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Oral transmission in traditional cultural expressions, and the challenge of their protection from intellectual property rights

La transmisión oral en las expresiones culturales tradicionales y el reto que supone su protección desde la propiedad intelectual

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RESUMEN

Palabras clave:

Expresiones culturales tradicionales; Tradición oral; Protección del conocimiento tradicional; Derecho de autor; Propiedad intelectual.

En el presente artículo se analiza la situación jurídica de la transmisión oral en las expresiones culturales tradicionales que, debiendo ser protegidas como obras, no cuentan con la cobertura que el derecho de autor les otorga a las creaciones de la mente humana, por no cumplir con el principio de fijación. Para abordar esta cuestión, se recurre a una metodología de análisis documental con un enfoque socio-jurídico, tras recopilar información relevante en este ámbito como doctrina jurídica-especializada, normas y jurisprudencia, a partir de un mapa temático con las principales tendencias en la materia. Como resultado, el autor apela a la relevancia de la tradición oral como vehículo de transmisión de ese conocimiento, y a la cobertura que se crea desde el Convenio 169 de 1989 de la OIT, que reconoce derechos fundamentales a los pueblos indígenas, entre estos, a su proteger su conocimiento tradicional, indistintamente de si está o no fijado o plasmado en un soporte.

ABSTRACT

Keywords:

Traditional cultural expressions; Oral tradition; Protection of traditional knowledge; Copyright; Intellectual property.

This research analyzes the legal situation of oral transmission in traditional cultural expressions. The objective of the paper focuses on the problem of Indigenous peoples not being able to protect their expressions by copyright. This legal regime requires that every creation be fixed in a medium. To address this problem, the authors use a documentary analysis methodology, supported by a socio-legal approach. This objective was achieved after collecting relevant information, such as specialized legal theory, current regulations, and jurisprudence. The authors relied on a thematic map with the main trends in the field. As a result, the article appeals to the relevance of oral tradition as a vehicle for the transmission of this knowledge, and to the coverage of ILO Convention 169 of 1989. This standard recognizes the fundamental rights of Indigenous peoples, such as the protection of their traditional knowledge, regardless of whether it is fixed or not on a medium.

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Introduction

The construction of social imaginaries constitutes a communicative act and a relevant component of traditional cultural expressions, which come from indigenous peoples and ethnic communities. Although these expressions can be equated with works protected by copyright, in practice they carry a differential connotation because oral transmission is the main vehicle of transmission, which means that they are not embodied or fixed in a medium, as required by copyright.

And although the copyright regime acquires relevance to encourage the creation and dissemination of culture by protecting the effort made by authors and owners in the creation of works, the protection granted by copyright to that which is not embodied in a medium is a complex issue that is the subject of debate in several discussion scenarios (Antequera Parilli, 2007; Caballero Leal, 2004). One of these scenarios revolves around the protection of traditional cultural expressions, which include stories, myths, legends, recipes and, in general, creations of the human mind that should nevertheless be protected as intellectual property.

To address this issue and meet the proposed objective, a documentary analysis methodology with a socio-legal approach was used, after collecting relevant information in databases such as Scopus, EBSCO and Web of Science, among others, in addition to books resulting from research, studies and reports, standards and jurisprudence. This was possible thanks to the ATLAS.ti tool, from which it was possible to establish a map with the main trends in these areas.

As a result, we appeal to the relevance of oral tradition as a vehicle for the transmission of this knowledge, and to the coverage created by Convention 169 of 1989 of the International Labor Organization (ILO) on the rights of indigenous and tribal peoples, which recognizes the fundamental

rights of indigenous peoples, including the right to protect their traditional knowledge.

The results presented in this article are divided into several sections. In the first, a preliminary approach to oral traditions is made. Next, the copyright regime and its relevance in the creative process are contextualized. Thirdly, the principle of fixation of works is studied. Finally, some reflections on the situation of traditional cultural expressions and the challenges posed by their oral transmission are presented, before arriving at the discussion section where some reflections are put forward as a final contribution.

In this sense, it is concluded that by protecting this intellectual property, regardless of whether or not it is embodied in a medium, that is, without following the logic of the principle of fixation of works established by the classic copyright regime, all the cultural wealth that indigenous peoples and ethnic communities have developed since ancestral times, transmitted from generation to generation, will be preserved, and is today a very important legacy for the human species.

Methodology

In order to meet the proposed objective, an exploration of relevant information in these areas was carried out through a documentary analysis methodology, including articles in scientific journals indexed in databases such as Scopus, EBSCO and Web of Science, among others, as well as books resulting from research in online bibliographic catalogs and library systems. Keywords such as 'traditional cultural expressions', 'protection of traditional knowledge', 'oral traditions', 'copyright' and 'rights of indigenous peoples', among others, were used.

These keywords were characterized and profiled using the ATLAS.ti tool, establishing the main trends that have been addressed over the last three decades on the topics developed in this article.

This was done following the documentary analysis approach proposed by Clausó (1993).

Since the results were not sufficiently extensive for the construction of the documentary analysis framework, the search in the aforementioned databases was extended with key words in other languages, and a greater volume of information was compiled, mainly in publications available in English. In addition to the above, the search was extended to reports and studies by public and private entities, norms and jurisprudence.

Based on the above, it was possible to gather relevant information on the different approaches to traditional knowledge, and particularly to traditional cultural expressions, from the problems in their identification and recognition, to the main debates on intellectual property. Thanks to this, the basis for the discussion was laid, where some reflections are presented as a socio-legal approach, before the conclusions section.

Results

Oral traditions: a first approach

As society advances, the oral tradition and its technique have been losing social value, since new communicative evolutionary processes, such as writing, have been developed within them. But what about those cultures that practice orality as the only means of traditional communication? Are they considered illiterate civilizations? This is a stigma that may be erroneous, not in the words of Havelock (1996) “the natural human being is neither a writer nor a reader, but a speaker and a listener”.

Speech does not require formal learning; one learns to speak as part of a social process of growth; likewise, orality has never ceased to exist as a tool for learning or for the transmission of knowledge. In fact, human beings since childhood are exposed to different communication situations; and knowledge is closely linked to communication and the different

ways of imparting meaningful processes, whether historical or ancestral conservation (Ramírez Poloche, 2012).

When referring to ancestral conservation processes, we refer to poems, songs or traditional agricultural practices, traditional medicine, crafts and languages, among other cultural expressions and traditional knowledge. That is why, for the speaking cultures, oral tradition seems to be the only way to investigate more about themselves, that is, the social reality of a being being being (Espino, 1999).

Likewise, oral tradition has been re-signified as the memories of the past, the primitive, that which is not allowed to evolve and lacks historical preservation. This narrative has been nurtured over the years and as social processes “grow” oral cultures increase their social stigma (Rivelino García, 2023). Consequently, oral cultures are considered untruthful by many writing-speaking civilizations.

“(…) thinking communication from disinformation usually admits that communicating is an action detached from the information it communicates, basically because information is understood as an external magnitude, alien to the communicating subject, and communication as an action that manipulates that information to achieve certain effects on others: hence, also, the idea of communication as interaction is perceived as the effect or impact on the exchange of information towards others” (Romeu, 2018).

This is explained by the fact that the oral tradition can be transformed as it is told, losing important aspects or adding events. The oral technique is considered poor in lexicon, rejecting it as subjective and trivial (Carranza Patiño et al, 2021). But 'simple orality' has only one purpose 'to be understood' (Abdul Kargbo, 2008). So why do these cultures base all their development processes on oral tradition?

The answer is simple, the oral tradition allows them to preserve cultural details that writing does not succeed in framing, one of them is the non-verbal in orality. This non-verbal language is the process of communication in which there is a sending and receiving of messages through gestures and movements. Such gestures and movements correspond to a different cultural space-time (Ortega Cobo & Giraldo Paredes, 2019).

The construction of social imaginaries that exist around the oral communicative act has not allowed us to detail in depth that orality is loaded with a myriad of edges such as language, accent and historical context (Ngulube, 2002). It is these aspects that allow us to differentiate factors such as Where are we speaking from or are we speaking from? and Where are we speaking to?

Thus, the spoken word occurs as a means of preservation of the different cultural collections through the transmission of their ethnic processes. In this sense Havelock (1996) insists that “writing, at any stage of its development, is an adventitious phenomenon, an artificial exercise, a work of culture and not of nature, imposed on the natural man” (p. 37).

Even as thinking beings, before writing something we think it; and we think it because we communicate; and in turn we communicate because language exists. Montemayor (1996) states that “orality comprises the art of language as the transmission of understanding, oral communication as a form of relationship and speech as the dialogic capacity for socialization” (p. 120), since the orality of peoples is the expression of their cultural heritage.

Copyright and its relevance in the creative process

Intellectual property as a legal discipline encompasses the protection of works, inventions, utility models, distinctive signs and even plant varieties, among other products and processes,

which are born of the creative spirit and ingenuity of human beings. This is achieved from the exclusivity granted through the recognition of both moral and patrimonial rights, for a certain period of time and after certain requirements for their protection.

Within the universe of intangible assets articulated from intellectual property, there are different categories of rights which are recognized according to the type of creation, distinctive sign, product or process. This is the case of works, which are protected by copyright, and are understood as any manifestation that, being original, is born from the creative spirit of the human mind and is embodied in a tangible or intangible medium.

This category includes literary, artistic, audiovisual, phonographic, architectural and software works, among many others. Examples include short stories, textbooks such as novels, manuals or treatises, as well as films, series, songs, lyrics, sculptures, architectural plans, paintings, computer programs, photographs, compilations of food recipes, etc. (Saiz García, 2000).

Regarding originality, it is a presupposition or quality that the work acquires by maintaining its own uniqueness, that is, that it is not a reproduction or simulation of another work (Rodríguez, 2022). So it happens with those works that derive from an original work created for the first time -also called original work- there are works that arise as a result or interpretation of this, and which are called derivative works (Cavero Safra, 2015).

To the above, the existing connection between the work and the author, and its creative vocation must be considered, far from any industrial application or purely productive vocation, in which case other intellectual property rights such as patents on inventions and utility models or industrial designs could be considered (see Rodríguez López, 2012; Andean Community, Decision 486 of 2000).

Copyright is regulated in Colombia by norms of domestic, international and supranational law, including Law 23 of 1982, the Berne Convention of 1886 and Decision 351 of 1993 of the Andean Community, the latter being the most important norm. These norms recognize moral and economic rights, in favor of authors and owners. The former, as creators of the works, and the latter as those entitled to exploit them economically.

The time of protection recognized in Colombia in favor of the owners of the works, that is, the duration of the economic rights of authors, presents two variations. In the first place, 70 years counted from the moment the work is embodied, fixed, created or disclosed -provided that these rights have not been transferred to a third party-, and secondly, 80 years, counted from the author's death, if the economic rights were not transferred during the author's lifetime. In the field of moral rights, the protection period is indefinite in time, being inalienable, unrenounceable, imprescriptible and unseizable.

Furthermore, the copyright regime is important to encourage the creation and dissemination of culture. This, by safeguarding the investment in time, effort and even economic investment made by authors in the creation of their works, as well as by the owners in their dissemination, which stimulates innovation. Moreover, with the remuneration received for the use of their works, all the actors in the process of creation of works can make a living from their work and continue to contribute to creation.

The principle of fixation of works

Copyright protects the form in which ideas are expressed, regardless of the medium on which they are expressed, be it a canvas, a book, an audiovisual recording or a data message. In this same sense, it should be specified that neither ideas nor facts are protected, since as indicated what is safeguarded is their fixation in a tangible or intangible support, that

is, the form in which the author expresses these ideas or facts (Timal López & Sánchez Espinoza, 2017).

This is the case of the work *Relato de un naufrago* by Gabriel García Márquez, which arose from some facts related to the author by the sailor Luis Alejandro Velasco, who was shipwrecked and was adrift for several days until he was rescued. His story, which was compiled in the newspaper *El Espectador* with García Márquez's prose, was republished years later in a book. Although Velasco sued the writer for the ownership and royalties of the literary work, the court ruled in favor of the writer, emphasizing the principle according to which the form used by the author to express his idea and make it perceptible to the sensory senses of third parties is protected.

The principle of fixation indicates that the work must be embodied in some tangible or intangible support, in the latter scenario are, for example, data or phonographic or audiovisual works fixed in electronic media (Antequera Parilli, 2007). In either case, works are protected immediately, without the need for registration, provided they comply with the criterion or principle of fixation.

The protection granted by copyright to that which is not embodied in a medium is a complex issue that has been the subject of debate for many years. Authors such as Vargas-Chaves & Dermer-Wodnický (2024) argue that what is not fixed -especially traditional knowledge- should be protected by this regime to prevent ideas or facts from being exploited by third parties without the consent of the creator. Other authors, including Caballero Leal (2004) and Antequera Parilli (2007), argue that the protection of ideas by copyright would be too restrictive and would inhibit creativity.

In both cases, current copyright legislation only admits as works subject to protection those creations or ideas that are fixed in a tangible or intangible medium (Pabón Cadavid, 2009). Thus, for example, the idea of writing a trilogy such as the script of the

movie *The Godfather*, as well as the books, was not protected per se, as Mario Puzo's work was covered by this regime.

The reason for the distinction made in this respect by the legal system is that ideas are, by nature, abstract and cannot be protected; however, as will be discussed below, this is not necessarily the case of traditional cultural expressions, whose main characteristic is oral transmission from generation to generation.

In this sense, legends and myths, narratives about facts, recipes, songs, instructions or guides in ceremonies and rituals associated with the worldview of an indigenous people or ethnic community, and, in general any traditional knowledge that may resemble a work protected by copyright from its classical conception, can be enlisted as traditional cultural expressions -and also as works- (Vargas-Chaves et al, 2018).

To conclude this section, it is valid to insist that the principle of fixation is a cardinal axis of copyright, and a sine qua non condition for the protection of creations, as long as they manage to be fixed or embodied in a tangible or intangible support. This, even without the need to register them, since protection is given automatically from the moment they are created.

Understanding traditional cultural expressions and their scope

Traditional cultural expressions are a type of traditional knowledge comparable to works protected by copyright, and which is the product of the creative activity of indigenous peoples and ethnic communities, who assume a role as guardians of a millenary culture that has been transmitted from generation to generation (Vargas-Chaves et al, 2020). Their culture and worldview, which includes their traditions, customs and artistic expressions, which make up these traditional cultural expressions, are an invaluable wealth for humanity.

Traditional cultural expressions are works, whose form of expression represents their identity, and is independent of the medium where they are embodied or fixed, and can be transmitted orally, such as stories and harmonic and musical compositions (Mauro & Hardison, 2000). Through these expressions, ethnic groups transmit their values, their legacy and history, and can even do so visually - in this second case with a support where they are fixed - for example through paintings, ceramics and handicrafts.

The importance that international law has given to traditional cultural expressions and, in general, to the traditional knowledge of indigenous peoples is unquestionable. ILO Convention 169 of 1989 on the rights of indigenous and tribal peoples recognizes the fundamental right that these have over the whole set of uses, customs, practices, techniques, etc. This right translates into a perpetual ownership and the enforceability of prior consultation for access to any traditional knowledge.

In the Colombian scenario, when the aforementioned Convention was integrated into the constitutional block, the rights recognized therein were categorized as fundamental rights of indigenous peoples. It is even possible to cite some cases of national transcendence, where the violation of one or more rights has unleashed important strategic litigation.

For example, the Constitutional Court in Decision C-1051 of 2012 declared unconstitutional the law approving the 1991 Act of the Convention of the International Union for the Protection of New Varieties of Plants, after concluding that the right to prior consultation was violated, since the provisions of this Convention would affect the territory, way of life and traditional knowledge of indigenous peoples in Colombia (Vargas Chaves et al, 2023).

We must not lose sight of the fact that all the traditional knowledge of indigenous peoples is essential to maintain their identity and culture

(Chaudhuri, 2015). Traditional cultural expressions and what they represent are an inexhaustible source of knowledge and ancestral wisdom (Seminario et al, 2020); or at least they have been since human beings learned to communicate with each other, being able to transmit not only their ideas, emotions or needs, but also their knowledge about the surrounding environment, agriculture and traditional medical practices.

In turn, the oral tradition as a vehicle for the transmission of this knowledge -especially non-visual traditional knowledge- informs through rituals and proxemics, which allow ethnic groups to maintain their roots. Orality and its phonetic component as part of traditional cultural expressions, although not necessarily embodied in a medium as required by copyright to protect them as works, continues to be a legal interest protected by the State, under the terms of the aforementioned ILO Convention 169 of 1989.

“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge, traditional cultural expressions and manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games, and visual and performing arts”. (ILO, Convention 169 of 1989)

Thus, orality, as the main channel of transmission of traditional non-visual cultural expressions, acquires a cardinal role in the field of intellectual property over traditional knowledge (Wongburanavart, 2023). By protecting this intellectual property, regardless of whether or not it is embodied in a medium, that is, without following the logic of the principle of fixation of works, all the cultural wealth that indigenous peoples and ethnic communities have developed over generations, and which are a legacy for humanity, will be preserved.

Discussion

Cultures with strong roots in oral tradition rely on this form of knowledge transmission as a means of preserving memory and history. In this context, folk phonetics acquires an important role as a cultural expression by encompassing creations in the fields of poetry, lyrics, tales, etc. Within this phonetics we find rhythm, harmony and everything that surrounds a cultural expression.

It is not in vain that the expressions that are embodied in a medium turn out to be only meaning, but often without meaning. In the words of Olañeta (1998) “in the course of the story, the storyteller not only unites several lexical themes in a single word, but sometimes uses them as interactive elements to attract the attention of the audience and make them participate in the process” (p. 4). Giving scope to this idea, the play or constructive work around words would then consist in transforming the phonetic unit into the grammatical fact (Bakánova, 2014).

For Ferdinand De Saussure, support and expression -understood as signifier- are part of the same structure of the sign. In his own terms “The signifier is the material form that a sign takes, being able to be from a word (spelling) or a visual image, to a sound; acquiring meaning at the level of the symbolic, that is, when it becomes meaningful in a specific linguistic context, being able even to be cultural” (De Saussure, 1998, p. 56).

By way of illustration, if we could travel back in time to Ancient Rome and refer to “telephone”, surely no inhabitant would know what that term refers to, since it is not possible to associate the image of a telephone with its acoustic image or representation. Meaning is the mental content that is given to a linguistic sign and that is associated with the sound -or with the acoustic image, following the term used by Saussure himself-, which refers to the mental image that each person has when he/she hears the sound emission of a word (Starobinsky, 1996).

It is this sound emission, which allows to place a traditional cultural expression in an appropriate space-time and even to fill with value a story, myth or legend, within the framework of the linguistic sign. In the end, the meaning could vary according to the social or cultural context. For example, one could say 'Tree' and give it a meaning as vegetable matter and compact structure that constitutes the plant kingdom, but what if that tree is also found in a sacred environment? Then it could acquire other cultural meanings for a people or community.

To give scope to the above, with some examples that are compiled by James Frazer, in the Siau Island in Indonesia the inhabitants conceive the trees as 'containers' or 'abodes' of spirits that come out of there to accompany them in times of harvest or in some rituals. On the African continent, some peoples believe that each tree is a spirit, and in the case of the 'Cocos Nucifera' palm, it is conceived as a mother, so that the mere fact of cutting down a specimen can be considered matricide (Frazer, 1951).

The same happens with traditional cultural expressions that are composed only of words, and in a context of oral tradition are accompanied by their own cultural and social meanings. In this case, both the support where the expressions are fixed and the fixation become secondary, since orality becomes the vehicle of those meanings, in addition to rhythm, harmony and everything that a cultural expression has.

In this sense, despite the fact that traditional cultural expressions as traditional knowledge are comparable to works protected by copyright, they cannot and should not be subject to its dynamics and protection regime. Assuming that patrimonial rights have a defined protection time, which may be 70 or 80 years as in the case of copyright, would imply leaving a millenary culture that has been protected by ethnic groups to the public domain, at the mercy of cultural piracy.

But beyond the considerations of economic exploitation of traditional cultural expressions, by conceiving the principle of copyright fixation as a principle extensible to this traditional knowledge, it would disregard orality as the main vehicle of expression and representation of their identity; which is independent of the support where a cultural expression is embodied or fixed.

Stories, tales, myths, legends, recipes, knowledge, practices, harmonic and musical compositions, among other expressions, are the product of the creative activity of indigenous peoples and ethnic communities, and are also the legacy of cultures that have been transmitted from generation to generation. They are, in other words, an invaluable wealth for humanity.

For all of the above, it is hardly understandable that cultural expressions and traditional knowledge in general are protected on the basis of the autonomy that indigenous peoples have to oppose any act that entails unauthorized exploitation of this intellectual property. It is also clear that prior consultation as a fundamental right becomes the only mechanism of access to traditional cultural expressions, where they can express their prior, informed and free consent, according to their customs, forms of government and decision-making.

As a preliminary conclusion, thanks to the binding nature in the Colombian legal system of ILO Convention 169 of 1989, which, as already indicated, is part of the constitutional block, indigenous peoples and ethnic communities may fully decide on the access, use and economic exploitation of their techniques, practices, customs, expressions and ancestral knowledge. This translates into a perpetual ownership and the unseizable and inalienable right of dominion over this type of intellectual property, which acquires a differential connotation with respect to the creations and inventions developed in other areas.

Conclusions

The oral tradition makes it possible to preserve cultural details that writing or the visual component does not manage to frame. This is accompanied by the non-verbal component in orality as part of the communication process, in which there is a sending and receiving of a message that corresponds to a cultural space-time of its own, which can only be understood from the worldview of an indigenous people or ethnic community.

Therefore, the construction of social imaginaries that exist around the oral communicative act constitutes a very important component of traditional cultural expressions, which can be equated with works protected by copyright such as books, songs, stories, sculptures or paintings, among others, but which, due to their particular characterization from the oral tradition, transcend this field. Thus, the spoken word occurs as a means of preservation of the different cultural assets through the transmission of their ethnic processes.

In addition, as was pointed out above, the copyright regime acquires relevance to encourage the creation and dissemination of culture by protecting the efforts made by authors and owners in the creation of works, but with a requirement that is not met by all traditional cultural expressions, namely fixation. For a work to be protected by copyright, it must be fixed or embodied in a medium, otherwise it would be considered as an idea excluded from this regime.

Copyright protects the form in which ideas are expressed, regardless of the medium in which they are expressed, whether it is a canvas, a book, an audiovisual recording, or a data message. In the same sense, the protection granted by copyright to that which is not embodied in a medium is a complex issue that has been the subject of debate for many years.

The problem, then, that must be solved is: What happens with the oral transmission of traditional

cultural expressions that, although they should be protected as works, prevent copyright from covering them because they do not comply with the principle of fixation? To answer this question, we appeal to the relevance of oral tradition as a vehicle for the transmission of this knowledge, for example through rituals and proxemics, which allow ethnic groups to maintain their roots. And it is in this rootedness that the law must dissociate traditional cultural expressions from the classical copyright regime.

Orality and its phonetic component as part of traditional cultural expressions, although not necessarily embodied in a medium as would be required by copyright to protect them as works, continues to be a legal interest protected by the State. This is possible thanks to the binding nature of ILO Convention 169 of 1989 on the rights of indigenous and tribal peoples, which is part of the constitutional block, and recognizes fundamental rights of indigenous peoples, among these, to protect their traditional knowledge and to demand prior consultation in its access by third parties.

With a *sui generis* intellectual property regime on traditional knowledge recognized from this norm, cultural expressions are recognized in favor of the communities that generate them, claiming a perpetual ownership and an inalienable, imprescriptible and unseizable right of dominion. It is also recognized that, following their own customs and rules within the framework of their autonomy and self-determination, they may fully decide on the access, use and economic exploitation of these expressions.

By protecting this intellectual property, regardless of whether or not it is embodied in a medium, that is, without following the logic of the principle of fixation of works established by the classic copyright regime, all the cultural wealth that indigenous peoples and ethnic communities have developed since ancestral times, have transmitted from generation to generation, and are today a very

important legacy for the human species, will be preserved.

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