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Intellectual Property Inter- faces with Expressions of Folklore

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Abstract

The growing awareness by certain countries, primarily developing, of the value of their cultural heritage, along with the commercialization of intangible goods and the increasing propertization of culture internationally, have intensified the demand for the legal protection of works of folklore. The demandeurs of protection are pushing for the adoption of a copyright-based sui generis binding international instrument, whereas major actors such as the USA, the EU and Japan, are opposed to this possibility, suggesting the utilization of existing Intellectual Property law and promoting national solutions. The discourse around the protection of folklore is fueled by policy antagonisms and fundamental conceptual divides regarding the legal treatment of folkloric works. The World Intellectual Property Organization has been leading the efforts to reach a consensus and, since the adoption of the first international initiative in 1982, a big progress has been made in clarifying the objectives and defining the scope and the beneficiaries. However, the rationales of protection and especially the means to achieving it are still in question.

Keywords: Intellectual Property, Folklore, International Law

Preface

This dissertation was written as part of the MA in Art Law and Economy at the International Hellenic University.

It addresses the legal protection of traditional cultural expressions at the international level and contains an overview of the main issues that arise. Beginning from the terminology, it continues to analyse the underlying reasoning of protection, including its aims and objectives. Further on, it attempts to document and assess the possibilities of protection offered by existing Intellectual Property law, as well as the advantages and disadvantages of a *sui generis* system of protection. The stance of the European Union is separately examined, as it is among the countries opposing international protection with important arguments against it. Finally, an attempt is made to recommend a balanced solution.

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Introduction

During the last decades, the discussion on the protection of traditional cultural expressions (TCEs)¹ that originate from traditional communities and indigenous groups has gained prominence internationally in academic circles and policy-making fora. Among the reasons for this are the new challenges and opportunities arising for Intellectual Property (IP) rights through digitization, increased connectivity and content-sharing in the information society. Furthermore, modern realities, such as the extensive propertization of culture, the commercialization of intangible goods and the socioeconomic effects of globalization, have been considered to threaten the cultural heritage of the non-dominant cultures of the world.

The protection of TCEs has been a persistent and uncompromising demand of the developing world, chiefly of countries in the African continent, regarded as a matter related to manifold interests of national importance. The major anxieties of the so-called *demandeurs* of protection are the appropriation and exploitation of their folkloric expressions by third parties, resulting in their cultural deterioration and economic damage. These anxieties are followed by concerns relating to the inadequacies of traditional copyright law to protect expressions of folklore and the subsequent need to create an appropriate legal framework that will respond to the particularities of the subject matter. The latter is referred to as *sui generis* protection in that it features TCE-targeted provisions, which can eliminate the gaps of existing copyright law and provide efficient protection, indicatively by providing for indefinite protection and exception from the requirements of originality and fixation.

The first international initiatives for the protection of folklore took place in the '70s by the World Intellectual Property Organization and UNESCO, still prominent in the efforts to reach an international agreement. The most notable are the Tunis Model Law on Copyright for Developing Countries of 1976, the Model Provisions for National Laws on the Protection of Folklore against Illicit Exploitation and Other Prejudicial Ac-

¹Traditional cultural expressions (TCEs) are interchangeably referred to as expressions of folklore (EoF), folkloric expressions, or simply folklore.

tions of 1982, and the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore of 1989. Although the aforementioned texts are not binding, they have had an important impact both in providing guidance to the countries desiring to implement relevant legislation at the national level, and in documenting in a systematic manner the key-concepts of protection to be further studied and discussed at the international level.

Although there is a wide acknowledgment of the intrinsic value of folklore and the need to protect it, no successful attempt has been made up to now to address the issue of protection at the international level. This is partly owing to the fact that the legal aspects of protection are fragmented in intellectual property, cultural, economic, and human rights regimes, but it is mainly due to the existing major conceptual differences between local traditions and established global law, expressing the values of the industrialized modern societies. The protection of folklore raises serious policy issues, as it concerns a subject matter traditionally belonging in the public domain, and collides with fundamental IP concepts that are targeted to balance the interests of the authors in exploiting their work with the needs of society for access to knowledge and promotion of creativity.

At the same time, the countries demanding protection put forward important arguments, such as their right to self-identification and self-determination, their right to “cultural privacy”, translating to their right to prevent certain sensitive folkloric expressions, namely secret or sacred, from being distorted or used in a culturally inappropriate manner, or from being revealed without their consent. Equally prominent in the discussion are concerns regarding the economic exploitation of folkloric expressions by third parties in manners harmful to the originating community.

However, the means of achieving protection are debatable. Specifically, the need for a *sui generis* law is doubted, given the existence of a number of IP tools that can provide solutions, such as trademarks, geographical indications and competition law. Also, there are serious concerns that protection might have a negative impact on the normal development of tradition, which is based primarily on free use and cultural exchange. Lastly, the solutions that have been proposed up to now are questioned as

responding poorly to the realities of the developing world and not embodying adequate measures that will lead to sustainability and ultimate empowerment of the communities concerned. These issues will be further examined in the following titles.

Defining Folklore

Folklore is defined as the body of traditional beliefs, customs and stories of a community that are passed through the generations by word of mouth or imitation². The word was coined in 1846 by the British writer William John Thoms³ and derives from the words *folk* meaning people and *lore* meaning traditional knowledge and beliefs, thus folklore is *the knowledge of the people*.

Despite the definition's universal spirit, the term folklore bears several connotations a lot of which are negative. In fact, folklore is perceived by the western societies to a great extent through what is culturally understood as its counterparts, such as the notion of *modern, civilized or westernized*⁴. It is linked with the past, with the non-modern or undeveloped, and since it is chiefly transmitted orally, although not exclusively, it is opposed to transcribed, systematic knowledge that is generally connected with academic disciplines and science.

The vocabulary used to describe the folkloric cultural production characteristically differs from the standard words we use for the same works of the dominant culture. Examples are craft versus art and creator versus author. The word folklore has largely become a synecdoche of cheap, touristic and banal productions. This is probably one of the reasons why the WIPO Intergovernmental Committee has opted for the use of *expressions of folklore* instead of just *folklore*⁵.

²'Folklore', Oxford Dictionaries, 3/7/2018, <https://en.oxforddictionaries.com/definition/folklore>

³'Folklore', *Wikipedia*, 3/7/2018, <https://en.wikipedia.org/wiki/Folklore>

⁴Christoph Beat Graber and Mira Burri Nenova (eds), 2008, *'Intellectual Property and Traditional Cultural Expressions in a Digital Environment'*, Edward Elgar Publishing Limited, Cheltenham, UK, page 5.

⁵Christoph Beat Graber and Martin Girsberger *'Traditional Knowledge at the international Level'*, 2006, *Luzerner Beitrage zur Rechtswissenschaft*, Band 11, page 247

Contrary to the western perceptions and realities, for the developing countries, small communities and indigenous groups, folklore is still a vital part of the social life and everyday activity, vibrant and ever evolving. This fundamental difference is not without complications for the efforts to reach a common ground on the protection of folklore. The aforementioned divides are illustrative of the conceptual differences between two worlds. However, it should be noted that during the last decades there is global acknowledgment of the importance of folklore both as a historic source and as a contributing factor to the evolution of our civilization. Also there is a revived interest for folklore's aesthetic value, highlighting the importance of its legal protection.

In the face of the current lack of a legal text of international acceptance, there is not yet uniform terminology on the subject matter, but a variety of definitions that reflect the currently existing policies on the protection of TCEs. Consensus over the core terminology translates on consensus on the scope of protection and its objectives. Therefore, it is a necessary condition in order to progress towards an international resolution: "*finding a common vocabulary on folklore among stakeholders will ultimately determine the capacity of an international approach*"⁶.

The existing literature involves the use of several terms, such as, among others, folklore, expressions of folklore, cultural heritage, traditional knowledge, and indigenous knowledge. For taxonomy reasons and although the terms are frequently used to mean the exact same thing, it should be noted that the term *expressions of folklore* is more precise than just *folklore*, since the latter is associated with the general idea of folkloric knowledge and the relevant academic discipline, whereas *expressions of folklore* stand for the tangible or intangible manifestations of folkloric knowledge⁷. Furthermore, according to WIPO, expressions of folklore are a subset of traditional knowledge, which includes "*tradition-based innovations and creations resulting from intel-*

⁶Stephen Palethorpe and Stefaan Verhulst, '*Report on the International Protection of Expressions of Folklore under Intellectual Property Law*', 2000, Programme in Comparative Media Law and Policy, University of Oxford, UK, page 6

⁷In the present paper the two terms are used interchangeably to mean the same thing.

lectual activity in the industrial, scientific, literary or artistic fields”, and traditional knowledge is a subset of the broader notion of cultural heritage⁸. Lastly, indigenous knowledge refers specifically to the knowledge of indigenous people and is similarly a subset of traditional knowledge.

Expressions of folklore, also called *traditional cultural expressions (TCEs)*, are of such variety and diversity, that the task of fitting them to a strict definition is very difficult. However, it is important to obtain a clear term that distinguishes the protected subject matter from similar fields of interest, in order to enable efficient and targeted protection. From a pluralism of opinions and an equal number of definitions, it is worth examining the definitions of UNESCO and WIPO.

According to UNESCO, *“folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.”*⁹

WIPO uses the term *traditional cultural expressions* interchangeably with *expressions of folklore* and defines them as *“forms in which traditional culture is expressed”*. These forms are *“passed down from generation to generation, [and] form part of the identity and heritage of a traditional or indigenous community”*¹⁰. Traditional cultural expressions (TCEs) may include indicatively music, dance, art, designs,

⁸WIPO, 2001, *‘Intellectual Property Needs and Expectations of Traditional Knowledge Holders: Draft Report on Fact Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, Geneva, page 28

⁹UNESCO, *Recommendation on the Safeguarding of Traditional Culture and Folklore*, 1989

¹⁰*‘Folklore’*, WIPO, 3/9/3018, <http://www.wipo.int/tk/en/folklore>

names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions¹¹.

The definitions of UNESCO and WIPO are generally aligned and it is worth noting that they both have excluded words which are closely associated with copyright, as namely the word “works”, and instead refer to “creations” and “forms of expression” respectively, reflecting a *sui generis* protection approach. In an attempt to guarantee a broad and precise scope of protection for TCEs they refer to both tangible and intangible cultural expressions and provide an enumeration that although is obviously indicative it sufficiently circumscribes the subject matter.

Attention is drawn by the shared requirement that the said TCEs express the identity and represent the values of the community, which introduces a qualitative criterion that desirably restricts the subject matter of protection. That is to say that not every cultural production coming from a traditional community would fall under the scope of protection, but only those which are characteristic of a certain community’s tradition. Of course, as it has been accurately remarked¹², this characteristic linkage between a certain community and a given cultural expression may face interpretation problems¹³.

A sine qua non condition for defining TCEs is to understand their nature. The features they embody are related to the potential and the suitability of existing IP

¹¹Idem

¹²Daniel F. Robinson, Ahmed Abdel-Latif and Pedro Roffe (eds), 2017, *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore*, Routledge, London (UK), New York (USA), page 183

¹³Who is to say when this linkage exists, outsiders or the community itself? And if the latter is accepted, then would it suffice if only a small group within the community recognized a certain cultural expression as “characteristic” or is general acceptance required? Although it seems only fair to say that responsible to answer questions of eligibility over folkloric expressions should be the originating community, this would cause great uncertainty to the potential users of the folkloric work in question globally.

rules, therefore their examination is important. These features are a) the temporal, b) the territorial, c) the societal and d) the communal, and they are briefly explained as following:

a) The temporal feature of folklore relates to the trans-generational and incremental nature of tradition. By definition, tradition has historic roots and evolves over time in a continuing process. It comes from the past and it is delivered in our time as an amalgam of multiple contributions and interpretations. It is non-static and changes over time. Regarding the legal protection of folklore, it raises an important question on the issue of duration. Protection under existing IP laws is typically limited and considered as unsuitable for TCEs. On the contrary, indefinite protection is thought to respond better to the nature of folklore.

b) The territorial feature refers to the nature of folklore as deriving from a particular community placed in a certain territory, at least originally. Although it is true that traditional communities usually bear a strong link with a particular place, the concept of territoriality does not correspond with the realities of the modern world. Examples include the diaspora of communities all over the globe, as well as the possibility that a country is host to more than one traditional communities. In respect of the protection of folklore, the territorial feature relates to the jurisdiction-based protection provided under IP law, but also with matters of attribution.

c) The societal feature relates with the perception of folklore in a given social environment. TCEs may be understood as sacred, as part of everyday life, or as a commodity, depending on the dominant values of a given society. These perceptions consequently determine the acknowledgment or not of the need for protection and affect the extent of protection reserved for TCEs. Characteristic issues relating to the societal feature are among others the perception of cultural heritage as property and the inclusion of TCEs in the public domain.

d) The communal feature of TCEs relates to authorship and the concept of property. Although an expression of folklore might have been the creation of a single individual, this individual is rarely traceable and the initial creation rarely if never remains unaltered over the course of time. It carries the input of the intellectual effort of

an indeterminate number of people. This fact has led to the presumption that TCEs belong to the community. Existing IP law, however, does not recognize communal proprietary rights. Even if an intellectual creation is the product of joint authorship acknowledging rights to each of the authors, these rights are individually owned.

Taking the aforementioned features as starting points, one may develop an outline of the main problems of protection faced by TCEs in the existing framework of IP law. These will be further analyzed under the relevant titles.

The rationale of protection

The level of protection proposed by the different actors in the international debate reflects the interests of each. These actors are multiple, given the international scope of the subject matter as well as its economic importance. However, they can be divided into three large groups, namely the communities which originated the folkloric expressions, society at large, and lastly, end users.

The members of a given ethnic, cultural or otherwise defined sub-group of people consisting a community, have an interest in protecting, preserving and promoting their cultural heritage. This interest has been met with new challenges in the modern globalized world and it has been seriously affected by the technological developments and increased connectivity of our time. Economic concerns over the commercial utilization TCEs have intensified, creating the need to exert some level of control over their exploitation by third parties, especially when done so in a culturally inappropriate or otherwise harmful manner.

Society at large has similarly an interest in the protection of folklore especially for the purpose of its maintenance and dissemination¹⁴ as an important means for the enrichment and promotion of culture, but also from a Human Rights aspect¹⁵, since cultural development is related to the fundamental right of the peoples in self-determination¹⁶. From an economic point of view, the effect the protection of TCEs can have for the developing world is also of interest to society. However, the restrictions that

¹⁴UNESCO, WIPO, 1982, *'Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, chapter II, at 25, page 9*

¹⁵Article 27 par. 2 of the *Universal Declaration of Human Rights*, 1948, reads that *'everyone has the right to the protection of the material and moral interests resulting from any literary, scientific or artistic production of which is the author.*

¹⁶Janet Blake, 2015, *'International Cultural Heritage Law'*, Oxford University Press, UK, page 277

probably be imposed to the utilization of TCEs through legal protection, might have negative effects for traditional goals of society such as education and the promotion of creativity.

End-users are most likely to experience negative effects from the protection of folklore to the extent that previously free content and available for whichever use, will acquire a legal status of limited accessibility and controlled and on-a-fee utilization. From the moment that such restrictions will be put into force, it is also expected that the interest of investors will drop and therefore the prices of folkloric cultural goods will rise, the latter perhaps to the advantage of the TCE holders.

In what follows an effort will be made to address the main questions arising on the matter of protection through summarizing the rationales and the underlying policies.

Competitive interests

The demand for protection comes partly as response to the negative impact of globalization, affecting the developing world on the one hand through the economic exploitation of its cultural resources by the big industries commonly without consent, and on the other hand through the rise of a unified universal culture that threatens the global cultural diversity and especially the vitality of minority cultures¹⁷. These concerns become even more intense due to the rise of new technologies and the spreading of the Internet, which although serve as unique tools for the dissemination of TCEs, at the same time expose them to a number of challenges¹⁸.

¹⁷Jon M. Garon, 2015, *'Rethinking Intangible Cultural Heritage and Expressions of Folklore: A Lesson from the FCC's Localism Standards'*, Nova Southeastern University, Shepard Broad College of Law, page 8

¹⁸It should be noted though that globalization and technology offer at the same time incredible opportunities for revitalizing, safeguarding and further developing TCEs that would have otherwise been lost. Especially the Internet can greatly help to the survival especially of languages but of certain TCEs as well that are not practised due to the dispersion or elimination of a given traditional community.

The developing countries with weak economies and lack of means to compete in the sophisticated and aggressive markets run by the industrialized countries, are growing awareness of the economic prospects of their cultural assets and wish to profit from them, by means among others of exclusion of third parties from exploiting their TCEs. Although there is insufficient statistics and analyses of the value of TCEs for the global economy¹⁹, there is confidence that the developing world will benefit importantly in terms of socio-economic development from exclusive rights over their TCEs²⁰.

Last but not least, there is a *fairness* argument put forward by the demandeurs of protection, with strong human rights connotations, referring to the historical treatment of developing countries, indigenous peoples and traditional communities by dominant groups during the era of colonialism. The misappropriation and misuse of TCEs by third parties, especially by the developed world, is seen by some as a continuation of injustice. In addition, the West is able to exploit foreign TCEs by producing and marketing goods that enjoy IP protection, whereas the communities generating these TCEs are left unprotected and are thus prevented from creating cultural capital.

In the times of vivid discussion around the problem of the continuing expansion of the subject matter of Intellectual Property²¹, the efforts towards making an international law that will result in the subtraction of significant public domain material is somewhat puzzling. The discourse over the protection of folklore is fueled by the conceptual divide between the demand for equal treatment of works of folklore and traditionally copyrightable works and the mere perception of public domain. The latter traditionally includes TCEs, rendering them ineligible for private ownership²².

¹⁹Supra note 6, page 22

²⁰Supra note 8, page 295

²¹Andrew Becherman-Rodau, 2011, *'The Problem With Intellectual Property Rights: Subject Matter Expansion'*, *Yale Journal of Law and Technology*, Vol 13: Iss. 1, Article 2, page 45

²²WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore, 2010, *'Note on the Meaning of the Term "Public Domain" in the Intellectual Property System with Special Reference to the Pro-*

This perception of the restriction of the public domain as harmful for the goals of society constitutes a basic argument against the protection of folklore brought forward in the international debate by the developed countries²³. There is no doubt that the growing commodification of intangible goods has created a dynamic cultural market with multiple financial interests, chiefly held by the developed economies. Any substantial change to the existing IP system will greatly affect existing IP rights and cause undesired market turbulence. It is therefore only natural that the developed world is reluctant to accept such an intersection to the established IP concepts.

From the point of view of the demandeurs of protection public domain is an alien concept, since TCEs are rarely perceived as “property” that is owned. On the contrary, the members of these societies rather consider themselves as *custodians* of their cultural heritage. Such custodianship is understood as a perpetual responsibility by the members of the community and it does not cease to exist when the cultural expressions in question fall in the public domain²⁴. In addition, the placement in the public domain of secret or sacred TCEs is considered as causing them irreparable harm, contradicting their very nature and cultural purposes. It should be noted, however, that there are concerns even among traditional communities that the proposed protection

tection of Traditional Knowledge and Traditional Cultural Expressions/Expressions of Folklore, Seventeenth Session, Geneva.

WIPO defines ‘public domain’ in intellectual property (IP) law, as to “generally consist of intangible materials that are not subject to exclusive IP rights and which are, therefore, freely available to be used or exploited by any person”, also noting that “the public domain is an elastic, versatile and relative concept and it is not susceptible to a uniform legal meaning”.

²³Rosa Giannina Alvarez Nunez, 2008, ‘*Intellectual Property and the Protection of Traditional Knowledge, Genetic Resources and Folklore: The Peruvian Experience*’, *Max Planck Yearbook of United Nations Law*, Vol 12, p.487-549, page 497

²⁴Graham Dutfield, 2009, ‘*Protecting Traditional Knowledge and Folklore: A Review of Progress in Diplomacy and Policy Formulation*’, UNCTAD-ICTSD, Issue Paper No. 1, page 24

might have reverse results for the normal enjoyment and development of TCEs, restricting the free cultural exchange and further interpretation of tradition²⁵.

The Objectives of Protection

In the context of the subject matter under discussion “protection” has also the meaning of “preservation” and “safeguarding”. These ideas are indeed related but their objectives are different: according to WIPO, they are concerned with the “*identification, documentation, transmission, revitalization and promotion of knowledge and cultural heritage, in order to ensure its maintenance or viability*”²⁶. Protection, on the other hand, specifically refers to the “*use of IP tools and principles to prevent unauthorized or inappropriate uses of traditional cultural expressions by third parties*”²⁷.

For the purpose of comprehending the objectives of protection, the possible misuses of TCEs are briefly described. These are²⁸:

a) The *appropriation* of TCEs, which consists in copying and/or modifying them in whole or in parts, without the consent of the holder and/or without attribution to the creators or the holders of such TCEs (i.e. when a traditional pattern is copied and used to decorate commercially produced carpets).

b) The *inappropriate use* of TCEs, in the form of their *distortion*, consisting in their use or modification in a manner that is culturally disrespectful (i.e. when a sacred symbol is used to decorate kitchen utensils), as well as in the form of *disclosure* of TCEs that are secret, therefore their publication results in the destruction of their cultural

²⁵Idem, page 20

²⁶Protection, preservation and safeguarding can in fact coexist and supplement each other. However, preservation and safeguarding might have a reverse effect, through the making available of TCEs to the public through their documentation and especially through their digitization, making them more vulnerable to wrongful uses.

²⁷Supra note 8, page 21

²⁸Supra note 24, pages 17-19

purpose (i.e. when the visual recording of a secret ritual is reproduced on the Internet).

c) The *authentication* of TCEs, which is an issue arising when imitations of TCEs are introduced in the market and compete with genuine TCEs.

Although TCEs for the moment belong in the public domain and their use is unrestricted, in all the above cases one easily detects elements of violation, primarily of the cultural significance of TCEs, but also of the economic value they embody.

Under the IP legal frame, *protection* is translated to exclusive property rights in the productions of the human intellect. In terms of TCEs an equivalent protection is demanded, that is the recognition of exclusive rights of the holders over their TCEs, consisting in their right to commercially exploit them by allowing or permitting their use and in their right to prevent claims by unauthorized third parties. Relating to these particular demands two approaches on protection have been developed: the so-called “positive protection” and the “defensive protection”.

Positive versus Defensive Protection

Positive protection consists in acquiring and asserting IP rights in TCEs that enable the holders of such rights to permit or prevent the use of the protected material, thus allowing them on the one hand to exploit them commercially if they wish and on the other hand to take legal action against misappropriation or unauthorized use. Positive protection, being the analogous of the IP notion of recognizing exclusive property rights, aims to allow the TCE holders to make profit from TCEs and control their use by others, i.e. through granting licenses. Positive protection can benefit from a range of existing IP tools, as indicatively Copyright or Trademark Law.

Given that TCEs are largely incompatible with the existing IP system, there are views that positive protection can only be understood by either extending or adapting certain aspects of existing IP rules, referred to as *sui generis measures*, or by creating a completely new system of protection designed especially for TCEs, referred to as *sui generis systems*.

The defensive protection approach, reportedly supported by a small number of developed countries²⁹, consists in ways of preventing the illegitimate use of TCEs by persons outside the cycle of the originating community. According to WIPO, defensive protection is based on the principle of prior informed consent, which can efficiently protect, specifically but not exclusively, secret or sacred TCEs. In addition, the obligation to refrain from using the TCEs concerned without proper authorization, and the concept of equitable benefit-sharing are introduced to supplement the *prior informed consent principle*. Documentation³⁰ can also be of use by assisting the interested parties to identify folkloric expressions in order to obtain consent over their use.

Positive protection is clearly more dynamic compared to defensive protection. However, it is faced with a number of technical difficulties, due to the nature of the subject matter of protection and requires more radical changes that are unwelcome by important actors. On the other hand, defensive protection entails more moderate measures and deals with legal concepts that most countries are familiar with. Even so, matters of who will be responsible to grant permission for the use of TCEs and/or who will be the beneficiary of compensation (i.e. the government, the community concerned or a special committee), or what will happen in cases of TCEs shared by more than one communities and/or countries which might simultaneously claim paternity, have not been adequately addressed yet.

International versus National Protection

The question of why international protection comes naturally given that the interested countries can regulate relevant provisions at the national level. The answer relates to the territoriality of folklore or rather the lack of it. Although TCEs have originated at some point in history from a certain community located in a particular place, the community concerned might have lost its bonds with the said place through the years, due to movements of population.

²⁹Supra note 12, page 151

³⁰Documentation is usually referenced in the international discourse as a means for the defensive protection of *traditional knowledge* and *genetic resources* especially in relation to patents.

In the globalization era the notion of community has become more fluid³¹. However, this does not mean that a dispersed community has ceased to exist. On the contrary, its existence depends on the identification of its members as such. At the same time, a single state might be host to more than one identifiable communities or ethnic groups. Taking these facts into account, protection at a national level is not adequate for the effective protection of a subject matter that can be of trans-territorial and transnational nature.

In addition, in a globalized networked world, TCEs are used internationally for multiple purposes by an indeterminate number of people. This brings up matters of jurisdiction. National legislation is applied in the national territory. Therefore, if an unlawful act by a third party is to take place outside the national borders, the national legislation cannot apply³². In view of this, national legislation for the protection of folklore is of limited value, especially when considering that major part of the problem is the wrongful use of TCEs taking place outside the borders of the originating country.

Moreover, even if bilateral or multilateral agreements among states existed, certain TCEs would never be recognized outside the country or community of origin, if their practice was considered as human rights violation in other countries. An example is female circumcision which is traditionally practiced in several African countries. An international agreement on protection would ideally resolve such issues by setting some minimum standards that would be unanimously accepted.

It should be noted, however, that the effectiveness of internationally enforceable legislation on the protection of folklore is doubted in relation to the political realities existing for certain traditional communities or indigenous groups that are seen with hostility by the governments of the countries in which they reside³³. It is doubtful that such governments would become signatories to a future international agreement,

³¹Supra note 17, page 29

³²Reto M. Hilty, 2009, '*Rationales for the Legal Protection of Intangible Goods and Cultural Heritage*', Max Planck Institute for Intellectual Property, Competition & Tax Law, Research Paper No 09-10, page 14

³³Supra note 17, page 41

but even if they would, it is questionable whether they would qualify as trustees for a community's interests.

Underlying Policies

The question of whether TCEs should be granted international legal protection or not is ultimately a question of purpose. Simply put, it is a question of the desired effects of protection.

In IP protection two rationales are identifiable. The first relates to the protection of the personality of the individual, perceiving the intellectual creations as expressions of the personality³⁴. The other relates to promoting literature and art by providing creators with economic incentives. These core concepts correspond respectively to the acknowledgment of moral and economic rights. But since tradition is spontaneously created by the peoples to express non-economic values, it is hard to see how the notion of economic incentives serves the promotion of tradition and specifically of TCEs.

However, it is true that Intellectual Property has bent its rules in the past so as to include new subject matter. Therefore, despite the arguments against it, there exists a possibility of finding a place for TCEs in the existing legal framework. In any case, if one acknowledges the harm caused by the unregulated exploitation of TCEs to their holders, then the recognition of the need for a minimum of protection is inevitable. However, given that substantial objectives of protection relate to the economic support and empowerment of economically disadvantaged countries, the efficiency of IP rules and especially of Copyright Law as means to achieving this goal should be further examined.

If the protection of TCEs is viewed as potentially capable of helping to create wealth for countries of the third world, then the communities concerned should be provided with incentives to further develop their TCEs, as well as with support towards the creation of sustainable businesses. In view of this, the suitability of a future legal instrument will depend on the form of protection we wish to grant and finally on whether the chosen instrument is inherently capable of creating prospects. At the

³⁴Supra note 23, page 5

same time, effective protection is an efficient and accessible protection. Therefore, the specific socioeconomic realities of the demandeurs should be taken into account before transferring to their societies paradigms of complex and costly procedures and concepts that are perhaps strange to their lifestyle.

It is worth noting that TCEs have benefited to some extent from the global trade that has evolved around them, since it has increased their identification even in remote parts of the world, increased their value and marketability and gained them new denotations in the context of modern cultures. Of course, these developments are not always welcome by traditional communities, especially by these which prefer to maintain their cultural privacy. But such communities are not interested in the commercial exploitation of their cultural expressions anyway. Those which are, however, should not be prevented from doing so by strict protective measures. A law on protection should allow the normal enjoyment of TCEs, including their exploitation, otherwise it can have reverse effects on the protected subject matter and on the beneficiaries.

Existing Intellectual Property Law

Apart from important policy issues, as previously mentioned, the debate on the protection of TCEs focuses equally on technical matters and specifically on the appropriate legal instrument for protection. Due to the fact that TCEs are essentially products of the human intellect, Intellectual Property³⁵ is considered to be the most suitable framework to accommodate the subject matter. However, there is no consensus on the particular ways TCEs should benefit from IP laws, whereas their temporal, societal, communal and territorial particularities create a number of implementation problems.

There are two approaches on the issue. The first one considers that protection of folkloric expressions can be successfully provided through existing IP tools and the second one, referred to as the *sui generis* approach, questions the suitability of existing IP law and proposes to either create a whole new system specifically designed for TCEs or to extend and/or adopt existing measures to complement existing law with specific provisions for TCEs³⁶.

A large part of the relevant literature underlines the inherent inability of TCEs to meet the requirements of the existing IP law, as well as the inability of the existing law to meet the needs and expectations of the TCE holders³⁷. IP enforcement is a demanding task that involves definitional and procedural difficulties, and requires trained experts and significant costs³⁸, contrary to the objectives of effectiveness and accessib-

³⁵For the purposes of the present paper and in accordance with the international literature on the subject matter, *Intellectual Property* is referred to as a generic term including not only copyright and related rights, but also industrial property, patents, trademarks, designs and geographical indications.

³⁶WIPO, 2003, *Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore*, Geneva, page 35

³⁷Supra note 23, page 514

³⁸Supra note 8, pages 203-204

ility of protection³⁹. Even if the TCE holders are adequately educated over their rights and how to claim them, it is doubtful that the IP system would be of service to societies structurally different from the ones which designed it.

Nevertheless, there is acknowledgement of the fact that the conventional IP tools, as they currently apply, do in fact offer TCEs protection against certain forms of misuse, even if doing so partly or indirectly. The following sections concentrate on the IP laws that can potentially apply to protect TCEs, assessing their potential to address the subject matter, as well as their disadvantages.

Copyright Law

Copyright Law's subject matter of protection is "*literary and artistic works*"⁴⁰. Therefore, it is seemingly the most suitable framework for the protection of the artistic manifestations of traditional communities and indigenous groups. Indeed, under certain conditions and to some extent, Copyright Law offers protection to TCE holders. However, the Berne Convention of 1971, regulating the core copyright law at the international level, did not include TCEs in its scope⁴¹. On the contrary, the notion of public domain, the criteria of protection, certain types of fair uses, the term of protection and domestic applicability, all preclude TCEs from benefiting from the provisions of Copyright Law as presently applied.

³⁹WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore, 2006, '*Note on the Meaning of the Term "The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles"*', Ninth Session, Geneva, page 7

⁴⁰Article 2 par. 1 of the Berne Convention for the Protection of Literary and Artistic Works, 1971

⁴¹Contracting Parties such as Greece have explicitly precluded traditional cultural expressions from the scope of national Copyright Law (see article 2 par. 5 of Law 2121/1993).

Originality

The precondition of originality is not explicitly stated but it is thought to be implied in Article 2 par. 1 of the Berne Convention, therefore many countries have included it in their domestic Copyright Law. There is no definition of originality provided by the legal systems that require it and its precise meaning is a subject of judicial interpretation. Despite the differences between the common law and civil law approaches, it is generally accepted that originality means that the work must firstly be the author's own intellectual creation, meaning that it has not been copied, and secondly that it should involve a minimum of intellectual effort⁴².

Given their nature and incremental manner of development, TCEs face difficulties in meeting the originality requirement. Each single TCE inevitably reproduces to some extent an existing TCE so as to continue it, thus failing to meet the standard of *minimum intellectual effort*. It should be noted however that under Copyright Law, TCEs might qualify for protection under the concept of derivative works, which are works based on pre-existing works, of which they incorporate elements, producing a final work worthy of protection.

It is important to underline that Copyright Law permits the imitation of the ideas and concepts behind works, considered in general to serve as sources of inspiration and creativity⁴³. Therefore, even if a TCE meets the originality criterion, copyright protection does not in itself prevent others from using the general idea and style of the said TCE, rendering protection inadequate in respect of the demandeurs' specific claims. Furthermore, the law does not involve any specifications regarding the author of the protected work. This means that it can be literally anyone and not necessarily related to the originating community.

As an exception to the general rule, Copyright Law recognizes a right to protection for non-original works. This is specifically the case of neighbouring rights, namely

⁴²Supra note 6, page 28

⁴³WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 2008, Thirteenth Session, 'The Protection of Traditional Cultural Expressions: Draft Gap Analysis', Geneva, page 21

the rights of performers, producers and broadcasters. Neighbouring rights serve as an example to the ability of Copyright Law and Intellectual Property in general to broaden their scope and adapt their provisions, in order to recognize protection for new subject matter. Therefore, if we accept that TCEs are worthy of protection, then admittedly there is a realistic possibility for their copyright protection.

Fixation

Fixation, which is the embodiment of the literary or artistic work in a material form, is not a requirement for protection under international Copyright Law. The Berne Convention leaves this to be decided by the national lawmaker⁴⁴. Therefore, intangible creations, such as fairy-tales or chants, as well as tangible creations that are however not fixed in a permanent manner, as for instance sand carvings, are also included in the scope of international copyright protection.

It follows that fixation becomes an obstacle for the protection of unfixed TCEs in the countries that demand it for copyright protection at the national level⁴⁵. However, it is considered that the TCEs which are most vulnerable to illicit exploitation are the ones fixed in a material form, such as crafts. At the same time, intangible TCEs that are performed live produce moral and certain exclusive economic rights for their performers under the WIPO Performances and Phonograms Treaty (WPPT), 1996⁴⁶, as further analysed below.

⁴⁴Article 2 par. 2 of the Berne Convention for the Protection of Literary and Artistic Works, 1971

⁴⁵The fixation criterion is a requirement primarily in the common law countries and it entails embodiment of the creative work in a tangible medium through for example transcription or recording. See supra note 44, page 18

⁴⁶Article 2 (a) and Article 15 of the WIPO Performances and Phonograms Treaty, 1996, Geneva

Ownership

Copyright Law grants exclusive rights to the authors of protected works. These rights are individually owned, either by single individuals or by individual legal entities, but not by communities. Of course, Copyright Law acknowledges joint authorship in cases of equal contribution of more than one authors for the production of a single work, over which all authors are equally copyright holders. Moreover, the concept of *collective works* also exists, constituting a combination of separate and independent works, assembled into a collective whole, each of which may enjoy separate copyright protection.

In the existing Copyright system the author or authors of a protected work can assign their copyright to others, persons or entities. This is an interesting option for TCEs since it gives the author of a folkloric creation the opportunity to transfer his rights to a legal entity or an association representing the traditional community or indigenous group linked to the particular folkloric work. In the same spirit, use could be made of the Copyright provision of some jurisdictions that recognizes the employer as the copyright owner of a work created by an employee within the context of their contract.

Authorship

TCEs are challenged with meeting the requirement for an identifiable author that is provided for in many jurisdictions for copyright protection. Given the historical nature of TCEs and incremental development through several contributions in the course of time by an unspecified number of authors, they are often of unidentifiable origin⁴⁷. Consequently, the author is either impossible to track if there is one or not identifiable at all. Again, this is an obstacle not absolutely insurmountable considering the concept of anonymous and pseudonymous works.

Article 15 par. 4 of the Berne Convention states:

“(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country

⁴⁷Supra note 6, page 29

of the Union, 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.

(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.”

This paragraph was added to Article 15 of the Berne Convention having in mind specifically the protection of TCEs and attempts to provide solution to the absence of an identifiable author⁴⁸. Notwithstanding its potential to address certain aspects of the problem, it should be read in combination with the last sentence of Article 7 par. 3 of the Berne, reading that “[t]he countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years”. Consequently, the protection deriving from Article 15 only concerns rather recent TCEs and at the same time presupposes the existence of an author even if non-identifiable.

Article 15.3 only applies for unpublished works, which a very little TCEs are likely to be. In addition, it leaves whether to protect or not to the discretion of the country of origin of the anonymous work, whereas the degree of involvement of the state in designating a competent authority and managing the details of enforcement does not respond to the needs and expectations of traditional communities and indigenous groups to directly seek protection. Perhaps it is not coincidental that among the signatories of the Berne, only India has implemented this provision until now⁴⁹.

Term of Protection

Copyright protection is time-limited. This means that after protection expires, the subject matter of protection falls in the public domain. This limited duration of protection is a cornerstone to the delicate balancing of interests Copyright is designed to achieve.

⁴⁸Idem, page 37

⁴⁹Supra note 36, page 57

The Berne Convention under Article 7 provides a minimum of the lifetime of the author plus 50 years, which has been adapted by many jurisdictions, whereas other jurisdictions provide for a plus of 70 years to the lifetime of the author.

This particular requirement is considered unsuitable for TCEs, not only because it presupposes the existence of an identifiable author, but also in respect of the intergenerational nature of folklore. As long as a TCE exists and it is linked to a specific traditional community, there exist reasons for its protection⁵⁰. Therefore, indefinite protection is an essential demand for the efficient protection of TCEs. Based upon a similar reasoning is the demand for retroactivity, in order to protect pre-existing folkloric expressions⁵¹.

Indefinite protection is found in Copyright Law, specifically in the protection of moral rights. The Berne Convention provides for a minimum protection that equals the term of protection of the author's economic rights⁵². Therefore, some jurisdictions have opted for a perpetual protection of the author's moral rights⁵³. This is not to say that the protection of TCEs could be satisfied by the concept of moral rights protection alone, but rather that IP law can be flexible enough to meet several objectives even if this means deviating from fundamental principles such as the term of protection.

⁵⁰ If for example a sacred tribal hymn was granted copyright protection, after 70 years it would fall in the public domain, although its sacredness would continue to exist along with interest of the community for its protection.

⁵¹Supra note 40, page 36

⁵²Article 6 bis, par. 2 of the Berne Convention for the Protection of Literary and Artistic Works, 1971

⁵³See for example Article 29 par. 2 of the Greek Copyright Law, granting to the Minister of Justice the right to exercise the right to paternity and the right to the integrity deriving from the moral rights to a protected work, after the copyright protection of the said work has expired.

Exceptions and Limitations

Certain exceptions and limitations to the exclusive rights of the author or otherwise referred to as *fair uses* of protected works have been introduced to Copyright Law in order to bend the rigidity of protection in favour of creativity, inspiration, free artistic expression and dissemination of information. Common examples indicatively include exceptions and limitations for teaching and for archival purposes. In respect of TCEs, their absolute protection would not only disregard public interests, but even possibly harm the mere mechanism of tradition by obstructing the enjoyment of cultural heritage by the peoples, the cultural exchange between communities and the transmission of their folkloric expressions.

However, the use of such exceptions and limitations for TCEs has been criticized as contradicting their nature and the purposes of protection⁵⁴. A characteristic example is the exception that permits the reproduction by illustration, photograph or other ways of a sculpture permanently displayed in public, especially if the sculpture is of a sacred nature. At the same time, documentation and digitization of TCEs for archival purposes, challenges their safety by exposing them to number of unlawful uses.

Moral Rights

The moral rights of the author, according to Article 6^{bis} paragraph 1 of the Berne Convention, consist of *“the right [of the author] to claim authorship of the work and to object to any distortion, mutilation or other modification of or other derogatory action in relation to the said work which would be prejudicial to his honour or reputation”*. The rights deriving from this article, known as the right of attribution, the right of integrity over the work and the right of publication, are considered by some to be especially suitable for protecting TCEs. The reason for this is, inter alia, that moral rights are protected independently of the author’s economic rights, that is even after the term of protection of the economic rights has expired and the protected work has entered the public domain⁵⁵.

⁵⁴Supra note 44, page 13

Under Copyright Law, moral rights are subject to the same criteria as economic rights, therefore the same obstacles arise in the protection of TCEs. Nevertheless, with the necessary adaptations, moral rights can respond to the main anxieties over certain unlawful uses. In particular, the right to attribution could potentially address the problem of authentication⁵⁶ by demanding reference of the creator when a TCE is used, informing the public on his identity. In practice, this requirement would need certain modifications so as to overcome the possible absence of a sole and/or identifiable author, thus requiring reference to the originating community instead of the creator⁵⁷.

In addition, the right of integrity over the protected work, successfully addresses a number of possible misuses of TCEs, resulting from their distortion or alteration which can have culturally undermining effects. In such cases, the possibility of equitable remuneration can prove particularly important. The right of publication consisting in the right of the author to decide when and in what manner their work will be published can provide suitable protection in cases of secret or sacred TCEs, and although perhaps remuneration could be perceived as futile given the exhaustion of the protected interest, it could help to reduce infringement incidents⁵⁸.

Resale Right

The resale right, also referred to as *droit de suite*, is provided under Article 14 of the Berne Convention and consists in the inalienable right of the author of a work or his

⁵⁵The -possibly indefinite- term of protection, combined with an optional provision for redress in cases of infringement, renders a moral rights model of protection more compatible with IP principles. Given that moral rights rules do not directly prohibit the use of TCEs but rather define how their use should be made, they provide for moderate solutions, which do not meet the protection criteria of the demandeurs.

⁵⁶Supra note 6, page 31

⁵⁷Even in cases where there is an identifiable creator, attribution does not suffice, if the public is unable to connect the creator with the originating community to which the particular TCE is linked.

⁵⁸Supra note 6, page 31

heirs to receive an interest in any sale of the work subsequent to its first transfer. This allows the author to benefit from their work as its value rises in time. The obstacle for TCEs is again the criteria of protection provided under Copyright Law, and particularly their difficulty to meet the requirement of originality, as well as the recognition of the resale right to the author instead of the community.

In addition, this particular measure is provided as optional in the Berne Convention, which means that not all signatory members have implemented it in national legislation, but even between those who have, there are differences regarding procedures⁵⁹. In any case, provided that the originality criterion is met, which can also be the case, the resale right can be used as a benefit-sharing mechanism⁶⁰⁶¹.

Neighboring Rights

One of the most important ways of transmitting and disseminating TCEs is through their performance. Story-telling, dance, tribal chants and many more performances are at the centre of preserving TCEs, invigorating them and passing them on to future generations. The uncertainty resulting from the fact that TCEs do not respond adequately to the “*literary and artistic works*”⁶² according to the definition given by Article 3(a) of the Rome Convention⁶³, gave place to the explicit inclusion of TCEs by the WIPO Perfor-

⁵⁹The European Union, in order to harmonize its members, has issued the Directive on Resale Rights for the Benefit of the Authors of Original Works of Art, 2001.

⁶⁰Supra note 46, page 32

⁶¹Relevant is the concept of the *domain public payant* system, implemented by certain countries, according to which royalties are paid to the state or to a competent organization for the use of certain works that belong in the public domain. However, the policy issues regarding the subtraction of public domain material remain, whereas the system of *domain public payant* would benefit only a small number of TCEs. also raising a question of which should be the ones to benefit.

⁶²Supra note 36, page 23

mances and Phonograms Treaty (the WPPT)⁶⁴, granting performers economic and moral rights⁶⁵.

It is noted that the WPPT applies only for aural -that is perceived by the ear- performances fixed in phonograms⁶⁶, thus limiting its usefulness for TCEs by leaving out important categories, such as traditional dances. However, this has been overcome by the adoption of the Beijing Treaty on Audiovisual Performances, 2012⁶⁷, encompassing performances of actors in different media, such as film and television, and explicitly including TCEs.

⁶³*“Performers” means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works,* Article 3(a), International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961

⁶⁴Article 2(a) of the WIPO Performances and Phonograms Treaty, 1996, 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”*.

⁶⁵*‘Summary of the WIPO Performances and Phonograms Treaty, 1961’*, WIPO, 04/14/2018, http://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html

Economic rights consist in the right of reproduction, the right of distribution, the right of rental and the right of making available. Moral rights consist in the right of attribution and the right of integrity over the performance.

⁶⁶Idem

⁶⁷WIPO, 2016, *‘Main Provisions and Benefits of the Beijing Treaty on Audiovisual Performances (2012)’*, Geneva

The Beijing Treaty grants performers the same economic and moral rights as the WPPT, but differs in that it modernizes and updates the context of the WPPT, in accordance with the developments of the digital era.

Both the WPPT and the Beijing Treaty protect the performances as such, regardless of whether the performed subject matter is protected or not. This means that protection is recognized for performances of works that may not only be unoriginal, but also of works that are no longer protected. However, there are certain drawbacks. Firstly, protection is granted to performers themselves and not to the performed subject matter and this creates a two-sided problem. On the one hand, TCEs are not protected as such, but only enjoy indirect protection. On the other hand, the beneficiaries of protection are the performers and not the performed TCE's originating community⁶⁸. In addition, the performer's protection is time-limited, specifically extending to a minimum of fifty years⁶⁹, a term even narrower than this provided by the Berne Convention.

Databases

At the international level, databases enjoy copyright protection under the same eligibility criteria as any other work: they need to be original. For databases in particular, originality consists in the selection or arrangement of their contents. There is an ongoing international discussion to grant protection to non-original databases as well⁷⁰, the reason being that the creation of a database requires substantial financial and professional investment to be made. Such legislation already exists in the European Union under the Directive 96/9/EC, referred to as "the Database Directive", containing sui generis provisions for the protection of databases.

Whether originality is required or not, databases are protected as a whole and the protection does not extend to their contents. The contents of a database are independently subjects of copyright protection, meaning that their eligibility is examined

⁶⁸This can be especially problematic when the performer does not belong to the originating community and/or is not interested in sharing the benefits of protection with the said community.

⁶⁹Supra note 65

⁷⁰'Protection of non-original databases', WIPO, 04/05/2018, <http://www.wipo.int/copyright/en/activities/databases.html>

individually. Therefore there may be copyright-protected databases with unprotected contents, as well as unprotected databases with copyright-protected contents. For TCEs this means that only indirect protection is possible, originality remaining a problem that hinders their eligibility for Copyright law. In addition, copyright over a database belongs to its maker and not to the originating community of the TCEs featured in the database⁷¹.

Trademarks

In general, trademark protection has less applicability issues than copyright in respect of TCEs⁷². Trademarks⁷³ are treated by law as a form of property and they can be used to protect symbols and words of traditional communities (positive protection), as well as to prevent third parties from registering such words⁷⁴ and symbols as trademarks (defensive protection). The latter is especially important, since the use of traditional or indigenous words or symbols as trademarks without the consent of the originating community, is a very common practice. Examples include Volkswagen *Tuareg*, Jeep *Cherokee*, *Billabong* surf clothing, *Mohawk* Paper Company and many more.

Trademarks are protected following a registration process, which takes into account certain criteria, such as the distinctiveness of the sign or combination of signs, and involves registration fees paid to the competent authority. The protection of

⁷¹However, this can become an incentive for the communities to create databases with their TCEs, gaining at the same time the copyrights over the database and creating through documentation a valuable tool for developing defensive strategy.

⁷²Supra note 17, page 40

⁷³Trademarks are signs or combination of signs used to identify the origin or source of a good or service, and to distinguish it from similar ones in the relevant market of products or services. Indicatively, a trademark may be a word, a symbol, an illustration, two or three-dimensional shapes, a numerical set, etc.

⁷⁴It is noted for reasons of consistency that if we were to strictly perceive TCEs as manifestations of the artistic heritage of a certain community, then words as such would not fall in the scope of TCEs.

trademarks typically lasts for a period of 10 to 15 years⁷⁵, but it is renewable, thus a given trademark can theoretically be protected indefinitely.

Trademark Law allows the holders of TCEs to designate certain signs through which they can endorse products that originate from their communities or that are relevant or consistent to the cultural values they represent. This can increase the consumers' awareness on authenticity issues, as well as increase the market value of traditional products. At the same time, it can provide either redress for the unlawful use of TCEs that are registered as trademarks, or compensation to the originating communities of words, symbols etc that are used by third parties. Reportedly, many countries take action towards protecting TCEs against their unauthorized use as trademarks by third parties⁷⁶, and there is also an increasing number of successful examples relating to the implementation of trademark law⁷⁷.

However, registration and renewal fees and the complex nature of legal procedures and other formalities involved constitute drawbacks as to the effectiveness of trademarks for TCEs⁷⁸. Moreover, TCE holders are not likely to register trademarks for products other than folkloric goods, and therefore they cannot stop i.e. car manufac-

⁷⁵Supra note 6, page 32

⁷⁶Supra note 36, page 49.

⁷⁷Idem, page 47, referring to a number of specific cases, as for example the use of Trademark Law by the Snuneymuxw First Nation of Canada to protect ten petroglyph images of religious significance to the community from being commercially exploited through their reproduction on t-shirts, mugs, postcards etc. According to the members of the Snuneymuxw, the local merchants actually stopped using the said images.

⁷⁸Idem

Characteristically, although under Trademark Law a community can oppose the registration of a mark or ask for the cancellation of a registration, inter alia on the grounds that the mark is not distinctive, or that it is deceptive, or contrary to law and/or morals, very few such cases of opposition or cancellation actually exist.

turers from using their words or symbols on vehicles. Nevertheless, trademark-like protection can lead to more balanced solutions between protecting TCEs and maintaining a rich public domain, whereas it better addresses some objectives of protection in comparison to Copyright, as namely the economic empowerment of local and traditional communities.

Geographical Indications

Under the TRIPs Agreement, geographical indications are defined as identifying “*a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin*”⁷⁹. According to Article 22.2, the signatory members are obliged to provide legal means for the interested parties allowing them to prevent the use of geographical indications in a manner that could potentially mislead the public, as well as to prevent any use of geographical indications that constitutes an act of unfair competition.

Geographical indications can only be used for “goods”, therefore a large number of TCEs falls out of their scope. However, some categories of TCEs, notably handicrafts made by natural resources⁸⁰, may qualify as goods. The mechanism of geographical indications resembles trademarks in that they are designed to guide consumer’s choice and distinguish similar products, while increasing their commercial value and providing them with legal protection. They differ, however, in that whereas trademarks are owned by individuals or enterprises offering products or services, geographical indications are not owned but can be used by an unspecified number of enterprises located in a specific area and producing the particular product for which the geographical indication is used⁸¹.

⁷⁹Article 22.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, 1999 (“The TRIPs Agreement”)

⁸⁰Supra note 36, page 50

⁸¹Supra note 6, page 34

Just as trademarks, geographical indications have potentially indefinite duration. Most importantly they provide direct protection to the qualified TCEs, since the folkloric products are protected as such. In addition, traditional communities are given the opportunity to exert control over who can use geographical indications relating to certain folkloric products, and claim redress over their unlawful use⁸², while helping promote the economic interests of traditional communities through increasing market awareness and product value⁸³.

Industrial Designs

Industrial designs grant IP rights over the aesthetic appearance of two-dimensional or three-dimensional items, which are of a utilitarian nature or that can be produced in a large scale⁸⁴. Under the concept of industrial designs the right-holder enjoys the right to authorize or prevent the manufacture, dealing or importing of copies of a registered design⁸⁵. Since TCEs are not expressly excluded from their scope, their mechanism can be used under certain conditions. TCEs that can be protected under industrial designs law are indicatively textiles, carpets, pottery, jewellery and other handicrafts.

From this point of view, they can be used for the protection of TCEs liberally to benefit the community without ownership concerns, provided that certain quality requirements are met.

⁸²Supra note 36, page 50

⁸³Mary O’Kicki, 2009, ‘*Lessons Learned from Ethiopia’s Trademarking and Licensing Initiative: Is the European Union’s Position on Geographical Indications Really Beneficial for Developing Nations?*’, Loyola University Chicago International Law Review, Vol. 6, Issue 2, Article 2.

Reportedly, geographical indications are recognized as valuable IP rights worldwide, with many studies suggesting the willingness of customers to invest more on products bearing a geographical indication.

⁸⁴Supra note 36, page 51

⁸⁵‘*Industrial Designs*’, WIPO, 04/17/2018, <http://www.wipo.int/designs/en/>

Given that the lack of harmonization at an international level, industrial designs are only generally discussed. It is noted that the preconditions of protection under industrial designs are similar to the ones provided for Copyright, therefore similar issues arise. The territoriality of the legislation is generally a negative factor, but industrial designs can register in multiple jurisdictions. Typically, industrial designs are mutually exclusive with copyright, meaning that when a certain work is eligible for copyright protection, it cannot be simultaneously protected as an industrial design.

Industrial designs require a formal procedure of registration, which can be a drawback for traditional communities that lack relevant expertise⁸⁶, although some jurisdictions grant limited protection to unregistered industrial designs as well⁸⁷. Protection lasts for a minimum of 10 years⁸⁸ and it is renewable. However, a known creator is required, which renders protection impossible for most TCEs. In addition, the item of protection needs to be novel, that is not to have become available to the public until registration⁸⁹. Therefore, contemporary interpretations of TCEs embodying novel elements are eligible as industrial designs, but a large part of TCEs and especially pre-existing ones fail to conform to this requirement.

Despite the aforementioned disadvantages, industrial designs can offer solutions for protection, and particularly of such TCEs that due to their utilitarian nature, cannot qualify for copyright protection. Serving as proof of this are examples of TCEs that have managed to register as industrial designs, such as the traditional women's bracelets *blezik* of Kazakhstan and a tradition-inspired tea-set created by a designer, registered in China⁹⁰.

⁸⁶The formalities seem to generally be a problem for the majority of IP tools discussed here in respect of the capacity of traditional communities and indigenous groups, although in the case of industrial designs it becomes accentuated when combined with the need for registration in multiple jurisdictions.

⁸⁷Supra note 85

⁸⁸Supra note 85

⁸⁹Supra note 36, page 51

Unfair Competition

According to the Paris Convention⁹¹, unfair competition is “*any act of competition contrary to honest practices in industrial or commercial matters*”. Protection against unfair competition includes (a) *the prohibition of acts that can create confusion with the establishment, the goods, or the industrial or commercial activities of a competitor*, (b) *the prohibition of false allegations that may discredit the establishment, the goods or the industrial or commercial activities of a competitor* and (c) *the prohibition of indications or allegations which may mislead the public as to the nature, the manufacturing process, the characteristics, the suitability of their purpose or the quantity of the goods*⁹². Additionally, unfair competition also includes the prohibition of a trade secret’s disclosure and the act of *free-riding*, that is taking advantage of another person’s achievement⁹³.

Unfair competition is not a law per se but rather a bundle of general principles that operate in a supplementary manner to Industrial Property Law. It is characterized by flexibility and does not depend on administrative formalities, which in general can be considered an advantage for TCEs. Unfair competition can have a significant impact in creating a legal culture in the protection of folklore, since it is an already established legal concept with which the courts worldwide are familiar with, a fact that secures effective enforcement. Perhaps issues may arise in that there might be practical difficulties in proving the damage or likely damage caused by the unlawful conduct⁹⁴, but unfair competition can successfully address matters relating to the appropriation and authentication of TCEs, which are central to the discussion.

The commercial misuse and specifically the appropriation or imitation of TCEs creating a misleading impression that a certain product either originates from or is en-

⁹⁰Idem

⁹¹The Paris Convention has been incorporated in the TRIPs Agreement.

⁹²Article 10bis of the Paris Convention of Industrial Property of March 20, 1883

⁹³Supra note 36, page 54

⁹⁴Supra note 6, page 36

dorsed by a traditional community, ultimately harms the community's reputation. In such cases competition law can intervene to protect the particular styles of folkloric expressions, securing their authenticity and/or protect against the use of folkloric indicia aiming to create false connotations⁹⁵. Under unfair competition *style* is regarded as a subject of protection, which responds to basic problems of the commercial practices evolved around TCEs⁹⁶. In addition, the possibility to prevent others from acquiring, using or disclosing undisclosed information without their consent⁹⁷ can be used for secret and/or sacred TCEs whose disclosure harms the interests of the originating community⁹⁸.

⁹⁵Relevant is also the common law tort of *passing-off* aiming to protect a business' reputation.

⁹⁶On the contrary Copyright Law does not protect *style* alone.

⁹⁷Article 39.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, 1999 ("The TRIPs Agreement").

The disclosure of undisclosed information is contrary to honest commercial practices, whereas it is not necessary for this information to have been given under contract or other formal manner.

⁹⁸See *Foster v Mountford* (1976) 29 FLR 233, a case of an anthropologist who disclosed information in his published book shared with him in confidence by Aborigines, the Australian court ruling that this behavior consisted a breach of confidence under the common law doctrine of confidential information.

Sui Generis Solutions

Sui generis solutions on the protection of TCEs consist in either independent laws specifically designed for folklore (sui generis systems) or in adopted or extended provisions of the existing IP framework so as to comprise elements regarding folklore (sui generis measures). These solutions are generally considered to be on the radical side of the literature on the protection of TCEs. The reason for this is that sui generis proposals include solutions that contradict basic concepts of IP law, such as the unlimited term of protection and the subtraction of public domain material, which stir important policy issues.

There are arguments suggesting that sui generis measures can prove very effective compared to sui generis systems or protection under existing IP law, since they can potentially balance the interests of both the demandeurs of protection and the supporters of classic IP systems through articulating middle ground solutions. A relevant example is given by the Peruvian sui generis law providing for the payment of a fee for the use of TCEs that have fallen in the public domain in the last 20 years, but not prior to that⁹⁹.

Although many countries have adopted at the national level either sui generis systems, or sui generis measures, there has not been until now any sui generis law on the protection of folklore at the international level, the reasons being inter alia the lack of adequate data and legal experiences from countries that have implemented sui generis laws, the lack of consensus on issues of terminology, and the demand of a number of countries to further investigate the possibilities of protection through the existing IP regime, considering the adoption of a sui generis law premature¹⁰⁰.

⁹⁹Article 13 of the Peruvian Law No. 27811 of August 10, 2001

¹⁰⁰WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fourth Session, 2002, *Elements of a Sui Generis System for the Protection of Folklore*, Geneva, page 3

However, there exist sui generis *model laws* on the protection of folklore, the most known among which are the Model Provisions of 1982, adopted by UNESCO and WIPO. Such model laws are not enforceable but offer guidance to the countries interested in adopting relevant provisions at the national level. These alternatives of soft law are not without importance, since they provide the opportunity to reach de facto a certain level of international uniformity in dealing with the protection of folkloric expressions. At the same time, their implementation creates sources of valuable information that can be used to better understand the particularities of the subject matter.

However, the latter might prove difficult, as much as time consuming. Indicatively, the IGC found that although many countries used the Model Provisions in drafting international laws on the protection of TCEs since their adoption in the '80s, there were only few countries actively utilizing the said laws and therefore little practical experience has been gained with their implementation¹⁰¹. This was an IGC survey of 2001-2002¹⁰², almost 20 years after the adoption of the Model Provisions.

The approach of the IGC

The WIPO Intergovernmental Committee is one of the most energetic actors in the efforts of reaching a solution for the international protection of folklore. Taking this fact into consideration, it is important to approach its stance. The IGC notably tends towards supporting sui generis measures, recognizing the fact that existing IP laws as they currently apply do not suffice alone for the desired protection. At the same time, it stresses the versatility of IP law, having been proved capable of accommodating solutions for subject matter seemingly falling out of its scope. A characteristic example is the law on databases¹⁰³. According to this view, not an entirely new law on protection is necessary, but rather a creative and efficient adaptation of existing law. There

¹⁰¹Supra note 36, page 56

¹⁰²WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 2001, '*Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge*', Second Session, Geneva

¹⁰³Supra note 100, page 14

follows a reference to some of the basic principles discussed by the IGC on sui generis systems of protection. Interestingly, some of them are already incorporated in the Model Provisions.

The IGC promotes solutions that address policy needs rather than specific aspects of the subject matter. Such a solution is the setting up of a *menu* of sui generis mechanisms, from which the TCE holders can choose according to their needs. In the same spirit is the proposal of setting protection criteria of general nature that contrary to specific criteria, such as originality, novelty, or fixation, will allow a desirable restriction of the scope of protection without the known problems. Examples involve the requirement of an existing connection between a folkloric expression and a certain traditional community, as well as the requirement of the commercial susceptibility of the folkloric expression concerned.

According to the IGC, a comprehensive sui generis system should protect both material and moral rights, as well as ideally incorporate combined elements from Copyright Law, Related Rights and Industrial Property. This is justified by the diversity of TCEs and also by their intertwined nature comprising features that belong both in the artistic-cultural field and in the commercial-industrial field¹⁰⁴. Solutions based on a sole IP law will inevitably result in the exclusion of whole categories of TCEs from the scope of protection. In any case, an integrated sui generis system should respect society's interests, thus include adequate exceptions and limitations.

The Model Provisions

The international discussion on the protection of TCEs which began during the Seventies¹⁰⁵ culminated in the adoption in of the “Model Provisions for National Law on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions” of 1982 (the Model Provisions) in a collaboration of UNESCO and WIPO. Although the Model Provisions are not an international treaty and therefore not bind-

¹⁰⁴Idem, page 27

¹⁰⁵Supra note 6, page 5

ing¹⁰⁶, they consist the first complete international sui generis legal text on the protection of folklore¹⁰⁷.

Characteristically, the Model Provisions contain no term of protection, which is stressed¹⁰⁸ as a fundamental difference between existing IP legal systems and in particular Copyright. It is expressly stated that protection in perpetuity is justified by the beneficiary of protection being not an individual creator but a community “*whose existence is not limited in time*”¹⁰⁹. In addition, they have taken into account the main demands on protection, the inadequacies of existing IP law, and the nature of folklore¹¹⁰, also establishing adequate exceptions and limitations, consistent with the acknowledgment of society’s interests, as well as of the fact that a too rigid protection could ultimately be harmful for the further development of tradition¹¹¹.

¹⁰⁶The non-binding nature of the Model Provisions caused the disappointment of some of the international actors supporting more radical solutions for achieving protection.

¹⁰⁷WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 2002, *‘Final Report on National Experiences with the Legal Protection of Expressions of Folklore’*, Third Session, page 12

It is however noted (*under 21*) that the Model Provisions have not had a significant impact on the legislation of the WIPO member-states.

¹⁰⁸UNESCO-WIPO *‘Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Acts’*, 1982, *Commentary*, at 65

¹⁰⁹Yet, in the absence of specific provisions on the matter, it is assumed that the existing national rules of the statute of limitations or prescriptions for penal sanctions are applicable.

¹¹⁰UNESCO-WIPO *‘Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Acts’*, 1982, Preamble, under points 5-14

The Model Provisions contain no definition of folklore, aiming to avoid possible conflict with definitions contained in other legal instruments¹¹², but it is clear that they only protect the artistic heritage of a community¹¹³, albeit both tangible and intangible, not requiring fixation. The scope of protection is desirably restricted by the requirement that the TCE in question constitutes “*characteristic element*” of the artistic heritage, meaning that it is generally recognized as representing a distinct traditional heritage of certain community¹¹⁴.

Protection is based on a system of prior authorization¹¹⁵, involving a relevant administrative procedure and prohibits any publication, reproduction and distribution

¹¹¹Section 4 of the Model Provisions includes the following exceptions: (a) utilization for educational purposes, (b) utilization by way of illustration of the original work that it is compatible with fair use (c) borrowing for the creation of an original work, and (d) incidental utilization of TCEs, including (i) utilization in reporting the news, within their informatory purpose, and (ii) utilization by inclusion in a photograph, film, or television broadcast of the image a TCE permanently located in a public place. These exceptions resemble a lot the ones provided for in the context of Copyright.

¹¹²A description is given under *Section 2* of the Model Provisions reading that “*expressions of folklore mean productions consisting of characteristic elements of the traditional artistic heritage developed or maintained by a community of [a country] or by individuals reflecting the traditional artistic expectations of such a community*”.

¹¹³Protection does not include traditional beliefs, the underlying events of legends, scientific views and expressions of a mere practical nature. However, the term *artistic* is broadly meant to include all folkloric expressions that might be perceived as aesthetically appealing.

¹¹⁴However, this general criterion creates a need for interpretation in each individual case arises.

¹¹⁵This system was chosen considering that subsequent checks would have negative consequences for both the communities linked to the TCEs in question and the users of TCEs.

of copies of TCEs, as well as any communication to the public of TCEs, including but not limited to any transmission wireless or by wire, and any public recitation or performance¹¹⁶. If not previously authorized, the aforementioned acts fall within the meaning of *illicit exploitation*, provided that¹¹⁷ they are made with gainful intent and outside their traditional or customary context¹¹⁸.

Moreover, certain utilizations are prohibited even when authorization is not required. These include the prohibition of any communication to the public without reference to the originating community and/or specific territory from which the said folkloric expression has been derived, provided that the origin is expected to be known by the user¹¹⁹. The acknowledgment of source is a direct analogy to the right of attribution under Copyright's moral rights of and it is a vital aspect of protection.

Similarly prohibited is the intended deception of others as to the source of TCEs that are presented to the public as relating to a certain community when they are not¹²⁰, corresponding to unfair competition¹²⁰, and the intended distortion of TCEs that are used publicly, bearing resemblance with the right of integrity over the work provided under moral rights in Copyright Law.

¹¹⁶UNESCO-WIPO '*Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Acts*', 1982, Section 3

¹¹⁷These two requirements need to be cumulatively met, meaning (a) that utilization of a given TCE is deemed lawful if it is not made with gainful intent in its traditional or customary context, (b) that even if there is no gainful intent, authorization is required if utilization is to take place out of the traditional or customary context, and (c) that unauthorized utilization with gainful intent and outside the borders of the originating community is equally prohibited even for the members of this community.

¹¹⁸The Model Provisions use the phrase "*within the traditional or customary context*" meaning the use of TCEs in their proper framework and in accordance with traditional practices.

¹¹⁹Exceptions to this provision include cases of permitted borrowing for the creation of original works and cases of incidental utilization.

According to the Model Provisions, responsible for granting authorization for the lawful utilization of TCEs is “*the competent authority or the community concerned*”¹²¹. However, there is no reference to the owner of rights, which was seen as a step back by members of the countries-demandeurs¹²². The choice to refrain from regulating ownership was mindful of the fact that there is a plurality of legal approaches concerning the issue¹²³, and that it is a sensitive matter that should be left to the national lawmaker.

It should be noted that the Model Provisions date back in the early times of the debate on protection. By now there is a better understanding of the rights involved, the needs and expectations of the TCE holders, and the legal and socio-economic realities of the communities concerned. Therefore, they are in need of revision. At the same time, a number of technological advancements have occurred, to which there is a need to respond, so as to provide effective protection in the digital era¹²⁴. The WIPO Draft Provisions constitute a valuable attempt in this direction as it will be analyzed below.

¹²⁰UNESCO-WIPO ‘*Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Acts*’, 1982, Section 6.3

¹²¹Details on *competent authorities* are to be found under Section 9 of the Model Provisions, whereas Section 10 of the Model Provisions regulates procedural matters regarding authorization.

¹²²Asian-African Consultative Organization, 2004, ‘*Expressions of Folklore and Its International Protection*’, New Delhi, India, (AALCO/43/BALI/2004/SD/S 15), page 9

¹²³The choice to provide for a *competent authority responds to* cases (a) of countries which perceive TCEs originating from a distinct community as belonging to the national cultural heritage, therefore the relevant rights are managed by the state and (b) of cases of communities that lack the necessary organization and know-how to manage administrative procedures (see *supra note 104*, Commentary on the Model Provisions, at 49).

¹²⁴*Supra* note 100, page 10

The Tunis Model Law

The “Tunis Model Law on Copyright for Developing Countries”, 1976, was drafted by UNESCO and WIPO in the face of the recent then revision of the Berne Convention on July 1971, in order to be used as a tool by the developing countries that wished to adhere to the Convention¹²⁵. The Tunis Model Law is essentially Copyright Law with a broadened scope so as to include expressions of folklore, which renders it a sui generis law. Reportedly, the Tunis Model Law has influenced the copyright legislation of many African nations¹²⁶.

The Tunis Model Law expressly includes in its scope “*works of folklore*¹²⁷” and defines them as “*literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage*”. Similarly to the Model Provisions, it is based on a system of prior authorization¹²⁸ and provides for a competent authority in charge of exercising

¹²⁵UNESCO-WIPO, 1976, ‘*The Tunis Model Law on Copyright for the Developing Countries*’, Paris-Geneva, Introduction, at 2

¹²⁶Supra note 100, citing P. Kuruk, ‘*Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions between Individual and Communal Rights in Africa and the United States*’ 48 American University Law Review 769 (1999): 814.

¹²⁷Article 1.3 of the Tunis Model Law on Copyright for the Developing Countries, 1976. The corresponding commentary reads: “*folklore is likewise protected because in developing countries national folklore constitutes an appreciable part of the cultural heritage and is susceptible of economic exploitation, the fruits of which should not be denied to those countries*”

¹²⁸ Excepted from prior authorization are only public entities using national folklore for non-commercial purposes. From this point of view, the Tunis Model Law provides for much stricter protection in comparison with the Model Provisions, since it is implied that even members of the community are to require authorization.

the economic and moral rights over TCEs, representing the people that originated them.

The Tunis Model Law has had a significant input in its time and constitutes a bold proposal that grants to works of folklore the same level of copyright protection as original works, also encompassing exclusion from the fixation requirement¹²⁹ and indefinite protection¹³⁰. However, the provisions of the Tunis Model Law are in need of revision, so as to follow the legal advancements on Copyright Law, as well as the contemporary needs of traditional communities.

The UNESCO Recommendation

The UNESCO Recommendation on the Safeguarding Protection of Traditional Culture and Folklore of 1989 deals with the identification, conservation, preservation, dissemination and protection of folklore and the development of international co-operation, acknowledging the need to protect *folklore* by means of Intellectual Property. Unlike the Model Provisions and the Tunis Model Law, it does not provide for specific measures, but rather sets principles to serve as guidance for the member states in taking appropriate action.

The UNESCO Recommendation served as a means of dissemination of the recent then Model Provisions and should be seen as a part of a collective effort to create an international framework for the protection of TCEs. However, as a component of the whole, it seems it is only of limited use¹³¹, since no specific mandate is given to UN-

¹²⁹Section 1.5bis of the Tunis Model Law on Copyright for the Developing Countries, 1976

¹³⁰Section 6.2 of the Tunis Model Law on Copyright for the Developing Countries, 1976

¹³¹However it sets useful standards for safeguarding folklore, that include the protection of privacy and confidentiality of the transmitter of tradition, the adoption of measures for the safeguarding of the collected material against misuse, and the responsibility of archives to monitor the uses of the gathered material.

ESCO itself, and there is no explanation as to the implementation of the obligations it sets for the member states.

The WIPO Draft Provisions

The work of WIPO's Intergovernmental Committee (IGC) in researching, surveying, recording and assessing national and regional experiences in collaboration and in consultation with the member states, traditional communities, indigenous groups and other interested parties, has culminated in the Draft Provisions of 2014. They have no formal status, but they are essentially a sui generis system, containing some core measures for protection along with alternatives providing for less radical solutions. Given this, they do not offer a solid and uniform protection proposal, but rather form a basis for negotiations.

The Draft Provisions have retained the basic concepts established by the Model Provisions of 1982 and further developed them by segmenting the issues of protection to provide for more detailed measures. These targeted provisions enable a desirable narrowing of the scope of protection and a better balancing of the multiple interests involved. Their purpose¹³² is to provide traditional communities and indigenous groups the means, *including effective and accessible enforcement measures*, to indicatively prevent the misappropriation and misuse of TCEs¹³³ and to control ways in which they are used beyond their traditional and customary context.

The restriction of their scope is achieved through a subjective criterion, namely the requirement that a TCE bears a direct link or that it "is *distinctively associated with*" the cultural and social identity and cultural heritage of the originating commu-

¹³²Under "*Objectives*" of the WIPO Draft Provisions, 2014

¹³³According to Article 1 of the WIPO Draft Provisions the subject matter of protection are "*traditional cultural expressions*", characterized by the collective context in which they are created, expressed and maintained, by their transmission from generation to generation, by their dynamic nature and by being the product of human intellectual activity.

nity¹³⁴. In addition, protection is to last “as long as the TCEs fulfill the criteria of eligibility for protection”¹³⁵, that is as long as the aforementioned *direct link* or *distinct association* exists. Therefore, protection is potentially indefinite¹³⁶.

The beneficiaries of protection¹³⁷ enjoy the right of attribution and the right to equitable remuneration¹³⁸, as well as exclusive and collective rights¹³⁹ on condition that the TCEs concerned are of particular importance for the beneficiaries, i.e. secret or sacred. Exclusive and collective rights include the right to grant authorization for or prevent the use of TCEs, the right of attribution, the right to protect against misleading uses, the right to prevent distortion, and the right to equitable compensation from use based on prior informed consent¹⁴⁰.

In terms of exceptions and limitations the Draft Provisions feature rather lengthy measures that contain not only an enumeration of proposed exceptions referred to as “*Specific Exceptions*”, but also the guiding principles that are to be taken

¹³⁴This provision is similar to the Model Provisions’ eligibility criterion requiring that TCEs constitute “*characteristic elements*” of the community’s traditional artistic heritage.

¹³⁵Article 6.1 of the WIPO Draft Provisions, 2014

¹³⁶Under Article 6.2 of the WIPO Draft Provisions, 2014, it is provided that protection against “*any distortion, mutilation or other modification or infringement*” can be determined as lasting indefinitely on condition that harm was intended to the reputation or image of the beneficiaries of protection

¹³⁷According to Article 2 of the WIPO Draft Provisions, 2014, beneficiaries of protection are the local communities or indigenous groups that created the folkloric expressions, but the option that the beneficiary is the state is provided as well.

¹³⁸Article 3.2 and 3.3 of the WIPO Draft Provisions, 2014

¹³⁹Article 3.1 of the WIPO Draft Provisions, 2014, expressly recognizing ‘*exclusive and collective rights*’.

¹⁴⁰Idem

into account in adopting relevant measures at the national level, called the “*General Exceptions*”¹⁴¹. In general, they contain familiar examples, such as the permitted use for educational, archival, inspirational and preservation purposes¹⁴². Notably, an exception to the exceptions is established for when there is apprehension that a given TCE is faced with irreparable harm¹⁴³

¹⁴¹The *general exceptions* are left to be decided upon by the member states, provided that (a) the beneficiaries are acknowledged where possible, (b) the use of TCEs is not offensive or derogatory to the beneficiaries, (c) the use is compatible with fair use, (d) the use does not conflict with the normal utilization of the folkloric expressions by the beneficiaries, and (e) the use does not unreasonably prejudice the legitimate interests of the beneficiaries, taking into account the legitimate interests of third parties (see *Article 5.1* of the WIPO Draft Provisions, 2014

¹⁴²Article 5.3 of the WIPO Draft Provisions, 2014

Under Article 5.4 permitted in any case is the utilization of TCEs (a) in official cultural institutions, archives, libraries etc (b) for the creation of original works, (c) that were legally derived from sources other than the beneficiaries, and (d) that are known through lawful means outside of the beneficiaries community.

¹⁴³Article 5.2.of the WIPO Draft Provisions, 2014.

Although in brackets, specific reference is made to secret or sacred traditional cultural expressions.

The European Union Stance

The European Union (EU) representing its Member States, generally objects to the adoption of an international instrument of binding force for the protection of TCEs¹⁴⁴. The opinion of the EU is that the matter should be left for national legislation to decide upon, whereas it considers that there are enough means of protection under existing international IP law, of which the potential should be further examined¹⁴⁵. Any regulation on the subject matter of protection should come from recommendations rather than actual legal obligations¹⁴⁶.

In the last General Assembly of WIPO¹⁴⁷, the EU clearly stated its objection to the prioritization of any single instrument, considering that common understanding on basic concepts has not been reached, and specifically on the questions of what is the subject matter under discussion, who should be the beneficiaries and what is understood by protection/safeguarding¹⁴⁸.

Europe's traditional communities have been "notoriously silent"¹⁴⁹ on the ongoing discussion of the international protection of folklore, and Europe was absent from

¹⁴⁴The United States of America, Japan and Canada share similar views with the EU on the subject.

¹⁴⁵WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 2016, '*Statement on the EU Proposal for a Study*', Thirty Second Session, Geneva

¹⁴⁶Irini Stamatoudi and Paul Torremans (eds), 2014, '*EU Copyright Law: A Commentary*', Elgar Commentaries, UK

¹⁴⁷WIPO, 57th General Assembly, 2-10 October 2017, Geneva.

¹⁴⁸WIPO, 2017, '*Report on the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)*', EU Statement (Item 18), WIPO 57th General Assembly, Geneva

¹⁴⁹Supra note 6, page 38

the list of regions covered by the WIPO Fact-Finding Missions¹⁵⁰. It is not to be assumed that this is owed to absence of European traditional communities. Notable examples include the Sami people of Sweden, Finland and Norway and the Basques of Spain, whereas a number of ethnic subgroups are located in several European countries. At the same time Europe with its ancient and diverse historic background has an abundance of TCEs worthy of protection many of which are still practiced today, such as the polyphonic songs of the Balkans, the Greek cyclical dances, the Highland games of Scotland, spring-welcoming rituals all around the continent etc¹⁵¹.

Importantly, Europe has a long-standing tradition of considering TCEs as belonging in the public domain, where they can be freely enjoyed, transmitted and developed by the peoples. This has been manifested several times by the EU in the discussions on protection, characteristically stating that *“the free access to and movement of folklore within [the] various European societies has been encouraged deliberately [by the EU] and the picture of today demonstrates that folklore is alive and well¹⁵²”*. Indeed, the European area is a mosaic of cohabiting cultures which have influenced one another, yet retaining their individuality and continuing to develop through time.

Furthermore, the EU does not consider the exploitation of TCEs by persons outside the originating community as being harmful, even when done so in a commercial scale, but on the contrary as being beneficial, *“stimulat[ing] cultural exchange and foster[ing] regional identities¹⁵³”*. The reasoning behind this is that the -even massive-

¹⁵⁰Idem

¹⁵¹Cited among reasons for the distancing of the European traditional communities are self-identification issues. A large part of ethnic or otherwise defined subgroups of Europe do not identify themselves as traditional communities and/or do not qualify as such, having been integrated to the industrialized environments in which they reside.

¹⁵²WIPO, 2002, *‘Written Submission for Folklore from the European Community and its Member States for the 3rd WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore’*, Geneva, page 1

¹⁵³Idem

commercial exploitation of TCEs ultimately leads to an increase of the public's ability to identify authentic folkloric expressions, and also raises their commercial value. Emphasis is added to the fact that not only will the advocated protection hinder exchange and interaction between cultures, but it will also lead to undesirable monopolies with negative effects on the market. Those who will choose protection will unavoidably be faced with monopoly claims from other regions¹⁵⁴.

In conclusion, the reasons behind the opposition of the EU to adopting a binding international legal instrument should be sought on the one hand in the fundamental differences of the legal traditions of Europe to some of the core concepts that have been evolved around the protection of TCEs, as is primarily the protection of public domain material, and on the other hand in the economic importance of Intellectual Property as a commercial commodity with considerable revenue. Any change to the current legal framework will considerably affect existing IP rights of multiple actors and create market turbulence.

Existing EU Legislation

Currently, there are no IP standards specifically directed at the protection of TCEs within the European Union. However, there is a number of existing IP rules which can potentially be used to this end, and specifically the Intellectual Property EU Directives. It is noted that the EU promotes the utilization of existing rules for the purpose of protecting TCEs, and namely trademarks, industrial designs, and geographical indications, along with the concepts of unfair competition, and through neighboring rights¹⁵⁵. On the contrary, it rejects protection under Copyright Law and copyright-based sui generis instruments, considering their principles to be inherently incompatible with the nature of folklore, causing a number of implementation problems¹⁵⁶.

¹⁵⁴Idem

¹⁵⁵Idem, page 3

¹⁵⁶Among these are copyright's requirement for an identifiable author versus the difficulty to trace the creator of a folkloric expression, the granting of exclusive rights to individuals versus the indeterminate number of people "owning" a folkloric

As regards the protection of TCEs under existing EU legislation, it should be noted that, as is the case of international IP legislation, it is only indirect. Such protection is provided primarily under neighboring rights, through the so called “Rental and Lending Directive” of November 1992¹⁵⁷. The said Directive does not contain a specific definition of performing artists, therefore nothing in the Directive prevents the member states from adopting specific provisions to include TCEs. In addition, phonograms include recordings of any kind, therefore of TCEs as well. However, the right-holder would be the performer or the phonogram producer and not the community, whereas the protected subject matter would be the performance and the recording respectively and not the performed or recorded TCEs.

Indirect protection can be similarly obtained under the “Data base Directive¹⁵⁸” which provides no restrictions as to the content of a database, therefore including TCEs. Again, the owner of rights is the maker of the database, whereas the contents of the database are not protected per se. Data bases are protected as intellectual creations by reason of the selection and arrangement of their contents, but each of the contents is subject to the general copyright protection criteria¹⁵⁹.

Another option for protection is given by the “Term Directive¹⁶⁰”, which under Article 4 provides for the protection of previously unpublished works. Previously unpublished works that are lawfully published for the first time are granted protection expression, the originality requirement versus the repetitive and imitative nature of folklore and others.

¹⁵⁷Council Directive 92/100/EEC of November 1992 on Rental Right and on Certain Rights Related to Copyright in the Field of Intellectual Property

¹⁵⁸Directive 96/9/EC of March 1996 on the Legal Protection of Data Bases

¹⁵⁹WIPO, 2002, ‘*Summary on Existing Legislation Concerning Intellectual Property in Non-Original Databases*’, Standing Committee on Copyright and Related Rights, 8th Session, Geneva, page 3

¹⁶⁰Directive 2006/116/EC of December 2006 on the Term of Protection of Copyright and certain Related Rights

even after the expiry of copyright protection, that is even after 70 years after the death of the author have passed¹⁶¹. The publisher of previously unpublished works receives a 25-year protection, equivalent to the economic rights of the author. Also, under Article 5 of the same Directive the option is given to the member states to grant a 30-year protection to “*critical and scientific publications of works which have come into the public domain*”, counting from the first lawful publication of such works.

As demonstrated, TCEs are not protected as such, but only partially and indirectly. Such a protection is “*fragmented, incomplete and not particularly effective*”¹⁶². Although the EU recognizes the importance of TCEs for the originating traditional communities, it brings forward equally important arguments against international protection. With the international discussion on protection being at a peak, it remains to be seen where negotiations will lead to and whether the EU will review its stance.

¹⁶¹Directive 2011/77/EU of September 2011 amending Directive 2006/116/EC of December 2006 on the Term of Protection of Copyright and certain Related Rights, Article 1

¹⁶²Henry Olson, 1997, ‘*Economic Exploitation of Expressions of Folklore: The European Experience*’, UNESCO-WIPO World Forum of the Protection of Folklore, Phuket, Thailand, page 5

Conclusions and Recommendations

The international protection of expressions of folklore raises a number of serious policy issues. Almost 50 years after the first initiatives in the '70s, the core issues remain unresolved. The definition of the subject matter, the rationale and the means to achieving protection, and a number of technical issues for constructing the appropriate legal instrument are still central in the international debate. It seems that the conceptual differences between the demandeurs of protection and the countries opposing it, such as the USA, the EU and Japan, are difficult to bridge, despite the serious efforts of WIPO and UNESCO. The length and the arduousness of the negotiations are relevant to cultural, social and economic divides, but importantly relate to major economic interests concerning IP rights.

Up to now there has been general acknowledgment of the need of certain countries to protect the folkloric expressions attached to their identity, involving moral and economic considerations. Also, it has become clear that existing legislation does not suffice for the protection of folklore, but also that the proposed solutions cannot completely disregard existing legal concepts and principles. As always, extremes cannot offer plausible solutions and cannot be considered to be realistic options. Consensus over the definition of the subject matter and the objectives of protection are *sine qua non* conditions for the formation of a sound solution. Moreover, an extensive evaluation of the IP tools as to their limits and potential is necessary, as well as an assessment of their actual value in relation to the needs of the beneficiaries of protection.

The latter is a vital condition so as to design efficient and effective protection. If the procedures and concepts transferred to the traditional communities and indigenous groups concerned are irrelevant to their realities and their actual capacities, then protection will remain a "paper tiger". More importantly, given that protection is differentiated from safeguarding, thus it is intended to grant enforceable exclusive rights over the use of TCEs, inevitably the economic purpose of protection becomes the focal point. In view of this, it is crucial, to consider protection not only from a perspective of fairness, but also -and even primarily- as a means of empowering the beneficiaries

that largely consist of economically underdeveloped or culturally subordinate populations.

Copyright-like protection appears to be weaker to this end in comparison with other models based on trademark law, industrial designs, geographical indications and competition law. As seen analytically, Copyright has more implementation problems for TCEs. On the contrary, trademark-like¹⁶³ protection systems seem to better address the particularities of TCEs, or more precisely, to operate regardless the said particularities. More importantly they are by design capable of motivating the communities concerned to create sustainable TCE-based sources of income, in the long run contributing to the improvement of their socioeconomic environments. Between copyright-like protection and trademark-like protection there is an analogy of passiveness versus activeness. Trademark-like protection promotes localism through entrepreneurship and know-how, eventually creating capacity, instead of just creating rules.

Although the cultural industry is an international industry and international protection would be more efficient, it is debatable whether an international binding legal instrument is presently the optimal solution, given the serious objections by a number of countries. In any case, it is doubtful whether reluctant countries would actually implement relevant legislation, especially if their policy regarding minority populations in their territory contradicts the general idea of protecting and promoting the cultural heritage of the said minorities. Perhaps, then, model laws and recommendations are preferable, at least at this stage. Despite the fact that they do not guarantee international enforceability, they can form a minimum of international uniformity and set judicial norms for cases of infringement. At the same time, codes of conduct for market branches closely related to expressions of folklore may also prove particularly useful.

The WIPO IGC's notable efforts have contributed significantly in clarifying and documenting the key issues of protection, as well as mapping its objectives and principles. As for now, the IGC continues its text-based negotiations with the objective of

¹⁶³'Trademark-like protection' is meant here as including geographical indications, industrial designs and competition law principles as well.

reaching an agreement on an international legal instrument¹⁶⁴. A number of countries consider such an action premature and have required further examination of a number of issues, as indicatively the objectives of protection and the relationship with the public domain. However, the IGC seems to think that there has been enough progress made, so as to consider the possibility of convening a diplomatic conference in its forthcoming General Assembly of 2019 to decide on the adoption of an international legal instrument¹⁶⁵. In the end, how close we are to this next step, will depend on the will of the member states.

¹⁶⁴WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore, 2017, '*Mandate 2018/2019*', Assemblies of Member States of WIPO, Fifty-Seventh Session, Geneva, under (a)

¹⁶⁵Idem, under (e)

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