

Protection of Traditional Cultural Expressions

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Abstract

This paper intends to study the protection of traditional cultural expressions in the context of the conventional intellectual property regime. It first identifies the genuine protection needs of indigenous communities. Next, the paper goes on to examine relevant treaties and touches upon the effectiveness of the type of protection. Last but not least, it presents the differences of positive and defensive protection strategies. To sum up, this paper discusses the protection of traditional cultural expressions mainly in copyright and copyright-plus terms.

Key words: Traditional cultural expressions; WIPO-UNESCO joint efforts; Indigenous protection needs; Positive protection; Defensive protection

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1. INTRODUCTION

Traditional cultural heritage has become invaluable assets to the human race. For instance, music producers and product manufacturers welcome the access to indigenous cultures mainly out of commercial considerations. Besides economic concerns, there also exist inspirational considerations in the need for traditional cultural assets. However, there has been much misuse or misappropriation of traditional cultural properties. (Krumenacher, 2004)

Traditional cultural expressions, often used interchangeably with the term “expressions of folklore”

in the World Intellectual Property Organization (WIPO)’s official documents, identify and form part of the cultural heritage of communities.¹ WIPO first set out to study the preservation, safeguarding and promotion of traditional cultural expressions five decades ago. The re-emergence of the issue is largely due to increasing misappropriation by third parties in recent years, together with indigenous peoples’ stronger claim for their economic and cultural rights thereafter.

The need to enhance the protection of traditional cultural expressions has become increasingly important with the fast globalization of trade, culture and communications, which has brought the outside world to indigenous communities in ways one never would have imagined. Different strategies have been discussed worldwide for effective protection in one way or another, while proper strategies consistent with indigenous interests could be further employed to protect traditional cultural heritage.

Indigenous groups and communities have been yearning for various types of protection when it comes to their valuable traditional cultural expressions. Adequate protection should include: (1) the proper use of traditional productions; (2) the due respect that should be paid to original holders; and (3) possible commercial benefits.²

2. CONVENTIONAL PROTECTION REGIME

The protection of traditional cultural expressions is most often discussed in copyright, or copyright-plus terms when applying the conventional intellectual property regime. (Riley, 2005)

Both WIPO and the United Nations Educational,

¹ Intellectual Property and Traditional Cultural Expressions/Folklore - http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf, at 1

² WIPO Intellectual Property Handbook: Policy, Law and Use - https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf, at 63

Scientific and Cultural Organization (UNESCO) have contribution when it comes to protecting traditional cultural expressions on the international plane.

2.1 WIPO-UNESCO Joint Efforts

For a period of five decades, WIPO, the major international regulatory body of intellectual property, has been identifying and seeking to “address legal, conceptual, operational and administrative needs and issues” in the realm of safeguarding traditional cultural expressions.³ The following are some of its previous and current achievements, several of which are obtained together with UNESCO.

Back in 1967, WIPO made it possible for “unpublished works” to be protected on the international level through the Revision of the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention).⁴ To be more specific, Article 15.4 of Berne Convention took into consideration the increasing needs for international protection of traditional cultural expressions and since then set out to safeguard traditional cultural expressions.⁵

In 1976, the Tunis Model Law on Copyright for Developing Countries (the Tunis Model Law) was enacted, which was another attempt to cater for the particular needs of the developing world by including *sui generis* protection of traditional cultural expressions.⁶ However, the Tunis Model Law ignores the “collective nature” of traditional cultural expressions.⁷

In 1982, an expert group from WIPO as well as UNESCO designed Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (Model Provisions), a *sui generis* model for the intellectual property type protection of traditional cultural expressions.⁸ Later that year, Model Provisions gained protection of traditional culture by means of assisting developing countries in drafting national copyright laws.⁹ Model Provisions has a great impact on the national laws of many WIPO countries.

In 1984, the Draft Treaty for the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions (the Draft Treaty) was proposed in a conference jointly convened by both WIPO and

UNESCO experts.¹⁰ The Draft Treaty is based on Model Provisions and operates on the basis of national treatment. (Lewinski, 2003) However, it was agreed by many experts at that time not to set up an international convention at too early a stage.¹¹

Then in 1996, WIPO’s major achievement was to adopt the WIPO Performances and Phonograms Treaty (WPPT). Simply put, WPPT grants protection for performers of traditional cultural expressions as well.¹²

In the following year, the “UNESCO-WIPO World Forum on the Protection of Folklore” was convened in the Asian country of Thailand.¹³

In 1998 and 1999, WIPO initiated large-scale fact-finding missions (FFMs) in 28 different countries to probe into the urging needs and expectations of traditional knowledge holders concerning intellectual property issues.¹⁴ In this sense, it was proper for “traditional knowledge” to include “traditional cultural expressions” as a sub-set.¹⁵ Participants of these FFMs were to include local and indigenous communities, government officials, non-governmental organizations, scholars, researchers and private sector representatives.¹⁶ The more than 3,000 people project was rewarding enough to produce the following report: Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions (1998-1999) (the FFM Report).¹⁷

In 1999, WIPO set out to convene regional consultations respectively on the protection of traditional cultural expressions for countries in Africa, the Asian-Pacific region, the Middle East, Latin America and the Caribbean area.¹⁸ All of these consultations were so fruitful that each one of them produced either recommendations or resolutions, which involved the suggestion for WIPO and UNESCO to enhance their efforts in the realm of

³ WIPO Intellectual Property Handbook: Policy, Law and Use - https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf, at 60

⁴ *Ibid.*, at 61

⁵ *Ibid.*, at 60-61

⁶ Intellectual Property and Traditional Cultural Expressions/Folklore - http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf, at 3

⁷ WIPO Intellectual Property Handbook: Policy, Law and Use - https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf, at 59

⁸ Intellectual Property and Traditional Cultural Expressions/Folklore http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf, at 4

⁹ WIPO Intellectual Property Handbook: Policy, Law and Use - https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf, at 60

¹⁰ *Ibid.*, at 3

¹¹ Intellectual Property and Traditional Cultural Expressions/Folklore - http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf, at 3

¹² WIPO Intellectual Property Handbook: Policy, Law and Use - https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf, at 61

¹³ Intellectual Property and Traditional Cultural Expressions/Folklore - http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf, at 3

¹⁴ Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) - https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf, at 6

¹⁵ WIPO Intellectual Property Handbook: Policy, Law and Use - https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf, at 62

¹⁶ Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) - https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf, at 7

¹⁷ *Ibid.*, at 6

¹⁸ Intellectual Property and Traditional Cultural Expressions/Folklore - http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf, at 3

traditional cultural expressions protection.¹⁹ Moreover, the recommendations agreed that future work in these fields should aim at generating an effective international legal framework to safeguard traditional cultural expressions.²⁰

Year 2000 witnessed the forming of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).²¹ WIPO established IGC due to discrepancies in different parties' ideas for definitions and the proper manner in which to discuss the interplay between international intellectual property regimes, traditional knowledge, genetic resources, traditional cultural expressions, and various ideas for remuneration plans. (Torsen, 2006) The purpose of IGC is to offer governments a forum to discuss intellectual property matters concerning "access to genetic resources, benefit-sharing, and the safeguarding of traditional knowledge, innovations, and expressions of Search Term Begin folklore". Search Term End (Riley, 2005) IGC has been making progress all the way through in articulating the intellectual property needs and expectations of indigenous peoples and traditional communities in terms of traditional cultural expressions protection. IGC has also marked out a "conceptual framework" within which to consider those needs and expectations, and has been developing policy options in response to those needs and expectations.²² Among other things, IGC has also done a survey of conventional forms of intellectual property protection for traditional knowledge. Its initiatives on traditional cultural expressions contribute to the ongoing process of re-appraisal of the Model Provisions. (Oguamanam, 2004)

IGC has made tremendous achievement in exploring both legal and practical connections between the intellectual property system and the collective concerns of holders and practitioners of traditional cultures.²³ More specifically, IGC's contribution includes the following: (1) Under its guidance, the Secretariat of WIPO thus designed a questionnaire to examine national experiences in detail; (2) the Secretariat then conducted a succession of overall analytical studies on the basis of the feedback of the questionnaire and other relevant information; (3) the above-mentioned studies laid the foundation for the later research of a workable international regime and helped

in developing effective means.²⁴ Thanks to this rewarding experience, IGC can set out to reach an "international understanding" of the shared purposes and beliefs that may lead to the more effective protection of traditional cultural expressions.²⁵

The first two decades of the new millennium has also witnessed WIPO and UNESCO's continuous efforts in safeguarding traditional knowledge. For example, WIPO issued the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge of Panama (2000) and the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (2002).

2.2 The Tunis Model Law

As mentioned before, the Tunis Model Law came into existence in 1976 to provide national traditional cultural expressions works with protection.²⁶ By including in itself *sui generis* protection of traditional cultural expressions, this law is another positive step in meeting the particular needs of developing nations.²⁷

Sui generis means "of its own kind" in the Latin language. And a *sui generis* regime refers to a framework especially devised to take care of the needs and expectations of a particular issue. For the past five decades, calls for a *sui generis regime* for the protection of traditional cultural expressions have been often heard. This could be a legal framework totally differentiating from the prevailing intellectual property system, or a framework with new intellectual property, or intellectual property like, rights.²⁸

When working on a *sui generis* regime for the protection of traditional cultural expressions, a couple of issues must be dealt with in the first place: specific cultural heritage to be protected, the objectives of protection, traditional owners or custodians of relevant traditional cultural rights, procedures to possess rights, how to enforce rights and impose sanctions, how rights can be recognized abroad, etc.²⁹

The Tunis Model Law is a positive step in exploring protection models of traditional cultural heritage. However, this law ignores the "collective nature" of

¹⁹ WIPO Intellectual Property Handbook: Policy, Law and Use - https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf, at 62

²⁰ Intellectual Property and Traditional Cultural Expressions/Folklore - http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf, at 4

²¹ WIPO Intellectual Property Handbook: Policy, Law and Use - https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf, at 62

²² WIPO Intellectual Property Handbook: Policy, Law and Use - https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf, at 57

²³ Intellectual Property and Traditional Cultural Expressions/Folklore - http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf, at 4

²⁴ WIPO Intellectual Property Handbook: Policy, Law and Use - https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf, at 63

²⁵ Intellectual Property and Traditional Cultural Expressions/Folklore - http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf, at 4

²⁶ WIPO Intellectual Property Handbook: Policy, Law and Use - https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf, at 60

²⁷ Intellectual Property and Traditional Cultural Expressions/Folklore - http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf, at 3

²⁸ *Ibid.*

²⁹ WIPO Intellectual Property Handbook: Policy, Law and Use - https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf, at 61

traditional cultural expressions.³⁰ By “collective nature”, we mean the collective interests of a traditional cultural community. Since traditional cultural heritage is usually associated with a community instead of one single person, it is desirable for a country to protect collective interests of traditional or indigenous communities.³¹

2.3 Model Provisions and the Draft Treaty

Model Provisions exerts great influence on the enactment of domestic laws of many WIPO countries. In fact, some countries and regional organizations have agreed to protect traditional cultural expressions via *sui generis* measures. And it is pointed out by WIPO that most have done so within their copyright laws, following Model Provisions.³²

Take the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (2002) for an example. According to this framework, “traditional owners” have the right to “authorize or prevent, amongst others, the adaptation, transformation and modification” of the protected traditional cultural expressions.³³ In other words, owners of traditional cultural expressions can fully enjoy their cultural rights. Any other user must have permission of the owner before he/she can make “new derivative works” based upon a particular traditional cultural expression. If the work is to be applied to commercial use, the rights-holder should not only show respect to traditional cultural heritage by indicating its source, but also share benefits with the traditional owner(s).³⁴

The Draft Treaty is another attempt to protect traditional cultural expressions on the basis of Model Provisions. The Draft Treaty recognizes national treatment in traditional cultural expressions protection. (Lewinski, 2003) As a matter of fact, there have been many attempts to establish an international treaty by the international community. Taking into consideration the “insufficient national experience” in the implementation of the Model Provisions, it was agreed at the time that a draft treaty instead of an international treaty is more realistic and appropriate.³⁵

³⁰ *Ibid.*, at 59

³¹ Intellectual Property and Traditional Cultural Expressions/Folklore - http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf, at 4

³² WIPO Intellectual Property Handbook: Policy, Law and Use - https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf, at 60

³³ *Ibid.*, at 61

³⁴ Intellectual Property and Traditional Cultural Expressions/Folklore - http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf, at 4

³⁵ Intellectual Property and Traditional Cultural Expressions/Folklore - http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf, at 3

3. POSITIVE AND DEFENSIVE PROTECTION

One single protection model for traditional cultural expressions is far from enough in terms of meeting all the needs and expectations of indigenous communities. Experts have suggested a range of “positive and defensive” legal instruments to reach various objectives in safeguarding traditional culture.³⁶ What is the difference between “positive and defensive” protection?

As is mentioned before, WIPO carried out large-scale fact-finding missions from 1998 to 1999 in nearly 30 different countries to examine the urging needs and strategies of traditional knowledge holders concerning intellectual property issues.³⁷ With regard to WIPO’s findings in these missions, three different approaches among indigenous communities have been identified:

“- intellectual property protection to support economic development;

- intellectual property protection to prevent unwanted use by others;

- prevention of others acquiring intellectual property rights over traditional cultural expressions.”³⁸

The first two approaches imply “positive protection”, which means “obtaining and asserting rights in the protected material”.³⁹ Thus positive protection can either offer a legal basis for any commercial and other business that traditional cultural assets custodians have decided to pursue with other partners, or prevent a third party from using traditional cultural expressions in an “unauthorized or inappropriate” manner.⁴⁰

In contrast to “positive protection”, “defensive protection” targets at stopping others from acquiring adverse intellectual property rights.⁴¹ Specifically speaking, indigenous communities are more concerned to prohibit others from achieving intellectual property over “derivations and adaptations” of traditional cultural expressions. In this sense, it is advisable to use defensive tools to “block or pre-empt” third parties’ intellectual property rights that are against indigenous communities’ interests.⁴²

Both positive and defensive strategies can be employed together to offer adequate and efficient protection for

³⁶ WIPO Intellectual Property Handbook: Policy, Law and Use - https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf, at 64

³⁷ Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) - <http://www.wipo.int/tk/en/tk/ffm/report/final/pdf/part1.pdf>, at 6

³⁸ WIPO Intellectual Property Handbook: Policy, Law and Use - https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf, at 63

³⁹ Intellectual Property and Traditional Cultural Expressions/Folklore - http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf, at 13

⁴⁰ *Ibid.*

⁴¹ WIPO Intellectual Property Handbook: Policy, Law and Use - https://www.wipo.int/edocs/pubdocs/en/wipo_pub_489.pdf, at 63

⁴² *Ibid.*

traditional cultural expressions. The choice of strategies is usually determined by what aims the holders or custodians want to achieve.⁴³

For instance, an indigenous community's traditional cultural expressions which are considered secret or sacred can be applied to defensive protection, while handicrafts can be of positive protection against imitations or fake goods.⁴⁴

CONCLUSION

Indigenous communities have been known to be abundant in traditional cultural assets. With the increasing cultural and commercial values that could be created by traditional cultural expressions, there comes misappropriation and misuse. There are already instances of the designs of Australian Aboriginal artists being replicated without authorization. And there are also successful stories in which Aboriginal Australians employ the existing intellectual property system to secure their cultural and economic rights, as well as the legal and practical lessons learned therefrom. (Janke, 2003)

To sum up, this paper discusses the protection of traditional cultural expressions mainly in copyright and copyright-plus terms. It has first examined WIPO-UNESCO joint efforts in a broad sense, followed by a more detailed introduction to *sui generis* protection: the Tunis Model Law, Model Provisions and the Draft Treaty. It is apparent that the existing intellectual property system has been set up to protect the knowledge and technology of the industrialized world. Though it is of some help in certain issues, this conventional protection regime has not provided comprehensive and adequate protection for traditional cultural expressions.

What is more, both positive and defensive protection

should be put to use in a complementary manner. Together with the two different approaches, it is more likely to achieve better results for indigenous communities.

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⁴³ Intellectual Property and Traditional Cultural Expressions/ Folklore - http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf, at 13

⁴⁴ *Ibid.*