# Traditional Cultural Expressions, Copyright and Culture: A Necessary Dialogue

# Expresiones culturales tradicionales, Derecho de autor y cultura: un necesario diálogo

DOI: https://doi.org/10.17981/juridcuc.20.1.2024.01

Fecha de Recepción: 2022/12/15. Fecha de Aceptación: 2023/11/02.

IVÁN VARGAS-CHAVES
Military University of New Granada, Colombia
ivan.vargas@unimilitar.edu.co

MIRIAM DERMER-WODNICKY
La Gran Colombia University. Colombia
miriam.dermer@ugc.edu.co

Para citar este articulo:
Vargas-Chaves, I y Dermer-Wodnicky, H. (2024). Expresiones culturales tradicionales, Derecho de autor y cultura: un necesario diálogo. *Jurídicas CUC*, 20(1). DOI: http://doi.org/10.17981/juridcuc.20.1.2024.01

*Abstract*

This paper studies the problems of the traditional and instrumental vision of copyright from the perspective of economic exploitation rights. This perspective limits the protection of traditional knowledge, ancestral practices, expressions, and elements that are part of the culture of indigenous peoples. The authors present an overview that examines the tensions and commonalities between culture, copyright, and traditional cultural expressions. The objective proposed was articulated with a finalist legal research methodology, as well as a descriptive research methodology based on synthetic analysis techniques of contemporary theories of culture. As a result, the authors evidenced the limitations that the current legal system has to assimilate culture and the lack of understanding in the regulation of the dynamics of culture. In this way, it is necessary to rethink the relationship between culture and law, contemplating its

tensions and ambiguities, to draw a roadmap that encompasses cultural expressions as a protected legal interest.

**Keywords:** Culture; Copyright; cultural diversity; traditional knowledge; intellectual property.

*Resumen*

El presente artículo aborda la problemática de la visión tradicional e instrumental que tiene el Derecho de autor desde la óptica de los derechos de explotación económica, la cual limita la protección del conjunto de conocimientos, prácticas, expresiones y elementos que son propios de la cultura de los pueblos indígenas. De este modo, se plantea un escenario el cual busca articular las tensiones y puntos en común entre el régimen del Derecho de autor, la cultura y las expresiones culturales tradicionales. Para lograr este objetivo, la metodología escogida por los autores contempló un enfoque de investigación jurídica aplicada sobre el fin de las normas, así como de investigación descriptiva a partir de técnicas de análisis sintético sobre teorías contemporáneas de la cultura. Como resultado se logró demostrar que existen limitaciones en el ordenamiento jurídico para normativizar la cultura, además de una falta de comprensión en la regulación de las dinámicas propias de la misma. En este sentido, se hace necesario redimensionar la relación entre cultura y derecho, contemplando primero sus tensiones y ambigüedades, con el fin de trazar una hoja de ruta que logre abarcar todas las expresiones culturales como parte de un único interés jurídico tutelado.

**Palabras clave:** Cultura; derecho de autor; diversidad cultural; conocimientos tradicionales; propiedad intelectual

## INTRODUCTION

This article aims to address the possible tensions between the traditional legal perspective of culture and a broader perspective of it, placing special emphasis on the traditional cultural expressions and *Copyright*. The latter is a legal regime that is presumed to be a framework for the protection of culture, but, as it will be seen in this text, it is not appropriate because it is disconnected from the dynamics of culture and diversity.

The above is explained in the traditional vision that the copyright has, which on certain occasions, through the rights of economic exploitation gives it a merely instrumental character. Nor do moral rights protect everything that culture and its diversity implies, despite not having a commercial nature. These two ways of approaching culture through intellectual property are related to another tension, the one existing between commerce and culture, which shape the context of intellectual property.

In relation to culture, it can be seen how in the international scenario there two standard positions are, on one hand, the United States, Israel, and Japan, and on the other, countries like Canada or France. The first position considers it as a good and/or service to be liberated which does not need protection in Free Trade Agreements (Kanwar & Evenson, 2009; Schneider, 2005). The second position considers that it is not the same as a merely marketable product for being linked to the identity and dignity of nations (Gray et al, 2017; De Beer, 2012).

Faced with these tensions and problems, the posed questions that are intended to be answered in this article are: How has the copyright regime understood the concept of culture? and which are the challenges that this concept poses to said regime?

Thus, the objective proposed in the article, which is a product result of the author's academic practice as a professor at the Military University of Nueva Granada and the author as a professor at the University La Gran Colombia, is to research the way in which this legal regime, from its tensions, has approached the concept of culture.

The main argument of the text is that it has done so in an incomplete manner, and that, in order to rethink this legal regime, it must start from its tensions, ambiguities and, from the practice both legal as well as cultural; posing the challenges that the concept of culture and diversity of cultures impose on copyright in order to achieve greater protection.

To approach the previously stated hypothesis, the paper is divided into two parts. In the first part, it will be analyzed how the copyright regime tries to apprehend the reality of culture from its normativity and from doctrine. In the second section some challenges to intellectual ownership will be addressed, to think about a broader concept, for which there will be defined five great challenges to overcome based on the consulted doctrine.

## DEVELOPMENT

## METODOLOGY

The selected methodology by the authors to develop the present research exercise, included descriptive research approaches based on synthetic analysis techniques on contemporary culture theories, and of documentary exploration with a legal interpretive method. This, in order to validate the tensions and ambiguities that arise between Law and culture.

From the synthetic analysis carried out it was possible to study the information compiled in articles from indexed and specialized magazines, books resulting from research and public policies on the cultural subject. Documental analysis sheets were used as instruments, thanks to which, it was possible to extract and contrast the ideas from leading authors on the subject.

In relation to the legal interpretative method used, after determining the relevance of the teleological component of the analyzed standards and policies, their relevance was validated by allowing the authors to unravel the final causes around the protection of the Traditional cultural expressions. That said, in other words, clarifies the purpose pursued in the legal system, which is to safeguard the protected legal interest of the traditional cultural expressions as part of the cultural and intangible heritage of the nation; under the terms of Convention 169 of the Organization Labor International-ILO (1989).

It is important to note that, as this is a methodology of legal research, is a discipline of the science of Law, which is used to generate new legal knowledge, without entering into making distinctions between normative systems schemes—e.g. Procedural law, Commercial law, constitutional Law, etc.—, that is, with a vocation for generality. So, this type of research starts from a qualification, by putting under "examination of the law, norms, procedures, and institutions (Agudelo-Giraldo, 2018, p. 17).

In this article, a vocation for generality was maintained, given the concurrence of private law regimes, as was the case of the copyright regime, and public law, with the approximations to culture as a protected constitutional legal interest, as well as the rights of indigenous peoples and ethnic communities. Thanks to this vocation for generality, it was possible to approach the problem identified from validity, legitimacy, and efficiency of current regulations in these areas.

## RESULTS

### *Culture and Copyright from a Regulatory Framework: a Traditional Look*

The law has approached culture through all the scenarios related to intellectual property rights. Although it is also important to clarify that culture and its diverse cultural expressions are related to three other regimes legal matters in particular: with free trade agreements, chapters related to investments, services, and e-commerce.

The above is supported by the vision that Deblock et al. (2004), formulate, after analyzing free trade agreements and their consequences on cultural policies. These authors consider necessary the review of primary sources or texts of the free trade

agreements. They also maintain that it is insufficient the analysis of Free Trade Agreements, which has been carried out in relation to four chapters that address culture and cultural diversity, namely: investment, trade in services, e-commerce, and intellectual property.

Thus, in this text, it is advocated to delve into the legal thinking of intellectual property with some more broad concepts, such as culture and cultural diversity. The fundament of this proposal has to do with two ideas:

i. With the limitations and tensions that intellectual property must standardize the culture, which will be developed in the second part of the writing.
ii. With the international context of the discussion on culture, linked to its own dynamics, led by several sectors of international civil society and some countries, such as has been said before.

It is considered that in the law there is a discussion–both in the doctrine as well as in the normativity—around defining whether the culture It is a commercial good or not. In that order of ideas, the Code itself of Colombian Commerce, C. of Co. (Presidency of the Republic of Colombia, Decree 410, 1971), is ambiguous and illustrates the tension against the topic, with regard to articles 20 (section 13 and section 14), article 22 and article 23 (section 2).

On the one hand, public shows are considered commercial and lithographic, photographic, informative, or publishing companies' propaganda and the entire service regime linked to culture. By the other, goods used to produce goods are considered non-commercial artistic works and their alienation.

Faced with this division, there can be public spectacles that are not commercial in themselves. Thus, nothing is said regarding artistic works or in relation to culture in general.

In that sense, in the C. of Co. (Presidency of the Republic of Colombia, Decree 410, 1971) are defined as commercial acts those whose purpose is to carry out operations of commerce, such as buying and selling, intermediation, transportation, the deposit, the provision of services, among others: In its article 22 establishes that, if an act is commercial for one of the parties, it will be governed by the provisions of commercial law, even if for the other part is not. And in article 23 it stipulates that they are not mercantile, the acts that are carried out for non-profit purposes, such as acquisition of goods to produce artistic works and the alienation of these by their author.

However, there is still no consensus on the location of the copyright, either in the field of civil law or in the field of commercial law. According to article 671 of the Civil Code, C.C. (Congress of the United States of Colombia, Law 84, 1873), the Copyright would fall into this first area. However, for authors like Castro (2016), copyright is framed in commercial law.

Even from the provisions of Sentence C-155 of the Colombian Constitutional Court (C. Ctnal, 1998), in which the moral rights of authors were elevated to the category of fundamental rights, it can be considered that this regime is located in the spectrum of public law. Meanwhile, it is recognized that the creative function of the human being is, in terms of Palacio and Bernal (2020), inherent to its condition

of being rational, therefore, if this condition were unknown—the condition of author—then it would be unknown that man has a condition of being a thinking being.

The truth of everything is that the idea of culture within a regime of purely commercial exploitation would limit its own concept. Given this consideration, the logical question that arises is whether the moral copyright rights protect everything that involves culture and cultural diversity.

It is important to specify that through these rights It is sought to protect the legal interest of the link between the author — an individual —who created the work, and this one; given that the work is an expression resulting from the personality of the author and his/her character—in regard to moral rights; not to economic rights—is that of inalienable, imprescriptible and irrevocable nature.

In these terms, the internal and community regulations establishes that the author has the power to decide if he/she wants his/her work published or not (moral right of unpublishability); claim the paternity of the work, that is, it has the right to be recognized as the creator of his/her work; oppose any modification that undermines the merit of the work or the reputation of the author; modify the work, before or after its publication.; and remove the work from market or suspend its use, even if it has been previously authorized (Andean Community [CAN], Decision 351, 1993).

While it is true that moral rights are not economic in the way in which copyright is conceived, a first tension is found when trying to standardize culture, since the Copyright protects the individual work and excludes the collective elements of culture, the knowledge that generates it, as well as the ideas.

In this sense, it is clear that economic rights illustrate the argument of this section of the writing, when considering the culture as a tradable good or service, because the patrimonial rights, or also called by authors such as Florez and Cardozo (2019) as 'exploitation', allow the owner to benefit financially of their intellectual production.

These patrimonial rights are of an economic nature, exclusive and of control when allowing its owner to control acts of economic exploitation that could make a work become the target of it (Congress of the Republic of Colombia, Law 23, 1982). The latter, in order to expressly and previously require the authorization of the owners, who would control the conditions of access, in exercise of their free autonomy.

Up to this point, it is valid to specify that, unlike the author's moral rights, the patrimonial rights or rights of exploitation of the economic rights of the work are transferable and limited in time, that is, they have a period of protection of eighty years after the death of the author—if they were not transferred during his lifetime—or of seventy years since the creation of the work, assuming that it was transferred.

Finally, the Colombian Author Statute (Congress of the Republic of Colombia, Law 23, 1982), establishes that moral rights and author's patrimonial rights fall

on scientific, literary and artisticworks[1], which are creations of the human spirit that are expressed in various ways, whether written, oral, visual, musical, or audiovisual. These works can have any purpose, such as entertainment, education, or the dissemination of knowledge.

Specifically, scientific works are those that provide new knowledge about the world. Literary works are those that express ideas, feelings, or emotions through words. Artistic works are those that transmit beauty or emotion through shapes, colors, or sounds (Congress of the Republic of Colombia, Law 23, 1982, art. 2).

This is the first evidence of the conception that regulations have of culture, and of cultural products as individual commercial products. In this way, its own dynamics are denied, which also implies the recognition of collective processes and knowledge—i.e. of indigenous peoples, ethnic or traditional communities—which may or may not be commercial.

From the above it is clear that there is a notable confusion regarding the treatment that the Law gives to traditional cultural expressions, especially those that are not regulated from the Traditional Knowledge regime, supported by the 169 Agreement of the ILO (1989), on indigenous and tribal peoples. This matter will be analyzed in later lines.

## *Copyright and culture from the legal doctrine*

The doctrine has assumed different positions on the role that should occupy copyright. According to Anaya-Quintero y Cruz-Fino (2018) since the 19th century several theories have been proposed, in two extremes, on the one hand, by placing it as a right of the personality, and on the other, as a property right.

In this last case, for authors such as Florez and Cardozo (2019) Copyright has a close relationship with the law of consumption, while it has an economic importance, in addition to consider works as marketable goods.

For his part, Rengifo (1999) observes intellectual property — within which copyrights are found—as a new form of wealth that demands both protection and promotion. This is a vision which encompasses that property that is considered commercial. In this author's terms, the creations, beyond being a work that is a product of the creative spirit, they are also goods intended to be incorporated into market dynamics, fulfilling with a concurrent function. This position undoubtedly privileges those products that are likely to generate wealth.

From the perspective of this writing, it is convenient to rethink this vision, as long as culture cannot be understood solely from a purely commercial logic since there are works— cultural products—that do not necessarily fit into these categories, nor are they governed by the laws of the market (Palumbo et al., 2022).

1 Some examples of scientific works are textbooks, academic articles, and scientific research; Literary works include novels, poems and plays; and of Artistic works are paintings, sculptures and musical pieces. Copyright protects scientific, literary, and artistic works, granting their authors the right to control their use and exploitation (Mondragón et al., 2022).

This is the case of traditional cultural expressions, such as stories, myths, legends, forms, representations, or any other type of expression that comes from indigenous peoples, unrecognized ethnic or traditional communities (Shivani et al., 2022). This

It has also been an error in public policies regarding this type of expressions (Lehtinen, 2022).

Consider the case of a traditional community that does not have the recognition of the Colombian State as an indigenous people or ethnic community–and therefore protected by the provisions on traditional knowledge of 169 ILO Convention (1989), but whose intellectual heritage is part of the cultural diversity of the Colombian nation; protected by article 7 and article 8 of the Colombian Political Constitution (National Constituent Assembly of Colombia, 1991).

On the other hand, it is pertinent to question whether it should be treated under the same legal concept, the industrial property and the copyright. It is necessary to rethink these two regimes in relation to the traditional knowledge, since they are different, due to the object they refer to in order to extend their protection.

Although for Rengifo (1999) the union of these two regimes is justified because the ratio of legal protection in both cases is the intellectual creation, this ratio stops protecting certain inherent phenomena, both industrial protections as of the cultural, for example, technical expressions or distinctive traditional ones.

A clear example, which illustrates the above, is found in the shapes, figures, colors and, in general, designs, that indigenous peoples embodied in their clothing or in everyday products such as backpacks (Vargas-Chaves et al, 2021; Zois & Pergantis, 2023).

This is the case of Wayuu weaving, whose protection has been given by industrial property regime through the subsystem of the appellations of origin as a distinctive sign.

This is a vision that can cause cultural erosion, given the massification of products that use large companies—for example, through prints or embroidery—the representations of this indigenous people. Which goes against the fundamental right that assists them with respect to their ethnic and cultural integrity, embodied in the legal system through jurisprudence in the sentence SU-510 of the C. Ctnal (1998).

Another tension that occurs in national doctrine regarding the issue object of the discussion between commerce and culture, has to do with a void regarding the issue of the orange industry. It is important to highlight that the Colombian position regarding the trade-culture debate aligns with one of the two sides of the international debate, namely, the position of the economic north: particularly from the United States, Western Europe and Japan (Rengifo, 1999).

About this point, Florez and Cardozo (2019), agree that the digital economy is presenting new challenges for emerging economies, like the Colombian one. These challenges require the creation of new public policies which take advantage of the behavior of markets, particularly intangible ones, around the exploitation of works protected by copyright. Specifically, the challenges include the ease of reproduction and distribution of digital works, which can facilitate piracy and copyright infringement, as well as the emergence of new business models based in the collaborative economy, posing challenges to the protection of Copyright.

Additionally, and to strengthen the mercantilist argument that has been assigned to culture, it is important to highlight that it was within the framework of the General Agreement on Tariffs and Trade-GATT (World Trade Organization [WTO], 1994) which included the issue of protection of intellectual property because it was considered that inadequate protection or ineffective intellectual property could constitute a barrier for trade. This is because intellectual property can be a valuable asset for companies, and inadequate protection can hinder or prevent its commercialization (Rengifo, 1999).

This commercial idea of culture and copyright is unaware of the international debates on the topic and the bias in the position of each of the parties in the international conflict.

For this reason, it is necessary to talk about the history of the Convention of the cultural diversity of the United Nations Organization for Education, Science and Culture (UNESCO, 2005), to understand what it means to think legally about culture when linking the international discussion on the issue, since the WTO, and its legal perspective of culture and the diversity of culture has not been the only international actor to consider, and it is clear that these ideas imply some challenges for the regulation of culture and diversity of their cultural expressions.

These concepts were debated within the framework of history about the UNESCO Convention on Cultural Diversity in 2005. This was an agreement that allowed two processes. On the one hand, to recognize the dual nature of culture, both economic and intangible. On the other hand, autonomously design, formulate and implement cultural policies at national level. The Convention on Cultural Diversity has made a transition in key legal concepts (UNESCO, 2005).

In accordance with the previous ideas, to assimilate with clarity the debate, it is necessary to specify two concepts that were the center of the above-mentioned international debate. The first of them is that of cultural exception and the second that of cultural diversity. These concepts are important, since it is proposed to redefine the legal regime of intellectual property since the last concept.

## *The case of Traditional Cultural Expressions of Indigenous Peoples and Ethnic Communities not recognized by the State*

Traditional cultural expressions are artistic and cultural manifestations that are part of the traditional culture of a town or community. These expressions are transmitted from generation to generation and reflect the identity and values of the community (World Intellectual Property Organization [WIPO], 2020; of Román, 2009).

In this sense, we can agree with Urra (2018), in that for this international organization the concept and scope of traditional cultural and folklore expressions is similar. In fact, in both cases, the cultural products or derivative works of the identity of indigenous peoples and ethnic communities are considered part of their cultural heritage.

Although copyright contemplates this set of expressions both traditional cultural and cultural products susceptible to economic exploitation, and with the same standards of Law 23 (Congress of the Republic of Colombia, 1982) and the Decision 351

(CAN, 1993); It is through 169 ILO Convention (1989) —integrated into the constitutional block— that they acquire a differentiated treatment, for example by

admitting the oral mode of transmission as occurs with myths, legends, or rites, omitting the requirement to translate ideas into a tangible or intangible support.

However, it is a scenario that only applies to recipients of said agreement, as are the indigenous peoples recognized by the Colombian State and the ethnic communities— namely, gypsies, Raizals, Rooms, Palenqueros and Afro-descendants.

The logical question that then arises is: What happens to the traditional cultural expressions of traditional communities? That is, the communities that have not been recognized by the Colombian State as holders of special constitutional protection rights. Think about the case of the Plainsmen (Llanera) culture, located in the Orinoquía region, where the joropo, a tap dancing (Zapateo) typical of this culture that has unique elements, and expresses traditional songs such as couplets, verses, and Ballads (trovas).

Cultural diversity is important because it comes from the interaction among different actors. In the context of globalization, the prime ministers of Quebec and France, Lucien Bouchard and Lionel Jospin, respectively, considered essential the inclusion of clauses to defend cultural diversity in commercial agreements (Dermer, 2017).

Martin (2005) shows how related legal regimes with culture and cultural diversity are crossed by tensions between different countries and across different scenarios of commercial negotiation. In the Uruguay Round, the European Union opposed the liberalization of the audiovisual sector, which would have omitted the role that traditional cultural expressions have. In the Multilateral Agreement on Investment-MAI of the Organization for Economic Cooperation and Development-OECD (1998), France withdrew from the negotiations because the cultural exception was not included.

In short, cultural diversity is important because it is a reflection of the interaction between different actors. In the context of globalization, countries have had to negotiate to find a balance between the protection of cultural diversity and freedom of trade.

In accordance with the previous ideas, to understand in a clear way the debate, it is necessary to specify two concepts that were the center of the aforementioned debate. The first of them is that of cultural exception and the second that of cultural diversity. These concepts are important since it is proposed to redefine the legal regime of intellectual property from the latest concept.

In that order of ideas, the cultural exception was a French concept that sought to exclude culture from the strict rules of trade because it is considered essential for the identity and dignity of the villages. Regarding the concept of cultural diversity, it refers to the different expressions within and between groups and societies related to the heritage of humanity, but also with the different modes of artistic expression (Carrillo, 2007).

Regarding traditional cultural expressions, this tension between copyright and culture that opts for a conception commercial of the works is unaware that there are manifestations of traditional communities that are seen as works, and that are fused with singular components of their cosmovision and cultural heritage.

It is also unknown that these traditional cultural expressions that have the treatment of works reflect both the identity and the values of the people where they are created (Teubner & Fischer-Lescano, 2008); They are even the result of their creative activity and innovative in a traditional framework that are part of their cultural heritage.

Furthermore, traditional cultural expressions when keeping an intrinsic relationship with copyright pose a complex scenery, which prevents a balanced relationship between trade and culture (Burri, 2010). Not in vain, efforts persist of the international community to give a harmonious treatment to this traditional knowledge, since to date the efforts of the international community have not yet landed on an instrument that guarantees effective protection.

It is because of all the debate that, from the perspective of this article, it is considered wrong to think about culture in light of the legal regime of copyright with trade legislation related to competition or trade; especially if the traditional cultural expressions of traditional communities not recognized by the State are included, and therefore, not covered by 169 ILO Convention (1989), then, as indicated, this is an instrument which protects the expressions of indigenous peoples and ethnic communities, but not of traditional communities.

And that is why, here it is proposed that this regime be redeemed from the tensions inherent to culture. Everything in the frame of a broad concept of this, where traditional cultural expressions play a key role. Lastly, it is important to link in the reflection the criticisms that have been made in the doctrine, and that are collected here, under the copyright regime.

## DISCUSSION

Within the core of WIPO, the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge, and Folklore-CIG, began its work in 2001. In its to do, land the discussions about the content and scope of traditional cultural expressions, which are defined as any form, tangible or intangible, through which the culture of indigenous peoples and ethnic communities is expressed, appears, or shows.

One of the axes of the discussion in this instance is the regulation of access to these expressions, which have been used by companies in the cultural, audiovisual, entertainment and even textile sectors (Antons, 2009).

It is in this way that they are used from shapes, colors, and textures in designs, even crafts to create works –derivate of traditional cultural expressions – which are protected by the copyright regime in favor of registrants, harming the interests of indigenous peoples and ethnic communities, who are their true owners.

The questions that result from this problematic scenario, and that guide this discussion section, are the following: How to achieve Indeed, that law incorporates other disciplines such as anthropology when standardizing culture? Can the regime of Copyright include the diversity of traditional cultural expressions?

These questions are the great practical challenges that must be thought so that the Law in its traditional vision — particularly, the one that regulates intellectual property—may escape the limited vision that they have had for many decades. Next, some postulates will be developed within the framework of this debate, in order to analyze a series of barriers that must be overcome so as to articulate copyright to the broad concepts of culture and cultural diversity.

A first challenge that must be overcome is to establish a bridge between copyright and anthropology. Not in vain, the regime of copyright has been left with a static vision of culture or, to be more precise, with a division between 'high culture' and 'mass culture (Dermer, 2017)[2]. This can be verified by the way copyright individualizes products that are the result of human creativity, but culture is much broader and more dynamic than its products.

It seems that the —products— that represent culture for the Copyright belong to that division typical of some approaches of the 20th century anthropology. For example, it leaves aside the idea according to which, with the processes of decolonization, culture began to be defined as the recognition of the uniqueness and singularity of cultures, as a source of identity, of dignity, of meaning and of social innovation (Mattelart, 2005).

Furthermore, the vision of culture proposed by authors like Geerts, for whom culture is nourished by a wide network of meanings coming from cultural practices and representations that are understood from the collective character of society. Here, of course, the expressions are excluded the traditional cultural expressions.

The law seems far away from the most recent definitions of anthropology that are concerned with cultures and their diverse expressions. Cultures are dynamic, contradictory, and permeable. Culture is a product of struggles for power and for power of semiotic meanings (Sewell, 1999).

It is for this reason that the first challenge encountered is resize intellectual property from ideas that are sensitive to anthropology and the diversity of cultures. Until now Law has not expanded its concepts to this type of disciplines to see phenomena in a broader dimension.

A second challenge to overcome is to rethink the concept of property itself. To do this, it is necessary to conceive this regime from the vision of Keenan (2010), that is, from a critical vision of the concept of property. From the traditional regime, culture are very precise goods and services. But the concepts of culture escape from this precision.

So intellectual property should be rethought based on this contingency and fluidity of concepts. In particular, the proposal of Keenan (2010) revolves around:

> [...] the spatiality of the property to divert the focus of proprietary subject, towards the broader networks of relationships that interact to form a property. Property can be understood as a relationship of belonging sustained

2 Dermer himself (2017) points out in this regard: "The concept of culture is the subject of many debates in various disciplines. This concept can have different meanings, depending on the disciplinary perspectives" (p. 125).

> by the surrounding space, a relationship that is neither fixed nor essential, but temporally and spatially contingent [...] Although the property can be understood as reproducing the status quo, it can be subversive too [...] but the most important thing is that it suggests the possibility of an alternative political agenda for property. Instead of questioning whether the subversive property is found within the parameters of the law, this article examines the legal and extralegal property on the same basis because both have real effects. It invites you to rethink what property can do (p. 423).

These ideas of property are more coherent with the concepts of culture and cultural diversity within the framework of traditional cultural expressions, since these concepts must be thought from practices, from geography and from the contingent. This author's legal proposal leads us to think about a type of protection of culture that considers its dynamics. Her ideas subvert the entire traditional conception of property because the author presents property as a network of relationships, dynamic and sustained in space.

For Keenan (2010), property is an illusion from its traditional conception, which in any case gives the power of exclusion. That is why the perspective of the article raises the need to think about those excluded—such as indigenous peoples and ethnic groups, generators of traditional cultural expressions—and that belong to the legal construction of culture to rethink its legal regime.

The legal theories of property, focusing on the law of exclusion, point out that this is not only an extension of the subject but a relationship between subjects. This is why the proposal of the author is to change the focus of property as exclusion, to property as belonging, which would expand the perspective towards the spaces, the relationships and networks that constitute the property.

The main strength of Keenan's (2010) proposal is to see the property also from the extralegal perspective or from the social practices, which contributes to reflecting on common public goods as is culture. As you can see, Keenan (2010) states:

> Alternative ownership practices [...] have an effect both in the identities of the subjects as in the surrounding physical space: spaces of different shapes are created. The result is a space that is unresolved in terms of its position withinthe hegemonic understandings of property that are embedded in the law and that tend to dominate space. The perspective of subversive property shows the cracks in the standard (p. 436).

From the previous conception of property, it is important to reflect on the challenges of spaces, relationships, and cultural networks to redefine intellectual property, especially if we want to revitalize traditional cultural expressions as part of the ancestral heritage of indigenous peoples and ethnic communities.

This implies assimilating culture in its diversity as a source of identity and dignity of the people, from the practices of these peoples and their struggles for power and not only from individual products that result from all of the above. Culture will never be a resolved space because it is a diverse space.

A third challenge involves rethinking copyright from the perspective of diversity of its expressions. In fact, another criticism of the notion of Copyright—as a branch of intellectual property—from cultural practices, is done by Fazio (2018), when considering that this regime has privatized culture through the Agreement on Aspects of Intellectual Property Rights-TRIPS of the WTO (1995). Fazio (2018) poses a third challenge to the regime of intellectual property, and it is thinking about culture from the public perspective. It is because of this phenomenon that new debates arise in law, economics, and philosophy on intellectual property.

To resize copyright and intellectual property, Fazio (2018) takes up two debates. The first of them related to the tension between freedom and property, materialized by Adam Mossof and Richard Epstein. This debate is another expression of the aforementioned commerce-culture. While for Epstein intellectual property must be placed in an intermediate regime between the (pecuniary) interests of the authors and the social aspects of the public domain interests, where clauses must be thought of exceptions for certain uses and the extension of the time of protection (Fazio, 2018). For Mossof, intellectual property must correspond with capitalism and with the economic valuation of their products (Fazio, 2018).

The second dispute is between Kenneth Himma and Adam Moore "as a starting point to contrast social criticism with intellectual property" (Fazio, 2018, p. 117). This rethinking of intellectual property must be based on the characteristics of the intangible work. In that same sense, Padilla (2013) considers that copyright is a reductionist of cultural dynamics, particularly from literature, since the definition of who is the author is more complex than the law conceives.

In this sense, a tension is generated between the creative subject and the public domain. In the current copyright regimes in the world, the public is absent in the recognition of rights. The second tension mentioned by Padilla (2013) has to do with conceiving culture from an individualist, neoliberal paradigm, and free market. He also mentions the limitation of the Copyright Law that was thought from literature, leaving aside other cultural and artistic settings (Padilla, 2013).

For the first author, what is known as the Mickey Mouse law[3] (Bono Copyright Term Extension Act [CTEA], 1998), was to blame for tightening the entire intellectual property regime. The regime of intellectual property censors culture because it reproduces a hegemonic regime of knowledge that passes through aesthetics, which excludes the diversity of cultures (Gaitán, 2019).

Criticism of intellectual property is about access to knowledge, and this is a constitutional right enshrined in international treaties. The challenge here is that the mentioned author has to do with including in the intellectual property regime an open perspective of knowledge, and of a type of diverse knowledge.

Likewise, Gaitán (2019) considers that the history of intellectual property is based on an imbalance between the North and the South.

3 *Mickey Mouse Law*, was promoted by Disney to maintain the copyright of movies, works, books and music about the famous little mouse until 70 years pass—instead of the 50 previous ones—of the death of its author (Mora, 2003).

The intellectual property regime is about the social division of work, that is, with a type of knowledge production of the North that is worth it, and other knowledge of the South that can be usurped.

This is one of the great problems of intellectual property, because certain types of knowledge are protected to the detriment of others that are absolutely unprotected, standardizing culture to certain expressions to the prejudice of diversity and constitutional rights to access to knowledge and the development of culture and of the peoples.

Finally, this author considers that intellectual property is a siege on human ingenuity. The alternative to intellectual property will be the open models for civilization, the collective and community knowledge. The proposal then is a legal liberalization of culture, which is different from the economic liberalization of it.

Likewise, by linking intellectual property with the regime of private property and the market, what is important is the use, pleasure, and enjoyment. Which leads to making collective interests accessory such as life or culture. This reflection has to do with the legal background of the trade-culture debate which is related to the access to medicines and monopolistic control of them by the big pharmaceutical companies, where the right to life is denied for privileging patents and the demands of these large companies.

In coherence with this idea, Lander (2002) raises a criticism to the copyright regime from the geopolitics, based on four scenarios:

i. In the first instance, reference is made to the ethical dilemmas related to ownership over life and genetic risks, which has to do with making life private property. Thus, there is a call for caution due to the various risks in which is being incurred regarding biomedical advances.
ii. Secondly, the TRIPS (WTO, 1995) is highlighted as a scenario of reproduction of inequalities in negotiations.
iii. Thirdly, intellectual property regimes generate very specific threats to food security and the ways of life of peasants and aboriginal peoples of the world. Faced with this threat, there is a monopoly on patents about genetically modified foods[4].
iv. Finally, it refers to the large transnationals that have appropriated the traditional knowledge of the people to achieve the maximum possible control. In this sense, it is necessary to criticize this reductionist vision of culture in law, limited to peasant and ethnic populations since the Culture also implies a diversity of artistic expressions, population and sectoral.

Finally, Lander's postulate (2002) is still valid, who makes a characterization of what is imposed by the countries of the economic north and multinationals in the cultural sector on an only standardized copyright regime, which addresses more to their immediate commercial interests than to safeguard the culture as a protected legal interest.

In its own terms, it is one of the most powerful devices in the tendencies towards the concentration of power and increase in inequalities that characterize the current

4 An example of the above are the multinationals in the plant breeding sector that control a large part of the global seed market, among them Syngenta, Basf, Bayer, Dow, DuPont and Monsanto. In this regard, as Vargas et al. (2020), is a consequence of the misappropriation of traditional knowledge by this great industry, an increasingly greater dependence of the peasant communities on it

process of globalization (Lander, 2002). This is one of the key dimensions of geopolitics of contemporary capitalism, since in the processes of globalization, the asymmetry between the instruments that seek to safeguard ethnic and cultural diversity, versus those who promote this capitalism[5].

## CONCLUSIONS

The purpose of this article was to present a scenario reflective on some tensions between a traditional legal perspective of culture versus a broader perspective of it. Apropos of the discussions raised here about the regime of Copyright and traditional cultural expressions, understood as the vehicle on which cultural identity travels, and a worldview of indigenous peoples, ethnic and traditional communities.

It was evident that intellectual property and, in particular, the copyright regime, have addressed the concept of culture in an incomplete manner. Therefore, in order to rethink this legal regime, its tensions and ambiguities must first be contemplated, in order to draw up a comprehensive and integrative roadmap that is capable of encompassing all cultural expressions and traditional knowledge.

These tensions and ambiguities that in this research exercise are characterized by the authors, they show the starting point of a long journey that must be addressed by the Academy and by those in charge of formulating public policies. That said, in other words, it sets the tone for future research on the topic, in order to rethink the study of culture and law from anthropology, while, from this, it is plausible to understand the role played by the worldview and identity of peoples in their traditional cultural expressions.

With the five great challenges posed in the last section of the text, suggest the need to reconceptualize intellectual property from broader concepts linked interdisciplinary, rethinking the traditional idea of property from a dynamic and culturally diverse optics, thus giving room to models of knowledge in which all knowledge is valued and ethnic and cultural diversity respected.

Finally, it is considered that studying tensions and ambiguities as challenges of the law generates a key space to resize intellectual property—and particularly the copyright regime—from the set of uses, practices, techniques and customs that make up the cultural and intangible heritage of the ethnic groups.

## REFERENCES

Agudelo Giraldo, O.A. (Ed.) (2018). *La pregunta por el método: derecho y metodología de la investigación*. Editorial Universidad Católica de Colombia.

Anaya-Quintero, L. Y Cruz-Fino, J. (2018). Reflexiones sobre la naturaleza jurídica del derecho de autor. *La Propiedad Inmaterial*, (26), 171–188. https://doi.org/10.18601/16571959.n26.07

5 Lander (2002) maintains that "while the former are declarations of intention or commitments that are not accompanied by instruments that guarantee their compliance, for the Second, there are precise mechanisms that guarantee severe sanctions in case of non-compliance." (p. 86). However, the tensions between the different commitments assumed at the international level, will be resolved in favor of the interests of the economic north, therefore, the countries dependent on them, faced with the threat of sanctions for non-compliance with these commitments, they will be forced to submit to this dynamic.

Antons, C. (2009). What is" traditional cultural expression?" International definitions and their application in developing Asia. *The WIPO Journal*, (1), 103–116. http://hdl.handle.net/10536/DRO/DU:30040002

Burri, M. (2010). Digital Technologies and Traditional Cultural Expressions: A Positive Look at a Difficult Relationship. *International Journal of Cultural Property*, 17(1), 33–63. https://doi.org/10.1017/S0940739110000032

CAN, *Decisión 351*, Régimen común sobre derecho de autor y derechos conexos, 17 de diciembre de 1993. http://www.sice.oas.org/trade/junac/decisiones/dec351s.asp

Carrillo, F. (2007). La excepción cultural. *Profesiones*, (marzo-abril), 64–65. http://www.profesiones.org/var/plain/storage/original/application/287ede405afa65e7c52 e3fc81ff2c8c0.pdf

Castro, M. (2016). *Derecho comercial: Actos de comercio, empresas comerciales y empresarios*. Ediciones Universidad de los Andes.

De Beer, J. (2012). Implementing international trade agreements in federal systems: a look at the Canada-EU CETA's intellectual property issues. *Legal Issues of Economic Integration*, 39(1), 51–71. https://doi.org/10.54648/leie2012004

De Roman, R. (2009). Las expresiones culturales tradicionales en las normas sobre el derecho de autor. En M. Becerra (Ed.), *Textos de la nueva cultura de la propiedad intelectual* (pp. 141–161). Universidad Nacional Autónoma de México. http://ru.juridicas.unam.mx/xmlui/handle/123456789/11546

Deblock, C. Cagné, G. & Côté, R. (2004). *Les récents accords de libre-*échange *conclu par les* États *unis: Une menace à la diversité culturelle*. Agence Intergouvernementale de la Francophonie. http://www.francophonie.org/IMG/pdf/accords_libre-echange_US_-_menace_pour_la_div_cult.pdf

Dermer, M. (2017). Hacia una revisión bibliográfica de los conceptos de cultura y diversidad cultural. *Revista Criterios*, 10(2), 123–147. https://doi.org/10.21500/20115733.3788

Fazio, A. (2018). The social critique of intellectual property. Signos Filosóficos, 20(39), 116–143. https://signosfilosoficos.izt.uam.mx/index.php/SF/article/view/600

Flórez, G. y Cardozo, C. (2019). *Consumo, propiedad intelectual y competencia: tensiones con el derecho mercantil*. Editorial Universidad Católica de Colombia.

Gaitán, J. (2019, 25 septiembre- 2 octubre). Seminario Doctoral [Apuntes de clase]. Doctorado en Derecho, Universidad del Rosario, Bogotá, D.C., Colombia.

Gray, R., Kingwell, R.S., Galushko, V. & Bolek, K. (2017). Intellectual property rights and Canadian wheat breeding for the 21st century. *Canadian Journal of Agricultural Economics/Revue canadienne d'agroeconomie,* 65(4), 667–691. https://doi.org/10.1111/cjag.12142

Kanwar, S. & Evenson, R. (2009). On the strength of intellectual property protection that nations provide. *Journal of Development Economics*, 90(1), 50–56. https://doi.org/10.1016/j.jdeveco.2008.11.006

Keenan, S. (2010). Subversive Property: Reshaping Malleable Spaces of Belonging. *Social & Legal Studies*, 19(4), 423–440. https://doi.org/10.1177/0964663910372175

Lander, E. (2002). Los derechos de propiedad intelectual en la geopolítica del saber de la sociedad global del conocimiento. *Revista del Centro Andino de Estudios Internacionales,*(2), 79–88. https://revistas.uasb.edu.ec/index.php/comentario/article/view/229

Lehtinen, L. M. (2022). Propiedad intelectual y sostenibilidad: la protección de los conocimientos tradicionales. Cuadernos del Centro de Estudios en Diseño y Comunicación. *Ensayos*, (106), 185–203. http://dx.doi.org/10.18682/cdc.vi106.4040

Martin, É. (2005). Le projet de Convention internationale sur la diversité culturelle comme réponse au marché mondial de la culture. Études *internationales*, 36, 201–217. https://doi.org/10.7202/011415ar

Mattelart A. (2005). Diversité et mondialisation. La Découverte.

Mondragón, S., Caballero, S., Díaz, L. y Herrera, J. (2022). Protección jurídica de los derechos de

autor en Colombia. *SUMMA. Revista disciplinaria en ciencias económicas y sociales*, 4(1), 1–10. https://doi.org/10.47666/summa.4.1.09

Mora, M. (2003, 4 de enero). La Ley de Mickey Mouse. *El País*. https://elpais.com/diario/2003/01/05/cultura/1041721202_850215.html

OCDE, *Acuerdo Multilateral sobre Inversiones*, Febrero 1998. https://www.wto.org/spanish/res_s/reser_s/ae9805_s.htm

OIT, Convenio 169 de 1989 sobre pueblos indígenas y tribales en países independientes, 27 de junio de 1989. https://www.ilo.org/americas/publicaciones/WCMS_507556/lang—es/in-dex.htm

OMC, *Acuerdo sobre los Aspectos de los Derechos de Propiedad Intelectual relacionados con el Comercio*, 1 de enero de 1995. https://www.wto.org/spanish/tratop_s/trips_s/trips_s.htm

OMC, *Acuerdo General sobre Aranceles Aduaneros y Comercio*, 21 de marzo de 1994. https://www.wto.org/spanish/docs_s/legal_s/06-gatt_s.htm

OMPI. (2020). *Propiedad intelectual y recursos genéticos, conocimientos tradicionales y expresiones culturales tradicionales*. OMPI. https://www.wipo.int/publications/es/details.jsp?id=4504

Padilla, J. C. (2013). Definir al autor. Desde la propiedad intelectual hasta el movimiento derecho y literatura. *Estudios Socio-Jurídicos*, 15(2), 159–180. https://revistas.urosario.edu.co/index.php/sociojuridicos/article/view/2517

Palacio, M. y Bernal, E. J. (2020). La flexibilización del derecho moral de integridad por la jurisprudencia andina. *Civilizar Ciencias Sociales y Humanas*, 20(38), 81–94. http://dx.doi.org/10.22518/jour.ccsh/2020.1a01

Palumbo, M. M., De Migo, A. C. y Plaza, B. L. (2022). Los procesos de construcción epistémica en la economía popular rural: conocimientos, saberes y aprendizajes en movimiento. *Espacio Abierto*, 31(1), 55–79. https://produccioncientificaluz.org/index.php/espacio/article/view/37853

Rengifo, E. (1999). *Propiedad intelectual el moderno derecho de autor*. Universidad Externado de Colombia.

República de Colombia. Asamblea Nacional Constituyente. (1991). *Constitución Política de Colombia de 1991*. https://www.constitucioncolombia.com/titulo-7/capitulo-1

República de Colombia. Congreso de los Estados Unidos de Colombia. (1873). *Ley 84*, Código Civil de los Estados Unidos de Colombia. Diario Oficial 2.867 de 31 de mayo de 1873. http://www.secretariasenado.gov.co/senado/basedoc/codigo_civil.html

República de Colombia. Congreso de la República. (1982). *Ley 23*, sobre derechos de autor. Diario Oficial No. 35.949 de 19 de febrero de 1982. https://www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=3431

República de Colombia, C. Ctnal. (1998). *Sentencia SU-510*. Magistrado Ponente-MP Eduardo Cifuentes Muñoz. https://www.corteconstitucional.gov.co/relatoria/1998/su510- 98.htm

República de Colombia. C. Ctnal. (1998). *Sentencia C-155*. MP Vladimiro Naranjo Mesa. https://www.corteconstitucional.gov.co/relatoria/1998/C-155-98.htm

República de Colombia. Presidencia de la República. (1971). *Decreto 410*, por el cual se expide el Código de Comercio. Diario Oficial 33.339 del 16 de junio de 1971. http://www.secretariasenado.gov.co/senado/basedoc/codigo_comercio.html

Schneider, P. H. (2005). International trade, economic growth and intellectual property rights: A panel data study of developed and developing countries. *Journal of Development Economics*, 78(2), 529–547. https://doi.org/10.1016/j.jdeve-co.2004.09.001

Sewell, W. (1999). The concept(s) of Culture. In V. E. Bonnell & L. Hunt (Eds.), *Beyond the Cultural Turn* [pp. 35–61]. University of California Press.

Shivani, S.,Aparna, A. & Mishra, S. (2022). Traditional knowledge: Much more than what meets the eyes. *International Journal of Health Sciences*, 6(S5), 1570–1581. https://doi.org/10.53730/ijhs.v6nS5.8916

Teubner, G. & Fischer-Lescano, A. (2008). Cannibalizing epistemes: will modern law protect traditional cultural expressions. In C. Graber & M. Burri-Nenova (eds), *Intellectual Property and Traditional Ccultural Expressions in a Digital Environment* [pp. 1–20]. Edward Elgar Publishing. https://doi.org/10.4337/9781848443914.00008

UNESCO, *Convención sobre la Protección y la Promoción de la Diversidad de las Expresiones Culturales*, 3 al 21 de octubre de 2005. https://es.unesco.org/creativity/convention

Urra, F. A. (2018). Las bases del estatuto de la protección preventiva de los recursos genéticos, los conocimientos tradicionales y las expresiones culturales tradicionales en Chile *[Tesis magíster*, Universidad de Chile]. Repositorio Académico Uchile. https://repositorio.uchile.cl/handle/2250/151549

US. HR. *Sonny Bono Copyright Term Extension Act*., Pub. L. No. 105-298, 112 Stat. 2827 (Oct. 7, 1998). https://www.govinfo.gov/content/pkg/PLAW-05publ298/pdf/PLAW-105publ298.pdf

Vargas, I., Rodríguez, G. y Blumenkranc, H. (2020). *Propiedad intelectual sobre los conocimientos tradicionales agrícolas. Elementos para su caracterización en el ordenamiento jurídico colombiano*. Editorial Universidad del Rosario. https://doi.org/10.12804/ga9789587844139

Vargas-Chaves, I., Fuentes-Mancipe, M. & Piracoca-Chaves, D. (2021). Conocimiento tradicional, propiedad intelectual y moda: una visión desde la participación equitativa de beneficios. *Estudios Socio-Jurídicos*, 23(2), 35–60. https://doi.org/10.12804/revistas.urosario.edu.co/sociojuridicos/a.9582

Zois, C. & Pergantis, V. (2023). An (un) common remedy to Indigenous communities' subsistence: revisiting Traditional Knowledge Commons. *Journal of Human Rights and the Environment*, 14(1), 27–48. https://doi.org/10.4337/jhre.2023.01.02

* This article is an academic product presented as a research result for the institutional project INV-DER-3439 "Bases for the design of a characterization methodology of conflicts related to peasant communities in Colombia", financed by the Nueva Granada Military University–Research Fund.

** Translated by ANA SUSANA HERRERA, Official Translator & Interpreter Resolution 0784 by the Colombian Ministry of Justice, Sept. 3, 1997

## BIODATA

**Iván Vargas-Chaves** Research PhD at the University from Palermo (Italy). Law PhD from the University of Barcelona (Spain). Master in Private Law from the University of Salamanca (Spain), Public University of Navarra (Spain) and from the Venice Ca' Foscari University (Italy). Master's in law from the University of Genova (Italy). Lawyer of the University of Rosario (Colombia). Professor and head of the Law area Private of the Nueva Granada Military University (Colombia). ORCID: https://orcid.org/0000-0001-6597-2335

**Miriam Dermer-Wodnicky** She has a master's degree in political science from the Université du Québec à Montréal (Canada). Political scientist from the University Nationality of Colombia. Career teacher and leader of the Research Group in Theory of Law, Justice, and Politics of La Universidad La Gran Colombia. ORCID: https://orcid.org/0000-0001-8749-9024