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THE PROTECTION OF THE TRADITIONAL CULTURAL  
EXPRESSIONS AND THE BERNE CONVENTION

The different definitions included in the last draft of an international instrument discussed in WIPO seem, in principle, accept the definition of traditional cultural expressions and/or expressions of folklore as any form tangible or intangible, in which traditional culture (and knowledge) of an indigenous people or local community are embodied and have been passed on from generation to generation.

This definition includes a list of examples of TCE such as :

- a) phonetic or verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
- b) musical or sound expressions, such as songs, rhythms, and instrumental music;
- c) expressions by action, such as dances, plays, ceremonies, rituals, games, puppet performances, and other performances;
- d) tangible expressions, such as material expressions of art, handicrafts, architecture and spiritual forms.

Looking at this list we should interrogate which is the difference with

the list of works included in the art 2 of the Berne Convention and if there is the need of a sui generis international instrument in order to protect folklore, mainly thinking that a new instrument would create an overlapping with the Berne Convention probably capable to generate conflicts of rules.

The philosophy of the proposed new instrument is to protect the creativity of indigenous people and local and cultural communities considered as entities totally different from authors of works.

But it is this true?

Indeed Traditional Cultural Expressions consist in most cases in “works” (songs, dances, paintings, poems etc), according to Article 2 of the Berne Convention, because they generally have the character of originality and, in any case, they are always expressions of single or collective author, also when the author is unknown.

As we know a protection for TCE is already provided for in art 15.4 of the Berne convention that establish that “(4)(a) *In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.*”

This rule is probably unclear and insufficient to grant an adequate

protection to TCE but we should ask ourselves if this rule could be modified also with the addition of other rules in order to make it effective.

For instance a first rule should specify that the TCEs of a local or indigenous community, maintained, used or developed by such community, that are literary and artistic works, are protected by the Berne Convention regardless to the fact if the works are collective or the author or the authors are unknown.

The second rule that could be introduced should establish that the local and/or indigenous communities should represent the unknown authors belonging to their communities and should be entitled to enforce their rights.

Thirdly, it should be made clear that TCE's are already protected by moral rights.

Furthermore, some new rules about the duration of the protection according to Article 7.3 of the Berne Convention should be added mainly regarding the TCE (works) already in public domain.

One of the main problem of the new sui generis instrument is the term of protection that, according to the view of many countries, should be endless.

It is indeed very difficult to accept this idea because it seems to be not compatible with the principles of Berne Convention and, in general, with

the philosophy that the author has the right to get economical benefits from its creativity but that after a certain number of years works fall in public domain and can be freely used by everybody.

The public domain is extremely important as a common cultural heritage that permit the free circulation of works and ideas all world round where the artist can find inspirations and the different cultures be in contact among them.

A possible suggestion could be introducing a rule that, according to certain criteria, let start again for a certain number of years the protection of TCE already in public domain.

It should be taken in account that the maintaining of an unique system of copyright , including TCE, could be an added value instead of creating two different systems probably in conflict each other.