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A PERSPECTIVE ON CULTURAL EXPRESSIONS PROTECTED UNDER THE UMBRELLA OF INTELLECTUAL PROPERTY LAW

Açar sözlər: əqli mülkiyyət hüququ, qeyri-maddi mədəni irs (QMMİ), ənənəvi mədəni nümunələr, ənənəvi bilik, mühafizə.

Ключевые слова: права интеллектуальной собственности, нематериальное культурное наследие (НКН), традиционные формы культурного самовыражения, традиционные знания, защита.

Keywords: intellectual property law, intangible cultural heritage (ICH), traditional cultural expressions, traditional knowledge, safeguarding.

The protection of cultural expressions within the framework of intellectual property law is a highly complex legal and theoretical matter, especially in the period of globalisation, digital dissemination, and the increasing commercial value of cultural elements. As states seek both to preserve their intangible cultural heritage (ICH) and to prevent the unauthorised use of traditional cultural expressions (TCEs), jurisprudence faces the challenge of harmonizing traditional cultural expressions and traditional knowledge (TK), which belong collectively to

a community or people, with conventional intellectual property systems that protect copyrights, inventions, utility models, etc. This problem forms the conceptual core of contemporary legal discourse on cultural heritage and intellectual property.

From a doctrinal point of view, one of the central difficulties arises from the nature of cultural expressions. "Berne Convention for the Protection of Literary and Artistic Works" determines the concept of literary and artistic works (Article 2) and the authors of these works (Article 3) [5]. Such works are created by a single author or several authors, but their identity are known. As mentioned above, TCEs and TK are not created by a known single author or known several authors, they are forms of creativity developed by a community, indigenous people, or the local population of a specific region, belonging exclusively to them and characterizing their identity.

First of all, it is important to give the concept of intangible cultural heritage. The modern terminology surrounding intangible cultural heritage emerged by two specialised UN bodies - UNESCO and WIPO. UNESCO employs the term "intangible cultural heritage," defining it as

a set of practices, expressions, knowledge and skills transmitted across generations, as well as the instruments and cultural spaces associated with them [6], [7]. More specifically, ICH consists of TCEs and TK, while TCEs are divided into intangible expressions and tangible expressions. Intangible expressions covers artistic folk creativity and tangible expressions includes folk crafts and folk decorative applied art, e.g. sculpture, carpet weaving, ornaments and so on [2, p.13]. UNESCO's definition is broad, surrounds verbal traditions, performing arts, social rituals, knowledge of nature and craftsmanship. This wide interpretation is designed to ensure the viability of traditions an idea central to UNESCO's 2003 Convention, where the operative term is "safeguarding," not "protection."

UNESCO defines intangible cultural heritage primarily as a living, evolving cultural phenomenon. Through the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, UNESCO focuses on the viability of cultural practices. The concept of "safeguarding" given by UNESCO demonstrates a preservation-oriented approach aimed at preventing the loss of cultural heritage. This approach differs fundamentally from intellectual property protection, which is based on granting exclusive rights and prohibiting unauthorised use.

WIPO, on the other hand, works toward the development of a legal framework capable of preventing misappropriation and unjust enrichment by third parties. It distinguishes between TCEs and TK. So that, TCEs are also expressed as the term of folklore in a lot of national laws, take into account songs, ceremonies, dances etc. However, TK means as knowledge, skills, practices etc, which belong to one community, people [2, p.11]. By distinguishing between Traditional Cultural Expressions (TCEs) and Traditional Knowledge (TK), WIPO proposes sui-generis legal rights for the protection of TCEs

and TK. The concept of TCEs and TK are really different. Although UNESCO's and WIPO's categories intersect, but their legal purposes distinctive: UNESCO safeguards culture for continuity, while WIPO protects culture for control and rights enforcement. The result is a dual framework in which UNESCO focuses on cultural continuity, whereas WIPO focuses on preventing misappropriation [2, p.14].

Some national legislations uses the concept of "ICH", others uses the concepts of "TCEs" and "TK". E.g, Azerbaijan Republic's Law on Copyright and Related Rights uses the concept of TK [3], Azerbaijan Republic's Law on the Legal Protection of Folklore Expressions gives concept of Azerbaijan folklore expressions.

When it comes to international debates on cultural expressions constituting a part of ICH, referred to as TCEs by some states and as folklore in others these discussions emerged in the late 20th century when states began calling attention to the misappropriation of their folklore. Prior to the 1960s and 1970s, most countries treated folklore simply as part of the national cultural treasure without codified legal protection. Early joint initiatives by UNESCO and WIPO sought to address the legal vacuum, and by 1989 the organizations had produced a Recommendation on the Safeguarding of Traditional Culture and Folklore. Although non-binding, this document initiated a normative shift by acknowledging that communities have legitimate interests in controlling the use of their cultural expressions.

UNESCO adopted the Convention for the Safeguarding of the Intangible Cultural Heritage, which legally obliged states to safeguard intangible heritage through identification, documentation, transmission, promotion and revitalization in 2003 year. Simultaneously, WIPO's Intergovernmental Committee (IGC) on IP and Genetic Resources, TK and Folklore began negotiating draft articles for an international legal

instrument considering sui-generis legal protection that would provide TCEs and TK with enforceable rights analogous to IP protection.

Now, let us pay attention why the elements of ICH are referred to using the term “expressions”. Intangible heritage elements are described as expressions rather than “works” or “inventions,” precisely to distinguish them from classical IP objects. Unlike copyrightable works, TCEs are typically created collectively, evolve over time, and lack identifiable authorship. Their identity lies not in individual creativity but in shared tradition and community practice.

As well one of significant issues is analysis of the terms “safeguarding,” “protection,” and “preservation,” from the aspect of linguistic and conceptual which appear frequently in debates but carry distinct meanings. In the English version of the UNESCO Convention, “safeguarding” refers to ensuring the viability of intangible heritage through activities such as documentation, identification, transmission and revitalisation. It is broader than “preservation,” which implies keeping something unchanged, and broader still than “protection,” which in IP contexts refers to preventing unauthorised use through legal enforcement. Safeguarding encompasses both preservation and legal protection, though UNESCO pays special attention to non-legal aspects. Safeguarding ensures the survival and transmission of heritage, whereas legal protection preserves its cultural integrity and prevents exploitation.

There is the term of “qorunma” in Azerbaijani language and this term - “qorunma” covers multiple English concepts, and also it creates a linguistic challenge in domestic legal drafting. As also recommended by Imanov, terminology must be context-sensitive: “qorunma” means safeguarding or ensuring the survival of heritage in the heritage context, whereas it refers to preventing infringement in IP context.

This distinction is essential because combining or conflating “safeguarding” with “legal protection”, to misuse them can create inconsistencies. Safeguarding recommends documenting and making TCEs publicly accessible, whereas legal protection sometimes requires restricting accessibility to prevent misuse. Thus, safeguarding and IP protection, while complementary, may occasionally create tension.

Furthermore, national legal frameworks supported by UNESCO and WIPO and enhanced through their provisions, principles, recommendations [8] demonstrate sui-generis legal protection models. Azerbaijan Republic’s Law on the ratification of the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage [4], Law on the Legal Protection of Folklore Expressions (2003) are also included here. States are beginning to acknowledge intangible heritage not merely as a cultural wealth, but as a subject of legal rights and obligations.

At the national level, the Azerbaijani legal framework incorporates elements from both UNESCO and WIPO. A broad concept of Azerbaijani folklore expressions is presented in this law [1]. The 2003 Law on the Legal Protection of Folklore Expressions, praised internationally by WIPO and the UN Committee on Economic, Social and Cultural Rights, provides a sui-generis mechanism ensuring that Azerbaijan’s folkloric expressions are recognised as a special type of IP. The law identifies the State, representing the people of Azerbaijan, as the custodian of folklore, allowing authorities to authorise use, enforce rights, and preserve moral integrity. Moreover, domestic patent legislation requires applicants to disclose whether their inventions rely on traditional knowledge and obliges them to identify the source of such knowledge another safeguard against misappropriation.

Another significant matter is associated with the relationship between cultural expressions and

the public domain. Classical IP law doctrine considers materials with expired rights, or materials never protected, as part of the public domain. It means, once rights expire, or where no rights exist, works fall into the public domain, where they can be freely used by anyone. However, applying the concept of the public domain to TCEs poses a problem, because they become publicly accessible in this case, and it is good, beneficial for public awareness and the cultural recognition of one community, indigenous among others, on the other hand it also creates the problem of appropriation and alienation by other societies and peoples. They may be accessible but cannot be treated as freely appropriable resources devoid of cultural rights by third parties, including commercial entities. Also, although they may be “public” in this case, they are not ownerless. Traditional cultural expressions belong collectively to the community that has created and maintained them, even though they do not have a specific author. At the same time, in the context of folklore, the notion of moral rights such as the right of attribution and the right to integrity takes on a collective form. The community must be acknowledged and the tradition must not be distorted, even if economic rights do not apply in the conventional sense.

Consideration should also be given to the dual system of positive and defensive protection. Positive protection gives communities rights to authorise the use of their TCEs, obtain compensation and prevent uses that misrepresent or exploit the tradition, while defensive protection prevents third parties from claiming exclusive

IP rights over expressions that originate in traditional culture. Defensive protection plays an essential role in trademark and patent systems, especially in preventing the registration of cultural names, designs by entities that have no cultural connection to them. In other words, defensive protection prevents third parties from acquiring IP rights over TCEs. Positive protection, simultaneously, can reinforce communities to participate actively in cultural economies, fostering equitable sharing mechanisms of benefit. Positive protection empowers communities, while defensive protection guards heritage against external capture. Hence, the protection of cultural expressions requires a model that synthesises safeguarding measures with defensive and positive legal rights.

Consequently, the intellectual property perspective cannot fully capture the cultural, symbolic and identity-forming dimensions of intangible heritage. However, neither can heritage survive without legal mechanisms to prevent misappropriation. The best way for legal safeguarding of cultural expressions is the development of a sui-generis legal system that acknowledges the collective, living and evolving nature of them. Such a system should incorporate the principles articulated in the UNESCO Convention, the evolving WIPO draft articles and the national experiences of states, which have crafted robust models for integrating heritage protection with intellectual property law.

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ƏQLİ MÜLKİYYƏT HÜQUQUNUN ÇƏTİRİ ALTINDA QORUNAN MƏDƏNİYYƏT NÜMUNƏLƏRİNƏ BAXIŞ

XÜLASƏ

Bu məqalədə mədəniyyət nümunələrinin anlayışı, təsnifatı, problemli müəlliflik məsələsi və onların “Əqli Mülkiyyət Hüququ” ilə qorunması tədqiq olunur. Mədəniyyət nümunələrinin-mədəni ifadələrin müəllifliyi və qorunması məsələsi əqli mülkiyyət hüququ sahəsində ən çox müzakirə olunan məsələlərdən biridir. Hər nə qədər mədəniyyət nümunələrinin konkret müəllifi və ya müəllifləri olmadığı fikri qəbul edilsə də, əslində bu fikir yanlış qənaətdə gəlməyə səbəb olur. Çünki bu mədəniyyət nümunələri də konkret müəllifi və ya müəllifləri olan əsərlər kimi heç də sahibsiz deyillər. YUNESKO və ÜƏMT-in də qəbul etdiyi və məqalədə də qeyd olunduğu kimi, onlar konkret yerin, ərazinin əhalisi, icması, yerli xalqı tərəfindən yaradılırlar və məhz onları səciyyələndirən xarakterə, keyfiyyətə malik nümunələrdir, hansı ki, bu nümunələr onları yaradan, ərsəyə gətirən konkret bir xalqı, icmanı digər xalqlardan, icmalardan fərqləndirirlər və sadəcə həmin xalqlar arasında yox, bütün dünyada tanınırlar, milli kimliyi təcəssüm etdirirlər. Onlar çox zaman mənimsənilməyə məruz qalırlar, xüsusilə də müasir rəqəmsallaşma dövründə. Tədqiqat əsasında bu nəticəyə gəlinir ki, onların “Əqli mülkiyyət hüququ” qorunmasından fərqli olan, “sui-generis” adlandırılan xüsusi bir hüquqi qorunma sisteminə və bu sistemin təkmilləşdirilməsinə ehtiyacları var.

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ВЗГЛЯД НА КУЛЬТУРНЫЕ ПРИМЕРЫ, ЗАЩИЩЕННЫЕ ЗАКОНОМ ОБ ИНТЕЛЛЕКТУАЛЬНОЙ СОБСТВЕННОСТИ

РЕЗЮМЕ

В данной статье рассматриваются концепция, классификация, проблемный вопрос авторства культурных артефактов и их защита в рамках «Прав Интеллектуальной Собственности». Вопрос авторства и защиты культурных артефактов-культурных выражений является одним из наиболее обсуждаемых вопросов в области права интеллектуальной собственности. Хотя принято считать, что культурные артефакты не имеют конкретного автора или авторов, на самом деле это представление приводит к неверному выводу. Эти культурные артефакты не яв-

ляются бесхозными, как произведения с конкретным автором или авторами. Как признают ЮНЕСКО и ВОИС, и как упоминается в статье, они создаются населением, общиной, коренными народами определенного места, территории и представляют собой примеры, обладающие характером и качеством, которые отличают конкретный народ, общину, создавшую их, от других народов и признаются не только среди этих народов, но и во всем мире, воплощая национальную идентичность. Они часто становятся объектом присвоения, особенно в современную эпоху цифровизации. На основании проведенного исследования сделан вывод о необходимости создания особой системы правовой защиты, называемой «sui-generis», которая отличается от защиты «прав интеллектуальной собственности», а также совершенствования этой системы.

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