

Needs of the Sámi people for intellectual property protection from the viewpoint of copyright and trademarks

– especially with regard to duodji-handicrafts and the Sámi dresses

Publications of the Ministry of Education and Culture, Finland 2018:40

Tuomas Mattila



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Report (2018):

Needs of the Sámi people for intellectual property protection from the viewpoint of copyright and trademarks – especially with regard to duodji-handicrafts and the Sámi dresses

Tuomas Mattila, PhD Student (University of Helsinki), Master of Laws, LL.M.,
Master of Social Sciences, M.Soc.Sc.

Ministry of Education and Culture

ISBN: 978-952-263-606-5

Layout: Government Administration Unit, Publications

Images in the publication: Image bank of the Sámi Parliament Sámi duodji ry

Helsinki 2018

Description sheet

Published by	Ministry of Education and Culture	11th December 2018	
Authors	Tuomas Mattila		
Title of publication	Needs of the Sámi people for intellectual property protection from the viewpoint of copyright and trademarks – especially with regard to duodji-handicrafts and the Sámi dresses		
Series and publication number	Publications of the Ministry of Education and Culture, Finland 2018:40		
Register number		Subject	Culture
ISBN PDF	978-952-263-606-5	ISSN (PDF)	1799-0351
Website address (URN)	http://urn.fi/URN:ISBN:978-952-263-606-5		
Pages	49	Language	English
Keywords	Sámi people, traditional culture, traditional cultural expression, intellectual property, copyright, trademarks, indigenous peoples		
<p>Abstract</p> <p>The right of indigenous peoples to their own culture has been a topic of international discourse for numerous years. The issue applies to the actual possibility to maintain and develop their cultural heritage as well as to the exclusive right to determine how and who can use traditional cultural expressions.</p> <p>A legal conflict concerning cultural rights can emerge, for example, when a third party uses traditional cultural expressions in a manner that offends the community's internal rules or experience. Unpermitted use can dilute the semantic content of cultural expressions as well as their appeal and authenticity, i.e. intellectual capital, and can, thus, also prevent the implementation of human and fundamental rights related to culture.</p> <p>This study aims, for its part, to map out the middle ground that falls between these collective needs and existing legal instruments. In particular, an effort has been made to examine to which extent intellectual property systems, in particular copyrights and trademarks are already used or could be used to protect the Sámi traditional culture, and, on the other hand, the extent to which the current system does not recognise the needs and special characteristics that the protection of the cultural heritage of indigenous peoples requires.</p> <p>The study aims to provide information both to IP specialists on the issue of traditional cultural expressions and to indigenous peoples and local communities on intellectual property matters.</p>			
Publisher	Ministry of Education and Culture, Finland		
Distributed by/ publication sales	Online version: julkaisut.valtioneuvosto.fi Publication sales: julkaisutilaukset.valtioneuvosto.fi		

Kuvailulehti

Julkaisija	Opetus- ja kulttuuriministeriö	11.12.2018
Tekijät	Tuomas Mattila	
Julkaisun nimi	Saamelaisten tarpeet henkisen omaisuuden suojaan tekijänoikeussuojan ja tavaramerkkisuojan näkökulmasta – erityisesti duodji-käsityön ja saamenpuvun osalta	
Julkaisusarjan nimi ja numero	Opetus- ja kulttuuriministeriön julkaisuja 2018:40	
Diaarinumero		Teema Kulttuuri
ISBN PDF	978-952-263-606-5	ISSN PDF 1799-0351
URN-osoite	http://urn.fi/URN:ISBN:978-952-263-606-5	
Sivumäärä	49	Kieli englanti
Asiasanat	Saamelaiset, perinteinen kulttuuri, perinteinen kulttuuri-ilmaisu, immateriaalioikeudet, tekijänoikeus, tavaramerkki, alkuperäiskansat	
Tiivistelmä	<p>Alkuperäiskansojen oikeudesta omaan kulttuuriinsa on keskusteltu kansainvälisesti jo useamman vuosikymmenen. Kysymys koskee niin tosiasiallisia mahdollisuuksia ylläpitää ja kehittää kulttuuriperintöä, kuin toisaalta yksinoikeutta määritellä sitä, miten ja kenen toimesta perinteisiä kulttuuri-ilmaisuja saadaan käyttää.</p> <p>Oikeudellinen konflikti koskien kulttuurisia oikeuksia voi konkretisoitua esimerkiksi silloin, kun kolmas osapuoli käyttää perinteisiä kulttuuri-ilmaisuja yhteisön sääntöjä ja kokemusta loukkaavalla tavalla. Luvaton käyttö voi liudentaa kulttuuri-ilmaistusten merkityssisältöjä ja niihin liittyvää houkuttelevuutta ja autenttisuutta – toisin sanoen aineetonta pääomaa – ja siten ehkäistä myös kulttuuristen ihmis- ja perusoikeuksien toteutumista.</p> <p>Tämä selvitys pyrkii kartoittamaan sitä maastoa, jossa saamelaisten perinteisiin kulttuuri-ilmaistuihin liittyvät oikeudellisen suojan tarpeet ja immateriaalioikeudet kohtaavat; millä tavoin immateriaalioikeusjärjestelmää, erityisesti tekijänoikeuksia ja tavaramerkkejä, voitaisiin käyttää saamelaisen perinteisen kulttuurin suojelemiseksi, sekä miltä osin nykyinen järjestelmä ei tunnista niitä tarpeita tai erityispiirteitä, joita alkuperäiskansojen kulttuuriperinnön suojaaminen edellyttää.</p> <p>Selvityksen tavoite on tuottaa tietoa niin immateriaalioikeusasiantuntijoille perinteisistä kulttuuri-ilmauksista kuin myös alkuperäiskansoille immateriaalioikeuksista.</p>	
Kustantaja	Opetus- ja kulttuuriministeriö	
Julkaisun jakaja/myynti	Sähköinen versio: julkaisut.valtioneuvosto.fi Julkaisumyynti: julkaisutilaukset.valtioneuvosto.fi	

Presentationsblad

Utgivare	Undervisnings- och kulturministeriet	11.12.2018
Författare	Tuomas Mattila	
Publikationens titel	Samernas behov till immaterialrättsligt skydd från upphovsrättslig och varumärkesrättslig synvinkel - särskilt i fråga om om duodji-hantverk och samedräkten	
Publikationsseriens namn och nummer	Undervisnings- och kulturministeriets publikationer 2018:40	
Diarienummer		Tema Kultur
ISBN PDF	978-952-263-606-5	ISSN PDF 1799-0351
URN-adress	http://urn.fi/URN:ISBN:978-952-263-606-5	
Sidantal	49	Språk engelska
Nyckelord	Samer, traditionell kultur, traditionella kulturella uttryck, immaterialrätt, upphovsrätt, varumärke, urfolk	
Referat	<p>Urfolkens rätt till sin egen kultur har varit föremål för diskussioner redan i flera årtionden. Det handlar både om deras reella möjligheter att upprätthålla och utveckla sitt kulturarv och, å andra sidan, om deras ensamrätt att bestämma vad, hur och vem som kan ge tillstånd till rätten att använda sig av ett visst kulturellt uttryck.</p> <p>Juridiskt sett får konflikten kring de kulturella rättigheterna konkret form till exempel när en tredje part tar i bruk ett traditionellt kulturellt uttryck på ett sätt som kränker gemenskapens regler och upplevs vara sårande. Otillåten användning kan urholka innehållet i kulturella uttrycks symbolik och den attraktionskraft och autenticitet som anknyter till dem - med andra ord till det immateriella kulturarvet - och därmed även utgöra ett hinder för att respektive urfolks kulturella mänskliga grundläggande rättigheterna tillgodoses.</p> <p>Denna utredning eftersträvar att kartlägga terrängen där samernas behov av rättsligt skydd och deras immaterialrättigheter möts; på vilket sätt det juridiska systemet gällande immaterialrätt, särskilt upphovsrätt och varumärken, skulle kunna användas för att skydda samernas traditionella kultur, samt till vilken del det nuvarande systemet inte erkänner de rättigheter eller särdrag som krävs för att urfolkens kulturarv ska skyddas.</p> <p>Syftet med utredningen är att ta fram kunskap såväl för experter på immaterialrätt angående traditionella kulturella uttryck som för urfolk om deras immaterialrättigheter.</p>	
Förläggare	Undervisnings- och kulturministeriet	
Distribution/ beställningar	Elektronisk version: julkaisut.valtioneuvosto.fi Beställningar: julkaisutilaukset.valtioneuvosto.fi	

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PREFACE

The right of indigenous peoples to their own culture has been a topic of international discourse for numerous years. The issue applies to the actual possibility to maintain and develop their cultural heritage as well as to the exclusive right to determine how and who can use traditional cultural expressions. Under the Constitution of Finland, the Sámi have the right to maintain and develop their language and culture¹ and the right to self-governance in matters related to these issues within the Sámi homeland². International human rights agreements guarantee every individual the right to take part in cultural life and to enjoy the protection given to the intangible and tangible interests of literary and artistic products³. The cultural rights of the Sámi could not be based on a stronger legal foundation.

However, while from the perspective of human and fundamental rights the right to maintain one's own culture is guaranteed, the matter of exclusive rights, meaning the right to determine the conditions for the use of culture or to prohibit others from using it, is specifically an intellectual property issue and is, therefore also in the scope of private law. A legal conflict concerning cultural rights can emerge, for example, when a third party uses traditional cultural expressions in a manner that offends the community's internal rules or experience. Unpermitted use can dilute the semantic content of cultural expressions as well as their appeal and authenticity, i.e. intellectual capital, and can, thus, also prevent the implementation of human and fundamental rights related to culture.

Although many traditional cultural expressions have originated a long time before intellectual property legislation was enacted, from a legal standpoint, this is a relatively new

1 The Constitution of Finland (731/1999), section 17

2 The Constitution of Finland (731/1999), section 121

3 The UN International Covenant on Economic, Social and Cultural Rights (1966) and the later Decree on the Enactment of the International Covenant on Economic, Social and Cultural Rights (6/1976), Article 15.

and still developing phenomenon that involves the individual and community. At the same time, moral needs are emphasised in addition to economic rights. While intellectual property has been legally seen as either private property or common heritage that all of society has the right to freely use (public domain), the collectivity is also a significant aspect when it comes to traditional culture. Intangible cultural heritage is the property of every individual member of the traditional community, but also property of the community collectively. It is difficult for the system of concepts that applies to intellectual property based on the dichotomy of exclusive ownership and public domain, to recognise the collective aspect that has facilitated the development of intangible and traditional cultural heritage in a long creative process spanning over generations. Even so, the legal need for the protection of cultural heritage is just as apparent as the shortage of existing legal instruments for the implementation of this protection. In part, this may have been due to the fact that traditionally – and due to the history behind the creation of legislation – the core of intellectual property logic has been based on the creation of something new, the functionality of the markets and exclusive rights, and not so much on communal creativity or collective moral values. Intellectual property rights have only little by little been able to map out the community needs related to the protection and preservation of cultural heritage.

This study aims, for its part, to map out the middle ground that falls between these collective needs and existing legal instruments. In particular, an effort has been made to examine how copyright and the rest of the intellectual property system are already used or could be used to protect the Sámi traditional culture, and, on the other hand, the extent to which the current system does not recognise the needs and special characteristics that the protection of the cultural heritage of indigenous peoples requires.

I would like to thank the Sámi Parliament, private individuals who were interviewed (PhD students Piia Nuorgam and Jacob Adams), and Sámi duodji handicraft association and Neeta Jääskö, who have helped in carrying out this study, providing the photographs to this study, and have commented on the manuscript.

Helsinki, winter 2018

Author

1 Introduction

1.1 Background of the study

In June 2017, in connection with the 34th session of the World Intellectual Property Organization's (WIPO⁴) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC⁵) in Geneva, Finland's Permanent Representation to the UN and the Ministry of Education and Culture organised an evening event where it highlighted, among others, the traditional culture of the Sámi. The event gave birth to the idea to conduct a national study on questions related to the intellectual property rights related to Sámi traditional cultural expressions. This report outlines the results of the study.

This was a short and preliminary exploratory project, the aim of which was to create a knowledge base for discussion on the ways in which indigenous people can be offered intellectual property-related conditions and tools for maintaining and safeguarding the preservation of their cultural heritage, and to explore the extent to which existing legal methods do not recognise the needs that Sámi have with regard to the protection of their intellectual property both as individuals and as a community. The study was conducted from the perspective of intellectual property with an emphasis on copyright and trademarks and focuses on certain Sámi traditional cultural expressions (TCE).

Representatives of the Finnish Sámi Parliament, Sámi duodji handicraft association and other experts versed in Sámi traditional cultural expressions have been interviewed for this study. However, it must be noted that the conclusions presented in this report are the

4 World Intellectual Property Organization, <http://www.wipo.int>

5 The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, <http://www.wipo.int/tk/en/folklore/>

author's summary of the overall picture for traditional cultural expressions and intellectual property and, despite the Finnish Sámi Parliament's involvement, do not represent an official opinion by the Sámi Parliament or Sámi duodji handicraft association, or the individuals who were interviewed.

1.2 Limiting the scope of the study

Culture as a concept always refers to an extensive and multidimensional entity, which includes all the practices, meanings and traditions that allow an individual to express themselves in relation to the community and in which knowledge is passed on from one generation to the next⁶. The Sámi culture, in its entirety, can be understood as follows: "the Sámi culture comprises the Sámi language, Sámi cultural heritage, cultural expressions, Sámi art, Sámi traditional knowledge, traditional Sámi livelihoods and their modern forms, as well as the norms, practices and forms of the Sámi culture as an indigenous people"⁷.

Therefore, when discussing culture, it should be noted that it contains both tangible and intangible elements and that, correspondingly, in addition to intangible cultural heritage many other factors will influence how well the Sámi culture remains vibrant. When further limiting the scope of the study to the examination of traditional culture, it should be noted that the referenced cultural dimensions are those that have been passed down from one generation to another for at least a certain period of time either remaining predominantly unchanged or changing slowly and that not everything considered Sámi culture is necessarily traditional Sámi culture⁸.

Thus, when we discuss traditional culture, it should be noted that the perspective of intellectual property is only one point of view from which this multidimensional entity can be examined. The problem of how traditional culture can be preserved and its continued vibrancy guaranteed can hardly be resolved with just intellectual property rights, but they are a necessary part of this process.

This study only examines part of the entirety that is considered Sámi culture; specifically Sámi traditional cultural expressions (TCE), and even with regard to these a decision had to

6 On the other hand, the Finnish online dictionary www.suomisanakirja.fi defines culture as follows: "A community's or the entire human population's intangible and tangible achievements in their entirety".

7 Sámediggi, the Sámi Parliament: *Kulttuurisesti vastuullinen saamelaismatkailu*, <https://www.samediggi.fi/me-neillaan-olevat-hankkeet/kulttuurisesti-vastuullinen-saamelaismatkailu/> cited on 1 May 2018

8 For example, it is not appropriate to define modern Sámi art or music as traditional even though it is part of Sámi culture.

be made to further limit the scope of the study specifically to traditional Sámi handicrafts such as are described in more detail below.

Traditional culture appears in both tangible and intangible forms, and these two cannot be separated from one another completely. For example, the materials for Sámi duodji handicrafts originate in great part from nature, and the handicrafts' patterns, symbols, designs, and forms and the way in which they are made reflect the intangible cultural heritage of the Sámi. However, at the same time, tangible cultural heritage such as reindeer husbandry and the diversity of the natural environment will directly impact what types of materials and what amounts of these materials are available for use in the making of traditional handicrafts. It is believed that the weakening of tangible heritage is directly related to whether intangible heritage can be preserved. The tangible heritage is also weakened by the ever-accelerating climate change whose impact is greatest on the arctic part of the world.

However, this report focuses, first and foremost, on intangible cultural heritage according to the limitations described above. We must first determine what is specifically meant by intangible cultural heritage.

According to the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage⁹ intangible cultural heritage means the "the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development."

9 The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003), which was enacted in Finland with the Government Decree (47/2013) on the Enactment of Convention for the Safeguarding of the Intangible Cultural Heritage.

WIPO's definition, which emphasises the significance of TCEs as an expression of collective identity and the related creative process as long-term development over many generations, can be considered a key element in international dialogue on intellectual property¹⁰.

However, it should be noted that concepts always have an impact in their given context and whatever is meant by "cultural heritage" or by TCE depends on the purpose the definition was created for in the first place¹¹. Therefore, when defining the TCEs that belong to Sámi culture, we must give weight to how the concept is understood by the Sámi community itself.

The definition given by the Sámi Parliament describes in a practical manner the TCEs that belong to Sámi culture. The definition is as follows: "In the Sámi culture, traditional cultural expressions include Joik music, Sámi handicrafts, Sámi arts, the storytelling tradition and myths, literature, place names in the Sámi language as well as Sámi building tradition (i.e. Lapp pole tents, turf huts, and various types of fencing). Additionally, sacrifices to Seidas, which were part of ancient Sámi paganism, are also cultural expressions. Newer cultural expressions refer to modern Sámi music, theatre and cinematic art¹²."

The definition explicitly states that the intangible Sámi culture is quite multidimensional. Sámi artists work in numerous fields of art including duodji handicrafts, cinema, literature, the visual arts, theatre, composing, the arts industries, dance and photography¹³. As was stated above concerning the limiting of the study, the focus selected was specifically Sámi traditional handicrafts, meaning traditional Sámi clothing and duodji handicrafts.

The reasons for this choice were that questions surrounding traditional Sámi clothing apply to all Sámi people as individuals and as a community. Similarly, duodji handicrafts are a key form of expression for the Sámi and this craft lives on within, for example, families and private lives as a personal heritage, but, at the same time, duodji is also a livelihood for many Sámi artisans.

Duodji handicrafts are also an important form of expression for Sámi artists. When examining the fields of art of Sámi artists in a multidisciplinary manner, it was observed that 51% of all Sámi artists also created duodji handicrafts, and in a comparison on artists focused on

10 According to WIPO's definition, TCEs can potentially cover an enormous variety of customs, traditions, forms of artistic expression, knowledge, beliefs, products, processes which express a traditional culture that form part of the indigenous group's or traditional community's identity and tradition and which are passed on from one generation to the next.

11 WIPO Intellectual Property Handbook, 2004, 2nd Edition, p. 58

12 Sámediggi (the Sámi Parliament): "Implementation of Article 8(j)", 13 November 2015, http://www2.samediggi.fi/index.php?option=com_content&task=blogcategory&id=184&Itemid=325

13 Rensujeff, Kaija: *Käsin, sävelin, sanoin ja kuvin – Saamelaiset taiteilijat Suomessa*, Taiteen keskustoimikunta Arts Council of Finland, 2011, p. 68-69

a single art form, duodji handicrafts were the most common form of art produced by Sámi artists (42% of artists)¹⁴.

Sámi handicrafts were selected as the focus point of the study, and, within these confines, it was not possible for us to examine all forms of traditional cultural expressions. This could be described as one step in a more extensive process. The purpose of limiting the scope of the study in this way was not to value what is important in traditional culture or, what traditional culture essentially consists of, but to facilitate the structured realisation of the study.

The study is positioned very well in relation to other projects that are currently under way. "Saamelaiskulttuuri ja kehittyvät tekijänoikeudet – yksilöllisen tekemisen ja yhteisöllisten kulttuuristen toimintojen yhteensovittaminen¹⁵", a project launched at the University of Lapland in summer 2017 focuses on copyright issues related to traditional Sámi music.

Another project worth mentioning is "Kulttuurisesti vastuullinen saamelaismatkailu¹⁶", Culturally Responsible Sámi Tourism. Kirsi Suomi has acted as the fixed-term co-ordinator of this project from 10 February 2017. The primary aim of this project is to draw up ethical guidelines for tourism that is based on and utilises the elements of Sámi culture.

A duodji trademark project¹⁷ was carried out in 2015-2016 in co-operation with the Nordic Saami Council and the University of Lapland. It was financed by the Sami Parliament of Norway and headed by Piia Nuorgam working with Jacob Adams. The purpose of the project was to reform and clarify the trademark used in connection with duodji handicrafts and to also create the foundation for the introduction of a new trademark that will reference Sámi culture.

1.3 Objective of the study

The objective of the study is to examine how copyright and trademark rights are already used to protect Sámi culture (the study focuses on Sámi handicrafts) and, on the other hand, the extent to which existing legal instruments cannot recognise the individual and

14 Rensujeff, Kaija: *Käsin, sävelin, sanoin ja kuvin – Saamelaiset taiteilijat Suomessa*, Taiteen keskustoimikunta Arts Council of Finland, 2011, p. 68-69

15 The project is headed by researcher Piia Nuorgam and other researchers involved in the project include Jacob Adams and the author of this study.

16 Sámediggi (the Sámi Parliament), *Kulttuurisesti vastuullinen saamelaismatkailu*, <https://www.samediggi.fi/me-neillaan-olevat-hankkeet/kulttuurisesti-vastuullinen-saamelaismatkailu/>

17 YLE: *Saami people are trying to stop exploitation of indigenous handicrafts*, 27 November 2015 https://yle.fi/uutiset/osasto/sapmi/saami_people_are_trying_to_stop_exploitation_of_indigenous_handicrafts/8485815

collective needs that are related to an indigenous people's culture. In addition to determining these needs, the study aims to supply proposals for solutions, and to clarify and answer the questions that must be answered, so that the observed needs can be met in a manner that is in accordance with the existing intellectual property rights system and its objectives. Thus the study looks at the types of legal means and practices that could facilitate the preservation and continued vibrancy of the Sámi's traditional culture.

The method used in the study was to examine known literature and research from the perspective of both the Sámi community and individual artists, as well as traditional culture from the perspective of copyright and trademarks. This method based on known information was supplemented with discussions with representatives of the Finnish Sámi Parliament as well as by carrying out open themed interviews with a representative of Sámi duodji handicraft association and with other experts on the field. The author has also participated in the Finnish Sámi Parliament's Conference on intangible cultural heritage in Inari 23 – 24 May 2018.

This method aims to identify the collective needs that must be taken into account in the protection of cultural heritage and the existing legal means that could be able to meet with these needs, as well as the possible gap or shortcoming in legal means where there are justified needs for protection but where protection cannot be provided.

1.4 The study's audience

The study has two primary target audiences. One of these audiences comprises the actors participating in the work of the WIPO's IGC. The aim of this study is to produce information that can be used to further the work of the WIPO's IGC. This work promotes the facilitation of international regulation related to the traditional cultural expressions of indigenous peoples. For this reason, the study uses terminology established by the WIPO Traditional Knowledge Division. The objective is for European Union member states to be able to see the benefit of this study in a broader scope than just in Finland.

At the same time, the Sámi themselves are a target audience, and the aim is for the study to benefit the Sámi community and promote discussion in the community on legal questions related to culture. The study aims to pinpoint the problem areas in the use of cultural heritage and to improve the legal self-awareness of the Sámi as a community in this respect. However, it should also be noted that although this study has been carried out taking into account Finnish legislation, the Sámi also live in parts of Norway, Sweden and Russia. Therefore, it is appropriate for any questions related to the protection of traditional culture to also

be discussed in the context that takes into account the Nordic joint perspective and that of the Sámi homeland in its entirety.

1.5 International legal context

The IGC, which began its work in 2000, is an intergovernmental committee, which processes intellectual property rights related to genetic resources, traditional knowledge and traditional cultural expressions (TCEs). The IGC's aim is to create an international legal instrument that would facilitate the protection of among others aforementioned traditional cultural expressions¹⁸. In autumn 2017, the IGC's mandate was extended by two years, and it will next meet in December 2018 to discuss questions related to TCEs. One of the issues that has been discussed to what extent TCEs of indigenous peoples can be protected within the confines of the existing copyright system or if a separate *sui generis*¹⁹ system should be formed to ensure protection. At the same time, the committee will also discuss whether the legal instrument should obligate member states or be a voluntary system.

However, the international community has engaged in discourse on the protection of the culture of indigenous peoples for longer than this. When the Berne Convention was adopted at the 1967 Stockholm Conference, the legal protection provided for folklore fell short due to the requirements for originality and a known author that were entered into the convention. However, at that time, Article 15 of the Berne Convention was expanded so that if the protection of an expression was not possible due to the author being unknown, the work could be handled as the work of an anonymous author. With the change to this Article, an anonymous author who can be assumed to be a citizen of the member state in question and whose work has not yet been published can be represented by an authority in the member state with *ex officio* procedure²⁰. Appointing the authority in question and defining their tasks was left to the competence of each member state.

It is essential with regard to the legal examination of traditional culture in this particular extension of the Berne Convention, that the legal requirements related to TCEs were recognised and acknowledged, and that it was deemed to be within a competence of national

18 No. 2 The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Background Brief

19 In legal context, "*sui generis*" refers to a unique piece of separate legislation drawn up for a certain purpose or context – legislation of its own kind.

20 Ricketson, Sam ja Ginsburg, Jane, C.: *International Copyright and Neighbouring Rights – The Berne Convention and Beyond, Volume 1*, Chapter 8.117

authorities to appoint a national “special authority” to guarantee the rights of unknown authors²¹.

International co-operation to develop legal protection for traditional culture continued, and in 1982 WIPO’s member states and UNESCO drew up model provisions for laws for the protection of traditional culture, which aimed to act as inspiration for the development of national legislation²².

A key legal step was taken in 1996 with regard to the performance of folklore, with the implementation of WIPO’s performers and phonograms treaty as protection was now extended also to the performers of folklore. In Finland, protection that applies to the performance of folklore entered into force in 2005, when this was included in the list of performances of literary or artistic works protected under section 45 of the Copyright Act. It is essential with regard to the protection of folklore performances that the content of the performance need not necessarily be a work in a copyright sense, but can be another type of performance as long as it is related to folklore²³.

The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage²⁴ was approved in 2003 at the UNESCO General Conference and enacted in Finland in 2013. In the convention, member states acknowledge that, in particular, indigenous people as a community have an important role “in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity²⁵”. From the perspective of intellectual property rights, it must be noted that indigenous peoples, specifically, as communities are believed to be promoters of creativity and cultural diversity.

Finland has yet to ratify the International Labour Organization’s (ILO) Indigenous and Tribal Peoples Convention “ILO 169”²⁶ from 1989. The ratification of this convention would “make it obligatory for the Finnish Government to work together with the Sámi Parliament to plan

21 Ricketson, Sam ja Ginsburg, Jane, C.: *International Copyright and Neighbouring Rights – The Berne Convention and Beyond, Volume I*, Chapter 8.117

22 UNESCO and WIPO: “Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions”

23 For example, a traditional wedding ceremony or the performance of a ritual could be protected as the performance of folklore even though no actual work is being performed.

24 The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003), which was enacted in Finland with the Government Decree (47/2013) on the Enactment of Convention for the Safeguarding of the Intangible Cultural Heritage.

25 The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, preamble.

26 Indigenous and Tribal Peoples Convention ILO 169

and implement special commitments that would safeguard the rights of the Sámi to maintain and develop their culture on their own terms²⁷”.

At its General Assembly in 2007, the UN approved the Declaration on the Rights of Indigenous Peoples (UNDRIP). Article 31 of the declaration states that indigenous peoples have the right to intellectual property linked to their cultural heritage²⁸. Although the declaration does not legally bind member states, each EU Member State voted in its favour.

In May 2017, the Council of the European Union²⁹ issued a conclusion in which it advised member states to make an effort to engage with the indigenous peoples and to aim for the implementation of the objectives outlined in UNDRIP, for example in the area of cultural heritage. The conclusion demonstrates that issues related to the cultural heritage of indigenous peoples have been recognised and acknowledged at the highest level of the EU.

The aim of the Nordic Saami Convention is to harmonise the regulations that apply to the Sámi in the countries that have ratified the convention. The convention was drawn up together by authorities from Finland, Norway and Sweden and the Sámi Parliaments in the countries in question. Its objective is to “affirm and strengthen such rights of the Saami people that are necessary to secure and develop its language, its culture, its livelihoods and society, with the smallest possible interference of the national borders³⁰”.

27 Non-discrimination Ombudsman: *99 Questions and answers about ILO 169 -treaty* (Vähemmistövaltuutettu, *99 Kysymystä ja vastausta ILO 169 -sopimuksesta*), only in Finnish, 2014, p. 22

28 61/295 United Nations Declaration on the Rights of Indigenous Peoples, Article 31: “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”

29 Council of the European Union: Council Conclusions on Indigenous Peoples (8814/17)

30 Ministry of Justice press release: *Pohjoismainen saamelaisopimus parafoitu* http://valtioneuvosto.fi/fi/artikkeli/-/asset_publisher/1410853/pohjoismainen-saamelaisopimus-parafoitu cited on 2 May 2018

2 Traditional cultural expressions and Sáminess

2.1 Description of the Sámi TCEs selected for the study

Sámi culture is quite diverse containing both tangible and intangible elements that also interact with one another. As was explained above, this study's focus is traditional cultural expressions, in particular, traditional Sámi clothing and Sámi handicrafts. In the following step, the study aims to give those readers, who are not familiar with Sámi culture, a general overview of the history of these TCEs and their significance today.

Traditional Sámi clothing

Traditional Sámi clothing (gákhti in Northern Sámi, mááccuh in Inari Sámi and máaccaĭ in Skólt Sámi) is possibly the most recognisable form of Sámi handicrafts and form of expression of the culture as a whole³¹. The design of the traditional Sámi clothing dictates that it should be open at the neck and otherwise closed at the front, it should have long sleeves and be historically made from reindeer leather, but can also be an outer coat made from frieze or broadcloth³². The dress worn by women can also be made from wool fabric³³. Traditional clothing includes many details such as shoes, a belt, a hat, a scarf and patterned details that vary by region³⁴. The various designs and features of traditional Sámi clothing and their related decorations have developed within communities and sometimes over long periods of time, although for the past one hundred years the designs have remained

31 Kulonen, Ulla-Maija; Seurujärvi, Kari; Pulkkinen, Risto: *The Saami – A Cultural Encyclopaedia*, Finnish Literature Society, 2005, p. 74 and Sámediggi, the Sámi Parliament: *Statement of the Sámi Parliament on the use of traditional Sámi clothing*, 1 March 2010, p. 1

32 Kulonen, Ulla-Maija; Seurujärvi, Kari; Pulkkinen, Risto: *The Saami – A Cultural Encyclopaedia*, Finnish Literature Society, 2005, p. 129 and Sámediggi, the Sámi Parliament: *Statement of the Sámi Parliament on the use of traditional Sámi clothing*, 1 March 2010, p. 5

33 Sámediggi, the Sámi Parliament: *Statement of the Sámi Parliament on the use of traditional Sámi clothing*, 1 March 2010, p. 5

34 Ibid.

relatively unchanged³⁵. On the other hand, the modernisation of the traditional clothing is appropriate as long as done within the confines of the rules known by the community, and every individual Sámi person can influence the design of their clothing by selecting the specific colours for the clothing according to the known rules³⁶. Currently known regional designs in Finland include the Enontekiö, Inari, Skólt Sámi, Utsjoki and Vuotso designs³⁷.

The patterns and shapes of traditional Sámi clothing include cultural codes that the community's members are able to read including information, for example, on the region in which the person lives and their family history³⁸. The use of traditional Sámi clothing is linked to significant moral values, such as an expression of the individual's identity and sense of belonging³⁹, but it also has a communicative function (e.g. the clothing's details, e.g. if the clothing is turned inside out it is a sign of disapproval) and functions as a cultural communicator⁴⁰.



Sámi dress (from Enontekiö region) photographer Juha Iisak Koivisto



Sámi dress (from Enontekiö region) photographer Juha Iisak Koivisto

35 Ibid.

36 Sámediggi, the Sámi Parliament: *Statement of the Sámi Parliament on the use of traditional Sámi clothing*, 1 March 2010, p. 5-7

37 Ibid.

38 Kulonen, Ulla-Maija; Seurujärvi, Kari; Pulkkinen, Risto: *The Saami – A Cultural Encyclopaedia*, Finnish Literature Society, 2005, p. 74

39 Ibid., p. 86

40 Sámediggi, the Sámi Parliament: *Statement of the Sámi Parliament on the use of traditional Sámi clothing*, 1 March 2010, p. 5, 7

The right to use traditional Sámi clothing comes from a person's right to their own heritage and tradition⁴¹, but at the same time, from the perspective of the Sámi community, the rights to traditional Sámi clothing and their use belong collectively to the Sámi⁴². On the other hand, the community's right should not limit the right of individual members of the community to use expressions of their culture; for example, a Sámi artisan who makes individual pieces of Sámi clothing cannot be prohibited from selling the clothing to a non-Sámi person for the basic reason that the artisan must be allowed to practice their livelihood and an individual artisan cannot always be able to ascertain the ethnic background of a purchaser or the future use of the item (traditional Sámi clothing can also be sold as works of art)⁴³.

There are unwritten norms on the use of the clothing (for example, men cannot use pieces that belong to women's dresses and vice versa⁴⁴, designs and details from different regions should not be mixed with one another, winter clothing should not be worn in summer and vice versa⁴⁵). The right to use traditional Sámi clothing is tied first and foremost to the person's Sámi origin (there are exceptions such as clothing given as a gift) and the traditional clothing should be made by a Sámi person and it should be used showing respect for the community's dress codes⁴⁶.

In her Master's thesis on the legal status of Sámi handicrafts, Piia Nuorgam states that:

"Unwritten norms apply to the Sámi's traditional cultural expressions, such as traditional Sámi clothing. These norms regulate such things as, for example, how the traditional Sámi clothing can be used and worn. Culturally exploitative use is therefore also against the Sámi's understanding of what is fair and right⁴⁷."

And continues with:

"Sámi cultural expressions and, in particular, "old" expressions have a special significance to Sámi values and thinking, in other words, as mediators and maintainers of

41 Sámediggi, the Sámi Parliament: *Kuvaohjeistus – Saamelaisuuden ja saamelaiskulttuurin esittämisen periaatteet*, <https://mb.cision.com/Public/14247/2124070/b51438405894675d.pdf> cited on 1 May 2018

42 Sámediggi, the Sámi Parliament: *Statement of the Sámi Parliament on the use of traditional Sámi clothing*, 1 March 2010, p. 2

43 Ibid., p. 3

44 Sámediggi, the Sámi Parliament: *Statement of the Sámi Parliament on the use of traditional Sámi clothing*, 1 March 2010, p. 3

45 Sámediggi, the Sámi Parliament: *Kuvaohjeistus – Saamelaisuuden ja saamelaiskulttuurin esittämisen periaatteet*, <https://mb.cision.com/Public/14247/2124070/b51438405894675d.pdf> cited on 1 May 2018

46 Ibid.

47 Nuorgam, Piia: *Duodjin eli saamelaisen käsityön oikeudellinen suoja perinteisenä kulttuuri-ilmaisuna*, Master's thesis, University of Lapland, Faculty of Law, 2009, p.3

culture in particular within the Sámi culture. For this reason, according to the Sámi, traditional cultural expressions of the Sámi should not be treated with disrespect. The western intellectual property rights system does not therefore seem effective in “promoting the creativity” of indigenous people’s cultures, quite the opposite especially when speaking of the external exploitation of Sámi culture.”

It should thus be noted that traditional Sámi clothing is not just a piece of clothing or a handicrafts product, but a cultural object that contains expressive intellectual capital with which an individual is able to communicate with other members of the community and which at the same time expresses the individual in relation to their community and the community in relation to the outside world. This expressiveness is based on a collective process of creating meaning, which the Sámi as a community have continued and maintained from one generation to the next.

Duodji handicrafts

Duodji is a Sámi word meaning work, activity or product, but these days refers in general to traditional Sámi handicrafts⁴⁸. Duodji can be understood in Sámi culture also as a tangible handmade creation, which expresses certain skills, methods, tradition and materials⁴⁹.

Sámi handicrafts typically have a close connection to nature and the raw materials for handicrafts have traditionally been collected for the most part from nature⁵⁰. The selection of materials produced by nature has also influenced the type of handicraft tradition that has developed in different areas⁵¹. Thus, tangible traditions such as reindeer husbandry or conservation of the natural environment is also directly related to the preservation of intellectual cultural heritage.

Historically, handicrafts items have been useful items that have also had decorative elements added to them. Traditional handicrafts are divided into hard and soft handicrafts primarily according to what type of materials they have been made from. Hard handicrafts include works made from wood, horns, bones and metal, whereas soft handicrafts are made of reindeer leather and textiles or have been woven. Historically, handicrafts have been made predominantly during winter as a part-time livelihood, and these have been

48 Kulonen, Ulla-Maija; Seurujärvi, Kari; Pulkkinen, Risto: *The Saami – A Cultural Encyclopaedia*, Finnish Literature Society, 2005, p. 74

49 Nuorgam, Piia: *Duodjin eli saamelaisen käsityön oikeudellinen suoja perinteisenä kulttuuri-ilmaisuna*, Master’s thesis, University of Lapland, Faculty of Law, 2009, p.35 and further reference to Guttorm, Gunvor: Duodji – árbediehtu ja oapmi. (Duodji – Sami handicrafts – who owns the knowledge and the works?). From the publication Solbakk John T. (Ed.): *Traditional knowledge and copyright*, Samikopiija. Karasjok 2007, p. 123–167. (Guttorm 2007)

50 Rensujeff, Kaija: *Käsin, sävelin, sanoin ja kuvin – Saamelaiset taiteilijat Suomessa*, Taiteen keskustoimikunta Arts Council of Finland, 2011, p. 40

51 Kulonen, Ulla-Maija; Seurujärvi, Kari; Pulkkinen, Risto: *The Saami – A Cultural Encyclopaedia*, Finnish Literature Society, 2005, p. 74

a normal part of the annual cycle for various livelihoods⁵². Craftsmanship is learned from one's family. Women have focused on making soft handicrafts and men hard handicrafts. Even now, handicrafts are a central feature of personal culture, and craftsmanship is also passed on in families from one generation to the next.



Guksi (traditional Sámi duodji-handicraft), made by Arto Saijets, photograph by Ulla Isotalo



Knife (traditional Sámi duodji-handicraft), made by Heikki Ranttila, photograph by Tuomas Mattila



Sisna-bag (traditional Sámi duodji-handicraft), made by Juulienna Näkkäläjärvi, photograph by Ulla Isotalo

52 Pennanen, Jukka; Näkkäläjärvi, Klemetti: *Siiddastallan – From Lapp Communities to Modern Sámi Life*, Siida Sámi Museum, 2002, p. 90 and Sámediggi, the Sámi Parliament: *Statement of the Sámi Parliament on the use of traditional Sámi clothing*, 1 March 2010, p. 7

However, the significance of Sámi handicrafts as useful daily items has decreased partly because authentic traditional handicrafts are expensive when compared to industrially produced goods⁵³. These days, the decorativeness of handicrafts products made especially for sale and their aesthetic values have become more important than their practical functions⁵⁴. Sámi handicrafts have also been popular souvenirs for the past few decades, and artistic handicrafts have been important primary and alternative sources of income throughout the Sámi homeland⁵⁵. It has been observed that, these days, craftsmanship is often also learned in vocational education and training institutions⁵⁶. Although not all Sámi handicrafts are made for sale and many times handicrafts are made within families, for example, for one's own use, handicrafts have also become a livelihood and their economic significance is very important for artisans who make traditional handicrafts⁵⁷. As such, an increasingly professional approach is seen as a positive, and the Sámi Parliament has expressed its desire to support this trend⁵⁸.

Although, craftsmanship has become more professional in nature, the regulation of making handicrafts and compliance with collective norms are key elements of the duodji tradition. Handicrafts are made under collective supervision complying with certain conditions, and duodji is not considered a completely autonomous work by an artisan⁵⁹. The use of traditional techniques is prevalent in Sámi handicrafts as is the preservation of folklore art and the expression of individualism is not a core element of the work⁶⁰. It must be noted that although duodji is a Sámi art form, not all Sámi handicrafts are necessarily duodji⁶¹. Duodji is a Sámi art form, but it is also defined by the rules and traditions related to the duodji tradition.

However, the duodji tradition does not mean that Sámi handicrafts as artistic expressions are unchanged or permanent – over the centuries, the Sámi have adopted and borrowed cultural aspects in a creative manner to the shapes and decorations in their handicrafts

53 Rensujeff, Kaija: *Käsin, sävelin, sanoin ja kuvin – Saamelaiset taiteilijat Suomessa*, Taiteen keskustoimikunta Arts Council of Finland, 2011, p. 43

54 Kulonen, Ulla-Maija; Seurujärvi, Kari; Pulkkinen, Risto: *The Saami – A Cultural Encyclopaedia*, Finnish Literature Society, 2005, p. 76

55 Rensujeff, Kaija: *Käsin, sävelin, sanoin ja kuvin – Saamelaiset taiteilijat Suomessa*, Taiteen keskustoimikunta Arts Council of Finland, 2011, p. 41

56 Ibid., p. 40

57 Sámediggi, the Sámi Parliament: *Statement of the Sámi Parliament on the use of traditional Sámi clothing*, 1 March 2010, p. 2

58 Ibid., p. 7

59 Rensujeff, Kaija: *Käsin, sävelin, sanoin ja kuvin – Saamelaiset taiteilijat Suomessa*, Taiteen keskustoimikunta Arts Council of Finland, 2011, p. 43

60 Pennanen, Jukka; Näkkäläjärvi, Klemetti: *Siiddastallan – From Lapp Communities to Modern Sámi Life*, Siida Sámi Museum, 2002, p. 166

61 Rensujeff, Kaija: *Käsin, sävelin, sanoin ja kuvin – Saamelaiset taiteilijat Suomessa*, Taiteen keskustoimikunta Arts Council of Finland, 2011, p. 43

(e.g. certain spoon designs have been borrowed⁶²). External influences are more obviously evident in certain forms of expression (silver or textile items), but, on the other hand, it is obvious that certain forms have originated within the Sámi communities (horn, bone, leather as well as a large part of their woodwork)⁶³. It should also be noted that the application of patterns and symbols that have been historically adopted to new types of items and in connection with new production methods have demonstrated a new type of use of intangible elements⁶⁴. The duodji tradition is therefore a living thing, a collective expression that has come about as the result of a slow, cross-generational creative process.

The Sámi handicrafts tradition's creative process can be understood as a long, cross-generational continuum, wherein a collective intellectual capital is created by reproducing the tradition and, at the same time, experimenting with new methods. The community's influence is a key element determining which duodji designs are kept alive. In this respect, traditionalism, which has facilitated the preservation of the skills to create items that can carry patterns and symbols in itself is quite special⁶⁵. The collective way of doing things and the related rules as well as the passing on of expertise is intellectual capital, and, although, this is not simply a matter of one artist's personal new creative process, it is the community that facilitates the expression, which we see in Sámi handicrafts. The skills that arise from the community's traditions, and the internal rules that safeguard the skills facilitate the accumulation of intellectual capital that is visible in *duodji*.

Even though, aesthetics and values are emphasised more than functionality in Sámi handicrafts these days, and even though the handicrafts tradition focuses more and more on professional artisans, handicrafts are of great importance to Sámi identity and cultural heritage; thus, handicrafts are both a livelihood and a form of expression that presents collective culture as intellectual capital⁶⁶.

62 Pennanen, Jukka; Näkkäläjärvi, Klemetti: *Siiddastallan – From Lapp Communities to Modern Sámi Life*, Siida Sámi Museum, 2002, p. 166

63 Ibid.

64 Ibid., p. 170

65 Ibid.

66 Kulonen, Ulla-Maija; Seurujärvi, Kari; Pulkkinen, Risto: *The Saami – A Cultural Encyclopaedia*, Finnish Literature Society, 2005, p. 76

3 Intangible factors that threaten the vibrancy of traditional culture

When discussing the factors that pose a threat specifically to traditional culture it should be noted that the concept of a threat is quite extensive in scope and contains a large number of factors from challenges related to the preservation of the language to the opportunity to practice traditional livelihoods and questions concerning other societal and social changes. The intellectual property issues that apply to intangible cultural heritage are thus only one part of a whole in which the continuation of culture in the forms in which *traditionalism*, in particular, is expressed. The passing on of traditional culture from one generation to another and the experience of younger generations on the appreciation for and importance of their culture are in a key role specifically in maintaining traditionalism⁶⁷.

Although legislation cannot dictate the preservation of traditional culture, legislators should facilitate the preservation of traditional culture by providing the legal means and instruments required by this to individuals and communities. In this respect, intellectual property rights could be considered as tools that can be used to prevent the violation of intangible cultural heritage that are likely to pose a threat to the preservation of traditional culture as such, but which can also be used to encourage individuals and communities within the sphere of the traditional culture to preserve this heritage.

It should be noted that intellectual property rights can in itself have an inspiring and confessional value. Something is felt to be valuable for the express reason that it has been granted legal protection. Granting protection can not only prevent unpermitted activity, but it can also act as an acknowledge of how valuable the subject matter which is protected is. The acknowledgement that a certain demonstration of traditional culture is

⁶⁷ The question on passing on of traditional culture and the desire of younger generations to adopt the culture's traditional expressions has often been voiced as an area of concern for indigenous peoples, see e.g. WIPO: *Intellectual Property Needs And Expectations of Traditional Knowledge Holders*, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), p 135, 136, 151

worthy of legal protection can in itself encourage individuals and communities to maintain its content and, thus, protect cultural diversity.

In addition to being an acknowledgement, the prevention of unpermitted use is the second important function of intellectual property rights. This need has become more emphasised in the context of indigenous peoples, as the exploitative use of cultural expressions concerns the community in its entirety, and can damage its members experience of how these cultural elements still belong to the said community. One threat resulting from this offence is that the communal meanings related to traditional culture can be diluted due to continuous unpermitted use and this can degrade the cultural significance of the expression. This will harm in particular the *expressiveness* of TCEs in question (i.e. the objects ability to express culture in its traditional form), and the community's *incentive* to maintain their cultural heritage may decline, as the *expressive capacity* of traditional cultural expressions erodes. For example, the unpermitted use of traditional Sámi clothing and the production of designs that violate cultural norms can in the long run decrease or alter the clothing's traditional semantic content, and the ability of this TCE to communicate, which from the perspective of the community is part of the traditional clothing's purpose. This is likely to harm the ability of traditional culture to be used also in the future, in particular, as a traditional *culture*, if and when the expressiveness of related cultural expressions weakens.

Third, the violation of intangible cultural heritage also poses direct economic risks that destroy traditional skills and the possibility to engage in intangible traditional work. With regard to duodji handicrafts, it has been observed that "for example in the 1970s craftsmanship underwent a great transformation. The use of the wrong types of materials and saturation of the market with product copies was reflected more extensively into a general identity crisis, the core of which comprised the question, what does it mean to be Sámi."⁶⁸ Klemetti Näkkäläjärvi, who is an expert of intangible cultural heritage of the Sámi has stated "there are traditions and heritage in the handicrafts tradition that are very threatened, and the protection of which will require special measures"⁶⁹.

With regard to individual TCEs, it can be stated that, for example, the sale of copies of traditional Sámi clothing made from cheap materials and their use, for example, for tourism-related programme services or leasing copies of traditional clothing to tourists violates this collective right⁷⁰. This has a negative impact on how highly traditional Sámi

68 Pennanen, Jukka; Näkkäläjärvi, Klemetti: *Siiddastallan – From Lapp Communities to Modern Sámi Life*, Siida Sámi Museum, 2002, p. 166

69 Näkkäläjärvi, Klemetti: *Saamelainen aineeton kulttuuriperintö ja sen suojele*, lecture, University of Lapland., 5 October 2016 <http://www.aineetonkulttuuriperinto.fi/fi/File/3018/klemetti-inari-suomeksi.pdf> cited on 1 May 2018

70 Ibid., p. 4

clothing is valued as well as on the image the Sámi have of themselves⁷¹. The unpermitted use of traditional Sámi clothing, for example, as part of business activities exploits the intellectual capital related to the appeal and authenticity of the tradition, which is related to traditional Sámi clothing and which has cumulated throughout the generations with the process of collective cultural reproduction.

Sámi duodji handicrafts as a livelihood are threatened by the cheaper non-Sámi handicrafts that duodji must compete with and which may imply Sámi origin, but are from outside the community⁷². Cheap, mass-produced souvenirs that copy regional handicrafts designs pose a threat⁷³. This will distort the markets and is problematic with regard to consumer protection.

This has led to the number of Sámi artisans steadily declining, which is a significant threat to the preservation of the handicrafts tradition⁷⁴. The situation could be improved with industrial policy. For example, the taxation of Sámi handicrafts could be reformed and the special subsidies could be implemented for the handicrafts tradition⁷⁵. However, it should be noted that this alone will not be enough and that traditional Sámi clothing and handicrafts must be legally protected against unpermitted economic exploitation⁷⁶.

71 Ibid.

72 Sámediggi, the Sámi Parliament: Statement of the Sámi Parliament on the use of traditional Sámi clothing 1 March 201 p. 9

73 Sámediggi, the Sámi Parliament: *Statement of the Sámi Parliament on the use of traditional Sámi clothing*, 1 March 2010 p. 4,7

74 Ibid.

75 Ibid.

76 Ibid.

4 Protecting cultural heritage and possibilities of legal remedies

4.1 Intellectual property theory related to traditional cultural expressions

Above, the study has given a description of the character of the TCEs selected for this study, and after this the violations that have an impact on the TCEs, as well as the threat these violations pose to the continuity of this cultural heritage have been discussed. Next, the study will look at the solutions that different forms of intellectual property rights might provide for the prevention of these threats.

Although values related to the preservation of traditional culture can be examined from different legal perspectives (in particular, the perspective of human rights⁷⁷), this study covers intellectual property and, for this reason, the perspective is from the logic of intellectual property rights. In the WIPO context a view given on traditional cultural expressions has stated that the legal interpretation of the changes should be consistent with the basic targets and goals for the intellectual property rights system⁷⁸.

This study aims to form an understanding of whether there is a gap between available legal means and existing needs. The concept of a legal gap has been defined by WIPO as referring to unfulfilled economic, cultural and social needs⁷⁹. In other words, this means that the intellectual property system cannot fulfil the legal need that arises from certain economic, cultural and social realities, but which by nature is an intellectual property rights

77 Especially in the light of Article 15 of the UN International Covenant on Economic, Social and Cultural Rights (the right to take part in cultural life) and the Decree that enacted the covenant in Finland (6/1976).

78 WIPO: *Intellectual Property Needs And Expectations of Traditional Knowledge Holders*, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), p 225

79 WIPO: Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Thirteenth Session, Geneva, October 13 to 17, 2008, The Protection of Traditional Cultural Expressions: Draft Gap Analysis, p. 9

issue. However, the question of whether or not a legal gap exists has been left for each member state to determine themselves⁸⁰.

The objective of intellectual property rights is, for example, to stimulate society to engage in creative work, as well as to safeguard the functionality of the market and competitiveness⁸¹. In this comprehensive view, copyright encourages creativity whereas trademark rights safeguard the functionality of the markets as well as facilitate the commercialisation of a brand and image for entrepreneurs⁸². These processes create intellectual capital, and success in the facilitation of processes that create intellectual capital (i.e. value creation) is the main reason for the entire intellectual property rights systems to exist.

The issue of protecting the culture of indigenous people must be examined against the logic of these intellectual property rights and, then, the question of what values of intellectual capital are promoted by the protection of traditional culture. If the cultural heritage of indigenous people is protected by means of intellectual property rights, what type of function would this have within the overall purpose of intellectual property rights.

According to WIPO's definition, TCE are a variety of customs, traditions, forms of artistic expression, knowledge, beliefs, products, processes which express a traditional culture that form part of the indigenous group's or traditional community's identity and tradition and which are passed on from one generation to the next.⁸³ It can be analogically thought that whereas a copyrighted work expresses its author's or artist's persona through the free choices made during the creation of the work⁸⁴, the forms seen in TCEs express its community's collective originality and identity (i.e. culture) in the tradition of which the expression has originated; TCE is after all specifically a traditional cultural *expression*. Traditional culture is visible in the externally observable forms that TCEs have in them and which are passed on from one generation to the next. Thus, there is no reason to perceive any fundamental difference between a copyrighted work and a TCE, since both objects contain intellectual capital and express an identity and originality of its origin (the work being considered as an expression of its author's individuality⁸⁵ whereas a TCE is a collective expression of communal identity). However, the collective creative process behind a TCE differs from

80 Ibid.

81 See e.g. Fisher, William: *Theories of Intellectual Property*, in *New Essays in the Legal and Political Theory of Property*, Cambridge University Press, 2001

82 A trademark makes it possible for a company to sell not only goods and services but also an image and offer its customer added social value, see e.g. Greg Lastowka, *The Trademark Function of Authorship*, 85 B.U. L. Rev. 1171 (2005)

83 WIPO: *Traditional Cultural Expressions*, <http://www.wipo.int/tk/en/folklore/> cited on 30 April 2018

84 See e.g. EU decision on C145/10, *Eva-Maria Painer v Standard VerlagsGmbH and Others*, para. 89, 94

85 In other words, the work carries the label of its maker's personality, see decision "Peiner" ECLI:EU:C:2011:798 *Eva Maria Painer v Standard VerlagsGmbH and Others*; and decision "Infopaq" ECLI:EU:C:2009:465 *Infopaq International A/S v Danske Dagblades Forening*

the process of an individual in which copyrighted works are created. Whereas a single work is created by a specific natural person (or several people) during a certain and known period of time, a TCE is a collective expression, which has been created over a long period of time and which does not necessarily have a final form (since TCEs may change slowly in inter-generational process). However, at their core both phenomena, a copyrighted work and a TCE are expressions of human intelligence and creativity.

Therefore, if a TCE is understood as an expression of a community's identity (i.e. expressing the culture characteristic of the community in question) it will be noted that the unauthorised, exploitative use of the TCE is not just the use of something external, but the exploitation of the community's *identity*, which the TCE expresses. Analogically, this thought is consistent with the protection copyright provides for a person; copyright bases the protection of a work on the special relationship that is born between the author and the work⁸⁶. The work expresses its author's personality, and is a continuation of its author's personality. Thus, copyright is also a matter of something larger than just ownership⁸⁷. Whereas the work expresses its author's personality, a TCE can be seen as an expression of the community's collective identity, in whose cultural process it has been created. Thus, a similar special relationship also exists between the community and the TCE.

From the perspective of intellectual property rights, this peculiar connection is also basis for the authenticity which give TCEs intangible value as intellectual property. In addition to social value, cultural expressions also have commercial value; TCEs are interesting and appealing to the public because they are still expressive in relation to their culture of origin. According to the old Anglo-American maxim, "the rough practical test that what is worth copying is prima facie worth protecting"⁸⁸. The unauthorised commercial or artistic use of this expressiveness violates the indigenous people's right to the intellectual property (e.g. the commercial attractiveness of TCEs as authentic cultural expressions) that collective activities have originally produced in a cross-generational process, and which the preservation of traditional culture still maintains.

Here, it is observed that in the context of traditional cultures of indigenous people, the authenticity of cultural expressions and that genuineness, that has been passed on as an

86 Kivimäki, T.M.: *Tekijänoikeus*, Porvoo Helsinki, Werner Söderström Osakeyhtiö, 1948

87 The protection provided by copyright as protection of a personality is based on Hegel's idea and conception of a work as an expression that is a continuation of a person's free will, see the history of intellectual property rights theory, e.g. Moore, Adam: *Intellectual Property*, Stanford Encyclopedia of Philosophy, <https://plato.stanford.edu/entries/intellectual-property/> cited on 30 April 2018

88 Harenko, Kristiina; Niiranen, Valtteri; Tarkela, Pekka: *Tekijänoikeus*, Alma Talent Oy, 2016, p. 78; the original rule came about as a result of the following court case: University of London Press Ltd v University Tutorial Press Ltd [1916] 2 Ch 601, which listed the following in its reasons: "the rough practical test that what is worth copying is prima facie worth protecting". However, it should be noted that as Harenko – Niiranen – Tarkela stated, this rule represents a different perspective on works when compared to Finnish legal thinking.

unbroken chain from previous generations to the present day, are indeed assets of intangible capital, that give TCEs social and commercial value. Traditional cultural expressions are interesting and appealing, partly, because they have remained expressive and a part of authentic and living culture. For example, the significance of Sámi traditional clothing as intellectual capital lies in the fact that Sámi dress is still able to express its culture of origin, it is authentic expression and contains cultural meanings.

Intellectual capital is not born only from an expression's external form, but also from the meanings related to the work. Analogically, added value is created for a trademark, for example, from the images linked to the brand, the recognisability of the brand and its general appeal. Correspondingly, the intellectual capital value of a traditional cultural expression is linked to its attractiveness, which is based at least in part on the fact that the expression is authentic and still in the use of the community as living culture.

When intellectual capital is understood to arise from the continued existence of the cultural expression as an authentic and *living* culture, it is apparent that all the collective work which reproduces the said culture and passes it on to the next generations, adds value to it. All the social and cultural activities that, for example, the Sámi engage in as a community to keep traditional Sámi clothing and handicrafts alive has significance also for adding value to this intellectual capital. The activities maintain interest in these expressions, and, thus, build their attractiveness and intangible value.

The fact, that traditional culture is still existing through authentic TCEs, adds value to community's intellectual capital. It promotes and supports the diversity and richness of cultural pool in general, ensuring that also traditional culture will exist in the future. In this respect all the offensive practices that decrease the possibility, that traditional culture can still be expressed as *culture*, should be seen as contrary to the general purpose of intellectual property rights.

If the risks and the offences that have been identified in this study lead to a situation where the community does not have the same kind of incentive to pass on their culture and its expressions to the next generations, or preserve TCEs in their authentic form, we can speak of development that is contrary to the purpose of intellectual property rights systems. Protecting the intellectual rights of indigenous people to their cultural expressions is congruent with the logic of intellectual property rights; namely to encourage and increase cultural diversity, an increase in the amount of intellectual capital and human creativity.

Next, the study will give a brief description of chosen intellectual property rights, namely copyright and trademark rights. The purpose of these descriptions is to give the reader a

basic understanding of how these laws can support the legal protection of traditional cultural expressions.

4.2 Copyright in brief

The purpose of the Copyright Act is to encourage creativity and facilitate the dissemination of the results of creative work as extensively as possible (one perspective on the maximising of intellectual capital)⁸⁹. For example, a Government proposal on an amendment to the Copyright Act states that “the key objective of copyright legislation is to support intangible creative work in all its different forms. By acknowledging the right of the author to determine the use of their works, society encourages creative activities⁹⁰”.

Another purpose of copyright is to protect creative workers, the author’s personality and work output⁹¹. Thus, copyright also includes moral values that are related to the author and their work as well as respect for the special relationship between these two.

Pursuant to section 1 of the Copyright Act, copyright protects the literary or artistic works created by a person. According to the current interpretation of Finnish legislation, the author must always be a natural person or several people together, and a legal person, such as a company cannot be an author in Finland.

The work may be expressed in various forms. It can be, for example, an oral performance, a musical composition or a stage performance, a cinematic work, a photographic work or another work in the visual arts, or artistic handicrafts, etc. In order for works to be granted protection, they must be independent and original, and the work must have an externally discernible form. It must also be possible to identify the work, in other words, we must be able to define what the work is consisting of. Thus, for example “culture” and “traditional handicrafts” cannot as such be considered works, since the definition lacks required precision, and only individual expressions of culture can be covered by copyright (for example, individual handicrafts or the forms and patterns they contain).

Section 43 of the Copyright Act provides that the protection period shall subsist until 70 years have elapsed from the year of the author’s death. However, if the author is unknown, section 44 provides that the protection period shall subsist until 70 years have elapsed

89 This perspective has been emphasised in Anglo-American legal thinking. See e.g. Fisher, William: *Theories of Intellectual Property*, in *New Essays in the Legal and Political Theory of Property*, Cambridge University Press, 2001

90 Government proposal 111/2005 vp, p. 4, also see government proposal 181/2014 vp, p. 64

91 See e.g. Haarmann, Pirkko-Liisa: *Immateriaalioikeus*, Talentum, 2014, p. 6

from the year in which the work was made public. The copyright for a work not made public, whose author is unknown, shall subsist until 70 years have elapsed from the year in which the work was created. After copyright is no longer valid, the work may be freely used by anyone, although section 53 of the Copyright Act does specify that the protection of the classics limits the public use of works where the copyright is no longer valid, if this use violates cultural interests.

Section 53 of the Copyright Act is quite exceptional in copyright as it provides protection to use that is public and violates public interest. The section provides: "If, after the death of the author, a literary or artistic work is publicly treated in a manner which violates cultural interests, the authority to be designated by decree shall have the right to prohibit such an action, notwithstanding that the copyright therein is no longer in force, or that copyright has never existed." Therefore, the protection of classics facilitates the protection of works for which copyright is no longer in force from practices or actions that violate cultural interests.

Section 2 of the Copyright Act gives the author the right with certain limitations to make copies of the work and make it available to the public, in the original form or in an altered form, in translation or in adaptation, in another literary or artistic form, or by any other technique. On the other hand, copyright has been limited in numerous ways to serve the objective that works could be disseminated to as large an audience as possible⁹². Section 3 of the Copyright Act provides on the author's moral rights, which include the right to be recognised as the author of the work (paternity), as well as the right to prohibit others from altering the work in a manner which is prejudicial to the author's literary or artistic reputation (right to respect).

In addition to authors, copyright law protects performers as well. Pursuant to section 45 the Copyright Act: without the performing artist's consent, a performance of a literary or artistic work or folklore shall not be recorded on a device by means of which the performance can be reproduced. With regard to traditional culture, it is significant that an addition was made to the act in 2005, and performers of folklore are now within the scope of protection for the performers. Performance of a work or folklore cannot be recorded without the permission of the performer and the recording cannot be shown to the public without permission.

92 The restrictions listed in chapter 2 of the Copyright Act apply to things such as use during teaching (section 14), events where no entrance fee is charged and the performance of the work is not the primary purpose of the event (section 21), private use (section 12) and citing of the work (section 22).

4.3 Trademark rights in brief

A trademark is a symbol used to identify goods and services in business. In most cases, trademarks are made up of words or images that are attached to goods or services, but a trademark can be any distinctive sign, such as a colour or a sound, which meets with the conditions of the Trademarks Act.

A trademark is analogous with an author's signature on a work of art. Whereas a signature refers to the source of the work, a trademark as a symbol of an entrepreneur indicates the origin of goods or services. A signature as well as a trademark can increase the value of a work and/or product if the author/supplier of the work/product is famous or has public appeal (e.g. if the author is famous or a company's brand has accumulated value)⁹³.

In addition to indicating origin, a trademark has other functions; the most important of these is so called function to distinguish. That means, that a trademark is able to distinguish the goods and services of those of its competitors. A trademark can help consumers recognise one set of products and differentiate them from another set of goods on the base of their trademark.

Provisions on exclusive rights to a trademark (with certain exceptions) are contained in section 6 of the Trademarks Act. It specifies that no one, but the holder of the trademark can without the permission of the holder use the same trademark in connection with the same goods. The protection also prevents the use of a similar trademark in connection with similar products, if this can cause confusion among the public regarding the origin of the goods (for example, the association people might make between the two trademarks). In this case, there is a danger that the public will falsely believe that the origin of both goods or services is the same or linked to each other.

In Finland, anyone, a private person or a company can apply for a sign of their choice to be registered as their own trademark. If the authority approves the trademark as registered, the trademark holder will be given protection for their sign from that day the application was originally submitted.

A trademark can also be established as an unregistered trademark of an entrepreneur. In this case, a company must be able to prove that due to its use on the markets, an adequately large portion of their target group recognises the sign as the company's trademark.

The scope of application of the Trademarks Act is limited compared to that of the Copyright Act; it only applies to business activities and even in this respect the activities must

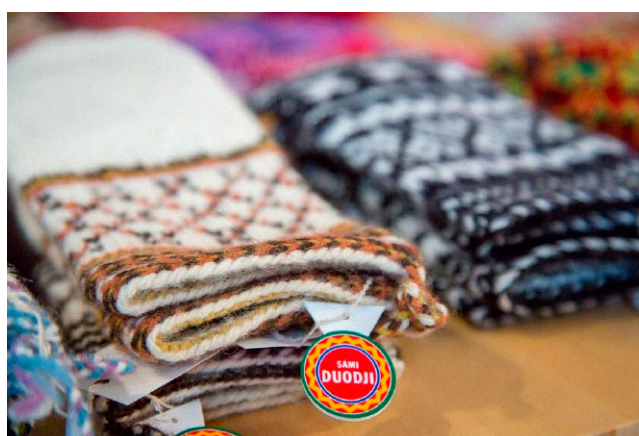
93 The similar trademark functions of a trademark and an author have been studied, for example, by Greg Lastowka, see.: *The Trademark Function of Authorship*, 85 B.U. L. Rev. 1171 (2005)

be trademark-like. As a rule, the Trademarks Act does not apply to, for example, non-commercial use by private persons or artistic activities, if these cannot be considered business activities.

4.4. Use of copyright and trademarks in Finland to protect traditional cultural expressions

No practical examples of the use of copyright in the protection of traditional Sámi clothing and other Sámi handicrafts could be found during this study. We can however assess what possibilities copyright could provide for the protection of these TCEs (we will return to this point in the next sub-chapter).

On the contrary, when examining trademarks, it was found that an effort has been made to protect Sámi traditional culture with trademarks. In 1982, the Nordic Saami Council registered the Sámi duodji trademark in Sweden. The use of this trademark is managed in Finland by Sámi duodji association (however, the trademark has not been registered in Finland and it has been used as an unregistered trademark). The trademark is an authenticity guarantee, which indicates that the handicrafts product was made by a Sámi artisan in accordance with *duodji* handicrafts tradition. Sámi duodji association provides advice to its Sámi members and promotes and monitors the teaching of Sámi handicrafts and the development of craftsmanship. In 2009, the association had a total of 314 members (some of whom were passive members) of whom 102 made duodji as their profession. 11% of the 102 were men⁹⁴.



The Sámi duodji label on handicrafts products⁹⁵

94 Rensujeff, Kaija: *Käsín, sävelin, sanoin ja kuvin – Saamelaiset taiteilijat Suomessa*, Taiteen keskustoimikunta Arts Council of Finland, 2011, p. 43

95 The right to use the photograph has been granted by the Sámi Parliament's image bank.

More recently, an alternative trademark has been recommended in the final report for the duodji trademark project, which could be introduced parallel to the *Sámi duodji* trademark. This new trademark would indicate the Sámi origin only in general (while the *Sámi duodji* trademark indicates that the product is not only Sámi but that it is also committed to the rules for traditional *duodji*). A more common label that would indicate Sámi origin would function on the basis of the joint government's of local regions (the right to the label could be granted by a local authority). However, this type of trademark has yet to be adopted.

At the same time, it has been noted that merely registering a trademark is not alone enough to provide legal protection. The management of the Sámi duodji trademark and defending it requires resources and without a cohesive structure this is difficult. The Sámi Parliament has further drawn attention to the aspect that the trademark by itself does not provide adequate protection against copied products and that the Sámi duodji trademark "cannot in an adequate manner protect Sámi handicrafts or Sámi culture from economic exploitation"⁹⁶. One problem that was observed was that trademark rights are at their core commercial and they cannot thus take into account other values⁹⁷.

Trademarks also come with the challenge that consumers must learn to recognise the mark to be able to select authentic products when making purchasing decisions. Especially in the tourism sector, where customer flows change continuously at the regional level and the recognisability of an authenticity guarantee must be continuously recreated, the same type of "brand loyalty" is not easy to establish. Another problem that has been pinpointed is that the trademark now in use does not prevent product copies from entering the market and does not protect, for example, the designs and patterns that have been developed in the *duodji* handicrafts tradition. It only indicates the origin of the products.

4.5 The potential of copyright and trademark rights in protecting TCEs

Next the study will look briefly at the ways in which copyright and trademark rights could provide legal protection for Sámi handicrafts.

From the perspective of copyright, it should first be considered whether the various designs of traditional Sámi clothing and *duodji* handicrafts can be considered works of art,

96 Sámediggi, the Sámi Parliament: *Statement of the Sámi Parliament on the use of traditional Sámi clothing*, 1 March 2010, p. 10

97 *Ibid.*, p. 1

and whether they are independent and original. If this is the case, they are in the scope of copyright, for example, as artistic handicrafts products.

The nature of artistic handicrafts as works of art are outlined for example in the Copyright Council's statement 2003:1, and this study does not give an opinion on whether the various designs of traditional Sámi clothing and *duodji* handicrafts or the elements that belong to these would pass the threshold of originality to be considered as works of art. It is merely stated that due to the functional purpose of handicrafts, in a traditional interpretation of legislation, the standards set for artistic handicrafts on independence and originality of a work are quite high⁹⁸. On the other hand, in this respect it should be noted that the practical function of the *duodji* handicrafts has declined over the past decades, while their aesthetic values have been increased, and this may underline their nature predominantly as art.

If it can be determined that these TCEs are works of art, next it must be examined whether the copyright relating to them is still valid. As was stated above regarding traditional Sámi clothing, the most well-known designs have remained relatively unchanged for approximately the past one hundred years, and it can be assumed that the copyright protection for the best-known and oldest traditional Sámi clothing is no longer in force. On the other hand, the copyright for new and original clothing designs may emerge independently from the older models.

In the case of individual *duodji* designs, the matter of copyright no longer being in force is not nearly as clear, because, as was stated, the designs, patterns and forms of handicrafts and their other decorative elements develop slowly in a collective process and individual handicrafts designs can also modernise the tradition. It could well be that certain patterns or decorative elements are so modern that 70 years has not yet passed from the time the person that created them died, or since the design or model was established. In this case, copyright for the *duodji* design in question would still be valid and copyright could also be transferred to others. This would mean that individual artisans or copyright holders could, if they so wish, hand over or licence their own copyright for collective use by all those who create Sámi *duodji* handicrafts and incorporate it into communal intellectual capital, at the same time ensuring that the right remains within the community.

However, if copyright has expired or the work is so old that there was never any copyright to it, the status of these TCEs can be studied in the light of section 53 of the Copyright Act (protection of classics)⁹⁹. The section on protection of classics makes it possible to prevent

98 Committee report 1953:5, p. 45

99 Nuorgam, among others, has also examined this option in her Master's thesis.

public practices that violate cultural interests (“If, after the death of the author, a literary or artistic work is publicly treated in a manner which violates cultural interests...”). Therefore, if someone publicly engages in activities that violate cultural interests the responsible authority has the power to prohibit these activities.

The application of protection of the classics would require case-by-case discretion on whether the exploitative practice has been public and how the violation of cultural interests is legally defined. If the practice deeply offends the Sámi community, for example, the use of known designs of traditional Sámi clothing in a manner contrary to the community’s norms or in another exploitative manner, it is not at all impossible that the case in question would concern a violation of such a cultural interest that the section of the Act aims to protect. This could be the case, for example, if the offensive use is likely to erode the system of cultural codes and the communicative nature of traditional Sámi clothing. The protection of classics should be examined in more detail and the legal means for the prevention of offensive practices that it facilitates should be considered. The study returns to this possibility in the report’s conclusions section.

With regard to copyright, examination should begin with determining whether the TCEs are works of art and after this the protection period should be determined. If the protection period has already come to an end, section 53 of the Copyright Act should be looked at for the possibility for protection.

With regard to trademarks, a reference to a recent research is made: Jacob Adams’ dissertation¹⁰⁰ at the University of Tromsø examines the use of trademark rights to protect the intellectual property of indigenous peoples using traditional Sámi clothing as an example and applying the results also to other cultural dimensions. The study emphasises the functionality of traditional cultural expressions in relation to the effectiveness of an unregistered trademark and its collective ownership.

It might be elaborated further, whether the Sámi Parliament could register trademarks for certain designs of traditional Sámi clothing and their features and could this legal practice protect the interests of the Sámi in this respect. This would mean that when providing tourist services traditional Sámi clothing would in itself act as a trademark that would indicate that the service is provided by the Sámi, i.e. to the origin of the goods and services.

In the light of the Trademarks Act, traditional Sámi clothing should meet with the general requirements for a trademark. It needs, for example, to be distinctive, but if the

100 Adams, Jacob R.: *Trademarks and the Protection of Indigenous Intangible Resources*, A dissertation for the degree of Philosophiae Doctor (unpublished), University of Tromsø – The Arctic University of Norway

requirements are met, the various designs of the clothing and their parts could be registered as trademarks and an effort could be made to prevent their unauthorised use. Similarly, individual duodji designs and patterns could be examined in the light of the trademark legislation. These patterns, forms and designs are external symbols that reference the product's origin, and, thus, a trademark could be applied to the protection of the handicrafts and to prevent the production and use of unpermitted copies.

However, a trademark comes with limitations as it only protects commercial use and does not take into consideration the whole cultural and social context related to traditional Sámi clothing. A trademark would not prevent the offending, non-commercial use of the clothing. Furthermore, the registration of a trademark in itself is not yet enough to prevent unauthorised use: this will also require market oversight and management of the trademark portfolio and the registration of tens (or hundreds) of trademarks for the various patterns and shapes of the handicrafts is not necessarily appropriate for numerous reasons, such as cost-efficiency. Application for trademarks is only a first step in acquiring protection, but questions such as who would own the trademark, who would control and manage the trademark, and who would benefit from any compensation paid for its use, would need to be resolved beforehand, as would the question of how disputes within the Sámi community on the use of the trademark would be resolved. On the other hand, the trademark system allows the use of communal trademarks, in which case the right to the use the trademark could be licensed to every individual Sámi person.

Furthermore, the benefits and possible risks of various legal measures should be carefully considered. For example, Miranda Forsyth has drawn attention to the fact that the application of "ownership" to traditional contexts and the centring of "ownership" to certain party – who are supported by the government and law – could be problematic for traditional regulatory systems such as customary rules and practices and questions concerning ownership should first be determined within the community¹⁰¹.

Although trademark rights are by nature a practical and effective way of preventing infringing commercial use, their practical implementation will require more extensive resources than just the submission of trademark applications. Furthermore, it would require a thorough and preliminary examination within the communities on how this form of protection would suit for the existing needs and what would be its social impacts.

101 Forsyth, Mirand: *Indigenous Peoples' Innovation: Intellectual Property Pathways to Development* (edited by Drahos, Peter and Frankel, Susy), Chapter 9. *Do You Want it Gift Wrapped?*, ANU E Press, 2012, p 202

5 Summary, conclusions and opportunities

The study addresses methods for the protection of intellectual property rights (copyright and trademark) that the Sámi people could pursue for their traditional cultural expressions (traditional Sámi dress and duodji handicrafts). The study describes the traditional cultural expressions that could be protected and the methods for protecting intellectual property rights, and it highlights the various opportunities and problems that may relate to the application of these rights. In addition to this, the value of traditional cultural expressions as intellectual property has been modelled and a theory has been formulated on how this immaterial capital related to cultural expressions fits together with the fundamental objectives of intellectual property rights systems.

As a summary of the study a list of proposals for solutions are made. Also some relevant questions are pinpointed, that should be solved in order to pursue the intellectual property rights for the protection of traditional cultural expressions. It should be noted that the framework for the study has been limited and not all intellectual property rights could be addressed within its confines¹⁰². Similarly, the only traditional cultural expression that the study examined was handicrafts. On the other hand, it is noteworthy that it may be possible to meet at least some of the needs that the protection of traditional cultural expressions requires with currently valid intellectual property rights.

However, first it must be stated that the perspective in all the proposed solutions should primarily be that of the Sámi people. It should be considered whether the problems encountered by the community with regard to the unpermitted use of traditional cultural expression could be resolved with these means. The premise for all measures should be that the Sámi's collective stance and opinion is set as a basis for any proposals.

Discourse should continue within the Sámi Parliament and the Sámi community to answer the following question: (1) what cultural elements from the Sámi community's point of view should be protected, meaning what exactly are the traditional cultural expressions or

102 For example, design rights could well be applicable for the protection of certain new handicrafts designs.

their parts that must be protected; what *forms* in copyright sense, or *distinctive signs* in a trademark sense, are such that they need protection? It must be noted that there are five known designs of Sámi dress used in Finland, and further more each dress piece can have many unique features such as colour – should protection apply to all these designs or even further to all their individual parts. Duodji handicrafts in turn comprise numerous different handicrafts designs and numerous different details, forms, patterns and decorative elements; in order to examine the protection of copyright or trademarks for these individual expressions, the elements to which protection should apply should be specified.

In this context, a common stance could be formed on (2) what type of activity or use the TCEs must be protected against; in other words what are we protecting it from and even further (3) what should be the content and the scope of the protection. A collective stance should be drawn up on how to react to the direct copying of cultural expressions and, on the other hand, how the product imitations, or works which are only inspired by TCEs are perceived. Consideration should be given to the extent and manner in which, for example, a non-Sámi person or entity could borrow from or be inspired by Sámi culture in a manner that does not offend the community. Taken these into account, it can be asked what should be the scope of the protection?

The content of the protection defines whether an exclusive right to forbid the use of TCEs and their imitations is needed, or could an ethical approach be implemented where those parties that meet with all the prerequisites, could be given permission to use the TCEs. (4) Another point that needs to be considered is who can grant or license to others the right to use Sámi cultural expressions, and should issuing such a permit involve the immediate family or extended family, local community, the Sámi Parliament or the entire Nordic community in addition to individual persons. Should, for example, the local or regional instance (immediate family, extended family, local community or village) from which the tradition has originated be involved in granting a permit or could the Sámi Parliament in this case represent Finland's Sámi community in its entirety. Can an individual Sámi person have the capacity to authorise those outside the community to use traditional cultural expressions, for example, for commercial gain?

Finally, (5) it should be specified who is the possible beneficiary in cases where someone benefits, that is who should benefit from an outsider and/or a non-Sámi person using a traditional cultural expression?

These questions can be summed up as follows:

1. What is being protected?
2. Against whom or what is protection sought?
3. What is the content of the protection?
4. Who has authority to manage the protection and can grant permission for use of the right?
5. Who has the right to the benefit from the protection and use of TCEs?

It would be important for the Sámi to form a collective understanding in these areas to facilitate a more comprehensive examination of whether current intellectual property rights are adequate to fulfil the needs related to the protection of traditional cultural expressions. As was stated above in the theoretical portion of this study: current legal instruments can provide at least some level of protection but, for example the question on whether the character of this protection is such that it will meet with the legal needs related of Sámi traditional culture remains unanswered.

For example, the exploitation of Sámi clothing can in theory be prevented with measures related to section 53 of the Copyright Act (protection of classics) on the condition that the requirements for the nature of these TCEs as a work in copyright sense is fulfilled (e.g. is Sámi dress a “work” in copyright sense). However, undertaking these measures would require the Sámi Parliament’s capacity to assess these issues as intellectual property rights issues. Furthermore, collective understanding from the Sámi point of view should be formulated (considering the previous question, e.g. which kind of infringing use should be intervened, in what way, etc. each case will be considered individually). It would be worthwhile to engage in the internal dialogue that could lead to the formation of this collective view, and, at this time, continue to provide training related to intellectual property rights to Sámi artists and communities (capacity building). Simultaneously, an examination could be conducted regarding the nature of different Sámi TCEs as works in copyright sense, or as distinguishing signs in trademark sense. The Sámi Parliament could also ask, for example, the Copyright Council to comment on the matter.

It should also be noted that all external and unpermitted use of traditional cultural expressions is not necessarily due to foul play. It is also sometimes due to lack of knowledge. Business operators and tourists often have a desire to act in an ethical manner. Another option could be for the Sámi Parliament to draw up ethical guidelines on the requirements and steps, which a third party must comply, to be granted permission to use Sámi traditional cultural expressions. When implemented in co-operation with the authorities these

guidelines could form the foundation for free prior informed consent procedure (FPIC¹⁰³), where a third party could request permission to use traditional cultural expressions and demonstrate the nature and purpose of their activities. The introduction of ethical guidelines will, of course, require resources and permanent administrative actions and, in this regard, the resources of the Finnish Sámi Parliament must also be taken care of.

It would therefore be possible to examine the Copyright Act's suitability as a legal tool for the protection of cultural rights. If it would be noticed on the markets that traditional cultural expressions are used in a manner that is not based on free and prior consent and violates the aforementioned ethical guidelines, an effort could be made to intervene on the basis of section 53 of the Copyright Act (protection of classics) at least so far as the actions are public, violates cultural interests and the cultural expression are defined as works of art. The Sámi Parliament could draw it to the attention of the authority responsible for making decisions on the matter (Ministry of Education and Culture), and the authority could make a decision after hearing the Sámi Parliament. In its assessment of the situation, the Ministry of Education and Culture could take into consideration the specific view of the Sámi Parliament on the use of the traditional cultural expressions in question and the scope of the offence when interpreting the concept of cultural interests.

This type of approach based on co-operation between the Sámi Parliament and authorities would be a logical model, since current legislation would also make it possible. This would also be a relatively quick way to react to various situations, and resolutions would not immediately require legal proceedings in the Court and it would avoid the related risk of legal expenses to be carried by the complainant. This model could also be consistent with the article of the Berne Convention for the Protection of Literary and Artistic Works, which is enacted to protect the works of indigenous peoples (works by anonymous authors and artists) and which specifies that a national authority has a role in safeguarding the rights of unknown authors or artists.

With regard to duodji handicrafts, a possible solution being considered would involve artisans working together to further specify questions listed above such as to what extent do the various handicrafts designs, patterns, shapes and elements need protection. This would make it possible to move forward to determining whether these elements can be considered artwork and the validity of possible copyright. If copyright is still in force, an individual artisan who oversees copyright can authorise other artisans to use the designs without a similar right being given to anyone outside the community.

103 The concept "Free and Prior Informed Consent" is today used in connection to the use of traditional knowledge of indigenous peoples.

In these cases, the possibility of using trademark rights to meet the needs that have been observed with regard to traditional Sámi clothing or duodji handicrafts should also be examined; for example, by registering as a trademark the most prominent and traditional patterns and designs by the artisans' association, or by Finnish Sámi Parliament. However, before implementing these measures, the aforementioned questions (such as to whom the rights belong to, who has the right to use them, and who benefits from this), should be carefully considered, along with all its possible socio-political impacts.

Finally, the question whether there is a legal shortfall in the protection of traditional cultural expressions will require further study. There clearly are certain intellectual property rights instruments available, but questions on how these can serve the Sámi as a community (e.g. are trademarks appropriate and necessary from the perspective of the community or can copyright be effectively monitored) and, on the other hand, whether they are applicable for the protection of the traditional cultural expressions in question, will require further study as well (e.g. are traditional cultural expressions works of art and/or can the section on protection of classics be applied: or do traditional cultural expressions meet with the formal requirements for the trademark legislation).

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Ministère de l'Éducation et de la Culture

ISBN 978-952-263-606-5 (PDF)

ISSN 1799-0351 (PDF)

