

**INTELLECTUAL PROPERTY LAW PROTECTION OF
FOLKLORE: A STEP TOWARDS A MORE GLOBAL
APPROACH**

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A B S T R A C T

Folklore, as a specific part of the traditional heritage, forms one of the constituent elements of the cultural identity of every community. As such, expressions of folklore ought to be preserved and protected from uncontrolled and inappropriate utilisation. The problem of an adequate system of protection of folklore has been discussed over the last few decades, yet, it seems that, up to date, legislative solutions fail to entirely efficiently and comprehensively deal with this issue.

At the same time, somewhat unfairly, mainly the indigenous communities have been the focus of most of these scientific and legislative approaches over the past decades. Predominant part of the existing literature and normative models of protection have used the indigenous communities as a starting point in developing folklore protection systems and schemes, leaving many other non-indigenous communities with rich folkloric opus on the margins of the attention. On account of this, one may argue that the proposed legislative solutions are not fully operational for both indigenous and non-indigenous communities.

Recognising the above, and at the same time aware that folklore does not only exist in isolated parts of the world but is present in every nation and in every culture, the main focus of this thesis is to examine the protection of folklore from a specific perspective, that of the overlooked non-indigenous communities. At the same time, this thesis also looks into answering certain currently unrequited issues, aiding in that way to the development of a more globally appropriate system of protection of expressions of folklore.

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To my grandma for teaching me that "each generation must go a bit beyond the previous one".

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CONTENTS

ABSTRACT	2
ACKNOWLEDGMENTS	3
CONTENTS	4
ABBREVIATIONS	7
1. CHAPTER I: INTRODUCTION	9
1.1 Preliminary Annotation	10
1.2 Background of the Research	11
1.3 Thesis Structure and Research Questions	14
1.4 Methodology	16
1.5 Limitations	18
2. CHAPTER II: CASE STUDIES	19
2.1 Introduction	20
2.2 Case Study 1: Balkan Music	21
2.2.1 <i>Understanding the Balkans – A Historical and Anthropological Overview</i>	25
2.2.2 <i>Following the Trails of a Tune – Whose Song Is It?</i>	29
2.2.3 <i>Normative Overview of Balkan Folklore</i>	33
2.2.4 <i>Some Practical Consequences</i>	36
2.3 Case Study 2: Folk Tales From Germanic Tradition	39
2.3.1 <i>Folklore of the Germanic Peoples</i>	42
2.3.2 <i>How the Expressions Evolved Over Time</i>	43
2.3.2.1 <i>Folklore in the Public Domain</i>	43
2.3.2.2 <i>Folk Tales Fixed in a Tangible Form</i>	45
2.3.2.3 <i>Folk Tales Adapted and Copyrighted</i>	46
2.3.2.4 <i>A new collection of folk tales</i>	48
2.3.3 <i>What Would Thompson, Propp and Others Say About the Germanic Folk Tales?</i>	49
2.4 Questions? Yes, Many!	52
3. CHAPTER III: TERMINOLOGICAL AND DEFINITIONAL CONSIDERATIONS: WHAT, WHO, WHY AND ONLY THEN – HOW? ..	56
3.1 Getting a Grasp of Folklore	57
3.2 <i>What?</i>	59
3.2.1 <i>Terminology</i>	59
3.2.1.1 <i>"Folklore" or "TCEs"</i>	61
3.2.1.2 <i>The Use of Particular Terms</i>	63
3.2.1.3 <i>Current Status</i>	67
3.2.2 <i>Definition</i>	67
3.2.2.1 <i>Current Status</i>	68
3.2.2.2 <i>WIPO Definitions</i>	69
3.2.2.3 <i>A Possible Approach: Folklore Characteristics as the Backbone of Folklore Definition</i>	76
3.3 <i>Who?</i>	80
3.3.1 <i>"Indigenous communities"</i>	80
3.3.2 <i>"Traditional and other cultural communities" or "Local communities"</i>	83

3.3.3	<i>What is a Community Really?</i>	87
3.3.4	<i>Identifying the Community – Rightholder</i>	90
3.4	<i>Why?</i>	92
3.4.1	<i>Arguments in Favour of Protection</i>	93
3.4.2	<i>Against Protection</i>	96
3.5	<i>What, Who and Why – a suggestion</i>	98
3.5.1	<i>What?</i>	98
3.5.2	<i>Who?</i>	101
3.5.3	<i>Why?</i>	103
4.	CHAPTER IV: HOW: WHICH LAW?	106
4.1	<i>Introduction</i>	107
4.2	<i>Human Rights Laws and Laws on Cultural Heritage</i>	108
4.2.1	<i>Human Rights Laws</i>	109
4.2.2	<i>Cultural Heritage Laws</i>	116
4.3	<i>Human Rights, Cultural Heritage or some other Law?</i>	122
4.4	<i>Intellectual Property Law</i>	125
4.4.1	<i>Evolution of Intellectual Property Law</i>	129
4.4.1.1	<i>The Subject Matter and Why Protect It</i>	131
4.4.1.2	<i>Individual Author</i>	135
4.4.1.3	<i>Moral Rights</i>	138
4.4.2	<i>Where Did It Go Wrong for Folklore?</i>	140
4.4.3	<i>Expanding Intellectual Property Law?</i>	143
4.4.4	<i>The Public Domain</i>	147
4.4.5	<i>The Domaine Public Payant</i>	151
4.5	<i>Which Law – a Suggestion</i>	155
5.	CHAPTER V: HOW: WHICH INTELLECTUAL PROPERTY LAW? ..	159
5.1	<i>Introduction</i>	160
5.2	<i>Copyright and Neighbouring Rights</i>	160
5.2.1	<i>Introduction</i>	160
5.2.2	<i>Protection at the International Level</i>	160
5.2.2.1	<i>The Berne Convention</i>	160
5.2.2.2	<i>The Tunis Model Law</i>	164
5.2.2.3	<i>The WIPO PPT and the Rome Convention</i>	167
5.2.2.3.1	<i>Performers</i>	167
5.2.2.3.2	<i>Producers of Phonograms</i>	168
5.2.3	<i>Limitations of Copyright Law</i>	169
5.2.3.1	<i>Limitations of the Direct Copyright Protection ..</i>	169
5.2.3.1.1	<i>Fixation</i>	169
5.2.3.1.2	<i>Originality</i>	170
5.2.3.1.3	<i>Authorship</i>	170
5.2.3.1.4	<i>Term of Protection</i>	171
5.2.3.2	<i>Limitations of Indirect Copyright Protection</i>	172
5.3	<i>Trademarks</i>	173
5.3.1	<i>Introduction</i>	173
5.3.2	<i>Registrability of Traditional Designations</i>	175
5.3.2.1	<i>The Paris Convention</i>	175

5.3.2.2	<i>Grounds for Refusal in National Legislation</i>	178
5.3.3	<i>Active Protection of Traditional Designations</i>	180
5.3.4	<i>Unfair Competition</i>	181
5.4	<i>Geographical Indications of Origin</i>	182
5.4.1	<i>Introduction</i>	182
5.4.2	<i>Protection of Folklore Under GI</i>	183
5.5	<i>Sui Generis Protection – A Work In Progress</i>	186
5.5.1	<i>Introduction</i>	186
5.5.2	<i>The WIPO Initiatives</i>	186
5.5.2.1	<i>The Model Provisions</i>	187
5.5.2.2	<i>Recent WIPO activity – Revised Draft Articles..</i>	190
5.6	<i>How much use can we make of Intellectual Property Law as it stands</i>	197
5.6.1	<i>Copyright</i>	198
5.6.2	<i>Trademark Law</i>	199
5.6.3	<i>Geographical Indications of Origin</i>	200
5.6.4	<i>Sui Generis Protection</i>	202
6.	CHAPTER VI: HOW: A PROPOSAL	204
6.1	<i>Developing A System</i>	205
6.1.1	<i>Some Aspects to be Taken Into Consideration</i>	205
6.1.2	<i>Protection From What?</i>	208
6.2	<i>How – A Suggestion</i>	211
6.2.1	<i>Basis: Moral Rights</i>	212
6.2.2	<i>Why Moral Rights May Work For Folklore?</i>	215
6.2.3	<i>Practical Application of Moral Rights: Creative Commons?</i>	218
6.2.4	<i>Can Creative Commons Work For Folklore?</i>	222
6.3	<i>Limitations and Prerequisites</i>	224
6.3.1	<i>Theoretical Limitations</i>	224
6.3.2	<i>Practical Problems</i>	228
6.3.2.1	<i>Databases</i>	228
6.3.2.2	<i>Coordination</i>	230
6.4	<i>Further questions, further steps</i>	231
6.5	<i>Conclusion</i>	233
7.	CHAPTER VI: CONCLUSIONS	235
	BIBLIOGRAPHY	246

ABBREVIATIONS

Berne Convention	the 1886 Berne Convention for the Protection of Artistic and Literary Works
Draft Treaty	the Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions
ECHR	the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13
ICCPR	the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, concluded on 16 December 1996, entered into force on 23 March 1976
ICESCR	the International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, concluded on 16 December 1996, entered into force on 3 January 1976
ICH Convention	the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage
IGC	the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
Lisbon Agreement	the 1958 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration
Madrid Agreement	the 1891 Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods
Model Provisions	the WIPO/UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions
Paris Convention	the 1883 Paris Convention for the Protection of Industrial Property
Revised Draft Articles	jointly the Draft Provisions/Articles for the Protection of Traditional Cultural Expressions, which are under constant revision by the IGC
2006 Revised	The Protection of traditional cultural

Draft Articles	expressions/expressions of folklore: Revised Objectives and Principles, Geneva, April 24 to 28, 2006, WIPO/GRTKF/IC/9/4
2013 Revised Draft Articles	The Protection of traditional cultural expressions: Draft Articles, Rev. 2, Geneva, July 15 to 24, 2013, WIPO/GRTKF/IC/25/7
Rome Convention	International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations
UDHR	the 1948 Universal Declaration on Human Rights, adopted and proclaimed by the United Nations in General Assembly Resolution 217 A(III), U.N. doc. A/810, 10 December 1948
TCEs	traditional cultural expressions
TRIPs	the 1994 WTO Agreement on Trade-Related Aspects of Intellectual Property Rights
Tunis Model Law	the 1976 Tunis Model Law on Copyright for Developing Countries
WHC	the 1972 UNESCO Convention Concerning the Protection of the World Cultural and National Heritage
WPPT	the WIPO Performances and Phonograms Treaty

CHAPTER I: Introduction

1.1 Preliminary Annotation

In order to frame this thesis, a few comments on my motivation for pursuing this topic are in order. My non-legal interest in folklore dates back to high school when I attended extracurricular ethnology courses and started purchasing my first ambient music CDs. In one of these compilations, there was a song by Peter Gabriel and Deep Forest – "*While the Earth Sleeps*", originally recorded for the motion picture "*Strange Days*"¹. While listening to the song, I recognised parts of a song which I knew as a Macedonian folk song "*Dali znaes mila majko*"². Peter Gabriel incorporated the tune of that folk song, including a couple of lines of the lyrics ("*do you know dear mother, how unhappy I am*"). Even back then it struck me how unfair it was that the CD failed to mention that parts of "*While the Earth Sleeps*" were actually taken from an old Balkan song.

This made a lasting impression on me. Over the years, I started paying attention and became increasingly aware of a number of bits and parts of folk songs which I could recognise, that were now being incorporated, both by domestic and foreign artists, into new songs and sold for high profits. A particularly egregious example of this was the soundtrack for the movie "*Queen Margot*" composed by Goran Bregović. Nearly all songs on the soundtrack included parts of old folk Balkan songs³. Astonishingly, only a few of the songs represented something genuinely new out of something old – the remaining songs were essentially unmodified folk songs. Yet, Bregović signed his name under all of these songs and sold them as his own creations.

To complete this recount, the final piece of puzzle came some years later, when I started exploring the folk songs exploited by these artists from ethnological curiosity. On the Internet, I came across different information on "*When the Night is Falling*". For example, an article on Wikipedia stated that "it is a song written by Eric Mouquet and Michel Sanchez of Deep Forest and Peter Gabriel" and that "it incorporates samples from "Shashvi, Kakabi", performed by Tsinandali Choir, from an old Bulgarian song called "*Dali znaes mila majko*", performed by Bulgarian singer Kate Petrova, and from

¹ The song can be found here: <http://www.youtube.com/watch?v=QZ1DKig78u0> [all Internet sources used in this thesis were last assessed on 21 January 2014]

² A recording of the Macedonian folk version of the song can be found here: <http://www.youtube.com/watch?v=Kf7G-CZgPkI>

³ For example: <http://www.youtube.com/watch?v=8z5Cx7thFXI> or <http://www.youtube.com/watch?v=cMeadwyaxe4>

"*Övgön Chuuvuu*" from the album *Mogolie, musique vocale et instrumentale*"⁴. The cited article referred to an anthology of Bulgarian music published by the Bulgarian Academy of sciences where the original folk song was collected and catalogued. At the same time, I found information which suggested that the bits of "While the Earth Sleeps" were taken from a Macedonian folk song – the official webpage of Deep Forest mentioned the Macedonian language version⁵. I have at that point already known a number of nearly identical folk songs which were performed in and claimed by different Balkan communities, and "*Dali znaes mila majko*" was obviously one of them – the same song appeared both in Macedonia and in Bulgaria.

These encounters with the music industry and the way it made use of folk songs which I knew as "ours" and a part of a cultural heritage, made me ask some questions – is it fair that one simply takes, as from some open treasury, without acknowledging the source? Is it just that one makes such profit, not even using it as an inspiration to create something new on the basis of something old, but merely copying? If not, how can we tell who should be acknowledged or asked for permission when we have one same identical songs appearing in different countries?

Years of research later, this thesis attempts to answer some of the above, but also other questions.

1.2 Background of the Research

As a short introduction into the substance of this thesis, it is necessary to sketch some background information and briefly outline the subject matter that will be presented and topics that will be discussed in the following pages.

Folklorists recognize that folklore⁶ is not merely something from the past to be collected or something that exists only in isolated pockets of the world. Folklore is living. The impulses to create and express that underpin it have not died. Particular traditions arise, are modified and come to an end, still, the folkloric process continues even as particular events, objects and forms of expression change

⁴ See the Wikipedia article on "While the Earth Sleeps" available at: http://en.wikipedia.org/wiki/While_the_Earth_Sleeps#cite_note-2

⁵ See this information at the official Deep Forest website at http://www.deepforest.co/lyrics.htm#lyric_wtes

⁶ This thesis will use the term "folklore" or "expressions of folklore" to describe the subject matter. The argumentation for this approach and the definition of folklore is provided in Chapter 3, Section 3.2.

and evolve⁷.

These evolving and living expressions are ubiquitous: folklore can be found in both the developing and developed worlds, in indigenous communities and non-indigenous communities⁸. Indigenous communities are usually seen as the custodians of folklore – given that they represent the most abundant source of folklore knowledge and that such communities most strongly preserve and develop the cultural traditions of past generations. This is not however to deny the significant elements of folklore existing in other, non-indigenous communities which continue to maintain and celebrate their shared cultural heritage⁹.

At the same time, folklore is being increasingly exploited. Undeniably, exploitation of folklore was also possible in the past. However, the rapid development of technology, the ever increasing ways of capturing and manufacturing expressions of folklore (audio-visual productions, phonograms, their mass reproduction, broadcasting, cable distribution, Internet transmissions and so on), have amplified the range and frequency of possible abuses¹⁰.

Arguably, folklore has particular importance for indigenous communities and developing countries: rather than serving as a memory of the past, there, folklore is more actively part of the present. Nevertheless, folklore is an important element of the cultural heritage of every nation and community. Accordingly, the protection of expressions of folklore from exploitation is not supposed to be a "South-North" issue since basically any community has valuable and cherished traditions with corresponding cultural expressions¹¹. Various elements of folklore exist in non-indigenous communities which continue to maintain and celebrate their shared

⁷ Palethorpe, S. and S. G. Verhulst. *Report on the International Protection of Expressions of Folklore Under Intellectual Property Law*. University of Oxford, 2000, pp. 13. Available online at the European Commission website at: http://ec.europa.eu/internal_market/copyright/docs/studies/etd2000b53001e04_en.pdf

⁸ In this thesis, it will be argued that the presumed rightholder of any folklore protection should not be defined and limited to an "indigenous community" but should be wide enough to include any community in the world. The different available terms and their definitions are provided in Chapter 3, Section 3.3. I will be, however, using the term "indigenous" and "non-indigenous" community throughout this thesis in order to stress the difference that exists between the two and accordingly reinforce the idea that we need to look for a global and all-inclusive, rather than an approach limited to indigenous communities.

⁹ Palethorpe, S. and S. G. Verhulst (2000), note supra 7, pp. 13

¹⁰ Ficsor, M. *The Protection of Traditional Cultural Expressions/Folklore*, WIPO National Seminar on Copyright Related Rights and Collective Management, Khartoum, February 28 – March 2, 2005, pp. 2, available online at: www.wipo.int/edocs/mdocs/arab/en/wipo_cr.../wipo_cr_krt_05_8.doc

¹¹ *ibid*

cultural heritage¹².

Yet, somewhat unjustly, the focal point of most social scientific and legislative approaches to folklore over the past decades has predominantly been folklore found in indigenous communities. The major part of the existing literature and normative models of protection have used indigenous communities as a starting point in developing an appropriate system of protection of folklore, leaving many non-indigenous communities with rich folkloric opus on the margins of the attention. This approach has produced a number of consequences.

First, the existing literature on the protection of folklore in non-indigenous communities is rather scarce. Rarely can one come across papers studying and discussing non-indigenous folklore, although such folklore evidently exists and is also being utilized and exploited.

Second and more important, the proposed legislative models regulating this subject matter have mainly been evolving around the idea of indigenous communities as creators of expressions of folklore and potential beneficiaries of the protective regime. As a result, some of the existing legislative solutions may, up to certain extent, be appropriate in dealing with folklore of the indigenous communities¹³. However, it is questionable whether they will be equally appropriate in addressing the same issues in non-indigenous communities. This is due to the differences which exist between indigenous and non-indigenous communities – for example, the role of folklore within the community, the prominence of interests that ought to be protected, gravity of consequences that unauthorized use of folklore produces and so on.

Third, and as a result of the previous two points, the solutions proposed so far will not address certain issues inherent to non-indigenous communities. For example, how does one determine which community a particular expression of folklore originates from? While in most cases it can be relatively easy to determine that a certain expression originates from a specific indigenous community, due to the fact that indigenous communities have mostly been developing their folklore in isolation from other communities, often

¹² Think for example of the Irish Riverdance; Spanish flamenco music and dances; Argentinian tango; Portuguese fado music; Silk craftsmanship of China; Iranian traditional carpet weaving skills; and so many others.

¹³ For details on some examples of different models working for indigenous communities in practice, please see Chapter 5

there are no clear demarcation lines that divide folklore between neighbouring non-indigenous communities. Indeed, if we look at Europe for example, it could be argued that most non-indigenous communities there have been developing their folklore in mutual integration and correlation with neighbouring communities. In many parts of continental Europe the formation of nations with relatively stable borders was a process that only occurred in the 19th and early 20th centuries, after centuries of continuous change in the geopolitics of the region and ongoing fluctuation and mixing of groups of people, influences, languages and cultures. Naturally, this process may be present in certain indigenous communities as well, however, it is typically much more prominent in non-indigenous ones where both the community-rightholder and the folklore have experienced greater evolution and modifications.

Bearing the aforementioned in mind, the main focus of this study will be to examine the protection of folklore from the perspective of overlooked non-indigenous communities, rather than the indigenous ones. Having said this, it is important to note that I am not trying to underestimate the importance of indigenous folklore nor to criticize the efforts made by the indigenous communities, but only to explore the problem from a slightly different and hitherto overlooked angle – an approach that could ultimately benefit both indigenous, as much as the non-indigenous communities.

1.3 Thesis Structure and Research Questions

For the purpose of exploring the problem of folklore protection from the identified angle, this thesis will begin by presenting two case studies in Chapter 2. It may at first seem somewhat unusual to commence with a case study before establishing the relevant theoretical foundations. The said approach may also seem rather peculiar as on the one hand, it is argued that we need to look for a more global approach to folklore protection, while on the other the problem is being observed through a specific position. Nevertheless, exploring the problem from a different angle has two key advantages. Firstly, it sets a particular framework and directs further research, which should lead to observing the problem from a fresh and novel angle. Secondly, it enables specific questions to be raised, issues that have tended to be overlooked or been given insufficient attention, which should ultimately contribute to more wide-ranging conclusions and solutions.

Chapter 3 lays down the theoretical basis for exploring the problem of folklore protection. Before even starting to consider how a phenomenon should be protected, one must first establish *what*

should be protected, *who* should be the rightholder of such protection and *why* it should be protected at all. Accordingly, Chapter 3 attempts to answer the questions "*What*", "*Who*" and "*Why*" before advancing further towards available methods of protection. It argues that "folklore" or "expressions of folklore" is an adequate term to describe the "*What*" and proposes the use of a definition based on certain constituent characteristics of the subject matter. In relation to "*Who*", it explores the dangers of defining the rightholder too narrowly and suggests that we define it in relation to the subject matter instead of the other way around. Finally, when it comes to "*Why*", Chapter 3 looks at the various reasons for and against protection in order to defend the position that folklore should indeed be protected.

Chapter 4 asks "*How to protect the What*" on a very theoretical level. It examines the different legal regimes that expressions of folklore can be dealt under and for that purpose looks into both intellectual property law and other types of protection, in an attempt to find the most appropriate one for dealing with the subject matter.

Chapter 5 continues the discussion about "*How*" but from a more practical viewpoint. The existing intellectual property categories are examined, as well as some recent WIPO initiatives, and the limitations of their direct application to folklore.

Finally, drawing from previous Chapters, Chapter 6 suggests some possible answers to the "*How*" question.

Summing up the above, this thesis is focused on the issues surrounding the legal protection of folklore. The key research questions that are explored are:

- (i) Based on the case studies, are there any particularities and specific problems that may emerge in relation to non-indigenous folklore that may have implications on the potential system of protection?
- (ii) Is intellectual property law the appropriate legal framework within which the protection of folklore should be sought and further developed?
- (iii) If yes, which key aspects of folklore should we consider protecting through an intellectual property-type of protection?
- (iv) Can we address the unresolved issues related to the protection and suggest a sufficiently flexible theoretical framework for protection of folklore in both indigenous and

non-indigenous communities?

By answering the above questions, this thesis adds to the field of folklore protection. The most original aspect of this thesis and accordingly the distinctive contribution to the field is the adoption of a fresh and novel angle through which the problem of folklore protection will be observed – the viewpoint of the overlooked non-indigenous communities. Through the said novel approach, this research contributes to answering certain yet unrequited issues, aiding in that way to the development of one more globally appropriate system of protection of folklore. In addition, this thesis summarizes and systematises a number of unsettled issues and problems – such as the question of adequate terminology and definitions, the question of adequate framework within which the potential system of protection should be placed – and suggests answers and solutions to these questions. Finally, the thesis proposes potential solutions and further directions worth exploring and pursuing.

1.4 Methodology

Choosing the appropriate methodology presents a vital phase of every research. To a great extent, the selection of methods will be conditioned by the scope of the research itself. The nature and the context of the research, the formulated research questions and aims, as well as the available sources, typically impose the methods that are to be chosen. Having said that, any research that aims to be well founded and thorough usually requires a mixture of various approaches, rather than evolving around a single one. Hence, bearing in mind the nature of the subject matter, as well as the research questions outlined above, this research is grounded on a combination of the doctrinal, theoretical, comparative and interdisciplinary methods. The sources used in the thesis are mainly legal literature on the folklore protection and literature on different folklore aspects from other, non-legal disciplines, as well as legislation, including the existing and draft and model laws.

For the purpose of presenting the two case studies in Chapter 2, a truly interdisciplinary approach is used, as the presented material has been collected using ethnological, anthropological, historical and socio-legal comparative analysis. The mixture of different methods was necessary in order to comprehensively present the examples chosen for the case studies. For that purpose, Chapter 2 contains a short overview of the political history and the creation of certain European states and nations at the early 20th century. Further to that, the Chapter includes ethnological and anthropological

perspectives, which were indispensable bearing in mind the nature of the researched subject matter. Finally, the different methods used in Chapter 2 are completed by a doctrinal method, as the Chapter includes an overview of the legislation in the selected countries in order to determine the scope of protection provided thereunder.

Chapter 3 is concerned with selecting the operable terms and definitions of *What* and *Who* and justifying the need to protect the subject matter. For the purpose of answering these questions, a theoretical method was used. The Chapter provides an analytical overview of expressions of folklore by outlining the existing definitions of folklore and its rightholder, summarizing their characteristic and distinguishing them from other forms of creativity, as well as turns the attention to their importance and the reasons why they ought to be protected. This approach is complemented with a doctrinal and interdisciplinary approach, adding valuable arguments and perspectives from different disciplines, in particular sociology, philosophy and anthropology.

Chapter 4 is focused on the *How* question on a very theoretical level. The Chapter provides a summary of the possible intellectual property and other manners of protection. The different possible systems of protection are explored on an abstract level, without getting into their application to the subject matter. Essentially, various arguments pro and contra any type of protection are summarized. In order to support the provided analysis, the Chapter also employs, for example, a historical approach so as to provide an overview of the development of intellectual property law, and comparative analysis, in order to point out the difference between certain intellectual property concepts.

Chapter 5 continues the discussion about "*How*" from a practical viewpoint and using a black letter law method. The main focus of this Chapter is the overview of the existing legislative models of protection, at the international, regional and national level, as well as draft laws, model laws and *sui generis* laws. The method used in this Chapter is purely doctrinal – stepping down from a theoretical approach used in Chapter 4, Chapter 5 tests how the analysed theoretical models function when applied in practice. This Chapter summarizes the various modes for protection of folklore and the ambiguities produced as a result of such protection. On the basis of the undertaken analysis, Chapter 5 provides a critical overview of the appropriateness and suitability of the existing systems.

Drawing upon the previous Chapters, Chapter 6 proposes certain solutions.

1.5 Limitations

Finally, having outlined what is analysed in this thesis, a couple of sentences are needed to clarify and justify what will not be discussed.

Firstly, when it comes to different fields of law potentially applicable to folklore, a comprehensive overview of all of these was beyond the scope of this thesis. While certain limited analysis of cultural heritage and human right laws was indispensable in order to explore the subject matter in a comprehensive manner, the principal focus of this thesis is intellectual property law and the ways in which intellectual property law can be used to protect folklore.

Moreover, bearing in mind the nature of folklore and its characteristics, as further detailed in Section 3.2, the analysis provided in this thesis is restricted to those areas of intellectual property law that relate to the artistic and cultural nature of folklore. This implies that intellectual property regimes such as copyright, trademark and geographical indications of origin are covered whereas the patent system is not included as it is not directly relevant for the present debate.

Further, given the focus of this thesis and the assumed angle through which the folklore protection problem is researched, certain aspects that could be relevant for indigenous folklore are not included, for example, the indigenous customary laws.

Finally, this thesis attempts, to the extent possible, to avoid the common reflections and arguments, and topics and issues that have been extensively discussed and researched, and thus focuses on those that have, so far, acquired insufficient attention or remain unresolved. Naturally, certain general discussions are unavoidable, for example in Chapter 5, where it is necessary to summarize the well-established limitations of existing intellectual property law categories. However, for most part, this thesis endeavours to provide an original contribution to the field – to tackle new questions, provide innovative perspectives, summarize scattered arguments and propose new solutions.

CHAPTER II: Case Studies

2.1 Introduction

This thesis will examine expressions of folklore from a broad angle, with the aim of placing them within a certain theoretical framework. The Chapters will follow the topic through various notions and definitions and the different existing and potential modes of protection available. This shall mainly be done from a legal perspective, although certain sociological and anthropological considerations will be necessary.

In order to achieve this, the thesis begins with two case studies. At first this may seem somewhat unusual – after all, case studies as a research method typically follow pages of studying, analysis and reasoning, succeeding the theoretical foundations laid down chapters ago. Thus it may appear somewhat unsound to start talking about specifics before providing the foundations, such as choosing the working terminology or defining the basic concepts.

However, as peculiar as this may seem, it is important to recognize and appreciate that the subject matter of this thesis is not a typical one: many of its features are unique and distinctive. Distinctive subject matters often benefit from distinctive treatments – and this, as shall be demonstrated, is the case at hand.

More precisely, by looking at the chosen folklore case studies through the lens of a specific viewpoint – the viewpoint of the non-indigenous communities – certain underlying principles can be found, principles that will further direct and frame this thesis. Working through these case studies will reveal a set of particular circumstances and hence bring to light certain subject-specific and general questions, which will then be addressed in the subsequent chapters.

Before presenting the case studies, I would like to briefly explain the reasons for selecting these two in particular.

First, these case studies were chosen to mirror certain general particularities of folklore. Namely, an element in relation to all expressions of folklore, which in general differentiates folklore from copyright works or other classic intellectual property subject matter, is the element of time. While a poem that attracts copyright, for example, is fixed in the moment it was created, altered and so on, expressions of folklore have at least two additional time dimensions – the constant time evolution of the expression itself and the transformation of the rightholder. Thus, an expression of folklore must be observed on two time scales – one in relation to the rightholder, which may be changing through time, and one in

relation to the expression itself, which will also be changing through time. Such continuous alteration of the rightholder and the subject matter, which by definition will not be fixed in a final tangible form, may impose a number of particular problems in relation to the potential mode of protection.

Second, the examples of Balkan folk music (*Case Study I*) and the folk tales from Germanic tradition (*Case Study II*) are selected in order to reflect the idea that non-indigenous communities have a rich folkloric opus worth considering when one is designing a system for folklore protection. Accordingly, these case studies were selected as they particularly clearly demonstrate how we need to think about non-indigenous communities, as well, when designing a system of protection, given that these communities' folklore may lead to certain problems and questions which may not appear or may not be as prominent in relation to indigenous folklore.

Hence, the case studies of Balkan folk music (*Case Study I*) and the folk tales from Germanic tradition (*Case Study II*) were chosen to highlight some potential differences in relation to indigenous folklore, while at the same time portraying the specific features of folklore, mirrored in its constant evolution and alteration.

Finally, by no means are the chosen case studies intended to be exhaustive¹⁴, but merely to emphasize the idea that a thorough study of folklore protection requires the adoption of a wider angle and consideration also of communities other than indigenous ones.

2.2 Case Study 1: Balkan Music

The region commonly known as the Balkans is a peninsula in the southeast of Europe. The Balkans is sometimes described as the "darker side of Europe"¹⁵ and as such, depending how we symbolically understand the concept of indigenous, might be classified as something between the indigenous and non-indigenous. Perhaps partly for this reason, the folkloric heritage, especially the folk music¹⁶, has often been exploited outside of the Balkans¹⁷.

¹⁴ As already mentioned in Chapter 1, there is a rich folkloric opus existing in non-indigenous communities. Parts of such folklore, like indigenous one, are living, being practiced and evolving, and are also being mis-used and exploited in various manners. The word limit of this thesis does not allow me to elaborate more than two case studies, although one certainly may find a number of other examples.

¹⁵ Todorova, M. N. *Imagining the Balkans*. Updated edition. Vol. 71. New York: Oxford University Press, 2009, pp. 53

¹⁶ This thesis will use the term "folk music" to describe music originating from the folkloric Balkan heritage. It should not be understood to include the newly created music sub-genre of "turbo folk" music. The "turbo folk" music, currently very popular throughout the Balkans, is

Historically, the Balkans was strategically placed as a crossroad between Asia, Africa and Europe, between the East and the West, between the Latin and the Greek parts of the Roman Empire, between Orthodox and Catholic Christianity, between Christianity and Islam. It was a cradle of various different civilizations and cultures over the centuries, such as Thracian, Illyrian, Roman, Celtic, German, Greek and Slavic¹⁸, that all left their marks and influenced the identity and cultures of today's Balkans. The area repeatedly experienced the migration of new people who drove earlier residents into remote enclaves, an effect that created the area's famed "ethnic mosaic" of numerous national groups living in close proximity¹⁹.

The history of the Balkans is a true history of creative borrowing between groups of people belonging to different civilizations and cultures that have inhabited the region. Today encompassing Bulgaria, Croatia, Bosnia and Herzegovina, Serbia, Montenegro, Albania, Macedonia, Greece, Kosovo and European Turkey, the Balkans have absorbed many voices and traditions, different nationals, languages, religions and customs, resulting in a very complex and unique region²⁰.

The presence of various cultures produced rich folkloric heritage of diverse kinds. The Balkans are known for beautiful embroidery works, costumes, jewellery, fresco-paintings, traditional dances but above all, the sounds of the folk music. Ethno-musicological

inspired by the traditional folk music but is newly composed and thus qualifies for protection under copyright.

¹⁷ Balkan music is by no means an isolated example. See for example Wallis, R. and Wright, Z.K. *Best Practice Cases in the Music Industry and their Relevance for Government Policies in Developing Countries*. WIPO-UNCTAD Report, 2001, available online at http://www.wipo.int/export/sites/www/about-ip/en/studies/pdf/study_r_wallis.pdf, at pp 4:

"A characteristic of many developing countries is the combination of poor economic conditions and a rich supply of unique raw materials that can be commercially exploited in the richer nations. In the case of the music industry they are a basin of creativity which has influenced international commercial activities for decades. With new communication technologies, both physical and virtual, allowing for cultures and cultural expressions to interact, it is likely that this creative and commercial potential will grow even stronger".

¹⁸ General on Balkan history: Jelavich, B. *History of the Balkans: Eighteenth and Nineteenth Centuries*. Cambridge: Cambridge University Press, 1983; Clissold, S., ed. *A short history of Yugoslavia: from early times to 1966*. Cambridge: Cambridge University Press, 1966; Mazower, M. *The Balkans: a short history*. New York: Modern Library. 2000; Wachtel, A. B. *The Balkans in World History*. Oxford: Oxford University Press, 2008; Hall, R. C. *The Modern Balkans: A History*. London: Reaktion Books, 2012; Jelavich, C. and Jelavich, B. *The establishment of the Balkan national states: 1804-1920*. A History of East Central Europe., Vol. 8. 4th ed. Washington: University of Washington Press, 2000.

¹⁹ Bahr, L. S., Johnston, B. and Bloomfield, L. A. *Collier's encyclopaedia: with bibliography and index*. Vol. 3. New York: Collier, 1993, pp. 484

²⁰ Wachtel, A. *The Balkans in world history*. Oxford: Oxford University Press, 2008

research shows that because of its position, the Balkans represent a real melting pot of various musical and cultural traditions and heritages that has been brewing for centuries. One may identify a strong influence by the Ottoman Empire and its highly developed classical music, of the Turkish folk music, as well as of the travelling gypsy musicians who travelled from India to the west, picking up many styles on their way. Another important influence is the Secular Byzantine music, with its complex tonal structure and rich tradition. All of these strands of influence were intertwined through the loom of Balkan history to produce a unique musical tradition, often characterised by odd meters (seven, nine, eleven and thirteen beats)²¹.

Over the last few decades, there has been growing interest in ethno and ambiental music. In particular, tunes from different parts of the Balkans became very popular outside of Balkan borders²². As a result, folk music from the Balkans is currently used like a popular treasury from which many have taken, making profit without acknowledging where they take from²³, or even, paradoxically, using it to create a deceitful and demeaning image of the communities that these originate from. While folk tunes from the Balkans are often being copied, fused with other sounds and further sold for high

²¹ Georgievski, N. *Vlatko Stefanovski and Miroslav Tadic featuring Teodosii Spasov: Treta Majka: An Extended Analysis*. Available online at <http://www.allaboutjazz.com/php/article.php?id=15560#.UtVBy9Ia27o>

²² Mirjana Laušević, a professor of ethnomusicology at the Minnesota University, dedicated years to researching fascination with Balkan folklore in the USA, in particular music and dance. In her book *Balkan Fascination: Creating an Alternative Music Culture in America* she describes how she found "a long list of folk dance periodicals, magazines and newsletter from all over North America (*Viltis, The Folk Dancer, Traditions, Ontario Folk Dancer, Folk Dance in Baton Rouge, Balkan Tunes and Kef Times*), dance and music instruction manuals, songbook, class syllabi, record covers and liner notes, posters, fliers, photographs, several unpublished papers and masters' thesis, all done by insiders and the web pages of various Balkan folk dance and music groups". See Laušević, M. *Balkan Fascination: Creating an Alternative Music Culture in America*. New York: Oxford University Press, 2007, pp. 9.

²³ Some examples were already mentioned in Chapter 1, but there are countless other. To mention just some – these include Balkan music used in ambiental and ethno music CDs (Marcel Stefanet, Deep Forest, and others), bands and DJ's playing or fusing Balkan sounds with other genres (Sultán Balkanero, Basement Jaxx, Beirut, Gogol Bordello, Los Magnificos Impostores, The Red Nose Army, Nabuzenko, Noir Manouche, Garland Kabarét, Tribal Fusion, Inspector Gadje, Slavic Soul Party!, Sam and the Womp, and many others), domestic artists exploiting Balkan music (Emir Kusturica, Goran Bregović and others) and so on. An interesting example of Balkan music serving as the matrix for creation of a new genre is the BalkanBeats. This genre first appeared in the Berlin underground scene in the mid-1990s. It incorporates traditional Balkan music mixed with modern, electronic beats. The term was coined by Berlin DJ Robert Soko, whose BalkanBeats monthly parties still continue nowadays. It then spread to the European and world scene, to become an established genre nowadays.

profits²⁴ by both foreign and domestic artists without acknowledging the origin of the copied songs, the legal status of expressions of folklore in the Balkans remains unsettled. The protection varies significantly from country to country. In some, they are not protected under intellectual property laws though certain limited protection exists under cultural heritage laws, while in others certain elements of folklore may be protected under intellectual property laws.

My first motivation for choosing this region for a case study was the popularity of Balkan music and the extent and frequency of its utilization²⁵, which does not seem to raise many concerns within or outside of the Balkans²⁶. My second incentive was the somewhat unique and interesting circumstances related to the Balkan region. Despite the divergence of nations and cultures inhabiting it, coined as a "puzzle of confusing complexity"²⁷, the Balkans share the same cultural framework and the different cultures that inhabit it are mutually folded to the point where it is often impossible to unknot one from another. Therefore, the evolution and change of the potential rightholder of folklore on a timescale is particularly evident in the Balkan example. Precisely because of such an excessive cultural interchange, constant variation and the cross border nature of its folklore, the Balkans are an exceptionally illustrative example for a case study, as the following pages will show.

Section 2.2.1 commences with providing some brief historical and anthropological background on the specifics of the Balkan region, necessary for informing the further debate on Balkan folklore. Following, Section 2.2.2 examines the particularities of the Balkan folk music, from a mainly ethnological perspective. Thereafter, Section 2.2.3 reviews the current status of folk music in the Balkans

²⁴ In a chapter on Irish traditional music, Seán Ó Nualláin recorded the ways in which a group of Irish and Irish-American musicians sold a celtic-balkan fusion, becoming "millionaires by the exploitation of Balkan music" – see Ó Nualláin, S. *On Tonality in Irish traditional Music*. In: Mc Kevitt, P., Ó Nualláin S., and Mulvihill C., ed. *Language, Vision, and Music: Selected Papers from the 8th International Workshop on the Cognitive Science of Natural Language Processing, Galway, Ireland, 1999*. Vol. 35. Amsterdam: John Benjamins Publishing, 2002, pp. 304

²⁵ While the size of the Balkan scene is difficult to estimate as it varies greatly depending on how such scene is defined, Yves Morreau, for example, a popular teacher of Balkan dance in USA, estimates that in 1990 well over 100,000 people participated in Balkan music and dance in the United States alone – see in Laušević, M. (2007), note supra 22, pp. 19

²⁶ See for example Jim Samson who says: "South East Europe resides in the margins of music histories, a footnote at best. Most music lovers know little of the art music from this region. Although it is a part of Europe's cultural heritage, it has been all but written out of the European story" – in Samson, J. *Music in the Balkans*. Brill, 2013, pp. 1

²⁷ Jelavich, B. (1983), note supra 18, pp. ix (Preface)

from a normative point of view. Finally, Section 2.2.4 caps the specific problems arising from the presented case study.

2.2.1 *Understanding the Balkans – A Historical and Anthropological Overview*

This Section will provide an overview of specifics of the Balkans. The presented thoughts on the formation of Balkan states and Balkan identities presented in this Section 2.2.1 will be necessary for placing the problems related to Balkan folklore into context, as it will be shown in Section 2.2.2.

What are the Balkans? The term itself, said to be deriving from Persian through Turkish, originally referred to mountain, thus presumably illustrating the area's mountainous terrain²⁸. The peninsula is dominated by its geographical position – historically this area is often described as a crossroad of various groups of people, their cultures and influences, as Greeks, Illyrians, Paeonians, Thracians, Dacians and other ancient groups dominated the area through antiquity, while big Empires – the Roman, the Byzantine, the Ottoman and the Austro-Hungarian one – consequently conquered the region and spread their culture in the following centuries.

Centuries of flow have left the region one of the most diverse in the world, with distinct ethnic, linguistic and religious groups living intermingled. Today, Albanians speak a distinctive Indo-European language and may be the ancestors of the ancient Illyrians. Romanians themselves argue descent from the Dacians. Greeks claim the heritage of the Hellenes of classical antiquity. Slavs arrived in the 6th century and began assimilating older inhabitants, although it was not before middle age that these tribes evolved into distinct groups – Slovenian, Croatian, Serbian, Montenegrin, Macedonian and arguably Bulgarian. This diversity of ethnics and cultures in the Balkans is also reflected in the variety of religions, and the Balkans is commonly described as a point of intersection between the world's major monotheistic religions – Roman Catholic, Eastern Orthodox, Muslim and Jewish. The line dividing the different religions depicts the dominant influences in the history of the Balkans. Slovenia

²⁸ Nation, C. R. *War in the Balkans, 1991-2002*. Carlisle, PA: Strategic Studies Institute, 2003, pp. 2

and Croatia are predominantly Catholic, under the influence of the Roman Empire, Serbia, Montenegro, Macedonia, Greece, Romania and Bulgaria Orthodox, under the influence of the Byzantine Empire. Albanians and today's Slavic Muslim communities are the product of the conversion which occurred during the Ottoman Empire²⁹.

Over the centuries, the region has experienced constant turbulences and fluctuations in all aspects – people inhabiting it, cultures influencing it, border lines dividing the great powers dominating it. The emergence of nation states in the 19th and early 20th centuries found the Balkans largely fragmented, with individual states slowly emerging from what was once a chaotic mixture of people, as they slowly gained independence either from the Ottoman Empire or the Austro-Hungarian Empire³⁰. The creation of nation states was further followed by the two Balkan Wars³¹, finally leaving the region with fairly stable inter-state borders at the beginning of 20th century³².

This fragmented and intermittent nation building process in the Balkans had its reflections on the creation of the Balkan identities, which up to date remain unstable, changing, yet, at the same time overlapping and symbiotic. What may appear as a single Balkan identity for an outside observer, as this will be described into more detail in the following pages, is in fact a diversity of blurry, intersecting identities of today's Balkan nations.

The concept of national identity, constructed at the end of the 18th and the beginning of the 19th centuries as "a revolutionary project", had an aim of establishing "people" from "nation"³³. The contemporary theoretical thought

²⁹ *ibid*, at pp. 4

³⁰ See for example Chawla, S. *Nationalism*. Available online at <http://www.moliis.org/jani/nationalism.pdf>

³¹ The First Balkan War (1912–1913) broke out when the Bulgaria, Serbia, Greece and Montenegro united in an alliance against the Ottoman Empire. As a result of the War, Ottoman Empire lost almost all remaining European territories. The Second Balkan War (1913) was a war between the former allies (Bulgaria, Serbia and Greece) dissatisfied with its share of the spoils of the First Balkan War.

³² Koulouri, C. and V. Kolev, eds. *Teaching Modern Southeast European History: Balkan Wars*. Centre for Democracy and Reconciliation in Southeast Europe, 2005. Vol. 3, pp. 13

³³ Marković, T. *Idiosyncrasies of the grand narratives on Serbian national identity*. Academia.edu, 2007, at pp. 1. Available online at http://www.academia.edu/2764576/Idiosyncrasies_of_the_Grand_Narratives_on_Serbian_National_Identity

about national identity often assumes differences between the so-called Western³⁴ and Eastern³⁵ understanding and embodiments of national identity³⁶. For example, Anthony Smith points out that the Western model of national identity explains nation by a specific territory, a political community of equal members and a common bourgeois culture and ideology. On the contrary, the Eastern or ethnic model of national identity is based on a community that is identified by language, narratives and the customs³⁷.

Consequently, early nationalisms in the Balkans were based on ethnographic research or on the image of folk culture, which was done, for example, by the ethnographers and language reformers. The importance of folk culture did not end there – it is often said that it was the shared folklore heritage and identity that was invoked in encouraging the nationalistic claims embedded in the unstable Balkans, perhaps most obviously revealed in the example of the breakup of Yugoslavia³⁸.

From an anthropological perspective, Maria Todorova in her books "*Imagining the Balkans*"³⁹ and "*Balkan Identities*"⁴⁰ recorded the mechanisms through which the Balkans – Europe's internal 'other' – served as a negative sheath for the establishment and consolidation of a collective identity

³⁴ "The current concept of the nation-state developed in Western Europe. Owing to the existence of centralized monarchies in that region, the idea of the nation was based on the existence of the state. We can say that the state came first and then the nation: all citizens living under the sovereignty of the same monarch became its "nation". It was of course normal that this nation was based on the dominant linguistic group which later assimilated the others. France is a good example of this process, but a similar situation occurred in England and the Nordic countries, too. Thus, the word "nation" in this part of Europe simply means "the citizens of the same state" and "nationality" means "state citizenship". – in Marushiakova, E., Heuss, H., Boev, I., Rychlik, J., Ragaru, N., Zemon, R., Popov, V. and Friedman V. *Identity Formation among Minorities in the Balkans: The cases of Roms, Egyptians and Ashkali in Kosovo*. Minority Studies Society Studii Romani, 2001, pp. 5. Available online at <http://home.uchicago.edu/~vfriedm/Articles/Edit008Friedman01.pdf>

³⁵ "This concept of the nation does not exist in Central and Eastern Europe. "Nation" here is not connected with the state and "nationality". It does not mean state citizenship. It is a cultural category connected mostly with language or another aspect of human spiritual life such as religion" – *ibid*

³⁶ Marković, T. (2007), note supra 33, at pp 1

³⁷ See Smith, A. D. *National identity*. In Marković, T. (2007), note supra 33, at pp 1. On this topic, see also Anderson, B. *Imagined Communities: Reflections on the Origin and Spread of Nationalism*. Updated ed. London: Verso, 2006

³⁸ Marković, T. (2007), note supra 33

³⁹ Todorova, M. (2009), note supra 15

⁴⁰ Todorova, M. ed. *Balkan identities: Nation and memory*. London: C. Hurst & Co Publishers, 2004

of European authority, coherence and civilization⁴¹. According to Todorova, Balkanism, depicting something primitive, backward and tribal, dominated western perceptions of the region from the early twentieth century until the beginning of World War II and then again from the demise of the Soviet Union onward when the Balkans again reappeared as the "other" of the newly forming Central Europe⁴². The Balkans, in contrast, emerged as "at once unified and jumbled a whole that was marked by confusion, fragmentation and a lack of coordination"⁴³. In defining the Balkans and its identity, Todorova suggests dropping the criteria of space and borders⁴⁴ but applying the "notion of historical legacy"⁴⁵. While there are different standards for identification and these are not fixed nor constant⁴⁶, among other criteria, it is the folklore of the Balkan peoples that is often stressed as a key factor in the formation, preservation and re-shaping of national identity⁴⁷, along with the epics, myths, narratives and prophecies of folk origin⁴⁸. Accordingly, identities are constructed through "shared meanings of nationhood"⁴⁹, narratives of the nation, which

⁴¹ Todorova, M. (2009), note supra 15, pp. 53

⁴² Slugan, M. *Some methodological concerns regarding the study of Balkanism in cinema*. Lucian.Uchicago.Edu. at pp. 1, available online at http://lucian.uchicago.edu/blogs/theslavicforum/files/2011/12/SLAVICFORUM_2011_SLUGAN_PUBLICATION.pdf

⁴³ Fleming, K. E. on Todorova in the Bulletin of the Royal Institute for Inter-faith Studies, at pp. 1, available online at http://www.cdsee.org/pdf/balkan_identities_bulletin.pdf

⁴⁴ Todorova's views are supported by many other scholars who have contributed to the idea further, such as Milica Bakić-Hayden, Robert Shannan Peckham, Ivan Čolović, Dunja Rihtman-Augustin, Costa Carras, Diana Mishkova, Alexander Kiossev, Stephaine Schwandner-Sievers, Dubravka Stojanović etc.

⁴⁵ Todorova, M. (2004), note supra 40, pp. 11

⁴⁶ "Society and culture in the Balkans create a lot of opportunities for identification. At the same time, society tries in various ways to force the individual or a group to assume a certain "stable" identity, a rigid structure, a fixed and stable totality. In the dynamic flux of identity (stable rigid and national) and identification we are faced with, a lot of overlapping cognitive maps and a multitude of possible or actual identities with competing cognitive strategies". – see Antic, M. *The Balkans and The Other Heading: Identity and Identification on the Margins of Europe*. *spacesofidentity.net*, Vol. 6. No. 2, 2006, pp. 159, available online at http://www.academia.edu/200923/The_Balkans_and_The_Other_Heading_Identity_and_Identifications_on_the_Margins_of_Europe

⁴⁷ "One medium for the preservation of national identity had been folklore and folk song. It was these, and especially the epic narrative poetry [of Serbia], that had kept alive the memory of Dušan, Skanderbeg, and others..." – see the article on Creation of Balkan Identities in the Encyclopaedia Britannica at <http://www.britannica.com/EBchecked/topic/50325/Balkans/43540/Creating-national-identities>

⁴⁸ Marković, T. (2007), note supra 33, pp. 1

⁴⁹ Bhabha, H. K. *Nation and narrative*. London and New York: Routledge, 1990 in: Barker,

include stories, music, images, symbols and rituals. These narratives serve "not to add information in the quantitative sense, but to enhance the ego" and ultimately result in the establishment of national identity through self-representation and auto-communication⁵⁰.

Summing up the above, it follows that what appears to be a single entity and a single identity for an outside observer, is in fact an entire mixture of different, yet touching cultures and identities, and these identities do not correspond to the existing borders. Within the Balkans, there is no single Balkan identity. This was neatly summarized by Jim Samson in his study on Balkan music: "As to geographical boundaries, it is best not to be too specific. If we treat "the Balkans" as a metaphor, we will leave the question of boundaries entirely open. If on the other hand we try to mark out the peninsula with precision, we will cut across recognisable culture areas"⁵¹.

2.2.2 Following the Trails of a Tune – Whose Song Is It?

In 1973, a Bulgarian ethnographer Raina Katsarova published an exhaustive article documenting the unusual circulation of a Turkish song "*Oskiidara gider iken*" [*On the way to Uskudar*] through different Balkan localities during the late nineteenth and early twentieth centuries⁵². In each of these places where Katsarova found the tune appearing, the local musicians adapted the song to suit local aesthetic feelings, always replacing the original Turkish version with new lyrics. Katsarova explored the origins of the song, but found it impossible to reveal where the song first emerged and what the route was under which it was disseminated throughout the Balkans. Following its trails, she found it an irresolvable mystery to track down the course in which the cultural exchange between the Balkan communities circulated and altered the song around the peninsula. Regarding the Serbian and Bulgarian version of the song

C. *Cultural studies: Theory and practice*. 4th ed. London: Sage, 2012, pp. 260

⁵⁰ Broms, H. and Henrik G. Communication to self in organizations and cultures. *Administrative Science Quarterly*, 1983, Vol 28(3), 482-495

⁵¹ Samson, J. (2013), note supra 26, pp. 2

⁵² I did not manage to find the original article published by Katsarova – the article is, nevertheless, replicated in detail in Buchanan, D. "Oh, Those Turks!" Music, Politics and Interculturality in the Balkans and Beyond. In Buchanan, D. ed., *Balkan popular culture and the Ottoman Ecumene: music, image, and regional political discourse*. Lanham Toronto Plymouth: Scarecrow Press, 2007

[*"Ruse kose"*], she observed: *"Where did it come from? Who took it from whom? Did we take it from the Serbs or did they from us? An exchange of songs has existed between the two countries for ages, one made easier in the past by the free mingling resulting from the absence of borders – the interchange"*. It has been suggested that if the genealogy of cultural forms is about their circulation across regions, the history of these forms is about their enduring domestication into local practice⁵³. Therefore, as the song was spread throughout the Balkans and further on, it was adopted by local performance, becoming every nations "own" song.

Perhaps building upon Katsarova's research further, a Bulgarian director and filmmaker Adela Peeva's filmed a documentary named *"Whose is this song?"*⁵⁴ She explains: *"I was in a small restaurant in Istanbul where I was having a dinner with a group of friends of different nationalities – one Greek, one Macedonian, a Turk, a Serb and me – Bulgarian. That's when I heard the song. I've known it ever since I was a little girl as a Bulgarian folk song. As soon as we heard it, each and one of us started singing, each in their own language naturally. Each of us claimed that the song originated precisely from his country. At one point, we found ourselves in a bitter debate – whose song is this?!"*⁵⁵ Searching for the origins of the song, in her documentary Peeva embarks on journey throughout the Balkans, exploring the origins of the song. Her search rediscovers the song again and again, as she finds seven equal versions of the same tune sang in seven different Balkan countries in different languages, styles and with completely different lyrics – as a romantic poem, a religious hymn, or even as a military march. Shifting her interest from a purely ethno-musicological angle to a more sociological and political perspective, Peeva goes exploring the sociological role that the *"Uskudar"* song has in the concerned communities and its role in reconfirming the persistent nationalism⁵⁶. In the

⁵³ Appadurai, A. *Modernity at large: cultural dimensions of globalization*. Univeristy of Minnesota Press, 1996. Vol. 1

⁵⁴ *Whose is This Song*. Adela Peeva. Europe: Adela Media, 2003

⁵⁵ Peeva's narration at the beginning of the documentary

⁵⁶ Part of an interview from the documentary: "Where is the origin of the song among our people known as *"Ruse kose curo imaš, žališ li gi ti?"* Is it Turkish? Oh, come on, the Turks must have taken it from us! Greek? No way! Maybe Serbian? Nonsense, Serbs could never

course of her interviews with local people, Peeva discovers how the song is a testament to the cultural ties binding the region's warring ethnicities, as in each country the people claimed and believed that the song originated precisely from their culture and that "none of the others" could have created such art⁵⁷. Peeva finds that while all nations call the song their own, within certain communities these claims embed virulent ethno nationalist sentiments, supporting the dominant Balkan national myth "we were here first"⁵⁸. Thus Peeva says that she created the film to illustrate intercultural commonalities and to enable audiences to see the ridiculousness of nationalistic claims. She concludes on a serious and somewhat balkanizing note, for she presents the region as stalled in ethno nationalist views that helped inspire the wars in the former Yugoslavia during the 1990s⁵⁹.

Taking Katsarova's and Peeva's findings further, in her book *"Balkan Popular Culture and the Ottoman Ecumene Music: Image, and Regional Political Discourse"*, Donna Buchanan further follows the trails of the Turkish *Uskudar* song through the different Balkan localities, although from a predominantly ethno-musicological perspective⁶⁰. Buchanan commences her analysis with an observation that it has not been previously considered *why* this particular song gained such popularity with diverse audiences, what the stylistic changes made upon it by various communities might signify, or the larger implications of its circulation for local, regional, national or transnational senses of identity. Through a comparative analysis of numerous recordings, transcriptions and film clips, Buchanan re-examines and extends Katsarova's investigation to explore these and other questions. Her findings demonstrate two broad hypotheses. First, most of the renditions have resulted from

create such a song..."

⁵⁷ Peeva's narration in the documentary

⁵⁸ A phenomenon extensively discussed in various historical, sociological and political works – for example, Craig Nation notes: "Accounts of national origin are controversial in the Balkans because they are often used to justify territorial claims. Several Balkan peoples claim descent from the region's earliest known inhabitants, though the assertions are sometimes disputed of scientific grounds or by rival nationalities seeking to prove that "we were here first" – Nation, C. R. (2003), note supra 28, pp. 4

⁵⁹ Buchanan, D. (2007), note supra 52, pp. 46

⁶⁰ In Macedonia, Bulgaria, Bosnia, and Serbia, the *Üsküdar* song spread as a song with romantic texts, most related to each other but unconnected to the Turkish original.

intercultural contact. Second, in contrast to the diversity of Balkan people, the popularization of a single song in so many venues reveals trails of Balkan interchange well-established prior to those of contemporary global media. These conclusions that Buchanan draws are very significant. Her research clearly shows that the main characteristic of Balkan folklore, and particularly music, is the cross border circuits, cultural interplay and interchange of elements of folklore, the movement of populations and cultural influences within the Balkans, all of which are common to the region itself and cannot be reduced down to a nationality, geographical space or border.

At the same time, while it seems impossibly complicated to trace back the roots of this song, it seems equally complicated to follow the various streams in which it has been and continues to be further distributed and spread around the world. For example, Buchanan finds numerous versions and recordings of the song performed in, for example, Australia⁶¹, Arab Middle East⁶² and United States⁶³.

What makes the quest for the origins of this particular tune even more interesting is that at least one Turkish scholar, Ekrem Kochu, believes that the melody originated as a soldier's march popularized by a Scottish military regiment stationed in the so-called Uskudar Barracks during the Crimean War (1853-56)⁶⁴.

The example of the "*Uskudar*" song is certainly not an isolated one⁶⁵, although it seems particularly demonstrative for the purpose of the present research. So, whose song is that really? Who can tell?

⁶¹ Buchanan finds the song played by an Islamic singer accompanied by Australian orchestra, using a thirteenth century Arabic devotional text.

⁶² Buchanan records that an ethnomusicologist Ali Jihad Racy says that he learned the tune in his native Lebanon and believes that the tune travelled to the Arab countries with the Ottomans.

⁶³ Buchanan records that in 1957, the Egyptian immigrant composer and vocalist Muhammad-al-Bakkar recorded a well-known version of *Yia banat Iskandaria* with his "Oriental Ensemble", which further popularized the tune among Arab, Turkish, Armenian and Greek communities in the United States.

⁶⁴ Buchanan, D. (2007), note supra 52, pp. 46

⁶⁵ The examples of tunes appearing in more than one Balkan community are numerous and one could go writing pages and pages about them. Nearly every popular folk song could be found in at least the bordering communities – naturally, it is equally claimed to belong to each of the communities where it appears.

2.2.3 Normative Overview of Balkan Folklore

Finally, stepping away from a factual, historical and ethno-musicological overview of the Balkans, it is necessary to briefly recap the normative status of folklore in general, and accordingly folk music, in the different Balkan countries. Namely, what, from a legal perspective at least, significantly complicates any prospect of folklore protection in the Balkans is the uncorrelated legal status of folklore in different Balkan countries. The examination of the existing legislation on the protection of folk music in the Balkans shows enormous variety, both from a normative and practical aspect.

Some countries, such as Bulgaria, expressly exclude expressions of folklore from the scope of their copyright laws. According to the Bulgarian Copyright and Neighbouring Rights Act⁶⁶, expressions of folklore are not considered to be copyrightable subject matter. The Bulgarian legislators held the viewpoint that copyright legislation is utterly unable to protect expressions of folklore because they are impersonal as they have no author, and because they are termless as they have no definite reference point for their material existence⁶⁷. Thus, Art 4 (3) of the Bulgarian Copyright and Neighbouring Rights Act establishes as a general principle that "works of folklore shall not be considered subject matter of copyright".

Others, like Serbia, do not specifically exclude folklore from the list of copyrightable subject matter but do not grant any direct protection either, thus essentially producing the same outcome. The Serbian Copyright and Neighbouring Rights Act⁶⁸, contains only one provision directly referring to expressions of folklore. Art 2 (2) (3) provides that, among others, works that originate/derive from folklore will be regarded as copyright works. Notwithstanding certain imprecision and vagueness in the formulation of the Art 2 (2) (3), the intention of the legislator in fact was to grant copyright protection only to adaptations and arrangements

⁶⁶ 1993, as amended from time to time, available online at http://www.wipo.int/wipolex/en/text.jsp?file_id=280106

⁶⁷ See WIPO International Conference on Intellectual Property, The Internet, Electronic Commerce and Traditional Knowledge, Sofia, 29-30 May 2001, doc WIPO/ECTK/SOF/01/3.7

⁶⁸ 2009, as amended from time to time, available online at http://www.wipo.int/wipolex/en/text.jsp?file_id=255383

of the expressions of folklore. Recognising that expressions of folklore hold specific characteristics that distinguish them from classical copyright works, the Act establishes only an indirect mode of their protection.

Finally, some countries, for instance Croatia and Macedonia, provide for what could be characterised as a *sui generis* type of protection for folklore within the frames of their copyright laws, regulating different aspects – moral or economic – of the exploitation of folklore.

The Croatian Copyright and Related Rights Act⁶⁹, Art 8 (3), provides that the "traditional literary and artistic creations" in their primary, raw form cannot be the subject matter of copyright. However, compensation must be paid for the public communication of these creations and this compensation is equal to the one that is being paid for the communication to the public of the protected copyright works. This compensation presents state revenue and is being used for the development of the creativity in the relevant areas. The types of commercial uses which are subject to compensation are borrowed from the copyright law and cover all forms of communication to the public. The legislative solution adopted in Croatia seems to reveal some evident influence from the WIPO *sui generis* legislation as it incorporates the *Domaine Public Payant* system.

Macedonian legislators seem to have taken the most comprehensive approach to folklore protection. Firstly, Macedonian Constitution⁷⁰ guarantees the protection of genetic resources and folklore, as Art 56 provides that "all the natural resources of the Republic of Macedonia, the flora and fauna, amenities in common use, as well as the objects and buildings of particular cultural and historical value determined by law, are amenities of common interest for the Republic and enjoy particular protection. The Republic guarantees the protection, promotion and enhancement of the *historical and artistic heritage* of the Macedonian people and of the nationalities and the treasures of which it is composed regardless of their legal status. ". Further, Art 53

⁶⁹ 2003, as amended from time to time

⁷⁰ 1991, as amended from time to time, available online at http://www.wipo.int/wipolex/en/text.jsp?file_id=239363

of the Macedonian Copyright Act⁷¹ establishes as a general rule "that works of folk creativity" [*дело од народното творештво*] are used freely. Accordingly, the use of folk music will in principle be unrestricted and free. This regime will apply to all kinds of uses of folk music – reproduction, distribution, publication, renting, public performances, public transmission, public presentation, public exposure, broadcasting and adaptation. However, the same Article further provides an important limitation to this rule. Namely, a work of folk creativity can indeed be used freely, but it is mandatory to acknowledge the source and the origin of that work, and to use it in a manner that is not distorting or indecent. Art 53 further authorises the Folklore Institute "Marko Cepenkov" Skopje to ensure that these rights are being implemented. If the works are being used contrary to the requirements laid down in Art 53, the Act provides for penalties and protection measures – fines, prohibition of activities for a period between three months and one year and the requisition of the copies of created works (Art 183). In addition, the Macedonia Criminal Code⁷² in Art 264-267 regulates and sanctions crimes against cultural monuments, archive materials and natural rarities. Finally, Art 68 (2) of the Macedonian Customs Act⁷³, regulates protection of traditional knowledge and folklore related to cultural heritage with artistic, historic, archaeological, ethnological value, or technical values.

Despite this variety, it seems all the countries have few things in common. Analysis of the factual situation seem to suggest that the importance of the phenomenon of folklore and the need to provide a suitable frame for its protection are issues that have not yet been recognised widely in the Balkans. Accordingly, insufficient attention is being paid to the problem of establishing adequate protection of folklore, which results in very scanty and incomplete legislation. This can be attributed to the adverse economic and social circumstances in the Balkans and a variety of political, financial, industrial and other problems that are inevitably

⁷¹ 2010, as amended from time to time, available online at http://www.wipo.int/wipolex/en/text.jsp?file_id=263877

⁷² 1996, as amended from time to time, available online at http://www.wipo.int/wipolex/en/text.jsp?file_id=241273

⁷³ 2005, as amended from time to time, available online at http://www.wipo.int/wipolex/en/text.jsp?file_id=244942

the focus of political attention.

Furthermore, most of the countries provide only an indirect type of protection, through neighbouring rights and laws on cultural heritage. Those countries that nevertheless directly regulate the uses of folk music, such as Macedonia and Croatia, do that only partially and incompletely. None of the countries chose to enact a separate law or at least a set of provisions that would deal specifically with the protection of the expressions of folklore, probably due to the abovementioned low appreciation of the need to protect folklore. Instead, the countries provide limited protection through a combination of copyright laws and laws on cultural heritage. The factual effectiveness of the existing legal protection of folklore is thus questionable as the systems establish only partial protection.

2.2.4 Some Practical Consequences

The incomplete legislation in the Balkans, the absence of comprehensive, public databases of folk music and above all, the uncorrelated provisions on the protection of folk music in different Balkan countries, have some dangerous consequences. A recent example demonstrates this particularly colourfully.

Tyler Bates, the composer of the music for the film "300", used elements of the traditional song "*Zajdi, zajdi*" in one of the leading musical themes for the movie soundtrack – the song "*Message for the Queen*"⁷⁴. The resemblance between the two songs is obvious and it could be argued that Bates copied the folk tune⁷⁵.

Now, motifs from "*Zajdi, zajdi*" are very frequent in folk songs and oral poems across Macedonia⁷⁶, Bulgaria⁷⁷ and to

⁷⁴ You may listen to the "Message for the Queen" here: <http://www.youtube.com/watch?v=p-Uxqt1Hai4>. You may listen to the folk version of "Zajdi, zajdi" by Aleksandar Sarievski here: <http://www.youtube.com/watch?v=jqMWYahVEc8>, one of the numerous vocal interpretations (by Nina Spirova) here: <http://www.youtube.com/watch?v=mbo8JqMjSGI>, a rock cover here: <http://www.youtube.com/watch?v=LMu3NxCa4uw> or a jazz cover here: <http://www.youtube.com/watch?v=r30nVLIAG0>

⁷⁵ Apparently, that was not the only thing that Bates may have copied. Warner Bros Pictures acknowledged in an official statement at the "300" website that "a number of the music cues for the score of "300" were, without our knowledge or participation, derived from music composed by Academy Award winning composer Elliot Goldenthal for the motion picture "Titus." Warner Bros. Pictures has great respect for Elliot, our longtime collaborator, and is pleased to have amicably resolved this matter". – see at <http://www.warnerbros.co.uk/300/>

⁷⁶ See for example Пенушлиски, К. Македонски народни балади. Македонска Кн., 1983

some extent Serbia⁷⁸. The song is categorically claimed by both Macedonia and Bulgaria.

In Macedonia, this song has a status of copyrighted work and is considered to have been written and composed by Aleksandar Sarievski, a famous Macedonian performer of folk songs. Though Sarievski composed the melody in the style of newly composed folk, he did acknowledge that the lyrics of "*Zajdi, zajdi*" were adapted from another source, saying: "*the song "Zajdi, zajdi, jasno sonce" emerged from the folk poem "Černej, goro, černej, sestro". In listening to that poem and occasionally singing it, I came up with the idea to make something similar in terms of content, but with a completely different melody. So, I gradually began to sing the song, which would soon after become very popular everywhere I sung it. That song means a lot to me because it was received well by many individuals interested in folk music, but above all it means a lot to me because it was accepted by the people. Every time I'd go somewhere I think everyone present expected me to sing it*"⁷⁹.

At the time, the absence of any databases of traditional music could have allowed artists in Macedonia to register traditional songs as their own creations. Knowing that, it may be questioned whether "*Zajdi, zajdi*" is indeed a creation of Sarievski or whether he heard this tune being sung in his homeland, later adapting it, recording it and registering it. In any case, at the moment this song has the status of a copyright protected work in Macedonia.

However, in Bulgaria, the same song is considered a folk song. The text of the song is somewhat comparable to the lyrics from Luyben Karavelov's collection of folk songs and poems published in 1878⁸⁰: "*Слънце ярко, слънце светло, зайди, помрачи са; а ти, ясна месечинко, бягай, удави са!*" Accordingly, a Bulgarian folklorist Nikolay Kaufman claims that the song is a Bulgarian folk song

⁷⁷ See for example Sbornik za narodni umotvoreniia. Bŭlgarska akademiia na naukite, Volume 50, 1963, pp. 145; Беновска-Събкова, М. *Българска народна поезия и проза в седем тома*. Т. V. Любвни песни. Варна: LiterNet, 2005

⁷⁸ See for example Vlahović, P. *Narodne pesme i igre u okolini Bujanovca*. Etnografski institut Srpske akademije nauka i umetnosti, 1980, pp. 188

⁷⁹ Тодевски, К. *Од Галичник до легенда*. Скопје: Дирекција за култура и уметност, 2003

⁸⁰ Моллов, Т. *Нова песнопойка. Народни песни и стихотворения. Съст. Любен Каравелов*. Варна: LiterNet, 2006

recurrent in Lyuben Karavelov's collection⁸¹. In the same interview, another prominent Bulgarian folklorist, Georgi Kraev, states that the song belongs to a tradition of Balkan tavern songs.

Without getting into the ongoing impassioned debate on whether the song is Macedonian or Bulgarian, since this Gordian knot can hardly be unravelled here, it is sufficient to know for the purpose of this thesis that "*Zajdi, zajdi*" is being performed in both Macedonia and Bulgaria and is perhaps one of the most well-known songs throughout the Balkans. The song's melody and vocals are highly ornamented and technically challenging, thus artists from the former Yugoslavia routinely perform the song live "to prove they can really sing"⁸². The lyrics are just as equally beautiful and emotional – they tell about one's grief of youth that has passed⁸³.

Within the Balkans, the song acquired astonishing popularity. It has been included in numerous anthologies and has been covered by many singers from different Balkan countries, including Toše Proeski⁸⁴, Haris Džinović⁸⁵, Karolina Gočeva⁸⁶, Gloria⁸⁷, Vasilisa⁸⁸, rock bands (Smak⁸⁹, Rosi Pandova⁹⁰), Mizar⁹¹ and many others⁹². Today within the Balkans, save for the ongoing dispute with Bulgaria as to whose is it, this famous song is often identified with Macedonia, especially in ex-Yugoslavian countries.

After the movie "300" was released, the successors of late

⁸¹ Interview on "Whom does "Zaydi, Zaydi, Yasno Slance" belong to published in the "Politika" newspaper", see online at <http://politika.bg/article?id=6366>

⁸² Silverman, C. *Romani Routes: Cultural Politics and Balkan Music in Diaspora*. New York: Oxford University Press, 2012, pp. 319

⁸³ Although very difficult to translate into English accurately, the song roughly reads: "*Set, set you bright sun / Set blackout / And you clear moonlight too / Run away, drown. Grief forest, grief sister / Let's be sad together / You – for your leaves, forest / Me – for my youth. Your leaves, forest, my sister / Will return to you / My youth, forest, my sister / Is never coming back.*"

⁸⁴ <http://www.youtube.com/watch?v=LKRaxPYSzKY>

⁸⁵ <http://www.youtube.com/watch?v=fB6YQ4FeEc>

⁸⁶ <http://www.youtube.com/watch?v=j-YINndWT6g>

⁸⁷ <http://www.youtube.com/watch?v=PLNfWMMT4m4>

⁸⁸ <http://www.youtube.com/watch?v=BGGrpCXs6fic>

⁸⁹ <http://www.youtube.com/watch?v=LMu3NxCa4uw>

⁹⁰ <http://www.youtube.com/watch?v=Q5wZFraL6Hw>

⁹¹ <http://www.youtube.com/watch?v=k3ax5SI1wiA>

⁹² Different interpretations of the Macedonian version can be heard here: <http://pesna.org/song.php?id=452>

Sarievski announced that they would file a suit against Tyler Bates⁹³. As reported by the local newspaper, the Macedonian Copyright Agency supposedly conducted an expertise of the song "Message for the Queen" and determined that there are elements of copyright infringement. However, given that the song is also performed in Bulgaria, in a recount Bates claimed that he used motives from the Bulgarian folk song, not the Macedonian one⁹⁴. Perhaps knowing that Bulgarian legislation does not contain any provisions on the protection of folk music as such, Bates could have used the tune unrestricted and free. At the moment, there is no information whether this case will actually reach the court, but it would be interesting to see the proceedings in the event it does.

It is worth noting that, even if "*Zajdi, zajdi*" was not registered as copyright work in Macedonia, the outcome would have in all probability still been the same. The Macedonian Copyright Act establishes an obligation to acknowledge the source of any traditional song being used, and given that he has not indicated any source, Macedonian or Bulgarian, Bates could have still claimed that he used the Bulgarian song, despite the fact that in reality *it is the same song*.

2.3 Case Study 2: Folk Tales From Germanic Tradition

Today, fairy tales are the domain of childhood but this has not always been so. Traditionally, tales were orally transmitted, told to mixed audiences of adults and children, often in the work environment of the "Spinnstube" in Germany or the "veillée" in France. It was not before the end of the seventeenth century, in France for example, that these peasant tales were taken up by the educated and became fixed in book format⁹⁵.

⁹³ This information was obtained from newspaper, television and internet sources, see for example: <http://vecer.mk/default.asp?ItemID=982601FE29BE5F498F0012B365492DCA>

⁹⁴ See Bates' response to the allegations he used the Macedonia tune: "The music cue from "300" is inspired by folk music of Bulgaria and the Ukraine as well as Macedonia. The vocal melodies are Bulgarian, the orchestra and choir is unlike anything I have heard in Macedonian music altogether. The ornaments that signify Macedonian music are not present in the cue from "300," That said, as an artist, I would never steal another artists' music. All of the music that that inspired "Message For The Queen" was of public domain" –at <http://on.net.mk/zabava/muzika-zabava/istraga-300-na-avtorot-mu-e-smeshano-vo-glavata>

⁹⁵ Seago, K. Nursery Politics: Sleeping Beauty or the Acculturation of a Tale. In: Lathey, G. ed. *The Translation of Children's Literature: A Reader*. Clevedon: Multilingual Matters, 2006,

The awakening nationalism in Europe and the formation of nation states in the 18th and 19th centuries found new use for old stories. The explicit connection between folk tales and nationalism is often pointed out: "the rising nationalisms of the nineteenth century made much use of folklore to typify and thus create new national identities around new national boundaries"⁹⁶. Developing the connection between nationalism and literature forms, Timothy Brennan in "The National Longing for Form" says that "nations [...] are imaginary constructs that depend for their existence on an apparatus of cultural fictions in which imaginative literature plays a decisive role"⁹⁷. Brennan, as many before and after him, recognizes that folk literature is one of the principal elements in the construction of national identity both in 18-century Europe and in the 20th-century postcolonial liberation movements⁹⁸.

This process occurred in the German speaking territories. Folklore played an important role in the emergence of the German state – declaring German folk songs and tales an authentic testimony to the endurance and continuity of German people contributed to the transformation and unification of a geographic and political entity which previously consisted of many small states⁹⁹. In the states that will later be formally united as Germany, the documentation of folklore was firstly carried out by Johann Karl August Musäus, an early collector, the Prussian poet and philosopher Johann Gottfried von Herder, who believed folklore was very important in boosting the ethnic nationalism of Germany as a nation instead of divided German-speaking people, and finally the Brothers Grimm and others.

The Grimm brothers – Jacob (1785–1863) and Wilhelm Grimm (1786–1859) – were German academics, linguists, cultural

at pp. 177

⁹⁶ Fernandez, J. W. Folklorists as agents of nationalism: Asturian legends and the problem of identity. *Fairy Tales and Society: Illusion, Allusion, and Paradigm*, 1986, pp. 133-48, at pp. 135

⁹⁷ Brennan, T. *The national longing for form*. Nation and Narration, 1990, at pp. 45

⁹⁸ See in Aleksić, T. *Mythistory and Narratives of the Nation in the Balkans*. Cambridge Scholars Publishing, 2007. On how a nation is an imaginary idea and literature serves as a key element in its creation see for example: Hobsbawm, E. and Terence R. eds. *The invention of tradition*. Cambridge University Press, 2012; Anderson, B. (2006), note supra 37; During, Simon. "Literature–Nationalism's other? The case for revision." *Nation and narration*, 1990, at pp. 138-53.

⁹⁹ Bendix, R. F. Folklore studies in German speaking Europe. In: Bendix, R. F. and G. Hasan-Rokem eds. *A companion to folklore*. Vol. 37. Chichester: John Wiley & Sons, 2012, pp. 371

researchers and authors who together collected folklore¹⁰⁰. In the course of their work on linguistics, which included analysis of how the sounds of words change over time, they found that one of the best ways to get older people to talk to them and share the sounds of their dialects was to ask them to tell the stories that had been passed down to them. The brothers kept a record of these stories and eventually published them in a form of a book "Children's and Household Tales" in 1812, following it up with an update in 1814¹⁰¹.

The stories collected by the Grimm brothers in the early 1800s now keep the memory of the life that central Europeans once knew it — capricious and often cruel. As, O'Neill notes, the two brothers, patriots determined to preserve Germanic folktales, were only "accidental entertainers". Once they saw how the tales bewitched young readers, the Grimms started fixing things, which was followed by the subsequent editors. On account of this, the tales became softer and prudishly moral. Nevertheless, all of this polishing did not manage to eradicate the core of the stories¹⁰².

Today, Brothers Grimm are among the most well-known storytellers of European folk tales. Their work promoted numerous stories, including "Cinderella", "The Frog Prince", "Hansel and Gretel", "Rapunzel", "Rumpelstiltskin" and "Snow White". The collected folk tales have also inspired numerous literary, artistic, and musical works¹⁰³. Over the centuries, the stories were polished, expressed in different forms, re-created and adapted countless times. For example, some of the works of Washington Irving – Rip van Winkle and The Legend of Sleepy Hollow – are based on German folktales. Folklore elements also form the foundation of Richard Wagner's opera cycle "The Ring of the Nibelung"¹⁰⁴. The tales have been used as a basis for various films, series and cartoons, the most famous perhaps being the Disney animated movies.

Precisely for this reason, I selected the folk tales from Germanic tradition for my second case study. These tales are a vivid illustration of expressions of folklore evolving on the timescale, an example of how they have been changing, taken over, expressed in

¹⁰⁰ For literature on Brothers Grimm and their work see for example: McGlathery, J. M., ed. *The Brothers Grimm and Folktale*. University of Illinois Press, 1991; Zipes, J. *The Brothers Grimm: from enchanted forests to the modern world*. Palgrave Macmillan, 2002

¹⁰¹ See at <http://www.candlelightstories.com/storybooks/grimms-fairy-tales/>

¹⁰² O'Neill, T. Guardians of the fairy tale: the Brothers Grimm. *National Geographic* 196, 1999, 102-29 at pp. 103.

¹⁰³ Dow, J. R. *German folklore: a handbook*. Greenwood Publishing Group, 2006

¹⁰⁴ DiGaetani, J. L. The cycles in the cycle. In: DiGaetani, J. L. ed. *Inside the Ring: Essays on Wagner's Opera Cycle*. North Carolina: McFarland, 2006, at pp. 11

other forms, re-created through time – given that we may follow the trails of a particular story from being folklore, to being collected by the Grimm Brothers and then reshaped in other forms, some of which may have attracted or attract different types of protection.

The present case study will also briefly introduce a couple of very prominent anthropological theories construed in relation to folk tales, notably those of Aarne, Thompson and Propp, which argue that each folk tale is a combination of repeating elements. Within the framework of Russian folklore, Propp, for example, analysed the structures of folk tales and demonstrated how each story is in fact a combination of possible elements or actions, which he has further classified. Propp's study has opened many other areas of study – building upon his work, various other anthropologists have looked into investigating to what extent Propp's theory, as an analysis of Russian fairy tales, is relevant to the fairy tales of other cultures and it has been argued that Propp's analysis is clearly not limited to Russian materials¹⁰⁵. These anthropological findings will be used to add valuable new perspectives to the debate on adequate system of protection – if each folk tale, including the ones from Germanic tradition, is a combination of specific elements which are inherent to the mankind, then what precisely are we looking to protect with the system we are designing?

Section 2.3.1 commences with providing some brief historical and anthropological background on the specifics of folklore from the Germanic tradition. Further, Section 2.3.2 follows the evolution of folk tales from the Germanic tradition through time. Finally, Section 2.2.3 introduces the relevant anthropological theories leading to certain specific questions.

2.3.1 *Folklore of the Germanic Peoples*

The term "Germanic" once belong to one single tribe and only later came to be applied all the peoples of the same ethnic group in northern Europe. Today, it is understood that the Germanic peoples are the vast ethnic group of old Europe, a basic stock in the composition of today's England, Sweden, Norway, Denmark, Iceland, Germany, Austria, Switzerland, Northern Italy, the Netherlands, Belgium, Luxembourg, North and central France, North and Lowland Scotland. Accordingly, the term Germanic folklore is in fact

¹⁰⁵ Dundes, A. Preface to the Second Edition. In: Propp, V. *Morphology of the Folktale*, Second Edition, Revised and Edited by Wagner, A. L., Austin: University of Texas Press, 2010, at pp. xiii

a generic term describing the surviving folklore of the Germanic peoples, encompassing, for example, Dutch, English, German, Scandinavian, Swiss and other folklores¹⁰⁶.

Looking back at the history of the Germanic peoples and their folklore, little is known about their early days, except through recorded interactions with the Roman Empire, etymological research and archaeological finds¹⁰⁷. The ethno genesis of the Germanic tribes is said to have occurred during the Bronze Age. From northern Germany, the tribes began expanding south, east and west in the 1st century BC, coming into contact with the Celtic tribes, Iranians, and Baltic and Slavic tribes in Central Europe. In a great migration that took place over the centuries, the Germanic peoples have spread throughout Europe, mixing with the existing local populations and forming the future basis of many nations that are today connected by similar languages, common history, mythology and culture¹⁰⁸.

Although the early Germanic tribes were not politically organized, they were connected by the mutually understandable dialects and have shared a common ethnic origin and culture. As they spread across Europe, the shared memories of the Germanic people were recited wherever they have settled. Their epics combined mythology with folk memory of real events, and have assumed many different forms before they were eventually recorded as literary versions, whether in Anglo-Saxon, German or Icelandic¹⁰⁹.

2.3.2 How the Expressions Evolved Over Time

2.3.2.1 Folklore in the Public Domain

In general, a folktale is usually defined as type of traditional story that tries to explain or

¹⁰⁶ See at <http://odinsvolk.ca/GermanicPeoples.htm>

¹⁰⁷ Travel Hamburg, Germany: Illustrated Guide, Phrasebook and Maps. Hamburg: MobileReference, 2010

¹⁰⁸ Pathak, B. and Singh, S. P. Glimpses of Europe: A Crucible of Winning Ideas, Great Civilizations and Bloodiest Wars. New Delhi: Gyan Publishing House, 2010 at pp. 444

¹⁰⁹ See at <http://www.historyworld.net/wrldhis/PlainTextHistories.asp?groupid=2323&HistoryID=ac01&track=pthc>

understand the world¹¹⁰. Such stories were orally passed down from generations to generations and usually conveyed specific morals and lessons.

As such, folk tales are common to all cultures and races, perhaps given that one of their primary roles was to develop the language. They have been and are being used as educational and instructive tools and tools for making sense of the world or recording the human experience¹¹¹. "There are countless forms of narrative in the world... a prodigious variety of genres, each of which branches out into a variety of media... Among the vehicles of narrative are articulated language, whether oral or written, pictures, still or moving... narrative is present in myth, legend, fables, tales, short stories, epics, history, tragedy... drama, comedy, pantomime, paintings... stained-glass windows, movies, local news, conversation... it is present at all times, in all places, in all societies... Like life itself, it is there, international, trans-historical, transcultural"¹¹².

The stories typically take place long ago in a far, faraway place and involve talking animals, royalty, peasants or mythical creatures, heroes and heroines. Though the stories sometimes slightly change, often resulting in more than one version of the same story, its core remains the same – conveying specific messages and morals, folk tales usually mirror the values and culture of the society from which they originate¹¹³.

The specific time and culture in which a story teller works will influence the resulting text, as

¹¹⁰ Ashliman, A. *Folk and fairy tales: A handbook*. ABC-CLIO, 2004, at pp. 32. See also Haase, D. *The reception of Grimms' fairy tales: Responses, reactions, revisions*. Wayne State University Press, 1996

¹¹¹ Lévi-Strauss, C. *Structural anthropology*. New York: Basic Books, 1967

¹¹² Barthes, R. and L. Duisit. An introduction to the structural analysis of narrative. *New Literary History*, 1975, vol. 6, No. 2, pp. 237-272, at pp. 237

¹¹³ See <http://www.wisegeek.org/what-is-a-folktale.htm>

noted by Zipes: "in each country the tales function differently, and the way they are used and received in each country indicates something about the national character of that country"¹¹⁴.

In Germany, long before the Brother Grimms' time, storytelling flourished in roadhouses, barns, and Spinnstuben, the spinning chambers of peasant women. "During winter nights, women softened the long hours of spinning flax into yarn by entertaining themselves with tales spiced with adventure, romance and magic"¹¹⁵. Spinnstuben were commonly places for communal spinning in the winter, but they also served as occasions for popular entertainment and youth courting rituals. The stories were told and retold, with the motives and patterns recurring, but the exact shape of the story was always given by the narrator telling the story¹¹⁶.

2.3.2.2 *Folk Tales Fixed in a Tangible Form*

Before the Internet, newspapers, radio, television and other types of media, the world relied on storytellers for entertainment and education. In 1450, when Johan Gutenberg invented the movable type printing press, the emergence of the book publishing industry made it possible for people to print books of folktales. Having folktales fixed in hard copy form, helped preserve the rich array of folktales floating around Europe¹¹⁷.

In Germany, as well as throughout Europe, the rise of romanticism in the 19th century revived

¹¹⁴ Zipes, J. The Grimms and the German obsession with fairy tales. In: Bottigheimer R. B. *Fairy Tales and Society: Illusion, Allusion and Paradigm*. 1986, pp. 271-285, at pp.281

¹¹⁵ O'Neill, T. (1999), note supra 102, pp. 114. On this see also: Scribner, R. W. *Popular Culture and Popular Movements in Reformation Germany*. Continuum International Publishing Group, 1987;

¹¹⁶ Darnton. R. The history of reading. In: Burke, P. ed. *New perspectives on historical writing*. Cambridge: Polity, 1991, at pp. 140-67

¹¹⁷ Note supra 113

the interest in traditional folk stories¹¹⁸, which to the Grimm Brothers represented a pure form of national literature and culture. They invented a method for collecting and recording folk tales that became the basis for further folklore studies. Between 1812 and 1857, their first collection was revised and published many times, and grew from 86 stories to more than 200¹¹⁹.

2.3.2.3 *Folk Tales Adapted and Copyrighted*

The popularity of the folk tales that the Brothers Grimms collected continued long after their era. In the subsequent centuries, the tales have served as a source of inspiration, as raw material or as the basis for adaptation. Today, Grimms' tales permeate world culture and generations of children have grown up with these tales. Their collection has been translated into more than 160 languages, from Inupiat in the Arctic to Swahili in Africa. Only in the United States, for example, their book has had over 120 editions and in terms of opus, may even compete with the Bible. The stories and their heroes have been transferred from Grimm's pages into virtually every media – theatre, opera, comic books, movies, paintings, rock music, advertising, fashion¹²⁰.

Perhaps the most famous example of Grimm's stories serving as basis for further adaptations is the example of Disney and his famous animated movies. The world fell in love with the Grimms' tales in 1937 when Disney released the first of three popular adaptations, the animated film "Snow White and the Seven Dwarfs", by converting a short story into an 80-minute musical. Afterwards, it was the Grimms' collection that supplied a lot of the raw material

¹¹⁸ Dewhurst, R. L. The Legacy of Luther: National Identity and State-Building in Early Nineteenth-Century Germany. *History Theses*, Paper 64, 2013

¹¹⁹ See About the Author. In: Grimm, J. *Grimm's Fairy Tales: With 200 Fairy Tales and 10 Children's Legends, Special Illustrated Edition*. Starbooks Classics, 1958, at pp.

¹²⁰ O'Neill, T. (1999), note supra 102, pp. 106.

that helped launch Disney as a media giant¹²¹.

On the basis of Grimms' stories, Disney had created marvellous new works. Disney's creativity built upon the work of others and the culture which he found around him, adding his own character in the additions. Though such borrowings were sometimes slight, sometimes significant, they were not unique, neither for Disney¹²² nor for the industry in general. And the fact remains that Disney's additions were built upon a base that was entirely borrowed¹²³. In a comprehensive account of Disney's work, Lessig reports: "Think about the fairy tales of the Brothers Grimm. If you're as oblivious as I was, you're likely to think that these tales are happy, sweet stories, appropriate for any child at bedtime. In fact, the Grimm fairy tales are, well, for us, grim. It is a rare and perhaps overly ambitious parent who would dare to read these bloody, moralistic stories to his or her child, at bedtime or anytime. Disney took these stories and retold them in a way that carried them into a new age. He animated the stories, with both characters and light. Without removing the elements of fear and danger altogether, he made funny what was dark and injected a genuine emotion of compassion where before there was fear"¹²⁴.

In all of these cases, Disney ripped creativity from the culture around him, mixed that creativity with his own extraordinary talent, and then burned that mix into the soul of his culture. In doing that, there was nothing wrong with the taking from the Grimms because the Grimms' work was in the public domain¹²⁵.

¹²¹ *ibid*

¹²² See for example Sunder, M. From free culture to fair culture. *WIPO Journal*, Vol. 4, No. 1, 2012, pp. 20-27: "Even the world's most famous copyright owner, Disney, thrived by mining the works of past creators, from Rudyard Kipling to Victor Hugo to Robert Louis Stevenson."

¹²³ Lessig, L. *Free culture: How big media uses technology and the law to lock down culture and control creativity*. New York: Penguin Press, 2004, at pp. 23

¹²⁴ *ibid*

¹²⁵ *Ibid*

Today, paradoxally, the Disney group of companies is one of the strongest proponents of strengthening intellectual property laws and have advocated or lobbied for such legislation initiatives in the USA¹²⁶. Disney protects its characters

through trademark and copyright registrations, and uses these to restrict any third parties of using the characters from the tales. As an illustration of this, Disney holds trademark and copyright registrations for the character of Snow White and in 1989 have sued the Academy of Motion Picture Arts and Sciences when the Academy used an entertainer to portray Snow White without Disney's permission in its opening number for an Academy Awards telecast. Walt Disney Inc. had not given the Academy the permission to use the Snow White character, protected both as trademark and copyright work, and therefore filed suit against the Academy charging copyright infringement of its Snow White character and unfair competition¹²⁷.

2.3.2.4 A new collection of folk tales

Recently, the Guardian published a story, further circulated by various newspapers, internet sites and blogs, that 500 new fairy tales were discovered in Germany. "A whole new world of magic animals, brave young princes and evil witches has come to light with the discovery of 500 new fairy tales, which were locked away in an archive in Regensburg, Germany for over 150 years. The tales are part of a collection of myths, legends

¹²⁶ The Copyright Term Extension Act (CTEA) of 1998 extended copyright terms in the United States by 20 years. Since the Copyright Act of 1976, copyright would last for the life of the author plus 50 years, or 75 years for a work of corporate authorship. The CTEA extended these terms to life of the author plus 70 years and for works of corporate authorship to 120 years after creation or 95 years after publication, whichever endpoint is earlier. The extensive lobbying efforts of the Walt Disney Company in the adoption of the CTEA inspired the nickname "The Mickey Mouse Protection Act".

¹²⁷ See in Jennings, M. M. *Business: Its legal, ethical and global environment*. 7th edition. Cengage Learning, 2005

and fairy tales, gathered by the local historian Franz Xaver von Schönwerth (1810–1886) in the Bavarian region of Oberpfalz at about the same time as the Grimm brothers were collecting the fairy tales that have since charmed adults and children around the world"¹²⁸.

The Guardian article reports that Von Schönwerth spent decades asking country folk, labourers and servants about local habits, traditions, customs and history, and putting down on paper what had only been passed on by word of mouth, and that even Jacob Grimm said this about him: "Nowhere in the whole of Germany is anyone collecting [folklore] so accurately, thoroughly and with such a sensitive ear"¹²⁹. Von Schönwerth compiled his research into a book that unfortunately never gained prominence and faded into obscurity. While shifting through Von Schönwerth's work, a researcher found 500 fairy tales, many of which do not appear in other European fairy tale collections, but the collection also includes local versions of the well-known tales, including Cinderella and Rumpelstiltskin. Since Von Schönwerth was a historian, apparently he recorded what he heard faithfully, and unlike the Grimm Brothers, made no attempt to polish and improve the stories. This factual recording adds to authenticity of the material, as the tales remained an accurate record of the telling¹³⁰.

2.3.3 *What Would Thompson, Propp and Others Say About the Germanic Folk Tales?*

Folk tales have also been thoroughly examined and researched by various anthropologists and ethnologists, such as Aarne, Thompson, Propp and others.

Aarne and Thomson, for example, established an index of

¹²⁸ The Guardian, Monday 5 March 2012 15.25 GMT, available at <http://www.guardian.co.uk/books/2012/mar/05/five-hundred-fairytales-discovered-germany>

¹²⁹ *Ibid*

¹³⁰ *Ibid*

tale types in order to help folklorists systematize and classify folk tales on the basis of recurring plot patterns in the narrative structures. For example, the Aarne-Thompson index groups folk tales into broad categories of fairy tales, animal tales, and so on, further subdividing them by certain patterns until individual types are reached. Today, the Aarne-Thompson tale type index is an essential tool for folklorists, because, as Dundes explains, "the identification of folk narratives through motif and/or tale type numbers has become an international *sine qua non* among *bona fide* folklorists"¹³¹.

Following this reasoning, Russian folklorist Vladimir Propp argued that each tale is a combination of certain repeating elements. Propp was one of the first theorists to propose the idea of an underlying structure of narratives, albeit in the narrow sub-genre of Russian folk tales. Within the framework of Russian folklore, Propp analysed the structures of particular Russian folk tales in order to publish the "*Morphology of folk tales*" in 1928 – a book which will have an enormous impact on folklorists, linguists, anthropologists and literary critics.

His model identifies 8 typical characters and thirty-one functions or actions¹³² performed by the characters, which ultimately account for the composition of every folk tale but can also be applied to almost any story, be it in literature, film, theatre and television¹³³. Plot, Propp claimed, is

¹³¹ Dundes, A. The Motif-Index and the Tale Type Index: A Critique. *Journal of Folklore Research*, Volume 34, 1997, at pp. 195

¹³² Without listing all 31 functions here, for illustrative purposes I will mention just a couple: (1) ABSENTATION: A member of a family leaves the security of the home environment. This may be the hero or some other member of the family that the hero will later need to rescue. This division of the cohesive family injects initial tension into the storyline; (2) INTERDICTION: An interdiction is addressed to the hero ('don't go there', 'don't do this'). The hero is warned against some action (given an 'interdiction'); (3) VIOLATION of INTERDICTION. The interdiction is violated (villain enters the tale). This generally proves to be a bad move and the villain enters the story, although not necessarily confronting the hero. Perhaps they are just a lurking presence or perhaps they attack the family whilst the hero is away. For all functions see Propp, V. *Morphology of the Folktale*. Vol. 9. University of Texas Press, 1973; or see Aguirre, M. An Outline of Propp's Model for the Study of Fairytales, available online at <http://www.northangerlibrary.com/documentos/AN%20OUTLINE%20OF%20PROPP'S%20MODEL%20FOR%20THE%20STUDY%20OF%20FAIRYTALES.pdf>

¹³³ In the context of the present debate, see for example Propp's model applied to "Cinderella" (at <http://englishteacher32.blogspot.com/2009/10/cinderella-analyzed-by-propps-taxonomy.html> or <http://emartinsen.wordpress.com/2011/10/17/breaking-down-cinderella/>)

nothing but action and that is why functions are independent of how, why and by whom they are fulfilled. They always occur in a specific order and not all of them need to be present in a tale. Tales are arranged in different "moves" or "sequences" consisting of a string of functions, functions which may or may not appear again in other sequences of the same tale¹³⁴.

Accordingly, Propp's theory, as a form of structuralism, considers texts as certain fixed structures. His name today is a reference point in the theory of narrative. The "*Morphology of folk tales*" was praised, criticized, tested and revised by a number of anthropologists and folklorists, such as A. J. Grimas, Tsvetan Todorov, Claude Bremond and Roland Barthes, who have made the "*Morphology of folk tales*" one "point of departure for structuralist narratology"¹³⁵.

Since the appearance of Propp's "*Morphology of the folk tales*", there has been an ever increasing interest in attempting structural analyses different genres. For example, Alan Dundes suggested the possibility of applying this model to materials other than Russian folk tales. A question was also raised whether Propp's analysis might be applicable to non-Indo-European folk tales – studies of African tales and American Indian tales have shown that certain parts of Propp's Morphology may certainly be cross-culturally valid¹³⁶.

Another question concerns the extent to which Propp's analysis applies to forms of folk narrative other than the folk tale, such as the structure of epics, folk dances and games, for example, where it was suggested that these may also be illuminated by Propp's analysis¹³⁷.

And not only that, but it has been argued that Propp's analysis may also be applicable to the structure of non-

or to Snow White (Jones, S. S. The Structure of Snow White. *Fabula* 24.1-2, 1983, pp. 56-71 or <http://www.antiessays.com/free-essays/286859.html>)

¹³⁴ Aguirre, M. and Ardoy, E. Narrative Morphology in Barbauld's "Sir Bertrand: A Fragment". *The Northanger Library Project*, 2009, at pp. 4

¹³⁵ Bordwell, D. ApPropriations and imProprieties: Problems in the morphology of film narrative. *Cinema Journal*, 1988, No. 3, pp. 5-20

¹³⁶ Aguirre, M. and Ardoy, E. (2009), note supra 134, at pp. 4

¹³⁷ Dundes, A. In: Propp, V. (2010), note supra 105, at pp. xiv. Dundes even suggests that the last portion of the Odyssey is strikingly similar to Propp's functions 23-31 – see in Dundes, A. *Interpreting Folklore*. Indiana University Press, 1980, at pp. 212

folkloristic materials. Dundes suggests that if there is a pattern in a culture, it is by no means necessary that it be limited to only one aspect of that culture, but quite the contrary – culture patterns normally manifest themselves in a variety of cultural materials. Accordingly, he suggests that Propp's analysis should be useful in analysing the structure of literary forms, including novels and plays, comic strips, motion picture and television plots, but also for enlightening the content and structural borrowing that exists between folklore and the mass media¹³⁸.

2.4 Questions? Yes, Many!

Even *prima facie*, it is obvious that a number of interesting questions and problems arise from the above presented case studies.

When it comes to Balkan folk music, putting the discussed features of the Balkans and Balkan folk music into perspective, it seems that any potential system of protection would have to be designed to overcome a number of specific challenges. Balkan folklore is characterized by particular conditions under which it was created, as the different potential rightholders inhabiting the region share a common origin, identical influences and have been mixing and blending over centuries. While the borders of the nation states have been created fairly recently, only some hundred years ago, there are no clear demarcation lines dividing the culture and identity of Balkan peoples.

So, firstly, how should we identify the rightholder? If due to a set of particular historical circumstances it is not viable to determine the rightholder on the basis of border or space, but on the basis of "historical legacy" – which was proposed by some anthropologists – then we may be entering a vicious circle. Towards the outside world (non-Balkan) this criteria is helpful, but what happens when we try to determine the rightholder *within* the Balkans? Is this possible at all? The folk legacy is what identifies Balkan and we identify Balkan identities in relation to their folk legacy – but then how do we identify the folk?

Furthermore, what happens when in a particular region different communities have been mixing and influencing each other to the point where it is tremendously complex or impossible to determine

¹³⁸ For example, I took place at a seminar where Propp's model was successfully applied to the famous thriller "Silence of the lambs".

what belongs to whom? For a start, we would have to think about how to handle situations where one expression can be found in two or more communities. Should that lead us to concluding that this particular expression should not qualify for protection as it is not authentic for only one community? Or does it mean that it can qualify and equally be protected in both communities? If we accept the former, that would unjustly exclude a number of expressions from the scope of protection, despite the fact that they undoubtedly present a part of folklore, simply because it cannot be determined who they belong to. But if we accept the latter, protecting the same expression in more than one community complicates the situation immensely. Which country should be acknowledged as the source of the song? Can we precisely determine where a certain song originates from, like Katsarova and Buchanan attempted to do? Maybe ethnomusicologists could do that in certain cases, on the basis of characteristic rhythms or tones. But is that a viable solution, given that this would be immensely time consuming work? If not, do we solve the problem by saying that, in the light of specific cultural and historical circumstances and interweaving of the Balkan countries, it is sometimes impossible to precisely determine where a certain song originates from and so we should call it just "Balkan folklore"?

Finally, a general problem with identifying the origin of a folk song, and folklore in general, is how far should one go? One of the main characteristics of folklore is that it is ever evolving and changing, thus, how could one freeze it in time and prove where it started from?

Again, in the example of folk tales from Germanic tradition, we face the same question – whose are these folk tales? Like in the previous case study, where this particular question was discussed into more detail, we will have the same problem of identifying the rightholder today. For example, what today is called "German folklore" is said to in fact share many characteristics with Scandinavian folklore and English folklore due to their origins in a common Germanic mythology and folklore. It reflects a similar mix of influences: a pre-Christian pantheon and other beings equivalent to those of Norse mythology, magical characters associated with Christian festivals and various regional stories. Moreover, it has been said that the origins of many of the Grimm fairy tales not only reach throughout Europe, but also as far as into the Middle East and

Orient¹³⁹, so the question is asked: How German are the Grimm tales? Accordingly, which community shall be the rightholder of these expressions? How far should one go to discover this?

Further, there are certain expressions which have greatly evolved over time. What once emerged as a result of common history, culture and recurring motifs, has later been taken over by collectors, polished, supplemented with different details and elements and fixed in a material form. Such an expression may have later been used as an inspiration or basis for different adaptations and has been expressed in a different form – for example, tales have served as the heart of future musical or film works. As a consequence, we may have the same story, expressed in a different form, attracting different type of protection or no protection at all and we end up having different regimes for different, yet same, expressions. Are they the same expressions though? Is Grimm's Snow White and Disney's story of Snow White essentially the same story, or is it the idea of Snow White that Disney has re-told in a sufficiently different manner? Also, what happens when a batch of lost tales has been found – what should be their status today? Should people be free to take from them and create works which shall then be copyrighted? Or should people be forbidden to take from them and impoverish the world from enjoying wonderful works created on the basis of these expressions? Should we maintain the current status or search for a different mode for dealing with these expressions?

Finally, as has been argued on the basis of Propp's method, if tales are something inherent to humanity as such, and if each community in the world creates tales combining the same repeating elements and patterns, what are we looking to protect then? Does that mean that if we simplify every narrative to its constituent elements, there is such cultural property which would belong to all mankind? If this is the case, where is the line between the elements that belong to humanity in general, and are thus free, and those elements that could potentially qualify for protection? Is the solution in the application of the standard copyright dichotomy idea-copyright work to folklore?

Or perhaps this may not be so easy, since a folk tale is not purely a text. "It is a transcription made on one or more occasions of the words spoken by one of many people who have told this tale, and all sorts of things affect the words that are finally written down. A storyteller might tell the tale more richly, more extravagantly, one

¹³⁹ O'Neill, T. (1999), note supra 102

day than the next, when he's tired or not in the mood. A transcriber might find his or her own equipment failing: a cold in the head might make hearing more difficult, or cause the writing-down to be interrupted by sneezes or coughs. Another accident might affect it too: a good tale might find itself in the mouth of a less than adequate teller. That matters a great deal, because tellers vary in their talents, techniques and attitudes to the process"¹⁴⁰. So it seems that applying the standard idea-expression test might not be so straightforward when it comes to folklore – one would have to determine those elements that are symbols and motifs incorporated into the story and that are universal and in the public domain; those elements that form the actual plot and could potentially attract protection; and finally those actual words through which the plot and the ideas are expressed.

To sum up the above, as it follows from the above discussed examples, based on the case studies, at least four problems may emerge in relation to non-indigenous folklore: (i) the problem of rightholder and its identification; (ii) the problem of cross-border folklore; (iii) the problem of "fixation" of folklore in time, in a sense that we must freeze it in a certain moment – which moment? – rather than necessarily fixing it in a tangible form; and (iv) the problem of substance of folklore and drawing the line between the elements that belong to humanity in general, and are thus free, and those elements that could potentially qualify for protection.

¹⁴⁰ Pullman, P. *Fairy Tales from the Brothers Grimm*. Penguin UK, 2013, at pp. xviii

**CHAPTER III: Terminological and Definitional
Considerations: *What, Who, Why* and only then –
*How?***

3.1 Getting a Grasp of Folklore

Over the past five decades since the subject of folklore and the question of its potential legal protection were first raised within the international community, much, without doubt, has been done in this field. Within this period, the tackled issues occupied considerable attention and acquired wide awareness, becoming one of the intellectual property law topics of the 21st century. While initially the topic was prompted by certain indigenous communities, it swiftly grew to become a widely recognized international problem and has, ever since, been a subject of interest of various local, regional and international governmental and non-governmental groups, among which WIPO lately plays the most important role. As a result, it is clear today, nearly 45 years after the Stockholm Diplomatic Conference for the Revision of the Berne Convention¹⁴¹, that the protection of folklore is a global concern which requires international attention and coordinated solutions.

However, while such attention was and still is primarily focused on the theoretical and practical problems related to achieving the most effective manner of protection of expressions folklore and proposing solutions to this problem – a work in progress itself – a number of preceding questions remain unanswered, and some, even more significantly, have only just been asked. It is to a certain extent understandable that, in a complex field such as this one, providing the theoretical underpinning and definitional framework within which the relevant problems should be addressed, is a complex and time consuming process. Certain critical issues further complicate the task of defining folklore, again underscoring its complex nature. Expressions of folklore emerge in an entire variety of different forms, encompassing a diversity of customs, traditions, artistic expressions, crafts and products, and appear in communities that are so essentially different, that there can hardly be found any links between them. As folklore entails diverse legal, social, anthropological and economic aspects, it seems almost impossible to

¹⁴¹ It has been argued that this was the moment when the first identification of the need to protect folklore and the first efforts to establish certain frame for protection were made. Namely, the Stockholm Diplomatic Conference of 1967 for revision of the Berne Convention for the Protection of Literary and Artistic Works (hereinafter "**the Berne Convention**") did reflect in a limited way, for the first time, the aspirations of the developing world on protection of folklore when it adopted a mechanism for the international protection of unpublished and anonymous work (Article 15 (4) of the Berne Convention) – see Kutty, P.V. *National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines*. Geneva: WIPO, 2002, available online at <http://www.wipo.int/tk/en/studies/cultural/expressions/study/kutty.pdf>

accurately comprise all these different elements under one all-including definition. Of course, this problem is not unique to folklore. Concepts with long and diverse histories often elude tidy definitions, as Nietzsche captures it best – "it is only that which has no history, which can be defined"¹⁴². On the account of the aforesaid, there still appears to be no wider concord on certain key terms and definitions of the basic concepts in the field, while some preface matters remain barely tackled.

While acknowledging the aforesaid, it is nevertheless noticeable that there is an apparent lack of understanding and agreement on the ground aspects of any folklore related considerations. Even though these issues have been discussed over the past decades, it seems only limited progress has been made at the international level. Moreover, it appears that within the recent discussions on folklore, considerably less attention and contemplation is being dedicated to establishing adequate terminology, definitions and justification of protection and that the discussion has now largely proceeded towards detailed analysis of the type of protection that should be established¹⁴³. It seems to me that, due to the above mentioned difficulties with getting a grasp of folklore, the fundamental questions are rarely any longer directly addressed in the theoretical or legislative texts, and that those scholars that do dare to engage in such thoughts nowadays, often merely restate what has already been established.

Before considering an examination and discussion of *how* certain phenomena ought to be protected, it is of fundamental importance to answer certain preceding questions. *What* are we contemplating protecting? *Who* should be the rightholder of such protection? *Why* should it be protected at all? Without establishing answers to these questions, which requires some definitional and justificatory work, any discussion on the protection itself will be premature.

Finding the appropriate terminology and agreeing on the basic definitions has further implications. Terms are not neutral, they always convey a certain meaning or message, and thus the choice of particular terms should be considered with great care¹⁴⁴. By

¹⁴² Nietzsche, F. *On the genealogy of morals and ecce homo*. New York: Courier Dover Publications, 2003, pp. 53

¹⁴³ Hilty, R. *Rationales for the Legal Protection of Intangible Goods and Cultural Heritage*. Munich: Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper, 2009, No. 09-10.

¹⁴⁴ Wendland, W. B. Intellectual property, traditional knowledge and folklore: WIPO's exploratory program. *IIC*, 2002, Vol. 33, No. 4, pp. 491

answering the above questions on *what*, *who* and *why*, we are sketching the borderlines and delineating the area within which all further issues related to folklore protection are to be addressed, directly shaping what will and what will not be covered by any future system of protection. For legal purposes, it is necessary to have clear and shared understanding of what is legally meant or not meant by a term or terms selected for protection¹⁴⁵. Furthermore, and equally important, the core founding definitions further impact the potential protection itself as they establish the context and connotations for understanding and interpreting the scope of potential protection. Hence, choosing the suitable definitions and terminology is one of the fundamental tasks, and certainly one that precedes all consequent debates on the protection itself.

Bearing the aforesaid in mind, the purpose of this chapter will be to determine the boundaries within which consequent thoughts on appropriate protection will be brought. For that purpose, Sections 3.2 and 3.3 will look at the existing terminology and the most common definitions used in the field, in an attempt to identify their most prominent flaws and potential consequences thereof. While vagueness is probably inevitable, like with any other sociological concept, these Sections will try to determine the scope of the folklore concept and its rightholder and identify the characteristics which belong to it. In doing so, the notion of folklore and its potential rightholder will be examined from a wider angle, to include both the perspectives of indigenous and non-indigenous communities, while trying to address certain specific problems raised in the case studies presented in the previous chapter. Section 3.4 will analyse the various reasons for and against folklore protection. Finally, based on previous analysis, Section 3.5 will suggest the terms, establish the elementary definitions and justify the search for protection, all of which are to be used as a starting point for future examination of folklore protection presented in this thesis.

3.2 What?

3.2.1 Terminology

Over the years, numerous different terms have been considered and used to describe the subject matter of this thesis, such as "folklore"¹⁴⁶, "expressions of folklore"¹⁴⁷,

¹⁴⁵ Palethorpe, S. and S. G. Verhulst (2000), note supra 7

¹⁴⁶ Term initially used but afterwards abandoned due to the negative connotation that this term was allegedly associated with. For details, see Section 3.2.1.

¹⁴⁷ The term is used in the WIPO/UNESCO Model Provisions and is nowadays often used by

"intangible cultural heritage"¹⁴⁸, "traditional cultural expressions" (hereinafter "**TCEs**"), "traditional knowledge"¹⁴⁹, "indigenous knowledge" or "indigenous heritage"¹⁵⁰, to mention just a few of the most frequent ones. Despite the lively debate on this topic, no internationally agreed term exists so far, although the two terms most commonly used today are "[expressions of] folklore" and "traditional cultural expressions" or "TCEs"¹⁵¹.

As a general preliminary note, based on the analysis of the available materials, it follows that the existing terminology is not used in a harmonized and uniform manner, not even by the main actors in this field, such as WIPO¹⁵² or UNESCO¹⁵³. It is noticeable that the terms "indigenous" and "traditional", "TCEs" and "expressions of folklore" or just "folklore", are often used interchangeably¹⁵⁴, but often without any particular remarks or underlining justification of such use. Furthermore, one may also observe that some of

WIPO interchangeably with the term "traditional cultural expressions". For details, see Section 3.2.1.

¹⁴⁸ The term is used in the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003).

¹⁴⁹ The term "traditional knowledge" is sometimes used as a wider term for both folklore and traditional knowledge, for example, in the WIPO Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), Geneva, 2001, available online at http://www.wipo.int/export/sites/www/freepublications/en/tk/768/wipo_pub_768.pdf. The two terms are, however, usually used to describe two distinct concepts – traditional knowledge stands for knowledge resulting from intellectual activity in a traditional context and includes the know-how, skills, innovation, practices and similar, while folklore stands for cultural forms.

¹⁵⁰ Term mostly used by UNESCO.

¹⁵¹ For discussions of terminological issues see Blakeney, M. The protection of traditional knowledge under intellectual property law. *European Intellectual Property Review*, 2000, vol. 22, no. 6, pp. 251-261; Niedzielska, M. The Intellectual Property Aspects of Folklore Protection. *Copyright*, November 1980, 339-346; Girsberger, M. A. Legal protection of traditional cultural expressions: A policy perspective. In: Graber, C. and Burri-Nenova, M. eds. *Intellectual property and traditional cultural expressions in a digital environment*. Cheltenham, UK: Edward Elgar, 2008, pp. 123-149.

¹⁵² For example, see WIPO. Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge, note supra 149. The Report uses the terms folklore, expressions of folklore and traditional cultural expressions interchangeably.

¹⁵³ UNESCO, one of the main international participants in the protection of folklore discourse, often uses "intangible cultural heritage" interchangeably with "folklore" – see in Palethorpe, S. and S. G. Verhulst (2000), note supra 7, pp. 7

¹⁵⁴ For example, see WIPO. Traditional Cultural Expressions/Expressions of Folklore: Legal and Policy Options, Geneva, March 15 to 19, 2004, WIPO/GRTKF/IC/6/3, at pp. 9: "The terms "traditional cultural expressions" and "expressions of folklore" are both used together or interchangeably in this document and are regarded for the present purposes as synonymous".

the terms used, as well as their definitions, overlap, while others conflict with each other¹⁵⁵.

3.2.1.1 "Folklore" or "TCEs"

Initially, the phenomenon was addressed under the term "folklore" or "expressions of folklore". In its literal meaning, the word "folklore" transcribes as "the wisdom/knowledge of the people"¹⁵⁶.

Historically and etymologically, this term is said to have been first coined by the British archaeologist William J. Thoms in 1846, in his letter to the *"The Athenaeum"*, where he used it as a phrase that was meant to replace "popular antiquities" and to include customs, observations, superstitions, ballads, proverbs and other concepts which summarize the lore of the people. Indeed, as Kutty notes, the pioneering work done by Thoms lead to an increasing awareness of folklore and the second half of the 19th century witnessed a large interest shown by eminent scholars in understanding the fundamentals and mapping this subject. The controversy that subsequently emerged in satisfactorily defining the term was so intense that in the *Funk & Wagnalls Standard Dictionary of Folklore* there are twenty-one definitions of "folklore" given by different scholars¹⁵⁷.

Within the context of its legal protection, the use of the term "folklore" has been severely and widely criticized over the years by a number of commentators which have referred to its pejorative connotations¹⁵⁸ and Eurocentric

¹⁵⁵ Girsberger, M. Legal protection of traditional cultural expressions: a policy perspective In: Graber, C. B. and M. B. Nenova, eds. (2008), note supra 151, pp. 126

¹⁵⁶ The term was used for the first time in 1846 by the W. J. Thoms and afterwards adopted in practically all languages.

¹⁵⁷ Kutty, P. V. (2002), note supra 141, at pp. 7

¹⁵⁸ During the early discussions on the protection of expressions of folklore in mid 1980s, the term "folklore" was criticized as an archaism, with negative connotation of being associated with the creations of lower or superseded civilizations (objection of the representatives of the Spanish speaking countries expressed at the 1985 meeting of the Group of Experts on Protection of Expressions of Folklore by Intellectual Property convened by WIPO and UNESCO) – see

undertone¹⁵⁹. It was particularly argued that the Western concept of "folklore" includes only artistic, literary and performing works, whereas it should be much broader, encompassing all aspects of cultural heritage¹⁶⁰. Blakeney has also stressed that folklore was typically discussed within copyright discourse or copyright-plus terms, so the shift from this term would also be justified by suggestions for a *sui generis* type of protection¹⁶¹.

On the strength of this critique, use of the term "folklore" decreased to a certain extent and subsequent discussions tended to adopt a different terminological approach. In an attempt to come up with a broader and more neutral term, a new term was proposed: "traditional cultural expressions" or "TCEs". Nevertheless, the criticism expressed at the term "folklore" has not been accepted without reservation and the arguments concerning its negative connotations have been challenged in the succeeding debates to suggest that "folklore" has actually acquired a new neutral meaning in recent times and is now in fact a suitable term¹⁶².

Today, the term "folklore" or "expressions of folklore" remains used internationally by a number of governments, organizations and academics as a useful handle for a broad range of material. In particular, WIPO has used this

in WIPO. Roundtable on intellectual property and traditional knowledge. WIPO/IPTK/RT/99/3, at pp. 2

¹⁵⁹ Stressed by speakers at the 1997 Phuket UNESCO-WIPO World Forum on the Protection Of Folklore – see in Janke, T. *UNESCO-WIPO World Forum on the Protection Of Folklore/Lessons for Protecting Indigenous Australian Cultural and Intellectual Property*. Phuket: 15 Copyright Reporter 104, 1997

¹⁶⁰ Argument raised by Mrs. Mould-Idrissu in a paper on the African Experience on the preservation and conservation of expressions of folklore – see in WIPO-UNESCO World Forum on the Protection of Folklore, Phuket, Thailand, 10 April, 1997, WIPO-UNESCO Publication, 1998, UNESCO-WIPO/FOLK/PKT/97/1

¹⁶¹ Blakeney, M. Hans Christian Andersen and the protection of traditional cultural expressions. In: Porsdam, H. ed. *Copyright and Other Fairy Tales*. Cheltenham: Edward Elgar, 2006, at pp. 111

¹⁶² *Ibid*, pp. 110

term in the past and continues to use it today, although interchangeably with the term "traditional cultural expressions" to refer to the same subject matter.

3.2.1.2 *The Use of Particular Terms*

While there is no all-embracing agreement on the phrase used to describe the subject matter, some basic constituent terms have been largely agreed on. For example, rather than using the phrase "works", it is now commonly accepted that one should address folklore under the term "expressions", in order to stress its nature, as expressions of collective spirit, as oppose to works of individual creativity. The term "expression" also serves to emphasize the *sui generis* nature of folklore and clearly marks the difference with "works" that can be protected on the basis of copyright.

Similarly, the term "cultural" does not seem to have provoked much debate in the folklore related discussions and, even though it is also very vague¹⁶³, may be the single phrase which obviously and undisputedly belongs in the description of folklore.

On the other hand, however, certain terms used in relation to folklore have not only steered – some more, some less – controversy, but for

¹⁶³ On the term "culture", see for example: Spencer-Oatey, H. *What is culture? A compilation of quotations*. GlobalPAD Core Concepts. Available at http://www2.warwick.ac.uk/fac/soc/al/globalpad/openhouse/interculturalskills/global_pad_-_what_is_culture.pdf, at pp.2: "Culture is a notoriously difficult term to define. In 1952, the American anthropologists, Kroeber and Kluckhohn, critically reviewed concepts and definitions of culture, and compiled a list of 164 different definitions. Apte, writing in the ten-volume Encyclopaedia of Language and Linguistics, summarized the problem as follows: "Despite a century of efforts to define culture adequately, there was in the early 1990s no agreement among anthropologists regarding its nature"." See also Kroeber, A. L., and Parsons. T. The concepts of culture and of social system. *American Sociological Review* 23.5, 1958, 582-583, at pp. 582: "There seems to have been a good deal of confusion among anthropologists and sociologists about the concepts of culture [and society (or social system)]. A lack of consensus – between and within disciplines – has made for semantic confusion as to what data are subsumed under these terms; but, more important, the lack has impeded theoretical advance as to their interrelation". Finally, Stuart Hall is often cited when he says that culture is a *distinctive way of life* – see in Hall, S. A. L. L. Cultural studies: Two paradigms. *Media, culture and society* 2.1, 1980, 57-72

some of them, it is also highly questionable whether they even belong in the folklore phrase and in its definition.

Potentially problematic is the use of term "traditional", due to the connotations that it might have. The word "tradition" comes from the Latin *tradere* which means to transmit, to hand over, to give for safekeeping¹⁶⁴. As with many other generic terms, there are many definitions of tradition. Philosophy, anthropology, religion, law, history and other disciplines tend to understand the concept of "tradition" in terms of strikingly different assumptions¹⁶⁵. The concept includes a number of interrelated ideas; perhaps the uniting one is that tradition refers to beliefs, objects or customs performed or believed in the past, originating in it, transmitted through time by being taught by one generation to the next, and are performed or believed in the present¹⁶⁶ or, as Edward Shils in his book "*Tradition*" simply summarized it, "in its barest, most elementary sense, tradition is anything which is transmitted or handed down from the past to the present"¹⁶⁷.

According to Anthony Giddens and others, the modern meaning of tradition can be seen as having evolved in the European discourse in the last two hundred years, as philosophers and thinkers counter posed the concept of modernity with the concept of tradition, in the context of progress¹⁶⁸.

The described evolution of the term raises the first concern for the use of the term

¹⁶⁴ Jacobs, J. Tradition is (not) modern: deterritorializing globalization, In: Alsayyad, N. ed. *The end of tradition?* London: Routledge, 2013, at pp. 31

¹⁶⁵ Phillips, M. S. and G. J. Schochet, eds. *Questions of tradition*. Toronto: University of Toronto Press, 2004, at pp. 9.

¹⁶⁶ Green, T. A., ed. *Folklore: An Encyclopedia of Beliefs, Customs, Tales, Music, and Art*. Santa Barbara: Abc-clio, 1997. Vol. 2, pp. 800

¹⁶⁷ Shils, E. *Tradition*. Chicago: University of Chicago Press, 2006, pp.12

¹⁶⁸ Giddens, A. *Runaway world: How globalisation is reshaping our lives*. London: Routledge, 2003, pp. 39

"traditional" in the folklore discourse – the concept of "tradition", after emerging and acquiring certain popularity in the 18th century, was used as the counterpart of the notion "civilized" and to depict something that was uncivilized, pre-modern and non-Western¹⁶⁹. This concern, however, seems to have been surpassed, as following the revival of traditional culture in 19th century nation-building, a process described as the "invention of tradition"¹⁷⁰, the negative connotations of "traditional" have faded away and are of secondary importance today. As described by Domman, over the 19th and 20th century's renaissance of tradition, this concept had been deconstructed as Eurocentric and the old cultural framework based on the polarity "modern vs. traditional" seems to have been surpassed¹⁷¹.

A more dangerous problem arises in relation to "traditional" if this term is to be understood as something of the past. One of the important characteristics of expressions of folklore, as discussed further below, is that they are "living" dynamic phenomena, part of an evolving living tradition, which exist as interplay between collective and individual creativity and are constantly being recreated by fresh elements and perspectives being brought into them¹⁷². Accordingly, the term "traditional" should be understood and used to portray the manner in which folklore has emerged in a particular community, rather than to signify creations of the past, or – as certain speakers at the WIPO/UNESCO World Forum on the Protection of Folklore have colourfully described it –

¹⁶⁹ Dommann, M. Lost in tradition? Reconsidering the history of folklore and its legal protection since 1800. In: Graber, C. B. and M. B. Nenova, eds. (2008), note supra 151, pp. 3-16.

¹⁷⁰ Hobsbawm, E. J. and T. Ranger. ed. (2012), note supra 98

¹⁷¹ Domman, M. In: Graber, C. B. and M. B. Nenova, eds. (2008), note supra 169, at pp. 15

¹⁷² Wendland, W. Intellectual Property and the Protection of Traditional Knowledge and Cultural Expressions. In: Hoffman, B. ed. *Art and Cultural Heritage: Law, Policy, and Practice*, Cambridge: Cambridge University Press, 2006, at pp. 328

"something dead to be collected and preserved"¹⁷³. All the same, a practical problem complicates the matter if we are to understand "traditional" as the manner in which expressions of folklore have been created. The use of the word "traditional" has been objected for suggesting that legal rights will only pertain to those culturally transmitted aspects of culture which remain faithful to ancient beliefs, practices and knowledge: "[the] adherence to "tradition" would require indigenous peoples to gather historical proof of the authenticity of their "traditions" before the rights stemming from traditional beliefs, practices or knowledge could be lawfully exercised"¹⁷⁴.

Likewise, a major problem may be identified in relation to the use of term "indigenous" in relation to folklore. It concerns both the understanding of the concept of "indigenous" itself and the use of this term as one of key elements for describing, identifying and defining folklore. It has been suggested that the phrase "indigenous knowledge" or "indigenous heritage" may be understood in at least two different ways.

For one, it may be used to describe knowledge and creations held and used by communities, peoples and nations that are "indigenous", where the very notion of "indigenous peoples" has been the subject of considerable debate, as this will be discussed into more detail in Section 3.3.1. If construed in this manner, that is, with reference to its rightholder, then "indigenous knowledge" would stand for the traditional knowledge of indigenous peoples. The dangers of this approach are apparent – indigenous knowledge is part of traditional knowledge/folklore, but not all traditional

¹⁷³ Janke, T. (1997), note supra 159, pp. 109

¹⁷⁴ Simpson, T. *The Cultural and Intellectual Property Rights of Indigenous Peoples*. Copenhagen: IWGIA, 1997, at pp. 18

knowledge/folklore is necessarily indigenous¹⁷⁵.

On the other hand, "indigenous knowledge" may also be used to refer to knowledge that is itself "indigenous". Dictionaries define "indigenous" as "originating or occurring naturally (in a country, region etc.); native, innate (to); inherent (in)"¹⁷⁶. Or, as Dutfield concisely captured it – "indigenous means belonging to, or specific to, a particular place"¹⁷⁷. Only in this sense, the terms "traditional knowledge" and "indigenous knowledge" may to some extent be understood as interchangeable¹⁷⁸.

3.2.1.3 *Current Status*

Despite various possible terms and their respective advantages and disadvantages, it seems that conceptual difficulties remain present in relation to various terminologies used¹⁷⁹. Thus, finding precise and suitable terminology remains a work in progress, where the choice of appropriate terms, and the identification of the subject matter that they cover, ultimately continues to be a matter for decision by policymakers and relevant communities at the local and national levels.

3.2.2 **Definition**

It has been recognized that the choice of a single term is perhaps less important than delineating the subject matter that ought to be protected¹⁸⁰. Describing the subject matter

¹⁷⁵ Mugabe, J. Intellectual property protection and traditional knowledge. *Intellectual Property and Human Rights*. Geneva, WIPO, 1999, 97-125, at pp. 98-99

¹⁷⁶ Collins English Dictionary, online edition, see <http://www.collinsdictionary.com/dictionary/english/indigenous>. Similarly, the Oxford Dictionary, online edition, defines indigenous as "'originating or occurring naturally in a particular place; native", see <http://www.oxforddictionaries.com/definition/english/indigenous?q=indigenous>

¹⁷⁷ See Comment on the Draft Report by Graham Dutfield in WIPO. Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge, note supra 149, at pp. 24

¹⁷⁸ Wendland, W. (2002), note supra 144, at pp. 493

¹⁷⁹ Oguamanam, C. Local knowledge as trapped knowledge: intellectual property, culture, power and politics. *The journal of world intellectual property*, 2008, vol. 11, no. 1, at pp. 35

¹⁸⁰ See WIPO. Intellectual Property Expectations of Traditional Knowledge Holders: WIPO Re-

of folklore and establishing an adequate definition has been identified as one of the most important problems in the field¹⁸¹. Yet, finding a suitable definition remains an uncompleted task.

3.2.2.1 *Current Status*

No internationally agreed consensus on the concept of folklore exists. Not only does the definition of folklore differ from discipline to discipline, from context to context and from time to time, but it also evolves as society and its values change. Moreover, at an international level, a dichotomy between the meaning of folklore in the developing and developed world is often observed¹⁸².

And not only that, but the disagreements also concern much more fundamental questions, such as whether "broad, non-exhaustive and non-exclusive, definitions" are indeed necessary at this moment or whether the goal should be more loosely worded terminology and definitions to avoid getting "stuck in working on ideal definitions that could take years to adopt"¹⁸³. In that sense, folklore is approached differently in developed countries and developing countries and indigenous groups – the former tend to adopt narrow definitions, viewing folklore as tradition, while the latter tend to prefer broader definitions, viewing folklore as a continuing and constant cultural manifestation¹⁸⁴.

So far, various definitions have been proposed

port on Fact-Finding Missions on Intellectual Property and Traditional Knowledge, note supra 149

¹⁸¹ For example, at the Tenth Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore in 2006 this was listed as the first out of ten issues to be focused on in the future work of WIPO.

¹⁸² Palethorpe, S. and S. G. Verhulst (2000), note supra 7, pp. 6

¹⁸³ See the statements of the representatives of New Zealand and Singapore, and of Nigeria at the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fourteenth Session, 2009 – see in Antons, C. What is "traditional cultural expression"? International definitions and their application in developing Asia. *WIPO Journal* 103, 2009, at pp. 104

¹⁸⁴ Palethorpe, S. and S. G. Verhulst (2000), note supra 7, pp. 6

at different national and international levels to describe the subject matter. From these, the ones proposed by WIPO in recent years are the most commonly used and referred to, given that they present the result of a continuous and advancing process. Accordingly, rather than reviewing a number of definitions produced over the years, the following pages will focus on the most influential ones proposed by WIPO¹⁸⁵.

3.2.2.2 *WIPO Definitions*¹⁸⁶

Section 2 of the Model Provisions defines expressions of folklore as:

"[...] productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community [] or by individuals reflecting the traditional artistic expectations of such a community, in particular:

- i) verbal expressions, such as folk tales, folk poetry and riddles;*
- ii) musical expressions, such as folk songs and instrumental music;*
- iii) expressions by action, such as folk dances, plays and artistic forms or rituals,*
- iv) whether or not reduced to a material form; and*

¹⁸⁵ For that purpose, in this thesis (this Section 3.2.2 and Section 5.5) I will be reviewing the WIPO/UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions Model Provisions (hereinafter "**Model Provisions**"), as the first WIPO document to comprehensively address the subject matter. Further, I will also review two versions of the Draft Provisions/Articles for the Protection of Traditional Cultural Expressions, which are under constant revision by WIPO (hereinafter jointly "**Revised Draft Articles**"), notably the Revised Draft Articles from 2006 (hereinafter "**2006 Revised Draft Articles**") and the most recent ones from 2013 (hereinafter "**2013 Revised Draft Articles**"), in order to flash up the different approaches adopted by WIPO in the process of folklore protection discussions.

¹⁸⁶ Given that this Section is concerned with terminology and definitions, the WIPO models will be discussed only with respect to the definitions they apply. For further details and chronology of relevant WIPO models and initiatives, see Section 5.5.

v) tangible expressions, such as:

- (a) productions of folk art,
in particular, drawings,
paintings, carvings,
sculptures, pottery,
terracotta, mosaic,
woodwork, metalware,
jewellery, basket
weaving, needlework,
textiles, carpets,
costumes;
- a) musical instruments;
- b) architectural forms."
[emphasis added]

It is worth noting that only "artistic" heritage is covered by the Model Provisions. This means that, among other things, traditional beliefs, scientific views (e.g. traditional cosmogony) or merely practical traditions as such, separated from possible traditional artistic forms of their expression, do not fall within the scope of the proposed definition of "expressions of folklore". On the other hand, "artistic" heritage is understood in the widest sense of the term and covers any traditional heritage appealing to our aesthetic sense. Verbal expressions, musical expressions, expressions by action and tangible expressions may all consist of characteristic elements of the traditional artistic heritage and qualify as protected expressions of folklore¹⁸⁷.

Ever since Model Provisions, WIPO has been continuously working on refining and amending the draft documents relating to folklore protection¹⁸⁸. Accordingly, a subsequent version of the WIPO definition, for example, draws upon the Model Provisions and is set in Article 1 of the 2006 Revised Draft Articles¹⁸⁹. Article 1 defines the subject matter as follows:

"Traditional cultural expressions"

¹⁸⁷ WIPO. Intellectual Property Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge, note supra 149, at pp. 22

¹⁸⁸ For details, see Section 5.5.2

¹⁸⁹ The protection of traditional cultural expressions/expressions of folklore: Revised Objectives and Principles, Geneva, April 24 to 28, 2006, WIPO/GRTKF/IC/9/4

and/or "expressions of folklore" are any forms, tangible or intangible or a combination thereof, in which **traditional culture and knowledge** are expressed, appear or are manifested, and are passed on from generation to generation, including/ such as but not limited to the following forms of expressions or combinations thereof:

- i) phonetic or verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols, etc.;
- ii) musical or sound expressions, such as songs, rhythms, instrumental music and popular tales;
- iii) expressions by action, such as dances, plays, ceremonies, rituals, sports and traditional games and other performances, theatre, including, among others, puppet performance and folk drama, whether or not reduced to a material form; and,
- iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), wooden carvings, sculptures, mouldings, pottery, terracotta, mosaic, woodwork, metalware, jewellery, baskets, food and drink, needlework, textiles, glassware, carpets, costumes, works of mas, toys, gifts and; handicrafts; musical instruments; stonework, metalwork, spinning, and architectural and/or funeral

forms.

Protection shall extend to those "traditional cultural expressions" or "expressions of folklore" which are:

- i) the products of creative intellectual activity, including individual and communal creativity;
- ii) indicative of authenticity/being genuine of the cultural and social identity and cultural [heritage] of indigenous peoples and communities and traditional and other cultural communities; and
- iii) maintained, used or developed by indigenous peoples and communities and traditional and other cultural communities, or by individuals having the right or responsibility to do so in accordance with the customary [law] land tenure system or law / normative systems or traditional/ancestral practices of those indigenous peoples and communities and traditional and other cultural communities or has an affiliation with an indigenous/traditional community.

The specific choice of terms to denote the protected subject matter should be determined at the national, sub-regional and regional levels."
[emphasis added]

The cited definitions cap folklore as a group-oriented and tradition-based creation of groups or individuals reflecting the expectations of the community as an adequate expression of its cultural and social identity. Its standards are transmitted orally, by imitation or by other means. Its forms include, among others, language, literature, music,

dance, games, mythology, rituals, customs, handicrafts, architecture and other arts. While the Model Provisions refer to expressions of folklore as "traditional artistic heritage", the 2006 Revised Draft Articles have dropped the aesthetic criteria and established a slightly broader and less specific definition of the subject matter as "traditional culture and knowledge". This formulation seems to be a compromise between the aspiration to provide an all-inclusive, sufficiently precise definition – by providing a non-exhaustive list of examples of folklore – and the view that a folklore definition must be less precise and sufficiently loose – by defining the subject matter as "traditional culture and knowledge" or "heritage" which appear in "any form".

Finally, the most recent definition used by WIPO is contained in the 2013 Revised Draft Articles¹⁹⁰. Article 1 of the 2013 Revised Draft Articles provides two options for defining the subject matter:

Option 1:

*"1. Traditional cultural expressions are **any form of [artistic and literary] expression**, tangible and/or intangible, or a combination thereof,*

Alternative 1: in which traditional culture [and knowledge] are [embodied]

Alternative 2: which are [indicative] of traditional culture [and knowledge]

which is intergenerational/from generation to generation and between generations, including, but not limited to: phonetic and verbal expressions, [musical and sound expressions], [expressions by action], tangible expressions, [and adaptations of these expressions].

2. Protection extends to traditional

¹⁹⁰ The protection of traditional cultural expressions: Draft Articles, Rev. 2, Geneva, July 15 to 24, 2013, WIPO/GRTKF/IC/25/7

cultural expressions that are:

(a) [the result of the creative intellectual activity] of; [and/or]

(b) [distinctive of or the unique product of]/[associated with] the cultural and social identity of; [and/or]

(c) [held], maintained, used and/or developed as part of the cultural or social identity [or heritage] of the beneficiaries as defined in Article 2."

Option 2:

*"1. For the purposes of this instrument, "traditional cultural expressions" include **any form of [creative and other spiritual] expressions**, tangible or intangible, or a combination thereof, such as phonetic and verbal, musical and sound, actions, tangibles and materials [and their adaptations] regardless of the form in which it is expressed, illustrated or embodied and are:*

a) intergenerational and/or passed on from generation to generation;

b) distinctive to or associated with the traditional culture, knowledge, or heritage of the beneficiaries; and

c) maintained, used or developed as part of their collective culture or social identity." [emphasis added]

The two options provided under the 2013 Revised Draft Articles seem to correspond to the two definitions provided under the Model Provisions and the 2006 Revised Draft Articles, and appear to in fact merge the different elements contained in the definitions provided in the Model Provisions and the 2006 Revised Draft Articles.

The cited definitions have been acclaimed as a departure from the earlier WIPO working definitions which comprised

expressions of folklore within the wider definition of "traditional knowledge", along with the knowledge related to the environment, biodiversity, traditional medicine and agriculture¹⁹¹. This is, however, only partially true given that the Revised Draft Articles still define the subject matter as not only culture but also knowledge.

As may be summarized from the WIPO initiatives, the definition of folklore relies and has been so far construed on the basis of several constituent elements and all of the cited definitions combine the identified different criteria on the basis of which folklore is defined.

First, the definitions cap the subject matter as certain *type of form*, mostly applying an aesthetic criterion – traditional artistic heritage, traditional culture and knowledge, forms of [artistic and literary] expression or forms of [creative and other spiritual] expressions.

Second, expressions of folklore are identified on the basis of their *typical characteristics* and the context within which they have been created, for example: as expressions which are passed on from generation to generation, as products of mixed individual and communal creative intellectual creativity, as indicative product of a people or community and so on.

Third, expressions of folklore are defined in relation to their rightholders and the context within which they are being used, where the rightholders have been identified as "indigenous peoples and communities and traditional and other cultural communities". The identification of expressions of folklore in relation to their rightholder resembles the idea of an author's intellectual creation as copyright, and possibly stresses the underlying intellectual property character of the phenomenon. Given that discussions on the protection of expressions of folklore have been initiated and are today still mainly carried out within the framework of intellectual property law, the approach which follows the copyright definition does not come as a

¹⁹¹ For example, see Wong, T. and C. Fernandini. Traditional cultural expressions: Preservation and innovation. In: Wong, T. and Dutfield, G. *Intellectual Property and Human Development: Current Trends and Future Scenarios*. New York: Cambridge University Press, 2011, pp.175; Antons, C. Introduction. In: Antons, C. ed. *Traditional knowledge, traditional cultural expressions, and intellectual property law in the Asia-Pacific region*. Vol. 14. Alphen aan den Rijn: Kluwer Law International, 2009

surprise. However, the construction of folklore upon the concept of its rightholder bears considerable risks and might encounter serious practical problems. On the one hand, the very notions of "indigenous", "traditional community", "other cultural community" or just "community" are very complex, vague and problematic *per se* and have not been sufficiently elucidated up until present. Accordingly, such articulation of folklore provides an entry point into the next terminological trap, namely how to define indigenous peoples and other subset references within peculiar national contexts¹⁹². Furthermore, there might be tremendous practical problems with identifying the exact (indigenous, traditional, cultural) community – the exact rightholder, as this follows from the Case Studies presented in Chapter 2. Finally and most importantly, the main danger of labelling expressions of folklore in relation to their rightholder lies in the fact that it might result in an unjustly limiting definition, given that there certainly exist expressions which could be considered "traditional", as in the context in which they have been created, but may not necessarily have been created by an indigenous community¹⁹³.

Finally, the definitions provide a list of illustrative examples of forms in which folklore appears – such as verbal, musical, sound, actions, tangibles etc. Indeed, it has been correctly suggested that a singular definition may not in fact be necessary in order to delimit the scope of subject matter, as may be noticed from a number of intellectual property rights¹⁹⁴. For example, the Berne Convention does not include an exclusive definition for the meaning of "literary and artistic works" but rather provides a non-exhaustive enumeration of the subject matter in order to demarcate the categories which are protected thereunder¹⁹⁵.

3.2.2.3 *A Possible Approach: Folklore Characteristics as the Backbone of Folklore Definition*

¹⁹² For example, see Oguamanam, C. (2008), note supra 179, at pp. 36

¹⁹³ For example, see Jensen, B. H. Who Owns Traditional Knowledge? A Personal and Industry View. In: Hoffman, B. ed. (2006), note supra 172, at pp. 341

¹⁹⁴ WIPO. Intellectual Property Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge, note supra 149, at pp. 25

¹⁹⁵ *ibid*

Attempts to construct a definition that would hold together all apparently diverse aspects of folklore encounter a difficulty inherent in the nature of folklore¹⁹⁶. While a precise definition of expressions of folklore may not be necessary, it is nevertheless indispensable to recognize the criteria which separate them from other "culture" or "knowledge" that is not protectable or already attracts protection on different basis.

In order to overcome the above discussed definitional problems, rather than establishing expressions of folklore in relation to their rightholders, a potentially useful approach would be to look at the social context and manner in which such expressions have been created, as their distinctive characteristics. In support of this approach, note that some have argued that, on the basis of certain basic concepts, several common features follow and typify the nature of folklore and that, in combination, these basic concepts and features can provide the basis upon which an analytical framework of folklore can be developed¹⁹⁷. Accordingly, the focus should be on the characteristics of folklore and processes leading to their creation, and not the community within which the particular expression of folklore has been created.

In order to identify such distinguishing characteristics, it is important to examine more closely the complex nature of folklore. In particular, Ben-Amos argues that, in spite of all the diversities, it is possible to distinguish three basic conceptions underlying the subject matter: it is a body of knowledge, a mode of thought and a kind of art. For the purpose of narrowing down these three very broad categories of culture – body of knowledge,

¹⁹⁶ Ben-Amos, D. Toward a Definition of Folklore in Context. *The Journal of American Folklore*, 1971, Vol. 84, No. 331, at pp. 4

¹⁹⁷ Palethorpe, S. and S. G. Verhulst (2000), note supra 7

mode of thought and kind of art – folklorists and ethnologists have established criteria on the basis of which folklore materials are classified, including its social context, time depth and medium of transmission¹⁹⁸.

Thus, certain characteristics may distinguish folklore from non-folklore. The first element is the "folk", that is, "people". With this respect, the "folk" does not pejoratively stand to signify uneducated people of the village or tribes, as this may have been the case in the 19th century when the romantic idea of folk was related to the primitive, but expresses the *collective character* of the phenomena. In that sense, folklore is the lore, teaching, knowledge and wisdom shared by members of a particular group, it is "common property"¹⁹⁹ of the community. It is the product of the community, emerging through individual genius. Despite the individual element in its creation, which is typically *anonymous*, folklore is accepted, followed and re-created within the community.

Second and closely linked to the above is the following characteristic of folklore – it is a phenomenon that *reflects the common aspects* of a community. Hence, folklore is that which is held by members of a distinct culture or, as WIPO formulated it, that which reflects a community's cultural and social identity and consists of characteristic elements of community's heritage²⁰⁰.

A third distinctive characteristic of folklore is *continuity and re-creation*. When observed on a time scale, folklore is that which is established on past experiences and observation, but is modified and enlarged while being used over

¹⁹⁸ Ben-Amos, D. (1971), note supra 196, at pp. 5

¹⁹⁹ Bayard, S.P. The Materials of Folklore. *Journal of American Folklore*, 1953, 66, at pp. 8

²⁰⁰ See for example WIPO Booklet on Intellectual Property and Traditional Cultural Expressions/Folklore, available at http://www.wipo.int/export/sites/www/freepublications/en/tk/913/wipo_pub_913.pdf

time²⁰¹. This does not exclude innovation in the tradition, on the contrary, but there has to be continuity in its presence, or colourfully put – it has to "live in people's mouth for at least several generations"²⁰². This does not, however, imply that folklore applies only to that item which has survived previous stages of evolution and was least exposed to the light of civilization, some sort of a "lively fossil"²⁰³. Ben-Amos correctly notes that folklore is not a collection of things but, in its cultural context, it is a process.

Finally, another important characteristic of folklore is *transmission*, in the sense that it has been and is being circulated from one person or group of persons to another. In Slavic languages there is an expression commonly associated with folklore that captures this characteristic vividly – folklore is that which is "passed from one knee to another" [*sa kolena na koleno*]. In this saying "knee" signifies an entire generation, but this construction also serves to illustrate a typical situation where a grandfather or grandmother holds a grandchild on their knees and re-tells a story, poem or other expression. While it is normally transmitted orally, folklore cannot entirely be characterised by this feature. Firstly, materials other than folklore are also orally transmitted, so the criterion of oral transmission by itself is not sufficient to distinguish folklore from non-folklore²⁰⁴. Furthermore, not all folklore has evolved strictly through oral transmission, given that some has been communicated in a written form, while others have been passed neither in written nor in verbal manner (such as dances and crafts)²⁰⁵. Thus, the manner of

²⁰¹ Mugabe, J. (1999), note supra 175

²⁰² Dorson, R. M. *Bloodstoppers and Bearwalkers: Folk Traditions of Michigan's Upper Peninsula*. London: University of Wisconsin Press, 3rd edition, 2008, at pp. 7

²⁰³ Ben-Amos, D. (1971), note supra 196, at pp. 8

²⁰⁴ Dundes, A. *The study of folklore*. Englewood Cliffs, New Jersey: Prentice-Hall, 1965

²⁰⁵ Islam, M. *Folklore, the pulse of the people: in the context of Indic folklore*. New Delhi:

transmission, as such, is not the relevant criterion. This is also recognized in the WIPO definitions, which provide a simple requirement that the expression is passed on from generation to generation, without specifying the exact mode of transmission.

Finally, given that the above criteria, *per se*, may not necessarily be sufficient for delineating the subject matter, the scope of folklore is also materialised through the *elements that constitute it*. In this sense, folklore includes literature, practices and arts, which is also reflected in the WIPO definitions, as verbal, sound, expressions of action and tangible expressions.

3.3 Who?

Folklore is not created by known persons and hence it is commonly ascribed to "peoples" as in a group of people, an entire community. Therefore, one of the crucial questions associated with the protection of expressions of folklore is the definition and identification of its holders. As confusing as the choice of appropriate term and definition when it comes to expressions of folklore may seem, this is even more so when we ask the question "*Who*": Who are the rightholders of folklore and, accordingly, who should be the beneficiaries of a potential protection?

Again, various terms have been used to describe the holders, such as "indigenous communities", "indigenous people", "traditional communities" and "cultural communities". The proposed terms and definitions will be discussed in the following pages – first, Section 3.3.1 analyses the phrase "indigenous communities" and following, Section 3.3.2 "traditional and other communities". Section 3.3.3 deconstructs the notion and definition of "community" as such, while Section 3.3.4 discusses the main problem related to the rightholder, however one chooses to designate it.

3.3.1 "*Indigenous communities*"

In discussions on the protection of expressions of folklore, the implied beneficiaries of this protection were initially and most commonly identified as "indigenous peoples" or "indigenous communities". The phrase "indigenous peoples"

has been the subject of considerable discussion and study. While initially based on the notion of "indigenous" [discussed in Section 3.2.1.2], it seems that over the late twentieth century, the term "indigenous peoples" has evolved into a political term that refers to ethnic groups with historical ties to groups that existed in a territory prior to colonization or formation to a nation state. Used politically, the term defines these groups as particularly vulnerable to exploitation and oppression by nation states, and as a result, a special set of political rights in accordance with international law have been set forth by international organizations such as the United Nations, the International Labour Organization and the World Bank²⁰⁶.

There is no agreed definition of indigenous people, and the definitions provided in international instruments vary in their language and scope. The International Labour Convention No. 169 provides some points of reference²⁰⁷, although this still remains a highly debated issue²⁰⁸.

Within the context of folklore discussions, the explanation of the concept "indigenous" in the Study of the Problem of Discrimination Against Indigenous Populations prepared by the Special Reporter of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, Dr. Martínez Cobo, has been regarded by WIPO as an acceptable working definition for many indigenous peoples and their representative organizations²⁰⁹. The working definition reads as follows:

"Indigenous communities, peoples and nations

²⁰⁶ Sanders, D. Indigenous peoples: Issues of definition. *International Journal of Cultural Property*, 1999, vol. 8, no. 01, at pp. 4 – 13

²⁰⁷ Article 1 of the Convention reads: "(1) This Convention applies to:(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. (2) Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply".

²⁰⁸ Wong, T. and Fernandini, C. In: Wong, T. and Dutfield, G. (2001), note supra 191, at pp. 3

²⁰⁹ See WIPO. Intellectual Property Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge, note supra 149

are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system".

However, references to criteria of colonization, conquest, domination, cultural distinctiveness, continual affiliation with pre-invasion and pre-colonial societies, geographical location and others are said to have proven to be inconclusive for precisely defining "indigenous peoples"²¹⁰. Furthermore, a number of representatives of indigenous groups have asserted that the diversity of the world's indigenous peoples renders problematic an all-embracing definition and that efforts by the international community to develop a binding, all-inclusive definition are a diversion of energies²¹¹. Likewise, Daes argues that a precise definition that accommodates the historical experiences and political trajectories of indigenous peoples globally is not feasible²¹². As practical definitional guidance, Daes suggests four factors which are often cited in folklore-related discussions:

- a. Priority in time with respect to the occupation and use of a specific territory;*
- b. Voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;*
- c. Self-identification, as well as self-*

²¹⁰ Oguamanam, C. (2008), note supra 179, at pp. 37

²¹¹ For example, see Blakeney, M. (2000), note supra 151, at pp. 36

²¹² Daes, E. The Concept of Self-Determination and Autonomy of Indigenous Peoples in the United Nations Declaration on the Rights of Indigenous Peoples'. *St. Thomas Law Review*, 14, 2001, at pp.259-270

recognition by other groups; and

- d. An experience of subjugation, marginalisation, dispossession, exclusion, or discrimination, whether or not these conditions persist*²¹³.

Hence, it should be clear that a group's indigenous status or claims thereto is an issue that is ultimately context dependent²¹⁴.

Two further points on this issue should also be taken into account. Firstly, the term "indigenous peoples" is basically a political concept, and as such, it is highly questionable to what extent it should find its place in legal discussions. Secondly, as recognized and stressed by the WIPO, the concept of "indigenous peoples" is much narrower than the folklore holder. While indigenous peoples and communities are certainly folklore holders, not all folklore holders are necessarily indigenous. Accordingly, defining the folklore rightholder as an "indigenous" community has as its consequence a rather constricted and narrowed type of protection that only limited categories could benefit from.

3.3.2 "Traditional and other cultural communities" or "Local communities"

Apart from indigenous peoples, certain other local communities could be treated as custodians of expressions of folklore under draft international provisions. In order to surpass the ambiguities related to defining "indigenous peoples" as well as to broaden the scope of potential beneficiaries, WIPO has, for example, included in the 2006 Revised Draft Articles a rather tentative definition of beneficiaries of folklore protection as "indigenous peoples and traditional and other cultural communities"²¹⁵.

²¹³ Daes, E. *Right of Indigenous Peoples*. Paper presented at Pacific Workshop on the United Nations Draft Declaration on the Rights of Indigenous Peoples, Suva, Fiji, 1996

²¹⁴ Arewa, O. B. *Piracy, Biopiracy and Borrowing: Culture, Cultural Heritage and the Globalization of Intellectual Property*. *Bepress Legal Series*, 2006, 1114.

²¹⁵ "At times, the discourse in this area has focused primarily on the interests of indigenous peoples. More recently, however, the debate has included the interests of local communities. Over the past two years, WIPO has broadened the scope of their annual Roundtable meetings from Intellectual Property and Indigenous Peoples in 1998 to Intellectual Property and Traditional Knowledge in 1999. This change goes far beyond a mere change of labels. It represents a significant shift in the nature of the debate. It demonstrates the recognition of "both the diversity of traditional knowledge itself, as well as the diversity among the groups and individu-

There is, however, little or no international consensus as to which communities the latter would comprise. A WIPO Secretariat's commentary suggests that the term "cultural communities" is broad enough to "include also the nationals of an entire country"²¹⁶.

Likewise, the term "traditional communities" was introduced with the aim of providing sufficient flexibility with respect to the rightholders of expressions of folklore. The use of this phrase, however, brings along a certain degree of puzzlement. While I perfectly agree with those who suggest that the term "traditional" should be understood as indicative of the manner in which expressions of folklore have been created, rather than to imply something of the past [see discussions related to term "traditional" in Section 3.2.1.2], the use of the word "traditional" within the context of rightholder seems to suggest something completely different. In the latter discourse, the term "traditional" is used to signify a community that stands opposite to modern and Western, non-traditional communities. In a field where broad and unclear sociological concepts are used to describe the subject matter, which accommodates continuous discussion as to their precise meaning and implications, there should be no room for contradictory use of the same term in relation to different concepts.

Likewise, the 2013 Revised Draft Articles have introduced the term "local communities" to the definition, by defining the beneficiaries of protection as (Option 1) *"[Indigenous [Peoples] or [local communities] [or nations] who [hold, maintain, use [and/or] develop their traditional cultural expressions as part of their collective cultural or social identity] are the beneficiaries of protection in respect of those traditional cultural expressions as defined in Article 1 [or an entity defined by national legislation as a beneficiary]"* or simply (Option 2) as *"Indigenous [Peoples] and [local communities], or as determined by national law"*.

Drawing from numerous previous discussions and revised definitions, the updated 2013 WIPO Glossary of Key Terms

als who are the holders of such knowledge". – see Palethorpe, S. and S. G. Verhulst (2000), note supra 7, pp. 15

²¹⁶ See WIPO. Traditional Cultural Expressions/Expressions of Folklore: Legal and Policy Options, note supra 154, at pp.17

Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions²¹⁷ under the term "beneficiaries" simply states that "there is no universally accepted definition of the term" as the "discussions on the issue have noted that the term could include indigenous peoples, indigenous communities, local communities, traditional communities, cultural communities, nations, individuals, groups, families, and minorities".

In any case, it is highly questionable whether the inclusion of the phrases "cultural", "traditional", "local" and "other" along with "communities" has indeed provided the necessary flexibility with respect to recognizing those who are the rightholders of expressions of folklore. Ultimately, all these terms are very vague and unclear – what does cultural, for example, next to community even mean? Literally every community has *some* culture, so cultural community means the community which shares the same *culture*. At the same time, this "culture" (presumably signifying the expressions of folklore in this case) is being identified on the basis of the community that it belongs to, so we end up in a "conceptual galimatias"²¹⁸, substituting one indefinable category with another equally indefinable yet inter-dependant. Similarly, what does "traditional" add as information if included in the definition? While it arguably points towards the fact that such communities possess folklore, the inclusion of this phrase is restricting, while on the other it does not really add much value to the definition.

Furthermore, one key issue highlighted by the case studies presented above is relevant regardless which of the above phrases and their associated and implied meanings we opt for. Namely, if folklore holders are all those "persons who create, originate, develop and practice"²¹⁹ folklore, then, as such, this concept is much wider than either of "indigenous", "traditional" "local" or "cultural community".

²¹⁷ WIPO Glossary of Key Terms Related to Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions , Geneva, July 15 to 24, 2013, WIPO Doc WIPO/GRTKF/IC/25/INF/7

²¹⁸ Fuentes, A. *Cultural diversity and indigenous peoples' land claims: argumentative dynamics and jurisprudential approach in the Americas*. Diss. University of Trento, 2012 , at pp. 177

²¹⁹ WIPO. Intellectual Property Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge, note supra 149 at pp. 26

As already pinpointed, indigenous people may be folklore holders, but not all folklore holders are necessarily indigenous. While the inclusion of the phrase "indigenous communities" in the Revised Draft Articles has been inspired by the raised voices of concern of various indigenous communities in an effort to protect their heritage and is therefore to a certain extent understandable, it seems to me that the Model Provisions provide a much better legislative solution with this respect. Namely, the Model Provisions define the rightholder solely in relation to the subject matter, where the rightholder is that community that has "developed and maintained" the relevant expression of folklore, and thus have avoided applying an unnecessary restrictive construction. Similarly, the Option 1 of the 2013 Revised Draft Articles seems to follow the same logic, as in addition to indigenous and local communities, it provides that the beneficiaries may be entire "nations who hold, maintain, use and/or develop their traditional cultural expressions as part of their collective cultural or social identity", apparently reflecting views from countries such as Egypt and Morocco that expressions of folklore may be "national folklore" and belong to all of the people of a particular country²²⁰.

Regardless of whether we name the potential beneficiaries of protection a "cultural community", "other community", just "community" or whatever else, in order for this concept to be practically operational, it is necessary to define it in relation to certain practical parameters. While the 2006 Revised Draft Articles provide a certain degree of guidance – these communities are those in whom "the custody, care and safeguarding of the traditional cultural expressions/expressions of folklore are entrusted in accordance with their customary law and practices" and "who maintain, use or develop the traditional cultural expressions/expressions of folklore as being characteristic of their cultural and social identity and cultural heritage"²²¹ – this does not provide a practical method for effectively *identifying* the exact community – the exact rightholder.

For these reasons, I am very sceptical that the inclusion of

²²⁰ Wong, T. and Fernandini, C. In: Wong, T. and Dutfield, G. (2001), note supra 191, at pp. 3

²²¹ Article 2 (i) and 2 (ii) of the 2006 Revised Draft Articles

either of these labels next to "community" has much improved the definition of rightholders or elucidated who the holder of folklore is and how we should define or identify it. While the inclusion of these terms was possibly intended to point out that the circle of potential beneficiaries should be observed wider than to merely include indigenous communities, it is highly questionable whether it has even achieved that. Namely, it was suggested that, even though it is more neutral, the term "local communities", like the term "indigenous peoples", in its non-literary meaning in fact mainly applies to colonized peoples of the global South²²². In any case, the circle of beneficiaries from potential protection is still too limited, as there are obviously communities which are neither indigenous nor traditional yet have folklore, and not only that, but we still have no hint who the rightholder is and how we identify him/her. On the other hand, one may question whether it is really necessary to add any of these terms – why wouldn't it be enough to just say "community"?

3.3.3 What is a Community Really?

While it is perfectly clear, and there seems to be no disagreement on this, that folklore is a collective matter by its very nature and that its holder cannot be individuals but a group of some sort, we still appear to be far away from determining which community should in fact be the rightholder. This raises an important question: What is a community really²²³?

*"Community is at once an indispensable term and a dangerous one, whether we are practicing history or sociology or simply living our everyday lives"*²²⁴. The concept of community, described as a "very slippery notion"²²⁵, has been one of the most compelling and attractive themes in modern social sciences, one of the key ideas, yet at the

²²² Oguamanam, C. (2008), note supra 179, at pp. 37

²²³ The problematic meaning of the term community has often been examined by scholars. See for example Shepard, A. and Withington, P. eds. *Communities in early modern England: Networks, place, rhetoric*. Manchester: Manchester University Press, 2000; Lynch, K. A. *Individuals, families, and communities in Europe, 1200-1800: the urban foundations of Western society*. Vol. 37. Cambridge: Cambridge University Press, 2003

²²⁴ Burke, P. *Languages and communities in early modern Europe*. Cambridge: Cambridge University Press, 2004, at pp.5

²²⁵ Amit, V, and N. Rapport. *The trouble with community: anthropological reflections on movement, identity and collectivity*. London: Pluto Press, 2002

same time one of the most elusive to define²²⁶. The term²²⁷ and its definition have been studied in various disciplines, including sociology²²⁸, psychology²²⁹, anthropology²³⁰, archaeology, theology²³¹, ecology, philosophy and others. Over the years, a large number of definitions²³² have been proposed, varying in richness, complexity and criteria for characterization and categorization²³³. Due to the volume of these definitions and their substantial disparity, it is not practically possible nor within the scope of this research to list them, especially if one bears in mind that, as with any other term, the definition of community ultimately depends upon the period and context of its use²³⁴. Indeed, how can one accurately and comprehensively define something that potentially encompasses forms as diverse as global, virtual, cyber-community, community of ethnicity, race, gender,

²²⁶ Hamilton, P. Preface, In: Cohen, A. *The Symbolic Construction of Community*. London: Psychology Press, 1985

²²⁷ Said to derive from Latin *communitas* (com meaning "with/together" and *munus* meaning "gift"), thus a broad term for fellowship or organized society.

²²⁸ See for example Messing, A. An Outsider's Sociology of Self. *Human Architecture. Journal of the Sociology of Self-Knowledge*, 2009, Vol. 7, no. 3; Putnam, R. D. *Bowling alone: the collapse and revival of American community*. New York: Simon and Schuster, 2000

²²⁹ See for example Verbit, M. F. The components and dimensions of religious behavior: Toward a reconceptualization of religiosity. *American mosaic*, 1970, vol. 24, 39.; Küçükcan, T. Multidimensional Approach to Religion: a way of looking at religious phenomena. *Journal for the Study of Religions and Ideologies*, 2010, vol. 4 no. 10, pp. 60-70

²³⁰ See for example McMillan, D. W. and D. M. Chavis. Sense of community: A definition and theory. *Journal of community psychology*, 1986, vol. 14, no. 1, pp. 6-23.; Perkins, D. D., et al. Participation and the social and physical environment of residential blocks: Crime and community context. *American journal of community psychology*, 1990, vol. 18, no. 1, 83-115; Chipuer, H. M. and G M.H. Pretty. A review of the sense of community index: Current uses, factor structure, reliability, and further development. *Journal of Community psychology*, 1999, vol. 27, no.6, 643-658; Long, D. A. and D. D. Perkins. Confirmatory factor analysis of the sense of community index and development of a brief SCI. *Journal of Community Psychology*, 2003, vol. 31, no. 3, 279-296.

²³¹ See for example Canuto, M. A. and J. Yaeger, ed. *The Archaeology of Communities*. New York: Routledge, 2000; Hegmon, M. Concepts of Community in Archaeological Research. In: Varien, M. and R. H. Wilshusen, ed. *Seeking the center place: Archaeology and ancient communities in the Mesa Verde region*. Salt Lake City: University of Utah Press, 2002.

²³² For example, even as early as the mid-1950s, George A. Hillery, an American sociologist, had uncovered more than 90 definitions of the term in use within the social sciences – see Hillery, G. A. Definitions of Community: Areas of Agreement. *Rural sociology* 20, 1955, 111-123

²³³ Communities are regularly categorized into geographic communities (as neighbourhood, village, town, region, country etc.), cultural communities (ethnic group, religious, sub-culture and so on) and community organizations (family, kinship, political structure, economic enterprise and so on) – see *ibid*

²³⁴ This idea was first expressed by Wittgenstein but may be considered as common ground today – see in Tyler, R. Comprehending Community. In: Herbrechter, S. and Higgins, M. eds. *Returning (to) Communities: theory, Culture and Political Practice*. Amsterdam: Rodopi, Vol. 28, 2006, at pp. 21

community of knowledge and tradition or a multicultural community²³⁵?

While there is no consensus on what the key factor in defining a community is and scholars vary significantly with their arguments on this topic, somewhat prevailing idea used in defining a community is the "sense of belonging". A number of influential sociologists, such as Cohen²³⁶, Brow²³⁷, Turner²³⁸ and others, suggest that some sort of social relationship – the "sense of belonging" – is the key identifying criteria, as opposed to spatially-specific grouping. This approach seems to have been accepted by legal scholars²³⁹ as well – Gibson for example proposes that a "community is not necessarily a physical location but a shared resource of custom and tradition from which the expression of self is possible"²⁴⁰. Accordingly, a community is *that entity to which one belongs*.

Just as the concept itself is vague so too are its boundaries – what marks the beginning and the end of one community? On boundaries, Cohen is often cited when he says that the simple answer is that the boundary encapsulates the identity of the community and, like the identity of an individual, is called into being by the exigencies of social interaction. Boundaries are marked because communities interact in some way or divide from entities from which they are or wish to be distinguished. The manner in which they are marked depends entirely upon the specific community in question. Some, like national or administrative boundaries, may be statutory and protected through law, others physical, marked by a mountain or water, yet others cultural – linguistic or religious. In any case, Cohen says that not all boundaries, and not all the components of any boundary, are so objectively apparent – they may only be

²³⁵ Herbrechter, S. and Higgins, M. Introduction. In: *ibid*, at pp. 10

²³⁶ Cohen, A. (1985), note *supra* 226

²³⁷ Brow, J. Notes on Community, Hegemony, and the Uses of the Past. *Anthropological Quarterly*, 1990, vol. 63, no. 1, pp. 1-6

²³⁸ Turner, V. W. *The ritual process: Structure and anti-structure*. New Jersey: Transaction Publishers, 1995

²³⁹ See for example Coleman who argues that culture and cultural possessions are linked to a group's identity and that art and culture express "the being" of a group – Coleman, E. *Cultural Property and Collective Identity*. In: Herbrechter, S. and Higgins, M. eds. (2006), note *supra* 234, at pp. 162

²⁴⁰ Gibson, J. Intellectual property systems, traditional knowledge and the legal authority of community. *European Intellectual Property Review*, 2004, vol. 26, pp.10

existing in the minds of their beholders²⁴¹.

The importance of boundaries has also been recognised by folklorists who say that "much folklore is about boundary maintenance rather than group vertebration or self-integration"²⁴².

Answering the question "what is a community?" is primarily a task for sociology, philosophy, anthropology and other adjacent subjects. Law often avoids answering this question. Nevertheless, there have been some attempts in law to engage with the question, mostly in the cultural heritage context. For example, the UNESCO glossary of terms defines communities as "*collectively, [are] the ones who create, carry and transmit intangible cultural heritage*"²⁴³. Similarly, the Report from the Expert Meeting on Community Involvement in Safeguarding Intangible Cultural Heritage provides the following definition: "*communities are networks of people whose sense of identity or connectedness emerges from a shared historical relationship that is rooted in the practice and transmission of, or engagement with, their intangible cultural heritage*"²⁴⁴.

The proposed legal definitions seem to apply the same criteria as proposed by the sociologists – a sense of belonging or a connectedness as the principle for identifying a member of a community.

3.3.4 Identifying the Community – Rightholder

Given the vast variety of diverse communities around the world differing in characteristics, as well as a lack of basic agreement on what the notion should embrace, a number of scholars have questioned the usefulness of the concept of community²⁴⁵. Amit and Rapport come to the conclusion

²⁴¹ Cohen, A. (1985), note supra 226, at pp 12.

²⁴² Bendix, R. F. and G. Hasan-Rokem, ed. *A companion to folklore*. Chichester: John Wiley & Sons, 2012, Vol. 37, at pp. 22

²⁴³ See UNESCO, Frequently asked questions, available at <http://www.unesco.org/culture/ich/index.php?lg=en&pg=00021>

²⁴⁴ UNESCO/ACCU, Expert Meeting on Community Involvement in Safeguarding Intangible Cultural Heritage: Towards the Implementation of the 2003 Convention, at pp. 9, available online at <http://www.unesco.org/culture/ich/doc/src/00034-EN.pdf>

²⁴⁵ See for example Watts, M. J. Contested communities, malignant markets, and gilded governance: justice, resource extraction, and conservation in the tropics. In: Zerner, C. ed. *People, plants, and justice: The politics of nature conservation*. New York: Colombia University Press, 2000, pp. 21; Amit, V, and N. Rapport. (2002), note supra 225

that such a vague term persists in usage only because it provides "a convenient conceptual heaven, a location from which to safely circumscribe potentially infinite webs of connection"²⁴⁶.

Without entering into the controversial academic discussions that have been continuing for decades, it suffices to briefly highlight a number of potential consequences to the implied beneficiary of potential protection of whichever definition or perception of the "community" we choose to adopt. First, from a legal point of view, the vagueness of the concept may have profound implications and may complicate or hinder any intended system of protection. If we surpass a definition that would distinguish a "community" in relation to a geographic location, territory, language or whatever other common feature, we may settle with a "sense of belonging"²⁴⁷ or "notion of historical specificity"²⁴⁸, whatever we chose to call it – in any case, "webs of connections"²⁴⁹ as the defining criteria.

While such a notion should be broad enough to cover any community in the world, and hence both indigenous and non-indigenous communities, there are certain practical problems which we may face. For one, a problem may be the administration of potential protection if the practical borders to such "community" are spread across a larger region or do not match the administrative borders of nowadays sovereign countries²⁵⁰. The enforceability of such system would accordingly be conditional on the creation of some sort of pan-national administrative body.

Second, another practical problem is the identification of the community from which a certain expression of folklore originates. The identification of the rightholders is of crucial

²⁴⁶ Amit and Rapport (2002), note supra 225, at pp. 37

²⁴⁷ Crow, G. and Allan, G. *Community Life. An introduction to local social relations*. Hemel Hempstead: Harvester Wheatsheaf, 1994, at pp. 6

²⁴⁸ Todorova, M. N. (2009), note supra 15, at pp. 11

²⁴⁹ Amit and Rapport (2002), note supra 225, at pp. 37

²⁵⁰ Although observing this problem from an indigenous perspective, Gibson, for example, also recognises that "In order to consider "community" within this model of protection, therefore, the creation of an unreasonable generalisation of the Indigenous or traditional community as a "legal entity" must nevertheless be resisted, and yet there must be some agent in which the authority to manage traditional resources may vest". – see Gibson, J. *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge*. Aldershot: Ashgate Publishing, Ltd., 2005, at pp. 276

importance from a practical point of view. As demonstrated in the case studies presented in Chapter 2, it is entirely possible that more than one community will claim custodianship of the same or very similar expression of folklore. Through geographical proximity, common history, migration or displacement of folklore holders to new territories, certain renditions of expressions of folklore might well appear concurrently in different countries, and all these raise complex, context specific questions²⁵¹. This problem might occur not only in European nations formed in recent history but could also be present globally. Harms, for example, has stressed the potential implications of the inability to identify the precise community to which an expression of folklore belongs in the South African context and has suggested that, perhaps, in this case it should be considered that no one is the rightholder, as the expressions of folklore do not belong to an identifiable community²⁵².

3.4 Why?

Finally, before moving on to thinking about a satisfactory method for protecting folklore, one more question needs to be answered: Should expressions of folklore be protected at all? If so, *why*? It may generally be remarked that these days academic and expert debates primarily focus on the issue of the most appropriate manner of protection, rarely tackling more fundamental issues concerning appropriateness and justification. In my judgement, however, the incentive for protection is not self-evident and so should not be taken for granted.

As with almost any other crucial question raised within this field, the answers in the existing literature vary from one extreme to the other – from those who strongly challenge the need for any protection²⁵³ to those who advocate extensive and strict types of protection. This is because the impetus for the protection of

²⁵¹ Wong, T. and Fernandini, C. In: Wong, T. and Dutfield, G. (2001), note supra 191, at pp. 3

²⁵² Harms, L.T.C. A few negative trends in the field of intellectual property rights, *EIPR*, 2009, at pp. 546

²⁵³ Such concerns have been expressed by various folklore holders who fear that "commodification" of folklore may be harmful – see WIPO. Intellectual Property Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge, note supra 149. Also, authors have stressed the dangers related to attempting to enforce new controls over cultural property, as this will be detailed in Section 3.4.2 – see for example Brown, M. F. Can Culture Be Copyrighted?. *Current anthropology*, 1998, vol. 39, no. 2, pp. 193-222

expressions of folklore reflects a wide range of interests and concerns and these are often not clear-cut as they differ across nations and cultures²⁵⁴.

3.4.1 Arguments in Favour of Protection

Summarizing the reasons for protection raised by indigenous peoples, WIPO pointed out the following: *"Indigenous art copied onto carpets, T-shirts and greeting cards; traditional music fused with techno-house dance rhythms to produce best-selling 'world music' albums; hand-woven carpets and handicrafts copied and sold as 'authentic'; the process for making a traditional musical instrument patented; indigenous words and names trademarked and used commercially. These are the kinds of examples that indigenous and other traditional and cultural communities cite when arguing that traditional creativity and cultural expressions require greater protection in relation to intellectual property (IP) "*²⁵⁵.

While potential arguments for protection are multiple, they could be summed up under the argument of *cultural appropriation*. As Ziff and Rao summarized it, cultural appropriation is wrong in a variety of ways. One of these ways is that it harms the appropriated community and so the claim is therefore based on a concern for the integrity and identities of cultural groups. A second complaint focuses on the impact of appropriation on the cultural object itself. The concern is that appropriation can either damage or transform a given cultural good or practice. A third criticism is that cultural appropriation wrongly allows some to benefit to the material detriment of others and it is thus a claim based on sovereignty²⁵⁶.

Another pro protection advocate, Jabbour, has suggested taxonomy of four "inchoate" concerns or anxieties which have led to international proposals for the protection of folklore²⁵⁷. The first issue he refers to is *authentication*. This

²⁵⁴ Palethorpe, S. and S. G. Verhulst (2000), note supra 7, at pp. 14

²⁵⁵ See for example WIPO Booklet on Intellectual Property and Traditional Cultural Expressions/Folklore, note supra 200

²⁵⁶ Ziff, B. and Rao, P. V. Introduction to Cultural Appropriation: A Framework for Analysis. In: Ziff, B. and Rao, P. V. eds. *Borrowed Power: Essays on Cultural Appropriation*. New Brunswick, NJ: Rutgers University Press, 1997, at pp. 8

²⁵⁷ Jabbour, A. Folklore Protection and National Patrimony: Developments and Dilemmas in the Legal Protection of Folklore. *Copyright Bulletin* 10, 1982, vol. 10, at pp. 11-12

concern is triggered by economic, cultural and psychological exploitation of expressions of folklore by persons other than the rightholders, through practices which range from unauthorized replication of expressions of folklore to simply use without the previous consent of the rightholders. The second issue is *expropriation*. This issue represents an anxiety about the removal of valuable artefacts and documents from their place of origin. Linked to the previous two issues is the issue of *compensation*, where the circulation of an expression of folklore requires the payment of an appropriate and fair compensation. The economic benefit derived from expressions of folklore may go into the pocket of a third party that has misappropriated the expression or it may be shared with the community from which that particular expression has originated. The final issue Jabbour identifies is *nurture or preservation*. The above concerns related to the circulation of expressions of folklore outside their original habitat are also accompanied by a parallel concern for maintaining the culture itself in the face of "modernization" and "internalization" and the flow of commerce and culture.

Depending on the viewpoint and the relevant interest – whether it is the interests of the folklore holders and creators, folklore users or society at large – Palethorpe and Verhulst have also summarized the different economic²⁵⁸, social and cultural objectives justifying more or less protection for expressions of folklore. For folklore holders, they suggest that the following specific issues are addressed: the appropriation of expressions of folklore; the authentication of expressions of folklore; the inappropriate use of expressions of folklore; the possibility of compensation for the appropriation and cultural harm caused by use of expressions of folklore; and the continued development of folklore. The interest of the users of folklore expressions is to be able to rely on the availability of expressions of folklore for their continued utilisation, but they also have an economic interest because of the effect

²⁵⁸ Although Palethorpe and Verhulst recognise that little or no data exists on the economic valuation of folklore. Nonetheless, it is generally accepted that folklore contributes substantially to the economy in a range of industries, such as: arts and crafts; tourism; advertising and branding; film and television; and music and festivals – see Palethorpe, S. and S. G. Verhulst (2000), note supra 7

that the protection may have on the level of competition in the cultural product market. Finally, the society at large might have different advantages if protecting folklore – for one, the preservation of culture is an important reason, including the identification, conservation and preservation of the cultural aspects of folklore. Equally important is the promotion and dissemination of creativity, based on the continuing use of tradition. According to Palethorpe and Verhulst, other rationales such as the protection of minorities, socioeconomic development of developing countries and fundamental rights are also important but may already be considered at length in other international forums²⁵⁹.

Finally, it is worth noting that most of the above outlined arguments in favour of protection have been set out with indigenous communities in mind. Accordingly, one may ask whether the same incentives for protection equally apply to the expressions of folklore of non-indigenous communities. Understandably, the role of heritage within an indigenous and a non-indigenous community will not be the same, due to the spectrum of different political, organisational, cultural and other circumstances. Equally, the damage to the community caused by unauthorized use of such expression and the incentives for protection originating from the relevant community may not be the same. If we use such a criterion, which is based on the graveness of potential consequences of non-protection, one may question whether non-indigenous folklore should be protected or not.

While such reasoning could find its roots and justification in some of the prominent legal theories of the past centuries²⁶⁰, it seems that the notion of "consequence" as the incentive for protection does not fully correspond to the legal reality of today²⁶¹. Therefore, if we advance from a

²⁵⁹ Palethorpe, S. and S. G. Verhulst (2000), note supra 7, at pp. 14 – 16

²⁶⁰ For example, the legal theory of consequentialism, which was developed through the late 18th and 19th centuries, held the view that normative properties depend only on the consequences and that consequences of one's conduct are the ultimate basis for any judgment about the rightness of that conduct. Thus, a morally right act (or omission) is one that will produce a good consequence – see in Presslaff, I. *Thoughts*. Bloomington: iUniverse, 2013, pp. 440

²⁶¹ In respect to intellectual property, legal theory does not adopt a purely consequentialist approach. In general, the arguments for intellectual property rights have taken one of three forms: (1) personality theorists endorse intellectual property as an extension of individual personality and creators' moral rights to control their work; (2) utilitarians ground intellectual

purely consequentialist approach and accept that there are other arguments to protection, it seems that non-indigenous folklore equally deserves attention. For example, do non-indigenous communities have the right to control their work? Does non-indigenous folklore, being folklore, deserve to be preserved and nurtured? Do non-indigenous communities have the right to be recognised and acknowledged as the creators of an expression of folklore? The answer to these questions must be positive. Thus, if, recognising the totality of theoretical reasons for protection in general, we use a purely objective standard and attempt to answer the above question focusing solely on the subject matter – the folklore – as the criterion for protection, then there should be no justification for differentiating between indigenous and non-indigenous communities as rightholders. As long as there is an expression that fits within the notion of folklore, it should not be relevant which community it originates from, how grave economic or moral damage for the relevant community its exploitation produces, whether the concerned community does or does not express loud concerns over its utilization and so on. In other words, the rationale behind the protection of indigenous folklore should be equally pertinent to the non-indigenous one, as long as it is *folklore*. And evidently, there is *folklore* in non-indigenous communities.

3.4.2 Against Protection

All of the above discussed incentives for protection are obvious and to a certain extent self-explanatory. However, nearly all of these could just as well be observed from the other side and used as arguments against protection.

For example, if we talk about the harms of cultural appropriation, as dangerous as unauthorized appropriation may be for the appropriated community, "commodification"²⁶² of culture may just as well be contrary to the interests and harmful for the community from which an expression originates. Some folklore holders claim that

property rights in social progress and incentives to innovate; and (3) Lockeans argue that rights are justified in relation to labour and merit. All of these will be discussed into more detail in Section 4.4.

²⁶² For example, M. J. Radin argues that commodification of certain objects might be antagonistic for the interests of personhood – see Radin, M. J. Market-inalienability. *Harvard Law Review*, 1986, vol. 100, pp. 1870-74)

the nature of folklore lies in the public domain and that it should not be the subject of protection given that attempts to regulate its use and transmission would have far-reaching philosophical and practical implications for information ethics, the public domain and the creation, management and free flow of information²⁶³. Furthermore, appropriation arguably does not only harm the communities from which expressions originate but the society at large, since creators draw upon a wealth of pre-existing material in developing new works. Besser, for example, therefore argues that access to and availability of our rich cultural heritage is critical to the creative process: "Yet at the end of the 20th century we began to see access to that culture being walled off. In a veritable assault on access to our common heritage, various segments of the content industry have used the courts, the legislative process, technological developments and downright bullying as part of a broad attempt to turn our cultural heritage into a common commodity (one that is owned, leased, and controlled). If this trajectory continues into the 21st century, this commodification of our cultural heritage will have serious implications for artists, writers and other creators"²⁶⁴.

A serious reservation was also expressed by Pager, for example, concerning the harms that a potential protection might have on the subject matter itself. "Traditional culture will only endure to the extent that it retains meaning and value to its source communities. This requires the freedom to creatively reinvent tradition to keep it relevant. A system of intangible property rights focused on preservation risks calcifying traditional expression in "authentic" forms that preclude experimentation. Enforcing intangible heritage rights could therefore limit socially valuable innovation and deter much-needed investment in creative industries"²⁶⁵. Accordingly, one may question whether protection of folklore will indeed nurture and preserve the subject matter or will, on the contrary, cause damage.

Lessig and Browne have particularly heavily criticised the

²⁶³ Palethorpe, S. and S. G. Verhulst (2000), note supra 7, at pp. 15

²⁶⁴ Besser, H. Commodification of culture harms creators. *The Information Commons, New Technology and the Future of Libraries*, 2002

²⁶⁵ Pager, S. Folklore 2.0: Preservation through Innovation. *Utah Law Review*, No 4, 2012, available online at <http://epubs.utah.edu/index.php/ulr/article/view/951>

idea of folklore protection, though they mainly focused on the deficiencies and inadequacy of copyright law, rather than law or intellectual property law in general. Browne, for example, argued that the proposals made by legal scholars, anthropologists and native activists to defend indigenous cultures by radically expanding the notion of copyright are often informed by romantic assumptions that ignore the broader crisis of intellectual property and the already imperilled status of the public domain. Among the different arguments he uses against protection, the most important ones are the incompatibility of copyright with folklore and the threat that potential copyright-like protection of expressions of folklore poses to the public domain. In connection with this, Browne argues that the common theme of conferred intellectual property rights is that they are limited and that the principal goal of intellectual property laws is to ensure that information enters the public domain in a timely fashion, where it loses most of protection²⁶⁶, after having allowed the creators, be they individuals or corporate groups, to derive reasonable financial and social benefits from their work. Furthermore, he argues that copyright is "predicated on romantic notions of an isolated creative genius who plucks beauty out of thin air by an inspired act of the imagination and that such identification of inventiveness with a solitary human life, however, cannot be easily reconciled with the political economy of modern industrial creativity or, for that matter, with the collective productions of indigenous peoples"²⁶⁷.

3.5 What, Who and Why – a suggestion

3.5.1 What?

With regards to the terminology used to describe the subject matter, various terms have been proposed over the years. Nearly each has attained certain support but has also attracted criticism which concerns the underlying meaning and potential connotations attached to the used terms. These arguments were briefly summarized in Section 3.2. As a result, the conceptual difficulties remain in relation to the various terminologies used in the field.

²⁶⁶ Yet, not all protection, especially with regards to the moral aspect of such work – this will be discussed into more detail in Chapter 6

²⁶⁷ Brown, M. F. (1998), note supra 253, pp. 193-222

Establishing a precise definition of folklore seems to be just as complicated as finding adequate terms. *"Compared to folklore, it is easy to define a lion, sodium chloride, an electron or the beauty of a woman, as their shape or nature can be seen and perceived"*²⁶⁸.

If we were to analyse the elements constituting folklore, the two most obvious ones are the "folk" and the "lore". The "lore" has, throughout the development of the concept, been identified as artistic expressions, artistic heritage, traditional culture and the like. As this was demonstrated to be insufficiently precise, it was suggested that folklore can only be adequately identified on the basis of elements that constitute it – the written expressions, such as literature, sound expressions, such as music, expressions by action, such as dances, and tangible expressions. But, while one can understand a poem or feel a song, it is very difficult to define these. As confusing it may seem, it has been correctly suggested that perhaps a singular definition may not really be necessary, as may be learned from a number of international intellectual property law instruments. Namely, music, literature, art and so on are categories which are not precisely defined under international intellectual property law and yet the criteria for their protection are set.

The second element that differentiates a "regular" song from a folk song is the "folk". In its non-literary meaning, this element of folklore signifies all those specific characteristics which are inherent to folklore and which distinguish it from non-folklore. These characteristics were discussed in the preceding chapters and, in brief, include the collective character of the phenomena which reflects the community's cultural and social identity and consists of characteristic elements of the community's heritage, constant continuity and re-creation, and finally transmission, in the sense that it has been and is being circulated from one person or group of persons to other. Certain other criteria commonly used to identify folklore, such as verbal transmission, have proven to be inadequate and insufficient in demarcating the subject matter.

In the light of the aforesaid, I agree with the view that a

²⁶⁸ Islam, M. (1985) note supra 205, at pp.5

loose, non-specific definition of expressions of folklore might be reasonably operational for the purpose of proceeding towards discussions on an adequate level of protection for folklore at a global level. Such an approach, however, stresses even more the importance of choosing precise terms and reaching certain consensus of their respective meaning. In my judgement, there is nothing wrong with the term "expressions of folklore". Even though the word "folklore" has earlier been widely criticized as Eurocentric and pejorative, it has been argued that this term has acquired a new and neutral meaning over the years, and should therefore not be so easily dismissed simply because it emerged from European tradition. The word "expressions" in the phrase is recommendable to stress the nature of the phenomenon, as expressions of collective spirit, as opposed to works of individual creativity. On the other hand, a number of other words used or suggested in relation to folklore, such as traditional, cultural and indigenous, seems to be too problematic and counterproductive, as shown in Section 3.2. Bearing in mind the practical problems that the use of such potentially confusing terms might generate, I think that the dangers of proceeding with them are greater than the benefits. Yes, we might end up with a more "neutral" phrase, as oppose to a phrase which potentially triggers certain negative feelings, but this does not seem justifiable if, on account of that, we end up operating with vague, confusing and problematic terms. For these reasons, this thesis will be using the phrase "expressions of folklore" or just "folklore" to describe the subject matter.

With regards to a potential definition of expressions of folklore, I strongly disagree with the proposals to define the subject matter in relation to the implied beneficiaries. Firstly, the concept of folklore rightholder is even more unclear and confusing than the concept of folklore itself, and so by linking these two in such manner, we might end up in a vicious circle. Furthermore, such an approach might result in an unjust limiting definition, given that there is a considerable pool of expressions of folklore which may not necessarily have been created by an indigenous community, but this should not disqualify them automatically from protection.

In order to overcome this, rather than establishing expressions of folklore in relation to their rightholders, my

proposal is to examine the social context and manner in which such expressions have been created, and their distinctive characteristics. Accordingly, instead of focusing on the community within the particular expression has been created, our angle could shift to the processes leading to the creation of and the genuine characteristics of the expressions of folklore. These inherent characteristics would, for example, include the following variables summarized by Palethorpe and Verhulst²⁶⁹ – continuance²⁷⁰, social aspect²⁷¹, territorial nature²⁷² and communal nature²⁷³. Such an identification of folklore could further be supported by specific examples, as this has been proposed by WIPO, by listing examples of expressions of folklore.

Finally, if we place folklore within an intellectual property based regime, which is what I will argue for later in this thesis, we do not need to dissect the notion of folklore further – there is no need to define or elaborate on specific forms of folklore as we can benefit from the already established categories like music, poems, stories etc. These are not defined, but we know what they are, we know how to recognize them and accordingly how to protect them, under copyright law for example. Accordingly, in this case we do not need to start from scratch but just to add the distinctive characteristics of folklore to these already established categories.

3.5.2 Who?

As difficult as describing the subject matter of expressions of folklore and establishing an adequate definition seem to be, this is even more obvious when it comes to naming and defining the potential rightholders. Despite continuous discussions, this remains an uncompleted task.

²⁶⁹ Palethorpe, S. and S. G. Verhulst (2000), note supra 7, at pp 9 and 10

²⁷⁰ Because of its trans-generational nature, folklore axiomatically derives from a historical or temporal background. This is not to suggest however that folklore is an anachronism – see *ibid*

²⁷¹ In general, folklore is an integral part of the society from which it originates. For many communities it is a source of cultural and social identity – see *ibid*

²⁷² Folklore is mostly associated with the region or territory from which particular traditional communities originate, although it may be transnational as different movements and globalisation have led to the spread of specific folklore across the globe – see *ibid*

²⁷³ Folklore evolves over successive generations and is communally created. Each generation gradually adds to the wealth of folkloric knowledge of numerous preceding generations. The creative efforts of many individuals intermingle to become part of a society's cultural heritage – see *ibid*

Most commonly, the rightholders of expressions of folklore are identified as "indigenous peoples" or, lately, "traditional or other cultural communities". The notion "indigenous peoples" has been the subject of considerable discussion and study, yet, the precise meaning of this term is not clear. Both the terms "indigenous" and "community" are very broad social and political concepts, and as such are ultimately context dependant. The prevailing view today is that no formal universal definition of the term is necessary, and that for practical purposes, the understanding of the term provided by Cobo study mentioned in Section 3.3, is regarded as an acceptable working definition by many indigenous peoples and their representative organizations. Similarly, the terms "traditional community" or "other cultural community" do not appear much clearer than the concept "indigenous peoples". According to some²⁷⁴, these phrases are also understood in a way similar to "indigenous" and in essence represent the colonized people of the south. On the other hand, there is very little guidance and almost no international consensus as to which communities this tentative definition would comprise. While the reasoning behind introducing such a formulation might be explained by the need to come up with a concept that is broad enough, the actual practical usefulness of such a construction is highly questionable. As discussed in Section 3.3, the use of some of these terms, in particular "traditional", is very problematic *per se*, and seems to create even more confusion, in an already puzzling field.

The use of the notion "indigenous peoples" can in particular be criticized. The interest in the subject matter was initially prompted by indigenous communities and discussions are still today being directed with taking their interests into account. Thus the reference to "indigenous" as rightholders should not come as a surprise. However, the term "indigenous peoples" is in essence a political concept and, as such, has limited place in legal discussions. While political interests of certain groups may belong to discussions on policy objectives and one must take them into account, a concept and its definition that we are striving to establish should primarily take into account

²⁷⁴ For example, see Oguamanam, C. (2008), note *supra* 179

inherent characteristics of the phenomena we are looking to protect. Furthermore, as recognized and stressed by the WIPO, the concept of "indigenous peoples" is much narrower than "TCEs holder". While indigenous peoples and communities are certainly folklore holders, not all folklore holders are necessarily indigenous.

Given this, the Model Provisions, in my judgement, provide a better solution in addressing the issue of who the rightholders of expressions of folklore are. They define the rightholder simply as the "community that has developed and maintained" a particular expression of folklore. While such a concept of the rightholder is not precise *per se* and might not be entirely operational without further specification of the criteria used to determine the exact group of people who will be the beneficiary of a future protection, at least this definition is not unnecessarily restrictive.

In any case, I believe that the crucial question to be asked is not who the rightholders are, in terms of how we should name and define them, but how we can identify them – a question that strikes from the case studies presented in Chapter 2. Practically, more than one community might claim custodianship of the same or similar expression of folklore in a country. Or, through geographical proximity, common history, migration or displacement of the folklore custodians to new territories, certain renditions of expressions of folklore might well appear concurrently in different countries. All these possibilities raise complex, context specific questions concerning which criteria can we use to identify the exact rightholder.

While these questions may not be within the competence of the law makers and are to be answered in other disciplines, they should not be ignored either. If we cannot come up with a system that would, when applied in practice, overcome challenges, then it is perhaps better to drop the idea of protection altogether rather than end up with a non-functional system.

3.5.3 Why?

Finally, before advancing towards discussions on the type of protection that would be most adequate for expressions of folklore, it is necessary to confirm that any sort of

protection is indeed required. The arguments in favour of protection are manifold and have been well established. They include concerns related to authentication of the expressions of folklore, their expropriation, fair compensation in return for their exploitation and their preservation. On the other hand, it has been pointed out that just because something is being copied, this does not automatically mean that it must be protected and that the maxim that "what is worth copying is *prima facie* worth protecting"²⁷⁵ threatens to collapse the crucial distinctions between harm and wrong, and between mere loss and actionable injury²⁷⁶.

Drawing on the various arguments and contrasting viewpoints for and against protection, I do not believe we should drop the idea of protection altogether just because the existing system may not be perfect and coming up with one that could benefit expressions of folklore overall may be difficult. While arguments against protection bear a certain degree of credibility, an underlining idea behind them seems to be a concern for the subject matter of potential protection, its rightholder, society as a whole and the public domain. Even Browne, who passionately advocates against protection, does not dismiss the idea of *some form* of protection (though other than copyright) and says that "although there are compelling reasons to be sceptical of some indigenous intellectual property rights proposals currently under discussion, I strongly support efforts to create basic mechanisms for the compensation of native peoples for commercial use of their scientific knowledge, musical performances, and artistic creations"²⁷⁷. Likewise, Lawrence Lessig seems to allow that a "knowledge commons might include works that must be paid for, so long as the payment is non-discriminatory and is structured as a liability rule"²⁷⁸.

Therefore, while recognizing and appreciating the expressed concerns, rather than dismissing the idea of protection

²⁷⁵ Justice Peterson in *University of London Press Ltd v University Tutorial Press Ltd*, 1916

²⁷⁶ Drassinower, A. Canadian originality: remarks on a judgement in search of an author. In: Gendreau, Y. ed. *An emerging Intellectual Property Paradigm: Perspectives from Canada*. Cheltenham: Edward Elgar Publishing, 2009, at pp. 150.

²⁷⁷ See Browne, M. F. note *supra* 253, at pp. 204

²⁷⁸ See on Lessig, L. in Boyle, J. The second enclosure movement and the construction of the public domain. *Law and contemporary problems* 66.1/2, 2003, 33-74, at pp. 68

completely, we should seek to design such a system of protection that would annul or at least minimize the harm that it could cause to the communities from which expressions of folklore originate, to the expressions itself and to the society at large. Accordingly, I believe that the question we should ask is not really "*should we protect*" but "*how should we protect*" and this is the question which I will be trying to answer in the following chapters.

Finally, it is again important to bear in mind the specific characteristics of folklore, when developing the system of protection. While the arguments on why it should be protected are well established and perfectly acceptable, the protection might not automatically be beneficial for the expressions of folklore itself. In order to exclude potential harms, any potential protection must take the specific features of folklore into consideration.

CHAPTER IV: *How:* Which Law?

4.1 Introduction

Expressions of folklore can be dealt with under a number of available legal regimes. In general and in brief, these different systems can principally be divided into intellectual property based and other types of protection. The appropriateness of dealing with the subject matter under either of these regimes has been a subject of an ongoing heated debate over the years, where different legal, socio-cultural, economic and political arguments have been used to justify the application of one or the other. Yet again, as with most other questions raised in this field, the answer seems difficult to grasp as it is neither simple nor straightforward.

Over the years, many advantages, drawbacks and justifications of particular types of protection have been pointed out. As it will be presented in the following pages, scholars have stressed that certain intellectual property concepts, such as those of authorship and originality, are wholly inapplicable to expressions of folklore and that therefore intellectual property laws are not suitable for regulating this subject matter. In contrast, there are those who claim that the existing intellectual property standards can nevertheless be modified so as to elude these problematic points. Yet others suggest designing a new, *sui generis* approach, but within the intellectual property law rationale. Some are concerned with the overexpansion of intellectual property law and consider it crucial to maintain a healthy public domain. Others are of the view that stretching intellectual property law to cover expressions of folklore is not dangerous and impossible *per se*, but might be unfeasible from the perspective of indigenous peoples as the potential beneficiaries of such protection.

On the other hand, there are those who think that the answer to "how" should be looked for in other fields. Apart from the intellectual property systems, expressions of folklore are said to be potentially regulated on the basis of some other laws, such as laws on cultural heritage or laws on human rights. But then, there are those who consider these laws incapable of providing a satisfactory mode of protection on their own as they can only protect certain limited aspects of folklore.

All of these arguments have strengths and weaknesses and degrees of credibility and so the issue of choosing the most appropriate method of protection is not a simple search for a "yes" or "no" answer, but rather a careful investigation and evaluation of all the "pros" and "cons" in the light of specific legal, political, sociological and cultural circumstances surrounding the subject matter of

folklore. For that purpose, it is important to, on the one side, comprehend expressions of folklore and their inherent characteristics, and on the other, understand the essence of whichever type of protection we are trying to bring expressions of folklore under.

Prior to considering particular practical modes of protection within the existing systems, it is necessary to examine the appropriateness of placing the search for an adequate protection of expressions of folklore within an intellectual property-type or other type of protection in general. Due to the diverse positions that need to be taken into consideration when deciding on this, the answer will not be straightforward. For that purpose, the following Sections, on a rather theoretical than practical level, examine the different relevant aspects of intellectual property law and other potentially applicable laws, in order to evaluate their capability and adequateness in protecting expressions of folklore. First, Sections 4.2 and 4.3 look at human rights and laws on culture and examine their potential limitations. Following, Section 4.4 looks at the history, essence and purpose of intellectual property law, the tension between intellectual property law and the public domain, and the general weaknesses of intellectual property law in dealing with the subject matter, but without getting into details of particular practical limitations under specific categories of intellectual property law, as these will be dealt with in the following Chapter 5. Finally, Section 4.5 provides a suggestion as to which field of law we should be placing the search for folklore protection.

4.2 Human Rights Laws and Laws on Cultural Heritage

The specific characteristics of expressions of folklore – for example, the fact that they are cultural expressions or expressions through which a right to pursue cultural development, as one of the elements of the right of self-determination, is manifested, inspired the attempts to place the search for their protection within the discourse of cultural laws and human rights law. The final verdict as to the usefulness of these has not yet been reached – as it will be shown in the following Sections, some argue that human rights or laws of culture are capable of protecting the subject matter in a comprehensible manner, while others claim that they can only add some elements to the protection but do not have the capacity, on their own, to provide satisfactory protection.

As a general observation, it is noticeable that, for the most part, the available literature takes a rather pragmatic approach when examining the appropriateness of relevant non-intellectual property

laws in dealing with folklore. For that purpose, most scholars have looked at particular provisions of the available international, regional and/or national instruments and treaties in the fields of human rights and laws on preservation of cultural heritage in order to assess their usefulness in relation to expressions of folklore. Nevertheless, it seems that significantly less attention has been dedicated to observing this problem from a more theoretical viewpoint – that is, to exploring the essence of human rights and laws on culture and their general appropriateness in providing protection of folklore. The practical approach is not necessarily theoretically deficient *per se*, as it inevitably also leads to certain general and abstract conclusions generated through inductive reasoning. However, additional theoretically based discussions in the field would certainly add to obtaining a more comprehensive and well-grounded justification of why the search of folklore protection should or should not be placed within the non-intellectual property discourse.

The scope and the focus of this research will not allow me to explore these issues in depth. Nevertheless, for the purpose of the present analysis, it is necessary to briefly look at human rights and laws on the preservation of cultural heritage, as well as the most important legal instruments in these fields, to an extent that is necessary in order to provide a comprehensive analysis of folklore protection.

4.2.1 Human Rights Laws

Outside intellectual property laws, human rights and within them rights of indigenous peoples acquired certain attention in discussions of folklore protection. When it comes to norms directly relevant for folklore within the framework of general human rights, it is possible to distinguish between the standards for the protection of intellectual property and those relevant for the protection of indigenous peoples²⁷⁹.

Within the first group, when it comes to the grounds to protect intellectual property, perhaps the most commonly quoted legal instrument is the European Convention on Human Rights²⁸⁰ (hereinafter "**ECHR**"). One might reasonably question what a human rights treaty has to do

²⁷⁹ Stoll, P.-T. and von Hahn, A. Indigenous Peoples, Knowledge and Resources in International Law. In: von Lewinski, S. ed. *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore*. The Hague: Kluwer Law International, 2004, at pp. 17

²⁸⁰ The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13

with intellectual property – the answer is the right of property, which appears in the ECHR²⁸¹. Article 1 of Protocol 1 of ECHR states: "*Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law*".

The protection of property contained in the ECHR has been one of the most controversial and disputed provisions in the European human rights system with regards to its purpose, scope and extent of protection it provides. The intention of the legislators was questioned, since the cited Article does not appear in the text of the ECHR but in the Protocol, and also, that it makes no mention of the word "right"²⁸². While the subsequent case law confirmed that intellectual property rights constitute possessions within the meaning of Article 1 of Protocol 1 and that these rights are under the guarantee of ECHR²⁸³, sceptics have repeatedly expressed their concerns over the dangers of an "arranged marriage" between human rights and intellectual property – some find this protection redundant, others fear that such protection is only secondary to some fundamental human rights, and some are concerned that the continuous proclamation of new human rights will undermine the balance of existing intellectual property laws²⁸⁴. For the purpose of the present debate, it is sufficient to say that the ECHR may serve as a ground but not as the detailed rule for protection of intellectual property. Therefore, as a general limitation of the human rights framework for intellectual property, it is worth noting that the detailed intellectual property law is not to be found in the human rights documents but in the laws on intellectual property.

Further and more specifically, within grounds for protection

²⁸¹ Helfer, L. The New Innovation Frontier? Intellectual Property and the European Court of Human Rights. *Intellectual Property and the European Court of Human Rights*. *Harvard International Law Journal* 49, 2008, at pp. 2

²⁸² Helfer, L. Intellectual Property and the European Court of Human Rights. In: Torremans, P. ed. *Intellectual Property and Human Rights*. London: Kluwer Law International, 2008, at pp. 32

²⁸³ Çoban, A. R. *Protection of property rights within the European Convention on Human Rights*. Ashgate Publishing, Ltd., 2004, at pp. 149

²⁸⁴ Yu, P. K. Challenges to the development of a Human-Rights Framework. In: Torremans, P. ed. (2008), note supra 282, at pp. 79-80

of intellectual property, there are several international and regional legal instruments in the field of human rights which recognise the right to benefit from the protection of the moral and material interests that derive from scientific, literary and artistic production. For example, pursuant to the 1948 Universal Declaration on Human Rights²⁸⁵ (hereinafter "**UDHR**") *"everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author"*²⁸⁶. Even though UDHR is a non-binding instrument in the field of international human rights law, it has influenced certain other documents, such as the International Covenant on Economic, Social and Cultural Rights²⁸⁷ (hereinafter "**ICESCR**") and the International Covenant on Civil and Political Rights²⁸⁸ (hereinafter "**ICCPR**"), which are both binding upon the signatory parties²⁸⁹. Accordingly, the provisions of the UDHR that may be relevant in relation to the protection of folklore are nearly directly reflected in the ICESCR and the ICCPR.

Looking more closely at the relevant provisions of the ICESCR and ICCPR, it follows that Article 15 of the ICESCR is the one most directly relevant for folklore, while certain other provisions also bear potential importance for the subject, including Article 27 ICCPR (minority rights), Article 19 ICCPR (freedom of expression), Article 1 ICCPR and Article 1 ICESCR (right to self-determination)²⁹⁰. Article 15 of the ICESCR provides that *"the State Parties [...] recognise the right of everyone [...] to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author"*²⁹¹. Such "right to benefit" has recently been interpreted as providing the linkage between copyright and

²⁸⁵ Universal Declaration on Human Rights, adopted and proclaimed by the United Nations in General Assembly Resolution 217 A(III), U.N. doc. A/810, 10 December 1948

²⁸⁶ Article 27 (2) of the UDHR

²⁸⁷ International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, concluded on 16 December 1966, entered into force on 3 January 1976

²⁸⁸ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, concluded on 16 December 1966, entered into force on 23 March 1976

²⁸⁹ Currently, 156 state are parties to the ICESCR and 160 states are parties to the ICCPR

²⁹⁰ Graber, C. Using human rights to tackle fragmentation in the field of traditional cultural expressions: an institutional approach. In: Graber, C. B. and M. B. Nenova, eds. (2008), note supra 151, at pp. 102

²⁹¹ Article 15 (1) (c) of the ICESCR

indigenous heritage²⁹² and thus particularly relevant within discussions on the protection of folklore expressions.

Furthermore, Article 1 (1) of the ICCPR is often cited as relevant in relation to the indigenous peoples, as the presumed rightholders of folklore, since it lays down the right to self-determination: "*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*"²⁹³.

In summary, it has been argued that all these provisions are relevant to the claims of traditional communities, inasmuch as they recognize collective rights, and may be used to require compensation for works relating to traditional knowledge and prohibit discriminatory tendencies reflected in the deliberate failure to protect folklore. In addition, provisions on self-determination are said to have the potential to be used by minority groups who are also fighting for political independence to support their right to control and dispose of their cultural resources²⁹⁴.

However, the direct application of these provisions, as well as the use of human rights in general, in relation to the protection of folklore has been subject to several reservations.

Firstly, as has been pointed out, apart from the right of self-determination whose features might be regarded as collective and could potentially serve as the basis for an

²⁹² Committee on Economic, Social and Cultural Rights, General Comment No. 17 (2005), adopted 21 November 2005, E/C.12/GC/17, 12 January 2006. Para 32 of the Comment reads that "[...] State Parties should adopt measures to ensure the effective protection of the interests of the indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge. In adopting measures to protect scientific, literary and artistic productions of indigenous peoples, States parties should take into account their preferences. Such protection might include the adoption of measures to recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes and should prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties..."

²⁹³ On right to self-determination, also relevant is the International Labour Organization Convention No. 169 which deals specifically with the rights of indigenous peoples – see for example, Cowan, J. K., Dembour, M-B. and Wilson, R. A. eds. *Culture and rights: Anthropological perspectives*. Cambridge: Cambridge University Press, 2001; Yupsanis, A. The International Labour Organization and its Contribution to the Protection of the Rights of Indigenous Peoples. *The Canadian Yearbook of International Law* 49.1 (2011), 117-176.

²⁹⁴ Kuruk, P. Protecting folklore under modern intellectual property regimes: a reappraisal of the tensions between individual and communal rights in Africa and the United States. *American University Law Review*, 1998, vol. 48

action by indigenous communities, human rights law provisions are intended primarily for individuals, rather than for groups²⁹⁵. Human rights theory and practice mainly perceives human rights as individual rights, and this is also the case in relation to the so-called "cultural rights" within the sense of ICCPR and ICESCR²⁹⁶. Accordingly, the established rights provide the basis for protecting the rights of individual authors, in their capacity as members of particular groups²⁹⁷. This, however, is in contrast to the collective nature of expressions of folklore and thus it has been argued that any attempt to provide legal protection for cultural minorities or groups cannot be efficient, as long as it is not based on a concept of group rights²⁹⁸.

On the other hand, it has also been pointed out that the individual character of human rights does not preclude them from enshrining a collective aspect as well²⁹⁹. Recent human rights theory seems to suggest that most individual human rights may have a collective dimension, without therefore becoming collective rights³⁰⁰. This has been pointed out in relation to the cited Article 27 ICCPR, which serves to protect cultural rights of individuals in their capacity as members of indigenous peoples. The expressed reasoning is supported by the interpretation of the Committee, which addressed the problematic relationship between individual and collective rights in two ways: (i) by inviting State Parties to recognize not only individual but also collective authorship; and (ii) by requiring State Parties to provide "for collective administration by indigenous peoples of the benefits derived from their productions" i.e. suggesting the use of *Domaine Public Payant* or other form of collective right management³⁰¹. However, as valuable as it may seem

²⁹⁵ See for example Chapman, A. Human Rights implications of Indigenous' Peoples Intellectual Property Right. In: Greaves, T. ed. *Intellectual Property Rights for Indigenous Peoples*. Society for Applied Anthropology, 1994; Evatt, E. Enforcing Indigenous Cultural Rights: Australia as a Case-Study. In: Niec, H. ed. *Cultural Rights and Wrongs*. UNESCO Publishing and Institute of Art and Law, 1998

²⁹⁶ Eide, A. Cultural Rights as Individual Human Rights. In: Eide, A., Krause, C. and Rosas, A. eds. *Economic, Social and Cultural Rights*. The Hague: Kluwer Law International, 2001, at pp.290-291

²⁹⁷ Graber, C. In: Graber, C. and Burri-Nenova, M. eds. (2008), note supra 151, at pp. 109

²⁹⁸ Stavenhagen, R. Cultural Rights: A Social Science Perspective. In: Eide, A., Krause, C. and Rosas, A. eds. note supra 296, at pp.102

²⁹⁹ Graber, C. In: Graber, C. and Burri-Nenova, M. eds. (2008), note supra 151, at pp. 103

³⁰⁰ See Kalin, W. and Kunzli, J. in: *ibid*, at pp. 103

³⁰¹ Committee on Economic, Social and Cultural Rights, note supra 292, at para. 32

in relation to clarifying the collective aspect of established human rights, this argumentation hardly clarifies the practical applicability of such rights. Rather, it merely observes the problem of protection through a copyright or general intellectual property prism.

Along the same discussion of the individual character of human rights, it has been pointed out that these, as public law rights, are essentially addressed to states and not to individuals or groups of individuals. Accordingly, their value in relation to folklore seems rather relative in that "indigenous people are primarily concerned with their collective rights as distinct peoples, while international human rights law is mainly concerned with the rights of individuals against states"³⁰². This is particularly evident if we look at the above cited right to self-determination. While the quoted international instruments provide for a right to self-determination, which may be of particular interest to indigenous peoples, the essential problem with the protection of folklore is not how to provide a mechanism for indigenous and potentially other communities to express their right to self-determination. Rather, the essential problem is how to protect the existing creations. Accordingly, it is highly questionable whether the relevant international human rights provisions in fact establish a clear basis for their application to individuals or corporations which engage in unauthorized utilization of folklore³⁰³.

This leads to one of the most important drawbacks related to the use of human rights as a tool for protecting expressions of folklore – its applicability and enforceability. Human rights are enforceable only to a limited extent. According to human rights theory, the recognition of human rights imposes three levels of obligation on State Parties: (i) the obligation to respect, (ii) the obligation to facilitate, and (iii) the obligation to provide³⁰⁴. Although these obligations present positive duties for State Parties, they essentially present a requirement to take all necessary steps within their own available resources to ensure effective protection

³⁰² Suagee, D.B. Human Rights and Cultural Heritage: Development in the United Nations Working Group on Indigenous Populations. In: Greaves, T. ed. (1994), note supra 295, at pp. 196

³⁰³ Kuruk, P. (1998), note supra 294

³⁰⁴ Committee on Economic, Social and Cultural Rights, note supra 292, at para. 15

of human rights³⁰⁵. In that way, the international human right standards merely impose a duty for states to provide organizational, administrative, judicial and other appropriate technical mechanisms for individuals to enforce their rights, rather than substantially providing the practical mechanisms for their implementation.

To a certain but limited extent, human rights may also be applied in private-law disputes³⁰⁶. Namely, there have been cases where judges have applied the provisions of human rights instruments horizontally, that is, in conflicts between private individuals. The provisions applied in private-law discourse concern the protection of property on the one hand, and the protection of freedom of expression, information, art and science on the other. Although not directly relevant in relation to folklore, the horizontal effect of human rights was argued to be important inasmuch as it may provide the flexibility and balance within intellectual property law – as a regulator between the protective tendencies of intellectual property and freedom of expression³⁰⁷.

Finally, another obstacle to the efficient use of the quoted provisions of human rights in relation to folklore is their vagueness. Namely, it has been pointed out that the exact ambits of the provisions of ICCPR and ICESCR are far from clear³⁰⁸. Accordingly, it is not certain whether the provided principles of cultural self-determination and cultural development are genuine rights or merely vague political principles³⁰⁹. Further, when examining these provisions, one again hits the same terminological and definitional obstacles, as already discussed in detail in Chapter 3. The provisions leave open the delicate question of how the relevant entities, as beneficiaries of the established human rights, may be identified and defined³¹⁰. While "peoples"

³⁰⁵ Graber, C. In: Graber, C. and Burri-Nenova, M. eds. (2008), note supra 151, at pp. 103

³⁰⁶ See in Geiger, C. The constitutional dimension of intellectual property In: Torremans, P. ed. (2008), note supra 282, at pp. 113

³⁰⁷ Geiger, C. Fundamental rights, a safeguard for the coherence of intellectual property law? *IIC*, 35.3, 2004, 268-280

³⁰⁸ Macmillan, F. Human Rights, cultural property and intellectual property: three concepts in search of a relationship. In: Graber, C. and Burri-Nenova, M. eds. (2008), note supra 151, at pp. 77

³⁰⁹ Graber, C. In: *ibid*, at pp. 105

³¹⁰ Macmillan, F. In: *ibid*, at pp. 76

may represent nationals or citizens of particular states, it has been disputed whether this concept should necessarily include indigenous communities or other groups identified on the basis of their ethnic, religious, cultural or linguistic characteristics, for example³¹¹.

The same problems appear in relation to the other concepts and provisions – for example, what precisely should be understood as falling under the "right to benefit"? While the "right to benefit" may be relevant insofar as it provides the basis for claims of communities to particular expression of folklore, it is not clear whether it may be imposed so as to prevent the misappropriation of those expressions by other communities or individuals. Quite the contrary, it may be argued that a vague formulation like the cited one provides sufficient ground for those who, on the basis of misappropriated expression of folklore, create new works, to "benefit" from such work.

4.2.2 Cultural Heritage Laws

While it was not until rather recently that intellectual property laws began taking into account the interests of communities when it comes to their cultural traditions, the laws of cultural heritage have long recognised the need and importance of safeguarding cultural heritage³¹². Under the auspices of UNESCO, various international, regional and national schemes for the identification and conservation of cultural heritage have been carried out. These initiatives certainly, although arguably only indirectly, contribute to the protection of the expressions of folklore. As a very broad depiction, UNESCO encourages the international collaboration in the preservation of cultural heritage and the introduction of measures for identification, conservation, preservation, dissemination and protection of traditional culture, which ultimately creates the necessary foundation for every subsequent legal protection of the expressions of folklore.

When it comes to cultural heritage protection in general, the

³¹¹ Musgrave, T. D. *Self Determination and National Minorities*. Oxford: Oxford University Press, 1997, at pp. 90

³¹² Kono, T. Convention for the safeguarding of intangible cultural heritage: Unresolved Issues and Unanswered Questions. In: Kono, T. ed. *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development*. Antwerp-Oxford-Portland: Intersentia, 2009, at pp. 5

first important international legal instrument dealing with cultural heritage³¹³, within the light of the present discussion, is the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (hereinafter "**WHC**"). The aim of the WHC is to mobilize the international cooperation for the protection of the cultural and natural heritage of mankind³¹⁴. The most commonly cited article of the WHC, when it comes to the protection of folklore, is Article 11 which provides that "[...] *every State Party to this Convention shall, in so far as possible, submit to the World Heritage Committee an inventory of property forming part of the cultural and natural heritage [...]*"³¹⁵. While it is unlikely that these provisions are aimed at providing legal protection of folklore, they are nevertheless valuable inasmuch as they require State Parties to create an inventory and take appropriate measures to preserve folklore.

In addition to the WHC, certain other related instruments, although not legally binding, add to the protection of cultural heritage. For example, the Recommendation on the Safeguarding of Traditional and Popular Culture adopted by the General Conference at its 25th Session urges the Member States to establish legislative measures necessary for the identification, conservation, preservation, dissemination, protection and international cooperation in the field of cultural heritage³¹⁶.

These instruments relating to cultural heritage in general are indisputably helpful as they raise awareness about the need to safeguard heritage, however, their practical effectiveness is somewhat limited. The most important drawback comes from their narrowness. Namely, the provisions of these legal instruments are applicable only to tangible forms of cultural heritage. However, folklore is predominantly intangible and thus cannot directly benefit from the protection offered under the laws on cultural heritage. The relevant cultural heritage law provisions could

³¹³ Another potentially relevant international legal instrument is the 2007 UNESCO Convention on the Protection and Promotion of Diversity of Cultural Expressions.

³¹⁴ Posey & Dutfield in Lucas-Schloetter, A. Folklore. In: von Lewinski, ed. (2004), note supra 279, at pp. 420

³¹⁵ Article 11 (1) of WHC

³¹⁶ Lucas-Schloetter, A. In: von Lewinski, ed. (2004), note supra 279, at pp. 420

potentially be applicable to folklore, but that would presume that the relevant expressions of folklore have been identified and fixed in a certain form. In some limited cases, this may not be in the interest of the communities which want to keep their folklore secret³¹⁷. Even more importantly, this would presuppose an entire technical process of collecting, cataloguing and fixating expressions of folklore, as a prerequisite for them to benefit from any protection, which may be practically cumbersome.

Recognising the above limitations, over the past 40 years UNESCO has been seeking to achieve an adequate level of protection for intangible cultural heritage as well, as an integral and vital part of cultural heritage as a whole. For a long time, the intangible heritage was excluded from the cultural heritage regime, due to a general lack of awareness and, accordingly, lack of binding international instruments. The culmination of the collaborative efforts of UNSECO and various international and national organizations, non-governmental organizations and other experts resulted in the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (hereinafter "**ICH Convention**"). It was argued that the ICH Convention overcame precisely the main shortcoming in the field – the narrow concept of cultural heritage covering only tangible aspects³¹⁸.

In the Preamble, the ICH Convention expressly recognises the universal will and the common concern to safeguard the intangible cultural heritage of humanity³¹⁹. Further to acknowledging the importance of preserving and safeguarding the intangible heritage, the ICH Convention sets down two main mechanisms for achieving that goal. Firstly, Article 11 provides that *"each State Party shall: (a) take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory; and (b) [...] identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non-governmental organizations."* As one of the main means for

³¹⁷ Brown, M. F. Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property. *International Journal Of Cultural Property* 12:1, 2005, at pp. 48-49

³¹⁸ Kono, T. Convention for the safeguarding of intangible cultural heritage: Unresolved Issues and Unanswered Questions. In: Kono, T. ed. (2009), note supra 312, at pp. 12

³¹⁹ ICH Convention Preamble

achieving that, Article 12 further provides that *"to ensure identification with a view to safeguarding, each State Party shall draw up, in a manner geared to its own situation, one or more inventories of the intangible cultural heritage present in its territory. These inventories shall be regularly updated."* Finally, Article 2 (3) specifies that safeguarding comprises *"measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage"*.

The cited provisions recognise that State Parties ought to play an active role in safeguarding intangible cultural heritage through different programs and activities, thus assigning them with roles of agents in the safeguarding process. As specified by Article 13 of the ICH Convention, a state that ratifies the ICH Convention shall become responsible for the "safeguarding, development and promotion of the intangible cultural heritage present in its territory". However, as a precondition for applying these measures, the ICH Convention recognises the need to *identify* and *define* the various elements of the intangible heritage. As one of the most important mechanisms for ensuring the identification, the ICH Convention urges the creation of regularly updated inventories.

One of the most proclaimed contributions of the ICH Convention, and laws on cultural heritage in general when it comes to expressions of folklore, is the recognition of a *community* as the beneficiary of the presumed protection. Contrary to the typical intellectual property logic centred on an individual (or more individuals), the cultural heritage laws are based on the idea of a community, understood in the widest sense, as a living entity capable of collective creativity.

As beneficial as this is, the practical effectiveness of this approach is rather limited and has been widely criticised as ineffective by the experts. For example, critics have argued that, as a first drawback, the ICH Convention lacks operational definitions, clear answers and workable

solutions to identify the holder of the intangible heritage³²⁰. In that respect, it is worth noting that the notion of "community" has been heavily criticised as a vague and useless term in social sciences³²¹. Some of these reasons have already been elaborated in Chapter 3, section 3.3, and they mainly concern the inability to comprise various types of communities under a single term and definition, fit to all possible cases and purposes³²². Furthermore, it has been stressed that the ICH Convention in fact only allows national governments to become owners of intangible heritage, given that it is State Parties that are members to the ICH Convention³²³, while in fact it should be the "people who practice them"³²⁴ who should have authority over heritage.

Similar criticism has been expressed in relation to the subject matter, where it was also argued that, due to operating with vague terms and concepts, the provisions of the ICH Convention do not provide an adequate basis for clearly determining what does and what does not constitute intangible heritage³²⁵. While the ICH Convention provides a very broad formulation of intangible cultural heritage consisting of non-physical characteristics, practises, representations, expressions, as well as knowledge and skills that identify and define a group³²⁶, in practice it often cannot be clearly distinguished which forms qualify as "heritage". The vast majority of practices, some of which hardly fall into the logic of "intangible heritage", could qualify under the ICH Convention. Indeed, some recent efforts even seek to include hand-washing, for example, into the UNESCO Intangible Heritage List³²⁷!

Apart from these arguments on terminological and definitional deficiencies, which are generally applicable to all

³²⁰ Kono, T. In: Kono, T. ed. (2009), note supra 312, at pp. 29

³²¹ Amit, V. and Rapport, N. (2002), note supra 225

³²² Hazucha, B. and Kono, T. Conceptualization of Community as a Holder of Intangible Cultural Heritage. In: Kono, T. ed. (2009), note supra 312, at pp. 147

³²³ Kono, T. In: *ibid*, at pp. 29

³²⁴ Kurin, R. Museums and intangible heritage: Culture dead or alive? *ICOM news* 57.4, 2004, 7-9

³²⁵ Kono, T. In: Kono, T. ed. (2009), note supra 312, at pp. 29

³²⁶ Article 2 (1) of the ICH Convention

³²⁷ See newspaper articles, for example <http://www.taipetimes.com/News/world/archives/2012/04/27/2003531419/2> and <http://www.google.com/hostednews/afp/article/ALeqM5iBCyoYbjfBEfGUe7cqALxIDoKZnQ?docId=CNG.a667c2f5c2ae88920e6404e109ae6992.641>

legal instruments operating with vague and insufficiently defined sociological concepts, be it cultural heritage, intellectual property or human rights ones, a very substantial criticism concerns the proposed mechanisms for "safeguarding" intangible heritage. Namely, the ICH Convention presumes that the cataloguing and inventorying of cultural heritage is an adequate means of its safeguarding. While similar measures were said to be beneficial and successful in relation to tangible cultural heritage, especially monuments and archaeological sites³²⁸, it is highly controversial whether the same reasoning can, by analogy, be applied to intangible heritage. Recognising the differences between tangible and intangible heritage, authors have argued that reducing cultural heritage to a mere list of items represents a major flaw in the ICH Convention, because inventorying is ill-suited for preserving heritage, which is a living and changing system³²⁹. Such treatment of intangible heritage was said to contradict the core idea of safeguarding, as heritage can never be equated to, and much less encapsulated by, a list³³⁰. Heritage is continuously evolving and codification might stifle the creativity and spontaneity associated with it³³¹. Accordingly, documentation and archiving can fossilize and objectify folklore while it is being embodied in texts, films, recordings and other tangible forms³³². Furthermore, it was argued that practically, this measure may be impossible to implement: the scale of such a project, especially in multi-ethnic states, may be so huge that it becomes a never ending task³³³.

Finally, strong arguments against the creation of inventories focus on the vulnerability of documented intangible cultural heritage to misappropriation, free ride and theft³³⁴. Such

³²⁸ Blake, J. *Commentary on UNESCO 2003 Convention on the Safeguarding of Intangible Cultural Heritage*. Leicester: Institute of Art and Law, 2006, at pp. 63

³²⁹ Brown, M. F. Safeguarding the Intangible. *Museum Anthropology Review*, 6.2, 2012, 93-97; Brown, M. F. (2005), note supra 317

³³⁰ *ibid*

³³¹ Kono, T. . In: Kono, T. ed. (2009) note supra 312, at pp. 35

³³² See Kreps, C. F. *Indigenous curation as intangible cultural heritage: Thoughts on the relevance of the 2003 UNESCO Convention*. Smithsonian institution. Center for folklife and cultural heritage, 2005

³³³ See Van Uytsel, S. and Kono, T. Intangible Cultural Heritage Identified: Inventories as an Essential Part of the Safeguarding Process. In: Kono, T. ed. (2009) note supra 312, at pp. 48

³³⁴ See Dutfield, G. *Protecting Traditional Knowledge: Pathways to the Future*. Geneva: International Centre for Trade and Sustainable Development, 2006

concerns have also been raised by WIPO, where a paper presented at a 2006 UNESCO meeting nicely pinpoints the values but also the dangers and possible negative outcomes of inventorying: *"ICH inventory-making can inadvertently facilitate the misappropriation, misuse and commercialisation of [folklore] to the detriment of their source communities and cultures; for example, digitalization and making accessible a traditional song can, while valuably contributing to the safeguarding of the song, enable the song to be copied and commercialized by a third party, so raising concerns to its legal protection"*³³⁵.

4.3 Human Rights, Cultural Heritage or some other Law?

On the basis of the afore discussed, it seems that the practical effectiveness of human rights laws and cultural heritage laws is somewhat limited when it comes to expressions of folklore, even though these fields of law are certainly a valuable contribution to the creation of a complete and well-balanced system. Namely, even if we start from a viewpoint of human rights or laws on safeguarding of cultural heritage, once their practical application has been exhausted, we are inevitably directed towards intellectual property laws. Or in other words – where human rights and cultural heritage laws stop and cannot go further, intellectual property law is expected to step in.

Some general basis for the protection of expressions of folklore may clearly be achieved through human rights. However, overall, there does not seem to be too many links between the potentially relevant human rights and the effective and enforceable safeguarding of expressions of folklore. On very general and basic grounds, one may say that human rights law has not been designed to protect intellectual creations, and in essence, this field of law is there to provide for some core principles and values which should be protected, rather than to establish precise mechanisms on the basis of which these principles and values will be protected. Furthermore, even those provisions of the international human rights law which could be understood as relevant in relation to folklore are said to be greatly limited due to their vagueness and limited enforceability. A general lack of effective implementation and enforcement

³³⁵ WIPO Secretariat Information Note (2006), paper presented at *UNESCO/ACCU Expert Meeting on Community Involvement in Safeguarding Intangible Cultural Heritage: Towards the Implementation of the 2003 Convention*, Tokyo, Japan, available online at http://www.accu.or.jp/ich/en/pdf/c2006Expert_UEMURA.pdf

mechanisms for human rights therefore dictates the need to promote alternative ways of realization of folklore related rights, such as intellectual property rights³³⁶.

For example, the provisions of ICCPR and ICESCR briefly discussed in Section 4.2.1 are said to be important in relation to folklore as they support the characterization of intellectual property rights as human rights and to ground intellectual property rights, in general, on human rights basis³³⁷. As a general concern relevant for the present discussion, however, it is highly dubious whether the protection of traditional culture or folklore does or should depend upon them being characterized as human rights. As Macmillan says, it seems that we have lived through one of the bloodiest centuries in human history and so the enforcement of even the most basic human rights is a highly disputed topic, and yet, at the same time, the idea of human rights seems to be attaining a growing popularity and the 20th century has seen a real expansion of human rights. However, not everything that requires protection and seems morally defensible automatically must mean or depend on being labelled as human right³³⁸. In addition to this general criticism, Peter Yu, for example, has expressed specific criticism when it comes to expressions of folklore by pointing out that the development of a human rights framework for intellectual property would result in the undesirable human rights ratchet of intellectual property protection and that such framework could potentially be biased against non-Western cultures and traditional communities³³⁹.

On the other hand, authors have pointed out examples which demonstrate the need for human rights and intellectual property laws to operate jointly³⁴⁰. Geiger, for example, has argued that it is

³³⁶ Tobin, B. Setting Protection of TK to Rights – Pacing Human Rights and Customary Law at the Heart of TK Governance. In: Kamau, E. C. and Winter, G. *"Genetic Resources, Traditional Knowledge and the Law: Solutions for Access and Benefit Sharing"*, London: Earthscan, 2009, at pp. 107

³³⁷ Macmillan, F. In: Graber, C. and Burri-Nenova, M. eds. (2008), note supra 151, at pp. 77. See also for example: Chapman, A. Approaching Intellectual Property as a Human Right. *Copyright Bulletin*, volume XXXV, no. 3, at pp.14; Santos, A. E. Rebalancing Intellectual Property In The Information Society: The Human Rights Approach. *Cornell Law School Inter-University Graduate Student Conference Paper*, 2011

³³⁸ Macmillan, F. In: Graber, C. and Burri-Nenova, M. eds. (2008), note supra 151, at pp. 77

³³⁹ Yu, P. Reconceptualizing intellectual property interests in a human rights framework. *UC Davis Law Review* 40, 2007, 1039-1149, at pp. 1128

³⁴⁰ See for example, Ruse-Khan, G. H. Proportionality and Balancing within the Objectives of Intellectual Property Protection. In: P. Torremans, ed. (2008), note supra 282, at pp. 161-194.; Helfer, L. R. Toward a human rights framework for intellectual property. *UC Davis Law Review*, 2006, vol. 40, 977; Gervais, D. J. Intellectual property and human rights: learning to live together. In: P. Torremans, ed. (2008), note supra 282, at pp. 6.

precisely the core values protected on the basis of human rights laws that may serve as a corrective to the over protectiveness and therewith potential misbalance existing under intellectual property regimes³⁴¹. When it comes to folklore, certain recent practices show an interesting approach, by focusing on the integration of human rights and intellectual property laws with the aim of protecting expressions of folklore and traditional knowledge – by basing the claim on human rights grounds and further enforcing it through intellectual property mechanisms³⁴².

When it comes to cultural heritage laws, in addition to the obvious contributions to the preservation of folklore, in that they seek to preserve, secure access and share benefits associated with that property, these also provide for certain other measures which may be particularly beneficial. Legally speaking, the claims to cultural property are claims by a state or by a community, however defined, to certain cultural artefacts. Thus, an obvious contribution is that the international cultural heritage law identifies these rights as being collective and belonging to a community, where such community may be limited to a group of people or global as humanity in general. Furthermore, cultural property rights provide for a wide range of measures, from those related to preservation to rights of states to control physical movement of artefacts, consequently preventing or limiting the privatisation of culture³⁴³.

However, the practical effectiveness of laws on cultural heritage, again, is somewhat limited. The most important drawback comes from their narrowness. Most provisions of the available legal instruments are applicable only to tangible forms of cultural heritage. On the other hand, folklore is predominantly intangible and thus cannot directly benefit from the protection offered under the laws on cultural heritage. As shown in Section 4.2.2, there are some relevant cultural heritage law provisions that could potentially be applicable to expressions of folklore, but the application of those would presume that the relevant expressions have been identified, catalogued and thus recorded in a certain form. In certain limited cases, this may not be in the interest of the communities which want to keep their folklore secret³⁴⁴. Even more importantly, this would

³⁴¹ Geiger, C. In: Torremans, P. ed. (2008), note supra 282, at pp. 113

³⁴² See for example an article by Catherine Ho published in the Washington Post: http://www.washingtonpost.com/business/capitalbusiness/new-practice-focuses-on-human-rights-intellectual-property/2012/03/30/gIQARQvnpS_story.html

³⁴³ Macmillan, F. In: Graber, C. and Burri-Nenova, M. eds. (2008), note supra 151, at pp. 91

³⁴⁴ Brown, M. F. (2005), note supra 317, at pp. 48-49

presuppose an entire technical process of collecting, cataloguing and fixating expressions of folklore, as a prerequisite for them to benefit from any protection, which has not only been criticised as contrary to the nature of folklore, but may also be utterly cumbersome practically. Furthermore, while the established rights provide a right to access to culture, they do not seem to provide practical mechanisms for enforcing and ensuring that these rights are exercised. Finally and most importantly, the cited provisions lay down for a set of positive rights but do not restrain actions of third persons or prevent them from utilizing and exploiting culture.

The discussed limitations particularly reinforce the need for complimentary operation of laws on cultural heritage and other laws, such as intellectual property laws. Cultural heritage laws and intellectual property laws, when it comes to intangible heritage, were said to have always had somewhat "uncertain and awkward" relationship, stemming in large measure from the inherent ambiguity in the meaning of "protect" and the need to clarify the relationship between the safeguarding of cultural heritage and legal protection of creativity against unauthorized use³⁴⁵. I believe, however, that it is precisely in their complementary application that we need to look for the solutions that would fit folklore protection the best – both *safeguarding* and *protecting*. Obviously, the range of cultural heritage laws is limited, and unless the next step is available under some set of rules, the very purpose of mechanisms established under, for example, the ICH Convention, may ultimately prove to be more detrimental than beneficial to the intangible heritage. Unless there is a set of positive rules and an enforceable mechanism that would *protect* the heritage, once it has been catalogued and inventoried, the created gap might facilitate practices which are directly contrary to the idea of *safeguarding* intangible property. This is precisely why it is intellectual property law that I turn to, after having examined laws of cultural heritage. Having said that, I fully recognise that cultural heritage laws provide a useful starting point and the necessary basis for the practical implementation of any subsequent positive norms – without the catalogues and lists of intangible heritage, it would be very difficult to create an operational system of protection.

4.4 Intellectual Property Law

Most of the literature seems to have focused on intellectual property

³⁴⁵ Wendland, W. B. Seeking tangible benefits from linking culture, development and intellectual property. *International Journal of Intangible Heritage*, 4, 2009, 127-136, at pp. 133

law when searching for the structure within which the problem of protecting folklore should be placed. This should not come as a surprise – folklore emerges in the artistic domain and therefore, at least at first sight, bears a certain level of resemblance with copyright works. Furthermore, predominant parts of folklore expression appear in forms corresponding to the classic copyright categories – such as music, dance, crafts, literary texts etc.

However, as straightforward as this may seem, once we look at intellectual property law as it stands today, it immediately becomes clear that this field of law is not, in its current form, entirely ideal for providing protection for expressions of folklore as the subject matter appears to be far more complex than the existing categories recognize and the inherent characteristics of expressions of folklore seem incompatible with the existing criteria for protection. While international and national intellectual property laws can in certain aspects facilitate the protection of folklore, they also demonstrate a number of drawbacks which significantly limit their efficiency. This is due to the fact that the application of standard intellectual property categories to folklore generates several critical difficulties related to the protection criteria³⁴⁶. These limitations altogether hinder the practical reach of any protection and make it rather difficult for expressions of folklore to be governed by intellectual property laws in their current forms. Reasons for this are multiple but they all appear to derive from the genuinely different natures of folklore and standard intellectual property subject matter, be it works in the regime of copyright, signs protected by trademark law or other intellectual property-governed works.

These limitations lead to asking whether intellectual property law is in fact that theoretical foundation from which we need to start searching for the answer to "how?"

While I believe that the answer to this question is yes, such an answer is not obvious nor should it be considered self-explanatory. It seems that nowadays, more than ever, intellectual property law is under the magnifying glass of the global public, both on a theoretical and practical level. At the theoretical level, many in contemporary legal theory are arguing that intellectual property law is at one of its crisis points³⁴⁷, on a cross-road³⁴⁸ and are pointing out various

³⁴⁶ For example, if one looks at copyright, these problems appear in relation to the protection requirements, authorship, term of protection and so on. For specific details on these and other limitations of different traditional intellectual property categories, see Chapter 5.

³⁴⁷ Peifer, K. N. The Return of the Commons – Copyright History as a Common Source. In: Kretschmer, M., L. Bently and R. Deazley, eds. *Privilege and property: essays on the history*

reasons and possible directions for re-designing the system. At the practical, every day, non-expert level, it seems that the turbulences are equally profound³⁴⁹. Intellectual property law is being scrutinized and questioned by many who advocate the free use of works, shorter term of protection, compulsory exceptions, or even complete abandonment of the system, based on the complaint that "each day brings some new Internet horror story about the excess of intellectual property"³⁵⁰.

And it seems that this growing turmoil is becoming more evident every day. Certain recent efforts to expand and develop intellectual property law have generated unseen waves of negative criticism and actions to limit its scope. Some recent developments illustrate this very well – the legislation proposed in the USA raised various counter arguments and radical actions around the globe³⁵¹. None could have imagined that they would boost such a reaction defending the freedom of online speech and open Internet. Opponents have argued against the proposed bills, claiming they threaten to trigger online censorship and pointing out the dangerous consequences that these laws would create for online speech. In the end, the criticism and protests expressed not only by legal experts and non-expert individuals but also by great parts of the industry³⁵², eventually lead to postponing or abandoning the adoption of the controversial legislation.

Even though these events, as such, probably seem to not have much in common with the protection of folklore, the global status of intellectual property law today does raise at least two important concerns which are very relevant to the present discussion. Firstly, bluntly labelling something with an intellectual property tag may not only be dangerous, but also harmful. At a time when the expansion of intellectual property law is being widely criticised and disapproved

of copyright. Cambridge: Open Book Publishers, 2010, at pp. 349

³⁴⁸ Nabhan, V. Opening speech. In: Bently, L., Suthersanen, U. and P. Torremans, eds., *Global Copyright: Three Hundred Years since the Statute of Anne, from 1709 to Cyberspace*. Cheltenham: Edward Elgar Publishing, 2010, at pp. 2

³⁴⁹ *ibid*

³⁵⁰ Boyle, J. *The Public Domain*, New Haven & London: Yale University Press, 2008, at pp.7

³⁵¹ Protect IP Act (PIPA) and Stop Online Piracy Act (SOPA)

³⁵² For example, Google, Facebook, eBay, Twitter and Yahoo protested the proposed legislation by "censoring" their own sites for a day; other sites like Wikipedia, Craigslist, Reddit and TwitPic went completely black on this day for a period of time; Google claims to have collected over four and a half million signatures in a petition against SOPA; Members of Anonymous, a hacktivist group claim responsibility for slowing/shutting down pro-SOPA organizations' Web sites such as the Justice Department, FBI, Universal Music Group, Recording Industry Association of America, Motion Picture Association of America and CBS.com – see <http://www.seamannnews.com/2012/02/sopa-pipa-postponed-because-of-massive-protest/>

of, naming something an intellectual property right may automatically entail a negative connotation and thus end up being rather counter-productive. Second, even if we defend the position that the subject matter should be protected under an intellectual property based system, the crucial issue to be kept in mind when creating a system is *balance* within the specific cultural, economic and political landscape. Balance between various interests – those of the potential rightholders, users, the public and the further creators; developing and developed countries; particular communities and interests in universal standards; protection on one side and freedom, competition and stimulation of further creation on the other. While the search for balance is by no means a new challenge in intellectual property law³⁵³, it is definitely a crucial one that must be kept in mind in any further discussion in relation to expressions of folklore.

The following pages shall be concerned with finding the answer to the first question raised above, namely, whether we should be looking at intellectual property law at all when searching for the most suitable system of folklore protection. My hypothesis is that the answer to this question is yes. However, in order to understand why folklore is currently not protectable under intellectual property rationale and to decide on a more general and theoretical level whether folklore belongs under an intellectual property law style of protection at all, it is necessary to first comprehend intellectual property, its features, purpose and scope, and the justification behind the protection granted under intellectual property rights. In that respect, I entirely agree with Sherman and Bently when they say that, if we accept that the past and the present are intimately linked, many aspects of modern intellectual property law can only be understood through the lens of the past³⁵⁴. Following this idea, Section 4.4.1 will briefly look at the history and development of

³⁵³ "The term "balance" is well qualified for the buzzword of intellectual property law of the current decade. The attempts to strike a balance in IP law are one of the most important and central pursuits and one of the basic principles in IP law, IP enforcement and IP policy" – see Wechsler, A. The Quest for Balance in Intellectual Property Law: A New Paradigm or a Fad?, 2009, available online at <http://www.atrip.org/Content/Essays/Andrea%20Wechsler.pdf> . See also Holt, M. K. In Search of Equilibrium: Intellectual Property, Antitrust and the Personal Computer Industry. *Software Law Journal*, Vol. 4, 1989, at pp. 577-595; Taubman, A. TRIPS Jurisprudence in the Balance. Between the Realist Defense of Policy Space and a Shared Utilitarian Ethic. In: Lenk, Ch. ed. *Ethics and Law of Intellectual Property, Current Problems in Politics, Science and Technology*. London: Ashgate Publishing, 2007; Gervais, D. The Changing Landscape of International Intellectual Property. *Journal of Intellectual Property Law & Practice*, Vol. 1, No. 4, 2006, 249 – 251

³⁵⁴ Sherman, B. and Bently, L. *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911*. Cambridge: Cambridge University Press, 1999, at pp. 1

intellectual property law, the most prominent legal and philosophical theories that shaped modern intellectual property law and the evolution of its core aspects, in an attempt to follow how it extended and changed over time. In doing this, Section 4.4.1 will mainly be looking at the development of intellectual property law through the lens of copyright, given that folklore has traditionally always been discussed in copyright terms and is, essentially, closest to the copyright rationale. Building upon the historical and philological overview, Section 4.4.2 will distinguish those crucial moments in the shaping of intellectual property law which preclude the application of traditional intellectual property rights to folklore. Section 4.4.3 will then look at the expansion and adaptation of intellectual property law to new forms created over the past century, arguing that intellectual property law is sufficiently flexible to protect diverse and new subject matter, rather than just the traditional intellectual property forms. At the same time, the counter-arguments raised by certain authors who are concerned with the over-expansion of intellectual property law and endangerment of the public domain will not be neglected. Finally, Sections 4.4.4 and 4.4.5 will look at the relation between intellectual property law and the public domain and its reflections on potential folklore protection.

The second issue raised above – finding a balanced system – belongs to Chapter 6, where certain mechanisms will be proposed.

4.4.1 *Evolution of Intellectual Property Law*

If we look at the emergence and development of the modern intellectual property law during the last few centuries, one thing, relevant for the present discussion, becomes evident straight away. Intellectual property law is not a static field but rather a vibrant, still-evolving body of law which has been modified, amended and adapted constantly over time. Since its contemporary history is considerably short, the fundamental concepts, basic categories and theoretical framework of intellectual property law are not stable, while its integration with other disciplines is not yet completed. Given that it is influenced by the rapid development of science and technology, intellectual property law is an exceptionally dynamic and changing field in nature.

The different philosophical cultural and economic factors behind the emergence and expansion of intellectual property law generated significant differences in the theoretical foundations and terminology of the French-

German *droit d'auteur* and the common law copyright. The initial lack of legislative and doctrinal uniformity between the Continental, based on author personality, and Anglo-American copyright, driven by commerce, persisted until the later internationalization through Berne Convention and subsequent international legislation³⁵⁵. It was not until the Berne Convention that the two different concepts of intellectual property law and copyright were somewhat merged, although not entirely and not without difficulty³⁵⁶.

What constitutes today's Western model of intellectual property law was mainly developed through the emergence of copyright in England and the USA and authors' rights in France and Germany, the 19th century trademark acts and patent privileges. Although the traditional legal taxonomy distinguishes sharply between copyright, patents and other intellectual property categories and accordingly their emergence and development, some recent studies argue that these, now different, institutions, in fact have common origins in the early systems of privileges³⁵⁷.

In a very broad sense, their roots can be traced back to the Roman law legacy and the doctrine of justified *privilegia* on one hand and *monopolia* on the other: "the Emperor had the right to grant individuals exemption from the general law, thereby protecting certain activities from competition, but these grants had to be justified by the common good, and they should not unduly impinge upon the rights of others"³⁵⁸.

More tangible lines in the genealogy of intellectual property law have been traced to the 15th century Venetian Republic, where the earliest patent was granted in 1469, subsequently followed by a number of others, in various different fields³⁵⁹. These early privileges had the form of a municipal favour and presented an exception to the law,

³⁵⁵ Burkitt, D. Copyrighting culture-the history and cultural specificity of the Western model of copyright. *Intellectual Property Quarterly*, 2001, at pp. 146

³⁵⁶ Ricketson, S. *The Berne Convention for the protection of literary and artistic works: 1886-1986*. London: Centre for Commercial Law Studies, Queen Mary College, 1987

³⁵⁷ Kostylo, J. From gunpowder to Print: the Common origins of Copyright and Patent. In: Kretschmer, M., L. Bently and R. Deazley, eds. (2010), note supra 347, at pp. 21

³⁵⁸ See in Petri, G. Transition from guild regulation to modern copyright law (Sweden). In: Bently, L., Suthersanen, U. and P. Torremans, eds. (2010), note supra 348, at pp. 108

³⁵⁹ Kostylo, J. In: Kretschmer, M., L. Bently and R. Deazley, eds. (2010), note supra 347, at pp. 23

rather than an institutional recognition of the rightholders rights. Joanna Kostylo argues that these middle-century privileges, which ranged from exclusive monopolies permitting inventors to exploit their invention to printing privileges, can be identified as proto-patents and proto-copyrights, although at the early stage of their development there was little differentiation between the two³⁶⁰.

The history of intellectual property law has been described as the development of a series of fragmented rules rather than a set of clearly defined principles³⁶¹. The development, expansion, change of scope and duration of rights, demonstrate that the early intellectual property rights were exceptions to the law, rather than firm recognition of particular rights. This process, from what it began as to what it is today, shows a complex and gradual evolution, often directed and shaped by a variety of philosophical, economic and cultural factors influential at the given moment.

Looking at the history and development of intellectual property law, from Roman legal doctrine, medieval Venetian printing privileges and time limited patents, to what we call modern intellectual property law, there are a couple of evolutionary points that seem particularly striking in the light of the present study and these will be discussed in the following Sub-Sections.

4.4.1.1 *The Subject Matter and Why Protect It*

The recognition of the existence of intangible property and its recognition as the protectable subject matter was a long and slow progression. Eventually, the acknowledgment of the subject matter lead to the transformation in the law that granted property rights in mental labour. But, before this process was completed, the early medieval privileges focused on the material realm of printing or other technology and expanded to less material objects much later³⁶².

³⁶⁰ *ibid*

³⁶¹ Patterson, L. R. *Copyright in historical perspective*. Nashville: Vanderbilt University Press, 1968, at pp. 222

³⁶² Sherman, B. and Bently, L. (1999), note supra 354, at pp. 205

Following a long and slow process, it was only in the eighteenth century that it became widely accepted that mental labour was fundamentally different from manual labour, which required it to be governed by specific rules³⁶³. This recognition of the subject matter and the justification of its protection had certain roots in some of the most prominent jurisprudential and philosophical theories of the time³⁶⁴.

In general, the arguments for intellectual property protection have taken one of three directions: (1) Lockeans argue that rights are justified in relation to labour and merit; (2) personality theorists understand intellectual property as an extension of individual personality and creators' moral rights to control their work; while (3) utilitarians justify intellectual property rights with the social progress and incentives to innovate which in the long run leads to maximizing the overall well-being. Without getting into too much detail, this Sub-Section will briefly recap these three theories insomuch they have each influenced and shaped what we today call intellectual property law³⁶⁵.

In England and in France, for example, the work of John Locke influenced the conception of

³⁶³ *ibid*, at pp. 15

³⁶⁴ On the history and development of intellectual property law and different legal and philosophical theories behind it, see for example: Schroeder, J. L. Unnatural Rights: Hegel and Intellectual Property. *University of Miami Law Review*, 2005, vol. 60, pp.453-504; Vivant M. Authors' Rights, Human Rights. *Revue Internationale du Droit D'Auteur*, 1997, no. 174, pp. 60. For copyright in particular and the contrast between civil law and common law systems, see Ginsburg, J. C. A Tale of Two Copyrights: Literary Property in Revolutionary France and America. *Tulane Law Review*, 1990, vol. 64, pp. 991; Hemmungs Wirtén, E. Wearing the Parisian Hat. In: Hemmungs Wirtén, E. ed. *No trespassing: Authorship, intellectual property rights, and the boundaries of globalization*. Toronto: University of Toronto Press, 2004; Moore, A. Personality-based, rule-utilitarian, and lockean justifications of intellectual property. *Information and Computer Ethics*, 2008, 105; Hettinger, E. C. Justifying intellectual property. *Philosophy & Public Affairs*, 1989, vol. 18, no. 1, pp. 31-52; Skone J. E. P., and Mumery, J. F. *Copinger and Skone James on copyright*. London: Sweet and Maxwell, 1991

³⁶⁵ The scope and focus of this research do not allow me to review these theories in details – for example, the philosophical thoughts behind each of them, the criticism expressed in relation to either of these theories and so on.

intellectual property³⁶⁶. Based on Locke's ideas, an argument can be drawn that if man is owner of his person and his labour, then an author should be regarded as the owner of his spirit and the fruit of this is intellectual labour³⁶⁷. His philosophy expressed in the 1690 "*Two Treatises on Civil Government*", where he argued that man are granted natural property rights because they had appropriated their work from general state of nature³⁶⁸, may be seen as further reflected in the differentiation between ideas, which are free, and the expression of ideas, which are protected for a certain period to provide an incentive for creativity and investment in printing/distribution. Locke's theory of property is itself subject to slightly different interpretations. One interpretation is that society rewards labour with property purely on the instrumental grounds that we must provide rewards to get labour. In contrast, a normative interpretation of this labour theory says that labour as such should be rewarded³⁶⁹. Locke's notion of property, although subject to many reinterpretations, has remained influential in framing intellectual property as a set of rights that orbit around the sphere of human rights³⁷⁰.

An alternative to the natural theory is the economic or utilitarian justification for intellectual property. Utilitarianism rejects the concept of natural rights and recognizes property only provided it stimulates utility or

³⁶⁶ For the purposes of the current research, Locke's theory may be summarised as follows: "In a state of nature, goods are held in common through a grant from God. Being given for the use of men, there must of necessity be a means to appropriate them some way or other, before they can be of any use or at all beneficial". – see Kretschmer, M., and Kawohl, F. The history & philosophy of copyright. In: Firth, S. and Marshall, L. eds. *Music and Copyright*. Edinburgh: Edinburgh University Press, 2004, at pp. 28

³⁶⁷ *ibid*, at pp. 129

³⁶⁸ Locke, J. *Two Treatises on Government*. In: Laslett, P. ed. *Two Treatises on Government*. Cambridge: Cambridge University Press, 1967

³⁶⁹ Hughes, J. The Philosophy of Intellectual Property. *Georgetown Law Journal*, 1988

³⁷⁰ Santos, A. E. (2011), note *supra* 337

wealth maximization³⁷¹. Under this theory, it is argued that "the purpose of copyright is basically to ensure a continuing profit to the originator of creator [of a copyrighted work]"³⁷². Accordingly, the grant of exclusive rights to the author is his incentive to create. As Trollope formulated it: "take away from English authors their copyright[s], and you would very soon take away from England her authors"³⁷³. The roots of utilitarian theory are seen in the thoughts of John Stuart Mill, influenced by Jeremy Bentham, who held that a law is justified when it promotes the "general happiness"³⁷⁴. Mill's understanding of happiness is simply pleasure, and freedom from pain, where the pleasure and pain considered here is not simply physical, but intellectual as well. Intellectual property thus promotes general happiness by allowing the inventor or artist to profit from his or her work³⁷⁵. The United States Constitution is often cited as an illustration of this kind of line of thought as it is argued that the Constitution expressly conditions the grant of power to Congress to create patent and copyright laws upon a utilitarian foundation³⁷⁶ – "to promote the Progress of Science and useful Arts"³⁷⁷.

Finally, the personality theory describes property as an expression of the self³⁷⁸. The

³⁷¹ Schroeder, Jeanne. Unnatural Rights: Hegel and Intellectual Property. *Cardozo Law, Legal Studies Research Paper*, 2004, no. 80

³⁷² Thomas, D. *Copyright and the creative artist*. Institute of Economic Affairs, 1967, pp. 27

³⁷³ See Anthony Trollope's quote in Stokes, S. *Art and Copyright*. London: Hart Publishing, 2001, at pp. 11

³⁷⁴ See for example Donner, W. Mill's utilitarianism. In: Skorupski, J. ed., *The Cambridge Companion to Mill*. Cambridge: Cambridge University Press, 1998, at pp. 257; Riley, J. Mill's political economy: Ricardian science and liberal utilitarian art. *The Cambridge Companion to Mill*, 1998, at pp. 294

³⁷⁵ Weber, D. J. *A Critique of Intellectual Property Rights*. Thesis submitted to Christendom College, 2-5, 2002, available online at <http://dane.weber.org/concept/thesis.html>

³⁷⁶ Menell, P. S. Intellectual Property: General Theories. In: Bouckaert, B. and De Geest, G. eds., *Encyclopedia of Law and Economics, Volume II. Civil Law and Economics*. Cheltenham, Edward Elgar, 2000, at pp. 130.

³⁷⁷ Constitution of the United States of America, Article I, section 8, para 8

³⁷⁸ Hughes, J. (1988), note supra 369

theory is said to have emerged in Germany, where the idea that an author's right emanates directly from the quality of his own intellectual creations provided an alternative to the natural law and economic law theory³⁷⁹. This approach, based largely on the philosophies of Kant³⁸⁰ and Fliche³⁸¹, gave even more prominence to the person of the author as the creator of his work and the personal character of his rights towards his work, rather than property rights³⁸². Their views of the different forms of existence of intellectual property, to which different rules apply, laid the groundwork for subsequent scholars to develop the theory of a personal author's right. In France, these and similar personalist theories were reflected in the development of the *droit moral* – a distinctive aspect of authorship which, in addition to the patrimonial or property, also included a moral component³⁸³. The concept of authors' moral rights, as developed under these specific cultural, legal and philosophical influences, developed fundamental characteristics that differentiate them from economic rights – they could not be waived, they were inalienable and to some extent, they were perpetual. Such a notion of moral rights developed in French law has further influenced the evolution of copyright laws in other civil law jurisdictions, as well as the development of international copyright law.

4.4.1.2 *Individual Author*

A milestone in the development of intellectual property law, particularly important for the

³⁷⁹ Van Gompel, S. *Les formalités sont mortes, vive les formalités!* Copyright formalities and the Reasons for their decline in Nineteenth Century Europe. In Kretschmer, M., L. Bently and R. Deazley, eds. (2010), note supra 347, at pp. 183

³⁸⁰ Kant recognized that in parallel to a property right in the book as a physical object, authors also have an innate right vested in their own person – see *ibid*, at pp. 118

³⁸¹ Fliche argued that there are three layers of protection: (i) work as a tangible object, to which normal rules of property apply; (ii) thoughts or ideas in the book, which cannot be exclusively owned, but are common property to all; and (iii) the way in which these ideas are expressed, which is inalienable and exclusive property of the author – see *ibid*, at pp. 119

³⁸² *ibid*, at pp.183

³⁸³ Burkitt, D. (2001), note supra 355, pp. 146-186

present discussion, is the identification of the rightholder as an individual, which further influenced and shaped a number of other features of modern intellectual property law. From the early beginnings to the contemporary notion, the evolution of the rightholder concept in intellectual property law has witnessed an enormous transformation. It was argued that this process, in its roots, was common to all intellectual property rights – what will later be distinguished into copyright was partly formulated on the model of protected industrial production, as the concept of possessive authorship was first developed with regards to material inventions before being applied to intangibles³⁸⁴.

Early intellectual property privileges were more concerned with the work, rather than the author, at least until the mid-eighteenth century. Authorial status did not constitute an important, and even less so a central element of the early legal privileges³⁸⁵. Quite the opposite, this early legal system was said to be rather "indifferent" towards the author, as the general rules gave very little prominence to the author or were even unfavourable towards the author³⁸⁶. This can partly be explained by the early understanding of the author as a mere reflection of the outer world and reproducer of tradition. Furthermore, when it comes to the substance of early authors' rights, it is evident that early authors were not necessarily making any aesthetic or moral claims in relation to their works, but were instead simply displaying entrepreneurial acumen in seeking to capitalise on the emerging markets³⁸⁷. Thus, it seems that at the early stages of the development of

³⁸⁴ Kostylo, J. (2010), note supra 357, at pp. 49

³⁸⁵ Bracha, O. Early American Printing Privileges: The Ambivalent Origins of Authors' Copyright in America. In: Kretschmer, M., L. Bently and R. Deazley, eds. (2010), note supra 347, at pp. 119

³⁸⁶ *Ibid*, at pp. 120

³⁸⁷ Kostylo, J. (2010), note supra 357, at pp. 30

intellectual property law, the author was a peripheral, rather than central figure.

And it was not until the eighteenth century that this began to change. As argued by Sherman and Bently, one of the most common claims made about eighteenth century intellectual property law is that during this period the individual came to be seen as the source or origin of the creation. It was at this moment that the author became to be viewed as the originator of the creation, rather than a mere *reproducer of the tradition*³⁸⁸.

Authors became sovereign individuals whose creativity and dedication should be encouraged and stimulated, instead of treated as mere conduits from the divine creator and thus undeserving of recognition. The change of the way in which the author, a figure initially on the margins of the privilege system, became to be viewed as the owner of the work, was a result of the evolution of the system itself. In addition to the specific economic stimulus driven by the emerging capitalistic publishing industry, this re-imagining of the author as the natural owner of his work also drew upon a number of other influences, in particular the rise of aesthetic and possessive individualism³⁸⁹.

Today, most copyright laws accord its bundle of rights to the "author", although it has not yet been agreed on precisely what characteristics this entity should have. Yet, as history and scholarship show, an author can take on multiple personas – he or she can be individual or corporate, he or she can be someone who creates deliberately or accidentally, he or she can work separately or in collaboration with

³⁸⁸ Sherman, B. and Bently, L. (1999), note supra 354

³⁸⁹ Pfister, L. Author and Work in the French Print Privileges System: Some Milestones. In: Kretschmer, M., L. Bently and R. Deazley, eds. (2010), note supra 347, at pp. 127

others³⁹⁰.

4.4.1.3 Moral Rights

The commercial, philosophical and cultural trends have been reflected not only on the formation of the notion of author, but also on a number of other protection aspects. Another one of these, very relevant for the present debate, is the evolution and differences in the concept of moral rights in different legal backgrounds³⁹¹.

Historically, moral rights are widely considered to originate in the culture of Western European Romanticism which idealized the creative individual as being uniquely invested with the power and mystique of the original genius³⁹². As per their historical routes, moral rights are said to have emerged from the *droit moral* enjoyed by the authors in countries such as France, Germany and Italy³⁹³, although the development of the author's right in the civil law world could perhaps be traced in the highly individualistic Roman law concept of ownership, embodied in the institute dominium – an essentially absolute right over property, inviolable and good against the world³⁹⁴.

In France, the country traditionally considered to be the birthplace of moral rights, legal

³⁹⁰ Heymann, L. A Tale of (At Least) Two Authors: Focusing Copyright Law on Process Over Product. *Journal of Corporation Law*, 2009, vol. 34, no. 4, at pp. 1009

³⁹¹ See for example Hansmann, H. and Santill, Mi. Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis. *The Journal of Legal Studies* 26.1, 1997, 95-143; Damich, E. J. Right of Personality: A Common--Law Basis for the Protection of the Moral Rights of Authors. *Georgia Law Review* 23, 1988, 1; Rigamonti, C. P. Deconstructing moral rights. *Harvard International Law Journal* 47, 2006, 353; Liemer, S. P. Understanding Artists' Moral Rights: Primer. *Boston University International Law Journal* 7, 1998, 41; Dietz, A. Moral Right of the Author: Moral Rights and the Civil Law Countries. *Colum.-VLA JL & Arts* 19, 1994, 199; Rosen, D. Artists' Moral Rights: A European Evolution, An American Revolution. *Cardozo Arts & Ent. LJ* 2, 1983, 155

³⁹² Rajan M. T. S. Moral Rights and the Protection of Cultural Heritage. *International Journal of Cultural Property*, 2001, vol. 10, no. 1, pp. 79-94

³⁹³ Sprawson, R. Moral Rights in the 21st Century: A Case for Bankruptcy? 58 *Entertainment Law Review*, 2006, Vol. 17, Issue 2

³⁹⁴ Newman, S. The Development of Copyright and Moral Rights in the European Legal Systems. *European Intellectual Property Review*, 2011, vol. 33, no. 11, pp. 677-689

protection for the diverse non-commercial interests arising out of creative expression – whether personal, intellectual, aesthetic, spiritual or cultural – came to be known collectively as *droit moral*, translated into English language and legal culture by the somewhat ambiguous expression moral rights³⁹⁵. While the term "moral rights" is a direct translation from the French, it does not address morality but rather non-pecuniary interest³⁹⁶.

Having emerged in the continental legal tradition, moral rights are often considered to conflict with the common law tradition, which is focused on the protection of authors' commercial interests. Commentators who are concerned with authors' moral interests often argue that common law systems are fundamentally antagonistic to the concept of moral rights, but it is perhaps more accurate to say that the idea of authors' personal interests has developed differently in the common law world. While the author has been the focus of copyright laws in Continental Europe, British copyright developed as publisher's right, leading to an in-built difficulty in prioritising the author over the publisher³⁹⁷.

Nowadays, however, the tension between copyright systems and authors' rights systems has significantly decreased, as most common law countries have adopted moral rights provisions³⁹⁸.

Today, the personal conception of moral rights gives them certain fundamental characteristics that differentiate them from economic rights.

³⁹⁵ Rajan, M. T. S. Moral Rights in Information Technology: A New Kind of Personal Right?. *International Journal of Law and Information Technology*, 2004, vol. 12, no. 1, pp. 32-54

³⁹⁶ Ginsburg, J. Moral Rights in a Common Law System. 1 *Entertainment Law Review*, 1990, 121

³⁹⁷ Rajan M. T. S. (2004), note supra 395

³⁹⁸ Ginsburg, J. (1990), note supra 396

First, as a general rule, moral rights cannot be waived³⁹⁹; for example, an author cannot legally renounce his paternity. Second, moral rights are inalienable, meaning they cannot be transferred by an *inter vivos* act, either as a gift or in exchange for something of value. Inalienability can be seen as the most important characteristic of moral rights, suggesting they are so closely linked to the author that they cannot be surrendered under any circumstances. Finally, in some countries, moral rights, at least in respect to paternity and integrity, are perpetual⁴⁰⁰. After the author's death, these two rights are held by the person or legal entity designated by the author, or the heirs or institutions recognized by the law as the holders of such, with no time restrictions. The justification behind perpetuity is that keeping a nation's cultural patrimony intact is a matter of public interest⁴⁰¹.

4.4.2 Where Did It Go Wrong for Folklore?

Without getting into further detail as the scope and focus of this study do not allow me to do so, for the purpose of the present discussion it is worth noting that the creation and development of copyright law, and also intellectual property law in general, was anything but a linear and a straightforward process. As it is evident from a historical perspective, the meaning and the scope of some key intellectual property concepts have gradually transformed since they were first captured and defined.

I believe that one of the keys to understanding the current status of folklore lies precisely there.

One reason why folklore was traditionally not seen as the subject matter of intellectual property protection may be found in the untidy emergence of intellectual property law

³⁹⁹ With certain exceptions – for example Under British law moral rights cannot be assigned or licensed but can be waived, normally as the result of a contract between the parties.

⁴⁰⁰ France, for example, provides moral rights in perpetuity, while some other countries restrict protection to the author's lifetime or to the duration of copyright

⁴⁰¹ Fernández-Molina, J. C. and E. Peis. The moral rights of authors in the age of digital information. *Journal of the American Society for Information Science and Technology*, 2001, vol. 52, no. 2, at pp. 110

and the driving forces behind it. At its early beginnings, intellectual property protection was an exception to the law, a privilege granted to a specific person, rather than a recognised, firm rule. The recognition of the protectable subject matter and the formulation of the reasons for its protection came much later.

The prominent philosophical ideas of the subsequent centuries provided the theoretical underpinning and justification of intellectual property protection and had direct reflections on the development of what we call intellectual property law today. Would these equally provide justification for folklore protection? While this is arguable, some of the expressed philosophical reasoning is certainly not incompatible with folklore. For example, consider the interpretation of Locke's theories – if spiritual and intellectual labour is the result of a collective effort, should that collective then be considered the owner of such labour? Or Kant and Fliche, who recognise the innate natural rights vested in the creator of an intellectual creation – does a community, being the source of such a creation, also have a corresponding moral right to its creation? Finally, would protection of folklore be in the interest of the community and would it promote the progress of the community?

While the answers to the above questions could be positive, folklore was never taken into account in the course of development of intellectual property law. It seems that there could be two synchronous reasons for that. One, clearly there was no incentive to protect folklore earlier as there was no awareness of its presence, characteristics or importance. Folklore became interesting only in the 19th century when scholars begun collecting it, recording it and using it as a powerful tool in national awakening and identity forming. But at the time when this process was occurring, the individual author had already emerged as the central figure of intellectual property law, which is the second crucial reason why folklore was never the focus of protection.

The adopted concept of authorship makes it impossible for intellectual property law to apply to folklore. Copyright for example, critics have noted, is "predicated on romantic notions of an isolated creative genius who plucks beauty out of thin air by an inspired act of the imagination. Copyright

law was designed to ensure that the author and his or her immediate descendants will benefit from this miracle of creation. The identification of inventiveness with a solitary human life, however, cannot be easily reconciled with the political economy of modern industrial creativity or, for that matter, with the collective productions of [indigenous] peoples"⁴⁰².

Thus, the past and the way in which Western intellectual property law has been shaped and determined by the prevailing philosophical and economic circumstances evolving around the notion of the author as proprietor and morally entitled to his or her work, explain why folklore was and is not included into such a system. But this does not, however, mean that it could not have been.

First, the personalization and individualization of the author that has occurred in Western intellectual property law is not common in some other, non-Western cultures, which traditionally have not recognised authors as individual creators⁴⁰³. Also, the concept of the rightholder itself, be it an individualistic one, has evolved through the history of intellectual property law as well – in early UK copyright law it was the printer-publisher who held the right to make printed copies of written works, not the author⁴⁰⁴.

It follows, thus, that the notion of the author as an individual is not a cohesive phenomenon in intellectual property law and has not emerged in a single historical or theoretical space, but has instead developed differently in different historical, socio-economical and geopolitical circumstances. This changeability in the cultural environment, which is reflected in the law itself, has led some authors to even ask whether the concept of the

⁴⁰² Brown, M. F. (1998), note supra 253, at pp. 196

⁴⁰³ See for example Burkitt, D. (2001), note supra 355; Baron, A. No Other Law? Author-ity, Property, Aboriginal Art. In: Bently, L. and Maniatis, S. eds. *Intellectual Property and Ethics. Perspectives on Intellectual Property Series*, 1998, Vol. 4; Sherman, B. From Non-original to Ab-original: A History. In: Sherman, B. and Strowel, A. eds. *Of authors and origins: essays in copyright law*. New York: Clarendon Press, 1994

⁴⁰⁴ Also for example, the investigation of the evolution of the author in Germany conducted by Martha Woodmansee shows that in the end of 18th century, the writer was just one of the numerous craftsmen involved in the production of a book, and not superior in any way to the other involved craftsmen. See Woodmansee, M. On the Author Effect: Recovering Collectivity. In: Jaszi, P. eds. *The construction of ownership: Textual appropriation in law and literature*. Duke University Press, 1994, at pp. 15

author in the modern sense will ultimately prove to be only a brief episode in the history of intellectual property law⁴⁰⁵. Martha Woodmansee, for example, argues that "our intellectual property laws are rooted in the historical reconceptualization of the creative process which culminated in the romantic notion of the author as a unique individual, but that, in a variety of ways, electronic communications now seem to be subverting the distinction between *mine* and *thine* that the modern authorship construct was designed to enforce"⁴⁰⁶.

4.4.3 Expanding Intellectual Property Law?

As it follows from the above, as a result of the specific combination of different influences which lead to the formation of the Western model of copyright law, folklore has always been outside the margin of protectable copyright subject matter. But does it have to remain so or could intellectual property law be expanded and adapted to cover folklore?

There is no doubt that intellectual property law has undergone major transformation since it emerged at the early stage of the industrial society, some four hundred years ago. What, in England for example, once began as copyright royal favours and privileges that were granted to publishers, grew into a discipline that today covers a broad and diverse subject matter, from classic categories, like poems or crafts, to new creations, such as biotechnology, new plant varieties, software, databases, multimedia works and many other forms.

While intellectual property law has always demonstrated flexibility in coping with new subject matter, the newly imposed challenges of the information society and new technologies also inspired some major points of criticism. In general, the 21st century developments are generally being

⁴⁰⁵ See for example Woodmansee, M. *The Author, Art & the Market*. Cambridge: Cambridge University Press, 1996; Woodmansee, M. The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'. *Eighteenth-century studies*, 1984, vol. 17, no. 4, pp. 425-448; Woodmansee, M. *The author, art, and the market: Rereading the history of aesthetics*. New York: Columbia University Press, 1994; Boyle, J. *Shamans, software, and spleens: Law and the construction of the information society*. Harvard University Press, 1996; Marshall, L. *Losing one's mind: bootlegging and the sociology of copyright*. Ph.D. thesis submitted to University of Warwick, 2001

⁴⁰⁶ Woodmansee, M. (1994), note supra 405, at pp. 26-27

reflected on the legal environment and are generating legal problems in various fields, but intellectual property law seems to be under particular scrutiny. Thus, the expansion of intellectual property law to folklore is not easily accepted without criticism.

There are those who suggest that intellectual property law struggles to change in order to keep up with developments and they thus have a "strong anti-intellectual property attitude"⁴⁰⁷ which seems to be revolving around the frustration with the way that digital media is dealt with by the established copyright and patent regime⁴⁰⁸. A general critique has also been expressed with regards to the adequateness of intellectual property law as such. Within this trend of criticism, for example, there are those who argue that the process of legal change is rather slow in responding to new challenges, and in the case of intellectual property law it is far too slow⁴⁰⁹. Authors argue that intellectual property law is incapable of keeping pace with the new technological developments⁴¹⁰, in particular with the continuous challenges imposed by the advancement of Internet⁴¹¹, and that on that account, it does not fit any more into the virtual reality of the twenty-first century⁴¹². Certain traditional principles of intellectual property law are being intensely criticised in the light of the new information society, such as, the classic copyright idea/expression dichotomy, which has been disapproved of as unsuitable in the era where digitalisation leads to dematerialisation of works⁴¹³. These and other difficulties that intellectual property law is facing have led some scholars to conclude that the ideas and institutions of intellectual property law are today outdated to an extent that " intellectual property

⁴⁰⁷ Bowrey, K. Who's Writing Copyright's History?. *European Intellectual Property Review*, 1996, vol. 18, at pp. at pp. 317

⁴⁰⁸ *ibid*

⁴⁰⁹ Wiese, H. The justification of copyright system in the digital age, *European Intellectual Property Review*, 2002, vol. 24, no. 8, pp. 387-396

⁴¹⁰ Barlow, J. P. Selling wine without bottles: The economy of mind on the global net. In: P. Ludlow, ed. *High noon on the electronic frontier: conceptual issues in cyberspace*. Cambridge: MIT Press, 1996, pp. 9-34

⁴¹¹ Boag-Thomson, J. Napster et al: Has copyright law passed its sell-by date?. *Computers and Law*, 2001, vol. 11, no. 6, pp. 39

⁴¹² Phan, D. T. T. Will fair use function on the Internet?. *Columbia Law Review*, 1998, vol. 98, pp. 169

⁴¹³ Higham, N. New Challenges of Digitalisation. *European Intellectual Property Review*, 1993, 355

law cannot be patched, retrofitted or expanded to contain the gasses of digitalized expression"⁴¹⁴ and that "we will need to develop an entirely new set of methods as befits this entirely new set of circumstances"⁴¹⁵.

Another important criticism concerns the fairness of intellectual property law. Namely, a number of authors claim that intellectual property law today is at a critical point because the current system is inherently unjust and in fact detrimental to knowledge and creativity⁴¹⁶. An argument often used is that intellectual property law has become a mechanism for a few cultural conglomerates to control the broad terrain of cultural communication⁴¹⁷, and that the system thus hurts the interest of most artists, as well as the public domain. The allegedly substantial and innate unfairness of intellectual property law leads these opponents to suggest that this situation cannot last and that developing an alternative system is a requisite, where such an alternative ought to move beyond any notion centred on private rights⁴¹⁸.

In addition to the general criticism expressed in relation to intellectual property law as such, there are authors which have pinpointed specific folklore-related inadequacies of intellectual property law, as a theoretical obstacle for any future models of protection. Particular criticism, for example, has been made on account of intellectual property law emerging from Western legal tradition and operating with Western legal concepts, such as the concept of private property, private ownership and so on, which may be unknown and inapplicable in non-Western communities⁴¹⁹.

Furthermore, some authors have argued that the extension of the intellectual property law approach to local knowledge and folklore does not seem feasible or reasonable, given that the increased exercise of control over intangible resources through intellectual property rights may lead to

⁴¹⁴ Barlow, J. P. (1996) , note supra 410, at pp. 9

⁴¹⁵ *ibid*

⁴¹⁶ Smiers, J. Is Copyright fit for the 21st century? No!. In: F. W. Grosheide, ed., *Intellectual property and human rights: a paradox*. Cheltenham: Edward Elgar Publishing, 2010, at pp. 105

⁴¹⁷ *Ibid*, at pp. 106

⁴¹⁸ *Ibid*, at pp. 105

⁴¹⁹ See for example Blakeney, M. (2000), note supra 151; Oguamanam, C. (2008), note supra 179; Arewa, O. B. (2006), note supra 214

negative consequences in the intellectual property realm generally⁴²⁰. Such privatization logic was argued to have the potential to restrict or eliminate the free flow and fluidity of folklore and traditional knowledge, its borrowing and the forces of its diffusion, and thus, have adverse implications on the subject of protection itself⁴²¹.

On the other hand, intellectual property law history seems to prove that this field of law is a "complex organic body of law, containing possibilities for development, re-development and reform"⁴²². The history of intellectual property law seems to have always demonstrated the law's capacity to keep up with technological developments. For example, copyright law has adapted to the advent of – at the time almost revolutionary – technological developments such as silent and talking pictures, radio, television and cable television broadcasts, sound recordings, photocopiers and, eventually, computer programs⁴²³. If intellectual property law adapted to those technological developments, why could it not also adapt to further developments?

While the new internet environment certainly poses serious difficulties for intellectual property law, mainly as a consequence of the two factors identified by Jones- speed and scale⁴²⁴ – it is questionable whether these difficulties really threaten intellectual property law at its core. For example, digital files still contain expressions of ideas (sounds, words, pictures – limited by our number of senses), so it has been said that the fundamentals of intellectual property law remain the same, regardless of the format of storage⁴²⁵. Also, one of its crucial and long-term goals, which is to provide incentives for the creation and dissemination of manifested intellectual efforts, continues to be of importance for the fostering of science and culture "no

⁴²⁰ Arewa, O. B. (2006), note supra 214

⁴²¹ See for example Osborne, S. D. Protecting tribal stories: The perils of propertization. *American Indian Law Review*, 2003, vol. 28, pp. 203; Chander, A. and M. Sunder. The romance of the public domain. *California Law Review*, 2004, pp. 1331; Brown, M. F. *Who owns native culture?* Harvard: Harvard University Press, 2004

⁴²² Bowrey, K. (1996), note supra 407, at pp. 218

⁴²³ Wiese, H. (2002), note supra 409

⁴²⁴ Jones, L. An Artist's Entry into Cyberspace: Intellectual Property on the Internet. *European Intellectual Property Review*, 2000, vol. 22, no. 2, pp. 79-92

⁴²⁵ Bannister, J. Is Copyright Coping with the Electronic Age. *Australian Law Librarian*, 1996, vol.4, pp. 13

matter what the technology of the day"⁴²⁶. In essence, intellectual property law "will always be relevant because the fundamental, underlying idea (that it is not fair to harvest without sowing, to steal the other person's labour of mind) remains the same"⁴²⁷.

Accordingly, while all the expressed concerns about flexibility of intellectual property law undeniably have certain weight, the question is perhaps not so much *whether* intellectual property law can adapt at all⁴²⁸, but rather *how* it should adapt. Exactly how this adaptation to the new challenges will happen is ultimately for time to tell.

There seems to be a common feeling among academics that the answer might lie in practical solutions and adjustments made to intellectual property law in response to real issues as, and when, they arise. Also, the potential changes to intellectual property law stress, perhaps more than ever, the need to preserve the historic balance and bargain which the law has struck between the public interest and creators' rights⁴²⁹. In doing so, the law, in an ideal world, takes into consideration the interests of all parties involved and weighs them against each other to find a proper balance, taking into account factors such as ethics and practicality⁴³⁰.

4.4.4 The Public Domain

Often, a principal critique of the intellectual property law is that broad and long-lasting rights might jeopardise further creative process and innovation. A maximalist intellectual property law, scholars fear, means poor innovation policy. A vibrant public domain, therefore, becomes a fount of creativity, and thus preservation of such a domain is said to be vital to innovation⁴³¹.

Accordingly, as important as it is to understand and discuss intellectual property law, one must also examine the notion of public domain in the light of potential folklore protection. Currently, the predominant status of folklore in most

⁴²⁶ Perlmutter, S. Convergence and the Future of Copyright. *Columbia Journal of Law and the Arts*, 2001, vol. 24, pp. 113

⁴²⁷ Wiese, H. (2002), note supra 409

⁴²⁸ de Zwart, M. Copyright has adapted in the past; it will again. In: M. de Zwart. Copyright in cyberspace. *Alternative Law Journal*, 1996, vol. 21, at pp. 270.

⁴²⁹ Jones, L. (2000), note supra 424, at pp. 91

⁴³⁰ Wiese, H. (2002), note supra 409

⁴³¹ Sunder, M. (2012), note supra 122, at pp. 21

jurisdictions, apart from those where certain levels of protection are provided through different protection mechanisms, is that they belong to the public domain.

Depending on how we understand, define and regulate the public domain, the interrelation between the public domain and folklore certainly produces some effects, whether we choose to maintain the current situation or to extract folklore from it and place within an intellectual property regime of protection.

The term and definition of the public domain deserve some initial examination. The use of the term "public domain" seems to suggest that this concept represents a clearly framed and defined place which belongs to everyone and from which anyone is free to take and use bits and pieces, some sort of a collective property which belongs to everyone and no one in particular. When it comes to a definition of the public domain, it seems that this is still a work in progress. Given that the public domain is a multifaceted concept whose scope varies from intellectual property law area to another and from one jurisdiction to another, it appears rather difficult to provide one certain definition⁴³². Traditionally, the public domain has been understood as some kind of a grey area, a no man's land from which parts and bits were taken and included into the intellectual property regime – some kind of predecessor to intellectual property rights. The traditional public domain definition is a negative one, where this concept is understood as consisting of those intangible goods which fall outside the scope of, and so are not subject to, intellectual property rights, for example because the term of protection has run out or because the subject does not qualify for protection⁴³³. One consequence of such a vacant definition of the public domain is that usually no specific rules apply to or are attached to the public domain and its elements. This is particularly unfavourable for folklore and commons in general given that, as a consequence of such a definition and regime of the public domain, anyone can take from that unregulated field, without any obstacle for exploitation and

⁴³² Kongolo, T. Intellectual Property and misappropriation of the public domain. *European Intellectual Property Review*, 2011, vol. 33, no. 12

⁴³³ Van Caenegem, W. The Public Domain: Scientia Nullius?. *European Intellectual Property Review*, 2002, vol. 6, pp. 324

appropriation of commons and without any limits or mechanisms against it⁴³⁴.

The discussed weaknesses and limitations of the negative definition of the public domain have inspired the need to postulate a positive one⁴³⁵. Accordingly, it has been suggested that the public domain should be considered on its own, rather than as oppose to intellectual property – as a notion which needs to be positively defined and which should entail a separate regime, rather than remain absolutely unprotected⁴³⁶. For example, Cohen suggests a set of cultural and creative practices as a basis for the definition and a protective regime of the public domain⁴³⁷. Benabou and Dusollier further suggest that a public domain defined in such a manner should comprise not only of elements not protected by intellectual property rights and works whose term of protection has expired but also works excluded from protection, exceptions to exclusive rights and the freedom of use not covered by exclusive rights⁴³⁸.

If we place the discussions concerning the concept of the public domain into a folklore perspective⁴³⁹, a couple of further issues seem to be particularly relevant. Firstly, will expanding the protectable subject matter on account of the public domain, that is, taking folklore out of the public domain and placing it within an intellectual property regime, necessarily mean endangering the public domain and thus present a threat to a "healthy" public domain? Many have debated over the expansion of the scope of intellectual

⁴³⁴ Benabou, V. L. and Dusollier, S. Draw me a public domain. In: P. Torremans, ed., *Copyright law: a handbook of contemporary research*, Cheltenham: Edward Elgar, 2007, pp. 163

⁴³⁵ See for example Litman, J. The Public Domain. *Emory Law Journal*, 1990, vol. 39, pp. 965; Lange, D. Recognizing the public domain. *Law & Contemporary Problems*, 1981, vol. 44, pp. 147; Cohen, J. Copyright, Commodification and Culture: Locating the Public Domain. In: L. Guibault and P. B. Hugenholtz, ed., *The future of the Public Domain: Identifying the commons in information law*, The Hague: Kluwer Law International, 2006

⁴³⁶ Benabou, V. L. and Dusollier, S. (2007), note supra 434, at pp. 163

⁴³⁷ Cohen, J. (2006), note supra 435, at pp. 38

⁴³⁸ Benabou, V. L. and Dusollier, S. (2007), note supra 434, at pp. 173

⁴³⁹ The concept of the public domain in the context of folklore protection also received some attention: "[t]he public domain is, however, an elastic, versatile and relative concept and it is not susceptible to a uniform legal meaning. Its meaning and effect in Intellectual Property theory are not yet well understood. The term rarely appears in legal texts and it is even rarer that specific rules are attached to it" – see the WIPO Note On The Meanings Of The Term Public Domain In The Intellectual Property System With Special Reference To The Protection Of Traditional Knowledge And Traditional Cultural Expressions/Expressions Of Folklore, Geneva, 2010, WIPO/GRTKF/IC/17/INF/8

property rights and the negative consequences thereof to the public domain⁴⁴⁰. They have raised concerns over the adverse implications of intellectual property law propertisation of intellectual commons and the impact this might have on the health of the public domain. According to one view, the public domain serves as some sort of a bastion against the privatization of culture and knowledge and therefore proponents of this view argue against the extension of intellectual property rights as this will result in the contraction of the public domain.

Accordingly, at the heart of the debate on whether expressions of folklore belong to the public domain is the question of whether a given regime provides opportunities for further creation, development, cultural exchange and fair trade. Resistance to providing protection to folklore expression relies on the necessity to keep folklore expression available as a source of further creation. In that sense, if one views the public domain as an unstructured sum of things, a kind of a zero sum game, every expansion of intellectual property shrinks the public domain⁴⁴¹.

However, this is not entirely correct. If we accept that intellectual property rights have an incentive in the sense that the reward for exploitable property rights increases the production of intellectual goods, then arguably the greater the incentive, the greater the potential returns, thus the greater volume of intangible goods created and ultimately, the greater the extent of the public domain⁴⁴².

A "total" public domain may seem at first glance to be more protective of creativity, since it gives new creators the chance to freely adapt from pre-existing work. However, the rights of attribution and integrity of the work, which essentially function to prevent plagiarism, in the long run help foster creativity. These rights do not remove works from the public domain; rather, they create a bounded or regulated public domain, which in many ways is what the

⁴⁴⁰ See for example Merges, R. P. Property rights theory and the commons: the case of scientific research. *Social Philosophy and Policy*, 1996, vol. 13, pp. 147-167; Aoki, K. Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain. *Columbia-VLA Journal of Law and the Arts*, 1993, vol. 18

⁴⁴¹ See Graber, C. B., K. Kuprecht and J. C. Lai, eds., *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues*. Edward Elgar Publishing, 2012, pp. 220

⁴⁴² Van Caenegem, W. (2002), note supra 433, at pp. 324

idea of the cultural commons is about⁴⁴³. Accordingly, even if one was to argue that folklore should remain in the public domain, does that mean that it should be free for exploitation and appropriation, since no rules apply in the public domain, or should some rights nevertheless be observed? For example, moral rights are not, *per se*, inconsistent with the rationale of the public domain. These rights that continue after the protection term has expired provide certain control over the quality of the work and paternity rights of the author, and as such, are not automatically incompatible with the logic of free use in the public domain⁴⁴⁴.

Therefore, the central questions remain: Should anyone have control over the resources that are in the public domain? And if yes, then who? And what kind of control should they have?

Chapter 6 will explore this line of thought further.

4.4.5 Between Intellectual Property and the Public Domain – the *Domaine Public Payant*

When it comes to the economic aspects of exploitation of works in the public domain, the *Domaine Public Payant*, literally meaning a "paying public domain", provides for a system which in a way is a bridge between a strong copyright system and a free public domain. Essentially, it presents a mechanism to somehow still protect works that have fallen into the public domain, by reducing the harm caused by creating property rights over the common cultural pool from which society draws while at the same time imposing certain conditions for the use of works in the public domain. The most common of these conditions is the payment of fees, which are normally intended to promote preservation of the culture of the country licensing the use of its heritage⁴⁴⁵.

The idea of a paying public domain, or *Domaine Public Payant*, is said to be traced back to the French author Victor Hugo who proposed that remuneration be provided for the benefit and encouragement of new generation of

⁴⁴³ Lixinski, L. *Intangible Cultural Heritage in International Law*. Oxford: Oxford University Press, 2013, pp. 199

⁴⁴⁴ Benabou, V. L. and Dusolier, S. (2007), note supra 434, at pp. 180

⁴⁴⁵ Lixinski, L. (2013), note supra 443, at pp. 200

creators⁴⁴⁶. The *Domaine Public Payant* doctrine considers that the entrance of an item into the public domain after a certain period of time would not mean that the use of such an item should necessarily become free of charge for all. The doctrine is therefore asserting an ongoing royalty on the commercial exploitation of any work, notwithstanding the expiration of the duration of the monopoly⁴⁴⁷.

The WIPO and UNESCO appraised the *Domaine Public Payant* regime as a model to protect expressions of folklore. Namely, WIPO and UNESCO issued the 1976 Tunis Model Law on Copyright for Developing Countries (hereinafter "**Tunis Model Law**") which, among others, encouraged the use of *Domaine Public Payant* as a recommendable method of protection of folklore for developing countries⁴⁴⁸. A proposal for a Public Domain Commission was made in the IGC at its 9th session, where the representative of Music in Common made the following statement: "*Old songs, worldwide, now in the public domain are often "adapted and arranged" and the new song copyrighted. We propose that a share, .01% or 99.99%, of the....royalties go to the place and people where the song originated. Every country should have a Public Domain Commission to help decide what money goes where... The public domain...[does] not mean that monies generated by sale somewhere not be returned to their source of inspiration, namely the peoples or countries whence they [have] arisen. Indeed, it would be one function of the Public Domain Commission to ensure that two apparently contradictory purposes [are] served: to ensure preservation and development of a natural resource for the benefit of all and, at the same time, to limit use by those seeking to profit from it and to ensure that a reasonable portion of those profits [are] returned to the source to sustain it*"⁴⁴⁹.

And it was not only in relation to folklore that the idea of *Domaine Public Payant* was asserted – the German Writers Union, for example, recently advocated a modernised form

⁴⁴⁶ The opening speech of Victor Hugo at the Congres Litteraire International 1878 – see in *ibid*

⁴⁴⁷ Benabou, V. L. and Dusolier, S. (2007), note supra 434, at pp. at pp. 182

⁴⁴⁸ Section 17 of the Tunis Model Law on Copyright – see in Harvey, R. E. The *domaine public payant* in Comparative Law with Special Reference to Argentina, Copyright Bulletin, XXVIII (4), 1994, at pp. 29-30

⁴⁴⁹ See Graber, C. B., K. Kuprecht and J. C. Lai, eds., (2012), note supra 441, at pp. 215

of paying public domain on the basis that earlier authors, whose works are often successful only long after their death, should help finance the creative activities of current, living authors⁴⁵⁰.

The *Domaine Public Payant* regime has been introduced by certain African countries⁴⁵¹, where it is used to complement existing copyright protection and to resolve the problem of expressions of folklore or works that have fallen into the public domain⁴⁵². As a notable example of *Domaine Public Payant* applied in practice, scholars⁴⁵³ are often citing the Peruvian statute⁴⁵⁴ which contains provisions for traditional knowledge that has "been made accessible to persons other than the indigenous peoples by mass communication media such as publication or, when the properties, uses or characteristics of a biological resource are concerned, where it has become extensively known outside the confines of the indigenous peoples and communities"⁴⁵⁵. The statute allows third parties to continue to use traditional knowledge subject to equitable remuneration – where traditional knowledge is being used within twenty years of its falling

⁴⁵⁰ See Dietz, A. Term of Protection in Copyright Law and Paying Public Domain: A New German Initiative. *European Intellectual Property Review*, 2000, vol. 22, no. 11, pp. 507-510

⁴⁵¹ Italy is often cited as an example, although the regime there was subsequently abrogated in 1996. Today, the regime exists in Algeria, Kenya, Rwanda, Senegal, Republic of Congo, Cote d'Ivoire, Tunisia and Paraguay. The pre-eminence of African countries is said to be explained by the Bangui Agreement which provides for such a regime for the exploitation of expressions of folklore and works or productions that have fallen into the public domain (section 59, as amended in 1999, Annex VII, title I) – see in Graber, C. B., K. Kuprecht and J. C. Lai, eds., (2012), note supra 441, at pp. 214

⁴⁵² These regimes establish sanctions for utilisation of works that could prejudice their authenticity or identity and also, an obligation to pay a certain fee in order to use them – see Blakeney, M. Intellectual property in the dreamtime-Protecting the cultural creativity of indigenous peoples. *Oxford Intellectual Property Research Centre*. 1999, vol. 30, at pp. 12

⁴⁵³ See for example Taubman A. and M. Leistner. Analysis of Different Areas of Indigenous Resources. In: Von Lewinski, S. ed. (2004), note supra 279; Munzer, S. R., and Raustiala, K. Uneasy Case for Intellectual Property Rights in Traditional Knowledge. *Cardozo Arts & Entertainment Law Journal* 27, 2009, 37, at pp. 92

⁴⁵⁴ Although it differs from the traditional *Domaine Public Payant* and presents a specific form thereof. First, it applies to genetic resources rather than literary or artistic works. Second, it applies even if there was no prior standard intellectual property right that has expired. Third, different groups are both the source and the beneficiary of the right, whereas in the case of the traditional *Domaine Public Payant* the source of the original intellectual property right, such as a copyright, is an individual author, though the beneficiary of the right is a group, such as a society of authors – see in Munzer, S. R., and Raustiala, K. note supra 453, at pp. 92

⁴⁵⁵ Peruvian Law no. 27811 introducing a protection system for the collective knowledge of indigenous peoples regarding biological resources, 2002, art. 13, available online at http://www.unesco.org/culture/natlaws/media/pdf/peru/pe_lev27811_spaorof.pdf

into the public domain "a percentage of the value, before tax, of the gross sales resulting from the marketing of the goods developed on the basis of that knowledge shall be set aside for the Fund for the Development of Indigenous Peoples"⁴⁵⁶. In addition, the statute provides for an elaborate registration system with three levels of registration: a register of public domain collective knowledge which is publicly accessible and used to be used as prior art in examination in the patent offices, a national confidential register of collective knowledge, and local registers of collective knowledge organized by indigenous peoples in accordance with their practices and customs⁴⁵⁷. Though being recognised as a valuable attempt at protecting traditional knowledge, the statute has also been criticized for certain reasons – firstly, the established right has a term of twenty years, which will not satisfy those who seek indefinite duration, secondly, the beneficiary of sums collected is the Fund for the Development of Indigenous Peoples instead of the indigenous group that generated the traditional knowledge, and thirdly, the statute does not attend with sufficient care to the way in which the traditional knowledge entered the public domain⁴⁵⁸.

While it is an important attempt in dealing with this subject matter, the regime seems to have so far acquired little support worldwide⁴⁵⁹. The effectiveness of the system has not really been assessed and the extent to which it can protect expressions of folklore has been questioned⁴⁶⁰. The first drawback of the regime is that there is little international recognition of public domain regulations and accordingly there is no international structure through which these mechanisms can be enforced⁴⁶¹. Another limitation of its usefulness concerns the fact it is usually aimed at preventing misuse only by foreign third parties⁴⁶². Furthermore, the administration and collection of fees can be a great burden for societies, particularly in developing

⁴⁵⁶ *ibid*

⁴⁵⁷ Taubman A. and M. Leistner. In: Von Lewinski, S. ed. (2004), note supra 279, at pp. 148

⁴⁵⁸ Munzer, S. R., and Raustiala, K. (2009), note supra 453, at pp. 93

⁴⁵⁹ Stokes, S. (2001), note supra 373, at pp. 63

⁴⁶⁰ Graber, C. B., K. Kuprecht and J. C. Lai, eds., (2012), note supra 441, at pp. 215

⁴⁶¹ Lixinski, L. (2013), note supra 443, at pp. 199

⁴⁶² Berryman, C. A. Towards More Universal Protection of Intangible Cultural Property. *Journal of Intellectual Property Law*, 1994, vol. 1, pp. 293

countries⁴⁶³. Finally, the system was contested as not being a satisfactory solution for communities whose priority is control over their folklore, rather than remuneration⁴⁶⁴. Despite these limitations, ultimately whether we decide to use this system depends on the goals we are seeking to achieve, as this will be discussed into more detail in Chapter 6.

4.5 Which Law – a Suggestion

The question raised in this Chapter 4 was – which field of law should we be looking at when thinking about folklore? In addressing this issue, the available literature has mainly been looking at intellectual property law, human rights and cultural heritage laws, weighing specific limitations of each of these against their potential to protect folklore. However, I think that the correct question to be asked is not *which law*, but *which laws*.

And the answer to this question would be – all of the above three. Firstly, these three fields of law do not necessarily conflict when it comes to folklore. Nor do they need to be seen as mutually exclusive. Quite the contrary, it is precisely in the case of folklore where it is evident that they can exist in parallel, dealing with different aspects and levels of protection, thus complementing one another rather than competing with one another. Indeed, not only we do not have to choose between these, but if we want to create a comprehensive system which will effectively deal with folklore, we do not have the luxury to do so. Due to the compound nature of folklore which comprises different cultural, historical, traditional and other elements, addressing the problem of its protection requires coordinated solutions in different fields of law, thus a truly multidisciplinary approach.

Therefore, instead of asking which – given that they are all relevant in certain aspects and contribute to providing a comprehensive system in their own way – what is needed is to think about the possibilities of integrating intellectual property, human rights and cultural heritage laws. Due to the limited focus of the present thesis, I will not be concerned with finding the practical ways to integrate these three fields of law, but this is certainly an objective for further research on this topic.

While they ought to remain in the folklore debate as they are

⁴⁶³ Niedzielska, M. (1980), note supra 151, at pp. 344

⁴⁶⁴ Graber, C. B., K. Kuprecht and J. C. Lai, eds., (2012), note supra 441, at pp. 215

indispensable when it comes to addressing certain aspects of folklore and could therefore contribute to the creation of a wide-ranging, complete system, it is evident that the legal instruments in the fields of cultural heritage and human rights cannot on their own provide a solid and concrete foundation for protection of folklore, mainly due to the lack of detailed provisions concerning the essence of protection and the problems with clear enforcement mechanisms for their application. Therefore, I believe that the platform for creating the basis of any future protection, which will be complemented by provisions from human rights and cultural heritage laws, lies within the framework of intellectual property law.

When it comes to intellectual property law, before considering the practical limitations and adequateness of intellectual property law in providing a satisfactory level of protection for folklore, it is firstly necessary to examine its adequateness as the theoretical basis for folklore protection. Only after answering this question can one start looking at particular intellectual property categories and their content and examine their potential in relation to folklore.

For the purpose of answering this question, this Chapter has looked in general at the development of intellectual property law, mainly through the example of copyright, the evolution of certain copyright concepts, the expansion of the subject matter and therewith connected criticism, and the relationship between intellectual property law and the public domain.

Looking at the development and the early stages of copyright law, it is evident that there were a number of diverse concepts reflected in the different theoretical foundations, interests (moral or economic), stakeholder roles (authors or other stakeholders), scopes of rights, and rationales behind the granted rights. These different concepts were the result of the changing forms of cultural production altered by the social relations⁴⁶⁵. The history of intellectual property law shows that this field of law is a "complex organic body of law, containing possibilities for development, re-development and reform"⁴⁶⁶. Accordingly, what we today call intellectual property law is a product of specific integration of diverse factors, but it is just one of many possible integrations. My intention is not to ask the "if" question – what if geopolitical and social circumstances were different, what if the stakeholders and their interests were different,

⁴⁶⁵ Chanan, M. *The Reuters Factor myth and realities of communicology: a scenario*. London : Free Association Books, 1985

⁴⁶⁶ Bowrey, K. (1996), note supra 407

what if cultural context was different, what if..? – but merely to point out that what we call intellectual property law today is just one of the possible outcomes, and not the only one. The differences between the Anglo-American and Continental approaches to the author, the moral rights and other concepts, for example, show historical particularity and diversity of economic, sociological political, legal and cultural norms which led to the formation of intellectual property law in the Western world. Thus, although on a theoretical level certain classic intellectual property notions, such as the one of highly individual authorship, do not readily fit with the characteristics of folklore, this does not necessarily mean that they could never fit.

The briefly discussed criticism of intellectual property law, although perhaps not directly relevant for the present discussion, nevertheless may be rather valuable as certain conclusions and further guidelines may be drawn from it. For example, the general claims concerning the discriminating and imbalanced nature of intellectual property law as it is today, although not directly linked to the problem of folklore protection, are still crucial inasmuch as they are built into any type of intellectual property protection. Accordingly, I believe that even if my task in this study is not to comment on the current global fairness of intellectual property law and its future, these arguments should not easily be neglected and must be kept in mind in all further contemplations on the system of protection to be proposed for folklore.

The final self-imposing question arising from the expressed criticism is – does intellectual property law have the capacity and sufficient flexibility to adjust to new subject matter? Although different experts today cannot reach an agreement on the question of the capability of intellectual property law to adjust to new technology and media forms and their opinions on the future of intellectual property law in the new digital environment remain greatly divided, it is, however, evident that intellectual property law has never been a static body of law. Quite the contrary, intellectual property law has shown a remarkable evolution and expansion over the years, and was never fixed and strictly limited to what intellectual property law is today but has constantly been modified and adapted to deal with new expressions of creativity and various forms in which creativity emerges. At the same time, the notion has always evolved keeping pace with creativity, incentives and recognition of individuals. While concepts have changed, expanded or decreased, altered in their scope or meaning, intellectual property law has constantly developed in order to protect creation, creativity and the use of

knowledge.

Finally, when constructing a proposed regime for folklore, one must not neglect the role of the public domain. At one end of the public domain spectrum is the "crumbs" theory, where creative work is deposited into the public domain after intellectual property rights have used up some of its usefulness⁴⁶⁷. At the other end of the spectrum is a free and open public domain of resources that are deposited there intentionally and which are shared among all people⁴⁶⁸. Somewhere in the middle is a conception of the public domain as a potential default rule – *"the common space where creative works not protected by copyright exist. Public domain should be the default condition for creative works. . . . If public domain is the norm, then copyright protection should be afforded only when certain conditions are met"*⁴⁶⁹. Accordingly, depending on how we understand and define it, it will be necessary to determine the place where folklore should belong – in the public domain, within the intellectual property realm, or, if the public domain is everything that is free and if intellectual property is everything that is exclusive, perhaps somewhere in between.

Summing up this Chapter 4, while intellectual property law, in its current form, is not the perfect solution, it still seems like it is the most workable one, and definitely one that should allow sufficient manoeuvring space for the development of a suitable system for protection of folklore. As the weaknesses of existing law are identified, what is needed are "soft rules"⁴⁷⁰. Recognising the theoretical weaknesses and limitations of intellectual property law, Chapter 6 will be concerned with finding such soft rules which are flexible and open to future developments, loose and only concern the most important aspects that need to be protected.

⁴⁶⁷ Chander, A. and Sunder, M. (2004), note supra 421, at pp. 1337. See also Lange, D. Reimagining the public domain. *Law and Contemporary Problems*, 2003, vol. 66, no.1/2, pp. 463, 465; Gasaway, L. N. A Defence of the public domain: A scholarly essay. *Law Library Journal*, 2009, vol. 101, no. 4, pp. 451, 457; Hansen, D. Protection of Traditional Knowledge: Trade Barriers and the Public Domain. *Journal of the Copyright Society of the USA*, 2001, vol. 58, no.4

⁴⁶⁸ Boyle, J. (2003), note supra 278

⁴⁶⁹ Gasaway, L. N. (2009), note supra 467, at pp. 452

⁴⁷⁰ Wiese, H. (2002), note supra 409

CHAPTER V: *How:* Which Intellectual Property Law?

5.1 Introduction

The appropriateness of dealing with expressions of folklore under intellectual property law has been a subject of heated debate. Some authors stress that certain intellectual property concepts, such as those of authorship and originality, are absolutely inapplicable to expressions of folklore and that therefore intellectual property laws are not suitable for regulating this subject matter⁴⁷¹. However, others claim that the existing intellectual property standards can nevertheless be modified so as to elude these problematic points⁴⁷².

Accordingly, this Chapter will examine the practical adequateness of those available intellectual property categories which are relevant in relation to the protection of folklore. Section 5.2 will be looking at copyright and neighbouring rights; Section 5.3 will be looking at trademark law; Section 5.4 at geographical indications of origin; while Section 5.5 will examine the *sui generis* modes of protection, in particular those proposed by WIPO.

5.2 Copyright and Neighbouring Rights

5.2.1 Introduction

Historically, the first attempts to protect expressions of folklore within the intellectual property regime were made in the framework of copyright law and neighbouring rights. The very notion of folklore (like the idea of intellectual property itself) emerged from Eurocentric precepts and was, as such, swiftly placed within the concept of copyright⁴⁷³. Such an initial classification of the expressions of folklore as copyright works appears unsurprising, since folklore emerges in the artistic domain and therefore, at least at first sight, bears a certain level of resemblance with the copyright works. Most expressions of folklore appear in the forms corresponding to the classic copyright categories – such as music, dances, crafts, tales etc. In addition to the protection achieved directly and indirectly via copyright, expressions of folklore might also obtain certain protection on the basis of neighbouring rights.

5.2.2 Protection at the International Level

5.2.2.1 The Berne Convention

⁴⁷¹ For example Blakeney – see Blakeney, M. (2000), note supra 151

⁴⁷² WIPO Final Report on National Experiences with the Legal Protection of the Expressions of Folklore Geneva, 13-21 June 2002, WIPO/GRTKF/IC/3/10

⁴⁷³ Blakeney, M. In: Porsdam, H. ed. (2006), note supra 161, at pp. 114

Internationally, the first regulation to address the issue of protection of the expressions of folklore was the Berne Convention. As a response to the increasing voices of concern over the protection of expressions of folklore⁴⁷⁴, the first identification of the need to protect expressions of folklore and the first efforts to establish a framework for protection were made at the 1967 Stockholm Diplomatic Conference for the Revision of the Berne Convention.

At the conference, the Indian delegation passed to the Main Committee the proposal for adding "folklore works"⁴⁷⁵ to the list of works which qualify for copyright protection under the Berne Convention. At the very beginning, the proposal faced a number of problematic aspects – defining folklore and folklore works, identifying the authors of folklore works and dealing with the fact that such works have already been in the public domain⁴⁷⁶. It shortly became clear that folklore had various features that notably diverged from classic copyright works. Consequently, the original suggestion of the Indian delegation was not adopted; however, the proposal did serve to draw wider attention to the idea of protection of folklore.

As a result, a new provision was inserted into the Berne Convention. Aware of the fact that expressions of folklore, although similar to copyright works nevertheless hold certain characteristics that distinguish them from the latter and thus cannot as such be included in the list of protectable literary and artistic works set down in Art 2 (1)⁴⁷⁷, the legislators identified the works of folklore as "works of an

⁴⁷⁴ Many of the delegations of the former colonies that have become independent stressed the importance of preservation and protection of folklore – see Taubman A. Genetic Resources. In: Von Lewinski, S. ed. (2004), note supra 279, at pp. 208

⁴⁷⁵ WIPO Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967

⁴⁷⁶ Ricketson, S. (1987), note supra 356, at pp. 314

⁴⁷⁷ von Lewinski, S. Adequate protection of folklore—a work in progress. In: P. Torremans, ed. (2007), note supra 434, pp. 208

unknown author"⁴⁷⁸ and included a new article. The new Article 15 (4) of the Berne Convention, which was designed to deal mainly with folklore, provided that:

"In the case of unpublished work where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority who shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.

Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union".

Albeit not explicitly mentioning folklore as the subject matter⁴⁷⁹, it was clear that Art 15 (4) provided protection for expressions of folklore through the establishment of a specific form of copyright protection for unpublished works whose authors are unknown but are presumed to be nationals of a country of the Union.

However, although the rule laid down in Art 15 (4) seems clear-cut, its actual application encounters a number of difficulties. Firstly, Art 15 (4) anticipates the designation of competent

⁴⁷⁸ WIPO Records of the Intellectual Property Conference of Stockholm, note supra 475

⁴⁷⁹ Due to the difficulties that arose with defining folklore – see Taubman A. In: Von Lewinski, S. ed. (2004), note supra 279, at pp. 208

authorities that will be appointed with the right to represent the unknown authors and represent their rights throughout the countries of the Union – yet, it is not clear from the Convention how "these bodies are to discharge their functions and responsibilities, for example, as regards the distribution and application of royalties"⁴⁸⁰.

The second dilemma that emerges from the application of Art 15 (4) concerns the term of protection for the expressions of folklore. Until when are the designated bodies authorised to perform their rights in regard to the expressions of folklore⁴⁸¹? Although it has been suggested that such protection is without time limits as there is nothing in the Convention that suggests otherwise⁴⁸², it is widely agreed that expressions of folklore succumb to the rules that apply to anonymous works, thus enjoying protection for 50 years after their publication⁴⁸³.

Furthermore, one of the main practical difficulties with Art 15 (4) concerns its discretionary character. The Berne Convention does not impose an obligation on countries to designate the competent authority; it merely allows them to do so. Moreover, in order to benefit from the international protection under the Berne Convention, countries must first incorporate into their national legislation provisions for protection of folklore which creates an additional obstacle. Consequently, most developing countries did not choose to profit from the protection offered under the Berne Convention – up to now, India is the only country to make the required notification to the WIPO Director General with regards to the

⁴⁸⁰ See Ricketson in Lucas-Schloetter, A. In: Silke von Lewinski ed. (2004), note supra 279, at pp. 267

⁴⁸¹ Lucas-Schloetter, A. In: Silke von Lewinski ed. (2004), note supra 279, at pp. 267

⁴⁸² See Nikiema in Lucas-Schloetter, A. In: Silke von Lewinski ed. (2004), note supra 279, at pp. 267

⁴⁸³ Lucas-Schloetter, A. In: Silke von Lewinski ed. (2004), note supra 279, at pp. 267

designation of a national authority that shall enforce the rights of authors whose identities are unknown⁴⁸⁴.

Finally, the expressed criticism also pointed towards the inability of the Berne Convention to protect works that are already published and are in the public domain⁴⁸⁵ and characterized the mechanisms anticipated by the Convention as unsatisfactory since they did not offer the possibility for folklore holders to exercise their rights directly⁴⁸⁶. On account of all these practical problems with its application, the protection of folklore under Art 15 (4) has, on the whole, been described as deficient⁴⁸⁷.

As a consequence of the hurdles in its interpretation and application, the real effectiveness of the protection established by the new Art 15 (4) of the Berne Convention seems rather limited, in particular if one takes into account that only one country chose to benefit from the protection granted by Art 15 (4) and designate a competent authority as suggested by the Convention. Thus, although the endorsement of a provision specifically designed to deal with expressions of folklore was undeniably valuable as it raised the awareness of the phenomenon of folklore, it is now generally agreed that it nevertheless failed to provide a suitable solution for the complex problem of its protection⁴⁸⁸.

5.2.2.2 *The Tunis Model Law*

Another major step in the development of the international legal protection of the expressions of folklore was taken with the Tunis Model Law. It was drawn up in 1976 with the joint effort of

⁴⁸⁴ *ibid*

⁴⁸⁵ Ricketson, S. (1987), note supra 356, at pp. 315

⁴⁸⁶ Zografos, D. *Intellectual property and traditional cultural expressions*. Cheltenham: Edward Elgar Publishing, 2010, at pp.14

⁴⁸⁷ See Farley in Lucas-Schloetter, in Lucas-Schloetter, A. In: Silke von Lewinski ed. (2004), note supra 279, at pp. 268

⁴⁸⁸ Lucas-Schloetter, A. In: Silke von Lewinski ed. (2004), note supra 279, at pp. 268

WIPO and UNESCO to serve as a reference for developing countries in the process of drafting their national copyright laws and adjusting them to the Berne Convention and has established a special protective regime for national folklore⁴⁸⁹. Works of national folklore are protected without limitation in time and enjoy certain limited economic rights⁴⁹⁰ as well as moral rights, where such rights are to be exercised by a competent authority⁴⁹¹. Section 5 (1) of the Tunis Model Law provides that "the moral rights are rights to claim authorship, to object to and seek relief in connection with distortion, mutilation, modification or any other action which would be prejudicial to his honour or reputation".

In short, the Tunis Model Law seeks to resolve the inadequacies of copyright by widening its conventional ambit so as to accommodate the special characteristics of folklore. The Tunis Model Law was subsequently adopted by Mali (1977), Burundi (1978), Ivory Coast (1978) and Guinea (1980)⁴⁹².

When compared to the Berne Convention, Tunis Model Law presents a significant step forward – even though, from what it appeared, the protection was also offered within the framework of copyright law, the provisions took into account a number of particularities of folklore⁴⁹³. Firstly, folklore was explicitly

⁴⁸⁹ Section 18 of the Tunis Model Law defines "folklore" as "all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage"

⁴⁹⁰ Tunis Model Law, s 4 – the economic rights are exclusive rights to reproduce, make translation, adaptation, arrangement, transformation, communicate work to public either through performance or broadcasting.

⁴⁹¹ Tunis Model Law, s 6

⁴⁹² Kuek, C. Y. Protection of Expressions of Folklore/Traditional Cultural Expressions: To What Extent is Copyright Law the Solution?. *Journal of Malaysian and Comparative Law*, 2005, vol. 32, no. 1

⁴⁹³ In fact, bearing in mind that it differs from classic copyright in a number of points, it is questionable whether it can be characterized as copyright or a *sui generis* type of protection

included in the list of protected works⁴⁹⁴. Furthermore, Section 18 (iv) attempted to define the subject matter by taking into account some of its most important characteristics and provided that *"folklore shall mean all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage"*. In addition, the Tunis Model Law provided that works of national folklore are to be protected against improper exploitation⁴⁹⁵. Importantly, an exception was made with respect to the fixation requirement, as the drafters held that *"the fixation requirement cannot possibly apply to works of folklore: such works form part of the cultural heritage or peoples and their very nature lies in their being handed on from generation to generation orally or in the form of dances whose steps have never been recorded"*⁴⁹⁶. Finally, the Tunis Model Law granted works of folklore a protection that is unlimited in time⁴⁹⁷.

In addition to the traditional copyright provisions, adjusted to deal with the peculiarities of folklore, the Tunis Model Law also introduced the *Domaine Public Payant* system designed for the economic aspects of exploitation of the works of folklore. According to Section 17, *"a work that has fallen into the public domain may be used without restriction, subject to the payment of a fee calculated as a percentage of the receipt produced by the use of the work or its adaptations"*⁴⁹⁸.

Over time, it appears that, to a certain extent,

⁴⁹⁴ Section 1 (3) of the Tunis Model Law

⁴⁹⁵ Section 6 of the Tunis Model Law

⁴⁹⁶ Commentary of the Tunis Model Law on Copyright

⁴⁹⁷ Section 6 (2) of the Tunis Model Law

⁴⁹⁸ Commentary of the Tunis Model Law on Copyright

the Tunis Model Law has met the expectations of its proponents as it influenced quite significantly the copyright laws of a number of African countries. Its relevance to protecting folklore is particularly reflected by the fact that a number of countries have adopted laws similar to the Tunis Model Law⁴⁹⁹.

5.2.2.3 *The WIPO Performances and Phonograms Treaty and the Rome Convention*

In addition to copyright, expressions of folklore might also obtain certain protection on the basis of neighbouring rights. An international protection for performers and producers of phonograms was established by the International Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (hereinafter the "**Rome Convention**") and the WIPO Performances and Phonograms Treaty (hereinafter the "**WPPT**"), which indirectly ensure a certain level of protection for the expressions of folklore as well.

5.2.2.3.1 Performers

As defined by the WPPT, "performers are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore"⁵⁰⁰. The definition of performers adopted by the WPPT is broad enough to embrace performance of any type of creative work or expression of folklore. Such an extensive definition resolved the dilemma imposed by the Rome Convention that did not specifically include expressions of folklore, thus leaving it somewhat vague whether performers of expressions of folklore can enjoy this type of protection⁵⁰¹. Also, the

⁴⁹⁹ Kuruk, P. (1998), note supra 294

⁵⁰⁰ Art 2 (a) of the WPPT

⁵⁰¹ The Rome Convention was applicable to all works, regardless of whether they were protected by copyright or not, as long as they were capable of being protected under cop-

inclusion of the phrase "or otherwise perform" resolved the ambiguity in regard to whether the definition of performers could be applied to all expressions of folklore⁵⁰², given that some traditional societies do not recognise some of the typically Western roles, for instance those of "musicians".

Based on the provisions of the Rome Convention and the WPPT, performers of expressions of folklore have the right to object to the unauthorised duplication and broadcast or recording of their performance. Such protection creates an indirect safeguard for the expressions of folklore which are ultimately being protected from unlawful broadcasting and recording.

5.2.2.3.2 Producers of Phonograms

Under the WPPT, the producer of a phonogram is defined as "the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds"⁵⁰³. It is obvious from this definition that the provisions on the producers of phonograms could find its application with the expressions of folklore. The producer will be the first to collect certain forms of the expressions of folklore, thus "carrying out his work on the material which, until then, has only been transmitted by oral tradition"⁵⁰⁴. The producers that bring together expressions of folklore for the first time will enjoy the exclusive right to authorise reproduction, distribution, rental or making available of their

right. However, the specific character of folklore and the uncertainty on whether it can enjoy copyright protection, made the applicability of Rome Convention to expressions of folklore a matter of intense debate.

⁵⁰² Kutty, P. V. (2002), note supra 141

⁵⁰³ Art 2 (d) of the WPPT

⁵⁰⁴ See Nikiema in Lucas-Schloetter, A. In: Silke von Lewinski ed. (2004), note supra 279, at pp. 271

phonograms⁵⁰⁵, consequently in some way providing a certain level of protection for the expressions of folklore included in the phonograms as well.

5.2.3 Limitations of Copyright Law

5.2.3.1 Limitations of the Direct Copyright Protection

Despite the failure of the Berne model for protecting expressions of folklore, the international attention was, and to a certain extent still is, turned to the possibilities of achieving protection based, directly or indirectly, on the general copyright principles⁵⁰⁶. However, overall, this approach involves a number of problems generated by the specific character of the phenomenon of folklore, which raises the question of adequateness of the copyright protection for expressions of folklore.

5.2.3.1.1 Fixation

The first collision between the principles of copyright law and the exceptional nature of folklore arises in relation to the fixation requirement. Namely, certain copyright systems require that the work, in order to be able to enjoy copyright protection, must be fixed in a material form. This requirement, however, directly clashes with the very idea of folklore which is mainly characterised by oral transmission. Consequently, an entire segment of folklore, in particular traditional music, will remain unprotected as the scope of copyright application is reduced only to works materialized in a certain tangible form.

This argument against the protection of folklore by means of copyright has a limited range, however, and will not present a difficulty in civil law countries, since the fixation requirement is characteristic mainly of common law copyright

⁵⁰⁵ Art 11-14 of the WPPT and Art 10 and 12 of the Rome Convention

⁵⁰⁶ Lucas-Schloetter, A. In: Silke von Lewinski ed. (2004), note supra 279, at pp 268

systems.

5.2.3.1.2 Originality

A more serious problem arises in respect of the originality requirement set by copyright law. Regardless of the different levels of originality established by different copyright systems⁵⁰⁷, it has now been widely agreed that expressions of folklore do not meet the required criteria for protection. This prerequisite directly collides with the very nature of expressions of folklore which are a "result of a constant and slow impersonal process of creative activity exercised by means of consecutive imitation within an ethnic community"⁵⁰⁸.

5.2.3.1.3 Authorship

The main difficulty in applying copyright protection to expressions of folklore is determining the author of the work. The copyright system is based on the idea of an individual author or group of individual authors that create a work. However, the main characteristic of folklore is that it is attributable to the community as a whole and not to an individual author. The continually changing nature of folklore, in which every generation reproduces and builds upon the creations of the previous generations, makes it generally impossible to determine the exact author of a certain expression of folklore.

However, could it be possible to apply general principles of copyright to folklore if we understand expressions of folklore as anonymous works or joint or collective works? Most of the national legislations contain provisions that protect anonymous works of authors who wish to remain hidden and unknown. Nevertheless, there is a significant

⁵⁰⁷ I.e. the author's own intellectual creation criterion, or the skill, labour or judgment criterion.

⁵⁰⁸ See Masouye in Lucas-Schloetter, A. In: Silke von Lewinski ed. (2004), note supra 279, at pp. 293

difference between anonymous works and expressions of folklore. Unlike the anonymous works whose authors *can* be identified despite their wish to remain unknown, authors of folklore are genuinely unknown and cannot be determined⁵⁰⁹.

It seems that it would be equally difficult to apply rules that govern works of joint or collective authorship. In the case of joint authorship, the work is being created as a result of connected contributions of the co-authors who have the intention to merge their creations in order to produce a new, separate work. However, many different generations that have complemented folklore through its reproduction can hardly be considered as joint authors in the sense of copyright law. Similarly, a collective work appears as a result of individual works of multiple authors being joined together by a natural or legal person. Again, folklore can hardly be considered as collective work of different authors, and moreover, it would be difficult to imagine who could be the collector and coordinator of the different works in the case of folklore.

5.2.3.1.4 Term of Protection

Finally, the last obstacle for applying the copyright principles to expressions of folklore is the duration of protection. The protection of copyright works is mainly limited to 70 years after the death of the author⁵¹⁰. It is difficult to imagine how this period could be measured for expressions of folklore when authors of folklore are impossible to identify. Furthermore, even if this problem could be surpassed, applying the copyright principles would mean that the expressions have already fallen in the public

⁵⁰⁹ Niedzielska, M. (1980), note supra 151

⁵¹⁰ In accordance with the Directive for Harmonisation of the Term of Protection of Copyright and Certain Neighbouring Rights. There are exceptions though, for example the Berne Convention where the term of protection is life plus 50 years.

domain as is it very likely that the term of protection has already passed. Finally, given that expressions of folklore have existed and were being developed over a number of centuries, it does not seem sensible to protect them only for a limited period of time. Therefore, it has been suggested that, in order to have an effective system for protection of expressions of folklore, it must be unlimited in time⁵¹¹.

5.2.3.2 *Limitations of Indirect Copyright Protection*

Following the above, it appears that the direct protection of expressions of folklore through copyright law is impossible due to a number of difficulties raised by the concepts of fixation, originality, authorship and term of protection. However, in some cases it might be possible to obtain indirect copyright protection for expressions of folklore by applying the general copyright principles to works derived from folklore.

Firstly, an indirect manner of protecting expressions of folklore is through collections. As anticipated by most national legislations around the world, a collection which, according to the selection, purpose or arrangement of its contents constitutes individual and intellectual creations shall be considered as independent copyright work.

Further on, there are certain provisions in the national copyright legislations that grant protection for derived works such as translations, adaptations, modifications of a work and other modifications that are an individual and intellectual creation. While it can be argued whether works derived from expressions of folklore can enjoy copyright protection when, in general, folklore as such is not capable of being protected via copyright, it

⁵¹¹ Romanello, F. Protection of folklore: Striking a balance. *Pravni život*, 54.11, 2005, at pp. 1139-1166

is unequivocally clear that works inspired by expressions of folklore can definitely enjoy this protection. Thus, an author who uses an expression of folklore as an inspiration in the course of creation of his individual work shall enjoy copyright protection for his work.

Whereas this type of protection directly benefits the collectors of expressions of folklore or authors who draw their inspiration from it, it fails to protect the expressions of folklore as such. What will be protected are the original elements of the newly created work, whilst the expressions of folklore integrated in the work will remain unprotected. Therefore, it has been suggested that, accepting the limited extent of protection established through indirect application of copyright to expressions of folklore in general, it could only be used as a supplementary mode of protection⁵¹².

5.3 Trademarks

5.3.1 Introduction

While placing the question of a suitable mode of protection for the expressions of folklore within the discourse of copyright law seems self-explanatory and obvious, given the nature of the phenomenon of folklore and the artistic forms in which it emerges, it might appear dubious whether any other intellectual property rights could serve as a mechanism for protection. This dilemma has particularly been reinforced over the past couple of decades when the increasing number of cases of unlawful use of traditional names, words and symbols shifted the interest of scholars towards re-examining the possibilities of applying trademark law in relation to expressions of folklore.

Examples of unauthorized registration of traditional designations can be found in various industries and in relation to different products – from car⁵¹³ and tobacco⁵¹⁴

⁵¹² *ibid*

⁵¹³ For example, Native American names of Winnebago and Cherokee in relation to car brands; see Tunney, J. EU, IP, Indigenous People and the Digital Age: Intersecting Circles, *European Intellectual Property Review*, 1998, vol. 20, at pp.337

⁵¹⁴ see Brascoupe, S. and Endemann, K. Intellectual property and aboriginal people: A working

companies and sport teams⁵¹⁵ in North America, to toys, video games, surfboarding equipment and fashion accessories in the South Pacific region⁵¹⁶, to mention just few most interesting ones. The unauthorized exploitation of aspects of traditional heritage includes the registration of different signs, from words, such as the word marks "Cherokee"⁵¹⁷ and "Redskins"⁵¹⁸, to tangible expressions, such as indigenous drawings, designs and images⁵¹⁹. The cited practices of commercial exploitation of traditional designations by companies, without the prior approval or consent from the indigenous communities, raised objections among the indigenous people who often deemed such use to be "offensive or degrading"⁵²⁰. Another important general concern was brought up – given that trademarks essentially serve as an indication of the origin of the products and services⁵²¹, the use of traditional names and symbols could be considered as misleading for the consumers with respect to the actual origin and identity of the concerned products and services.

Bearing in mind these concerns and the rising number of unlawful practices, the debate on placing the expressions of folklore within the sphere of trademark law further developed in two main directions – the prospect of excluding signs which comprise traditional designations from registration by non-indigenous entities, on one side, and the prospects of active employment of trademark law by the indigenous communities themselves for protecting

paper. *Research and Analysis Directorate, Indian and Northern Affairs Canada. Ottawa, Minister of Indian Affairs and Northern Development Catalogue*, R32-204, 1999

⁵¹⁵ For example, Native American names and symbols of Braves, Redskins and Chiefs in relation to football team names and logos; see Tunney, J. (1998), note supra 513, at pp. 337

⁵¹⁶ Various Maori words and symbols can be found in New Zealand trademarks. See for example Kur, A. and Knaak, R. Protection of Traditional Names and Designations. In: von Lewinski ed. (2004), note supra 279, at pp. 222

⁵¹⁷ Registered by the car manufacturer Daimler Chrysler; see Zografos, D. (2010), note supra 486, at pp.55

⁵¹⁸ Registered by Washington professional football team; see *ibid*

⁵¹⁹ For example, a number of current trademarks incorporate the images of Aboriginal people; see Janke, T. ed. *Minding culture: case studies on intellectual property and traditional cultural expressions*. Geneva: World Intellectual Property Organization, 2003

⁵²⁰ *Ibid*, at pp.50

⁵²¹ The primary function of trademarks as indicators of the origin of the goods/services with regards to which it is being used has now been widely recognized in both civil and common law jurisdictions; for example see Sanders, A. K. and S. M. Maniatis. A Consumer Trade Mark: Protection Based on Origin and Quality. *European Intellectual Property Review*, 1993, vol. 15, pp. 406

aspects of their cultural heritage, on the other.

5.3.2 **Registrability of Traditional Designations**

Generally, a sign can be registered as a trademark provided it complies with the basic registrability conditions prescribed by the relevant laws⁵²². On the basis of the aforesaid, the question imposed in relation to the expressions of folklore was whether any prospective grounds can be found in trademark law, as it stands, for refusing the registration of signs which comprise traditional designations, if such registration is made by non-indigenous entities without the prior consent or approval of the concerned folklore holders.

5.3.2.1 *The Paris Convention*

The Paris Convention for the Protection of Industrial Property (hereinafter the "**Paris Convention**"), signed in Paris in 1883, established a Union for the protection of industrial property. As one of the most widely adopted treaties worldwide⁵²³, it represents a milestone in the process of international harmonization of the trademark law and lays down certain core rules related to trademark registration.

Article 6^{quinquies} of the Paris Convention provides the grounds for refusal or invalidity of trademark registration for signs where such signs:

"... (i) [when they] are of such a nature as to infringe rights acquired by third parties in the country where protection is claimed;

(ii) [when they] are devoid of any distinctive character, or consist exclusively of signs or indications which may serve, in trade, to

⁵²² In brief, these include the requirement that a sign can be graphically represented, that it has the quality to distinguish related goods/services in the course of trade from the good/services of other market players

⁵²³ Today, it has 173 contracting member countries: see Contracting Parties to the Paris Convention, available online at http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=2

designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed;

(iii) [when they] are contrary to morality or public order and, in particular, of such a nature as to deceive the public..."

In the light of the present discussion, the grounds for refusal referred to above under point (iii) of Article 6^{quinquies} deserve further attention⁵²⁴. Could the general morality clause, expressed as "morality and public order", provide the grounds for objecting to the registration of a trademark that contains elements of folklore? The concepts of morality and public order are legal standards, consciously drawn rather widely, and to an extent vaguely, in order to allow sufficient scope of manoeuvre for the relevant national trademark registries. In European law, the phrase public order signifies the protection of the public safety and the integrity of persons, in the widest sense, while the principle of morality in its core meaning represents a code of conduct put forward by the society and held to be authoritative in matters of right and wrong. Whether ultimately one trademark shall be regarded as contrary to morality and/or public order depends on the actual facts of the case, where the authorized trademark registry must also take into consideration the specific social

⁵²⁴ The "lack of distinctive character" referred to under point (ii) of Article 6^{quinquies} does not have direct relevance in the present assessment; the stated rules merely establishes that a trademark that does not have the capacity to distinguish goods and services of one tradesman from another's, cannot be registered. As such, this general exclusion has rather limited practical importance in the field of folklore protection – folklore-based signs will be excluded from protection, as any other signs, to the extent they are not sufficiently distinctive.

and cultural context of the relevant contracting state. The cited concepts, according to trademark registries' examination guidelines, usually concern signs related to race and sex⁵²⁵, signs which have religious connotations⁵²⁶ or may increase the likelihood of criminal or other offensive behaviour⁵²⁷, signs which are offensive or blasphemous⁵²⁸ etc.

Even though at first sight the exclusion of folklore-based signs on the basis of morality and public order might appear as a convenient solution, its practical applicability is greatly restricted for three reasons. Firstly, this ground for refusal is concerned with the inherent quality of the sign itself, rather than the issues related to its rightholder, such as his identity or authorization to use the sign⁵²⁹. Secondly, in order to be able to apply any kind of general moral exclusion to a certain sign, there must be at least certain level of consensus within the relevant public on its moral intolerability. While it might be argued that certain consumers could consider registration of traditional designations politically incorrect, it is highly unlikely that they could regard it as immoral. Thirdly, the matter is additionally complicated in the situation where there is an attempt to trademark an expression of folklore in a country other than the country from which it originates – as a result, while an expression of folklore might be excluded from protection in its country of origin, there is nothing preventing its registration in a country where it is unknown "or at least not perceived and understood in its

⁵²⁵ Kitchin, D. et al. *Kerly's Law of Trade Marks and Trade Names*, 14th edition, London: Sweet & Maxwell, 2005, at pp. 212-213

⁵²⁶ For example, see the UK Patent Office *Manual of trade mark practice* under Section "Offensive Marks", available online at <http://www.ipo.gov.uk/tmmanual-chap3-exam.pdf>

⁵²⁷ *ibid*

⁵²⁸ see Article 8.7 of the OHIM examination guidelines, available online at <https://oami.europa.eu/ohimportal/en/>

⁵²⁹ Zografos, D. (2010), note supra 486, at pp.59

full and true meaning"⁵³⁰.

5.3.2.2 *Grounds for Refusal in National Legislation*

The Paris Convention mainly aimed at determining the minimum standards in the contracting member countries for providing and recognizing trademark protection within the Union, rather than establishing rules for their exclusion from protection. Consequently, certain potential grounds for refusal, such as the concept of "deceptive marks"⁵³¹, which may be found in the majority of national trademark legislations, are not rooted and mirrored in the Paris Convention, or other international instruments for that matter⁵³².

Given that trademark law essentially seeks to proactively prevent consumer confusion, signs which are likely "to deceive the public, for instance as to the nature, quality or geographical origin of the goods and services"⁵³³ would, in most cases, be denied protection. Such deception in practice usually means that a potential consumer would be likely to draw the conclusion that the relevant goods or services originate from a particular locality or are made of a particular material or have certain characteristics⁵³⁴.

On the basis of the aforesaid, it is fairly evident how the expressions of folklore could benefit from the "deceptive marks" provisions. However, as with the previously discussed morality based exclusion, the functional effectiveness of this ground for refusal *per se* is highly debatable. Again, the deceptiveness of the sign is assessed on the basis of the public

⁵³⁰ Kur, A. and Knaak, R. In: von Lewinski ed. (2004), note supra 279, at pp.225

⁵³¹ In addition to this, common grounds for refusal present in national legislations are "non-distinctiveness" and "offensiveness" which have already been discussed within the framework of Paris Convention under Section 5.3.2.1.

⁵³² Kur, A. and Knaak, R. In: von Lewinski ed. (2004), note supra 279, at pp.225

⁵³³ Article 3 (1) (g) of the Council Directive 89/104/EEC

⁵³⁴ For example, see Article 8.8 of the OHIM examination guidelines, available online at <https://oami.europa.eu/ohimportal/en/>

perception and understanding. Consequently, if the relevant part of the public is not familiar with the connotations of the sign, particularly in cases where the registration is sought in a country other than the country of origin of the concerned expression of folklore, then it is highly unlikely that the sign will be excluded from protection. Another likely situation is that consumers might be well familiar with the meaning of the sign but will not be confused as to the origin of the goods and services⁵³⁵. Finally, Kur and Knaak⁵³⁶ have pointed another significant aspect within this context – public opinion is not stable and fixed in time when it comes to understanding the meaning of traditional designations. Consequently, the descriptive quality of a particular traditional symbol may eventually be reduced or even lost if that sign is commonly used on the market in relation to various different products.

As such, contemporary international and national trademark laws do not provide a comprehensive and fully operational mechanism for protection of expressions of folklore through the above discussed grounds for refusal. However, it does provide a valuable starting point for further development. In this regard, the practice of the national trademark offices might have particular significance in determining the actual extent to which the expressions of folklore and their rightholders could benefit from trademark law⁵³⁷. An

⁵³⁵ For example, is it very unlikely that any consumer would actually believe that the "Cheeokee" branded cars are in fact made by Native Americans and manufactured in the "Cherokee" region – see Kur, A. and Knaak, R. In: von Lewinski ed. (2004), note supra 279, at pp.241

⁵³⁶ *ibid*

⁵³⁷ A notable example of legislators adapting the existing intellectual property law in order to take into account indigenous needs and viewpoints is the case of New Zealand and the Maori people. The exceptionality of Maori culture has been very attractive, especially during the last few decades, to a number of companies which began copying and producing Maori-like craft products, as well as using Maori images and symbols to market their goods. In response to the growing concerns and demands on the part of the Maori population, the government of New Zealand embarked on 10-years long process of reforming legislation in an attempt to

excellent example of this is the practice of the United States Patent and Trade Mark Office, which has established a database for recording the official insignia of federally and state-recognized Native American tribes and consequently might refuse the registration of a sign that suggests a false connection with a tribe⁵³⁸.

5.3.3 Active Protection of Traditional Designations

While one approach is to attempt to use trademark law passively by prohibiting the registration of folklore-based signs by non-authorized persons, it might also be actively used by expressions of folklore holders themselves for being the first to register and trademark elements of their culture. However, in addition to the general limitations of trademark law in relation to expressions of folklore, as summarized below, one common obstacle that indigenous communities might face is their unwillingness or inability to follow the concepts, framework and ideology of the Western intellectual property rights system. This often results in their failure to obtain trademark, or other intellectual property rights, and the benefits direct protection can provide.

Certain authors have especially stressed the direct benefits that expressions of folklore holders might have from collective and certification marks, as specific types of

consolidate the needs of the Maori and the trademark law – a step which would be qualified as "unprecedented" – see Zografos, D. New Perspectives for the Protection of Traditional Cultural Expressions in New Zealand. *IIC* 36, 8, 2005, at pp. 928-952. The result was a Trade Marks Act enacted in 2002 which represents an inventive legislative solution with certain unique aspects, while still within the boundaries of trademark law. For example, Article 17 (1) (b) (ii) of the Act provides that a trademark will not be registered if it considered that "its use or registration would be likely to offend a significant section of the community, including Maori". Also, a Maori Trademarks Committee was established with the function to advise "whether the proposed use or registration of a trademark that is, or appears to be, derivative of a Maori sign, including text and imagery, is, or is likely to be, offensive to Maori". While it is clear that it essentially does not provide general protection of Maori folklore, the Act is recognized for introducing valuable changes into the existing trademark law.

⁵³⁸ "Section 2(a) of the Trademark Act, 15 U.S.C. §1052(a), disallows the registration of various marks, including ones which falsely suggest a connection with particular institutions. If a mark that a party wishes to register as a trademark resembles an insignia of a Native American tribe, the USPTO might conclude that use of that mark would suggest a false connection with the tribe" – see USPTO Native American Tribal Insignia Database, available at <http://www.uspto.gov/trademarks/law/tribal/index.jsp>

marks⁵³⁹. It was suggested that certification marks, as marks that indicate the conformity of goods/services with certain standards, could be used by traditional communities to indicate that their products originate from a particular location, are original and manufactured in a specific traditional way. Also, collective marks which are protected by certain associations could be used to govern the circle of persons authorized to use the collective mark and convey a message to the public as to the common trade origin of the concerned products/services.

There have been some notable examples, among the indigenous communities, of how certification and collective marks could directly benefit the expressions of folklore and their holders⁵⁴⁰. For example, a hand-shaped logo administered by the Alaska State Council on the Arts has successfully been used since 1961 to identify the authentic Alaska Native art and guarantee that the relevant products were handcrafted by a Native Alaskan using natural materials⁵⁴¹. Also, an example of a collective mark used by folklore holders is the Marinha Grande Mglass collective mark, registered in 2001 to promote the traditional mouth-blown glass from the Marinha Grande region in Portugal⁵⁴².

5.3.4 Unfair Competition

Finally, a few words when it comes to folklore and unfair competition are in order. There appear to be at least two different ways in which unfair competition rules may aid to protection of folklore.

First, it was said that to some extent, unfair competition rules may provide protection for folklore, in particular in the form of trade secret protection in civil law jurisdictions or breach of confidentiality in common law ones. Such protection would apply if there is an expression of folklore

⁵³⁹ See for example Zografos, D. (2010), note supra 486; Janke, T. (1997), note supra 159; Kur, A. and Knaak, R. In: von Lewinski ed. (2004), note supra 279; Morgan, O. Protecting indigenous signs and trademarks – the New Zealand experiment. *I.P.Q.* 1, 2004, at pp. 58-84

⁵⁴⁰ See WIPO Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge, note supra 149

⁵⁴¹ See Alaska State Council on the Arts, Silver Hand Program, available online at <http://www.eed.state.ak.us/aksca/>

⁵⁴² International Trade Centre UNCTAD/WTO and WIPO. *Marketing Crafts And Visual Arts: The Role Of Intellectual Property-A Practical Guide*. Geneva: WIPO E-bookshop, 2003 at pp.82-3

that is kept as secret and confidential within the community and a confidentiality obligation existed⁵⁴³.

Under the second option, the unfair competition rules may serve to protect against acts and such uses of expressions of folklore which constitute an act of unfair competition within the meaning of Article 10bis of the Paris Convention. Under the cited article, an act of unfair competition is defined as "any act of competition contrary to honest practices in industrial or commercial matters", including for example "(i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor; (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor; or (iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods". The countries of the Union are obliged, under the Paris Convention, to assure to nationals of such countries effective protection against unfair competition. Accordingly, these rules may be invoked, for example, in situations where an expression is used in a manner that could be detrimental to the reputation of the community from which it originates; or in a manner that is misleading the consumers with regards to the origin of the expression.

However, the limitations of unfair competition rules in protecting folklore are obvious. First, the application of these rules is limited to instances involving commercial transactions⁵⁴⁴. Second, the rules contained in Article 10bis of the Paris Convention are only applicable insofar the community whose interests may be affected by the unfair competition act are actually doing business in the respective country⁵⁴⁵.

5.4 Geographical Indications of Origin

5.4.1 Introduction

⁵⁴³ von Lewinski, S.. In: P. Torremans, ed. (2007), note supra 434, at pp. 214

⁵⁴⁴ *ibid*

⁵⁴⁵ Kur, A. and Knaak, R. In: von Lewinski ed. (2004), note supra 279, at pp. 308

Following the extensive debates on the possibilities and manners of making use of existing intellectual property systems, mainly copyright but others as well, geographical indications of origin have also been considered in recent years and graded as potentially useful when it comes to protecting expressions of folklore. While it was recognized that traditional knowledge and expressions of folklore cannot enjoy protection *per se* via means of geographical indications of origin⁵⁴⁶, certain tangible expressions of folklore, such as handcrafts made from natural resources, could benefit from the protection offered under geographical indications of origin⁵⁴⁷. Furthermore, it was concluded that some expressions of folklore may themselves be geographical indications of origin, such as indigenous and traditional names, signs and other indications⁵⁴⁸. The rationale behind this approach lays in the common characteristics of geographical indications of origin and the phenomenon of folklore – for example, geographical indications of origin serve to identify certain goods which have been produced at a specific geographical region and expressions of folklore also usually originate from a particular geographical settlement; geographical indications of origin, like expressions of folklore, are often based on certain traditional methods; both the geographical indications of origin and expressions of folklore typically entail certain know-how which has been transmitted from one generation to another and both require long periods of time to be created and for the link between the product and its geographical origin to be produced⁵⁴⁹.

5.4.2 Protection of Folklore Under Geographical Indications of Origin

The fundamental initial question that complicates any further reflections on the appropriateness of geographical indications of origin for expressions of folklore protection is

⁵⁴⁶ see WIPO Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge, note *supra* 149

⁵⁴⁷ See Secretariat. Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore./Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions. Geneva: World Intellectual Property Organization, May 2003, at pp. 53

⁵⁴⁸ *ibid*

⁵⁴⁹ Zografos, D. (2010), note *supra* 486

the exact definition of a geographical indication of origin. It is more or less common that geographical indications of origin are names or signs used on goods with a specific geographical origin and with certain qualities or reputation due to their origin. As such, geographical indications of origin convey information to the public as to certain characteristics of the product. Geographical indications of origin might indicate a country, a region, geographical locality or a city from which the relevant product, usually an agricultural good, originates. However, relevant international instruments use different terminology and different definitions with respect to geographical indications of origin. For example, both the 1883 Paris Convention and the 1891 Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods (hereinafter the "**Madrid Agreement**") use the term "indications of source" while none of these two documents provides a definition of the geographical indications of origin. Further, the 1958 Lisbon Agreement for the Protection of Appellations of Origin and their International Registration (hereinafter the "**Lisbon Agreement**") operates with the term "appellations of origin" and defines this as "the geographical name of a country, region, or locality, which designates a product originating therein, the quality or characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors"⁵⁵⁰.

The 1994 WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter the "**TRIPs**") was the first international instrument to use the term "geographical indication" and, as one of the treaties with the widest scope of application⁵⁵¹, is particularly relevant to examining the application of geographical indications of origin to the protection of folklore. Article 22 of the TRIPs defines a geographical indication of origin as an:

"...indication which identifies a good as originating in the territory of a Member, or a region or locality in that

⁵⁵⁰ see Article 2 (1) of the Lisbon Agreement

⁵⁵¹ Members of the WTO are automatically parties to the TRIPs. Accordingly, TRIPs today has 159 members; see http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm

territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin".

The TRIPs further provides two layers of protection – one, special and wider, for wines and spirits, and the other for all other goods. As a general rule⁵⁵², TRIPs grants protection against deceptive use of a geographical name, that is, a use which falsely represents the origins of a certain product⁵⁵³. In particular, the protection is offered against misleading appropriation or use of a geographical indication of origin and any other use which constitutes an act of unfair competition within the meaning of the Paris Convention.

As it follows, four conditions must be fulfilled under the TRIPs in order to benefit from the protection granted by geographical indications of origin. Firstly, the product in question must be in a tangible form. Secondly, the good must originate from a territory, region or locality in a Member state and it must be "essentially attributable" to that geographical territory⁵⁵⁴. Thirdly, the geographical indication of origin holder must show that the public has been misled as to the use of the geographical indication of origin, or alternatively, that there was an act of unfair competition. The burden of proof rests on the holder, which in fact is justifiable given that the protection system does not rely on a registration or certification system⁵⁵⁵. Fourthly, the protection by means of geographical indications of origin is based on the rule of the country of protection – that means that a particular geographical indication of origin shall be protected in Member countries under the TRIPs only and for as long as it is protected in its country of origin.

⁵⁵² The exception is in the case of wines and spirits where the protection applies even where the public is not being misled and there is no unfair competition; see Article 23 of the TRIPS

⁵⁵³ See Article 22 of the TRIPS

⁵⁵⁴ The term "essentially attributable" bears certain level of flexibility and should be understood to refer to a link created over a lengthy period by product's characteristics and value, but could include also as referring to human labor in the place or goodwill created by advertisement in relation to the territory – see the International Centre for Trade, and Sustainable Development. *Resource Book on TRIPS and Development*. Cambridge: Cambridge University Press, 2005, at pp. 289

⁵⁵⁵ See Gervais, D. J. *The TRIPS agreement: drafting history and analysis*. London: Sweet & Maxwell, 1998, vol. 2, at pp. 192

The discussed practical constraints to the effectiveness of the geographical indications of origin system inspired a round of discussions within the TRIPs Council. The main proposal for improving the system concerned the extension of the special type of protection granted for wines and spirits to all goods, such as agricultural and handcrafts products⁵⁵⁶. However, up to now, the WTO Member states have not reached an agreement on the extension of the protection.

5.5 *Sui Generis* Protection – A Work In Progress

5.5.1 *Introduction*

In parallel with exploring the possibilities of folklore protection under the existing intellectual property systems and aware of the fact that the existing legislative models are not entirely adequate in comprehensively dealing with the subject matter, the attention of the experts has been turned towards the potentials of creating a special *sui generis* system of protection. The *sui generis* system was expected to be sufficiently close to existing intellectual property laws, mainly copyright, so as to benefit from the general principles in the amount allowed by the extraordinary characteristics of folklore, yet modified enough in order to reflect its specific features⁵⁵⁷.

5.5.2 *The WIPO Initiatives*

As a response to the expressed concerns over the protection of folklore and the need to share experiences on these issues, WIPO has been developing best practices and guidelines for managing and safeguarding folklore. These guidelines are aimed at assisting communities in managing and protection their folklore against misappropriation and misuse⁵⁵⁸.

⁵⁵⁶ The proposal was communicated by Turkey and was particularly welcomed and supported by the African group of countries – see WTO, General Council, Preparations for the 1999 Ministerial Conference, Agreement on TRIPS: Extension of Additional Protection for Geographical Indications to Other Products, Communication from Turkey, WT/GC/W/249

⁵⁵⁷ "Expressions of folklore constituting manifestations of intellectual creativity deserved to be protected in a manner inspired by the protection provided for intellectual productions, and that the protection of folklore had become indispensable as a means of promoting its further development, maintenance and dissemination" – see WIPO Final Report on National Experiences with the Legal Protection of the Expressions of Folklore, note supra 472, at pp. 10

⁵⁵⁸ Wendland, W. Managing Intellectual Property Options. In: Kono, T. ed. (2009), note supra 312, at pp. 87

As a brief historical overview of the WIPO activities in relation to folklore, it is worth noting that WIPO has been active in the legal and policy debate over folklore for several decades. Past highlights include working with UNESCO to adopt the Model Provisions in the 1980s and attempting to establish an international treaty, which will be discussed in more detail in Section 5.5.2.1. Following, under the auspices of WIPO, the WPPT was adopted in 1996, providing a certain level of indirect protection for the expressions of folklore as well, as already detailed in Section 5.2.2.3. In 1997, the WIPO-UNESCO World Forum on the Protection of Folklore was held, discussing the needs and addressing issues related to intellectual property and folklore. Next, through 1998 and 1999, WIPO conducted fact-finding missions to identify the expectations of folklore holders. The results of the missions, conducted in 28 countries, were published as a WIPO Report "Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions (1998-1999)". Most recently, WIPO's Member States established the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (hereinafter the "**IGC**") in 2000, which serves as an ongoing forum for discussion between Member States, intergovernmental and non-governmental organizations on genetic resources, traditional knowledge and folklore. The IGC and WIPO Secretariat undertake a series of detailed analytical studies, surveys national experiences and fosters international policy debate, and is also working on developing practical tools for protection of folklore, including the Draft Provisions/Articles for the Protection of Traditional Cultural Expressions that are under constant revision, i.e. the Revised Draft Articles.

The following pages will examine the most influential and the most recent WIPO activities in relation to folklore protection. First, Section 5.5.2.1 will look at the Model Provisions. Following, Section 5.5.2.2 will examine the most recent WIPO activity, namely the 2013 Revised Draft Articles, and for discussion proposes compare it against an earlier version, the 2006 Revised Draft Articles.

5.5.2.1 The Model Provisions

As a result of a joint action of the WIPO and

UNESCO, a wide-ranging model of provisions dealing specifically with expressions of folklore was developed in 1985. In an attempt to promote legal protection of expressions of folklore at national levels, the provisions were built in the form of non-binding Model Provisions, flexible enough to be adopted in any manner suitable in different countries⁵⁵⁹.

The Model Provisions aimed at achieving a balance between the protection of expressions of folklore against "illicit exploitation" and encouragement of its further development. It seems that the Model Provisions present a specific mixture of *sui generis* type of provisions and general, well established copyright principles. Their *sui generis* character becomes obvious with the use of the phrase "expressions of folklore" in contrast to the term "works" as in copyright law⁵⁶⁰, and also from the fact that they expressly remove fixation as a requirement for protection⁵⁶¹.

The Model Provisions established a system of prior authorisation for the commercial utilization of the expressions of folklore, which is to be administered by a competent authority representing the concerned community⁵⁶². The uses for which authorisation is required are outlined in Section 3 of the Model Provisions and are to a great extent borrowed from copyright systems. They include publication, reproduction and distribution of copies and any form of communication to the public of expression of folklore. Further on, Section 4 of the Model Provisions provides a list of cases in which the use of folklore is not subject to prior authorisation. These exceptions are, again, "comparable, and in many ways similar, to the

⁵⁵⁹ As a separate law, intellectual property law, a decree or a law with less force than a statute

⁵⁶⁰ Section 2 of the Model Provisions

⁵⁶¹ *ibid*

⁵⁶² *ibid*

fair use provisions in the copyright laws"⁵⁶³. Section 5 establishes the obligation to acknowledge the source of the expressions of folklore, provision analogous to moral rights in copyright law. Finally, Section 6 deals with four categories of various offences.

Experts have extensively discussed the merits of the Model Provisions. The Model Provisions have been acclaimed for the indefinite protection that they provide in contrast to the limited term of protection in copyright law, for the elimination of the fixation requirement and for the establishment of rights parallel to moral rights in the copyright law but modified so as to respond to the collective character of the expressions of folklore. Also, they have been praised for their flexibility, which allows them to take into account the differences that exist in various countries⁵⁶⁴. However, the very limited impact on the legislation of WIPO Member States indicated that there were some negative aspects of the Model Provisions. They have been criticised, for instance, for the nature and scope of rights granted over expressions of folklore. In this regard, it has been suggested that the Model Provisions were limited in their effectiveness as they did not provide for an exclusive ownership-type rights over folklore. Also, the practical efficacy of the Model Provisions was questioned given that they did not manage to clearly define the subject matter nor the exact scope of protection. Finally, it has also been indicated that the provisions were outdated, given the technological, legal, social, cultural and commercial developments since 1982⁵⁶⁵.

Soon after the Model Provisions, an analogous draft treaty was prepared by the WIPO and

⁵⁶³ Kutty, P. V. (2002), note supra 141, at pp. 16

⁵⁶⁴ Lucas-Schloetter, A. In: Silke von Lewinski ed. (2004), note supra 279, at pp. 344

⁵⁶⁵ WIPO Final Report on National Experiences with the Legal Protection of the Expressions of Folklore, note supra 472, at pp. 10

UNESCO. The Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (hereinafter the "**Draft Treaty**") to a great extent took up the contents of the Model Provisions. However, this Draft Treaty was never adopted because the opinions on the adequateness of *sui generis* type of protection for the expressions of folklore varied and also because a number of parties held that the idea of an international treaty was premature. Despite the very limited impact that the Model Provisions had on the national legislation of WIPO Member States, which led to the abandonment and failure of the Draft Treaty, it has recently been suggested that they ultimately constitute a good starting point in creating a suitable structure for the protection of expressions of folklore⁵⁶⁶.

5.5.2.2 *Recent WIPO activity – the Revised Draft Articles*

Since the Model Provisions and the Draft Treaty did not manage to achieve the desired effects, the WIPO Secretariat in collaboration with various governmental, intergovernmental and non-governmental experts has continued and continues working on the problem of the appropriate system of protection for the expressions of folklore. Using the Model Provisions and elements of different customary laws as a starting point, since 2000, the WIPO Secretariat has been developing and reviewing the Revised Draft Articles.

The most recent version of the Revised Draft Articles was adopted at the IGC Twenty-Fifth Session held in Geneva in July 15 to 24 2013⁵⁶⁷. Given that they present the most advanced state of the art of the field, these provisions will now be analysed in greater

⁵⁶⁶ Lucas-Schloetter, A. In: Silke von Lewinski ed. (2004), note supra 279, at pp. 345

⁵⁶⁷ See WIPO Revised Draft Articles, note supra 190

detail.

To an extent, the current structure of the 2013 Revised Draft Articles follows the one established by copyright law and therefore, at first sight, it might seem that they follow the copyright logic and structure. However, the substantive matter as covered by the 2013 Revised Draft Articles shows various fundamental differences when compared to provisions of copyright law or other intellectual property laws⁵⁶⁸.

Section 1 of the 2013 Revised Draft Articles lays down the list of protectable subject matter, as this was already briefly discussed in Section 3.2.2.2. The 2013 Revised Draft Articles uses the term "traditional cultural expressions" or "TCEs", which is a departure from the terminology used in the previous drafts, for example the 2006 Revised Draft Articles, where the terms "traditional cultural expressions" and "expressions of folklore" were used interchangeably. Like in the Model Provisions, the word "works" is not applied in the definition, in order to stress the different nature of expressions of folklore in comparison to traditional copyright works. The definition of protectable subject matter expressly comprises tangible and intangible forms of folklore, as well as mixed expressions that have both tangible and intangible elements. The Section further sets the list of examples, whether reduced to a material form or not. Thus, fixation is explicitly removed as a requirement for protection.

In addition, this Section establishes the substantive eligibility criteria on which it will be decided whether an expression qualifies for protection. It has previously been agreed that not every expression of folklore deserves to be subject to protection on the basis of intellectual property law, thus only those expressions

⁵⁶⁸ Taubman A. In: Von Lewinski, S. ed. (2004), note supra 279, at pp. 218

complying with the requirements set down in Section 1 will be protected⁵⁶⁹. Three conditions must be satisfied. Firstly, the expression must be a product of intellectual creativity, which makes it an "intellectual property", regardless of the individual or communal character of that activity. Secondly, the expression must be characteristic, distinctive of the community's cultural and social identity and cultural heritage. This means that the expression must be genuine and authentic for the concerned community. Thirdly, the expression must be held, maintained, used or developed by the beneficiaries as defined in Section 2 of the 2013 Revised Draft Articles.

Section 2 of the 2013 Revised Draft Articles establishes that, in contrast with the copyright systems where the beneficiaries of the protection are the authors of the work, the beneficiaries of the protection of expressions of folklore will be the communities as a whole⁵⁷⁰. However, communities will be able to benefit from this provision only if they hold, maintain, use and develop folklore as part of their cultural and social identity and heritage. The 2013 Revised Draft Articles defines these communities as "indigenous", "local" or as "nations", which was already discussed into more detail under Section 3.3.2.

For the first time, as a response to a question raised at the Session on what is to happen if there is no beneficiary or if the beneficiary cannot be identified, the 2013 Revised Draft Articles address this problem of folklore that cannot be attributed to a specific community: *"where a traditional cultural expression is not*

⁵⁶⁹ See Section 1 of the WIPO Revised Draft Articles, note supra 190

⁵⁷⁰ "[Indigenous [Peoples] or [local communities] [or nations] who [hold, maintain, use [and/or] develop their traditional cultural expressions as part of their collective cultural or social identity] are the beneficiaries of protection in respect of those traditional cultural expressions as defined in Article 1 [or an entity defined by national legislation as a beneficiary]" – see Section 2 of the Revised Draft Provisions.

specifically attributable or confined to an/the Indigenous [People] or [local community] that [holds, maintains, uses [and/or] develops it] [and/or] it is not possible to [identify] the Indigenous [People] or [local community] that holds, maintains, uses or develops it, [Member States]/[Contracting Parties] may define [a]/[any] national entity as a beneficiary by national legislation".

Section 3 of the 2013 Revised Draft Articles provides two very short and summarized options for formulating the scope of protection. Option 1 simply states that *"the economic and moral interests of the beneficiaries concerning their traditional cultural expressions, as defined in Articles 1 and 2, shall/should be safeguarded as appropriate and according to national law, in a reasonable and balanced manner"*. Option 2 provides some examples of "economic and moral interests" that ought to be protected, including that the beneficiaries should have *"exclusive and inalienable collective rights to authorize and prohibit the use and exploitation of traditional cultural expressions by others; prevent the unauthorized disclosure, fixation or other exploitation of [secret] traditional cultural expressions; acknowledge the beneficiaries to be the source of the traditional cultural expression, unless this turns out to be impossible; prevent use or modification which distorts or mutilates a traditional cultural expression or that is otherwise offensive, derogatory or diminishes its cultural significance to the beneficiary; protect against any false or misleading uses of traditional cultural expressions, in relation to goods and services, that suggest endorsement by or linkage with the beneficiaries"*. While the two proposed Options seem to be complementary, it seems that they bring the discussion back towards a classic copyright approach, rather than a *sui generis* one. The proposed scope of protection strives to regulate both moral and economic

aspects of folklore protection, though it merely states that such protection will be determined in accordance with national requirements.

The current scope of protection, as proposed by the 2013 Revised Draft Articles differs greatly from previous proposals, for example the one contained in the 2006 Revised Draft Articles. Section 2 of the 2006 Revised Draft Articles provided for three different layers of protection, specifically designed to match the three different types of expressions of folklore. Firstly, it proposed the broadest scope of protection for the expressions that hold particular cultural or spiritual value for the concerned community, under the condition that they have previously been registered or notified. For this type, the 2006 Revised Draft Articles established the right of "free, prior and informed consent" which corresponds to the exclusive rights as granted by intellectual property laws⁵⁷¹. The community-beneficiary of the protection has to have the right to prevent or authorise the uses of such expressions of folklore. If the formalities are satisfied and certain expression of folklore qualifies for this broadest type of protection, the concerned community will be able to enjoy a wide range of rights comparable to economic rights in copyright law⁵⁷². Also, they assigned "moral rights" to the beneficiaries of protection that parallel the rights of paternity and integrity in copyright law⁵⁷³. The second type is the non-registered or non-notified expressions of folklore. They enjoy lower protection which is mainly concerned with the manner in which they are being used. The expressions of folklore can freely be used as a source of inspiration for

⁵⁷¹ Section 3 of the Draft Provisions

⁵⁷² Such as rights of reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution and so on.

⁵⁷³ For example, it is necessary to acknowledge the community as the source of the TCEs/EoF. Also, any distortion, mutilation or other modification of, or other derogatory action in relation to the TCEs/EoF, is forbidden.

the creation of new works without the need for prior authorisation; however, the way they are used is regulated by principles analogous to moral rights in copyright law and to unfair competition⁵⁷⁴. Finally, the third type is the secret, confidential or undisclosed expressions of folklore. There shall be adequate measures to ensure that communities are able to prevent unauthorised disclosure, use and exercise of intellectual property rights over this type of expressions of folklore. Whereas it was argued that such a levelled system is inappropriate for some indigenous communities for being "too close to Western thinking"⁵⁷⁵, it seems that it could be beneficial for other types of communities.

Section 4 of the 2013 Revised Draft Articles lays down the rules that concern how and by whom the utilisation of expressions of folklore will be authorised. It provides that the exercise of the rights can be entrusted directly to the concerned communities. Optionally, if the community cannot or does not wish to use this right, a competent authority can be appointed to act on behalf of that community and assist with the management of beneficiaries' rights. This option is subject to two limitations. Firstly, the competent authority can grant authorisation for the use of expressions of folklore only after previous appropriate consultation with the community. Secondly, any benefits collected by the competent authority must be transferred directly to the concerned community. Despite various advantages of this system of management of rights, a number of parties have pointed out the potential problem that the collected benefits might never, or at least not fully, reach the concerned communities.

In addition, Section 4 enlists, as an illustration,

⁵⁷⁴ Section 3 of the Draft Provisions

⁵⁷⁵ Taubman A. In: Von Lewinski, S. ed. (2004), note supra 279, at pp. 222

certain practical measures and functions that the competent authority may carry out, including to conduct awareness-raising, education, advice and guidance functions; monitor uses of folklore for purposes of ensuring fair and appropriate use; grant licenses; collect monetary or non-monetary benefits from the use of folklore and provide them to the beneficiaries and so on.

Similarly to traditional intellectual property rights that are subject to a number of limitations, a balanced system of protection of expressions of folklore must be subject to certain limitations in order not to hinder further creativity and freedom. Firstly, Section 5 generally allows Member States to adopt specific exceptions under national law, provided that they comply with certain requirements – are limited to certain special cases; do not conflict with the normal utilization by the beneficiaries; are not offensive or derogatory to the beneficiaries, acknowledges the beneficiaries and are compatible with fair practice.

Further, following the classical intellectual property logic, Section 5 provides a list of general exceptions common to copyright such as for "archives, libraries, museums or cultural institutions for non-commercial cultural heritage purposes, including for preservation, display, research, presentation and education", as well as for the "creation of an original work of authorship inspired by or borrowed from traditional cultural expressions". However, these require the free prior and informed consent of the beneficiaries. The Section also recognises that the "measures for the protection of traditional cultural expressions shall/should not restrict the creation, customary use, transmission, exchange and development of traditional cultural expressions by the beneficiaries, within and among communities, in the traditional and customary context".

Next, Section 6 of the 2013 Revised Draft Articles provides that the protection of expressions of folklore will be unlimited in time, enduring as long as they continue to fulfil the criteria for protection under Article 1, that is, as long as they are being practiced in the concerned communities. The Section further provides that this does not apply when there is an act of distortion, mutilation or other modification or infringement, done with the aim of causing harm to the expression or to the reputation or image of the beneficiaries or region to which they belong – in this case the protection is indefinite. Again, this Section seems to reflect copyright logic, whereby economic aspects of protection have certain time limits, where the moral aspects are protected perpetually.

Finally, Sections 7 to 12 regulate formalities, sanctions, remedies and exercise of rights, transitional measures, national treatment and cooperation.

Taken as a whole, the Revised Draft Articles, as amended from time to time, aim at providing a more balanced system for the protection of expressions of folklore when compared to the previous WIPO documents. In many ways, they do follow the Model Provisions but in a number of other ways they generate new legislative solutions which are constantly being refined and amended. Generally, they could be positively appraised for dealing with the subject matter into much more detail than the Model Provisions. Given that the Revised Draft Articles are under constant revision and adaptation, reflecting the views of interested parties, it yet remains to be seen whether they will be positively accepted or whether they will ultimately share the same fate as their predecessors.

5.6 How much use can we make of Intellectual *Property* Law as it stands

As it follows from this Chapter 5, historically, the first attempts to protect folklore within the intellectual property regime were made in the framework of copyright law and neighbouring rights. The very notion of "folklore" (like the idea of intellectual property itself) emerged from the Eurocentric precepts and was, as such, swiftly placed within the concept of copyright⁵⁷⁶. Such an initial classification of expressions of folklore as copyright works appears unsurprising, knowing that folklore emerges in the artistic domain and therefore, at least at first sight, bears a certain level of resemblance with copyright works, given that most expressions of folklore appear in the forms corresponding to the classic copyright categories – such as music, dances, crafts, tales etc. In addition to copyright and neighbouring rights, over the years the search for adequate folklore protection has also been placed within the trademark, geographical indications of origin, *sui generis* and other types of intellectual property law.

5.6.1 Copyright

As argued in Section 5.2, direct protection of folklore on the basis of general copyright principles appears to be substantially inadequate. Application of copyright rules to folklore generates several critical difficulties in relation to the fixation requirement, originality and authorship of the work and the term of protection that, altogether, make it practically impossible to be governed by copyright. Reasons for this are multiple but they all seem to derive from the genuinely different natures of folklore and copyright works. Three reasons are particularly instructive. Firstly, it is the collective and anonymous nature of folklore which is in opposition with the individualistic character of copyright. The rationale behind copyright is the protection of the author's own intellectual creation or skill, labour and judgement. On the contrary, folklore is an expression of the collective spirit and therefore does not have an author or, to be more precise, has a multiplicity of unknown authors. Secondly, copyright is designed to guide the commercial exploitation of the work. Quite the opposite, expressions of folklore have not been created in order to be economically exploited but only to serve the community from which they originate and whose tradition they exemplify. Thirdly, when it comes to damage caused by exploitation of folklore, it is

⁵⁷⁶ Blakeney, M. In: Porsdam, H. ed. (2006), note supra 161, at pp. 114

mainly of a moral nature, rather than economical⁵⁷⁷.

Thus, it is now commonly accepted that copyright and neighbouring rights appear to be a fundamentally inappropriate system for the protection of folklore. Certain indirect protection based on the copyright principles can be achieved in the case of collections of folklore and works derived from it. However, the real extent of such protection is rather limited and can only be used to supplement some other form of protection as it does not benefit the folklore or the community it originates from as such, but only the original elements of the newly created works.

5.6.2 Trademark Law

Likewise, as shown in Section 5.3, international and national trademark law, as it currently stands, can in certain aspects facilitate the protection of folklore. However, it also has a number of drawbacks which significantly limit its efficiency.

For example, when it comes to positive protection of folklore on the basis of trademark law, fulfilling the requirements for trademark registration are fewer and simpler than the ones necessary under copyright law. Consequently, it might be easier for folklore holders to meet the criteria for trademark protection and directly benefit from trademark law, and in this respect the use of certification and collective marks is particularly noteworthy. Furthermore, trademark rights can be renewed continually and the benefits from their use are therefore not limited only for a certain period.

However, the first important restraint on the effectiveness of active trademark protection is that it is only applicable when there is commercialization of the folklore, that is, when there is an attempt to use and protect them in the course of trade and in relation to certain goods. Furthermore, one self-imposing question arises in relation to this approach – should one particular person, whether natural or legal or an association of any kind, even though a member of the community from which the concerned expression of folklore originates, be allowed to register that expression as a trademark and consequently monopolize an element of collective culture that in fact belongs to that community as a whole? In order to address this issue, it

⁵⁷⁷ *ibid*, at pp. 298

would be necessary to have a certain administrative body that would apply for the trademark on behalf of the entire concerned community and this in fact requires a high level of organization as well as consensus of the entire community on the need to register certain trademark.

With respect to defensive employment of trademark law, trademarks might be used to prevent the unauthorized exploitation and commercialization of traditional designations. Although within the limits discussed above, trademark law can provide certain protection against offensive and deceptive use of folklore, which ultimately also benefits consumers. However, the practical effectiveness of this approach is rather limited for a number of reasons which were discussed in Section 5.3. In addition, trademark law might only provide partial protection against offensive and deceptive use rather than protection of general use of traditional designations. Furthermore, and very importantly, this type of protection is only triggered when a third party applies to register a trademark that contains certain traditional elements, and thus fails to provide protection in all other situations where expressions of folklore are exploited without filing a registration application. Finally, as a general observation, trademark law essentially only concerns the commercial aspect of exploitation of folklore in the course of trade, whereas folklore should enjoy protection in any case, whether it is being exploited or not and regardless of whether such exploitation is done in the course of trade and in relation to particular goods and services or not.

Evaluation of both the advantages and shortcomings of trademark law in relation to traditional designations leads to the conclusion that trademark law, in its current form, has a rather limited effect on the protection of folklore. However, it also appears that further improvement, within the boundaries of existing trademark law, is absolutely feasible. The recognition and acknowledgement of the existing limitations provides a valuable starting point for the development and adjustment of trademark law which could, ultimately, provide a more balanced and functional mechanism for protection of one aspect of folklore.

5.6.3 *Geographical Indications of Origin*

As shown in Section 5.4, the opinions on the adequateness

of geographical indications of origin in relation to folklore vary significantly. While on the one hand geographical indications of origin have been praised as having the best balance in recognizing the cultural significance and protecting the commercial value of folklore⁵⁷⁸, on the other hand, they were said to provide too limited, and thus insufficient, protection⁵⁷⁹.

A potential advantage of protection of folklore by geographical indications of origin is that such protection could be unlimited in time. The crucial argument in favour of geographical indications of origin-based protection of folklore lays in the nature of geographical indications of origin – they are a collective right and as such, do not require that a potential protection is limited in relation to certain organizational form, which would be the case with trademark protection.

On the other flipside though, the main problem with the protection offered under the TRIPs is generated by the narrowed scope of protection which has not, up to now, been equalized with the protection offered for wines and spirits. As a result, such protection ultimately depends on the public opinion in the country where protection is sought, which in turn might significantly limit the scope of protection. Furthermore, and as a general drawback of this type of protection – geographical indications of origin can only protect tangible expressions of folklore and only the tangible element of an expression, while the know-how behind it remains the public domain. Finally, and essentially, geographical indications of origin cannot prevent others from making the same products as long as they use a different denomination.

Despite the disagreement on the actual effectiveness of the current scope of protection offered for folklore under TRIPs, it appears that geographical indications of origin nevertheless provide an interesting system whose elements could be valuable in developing a future model for folklore

⁵⁷⁸ For example, see Gangjee, D. S. *Geographical Indications Protection for Handicrafts under TRIPs*. MPhil Thesis submitted to University of Oxford, 2002; Zografos, D. (2010), note supra 486; Kamperman Sanders, A. Incentives for and protection of cultural expression: Art, trade and geographical indications. *The Journal of World Intellectual Property*, 2010, vol. 13, no. 2, pp. 81-93

⁵⁷⁹ For example, see Kur, A. and Knaak, R. In: von Lewinski ed. (2004), note supra 279

protection⁵⁸⁰. Within this context, it is worth noting that examples of registrations of geographical indications of origin with respect to expressions of folklore can be found in many countries⁵⁸¹.

5.6.4 *Sui Generis Protection*

As it follows from the Section 5.5, the *sui generis* model proposed by WIPO can certainly be appraised as a vital step towards adequate folklore protection. This is not reflected merely in the provisions which are currently being developed by IGC, but also in the wider appreciation and recognition of the issues that arise in the context of folklore protection. Wide-ranging attention, acknowledgment of the specifics of the subject matter and global efforts are an imperative in developing any system for folklore protection.

Nevertheless, the WIPO initiatives entail certain limitations. Firstly, the documents produced up to date are not legally binding upon Member States, but merely provide for optional rules which could be implemented in the legislation of the Member States. It appears, however, that so far they had somewhat limited impact on the national legislation of Member States as these have been hesitant to incorporate the proposed provisions⁵⁸².

Further, for such a system to be fully operational and globally functions, it is not sufficient that some Member States implement some solutions. For the system to work, it is either necessary that Member States enter into a legally binding Treaty or that they all implement the corresponding provisions in their national legislations.

Next, the WIPO models have mainly been centred on the idea of indigenous communities as the implied beneficiaries of protection, which ultimately restricts any future protection, as it has been discussed throughout this thesis.

Also, the WIPO proposals attempt regulating both the

⁵⁸⁰ In addition to the international protection offered under TRIPS, the GIs type of protection can also be supplemented on the basis of bilateral GI agreements – an excellent example of this is Switzerland which has used bilateral agreements to protect its folklore (the Lotschental masks) – see Zografos, D. (2010), note supra 486, at pp. 170

⁵⁸¹ For example Russia, Portugal and India; see WIPO Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, Geneva, July 7 to 15, 2003, WIPO/GRTKF/IC/5/3, at pp. 53

⁵⁸² Lucas-Schloetter, A. In: Silke von Lewinski ed. (2004), note supra 279, at pp. 345

economic and moral aspects of folklore protection, which, as it will be argued further in Chapter 6, may not be entirely necessary and certainly not required for all of the potential beneficiaries. This may result in a somewhat stiff and robust system which may not be fully adequate, as what is needed are soft, manageable and flexible rules, as it will be argued in more detail in Chapter 6.

Finally, the major critique when it comes to the WIPO instruments concerns the duration of the entire process. Leaving aside the earlier attempts, it has been over a decade since IGC began developing the Draft Articles, and these have undergone a number of revisions since. Not only do the Draft Articles not appear closer to a final text, but the debate seems to heaten even more as the discussions continue. At the same time, the parties involved in the consultations hold diametrically opposite positions⁵⁸³. This is also obvious from the proposals – some of the solutions offered under the earlier drafts diverge considerably when compared to the recent ones. On account of all this, it seems that the efforts made by WIPO, while indisputably valuable, are far away from reaching a practically functional form.

⁵⁸³ See for example the WIPO Draft Report, Twenty-Fifth Session, Geneva, July 15 to 24, 2013, WIPO/GRTKF/IC/25/8

CHAPTER VI: *How:* a Proposal

6.1 Developing A System

6.1.1 *Some Aspects to be Taken Into Consideration*

As it follows from the previous Chapters, it seems that there is an entire range of complex aspects that one must take into account when thinking about the appropriate practical system for dealing with folklore.

Firstly, one should start by assessing the genuine features of folklore, those that make it a phenomenon different from others.

In that sense, perhaps we should start by asking *why* folklore exists. A comparable question has recently been raised in relation to classic copyright works – for example, Heymann stressed the importance of asking *why* an author creates, rather than merely considering *what* the author creates. The answer to this question naturally depends on the position we assume – it may be the economic incentives to create or some other motivation. "A Hollywood studio or a famous romance writer might well be thinking about profits and losses as they begin work on a new film or novel, but a teenager writing songs in her bedroom might merely be expressing sadness over a breakup or sharing her musicality with her friends"⁵⁸⁴.

Yet, as Heymann notes, copyright law itself remains fairly agnostic in this debate. Despite the varying interests and incentives that motivate authors to create, copyright law gives all authors exactly the same bundle of rights. Although the term of those rights may differ depending on whether the author is corporate or individual, both the individual and the corporate author hold the same rights to prevent certain unauthorized uses of the work. Copyright law makes no attempt to match the rights it grants to the needs of the party to whom it grants those rights, resulting in too much protection in some instances and not enough in others. This state of affairs is, according to Heymann, aggravated by the lack of any formalities such as registration and notice, whereby creators are not required to take some affirmative action to indicate their desire to distribute their work or otherwise exploit their work in order

⁵⁸⁴ Heymann, L. (2009), note supra 390, at pp. 1010

to enjoy copyright⁵⁸⁵.

In order to establish a potential system of protection on the right grounds, it is thus necessary to ask: why was folklore created? Why does it still exist?

Of course, different reasons for the existence of folklore have been suggested. Perhaps the most influential was Dundes's Freudian approach to folklore which assumes that folklore is a manifestation of the nature and workings of the human psyche and unconscious⁵⁸⁶. Whatever the reasons are, one thing is fairly certain – while an economic incentive may be one of the potential reasons when it comes to classic copyright works, this will obviously not be the case in relation to folklore. Notwithstanding the fact that folklore has over the time acquired certain commercial value, as a general rule folklore was not created to be commercially traded or particularly valuable (of course, subject to exceptions – some expressions may have had certain commercial value, such as craft objects), so one of the basic characteristics of folklore is that it was created and is being created for cultural and community reasons, rather than for commercial gain. While in many respects one may argue that expressions of folklore and works of classic copyright are analogous, the rationale behind creation of folklore is one key characteristic where the two differ significantly. Accordingly, a system of folklore protection must take this into account, and in my opinion should be designed to primarily protect these non-economic aspects of folklore.

Further, we also need to ask for *how long* folklore has existed for and how long it should be protected for. In most cases folklore, at least in its basic forms, has been in existence for many years and is generally created with the intention of existing in perpetuity, or at least for a long period as part of and together with the culture of the part of society in which it was created. Therefore, it is now generally accepted that folklore should not have a limited term. Most scholars agree that any limitation of the duration of protection of folklore would go against its very nature. If certain expression has been developing for centuries, would it be effective to protect it only for ten, twenty, fifty years?

⁵⁸⁵ *Ibid*, at pp. 1011

⁵⁸⁶ Georges, R. A. *Folkloristics: an introduction*. Indiana University Press, 1995, at pp. 235

On the other side, if the concerned expression is not being "lived" any more, if it is not being performed and there is no attempt to use it, should it be protected eternally⁵⁸⁷?

In answering this question, we may rely on the Revised Draft Articles as they seem to suggest a rather balanced starting point – expressions of folklore should be protected for as long as they are being practiced in the concerned communities. Of course, this solution may not pass without certain practical difficulties, for example, how do we assess whether this condition has been satisfied – is it enough if at least one person practices the expression or does it have to be a substantial part of the relevant community? What does "practiced" mean – does it mean that they just need to exist in a community or they need to evolve? What happens, for example, with "lost" folklore, like fairy tales that have been buried in a library for centuries and are now unknown to the community that they once originate from?

Another question to be asked is *whose* is folklore? By its nature, folklore is considered to be community heritage, rather than private property, and cannot be owned by one person, bought or sold – so, a system for protection should recognise the collective nature of the potential rightholder, yet such rightholder should not be the society at large (as if folklore was in the public domain) but a particular community or a part of it⁵⁸⁸. This aspect of folklore was already examined in detail in Section 3.3 in the discussion on the rightholder.

Then, we need to ask – *what* is folklore? Accepting that folklore in general presents artistic heritage of a community and therefore is a manifestation of an intellectual creativity, a potential system should be designed in a manner that is inspired by intellectual property law but able to surpass the current limitations and stiffness of existing intellectual property rights. "If classic intellectual property rights are applied to folklore, that part of folklore protected by the intellectual property rights may be alienated from its communal ownership and will become private property. When such rights would lapse or their term expire, that part

⁵⁸⁷ Romanello, F. (2005), note supra 511

⁵⁸⁸ Van der Merwe, A. Can traditional knowledge be effectively covered under a single "umbrella"? *Potchefstroom Electronic Law Journal*, 2010, vol. 13, no. 4, pp. 2-10

of folklore so removed will subsequently fall into the public domain, becoming free from any restrictions as regards to copying them and using them in any other way instead of remaining part of the heritage of the community in which it originated. Also, while intellectual property rights regard "protection" as preventing unauthorised people from copying protected intellectual property, in the folklore context what is sought after is also to safeguard the continued existence and development of folklore"⁵⁸⁹.

When developing this system, it is therefore very important to carefully outline the scope of protection in order to preserve the balance between the protection of folklore and the public domain. On one side, it is vital to protect folklore from uncontrolled exploitation. On the other side, such protection must be reasonable and balanced, and must leave certain elements in the public domain in order not to obstruct further creativity⁵⁹⁰.

6.1.2 Protection From What?

As important as it is to determine what is being protected, one must also consider *from what it* should be protected. Ultimately, it is the goals that we are looking to achieve and practices that we are looking to restrict that will determine the scope and limitations of any intended system of protection for folklore.

So, one must start by asking exactly what it is that we want to protect folklore from? Which practices are we looking to restrict and which to allow? Or what are the conditions under which a person should be allowed to use an expression of folklore and in which manner?

A phrase that can often be heard in folklore related debates is that folklore should be protected from "unlawful exploitation, misappropriation and commercialisation"⁵⁹¹. It is repeatedly pointed out that "folklore is commercialized without due respect for the cultural and economic interests

⁵⁸⁹ *Ibid*

⁵⁹⁰ "Virtual elimination of the public domain through the wholesale protection of all cultural elements of a society would do untold harm to the creation of future works" – see Romanello, F. (2005), note supra 511

⁵⁹¹ See for example Kuruk, P. (1998), note supra 394; Kutty, P. V. (2002), note supra 141; Silke von Lewinski ed. (2004), note supra 279; Goel, G. and Tripathi, R. E-Government Approach to Management of Intellectual Property in Indian Folklore. Available from www.csi-sigegov.org/1/32_383.pdf; and others.

of the communities in which it originates"⁵⁹² and that on account of that, both folklore and its rightholders are being harmed.

While the forms in which different expressions of folklore are exploited, misused and commercialized around the world are extremely varied, researchers in the field have made attempts to record at least some of them. Lucas-Schloetter, for example, lists a number of examples, although mainly in the context of indigenous peoples: "production of indigenous craft objects for the souvenir market, slavish imitations of traditional motifs on T-shirts, carpets or bank notes, use of names of famous Indian tribes as brand names, various examples in the field of music where samples of traditional music are incorporated into albums or fused with other sounds, legends and beliefs of communities used in Disney cartoons like Mulan or Pocahontas or as Lego Bionicle action toy figures"⁵⁹³. There are as well other examples of expressions of folklore unlawfully commercialized, and they are indeed numerous and not only restricted to indigenous communicates – some of these were also mentioned in Section 1.1 and in Chapter 2.

From the collected examples, it seems that there are a number of interests that ought to be protected from certain practices. These were summarized by Zografos into four categories. First, folklore holders stress the difficulties they encounter in preventing and controlling the commercial use of their expressions of folklore by third parties and benefiting from this commercialisation themselves. Second, they express concerns about the inappropriate and offensive use of their expressions of folklore. Third, they wish to be attributed to their expressions of folklore, as well as to have the possibility to object to any false attribution. Finally, they emphasise the need to ensure the identification, safeguarding and preservation of existing folklore, as well as its promotion, dissemination and continued evolution⁵⁹⁴. These could roughly be further grouped into the interests of

⁵⁹² See Lucas-Schloetter, A. In: Silke von Lewinski ed. (2004), note supra 279, at pp 339; Alikhan, S. *Socio-Economic Benefits of Intellectual Property Protection in Developing Countries*. WIPO Publication No. 454. 2000, at pp. 80; Kutty, P. V. (2002), note supra 141

⁵⁹³ Lucas-Schloetter, A. In: Silke von Lewinski ed. (2004), note supra 279, at pp 342

⁵⁹⁴ Zografos, D. (2010), note supra 486, at pp. 1.

folklore *per se* – as in protecting the expressions of folklore from those practices that hinder with their creative continuity and are generally detrimental to the subject matter itself – and the interests of the relevant concerned communities – as in the economic and moral ones. So it follows that folklore should be protected from: (i) unlawful commercialisation without the permission of its rightholders; (ii) offensive or inappropriate use; (iii) false attribution or no attribution; and (iv) all other practices that hinder with its continued evolution and existence.

The above potentially harming practices strikingly resemble those behind copyright protection – the economic and moral aspects of copyright protection, as well as the interests of the community at large. While a widely debated philosophical issue amongst scholars of copyright law is its purpose, as I already discussed in Section 4.4, the objectives of copyright law can also roughly be divided into corresponding arguments – moral objectives according to which an author should be able to decide if and how his work should be exploited and to prevent damage or mutilation to his intellectual creation; economic objectives where the creation of works requires efforts, time and money and so the author should be able to recoup his investments; and finally social objectives whereby the society as such has an interest to continually benefit from copyright works⁵⁹⁵.

And while it is rather self-justifiable that the practices hindering the above objectives should generally be regulated in a certain manner, there are certain further questions that deserve attention. For example – should it make a difference *who* is using an expression of folklore, a member of the community-rightholder or an outsider? Should some practices which are restricted for the outsiders be allowed for the members of the community when they use the expression within the community? And also – where do we draw the line between those practices that should be restricted and those that should be permitted? When does an action stop being inspiration and becomes misappropriation of folklore? As illustrated in Chapter 2, the

⁵⁹⁵ van Eechoud, M. Hugenholtz P. B., van Gompel S., Guibault L. and Helberger N.. *Harmonizing European copyright law: the challenges of better lawmaking*. Kluwer Law International, 2009, vol. 19, at pp. 186

world is full of examples of expressions of folklore serving as a source of inspiration and basis to create wonderful works by various authors, although the manner in which they used folklore may just as well be an example of pure plagiarism.

Accordingly, not all use of folklore will by definition be harmful and thus restricted, as some of it may be necessary in order to allow continuous existence of folklore and further creativity. Transformative appropriation, the act of referring to or quoting old works in order to create a new work, Demers points out, has always been a key element in thriving cultures. Such transformative appropriation has historically functioned in a spirit of sharing, friendly competition, and homage and is particularly important in music culture. In the past, she says, intellectual property law protected against outright piracy but viewed transformative appropriation as a legitimate component of music making⁵⁹⁶.

The line between the above opposing interests seems to be more than thin. Yet again, I believe the answer to these questions may be found in the flexibility of the proposed system and the balance that it should be able to strike between free culture and fair culture. Authors have already spoken of the importance of free culture. Sunder summarizes the different arguments raised by different authors – on one hand, Lawrence Lessig and James Boyle for example, consider that broad and durable intellectual property rights might jeopardise further creation and innovation. On the other hand, other authors have also noted that simply leaving a resource in the public domain is not enough to satisfy societal ideals. Sunder concludes, and I fully agree with this, that our laws should serve to facilitate the free flow of culture but on fair terms⁵⁹⁷. Therefore, it is ultimately *fairness* in cultural exchanges that requires that we regulate at least certain practices and certain aspects of folklore.

6.2 How – A Suggestion

So, *summa summarum* – we need to look for an intellectual

⁵⁹⁶ Demers, J. Steal this music: How intellectual property law affects musical creativity. *Syracuse Sci. & Tech. L. Rep.*, 2006, at pp. 78-110

⁵⁹⁷ Sunder, M. (2012), note supra 122, at pp. 21

property-inspired protection flexible enough so as to safeguard but not hinder development and continuous creativity, to prevent unlawful free riding but not monopolize the subject matter, to belong to a particular community but not become private property, to protect the key interest of the communities in relation to their folklore but not be burdened with interests that are of secondary importance.

In that sense, I strongly advocate the use of a loose and elastic approach as opposed to a strict and inflexible one. Recognising that folklore is predominantly created for cultural, rather than commercial purposes, I believe that attention should primarily be turned to protecting this aspect of folklore and a self-imposing route would therefore be to look into moral rights. This Section will therefore look at moral rights, as the theoretical basis within which I will search for the practical solution for folklore protection.

6.2.1 Basis: Moral Rights

The basic premise of moral rights is that creative work is in essence personal and gives rise to a privileged relationship between an author and his or her work. Moral rights are thus generally characterised as "non-economic", "non-proprietary" or "personal" rights of the author⁵⁹⁸. The doctrine of moral rights reflects the idea that an artist has a special interest in his or her work which transcends the ordinary motives of commercial gain⁵⁹⁹.

An extensive discussion on the nature and scope of moral rights exceeds the focus of this study and some preliminary notes were in any case already made in Section 4.4.1.3⁶⁰⁰. For the purpose of this thesis, however, it is necessary to highlight some of the core features of moral rights and the legal basis of their protection.

The international standard for protection of moral rights is established under Article 6bis of the Berne Convention. The said Article states: "*independently of the author's economic rights and even after the transfer of said rights, the author*

⁵⁹⁸ Rajan, M. T. S. Moral rights in the digital age: New possibilities for the democratization of culture. *International Review of Law, Computers & Technology*, 2002, vol. 16, no. 2, pp. 187-197

⁵⁹⁹ Rajan M. T. S. (2004), note supra 395

⁶⁰⁰ Even though there may be waived in certain jurisdictions. In general on moral rights, see for example Holderness, M. Moral rights and authors' rights: The keys to the Information Age. *Journal of Information, Law and Technology*, 1998, vol. 1; Chartrand, H. H. Toward an American arts industry. *The public life of the arts in America*, 2000, pp. 22-49

shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to this honour or reputation". Moral rights are also recognised by other international non-intellectual property instruments, such as for example the UDHR which provides in Article 27 that "[...] *everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author*". On the other hand though, some international instruments remain silent on moral rights – the TRIPs⁶⁰¹, for example, although incorporating the provisions of the Berne Convention, explicitly excludes the incorporation of Article 6bis⁶⁰², as a result of what was said to be "a result of US pressure during the negotiations"⁶⁰³.

In the folklore discussion, some aspects of moral rights are particularly important.

Firstly, moral rights cannot be transferred⁶⁰⁴, which matches the genuine nature of folklore and the idea that it should not be disposed to privatization and monopolization. Second, some of these rights are not susceptible to expiration with time, which also corresponds to the ideas behind folklore protection. "Moral rights as set out in the Berne Convention are particularly powerful because they continue to be vested in the author even after he has relinquished his rights to economic returns from the dissemination of his work. At the minimum, the term of protection must be equivalent to the duration of the author's economic rights, while the Berne Convention leaves

⁶⁰¹ While moral rights do not constitute the only strategical basis for folklore protection, the absence of these rights in certain international documents is not without possible ramifications. If the only way to hinder further looting is to make folklore into trade or to take trade as the guarantee for why folklore should subsumed under TRIPS, and the only way to protection is by way of moral rights, rights that are not recognized under TRIPS, then we at least appear to have on our hands a zero-sum game of the highest order. – see Wirtén, E. H. *No Trespassing: Authorship, Intellectual Property Rights and the Boundaries of Globalization*. University of Toronto Press, 2004, at pp. 123

⁶⁰² Article 9 of TRIPS provides that "members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom".

⁶⁰³ Lixinski, L. (2013), note supra 443, at pp. 190

⁶⁰⁴ H Mazeaud, H., L. Mazeaud and F. Chabas. *Leçons de droit civil*. Montchrestien, 1998, vol. 1, at pp. 656

open the possibility that they may be protected in perpetuity"⁶⁰⁵. Third, the protection of these rights may be connected to the protection of cultural values of the society in general, rather than the interests of a single author, which is the reason why upon the expiration of the economic rights of the author, the protection of moral rights often falls with the states⁶⁰⁶.

The most widely recognised moral rights are those of "attribution" and "integrity". As the name suggests, attribution right means that an author is entitled to his name associated with his own work. According to the integrity right, the author also has the right to demand that the artistic integrity of his work remain uncompromised by modifications or distortions – though in most jurisdictions, the author must show that his reputation is at stake in the matter⁶⁰⁷. Civil laws systems, with their tradition in natural rights, are commonly thought to provide more rigorous moral rights protection when compared to common law systems, with their reputed utilitarian bend⁶⁰⁸. However, national protection of the two above described moral rights today exists in most jurisdictions, even if not through mechanisms falling explicitly under the label of moral rights⁶⁰⁹. For example, the 1988 Copyright, Designs and Patents Act in the United Kingdom provides discrete rights of integrity and paternity and against false attribution⁶¹⁰, while in the United States, the protection is accomplished through the application of laws of publicity, privacy and contract law, among other tools⁶¹¹.

Rajan recognised that a widely acknowledged reason for hesitation about moral rights has been a degree of concern about their economic effect. Here common law countries have been the most fearful about the practical consequences of introducing protection for moral rights into

⁶⁰⁵ Rajan M. T. S. (2001), note supra 392

⁶⁰⁶ Lixinski, L. (2013), note supra 443, at pp. 189

⁶⁰⁷ Rajan M. T. S. (2002), note supra 598

⁶⁰⁸ Goldstein, P. and Hugenholtz, P. B. *International Copyright: Principles, Law, and Practice*. Oxford: Oxford University Press, 2012, at pp. 284

⁶⁰⁹ Lixinski, L. (2013), note supra 443, at pp. 190

⁶¹⁰ Goldstein, P. and Hugenholtz, P. B. (2012), note supra 608, at pp. 284

⁶¹¹ Pitta, L. A. Economic and Moral Rights under US Copyright Law-Protecting Authors and Producers in the Motion Picture Industry. *Entertainment and Sports Law Journal*, 1994, vol. 12.

systems that traditionally emphasize economic rights⁶¹². However, some recent studies have explored the economic aspects of moral rights. With that respect, Kikkis has argued that moral rights remedy market failures, as a perfectly efficient market requires full available information for all agents and free competition. Any deviations from this perfection could impose further costs upon users and those that want to trade with intellectual goods. In a market where information is incomplete or unreliable, moral rights therefore help identify work's owners and make easier to locate them and obtain further information on the validity and duration of copyright claimed. Moral rights thus help avoid public deception, and the public, as Ginsburg notes, has at least as much interest in knowing who the author is, as knowing who the producer of a brand of detergent is⁶¹³. Also, Hansmann and Santilli point out that another economic function of moral rights is to control reputational externalities to the potential benefit not just of the individual artists but of other owners of the artist's works as well as of the public at large. The long duration of moral rights exceeding the artist's life is therefore coherent with the position that moral rights serve to the society at large. The intellectual work after the death of the author acquires a collective dimension, in the sense that society has an interest that future generations could form an exact opinion of the work without being misled from the opportunistic actions of successive owners⁶¹⁴.

6.2.2 *Why Moral Rights May Work For Folklore?*

Despite the tensions still existing in relation to moral rights, in particular the inconsistencies present between the continental and common law countries briefly mentioned above, I believe that moral rights may be a workable starting point and foundation when it comes to protecting folklore.

There are a number of arguments in favour of applying moral rights to folklore.

⁶¹² Rajan M. T. S. (2004), note supra 395

⁶¹³ Ginsburg, J. (1990), note supra 396

⁶¹⁴ Kikkis, I. The economic analysis of moral rights. Available online at http://conferences.ionio.gr/isil2010/download.php?f=papers/kikkis_ioannis_full.pdf, at pp. 4; Hansmann, H. and Santilli, M. (1997), note supra 391, at pp. 95

Firstly, the attribution and integrity rights seem to reflect the exact two key aspects of folklore that ought to be protected. As already discussed in the previous Section 6.1, it is widely agreed that for most communities around the world, the interest worth protecting is not of commercial but rather of ethical, non-economic nature⁶¹⁵. The same reasoning could just as equally be applied to non-indigenous communities, if not even more so, given that in non-indigenous communities folklore is in general regarded as having purely cultural and not business-related qualities. The value of expressions of folklore lies mainly in the fact that they are being identified as originating from a certain community, certain culture and certain geographical area, in that way serving to create and uphold the cultural identity of the community of origin itself. Furthermore, in the course of their exploitation, expressions of folklore (both of indigenous and non-indigenous communities) are often distorted, used in a manner that is disrespectful or damaging to the community from which they originated. For example, a new musical genre has recently been developed called "Gipsy hip-hop". This genre actually contains traditional songs from different Balkan countries mixed up with hip-hop sounds. Without getting to the question of commercial gains made from this music, it is arguable whether bundling together various traditional songs from different parts of Balkans without indicating their origin, and simply labelling it as Gipsy music, should be allowed. Besides, not only that the origin of the compiled music is not protected, but what is more, this music is used to create a negative image of the region that it comes from.

Secondly, application of moral rights to folklore has one strong advantage when compared to other potentially applicable solutions, such as the WIPO instruments. Moral rights have existed for a long time and thus present a very well established international standard whose contents are clear and well defined. Moral rights provisions have been adopted in the copyright legislation of most countries in the world, including developing countries in Asia and Africa, some of which are common law influenced jurisdictions, as

⁶¹⁵ Lucas-Schloetter, A. In: Silke von Lewinski ed. (2004), note supra 279, at pp. 365

well as countries in Central and Eastern Europe⁶¹⁶.

Thirdly, a solid argument in favour of moral rights is their duration. Although currently the duration of moral rights differs in different countries and illustrates, again, the weaker consideration granted in common law countries and stronger in civil law jurisdictions⁶¹⁷, moral rights are capable of being protected endlessly⁶¹⁸. In addition, moral rights are generally inalienable. The capability of moral rights to be perpetual and inalienable corresponds with the idea that folklore, as a phenomenon that has been created over a number of years and is ever evolving, should not be protected for a limited time, but for as long as it exists and is being practiced in the concerned communities.

Although moral rights have traditionally been associated with the individualistic cultures of Western Europe, Rajan points out that the doctrine has proven to be adaptable and popular in non-traditional jurisdictions too, given that moral rights provisions have been adopted in the copyright legislation of most countries in the world, in countries as diverse as India, Russia and Mali. Their experience suggests that moral rights need not be limited in their application to the relationship between an author who matches the romantic conception of individual genius, and a work which falls within established categories of Western art. As Rajan further suggests, "if Western society has indeed outgrown the concept of original authorship, the rationale for moral rights protections must be re-examined and should be associated with a broader understanding of creativity"⁶¹⁹. In particular, the apparent flexibility of moral rights doctrine has interesting implications for cultural patrimony, suggesting that moral rights can make an important contribution to the preservation and protection of cultural heritage⁶²⁰. In that sense, Lixinski has argued that moral rights could be applied to a custodial community as a whole, deeming the individualization requirement a formal requirement, and one that does not affect the essence of

⁶¹⁶ Rajan M. T. S. (2004), note supra 395

⁶¹⁷ Nocella, L. Copyright and Moral Rights versus author's right and droit moral: convergence or divergence? *Entertainment Law Review*, 2008, 76 Vol. 19 No. 7, p.151-157

⁶¹⁸ For example, in France, moral rights are perpetual.

⁶¹⁹ Rajan, M. T. S. (2002), note supra 598, at pp. 193

⁶²⁰ Rajan M. T. S. (2001), note supra 392

moral rights. In this sense, moral rights can be collectively translated into the right to attribution and integrity and the communities would be entitled to moral rights similarly to individuals⁶²¹. Finally, Rajan suggests that the limitations of individualism in moral rights doctrine may practically be remedied by the creation of public agencies for the protection of moral rights, such as authors' groups, councils of scholars or other suitable organizations⁶²².

On account of the above discussed features of moral right, their application to folklore has already been discussed by some experts who suggest that "moral rights doctrine has proven to be a surprisingly flexible area of law, able to accommodate models of authorship and creativity that do not necessary fall within traditional moral rights theory, but may also be extended to [anonymous works] of folklore"⁶²³.

Indeed, this has been the approach of some governments in developing countries to valuable cultural works whose authorship is unknown. For example, as briefly discussed under Section 5.2.2.2, the government of Tunisia has pioneered moral rights protection for folklore through the Tunis Model Law⁶²⁴. Even though it was said that the Tunis Model Law has "not [been] widely adopted due to the over-broad nature of the availability and scope of protection"⁶²⁵, it nevertheless demonstrates that moral rights can successfully be used as the foundation of folklore protection.

6.2.3 Practical Application of Moral Rights: Creative Commons?

Finally, building upon the idea that the search for an adequate protection of folklore should be placed within the realm of moral rights, a possible interesting practical model worth looking at, through which such moral rights could be applied to folklore, is the Creative Commons licenses. Of course, there is no obstacle in applying moral rights, as they are, directly to folklore. However, a strict and robust application of intellectual property principles, even if only moral rights, may lead to restraining creativity. If we are

⁶²¹ Lixinski, L. (2013), note supra 443, at pp. 190

⁶²² Rajan M. T. S. (2001), note supra 392

⁶²³ *ibid*

⁶²⁴ *ibid*

⁶²⁵ Kuek, C. Y. (2005), note supra 492

looking to achieve only very limited and balanced protection where we want to establish minimum rules and conditions for the use of folklore, yet to encourage the creative process, perhaps we need to look into an even softer and more flexible approach while observing the identified basic principles. In that sense, Creative Commons seem to open up interesting possibilities as one of their basic aims is to promote the dissemination of works without the restrictions of copyright law. Even more importantly, as I will detail further below, Creative Commons not only regulate the use of certain works by requiring the observance of basic moral rights, but they do more – they serve as a *stimulant* for further creativity and controlled dissemination.

As a brief introduction, historically, Creative Commons begun as a rebellion against broad copyright rights and the overly complex ownership system for the building blocks of culture, and has followed the free software movement and the open source licensing model. Free software and open source licenses were limited to computer programs, but the Creative Commons has managed to expand beyond the realm of computer programs and has created licensing tools applicable to all fields of creative works that are available for anyone to use⁶²⁶.

Today, Creative Commons is a non-profit organization that applies a licensing platform to encourage the free use of creative works. Creative Commons seeks "to build a layer of reasonable, flexible copyright in the face of increasingly restrictive default rules"⁶²⁷ and by now, more than 200 million unique webpages have employed the Creative Commons tools⁶²⁸.

The Creative Commons are in fact using license agreements for the purpose of strengthening and enriching the public domain, yet observing certain selected intellectual property rights. Namely, the high cost associated with securing a

⁶²⁶ Loren, L. P. Building a reliable semicommons of creative works: Enforcement of creative commons licenses and limited abandonment of copyright. *George Mason Law Review*, 2006, vol. 14, pp. 271

⁶²⁷ Kim, M. The creative commons and copyright protection in the digital era: Uses of creative commons licenses. *Journal of Computer-Mediated Communication*, 2007, vol. 13, no. 1, pp. 187-209

⁶²⁸ Ricolfi, M. Consume and Share: Making Copyright Fit for the Digital Agenda. In: de Rosnay, M. D. and De Martin, J. C. eds. *The Digital Public Domain: Foundations for an Open Culture*. Cambridge: Open Book Publishers, 2012, at pp. 57

license to use works were a serious obstacle for the circulation of copyrighted works – the use and reuse of works created by others. Creative Commons therefore looked into reducing these costs in order to ease non-profit players to use, re-use and share the creative content. The implemented licensing platform seeks to decrease the transaction costs of both licensing and acquiring a license for reuse. The way it works is that, at the producer's end, authors are offered a licensing scheme for distributing their works for use while at the same time safeguarding those works against abuse and misappropriation. At the users' end, the platform is expected to make it easier for users or future creators to identify works, which are available under generous terms, and use it for subsequent creation⁶²⁹.

Importantly, the objective of the Creative Commons movement is not to circumvent the copyright system in its entirety. Instead, the Creative Commons aim to promote the dissemination of works without the restrictions of copyright law, but under certain controlled terms. They provide an *alternative* to standard copyright protection by proposing that authors release their works under the terms of a license to the general public. The exact terms of the license vary according to a number of possible models provided by Creative Commons, and examples may be seen on the Creative Commons website. In any case, the Creative Commons license does not cancel the copyright in the original work, which remains underlying, but it does suspend the operation of a part of the copyright rules. According to the terms of a Creative Commons license, a person wanting to use a work released under the license must comply with one crucial requirement – acknowledge and credit the creator of the original work⁶³⁰.

A copyright owner seeking to offer his/her work under a Creative Commons license can do so by visiting the Creative Commons website and selecting an appropriate license. Initially, the basic conditions that a copyright owner could choose to require from users were: (1) Attribution (meaning the creator requires attribution as a condition of using his or

⁶²⁹ Elkin-Koren, N. Creative commons: a skeptical view of a worthy pursuit. In: Guibault, L. M. C. R. and Hugenholtz, P. B. eds. (2006), note supra 435

⁶³⁰ Rajan, M. T. S. Creative Commons: America's Moral Rights. *Fordham Intellectual Property, Media and Entertainment Law Journal*, 2010, vol. 21, pp. 905

her creative work); (2) NonCommercial (meaning the creator allows only non-commercial uses of his or her work); (3) NoDerivatives (meaning the creator asks that the work be used as is, and not as the basis for something else), and (4) ShareAlike (meaning any derivative you make using the licensed work must also be released under a ShareAlike license). These four options produce eleven possible licenses. However, early data showed that 98% of licensors chose the "attribution" requirement, so Creative Commons made attribution a required condition of all licenses, which reduced the copyright owner's choice to one of six core license when the remaining three licenses were combined⁶³¹.

The attribution right is the core moral right and so the Attribution license could be called a moral rights license for the use of the work. It protects the author's right of attribution without imposing financial obligations on the user or providing in any way for economic rewards to the author. As Rajan argues, the attribution license does leave open the question of integrity, but the explanation of the license by Creative Commons states that "the author's moral rights are [i]n no way [...] affected by the license". Accordingly, the attribution license explicitly operates in addition to the existing legal framework for the protection of authors' moral rights. If the copyright law of the relevant country offers protection for moral rights, the attribution license simply reinforces that law. But, if moral rights are not well-protected in a country, the Creative Commons license may even serve to protect moral rights protection that is not otherwise available in this form. Based on the Attribution concept, the second license provides a ShareAlike principle: if the user creates new work out of his creative re-use of the earlier, he will be required to release it under the same type of Creative Commons license as the original work. The NonCommercial license is rather restrictive – prevents the users to release the created work for commercial purposes. Any subsequent use of the work which leads to commercial gain, intentionally or

⁶³¹ Carroll, M. W. Creative Commons as Conversational Copyright. *Public Law and Legal Theory Working Paper*, No. 2007-8, available online at <http://infojustice.org/download/gcongress/openaccesstoresearch/Carroll%20-%20CC%20as%20Conversational%20Copyright.pdf>

accidentally, cancels the license, potentially exposing the user of the work to copyright liability⁶³².

6.2.4 Can Creative Commons Work For Folklore?

Creative Commons is "a work in progress, an ongoing social experiment. The experiment began with a simple premise: in copyright law, one size does not fit all"⁶³³. This means that there are authors who will not necessarily chose to exercise the entire range of rights automatically given to them by the law. As Carroll explains, from that premise ensued the following hypothesis – if such authors were given a tool that is easy to use and that licenses back to the public some of the power to control the work that the public gave to the authors through copyright law, these authors might actually use such tool. Widespread use of such a tool would "create a commons, a pool of resources open to all to use in conversation and self-expression"⁶³⁴.

The application of Creative Commons to folklore seems to open a range of very interesting possibilities. I will start by firstly examining which combination of licenses would be the most suitable basis for folklore protection. Naturally, not all licenses available under the Creative Commons are automatically corresponding to the nature of folklore. For folklore, one may think of two types of licenses: (i) an attribution (and integrity) license plus ShareAlike license; or (ii) a more rigorous approach – attribution (and integrity) license plus ShareAlike and NonCommercial.

Could it work? Traditional copyright law is based on the assumption that all rights are reserved, while Creative Commons is based on the concept that some rights are reserved and the licensor can decide to what extent he will keep his rights over his work⁶³⁵. Accordingly, Creative Commons seeks to cure a symbolic failure of the present copyright regime which is reflected in the increasing perception of copyright as an impediment to the creative process or the enjoyment of cultural resources⁶³⁶. At the

⁶³² Rajan, M. T. S. (2010), note supra 629, at pp. 499

⁶³³ Carroll, M. W., note supra 630, at pp 446

⁶³⁴ *Ibid*

⁶³⁵ Parrilli, D. Creative Commons Licenses: the Brazilian Experience, in Abstracts of the Conference Media and Global Divides. *Abstracts Media and Global Divides*, 2008, 43

⁶³⁶ Dusollier, S. The master's tools v. the master's house: Creative commons v. copyright. *Columbia Journal of Law and The Arts*, 2006, vol. 29, pp. 271-293

same time, Creative Commons licenses do that while observing and reinforcing the basic moral rights, which is exactly one of the core tasks that a folklore protection system should achieve.

The second license, ShareAlike, corresponds to the idea that folklore should be allowed to further evolve, be disseminated and shared. The ShareAlike thus stimulates the evolution and circulation of folklore, aiding the creation of a pool of commons open to everyone to draw from and further create.

The fourth, NonCommercial license recognises that, while folklore should be used as an inspiration, it should not be permitted to lead to commercial gain.

The third Creative Commons license, which adds a NoDerivatives principle to the attribution license, may not be suitable for folklore. It provides that no person should make a derivative work based on the original work; as the Creative Commons group explains: "this license allows for redistribution, commercial and non-commercial, as long as it is passed along unchanged and in whole, with credit to you"⁶³⁷. Quite the contrary, expressions of folklore should be allowed to continue to evolve, rather than being frozen and merely passed on unchanged.

The combination of these three licenses, Attribution, NonCommercial and ShareAlike, seem to open up significant potential for the preservation of folklore and further development of culture by allowing artistic collaborations and exploring and developing of new forms of expressions. Although Creative Commons requires specialist knowledge, there is a shared agreement between the user and the author that "creates something much more complex, vital and expressive than if this symbiotic relationship did not exist" and this mirrors folkloric practice as there will always be innovation, innovators and something new borne out of evolution of culture. It is this repetition and uptake by multiple members of the group that enables the development of individual activities into a tradition or cultural practice⁶³⁸.

⁶³⁷ Rajan, M. T. S. (2010), note supra 629

⁶³⁸ McKeown, A. *Diggers and Dreamers of the 20th and 21st Centuries: Creative Commons, Open source and Digital Folklore*. Presented at ISEA RUHR 2010, available online at

In practice, the chosen license could be posted on the website of the relevant cultural heritage department of a country or a specialised authority, along with a database or identification list of expressions of folklore. At this point, it is the cultural heritage laws which may add to achieving a complete system of protection, as this field of law seeks to provide and regulate the practical measures for identification, conservation, preservation, dissemination and protection of traditional culture. Behind national cultural heritage institutions stand years of collecting and conserving expressions of folklore and presumably every country in the world already has assembled, more or less detailed, certain records of folklore. Cultural heritage institutions have already spent decades of resources and effort in collecting, cataloguing and fixating expressions of folklore, which could serve as a prerequisite for documented intangible cultural heritage to benefit from Creative Commons.

6.3 Limitations and Prerequisites

6.3.1 Theoretical Limitations

While the above approach seems exceptionally interesting in relation to folklore and may open grounds for wide possibilities for protection, yet permitting further evolution of folklore, it would naturally not be without certain potential limitations and problems.

Regardless of the folklore context but as a general issue, after the "initial honeymoon"⁶³⁹, the Creative Commons initiative is nowadays facing some growing criticism⁶⁴⁰. Florian Cramer, for example, summarized some of these arguments against Creative Commons as follows: "To say

https://www.academia.edu/341798/Diggers_and_Dreamers_of_the_21st_Century_Creative_Commons_Opens_Source_and_Digital_Folklore

⁶³⁹ Pasquinelli, M. The Ideology of Free Culture and the Grammar of Sabotage. In: Araya, D. E. and M. A. Peters, eds. *Education in the creative economy: knowledge and learning in the age of innovation*. New York: Peter Lang Publishing, 2010, at pp.291

⁶⁴⁰ For criticism of Creative Commons, see Elkin-Koren, N. In: Guibault, L. M. C. R. and Hugenholtz, P. B. eds. (2006), note supra 435; Berry, D. M. and G. Moss. On the Creative Commons: a critique of the commons without commonalty. *Free Software Magazine*, 2005, vol. 5; Liang, L. *Free/open source software: open content*. United Nations Development Programme-Asia-Pacific Development Information Programme (Undp-Apdip), 2007; Orłowski, A. The Tragedy of Creative Commons, available online at <http://andreworlowski.com/2009/07/16/the-tragedy-of-the-creative-commons/#more-1277>; Välimäki, M. *The rise of open source licensing: A Challenge to the Use of Intellectual Property in the Software Industry*. Helsinki: Turre Publishing, 2005

something is available under a Creative Commons license is meaningless in practice. [...] Creative Commons licenses are fragmented, do not define a common minimum standard of freedoms and rights granted to users or even fail to meet the criteria of free licenses altogether and unlike the Free Software and Open Source movements, they follow a philosophy of reserving rights of copyright owners rather than granting them to audiences⁶⁴¹". Similarly, Anna Nimus suggested that "Creative Commons legitimates, rather than denies, producer-control and enforces, rather than abolishes, the distinction between producer and consumer. It expands the legal framework for producers to deny consumers the possibility to create use-value or exchange-value out of the common stock⁶⁴²". She claims that Creative Commons in fact close the commons with many restrictions rather than open it up to real productivity. Similarly, Mako Hill says: "[...] despite Creative Commons' desire to learn from and build upon the example of the free software movement, Creative Commons sets no defined limits and promises no freedoms, no rights and no fixed qualities. The success of free software is built upon an ethical position. Creative Commons sets no such standard. At the core of most Creative Commons licenses is a hodgepodge of pick-and-choose (and often incompatible) features that can include prohibitions on commercial use, the requirement to release and redistribute derivative works freely, the requirement to retain attribution and a blanket ban on derivative versions altogether"⁶⁴³.

Leaving aside the drastic theoretical criticism generated by ideological differences existing between those who require "free culture"⁶⁴⁴ and those who advocate strong intellectual property rights⁶⁴⁵, there are certain arguments raised in

⁶⁴¹ Available online at <http://www.nettime.org/Lists-Archives/nettime-l-0610/msg00025.html>

⁶⁴² Available online at http://subsol.c3.hu/subsol_2/contributors0/nimustext.html

⁶⁴³ Available at http://mako.cc/writing/toward_a_standard_of_freedom.html

⁶⁴⁴ For example, Lessig, Stallman and Boyle

⁶⁴⁵ See for example Berry, D. On the "Creative Commons": a critique of the commons without commonalty, available online at http://www.freesoftwaremagazine.com/articles/commons_without_commonalty: "For us, Lessig's particular understanding of the world, and his desire to strike a balanced bargain between the public and private that follows from this, appear naïve and outmoded in the age of late capitalism. Listen to the political economists. Capital is continually rendering culture and communication private, subject to property rights and the horror of commercial exploitation and beautification. When immaterial labour is hegemonic, the relationship codified in intellec-

relation to Creative Commons which may practically be important if we look into applying the licenses to folklore. An argument often addressed against Creative Commons is that it lacks clarity on its objectives and defined goals of promotion⁶⁴⁶ – although this argument may be surpassed in relation to folklore, as the goals behind protection of folklore have been a subject of debate for decades. The licenses were also generally criticised for adding another layer of bureaucracy on top of the existing legal environment of copyright and practice⁶⁴⁷, but this will also be the case in relation to folklore whichever mode of protection we choose to apply.

Importantly, it has been suggested that without a common legal framework for all licenses, the practical efficiency of Creative Commons is limited as works that inadvertently mix licenses might ultimately become unshareable⁶⁴⁸. This will especially be problematic in relation to enforcement of rights provided under and behind the license. Firstly, one may ask about the sanction of the infringers which circulate or exploit expressions of folklore without a relevant license or contrary to the terms of the license. Since Creative Commons are an alternative to copyright protection and apply to works that would normally be protected under the copyright regime, they do not cancel but only suspend the operation of a part of copyright. Therefore, behind or under Creative Commons, there is still copyright. Accordingly, the Creative Commons provide that use of the work contrary to the terms of the license, whether intentionally or accidentally, would invalidate the license, potentially exposing the user of the work to copyright liability⁶⁴⁹. Paradoxally, Creative Commons might actually strengthen the rights discourse behind the license and the copyright as a conceptual framework and regulatory scheme for creative

tual property between the "public" and "private", between labour and capital, becomes a crucial locus of power and profit. And it is quite natural that private interests would want to protect and extend this profit base at all costs. Their existence depends on it. If libre culture or the Creative Commons threatens this profit base in any way, wars of manoeuvre and position will ensue, where corporations and the state will set out either to crush or co-opt".

⁶⁴⁶ Katz, Z. Pitfalls of open licensing: An analysis of Creative Commons licensing. *Intellectual Property Law Review*, 2005, vol. 46, pp. 391-413

⁶⁴⁷ See Dilanchian in Olwan, R. *Intellectual Property and Development: Theory and Practice*. Berling: Springer, 2013, at pp. 329

⁶⁴⁸ See <http://www.technologyreview.com/news/405089/copyleft-hits-a-snag/page/2/>

⁶⁴⁹ Rajan, M. T. S. (2010), note supra 629

works⁶⁵⁰.

If we argue that we are looking to protect only moral rights, and thus reduce the copyright behind expressions of folklore only to moral rights, a Creative Commons license breach or use of an expression of folklore without a license would be moral rights infringement and would thus trigger the application of existing rules for moral rights protection.

However, the enforcement of moral rights is not internationally harmonized, as the sanctions for their infringement differ significantly. For example, in France, it is a criminal offence to infringe the integrity right, as an alteration or modification of a work can attract penal sanctions, and any assault on the work is considered as much as attack on the author as physical assault. On the contrary, common law jurisdictions do not hold penal measures – for example, under the 1988 United Kingdom Copyright Designs and Patents Act an infringement of moral rights is actionable as a breach of statutory duty⁶⁵¹. Of course, there is also a general practical problem with enforcing moral rights when the author's capacity to control the use of his work is limited⁶⁵².

Furthermore, the essentially contractual nature of moral rights under the licenses is also very important to note. The helpfulness of the Creative Commons might be limited if the fear of unenforceability would deter stakeholders from using the licenses at all. The idea of the Creative Commons is to offer an alternative to the present rules and norms by using contracts but this can only be done if these contracts are enforceable⁶⁵³.

Moral rights under the Creative Commons exist above and beyond copyright legislation in certain countries and they derive their force from the mutual agreement of author and user of the work. Accordingly, their effectiveness depends on the broader environment for the recognition and enforcement of contracts⁶⁵⁴.

⁶⁵⁰ Elkin-Koren, N. In: Guibault, L. M. C. R. and Hugenholtz, P. B. eds. (2006), note supra 435

⁶⁵¹ Nocella, L. (2008), note supra 617

⁶⁵² Rajan M. T. S. (2002), note supra 598

⁶⁵³ Lukoseviciene, A. *Beyond the Creative Commons Framework for production and dissemination of information*, Ph.D. thesis submitted to Lund University, 2011

⁶⁵⁴ Rajan, M. T. S. (2010), note supra 629

Finally, one question related to the enforceability of the proposed system concerns the competent authority – who would enforce these rights? In its current form, Creative Commons licenses are a tool intended to be used by rightholders and therefore do not seem to provide a solution to the problem of unknown rightholders. In the context of the proposed system of protection, the licenses would have to be modified so as to allow the relevant rightholder – be it an organized community or the competent body of an entire state – to exercise and enforce the relevant rights upon breachers/infringers in accordance with the applicable national copyright rules.

6.3.2 *Practical Problems*

Equally, if not even more importantly than to work through the theoretical limitations, for the proposed system to work (or any other system, for that matter), it is crucial to regulate and secure certain practical preconditions. Within the context of the proposed system, the application of moral rights through a Creative Commons-type of license to folklore requires a number of previous practical steps, which may be very time consuming and challenging. It is precisely the practical prerequisites that, perhaps more than the legal ones, are vital for the designed system to operate in practice.

6.3.2.1 *Databases*

Firstly, a general problem that hinders the effectiveness of any legislative system for the protection of the expressions of folklore, and Creative Commons as well, occurs due to the lack of all-inclusive common databases of folklore. As illustrated in the Case Study 1 in Section 2.2, one of the consequences of this is that various artists used the lack of legislative regulation and the lack of databases to register expressions of folklore as their own and then profit from them.

This problem will be even more crucial if we look into applying moral rights through Creative Commons licenses to folklore. Creative Commons are forms of license that can be linked to via the World Wide Web. Accordingly,

the application of Creative Commons to folklore would require previous mass cataloguing of the expressions of folklore. Moreover, such databases would have to be digitalized, which seems like an enormously complex task, although probably not unachievable. After all, tens of millions of books, songs, and museum items have been digitalised in recent years. Further, the creation of such database would require a high level of collaboration between countries and would presuppose a previously defined relationship between them, especially in cases where the origin of an expression cannot be traced in a single country. Although difficult, this is not an impossible task. A similar problem of unfeasibility of determining the origin of certain expressions of folklore exists in Africa⁶⁵⁵ and an International Centre for African Music and Dance has been founded in Ghana, with the aim to create a collection of African music and dances⁶⁵⁶.

Bearing in mind the aforesaid, until now, examples of productive use of Creative Commons licenses by cultural heritage institutions have been rare. Although museums, libraries and archives have an important role in safeguarding the knowledge and culture, the digital environment involves them, much more than before, in copyright questions concerning such issues. When it comes to mass digitization, this task is especially problematic in relation to the orphan works⁶⁵⁷.

Accordingly, the simplest and initial option is to create separate databases of expressions of folklore in individual countries. This process is taking place at the moment. Institutes for

⁶⁵⁵ Lucas-Schloetter, A. In: Silke von Lewinski ed. (2004), note supra 279, at pp. 265

⁶⁵⁶ WIPO Final Report on National Experiences with the Legal Protection of the Expressions, note supra 472

⁶⁵⁷ Hoorn, E. Creative Commons Licences for cultural heritage institutions. *A Dutch perspective*. 2006, available at http://www.ivir.nl/publications/angelopoulos/9789089643070_TEXT_HR_DRUK.pdf

folklore in different countries are gathering and registering the various forms of expressions of folklore collected in their countries. Unavoidably, this generates confusion as one same expression may appear registered in several countries (as is the case with Balkan music). A creation of all inclusive (national, regional, world) databases of expressions of folklore would simplify things considerably; however, this would require a high level of collaboration between the communities/countries and would presuppose previously defined relationships between the countries, perhaps on the basis of regional agreements, international instruments or other documents.

6.3.2.2 *Coordination*

The second problem that reduces the efficiency of any existing or future legislative system for the protection of expressions of folklore is the lack of international synchronization between the countries. For example, from the above mentioned illustration of the movie "300" in Case Study 1, it becomes clear that even a complete and well-designed legislation in one country can still sometimes fail to produce the expected results if there is no corresponding legislation in the other countries.

Adoption of a globally harmonized level and manner of protection would of course provide the solution for this problem. Incorporating adequate provisions into the national legislations would provide, as a particularly important advantage, coordinated conditions for the protection of the expressions of folklore.

Meanwhile, a transitional solution might be regional agreements on the protection of expressions of folklore. Such agreements should anticipate the legal mechanisms for solving the potential disputes on the origin of expressions of folklore. Regional agreements are not a new idea. The Bangui Agreement, The

Pacific Regional Model Framework and the Andean Community⁶⁵⁸ are already well known common regimes for, among others, protection of various types of expressions of folklore. They could certainly serve as exemplars in creating other regional agreements.

6.4 Further questions, further steps

Finally, if we apply moral rights through Creative Commons, do we answer all the specific questions tackled in the non-indigenous folklore case studies?

We certainly answer some of them. For example, Creative Commons may address the problem of "fixation" of folklore. While it must be fixated in a certain historical moment in order to be catalogued and thus offered under an adequate license, such fixation will not freeze the expression in time and hinder its development, given that Creative Commons allow and stimulate further creation and evolution of expressions.

Similarly, if we apply Creative Commons to folklore, the problem of delineating the protectable parts of an expression and those motifs and symbols that are inherent to humanity in general, becomes of secondary importance. Since Creative Commons are not restricting the use of expressions of folklore, but are only imposing certain rules against their exploitation, there is no need to clearly divide what is free and what is not – in fact, everything is free to take, provided that one respects the terms of such taking. The problem of delineating the protectable subject matter, however, is not completely annulled in this case, as it will still be necessary to assess this question in case one has used an expression of folklore contrary or without the license. In that case, it will be necessary to evaluate whether a particular act constitutes infringement and assessing this matter may be more difficult than judging the classical idea/expression border. In any case, the exact demarcation lines can probably only be established through practice and will hardly be firm and strict, but will probably slide from case to case.

A question that surely remains unsettled and will probably also be answered only through practice is what happens when in one region different communities have been mixing and influencing each other to the point where it is tremendously complex or impossible to

⁶⁵⁸ WIPO Final Report on National Experiences with the Legal Protection of the Expressions of Folklore, note supra 472, at pp. 28

determine what belongs to whom? If we look at the example of "*Zajdi, zajdi*" song from Section 2.2, which country should be acknowledged as the source of the song?

One option, although certainly not an easy one, is to precisely determine where the song originates from. Without getting into this matter too deeply as it is in the competence of ethnomusicology, maybe in certain cases it could be possible to establish, more or less precisely, based on the characteristic rhythms or tones, which region exactly a certain song comes from. In other cases, the countries would have to try to prove at arbitrations why they claim certain song as theirs. However, the general problem with identifying the origin of a song is how far should one go? One of the main characteristics of folklore is that it is ever evolving and changing, thus, how could one freeze it in time and prove where it started from? Finally, even if all this is done, there will always remain certain songs that cannot be identified as only, for example, Serbian or Macedonian or Bulgarian.

Instead of that, another option is to say that, in light of specific cultural and historical circumstances of the Balkan countries and the close interweave that exists between all the represented cultures, it is sometimes impossible and would present a Sisyphus' task to unroll what is whose and where it comes from. Therefore, without getting into where precisely from the Balkans it comes from, folk music coming from any part of the Balkans could be acknowledged as Balkan music⁶⁵⁹. However, under this scenario, it is difficult to imagine who would practically be in charge of this Balkan music and who would give authorisation for use of a certain song. This would require a high level of coordination between the countries and establishment of some sort of pan Balkan institution to deal with these matters.

Some of these questions will naturally remain unanswered, but in any case, the intention when setting up the legal basis for protection is not to answer all of the possible questions and problems in advance, nor is this possible. Real life circumstances, which frequently change, will inevitably pose new challenges to every legal

⁶⁵⁹ This solution, although simplifying things considerably, would probably encounter a number of opponents in the Balkans. Firstly, Balkans as a joint term exists only outside the Balkans. It is highly unlikely a community there would give up on a song that has been sung for generations and that identifies them as Macedonians, Bulgarians or Serbians, and call it simply a Balkan song. Furthermore, even if this was surpassed, perhaps it is unjust to blend all of the folk songs, including those that can most certainly be identified as originating only from one country, under the term "Balkan".

solution, no matter how well designed and detailed. Thus, my idea and investigation was not to answer every possible question, but merely to provide a flexible framework that would be soft enough to adjust to different and changing circumstances.

6.5 Conclusion

Building upon the basic idea of this thesis – that what is needed is a more global approach to observing the problem of folklore protection – it is nevertheless noticeable that there are certain differences between the different potential rightholders, for example, the role of folklore within the community, the prominence of interests that ought to be protected, the gravity of consequences that unauthorized use of folklore produces and so on.

This is firstly reflected in the role that folklore has within an indigenous and a non-indigenous community. Such role will not be the same, due to the spectrum of different political, organisational, cultural and other circumstances. Arguably, folklore has particular importance for indigenous communities and developing countries: rather than serving as a memory of the past, there, folklore is more actively part of the present. Furthermore, in indigenous communities, folklore, and even more importantly traditional knowledge, is a resource that serves the community at large, much more than it does in non-indigenous communities. For example, as Dutfield notes, local communities depend on traditional knowledge for their health, livelihoods and general well-being⁶⁶⁰.

On account of this, secondly, the damage to the community caused by unauthorized use of such expression and the incentives for protection originating from the relevant community may not be the same.

Resulting, as a third difference, the interests worth protecting may not be the same. While indigenous communities often stress their interests in protecting the economic aspect of their folklore⁶⁶¹, this is hardly going to be the case with non-indigenous communities.

While I strongly believe that the application of moral rights to folklore is the correct approach and that it is precisely the non-economic aspects of folklore that we ought to protect, I do recognise that perhaps such a system may not suffice for the indigenous communities who have already on various occasions expressed their

⁶⁶⁰ Dutfield, G. Protecting Traditional Knowledge: Pathways to the Future. Geneva: *International Centre for Trade and Sustainable Development (ICTSD)*, 2006, at pp. 3

⁶⁶¹ See for example the WIPO Draft Report, note supra 583

interest in achieving the protection of the economic aspects of folklore. Accordingly, moral rights should arguably operate for non-indigenous communities as the interest worth protecting, as discussed above, is not of commercial but rather of ethical, cultural and non-economic nature. Nevertheless, for indigenous communities, this may not be enough. For indigenous communities, perhaps, in respect to the very essence of the protection, an effective system should attempt to deal with all the aspects of utilization of folklore. This means that it should regulate the "moral" side of the exploitation of folklore, as well as the "economic", commercial aspect of it.

Without leading to fragmentation in the field, the solution may lay in a two-layered system of protection. The first, globally applicable layer would be the observance of the discussed moral rights of attribution and integrity. The second, completing layer of protection, which may or may not be applied by the concerned community, would be the application of a *Domaine Public Payant* type of system.

Under the proposed regime, an authorisation for use should firstly be obtained from the concerned community. In this respect, the Model Provisions seem to provide a very balanced solution for proposing that such authorisation should be requested only when the expressions of folklore are being utilized "for gainful interest"⁶⁶². In this way, folklore would remain free and unrestricted as inspiration for individual creativity. Secondly, this protection could be completed by a *Domaine Public Payant* system, where a share of the commercial profit gained by the utilization of folklore would be returned back to the communities it originates from.

Such two-layered system of protection established under a Creative Commons-type of license, completed by *Domaine Public Payant* where and to the extent necessary, should not lead to disintegration in the field as we could still achieve an all-inclusive system which could potentially work for both indigenous and non-indigenous communities.

⁶⁶² Section 3 of the WIPO/UNESCO Model Provisions

CHAPTER VI: Conclusions

*"Folklore is universal to all human culture and dynamic. It permeates all cultures and every nation"*⁶⁶³.

*"Cultures are not pure, authentic and locally bounded; rather, they are syncretic and the hybridized products of interactions across space"*⁶⁶⁴.

*"Cultural property is not and cannot be claimed to be the absolute property of a nation, any one nation. It is the property of humankind as a whole since it represents the achievement of a part of all the humankind [...] since cultural achievements are the product of worldwide interactions and are the heritage of future generations, worldwide"*⁶⁶⁵.

The history of mankind is a history of borrowing and piracy. If you watch a Disney cartoon, purchase a hand-made Persian rug or join a Halloween party, you will be enjoying the results of hundreds or even thousands of years of continuous folklore flow, mixing, borrowing, re-shaping and evolution. One may ask – should we interfere with that at all or should folklore be left free?

Folklore should be free, but the use of folklore should also be fair. This thesis was based on the idea that fair folklore does not necessarily mean non-free folklore and that there certainly are certain limited aspects of every nation's folklore that should be regulated without restricting the free flow and further evolution of folklore. The idea that framed this thesis was that we need to broaden the views when thinking about folklore protection and consider globally applicable solutions, rather than restrict ourselves to only one segment of folklore – indigenous folklore.

For that purpose, this thesis explored folklore using various approaches with the aim of tackling general and specific questions and placing folklore within the right theoretical framework. Folklore was examined from different angles – from a broad and neutral position, from theoretical and practical angles, from general and specific viewpoints, and from legal and perspectives other than

⁶⁶³ Palethorpe, S. and S. G. Verhulst (2000), note supra 7, pp. 13

⁶⁶⁴ Barker, C. *Cultural studies: Theory and practice*. 4th ed. London: Sage, 2012, pp. 16.

⁶⁶⁵ King, J. L. *Cultural property and national sovereignty*. In Messenger, Phyllis Mauch, ed., *The Ethics of Collecting Cultural Property: Whose Culture? Whose Property?* 2nd ed. Albuquerque: The University of New Mexico Press, 2003, pp. 199

purely the legal one. This led to asking a number of questions – some general and relevant to folklore as such, such as the question of adequate terminology, definition and theoretical basis for protection, and some practical and specific, such as those that may arise in relation to certain expressions of folklore in certain non-indigenous communities.

This thesis began with two case studies presented in Chapter 2 which opened a number of specific questions and tackled particular problems, some, if not most, of which may not be relevant in relation to indigenous communities. The specific viewpoint which was assumed and the particular problems which were identified at the beginning of the thesis set the framework and further guided the subsequent Chapters. Based on the case study, at least four compound problems were distinguished which may emerge in relation to non-indigenous folklore: the problem of rightholder and its identification; the problem of cross-border folklore; the problem of fixation of folklore in a certain historical moment in order to catalogue it while at the same time folklore should remain ever-changing; and the problem of delineating the protectable parts of an expression from the non-protectable parts, as certain motifs and symbols may be inherent to humanity in general. On account of these specific problems which emerge in relation to non-indigenous folklore, it appears that the existing legislative solutions may not be perfectly workable for non-indigenous folklore, in particular the WIPO ones, as they have been developed for the indigenous communities as the presumed rightholders and thus the terminology used, definitions and the scope of protection may not be universally applicable.

Having framed this thesis, Chapter 3 looked at delineating the subject matter. Before even considering how certain phenomena ought to be protected, as a first step it is of crucial importance to answer certain prior questions – what are we contemplating protecting? Who should be the rightholder(s) of such protection? And – why should it be protected at all? Without establishing answers to these questions, something that requires definitional and justificatory work, it appears that any discussion of the protection itself is, to say the least – premature. Therefore, Chapter 3 attempted answering these three fundamental questions. The difficulties experienced in relation to establishing adequate terms and defining expressions of folklore and their rightholders are genuine and are a result of the specific nature of folklore itself and the historical development of the concept. While the phenomenon of folklore is evidently diverse and it seems almost unfeasible to

comprise all of the different aspects under a single all-embracing term and definition⁶⁶⁶, in Chapter 3 I presented my views and proposed certain solutions to *What, Who* and *Why*.

Following this, Chapter 4 asked which field of law we should be looking at when thinking about *How*. In addressing this issue, Chapter 4 explored intellectual property law, human rights and cultural heritage laws, weighing specific theoretical limitations of each of these against their potential to protect folklore. Recognising the inherent limitations of cultural heritage and human rights laws and their incapability to systematically protect the subject matter, Chapter 4 particularly looked at intellectual property law, from a neutral and theoretical perspective, defending the viewpoint that the search for adequate folklore protection should be placed precisely within this rationale. While we should be considering the ways in which human rights, cultural heritage and intellectual property laws can be correlated and integrated to comprehensively protect folklore, I have argued that it is only intellectual property law that can provide the appropriate basis for folklore protection. Drawing upon the analysis and arguments, Chapter 4 concluded that, while intellectual property law in its current form is not the perfect solution, it still seems like it is the most workable one, and definitely one that should allow sufficient manoeuvring space for the development of a suitable system for protection of folklore. Recognising that in the age of expansion of intellectual property law and therewith generated criticism, easily granting an intellectual property status to subject matter may not be prudent, Chapter 4 further argued that what is needed are soft solutions, flexible and open to future developments, and loose enough to only concern the most important aspects that need to be protected.

Thereupon, Chapter 5 looked at intellectual property law on a very practical level, with the aim of finding the practical limitations of different intellectual property categories when it comes to dealing with folklore. While certain underlining principles behind different intellectual property categories, be it copyright, trademark or others, are undeniably relevant and valuable in relation to folklore, each of these includes certain inherent limitations which hinder its practical efficiency and thus reinforce the need to look at an alternative basis for folklore protection.

Drawing upon the previous Chapters, having proposed solutions to *What, Who, Why* and *How* – in terms of the theoretical basis and

⁶⁶⁶ Ben-Amos, D. (1971), note supra 196, at pp. 4

practical limitations of existing categories – Chapter 6 was focused on suggesting practically *How*. In doing so, it was important to keep in mind the general and specific problems that an appropriate system of protection should potentially have to deal with. Bearing in mind all these, I have explored certain options for protection of folklore different to the ones that are currently being proposed (i.e. the WIPO ones), and have identified certain features that this presumed system of protection must have. First, I was looking for a softer and more flexible system which would protect only the key aspects of folklore, which, as it was argued, are the moral ones. Second, such a system was expected to be less burdensome, less strict and less robust than the existing models. Third, such a system must have been loose enough so as not to be detrimental to the subject matter itself – it should not "freeze" folklore in order to protect it but must allow continuous flow. Finally, the system was envisaged to serve another function – not only to protect and restrict but also to encourage further evolution and dissemination of folklore. Ultimately, it was balance and fairness that I had in mind when searching for such an alternative system of protection – the balance between protection and no protection, between free flow and restricted use and the fairness in further exchange and evolution.

Bearing the above in mind, Chapter 6 argued that it is the moral aspects of folklore that we should look into protecting and have therefore advocated that it is the moral rights that we need to observe and protect when it comes to folklore. Firstly, the attribution and integrity rights seem to reflect the exact two key aspects of folklore that ought to be protected, since folklore has less of a commercial but more of ethical and non-economic value. Second, moral rights have existed for a long time and thus present a very well established international standard whose contents are clear and well defined, included in the copyright legislation of most countries in the world, thus their application should be less troublesome as compared to certain new models. Thirdly, moral rights are capable of being protected endlessly and are generally inalienable. Finally, moral rights have proven to be a very adaptable and flexible concept, and authors have argued that moral rights could be applied to a custodial community as a whole, deeming the individualization requirement a formal requirement, and one that does not affect the essence of moral rights.

Finally, building upon the idea that the search for an adequate protection of folklore should be placed within the moral rights discourse, a new type of Creative Commons license was suggested

as an exciting and promising route through which moral rights could be applied to folklore. Two potential suggested combinations of the Attribution, NonCommercial and ShareAlike licenses seem to open up interesting potential for the preservation of folklore and further development of culture by allowing artistic collaborations and exploring and developing of new forms of expressions.

Having said the above, it is also to be recognised that a unanimous universal solution might not be practical given the differences that exist between indigenous and non-indigenous communities. These differences primarily relate to the stakes of concerned communities – indigenous communities, as this was stressed on a number of occasions, may also have an interest in achieving the protection of the economic aspects of their folklore. Accordingly, a two layered approach may be necessary where the first, global layer of protection could be provided under moral rights/Creative Commons, and the second layer could be available to interested communities through a *Domaine Public Payant* type of protection.

Does the proposed system answer all of the questions which were raised in this thesis? No, but this was never the intention nor the goal. It is not possible to solve all potential practical problems when setting up the framework and establishing the grounds of potential system of protection, but merely to try to design such a system that should be flexible enough to adapt to any potential problems. Law does not strive to provide answers in advance to every possible practical problem that can arise but rather to set the overall framework, so that particular questions may be addressed and solved by other stakeholders in the usual course of shaping and re-shaping law.

Finally, it is well worth noting that there are a number of practical preceding steps that must be fulfilled for any system to work, be it the current ones proposed by WIPO or any potential new systems of protection. While these questions may not be within the competence of law makers and are to be answered in other disciplines, they must not be ignored either. If we cannot come up with a system that would, when applied in practice, overcome practical challenges, then the very idea of folklore protection may be premature and practically unachievable.

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