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Preface

Just over a decade ago I organized a conference on intellectual property and human rights at Canada House in London.[1] The papers dealt essentially with copyright related issues and many of us felt that we were dealing with a niche topic. We were very happy when Kluwer Law International accepted to publish the papers as a book.[2] Soon afterwards though we become aware that our niche topic started to mushroom and the book started to attract an increasing amount of interest. A much expanded second edition followed in 2008.

The third edition that you have in front of you is again a much expanded and updated edition. The majority of the original papers have been updated thoroughly and developed much further. They are now part of a much larger project though. Many papers have been added. And apart from copyright, the interaction between human rights, patents, trademarks and rights in information is now also fully addressed. New technologies and new evolutions in society have led to new topics and new chapters.

In a first set of papers the complex relationship between human rights and intellectual property as a whole is analysed. The starting point is that over the last couple of years these two disciplines had to learn to live together.

That brings us to the interaction with specific intellectual property rights. First, our attention turns to copyright.

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1. The support of the Canadian High Commission in London, my then colleagues in the BACS Legal Studies Group and especially Michael Hellyer in launching this project is gratefully acknowledged.

2. Paul Torremans (ed.), *Copyright and Human Rights: Freedom of Expression – Intellectual Property – Privacy,* Volume 14 Information Law Series, Kluwer Law International (2004).

Secondly, we address issues related to trademarks and similar rights. Here the plain packaging debate is clearly a new evolution and there is also renewed emphasis on folklore and on commercial freedom of speech.

Thirdly, our attention turns to rights in information. Privacy and breach of confidence clearly raise a lot of issues. That applies maybe not only in a context related to private persons, but it could also affect corporations. Freedom of information and the public interest defence clearly also affect this area.

Finally, we address issues in relation to patents for biotechnological material and some of the issues in relation to living materials are shown very sharply in relation to embryo research and stem cells. Gene patents are another example. Ethical and moral issues then play a dominant role. And nanotechnology is another new development with far reaching implications.

Human rights and intellectual property is clearly a field in full expansion and development. On behalf of all the contributors I hope that this book can make a substantial contribution to this development. Our thanks also go to Miriam Weemhoff and her team at Kluwer Law International who made this expended and revised edition possible and who made the editing such a pleasant experience.

Paul Torremans
Nottingham
March 2015

Chapter 16

Folklore, Human Rights and Intellectual Property

Andrea Radonjanin*

16.1. INTRODUCTION

Folklorists recognize that folklore[1] is not merely something from the past to be collected or something that exists only in isolated pockets of the world. Quite the contrary – 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 and evolve.[2] These evolving and living expressions are ubiquitous: folklore can be found in both the developing and developed worlds, in indigenous communities and non-indigenous communities, in cities as well as rural environments.

At the same time, folklore is being increasingly exploited. Undeniably, exploitation of folklore was also possible in the past. However, the rapid

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1. While there is a number of different terms used over the past years to describe the subject matter (folklore, traditional cultural expressions, indigenous heritage, etc.), this chapter will use the term 'folklore' or 'expressions of folklore' to describe the subject matter.
2. Palethorpe, S. and S.G. Verhulst. *Report on the International Protection of Expressions of Folklore Under Intellectual Property Law*. University of Oxford, 2000, p. 13. Available online at the European Commission website at: http://ec.europa.eu/internal_market/copyright/docs/studies/etd2000b53001e04_en.pdf.

development of technology, the ever increasing ways of capturing and manufacturing expressions of folklore through audio-visual productions, phonograms, their mass reproduction, broadcasting, cable distribution, Internet transmissions and so on, have amplified the range and frequency of possible abuses.[3]

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 'hot' law topics of the twenty-first 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 Convention,[4] that the protection of folklore is a global problem which requires international attention and coordinated solutions.

Even though much has been done in the field of folklore protection to date, a number of questions remain unanswered. The attention of the experts 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 –, however, a number of preceding questions have only just been asked. One cannot but conclude that there is an apparent lack of understanding and agreement on the ground aspects of any folklore related considerations. The pondering questions are not just few and they are fundamental: What is folklore? Who is the holder of folklore? Should it be protected? If yes, which law is the most appropriate for achieving such protection?

The last of these questions seems to have attracted most attention in the scholarly debates and legal literature, since expressions of folklore can be dealt with under a number of available legal regimes. In addition to

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

intellectual property laws, various international agreements concerning the protection of human rights are often invoked in the debate on legal protection of folklore.[5] Provisions of human rights laws are often suggested as tools for improving the existing unsatisfactory legal regime.[6] This approach opens a range of interesting questions – which of the legal regimes, intellectual property or human rights law, is more suitable? Depending on the envisaged goals of such protection, is it necessary to choose just one of these? Or, instead of selecting one, we should be thinking about the ways of integrating them?

While I believe that it is only intellectual property law that can provide the appropriate *basis* for folklore protection, I also think that we ought to be considering the ways in which human rights and intellectual property laws can be correlated and integrated to comprehensively protect folklore. Guided by that idea, this chapter will examine the different legal regimes that expressions of folklore can be dealt under and for that purpose look into both intellectual property law and human rights laws. Before proceeding on to exploring the particular legal regimes, the chapter will first briefly delineate the subject matter of folklore and answer certain vital questions that precede any protection related debates. Finally, having examined the different relevant aspects of intellectual property law and human rights laws, in order to evaluate their capability and adequateness in protecting expressions of folklore, this chapter will suggest further ways in which the search of adequate folklore protection could advance.

16.2. GETTING A GRASP OF FOLKLORE

To start with, experts have not yet agreed on the most fundamental of all question – should folklore be protected at all? With this respect, it has been pointed out that just because something is being copied, this does not automatically mean that is must be protected and that the maxim that '*what is worth copying is prima facie worth protecting*'[7] threatens to collapse the crucial distinctions between harm and wrong, and between mere loss and actionable injury.[8] At the heart of the debate on whether expressions of

5. Lucas-Schloetter, A. Folklore. In: von Lewinski, S. ed. *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore.* The Hague: Kluwer Law International, 2004, at p. 434.
6. 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, at p. 61.
7. Justice Peterson in University of London Press Ltd v. University Tutorial Press Ltd, 1916.
8. A. Drassinower, Canadian Originality: Remarks on a Judgement in Search of an Author, in Y. Gendreau ed. *An emerging Intellectual Property Paradigm: Perspectives from Canada*. Edward Elgar Publishing, Cheltenham, 2009, 150.

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 expressions available as a source of further creation. For example, when examined in the intellectual property discourse, placing folklore within a protection regime might mean that the public domain will shrink, if one views the public domain as an unstructured sum of things, a kind of a zero sum game.[9] 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 domain.[10] Also, in copyright terms, 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 'softly' regulated public domain, which in many ways is what the idea of the cultural commons is about.[11]

Ultimately, and regardless of the concrete type of protection we are considering, when we come to *why* folklore should or should not be protected, one must ask – is it fair that one simply takes, as from some open treasury, without acknowledging the source? Is it just that one makes significant profit, not even using it as an inspiration to create something new on the basis of something old, but merely copying? Is it fair to '*harvest without sowing, to steal the other person's labour of mind*'?[12] If not, drawing upon the various arguments and contrasting viewpoints for and against protection, one should not 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.[13] While recognizing

9. See C.B. Graber, K. Kuprecht and J.C. Lai eds, *International Trade in Indigenous Cultural Heritage: Legal and Policy Issues*. Edward Elgar Publishing, Cheltenham, 2012, 220.
10. W. Van Caenegen, The Public Domain: Scientia Nullius?, *European Intellectual Property Review,* 2002, vol. 6, p. 324.
11. L. Lixinski, *Intangible Cultural Heritage in International Law*. Oxford University Press, Oxford, 2013, 199.
12. Wiese, H. The Justification of Copyright System in the Digital Age, *European Intellectual Property Review,* 2002, vol. 24, no. 8.
13. With that respect, note that even authors like Browne, who passionately advocate against protection, do not dismiss the idea of some form of protection (though other than copyright) and say 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' – see M.F. Browne, Can Culture Be Copyrighted?, *Current Anthropology*, 1998, vol. 39, no. 2, 193-222, 204.

and appreciating the expressed concerns, rather than dismissing the idea of protection completely, one 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.

Further, before considering *how* certain phenomena ought to be protected, it is of fundamental importance to establish *what* we are contemplating protecting and *who* should be the rightholder of such protection. Finding the appropriate terminology and agreeing on the basic definitions has further implications. 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 protection.[14] 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. Accordingly, describing the subject matter and establishing the adequate definitions has been identified as one of the most important problems in the field.[15] Yet, extraordinary complicated task remains uncompleted.[16]

Over the years, numerous different terms have been considered and used to describe the subject matter, such as 'folklore',[17] 'expressions of folklore',[18] 'intangible cultural heritage',[19] 'traditional cultural expressions' (TCEs), 'traditional knowledge',[20] 'indigenous knowledge' or 'indigenous

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14. Palethorpe, S. and S.G. Verhulst (2000), *supra* note 2.
15. 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.
16. '*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*' – see Islam, M. *Folklore, the Pulse of the People: In the Context of Indic Folklore*. New Delhi: Concept Publishing Company, 1985, vol. 7, p. 5.
17. Term initially used but afterwards abandoned due to the negative connotation that this term was allegedly associated with.
18. The term is used in the WIPO/UNESCO Model Provisions and is nowadays often used by WIPO interchangeably with the term 'traditional cultural expressions'.
19. The term is used in the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003).
20. 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

heritage',[21] 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'.[22]

With regards to a definition, no internationally agreed consensus on the concept of folklore exists either. 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'.[23] 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 manifestation.[24]

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 who the rightholders of folklore are and, accordingly, who should be the beneficiaries of a potential protection. Namely, 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.

Again, various terms have been used to describe the holders, such as 'indigenous communities', 'indigenous people', 'traditional communities' and 'cultural communities'. Most commonly, the rightholders of expressions of folklore are identified as 'indigenous peoples'. This notion 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

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activity in a traditional context and includes the know-how, skills, innovation, practices and similar, while folklore stands for cultural forms.

21. Term mostly used by UNESCO.
22. 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.
23. 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 p. 104.
24. Palethorpe, S. and S.G. Verhulst (2000), *supra* note 2, p. 6.

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[25] is regarded as an acceptable working definition by many indigenous peoples and their representative organizations. Similarly, the terms 'traditional community' or 'other cultural community'[26] do not appear much clearer than the concept 'indigenous peoples'. According to some,[27] 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,[28] the actual practical usefulness of such a construction is highly questionable.

In any case, a crucial question that remains unanswered is not who the rightholders are, in terms of how we should name and define them, but how we can identify them. 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.

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

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25. '*Indigenous communities, peoples and nations 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*' – see WIPO. Intellectual Property Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge, *supra* note 20.
26. 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'.
27. For example, see 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 p. 35.
28. A WIPO Secretariat's commentary suggests that the term 'cultural communities' is broad enough to 'include also the nationals of an entire country' – See WIPO. Traditional Cultural Expressions/Expressions of Folklore: Legal and Policy Options, Geneva, 15 to 19 March 2004, WIPO/GRTKF/IC/6/3, at p. 17.

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 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*'.[29] On the account of the aforesaid, although a number of terms and definitions have been proposed over the years, there still appears to be no wider concord on certain key terms and definitions of the basic concepts in the field.

16.3. PLACING THE PROTECTION OF FOLKLORE WITHIN THE RIGHT LEGAL FRAMEWORK

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, 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. 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.

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29. F. Nietzsche, *On the Genealogy of Morals and Ecce Homo*, Courier Dover Publications, New York, 2003, 53.

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, in particular, laws on human rights. Again, 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.

The following pages will be concerned with examining the appropriateness of these legal regimes in protecting folklore. For that purpose, the following sections will provide a summary of the possible intellectual property and human rights based types of protection.

16.3.1 Intellectual Property Laws

Most of the literature seems to have focused on intellectual property law when searching for the structure within which the problem of protecting folklore should be placed. This does not come as a surprise. 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' emerged from the Eurocentric precepts and was, as such, swiftly placed within the concept of copyright.[30] 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.

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

30. Blakeney, M. Hans. Christian Andersen and the Protection of Traditional Cultural Expressions. In: Helle Porsdam, ed. *Copyright and Other Fairy Tales.* Cheltenham: Edward Elgar, 2006, at pp. 114.

protection criteria. 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.

16.3.1.1 Copyright

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,[31] originality,[32] authorship[33] of the work and the term of protection[34] 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. First, 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 judgment. On the contrary, folklore

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31. 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 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 systems.
32. Regardless of the different levels of originality established by different copyright systems, it has now been widely agreed that expressions of folklore do not meet the required criterions 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'.
33. 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.
34. The protection of copyright works is mainly limited to 70 years after the death of the author in accordance with the Directive for Harmonisation of the Term of Protection of Copyright and Certain Neighbouring Rights (with certain exceptions, for example the Berne Convention where the term of protection is life plus 50 years). 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 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.

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. Second, 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. Third, when it comes to damage caused by exploitation of folklore, it is mainly of a moral nature, rather than economical.[35]

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.

16.3.1.2 Trademark Law

Likewise, 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 would be

35. Blakeney, M. In: Helle Porsdam, ed. (2006), *supra* note 30, at p. 298.

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. 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 filling 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.

16.3.1.3 Geographical Indications of Origin

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

folklore,[36] on the other hand, they were said to provide too limited, and thus insufficient, protection.[37]

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 protection.[38] 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 countries.[39]

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36. For example, see Gangjee, D.S. *Geographical Indications Protection for Handicrafts under TRIPS*. MPhil Thesis submitted to University of Oxford, 2002; Zografos, D. *Intellectual Property and Traditional Cultural Expressions*. Cheltenham: Edward Elgar Publishing, 2010; 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.
37. For example, see Kur, A. and Knaak, R. Protection of Traditional Names and Designations. In: von Lewinski ed. (2004), *supra* note 5.
38. 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), *supra* note 36, at p. 170.
39. For example Russia, Portugal and India; see WIPO Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, Geneva, 7 to 15 July 2003, WIPO/GRTKF/IC/5/3, at p. 53.

16.3.1.4 Sui Generis *Protection*

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 within intellectual property law. 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 features.[40]

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 misuse.[41]

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. 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. In 1997, the WIPO-UNESCO World, 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

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40. '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 Geneva, 13-21 June 2002, WIPO/GRTKF/IC/3/10, at p. 10.
41. Wendland, W. Managing Intellectual Property Options. In: Kono, T. ed. *Intangible Cultural Heritage and Intellectual Property: Communities, Cultural Diversity and Sustainable Development*. Antwerp-Oxford-Portland: Intersentia, 2009, at p. 87.

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.

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, even the WIPO achievements entail certain limitations. First, 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 provisions.[42] 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. Also, the WIPO proposals attempt regulating both the economic and moral aspects of folklore protection, which may not be entirely necessary and will certainly not be 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. 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 begun developing the Draft Articles, and these have undergone a number of revisions since. Not only do the Draft Articles do not appear closer to a final text, but the debate seems to heathen even more as the discussion continue. At the same time, the parties involved in the consultations hold diametrically opposite positions.[43] 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.

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42. Lucas-Schloetter, A. In: Silke von Lewinski ed. (2004), *supra* note 5, at p. 345.
43. See for example the WIPO Draft Report, Twenty-Fifth Session, Geneva, 15 to 24 July 2013, WIPO/GRTKF/IC/25/8.

16.3.2 HUMAN RIGHTS LAWS

The specific characteristics of expressions of folklore – for example, the fact that they are 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 human rights law. The final verdict as to the usefulness of these attempts has not yet been reached – as it will be summarized in the following pages, some argue that human rights laws 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.

16.3.2.1 Relevant Legal Instruments in the Field of Human Rights Laws

Human rights and within them rights of indigenous peoples acquired particular 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 peoples.[44]

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 Rights[45] (ECHR). One might reasonably question what a human rights treaty has to do with intellectual property – the answer is the right of property, which appears in the ECHR.[46] 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 seems to be 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

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44. Stoll, P-T. and von Hahn, A. Indigenous Peoples, Knowledge and Resources in International Law. In: von Lewinski, S. ed. (2004), *supra* note 5, at p. 17.
45. 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.
46. 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 p. 2.

no mention the word 'right'.[47] 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 ECHR,[48] 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 laws.[49] On account of this, it appears that the ECHR may serve as a ground but not as the detailed rule for protection of intellectual property.

Further and more specifically, within grounds for protection 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 Rights[50] (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*'.[51] 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 Rights[52] (ICESCR) and the International Covenant on Civil and Political Rights[53] (ICCPR), which are both binding upon the signatory parties.[54] 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 ICCRP (freedom of expression), Article 1 ICCRP and Article 1

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47. 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 p. 32.
48. Çoban, A.R. *Protection of Property Rights within the European Convention on Human Rights*. Ashgate Publishing, Ltd., 2004, at p. 149.
49. Yu, P.K. Challenges to the Development of a Human-Rights Framework. In: Torremans, P. ed. (2008), *supra* note 47, at pp. 79-80.
50. 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.
51. Art. 27 (2) of the UDHR.
52. 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.
53. 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.
54. Currently, 156 state are parties to the ICESCR and 160 states are parties to the ICCPR.

ICESCR (right to self-determination).[55] 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*'.[56] Such 'right to benefit' has recently been interpreted as providing the linkage between copyright and indigenous heritage[57] 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*'.[58]

Summarizing the above outlined, it has been argued that all these provisions are relevant to the claims of traditional communities, insomuch 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 resources.[59]

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55. 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), *supra* note 151, at p. 102.
56. Art. 15 (1) (c) of the ICESCR.
57. 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 … '.
58. 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.
59. Kuruk, P. (1998), *supra* note 6, vol. 48.

16.3.2.2 Suitability of Human Rights Laws for Protecting Folklore

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.

First, 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 action by indigenous communities, human rights law provisions are intended primarily for individuals, rather than for groups.[60] 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 ICESCR.[61] Accordingly, the established rights provide the basis for protecting the rights of individual authors, in their capacity as members of particular groups.[62] 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 rights.[63]

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 well.[64] Recent human rights theory seems to suggest that most individual human rights may have a collective dimension, without therefore becoming collective rights.[65] 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 ICCPR 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*

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60. 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.
61. 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.
62. Graber, C. In: Graber, C. and Burri-Nenova, M. eds (2008), *supra* note 22, at p. 109.
63. Stavenhagen, R. Cultural Rights: A Social Science Perspective. In: Eide, A., Krause, C. and Rosas, A. eds, *Economic, Social and Cultural Rights*. The Hague: Kluwer Law International, 2001, at p. 102.
64. Graber, C. In: Graber, C. and Burri-Nenova, M. eds, (2008), *supra* note 22, at p. 103.
65. See Kalin, W. and Kunzli, J. in: *ibid*., at p. 103.

Public Payant or other form of collective right management.[66] However, as valuable as it may seem 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'.[67] 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. This casts doubt on 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 folklore.[68]

Perhaps the most important drawback related to the use of human rights as a tool for protecting expressions of folklore is the problem of 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 provide.[69] 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 of human rights.[70] In that way, the international human right standards 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.

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66. Committee on Economic, Social and Cultural Rights, *supra* note 57, at para. 32.
67. Suagee, D.B. Human Rights and Cultural Heritage: Development in the United Nations Working Group on Indigenous Populations. In: Greaves, T. ed. (1994), *supra* note 60, at p. 196.
68. Kuruk, P. (1998), *supra* note 6.
69. Committee on Economic, Social and Cultural Rights, *supra* note 57, at para. 15.
70. Graber, C. In: Graber, C. and Burri-Nenova, M. eds (2008), *supra* note 22, at p. 103.

To a certain but limited extent, human rights may also be applied in private-law disputes.[71] 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 insomuch 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 expression.[72]

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 clear.[73] Accordingly, it is not certain whether the provided principles of cultural self-determination and cultural development are genuine rights or merely political principles.[74] The provisions leave open the delicate question of how the relevant entities, as beneficiaries of the established human rights, may be identified and defined.[75] While 'peoples' 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 example.[76]

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 insomuch 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.

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71. See in Geiger, C. The Constitutional Dimension of Intellectual Property. In: Torremans, P. ed. (2008), *supra* note 47, at p. 113.
72. Geiger, C. Fundamental Rights, a Safeguard for the Coherence of Intellectual Property Law? *IIC,* 35.3, 2004, 268-280.
73. 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), *supra* note 22, at p. 77.
74. Graber, C. In: *ibid*, at p. 105.
75. Macmillan, F. In: *ibid*, at p. 76.
76. Musgrave, T.D., *Self Determination and National Minorities*. Oxford: Oxford University Press, 1997, at p. 90.

16.4. WHICH LAW FOR FOLKLORE – A SUGGESTION

On the basis of the afore discussed, it seems that the practical effectiveness of both the existing intellectual property and human rights laws is somewhat limited when it comes to expressions of folklore, even though both fields of law are certainly an indispensable contribution to the creation of a complete and well-balanced system.

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 mechanisms for human rights therefore dictates the need to promote alternative ways of realization of folklore related rights, such as intellectual property rights.[77]

For example, the provisions of ICCPR and ICESCR briefly discussed in the previous pages 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 basis.[78] 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, not everything that requires protection and seems morally defensible automatically must mean or depend on being labelled as human right.[79] 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

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77. 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 p. 107.
78. Macmillan, F. In: Graber, C. and Burri-Nenova, M. eds (2008), *supra* note 22, at p. 77. See also for example: Chapman, A. Approaching Intellectual Property as a Human Right. *Copyright Bulletin*, vol. XXXV, no. 3, at p. 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.
79. Macmillan, F. In: Graber, C. and Burri-Nenova, M. eds (2008), *supra* note 22, at p. 77.

intellectual property protection and that such framework could potentially be biased against non-Western cultures and traditional communities.[80]

On the other hand, authors have pointed out examples which demonstrate the need for human rights and intellectual property laws to operate jointly.[81] Geiger, for example, has argued that it is 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 regimes.[82] 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 mechanisms.[83]

The discussed limitations particularly reinforce the need for complimentary operation of human rights laws and intellectual property laws. I believe that it is precisely in their complementary application that we need to look for the solutions that would fit folklore protection the best. Obviously, the range of human rights laws is limited when it comes to folklore, and unless the next step is available under some set of rules, the very purpose of mechanisms established under human rights law may ultimately prove to be impractical. Unless there is a set of positive rules and enforceable mechanisms, it would be very difficult to create an operational system of protection. Therefore, even if we start from a viewpoint of human rights laws, once their practical application has been exhausted, we are inevitably directed towards intellectual property laws.

16.5. CONCLUSION

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?

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80. Yu, P. Reconceptualizing Intellectual Property Interests in a Human Rights Framework. *UC Davis Law Review* 40, 2007, 1039-1149, at pp. 1128.
81. See for example, Ruse-Khan, G.H. Proportionality and Balancing within the Objectives of Intellectual Property Protection. In: P. Torremanns, ed. (2008), *supra* note 47, 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), *supra* note 47, at p. 6.
82. Geiger, C. In: Torremans, P. ed. (2008), *supra* note 47, at p. 113.
83. See for example: http://www.washingtonpost.com/business/capitalbusiness/new-practice-focuses-on-human-rights-intellectual-property/2012/03/30/gIQARQvnpS_story.html.

Folklore should be free, but the use of folklore should also be fair. Fair folklore does not necessarily mean non-free folklore and 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. Authors have already spoken of the importance of free culture. On one hand, many scholars considered that broad and durable intellectual property rights might jeopardise further creation and innovation. On the other hand, others 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 terms.[84] Therefore, it is ultimately *fairness* in cultural exchanges that requires that we regulate at least certain practices and certain aspects of folklore.

The question raised in this chapter was which law could provide such adequate basis for the protection of folklore. In addressing this issue, the available literature has mainly been looking at intellectual property law, but also at human rights 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 law**s***.

And the answer to this question would be – all of them. First, these 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 work in parallel, dealing with different aspects and levels of protection, thus completing 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 and human rights laws.

While they ought to remain in the folklore debate as they are 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 human rights law 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

84. Sunder, M. From Free Culture to Fair Culture. *WIPO Journal*, 2012, vol. 4, no. 1, pp. 20-27, at p. 21.

for creating the basis of any future protection, which should be complemented by provisions from human rights laws, lies within the framework of intellectual property law. Though intellectual property law, in its current form, is not the perfect solution, it still seems like it is the most effective one, and, as it follows from the ongoing WIPO work in this field, definitely the one that has most sufficient capacity and flexibility for developing a suitable system for protection of folklore.