PROTECTING INTANGIBLE CULTURAL HERITAGE THROUGH INTELLECTUAL PROPERTY A CHALLENGE FOR IP CLASSIC TOOLS?

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1.- The intersection between Intellectual Property (IP) and Intangible Cultural Heritage (ICH) has been always controversial. It is not a surprise that authorized voices focus this relationship in terms of unavoidable, permanent and irresoluble conflict. Apparently, there is no way to make them playing together.

> "Applying intellectual property rights with the current legislative framework is not satisfactory when dealing with intangible cultural heritage. Main difficulties are related to its evolving and shared nature as well as to the fact that it is often owned collectively. Indeed, as intangible cultural heritage evolves thanks to its continuous recreation by the communities and groups that bear and practice it, protecting a specific manifestation like the performance of a dance, the recorded interpretation of a song or the patented use of a medicinal plant may lead to freezing this intangible cultural heritage and hinder its natural evolution"[1].

Is that all? Should we resign ourselves and conclude that both institutions have a radical different background and ignore each other completely? This contribution, which renders homage to Michel Vivant, one of

1. UNESCO Web site, Intangible Heritage, Frequently Asked Questions, [http://www.unesco.org/culture/ich/index.php?lg=en&pg=00021].

the most recognized academic builders of the science known as Intellectual Property in the last half century, proposes a different perspective: by challenging IP classic tools it is possible to effectively protect ICH through IP. But in order to arrive to such a conclusion it is imperative to understand that the relationship between both institutions is vertical, not horizontal: what is really at stake is not how IP relates with ICH, but rather to ascertain how IP tools can contribute to a better protection of ICH.

I. – ICH AND IP: A BATTLEFIELD

2.- ICH, Traditional Knowledge (TK), Traditional Cultural Expressions/Folklore (TCE), Cultural Traditions (CT), Genetic Resources (GR)… are all expressions that we use more and more in our daily life without having a clear understanding of their meaning. Around them, different legal regimes aim to safeguard and protect their different manifestations all over the world.

Two specialized international organizations, WIPO and UNESCO, prioritize the matter year after year in their agendas, although focusing in very different objectives: so, while WIPO concentrates in the protection of TCE/Folklore, TK and GR through IP old or — to be developed — new tools[2], UNESCO emphasizes the safeguarding of ICH aspects[3]. How to interrelate and coordinate both objectives — protection and safeguarding — and how to align both subject matters — TCE, TK and GR on the one side, ICH on the other — are controversial issues both in doctrine and in practice.

3.- As discussed below, ICH is much more vulnerable than Tangible Cultural Heritage (TCH) to the radical changes caused by the globalization process. On the other hand, when dealing with ICH the role of communities — defined as groups of people with a "shared history, shared experience, shared practice, shared knowledge, shared values"[4] — is also much more crucial than in the case of TCH. Consequently, if in many cases the IP rights related to ICH should be attributed to the communities

2. The Intergovernmental Committee (ICG) on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore celebrated its 40 Session from June 17 to June 21, 2019.

3. From 26 November to 1 December 2018 representatives from over 120 countries gathered for the Thirteen Session of the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage (see [http://www.ich.unesco.org]).

4. *Vid.* D. B. N'Diaye, "Community in the Context of UNESCO's Convention on Intangible Cultural Heritage", Paper presented at the UNESCO-ACCU Expert meeting on Community involvement in Safeguarding Intangible Cultural Heritage: Towards the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage, Tokyo, 13-15 March 2006 [http://unesdoc.unesco.org/images/0014/001459/145919e.pdf].

and not to the individuals, our "individualistic" IP systems have severe difficulties to tolerate this situation. As UNESCO clearly recalls,

> "Moreover, as the communities are the ones who create, maintain and transmit intangible cultural heritage, it is difficult to determine the collective owner of such heritage"[5].

4.- The new global society has visible contradictory effects on the complex world of the intangible heritage. On the one hand, the standardization of practices worldwide keeps youth more and more out of their traditions and the risk of simply disappearance for lack of interest is today greater than ever. But on the other hand, these practices have much more possibilities to be known and recollected, increasing therefore the awareness and the need of encouraging their preservation. What is more important: the massive recording and diffusion of creative works through internet has completely reschedule the role of IP as the main tool devoted to encourage creativity, competitiveness and development.

Just combine all these elements and the cocktail is served… Imagine a traditional song which has served as a source of "inspiration" to someone not belonging to the affected community, imagine someone obtaining a patent on a medicinal product after having observed their effects in a given community, imagine someone registering a trademark or a design corresponding to a name or to a distinctive sign or drawing used since centuries by a group… Basic questions related to authorship, control over its diffusion and reproduction, ownership or even enjoyment of benefits appear in the horizon. If the result is systematically the enrichment of the "pirate" and the "impoverishment" of the community or the group, it is obvious that something is wrong with the system. And it is under this perspective that the high degree of skepticism showed by the communities should be understood, specially the indigenous communities, around classic IP tools[6].

5.- Reading the lapidary sentences included in the website of UNESCO one can conclude that what is at stake is just a war: protection of IP and safeguarding of ICH are at odds. So, in a nutshell: a) traditional opposes to innovative or creative; b) shared opposes to exclusive; c) passed openly from generation to generation opposes to limited in time; d) evolution depending on the environment opposes to fixing the state of the art; e) contribution to social cohesion and encouragement of a sense of identity opposes to tool for innovation and competitiveness; f) not measured by its exceptional or economical value but by its preservation and maintenance

5. UNESCO Web site, Intangible Heritage, Frequently Asked Questions, [http://www.unesco.org/culture/ich/index.php?lg=en&pg=00021].

6. This vision corresponds to the understanding — well spread out in non industrialized countries — that IP serves primarily to protect investors rather than creators. *Vid.* S. Sell and C. May, "Moments in Law: Contestation and Settlement in the History of Intellectual Property", *Review of International Political Economy* 2001, vol. 8, p. 467 s.

of culture opposes to economic value measurement; g) driving on its basis in communities opposes to individual assignment; h) recognized by a given community opposes to external recognition; i) living expressions inherited opposes to complete novelty; j) relevance put on the wealth of knowledge and skills that are transmitted through it from one generation to the next opposes to relevance put on the manifestation itself (sign, industrial applicability of a patent, CDRom in copyright); k) generally orally transmitted opposes to putting the emphasis in the material form; l) transmission based on a series of cultural qualifications opposes to freely transmission and assignment, m) tool for everybody opposes to tool for some; n) collectively ownership — if such an ownership exists — opposes to personal property… All in all, ICH elements are constantly evolving and recreated in a complete impressionistic way by communities and groups that practice them. Simply using copyright or patent tools, for instance, for protecting a specific manifestation of an ICH — a medicinal plant, a song, a dance, a festivity — has the risk of freezing its natural evolution and denaturalize it completely. It is, therefore, difficult to find two things which looks at first instance more different: ICH and IP.

6.- It is obvious that there is a lack of consensus on how to legally protect ICH all over the world, very especially how to get an efficient use of IP tools. Apart from the main problem regarding the consideration or not of the community as the owner of the ICH, there is a lack of international agreements dealing specifically with the matter. WIPO is trying to arrive to some common understanding on the basis of a new *sui generis* right, and there are reasonable hope that the attempt will see "tangible" results in the next years. On the other hand, communities spread over several States or spread all over the world risk to be faced to different IP laws as each jurisdiction will apply "national treatment" according to art. 5.1 of the Berne Convention.

7.- Finally, it is important to note that the worldwide characterization of the problem — all sort of ICH anywhere in the world need to be safeguarded — becomes a problem in itself. And becomes a problem because what is behind the safeguarding is very different depending on the place: so, what in our western world is most of the times something more related to pride and avoiding deterioration, in indigenous cultures is just a matter of survival. Safeguarding for pride and safeguarding for survival are different concepts and should not be dealt with as a single matter.

II. – **ICH VERSUS IP:**
CHANGING THE STARTING POINT

8.- While the abovementioned statements are true, I am convinced that the comparison cannot be established under these terms. And this is so because both institutions should not be understood at the same level and

within a horizontal framework. The relationship between both should be vertical, not horizontal, and the starting point should not be IP but ICH. IP is not more — and not less — than a number of tools which are put at the disposal of a certain number of objectives, which in this case could be summarize as "the growing process of safeguarding and protecting intangible cultural heritage". It is only after having understood what ICH is and why it is essential to safeguard it and to protect it that we can properly focus the matter on how IP can be used — if any — to foster such protection. Consequently, safeguarding ICH and using wisely IP protection can be not only compatible but rather indispensable tools for keeping this heritage alive and for properly transmit it to the new generations. The question, therefore, is to try to identify the new role that IP principles and systems can play in the protection of ICH from misappropriation[7].

9.- If the cornerstone should be ICH and not IP, it is essential to define clearly the meaning of the expression "cultural heritage". As it is well known, the expression "cultural heritage" in international conventions has its roots in the need of protecting cultural property after the Second World War. The Convention of May 14, 1954, for the Protection of Cultural Property in the Event of Armed Conflict[8], defined the meaning of "cultural property" including, amongst others, "movable or immovable property of great importance to the cultural heritage of every people"[9]. Some years late, the progressive opening of physical national borders justified the Convention of November 14, 1970, on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property[10]. All in all, the apparent complexity of the expression

7. A different issue, not studied in this paper, is the classic role of the IP tools — most specially, copyright — when approaching the inventorying, the digitalization, the commercialization and the commoditization of ICH elements. In fact, inventorying, recording and documenting ICH elements is generally perceived as an indispensable tool for properly safeguarding them. However, without the assistance of an efficient IP system, the whole exercise could be compared with the announcement that a huge treasure has been found in a given small island, including the friendly invitation to any interested person to come over, take it and appropriate it. If ICH is perceived in our western world as "public domain", no better way to lose it than inventorying without properly considering how can IP assure a proper protection.

8. Known as The Hague 1954 Convention, 249 United Nations Treaty Series (U.N.T.S.), 240.

9. Article 1(a) of The Hague 1954 Convention. The definition had clearly in mind only tangible assets, so movable or immovable property: monuments, archaeological sites, buildings, works of art, manuscripts, books, scientific collections and other objects, museums, libraries and centers containing monuments. As stated in the Preamble, "Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world"; and "Considering that the preservation of the cultural heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection".

10. Known as the UNESCO 1970 Convention, 823 U.N.T.S. 231: "Considering that, to avert these dangers, it is essential for every State to become increasingly alive to the moral obligations to respect its own cultural heritage and that of all nations".

"cultural property" moved part of the doctrine[11], followed by the legal practice, to use instead the expression "cultural heritage" as also covering all sorts of "cultural property".

10.- Since then, the expression "cultural heritage" has been widely used, first still referred to tangible heritage[12], and more recently including also the intangible heritage in the 2001 UNESCO Universal Declaration on Cultural Diversity[13], in the Convention of October 17, 2003, for the Safeguarding of the Intangible Cultural Heritage (The 2003 UNESCO Convention)[14], and in the Convention of October 20, 2005, on the Protection and Promotion of the Diversity of Cultural Expressions (The 2005 UNESCO Convention)[15]. No doubt the most relevant for our purposes is the 2003 UNESCO Convention.

11.- The 2003 UNESCO Convention give us precious indications for the use of expressions as "heritage" and "safeguarding". On the one hand, the term "heritage" has been always controversial, having been understood by some as the "practices which are not alive any more", while "traditions"

11. See, amongst others, L. V. Prott and P. J. O'Keefe, ""Cultural Heritage" or "Cultural Property"?", en *1 International Journal of Cultural Property*, 1992, p. 307; and S. Harding, "Value, Obligation and Cultural Heritage", 31 *Arizona State Law Journal*, 1999, p. 298.

12. See the Convention of November 16, 1972, for the Protection of the World Cultural and Natural Heritage, 1037 U.N.T.S. 151, which refers in its Article 1 "cultural heritage" to monuments, groups of buildings and sites; and the Convention of November 2, 2001, on the Protection of the Underwater Cultural Heritage, 41 *International Law Materials* (ILM) 40, which defines in its article 1(b) "Underwater cultural heritage" as "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years such as: (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context; (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and (iii) objects of prehistoric character.

13. The 2001 UNESCO Universal Declaration on Cultural Diversity (U.N. Docs. CLT-2002/WS/9, [http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html] included in its Preamble a definition of "culture" as the "set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs", definition which is in line with the conclusions of the World Conference on Cultural Policies (MONDIACULT) celebrated in Mexico City in 1982: "Culture… is… the whole complex of distinctive spiritual, material, intellectual and emotional features that characterize a society or social group. It includes not only arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs."

14. Convention of October 17, 2003, for the Safeguarding of the Intangible Cultural Heritage, U.N. Doc. MISC/2003/CLT/CH/14, available at [http://unesdoc.unesco.org/images/0013/001325/132540e.pdf].

15. Convention of October 20, 2005, on the Protection and Promotion of the Diversity of Cultural Expressions, U.N. Doc CLT-2005/CONVENTION DIVERSITE-CULT REV, available at [http://unesdoc.unesco.org/images/0014/001429/142919e.pdf]. The UNESCO 2005 Convention aims "to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner" and to "encourage dialogue among cultures" and countries (article 1.b,c).

are "practices alive"[16]. However, the 2003 UNESCO Convention only contemplates ICH "in its living form"[17], therefore assimilating ICH to "cultural traditions" such as "TK" and "TCE". In this manner, the terminology used by UNESCO and WIPO becomes compatible, while it is regrettable that both organizations did not make an effort until now to align them. On the other hand, while the term "safeguarding" is used by the Convention in a very broad sense[18], including the word "protection", I believe that this expression should refer to the use of IP tools — basically, copyright — to guarantee that the benefits of inventorying, documenting, commercializing, etc., are used to support safeguarding measures[19], but it should not include the specific IP measures aiming at protecting the ICH.

12.- At the end of the century it was obvious that both international organizations, WIPO and UNESCO, had different agendas regarding ICH[20]. While in UNESCO prevailed the concept of "safeguarding", in WIPO a strong group of developing countries claimed for a much more specific and *sui generis* protection and pushed for the establishment in September 2000 of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore with the main objective of creating a "forum for international policy debate and development of legal mechanisms and practical tools concerning the

16. See U. Kockel, "Reflexive Traditions and Heritage Production", *in* U. Kockel and M. Nic Craith (eds), *Cultural Heritages as Reflexive Traditions*, Palgrave McMillan, 2007, p. 19.
17. Art. 2.3 defines "safeguarding" of ICH as "measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage".
18. See Art. 2.3, reproduced above.
19. This would explain why Art. 3.b of the Conventions establishes that "Nothing in this Convention may be interpreted as… affecting the rights and obligations of State Parties deriving from any international instrument relating to intellectual property rights or to the use of biological and ecological resources to which they are parties".
20. It is interesting to point out that until the end of the Eighties both organizations had held a series of intergovernmental meetings which brought in 1982 to the adoption of a document called Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions [http://www.wipo.int/export/sites/www/tk/en/documents/pdf/1982-folklore-model-provisions.pdf]. Even further, in April 1997 UNESCO and WIPO managed to organize jointly the World Forum of Folklore, which was attended by some 180 participants from about 50 countries, and where many member states encouraged them to proceed together. Following that Forum, WIPO and UNESCO were asked to convene regional consultations for developing countries on protection of folklore, and several meetings took place in 1999 (*See* S. Palethorpe and S. Verhulst, *Report on the international protection of expressions of folklore under intellectual property law*, Final Report, October 2000, [http://www.colophon.be/images/Documents_pdf/FolkloreFinal_UE1.pdf]). *Vid*. an interesting study from the Australian perspective *in* M. Blakeney, "Protecting the Cultural Expressions of Indigenous Peoples under intellectual Property Law: The Australian Perspective", *in* F. W. Grosheide (ed.), *Intellectual Property Law: Articles on Cultural Expression and Indigenous Knowledge*, Antwerp, Intersentia, 2002, p. 170-171). It is evident that time has arrived to reassume this co-operation between WIPO and UNESCO.

protection of traditional knowledge… and traditional cultural expressions (folklore) against misappropriation and misuse, and the intellectual property aspects of access to and benefit-sharing in genetic resources"[21]. The expressions "TK" and "GR" have been since then used in many other contexts. For instance, a) within the framework of the proposals to allow or even to oblige Member States to introduce in their national patent legislations a clause requiring the disclosure in patent applications of TK or GR used in the inventions for which IP rights are claimed, the discussions to reform the Patent Cooperation Treaty (PCT)[22], and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)[23]; or b) also within the framework of the Convention on Biological Diversity[24], or the International Treaty on Plant Generic Resources for Food and Agriculture (ITPGR)[25].

13.- After having reviewed the international legal corpus established — or in the process of being established — during the last decades, two apparently contradictory conclusions appears. First, we have to acknowledge that the concept of ICH is very complex and there is still a lot of work to do to conceptualize it: therefore, each legal text uses the expression, or their parallels — TK or TCE — with a different meaning[26]. If achieving a common understanding of the meaning of "cultural heritage" is already something highly controversial, limiting the scope of the matter to the "intangible" create more vague boundaries. Even the boundaries between tangible and intangible are subject to continuous discussions,

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21. *Vid.* [http://www.wipo.in/tk/en]. *Vid.* the evolution of the institution *in* P. K. Yu, "Traditional Knowledge, Intellectual Property and Indigenous culture: an Introduction", in *11 Cardozo J. Int'l & Comp. L*. 2003, p. 239 s., and W. B. Wendland, "It's a Small World (After All): Some Reflections on Intellectual Property and Traditional Cultural Expressions", *in* C. B. Graber and M. Burri-Nenova (eds.), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, Edward Elgar, 2008, p. 150 s. For the progressive movement from "Folklore" to "Traditional Cultural Expressions", *vid*. R. J. Coombe, "First Nations Intangible Cultural Heritage Concerns: Prospects for Protection of Traditional Knowledge and Traditional Cultural Expressions in International Law", *in* C. Bell and R. K. Paterson, *Protection of First Nations Cultural Heritage. Laws, Policy and Reform*, UBC Press, 2009, p. 260 s.

22. WIPO, Working Group on Reform of the PCT, *Proposals by Switzerland Regarding the Declaration of the Source of Genetic Resources and Traditional Knowledge in Patent Applications*, November 19th, 2003, PCT/R/WG/5/11 Rev.1.

23. *Vid.* Communication from Brazil, China, Colombia, Cuba, India, Pakistan, Peru, Thailand and Tanzania, Doha Work Program — *The Outstanding Implementation Issue on the Relationship between the TRIPS Agreement and the Convention on Biological Diversity*, July 5th, 2006, 2 WT/GC/W/564/Rev2.

24. Convention on Biological Diversity, 1992, 1760 U.N.T.S. 79.

25. *Vid.* [http://www.planttreaty.org/texts_en.htm].

26. Sometimes including all possible manifestations of what could be considered as "intangible": so, for the 2003 Convention Intangible Cultural Heritage means "the practices, representations, expressions, knowledge, skills — as well as the instruments, objects, artefacts and cultural spaces associated therewith — that communities, groups and, in some cases, individuals recognize as part of their cultural heritage" (Art. 2.1).

until the point that many indigenous cultures having a holistic understanding of life and nature simply deny this artificial distinction.

Second, while at first sight it looks like the safeguarding approach (UNESCO: ICH) and the protecting approach (WIPO: TK, TCE/folklore, GR) have different objectives and work in a complete independent way, a deep analysis of both processes invites to follow the thesis of the complementarity. First of all, because, as discussed above, this subject matter has been little by little approached and interpreted in both cases in a broad way in order to cover the maximum spectrum. But, most of all, because other organizations have assumed the terminology and bring the different expressions together in order to obtain a specific objective. A landmark in this process is the Declaration on the Rights of Indigenous Peoples ("DRIPS"), adopted by the General Assembly of the United Nations on September 13, 2007[27], according to which "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the 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. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions" (Article 31.1). It is relevant to point out that the subject matter is common ("cultural heritage, traditional knowledge and traditional cultural expressions"), that the objectives are similar ("maintain, control, protect and develop), and that both sentences complement to each other. What is at stake is the control by indigenous peoples over developments affecting them and their lands, territories and resources, control which will allow them "to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs" (Preamble).

III. – **ICH** VERSUS **IP:**
THE POLIMATRIX PERSPECTIVE

14.- To study the tools aiming at protecting ICH presupposes the assumption that at the end the combination of matrix brings necessarily to a case by case approach where the degree of protection has to vary notably depending on numerous factors. A non-closed poli-matrix tentative could be the following:

A) Depending on the *urgency of action*, the degree of protection should be very different in these cases a) where there is a clear risk of disappearance

27. [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf]

of the ICH, b) where there is a risk of degradation, and c) where this risk does not exist at all.

B) Depending on the *source of the awareness*, it should be identified whether the survived of the community is at stake or not.

C) Depending on the *degree of development of the country/ies affected*, the differentiation between developing and developed countries has clear implications on the efficiency of the protection.

D) Depending on the *IP culture underlying the application of a given legal order*, it is not the same if this IP culture comes from a western than from a non-western environment.

E) Depending on the *degree of identification of the community* supporting a given ICH, the approach will vary notably in cases where the community is easy to identify and in cases where the community is delocalized, not concentrated or occupying a vast territory covering several countries.

F) Depending on the *relevance of the territory*, sometimes the territory is absolutely relevant and there is no way to reproduce this ICH but only the "representation of this ICH" in another place, but in many other cases the attachment to a given territory is not the essential relevant factor.

G) Depending on the *degree of maturity of the ICH*, it is possible to distinguish between those elements where measures are implemented since time ago and elements where measures are recently implemented. Experience shows that those elements belonging to the first group are much more evolved in terms of safeguarding and protecting.

H) Depending on the *physical location of the element*, the efficiency of the protection will vary in those cases whether the element is completely localized within the borders of one State and in those cases whether the community is spread out all over several States.

I) Depending on the *coherence of the community* advocating the ICH, some communities are concentrated in a concrete territory while others are completely delocalized and the territory is not a characterized sign.

J) Depending on the *application or not of the 2003 UNESCO Convention*, ICHs located in a State which applies the Convention have many more chances to have their heritage better safeguarded and protected than those concentrated on territories where the Convention does not apply yet.

K) Depending on the *ICH domain* both the safeguarding and the protection acquires completely different magnitudes: so, ethno-botanic has little to do with ethno-music or ethno-folklore.

L) Finally, depending on whether the ICH is claimed by *indigenous cultures of by societies settled through centuries in "Eurocentric" communities* the consequences vary completely[28].

28. *Vid.* M. Desantes Real, "Safeguarding and protecting eurocentric and indigenous intangible cultural heritage: no room for marriage", in *Il Patrimonio culturale intangibile*

IV. – ICH VERSUS IP: CHALLENGING IP CLASSIC TOOLS?

15.- Concepts like ICH, TK and TCE were developed in the last decade of the last century and pursue to generalize a fundamental claim raised by indigenous communities all over the world since forty years ago. When facing the relationship between all these expressions with IP twenty years later we realize immediately that it is very different if addressed to an indigenous community in a developing country than if addressed to a community settled in a developed country. It is very different because the background is very different indeed[29].

So, it is not complex to contextualize the antagonism between classic IP tools and ICH elements when applied to indigenous cultures[30] and to the colonial experience: the Western imperialist powers, being the "superior" civilization, accorded a preeminent role to the individual in the authorial process and neglected the intangible cultural heritage created and developed through generations by indigenous communities. These elements of ICH had some characteristics in common: a) the primacy of communal institutions over individuals; b) a close and private membership functioning in practice like an onion where the understanding of what is behind an ICH is only known by some representing the community; c) a holistic — dead and live, animate and inanimate, tangible and intangible are parts of the total and are in a dynamic equilibrium — rather than analytic view; d) a desperate need of survival in a hostile environment where what really matters is keeping the community alive[31].

16.- What it is much more complex is to analyze this antagonism when applied to ICH generated in developed countries. When approaching ICHs elements enrooted in western countries, these questions can hardly be explained following the colonial pattern but it is evident that neither authorship nor ownership can be claimed by individuals, and it has still to be proven

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nelle sue diverse dimensioni, a cura di T. Scovazzi, B. Ubertazzi e L. Zagato (ed.), Università degli Study di Milano — Bicocca, Milano, Giuffrè Editore, 2012, p. 183-199, especm. 193-197.

29. *Vid.* J. C. Lai, *Indigenous Cultural Heritage and Intellectual Property rights. Learnings from the New Zealand experience?*, Cham, Springer, 2014, and M. Forsyth, "Making the case for a pluralistic approach to intellectual property regulation in developing countries", *Queen Mary Journal of Intellectual Property* 2016, vol. 6, nº 1, p. 3-26.

30. *Vid.* I. Mgbeoji, "On the shoulders of the 'other'ED'. Intellectual Property Rights in Intangible Cultural Heritage and the Persistence of Indigenous Peoples' Texts and Inter-Texts in a Contextual World", *in* T. Kono (ed.), *Intangible Cultural Heritage and Intellectual Property. Communities, Cultural Diversity and Sustainable Development*, Antwerp, Intersentia, 2009, p. 208-210.

31. Specifically referring to the concepts of authorship and ownership, *vid.* M. M. Carpenter, "Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community", *7 Yale Human Rights & Development Law Journal* 2004, p. 51-78.

that it can be claimed by the communities. Consequently, recognizing that a) it is not advisable to bring into the same box all sort of ICH and that b) it is not therefore possible to create an unitary perception of the protection of ICH through IP tools is an important step forward to approach the matter in a more realistic way. What it is evident is that the protection of ICH elements puts into question the doctrine — which sustains our copyright systems — of authorship as a solitary effort of one or several identified persons. At the end, two lines emerge: either a) ICH forces necessarily to adapt the IP system to a new reality, therefore a new concept of authorship has to be developed, or b) ICH advises for a more comprehensive analysis where it is possible to identify the legal persons capable of exercising ownership over ICH.

17.- If the above is true, then the main challenge would be to find ways to reconcile the classic IP western systems based on individual ownership a) with the non-western concepts and practices of ICH (TK and TCE) deriving from indigenous communities where individual ownership is unknown and in many cases also the difference between tangible and intangible is unknown, and b) with the western concepts and practices of ICH where individual ownership is known but ICH elements are not supposed to have an individual as a proprietor.

All in all, what this approach reflects is a huge cultural gap between the Eurocentric and the Indigenous understanding on how to properly deal with this matter. We just cannot continue approaching ICH protection globally. The enthusiasm for the management of ICH shown in the last decades is admirable. But we should never forget that what is behind "safeguarding" in indigenous cultures is much more than "safeguarding ICH:" it is public health, education, self-government, transmission capability… survival[32]. As a result, dealing properly with indigenous ICH implies that there is "an urgent need to introduce new forms of protection for TK that not only give communities rights over their knowledge but also enable the wider preservation and promotion of such knowledge systems"[33]: the classic IP tools are simply not at all fit for this purpose, and it is not enough to propose an "adaptation" of individual ownership to the needs of a given indigenous community. On the contrary, probably the classic system can be easily accommodated to the needs of "Eurocentric" ICH elements, where the understanding of what "safeguarding" means is completely different and where the survival of the community is not generally at stake[34]. A "poli-matrix" understanding of what protection of ICH means

32. *Vid*. some of these considerations reflected *in* M. F. Brown, "Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property", *International Journal of Cultural Property* 2005, p. 53-54.

33. S.A. Laird, S.A. and R. Wynberg, "Access and Benefit-Sharing in Practice: Trends in Partnerships Across Sectors, Secretariat of the Convention on Biological Diversity", *Technical Series*, No. 38, Montreal, 2008, p. 98.

34. It is not by chance than even WIPO recognizes that "The need for intellectual property protection of expressions of folklore emerged in developing countries" (The Protection of

could give some light to a problem still dominated by a unsatisfactory "one's fit all" approach.

18.- Finally, clarify the relation between the community and the authorship and ownership of the ICH is crucial. In spite to the fact that UNESCO recognizes that communities "identify, enact, recreate and transmit the intangible or living heritage"[35] and that the involvement of the communities in both the safeguarding and the protection is considered vital by everybody[36], the 2003 UNESCO Convention did not manage to identify the owner or holder of the intangible cultural heritage. Although this gives some reasons to those who suggest that in fact Member States are the only owners of intangible cultural heritage[37], I believe that States should not exercise ownership rights over elements of ICH that have been created, developed and transmitted basically by oral traditions within communities[38]. Other scholars maintain that only the communities should own their intangible cultural heritage, and that the role of the Member States is merely to "identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of

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Expressions of Folklore: The Attempts at International Level, Paper prepared by the International Bureau of WIPO, Reproduced from Intellectual Property in Asia and the Pacific, January-June 1998, No. 56/57 [ISSN 1014-336X, WIPO Publication No. 435(E)]).

35. UNESCO, Intangible Heritage [http://portal.unesco.org/geography/en/ev.php-URL_ID=10482&URL_DO=DO_TOPIC&URL_SECTION=201.html]. According to the Preamble, par. 6, "recognizing that communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and re-creation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity". See also Arts. 11.b, 14.a.ii, and 15.

36. This involvement, specifically requested in Art. 15 ("Within the framework of its safeguarding activities of the intangible cultural heritage, each State Party shall endeavor to ensure the widest possible participation of communities, groups and, where appropriate, individuals that create, maintain and transmit such heritage, and to involve them actively in its management") has been the subject of many discussions. In the Conclusions and Recommendations of the UNESCO-ACCU Expert Meeting on Community Involvement in Safeguarding Intangible Cultural Heritage: Towards the Implementation of the 2003 Convention (13-15 March 2006), the experts concluded that States should involve communities through 1) properly identifying of communities and their representatives, 2) inventorying or proposing for listing only the elements which have been recognized by them, 3) ensuring that permission is obtained before inventorying, 4) ensuring the prior consent when involving non community members, 5) respecting customary practices governing the access to intangible cultural heritage, and 6) ensuring the free, prior and informed consent for nominating their intangible cultural heritage for the lists under the Convention.

37. Even members of the Committee of Experts like Paul Kuruk seems to come to this conclusion. *Vid.* P. Kuruk, "Cultural Heritage, Traditional Knowledge and Indigenous Rights: An Analysis of the Convention for the Safeguarding of intangible Cultural Heritage", *1 Macquarie J. Int'l & Comp. Env'l Law* 2004, p. 111: "As currently worded, the ICH Convention leaves the impression that the State has exclusive rights to intangible cultural heritage found within its territories and ignores the rights of others, including indigenous groups".

38. *Vid.* T. Kono, "Convention for the Safeguarding of Intangible Cultural Heritage. Unresolved Issues and Unanswered Questions", *in* T. Kono (ed.), cit., p. 30.

communities, groups and relevant non-governmental organizations"[39]. And many of them, finally, come to the conclusion that the *statu quo* is simple: the ICH elements are part of the public domain, and the Convention has lost an opportunity to clarify this situation[40]. This discussion shows that the matter is far from being pacific. Ownership of specific forms of ICH intangible by groups of communities is difficult to define, and will be an important issue of discussion in the future. Probably this future will show that the answer is not uniform, and that it will again depend, amongst other conditions, on the Eurocentric or the Indigenous starting point.

V. – **Conclusions**

1. The ICH development is key for our future. It is a process which require a complete change of our perceptions in many respects: focusing on a master or on a craftsman is very different than focusing on a masterpiece or an artifact; focusing on a social process is very different than focusing on the items produced; focusing on knowledge, skills and values behind tangible culture is very different than focusing in the tangible culture itself; and focusing on the intangible and the spiritual is much more complex than focusing on the tangible and the material.

2. A more attentive reading of the main objectives of the 2003 UNESCO Convention brings certainly new questions on board. Whatever the "international instrument(s) relating to IP rights" would say, article 1 of the Convention requests member states "to ensure respect for ICH or the communities, groups and individuals concerned". The question, therefore, is to ascertain how can ICH be "respected" without recognizing the corresponding rights hold by those who have a title: the communities.

3. IP has been a precious instrument for industrialization and for encouragement of innovation, creativity and competitiveness, and at the same time has paid a certain contribution — through the consideration of cultural traditions as public domain, to the degradation of cultural heritance. What we should question today is how can the IP concept evolve to serve, in the new society — digital, global, plural, driven by information and knowledge — of the XXIst century new priorities like cultural diversity

39. *Vid.* H. Deacon, "Expert Meeting on Community Involvement in Safeguarding Intangible Cultural Heritage: Towards the Implementation of the 2003 Convention", 13-15 March 2006, Tokyo, Japan, cited by T. Kono, cit., p. 33.

40. *Vid.* T. Kono, cit., p. 33: "Since the ICH Convention lacks specifics defining ownership, challenges arise between communal rights and potential restrictions of non-members seeking use of intangible cultural heritage. Intangible cultural heritage is conventionally considered to be in the public domain and thus accessible to, and appropriate by, anyone".

and sustainable development, priorities which are at the core of the safeguarding and protecting ICH.

4. As a result, I would propose to work in a more efficient way with three lists of ICHs: a) ICHs vulnerable and under risk of deterioration, b) ICHs vulnerable and under risk of disappearance, and c) other types of ICHs. The treatment should be very different in each list, also with consequences for intellectual property. For instance, priority for recording and documentation should be given to the second list.

5. All in all, a confrontation approach between ICH and IP brings us nowhere and gives no light to address consistently the future. The same reasoning often offered between IP and Human Rights could be reproduced when approaching the relation between ICH and IP. After decades of confrontation, it is possible to visualize today more and more voices proposing a cooperation approach, where IP push the evolution of ICH.

6. I am convinced that the relations between ICH and IP have to be located in a constructive way. But we should not forget the right perspective: what we are aiming is to use IP to foster measures that contribute to the safeguarding of a given ICH element, not the other way around.

7. "Indigenous" and "Eurocentric" ICH are very different issues and advice different approaches. While protecting ICH in an "Eurocentric" environment will only require refocus IP institutions and develop an IP culture which is still lacking today, protecting ICH in indigenous cultures will request an IP system completely renewed able to foster cultural rights for the community as opposed to human rights for the individuals, and able to foster both cultural diversity and sustainability.