for example, nothing in copyright to stop dances as TCEs from being separated from the music that traditionally accompanies them and being accompanied instead by modern western music. This will dilute the TCE and it may undermine its integrity and cause offence within the traditional or indigenous community.

This is illustrated well by the case *Terry Yumbulul v. Reserve Bank of Australia, Aboriginal Artists Agency Ltd.* ([1991] FCA 448; 21 IPR 481). The artist Terry Yumbulul had made a sculpture called *Morning Star Pole*, which was, for our purposes, an adaption of morning star poles as a TCE with an important place in the life of numerous Aboriginal Australian communities. The artist had been educated in these communities and he had permission to create the sculpture. He then gave a license to the Reserve Bank of Australia to use a reproduction of the sculpture on the ten dollar banknote. The morning star poles have a central role in ceremonies that commemorate the deaths of particular individuals, and link the spirits of the dead to their ancestral home. They also reinforce bonds of respect between peoples, as different groups are brought together for the commemorative ceremony at which the pole is presented to the family of the deceased person. The aboriginal communities therefore took exception to the use of this symbol on commercial bank note. However, copyright does not protect the original TCE and, on the contrary, Terry Yumbulul had copyright in his sculpture/adaptation and he could validly grant a license to the bank. It is therefore striking that the presiding judge in the case, J. French, noted that:

“it may also be that Australia’s copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin”.

3.4 Protecting the idea in a perpetual way

These works that are essentially communal in origin often involve the idea as much as a particular expression of that idea. What the communities want to protect is the value and meaning of the TCE. That comes close to a concept or idea. One can understand the importance of this point if one accepts that there are often sacred elements involved that touch upon the essence and the integrity of the community and its culture. However, copyright is not suited to this. The fundamental point that the idea remains unprotected and that only a single form of expression attracts copyright protection, while other forms of expressions can be made freely, flies in the face of what is needed here. Another argument of copyright's inadequacy to protect TCEs of essentially communal origin is the fact that copyright cannot be vested over the entire tribe or community, as the law does not recognize communal ownership of copyright. Lastly, copyright will not recognize any form of perpetual protection that is needed to protect the original form of the TCEs.

3.5 Fixation

Fixation, in those countries that require it, is also often referred to as a problem. There are indeed many elements of TCE that are not fixed, but this problem can be overcome as the Māori experience has shown. Traditional and indigenous communities can express their TCEs in a tangible form and thereby overcome the fixation hurdle. What remains problematic is that the TCE is not always defined in a unique way or version. The fixation will then only be one form and it may not be perfectly clear what the underlying work is exactly for copyright purposes. However, this is a minor hurdle. The work will be sufficiently clearly defined for most infringement proceedings.

SAQ 6 What are the three key areas of conflict that arise between copyright and the protection required by TCEs?

Type your answer here

4.0 Relationship of the WIPO Development Agenda with expressions of folklore and copyright

Recommendation 18 of the Development Agenda is “to urge the IGC to accelerate the process on the protection of genetic resources, traditional knowledge and folklore, without prejudice to any outcome, including the possible development of an international instrument or instruments”. This module reflects the gap in the existing copyright law to afford protection to TCEs in their original form. Protection of TCEs is intended to promote the developmental needs of traditional communities using copyright or other appropriate legal frameworks. One can be hopeful that the negotiations taking place in the IGC are going to fulfill the ambitions of traditional communities in the near future.

5.0 Summary

Copyright and related rights are clearly not a perfect fit when it comes to the protection of expressions of folklore.

Copyright can protect individual adaptations of TCEs and rights in performances are available for performances of TCEs.

However, the limited duration of copyright, the need for an individual author, the lack of protection for the culture and the idea as such, and the perceived need for fixation mean that copyright can only offer partial protection. The perceived need for protection is larger than that. The underlying culture needs a perpetual protection, allowing the community to control the use of its culture, and there is a need for common authorship, to name just a few points.

The question is therefore whether sufficient accommodations can be made within copyright and related rights to meet these needs or whether there is instead a need for a sui generis instrument for the protection of folklore. The international negotiations on this point are ongoing.

Further reading:

1. Hughes, Justin. "Traditional Knowledge, Cultural Expression, and the Siren's Call of Property." *San Diego Law Review* 49.1215 (2012). Web. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2215996.
2. Moran, Lucy M. "Intellectual Property Law Protection for Traditional and Sacred "Folklife Expressions" – Will Remedies become available to Cultural Authors and Communities?" *University of Baltimore Intellectual Property Law Journal* 6.2 (1998). Web.
3. Torsen Stech, Molly. "Intellectual Property and Traditional Cultural Expressions: A Synopsis of Current Issues." *Intercultural Human Rights Law Review* 3 (2008). Web.
4. Ragavan, Srividhya. "Protection of Traditional Knowledge." *Minnesota Intellectual Property Review* 2.2 (2001). Web. <https://scholarship.law.umn.edu/mjlst/vol2/iss2/1/>.