

## **Should “Works of Mas” be protected as Traditional Knowledge or Copyright or any other form of Intellectual Property?**

### **I. INTRODUCTION**

In Trinidad and Tobago, the Carnival Industry is an important source of revenue for the economy and it plays a vital role in promoting the country regionally and internationally. Works of mas play an integral role in Carnival celebrations not only in Trinidad and Tobago, but also at the Miami Carnival, Caribana in Toronto, Notting Hill Carnival in England as well as in Carnival celebrations in other countries including Brazil and Mardi Gras in New Orleans, United States of America.

Recognizing the importance of works of mas to Trinidad and Tobago, the term ‘work of mas’ was included in the **Copyright Act, Chap. 82:80, 1997**. This inclusion was intended to deal with not only old or traditional works but also new works created in the Carnival Industry. However, in light of the fact that a work of mas is an extremely valuable cultural and economic asset to Trinidad and Tobago, it is crucial that our country seeks to protect works of mas with appropriate legislation at the international level. Such legislative protection will ensure that local traditions, culture and knowledge associated with works of mas are preserved.

In addressing the research topic, this paper will examine the following:

- (i) The definition of the term “work of mas”;
- (ii) Whether or not a work of mas can be protected under conventional intellectual property rights (IPRs) such as industrial designs, trade marks, patents and copyright and related rights; and
- (iii) Whether or not a work of mas is better suited to be protected under a separate category, traditional knowledge and more particularly, traditional cultural expressions (TCEs) as oppose to copyright and related rights.

### **II. WHAT IS A WORK OF MAS?**

**Section 3 of the Copyright Act, Chap. 82:80** defines a ‘work of mas’ as *“an original production intended to be performed by a person or a group of persons in which an artistic work in the form of an adornment or image presented by the person or persons is the primary element of the production, and in which such adornment or image may be accompanied by words, music, choreography or other works, regardless of whether the production is intended to be performed on stage, platform, street or other venue.”*

Additionally, under **Section 6(1)(c) of the Copyright Act, Chap. 82:20** a work of mas is characterized as a derivative work that is, a work which incorporates the works of other creators.

In simpler terms, a work of mas is a multi-faceted work which involves a combination of tangible manifestations such as the physical costume and intangible manifestations such as a style of dance, a genre of music and a style of oratory associated with culture and tradition.

In Trinidad and Tobago, works of mas include the physical costume and intangible manifestations such as the style of dance associated with Sailor Bands, genre of music as is the case with the Minstrel and Blue Devil and style of oratory associated with the Midnight Robber and Pierrot Grenade. Such manifestations have been passed down from generation to generation and are a fundamental part of the tradition and culture that are indigenous to Trinidad and Tobago.

### **III. CAN A WORK OF MAS BE PROTECTED UNDER CONVENTIONAL INTELLECTUAL PROPERTY RIGHTS?**

To some extent, certain elements of a work of mas can be protected by conventional IPRs. The following analysis examines whether or not and the extent to which conventional IPRs can protect works of mas.

#### **(a) WORKS OF MAS AND INDUSTRIAL DESIGNS**

**Section 3(1) of the Industrial Designs Act, Chap. 82:77** defines an industrial design as *"any composition of lines or colours, any three-dimensional form or any material whether or not associated with lines or colours, is deemed to be an industrial design where such composition, form or material gives a special appearance to a product of industry or handicraft, can serve as a pattern for a product of industry or handicraft and appeals to and is judged by the eye."* Under **Section 4** of the Act, the design must be new, that is, not disclosed to the public for more than twelve months preceding the filing date of the application and must not be contrary to public order or morality.

In light of this legislation, the creator of a mas design may register his design as an industrial design so long as the substantive requirements are met<sup>1</sup>. However, it is important to note the intangible elements of a work of mas such as a style of dance, a genre of music and a style of oratory cannot be protected as an industrial design. Further, the traditions and culture associated with works of mas cannot be protected under an industrial design.

#### **(b) WORKS OF MAS AND TRADE MARKS**

**Section 2(1) of the Trade Marks Act, Chap. 82:81** defines a trade mark as *"a mark used or proposed to be used in relation to goods for the purpose of indicating, or so as to indicate, a connection in the course of trade between the goods and some person having the right either as proprietor or as registered user to use the mark."*

A trade mark can serve as a label for consumers to recognize which products have been produced by artists, such as costume designs.<sup>2</sup> However, it is important to note that a trade mark does not protect the intangible elements of a work of mas such as a style of dance, a genre of music and a style of oratory. Further, the traditions and culture associated with works of mas cannot be protected as a trade mark.

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<sup>1</sup> *Guide to the Copyright Act For Producers of Mas*, Clive Pegus, 2003, pg. 6

<sup>2</sup> *Poor People's Knowledge Promoting Intellectual Property In Developing Countries*, J. Michael Finger and Philip Schuler, 2004, Chapter 8 *Prevention Of Misappropriation Of Intangible Cultural Heritage Through Intellectual Property Laws*, Daniel Wüger, pg. 190

### (c) WORKS OF MAS AND PATENTS

**Section 8 of the Patents Act, Chap: 82:76** states that a patent may be granted where the invention is new, involves an inventive step (the invention must be non-obvious to a person having ordinary skill in the art) and is capable of industrial application (the invention must be useful).

Technological processes such as cloth-weaving, metal-working, construction of musical instruments may have the potential for patentability.<sup>3</sup> However, a work of mas does not meet the requirements for patentability for several reasons which are as follows:

- (i) Many of the elements of a work of mas have been passed down from generation to generation and as such, one of the fundamental requirements for patent protection, novelty is not met;<sup>4</sup>
- (ii) Patent law does not reflect community ownership<sup>5</sup> which is essential component to a work of mas;
- (iii) The invention must be disclosed in a manner sufficiently clear such that a person having ordinary skill in the art can carry it out.<sup>6</sup> However, local communities tend to lack the capacity to do so<sup>7</sup> or perhaps do not want to reveal such information; and
- (iv) A patent does not protect the intangible elements of a work of mas such as a style of dance, a genre of music and a style of oratory and also does not protect the traditions and culture associated with works of mas.

### (d) WORKS OF MAS AND COPYRIGHT AND RELATED RIGHTS

**Section 5(1) of the Copyright Act, Chap. 82:20** states

*Copyright is a property right which subsists in literary and artistic works that are original intellectual creations in the literary and artistic domain, including in particular—*

- (a) books, pamphlets, articles, computer programs and other writings;*
- (b) speeches, lectures, addresses, sermons and other works of the same nature;*
- (c) dramatic works, dramatico-musical works, pantomimes, choreographic works and other works created for stage productions;*
- (d) stage productions of works mentioned in paragraph (c);*
- (e) musical works, with or without accompanying words;*
- (f) audio-visual works;*
- (g) works of architecture;*

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<sup>3</sup> *Id.* at pg. 192

<sup>4</sup> *Id.* at pg. 193

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

- (h) works of drawing, painting, sculpture, engraving, lithography, tapestry and other works of fine art;*
- (i) photographic works;*
- (j) works of applied art;*
- (k) illustrations, maps, plans, sketches and three dimensional works relative to geography, topography, architecture or science.*

Related rights are proprietary rights that subsist in performances, sound recordings and broadcasts.

As previously stated, works of mas is protected under **Section 3 of the Copyright Act, Chap. 82:80** and under **Section 6(1)(c) of the Copyright Act, Chap. 82:80** where it is characterized as a derivative work.

In light of the Copyright Act, copyright protects work of mas to a certain extent. Indeed, copyright protects the tangible elements of a work of mas such as drawings which are original. Further, protection is also given to proprietary rights in performances, recordings and broadcasts. However, copyright protection with respect to works of mas is limited for the following reasons:

**(i) Form of the work** - Copyright only protects the form in which works of mas (for example, dance, music, oratory) are expressed and not necessarily the styles or traditions and culture associated with works of mas. In Trinidad and Tobago, it is the very style of dance, genre of music and style of oratory which gives our Carnival celebrations uniqueness;

**(ii) Concept of originality** - Copyright protects originality in works as oppose to works based on traditions and culture. For instance, local traditions and culture play a significant role in 'ole mas' with characters such as Sailor Bands, Minstrel, Blue Devil, Midnight Robber and Pierrot Grenade. These works are not original but have been passed on from generation to generation;

**(iii) 'Sweat of the brow'** - Copyright protects works which are usually the product of the 'sweat of the brow' of an individual. With some types of works of mas, in particular 'ole mas,' any notion of an author is generally absent since the works are passed on from generation to generation; and

**(iv) Duration** – Generally, the duration of copyright protection in Trinidad and Tobago is the life of the author and fifty (50) years after his death.<sup>8</sup> However, there is no specified period of protection for works of mas that have been passed down from generation to generation.

#### **IV. SHOULD A WORK OF MAS BE PROTECTED UNDER TRADITIONAL KNOWLEDGE/TRADITIONAL CULTURAL EXPRESSIONS OR COPYRIGHT?**

In light of the fact that only certain aspects of a work of mas can be protected by conventional IPRs and conventional IPRs do not protect the traditions and culture associated with works of mas, it is important to determine whether a separate category for the protection of such

<sup>8</sup> Section 19(1) of the Copyright Act, Chap. 82:20

works, traditional knowledge or more particularly, traditional cultural expression is more appropriate for the protection of a work of mas.

**(a) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)**

In 2000, the World Intellectual Property Organization (WIPO) Members established an **Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)**, and they agreed to develop an international legal instrument that would give traditional knowledge, genetic resources and traditional cultural expressions (folklore) effective protection. According to WIPO, traditional knowledge “*is a living body of knowledge that is developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity.*”<sup>9</sup> WIPO goes on to state that traditional knowledge in a general sense “*embraces the content of knowledge itself as well as traditional cultural expressions, including distinctive signs and symbols associated with TK*” and in the narrow sense “*refers to knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations.*”<sup>10</sup>

According to Article 1 of **The Protection of Traditional Cultural Expressions: Draft Articles**, TCEs is defined as follows:

*Traditional cultural expressions are any form of [artistic and literary] expression, tangible and/or intangible, or a combination thereof,*

*Alternative 1: in which traditional culture [and knowledge] are embodied*

*Alternative 2: which are indicative of traditional culture [and knowledge][which pass from generation to generation and between generations], including, but not limited to:*

- (a) phonetic or verbal expressions, [such as stories, epics, legends, popular stories, poetry, riddles and other narratives; words, signs, names, and symbols];*
- (b) musical or sound expressions, [such as songs, rhythms, and instrumental music, the sounds which are the expression of rituals];*
- (c) expressions by action, [such as dances, works of mas, plays, ceremonies, rituals, rituals in sacred places and peregrinations, games and traditional sports, puppet performances, and other performances, whether fixed or unfixed]; and*
- (d) tangible expressions, [such as material expressions] of art, [handicrafts, handmade carpets, architecture, and tangible spiritual forms, and sacred places];*
- (e) [adaptations of the expressions referred to in the above categories].*

In light of WIPO’s definition of TCEs and the substance of Article 1, a work of mas embodies the very definition of a TCE that is, a combination of tangible and intangible elements of traditional culture and knowledge which have been passed on from generation to generation. This notion has been strongly advocated by the Trinidad and Tobago Delegation

<sup>9</sup> World Intellectual Property Organization, Traditional Knowledge and Intellectual Property available at [http://www.wipo.int/pressroom/en/briefs/tk\\_ip.html](http://www.wipo.int/pressroom/en/briefs/tk_ip.html)

<sup>10</sup> World Intellectual Property Organization, Traditional Knowledge and Intellectual Property available at <http://www.wipo.int/tk/en/tk/>

at the IGC meetings via interventions that: (i) the term 'works of mas' should be included in Article 1 under the subject matter for protection of TCEs and (ii) the term 'works of mas' cannot be subsumed under the phrase "material expressions of art" in Article 1 primarily because a work of mas is more than material expressions of art, it is a combination of tangible and intangible elements.

Trinidad and Tobago's interventions pertaining to works of mas is in keeping with the mandate of two standing setting instruments pertaining to the protection of traditions and culture:

(i) **The United Nations Declaration on the Rights of Indigenous Peoples** - this Declaration sets out an international standard for the treatment of indigenous peoples with respect to their rights to culture, identity, language, employment, health, education and other issues.

**Article 31** of the Declaration makes specific mention of TCEs and states:

*1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*

*2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these right; and*

(ii) **UNESCO's Convention for the Safeguarding of the Intangible Cultural Heritage**

**Article 1** of the Convention states that the purposes of the Convention are:

- (a) to safeguard the intangible cultural heritage;*
- (b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;*
- (c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;*
- (d) to provide for international cooperation and assistance.*

**Article 2** defines the term "intangible cultural heritage" as "*the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage*" and states that intangible cultural heritage is manifested in the following domains "*(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;*

*(b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; and (e) traditional craftsmanship”*

**Article 11** of the Convention states that each State Party shall

- (a) take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory;*
- (b) among the safeguarding measures referred to in Article 2, paragraph 3, identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non-governmental organizations*

With respect to safeguarding intangible cultural heritage, **Article 13** states that each State Party shall endeavour to

- (a) adopt a general policy aimed at promoting the function of the intangible cultural heritage in society, and at integrating the safeguarding of such heritage into planning programmes;*
- (b) designate or establish one or more competent bodies for the safeguarding of the intangible cultural heritage present in its territory;*
- (c) foster scientific, technical and artistic studies, as well as research methodologies, with a view to effective safeguarding of the intangible cultural heritage, in particular the intangible cultural heritage in danger;*
- (d) adopt appropriate legal, technical, administrative and financial measures aimed at:
  - (i) fostering the creation or strengthening of institutions for training in the management of the intangible cultural heritage and the transmission of such heritage through forums and spaces intended for the performance or expression thereof;*
  - (ii) ensuring access to the intangible cultural heritage while respecting customary practices governing access to specific aspects of such heritage;*
  - (iii) establishing documentation institutions for the intangible cultural heritage and facilitating access to them**

At the international level, the Convention promotes international cooperation, which according to **Article 19** includes “*the exchange of information and experience, joint initiatives, and the establishment of a mechanism of assistance” to other State Parties in their efforts to safeguard the intangible cultural heritage.*”

These standard setting instruments should guide all policy makers engaged in policy making regarding culture and traditions and in particular, the inclusion of the term ‘works of mas’ under the subject matter for protection of TCEs in **Article 1 of The Protection of Traditional Cultural Expressions: Draft Articles**

#### **(b) Traditional cultural expressions and Copyright**

Since many forms of TCEs fall under literary and artistic works, it has been argued that works of mas can be protected under copyright. Thus, it is important to determine whether copyright or TCEs is the more appropriate means of protection for a work of mas. In so doing, it is crucial to compare copyright and TCEs.

The fundamental differences between copyright and TCEs are as follows:

1. With copyright, only the particular expression (for example writings, music, drawings, paintings etc) is protected and not the underlying idea or particular style. On the other hand, TCEs protect the underlying idea and styles including the traditions and culture that is, TCEs protect the combination of tangible and intangible elements in a work;
2. Works that receive copyright protection are usually the work of an individual whereas with TCEs, any notion of an author is generally absent as TCEs are associated with a community interest since knowledge is passed down from community to community and from generation to generation;
3. Copyright laws are based on a limited period of individual authorship as a reward for the creative act after which the work falls into the public domain.<sup>11</sup> However, TCEs are generally part of the public domain as it is passed on from generation to generation and
4. Copyright protects original works as oppose to works based on traditions and culture which have been passed on from generation to generation.

## V. CONCLUSION

Works of of mas is better suited to be protected as TCEs under a sui generis legal regime and not as copyright or other conventional IPRs for the following reasons:

- (i) While certain elements of a work of mas can be protected under conventional IPRs, for example industrial designs, trade marks and patents, these IPRs are not the appropriate forms of protection for a work of mas for primarily two reasons:
  - (a) it involves the separation of various elements in the work and in so doing the combination of tangible and intangible elements in the work of mas is not protected and
  - (b) conventional IPRs neither protects the intangible elements of a work of mas such as a style of dance, a genre of music and a style of oratory nor the traditions and culture which have been passed down from generation to generation and that are associated with works of mas.
- (ii) While copyright protects the tangible elements of a work of mas that are original, its protection regarding works of mas is limited because copyright:
  - (a) only protects the form in which works of mas are expressed and not necessarily the traditions and culture associated with works of mas;
  - (b) original works as oppose to works based on traditions and culture;
  - (c) usually protects works are the product of the 'sweat of the brow' of an individual whereas with some types of works of mas, in particular 'ole mas,' any notion of an author is generally absent; and

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<sup>11</sup> *Poor People's Knowledge Promoting Intellectual Property In Developing Countries*, J. Michael Finger and Philip Schuler, 2004, Chapter 8 *Prevention Of Misappropriation Of Intangible Cultural Heritage Through Intellectual Property Laws*, Daniel Wüger, pg. 11



(d) has a limited period of protection however, with works of mas there is no specified period of protection as the works have been passed down from generation to generation.

(iii) The definition of TCEs according to **Article 1 of The Protection of Traditional Cultural Expressions: Draft Articles**, tangible or intangible or a combination in which traditional culture and knowledge are embodied and have been passed from one generation to another, embodies the very definition of a work of mas. Protection of works of mas under TCEs:

- (a) Ensures that the combination of the tangible and intangible elements of a work of mas, without any separation of the elements, is protected;
- (b) Ensures that not only the forms of the works of mas are protected but also that the underlying idea and styles are protected; and
- (c) Reflects community ownership as knowledge of works of mas is passed down from community to community and generation to generation and this knowledge is in the public domain to be used by future generations.

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