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SOCIO

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For the past several decades, the world has struggled to protect folkloric expressions, without yet achieving a result that is either globally consistent or satisfactory. The need for protection derives from the fact that Western civilisations have adapted folklore as a means of entertainment or have converted folklore into products with economic value that are attractive to global markets. Western cultures have intruded upon the land of indigenous groups in order to film or record their rituals or music, copy their stories or legends, or imitate their arts and crafts. Folklore has inspired musicians, artists and filmmakers around the world, and has often motivated the latest trends in music, art, and design or in the creation of branded ethnic products. Likewise, slavish or kitsch imitations of folkloric expressions have sometimes been utilised as tourist attractions or for the making of souvenirs.

ATTACKING THE PROBLEM

In response to the problems that folklore has posed, the International Labor Organization (ILO) Conventions of 1957 and 1989 have been instrumental in recognising the vulnerability of indigenous peoples and have raised the need for special measures for improving social and economic conditions. Likewise, the United Nations has proclaimed the Declaration of Rights of Indigenous Peoples of 2007, and the World Intellectual Property Organization has drafted certain general provisions related to folklore and intellectual property rights.

Scholars have agreed that folklore is characterised by: i) oral transmission or by imitation; ii) traditional knowledge expressed in language – stories, epics, legends, tales or poetry -, music – folk songs or instrumental music -, spiritual activity – dance, rituals or ceremonies -, arts and crafts – drawings, paintings on bodies or other surfaces, carving, pottery, jewellery, textiles, carpets, costumes or musical instruments; iii) passing of traditions from generation to generation by unfixed forms; iv) community-oriented forms of finding knowledge and expressing it; and v) continuous utilisation and development of traditional knowledge.

For indigenous communities folklore represents a form of living, survival or self-determination, and it is not a good that can be owned or sold as merchandise that entertains, decorates, circulates in trade or that pursues a patrimonial or

commercial purpose. Folklore has to do with the land, living beings, the indigenous community or spiritual living. It has been said that it is a living and continually evolving tradition or living inheritance, that if protected, should be ruled exclusively by the customary laws of the indigenous communities, which are alien to the legal systems or regimes of the modern world.

For Western civilisations, folklore is often viewed as being in the public domain of information that can be freely used for creating works or for collecting in databases. However, Copyright Law was designed to protect individual expressions that are original and that have been fixed. Folklore is not individual, but rather collective expression; it is not original, but rather tradition characterised by repetitive patterns and slow changes, and is mostly unfixed. Likewise, it does not represent economic rights that can be owned, licensed or assigned, is not subject to any terms that would fall into the public domain after expiration, and simply cannot be viewed as data that can be collected. Accordingly, copyright seems to contradict or disrespect the customary norms of indigenous communities.

This raises the question of whether industries have the right to use or exploit folkloric expressions by copying (recording, filming or otherwise reproducing), distributing copies to the public of reproduced folkloric expressions, making public communication or transforming them, without having permission or offering monetary compensation. Other questions relate to the right that popular artists have to utilise folkloric expressions to create derivative art works and if such folkloric expression could be considered the preexisting or underlying work, since it is considered information and not a work.

Notwithstanding these conflicts, copyright regimes have undertaken great efforts to protect folklore from an international, regional and national standpoint. These efforts are outlined below at the international, regional and local levels:

INTERNATIONAL EFFORTS

As a result of the Stockholm Diplomatic Conference of 1967, the Berne Convention was amended to extend copyright protection to works whose authors are unknown (Article 15, paragraph 4 of the Berne Convention). At the Stockholm conference, the possibility of adding “folkloric works” to the list of protected works was also discussed but not ultimately approved. Thus, the

Berne Convention has contributed very little to protecting folklore by concluding that folklore is equivalent to anonymous works.

By admitting that facts can be collected in databases and not only works in compilations, TRIPS and the World Copyright Treaty (WCT) made it possible for folkloric expressions to be the subject of collections, and for collections to be copyrightable. Before the World Performers and Phonogram Treaty (WPPT), it was unclear whether folkloric dancers or singers could be considered performers under the Rome Convention of 1961. WPPT eliminated the ambiguity by including an indication related to this point. Accordingly, folkloric performers were conferred: i) exclusive patrimonial rights of fixation, reproduction, distribution – including rental – and public communication; ii) remuneration rights when their folkloric performances have been recorded in phonograms; and iii) moral rights of paternity and integrity. On the other hand, under WPPT, phonogram producers were entitled to exclusive rights on the phonograms that they make by collecting sound expressions fixed by them.

REGIONAL EFFORTS

Regionally, NAFTA has also recognised protection for databases. Canada, Mexico and the United States of America, have thus set a standard rule in connection with data compilation that would allow collectors of folkloric expressions to enjoy copyright rights on their collections. Other regional treaties have recognised certain rights for folkloric expressions, some of them linked to copyright law.

NATIONAL EFFORTS

Mexican laws have been quite divergent in connection with the protection of folkloric expressions. A first group of jurisdictions has been silent concerning the issue or has excluded it; a second group of jurisdictions has worked on amendments to their copyright laws, with the purpose of including folkloric expressions within the classification of subject matter protected; a third group has protected folklore by copyright in an indirect fashion; and a fourth group has provided *sui generis* rights to folklore.

Mexico can be counted among the national legislations that grant copyright

protection to folklore in some way, whether direct or indirect, ie that view folklore as information that can be utilised to create works with certain minor restrictions. In keeping with this, the Copyright Law of 1997 contemplates provisions – within a chapter devoted to national symbols and so-called popular cultures – addressing popular or craft works. On the other hand, folklore as such can be information collected in databases or sound recordings or the content of audiovisual productions, among other forms of copyrighted expressions. The Copyright Law seems to consider folklore as non-copyrightable information that everyone can utilise for the foregoing purposes.

A relevant provision in the chapter related to popular cultures protects “literary” and “artistic” works of “popular” or “craft” arts. Other provisions state that the works of popular or craft arts can be freely adapted, provided that the name of the community is credited or, when applicable, the name of the region in the Mexican territory to which the community belongs. The language of these provisions is problematic, for the following reasons:

- It is authors, and not indigenous peoples, who create authored works, including popular craft art works. Authors of popular or craft works mostly rely on folkloric expressions by indigenous peoples to produce their works. Folklore is not synonymous with authored works; the two concepts are in fact rather contradictory.
- No authored work under the law should be used without the consent of the rights holder. Popular art works cannot be an exception to that rule. If they are subject matter of protection, as the Copyright Law provides expressly, it is hard to understand why they can be used without restriction. The Copyright Law should make it clear that it is folklore, and not the works resulting thereof, that can be used freely.
- Indigenous communities cannot make popular or craft works and, accordingly, cannot be credited for that purpose. Likewise, they are collectives and not individuals. Only individuals can be authors.

Indigenous communities have developed their folkloric expressions and can only be named for that.

The Copyright Law recognises indirect forms of protecting folkloric expressions in order to produce works.

However, the copyright rights accrue to the author of the work produced and not the community group associated with the folkloric expression employed in the work. That is true because folklore is unprotected subject matter. Under the Copyright Law, folklore can be used without need of authorisation, for various purposes, including all forms of copying, depending on the nature of the folkloric expression. In particular, indigenous language, music, spiritual activity or arts and craft expressions, can be reproduced by any form or means, in any tangible medium, or can be incorporated in any production, whether audiovisual or aural. Folklore can also be collected in databases and the data base collector representing the owner of the folkloric expressions as collected in the database. Something similar happens with regard to folkloric expressions recorded in a phonogram. In that case the phonogram producer can claim neighbouring rights on the folkloric expressions as collected in the phonogram. Under the Copyright Law of Mexico it would be hard to determine that a folkloric expression could be the underlying work that is used for creating a derivative work. Again, this is because folkloric expressions are not regarded as works-of authorship. On the other hand, pop or craft art works, as they are referred to in the statute, may be used as underlying works in order to produce a derivative work. However, since the law allows that popular art or craft works can be used freely, authors of derivative works would not require authorisation in order to publish them.

Dancers and singers of folkloric expressions are entitled to neighbouring rights of performer artists. Inspired by WPPT, the Copyright Law has extended the scope of the legal definition of performing artists to include “interpreters of expressions of folklore”. They have thus been granted patrimonial and moral rights related to their artistic activities, including the right to oppose the fixation, reproduction or public communication of their performances, remuneration rights when the performances have been incorporated into phonograph productions – and perhaps audiovisual productions, although this is

not clear – and moral rights of paternity and integrity.

A NEED FOR REFORM

The foregoing reflects the inconsistencies that prevail in the Mexican law with regard to the protection of folkloric expressions. There is confusion as to their nature, which is distinct from that of authored works and simply does not fit within the realm of copyright law. By equating folklore to other works, and by referencing popular or craft works, the Mexican law has clearly erred in defining the spirit of folklore. And by allowing the unrestrictive use of popular and craft art works, the law alters the system of protection, not only of folklore but of copyrighted works as well.

It is a major problem that folkloric expressions can be copied for any purpose and without limit, because there is no supporting legal protection. The customary laws of the indigenous peoples living in the Mexican territory have not been considered or respected, and have indeed been neglected. Dancers and singers have had better luck, since they receive protection by virtue of neighbouring rights. This represents a glimmer of hope, but more still needs to be done to protect the rights of indigenous peoples.