IPSP089 - Legal Aspects of Traditional Knowledge and Biodiversity

Assignment 2: 656029

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NOTE

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[1] This is a footnote.

1 Question 1 [50]

Discuss the following in respect of traditional cultural expressions (expressions of folklore):

1.1 Why is there a need to protect expressions of folklore? (20)

As per the introductory observations in [1], folklore is an important element of a nation's cultural heritage, providing its people with an avenue for self-expression and it exists as a means of a country's social identity. Traditional expressions have generally been characterized as a broad set of oral and or written literary, artistic, religious, scientific, technological works and other traditions and productions that are transmitted from one generation to another, and whose creators need not necessarily be indigenous peoples.

With regards to folklore, aspects related to its subject matter, technological and methodological content need to be taken into consideration. Thus it is important to consider not only protection from a copyright perspective, but also the mechanisms of industrial property protection, including patents, trademarks and industrial designs [2].

The need for protection of expressions of folklore arises where the creators or rights holders, would need to prevent others from reproducing their creations or disseminating them to the public through performance or broadcast, *(i.e. law of copyright)*; and to restrict the unauthorized misappropriation of technological and methodological ideas, inventions, crafts, designs and carvings, *(i.e. laws of patents, trademarks and industrial designs)* [3]. Moreover, informal traditional customary regimes may not provide adequate protection against cultural, economic or commercial exploitation.

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Both globalization and the advent of technological telecommunications advances in recent history, have lead to the improper exploitation of cultural expressions of folklore currently experienced today [4]. The misappropriation of the intellectual property rights that *'should'* be enjoyed by a people, resulting from their endeavors and accumulated cultural heritage can take a number of forms, from commercial exploitation to adaptation and distortion of the original works.

There exists a clear need for the development of both national and international instruments \ frameworks, providing legal protection against the exploitation of cultural expressions of folklore, without any compensation to their originating communities [2]. Moreover, litigation processes are also required to reclassify those expressions of folklore that were previously considered to belong to the public domain. Not forgetting the subsequent infringement and sanctioning procedures with regards to infringement of the rights in 'works of folklore'.

1.2 The WIPO / UNESCO's Model Provisions on the issue. (30)

As per the provisions of [article 15(4)(a-b)][5], although not explicitly limited to, nor directly referring to folklore, member Union countries may use their respective national legislation to designate a competent authority to represent, protect and enforce the rights of an unknown, but assumed to be a domiciled in said country, author of an unpublished work. After which, that member of the Union must by way of written declaration notify the WIPO Director General of said details, who in turn will communicate the details of the declaration to all other countries of the Union, as per the introductory observations of [1].

In 1980 a working group was established between WIPO and UNESCO, where a study for the draft model provisions for national laws on the protection of creations of folklore were undertaken. In 1982 the Directors General of UNESCO and WIPO convened a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore, where the *'Model Provisions*

for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions' were adopted. Moreover these provisions were designed in such a way as to be adaptable to appropriate national conditions, with the primary objective of protecting against the abuse [section 1][1], of expressions of folklore whilst also encouraging it's further development and dissemination, as per the introductory observations of [1].

[Section 2][1] articulates the expressions of folklore protected under these Model Provisions, as *"productions consisting of characteristic elements of the traditional artistic heritage developed and maintain by a community"*, including verbal, musical, physically demonstrative and tangible expressions. [Sections 3 and 4][1] deal with the authorized utilization and corresponding exceptions respectively. Permission from a competent authority is required for: any publication, reproduction or any distribution of copies of [section 3(i)][1]; or any public recitation, performance or transmission [section 3(ii)][1] of expressions of folklore. With the exception of utilization that is educational [section 4.1(i)][1]; an illustration consistent with fair practice [section 4.1(ii)][1]; borrowed and re-used in the creation of an original work of an author(s) [section 4.1(iii)][1]; or where the utilization is incidental [section 4.2][1].

Utilization of an expression of folklore without either consent from a competent authority nor appropriate acknowledgement of source of the author or community and / or geographic place from which the work originates [section 5.1][1], constitute offensive violations [section 6][1] which are liable to seizure or other actions [section 7][1] and other civil remedies such as damages [section 8][1]. Where the definition of a 'competent or supervisory authority' [section 9][1] is left open to the relevant member Union country.

[Section 10[[1] details the necessary procedures required for authorization with respect to utilization of an expression of folklore. Such requests should be in writing to the competent authority / community concerned [section 10.1][1]. Where a fee may be collected, as established by the supervisory authority, for the purposes of promoting / safeguarding national culture and folklore [section 10.2][1]. The Model Provisions also accommodate appeals from authorization applicant against decisions made by the competent authority [section 10.3][1].

As per the provisions of [section 11][1], with respect to matters relating to appeals or offenses, the question of jurisdiction is left open and to be defined by the relevant member Union country. This vague and opened-ended definition in the Model Provisions is indeed problematic and inadequate, especially in light of electronic transactions and the nature of potential infringements and offenses that span multiple jurisdictions, across a number of member Union countries. As per the provisions of [section 12][1] the Model Provisions shall in no way limit, prejudice nor supersede any protections applicable to expressions of folklore, enjoyed under copyright law; industrial property law; laws protecting producers, performers and broadcasting organizations; or any other laws or international treaties to which the country is a party to. Lastly [sections 13 and 14][1] describe how the Model Provisions cannot be interpreted in any way to hinder the use or development of expressions of folklore, and where expressions of folklore are developed in a foreign country they are subject to reciprocal or international treaty based protection.

While it is apparent that the Model Provisions provide a robust framework enabling Union member countries to enforce protection of their communities' expressions of folklore with the freedom and flexibility to be adapted to locale specific concessions. There however exists a clear need for the Model Provisions to be adapted and updated to cope with the problems facing traditional knowledge and expressions of folklore associated with the digital age.

References

[1] Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Forms of Prejudicial Action, 1985.

[2] A. Saurombe, "The protection of indigenous traditional knowledge though the intellectual property system and the 2008 south african intellectual property law amendment bill," *Journal of International Commercial Law and Technology*, vol. 4, no. 3, 196–202, 2009.

[3] C. A. Masango, "Indigenous traditional knowledge protection: Prospects in south africa's intellectual property framework?" *SA Jnl Libs & Info Sci*, vol. 76, no. 1, 74–80, 2010.

[4] S. Geyer, "Towards a clearer definition and understanding of "indigenous community" for the purposes of Intellectual Property Laws Amendment Bill 2010: An exploration of the concepts "indigenous" and "traditional"," *PER / PELJ*, vol. 13, no. 4, 127–143, 2010, ISSN: 1727-3781.

[5] Berne Convention for the Protection of Literary and Artistic Works, 1886.

RESULTS

Total = 45 / 50 (90%)