PROTECTION OF HANDICRAFT GOODS AND TRADITIONAL CULTURAL EXPRESSIONS: A COPYRIGHT PERSPECTIVE

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PART ONE:

CONTEXTUALISING TRADITIONAL HANDICRAFTS AND CULTURAL EXPRESSIONS
TRADITIONAL CRAFTS ECONOMY

- Traditional heritage has commercial value in the local and wider economy, and can improve lives of communities.
TRADITIONAL CRAFTS ECONOMY

- Trade in handicrafts is substantial.
- Artisan handicrafts represent an estimated US$30 billion world market.
- Handicraft production and sales represent a substantial percentage of gross domestic product (GDP) for some countries.

TRADITIONAL CRAFTS ECONOMY: INDIA EXAMPLE

- More than 2.18 million people are engaged in full-time craft employment

- Contribution to foreign-exchange earnings was significant

- Revenue from exports of artisan-produced handicrafts represent 16 percent of India's total trade and 13 percent of Nepal's

TRADITIONAL CRAFTS ECONOMY: INDONESIA EXAMPLE

- Forest-based crafts have particularly high potential, in comparison with other crafts.

- Central Java - woodcarving represents roughly 75% of the handicraft exports.

- Average woodcrafter's annual earnings for the period between 1979 and 1984 were slightly higher (Rp 846000) than those of other handicraft artisans (Rp 830000).

Gearheart, P. & Kerr, K. 1987. The crafts of Indonesia: their preservation and development. Farmington, Conn., Aid to Artisans
TYPE OF HANDICRAFTS

- 1997 UNESCO / ITC definition

  Artisanal products or handicrafts are those produced by artisans, completely by hand or with the help of hand-tools and even mechanical means, as long as the direct manual contribution of the artisan remains the most substantial component of the finished product.

  Their special nature derives from their distinctive features, which can be utilitarian, aesthetic, artistic, creative, culturally attached, decorative, functional, traditional, and religiously and socially symbolic and significant. They are made of sustainably produced raw materials and there is no particular restriction in terms of production quantity.

  Even when artisans make quantities of the same design, no two pieces are ever exactly alike.
TYPE OF HANDICRAFTS

- Handicrafts can be divided into two basic categories: tools and household products.

- Examples include: baskets, pottery, textiles, furniture and ritual objects. In most cases, the raw materials for handicrafts production are obtained from forested areas.

- In the traditional village setting, there was always enough time to embellish tools and utilitarian objects.
WHY HANDICRAFTS MUST BE LOCAL/INDIGENOUS TO COUNTRY OF ORIGIN

- According to buyers, “handicrafts are products significant to the country where they are made, due to skill, tradition, culture, and local materials used.”

- Most of the products made in China are not considered as handicrafts, even though many are partially or fully handmade. “China will produce anything that you will ask, better than anyone else, and at a better price, but these are not unique handicrafts like those being produced in other countries.”
TYPE OF HANDICRAFTS

- EXAMPLES:
  - carving the handle of a sword increased its value and power.
  - ritual object, produced by skilled members of the society, are given painstaking attention and used ceremonially, which represents the highest artistic achievement of such cultures.
  - Dayak women of Borneo make woven baby-carriers adorned with prized beads, amulets of boar's teeth, bear claws and old Chinese coins.
  - textiles of the Indonesian islands have a historic, almost mystical link to birth, marriage and health.
INDIGENOUS ART AND DESIGNS

- The only way for the artisan to survive is to tap into his or her own indigenous culture to find what is really unique. Most cultures have indigenous designs and often have abandoned them, but they should instead incorporate these into products used today—as elements, accents.

- For example, the border on a scarf or shawl. It is the accent that makes the product unique, and it is drawn from their culture, their traditions.

- Contemporary products and contemporary functionality are important—products that fit into people’s lives and homes, but have a wonderful, indigenous element to them.

- “When it works, it really works.”
PART TWO:

ISSUES AND CONCERNS
MAIN ISSUES ARISING

- Preservation and promotion
- Capturing economic value
- Unauthorised commercial uses
- Inappropriate and offensive uses
- Attribution of authorship and ownership
PRESERVATION AND PROMOTION

- Continued production and development of traditional handicrafts and artworks are threatened by the disappearance of traditional skills.

- As contact with the outside world increases, these traditional cultures inevitably change.

- The introduction of new ideas and belief systems; changing access to natural resources; the availability of new trade goods and the disappearance of old; new authority figures - supplanting traditional local leaders; new employment and education opportunities - all contribute to this change.
Capturing Value and Unauthorised Commercial Use

- Copying and mass production by outsiders deprive artisans of a source of income, and represents a loss of export revenue for the country hosting the indigenous group.
PART THREE:

COPYRIGHT PROTECTION
PROBLEMS WITH COPYRIGHT LAW

- Subject matter - are there limits
- Fixation - What of oral culture?
- Authorship - who is the author and beneficiary? Individual, community, tribe, country?
- Term of protection - No protection for very old Aboriginal art such as rock engravings and paintings; intangible property is also distinct from land ownership
What can be protected?

Le terme “œuvre de l’esprit” s’entend de toute création ou production du domaine littéraire, artistique ou scientifique quel qu’en soit le mode d’expression et tel que déterminé à l’article 6.

La protection des droits des auteurs s’exerce sur toutes œuvres originales, quels qu’en soient le genre, la valeur, la destination, le mode ou la forme d’expression….

Irrespective of genre, value, purpose, mode or form of expression

L’œuvre est réputée créée, indépendamment de toute divulgation, du seul fait de sa conception, de sa réalisation, de son existence à l’état achevé ou non et de la qualité de l’auteur.
PROTECTED SUBJECT MATTER: FRENCH COPYRIGHT EXAMPLE

- Art. L. 112-1, French Intellectual Property Code – “…whatever the form of expression”

- The principle of not awarding protection to ideas or commonplace works is implicit in the doctrine that only intellectual creations (works of the mind) are protectable subject matter

- An intellectual creation = a work that shows the author’s personality
IDEA-EXPRESSION PRINCIPLE - FRENCH EXAMPLE

- *Pont Neuf/Cristo case*

- Copyright protection was granted to the Cristo work which comprised of wrapping the Pont Neuf bridge using canvas and ropes

- The scope was limited in that the author could not oppose other types of works using the same style of wrapping

- *TGI Paris, 10e Ch., May 26, 1987; D. somm., 1988, p.201, obs. Colombet*
PROTECTED SUBJECT MATTER: OTHER FRENCH EXAMPLES

- Article L112-2: The following, *in particular*, shall be considered works of the mind .

- *Eiffel Tower, Cass. Civ*: Protected a “visual creation” consisting in the play of lights intended to reveal and highlight the lines and forms of the Eiffel Tower

- *Mediafusion v Sorayama (Sexy Robot): CA Paris* - robot held to be an artistic work

- *Musée du Cinéma Langlois v Cinémathèque Française, TGI Paris*: Display and presentation of objects held to be a copyright artistic work
PROTECTED SUBJECT MATTER: FRANCE EXAMPLE

- Roberts A. D. et al. v Chanel et al. - Court of Cassation, 5 February 2008

French Federation of Couture and several haute couture companies (including Chanel, Christian Dior, and Hermes) complained about unauthorised photographs of fashion shows. French Criminal Prosecution Service sued photographers for copyright infringement.

Paris Court of Appeal (affirmed by Cour de Cassation) held that they infringed the copyright in
(i) the claimants' clothes
(ii) the fashion shows
Found guilty of a criminal offence and obliged to indemnify the civil parties, who had joined the lawsuit.
Examples of Satava’s works
US COPYRIGHT EXAMPLE: IDEA/EXPRESSON

• “It follows from these principles that no copyright protection may be afforded to the idea of producing a glass-in-glass jellyfish sculpture or to elements of expression that naturally follow from the idea of such a sculpture. [...] Satava may not prevent others from copying aspects of his sculptures resulting from either jellyfish physiology or from their depiction in the glass-in-glass medium. […]

• Satava’s glass-in-glass jellyfish sculptures, though beautiful, combine several unprotectable ideas and standard elements. These elements are part of the public domain. They are the common property of all, and Satava may not use copyright law to seize them for his exclusive use. […]

• Satava may prevent others from copying the original features he contributed, but he may not prevent others from copying elements of expression that nature displays for all observers, or that the glass-in-glass medium suggests to all sculptors. Satava possesses a thin copyright that protects against only virtually identical copying.
COPYRIGHT SUBJECT MATTER: /TRADITIONAL HERITAGE/EXPRESSIONS
CÔTE D’IVOIRE EXAMPLE

- Article 6, Copyright Act Côte d'Ivoire

- “les œuvres du folklore”

- les œuvres picturales, les dessins, les lithographies, les gravures à eau forte, sur bois et autres du même genre;

- les sculptures de toutes sortes;

- les tapisseries et les objets créés par les métiers artistiques et les arts appliqués, aussi bien les croquis ou modèles que l'œuvre elle-même;

- les cartes, ainsi que les dessins et les reproductions graphiques, plastiques, de nature scientifique ou technique;
SUBJECT MATTER: CÔTE D’IVOIRE
EXAMPLE

- Article 7, Copyright Act Côte d’Ivoire

- Sont protégés comme des œuvres originales, sans préjudice des droits de l’auteur de l’œuvre originale:
  - (3) les œuvres inspirées du folklore.
Article 8, Copyright Act Côte d’Ivoire

Le folklore appartient à un titre originaire au patrimoine national. Aux fins de la présente loi:

- le folklore s’entend de l’ensemble des productions littéraires et artistiques, transmises de génération en génération, faisant partie du patrimoine culturel traditionnel ivoirien dont l’identité de l’auteur est inconnue, mais pour lesquelles il y a tout lieu de présumer que cet auteur est un ressortissant de Côte d’Ivoire;

- l’œuvre inspirée du folklore s’entend de toute œuvre composée à partir d’éléments empruntés au patrimoine culturel traditionnel ivoirien;
…all literary and artistic productions

…trans-generational (transmises de génération en génération,)

…cultural heritage (patrimoine national)

….any work composed of elements borrowed from the Ivorian traditional cultural heritage (patrimoine culturel traditionnel ivoirien)
COPYRIGHT - CRITERION OF PROTECTION
CÔTE D’IVOIRE EXAMPLE

- Originality

- Le titre d’une œuvre de l’esprit est protégé comme l’œuvre elle-même dès lors qu’il présente un caractère original.

- Adaptations

- Sont protégés comme des œuvres originales, sans préjudice des droits de l’auteur de l’œuvre originale:

  - les traductions, adaptations, arrangements d’œuvres littéraires, musicales, artistiques ou scientifique;
ORIGINALITY: FRANCE EXAMPLE

- Not expressed in Code, but doctrine

- A work is original if the work reflects

  - the “stamp of the author’s personality” - l’empreinte de la personnalité d’auteur

  - “personal imprint” - empreinte personnelle

  - “personal vision” - vision personnelle

  - “individual temperament and style of the author” - tempérament individuel et le style de l'auteur

  - “expression of the author’s personality” - expression de la personnalité de l'auteur
ORIGINALLITY - ADAPTATIONS
FRENCH EXAMPLE

- Crystal Figures case (Paris Cour D’Appel)
- Four animal figures made from crystal
- Held these particular works to be protectable
- Dismissed argument that the idea of producing animal figures from crystal had existed for more than 150 years
- **Decisive factor**: highly individualistic works, with a hand-polished finish which succeeded in giving these animal figures an appearance which was attractive and luxurious, as well as a characteristic appearance which represented the expression of an intellectual creation.

- Adaptations and derivative works, which borrow from a pre-existing work, can be protected, if the works exhibit the author’s individuality or stamp of personality
COPYRIGHT: BENEFICIARIES OF PROTECTION
CÔTE D’IVOIRE EXAMPLE

- Who is the author? Disclosure of author
  - “Le ou les auteurs d’une œuvre sont, sauf preuve du contraire, celui ou ceux sous le nom ou le pseudonyme desquels l’œuvre est divulguée.”

- Individual or community

- Sovereign country? Patrimoine national?

- Unknown authors?
  - “…….dont l’identité de l’auteur est inconnue, mais pour lesquelles il y a tout lieu de présumer que cet auteur est un ressortissant de Côte d’Ivoire”
BENEFICIARIES: AUSTRALIAN CASE STUDIES

- Who is the real owner of indigenous/tribal art work?
- What is the basis of copyright law protect?
- Duration of rights?
AUSTRALIAN CASE STUDY 1: TERRY YUMBULULUL V RESERVE BANK OF AUSTRALIA (1991)

- Morning Star Pole - Sculpture?
- Morning Star poles are used in ceremonies commemorating the deaths of particular individuals, and link the spirits of the dead to their ancestral home. Poles are painted with sacred designs - which artists are allowed to paint after a secret initiation ceremony.
- Artist given permission to create and display poles for cultural and educational purposes, and to receive any associated income.
AUSTRALIAN CASE STUDY 1: TERRY YUMBULULUL V RESERVE BANK OF AUSTRALIA (1991)

- Commemorative Banknote to recognise 1988 bicentenary of English occupation
- Pole was commissioned by an art dealer and sold to the Australian Museum.
- Yumbululul signed licence agreement allowing reproduction of work “by mechanical reproduction throughout the world and to licence others to do so” for 85% royalties
- Dispute as to Y’s understanding of contract
- Banknote was printed
RESERVE BANK OF AUSTRALIA’S COMMEMORATIVE $10 NOTE
AUSTRALIAN CASE STUDY 1: TERRY YUMBULULUL V RESERVE BANK OF AUSTRALIA (1991)

- Yumbulul regarded as sole owner of copyright in the work
- Assumed to have signed contract willingly and with knowledge of consequences, as was advised by Aboriginal Artists Agency
- Community criticised his exploitation, whilst court criticised the agency’s failure to protect community
“There was evidence that Mr. Yumbulul came under considerable criticism from within the Aboriginal community for permitting the reproduction of the pole by the bank.

It may well be that when he executed the agreement he did not fully appreciate the implications of what he was doing in terms of his own cultural obligations ...

And it may also be that Australia’s copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin.”
CASE STUDY 1: TERRY YUMBULUL V RESERVE BANK OF AUSTRALIA (1991) CRITIQUE

- Artist was surprised and dismayed by what happened to his work. What things occurred that he had not foreseen?

- Whose responsibility is it to ensure that works of cultural heritage are treated with respect?

- How can copyright law help?
AUSTRALIAN CASE STUDY 2: BULUN
BULUN V R&T TEXTILES (1998)

- Magpie Geese and Water Lilies at Waterhole
- Bark painting depicting ancient and cultural aboriginal site
- Unauthorised reproduction as textile pattern
“Whilst it is superficially attractive to postulate that the common law should recognise communal title, it would be contrary to established legal principle for the common law to do so.

There seems no reason to doubt that customary Aboriginal laws relating to the ownership of artistic works survived the introduction of the common law of England in 1788. The Aboriginal peoples did not cease to observe their sui generis system of rights and obligations upon the acquisition of sovereignty of Australia by the Crown.

The question however is whether those Aboriginal laws can create binding obligations on persons outside the relevant Aboriginal community, either through recognition of those laws by the common law, or by their capacity to found equitable rights in rem.”
AUSTRALIAN CASE STUDY 2: BULUN BULUN V R&T TEXTILES (1998)

JUDGEMENT

- Cannot recognise the tribe as communal owners
- This would mean the creation of rights in indigenous peoples which are not otherwise recognised by the legal system of Australia.
CRITIQUE

- Is this a case for moral rights?

- “….de revendiquer la paternité et de défendre l'intégrité de l'œuvre”

- “L’auteur a le droit de s’opposer à toute déformation, mutilation et autre modification de son œuvre ou à toute atteinte à la même œuvre préjudiciable à son honneur ou à sa réputation.”

- Right of integrity: this right could be useful for the copyright owner of the material if there is culturally inappropriate usage of a work

- Right of attribution: this right could be used to ensure that works of indigenous authors are properly referenced when the work is reproduced by others
any use of the traditional cultural expressions or adaptation thereof which does not acknowledge in an appropriate way the indigenous peoples and communities and traditional and other cultural communities or the nation as the source or owner of the traditional cultural expressions, except where omission is dictated by the manner of the use
any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions, done in order to cause harm thereto or any action that may be prejudicial to the expressions, that would offend against or would damage the reputation, customary values or cultural identity or integrity of the community to the reputation or image of the community, indigenous peoples and communities or region or nation to which they belong or any action that may be prejudicial to the expressions that would offend against or would damage the reputation, customary values or cultural identity or integrity of the community.
“...endure for as long as the traditional cultural expressions continue to meet the criteria for protection”

“...in so far as secret TCEs/ are concerned, their protection as such shall endure for so long as they remain secret”

“the protection granted to TCEs against any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the community, indigenous peoples and communities or region to which they belong, shall last indefinitely.”
MORAL RIGHTS - BEST WAY?
FRANCE EXAMPLE

- *Société Valterre v. Roubakineh (CA Paris, February 11, 2004,)*

- Plaintiff "re-created" the garden features of Le Nôtre - 18th century landscaper

- Protected as work had originality i.e. artist "expressing his art, his savoir-faire and his creative imagination”

- Defendants claimed to have infringed the plaintiff’s moral rights by taking a photograph of the plaintiff’s re-created garden without his permission

- Plea that the author’s right passed to the present owners of the land was rejected by the Court: “the incorporeal property attaching to author’s right was not to be confused with the real property elements.”
THE END