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INTELLECTUAL PROPERTY, THE INTERNET,  
ELECTRONIC COMMERCE AND TRADITIONAL KNOWLEDGE**

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INTELLECTUAL PROPERTY, TRADITIONAL KNOWLEDGE AND GENETIC  
RESOURCES  
PROBLEMS OF THE PROTECTION OF FOLKLORE AS INTELLECTUAL PROPERTY  
AT THE DAWN OF THE 21ST CENTURY

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## BACKGROUND

1. Active and consistent international interest in the protection of folklore as the intellectual property of individuals, groups and, at a broader level, of peoples and nations, dates from the late 1970s and 80s.
2. There have been two main - albeit largely interconnected - “trends” in the international community's work in this respect.
3. On the one hand, a series of UNESCO initiatives led to the adoption of the “Recommendation about Preservation of Folklore” at the 25th session of the General Conference in Paris in 1989. The following decade saw a number of regional seminars and meetings related to the application of the provisions in the Recommendation and to unlawful commercialization of certain “expressions of folklore,” along with attempts to formulate a “code of ethics” in preservation, protection and revitalization processes.
4. On the other hand, WIPO has made considerable progress in this field, starting with, such things as the adoption in 1982 of “Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions” - “Model Provisions” (jointly with UNESCO). Recent initiatives in this respect include four regional round tables (1999) on the protection of expressions of folklore in the African countries, Asia and the Pacific, the Arab countries, and Latin America and the Caribbean<sup>i</sup>.
5. Even just the list of regions covered by the regional round tables indicates that the latter concern themselves with countries that have largely preserved a viable folk tradition both as a whole (in the broadest sense) and at the level of their separate indigenous communities. Obviously due among other things to the sufficiently viable, existing and active cultural reality in those regions, they have also intensified efforts to find universally valid and codified “rules” for its protection as intellectual property.
6. I will not examine the development of international dialogue in this respect, but only note that terms and concepts such as Traditional Knowledge, Traditional Indigenous Peoples, Expressions of Folklore and Genetic Resources<sup>ii</sup> have been clarified in the course of the debate; each one of those concepts and terms is indicative of an effort to grasp the essence of the subject matter in question. The requisite linkages and projects relevant to conventions and laws on copyright or trade-related intellectual property (TRIPS Agreement)<sup>iii</sup> have been more clearly identified.
7. Indeed this alone indicates the complexity of the problem, which is growing exponentially once the latter is approached in the context of the current globalization of the Information Society, and the concurrent intensified processes of commercialization.
8. If the problems in separate regions with cultures that have largely preserved their traditional (indigenous) character are subject to some sort of typological generalization (difficult as that might be), their comparison with largely urbanized cultural realities, e.g. of the Western European type, complicates matters even further. This is associated, for example, with the fact that in the latter a series of cultural forms of a “traditional” type proper or a series of “expressions of folklore” have become obsolete, being edged out by newly established forms - which often have modified or different significative characteristics. This in turn has led to definite modifications in the formulation of the actual target subject to protection. The problem is all the more difficult because of the specificities of the so-called

“countries in transition,” the majority of which have a well preserved traditional cultural fund of “expressions of folklore” that is now seriously threatened with loss or unlawful commercialization as an immediate effect of the changed socio-economic and cultural conditions and, last but not least, by the current absence of adequate legislation.

9. Concise as I want this general description of the present situation to be, I cannot omit the fact that circumstances such as the above have prompted the international community to go a long way in finding an adequate and universally valid definition of the term “folklore” itself, namely:

10. “Folklore (in the broader sense, traditional and popular folk culture) is a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity; its standards are transmitted orally, by imitation or by other means. Its forms include, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.”<sup>iv</sup>

11. Even though this definition is still debatable, both in general and at the level of its individual components, today it is the only more or less unambiguous formula on which the international community has reached relative consensus. It presumes the objective of the protection and preservation of folklore as “intellectual property” of the separate peoples. Today there is obviously a pressing need to codify the range of cultural reality-related concepts and terms not only on a recommendatory, but also on a statutory basis.

### THREE MAIN POINTS

12. Proceeding from the definition of the Recommendation and without claiming to be exhaustive, I will note three points in the former which I believe are especially important:

- the Recommendation refers to “creations,” which presumes the component of “artistry.” However, noting the need of the presence of the artistic component in general, we should bear in mind that when proceeding from “traditional cultures,” which are by rule syncretic, this component has specific forms of expression. This means that its deciphering and formulation (on a case-by-case basis) presupposes the active participation primarily of the (creative) community itself - but probably also of a “distanced” perspective that would identify more general parameters;

- the holders or creators of “expressions of folklore” are both individuals and groups. From the perspective of the protection of copyright as intellectual property, this aspect complicates the problem significantly;

- as a rule (and there seems to be virtually no controversy over this), knowledge of the forms of folk culture - which is also directly related to the inherent expressions of folklore as the final product of creation and renewal of the creative process - is transmitted orally. Also as a rule, this culture and its forms and processes of training are not (or are seldom) codified. Precisely due to the preconditioned presence of this basic and essentially diachronic code - oral transmission - this culture (and its individual concrete forms) is very fragile, even though it might be sustainable in principle in the notions of the particular community that reproduces it. Knowledge of its forms and mechanisms may be very easily lost, especially given the active processes of globalization (as well as commercialization).

13. I will not deal separately with the crucial aspect of the significant role of folk culture (personified in the expressions of folklore) in the processes of individual and community identification.

#### WHAT IS TO BE DONE?

14. I think that it is reasonable to apply the already-advocated approach in which each country or community (in the person mainly of its experts) itself identifies and sets the priorities and concrete areas of protection for “expressions of folklore,” proceeding from the specificities of its own traditional culture. Hard and unambiguous as this process might be, defining priorities would be a significant step towards the possibility of formulating and codifying protective measures in unambiguous statutory provisions. Such identification and definition would ultimately outline a nomenclature of areas subject to concrete protection, which I believe ought to be formally harmonized with the general framework of the definition of “folklore” in the international documents already adopted. It would probably be most feasible to ensure that this nomenclature remains open - static as traditional culture is in principle, it is nevertheless subject to some (albeit slow) development, and this is a circumstance that ought to be provided for. National nomenclatures obviously ought to take into account the variation of the possible community specificities, with the envisaged inclusion of new areas of protection preceded by expert activity.

15. Notably, a role model in this respect is offered by the UNESCO programme “Human Living Treasury,” which focuses the attention of Member States precisely on humans as holders of traditional knowledge, and on providing opportunities for the transmission of this knowledge to the next generations.

16. Naturally, we should also bear in mind an extremely important precondition - which I will not discuss extensively here – regarding the provision at the national level of subsidies to encourage the preservation of traditional knowledge. That entails pursuing a consistent cultural policy in this respect.

17. The framework of the diachronic code - which characterizes traditional cultures in principle on the one hand and contemporary active processes of globalization (commercialization) on the other - presupposes devoting special attention to the figure of the recorder. The recorder is an expert researcher who records – in other words codifies - expressions of folklore on-site. In the conditions of contemporary society, this type of codification is of particular importance. In fact, figuratively speaking, it is a means of compiling a record - which may also be transmitted unambiguously to succeeding generations - of national and, at the lower level, of community and ancestral memories. The recorder has a special role in these processes. His or her activity is just as creative (in the broadest sense) as the activity of the performer of expressions of folklore. Furthermore, the activity of the recorder, who is by rule an expert, also entails a significant stock of special knowledge applied in the processes of deciphering and systematizing the material gathered. Notably, the figure of the recorder will play an increasingly important role even in cultures whose traditional forms of expression are still sufficiently viable and active today.

18. It is obvious that, in the context of efforts to preserve traditional knowledge, the figure of the recorder requires special consideration. Moreover, recorders are obviously invested with certain rights in the recorded material.

19. The figure of the recorder and the authentic material gathered by him or her is logically associated with the institution of the Archive or Museum where the material is stored. In the case of the museum of ethnography which preserves tangible forms of traditional culture, things seem clearer, as sufficiently developed international and national statutory frameworks relevant to this institution are arguably in place. However, the archive, and the folk archive in particular, still seems to be something of a Cinderella, since the copyright status of the archive is in most cases – including at the international level – subject to only the most general statutory regulation only. The archive, which is in effect the material “treasury” of traditional memory, is virtually unprotected. The danger of a lack of concrete protection for the folk archive grows exponentially in the conditions of the information superhighway or Internet. We have already seen cases in which unscrupulous people have violated the code of ethics and the rights of performers, recorders and the archive as an institution (or in broader terms, of the State and its interests in the sphere of culture), posting on the Internet recordings painstakingly gathered on site by others for decades.

20. Obviously, the performer or creator holds one of the first places in the chain of operators eligible for protection. The issue of their rights is extremely complicated, above all because of the very nature of the type of culture that folklore is. Unlike the forms of so-called autonomous creativity, as a rule the creation of “expressions of folklore” is related to community models - which means that the real intellectual property holder is actually the community, regardless of or rather, parallel with, the specific talent of the actual performer or creator. This is all the more if one considers that a significant part of the expressions of folklore are linked with the so-called “group performer” or the group - which in turn reconfirms the link with the community.

21. Without attempting to offer an unambiguous and final solution to the issue of the property rights of the performer of “expressions of folklore,” I think that their definition must take into account the more general interests of the community, or chain of communities in an ascending order right up to the level of the State. I believe it would be useful to provide for the participation of the community or State (this question has already been discussed in the relevant areas of the international community) at the stage of formulating the intellectual property rights or copyright of the non-professional performer of “expressions of folklore” in the process of framing specific statutory measures. Thus in the event of commercial distribution of the product, the community or State would be entitled to royalties which it could invest in subsidies and support for traditional cultural forms important to the community.

22. Notably, special attention should be paid to an important circumstance: such provisions should provide special preferences for scientific documentation activities, and in particular to those of State scientific institutions, which cultivate and reproduce experts whose leading role has been noted above.

#### MAIN TRIAD: BY WAY OF CONCLUSION

23. I believe I would not be wrong to identify performer-recorder-archive as the main triad, representing the three major entities deserving special protection as holders of intellectual property rights or copyright.

24. Different and diverse as the forms of traditional cultures worldwide might be, the need to protect these three main entities and holders of rights seems to be constant.

25. Hence, I believe that the international community and international specialized agencies such as WIPO should concentrate on finding concrete formulations precisely in this respect. In the context of the cultures of the different States or communities, these formulations could be elaborated on in nomenclatures of activities which each would identify as significant for its traditional expressions of folklore.

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- <sup>i</sup> WIPO/IPTK/RT/99/2 - Roundtable on Intellectual Property and Traditional Knowledge. Geneva. November 1 and 2, 1999, & 9.
  - <sup>ii</sup> WIPO/IPTK/RT/99/3 - Roundtable on Intellectual Property and Traditional Knowledge. Geneva, November 1 and 2, 1999, & 1, 1b, 3, etc.
  - <sup>iii</sup> WIPO/IPTK/RT/99/2 - Roundtable on Intellectual Property and Traditional Knowledge. Geneva. November 1 and 2, 1999, & 16.
  - <sup>iv</sup> Recommendation about Preservation of Folklore; WIPO/IPTK/RT/99/3 ..., 1a "Folklore."