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Tradition-based Modern Creations of a Cultural Community – Some Thoughts on the Copyright Status of Internet Folklore

Abstract: Folklore is not only an essential part of our cultural heritage, it is also an extremely important means of communication and expression. Although many theories try to capture the concept of "modern folklore" that is emerging at the present, only its main characteristics can be considered. When it comes to understanding internet folklore the ground is even more fragile, especially if we wish to examine and assess it not exclusively through a folkloristic lens, but also from a copyright perspective. There is a tendency to identify its natural presence based on a kind of simplicity, and to project that simplicity not only with respect to its use, but also with respect to the legal regulation that applies to it. The present study aims to show how internet folkore has to fit into an incredibly complex set of copyright rules, and how not only its creation but also

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its use for various purposes and in several different ways raises different copyright issues from one jurisdiction to another. As UNESCO clearly points out, intangible cultural heritage is community-based, but raising awareness and emphasizing its importance is a universal task. In this context, a cultural community needs to find a place for tradition-based modern creations such as internet folklore, without disregarding their copyright status and future.

Keywords: intangible cultural heritage, folklore, internet folklore, copyright, freedom of expression

Introduction

From folklore dynamics to internet folklore – context and research questions

When hearing the word "folklore", many people think of famous folk tales, folk traditions, customs related to festivities, or authentic folk dance steps and moves. When it comes to defining *folklore*, the "I know it when I see it" approach is frequently used by analogy.[1] The term itself, which means "folk science" or "folk knowledge", was proposed by the British writer and antiquary, Willim J. Thoms in his letter to the editor of the *Athenaeum* journal on 11 August 1846.[2] Opinions differ however as to the significance of this historical moment from the perspective of folklore studies.[3] Of course, the scientific exploration of the field of folklore began long before this point in time, but the emergence of the expression shaped and stimulated the scientific discourse concerning it, even if the term was far from having a uniformly accepted meaning.[4] In fact, as Richard Dorson has pointed out, the basic work edited by Maria Leach and published in 1949 already contained 21 different definitions of folklore.[5]

[1] Although in the *Jacobellis v. Ohio* case, 378 U.S. 184 (1964), which was decided on 22 June 1964, Justice Stewart did not use the term in the context of folklore, it is instructive by analogy: "the Court [...] was faced with the task of trying to define what may be indefinable. [...] I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it [...]".

[2] R.M. Dorson, *Introduction*, in: R.M. Dorson (ed.), *Folklore and Folklife*, University of Chicago Press, Chicago–London 1972, p. 1.

[3] E.-K. Kongas, *The Concept of Folklore*, "Midwest Folklore" 1963, Vol. 13(2), pp. 69-88.

[4] V. Voigt, *Bevezetés* [Introduction], in: V. Voigt (ed.), *A magyar folklór* [The Hungarian Folklore], Osiris, Budapest 1998, p. 7.

[5] M. Leach (ed.), *Standard Dictionary of Folklore, Mythology and Legend*, Funk & Wagnalls, New York 1949, pp. 398-402.

The study of the various fields and the results vis-à-vis the individual elements of folklore slowly pointed in the same direction, and – based on the role of preserving tradition and identity – folkloristics as a discipline developed, forming a specific conceptual system by the end of the 19th century.[6] However, even in today's folkloristics it is not entirely clear what is considered to be the actual object of research, which is even more pronounced in international comparisons.[7]

Many decisions have had to be made by practitioners of the discipline, and the determination of its role and its subject has varied from one legal system to another. Some approaches risked becoming stuck in the past, although several researchers have warned that folklore is not only a product of the past but also a reflection of the present, and this recognition has had a serious impact on the methodology of folklore.[8]

> Folklore was a "mirror of culture" but not a dynamic factor in it, a projection of basic personality, but not personality in action. Once viewed as a process, however, folklore does not have to be a marginal projection or reflection; it can be considered a sphere of interaction in its own right.[9]

The significance of this dynamic becomes even more pronounced if the concept and phenomenon of internet folklore is to be understood and evaluated. The aim of this paper is to identify internet folklore in order to get a clearer picture of it through the lens of copyright. My main hypothesis is that the term nowadays covers such a wide range of subjects that not only is it not treated uniformly from a copyright perspective, but unexpected problems arise in practice when internet folklore does not "behave as folklore" in the way that its name suggests. While the literature does address the cultural significance of internet folklore, its colourful elements are on even more uncertain ground than the status of folklore itself. Its integration into a complex system of human rights also gives rise to specific points of controversy;[10] thus its relationship with freedom of expression, which is reflect-

[6] V. Voigt, *A magyar folklór történetének korszakai* [Periods in the History of Hungarian Folklore], in: I. Kollega Tarsoly (ed.), *Magyarország a XX. században* [Hungary in the 20th Century], Babits, Szekszárd 1996–2000, p. 545.

[7] É. Mikos, *Paradigmaváltások a folklorisztikai terepmunka történetében a 19–20. század fordulóján és a 20. század első felében* [Paradigm Shifts in the History of Folkloristic Fieldwork at the Turn of the 19th and 20th Centuries and in the First Half of the 20th Century], in: Á.L. Ispán, Z. Magyar (eds.), *Ethno-lore. A Magyar Tudományos Akadémia Bölcsészettudományi Kutatóközpont Néprajztudományi Intézetének Évkönyve* [Ethnolore. Yearbook of the Institute of Ethnography of the Hungarian Academy of Sciences Research Centre for the Humanities], Magyar Tudományos Akadémia Bölcsészettudományi Kutatóközpont, Budapest 2016, p. 259.

[8] A. Dundes, *The American Concept of Folklore*, "Journal of the Folklore Institute" 1966, Vol. 3(3) [Special Issue: The Yugoslav-American Folklore Seminar], p. 242.

[9] D. Ben-Amos, *Toward a Definition of Folklore in Context*, "The Journal of American Folklore" 1971, Vol. 84(331), p. 13.

[10] D. Guangyu, *Cultural Heritage Rights and Rights Related to Cultural Heritage: A Review of the Cultural Heritage Rights System*, "Santander Art and Culture Law Review" 2023, Vol. 2(9), p. 187.

ed in the relevant case law, is also worth examining. The paper also seeks to answer the question of the impact of the highly incidental enforcement of copyright in this area, and examines whether the internal and external limitations of copyright law adequately address these situations.

Structure and methodology

In order to answer these questions, this paper also identifies the conceptual elements of internet folklore in relation to folklore in general, and explores their relationship. It then focuses on the challenges posed by the rather complex copyright issues surrounding the creation and the use of internet folklore. In this respect, the article aims to contribute to a holistic approach to the study of internet folklore, exploring its place not only in terms of cultural heritage but also in copyright law. It is important to explore these implications for rightholders, users, and cultural communities alike, especially given that internet folklore behaves differently in "its own medium" (as "de facto folklore") than when it "escapes from it" for different reasons.

Throughout, I have relied primarily on the dogmatic analytical method, taking due care to analyse and interpret the folkloristic literature in line with the copyright literature. This method of legal analysis was indispensable, particularly in order to place the issue in an international and European context and to draw attention to the differences in approach between various jurisdictions. Case study analysis was also applied in order to properly substantiate the existence of the various practical problems envisaged in my hypothesis, and to uncover copyright complexities and the unique characteristics of internet folklore. The primary purpose of using these research methods is to systematize and describe the applicable laws in order to identify the legal categories that are often overlooked in practice and to draw attention to inconsistencies and the potential for abuse. The results of this holistic – but essentially copyright-focused – analytical and critical overview are summarized in the conclusion, offering answers to the questions raised above.

The Place of Internet Folklore in Copyright Law

Is folklore the reference point?

In order to understand internet folklore and its place in copyright law, it is worth briefly placing it in context by reviewing the position of *folklore* itself in copyright law. Despite the long-standing interest in the subject in the literature, this seems essential for two specific reasons. Firstly, the conceptual features and dynamics of folklore need to be highlighted so as to understand internet folklore in relation to these characteristics. Secondly, in order to identify the current challenges in the appropriate regulatory context, it is also necessary to recognize the specificities of the position of folklore within copyright.

As regards the first perspective, it should be stressed as a starting point that, however serious the study, collection, and transmission of folklore has become, its *concept* – and especially its *subject matter* – remain very *heterogeneous*. However, the uncertain boundaries can also be seen as a specific characteristic of folklore: i.e. that "folklore is by no means a group of phenomena with an eternal life, but is subject to the law of change".[11] Therefore, the definitions of folklore also need to be constantly revised.[12] This is true even if, seemingly paradoxically, "folklore is an important mechanism for maintaining the stability of culture".[13]

According to the 1989 UNESCO Recommendation, folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community insofar as they reflect its cultural and social identity. Its standards and values are transmitted orally, by imitation or by other means. It takes forms such as, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture, and other arts.[14]

Drawing on the academic literature, the following can be identified as traditional and permanent conceptual elements of folklore: oral transmission, continuity, living in variation, formulaic nature, and connection to a particular social group.[15] Moreover, it is not simply a kind of impersonality – the elements of folklore are formed from the dialectic of the *collective* and the *personal*,[16] i.e. the creative individuality is somehow present, even if only in the background. This is especially true in the case of certain genres, all the more so the closer the process of creation is to the present.[17]

Therefore, no uniform definition of folklore is established, and according to some folklorists there is no need for one, since such a definition would limit the work of collecting on the basis of arbitrary criteria.[18] And indeed, as the *digital age* has arrived, the conceptual elements that identify folklore seem to be increasingly flexible. In fact, even conceptual elements previously thought to be stable are changing, as digital technology, digital culture, and folklore meet.

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11 I. Katona, *A folklór és a folklorisztika általános problémái* [General Problems of Folklore and Folkloristics], in: V. Voigt (ed.), op. cit., p. 18.

12 I. Stamatoudi, *Protection of Intangible Property by Means of the UNESCO Convention on the Safeguarding of Intangible Heritage and Intellectual Property Law*, "Revue Hellenique de Droit International" 2004, Vol. 57(1), p. 154.

13 W.R. Bascom, *Four Functions of Folklore*, "The Journal of American Folklore" 1954, Vol. 67(266), pp. 333-349.

14 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore, 15 November 1989.

15 K. Vargha, *Miért és hogyan végezzünk online folklorisztikai terepmunkát?* [Why and How to Do Online Folklore Fieldwork?], in: Á.L. Ispán, Z. Magyar (eds.), op. cit., p. 283.

16 Gy. Ortutay (ed.), *Magyar néprajzi lexikon* [Hungarian Ethnographical Lexicon], Akadémiai, Budapest 1979, https://bit.ly/43t7aRT.

17 I. Katona, op. cit., p. 28.

18 K. Vargha, *Miért és hogyan…*, p. 283.

As regards the *second* dimension, not only the concept of folklore but also the future of its *regulation* can be described as *uncertain*.[19] A wide variety of solutions can be imagined and have emerged for the protection of folklore, and more specifically for the relationship between folklore and copyright. Expressions of folklore can be protected by copyright (which seemed like a reasonable solution in some African countries, like Nigeria[20]), and *sui generis* protection is also a possibility (e.g. as in Panama or Peru[21]); but in international law it is protectable indirectly under the concept of "neighbouring rights" (performing expressions of folklore[22]). As was emphasized in the introductory remarks of the paper prepared for the UNESCO-WIPO World Forum on the Protection of Folklore in 1997, most of the solutions are not focused on the *source* of these expressions, but on the persons who "have taken certain actions in relation to expressions of folklore".[23]

Even among European countries there is no consistent approach. Many countries do not explicitly refer to folklore works in their copyright laws.[24] Others prefer to assume that elements of folklore are part of the *public domain*,[25] and may consider specific cases, such as the protection of works made using elements of folklore[26] (which is a kind of adaptation of folklore[27]), or that collections or compilations of folklore may be covered by copyright protection.[28] In many jurisdictions "works of

19 P. Kimani, *Consolidated Assessment of the Legal Protection of Folklore*, "Wake Forest Journal of Business and Intellectual Property Law" 2023, Vol. 23(4), p. 281.

20 Nigerian Copyright Act, 2022, Art. 74.

21 S. von Lewinski (ed.), *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore*, Kluwer Law International, Alphen aan den Rijn 2008, p. 151.

22 Article 2 of the WIPO Copyright Treaty (adopted in Geneva on 20 December 1996) and the WIPO Performances and Phonograms Treaty (adopted in Geneva on 20 December 1996), "For the purposes of this Treaty: *(a)* 'performers' are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore". See also G. Békés, *Előadóművészi teljesítmény* [The Achievement of a Performer], in: A. Jakab et al. (eds.), *The Internet Encyclopaedia of Legal Studies* (Copyright and Industrial Property, column editors: A. Grad-Gyenge, A. Pogácsás), https://bit.ly/45UsK3h, 2021, [3]-[4].

23 UNESCO-WIPO World Forum on the Protection of Folklore, *Economic Exploitation of Expressions of Folklore: the European Experience*, 17 March 1997, UNESCO-WIPO/FOLK/PKT/97/16, p. 5.

24 See copyright acts of Belgium, Cyprus, Denmark, Finland, France, Germany, Iceland, Italy, Latvia, Luxembourg, Norway, Poland, Portugal, San Marino, Spain, Sweden, and Switzerland.

25 The official explanation of the Hungarian Copyright Act briefly reveals the arguments behind this decision of the legislator: the fact that copyright focuses on "the relationship between the work and the author" makes it "impossible to apply […] copyright protection to 'works of folklore'". Explanatory memorandum to Articles 1-9 of Act LXXVI of 1999 on Copyright.

26 1999. évi LXXVI. törvény a szerzői jogról [Hungarian Copyright Act], Art. 1(7)

27 Закон за авторското право и сродните му права (ДВ, бр. 56/1993) [Bulgarian Copyright Act], Art. 3(2)1. However, adaptation raises a number of borderline issues. For more on this, see G. Békés, P. Mezei, *Eredetiség és azonosíthatóság* [Originality and Identifiability], in: A. Grad-Gyenge, E. Kabai, A. Menyhárd (eds.), *Liber Amicorum – Studia G. Faludi Dedicata. Ünnepi tanulmányok Faludi Gábor 65. születésnapja tiszteletére* [Studies in Honour of the 65th Birthday of Gábor Faludi], ELTE Eötvös, Budapest 2018.

28 Νόμος 2121/1993, Πνευματική Ιδιοκτησία, Συγγενικά Δικαιώματα και Πολιτιστικά Θέματα (επικαιροποιημένος μέχρι και τον ν. 4531/2018) [Greek Copyright Act], Art. 2(2).

folklore" are considered to be results of intellectual property that are *not subject to copyright*, for example in Bulgaria,[29] Estonia,[30] Greece,[31] Hungary,[32] Lithuania,[33] Slovakia,[34] or Slovenia.[35] The reasoning behind this approach is that in the case of folk art the community of people who create these works, and thus the personal creative link between the author and her or his work, is very remote.[36] Some regulations also impose special conditions, such as the Czech solution, according to which copyright protection shall not apply to creations of traditional folk culture unless the real name of the author is commonly known and the works are anonymous or pseudonymous.[37] The Croatian solution, from the point of view of exploitation, in a certain sense excludes folk literary and artistic works from the public domain and provides that these creations in their original form are not subject to copyright, but that remuneration must be paid for their communication to the public as for the communication to the public of protected copyright works. Such remuneration shall be used to develop creativity in the relevant artistic and cultural field.[38] Nevertheless, the 1967 Stockholm Diplomatic Conference on the revision of the Berne Convention reflected to some extent the aspirations of the developing world for the protection of folklore.[39] This was a significant milestone, even though it was evident that it was forced into the closed copyright system.[40] Although this provision of the Berne Convention is still in force today, as discussed earlier the approach to the regulation varies from jurisdiction to jurisdiction. Even if there are countries that are still looking for a solution under the umbrella of copyright, the *sui generis*

29 Bulgarian Copyright Act, Art. 4.

30 Autoriõiguse seadus (Vastu võetud 11.11.1992, konsolideeritud tekst 01.04.2019) [Estonian Copyright Act], Art. 5.

31 Greek Copyright Act, Art. 2(5).

32 Hungarian Copyright Act, Art. 1(7).

33 Autorių teisių ir gretutinių teisių įstatymas 1999 m. gegužės 18 d. Nr. VIII-1185 [Lithuanian Copyright Act], Art. 5.

34 Zákon č. 185/2015 Z.z. o autorskom práve a právach súvisiacich s autorským právom [Slovakian Copyright Act], Art. 5.

35 Zakon o kolektivnem upravljanju avtorske in sorodnih pravic (Uradni list RS, št. 63/16 z dne 7. 10. 2016) [Slovenian Copyright Act], Art. 8(1)(3).

36 Hungarian Council of Copyright Experts, Case SZJSZT–01/15. The fact that folklore works "cannot be attributed to a single author" (or to specific co-authors) makes it impossible, or at least meaningless, to assess individual originality, which is a prerequisite for copyright protection. Hungarian Council of Copyright Experts, Case SZJSZT–3/2004.

37 Zákon č. 121/2000 Sb., ze dne 7. dubna 2000 o právu autorském, o právech souvisejících s právem autorským a o změně některých zákonů [Czech Copyright Act], Art. 3.

38 Zakon o autorskom pravu (NN 111/2021) [Croatian Copyright Act], Art. 18(7).

39 Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, revised at Stockholm on 14 July 1967.

40 V.G. Kutty, *National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and the Philippines*, 25 November 2002, WIPO/GRTKF/STUDY/1, p. 8.

protection of folklore has begun to take its own course. This path leads through the model provisions of UNESCO-WIPO[41] – a series of regional consultations and recommendations – and the establishment of an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore,[42] but where it will lead is still a matter of conjection about the future.[43]

In answer to the – to a certain extent rhetorical – question posed in the title of this section, the concept and regulation of folklore can be considered a kind of basis for understanding the status of internet folklore, but it is certainly not a stable point of reference in any respect.

The nature and characteristics of internet folklore

A significant number of 21st century folklorists have expressed fears that the new era of human communication will lead to the death of folklore, although the main task of folklore itself is, according to one interpretation, to collect and thus preserve for posterity elements of folklore that are dying out, since folklore functions as "evidence" of tradition and national culture, providing an opportunity to learn about the "common past".[44] In other words, it is the destiny of each folklore element to be lost in the past, even if folklore preserves, researches, and makes accessible the elements that have fallen out of the reality of everyday life, which places them in folklore volumes and on the shelves of museums. Consequently, it is a constant and continual task to collect and save the very fast-changing, living, and existing folklore.[45] Folklore itself is not dying, but folkloristics traditionally:

> primarily recorded and analysed certain oral manifestations of contemporary culture, albeit with the restriction that it concentrated on what seemed to belong most to the past, in accordance with the rescue of the present oral culture. Another way of expressing this is that it was contemporary cultural research that focused on cultural elements that were already irrelevant to the majority of people living in that popular culture.[46]

Moving towards the present means that digital technology not only helps to fulfil the traditional folkloristic task of collection and preservation mentioned

[41] UNESCO/WIPO, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, 15 February 1983, UNESCO/WIPO/FOLK/AFR/2.

[42] See the website of the Intergovernmental Committee, https://bit.ly/3NgVIDn.

[43] N. Sharma, Ipsa, *IPR Regime: Copyrighting Tradition and Culture!* "Indian Journal of Law and Legal Research" 2023, Vol. 5(2), pp. 1-9.

[44] J. Gulyás, *A szóbeliség értéke, értelmezése és a folklorisztika önmeghatározása* [The Value, Interpretation of Orality, and the Self-definition of Folkloristics], in: K. Neumer (ed.), *Médiák és váltások* [Medias and Shifts], MTA Bölcsészettudományi Kutatóközpont – Gondolat, Budapest 2015, pp. 13-14.

[45] Ibidem, p. 17.

[46] Ibidem, p. 27.

above,[47] but has also become a medium for *digital folklore*.[48] The folklore of the modern human race is evolving before our eyes.

We hear the expression *internet folklore* more and more often, and the terms e-, online, net, virtual, cyberfolklore, and even Facebook or like-folklore have appeared.[49] It soon became clear that the use of language on the internet was "in many ways a vehicle for new folklore phenomena".[50] In addition to the exchange of information, a strong element of online communication is obviously community cohesion, which is the breeding ground for folklore; even if, when browsing the content of the internet, people do not immediately realize that they are encountering new phenomena of folklore, since they differ in many respects from the traditional, "authentic" folklore.[51]

Traditional oral folklore in this online medium has led to a number of changes in both content and style, in addition to the emergence of visual and multimedia language as opposed to natural language texts, resulting in new hybrid genres. At the same time, it should also be recognized that the repositories of internet folklore fulfil the same functions as traditional oral folklore, i.e. as "outsourced memory".[52] According to György Molnár, Zoltán Szűts, and Márta Telek Törteli, in the majority of cases it is a collective work, but it may have an individual or even a well-known author. In their view, the reason for the "facelessness" of folklore is essentially technical in nature, which they interpret as the fact that in online communications the identity of the narrator can never be absolutely certain, since everyone has a kind of "virtual identity". However, other scholars point out that online personalities do play a huge role in internet folklore, and that individual contributions and activities are highly visible and even retraceable.[53] This may represent a certain change in the common conceptual elements that have been identified so far, but it is a consequence

[47] I. Lourdi, C. Papatheodorou, M. Nikolaidou, *A Multi-layer Metadata Schema for Digital Folklore Collections*, "Journal of Information Science" 2007, Vol. 33(2), pp. 167-213.

[48] "[D]igital folkloristics should include the digital processing of traditional folklore as well as the research of digital folklore using traditional folkloristic methods". K. Vargha, *A digitális folklorisztika felé. Egy új kulcsszó és háttere a nemzetközi kutatásban* [Towards Digital Folkloristics. A New Keyword and Its Background in International Research], "Ethnographia" 2016, Vol. 127(4), p. 624; D. Keller, *Digital Folklore: Marble Hornets, the Slender Man, and the Emergence of Folk Horror in Online Communities*, MA thesis, University of British Columbia, 2013.

[49] Á. Veszelszki, *Lájkolom! A Facebook-folklórról* [Like! About Facebook Folklore], in: G. Csiszár, A. Darvas (eds.), *Klárisok. Tanulmánykötet Korompay Klára tiszteletére* [Study Book in Honour of Klára Korompay], ELTE BTK Magyar Nyelvtörténeti, Szociolingvisztikai, Dialektológiai Tanszék, Budapest 2011, p. 380.

[50] G. Balázs, *Netfolklór – intermedialitás és terjedés* [Netfolklore – Intermediality and Diffusion], "Replika" 2015, Vol. 90-91(1-2), p. 172.

[51] C.Y.N. Smith, *Beware the Slender Man: Intellectual Property and Internet Folklore*, "Florida Law Review" 2018, Vol. 70(3), pp. 601-648.

[52] Gy. Molnár, Z. Szűts, M. Törteli Telek, *A mémek mint az internetes folklór részei* [Memes as Part of Internet Folklore], "Hungarológiai Közlemények" 2017, Vol. 18(1), pp. 54-55.

[53] L.S. McNeill, *The End of the Internet: A Folk Response to the Provision of Infinite Choice*, in: T.J. Blank (ed.), *Folklore and the Internet: Vernacular Expression in a Digital World*, University Press of Colorado, Logan 2009, p. 84.

of the changing nature of folklore. But other elements are still present, just like in traditional folklore. Internet folklore also spreads from user to user; is built on traditional elements; and while it strives for formulaic accuracy it can still be disseminated very quickly, which is particularly decisive; and its variants are also easy and quick to create.[54] One of the characteristics of traditional folklore is verbalism, and in fact because of its interactivity and synchronicity internet literacy is closer to verbalism.[55] However, there is a large and major shift towards visuality. Defining phenomena rooted in visual perception is a difficult task in itself, as it is difficult to capture in words and concepts the dynamically changing images of cultural and social life.[56]

There are several types of internet folklore, and in addition to providing entertainment and social experience, most of them react to current news and events, which is why there are also cases where they are made specifically for political purposes. While they can have serious economic interests (see the various aggregator sites), and can be created for advertising or other business purposes, it is completely unpredictable which ones will achieve popularity and spread rapidly. Their lifespan is also unpredictable, but often they are very fragile works that can lose their relevance within an extremely short period of time. When attempting to capture the essence of internet folklore, it should be kept in mind that these terms refer only to the medium of transmission, which of course determines in many respects the form in which it is presented and disseminated but is not entirely separated from folklore presented orally. Moreover, recent research increasingly emphasizes its hybridity, pointing out that there is no separate offline and online folklore, but that they are different manifestations of the same folklore.[57]

Hence there is no unified definition, and although there is a lot of research on them,[58] folklore literature does not clearly include within the scope of folklore all the elements considered as internet folklore. Instead, "internet folklore" as a general term can rather "be interpreted folklorologically".[59] If the internet is to be seen simply as a new medium for traditional face-to-face communication, there must also be online folklore, "because online is just another way of communicating".[60]

Nonetheless, the above reasoning outlines a rather broad interpretation of internet folklore. Similarly to the rapid expansion of the concept of cultural heritage,

[54] Gy. Molnár, Z. Szűts, M. Törteli Telek, op. cit., pp. 58-61.

[55] M. Domokos, *Az elektronikus folklór gyűjtéséről* [On Collecting Electronic Folklore], in: Á.L. Ispán, Z. Magyar (eds.), op. cit., p. 295.

[56] M.H. Segall, D.T. Campbell, M.J. Herskovit, *The Influence of Culture on Visual Perception*, in: H. Toch, C. Smith (eds.), *Social Perception*, Van Nostrand, Princeton 1968, p. 141.

[57] K. Vargha, *Miért és hogyan…*, pp. 284-285.

[58] T.J. Blank, *Introduction: Toward a Conceptual Framework for the Study of Folklore and the Internet*, in: T.J. Blank (ed.), op. cit., pp. 1-20.

[59] K. Vargha, *Miért és hogyan…*, p. 285.

[60] Robert Glenn Howard, quoted in ibidem, p. 291.

which Salvador Muñoz Viñas calls "the Heritage Big Bang",[61] the broad concept of internet folklore also implies that it is difficult – if not impossible – to treat it uniformly.

The copyright status of internet folklore

The fact that internet folklore as such cannot be clearly considered to be part of folklore (in fact, the relationship may be reversed), and that for the reasons mentioned earlier the concept of folklore is ambiguous, has wide-ranging implications for copyright. In many legal systems folklore falls under the public domain, i.e. it is outside the scope of copyright protection. However, this may be true for only a certain – and apparently relatively small – proportion of internet folklore. In many cases of memes, gifs, and other forms of typical popular cultural content that can be classified as internet folklore,[62] it is possible to identify (at least) one of the works of authorship and often also its creator. While some of these works are created specifically for this purpose, i.e. for use in the context of internet folklore, a significant number are not, but rather are simply used in this medium – either as simple reproductions (with at most minor, insignificant modifications that do not affect their individual, original character) or by creating derivative works.

In the latter group of works, it is most conceivable that the conceptual elements of folklore as a collective creation are realized in works whose creator, although they appear to be individual and original, is unidentifiable. The reason for this *unidentifiability*, however, does not seem to be indifferent. In the case of internet folklore, the time of creation is typically recent and it can be assumed that the term of protection has not yet expired, but the fact that the creator is unidentifiable does not in itself qualify it as folklore; it may also be an orphan work.[63] However, the unidentifiability of the creator – which may also have an impact on the individual, original character of the work – may have other consequences if the reason is that the work cannot be considered as the creation of a particular person (or a given group of persons).

The influence of the *remix culture* of the last few decades[64] – which relies heavily on collective creation and relegates the importance of the author to the background; even predicting his or her death[65] – cannot be ignored.[66] Folklore itself is the oldest community creation; folk tales and stories have accompanied humanity for thou-

[61] S. Muñoz Viñas, *A Theory of Cultural Heritage: Beyond the Intangible*, Routledge, Abingdon 2023, p. 5.

[62] Folk and popular culture not simply evolved beside each other, but there is a kind of fusion between them. See in detail: T.J. Blank, *Folklore and the Internet: The Challenge of an Ephemeral Landscape*, "Humanities" 2018, Vol. 7(2), p. 50.

[63] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012, p. 5, Art. 2(1).

[64] L. Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy*, Penguin, New York 2008, p. 68.

[65] P.K. Saint-Amour, *The Copywrights. Intellectual Property and the Literary Imagination*, Cornell University Press, Ithaca–London 2003, p. 205.

[66] R. Tracy, *Cancel [Copyright] Culture: A Legal Analysis of George Orwell's Nineteen Eighty-Four*, "Chicago-Kent Journal of Intellectual Property" 2022, Vol. 21(1), p. 49.

sands of years. In its modern form it has been transmitted by the digital revolution to certain areas of art and society in general. The read-write culture[67] is characterized by the fact that user-generated content is simultaneously consumed and created, with the personality of the creator(s) being relegated to the background. The question has also been raised in the academic literature whether this collaborative creation is a new form of authorship or merely a re-emergence of an ancient form of cooperative creation – which is characteristic of folklore – in the digital medium.[68]

In the case of internet folklore, however, it seems that it is not easy to draw a line and establish precise categories. This issue is further complicated by the fact that in many cases there is a creator – often identifiable – who initiates a creative process in a community by means of his or her individual, original creative activity. Anonimity, absence of identification or the simple lack of enforcement, does not however remove the copyright holder from protection in chain.

The process of creating internet folklore

In the field of internet folklore, content also presents a very heterogeneous picture in terms of copyright. Many elements do not go beyond the level of an idea – they do not have an individual, original character and are therefore not protected by copyright. In the folkloristic sense, for example "a meme is an idea that spreads from user to user through online communication channels, essentially social networking sites (Facebook). A popular meme […] always carries ideas, symbols, pop culture references, in the form of writing, images or multimedia text".[69] While from a copyright point of view memes and similar content often do not go beyond the representation of an idea, they very often are characterized by individual, original expression or by the adoption or adaptation of individual, original elements alongside the shared idea.

At the same time, content circulating as part of internet folklore may be in the public domain because the protection term has expired or because it is considered folklore, depending on the legal system.[70] Often, the starting point is an original work by one or several authors, or an individual, original element is added during the adaptation process. In many cases this simply results in an orphan work if the rightholder is unknown. Even in the case of known rightholders, there is often a lack of enforcement, i.e. the rightholder does not take action against the use (typically reproduction, adaptation, communication to the public) of his/her work in the context of internet folklore.

[67] L. Lessig, op. cit., p. 28.

[68] S. Mendis, *Wiki (POCC) Authorship: The Case for an Inclusive Copyright*, "Journal of Intellectual Property, Information Technology and Electronic Commerce Law" 2022, Vol. 13(3), p. 270.

[69] Gy. Molnár, Z. Szűts, M. Törteli Telek, op. cit., p. 63.

[70] E.L. Rosenblatt, *Who Will Speak for the Slender Man: Dialogism and Dilemmas in Character Copyright*, "Florida Law Review Forum" 2018, Vol. 70, pp. 69-78.

But it is not only the non-enforcement of the copyright law that the creator of internet folklore content who wants to (also) use the copyright of another person can rely on. Copyright law provides creators and users with a number of tools that, in the spirit of supporting freedom of expression, make it possible to create colourful content on the internet without having to seek permission from the copyright holders of the works used. Fair use and several of the free use cases thus play a prominent role in enabling free expression. Directive (EU) 2019/790 on Copyright and Related Rights in the Digital Single Market ("CDSM Directive") further strengthened this possibility, as it emphasized in its Recital (70) that:

> users should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. That is particularly important for the purposes of striking a balance between the fundamental rights laid down in the Charter of Fundamental Rights of the European Union ("the Charter"), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property.[71]

From the point of view of our topic, it should again be stressed that there is a great need for harmonization, at least at the level of the European Union (EU), since many Member States, such as Cyprus, Greece, Hungary, or Portugal, have not built on the parody exception. Hungary however took the chance and used the reform to codify a general parody exception[72] covering not only works or other subject matter uploaded by users,[73] but also in other – online or offline – cases.[74]

Still, while the CDSM Directive did not bring about the death of internet folklore, as many feared it would because of its famous Article 17,[75] neither did it bring uniformity in its treatment across the EU.[76] In the years since its adoption, it has

[71] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.05.2019, p. 92, Recital (70).

[72] 2021. évi XXXVII. törvény a szerzői jogról szóló 1999. évi LXXVI. törvény és a szerzői jogok és a szerzői joghoz kapcsolódó jogok közös kezeléséről szóló 2016. évi XCIII. törvény jogharmonizációs célú módosításáról [Amendments to the Hungarian Copyright Act, 2021], Art. 8; Hungarian Copyright Act, Art. 34/A; see in detail: D. Ujhelyi, *The Long Road to Parody Exception in Hungarian Copyright Law – An Explorer's Log*, "Iparjogvédelmi és Szerzői Jogi Szemle" 2022, Vol. 17(2), pp. 44-108.

[73] CDSM Directive, Art. 17(7).

[74] See in detail: T. Rendas, *Are EU Member States Required to Have a Sense of Humor?* "IIC International Review of Intellectual Property and Competition Law" 2023, Vol. 54(1), pp. 1-4.

[75] E. Rosati, *The Legal Nature of Article 17 of the Copyright DSM Directive, the (Lack of) Freedom of Member States and Why the German Implementation Proposal Is Not Compatible with EU Law*, "Journal of Intellectual Property Law & Practice" 2020, Vol. 15(11), pp. 874–878; F. Romero-Moreno, *'Upload Filters' and Human Rights: Implementing Article 17 of the Directive on Copyright in the Digital Single Market*, "International Review of Law, Computers & Technology" 2020, Vol. 34(2), pp. 153-182.

[76] C. Angelopoulos, *Comparative Report on the National Implementations of Articles 15 & 17 of the Directive on Copyright in the Digital Single Market*, CIPIL, University of Cambridge, 29 November 2022, https://informationlabs.org/wp-content/uploads/2023/12/Full-DCDSM-Report-Dr-Angelopoulos.pdf (accessed: 13.07.2024).

become apparent that questions are raised not only about how the relationship between the protection of moral rights and free use is assessed from one legal system to another,[77] but also about the interpretation of the caricature, parody, pastiche,[78] and their related conditions set out in Article 17(7).

Although it seems to be less complicated, the situation is no easier in the case of quotation, criticism, and review.[79] Even though they can be considered one of the most fundamental cases of free use,[80] there are many uncertainties and national differences here too (for example, quoting from visual works has only been legally permitted in Hungary since 2021,[81] but the practice has not yet been outlined at all).[82] In addition, while quoting from a visual work is predominant in internet folklore, the likelihood of a violation of integrity rights is much higher for this type of work than for other works.[83]

As a partial conclusion, it may be said that in part copyright law does not affect the creation of content that falls within the scope of internet folklore, and in part supports it through a number of means, and that users need to be aware and careful in dealing with those cases where it does act as some kind of barrier.

The use of internet folklore

The mechanics of internet folklore are often examined, and the rights of those involved in the creation process are also often studied, by focusing on how a copyrighted work can become part of internet folklore without the consent of the original author. The findings of the previous point suggest that elements of internet folklore behave as de facto folklore in their own medium, whether they are protected works of authorship by known or unknown authors, and whether or not they fall within the scope of a free use case in any or all jurisdictions.

However, elements of internet folklore are not only formed and used in copyright terms in their own medium, but often move beyond the original context of internet folklore into other areas of the user value chain. Fair or free uses are, of course, also available in these area, but more typically there are uses where these

77 See Case C-201/13, *Johan Deckmyn and Vrijheidsfonds VZW v. Helena Vandersteen and Others*, Judgment of the Court (Grand Chamber), 3 September 2014, ECLI:EU:C:2014:2132; E. Sápi, *Authors' Moral Rights in the Digital Environment*, "Journal of Digital Technologies and Law" 2024, Vol. 2(1), pp. 141-162.

78 CDSM Directive, Art. 17(7)(b).

79 CDSM Directive, Art. 17(7)(a).

80 T. Aplin, L. Bently, *Global Mandatory Fair Use. The Nature and Scope of the Right to Quote Copyright Works*, Cambridge University Press, Cambridge 2020, p. 3.

81 Amendments to the Hungarian Copyright Act, 2021, Art. 33.

82 See in detail: A. Pogácsás, *Quotation from Visual Works in the Hungarian Copyright Law*, in: A. Pogácsás (ed.), *„Szellemi alkotások az ember szolgálatában": Professzor Dr. Tattay Levente tiszteletére szervezett emlékkonferencia tanulmánykötete* ["Intellectual Creations in the Service of Mankind": Study Volume of the Memorial Conference in Honour of Professor Dr. Levente Tattay], Pázmány Press, Budapest 2022, pp. 279-289.

83 Explanatory memorandum to Art. 8 and Art. 33 of the Amendments to the Hungarian Copyright Act, 2021.

conditions are no longer met. Thus, despite the frequent lack of enforcement, a significant proportion of uses require authorization. The difficulty is that users often regard elements of internet folklore as always being in the public domain, despite the fact that valid (at least partial) public domain dedication is rarely provided for copyright protected elements. Only in some jurisdictions (such as the United States) is a valid copyright waiver possible, but even there for various reasons rightholders make little use of this legal instrument.[84] "General" licences (e.g. CC licences),[85] which can be validly granted in many jurisdictions, are also not widespread enough to eliminate grey areas.

We can also find examples of rightholders who do not wish to place their works into the public domain, but are not consciously opposed to their use outside the original medium of internet folklore, and often are even happy to see their work become popular. There are two types of use that generally restrict this: commercial and political. In these areas, the scope for fair or free use is typically different and authors are more "sensitive" to the use of their works for certain purposes.

There are many examples of this in practice. In internet folklore, the cat with a crabby face known as "Grumpy cat" has come a pretty long way. The original photo taken by the animal's owner has been circulated on the internet in the form of memes and gifs. The copyright holder of the photo has not taken any action against the use of the photo or the various graphics based on it, which are either adaptations or, in most cases, simply reproductions. The image proved so popular that a company selling iced coffee drinks used the graphic on its Grumpy Cat Grumppuccino product. Although the company had signed a licence agreement with the rightholder to use the image on its products, it later used the image on the packaging of its roasted coffee products and even marketed Grumppuccino T-shirts. The rightholder went to court to challenge the unauthorized use. The court found the defendant's actions "overbroad" of the licence agreement and thus infringed the copyright, awarding the plaintiff hundreds of thousands of dollars.[86]

In the case of commercial use, enforcement is generally not neglected by the rightholders, and among users there is a growing focus on the need to ensure proper authorization, either by seeking permission from the copyright holder himself, or by obtaining images under orphan work licensing[87] or from stock pho-

[84] D. Fagundes, A. Perzanowski, *Abandoning Copyright*, "William & Mary Law Review" 2020, Vol. 62(2), p. 487.

[85] In Hungary, for example, the legal basis for this has only been established since 2021: "[N]o written contract of use is required in cases where the author grants a licence for use of his work by making an undirected offer to an unspecified number of persons. Among other things, the amendment makes it legal to grant licences under the Creative Commons licence or to conclude contracts under the GPL (General Public License)". Explanatory memorandum to Art. 45 of the Hungarian Copyright Act.

[86] *Grumpy Cat Ltd. v. Grenade Beverage LLC*, Case No. SA CV 15-2063-DOC (DFMx) (C.D. Cal. May 31, 2018).

[87] Although the Commentary on Hungarian Copyright Act points out that only 2% of orphan works have real commercial value, there is no real market demand for their use, see P. Gyertyánfy, D. Legeza (eds.),

to sites.[88] However, what seems to be the simplest – and also legal – solution may also hold further surprises: the reproduction of visual works as secondary use may be subject to collective management.

For example, the German VG Bild-Kunst grants extended collective licences to domestic and foreign third parties, including the right of public reproduction,[89] in particular the right of making works available to the public,[90] to service providers for sharing online content (i.e. "social media platforms") for visual works (works of fine art, photography, illustration, and design) which non-commercial users of the service have uploaded and which they have not produced themselves.[91] Similarly, HUNGART, the Collecting Society of Hungarian Visual Artists, authorizes the unaltered secondary use of works of both Hungarian and foreign authors in the scope of its extended collective rights management, unless the rightholder has opted out.[92] This should include the use of a work by an unknown author.[93] These examples illustrate the complexity of the overall situation: it may happen that a stock photo site offers an image for free for commercial use, but the use could in fact only be permitted under the authorization of a collecting society if it does not fall under one of the free use categories and, if it is possible, the creator has not opted out of the rights management or has not given permission directly (keeping in mind that this is only possible if the use is not for commercial purposes).[94]

A similar situation occurs when elements of internet folklore are used for political purposes. One of the most famous examples is Pepe the frog, a character that has become not only a well-known meme but also the protagonist of the *Furie v. Infowars LLC* case.[95] Its creator, Matt Furie, originally created the simple, bulging-eyed frog graphic as a comic book character, which eventually became a widely shared meme. The problem began when Pepe started to be used for far-right caricatures, to such an extent that in 2016 Hillary Clinton issued a political statement protesting against the frog, who was innocently starting out on his journey.[96] Meanwhile,

Nagykommentár a szerzői jogi törvényhez [Commentary on Copyright Act], Wolters Kluwer, Budapest 2023, p. 302.

88 *Companies and Copyright: Memes and the Intellectual Property Issue*, "Stephenson Law", 18 May 2021, https://bit.ly/45TrBZO (accessed: 13.07.2024).

89 Gesetz über Urheberrecht und verwandte Schutzrechte [German Copyright Act], Art. 15(2).

90 German Copyright Act, Art. 19a.

91 https://www.bildkunst.de/service/extended-collective-licenses (accessed: 13.07.2024).

92 2016. évi XCIII. törvény a szerzői jogok és a szerzői joghoz kapcsolódó jogok közös kezeléséről [Act on Collective Management of Copyright and Related Rights], Art. 18, see also in HUNGART regulation: http://www.hungart.org/en/licensing-method.

93 http://www.hungart.org/en/licensing-method (accessed: 13.07.2024).

94 Act on Collective Management of Copyright and Related Rights, Art. 11.

95 *Furie v. Infowars*, LLC, 401 F. Supp. 3d 952 (C.D. Cal. 2019).

96 A. Chozick, *Hillary Clinton Calls Many Trump Backers 'Deplorables', and G.O.P. Pounces*, "The New York Times", 10 September 2016.

presidential candidate Donald Trump was often depicted with the frog, and he himself posted content with Pepe on his Twitter page. At the time of Pepe's rise to fame, his original creator said on several forums that he was happy that his character had become part of internet folklore: he found it very honouring and inspiring, and did not mind if users profited from his work. But when his former creation became increasingly symbolic of far-right ideas, he was keen to take action.

A far-right radio and internet platform, Infowars, also ran a website selling various products and promotional material, including a poster featuring Pepe the frog with Trump and other right-wing personalities. Furie went to court in 2017. The case is also very interesting because it illustrates the importance of memes and the serious battles that can take place to give meaning to certain content. They can create a cyberspace which can build an ideological and political environment and generate a strong sense of community (and antipathy).[97] But the author also has an influence on this process. As confirmed by the court, the unauthorized use of a character that is often used as a meme can also constitute an infringement. In other words, the fact that the rightholder had not previously taken action against the use of a character as a meme does not mean that he waived his copyright (it should be noted that in many jurisdictions this would not be an option) or lost further enforceability, even if the work has since become a dominant means of expressing certain opinions.

As I have already pointed out, the picture is further complicated by the possibility of a parody exception,[98] since parody – which allows the free use of an author's work within certain limits – is undoubtedly "an appropriate means of expressing an opinion".[99] But its definition, concept, and framework are not uniform, not only across jurisdictions but even within the EU, despite the efforts of the CDSM Directive.

In his detailed study of the issue, Dávid Ujhelyi states that "the mere fact that a parody contains political expression is not significant in determining the legality of its use".[100] However, the general legal conditions for parody allow the author to be able, in certain cases, to take action against the imposition of a certain message on his work on the basis of his right to integrity, in the case of uses that go "beyond the limits of expression", such as discriminatory, anti-Semitic, or hate speech.[101]

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97 See in detail: J. Pelletier-Gagnon, A.P. Trujillo Diniz, *Colonizing Pepe: Internet Memes as Cyberplaces*, "Space and Culture" 2021, Vol. 24(1), pp. 12-14.

98 D. Ujhelyi, *A paródiakivétel szükségessége és lehetséges keretrendszere a hazai szerzői jogban* [The Need and Possible Legislative Framework for a Parody Exception in the Hungarian Copyright System], Ludovika, Budapest 2021.

99 Case C-201/13, op. cit., [25].

100 D. Ujhelyi, *A politikai paródia célját szolgáló felhasználások szerzői jogi megítélése* [Political Parody in Hungarian Copyright Law], "In Medias Res" 2022, Vol. 11(1), p. 64.

101 D. Jongsma, *Parody after Deckmyn. A Comparative Overview of the Approach to Parody under Copyright Law in Belgium, France, Germany and the Netherlands*, "International Review of Intellectual Property and Competition Law" 2017, Vol. 48(6), p. 663.

"Folklore is therefore not a bunch of flowers on the hat of God (and culture), but an accessory of everyday life; one of the daily routine mechanisms that can be used as a symbolic tool of consumer society's business on the one hand, and of ideological manipulation on the other".[102] Mihály Hoppál put the above idea on paper in 1982, and today, over forty years later, it is even more powerful and applies to an enormous extent to internet folklore. At the same time, the copyright situation of internet folklore in the broad sense, as well as the possibilities for creators and users, and thus its relationship to freedom of expression, has become incredibly complex.

In the meantime it is important to bear in mind the fact that "[…] folklore is not a science about a folk, but the traditional folk-science and folk-poetry".[103] And internet folklore itself is not only important for freedom of expression, but it also plays an important cultural role, just as traditional folklore does.[104] However, it is not only its identification that raises questions, but also – as part of our cultural heritage – its preservation, care, and the framework and possibilities of its use and exploitation. And the answers to these questions are far from uniform across different legal systems.

Conclusions

Internet folklore plays a major role not only in digital culture, but also in the expression of cohesion in communities and in communication in general. As Amy Adler and Jeanne Fromer so eloquently articulated: it can be seen as providing a "megaphone" for individuals to achieve their goals.[105] In principle, copyright law does not prevent, but in fact tries to assist, by various means, internet folklore to become a tool and a medium for freedom of expression. There are, however, cases where the creation of internet folklore, and even more so the use of certain elements of it, constitutes an infringement of copyright, even if rightholders exercise their rights only in a limited number of such cases. Some argue that the fact of "selective enforcement" in itself raises concerns about freedom of expression. Arguments in support of this view are that elements of internet folklore function as a kind of "cultural currency", i.e. their usability for the expression of opinion may be virtually indispensable, even if there is an abundance of similar content available for use due to the extreme diversity of the content.[106] The above-mentioned authors drew

[102] M. Hoppál, *"Parttalan" folklór? A "rejtett tudás" antropológiája* ["Bland" Folklore? The Anthropology of "Hidden Knowledge"], "Korunk" 1982, Vol. 41(5), p. 331.

[103] *Definitions of Folklore. Reprinted with permission from Maria Leach, editor Funk and Wagnalls Standard Dictionary of Folklore, Mythology, and Legend (Harper & Row, 1959)*, "Journal of Folklore Research" 1996, Vol. 33(3), p. 255.

[104] K. Chałubińska-Jentkiewicz, *Digital Single Market. Cyber Threats and the Protection of Digital Contents: An Overview*, "Santander Art and Culture Law Review" 2020, Vol. 6(2), p. 280.

[105] A.M. Adler, J.C. Fromer, *Memes on Memes and the New Creativity*, "New York University Law Review" 2022, Vol. 97(2), p. 541.

[106] Ibidem, pp. 542-544.

a parallel with *Cohen v. California*, in which the court held that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process".[107]

While copyright law has always evolved, and continues to evolve, as a tool to support freedom of expression and culture, it is true that it does not necessarily work in a binary way: the extreme complexity of the rules (also) applicable to internet folklore[108] and the case-by-case application of the different rules in different countries – which requires a certain degree of discretion – in itself creates a sense of uncertainty among users. The fact that the boundaries are clearer "inside" the original medium of internet folklore and more cautious user behaviour is expected "outside" of it does not improve this situation, since the two media are increasingly merging. Thus, despite an increasingly precise legislative and regulatory framework, it is not unreasonable to posit that "Meme culture thrives in the grey areas of intellectual property protection".[109]

The content of traditional folklore itself is changing,[110] and intangible cultural heritage is becoming increasingly colourful and rich.[111] The term *internet folklore* gives the impression that it covers a homogeneous content, while in fact it refers to a diverse and wide range of different categories, some of which can be classified as folklore, and others of which are at most folklore-inspired works. At the same time, the two extremes of the public domain[112] and *sui generis* protection do not provide a universal, reliable concept.[113] Several of the existing free uses have emerged as completely new elements in several legal systems, with still evolving content, and the author's moral rights are an additional factor to consider. In addition, it is virtually impossible to predict when enforcement will or will not happen and when the rightholder – often unknown at the beginning – will take steps. My research hypothesis seems to be strongly supported by the analysis of the copyright background and the lessons that emerge from the cases. Although internet folklore has become an important tool for freedom of expression and an undisputed modern component of our cultural heritage,[114] its lawful use requires users to be aware

107 *Cohen v. California*, 403 US 15 (1971).

108 M. Marciszewski, *The Problem of Modern Monetization of Memes: How Copyright Law Can Give Protection to Meme Creators*, "Pace Intellectual Property, Sports & Entertainment Law Forum" 2020, Vol. 9(1), p. 61.

109 B.D. Schwartz, *Who Owns Memes?* "The National Law Review" 2022, Vol. 12(217).

110 C. Bortolotto, *From Objects to Process: UNESCO's 'Intangible Cultural Heritage'*, "Journal of Museum Ethnography" 2007, Vol. 19, p. 21.

111 J. Blake, *From Traditional Culture and Folklore to Intangible Cultural Heritage: Evolution of a Treaty*, "Santander Art and Culture Law Review" 2017, Vol. 3(2), p. 56; see https://ich.unesco.org/en/dive.

112 S. Lantagne, *Goncharov (1973), Internet Folklore, and Corporate Copyright*, "Vanderbilt Journal of Entertainment & Technology Law" 2024 (forthcoming).

113 K. Prażmowska, *Misappropriation of Indigenous Cultural Heritage – Intellectual Property Rights in the Digital Era*, "Santander Art and Culture Law Review" 2020, Vol. 6(2), p. 145.

114 W. Szafrański, P. Lasik, *Prawo ochrony dziedzictwa kulturowego. Quo vadis?* [Heritage Protection Law. Quo Vadis?], "Santander Art and Culture Law Review" 2021, Vol. 7(1), p. 213.

not only of considerations that balance fundamental rights, but also of the complex framework of copyright law. In theory, in "sterile" circumstances the internal and external limitations of copyright could provide an appropriate framework, but in practice users are faced with a complex – or even confusing – landscape in which the diversity of possible uses and demands, and the heterogeneity of the way rightholders relate to their own content, has moved internet folklore far away from black and white scenarios. The legal situation of the seemingly harmless and simple internet folklore is therefore uncertain in many respects, which is not particularly encouraging, even if (or because) enforcement is often lacking.

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