

WIPO IGC Folklore Seminar

Roundtable 1. The Cross-Border Protection of Intellectual Property, and its Relevance for the Protection of Traditional Knowledge and Traditional Cultural Expressions

„*Freedom Cry* - Cross border IP Protection and Folk Music”¹

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[Introduction part]

Following Professor Frankel and Professor Bagley’s excellent presentations I would like to focus our attention on expressions of folklore, in particular the potential aspects of the illicit use of the rich traditional music of the small cultural communities as for example the Hungarian Roma community in mainstream music industry activities. Hungarian Gypsy (Roma) music is vibrant, passionate and brimming with colour, its songs reflect the hardships of daily life. My response reflects a pending case in US, namely in December 2014 Beyoncé was sued by a Hungarian folk singer for using her content in her song “*Drunk in Love*” which features Jay Z without her permission. The internationally acclaimed Hungarian Roma singer Mónika Juhász Miczura, known as Mitsou, says that Beyoncé recorded her voice in 1995 while Mitsou was singing the traditional folk song “*Bajba, Bajba Pelem,*” which she learned from her grandmother. Mitsou’s voice was sampled and digitally manipulated without her permission for Beyoncé’s Grammy-awarded “*Drunk in Love*”. The song appears on Beyoncé’s self-titled 2013 album, which has sold more than 5m copies worldwide. The song itself has also been purchased more than 1.6m times in the US alone. The case is still pending, however it shows similarities to the so called “Freedom Cry”-case 20 years ago which gives me an opportunity to raise some further issues.

Dividing my response into two parts I would like to mention:

- the need for a widely accepted definition on folklore/traditional cultural expressions;
- indirect protection of folklore/traditional cultural expressions.

¹ The author wish to thank for the kind assistance to Ms Mariann Domokos researcher (MTA Institute of Ethnology). The responsibility for the opinion expressed in the presentation remains with the author.

Widely accepted definition on folklore/traditional cultural expressions

As an introductory remark, please allow me to revisit briefly the works of the famous Hungarian composer, pianist, ethnomusicologist, Béla Bartók. In 1904, when Bartók was in his early 20s, he heard a peasant woman singing indigenous folk songs. He became obsessed with tracking down original folk tunes from tiny villages in Hungary and Romania. Together with fellow composer Zoltán Kodály, Bartók recorded, notated and collected thousands of original tunes, ultimately preserving an entire culture.

It is worth recalling what he wrote on folk music: *The concepts of folk music and folk songs raise many questions. The public tends to think that a nation's folk music is homogeneous which is not true at all for folk music which is comprised of two elements. One is folk-art music or folk music of the towns, the other is called peasant music. This is how it is in Eastern Europe, that is, in the part of the world that interests us the most.*" Bartók's complex definition, among others, describes the term 'folk song' in the following, rather simple way: *folk songs were sung in a certain territory by many for a long time in the same way and were transmitted through an oral tradition; in a narrower sense, folk music is peasant music as it was preserved, carried, refined and transmitted by peasants, unlike town music; it carries a particular style; it has a power to assimilate and reshape recent musical trends in line with its own style "it spontaneously satisfies musical instinct and is therefore a natural phenomenon"... it embodies the most excellent artistic perfection. Folk songs are classical demonstrations of how a musical idea can be expressed the best possible way through humbleness.*

Despite all efforts, and qualified scientific discussions in the past and present there is a need for a proper definition on ethnographical or legal interpretation of folklore, expressions of folklore or, in a narrower sense, folk music. The already existing definitions on folklore stressed the community-based character of the creations because ethnography became an independent discipline in the late 18th, early 19th centuries and defined itself against the literary works and other creations, subject matter of copyright. It is difficult to define folklore in the legal sense, because of its variable, community-based character compared with the general principle of originality in copyright law. Nowadays the term 'folklore' itself is more frequently replaced by that of 'expressions of folklore'.

Indirect protection on folklore/ traditional cultural expressions

In 1996 Sherylle Mills described a traditional music and Western law clash at the most fundamental level. She pointed out in that context Western music is regarded as a piece of individual property, performed to entertain and appeal to the listener's emotions. Thus, following her opinion, modern copyright law was not appropriate to provide cross-cultural protection, in particular on the eve of the world music explosion in the music industry.

As far as the European copyright issues are concerned, legislators have always been particularly aware of the specific nature of copyright protection: copyright is an economic and cultural, one could say societal, instrument for fostering creativity, growth, job creation, investments and cultural diversity. This instrument includes, therefore, economic, cultural, legal and social elements. These elements are the basis for the deal between right holders and society: society grants right holders exclusive property rights, qualified by certain limitations and exceptions and limited in time, in return for their contributions to society in terms of creativity and investment.

It should be noted that the protection of folklore/traditional cultural expressions on the basis of the European Union directives can only be indirect, since no directive expressly deals with folklore. The harmonization procedure only concerns certain precisely defined aspects of importance for the internal market.

Recently, on 6 May this year, the European Commission published its Digital Single Market Strategy for Europe which is one of the Commission's key priorities. The Strategy elaborates 16 high priority interdependent actions to be completed by the Commission in the recent biennium. These actions are built on three pillars: (1) better access for consumers and businesses to digital goods and services across Europe, (2) creating the right conditions and a level playing field for digital networks and innovative services to flourish and (3) maximizing the growth potential of the digital economy.

To improve access to digital goods and services (the first pillar) the Strategy proposes *inter alia* to modernize the European copyright framework.

In order to modernize the European copyright framework, the Commission plans by the end of 2015 to develop legislative proposals harmonizing national copyright regimes and

providing wider cross-border online access to works in the EU. The proposals will address the portability of and cross-border access to legally purchased online content services (especially video content), harmonized exceptions for the cross-border use of works for, in particular, research, education, text and data mining and clarification of the rules for online intermediaries in the copyright enforcement regime.

In the following part let me take two examples; despite the collision of different cultures and legal approaches, Paul Simon's *Graceland* from 1986 seems to be best practice. In his enormously successful album he used African music. Paul Simon treated their musicians hired from Africa well, and paid them the triple American scale for their labor. He also granted liberal co-credits which resulted in the payment of significant royalties to the traditional artists. The musicians themselves were already active recording artists in their own countries, and most were represented by record companies. Although Paul Simon was generous to the African performers, the current copyright laws would not have prevented unfair contracts or blatant appropriation of less sophisticated artists' music.

My other detailed example is the case of Deep Forest. In their first album, *Deep Forest*, in 1992, two Frenchmen, Michael Sanchez and Eric Mouquet, created an album which fused digital samples of music from Ghana, the Solomon Islands and African pygmies with "techno-house" dance rhythms. Although the album mentioned that it received the "support of UNESCO and two musicologists and respected the applied rites and customs, it fails to credit the Solomon Islands as the source for the music sampled in "*Sweet Lullaby*," one of the album's most successful singles.

As a result of this success, a second album was released in May, 1995, entitled *Boheme*. The new album incorporates digital samplings from Eastern European, Mongolian, East Asian and Native American music into similar techno-house grooves. Hit singles included "*Marta's Song*" (featuring Márta Sebestyén) and "*Freedom Cry*". The album became the duo's most successful one, selling over 4 million copies and receiving a number of Diamond, Platinum and Gold awards in 15 countries.

The song "*Freedom Cry*" later caused controversy when it was revealed that the singer, Károly Rostás ("Huttyán"), never received any monetary compensation from the song, and neither did his family after he died in 1986. His singing was archived by Claude Flagel and

his own publisher in 1993 an album where Hungarian music gypsies play and sing for each other. There are solo and a cappella voices, none of them "professional" and some less than polished, but with full of emotional reality. The song „*Esik az eső* (Listen to rain)” was later sampled by Deep Forest in the song ”*Freedom Cry*”. The song is based on a man that was imprisoned, struggled, and was singing out from his cell to be relieved of his strife and set free.

There was a contract between the two publishers on the clearance of the rights and the remuneration. A royalty was paid to Flagel and the Hungarian performers of the “*Martha’ Song*”, furthermore for a Hungarian ethnography foundation to conduct folk music research in the traditional Roma communities, however no remuneration was provided for Hutyán. It started a long and painful process before the Hungarian courts which was later documented in a movie entitled “*Hutyán*” released in 1996. The heirs of Hutyán and Flagel in 2000 agreed on relatively high single remuneration for the performance. Nevertheless, the relatives did succeed in gaining further compensation of damages from Deep Forest.

It should be mentioned that Deep Forest donated to the "Pygmy Fund," to "help save African pygmies and preserve their unique rain forest songs". The Pygmy Fund is a legitimate charitable corporation, established in 1977, but created only to "preserve the Efe Pygmies of the Ituri Forest, Zaire." The fund raises money to provide land, tools, food and medical care for the impoverished Efe people and undoubtedly provides valuable aid. The recordings the Deep Forest composers sampled, however, were not from the Efe people. Any money that Deep Forest has contributed to the Fund is benefiting the wrong people, musical tradition and performers. Thus, as Mills sums up, Deep Forest remains an excellent example of the alarming vulnerability of non-Western music in today's commercial music world.

What lessons have we learned from the Freedom Cry-case? The Hungarian court of first instance was of the opinion that Hutyán was a so called “informant”, a mere interpreter of the song for the purpose of the collecting, archiving and preservation. “Informant” is not a legal terminology it is just based on the non-codified practice and applied by the ethnology. The judgment was supported by different expert opinions obtained from the musicologist and legal experts as well, therefore Hutyán had no chance for any protection because either the Hungarian copyright legislation expressly excluded folklore from the scope of copyright protection or – according to the court - his performance did not achieve the level of artist. The

court of appeal took a different position assuming that Huttyán is a performing artist because his performance is characteristic and original with new elements even though he sung folk music. The case is an example of the longtime discussion on the indirect way of protection, on how folklore could be protected via performers neighboring rights. As Lucas-Schloetter mentioned, if the level of protection recognized at international level is relatively low and that the protection at issue does not concern the expression of folklore itself but rather its interpretation by a person or group of persons that can easily be identified, it was justifiable to grant the benefits of neighboring rights to artists who perform works of folklore. Article 2a) of WPPT eliminated all ambiguity by expressly including folklore within the definition of the performer.

Conclusion

As a concluding remark I would recall Professor Susy Frankel's excellent presentation on the global protection challenge we are facing. The intellectual property law is territorial and international agreements have created ways to address some cross-border issues. There is a challenge and enormous expectations also at European level about how we could take appropriate steps to build a legal environment for creativity. Approximation of laws and legal systems is also important.

As far as the folklore (traditional cultural expressions) is concerned it is worth noting that the national treatment requirement for neighboring rights in the existing international treaties on related rights is weaker than that granted for copyright in literary and artistic works. A further analysis is needed concerning use of national treatment on indirect protection of folklore. The fundamental question on the elaboration of a widely acceptable enforceable definition on folklore/traditional cultural expression also remains.

Literature:

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