

COPYRIGHTS, DIVERSITY OF CULTURAL EXPRESSIONS, AND AUTHORSHIP PLURALITY*

Guilherme Carboni

Master and Doctor of Law from the College of Law at USP

Post-Doctoral Degree from the School of Communications and Art (ECA) at USP

Beginning from the premise that culture assumes diverse shapes and that this diversity is manifest in the cultural expressions of peoples and societies, the Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005, ratified in Brazil via Legislative Decree 485/2006, defines cultural diversity as the “the manifold ways in which the cultures of groups and societies find expression.” It continues that “cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production, dissemination, distribution and enjoyment, whatever the means and technologies used.”¹

This means that cultural diversity is manifest not only in the variety of content, but also in the different relationships between creators and their cultural expressions - here called "authorship plurality" - which are transmitted through the various modes of creation, production, dissemination, distribution, and completion of cultural expressions, as well as through the treatment and valuation of the identification and appointment of authorship.

The previously referenced Convention also recognizes “the importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection² and promotion.

In Brazil, cultural expressions can be protected in two distinct dimensions: (a) through measures aimed at the preservation, safeguarding, and valorization of the diversity of cultural expressions, and (b) through copyrights.

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¹ Chapter III, article 4°, item 1.

² In accordance with article 4, item 7 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, “‘Protection’ means the adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions. ‘Protect’ means to adopt such measures”.

These two protective dimensions possess distinct objectives. The protection of cultural heritage seeks to preserve works of public and cultural interest, with the intent of “cataloging” the work in order to allow the implementation of public policies aiming at its maintenance with respect to cultural diversity and social interest. While copyright protection confers on the work’s creator the right to its exclusive use, thereby favoring interest of a private nature.

In this article, the author will examine the relationship between copyright and diverse cultural expressions to evaluate to what extent the copyright system matches (or not) the authorship plurality existing in the cultures of diverse groups and societies. The focus will be drawn to indigenous populations, because of the importance of protecting the knowledge systems and cultural expressions of these populations.

1. Protection of cultural expressions as intangible cultural heritage

In Brazil, cultural expressions are goods of an intangible nature and constitute the cultural heritage of the country. Article 216 of the Brazilian Federal Constitution establishes that "material and intangible goods that constitute the Brazilian cultural heritage, taken individually or together, bear reference to the identity, action and memory of the various groups that form Brazilian society, in which are included: I - forms of expression; II – methods of creation, working, and living; III - scientific, artistic and technological creations; IV - works, objects, documents, buildings and other spaces intended for artistic and cultural events; V - urban complexes and sites of historical, natural, artistic, archaeological, paleontological, ecological, and scientific value." Further, the first paragraph of the same article provides that "the Government, with the cooperation of the community, will promote and protect the Brazilian cultural heritage through inventories, records, surveillance, declarations and expropriation, and other forms of precaution and preservation."

Decree no. 3.551/2000 provides rules for the registration of goods of an intangible nature that constitute the Brazilian cultural heritage. This registration is done via IPHAN – Instituto do Patrimônio Histórico e Artístico Nacional [the Institute of Natural Historical and Artistic Heritage], in one of the following books as established in Article 1, § 1st: I – Livro de Registro dos Saberes [Record Book of Knowledge]; II - Livro de Registro das Celebrações [Record Book of Ceremonies]; III - Livro de Registro das Formas de Expressão [Record Book of Forms of Expression]; IV - Livro de Registro dos Lugares [Record Book of Places]. In order to complete registration, formal authorization must be obtained from the community representative, expressing interest and consent.

Some examples (Coelho, 2013) of cultural goods already registered in Brazil are: the *Ofício das Paneleiras Goiabeiras* (Espírito Santo, Book of Knowledge, 2012), the work of art *Kusiwa – Pintura Corporal e Arte Gráfica dos índios Wajãpi* [Kusiwa - Body Painting and Graphic Art of the Wajãpi Indians] (Amapá, Book of Forms of Expression, 2002), the Candle of Our Lady of Nazareth in Belem (Pará, Book of Ceremonies, 2004), The Iauaretê Waterfall - sacred place of the indigenous peoples of the Uaupes and Papuri rivers (Book of Places, 2006), and most recently the *Fandango Caiçara* (Book of Forms of Expression, 2013).

In accordance with the National Program of the Intangible Cultural Heritage, the importance of the inventories and records can be found in: (a) promoting social inclusion and improved living conditions of the producers and holders of the intangible cultural heritage, (b) increasing participation of the groups that produce, transmit, and update cultural activities of an intangible nature in projects to preserve and value this heritage, (c) promoting the safeguarding of intangible cultural goods through supporting the tangible conditions that foster their existence, as well as increasing access to the benefits generated by their preservation, (d) implementing mechanisms for the effective protection of at-risk intangible cultural goods, (e) respecting and protecting diffuse or collective rights related to the preservation and the use of the intangible cultural heritage.

The Brazilian rules for the protection of the intangible cultural heritage, established in the Federal Constitution and by Decree 3.551/2000, are aligned to UNESCO's three principals International Statements on the subject: the Universal Declaration on Cultural Diversity (2001), the Convention for the Safeguarding of Intangible Cultural Heritage (2003), and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005).

Based on Article 216 of the Federal Constitution and Decree No. 3.551/2000, the preservation of cultural expressions of intangible cultural heritage includes not only the content and works themselves, but also the forms of expression, methods of creating, working, and living, as well as knowledge, ceremonies, and places. Therefore, Brazilian law recognizes that the formats, styles, methods of acting, and authorship plurality of the groups and societies should be preserved in their diversity, even though they constitute a dimension that is not an object of copyright, as will be discussed below.

2. The system of copyright: originality and identification of authorship as premises for protection

A copyright confers on its holder a right to exclusive use of the work as a result of the creative act. Abstract ideas and styles, by themselves, are not protected by copyright. The protection is only invoked on the manifestation of ideas and styles in works that are

solidified in certain forms of expression: text, music, photographs, audio-visual works, and artwork, among others.

The copyright system rests on the idea that the protected work is only that (a) which is considered original, and (b) in which the author can be identified.

The fact that the copyright system is based on the protection of the original work stems from the emergence of the printed word, which enforced a sense of closure to written text as applied to a thought contained in thousands of copies of a work with identical visual appearance and physical consistency. The printed text came to represent the definitive words of an author, because once the typographical characters were chosen or the lithographic plate was made, and the sheet printed, the text could not be changed; as had happened with manuscripts from the Middle Ages in which comments and changes were often introduced in subsequent copies, leaving readers less attached to the author himself and more involved in the work than the readers of texts intended for printing (Carboni, 2010).

Upon understanding a work to be self-contained, separate from other works, a unit unto itself, the printing culture gives rise to the romantic notions of "originality" and "creativity," separating further one work from another, considering their origins and meanings to be independent of outside influence, at least in an ideal point of view. Walter Ong (1998) explains that when the doctrines of intertextuality arise to counter the isolationist aesthetics of romantic print culture, this is a shock to modern writers because they begin to worry about the fact that they are not producing anything truly new or different, and they may even be influenced by existing texts³.

This perception that the printed work is a unit unto itself, giving rise to the romantic ideas of "originality" and "creativity," forms the basis of copyright. If a work is not unique, i.e., if it does not bring anything new with respect to a previous work, it is not protected by copyrights.

³ According to Ong (1998), the work "*The Anxiety of Influence*" by Harold Bloom, speaks to this anguish of the modern writer that did not torment manuscript authors to the same degree and was practically non-existent in the oral culture. Bloom's central idea is that poems are not written for pleasure, but due to the anxiety the poet feels upon comparing his work with those of his predecessors. Through influential relationships, the poem is the greatest expression of the poet's anxiety via the prioritization of a more powerful language that can overcome previous works and exert influence on new poets. For Doug Brent (1994), the effects of written text, after the advent of the printed word, are paradoxical: on one hand, the fact that every idea can be "tagged" with the name of its author makes the "romantic myth" of creative genius individual; on the other, reference to previous texts reinforces the idea that the arts and knowledge are always constructed collectively..

Another important aspect of copyright protection is that the work should have its author clearly identified. If there is uncertainty regarding the authorship of a certain work, especially in situations of collective creation, copyright protection is problematic, because it depends on an analysis of all the people involved in the creative process.

Much of the prestige and allure that we borrow from the term 'author,' and that makes us consider the author who publishes a book to be a great human being, is a recent development (Goldschmidt, 1969). In the Middle Ages there was an indifference to authors' identities. And the writers themselves did not take on the responsibility to "insert quotation marks" in the parts of their works that were taken from other books or to indicate the source from which they quoted passages. Moreover, they were also hesitant to sign their own works in a clear and unmistakable way (Goldschmidt, 1969).

According to Martha Woodmansee (1984), the idea of authorship during the Middle Ages was linked to two distinct concepts: (a) the characterization of the author as an artisan or craftsman, who possessed the mastery of a body of rules preserved and transmitted to him for the manipulation of traditional materials in order to achieve specific effects for the cultured court audiences to which he owed his livelihood and social status, and (b) the rare moments in literature in which the concept of artisan or craftsman did not seem to fit. This happened when the author sought to overcome the requirements of the occasion in search of something higher, beyond the idea of craftsman or artisan. To explain these moments a new concept was introduced: the writer was said to be inspired by a muse, or by God.

It was only in the modern era, with the construction of the subject who was autonomous and free to think and create, that the concept of authorship appeared as it is conceived today. This ideal was crystallized at the Berne Convention of 1886 and in the copyright systems of the majority of countries. If the human being becomes free and autonomous, the fruits of his creative process are no longer derived from a sovereign being, a muse, or a collective order, but rather from the individual himself who becomes the "God" of the creation.

For Rebecca Moore Howard (1995), the ideal of the 'individual author' comes to define the playing field of the post Gutenberg era, and the author is credited with the attributes of ownership, autonomy, originality, and morality. She adds that even though three centuries have elapsed since the introduction of the modern concept of authorship, such attributes are now considered to be indisputable facts. However, their recent appearance shows that such attributes are clearly arbitrary cultural decisions based on the technological and economic conditions of the society into which they were introduced, which allows – it can be added – for their understanding and classification as natural facts, as common in doctrine as copyrights.

This new conception of the work as a brand, memory, or intellectual testimony of a single individual - and therefore a tremendous revelation for that individual - allows for a new way of reading: if, in the Middle Ages, the pleasure of reading was in the recognition of the reader himself in the work, in Romanticism the pleasure lies in the exploration of the author's soul (Woodmansee, 1984). In this way, the work is treated as a manifestation of the personality of the author, which, even today, is the key element of the moral component of copyright.

According to Paula Sibilia (2008), an author of Romanticism no longer searched for order in nature that, by perception and sensory capture, was considered exterior, but rather for that which was within himself. Because, to quote Jan Mukarovsky, "the image of nature as it is felt internally and its representation in a work is more authentic than the testimony of the senses in their mechanical reproduction" (1977 cited Sibilia 2008). Thus, says Sibilia, was born "an artistic way of looking within oneself that does not seem to have existed in the times of Leonardo or Homer, for example, or in the time of Descartes, and which was intricately chiseled into the last two centuries of Western history." She adds that there is "a finely tuned subjectivity with the *Homo psychologicus* and with all the complex edges of modern subjects, whose character was thought to be directed internally." Along with this "introspective gaze and this externalization of the creativity that flows from within each person" the figure of the author would also have been consolidated as one that "claims to be creator of a universe: his work."

Based on the conception of authorship formulated by Romanticism, the Berne Convention was signed in 1886 for copyright protection. The justification for the copyright protection system was based on the understanding that the author should be given exclusive rights to his artistic expressions, because they are an extension of his personality (which is the foundation of the author's moral rights) and they belong to him as the result of his creative work (which is the basis of the author's property rights).

Thus, all original works created by individuals who can be identified to be their creators must be protected by copyrights, regardless of the practices and specific authorship processes of the social groups to which these individuals belong, as well as their individual desires. It is for this reason that we are all "condemned to be authors," a condition which we cannot escape and that is imposed on us by copyrights as a fact of nature, despite the historic nature of authorship.

The authorship grounded in Romanticism that is imposed on us by the copyright system does not recognize the existence of other forms of authorship that might be regulated according to their particularities. As romantic authorship is far from the only form of authorship present among peoples, it is worth asking to what extent copyright conflicts with the principle of cultural diversity by reducing the complexity of the authorship processes to just a single form of legal authorship, and what are the consequences of this

fact on the protection of cultural expressions, especially those of indigenous peoples and traditional communities.

3. The problem of copyright protection for cultural expressions

Due to the historic nature of the concept of authorship and the fact that copyright is based on just one conception of authorship - the romantic authorship - the system of copyright can become problematic in its claim to unambiguously protect all works created by human beings, without taking into account the creative dynamics and authorship processes of different social groups.

These creative dynamics and individual authorship processes and differences are more pronounced in traditional communities and indigenous peoples, who are the focus of the analysis that follows.

In some situations, it is difficult to identify the traditional community or indigenous people who created a particular work or piece of knowledge. This is because the idea of individual authorship is not present in some of these populations, especially if they share their experiences, knowledge, and artistic creations with other groups.

An example is the graphic work of the Wajãpi people, called *kusiwa*, which is registered as a part of the Brazilian cultural heritage in IPHAN, as mentioned above. The Wajãpis have occupied, for more than two centuries, a vast area located in the interior of Brazil and French Guiana and have a tradition of decorating bodies and objects with figures of jaguars, anacondas, pythons, fish, and butterflies, among other animals. They also paint abstract designs, which may or may not contain color. This graphical language that the Wajãpis from Amapá call *kusiwa* synthesizes their understanding, conception, and action within the universe.

Despite the IPHAN record having been made on behalf of the Wajãpi people, the fact is that it was discovered that these graphics are the result of a complex exchange and flow of knowledge between various indigenous groups, which does not, therefore, allow the authorship to be identified as pertaining strictly to the Wajãpis.

It is also curious to note that until the eighties, within the Wajãpi group, references to ethnic groups or even the term "Wajãpi" were unknown. It is in this sense that we can understand the attempt to identify the authorship of indigenous peoples as part of a public policy to strengthen the ethnic identity of these peoples and individuals. Dominique Gallois (2006) inquires about the impact that public policies for cultural protection generate in

indigenous communities; like the transformation of their methods of production, the reproduction of their knowledge, and their procedures for exchange.

For Gallois (2006), one cannot dissociate the production of cultural objects from the production of social subjects. He adds the following: "against the grain of conventional criticism regarding the direction of these changes, perceived only in terms of loss or homogenization, I would like to propose a positive reflection on the changes experienced by communities in the Amazon, when they adopt the instruments of public policy to protect territories, or record their assets. In such cases they not only create new objects, they construct themselves as political subjects and active agents of change"

Daniele Coelho (2013) says "in this process of defining of the contours of their identity, combined with the difficulties of translating the mystical narratives into writing (needed for registration with IPHAN), young Wajãpis re-approach their elders to seek answers to their questions." In practice, comments Coelho, referring to Gallois, it was found that "young people, unlike the elders, familiar with the system of exchange and sharing, have increasingly become interested in 'identifying what belongs to whom' and 'adopting our language of ownership'."

Although such policies are important for the political recognition of the many indigenous groups and the aggregation of symbolic values, the fact is that culture is dynamic. The contact of one group with another, and today – it may be added - the possibilities for interaction afforded by information networks, accelerate the dynamism of cultural processes.

It is for this reason that the determination of authorship of a particular cultural expression to a specific group can be understood as a way to simplify the authoring process, and remove the greater complexity of involving other groups which may also have a share of authorship in certain cultural expressions due to the dynamic nature of culture.

In this way establishing authorship to just one group based on the copyright system may not match the complexity of the authorship processes involved in the creation of cultural expressions by that group, particularly in view of their contact with other groups, and the symbolic exchanges between many groups which obviously do not occur only among such populations. In addition, the adoption of the copyright system for peoples and communities who have other dynamic authorship processes for their cultural expressions can be a strange and disruptive element for such communities.

Article 231 of the Brazilian Federal Constitution establishes that "the Indians' social organization, customs, languages, beliefs and traditions (...) are recognized as theirs."

Therefore, legal validity should be given to the various forms of organization and representation of indigenous groups, including here, the recognition of the various authorship processes in each group, with respect to their cultural expressions as a form of legal pluralism.

The difficulties of including the creations of indigenous peoples and traditional communities in the copyright system also arise from the fact that Brazilian copyright legislation does not contain the option for a "collective copyright " on behalf of the people or community. This is fundamental as it concerns the collective character that cultural expressions acquire within a particular people or community, independently of whether they were created individually.

Brazilian copyright law also lacks any provision regarding the time frame of protection for works of a collective nature, such as creations of indigenous peoples and traditional communities. In the absence of a specific legal provision, the term of copyright protection for these communities' cultural expressions remains unclear.

Finally, assuming that the concept of cultural diversity should encompass not only the diversity of content produced, but also the plurality of authorship of different social groups in the creation of cultural expressions, copyright becomes problematic because it does not include other forms of authorship that do not follow the romantic rule of authorship, according to which the work must be original and the author recognized as such.

4. Copyright and authorship plurality

Some anthropological studies provide interesting examples of creations whose authoring processes follow a different logic than that adopted by the copyright system. One is the *Malanggan*, which is an object produced on the island of New Ireland in Papua New Guinea in the form of embroidery, mask, or sculpture.

The *Malanggan* functions as a kind of "body" or "skin" of a deceased person, representing his life force, and it is carved into a shape that is recognizable to his relatives who believe that his spirit is prepared to become an ancestor. Once displayed, people leave monetary contributions at its base. After a few hours or days, the *Malanggan* is destroyed so that the life force may be released. When a new *Malanggan* is built for the funeral ceremony, it incorporates new images (Strathern, 2005).

The person commissions the Malanggan wishing to reproduce an image that he had seen earlier and for which he had paid to see. The newly ordered Malanggan will be seen by a new generation that will carry it in memory. Thus a chain is established by means of the payment. Although the form (the sculpture itself) is destroyed, its image remains in the peoples' memories, traveling through time and space.

For Marilyn Strathern (2005), the system of private property is not suitable to define the Malanggan production model because the claim for its creation lies in a plane of multiple, and not individual, interests.

There are numerous occasions in which the people of Papua New Guinea pay for things, both tangible and intangible (Strathern, 2005). However, the author says, we must make a distinction between payments in the context of ownership vs the context of non-ownership. In the context of non-ownership as of the Malanggan, one pays for maintaining the flow of their creation. Another detail is that only the people who saw the Malanggan and retain its image in their minds can reproduce it. One might accuse another of incorporating new shapes into a Malanggan that should not be incorporated. However, this "right " (if it may be called that) has as its main objective the protection of empowerment and not the guaranteeing of possession. So much so that the value of these newly included shapes in the overall value is retained for the maintenance of the powers and energies of the productive process of new Malanggans.

The reproduction of the Malanggan is collaborative in two senses. First, because no sculptor produces a Malanggan based on his own image. Each sculpture is produced as the result of a joint venture between the sponsor and sculptor, whose roles may not be taken on by the same person, thus incorporating two distinct forms of creativity. Second, because collaboration is maintained over a long period of time, as the person that sponsors the Malanggan reclaims the image from the last time it was displayed. This results in a kind of "delayed collaboration" between the sponsor and the sculptor. Therefore, each Malanggan produced incorporates unique elements, as two sculptures will never be identical (Strathern, 2005).

The Malanggans are reproduced by people dispersed through time and space, in the same way that free software is produced today. Additionally, in the same way that a person may potentially see a Malanggan, a user of free software stays hidden and unknown until the time that he is stimulated to reproduce it. In a property-based economy such moments would be recognized as the appropriation of the object, an action that does not occur with the Malanggan or with free software, which are both valued for their derivative processes (Strathern, 2005).

The Malanggan is one among many examples of forms of authorship that do not follow the romantic authorship logic governed by the copyright system. There are countless others, not only from traditional communities and indigenous peoples, but also in the production of music⁴, film⁵, and other artistic manifestations, especially in the context of networks and new technologies⁶, which are not the focus of the present article, all of which are pushed to the margins by the copyright system that does not recognize them.

Final thoughts

The copyright system regulated by the Berne Convention reduces the many possibilities for authorship to exclusively recognize as valid romantic authorship, basing the need for the work to be considered original according to specific parameters and for the author to be identified as assumptions for granting exclusive right to use and economic exploitation of the work.

Despite the existence of numerous other forms of authorship, particularly in the context of traditional peoples and communities, the copyright system transforms all of the richness and diversity of the different forms into only a single viable, internationally recognized format.

The recognition of multiple authorship for diverse groups and societies is therefore essential to the copyright system, having at its core the concept of cultural diversity established by the Convention on the Protection and Protection of Diverse Cultural Expressions of 2005 and the legal pluralism of indigenous peoples under the law of some countries (in Brazil, under Article 231 of the Federal Constitution).

Such recognition does not imply that the cultural expressions of indigenous peoples and traditional communities should be protected by copyrights to enable these groups and societies to prevent their use by third parties. We understand that the protection of these cultural practices as intangible cultural heritage and the establishment of public policies aimed at promoting their creation are more appropriate to the goal of preserving cultural diversity. What is important for the copyright system is to dialogue with the authorship

⁴ See an example of tecnobrega music in Pará in *Tecnobrega: o Pará reinventando o negócio da música [Tecnobrega: Pará reinvents the music business]* (organized by Ronaldo Lemos and others), available at <<http://bibliotecadigital.fgv.br/dspace/handle/10438/2653>>.

⁵ See an example of Nigerian cinema in *Três dimensões do cinema: economia, direitos autorais e tecnologia [3 Dimensions of Cinema: economy, copyright, and technology]* (organized by Carlos Affonso Pereira da Silva, Marília Maciel e Ronaldo Lemos).

⁶ See Carboni (2010), especially the chapter regarding digital means of authorship and the manifestations: *leitactura* on hypertext, co-authorship on creative collaborations, meta-authorship on works created by computer systems, and plural-authorship on collaborative creations, p. 77-99.

plurality by recognizing it as a general principle, even if the cultural expressions are not subject to copyright protection.

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