

**BEIJING TREATY ON AUDIOVISUAL PERFORMANCES:
A PANACEA FOR TRADITIONAL RIGHTS HOLDERS?**

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ABSTRACT

The adoption of the Beijing Treaty on Audiovisual Performances ('the Treaty') in 2012 was applauded all around the world. Many have seen in it the panacea for troubles experienced by performers. It was said that the Treaty came to strengthen the precarious position of performers in the audiovisual industry by providing a clearer legal basis for the international use of audiovisual productions, both in the traditional media industry and in the field of traditional cultural expressions (TCEs). The pledges formulated for traditional rights holders were based on the inclusion of performers of expressions of folklore as beneficiaries under the Treaty. The present paper questions the veracity of this assertion by analysing the capacity of the Treaty to protect TCEs from misappropriation. The incompatibilities between the ancient features of TCEs and the creativity-based system of intellectual property (IP) have left TCEs without adequate protection within the IP system for decades. Meanwhile, with the advent of new technologies, the rich creativity embodied in indigenous designs, performances, art and music is constantly exposed to freeriding by third parties, which raises issues of authorship, access and use. This paper firstly discusses the recognition of indigenous property rights over their performances under the Treaty. The paper then critically appraises the scope of existing limitations pertaining to indigenous control over such performances, as well as the access and use by third parties. Suggestions are made for the management and enforcement of TCEs and audiovisual performances beyond the copyright and related rights regimes for a right of recognition of indigenous performers, to whom any benefits arising from these rights should accrue.

Keywords: Beijing Treaty – audiovisual performances – traditional cultural expressions – traditional rights holders – control – access – use – intellectual property

1. INTRODUCTION

Traditional cultural expression (TCE) is a term originating from the World Intellectual Property Organization (WIPO)

Intergovernmental Committee (IGC) on Genetic Resources (GR), traditional knowledge (TK), and TCEs. According to article 2 of the WIPO-IGC draft gap analyses for the protection of traditional cultural expressions, in the second revision of the text,¹ an alternative definition was proposed by a group of Least developed countries (LDCs) as:

the various dynamic forms which are created, expressed or manifested in traditional cultures and are integral to the collective cultural and social identities of the indigenous local communities and other beneficiaries.

Performers include actors, singers, and musicians other actors singing, delivering or playing in literary or artistic works.² Performances related to traditional cultural heritage generally extend to performing arts, social practices, rituals and festive events.³ Several studies have demonstrated the incompatibility between TCEs and IP laws, based on the fact that the requirements of novelty, creativity and authorship in terms of the patent and copyright system do not match the features of inherited cultural expressions transmitted from generation to generation.⁴ Performances received historical recognition within the conventional IP system under the Rome Convention in 1961⁵, the WIPO Performances and Phonograms Treaty in 1996 (WPPT), and the TRIPS Agreement⁶ in 1995 under a related rights regime. Those treaties enhance the protection of music performers, but still without proper identification of traditional cultural expressions related performers as subject of rights. The turnaround came in July 2012 in Beijing, when the international IP community applauded the ratification of

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¹ WIPO/GRTKF/IC/33/4

² Art. 3(a) Rome Convention for the Protection of Performers, Producers, Phonograms and Broadcasting Organizations, 1961.

³ Art. 2(2)(b)(c) UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, 2003.

⁴ Caroline Joelle Nwabueze, 'The Protection of Traditional Cultural Expressions in OAPI States' (LLM thesis, University of Turin WIPO 2011)

⁵ Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, (1961)

⁶ Trade Related aspects of Intellectual Property Rights Agreement (1995)

the Treaty with respect to audiovisual performances.

Cultural actors rejoiced for two reasons:

- Traditional performances appeal to the eyes and the hearing. Therefore, a treaty on audiovisual performances will definitely strengthen the local industry and advertise cultural patrimony.
- The Treaty specifically refers to the protection of singers and dancers of expressions of folklore.⁷

In addition, the rights granted were for fixed and unfixed performances.

This research paper questions the suitability of the Treaty to enhance the protection of traditional rights holders in the case of audiovisual performances.

The following brief analysis of the impact of the Treaty on traditional performers examines to what extent the Treaty enables the protection of traditional performances, and whether the Treaty has gone beyond the WIPO Copyright Treaty (WCT)⁸ and the WPPT to permit traditional rights holders to reap the fruit of their creativity. An overview of the restricted scope of protection granted to traditional performers under the Treaty is followed by an exploration of subsequent legal protection alternatives under other existing IPR categories, to enable effective adaption for the benefit of traditional rights holders' interests in audiovisual performances.

2. POLICY DEVELOPMENT TO VEST INTELLECTUAL PROPERTY RIGHTS IN TRADITIONAL PERFORMERS

There has been a long series of discussions relating to the IPRs of traditional rights holders both as traditional rights under the WIPO-IGC, and as performances under performers' treaties.

2.1. WIPO-IGC

WIPO's website points out that:

The current international system for protecting intellectual property was fashioned during the age of industrialization in the West and developed subsequently in line with the perceived needs of technologically advanced societies. However, in recent years, indigenous peoples, local communities, and governments, mainly in developing countries, have demanded equivalent protection for traditional knowledge systems.⁹

Even though TCEs are often works that involve genuine creativity, they have been denied full recognition under the existing IP legal framework since they do not fulfil the requirements of creativity/novelty.¹⁰ Traditional artistic knowledge on an inter-generational transfer basis precludes traditional performers from IP protection based on authorship.¹¹

To remedy the injustice embedded in the current legislative framework's failure to protect tradition-based works, WIPO-IGC current text-based negotiations are taking into consideration key points for the protection of traditional works, including¹²: (i) what to protect; (ii) why to protect; (iii) who will benefit; and (iv) how to protect. Two types of protection have been envisaged in the course of the negotiations, namely a positive protection to acquire IPRs in order to meet the objectives of protecting traditional works, and a defensive protection to prevent others from acquiring IP rights to traditional knowledge (TK) and/or TCEs.

Meanwhile, a pressing concern exposed by Jane Anderson is the commensurate economic reward for maintaining community traditions,¹³ which has been

⁷ Beijing Treaty of Audiovisual Performances (2012) Art. 2(a)

⁸ World Intellectual Property Organization Copyright Treaty (1996)

⁹ www.wipo.int (accessed on the 5th day of April 2018)

¹⁰ C J Nwabueze, *Copyright and Data Authenticity in the Digital Preservation of Heritage: The Case of OAPI States* (JIH Vol. 12, 2017) 98

¹¹ Jane Anderson, 'Developments in Intellectual Property and Traditional Knowledge Protection' in U Popova-Gosart (ed)

Traditional Knowledge & Indigenous Peoples (WIPO Publication 2009)

¹²For example, the WIPO-IGC texts negotiations on TCEs Issues relevant to *sui generis* systems of protection include: Definition of the subject matter (Article 1 of the *Draft Provisions*), Formalities (Art. 7), Illegal acts (Art. 3), Exceptions and limitations (Art. 5), Beneficiaries (Art. 2), Management of rights (Art. 4), Transitional Measures (Art. 9).

¹³ *ibid* (n 10)

coupled with the misuse and misappropriation of traditional performances.

The expansion of digital technology adds an additional impetus for the protection of performers' rights in the online environment.¹⁴ If the configuration of TCEs in an audio visual format enables the growth of the tourism sector, the advertising of national cultural patrimony, etc., it nevertheless could cause sustainable harm, including the migration of all cultural content to the internet and unauthorised use of traditional performances in audio-visual media such as television, film and video. The result is several cases of misappropriation of traditional performances. In the absence of an international legally binding instrument enhancing the recognition of traditional works as a rights category under the IP system, it is important to examine under the existing related rights framework the feasibility of protection granted to traditional performers.

2.2. Recognition of performers of TCEs in audiovisual works: historical legal framework under the WCT and WPPT

Traditional performances are often expressed through pantomime, choreographic works, drama, impromptu/unrecorded dancing, etc. With the advent of new technologies and the internet, traditional performances have been increasingly shared from one part of the globe to the other without the knowledge of the communities from which they originate, and sometimes out of their cultural context. The internet grants users of audiovisual performances the ability to easily copy and share works, which may infringe on existing holders' rights. This raises numerous issues pertaining to the control of data flows. Users could be held liable of contributory liability based on their distributing a product with alternative lawful or unlawful

uses or be guilty of secondary liability based on acts of inducement of copyright infringement.

A case on this subject arose in *MGM Studios, Inc. v. Grokster*,¹⁵ which involved a decentralised software system that enabled users to make available and share content files residing on various users' computers. *Grokster* was not protected because it actively induced the use of its system to infringe copyright.¹⁶

Performers are beneficiaries under related rights, otherwise called neighbouring rights¹⁷, or the French term 'Droits Voisins'. Article 7 of the Rome Convention prescribes the minimum protection to be given to performers.¹⁸ Under the convention, and base on the fact that they do not fulfil the requirement of authorship, performers cannot prevent broadcasting and communication to the public of their fixed performances without their consent.¹⁹ They therefore cannot prevent any use that is made of their fixed performances, whether the fixation was intended for cinema showing or for television.²⁰ As illustrative example, a performer of traditional choreography recorded for use on a movie soundtrack cannot prevent further use once the recording has been released. A payment for subsequent audiovisual use is neutralised by the dispositions of section 12 of the Rome Convention, which stipulates: 'once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation, Article 7 shall have no further application.'

Pistorius mentioned that audiovisual performers were deprived of any significant protection for their fixed performances.²¹ The WPPT improved the traditional performers' protection, firstly through the extension of the definition of performers to include performers of expressions of folklore. WPPT defines the performer as 'performers are actors, singers, musicians, dancers, and

¹⁴ Tana Pistorius, 'The Beijing Treaty on Audiovisual Performances' in IA. Stamatoudi (ed) *New Developments in EU and International Copyright Law* (Kluwer 2016)

¹⁵ [2005] 545 US, 913, 919-23.

¹⁶ RT Nimmer, *Information Wars and the Challenges of Content Protection in Digital Context*, 847.

¹⁷ *Understanding Copyright and Related Rights*, WIPO Publication (2016) 27

¹⁸ P Goldstein, B Hugenholtz, *International Copyright- Principles, Law and Practice* (2nd edn, Oxford 2010) 259.

¹⁹ *Ibid* (n4) Art. 7

²⁰ WIPO Publication, *Guide to the Rome Convention and the Phonograms Convention* (No. 617, 1981)

²¹ *ibid* (n 13) 143

other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore'.²²

Under the Rome Convention, performers were defined as 'actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works'.²³ This definition was not favourable to performers of traditional cultural literary and artistic works, since the requirements for protection of "works" such as underlined by the Berne Convention did not accommodate expressions of folklore. The conditions of authorship and terms of protection in particular, preclude the recognition as right category of ancient, inherited, and collectively recreated folkloric works²⁴

Additionally, the WPPT enables the protection of performances and fixations of folklore. Under article 15, performers of folklore and producers of phonograms recording folklore shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.²⁵

Apart from these two innovations with respect to performers' rights, the WPPT has merely reproduced the provision of the Rome Convention, with a restriction of the scope of protection granted to transmission by wireless means,²⁶ communication to the public by any medium,²⁷ and the embodiment of sounds, or of the representations thereof.²⁸

The TRIPS Agreement did not remedy much of the legal gap noticed at the international level prior the adoption of the Agreement. Article 14 of the TRIPS Agreement grants performers rights to communication to the public of live performances.²⁹ It is regrettable and of importance that the historical framework has evolved without due consideration being given to audiovisual fixation. Traditional performances express rich creativity and are vectors of the cultural identity of indigenous peoples. Performers' creative intervention gives life to motion pictures and musical or choreographic works, which therefore represents a justifiable interest in the protection of their individual interpretation under IP law.³⁰ Having become vulnerable prey in misappropriation schemes using the internet and information communication technologies, traditional performers needed to benefit from the audiovisual performances protection granted in China in 2012. The entry into force of the Treaty ratification constitutes a drastic turnaround in the freeriding noticed in the use of performances from local communities and indigenous people.

3. SCOPE OF PROTECTION UNDER THE BEIJING TREATY

The 21st century, otherwise identified as the internet age, has witnessed a high flow in the production and consumption of digital cultural products. The intangible aspects of cultural heritage have not been exempted: Performances as conduits through which indigenous people's values and heritage are brought to the external

²² (Art 2(a) WIPO Performances and Phonograms Treaty (1996)

²³ *ibid* (n18) (Art. 3(a))

²⁴ Berne Convention Paris Act (Vol. 1161, 1-18338, 1971) Art. 2(1):

The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramaticomusical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations,

maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

²⁵ *Ibid* (n21); Agreed Statement 13 concerning article 15

²⁶ *Ibid*. Art. 2(f).

²⁷ *Ibid*. Art 2(g)

²⁸ *Ibid*. (n21) Art. 2(c)

²⁹ *Ibid* (n5) Article 14 (1): *In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.*

³⁰ *ibid* (n16) 28

world are constantly shared via digital platforms. Multiple affordances of digital technologies have fuelled misappropriation, illegal distribution and freeriding of sacred values. The Treaty attempts to remedy this state of unfair use of audiovisual performances by recognising a universal right of audiovisual performers to benefit from the exploitation of their performances. This right extends to both economic and moral rights and is recognised with respect to fixed and unfixed performances.

3.1. Recognition of traditional audiovisual performances within the scope of protection

The protection of traditional cultural performances is a human rights imperative. Recognising the cultural rights of indigenous peoples, the Committee on Economic, Social and Cultural Rights purposefully mentioned:

Indigenous peoples have the right to act collectively to ensure respect for their right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literature, designs, sports and traditional games, and visual and performing arts.³¹

The dual dimension of traditional audiovisual performances has been taken into account by the Treaty. This is done firstly through the recognition of performers of expression of folklore as a category of performers. Under the Treaty, ‘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.³²

Secondly, article 2(b) of the Treaty defines the term audiovisual as the embodiment of moving images, whether or not accompanied by sounds or by the

representations thereof, from which they can be perceived, reproduced or communicated through a device. This consideration is of inestimable importance for traditional performances. Audiovisual content appeals to two senses: sight and hearing, which are fundamental in the expression of cultural diversity embodied in traditional performances. Audiovisual is the most vibrant platform for expressing cultural creativity, and therefore a powerful vehicle of cultural performances. Moving images constitute an excellent instrument for the expression of cultural creativity, as they unveil the beauty of cultural performances.

3.2. Recognition of economic rights and moral rights of traditional performers to audiovisual performances

The innovations under the Treaty extend fundamentally to the recognition of the numerous economic rights of the performers to fixed and unfixed performances and equitable remuneration for making the performances internationally available. The Treaty equally grants a moral right in the case of audiovisual performances.

3.2.1. Economic rights to fixed and unfixed performances

With the passing of the Treaty, traditional performers have the exclusive right to authorise the fixation of unfixed performances.³³ This implies, for example, that during the yearly traditional Chieftaincy of the Sultan in Fouban West Cameroon, traditional performers, beautified by richly dressed horses and riders accompanying the king, have the exclusive right to grant permission for a video/film to be made of their performances.

A part of economic rights is the exclusive right to give approval for broadcasting and communicating any unfixed performances to the public. Examples could be the traditional performer’s authorisation for the live broadcasting of performing arts; social practices, rituals.³⁴

³¹ The Committee on Economic, Social and Cultural Rights General Comment No. 2 (para. 37)

³² Ibid (n6)

³³ Ibid Art. 6

³⁴ Ibid (n13) 161

Economic rights under the Treaty extend to:

- The right of authorising commercial rental to the public of copies of the performances.³⁵
- The right of authorising the making available to the public of the performances by wire or wireless means.³⁶
- The right of broadcasting and communication of performances to the public.³⁷
- A right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public internationally.³⁸

3.2.2. Recognition of performers' moral rights to audiovisual performances

Moral rights allow authors and creators to take certain actions to preserve and protect their link with their work.³⁹ Moral rights include the author's right to claim authorship of the performance, as well as the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said performance, which would be prejudicial to the performer's honour or reputation.⁴⁰ The Treaty innovates by establishing the above rights of attribution and of integrity of audiovisual performers.⁴¹

Traditional performances usually embody the spirit of a cultural group and the heart of its cultural identity transferred from generation to generation. Therefore, the performance of rituals and social events usually relate to sacredness. The distribution of traditional performances without a performer's approval could

violate community rules, especially in the case of online sharing on foreign websites.

Performers' moral rights could be exercised to prevent the unauthorised use of cultural images and to protect the sacredness and secrecy embodied in traditional performances. For example, TCEs in Malaysia are represented through traditional dances. The Sewang of the Semai community is an illustrative example. The performances combine elements of rituals, songs, dance and music. The Sewang is practised for rituals and medicinal purposes as well.⁴² Moral rights could be used in this context to prevent use outside customary rules, which could amount to distorted use of the performance under the Treaty.

The unfair performance of Ngajat of the Iban community in Malaysia constitutes a case of the violation of performers' rights to their traditional performances. The performance of Ngajat as portrayed in the media is inauthentic based on the fact that the steps for Ngajat in welcoming people are different from dances performed for other functions.⁴³ As a sacred dance, Ngajat is an art of respect and not just a 'show' to outsiders. Reports indicate that as the association is a small group, it cannot do much against the adulteration of their cultural performances. The ascertaining of moral rights can serve as a tool to enhance the authenticity of Ngajat in this context.

The protection of actors, musicians and performers in an audiovisual work has definitively improved since 2012. Prior to the adoption of the Treaty, such benefits were restricted solely to audio and music performers. The Treaty equally innovates by providing remuneration for

³⁵ *ibid* (n31) Art. 9(1)

³⁶ *ibid* Art. 10

³⁷ *ibid* Art. 11

³⁸ *ibid* Art. 11(2)

³⁹ *ibid* (n16) 9

⁴⁰ Berne Convention Art.6; *ibid* (n6) Art. 5(1)

⁴¹ *ibid* (n31) Art. 5:

the performer shall, as regards his live performances or performances fixed in audiovisual fixations, have the right: (i) to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance; and

(ii) to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation, taking due account of the nature of audiovisual fixations.

⁴² IM Azmi, Ismail SF, J Jalil, H Hamzah, M Daud, *Misappropriation and Dilution of Indigenous People's Cultural Expression through the Sale of Their Arts and Crafts: Should More Be Done?* Social Science and Humanities 23 (University of Malaysia Press 2015) available at [www.pertanika.upm.edu.my/Pertanika%20PAPERS/JSSH%20Vol.%2023%20\(S\)%20Nov.%202015/15%20JSSH%20Vol%2023%20\(S\)%20Nov%202015_pg165-178.pdf](http://www.pertanika.upm.edu.my/Pertanika%20PAPERS/JSSH%20Vol.%2023%20(S)%20Nov.%202015/15%20JSSH%20Vol%2023%20(S)%20Nov%202015_pg165-178.pdf) accessed on the 17th May, 2019.

⁴³ *Ibid.* 168

the use of audiovisual works internationally, and through the recognition of moral rights.⁴⁴

Against the background of existing legal insecurity for the protection of TCEs at international level, can we then conclude that the Treaty constitutes a relevant panacea for rights holders in the field? In other words, does the Treaty enable recognition of the rights of traditional performers under the IP system?

The next section underlines the limits in the Treaty preventing a full return on creativity in the case of traditional audiovisual performances.

4. EXISTING RESTRICTIONS OF TRADITIONAL PERFORMERS' RIGHTS UNDER THE TREATY

Despite its innovations applauded by the international community relating to the recognition of performers' rights to audiovisual performances, the Treaty has not resolved the question of equitable management of IP interests of audiovisual performers. This serves as an obstacle to the reward of creativity of traditional creators as subjects of rights under the IP system. In addition, the Treaty enforces a term of protection as well as a restrictive approach to the moral right granted to the performer.

4.1. Traditional performer - producer: the saga of transfer of rights

Audiovisual content represents a powerful vehicle for unlocking cultural tourism,⁴⁵ especially in a developing context with culture-based economies. Once the copyrighted work in audiovisual performances is created and the exclusive right granted to the author subsists in the work, those rights statutory provided constitute property. As such, the audiovisual performance may

boost the producer's financing efforts and value the traditional performer's economic potential on the marketplace. The successful appropriation and exploitation of IP rights is source of huge economic impact.⁴⁶ The IP right related to the audiovisual performance, as all IP right categories can be transferred. The Beijing Treaty on Audiovisual Performances organizes the transfer of rights between performers and producers. Generally, under the Treaty, a performer can agree to the fixation of his or her performance in an audiovisual fixation. Such agreement automatically operates transfer of the performer's exclusive rights to the producer⁴⁷, unless both parties have agreed otherwise by way of contract.

This disposition does not clearly stipulate when does a consent leaves the forum of private negotiations to become officially binding, and constitutive of transfer of rights. The sanctity and consensual formalism characteristics of contractual agreements have not been respected in this case. In the absence of clear information and notification to the performer of the impact of his or her consent, this disposition is subject to abuse of the performers' intellectual rights.

IP can not engineer economic development in the absence of a successful management. If IP management has the ability to turn IP in a power tool⁴⁸, does the Beijing Treaty enable a good management of the traditional performer's rights in audiovisual performances?

4.2. Inherent power imbalance in contractual relation performer-producer

Inherent disproportion of power within the relationship between performer and producer greatly impair the performer's capital and bargaining skills.⁴⁹ The traditional performer more specifically, usually considers display of cultural heritage values as a spiritual assignment or

⁴⁴ Rafael Ferraz, *The Beijing and Marrakesh Treaty* (LLM Lecture Notes, University of Turin, October 2015)

⁴⁵ P Lanteri, WIPO Copyright Law Division, *The Role of International Copyright Framework and Its Benefits*; WIPO, Bangkok (2017)

⁴⁶ G. Gabison and A. Pesole, 'An Overview of Models of Distributed Innovation', JRC and Policy Reports. Report EUR

⁴⁷ Art. 12(1) Beijing Treaty

⁴⁸ A. Krattiger and S. P. Kowalski 'Principal Factor Driving Innovation' in WIPO, 'in WIPO Intellectual Property Management. Module 8. Unit 8.1. WIPO/OMPI p. 2.

⁴⁹ See generally, Vettori, M-S (2005), Chapter 2 The Function of Labour Law, P. 24 University of Pretoria etd – Available at <https://repository.up.ac.za/bitstream/handle/2263/29308/02chapter2.pdf?sequence=3>. Accessed on 10/5/18

cultural duty. In addition, it is not common factor having a traditional performer versed in literacy and conscious of the value of the intellectual creativity related to cultural performances. In a context where the financial ambitions of powerful producers dictate the tune of transfer of rights over intellectual creativity, abuse and unfair exploitation are common practice. To palliate to such unethical behaviors, certain countries like Australia have set councils for the management of indigenous interests. The Aboriginal and Torres Strait Islander Arts Board of the Australia Council made mainly indigenous scholars is an illustrative example⁵⁰.

International intellectual property legal normative is an indispensable impetus for the recognition of creativity in presence of unequal forces and discrimination of vulnerable performers. In the absence of management binding legal framework, how can member states enhance due reward of genius creativity in contracts regulating the exploitation audiovisual performances?

This paper argues that Beijing Treaty has failed to set a framework of binding rules regulating the contractual relationship between two principal subjects of the cultural industry in the information age: the performer and the producer. The Treaty's drafters missed the legal opportunity to build the normative framework for the existence and operations of all the parties in an important sector of the cultural industry. Unfortunately, this important task was left over to national legislations.

4.2.1. Failure of Beijing Treaty to regulate unequal forces in the contractual relation performer-producer

Beijing Treaty has established a legal formalism for the contract of transfer of rights between the performer and producer. The Treaty's dispositions stipulate the feasibility of a consent given to be in writing and signed by both parties to the contract or by their duly authorized

representatives.⁵¹ In addition, concerning the making available or broadcasting and communication to the public of any fixed audiovisual performance, the Treaty emphasizes on the provision of a right to royalties for the performer, or a right to equitable remuneration for any use of his or her performance.⁵²

Unfortunately, these requirements are just soft standards set for States parties, without any peremptory force. The use of the expressions "Contracting Party may provide in its national law" or "may require" has demonstrated the Treaty's intention not to make these important dispositions binding as a matter of law. They are therefore left over to the sovereign appreciation of member States. In this context, it will be difficult to alleviate discriminations extended to creativities authored by feeble traditional performers, - denying recognition of created works. Copyright has fell here to prevent the weak traditional performer from being eaten by predatory producers.

It seems not to be the end of the tunnel for several cases of the misappropriation of audiovisual performances, especially with the expansion of information technology and the internet enabling easy access/downloading without the performer's knowledge, and illegal communication to the public without acknowledgement.

Peter Sculthorpe's case of the misappropriation of indigenous musical material in Australia in the early 1980s is a relevant example. The court qualified such misappropriation as culturally insensitive and unethical.⁵³

The author of the fixation can successfully prosper under the Treaty, but not the traditional rights holder because he has been deprived of ownership under the system.

In the following part of this article the existing term of protection, which represents another impediment to the realisation of traditional performers' rights, will be discussed.

⁵⁰ Terri Janke, "Minding Culture- Case Studies on Intellectual Property and Traditional Cultural Expressions", WIPO Publications, 2003. P. 160

⁵¹ Art. 12(2) Beijing Treaty

⁵² Art. 12(3) Beijing Treaty

⁵³ Jonathan Paget, *Has Sculthorpe Misappropriated Indigenous Technologies?* Vol. 35, No. 1 (Musicology Australia 2013) 86-111

4.3. Existing term of protection

Western principles of copyright protection include term limits in order to ensure a public domain of works and to maintain the copyright balance.⁵⁴ Under the TRIPS Agreement and the WPPT, the rights of performers are protected for 50 years from the date of the fixation or the performance. The Treaty equally provides for a term of protection of 50 years. The existing term of protection contravenes the cultural ownership values as symbol of cultural identity belonging to a particular people. Depriving the people of such identity after a term contravenes the international standards of cultural and human rights relating to self-determination and to cultural identity. It is a universal will and a common concern to safeguard the intangible cultural heritage of humanity, of which communities' traditional performances are part.⁵⁵ This paper suggests the remedy for this failure through the abolishment of a term of protection and the introduction of perpetual protection with respect to traditional works.

The existing term of protection does not enhance a proper protection of TCEs. TCEs are the living treasure of the spirit of a community. This is so because in addition to establishing a term of protection, calculators should underline the date of the first publication of the performance creation, which is usually not available for traditional performances.⁵⁶

4.4. Restricted moral rights

The Treaty for the protection of audiovisual performances failed to adopt a straightforward standard with respect to a performer's moral rights.

As was underlined above, article 5(1) of the Treaty does grant the performer a right to paternity as well as a right to the integrity of the audiovisual performances. Nevertheless, under article 5, the moral rights so described are limited by restrictive factors where the

omission is dictated by the manner of the use of the performance and taking due account of the nature of an audiovisual performance. Three fundamental restrictions were identified:

- (i) The normal modification of the performances arising in the course of their exploitation and including editing, compression, dubbing, or formatting, in existing or new media or formats, and that are made in the course of a use authorised by the performer, would not amount to modifications within the meaning of article 5(1)(ii).
- (ii) In the event that a change of the performance is not objectively prejudicial to the performer's reputation in a substantial way, it does not amount to change.
- (iii) The mere use of new or changed technology or media, as such, does not amount to modification within the meaning of article 5(1)(ii).

The Treaty adopts a large conception of acceptable modifications, which could prejudice the performers' interest. In addition, the change when recognised shall fulfil an additional requirement of 'objectively prejudicing the performers' reputation'.

Pistorius argues that such a language of ambiguities could give rise to discrimination in the management of actors with small roles.⁵⁷

In the absence of an international standard-setting instrument for the protection of traditional performers' rights, the lack of a strong regional mechanism in several developing countries for the protection of traditional rights holders' audiovisual performances creates opportunities for misappropriation. This paper goes further to examine ways of protection of TCEs beyond the Treaty, firstly, within the existing IP system, and secondly, outside the IP system.

⁵⁴ Peter Jaszi, 'Protecting traditional cultural expressions – some questions for lawmakers' (2017) WIPO Magazine. www.wipo.int/wipo_magazine/en/2017/04/article_0002.html Accessed 17th June, 2018.

⁵⁵ Preamble, UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, 2003.

⁵⁷ *ibid* (n23)160

5. EXISTING PROTECTION MEANS WITHIN THE IP SYSTEM AND BEYOND

While international dialogue evolves regarding the adoption of an internationally binding instrument aimed at the recognition of traditional rights holders' rights under the IP system, it is important to look firstly within the IP system and then beyond the IP system for legal means suitable to palliate the unfair use of traditional performances without recognition, attribution or economic reward. With the advent of new technologies and the extension of the concept of property rights to new areas such as traditional societies, the IP system has become more integrated.⁵⁸ This part of the article envisages the manner in which various modes of IP protection as well as non-IP legal systems have become a potential tool for the protection of new rights under a traditional system.

5.1. Enhancing the protection of traditional audiovisual performances outside the copyright related rights regime and within the IP system

Digital distribution resulting from the audiovisualisation of traditional performances raises the possibility of mass dissemination and therefore infringement of traditional rights. Performers play, act, and interpret original works of authorship, which they bring to life.⁵⁹ In this vein, they relate to the copyright regime. Goldstein and Hugenholtz point out that the object of a performance must be a 'work' in the sense of the Berne Convention of the UCC.⁶⁰ This justifies the recognition of a copyright-like property right,⁶¹ with the same effect of copyright principles of ownership and authorship.⁶² Litman notes that the massive distribution of works on the internet is enabled

without the assistance of professional distributors via direct author-to-consumer and consumer-to-consumer dissemination.⁶³ This leads to a reconsideration of the conventional copyright model.⁶⁴

On another side, copyright incentive is generally understood as based on the author's ability to monetize⁶⁵ the distribution of the work of authorship. The absence of recognised authorship in the case of traditional performances precludes deriving benefits and questions the whole concept of copyright.

These two hypotheses underline the failure of copyright and related rights to sustain the IP protection objective which is to reward creativity. Meanwhile, performances are distinctive intellectual and creative life that is as valuable as other knowledge systems.⁶⁶ It therefore becomes imperative to look beyond the copyright regime for suitable means to manage traditional performers' rights under existing IP categories.

5.1.1. Unfair competition

Unfair competition actions based on misappropriation require a much higher standard of protection against audiovisual performances than the one granted under the Treaty. Unfair competition laws under article 10 Bis (2) of the Paris Convention prevent any act of competition contrary to honest practices in industrial or commercial matters, as it constitutes an act of unfair competition. Tribunals may prohibit unfair competitive conduct affecting audiovisual performances of traditional rights holders on this ground.

5.1.2. Extension to TCEs of access and benefits sharing of the CBD

⁵⁸ Merges, Menell, Lemley, *Intellectual Property in the New Technological Age* (4th edn, Aspen 2006) 953

⁵⁹ *Ibid* (n13) 144

⁶⁰ *Ibid* (n17) 234

⁶¹ *Ibid* (n16) 29

⁶² *Ibid* (n17); note for example that in U.S., a performance will be protected under copyright law as long as it is fixed in a tangible medium of expression and meets the Copyright Act's modest originality standard. 235.

⁶³ Jessica Litman, 'Sharing and Stealing' in RS Gruner (ed), *Intellectual Property and Digital Content* (2013) 125

⁶⁴ *Ibid*.

⁶⁵ "Copyright law has long been premised on the assumption that economic incentives to produce creative works are a principal reason for enacting intellectual property protections", Richard Chused, "Sculpture, Industrial Design, Architecture, and the Right to Control uses of Publicly Displayed Works, 17 *NW.J. Tech. & Intell. Prop.* 55 (2019). P. 114

⁶⁶ S. Rama Rao, 'The Relationship between Intellectual Property and the Protection of traditional Knowledge and Cultural Expressions' in U Popova-Gosart (ed), *Traditional Knowledge & Indigenous Peoples*. (WIPO Publication 2009) 145

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity (CBD) has been adopted as a supplementary agreement to the Convention on Biological Diversity. The protocol is based on a transparent legal framework for the effective implementation of one of the three objectives of the CBD: the fair and equitable sharing of benefits arising from the utilisation of genetic resources. This represents a valuable contribution to the conservation and sustainable use of biodiversity.

The present paper argues that no principle of fairness in resources management via the benefits sharing (ABS) has been adopted in the context of TCEs. ABS was solely drafted for the context of traditional knowledge and genetic resources. The author emphasises the need of recognition of the benefit-sharing approach within the scope of TCEs, and more specifically on the online distribution platform. This could be translated to benefit sharing of outputs each time a community's audiovisual performance is used for commercial purposes. ABS in this context could be regarded as 'use and benefits sharing'.

5.1.3. Labels of authenticity and geographical indications as indicators of origin of original performances

A primary function of a trademark is to distinguish the goods or services offered by one undertaking from those offered by another.⁶⁷ A trademark may consist of labels of authenticity. The use of a name of a community or region could serve as a label authenticating the origin of the performance/social practice/festive event of the relevant community. The label used as a certification mark is evidence that the festival is related to the place where the performance originates.

The use of the label by cultural industries, broadcasting organisations, the movie industry, etc. could serve as an

indicator of origin and prevent any misuse of the performances. In addition, the use of labels could attract some royalties, which could be sent back to the originating community as instrument of social development, building of hospitals, indigenous education, etc. An example of festival labels is Europe for festivals.



Geographical indications (GIs) constitute an important method of indicating the origin of goods and services under the IP system.⁶⁸ The reputation of a performance could be viewed as an autonomous, commercially valuable intangible.⁶⁹ In this case the reputation of audiovisual performances can be protected against unfair labour practices.⁷⁰

GIs represent an added value scheme for TCEs. Some products identified by a GI may represent characteristic elements of the traditional artistic heritage developed in a given region and manifested through performances. Advantages are numerous for traditional performances:

- GIs are a sustainable tool for recognition of the cultural creativity of traditional performances.
- GIs design a scheme for the performance through code of practice or regulations of use.
- GIs provide protection for audiovisual performances against misleading and deceptive trading practices.

Essama Pierette argues that GIs could perfectly valorise TCEs in the case of several communities owning the same cultural value or promoting a cultural heritage common to the same region.⁷¹ The Igbo Masquerade Drama and Festivals Performances is a relevant example. This social

⁶⁷ DL 101 WIPO/OMPI Trademarks.

⁶⁸ DL 101 WIPO/OMPI Geographical Indications

⁶⁹ Dev S. Gangjee, "From Geography to History: Geographical Indications and the Reputational Link," in I Calboli, WL Ng-Loy

(eds), *Geographical Indications at the Crossroads of Trade, Development, and Culture* (Cambridge University Press 2017) 60 ⁷⁰ *Ibid.*

⁷¹ E. Pierette, Intervention during the first WIPO-WTO African IP Teachers, (University of South Africa, April 2018)

practice is a common cultural heritage to the Anambra, Abia, Imo, Ebonyi, and Enugu communities within the Federal Republic of Nigeria. Even though the practising of the festivities could differ in a few respects, the Masquerade Drama represents similar characteristic elements of all the Igbos people in Nigeria. GIs could therefore valuably enhance protection against unfair trade practices.

5.2. Beyond the existing IP framework

5.2.1. Codes of conduct and community protocols

Since article 6Bis of the Berne Convention protecting moral rights cannot really be used, one could recommend a code of conduct to prevent distortion and promote acknowledgement and ethical use of the performances in line with community rules.

Protocols are about setting codes of conduct or establishing behavioural norms⁷² for the management of traditional performances in the online environment or for use by third parties. Jane Anderson underlines the importance of protocols in Australia in a context where legislation alone could not solve the problem of the misappropriation of indigenous values.⁷³

5.2.2. Traditional IP rights under customary laws

Customary standards can be used to re-draft the concept of ownership, with due consideration to the community dimension such as envisaged by indigenous customary systems. This is the position of some academic scholars, including Professor Thomas Cottier and Marrion Parrizon of the World Trade Institute, who promote traditional intellectual property rights (TIPR) as a means to rescue traditional rights holders from the unfairness displayed under the existing IP system.

Communities could draft the IP rights relating to their performances with cancellation of the terms of authorship and creation that preclude them from partaking in the fruit of IP protection. The terms of individual ownership have been inserted in the national

legal systems in Africa, for example by assimilation of the colonial master's legal system after a country's access to independence. An illustrative example is article 32 of Annex VII of the Bangui Agreement, regulating ownership of audiovisual work, referring to the condition of authorship. Meanwhile, none of the 17 member states of the African organisation of IP have an individual property management approach to its cultural values.

CONCLUSION

This paper argued that the Beijing Treaty constitutes a relevant innovation in the international IP system as precursor to rights for audiovisual performers of traditional cultural expressions. Nevertheless, maintaining conditions of authorship/ownership and terms of protection like several IP treaties disqualify traditional performers in the race for recognition as a subject of IP rights.

The Treaty makes the exigency of ownership a condition for the traditional performer to be granted protection. For example, article 5, relating to performer's moral rights, refers to 'his' performances. As were previously underlined, traditional performances, like other categories of TCEs, are communally owned, and not based on individual authorship. In addition, they are passed down from generation to generation, therefore inherited, not created.⁷⁴ Those characteristics are the antipodes of the substantive requirement for the protection of performances under the copyright and related rights.

The Treaty promotes cultural diversity, without recognising the traditional performer as the subject of rights under the IP system. The relevant recognition of the rights of performers, including actors and singers, is fundamental. This legal incapacity is reinforced by the existence of several restrictions to the enforcement of the performer's moral right.

⁷² Ibid (n10) 62

⁷³ Ibid.

⁷⁴ Ibid (n3)

Copyright-related rights seem to have failed as an enabler of cultural richness. The traditional IP systems fail to recognise the particular nature of indigenous audiovisual performances that encompass inherited spiritual, economic and social connections to their lands and territories. Meanwhile, with the advent of new technologies, indigenous audiovisual performances are constantly misused and misappropriated.

The WIPO-IGC's work has been directed at evaluating if and what additional protections are warranted for TK and TCEs, besides those already provided for in existing agreements. While waiting for an international instrument/s that is binding and regulates the protection of traditional rights holders, and in order to fill this existing legal gap, this paper recommends, firstly, that a look beyond the copyright system in existing IP rights categories be taken to remedy the Beijing Treaty in recognising traditional performers' interests. Secondly, means of protection beyond the conventional IP system and in the field of protocols and traditional IPRs could provide sustainable remedies.

BIBLIOGRAPHY

Articles

Nwabueze J, Copyright and Data Authenticity in the Digital Preservation of Heritage: The Case of OAPI States (IJH 2017)

Paget J, Has Sculthrope Misappropriated Indigenous Technologies? Vol. 35, No. 1 (Musicology Australia 2013) 86-111

Peter Jaszi P, Protecting traditional cultural expressions – some questions for lawmakers (WIPO Magazine 2017) www.wipo.int/wipo_magazine/en/2017/04/article_0002.html

Books

Calboli I, Ng-Loy WL, Geographical Indications at the Crossroads of Trade, Development, and Culture (Cambridge University Press 2017)

Goldstein P, Hugenholtz B, International Copyright-Principles, Law and Practice (Oxford 2nd ed 2010)

Lloyd IJ, Information Technology Law (Oxford 7th ed 2014)

Merges, Menell, Lemley, Intellectual Property in the New Technological Age Aspen (4th ed 2006)

Smedinghoff TJ, Online Law (Addison-Wesley Developers Press 1996)

Chapters in Books

Anderson J, Developments in Intellectual Property and Traditional Knowledge Protection, in Popova-Gosart U, Traditional Knowledge & Indigenous Peoples (WIPO Publication 2009)

Litman J, Sharing and Stealing in Gruner RS, Intellectual Property and Digital Content I. (2013)

Nimmer RT, Information Wards and the Challenges of Content Protection in Digital Contexts, in Richard SG, Intellectual Property and Digital Content I. (2013)

Pistorius T, The Beijing treaty on Audio-visual Performances, in Stamatoudi IA, New Developments in EU and International Copyright Law (Kluwer 2016)

Rao SR, The Relationship between Intellectual Property and the Protection of traditional Knowledge and Cultural Expressions in Popova-Gosart U (ed), Traditional Knowledge & Indigenous Peoples. (WIPO Publication 2009)

Lecture Note

Ferraz R, WIPO Copyright Law Division, The Beijing and Marrakesh Treaty Lecture Notes. (University of Turin October 2015)

Presentations

Pierette E, Intervention during the first WIPO-WTO African IP Teachers, (University of South Africa, April 2018)

Lanteri P, WIPO Copyright Law Division, The Role of International Copyright Framework and Its Benefits. (WIPO Bangkok, December 2017)

WIPO Performances and Phonograms Treaty, 1996

Publications/Online Materials

Azmi IM, Ismail SF, Jalil J, Hamzah H, Daud, M, Misappropriation and Dilution of Indigenous People's Cultural Expression through the Sale of Their Arts and Crafts: Should More Be Done? (University of Malaysia Press 2015)
[www.pertanika.upm.edu.my/Pertanika%20PAPERS/JSSH%20Vol.%2023%20\(S\)%20Nov.%202015/15%20JSSH%20Vol%2023%20\(S\)%20Nov%202015_pg165-178.pdf](http://www.pertanika.upm.edu.my/Pertanika%20PAPERS/JSSH%20Vol.%2023%20(S)%20Nov.%202015/15%20JSSH%20Vol%2023%20(S)%20Nov%202015_pg165-178.pdf)

World Intellectual Property Organization (WIPO) Academy Distant Learning 101, Geographical Indications

World Intellectual Property Organization (WIPO) Academy Distant Learning 101, Trademark

Gee LH, National Experience in the Protection of Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources. WIPO First Interregional Meeting on South-South Cooperation on Intellectual Property Governance; Genetic Resources, Traditional Knowledge and Folklore; and Copyright and Related Rights. 8-10 August 2012. Available at www.wipo.int/edocs/mdocs/mdocs/en/wipo_ip_grtkf_bra_12/wipo_ip_grtkf_bra_12_topic_2_presentation_lim_heng_gee.pdf

Understanding Copyright and Related Rights (WIPO Publication 2016).

Terri Janke, "Minding Culture- Case Studies on Intellectual Property and Traditional Cultural Expressions", WIPO Publications, 2003. P. 160
WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Thirty-Seventh Session, Geneva, August 27 to 31, 2018. The protection of traditional cultural expressions. Draft Gap Analysis.

Dissertation

Nwabueze CJ, The Protection of Traditional Cultural Expressions in OAPI States (LLM thesis, University of Turin 2011)

Treaties

Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS) Agreement, 1995
Bangui Agreement, 1999

Beijing Treaty of Audio-visual Performances, 2012

Berne Convention Paris Act, 1971

Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, 1961

United Nations Educational Social and Cultural Organisation (UNESCO) Convention for the Safeguarding of Intangible Cultural Heritage, 2003
WIPO Copyright Treaty (1996)