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PROTECTION OF FOLKLORE: A WORK IN PROGRESS

Abstract

Over the past five decades since the subject of folklore and the question of its legal protection were first raised within the international community, this topic has acquired significant attention. Despite the efforts of various local, regional and international governmental and non-governmental groups, the question of finding the appropriate mode of protection of folklore remains an uncompleted task. Given that expressions of folklore can be dealt with under a number of available legal regimes, this paper will critically examine the appropriateness of dealing with the subject matter under the most important ones. For that purpose, the paper will firstly look at human rights laws and cultural heritage laws. Due to the discussed weakness of these legal regimes, this paper will then consider different intellectual property laws and sui generis proposed legislation and examine their adequateness in providing protection for expressions of folklore. Finally, the crucial questions that remain open in the folklore related debate will be recapped and potential further directions worth pursuing suggested.

Keywords: Folklore, Intellectual Property Law, WIPO, *Sui Generis* Law, Human Rights Law, Cultural Heritage Law

1. Introduction

Folklorists recognize that folklore[2] is not merely something from the past to be collected or something that exists only in isolated pockets of the world. Quite the contrary - the impulses to create and express that

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[2] While there is a number of different terms used to describe the subject matter (folklore, traditional cultural expressions, indigenous heritage etc.), this paper will use the term "folklore" or "expressions of folklore" to describe the subject matter.

underpin it have not died. Particular traditions arise, are modified and come to an end, still, the folkloric process continues even as particular events, objects and forms of expression change and evolve[3]. These evolving and living expressions are ubiquitous: folklore can be found in both the developing and developed worlds, in indigenous communities and the non-indigenous ones.

At the same time, folklore is being increasingly exploited. Undeniably, exploitation of folklore was also possible in the past. However, the rapid development of technology, the ever increasing ways of capturing and manufacturing expressions of folklore through audio-visual productions, phonograms, mass reproduction, broadcasting, cable distribution, Internet transmissions and so on, have amplified the range and frequency of possible abuses[4].

Over the past five decades since the subject of folklore and the question of its potential legal protection were first raised within the international community, much, without doubt, has been done in this field. Within this period, the tackled issues occupied considerable attention and acquired wide awareness, becoming one of the "hot" intellectual property law topics of the 21st century. While initially the topic was prompted by certain indigenous communities, it swiftly grew to become a widely recognized international problem and has, ever since, been a subject of interest of various local, regional and international governmental and non-governmental groups, among which the World Intellectual Property Organization (hereinafter the "**WIPO**") lately plays the most important role. As a result, it is clear today, nearly 45 years after the Stockholm Diplomatic Conference for the Revision of the Berne Convention[5], that the protection of folklore is a global problem which requires international attention and coordinated solutions.

[3] S. Palethorpeand and S. G. Verhulst, *Report on the International Protection of Expressions of Folklore Under Intellectual Property Law*, University of Oxford, 2000, 13. Available online at the European Commission website at: http://ec.europa.eu/internal_market/copyright/docs/studies/etd2000b53001e04_en.pdf , 27.03.2014.

[4] M. Ficsor, *The Protection of Traditional Cultural Expressions/Folklore,* WIPO National Seminar on Copyright Related Rights and Collective Management, Khartoum, February 28 – March 2, 2005, 2. Available online at: www.wipo.int/edocs/mdocs/arab/en/wipo_cr.../wipo_cr_krt_05_8.doc , 27.03.2014.

[5] Arguably, this was the moment when the first identification of the need to protect folklore and the first efforts to establish certain frame for protection were made. The Stockholm Diplomatic Conference of 1967 did reflect in a limited way, for the first time, the aspirations of the developing world on protection of folklore when it adopted a mechanism for the international protection of unpublished and anonymous work (Article 15 (4) of the Berne Convention) – see P.V. Kutty, *National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines*. WIPO, Geneva, 2002. Available online at http://www.wipo/int/tk/en/studies/cultural/expressions/study/kutty.pdf , 27.03.2014.

2. Placing folklore within the adequate legal framework

Expressions of folklore can be dealt with under a number of available legal regimes. In general and in brief, these different systems can principally be divided into intellectual property based and other types of protection. The appropriateness of dealing with the subject matter under either of these regimes has been a subject of an ongoing heated debate over the years, where different legal, socio-cultural, economic and political arguments have been used to justify the application of one or the other, demonstrating different advantages, drawbacks and justifications of particular types of protection.

2.1. Human Rights Laws and Laws on Cultural Heritage

2.1.1. Human Rights Laws

There are several international and regional legal instruments in the field of human rights which recognise the right to benefit from the protection of the moral and material interests that derive from scientific, literary and artistic production. For example, the relevant provisions of the International Covenant on Economic, Social and Cultural Rights[6] and the International Covenant on Civil and Political Rights[7] are said to be important in relation to folklore as they support the characterization of intellectual property rights as human rights and to ground intellectual property rights, in general, on human rights basis[8]. As a general concern relevant for the present discussion, however, it is highly dubious whether the protection of folklore does or should depend upon being characterized as a human right. As Macmillan says, it seems that we have lived through one of the bloodiest centuries in human history and so the enforcement of even the most basic human rights is a highly disputed topic, and yet, at

[6] International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, concluded on 16 December 1966, entered into force on 3 January 1976

[7] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, concluded on 16 December 1966, entered into force on 23 March 1976

[8] F. Macmillan "Human Rights, cultural property and intellectual property: three concepts in search of a relationship" in: C. Graber and M. Burri-Nenova, eds. *Intellectual property and traditional cultural expressions in a digital environment,* Edward Elgar, Cheltenham, 2008, 77. See also for example: A. Chapman "Approaching Intellectual Property as a Human Right" *Copyright Bulletin*, volume XXXV, no. 3, 14; A. E. Santos "Rebalancing Intellectual Property In The Information Society: The Human Rights Approach" *Cornell Law School Inter-University Graduate Student Conference Paper*, 2011

the same time, the idea of human rights seems to be attaining a growing popularity and the 20th century has seen a real expansion of human rights. However, not everything that requires protection and seems morally defensible automatically must mean or depend on being labelled as human right[9]. In addition to this general criticism, Yu, for example, has expressed specific criticism by pointing out that the development of a human rights framework for intellectual property would result in the undesirable human rights ratchet of intellectual property protection and that such framework could potentially be biased against non-Western cultures and traditional communities[10].

On the other hand, authors have pointed out examples which demonstrate the need for human rights and intellectual property laws to operate jointly[11]. Geiger, for example, has argued that it is precisely the core values protected on the basis of human rights laws that may serve as a corrective to the over protectiveness and therewith potential misbalance existing under intellectual property regimes[12]. When it comes to folklore, certain recent practices show an interesting approach, by focusing on the integration of human rights and intellectual property laws with the aim of protecting expressions of folklore and traditional knowledge – by basing the claim on human rights grounds and further enforcing it through intellectual property mechanisms.

While some general basis for the protection of expressions of folklore may clearly be achieved through human rights, overall, there do not seem to be too many links between the potentially relevant human rights and the effective and enforceable safeguarding of expressions of folklore. On very general and basic grounds, one may say that human rights law has not been designed to protect intellectual creations, and in essence, this field of law is there to provide for some core principles and values which should be protected, rather than to establish precise mechanisms on the basis of which these principles and values will be protected. Furthermore, even those provisions of the international human rights law which could be understood as relevant in relation to folklore are said to be greatly

[9] F. Macmillan, 7, 77

[10] P. Yu "Reconceptualizing intellectual property interests in a human rights framework" *UC Davis Law Review* 40, 2007, 1039-1149, 1128

[11] See for example, G. H. Ruse-Khan "Proportionality and Balancing within the Objectives of Intellectual Property Protection" in: P. Torremanns ed. *Intellectual Property and Human Rights*. Kluwer Law International, London, 2008, 161-194; L. R. Helfer "Toward a human rights framework for intellectual property" *UC Davis Law Review*, 2006, vol. 40, 977; D. J. Gervais "Intellectual property and human rights: learning to live together" in P. Torremans ed. 10, 6.

[12] C. Geiger "The constitutional dimension of intellectual property" In: Torremans, P. ed. Intellectual Property and Human Rights. London: Kluwer Law International, 2008, at pp. 113

limited due to their vagueness and limited enforceability. A general lack of effective implementation and enforcement mechanisms for human rights therefore dictates the need to promote alternative ways of realization of folklore related rights, such as intellectual property rights[13].

2.1.2. Cultural Heritage Laws

When it comes to cultural heritage laws, in addition to the obvious contributions to the preservation of folklore, in that they seek to preserve, secure access and share benefits associated with that property, these also provide for certain other measures which may be particularly beneficial. Legally speaking, the claims to cultural property are claims by a state or by a community, however defined, to certain cultural artefacts. Thus, an obvious contribution is that the international cultural heritage law identifies these rights as being collective and belonging to a community, where such community may be limited to a group of people or global as humanity in general. Furthermore, cultural property rights provide for a wide range of measures, from those related to preservation to rights of states to control physical movement of artefacts, consequently preventing or limiting the privatisation of culture[14].

However, the practical effectiveness of laws on cultural heritage, again, is somewhat limited. The most important drawback comes from their narrowness. Most provisions of the available legal instruments are applicable only to tangible forms of cultural heritage. On the other hand, folklore is predominantly intangible and thus cannot directly benefit from the protection offered under the laws on cultural heritage. There are some relevant cultural heritage law provisions that could potentially be applicable to expressions of folklore, for example in the 2003 binding Convention for the Safeguarding of the Intangible Cultural Heritage (hereinafter "**ICH Convention**"), but the application of those would presume that the relevant expressions have been identified, catalogued and thus recorded in a certain form. In certain limited cases, this may not be in the interest of the communities which want to keep their folklore

[13] B. Tobin "Setting Protection of TK to Rights – Pacing Human Rights and Customary Law at the Heart of TK Governance" in E. C. Kamau and G. Winter, *Genetic Resources, Traditional Knowledge and the Law: Solutions for Access and Benefit Sharing*, Earthscan, London, 2009, 107

[14] F. Macmillan, 7, 91

secret[15]. Even more importantly, this would presuppose an entire technical process of collecting, cataloguing and fixating expressions of folklore, as a prerequisite for them to benefit from any protection, which has not only been criticised as contrary to the nature of folklore, but may also be utterly cumbersome practically. Furthermore, while the established rights provide a right to access to culture, they do not seem to provide practical mechanisms for enforcing and ensuring that these rights are exercised. Finally and most importantly, the cited provisions lay down for a set of positive rights but do not restrain actions of third persons or prevent them from utilizing and exploiting culture.

The discussed limitations particularly reinforce the need for complimentary operation of laws on cultural heritage and other laws, such as intellectual property laws. Cultural heritage laws and intellectual property laws, when it comes to intangible heritage, were said to have always had somewhat "uncertain and awkward" relationship, stemming in large measure from the inherent ambiguity in the meaning of "protect" and the need to clarify the relationship between the safeguarding of cultural heritage and legal protection of creativity against unauthorized use[16]. However, it might be precisely in their complementary application that we need to look for the solutions that would fit folklore protection the best – both *safeguarding* and *protecting*. Obviously, the range of cultural heritage laws is limited, and unless the next step is available under some set of rules, the very purpose of mechanisms established under, for example, the ICH Convention, may ultimately prove to be more detrimental than beneficial to the intangible heritage. Unless there is a set of positive rules and an enforceable mechanism that would *protect* the heritage, once it has been catalogued and inventoried, the created gap might facilitate practices which are directly contrary to the idea of *safeguarding* intangible property.

2.2. Intellectual Property Laws

Bearing in mind the discussed limitations of human right and cultural heritage laws, most of the literature seems to have focused on intellectual property law when searching for the structure within which the problem of protecting folklore should be placed. This should not come as a

[15] M. F. Browne "Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property" *International Journal Of Cultural Property* 12:1, 2005, 48-49

[16] W. B. Wendland, "Seeking tangible benefits from linking culture, development and intellectual property" *International Journal of Intangible Heritage,* 4, 2009, 127-136, 133

surprise – folklore emerges in the artistic domain and therefore bears a certain level of resemblance with copyright works. Predominant parts of folklore expression appear in forms corresponding to the classic copyright categories – such as music, dance, crafts, literary texts etc.

However, as straightforward as this may seem, once we look at intellectual property law as it stands today, it immediately becomes clear that this field of law is not, in its current form, entirely ideal for providing protection for expressions of folklore as the subject matter appears to be far more complex than the existing categories recognize and the inherent characteristics of expressions of folklore seem incompatible with the existing criteria for protection. While international and national intellectual property laws can in certain aspects facilitate the protection of folklore, they also demonstrate a number of drawbacks which significantly limit their efficiency. This is due to the fact that the application of standard intellectual property categories to folklore generates several critical difficulties related to the protection criteria. These limitations altogether hinder the practical reach of any protection and make it rather difficult for expressions of folklore to be governed by intellectual property laws in their current forms. Reasons for this are multiple but they all appear to derive from the genuinely different natures of folklore and standard intellectual property subject matter, be it works in the regime of copyright, signs protected by trademark law or other intellectual property-governed works. This is the reason why, over the past decades, in parallel with exploring the application of standard intellectual property law categories to folklore, experts have been considering the development of a particular new, *sui generis* type of protection.

2.2.1. Copyright Law

Historically, the first attempts to protect folklore within the intellectual property regime were made in the framework of copyright law and neighbouring rights. The very notion of "folklore" (like the idea of intellectual property itself) emerged from the Eurocentric precepts and was, as such, swiftly placed within the concept of copyright[17].

However, direct protection of folklore on the basis of general copyright principles appears to be substantially inadequate. Application

[17] M. Blakeney "Hans Christian Andersen and the protection of traditional cultural expressions" in Helle Porsdam ed. *Copyright and Other Fairy Tales,* Edward Elgar, Cheltenham, 2006, 114

of copyright rules to folklore generates several critical difficulties in relation to the fixation requirement, originality and authorship of the work and the term of protection that, altogether, make it practically impossible to be governed by copyright. Reasons for this are multiple but they all seem to derive from the genuinely different natures of folklore and copyright works. Three reasons are particularly instructive. Firstly, it is the collective and anonymous nature of folklore which is in opposition with the individualistic character of copyright. The rationale behind copyright is the protection of the author's own intellectual creation or skill, labour and judgement. On the contrary, folklore is an expression of the collective spirit and therefore does not have an author or, to be more precise, has a multiplicity of unknown authors. Secondly, copyright is designed to guide the commercial exploitation of the work. Quite the opposite, expressions of folklore have not been created in order to be economically exploited but only to serve the community from which they originate and whose tradition they exemplify. Thirdly, when it comes to damage caused by exploitation of folklore, it is mainly of a moral nature, rather than economical[18].

Thus, it is now commonly accepted that copyright and neighbouring rights appear to be a fundamentally inappropriate system for the protection of folklore. Certain indirect protection based on the copyright principles can be achieved in the case of collections of folklore and works derived from it. However, the real extent of such protection is rather limited and can only be used to supplement some other form of protection as it does not benefit the folklore or the community it originates from as such, but only the original elements of the newly created works.

2.2.2. Trademark Law

Likewise, international and national trademark law, as it currently stands, can in certain aspects facilitate the protection of folklore but also has a number of drawbacks which significantly limit its efficiency.

For example, when it comes to positive protection of folklore on the basis of trademark law, fulfilling the requirements for trademark registration are fewer and simpler than the ones necessary under copyright law. Consequently, it might be easier for folklore holders to meet the criteria for trademark protection and directly benefit from trademark

[18] R. Stavenhagen "Cultural Rights: A Social Science Perspective" in A. Eide, C. Krause and A. Rosas. eds. *Economic, Social and Cultural Rights*, Kluwer Law International, The Hague, 2001, 298

law, and in this respect the use of certification and collective marks is particularly noteworthy. Furthermore, trademark rights can be renewed continually and the benefits from their use are therefore not limited only for a certain period.

However, the first important restraint on the effectiveness of active trademark protection is that it is only applicable when there is commercialization of the folklore, that is, when there is an attempt to use and protect them in the course of trade and in relation to certain goods. Furthermore, it is debatable whether one particular person, whether natural or legal or an association of any kind, even though a member of the community from which the concerned expression of folklore originates, should be allowed to register that expression as a trademark and consequently monopolize an element of collective culture that in fact belongs to that community as a whole. In order to address this issue, it would be necessary to have a certain administrative body that would apply for the trademark on behalf of the entire concerned community and this in fact requires a high level of organization.

With respect to defensive employment of trademark law, trademarks might be used to prevent the unauthorized exploitation and commercialization of traditional designations. Although within certain limits, trademark law can provide certain protection against offensive and deceptive use of folklore, which ultimately also benefits consumers. However, the practical effectiveness of this approach is rather limited for a number of reasons. In addition, trademark law might only provide partial protection against offensive and deceptive use rather than protection of general use of traditional designations. Furthermore, and very importantly, this type of protection is only triggered when a third party applies to register a trademark that contains certain traditional elements, and thus fails to provide protection in all other situations where expressions of folklore are exploited without filling a registration application. Finally, as a general observation, trademark law essentially only concerns the commercial aspect of exploitation of folklore in the course of trade, whereas folklore should enjoy protection in any case, whether it is being exploited or not and regardless of whether such exploitation is done in the course of trade and in relation to particular goods and services or not.

Evaluation of both the advantages and shortcomings of trademark law in relation to traditional designations leads to the conclusion that trademark law, in its current form, has a rather limited effect on the protection of folklore. However, it also appears that further improvement,

within the boundaries of existing trademark law, is absolutely feasible. The recognition and acknowledgement of the existing limitations provides a valuable starting point for the development and adjustment of trademark law which could, ultimately, provide a more balanced and functional mechanism for protection of one aspect of folklore.

2.2.3. Geographical Indications of Origin

The opinions on the adequateness of geographical indications of origin in relation to folklore vary significantly. While on the one hand geographical indications of origin have been praised as having the best balance in recognizing the cultural significance and protecting the commercial value of folklore[19], on the other hand, they were said to provide too limited, and thus insufficient, protection[20].

A potential advantage of protection of folklore by geographical indications of origin is that such protection could be unlimited in time. The crucial argument in favour of geographical indications of origin-based protection of folklore lays in the nature of geographical indications of origin – they are a collective right and as such, do not require that a potential protection is limited in relation to certain organizational form, which would be the case with trademark protection.

On the other flipside though, the main problem with the protection offered under the 1994 WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter the "**TRIPs**") is generated by the narrowed scope of protection which has not, up to now, been equalized with the protection offered for wines and spirits. As a result, such protection ultimately depends on the public opinion in the country where protection is sought, which in turn might significantly limit the scope of protection. Furthermore, and as a general drawback of this type of protection – geographical indications of origin can only protect tangible expressions of folklore and only the tangible element of an expression, while the know-how behind it remains the public domain. Finally, and

[19] For example, see D. S. Gangjee, *Geographical Indications Protection for Handicrafts under TRIPS*, MPhil Thesis submitted to University of Oxford, 2002; D. Zografos, *Intellectual property and traditional cultural expressions*, Edward Elgar Publishing, Cheltenham, 2010; A. Kamperman Sanders "Incentives for and protection of cultural expression: Art, trade and geographical indications" *The Journal of World Intellectual Property*, 2010, vol. 13, no. 2, 81-93

[20] For example, see A. Kur and R. Knaak " Protection of Traditional Names and Designations" in S. von Lewinski ed. *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore,* Kluwer Law International, The Hague, 2004

essentially, geographical indications of origin cannot prevent others from making the same products as long as they use a different denomination.

Despite the disagreement on the actual effectiveness of the current scope of protection offered for folklore under TRIPs, it appears that geographical indications of origin nevertheless provide an interesting system whose elements could be valuable in developing a future model for folklore protection[21]. Within this context, it is worth noting that examples of registrations of geographical indications of origin with respect to expressions of folklore can be found in many countries[22].

2.2.4. Sui Generis Protection

Under the auspices of WIPO, in parallel with exploring the possibilities of folklore protection under the existing intellectual property systems and aware of the fact that the existing legislative models are not entirely adequate in comprehensively dealing with the subject matter, the attention of the experts has been turned towards the potentials of creating a special *sui generis* system of protection. The *sui generis* system was expected to be sufficiently close to existing intellectual property laws, mainly copyright, so as to benefit from the general principles in the amount allowed by the extraordinary characteristics of folklore, yet modified enough in order to reflect its specific features[23].

As a brief historical overview, it is worth noting that WIPO has been active in the legal and policy debate over folklore for several decades. Past highlights include working with UNESCO to adopt the Model Provisions in the 1980s and attempting to establish an international treaty. In 1997, the WIPO-UNESCO World Forum discussed the needs and addressing issues related to intellectual property and folklore. Next, through

[21] In addition to the international protection offered under TRIPS, the GIs type of protection can also be supplemented on the basis of bilateral GI agreements – an excellent example of this is Switzerland which has used bilateral agreements to protect its folklore (the Lotschental masks) – see D. Zografos, 18, 170

[22] For example Russia, Portugal and India; see WIPO Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, Geneva, July 7 to 15, 2003, WIPO/GRTKF/IC/5/3, 53

[23] "Expressions of folklore constituting manifestations of intellectual creativity deserved to be protected in a manner inspired by the protection provided for intellectual productions, and that the protection of folklore had become indispensable as a means of promoting its further development, maintenance and dissemination" – see WIPO Final Report on National Experiences with the Legal Protection of the Expressions of Folklore, , 13-21 June 2002, WIPO/GRTKF/IC/3/10, 10

1998 and 1999, WIPO conducted fact-finding missions to identify the expectations of folklore holders. The results of the missions, conducted in 28 countries, were published as a WIPO Report "Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions (1998-1999)". Most recently, WIPO's Member States established the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (hereinafter the "**IGC**") in 2000, which serves as an ongoing forum for discussion between Member States, intergovernmental and non-governmental organizations on genetic resources, traditional knowledge and folklore. The IGC and WIPO Secretariat undertake a series of detailed analytical studies, surveys national experiences and fosters international policy debate, and is also working on developing practical tools for protection of folklore, including the Draft Provisions/ Articles for the Protection of Traditional Cultural Expressions that are under constant revision.

The *sui generis* model proposed by WIPO can certainly be appraised as a vital step towards adequate folklore protection. This is not reflected merely in the provisions which are currently being developed by IGC, but also in the wider appreciation and recognition of the issues that arise in the context of folklore protection. Wide-ranging attention, acknowledgment of the specifics of the subject matter and global efforts are an imperative in developing any system for folklore protection.

Nevertheless, the WIPO initiatives also entail certain limitations. Firstly, the documents produced up to date are not legally binding upon Member States, but merely provide for optional rules which could be implemented in the legislation of the Member States. It appears, however, that so far they had somewhat limited impact on the national legislation of Member States as these have been hesitant to incorporate the proposed provisions[24]. However, for such a system to be fully operational and globally functions, it is not sufficient that some Member States implement some solutions. For the system to work, it is either necessary that Member States enter into a legally binding Treaty or that they all implement the corresponding provisions in their national legislations.

Next, the WIPO models have mainly been centred on the idea of indigenous communities as the implied beneficiaries of protection, which ultimately restricts any future protection. Also, WIPO proposals attempt

[24] A. Lucas-Schloetter "Folklore" In: von Lewinski, S. ed. Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore. The Hague: Kluwer Law International, 2004, at pp. 345

regulating both the economic and moral aspects of folklore although this may not be entirely necessary for all of the potential beneficiaries. This may result in a somewhat stiff and robust system which may not be fully adequate, as what is needed are soft, manageable and flexible rules.

Finally, a major critique when it comes to the WIPO instruments concerns the duration of the entire process. Leaving aside the earlier attempts, it has been over a decade since IGC begun developing the Draft Articles, and these have undergone a number of revisions since. Not only do the Draft Articles do not appear closer to a final text, but the debate seems to heathen even more as the discussion continue. At the same time, the parties involved in the consultations hold diametrically opposite positions[25]. This is also obvious from the proposals – some of the solutions offered under the earlier drafts diverge considerably when compared to the recent ones. On account of all this, it seems that the efforts made by WIPO, while indisputably valuable, are far away from reaching a practically functional form.

3. Further questions, further steps?

Although much has been done in the field of folklore protection, a number of questions remain unanswered.While the attention of the experts was and still is primarily focused on the theoretical and practical problems related to achieving the most effective manner of protection of expressions folklore and proposing solutions to this problem – a work in progress itself – a number of preceding questions have only just been asked.

First, experts have not yet agreed on the most fundamental of all question – should folklore be protected at all? With this respect, it has been pointed out that just because something is being copied, this does not automatically mean that is must be protected and that the maxim that "*what is worth copying is prima facie worth protecting*"[26] threatens to collapse the crucial distinctions between harm and wrong, and between mere loss and actionable injury[27]. At the heart of the debate on whether expressions of folklore belong to the public domain is the question of whether a given

[25] See for example the WIPO Draft Report, Twenty-Fifth Session, Geneva, July 15 to [24], 2013, WIPO/GRTKF/IC/25/8

[26] Justice Peterson in University of London Press Ltd v University Tutorial Press Ltd, 1916

[27] A. Drassinower "Canadian originality: remarks on a judgement in search of an author" in Y. Gendreau ed. *An emerging Intellectual Property Paradigm: Perspectives from Canada*. Edward Elgar Publishing, Cheltenham, 2009, 150.

regime provides opportunities for further creation, development, cultural exchange and fair trade. Resistance to providing protection to folklore expression relies on the necessity to keep folklore expression available as a source of further creation. In that sense, if one views the public domain as an unstructured sum of things, a kind of a zero sum game, every expansion of intellectual property shrinks the public domain[28], however, this is not entirely correct. If we accept that intellectual property rights have an incentive in the sense that the reward for exploitable property rights increases the production of intellectual goods, then arguably the greater the incentive, the greater the potential returns, thus the greater volume of intangible goods created and ultimately, the greater the extent of the public domain[29]. Also, the rights of attribution and integrity of the work, which essentially function to prevent plagiarism, in the long run help foster creativity. These rights do not remove works from the public domain; rather, they create a bounded or regulated public domain, which in many ways is what the idea of the cultural commons is about[30].

Ultimately, one must ask - is it fair that one simply takes, as from some open treasury, without acknowledging the source? Is it just that one makes such profit, not even using it as an inspiration to create something new on the basis of something old, but merely copying? Is it fair to "harvest without sowing, to steal the other person's labour of mind"? [31] If not, drawing upon the various arguments and contrasting viewpoints for and against protection, one should not drop the idea of protection altogether just because the existing system may not be perfect and coming up with one that could benefit expressions of folklore overall may be difficult[32]. While recognizing and appreciating the expressed concerns, rather than dismissing the idea of protection completely, we should seek to design such a system of protection that would annul or at least minimize the harm that it could cause to the communities from which expressions of folklore originate, to the expressions itself and to the society at large.

[28] See C. B Graber, K. Kuprecht and J. C. Lai eds., *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues*. Edward Elgar Publishing, Cheltenham, 2012, 220

[29] W. Van Caenegen "The Public Domain: Scientia Nullius?" *European Intellectual Property Review,* 2002, vol. 6, 324

[30] L. Lixinski, *Intangible Cultural Heritage in International Law*. Oxford University Press, Oxford, 2013, 199

[31] Wiese, H. The justification of copyright system in the digital age, *European Intellectual Property Review,* 2002, vol. 24, no. 8

[32] With that respect, note that even authors like Browne, who passionately advocate against protection, do not dismiss the idea of some form of protection (though other than copyright) and say that "although there are compelling reasons to be sceptical of some indigenous intellectual property rights proposals currently under discussion, I strongly support efforts to create basic mechanisms for the compensation of native peoples for commercial use of their scientific knowledge, musical performances, and artistic creations" - see M. F Browne "Can Culture Be Copyrighted?" *Current anthropology* , 1998, vol. 39, no. 2, 193-222, 204

Further, before considering an examination and discussion of *how* certain phenomena ought to be protected, it is of fundamental importance to answer certain preceding questions. *What* are we contemplating protecting? *Who* should be the rightholder of such protection? Finding the appropriate terminology and agreeing on the basic definitions has further implications. Terms are not neutral, they always convey a certain meaning or message, and thus the choice of particular terms should be considered with great care[33]. For legal purposes, it is necessary to have clear and shared understanding of what is legally meant or not meant by a term or terms selected for protection[34]. Furthermore, and equally important, the core founding definitions further impact the potential protection itself as they establish the context and connotations for understanding and interpreting the scope of potential protection. Hence, choosing the suitable definitions and terminology is one of the fundamental tasks, and certainly one that precedes all consequent debates on the protection itself.

It is to a certain extent understandable that, in a complex field such as this one, providing the theoretical underpinning and definitional framework within which the relevant problems should be addressed, is a complex and time consuming process. Certain critical issues further complicate the task of defining folklore, again underscoring its complex nature. Expressions of folklore emerge in an entire variety of different forms, encompassing a diversity of customs, traditions, artistic expressions, crafts and products, and appear in communities that are so essentially different, that there can hardly be found any links between them. As folklore entails diverse legal, social, anthropological and economic aspects, it seems almost impossible to accurately comprise all these different elements under one all-including definition. Of course, this problem is not unique to folklore. Concepts with long and diverse histories often elude tidy definitions, as Nietzsche captures it best – "**it is only that which has no history, which can be defined**"[35]. On the account of the aforesaid, there still appears to be no wider concord on certain key terms and definitions of the basic concepts in the field.

When it comes to *how* folklore should be protected, it is necessary to agree which aspects of folklore are we looking to protect and accordingly, what type of rules should we be looking at. Recognising that in the age of

[33] W. B. Wendland "Intellectual property, traditional knowledge and folklore: WIPO's exploratory program" *IIC*, 2002, Vol. 33, No. 4, 491
[34] S. Palethorpe and S. G. Verhulst, 2
[35] F. Nietzsche, *On the genealogy of morals and ecce homo*, Courier Dover Publications, New York, 2003, 53

expansion of intellectual property law and therewith generated criticism, easily granting an intellectual property status to subject matter may not be prudent, it can be argued that what is needed are soft solutions, flexible and open to future developments, and loose enough to only concern the most important aspects that need to be protected. A potential system for protection is expected to be less burdensome, less strict and less robust than the existing models; it must be loose enough so as not to be detrimental to the subject matter itself – it should not "freeze" folklore in order to protect it but must allow continuous flow. Finally, the system must also serve another function – not only to protect and restrict but also to encourage further evolution and dissemination of folklore. Ultimately, it is balance and fairness that one must keep in mind when searching for such an alternative system of protection – the balance between protection and no protection, between free flow and restricted use and the fairness in further exchange and evolution.

Finally, equally, if not even more importantly than to work through the theoretical limitations, for any proposed system to work, it is crucial to regulate and secure certain practical preconditions. Any type of protection of folklore requires a number of previous practical steps, which may be very time consuming and challenging. It is precisely the practical prerequisites that, perhaps more than the legal ones, are vital for the designed system to operate in practice.

4. Conclusion

The history of mankind is a history of borrowing and piracy. If you watch a Disney cartoon, purchase a hand-made Persian rug or join a Halloween party, you will be enjoying the results of hundreds or even thousands of years of continuous folklore flow, mixing, borrowing, re-shaping and evolution. One may ask – should we interfere with that at all or should folklore be left free?

Folklore should be free, but the use of folklore should also be fair. Fair folklore does not necessarily mean non-free folklore and there certainly are certain limited aspects of every nation's folklore that should be regulated without restricting the free flow and further evolution of folklore. Authors have already spoken of the importance of free culture and they consider that broad and durable intellectual property rights might

jeopardise further creation and innovation[36]. On the other hand, other authors noted that simply leaving a resource in the public domain is not enough to satisfy societal ideals. Sunder concludes, and I fully agree with this, that our laws should serve to facilitate the free flow of culture but on fair terms[37]. Therefore, it is ultimately *fairness* in cultural exchanges that requires that we regulate at least certain practices and certain aspects of folklore.

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ZAŠTITA FOLKLORA: RADOVI U TOKU

Rezime

Od kada je, pre pedesetak godina, pitanje folklora i njegove zaštite prvi put pokrenuto u okviru međunarodne zajednice, ova tema je privukla veliku pažnju. I pored značajnih napora brojnih lokalnih, regionalnih i međunarodnih radnih grupa, problem adekvatne zaštite folklora je i dalje nerešen. Obzirom na to da se folklor potencijalno može regulisati kroz različite pravne mehanizme, predmet ovog članka je kritička analiza adekvatnosti ovih mehanizama. Shodno tome, ovaj članak će prvo analizirati zakone o ljudskim pravima i zakone o zaštiti kulturne baštine. Imajući u vidu određene nedostatke ovih oblasti prava, ovaj članak će zatim ispitati različite kategorije prava intelektualne svojine i sui generis prava. Konačno, biće sumirana otvorena pitanja i problemi vezani za zaštitu folklora i date smernice za dalje prilagođavanje pravnog okvira u cilju odgovarajuće zaštite i mogućih rešenja.

Ključne reči: folklor, pravo intelektualne svojine, Svetska Organizacija za Zaštitu Intelektualne Svojine, sui generis pravo, ljudska prava, kulturna baština.

[36] See for example J. Boyle "The second enclosure movement and the construction of the public domain" *Law and contemporary problems* 66.1/2, 2003, 33-74; L. *Lessig, Free culture: How big media uses technology and the law to lock down culture and control creativity*, Penguin Press, New York, 2004

[37] M. Sunder "*From free culture to fair culture*" *WIPO Journal,* Vol. 4, No. 1, 2012, 20-27, 21