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Intellectual Property and Culture

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Part V - Intersections of Intellectual Property

Chapter 2 - Intellectual Property and Culture

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1 Introduction

The *Universal Declaration of Human Rights* affirms everyone's right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.[2] This somewhat narrow conception of culture expanded significantly over the years.[3] Today, the international community recognizes 'culture' as the 'set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs'.[4] Culture forms one of society's main vectors of identity, values and meaning. It contributes to a group's self-development and self-determination. Among the elements that influence a nation's cultural landscape are the provenance, religion, way of life and language of that nation's inhabitants. Especially as a result of international migration movements, national territories nowadays are home to a mosaic of 'cultures', each of which should be allowed to blossom as a dynamic and living testimony of its peoples' identities. To this end, the *UNESCO Convention on the Protection and Promotion of the Diversity of*

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[2] United Nations, Universal Declaration of Human Rights, General Assembly, Geneva, 10 December 1948, art. 27(1).

[3] I. Bernier, 'A UNESCO International Convention on Cultural Diversity', in C. B. Graber, M. Girsberger and M. Nenova (eds.), Free Trade versus Cultural Diversity: WTO Negotiations in the Field of Audiovisual Services (Zurich: Schulthess, 2004), pp. 65–76, p. 66.

[4] UNESCO Universal Declaration on Cultural Diversity, adopted by the 31st Session of the General Conference of UNESCO, Paris, 2 November 2001, preamble.

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Cultural Expressions[5] encourages Contracting Parties to take a variety of steps towards the protection and promotion of cultural diversity. These include the creation of the conditions for cultures to flourish and to freely interact in a mutually beneficial manner and the recognition of the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning.[6]

Intellectual Property (IP) rights figure among the steps that countries can take towards the protection and promotion of culture. As described in greater detail in other chapters of this book, IP rights have received recognition at the international level through a number of multilateral and regional treaties. They aim at providing the economic incentive for further creation or at rewarding the author or inventor for her intellectual labour. The grant of exclusive rights, under certain conditions and for a limited period of time, on works, inventions, or designs is thought, in theory, to stimulate creation and innovation.

Culture and IP law are indisputably intertwined, although their relationship is not always an easy one. IP law's contribution to the protection and dissemination of culture is not that straightforward: it highly depends on one's conception of 'culture' and on the rationales thought to underlie IP rights.[7] Because of the multiplicity of views on either topic, a 'culture clash' between IP and cultural diversity is practically unavoidable. So, while Article 27(2) of the *Universal Declaration* asserts everyone's 'right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author', the preamble to the *UNESCO Diversity Convention* recognizes the importance of IP in sustaining those involved in cultural creativity, but warns against the commodification of cultural expressions.[8] If one takes the position that 'culture' should not be reduced to mere things subject to private appropriation and that IP's justification should not be confined to the utilitarian or the natural rights principles, the interaction between both would demand reconsideration.

This chapter takes a critical look at the interaction between IP law and culture using three examples, namely: 1) the need to preserve and disseminate culture, through the recognition of cultural heritage institutions' vital role in society; 2) the need to maintain culture from depreciation, through the safeguard of a strong public domain; and 3) the need to let culture evolve, through the protection of Traditional Cultural Expressions (TCE's).[9] This brief study will show that, although IP rights can be said

5 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Paris, 20 October 2005.

6 Id. Art. 1.

7 The rationales most commonly attributed to IP rights are the utilitarian argument (law and economics), the natural rights theory (Kant and Hegel), and the labour theory (Locke); more recently, some scholars have argued that IP rights could be justified on the basis of Rawl's distributive justice theory or a human rights based, development theory. See S. Yanisky-Ravid (2017), "The Hidden Though Flourishing Justification Of Intellectual Property Laws: Distributive Justice, National Versus International Approaches", Lewis And Clark Law Review 21:1; A. Peukert, Intellectual property and development—narratives and their empirical validity. J World Intellect Prop. 2017; 20:2–23.

8 Id. Preamble, which reads in part: "*Being convinced* that cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value, (…)"

9 Brown, D. and Nicholas, G., Protecting Canadian First Nations and Maori Heritage through Conventional Legal Means, (2012) Journal of Material Culture 17(3) pp. 307-324, p. 307.

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to afford useful protection to objects of culture – taken in the narrow sense of 'culture', they can also prove to be inappropriate for preserving and promoting culture or cultural diversity – taken the broader sense of the word, either because they are too rigid, last too long, or are ill-suited for the intended object of protection.[10] As a result, a serious mismatch occurs between the private appropriation of objects of culture through IP rights and the full implementation of public policy objectives towards the protection and promotion of culture and cultural diversity. It would go well beyond the bounds of this chapter to investigate whether a different approach to the justification of IP rights would bring IP protection closer to addressing the needs of cultural diversity. Let this chapter be a starting point for further research into the best ways to avoid this observable legal culture clash and to ensure that all cultures can really flourish.

2 The Role of Libraries, Archives and Museums in Disseminating Culture

The uneasy relationship between IP law and the promotion of culture is immediately apparent in relation to the activities of cultural heritage institutions, like libraries, archives and museums.
Partly in response to the American Google Books project but mostly to encourage the preservation and promotion of European rich culture, the European Commission developed in the late 2000s a cultural policy that emphasizes the role of the Internet and digitisation technologies for the distribution of, and access to creative content online, including for cultural heritage institutions.[11] To this end, the Commission issued a *Recommendation on the digitization and online accessibility of cultural material and digital preservation*[12] in which it called upon the Member States to take necessary measures to increase the digitisation, digital preservation and online accessibility of cultural material. The measures put forward in the Recommendation relate primarily to the organisation and funding of digitisation by the cultural institutions, the improvement of online accessibility to digitised cultural material, the continued development of Europeana, the reinforcement of national strategies for the long-term preservation of digital material.

The European Union adopted another instrument in support of its cultural policy in 2013, when it amended *Directive 2003/98/EC on the re-use of public sector information*[13] to include public museums, libraries (including university libraries) and archives within its scope. In the accompanying Explanatory Memorandum, the European Commission explained:

> *The digitisation of cultural collections promotes access to culture by making European cultural heritage held by Europe's cultural institutions — books, maps, audio, films, manuscripts, museum objects, etc. — more easily accessible to all for work, study and leisure. At the same time, digitisation turns these resources into a lasting asset for the digital economy, creating*

[10] R. Coombe, 'Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property', (2002-2003) DePaul Law Review 1171.
[11] Communication from the Commission on A Digital Agenda for Europe, COM(2010) 245 final/2, p. 4;
[12] Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation, Brussels, 27.10.2011 C(2011) 7579 final.
[13] Directive 2013/37/EU of the European Parliament and of the Council of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information Text with EEA relevance, Official Journal L 175, 27/06/2013 p. 1 – 8.

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> *many opportunities for innovation, although the full exploitation of digital cultural assets is still embryonic. Business models are being explored and commercial activities are just starting. The goals of ensuring the wide availability of public sector information (PSI Directive) and placing digitised cultural assets at the disposal of creative and innovative businesses (digitisation policy) are entirely consistent and mutually reinforcing and fully comply with the European Agenda for Culture and the Council Workplan on Culture.*[14]

However, neither the *Recommendation on the digitisation and online accessibility of cultural material and digital preservation* or the *Directive on the re-use of public sector information* affects IP rights held by third parties on material contained in the collections of the libraries, archives and museums.[15] In other words, the capacity to actually achieve the goals set out in the Recommendation and Directive 2003/98/EC, and to digitise and disseminate (parts of) the collections held by cultural heritage institutions, is entirely contingent on the rules of the European *acquis communautaire* in the area of copyright and related rights.

Directive 2001/29/EC on copyright in the information society[16] establishes, for the European Union, the legal framework pertaining to the protection of works and other subject matter. It harmonizes the grant of the exclusive right of reproduction and the right of communication to the public, including the right of making available to the public. But Directive 2001/29/EC only provides for narrow limitations and exceptions for the benefit of cultural institutions. The two relevant provisions directed at the activities of these institutions are the following:

- a limitation to the reproduction right for specific acts of reproduction for non-commercial purposes (article 5(2)(c)), and
- a narrowly formulated limitation to the communication to the public right and the making available right for the purpose of research or private study by means of dedicated terminals located on the premises of such establishments (article 5(3)(n)).

Not all Member States have implemented the optional limitation of article 5(2)(c) of Directive 2001/29/EC. And those that did have often chosen different ways to do it, subjecting the act of reproduction to different conditions of application and requirements. Some Member States only allow reproductions to be made in analogue format; others restrict the digitisation to certain types of works, while yet other Member States allow all categories of works to be reproduced in both analogue and digital form.[17] In addition, Member States have identified different beneficiaries of this limitation. The prevailing legal uncertainty regarding the manner, in which digitised material may be used and reproduced, has been known to constitute a disincentive to digitisation. In countries that chose to

[14] *Proposal for a Directive of the European Parliament and of the Council Amending Directive 2003/98/EC on re-use of public sector information*, COM/2011/0877 final - 2011/0430 (COD), para. 1.3.6.

[15] P. Keller, T. Margoni, K. Rybicka, A. Tarkowski (2014) 'Re-use of public sector information in cultural heritage institutions', *International Free and Open Source Software Law Review*, 6(I), pp 1 – 9.

[16] *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society*, OJ L 167, 22.6.2001, p. 10–19.

[17] L. Guibault, 'Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC', JIPITEC 2010-2.

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implement it, article 5(3)(n) was transposed almost word-for-word in the national legislation. However, considering the default nature of this provision and the fact that its application is most often overridden by contract, libraries advocate for specific contracts or licenses, which, without creating an imbalance, would take account of their specific role in the dissemination of knowledge.

The Court of Justice of the EU examined the scope of articles 5(2)(c) and 5(3)(n) of Directive 2001/29/EC in the *Darmstadt/Ulmer* case.[18] The Court ruled that where an institution, such as a publicly accessible library, gives access to a work contained in its collection to a 'public', namely all of the individual members of the public using the dedicated terminals installed on its premises for the purpose of research or private study, that must be considered to be 'making [that work] available' and, therefore, an 'act of communication' for the purposes of Article 3(1) of that directive. Such a right of communication of works enjoyed by the institutions covered by article 5(3)(n) would risk being rendered largely meaningless, or indeed ineffective, if those institutions did not have an ancillary right to digitise the works in question. Those institutions are recognized as having the right to digitise works pursuant to Article 5(2)(c), provided that such acts of reproduction do not go beyond 'specific acts of reproduction'. That condition of specificity must be understood as meaning that, as a general rule, the institutions in question may not digitise their entire collections.[19]

Even if this decision confers on cultural heritage institutions a certain leeway to digitise some works in their collections, it does not allow the digitisation of entire collections. This creates genuine limits on the Commission's broad objective of digitising and disseminating cultural collections; requiring institutions to obtain authorisation from the rights owners for the reproduction and making available of millions of works in their collection pushes the endeavour beyond any reach. The task becomes unpalatable when the rights holder of a copyrighted work is unknown or unlocatable, i.e. when a work is 'orphan'.[20] *Directive 2012/28/EU on certain permitted uses of orphan works*[21] was adopted in an attempt to solve the orphan works problem, through the harmonisation of the requirements for the recognition of a work's orphan status. Directive 2012/28/EC involves a diligent search process that can be very cumbersome for institutions with larger collections. It is fair to say that Directive 2012/28/EU generated mixed feelings in the field: while rights owners welcome the fact that their rights are respected as much as possible, cultural heritage institutions are dismayed by the magnitude of the burden imposed on them in terms of diligent search.[22] The intended effect of facilitating the cross-border digitisation and dissemination of works within the Single Market has remained so far extremely modest.

[18] Case 117-13, Decision of the Court of Justice of the EU, 11 September 2014 (Technische Universität Darmstadt/Eugen Ulmer KG).

[19] Id., para. 42-45.

[20] Commission Staff Working Paper, 'Impact Assessment on the cross-border online access to orphan works accompanying the document 'Proposal for a directive of the European Parliament and of the Council on certain permitted uses of orphan works'', (*SEC*(2011) 615 final), p. 11-12.

[21] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works Text, OJ L 299, 27.10.2012, p. 5–12.

[22] See: Favale, M. and Schroff, S. and Bertoni, A., The Impossible Quest: Problems with Diligent Search for Orphan Works, IIC (2017) 48: 286.

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Discontent persists among heads of European cultural heritage institutions, who feel unable to take advantage of digital technology so as to increase digitisation and dissemination of material to the benefit of the public. In its most recent efforts towards copyright reform, the European Commission proposes the adoption of rules concerning the use of out-of-commerce works contained in the catalogues of cultural heritage institutions. The *Proposal for a Directive on Copyright in the Digital Single Market*[23] would introduce a specific mechanism, known as extended collective licensing, to facilitate through collective rights management organisations the conclusion of licences for the use of out-of-commerce works[24] by cultural heritage institutions. Time will tell how the final text of the *Proposal for a Directive* will read. In any case, the provisions relating to the use of copyright protected works by cultural heritage institutions would certainly be a step in the right direction, but they would presumably not be able to solve all issues of digitisation and dissemination of cultural material, especially with regards to works the rights of which are not usually exercised through a collective management organisation. It is therefore unlikely to fully reconcile IP law with the EU objectives behind the 2011 *Recommendation on the digitisation and online accessibility of cultural material and digital preservation* or the *Directive of 2013 on the re-use of public sector information*.

3 The Importance of the Public Domain in Preserving Culture

The difficult relationship between culture and IP law transpires almost immediately when considering the composition of the public domain. Generally speaking, the wealth of non-appropriated information is usually referred to as the public domain.[25] Outside of a strict public administration context, the definition of the public domain is generally given in relation to IP laws. The traditional view of the 'public domain' is that it encompasses not only all works that are no longer protected by copyright or any other IP right,[26] but certainly all elements of information that are not susceptible of protection because they lack originality, substantial investment, or novelty. A less conventional, and perhaps more controversial, view of the public domain is that it also embraces acts that are exempted by law from the scope of protection and those that are possible through voluntarily relinquishment by the rights owner.[27] Material in the public domain is in principle free for re-use by anyone without restriction. As no author or inventor creates in complete isolation, public domain material serves as building blocks to further creation and innovation.

[23] EU Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - COM(2016)593

[24] Art. 7(2) of Proposal for a Directive on Copyright in the Digital Single Market defines out-of-commerce works as follows: '2. A work or other subject-matter shall be deemed to be out of commerce when the whole work or other subject-matter, in all its translations, versions and manifestations, is not available to the public through customary channels of commerce and cannot be reasonably expected to become so.'

[25] This definition contrasts with the public law notion of 'public domain' which refers to 'the realm embracing property rights that belong to the community at large', or 'land owned directly by the government'.

[26] See Berne Convention on the Protection of Literary and Artistic Works, Geneva, 1971, art. 18(1): "This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection."

[27] P. Samuelson, 'Challenges in Mapping the Public Domain', in L. Guibault and P.B. Hugenholtz (eds.), The Future of the Public Domain – Identifying the Commons in Information Law, Alphen aan den Rijn, Kluwer Law International, 2006, pp. 7-27.

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Just as the guarantee of everyone's freedom of expression, 'a healthy and thriving public domain plays an essential role for cultural and democratic participation, economic development, education and cultural heritage.'[28] Referring back to the definition of 'culture' laid down in the *UNESCO Convention on Cultural Diversity*,[29] a society's 'distinctive spiritual, material, intellectual and emotional features' should not be subject to unbridled private appropriation. Whereas some of these features, like 'art and literature', can be controlled by individual IP rights, other features such as 'lifestyles, ways of living together, value systems, traditions and beliefs' should not. The complexity lies in the fact that the contours of the public domain are not self-evident: first, it is difficult to ascertain whether a cultural object meets the requirements for protection; second, if it does, it is a challenge to determine the duration of protection[30]; and third, the question may arise whether a piece of art that is an integral part of a community's set of traditions or beliefs should receive protection, and if so, in what form. This last instance highlights the fact that protecting culture is not necessarily the same as granting IP rights.

However important the public domain is for the preservation of culture, it receives regrettably scant attention in the IP legislation. Although there is no common understanding of the rationales behind the grant of IP rights, these rationales play a key role in the determination of the boundaries of the public domain. The rationales help lawmakers decide where to draw the line between what falls within or outside of the IP regimes, between what is or is not protectable, for how long and under which conditions. Consequently, different jurisdictions recognising different justifications for IP rights will come to different outcomes on this issue. In light of these characteristics, it is not easy for the layperson to ascertain the exact content of the public domain. This uncertainty risks creating a chilling effect on authors and inventors who may refrain from using public domain material for fear of infringing third party rights. Greater transparency and knowledge about the composition of the public domain would reduce this threat. The role of cultural heritage institutions in the labelling, cataloguing, preserving and making available of public domain works, should be recognised and supported, particularly in the digital environment.[31]

The public domain is an inherently dynamic, continuously growing body of knowledge and culture. As time passes, the term of protection of more and more works and inventions expires, just as more and more non-protectable information is produced, bringing new items within the realm of the public domain. Unfortunately, it happens all too often nowadays that people attempt to (re)capture exclusivity in works or other material that have either fallen into the public domain or never qualified for protection. Exclusivity can be gained through another intellectual property right (trademark or right in databases), property rights, contracts or technical protection. Such attempts should be

[28] S. Dusollier, Scoping Study on Copyright and Related Rights and The Public Domain, WIPO, Committee on Development and Intellectual Property (CDIP), Geneva, March 2011, CDIP/7/INF/2 p. 68.

[29] UNESCO Universal Declaration on Cultural Diversity, adopted by the 31st Session of the General Conference of UNESCO, Paris, 2 November 2001, preamble.

[30] Angelopoulos A., 'The myth of term harmonisation: 27 public domains for 27 member states', IIC (2012) 35: 567–594.

[31] S. Dusollier, Scoping Study on Copyright and Related Rights and The Public Domain, WIPO, Committee on Development and Intellectual Property (CDIP), Geneva, March 2011, CDIP/7/INF/2 p. 71.

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prevented if the ensuing entitlements are similar in scope or effect to that of copyright, or if they impede the non-rivalrous or concurrent uses of the public domain work.[32]

4 The Contribution of Traditional Cultural Expressions to a Vibrant Culture

Culture plays an integral and essential part in defining peoples' identity for all nations around the world, but perhaps even more particularly for indigenous communities.[33] This is recognized in the UNESCO *Convention on the Safeguarding of Intangible Cultural Heritage* of 2003.[34] At the international level, the legal protection of indigenous peoples' traditional knowledge and culture is a politically complex and sensitive issue, for which a viable solution is very slow to emerge. Not only do TCE's rarely meet the requirements for protection, but the objectives sought by IP law are alien to the protection needs of indigenous peoples. For them, culture is not something to own, but rather a heritage to be preserved and respected, most typically in a collective form.[35] Indigenous peoples reject the 'public domain' status of traditional knowledge and traditional cultural expressions and argue that this status opens the door to misappropriation and misuse.[36] For indigenous peoples, such acts not only constitute an encroachment upon their economic interests, but more importantly they form an attack on their identity.

An important step was accomplished with the adoption in 2007 of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).[37] Article 31 recognizes the indigenous peoples' right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as their intellectual property over these matters. Although the Declaration is non-binding on the signatories, and despite the fact that four key countries from the

[32] Ibid.

[33] Brown, D. and Nicholas, G., 'Protecting Canadian First Nations and Maori Heritage through Conventional Legal Means', *New Zealand and Canada: Connections, Comparisons and Challenges Conference*, Wellington, New Zealand, Feb. 9-10, 2010

[34] UNESCO, *Convention on the Safeguarding of Intangible Cultural Heritage*, Paris, 17 October 2003, where the preamble 'Recogniz[es] that communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity'.

[35] Barelli, M., The United Nations Declaration on the Rights of Indigenous Peoples: A Human Rights Framework for Intellectual Property Rights (January 17, 2014). M. Rimmer (ed.) A Research Handbook on Indigenous Intellectual Property, Edward Elgar (2014), p. 2; United Nations, Human Rights Council, Promotion and protection of the rights of indigenous peoples with respect to their cultural heritage - Study by the Expert Mechanism on the Rights of Indigenous Peoples, A/HRC/30/53, 19 August 2015, p. 15.

[36] More recently, see: Friedman, V., 'Chanel's Boomerang Comes Back to Hit It', May 16, 2017 *New York Times*; and Harford, E., 'How to appreciate indigenous culture, without appropriating it', June 24, 2016 *Ottawa Citizen*.

[37] United Nations, *Declaration on the Rights of Indigenous Peoples*, adopted at the 107th Plenary meeting of the General Assembly of the United Nations, Geneva, 13 September 2007 No. 53 (A/61/53), part one, chap. II, sect. A. The Declaration was adopted by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).

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perspective of the indigenous peoples (Australia, Canada[38], New Zealand and United States) have voted against it, the political and legal significance of the UNDRIP is undeniable.[39] Well before the adoption of the *UNESCO Convention on Cultural Diversity* and the UNDRIP, the WIPO started devoting attention to the question of the protection of traditional knowledge and traditional cultural expressions. For sixty years now, and more urgently since the creation in 2000 of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC),[40] the WIPO has worked with the delegations of the Member Countries, international observers, scholars and stakeholders in trying to devise a level of protection for TCE's that would address most concerns.

TCE's encompass a vast array of tangible and intangible expressions, including all genres of cultural expressions ranging from music, to dance, songs, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, and many other artistic or cultural expressions. As such, these forms of expressions would in principle be covered by the protection of established IP regimes, provided they meet the requirements for protection. But the creation, preservation and promotion of community owned TCE's follow a different path than modern individual works of authorship. For the reasons presented below, a protection regime based on individual property rights is not suitable for TCE's. One of the key features of TCE's is that they consist of forms of expressions that are passed down from one generation to another, either orally or by imitation, reflecting a community's cultural and social identity. TCE's are said to manifest unique characteristic elements of a community's heritage. Since they are generally produced or created by (authorized) members of a community, they are maintained collectively rather than being kept individually. TCE's may be dynamic and evolving, as a reflection of the community from which they stem.[41]

These essential characteristics mean that TCE's do not benefit from copyright protection. First, TCE's are not always fixed in a material form to allow for the requirement of fixation to be satisfied. As article 2(2) of the Berne Convention leaves it to the 'countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form', not all copyright laws demand that a work be fixed. Where the criterion of fixation does exist, protection will be unavailable for TCE's that are transmitted orally,[42] as for any TCE that is performed but not recorded.

[38] In May 2016, the Minister of Indigenous and Northern Affairs announced Canada is now a full supporter, without qualification, of the declaration: http://news.gc.ca/web/article-en.do?mthd=tp&crtr.page=1&nid=1063339&crtr.tp1D=1&_ga=1.40822306.1066794629.1422563602.

[39] Barelli (2014), p. 5.

[40] See: WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders*, Geneva, WIPO Report, 2001.

[41] WIPO, Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore, The Protection Of Traditional Cultural Expressions: Draft Gap Analysis, Thirteenth Session, Geneva, October 13 To 17, 2008, WIPO/GRTKF/IC/13/4(B) REV., ANNEX I, p. 5 [hereinafter WIPO, 'Draft Gap Analysis'].

[42] Howell and Ripley (2009), at p. 228.

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Second, TCE's generally do not meet the required level of originality necessary to obtain copyright protection. Not only are TCE's passed down from one generation to the next, but their historical or spiritual dimension leaves little space for creativity and innovation. The originality threshold varies from one country to the next and it is conceivable that in countries applying a lower threshold, small variations on TCE's may gain protection. Where TCE's spark individual artists' inspiration and lead to the creation of works in the sense of the copyright act, these individual creations may qualify for copyright protection. The question arises, however, as to the TCE status of new, derivative, creations: are they part of the cultural heritage that emanates from the community concerned or are they instances of (unauthorized) imitation that the community would rather not see happen?

Third, the copyright regime appears ill suited to protect TCE's because of the impossibility to identify a known author of a specific manifestation of TCE prevents an effective allocation of rights. It has been suggested that TCE's could be regarded as anonymous works, but this solution would bring about the unwarranted effect that where the author cannot be identified, the publisher is presumed the owner of the work. TCE's could also be seen as works of joint authorship were it not for the fact that traditional cultural heritage developed over several generations cannot be said to have been conceived jointly. Joint authorship in copyright law requires a common intention to create among the collaborators which does not exist in the case of TCE's.[43]

Fourth, the limited duration of copyright protection[44] is problematic for indigenous communities for two reasons, e.g. two sides of the same coin: first, because under most copyright regimes, the term of protection normally granted from the date of disclosure to the public of the work would have lapsed even before the TCE's would be recognized as protectable subject matter; and, more importantly from the point of view of indigenous communities, the limited period of protection afforded by the copyright regime does not confer communities perpetual control over their cultural heritage.

It is unfortunate that the copyright regime is so ill suited to TCE's, since rights like those granted by copyright would be most useful to address the three main concerns of indigenous communities in relation to their cultural heritage, e.g. attribution, control, and remuneration.[45] Political pressure and a clash of culture and tradition between lawmakers and indigenous peoples are not the only obstacle towards the adoption of protection for TCE's. Two practical features of TCE's make the design of adequate protection very complex: First, TCE's come in so many different shapes that a single regime of protection for all is most likely insufficient to properly address each of their characteristics. Second, the contours of the protection will vary depending on the goals to be achieved: is the regime aimed at preventing appropriation or disclosure of sacred TCE's, at requiring attribution of the community as the source of a specific TCE, or at securing financial returns from the commercial exploitation of TCE's by third parties? In addition to this, indigenous peoples worldwide are far from homogeneous

[43] Id., p. 388.

[44] As discussed elsewhere in this book, copyright protection lasts in Europe for the life of the author plus seventy years after his/her death (or fifty years after death, pursuant to art. 7(1) of the Berne Convention); in case of anonymous works, copyright protection lasts for a period of fifty/seventy years after the work has been lawfully made available to the public.

[45] WIPO, Draft Gap Analysis (2008), p. 8.

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in the way they view their traditional cultural heritage and their assessment of the type of protection needed.

5 Conclusion

The relationship between intellectual property law and culture is an ambiguous one, to say the least. As the preceding pages have shown, IP rights do not always contribute to the development and growth of culture, nor to its preservation and dissemination. A one-size-fits-all solution would not be of much help, either. Reconciling cultural policy with intellectual property would demand some fine tuning on different fronts to cater for the different needs and interests of the main stakeholders. The task would also require a deeper understanding of what aspects of culture need protection, and of how intellectual property could best address those needs, if at all.

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