Copyright Laws as a Means of Extending Protection to Expressions of Folklore

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Received 24 September 2004, revised 24 June 2005

One of the great ironies for indigenous people and local communities is that while scientific and commercial interest in their ecological knowledge and resource management practices have never been greater, human cultural diversity is eroding at an accelerating rate as the world steadily becomes more biologically and culturally uniform. With the advent of globalization, cultural heritages of different countries have become more vulnerable to those of the rest of the world. Folklore is one such heritage for the indigenous people of one country. Intellectual property rights are meant to protect diverse heritages. This paper attempts to analyse the existing copyright laws with a view to determining their potential to extend protection to these vulnerable rights.

Keywords: Folklore, copyright, WIPO, UNESCO, Berne Convention, indigenous people

According to the IUCN Inter-Commission Task Force on indigenous people, "cultures are dying out faster than the people associated with them. It has been estimated that half the world's languages—the storehouses of peoples' intellectual heritages and the framework for their unique understandings of life—will disappear within less than a century". Indigenous people and local communities often welcome interest in their knowledge as long as their rights as holders of this knowledge are respected. But they condemn the ‘mining’ or 'salvaging of their knowledge by commercial concerns and scientists that feel they have no responsibility to ensure that benefits flow back to their communities, or to help stem the erosion of their cultures.

The term ‘folklore’ was first coined by William Thomas in 1846 who referred to folklore as a suitable word to replace ‘popular antiquities’ and ‘popular literature’, he summarized it as the lore of the people. This paper aims at understanding the key requirements of obtaining copyright over a creation of intellect and to assess the suitability of extending copyright protection to folklore. For this purpose, the pre-requisites for copyrights have been discussed, followed by innovative suggestions to expand or limit their scope so as to allow folklores to meet these requirements.

The term folklore has not been defined in any national or international legal document existing in this field, but the term ‘expressions of folklore’ has been defined in the Model Provisions prepared by WIPO and UNESCO to act as a guideline for states desirous of framing legislations in this area. This definition is broad and an all encompassing one, According to it:

"Expressions of folklore mean productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of (name of the country) or by individuals reflecting the traditional artistic expectations of such a community, in particular: (i) Verbal expressions, such as folk tales, folk poetry and riddles; (ii) Musical expressions, such as folk songs and instrumental music; (iii) Expressions by action, such as folk dances, plays and artistic forms of rituals whether or not reduced to a material form; and (iv) Tangible expressions such as, productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalwork, jewellery, basket weaving, needlework, textiles, carpets, costumes; musical instruments; architectural forms”.

The Need for Protection of Expressions of Folklore

An analysis of the above definition shows that folklore means the sum total of human creativity. Unfortunately (not only for those who posses it but for the entire mankind) these important aspects of a community's cultural heritage and identity have been exploited to the detriment of those to whom they belong. There has been unauthorized adaptation, reproduction and commercialization of expressions of

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folklore or traditional cultural expressions (TCEs), with no sharing of economic benefits and they have been used in ways that are insulting, degrading and/or culturally offensive.

The list of traditional cultural expressions being misused is too long, however, a few glaring examples are discussed to allow an assessment of the damage being caused. Paintings made by indigenous persons have been reproduced by non-indigenous persons on carpets, T-shirts and other garments and greeting cards. Traditional songs and music have been recorded, adapted and arranged, publicly performed and communicated to the public. Traditional music can be downloaded from any number of free music archives onto one's home computer and stored as digital information that can then be transferred into other sound files, new compositions oral indigenous and traditional stories and poetry have been written down, translated and published by non-indigenous or non-traditional persons. Traditional musical instruments have been transformed into modern instruments, renamed and commercialized, or used by non-traditional persons active in the world music community or the New Age movement, or for purposes of tourism (such as the steel pan of the Caribbean region and the didgeridoo of indigenous Australians). Musical instruments, such as drums and the didgeridoo, are also subject to unauthentic mass-production as souvenir items. The photographing of live performances of songs and dances by indigenous persons, and the subsequent reproduction and publication of the photographs on CDs, tape cassettes, postcards and on the Internet.

Indigenous people and traditional communities have expressed the need to be able to protect designs embodied in hand-woven or hand-made textiles, weavings and garments that have been copied and commercialized by non-indigenous persons. Examples include: the saris of South Asia, the ‘tie and dye’ cloth in Nigeria and Mali, carpets of Egypt, Oman, Iran, etc.

In a fact finding mission conducted by WIPO in 1998 & 1999 concerns and legal questions have been raised on the commercial use of originally indigenous words by non-indigenous entities, such as 'vastu', 'ayurveda', 'gayatri', 'siddhi', 'yoga' 'tohunga', 'mata nui' and 'boomerang'.

It is evident from these examples that these treasure of human creativity are being misused. Therefore, the need of the hour is to grant adequate protection to them.

**International Efforts**

The international community is not oblivious to the misuse of its folklore and therefore efforts are being made at all levels to bring forth a strong legal regime for protection of our heritage. In October 2000, a WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was established by the WIPO General Assembly as an international forum for debate and dialogue concerning the interplay between intellectual property (IP), and traditional knowledge, genetic resources and traditional cultural expressions. Members of the Intergovernmental Committee (IGC) include member states of WIPO and international and regional non-governmental organizations (NGOs) accredited to WIPO as observers. In its Seventh Session at Geneva, in November 2004, the Committee formulated draft provisions on the Protection of Traditional Cultural Expressions/Expressions of Folklore (TCEs). It was agreed that this would set common general directions for protection and provide a consistent policy framework. The provisions contained in this draft reflect the international opinion on the subject under consideration. It is for this reason that relevant provisions of this document have been borrowed to substantiate the arguments put forward in the paper.

Since the traditional attitude of societies was to keep folklore as part of the common heritage of the community without individual ownership, there are no formal laws in developing countries, which bestow ownership rights of folklore on any community or group of persons and prohibit its commercial exploitation. Therefore it is important that these protective legislations must be made under all areas of law. One such area of law where protective measures need to be formulated is under the growing intellectual property law regime. The expressions of folklore are undoubtedly a product of human genus and intellect and hence deserve adequate protection under the fast growing system of intellectual property rights laws. ‘Copyright protection’ is one such important and strong protection guaranteed under intellectual property laws. Thus existing copyright laws are analysed with a view to determining their potential to extend protection to these vulnerable rights, which as explained above due to their unique characteristics need special degree of protection.
Copyright Laws as a Means of Extending Protection to Expressions of Folklore

Copyright protection is available for ‘literary and artistic works’ as referred to in the Berne Convention as amended in 1971. This convention is applicable only after a process of local legislation in each Member State, however, even those states that have not ratified it, may not stay untouched by its provisions as it is gaining strong hold as part of international customary law. This convention also forms part of TRIPS and is therefore accepted by a large number of countries that are a part of TRIPS. The Convention makes clear that all productions in the literary, scientific and artistic domains are covered, and no limitation by reason of the mode or form of their expression is permitted.

Many TCEs for which protection is desired constitute the subject matter of copyright protection. Examples include music and songs, dances, plays, stories, ceremonies and rituals, drawings, paintings, carvings, pottery, mosaic, woodwork, metal ware, jewellery, architecture, sculptures, handicrafts, poetry, and designs.

The protection provided by copyright is mainly the ‘right to prevent or authorize, the reproduction, adaptation, communication to the public and others, and the moral rights of attribution and integrity’. This seems well suited to meeting many of the needs and objectives of indigenous people and traditional communities.

The Indian Copyright Act is a good illustration of the copyright law providing special protection to certain expressions of traditional culture. Section 38 of this Act provides that where any performer engages in any performance, he has a special right known as ‘performer's right’ in relation to such performance. Indigenous artists are granted this right. This right subsists until twenty-five years. During the continuance of performer's right, any person who, without the consent of the performer makes a sound or visual recording of the performance; or communicates the performance to the public in any manner shall be deemed to have infringed the performer's right (an exception is made with regard to usage for educational or reporting purposes). Granting of such a right to performers of indigenous arts is a step in the right direction, however; such a provision provides only limited protection. For example, this right is granted to individual or group performers whereas the traditional cultural expression belongs to the whole community and secondly the right is granted for a very short duration of twenty five years and the cultural expression would come into public domain after that, free for everyone to distort and deface it in whatsoever manner they may choose. Thus there is an urgent need to settle various important issues surrounding the concept of copyright before a copyright law may aim at providing due protection to folklore.

The important pre-conditions for granting copyright protection vis-à-vis the characteristics of expressions of folklore are examined to see how the existing laws can be interpreted to accommodate these expressions.

Requirements under the Copyright Laws

The Identifiable Author Requirement

Copyright requires the identification of a known individual creator or creators and the creators of traditional cultural expressions are often unknown. The European Community in their response to the WIPO questionnaire on expressions of folklore voiced this limitation in the following words: “copyright is based on the identification of the person originating the work, whereas folklore is distinguished by the anonymity of the originator of the tradition or by the fact that the tradition is the attribute of a whole community”. Unfortunately the provisions of the Berne Convention provide no relief in overcoming this requirement as Article 7.3 of the Berne Convention provides that “The 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”. Needless to say, most cultural expressions would therefore be left unprotected.

However, innovative & purposive national laws may still be legislated to protect symbols of our heritage as whether or not States wish to provide for general groups to be able to acquire copyright is a matter of its policy and choice. Doing so in a general IP law may be possible and the following legal provisions are an illustration of local laws that have deviated from this requirement to protect their ethnic creativities.

(a) The Tunis Model Law on Copyright, states that the rights granted by it in folklores shall be exercised by a Government appointed authority; (b) The Panama Law provides for the protection of the ‘collective rights of the indigenous communities,’ and applications for registration of these rights shall be made by ‘the respective general congresses or indigenous traditional authorities’; (c) The South
Pacific Model Law vests ‘traditional cultural rights’ in ‘traditional owners’, who may be a group or an individual in whom the custody of the expressions of culture are entrusted in accordance with the customary law and practices of that group\textsuperscript{11}; (d) The guiding principles adopted by the intergovernmental committee also provides that measures for the protection of TCE should be for the benefit of the indigenous peoples in whom the custody and protection of the TCE are entrusted in accordance with the customary law and practices of that community.

Therefore, it can be said that rights may be vested in a community or group as a whole in absence of an identifiable author. However, the effectiveness of such provisions would depend upon practical considerations, such as, the organizational capital of communities, their knowledge of and access to the law, the resources that they have to enforce their rights etc\textsuperscript{12}. The intergovernmental committee has also recognized this and resolved that to ensure the effectiveness of protection of TCE, a responsible authority, which may be an existing office or agency, should be tasked with awareness-raising, education, advice and guidance, monitoring, dispute resolution and other functions.

Originality

Another requirement is that of originality. Article 2.1 of the Berne Convention provides that protected works must be intellectual creations. It is for this reason; many national laws provide that works must be ‘original’.

However, there is no consensus on what ‘originality’ really means. The term is not defined in the Berne Convention or other relevant international treaties, nor is it generally defined in national laws\textsuperscript{13}. It is rather a matter left for determination by the courts in relation to particular cases. However, it seems that it does not mean the same as ‘novelty’ as understood in patent law and a work is considered to be ‘original’ if there is some degree of intellectual effort involved and it has not been copied from someone else’s work\textsuperscript{14}. It is for this reason that new productions made by current generations of society and inspired by or based upon pre-existing indigenous designs have received protection. For example in \textit{Payunka, Marika and Others v Indofurn Pty Ltd}\textsuperscript{15}, the Australian Court had no difficulty in holding that the artworks before it were original and held that: “Although the artworks follow traditional Aboriginal form and are based on similar dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality”\textsuperscript{16}.

Therefore, it may be concluded that, contemporary, tradition-based TCE are sufficiently original to be protected as copyright works provided that some new expression, beyond merely reproducing the traditional form, is added. The only flip side to this kind of liberal interpretation given by courts is that, the originality requirement could be met even by an author who is not a member of the relevant cultural community in which the tradition originated. This may trouble indigenous communities, who may wish to deny persons not from the relevant cultural community from enjoyment of copyright in creations derived from that cultural community.

It is submitted that to address this legitimate concern states would need to develop means of placing upon such a person certain obligations towards that community before granting him copyright (such as to acknowledge the community and/or share benefits from exploitation of the copyright and/or respect some form of moral rights in the underlying traditions used). Doing so would be in consonance with one of the main policy objectives, adopted by the intergovernmental committee which is, to curtail the exercise and enforce of intellectual property rights acquired by unauthorized parties over TCE, and derivatives thereof\textsuperscript{17}.

Thus with meaningful interpretations the courts can overcome the not so strict requirement of originality and by placing effective restrictions on copyright holders countries can protect their traditional cultural expressions. It is reiterated that whether or not States wish to provide some form of protection for this public domain material is first and foremost a policy question. For example, the Model Provisions, 1982 make no reference to an originality requirement; consequently, nor do many of the national copyright laws which have implemented them. Similarly, the law of Panama makes no reference to an originality requirement, and nor does the Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture developed by Pacific Island countries.

Ownership Requirement

The conception of ‘absolute ownership’ in copyright law is incompatible with certain customary laws and systems. While copyright confers exclusive, private property rights in individuals, at times indigenous authors are subject to complex rules, regulations and responsibilities, more akin to usage or
management rights, which are communal in nature. The complex of rights regulating the production of indigenous cultural materials has been beautifully described in the already discussed Australian case, Payunka, Marika and Others v Indofurn Pty Ltd18 as follows:

“As an artist, while I may own the copyright in a particular artwork under western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all the other Yolngu (her clan) who have an interest whether direct or indirect in it. In this way I hold the image in trust for all the other Yolngu with an interest in the story”.

This divergence between ‘ownership’ in the copyright sense and communal ‘usage’ rights and responsibilities, has practical meaning in licensing cases, for example, an indigenous copyright owner would be entitled under copyright law to license or assign his or her rights to a third party, but under customary rules and regulations this may not be permissible.

It is submitted that customary rules should not be treated differently from the rules of other non-IP laws with which IP rules may appear to conflict. For example, morality laws may prohibit the publication of pornographic photographs, yet copyright law grants the author rights over the reproduction and publication of the photographs. However, there is no conflict – copyright law does not grant a right holder the positive entitlement to exercise rights; rather, it enables the right holder to prevent others from exercising the rights (or to authorize them to do so). Whether or not a right holder is entitled to exercise his or her rights may depend upon other laws, as Article 17 of the Berne Convention makes clear:

“The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right”.

Therefore, it could be argued by analogy that, there is no ‘conflict’ between copyright and customary laws, because, in the event that customary laws were to be recognized for this purpose by a country’s laws, copyright does not entitle or oblige a traditional artist to act contrary to his or her customary responsibilities.

The Fixation Requirement

According to general international principles, copyright protection is available for both oral and written works. Article 2.1 of the Berne Convention provides that among the kinds protected as copyright are ‘lectures, addresses, sermons and other works of the same nature.’ Although the words ‘of the same nature’ may restrict the range of oral works that may be protected to those similar to lectures, addresses and sermons, but Article 2.2 of the Convention explicitly provides that national laws need not make fixation a general pre-condition for protection. Despite this, many national laws do so because fixation proves the existence of the work, and provides for a clearer and more definite basis for rights. However, as mentioned above, this is not a treaty requirement, and states may exploit this in their interest by providing protection to the so-called unfixed expressions as well. TCE are ‘living,’ constantly being adapted and recreated. Requiring some form of prior documentation and/or registration contradicts the oral, intangible and ‘living’ nature of many TCEs. In the draft policy adopted by the Intergovernmental committee, it is argued that the inventories and databases of cultural materials may, of course, be useful for identifying, safeguarding and promoting their use as part of cultural heritage programs. But documenting or recording TCE should not be seen as a stand-alone approach to protection19.

It is noteworthy that the copyright law of countries such as Spain, France and Germany do not require fixation as far as traditional cultural expressions are concerned.

Limited Duration of Protection

Copyright protection is granted only for a limited term, as the system is based on the notion that works should ultimately enter the public domain. However, many indigenous people and traditional communities desire indefinite protection for expressions of their traditional cultures, and want their expressions to be protected in perpetuity. This demand is certainly justified as, protecting an expression that has been unique to a community since time immemorial, for a couple of decades, serves no purpose. Another difficulty in granting limited protection is that it requires certainty as to the date of a work's creation or first publication, which is unknown in the case of pre-existing traditional cultural expressions.

Fortunately at least the international IP laws regime possess no barrier to implementing the concept of indefinite protection. The Berne Convention itself
does not provide for any maximum period of protection though it stipulates 50 years as a minimum period for protection, therefore, countries are free to provide copyright for longer periods.

It is to be noted that this is not a new concept in IP law, and States may choose to establish systems that provide for some form of indefinite protection for literary and artistic productions. The Model Provisions, 1982 themselves do not provide for any time limit nor do the laws of Panama or the model law of the Pacific Island countries. Moreover, the intergovernmental committee has also resolved that protection of any traditional cultural expression should endure for as long as it continues to be maintained and used by, and is characteristic of, the cultural identity and traditional heritage of the relevant indigenous people.

Thus with some inputs of creativity and liberal construction of existing laws traditional cultural expressions may meet all the requirements to the grant of copyright protection.

There are however, some limits as to what can be protected by copyright. Article 9.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) makes clear: “Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.” Copyright, therefore, permits the imitation of the non-original elements or underlying ideas and concepts of works, which is a widespread practice as creativity is nourished and inspired by other works.

Therefore, even if copyright were to vest in a new tradition-based cultural expression, copyright protection would not per se prevent the traditional ‘style’ of the protected work from being appropriated.

Copyright protection does not extend to ‘style’ or method of manufacture, yet the method of manufacture and ‘style’ of traditional products is vulnerable to imitation. In so far as ‘style’ and method of manufacture go, copyright protection does not extend to utilitarian aspects, concepts, formulaic or other non-original elements, colours, subject matter and techniques used to create a work.

**Conclusion**

Thus, it may be stated that by adopting a purposive and liberal approach towards interpretation of copyright laws one may extend the protection of these laws to folklore. However, it cannot be denied that while copyright protection is possible in certain cases, it may not meet all the needs and objectives of indigenous people and traditional communities. The limited term of protection and certain other features of copyright (such as that it does not protect style or method of production) may make copyright protection less attractive to indigenous people and traditional communities. However, there are still ways and means like those discussed in this paper by which the law of copyright may also come to the rescue of folklores, which are being mercilessly exploited. However, to allow this to happen it must be ensured that those to whom these folklore belong must have a basic knowledge of copyright laws. Few suggestions towards this end include improved awareness raising and training, legal aid, assistance with enforcement of rights, and use of collective management by communities. Besides increasing the umbrella of protection each one of us must develop respect for our traditional heritage and discourage its misuse in our own small ways.

**References**

1. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge And Folklore in its summary of Draft policy objectives and core Principles (adopted at its Seventh session in November 2004) has accepted the same definition of the folklore, thereby, rendering even more legitimacy to this definition, for details refer, Annex I, of document WIPO/GRTKF/IC/7/3 http://www.wipo.int/es/docs/mdocs/kt/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_3-annex1.pdf
2. Perhaps the most publicized example of this is the successful ‘Deep Forest’ CD produced in 1992, which fused digital samples of music from the Ghana, the Solomon Islands and African ‘pygmy’ communities with ‘techno-house’ dance rhythms
4. Sandler Felicia, op. cit., 35 to 38
5. Terri Janke, Minding culture: Case studies on intellectual property and traditional cultural expressions, [http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html](http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html)
6. In India and Bhutan, for example, grave concern has been raised over the copying and use of traditional textile designs and patterns on machine-made fabrics which diluted the intrinsic value of textile designs and at the same time stifling the local weaving practice which is mostly prevalent among the women folk in villages. The imitation of traditional textile designs causes not only economic prejudice but also threatens to destroy traditional textiles and weaving crafts
8. Article 2.1 of the Berne Convention: “The expression ‘literary and artistic works’ shall include every production in the literary, scientific and artistic domain, whatever may be
the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematicographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.” See also Articles 2(3), 2(4) and 2(5) where the requirement to protect certain other kinds of works is dealt with

9 Section 38, The Indian Copyright Act, 1957
10 Document WIPO/GRTKF/IC/3/11, 3
11 Another example would be that of The 1982 Model Provisions, which recognize the possibility of collective, or community rights. Being a sui generis system and not a copyright system, they do not refer to ‘authors’ of expressions of folklore. They do not even refer directly to the ‘owners’ of expressions of folklore. Rather, they state that authorizations for using expressions of folklore should be obtained either from an entity (a ‘competent authority’) established by the State (this option creates a fiction that the State is the ‘author’ and/or the ‘owner’ of the rights in the ‘expressions) or from the ‘community concerned’ (Section 10). In short, the Model Provisions do not require there to be an identifiable ‘author’ or ‘authors’
12 Annex, WIPO/GRTKF/IC/5/3, 42
13 The Indian Copyright Act, for instance, does not define what originality means
15 (1994) 30 IPR 209. This is the so-called carpets case, entitled ‘Minding culture: Case studies on intellectual property and traditional cultural expressions’, undertaken for WIPO by Terri Janke, http://www.wipo.int/globalissues/studies/cultural/minding-culture/index.html
16 (1994) 30 IPR 209 , 216 (Though this case was concerned with the visual arts, there seems to be no reason why the results would be different in other areas, such as music)
17 Summary of draft policy objectives and core principles, Annex I, WIPO/GRTKF/IC/7/3, para I (XII)
18 Supra note15
19 Draft policy objectives and core principles, Annex II, WIPO/GRTKF/IC/7/3, para 35
20 Trademark and geographical protection can continue indefinitely (subject to certain conditions). The early House of Lords decision of Millar v Taylor (4 Burr. (4th ed.) 2303, 98 Eng. Rep 201 (K.B. 1769)) provided for perpetual copyright, but this principle was superseded by later judgements
22 Annex II, WIPO/GRTKF/IC/1/5, 7-8