Traditional cultural expressions: challenges of the Russian Intellectual property law for indigenous communities of the Russian North

Pavel Tkach[*]

This year, at the Northern Forum in Yakutsk, the President of the Council of the Association Reindeer Herders of the World, Sergei Kharyuchi, announced the possible creation of the intellectual property register of indigenous people of the North.[1] According to Kharyuchi, the register could include folklore, traditional knowledge in health protection, and surviving in extreme conditions. Grigory Dyukarev, Chairman of the Association of Indigenous Minorities of Taimyr, noted that the indigenous peoples of the Arctic should share the profits that business receives using their knowledge and traditions.[2] The mentioned initiative raised the question of the current recognition cultural identity of indigenous communities in Russia.

This article aims to evaluate legal obstacles limiting exclusive access and use of traditional cultural expressions (folklore) by indigenous communities who invented them and transmitted them from generation to generation. The review of the existing loopholes in the Russian intellectual property law will be concluded by defining the actual consequences of such limitations to indigenous communities.

1. Introduction to the legal and factual definition of the indigenous people in Russian Law.

Definition of the indigenous peoples of the North has been declared in Federal Law of 30.04.1999 N 82-FZ (as amended on 13.07.2020) on guarantees of the rights of the small-populated indigenous peoples of the Russian Federation and Order of the Government of the Russian Federation of 04.02.2009 N 132-r on the Concept of Sustainable Development of the Indigenous Peoples of the North, Siberia and the Far East of the Russian Federation. The definition of the indigenous peoples declared by the

[*] Junior Researcher, Arctic Centre University of Lapland, Arctic Governance research group

[1] National Accent (2021) "The rights of Northern people to their culture would be protected by the register of intellectual property" access from <https://nazaccent.ru/content/36776-prava-severnyh-narodov-na-ih-kulturu-hotyat-zashitit-reestrom-intellektualnoj-sobstvennosti.html> (source in the Russian language) (translation by author)

[2] ibid

Federal Law N 82-FZ is a subject of disputes and adverse reactions from the Polar law scientists. The dispute arose because the mentioned law does not recognise the concept of indigenous people itself and only recognises small-populated indigenous peoples. Small-populated indigenous people of the North are the people living in the territories of the traditional settlement of their ancestors, preserving the traditional way of life, economic activity and crafts, numbering less than 50 thousand people in the Russian Federation and realising themselves as independent ethnic communities.[3]

Categorisation of communities according to population created legal discrimination against indigenous communities populated by more than 50 thousand people. Legal discrimination in the mentioned case is reflected by the absence of legal guarantees to indigenous communities other than small-populated ones. In addition, the recognition of the community as a small-populated indigenous community is carried out based on the bureaucratic and complex process of inclusion into the Unified List of Indigenous Communities, instead of globally accepted the right of self-determination. In general, indigenous people in the Russian legislation is a bureaucratic concept, and rights related to freedoms and guarantees of indigenous communities are also linked with the bureaucratic processes and ascertainment.

2. Introduction to the Russian intellectual property law.

The legislation of the Russian Federation on intellectual property law is part of Russian civil law nowadays. In the traditional, comprehensive structure of civil law, the primary regulation of legal relations is expressed in the Constitution of the Russian Federation and the Civil Code of the Russian Federation. The Civil Code of the Russian Federation consists of four Federal Laws, named accordingly - Part One, Part Two, Part Three and Part Four of the Civil Code of the Russian Federation.[4] The Federal Law of December 18, 2006, N 230-FZ "Civil Code of the Russian Federation. Part Four" is devoted to intellectual property rights. This Law came into

[3] Federal Law of 30.04.1999 N 82-FZ (as amended on 13.07.2020) on Guarantees of the rights of the small-populated indigenous peoples of the Russian Federation (source in the Russian language) (translation by author)

[4] Gavrilov E.P. (2018) "Intellectual Property Law of the Russian Federation: Legislation and Doctrine". In Patents and Licenses, 2018, N 8. (source in the Russian language) (translation by author)

force on January 1, 2008, and is currently in force with numerous amendments.

Intellectual property law aims to protect a set of rights that a person (persons) has to the results of their intellectual activity. Mentioned set of rights include exclusive rights that are of a proprietary nature, personal non-proprietary rights that are of a non-proprietary nature and other rights that can have both proprietary and non-proprietary nature. The Civil Code of the Russian Federation regulates the set of rights related to copyright and neighbouring fields, patents, selectional achievements, the topology of integrated microcircuits, production secrets (know-how), means of individualisation, and results of the intellectual activities as a unified technology.[5] Article 1225 of the Civil Code, in the form of an exhaustive list, defines 16 categories of objects that can be protected by the intellectual property law, including the objects that can be considered parts of traditional cultural expressions.

Civil Code of the Russian Federation defines the author as a citizen (person) whose creative work has created the result of intellectual activity (clause 1 of article 1228).[6] Opinion of the Chamber for Patent Disputes dated 07.02.2011 (Appendix to the decision of Rospatent dated 24.03.2011 on application N 2006714356/50) clarified that an author is a natural person.[7] But the definition of work, like the definition of creative activities, is absent in the Civil Code of the Russian Federation (they are absent in other Russian and foreign laws, in international treaties). So the presence of creativity, creative activities, and work resulting from such activities is a rather vague question.[8] If there is no dispute, then it is determined with the author's consent and his counterparties in the contractual relationship, and in the case of a dispute - by the court.[9] The definition of an author does not recognise a legal entity as the author of objects placed under copyrights protection. Nevertheless, the legal entity can hold exclusive rights to particular objects of intellectual

[5] Federal Law of 18.12.2006 N 230-FZ "Civil Code of the Russian Federation. Part Four" (source in the Russian language) (translation by author)

[6] ibid

[7] Rospatent (2011). Decision of Rospatent dated 24.03.2011 on application N 2006714356/50. Moscow, Russia (source in the Russian language) (translation by author)

[8] Savina V.S. (2020). “Public law restrictions and prohibitions in intellectual property law”. In IP. Copyright and related rights, 2020, N 2 (source in the Russian language) (translation by author)

[9] ibid

property law, for example, resulting from an agreement for the alienation of exclusive rights in favour of another person (including a legal entity). In addition, the legal entity can be recognised as the producer of the database(s) following article 1333 of the Civil Code.[10]

As a result, defining approach in the Russian intellectual property is concentration around individualisation of author protection and collectivisation of objects included in the public domain, to which we will pay attention in the further sections.

3. Introduction to the concept of traditional cultural expressions

Traditional cultural expressions (expressions of folklore) means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community.[11] The international definition of the traditional cultural expression is more dynamic and not exhaustive, giving space to define characteristic elements of such a concept. The World Intellectual Property Organisation, in a booklet related to the concept of the traditional cultural expressions, defined that characteristic elements include the facts that objects of traditional cultural expressions are usually:

i. handed down from one generation to another, either orally or by imitation,
ii. reflect a community's cultural and social identity,
iii. consist of characteristic elements of a community's heritage,
iv. made by 'authors unknown' and/or by communities and/or by individuals communally recognised as having the right, responsibility or permission to do so,
v. often not created for commercial purposes but as drivers for religious and cultural expression,
vi. constantly evolving, developing and being recreated within the community.[12]

The Russian academic literature defines traditional cultural expressions

[10] ibid (no.5)

[11] World Intellectual Property Organisation (2005). "Intellectual property and traditional cultural expressions/folklore. Booklet No.1." Geneva. Switzerland, access from <https://www.wipo.int/edocs/pubdocs/en/tk/913/wipo_pub_913.pdf>

[12] ibid

in tight connection with the above-mentioned characteristic elements in a more dynamic definition and acknowledges indigenous communities as the most common stakeholders using the objects of traditional cultural expressions. According to them, traditional cultural expressions are works of science, literature and art, passed down from generation to generation, without specific authors, created and used by indigenous peoples, whose legal personality is determined in accordance with the national legislation of the residence country.[13] The definition implies that the plenitude of the rights and freedoms a particular user can enjoy concerning traditional cultural expressions depends on their legal personality in a particular legal relationship. Legal personality in intellectual property relations is usually determined by three factors: characteristics of the subject (user), characteristics of the object, types of intellectual property rights that the subject wants to enjoy.[14]

By that, we would conclude that indigenous people's rights and freedoms to own traditional cultural expressions are defined by the legal personality of a particular indigenous community, characteristics of a particular object of traditional cultural expressions, and which type of rights and freedoms the community wants to enjoy.

4. Indigenous people in intellectual property relations concerning traditional cultural expressions.

The most common objects of traditional cultural expressions are literature, music and art. Article 1255 of the Civil Code defined these objects as objects of copyright or neighbouring rights.[15] Article 1257 and 1258 define authors and co-authors only as concrete persons, with names and surnames that can be mentioned. One of the features of traditional cultural expressions (folklore) is the lack of concrete author, limiting access to copyright protection in the Russian legal system. That limitation is confirmed by article 1258,

[13] Gazizova A.S. (2019). "On the protection of knowledge, cultural expressions and genetic resources". In Russian Law Journal, 2019, N 2 (source in the Russian language) (translation by author)

[14] Federal Assembly of the Russian Federation (2019). "Analysis of the Russian and foreign legal framework, international legal acts, as well as law enforcement practice in the field of protecting the rights of indigenous peoples of the North, Siberia and the Far East of the Russian Federation", access from <http://duma.gov.ru/media/files/ac56at9WNIN403jBAeKGTGGbqfeyNPfX.pdf> (source in the Russian language) (translation by author)

[15] ibid (no.5)

paragraph 6 that exhaustively excluded folklore from objects that the copyright can protect.[16] Numerus clausus list of article 1304 did not include traditional cultural expressions itself to objects of neighbouring rights.[17] However, according to international law, objects with unknown authors still can be protected by the copyright. Such option has been declared by Berne Convention for the Protection of Literary and Artistic Works of 09.09.1886 (as revised on 28.09.1979) article 15 paragraph 4, according to which in the case of subject to two conditions the domestic legislation of convention country may determine the competent authority representing the author and competent to protect the rights and ensure their observance in other convention countries.[18] The first condition – object should not be published. In other words, the potential protection of the Convention applies only to unpublished objects. The second condition – proved reasons to believe that the author is a citizen of the convention country. For example, the object explicitly mentions that it was created by a member or members of the indigenous community residing on the territory of the convention country. It is worth paying attention, the provision of article 15, paragraph 4 uses the clause "may determine", which does not have an imperative feature and does not oblige any of the convention countries to protect mentioned category of objects. Russia ratified the Convention but did not use the mechanism of article 15, paragraph 4, and prioritise the instruments defined by domestic legislation.

The Russian intellectual property law and related practices imply that the indigenous community's inability to define a concrete author usually leads to the object's inclusion in the public domain. Inclusion into the public domain means that any person can freely use the object without anyone's consent or permission and without payment of remuneration. Nevertheless, it is necessary to note that public domain objects can be freely used only for uncommercial purposes. As a result, the indigenous communities do not have the exclusive rights and freedoms to own expressions of folklore without a defined author because the protection of folklore as objects of intellectual property is constructed from the

[16] ibid (no.5)

[17] ibid (no.5)

[18] Berne Convention for the Protection of Literary and Artistic Works of 09.09.1886 (as revised on 28.09.1979), access from <https://wipolex.wipo.int/en/text/283698>

perspective of the whole society and potential value for society, instead of the rights of indigenous people to freely and exclusively use own culture. The traditional cultural expressions of the indigenous people without defined and concrete author(s) still can receive legal protection, and the indigenous community can receive exclusive rights, but not to traditional cultural expressions itself.

The first, section of the Civil Code dedicated to the regulation of neighbouring rights included performances as objects under protection. Among performances, article 1304 paragraph 1 sub-paragraph 1 included performances expressed in a form that allows their reproduction and distribution using technical means and repeated public performance.[19] In other words, the literature object of the folklore of the indigenous community without a defined author will not be an object of copyright. However, a theatre performance based on that object performed by indigenous community members will be protected by the right neighbouring with copyrights. The difference between copyrights and neighbouring rights can be seen in the absence of exclusive rights of the proprietary nature in the set of rights defined by neighbouring rights.[20] The performances by indigenous communities based on their own folklore will be protected by technical means of protection of neighbouring rights (exclusive marks), obligation in the case of the reproduction to maintain the recognition of an original performance by the audience, and obligation of reproductors to receive consent from original performers.[21] But, the original performers will not be able to profit from the distribution or sharing of the performance script, as the basis of such script will be the folklore objects. Moreover, the Civil Code allows the use of objects of neighbouring rights without the consent of the copyright holder and without payment of remuneration in cases of free use of works for private purposes; informational, scientific, educational or cultural purposes; law enforcement purposes (as evidence in judicial proceedings); short-term use by broadcasting organisation.[22] As a result, de-jure, indigenous performers can enjoy neighbouring rights to their

[19] ibid (no.5)

[20] Novoselova L.A. (2017) "Intellectual Property Law. Textbook", Moscow, Russia: Statut (source in the Russian language) (translation by author)

[21] ibid

[22] ibid (no.5)

own performances. Nevertheless, de-facto, this type of intellectual property rights possess a lot of implicit limitations and potential collisions to holders.

The second, copyright regulation included the translation and processing of another (original) work and composite works (anthology, encyclopedia, database, website, atlas or other similar work) into the list of objects under copyright protection.[23] The authors and (or) co-authors will receive all components of the mentioned above rights under the intellectual property law. Traditional cultural expressions of the particular indigenous community can be published under a holistic collection. However, in that approach, there are several disadvantaging aspects. The author(s) of the collection does not receive exclusive rights for objects included in the collection, and only the author of the original object will have a copyright. Moreover, the copyright for collection, result of processing or translation belonging to the author(s) of collection, processed work, translation does not prevent the others from processing, translation and inclusion of original object.[24]

As we mentioned before, legal entities can produce databases and can be recognised as the author. Following Federal Law of 20.07.2000 N 104-FZ (as amended on 27.06.2018) on the General Principles of Organization of Communities of small-populated indigenous communities of the North, Siberia and the Far East of the Russian Federation, the indigenous communities can separate into indigenous communes, and such communes can obtain the status of non-commercial legal entity.[25] By that, we assume that a particular indigenous commune can produce a database of its own traditional cultural expressions, can be recognised as the author and possess a set of rights under copyright law. However, as we mentioned before, the right to acquire a status of legal entity in the form of the indigenous commune is entitled only to those communities whose population is less than 50 thousand people. That is another discriminative loophole against communities with more

[23] ibid (no.5)

[24] ibid (no.5)

[25] Federal Law of 20.07.2000 N 104-FZ (as amended on 27.06.2018) on the General Principles of Organization of Communities of small-populated indigenous communities of the North, Siberia and the Far East of the Russian Federation (source in the Russian language) (translation by author)

population than the border defined by law.

5. Conclusion

The most obvious conclusion that is possible to make from the contribution loopholes is that the indigenous communities in the Russian Federation rarely can profit from using and sharing their own culture. Lack of values-concentrated regulation of protection the objects of intellectual property law led to the strict necessity of the indigenous communities to determine the concrete author or transform objects of own traditional cultural expressions to the form that will be exclusively protected without the concrete, natural person as an author, or to the form where it would be possible to determine own author even if the original object fell under the category "author unknown" even if there are strong assumptions that the author is a member of a particular community. The international protection of traditional cultural expression cannot be considered sufficient. The most effective tool of international protection is article 15 of the Berne Convention, allowing indigenous communities to demand protection efforts from authorities without strong hope that the request will be satisfied. The most common scenario with traditional cultural expressions of explicitly defined indigenous community, but without explicitly defined concrete author, is subsequent inclusion of the particular object into the public domain. The objects in the public domain cannot be used for commercial purposes and cannot be modified, so the originality is implicitly protected. Nevertheless, indigenous communities cannot demand acquiring exclusive rights for the object, even if they know and can prove that the object is a vital part of their culture. Thus, the community appears in front of a choice: to find the concrete author and acquire exclusive copyright or to make a performance, database, encyclopedia and declare own authorship, but at the same time to fail the protection of the original object from reproducing by other people. In one option – it is complicated to acquire exclusiveness; in another – it is easy to protect, but not exclusively. As a result, indigenous communities are in the ouroboros circle related to folklore objects where it is impossible to define a concrete author.

Nevertheless, the most disappointing, that the intellectual property regulation loophole is not the only challenge that indigenous communities in Russia face. Intellectual property law provided another demonstration of how the

indigenous communities in Russia face disadvantages and bureaucracy related to the population and inclusion into the unified list of the indigenous communities. And this raised a question, how good it would be if the category of the small-populated indigenous community were removed from the Russian legal system, just as we did in this contribution…

References:

Berne Convention for the Protection of Literary and Artistic Works of 09.09.1886 (as revised on 28.09.1979), access from <https://wipolex.wipo.int/en/text/283698>

Gavrilov E.P. (2018) "Intellectual Property Law of the Russian Federation: Legislation and Doctrine". In Patents and Licenses, 2018, N 8

Gazizova A.S. (2019). "On the protection of knowledge, cultural expressions and genetic resources". In Russian Law Journal, 2019, N 2

National Accent (2021) "The rights of Northern people to their culture would be protected by the register of intellectual property" access from <https://nazaccent.ru/content/36776-prava-severnyh-narodov-na-ih-

kulturu-hotyat-zashitit-reestrom-intellektualnoj-sobstvennosti.html>
Savina V.S. (2020). "Public law restrictions and prohibitions in intellectual property law". In IP. Copyright and related rights, 2020, N 2
World Intellectual Property Organisation (2005). "Intellectual property and traditional cultural expressions/folklore. Booklet No.1." Geneva. Switzerland, access from <https://www.wipo.int/edocs/pubdocs/en/tk/913/wipo_pub_913.pdf>
Federal Assembly of the Russian Federation (2019). "Analysis of the Russian and foreign legal framework, international legal acts, as well as law enforcement practice in the field of protecting the rights of indigenous peoples of the North, Siberia and the Far East of the Russian Federation", access from <http://duma.gov.ru/media/files/ac56at9WNIN403jBAeKGTGGbqfeyNPfX.pdf>
Novoselova L.A. (2017) "Intellectual Property Law. Textbook", Moscow, Russia: Statut
Federal Law of 18.12.2006 N 230-FZ "Civil Code of the Russian Federation. Part Four"
Rospatent (2011). Decision of Rospatent dated 24.03.2011 on application N 2006714356/50. Moscow, Russia
Federal Law of 20.07.2000 N 104-FZ (as amended on 27.06.2018) on the General Principles of Organization of Communities of small-populated indigenous communities of the North, Siberia and the Far East of the Russian Federation
Federal Law of 30.04.1999 N 82-FZ (as amended on 13.07.2020) on Guarantees of the rights of the small-populated indigenous peoples of the Russian Federation

''Traditional cultural expressions (expressions of folklore) means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community.''