

COPYRIGHT AS AN INCENTIVE AND AS A GROWTH DRIVER FOR DIGITAL DEVELOPMENT: CULTURAL HERITAGE IN THE DIGITAL ERA

Paper Presented By Marisella Ouma at the African Ministerial Conference 2015 on Intellectual Property for an Emerging Africa, Dakar, Senegal Tuesday November 3, 2015

Abstract

Digital technologies have changed the way we create and disseminate content. Copyright may be used as an incentive for development in the digital environment to ensure growth and preservation of our cultural heritage. It is of fundamental importance that we maximise on the opportunities available and mitigate attendant challenges in the digital environment.

Introduction

Digital technologies and the Internet in particular have changed the world in more ways than one. The way we create, disseminate, share cultural works has changed creating opportunities and challenges in equal measures. Cultural industries contribute to the creative economy through creation of intellectual capital. Most developing countries in Africa tend to ignore the creative industries, which if well developed and nurtured can change the economic landscape positively. In recent years, we have heard cases of cultural heritage from the continent being appropriated by third parties for commercial purposes.

Cases in point include the use of the distinctive Maasai *Shuka* by Louis Vuitton in 2011 or the attempts to trademark “Kikoy” in the UK Patent and Trademarks Office, the use of the commercialization of the *Kente* fabric from Ghana by third parties among others. These all form part the cultural heritage of a specific community



<http://i.ebayimg.com>

<http://40.media.tumblr.com>



These industries have continued to grow and need to be nurtured, protected and the originators and custodians of cultural heritage should be compensated commensurately. Some people believe that cultural heritage is within the public domain and people should be allowed to use it freely. However, cultural heritage does not belong to the public domain and should be recognised as part of intellectual property.



http://www.lionking.org/imgarchive/Miscellaneous_Images/LionKingCast.jpg

One of the most famous cases was the Solomon Linda case from South Africa. The use of his song 'The Lion Sleeps Tonight' by the major record labels, musicians and even Disney underscored the need to have the cultural heritage of a community safeguarded. The impact of the digital technologies cannot be underestimated and there is need to take advantage of the new opportunities and at the same time address the attendant challenges.

Cultural heritage includes both tangible and intangible heritage, but this paper shall cover the intangible cultural heritage as it falls within the scope of intellectual property. Intangible cultural heritage is defined to include practices, representations, expressions, knowledge, skills, instruments, objects, artefacts and cultural spaces associated with the same and is transmitted from one generation to another within a community and is part of the cultural heritage. It is dynamic and responds to the different environmental *stimuli* and changes. It provides a sense of identity and continuity.¹ It covers oral traditions and expressions, performing arts, social practices, rituals, knowledge and traditional crafts. This is in line with the WIPO definition of traditional knowledge and traditional cultural expressions.

Traditional knowledge, which is part of intangible cultural heritage is defined as 'traditional-based literary, artistic or scientific works, performances, invention, information and all other tradition based innovations and creations resulting from intellectual activity in all fields.'

Different countries in Africa all have rich cultural heritage, which can be harnessed for socio-economic development. It was only until recently that most countries started to take intangible cultural heritage seriously and ensure that there are proper legal and administrative mechanisms put in place.² Other than the UNESCO convention,³ the WIPO Member States through the Inter-governmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (WIPO IGC) have been working towards an international instrument for the protection of among other things, traditional cultural expressions.

One may now ask, where does copyright come in? For a long time, copyright laws have made provision for the protection of cultural heritage in an indirect way. For instance, the Copyright Act in Kenya defines traditional cultural expressions and provides for one to seek authority from the Attorney General if they wish to use the

¹ UNESCO Convention for Safeguarding of The Intangible Cultural Heritage Paris 17 October 2003

² Customary Law, Traditional Knowledge, and Intellectual Property: An Outline of Issues WIPO Publication 2013

http://www.wipo.int/export/sites/www/tk/en/resources/pdf/overview_customary_law.pdf

³ *Supra Note 1*

works for commercial purposes.⁴ Copyright also protects derivative works and works inspired by traditional cultural expressions. Recordings of works such as folktales, dances, and other performances can also be protected under the related rights. These works may be performed and recorded and the resultant work is protected within copyright and related rights. Copyright is based on the premise that one is entitled exclusive rights for his effort and time in the production of goods and services. It also seeks to ensure that the creator of the work is compensated and rewarded for his creative intellectual effort in the work; the author deserves a just reward for his or her intellectual labour. Copyright protection is also important in the preservation of culture and heritage. It also recognises the moral rights of the author.

It is important to look at the role of copyright and related rights, the impact of the digital eco-system on cultural industries. The paper takes cognizance of the role of the local and indigenous communities in the production, protection, maintenance and preservation of cultural heritage in the digital environment, which contributes to the cultural heritage and creativity in general.

Copyright and Cultural Heritage in the Digital Environment

“Technology and the Internet have triggered important changes to how creative works are created, accessed and how creators and copyright-based industries generate their revenues.”⁵ Copyright plays a fundamental role in the growth and development of creative industries and by extension cultural industries that fall within the realm of copyright and related rights. The ever-changing technologies have an impact on how content is created, disseminated and administered.

The digital ecosystem provides numerous opportunities for the creation and dissemination of works including works emanating from various creative industries. These include, film, music, fashion and design, visual arts, photography and computer games and broadcasting. Traditional cultural expressions are constantly being used in various economic ventures online and digitisation has made it much easier. Copyright grants the creator of the work exclusive rights subject to specific exceptions and limitations for a specific period of time. As stated earlier, culture is dynamic and responds to different environmental *stimuli* but is part of the identity of a particular local or indigenous community.

In 2009, WIPO, under the creative heritage project undertook to help in the documentation of the Maasai culture with the help of two members of the community. The main purpose of the project was to help in the documentation of Maasai culture and heritage. Working with two persons trained on digital documentation from the community, the project was able to document various aspects of the Maasai cultural heritage including folksongs, dances among others. Using the digital technology, the project was to assist the community in protection, management, strengthening and promotion of their cultural heritage for their own cultural and economic development. It was also meant to promote cultural diversity through documentation.

⁴ Section 49 (d) of the Copyright Act Cap 130 of the Laws of Kenya

⁵ Sacha Wunsch-Vincent, “The Economics of Copyright and the Internet: Moving to an Empirical Assessment Relevant in the Digital Age” WIPO Research Working Paper 9 2013
http://www.wipo.int/edocs/pubdocs/en/wipo_pub_econstat_wp_9.pdf (last accessed October 12 2015)

Valuation of traditional knowledge is part of the community's cultural identity, which has an intrinsic social and economic value. With digital documentation, various copyright issues arise. For instance who owns the derivative works and who is entitled to compensation in the form of royalties or other forms of payment arising from commercial use of such works? Documentation is vital for continuity and diversity as one of the project team members clearly stated that when an elder dies, they die with the knowledge if it is not documented and we end up losing valuable cultural heritage. Ownership of the cultural heritage is not in question but there are issues as to who can reproduce the digitised works, make them available online and even commercialise the same.

In the case of music, we have seen a significant increase in use of cultural heritage in the music now commonly known as *Afro-fusion*. This music is either derived from or inspired by traditional cultural expressions. Examples of artistes within the continent who have managed to bring this to life are Baba Maal, Suzanna Owiyo, LadySmith Black Mamabzo, Salif Keita, Nayanka Bel among others. The owner of the works, if they were derived or inspired by traditional cultural expressions is the author of the works. However, in the case where an artist simply does a cover of an existing folksong, then they can only own the rights in the recording of the performance but not the copyright in the song itself as that would be in the domain of the traditional cultural expression.

The digital environment offers a perfect opportunity for the dissemination and use of these works and even provides a platform for works that would otherwise have disappeared. Animation of folktales provides a perfect opportunity to share and ensure continuity.



The Legend of Lwanda Magere from Kenya has been animated and is available online. The creators of the animation enjoy copyright protection in the animation and stand to benefit economically. At the same time, the availability of the animation ensures that it promotes cultural heritage for social-economic development and preservation of the same. Copyright protection plays a key role in the digital environment.

<http://seraphicstudio.weebly.com/uploads/6/3/8/2/6382238/1245375.jpg?496>

These animations can be uploaded onto the Internet, streamed live and downloaded by third parties across the globe. There is need to control use and access so that the creator can benefit from his/her intellectual creation and also contribute to the promotion and preservation of one's cultural heritage.

Handicrafts and visual arts have not been left behind. Various designers create handicrafts that are inspired by one's cultural heritage and come up with new designs or bring out the traditional cultural expressions. Examples include the baskets from Rwanda by Gahaya links, Masks from the Central African Republic, stone carvings from Zimbabwe, woodcarvings from Malawi among others. Demand for these works

has increased in the recent past with markets all over the world. Copyright provides for the protection of the works online to the extent that they fulfil the requirements for protection. Photographs also help in the dissemination and se of works over the Internet and other digital networks.

Fashion and design also form an integral part of our cultural heritage in Africa. This is evident from the successful African Fashion week held in various venues across the globe. The designs are part of the cultural heritage from the continent



https://vuyisotshabalala.files.wordpress.com/2015/03/img_0098-alternative1.jpg?w=1200

The other forms of protection include the UNESCO Convention on the protection of Intangible Cultural Heritage and the protection offered under traditional cultural expressions. In Kenya, the proposed bill for the protection of Traditional Knowledge 2015 seeks to protect traditional cultural expressions from misappropriation and misuse by third parties and this also includes protection in the digital environment.

From the above, it is evident that digitisation plays an important role in ensuring that traditional cultural expressions are brought to life and preserved while at the same time ensuring some social-economic benefit for the artist as well as the community as a whole.

Impact of the Digital eco-system on cultural industries and their markets

In the non-digital environment, most cultural heritage; traditional cultural expressions were quite localised, for instance, most children got to hear of the folktales and folksongs from their parents or grandparents. Arts and crafts were also produced and sold within a certain area except those exported to other countries. However, with the digital technologies and the proliferation of the mobile telephone, most of the creative works are available online ad on demand. This has created new revenue streams and modes of dissemination of works.

Availability of faster and cheaper Internet connections especially through the mobile phones has revolutionised the way business is carried out. This is enhanced by the innovative creators within the software industries who provide more channels for electronic commerce through the revolutionary applications that are being created by the hundreds per day. The value chains as well as business models have changed in the digital environment especially with the shift from what would be termed as more regulated ‘analogue’ non-digital world to what is deemed to be a more liberal and open space online

Content can be generated and shared from practically any point using the different platforms and gadgets available today. This has increased opportunities for e-commerce for the cultural industries especially handicrafts and other cultural goods. For instance, prior to digitisation, not many of us knew of the Nigerian movie industry. From straight to video to online on demand services such as Netflix and *Iroko TV*, the audience from around the continent is the world is able to get a glimpse of Nigerian cultural heritage. There are several opportunities to ensure the development of these industries especially in relation to content created be it music, film or literary works. So far, we have not taken full advantage of the broad spectrum offered by the digital technologies and still prefer to deal with the non-digital world.

Social media and other online user generated platforms change the way we deal with cultural goods especially through platforms such as You Tube, WhatsApp, Instagram, Facebook among others. These have been used as marketing tools as well as means of disseminating works to others. New business models have been created around these platforms and there is need to take maximum advantage to ensure the economic growth and development of our creative industries and ultimately the preservation of our cultural heritage. Areas that need further exploitation include the online games, digital broadcasting and distribution of works, creation of content that brings out our cultural heritage, and software and performances.

Copyright also provides for the enforcement of the rights online through the use of technological protection measures and makes it illegal for one to circumvent them unless they fall within the exceptions and limitations.

As stated earlier, there are several ways in which copyright and related rights may be used to provide an incentive for growth in the digital environment as discussed by my fellow panellists.

Challenges

There are several challenges brought about by these new technologies and they include the issue of control of access to the works, which in turn brings about misappropriation and misuse of works, limited or difficult online enforcement and exposure of the works to third parties. Not many of us have fully embraced the dynamic technologies due to various factors such as power outages, high cost of accessing the Internet as well as other administrative and policy issues.

Summary and Conclusion

The digital eco system has an impact on creative industries and specifically cultural industries and their markets. From the above, it is clear that it can either positively or negatively affect the value chain as well as provide new growth areas and markets. It is important to take advantage of these new markets as driven by copyright and related rights. The digital ecosystem offers an opportunity for the creative industries to thrive within the copyright framework and this in turn has a positive impact on our cultural heritage.