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## The phenomenon of Art Festivals

An empirical and legal analysis

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## Introduction

In the last few years there has been an explosion of art festivals around Europe as this type of event seems to be very appealing, whether as local or global attractions. Art festivals are a very challenging field of research as they rapidly became a very important cultural phenomena and are now at the core of many national cultural programs. The European scenario is extremely rich both in terms of forms and quantity. The Italian state of art, as well, shows that this sector is highly prolific and vibrant: according to OIFEC (Osservatorio Italiano Festival ed Eventi Culturali), a monitoring body which analyses the development and the impacts of festivals, the number of Italian festivals is 945, growing from 883 in just two years, with investments for 400 million of euros.

Besides being very popular, festivals are currently considered one of the most trendy way of promoting culture since they are a suitable vehicle to introduce art into contemporary life. As the festival practice is much utilized, in reason of its flexibility capable of satisfying multiple needs, there are many kind of festivals: the “festival formula” can be applied to various topics.

The most evident features of festivals are the high concentration of performances in a specific space and time, the live dimension, the ability of creating strong relationships among territory, casting community and cultural identity and the promotion of art mixing culture and entertainment.<sup>1</sup> Hence festivals can be comprised in Golblatt’s declaration of that “*special event recognizes a unique moment in time with ceremony and ritual to satisfy specific needs*”.<sup>2</sup>

Recent tendencies reveal a growing request for activities and attractions which mix pleasure, culture and learning. Festivals have proved themselves to be a winning policy as they fill up the cultural divide of modern society and satisfy its need for authenticity.<sup>3</sup> Their peculiarity of being an event in progress, with a precise cultural theme developed through live performances makes them extremely appreciated. Festivals are seen as occasions in which the “crowds, the noise and the chaos” are an essential part of the event, enhancing people participation strongly, making them feel belonging to a community, taking part in the rites and sharing a common interest.

Moreover, it seems that festival is an appropriate way for different forms of art to be manifested. Quite often, they are organized by the explicit intent of artists to have an opportunity for displaying their works: in a time where there are no longer patrons, artists tend to gather and find occasions for meetings to share ideas. They have a great importance as catalyst and driver for new works. Often, festivals are the only way for specific forms of art to reach the public. For example, festivals are a vital opportunity for independent film productions which hardly reach the standard fare; or in Italy, it can be said that the experimental theatre is strongly supported by these manifestations, as generally, such performances are not in the bill of Italian theatres.

Focusing on the role played by festivals for the community, it is important to highlight that they suggest a different approach to the arts and they are usually easy to access. Festivals’ informal settings break down the barriers which sometimes certain categories of people might feel attending

<sup>1</sup> Guido Guerzoni, *I festivals di apprendimento culturale in Italia nel 2006/2009*, in *Economia della Cultura*, 2009, 1.

<sup>2</sup> Ross Derrett in Ian Yeoman, Martin Robertson, Jane Ali-knight, Siobhan Drummond & Una MCMahon - Beattie, *Festival and events management – an International arts and culture perspective*, Elsevier Butterworth Heinemann, 2004, 33.

<sup>3</sup> B. Maussier, *Festival management e destinazione turistica - I festival come nuovi media della società post industriale*, Hoepli, 2010, 101.

performances in institutional venues. In fact, they are celebratory events which present cultural contents in an unusual and casual way as “*they encourage involvement rather than contemplation.*”<sup>4</sup> The audience has clearly an active role since the event is based on the participation of a selected community in a common rite. The open stage offered by the city itself and the cheerful atmosphere invite people participation making the access more direct both for technical and social reasons: going to prestigious theatre or museums can be difficult for people who think themselves socially and culturally inadequate. For participants, these events are generally perceived as a special dimension to be explored as they are a moment of great emotional involvement. The live experience is precious and priceless as the audience interprets the festivals as an initiation for shaping their attitudes. This kind of event makes people live the culture and enjoy a creative adventure. In festivals, it is possible to experience cultural consumption as the audience both watches the emerging of art from artists and has an active role in the creative process. The so called *festival goers* look for a new kind of experience, an occasion to gather and an opportunity to gain more valuable knowledge as the traditional means of acquiring culture seem to be out-dated. Moreover, the accessibility is encouraged by favourable pricing policies: many festivals are admission free or provide inviting promotions. This opportunity can encourage new behaviours and experiences of people who are not usually involved in cultural consumption.

Festivals generate a variety of effects which impact on the local territories and communities such as artistic, social, cultural, economical and political ones. The sum of these elements makes clear that the cultural events and festivals can be a resource for the hosting area, and they are an expression of value.

Festivals become indeed important components of policy choices since they respond to the essential need of gathering, exposing opinions and belonging to a group. They greatly promote the circulation of ideas and people and grant the right of freedom of expression. Furthermore, festivals play a fundamental role in shaping the cultural identity of the local communities, identities which are constantly subject to a process of renewal and revision: in this globalized and multicultural society, it is important to enhance the value of the variety of tradition and cultural patrimonies and to promote continuous contacts and exchanges in order to favour social integration. To gain this objective, one of the advantages of the festival practice is the possibility of reaching broad audiences as it represents an ideal location for the different cultural streams and phenomena. The open accessibility encourages intercultural interactions among people and makes festivals essential for education and the promotion of culture.

However, festivals often need to prove their existence through their ability to generate a positive economic impact. In some countries, such as UK, they are considered a remunerative field for investments as they generate economic benefits to various stakeholders. They have proved to be remunerative: an increased tourism results as well as major employment for the locals and an increment of income for the host economy. A shining example of how festivals can be used for both cultural and economic reasons is Scotland which has strategically based its renewal on festivals and events. The Scotland case can be taken as an elucidation of festivals’ tasks in modern societies and how they are inserted into national policies. Indeed, the Scottish Government promotes events throughout the country for the entire year concentrating in Edinburgh which presents a different festival each month. They found a cheerful and remunerative way to promote their culture and

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<sup>4</sup> Karp in *Art Festivals and the European Public Culture*, Project no 215747, University of Sussex, 2008, 23.

traditions, develop tourism and employment, and establish a national agency, EventScotland, in order to develop a viable portfolio of events to attract visitors to Scotland, to enhance the country's international profile, to strengthen its sporting and cultural infrastructure and to maximize the economic, social and environmental benefits produced by events in all parts of the country.

Since art festivals have been widely developing as a new form of promoting arts and as a new way of participation in cultural life and since their economical role is increasing because of their capability to move resources and generate impacts on local communities, their legal protection becomes a priority to be discussed.

Festivals have been subject of study mainly from an economic, managerial or social point of view while little has been said about the relevance of this new cultural product from a legal point of view. The lack of debate makes them an interesting, unexplored field of research. Given the relevance of this phenomenon, both from an economic and above all, from a cultural point of view, questions on how to protect festivals arise and need to be answered. What kind of rights are involved in such contexts? Who are supposed to be the owner of these rights?

As far as legal protection is concerned, although copyright seems to be the most appropriate tool, the assessment of copyright protection for festivals in terms of structure and contents has never been undertaken. Therefore, given the relevance, of the phenomenon and the lack of explicit copyright protection, the exploration of what legal tools may provide protection to artists and creative activities of festivals ought to be initiated. In order to proceed, though, it becomes necessary to formulate a definition of the phenomenon.

A legal assessment requires a definition of the festival phenomenon in order to state what is considered festival according to the law and what protection can be applied. The term "festival" is increasingly used in many different contexts for different sorts of events. Therefore, problems concerning the definition of what falls within the category of festival rise indeed. One of the reasons of the difficulty in classification may be that festivals are pre-eminently a composite topic of study, reaching across the usual demarcation lines that separate fields of expertise. Definitions of festivals may be found in the economic field where the topic has been widely discussed. Nevertheless, even though there has been a lot of research and study, and even an attempt to conduct a census,<sup>5</sup> making

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<sup>5</sup> "Non si tratta per altro di un vizio nazionale, dacché in Europa e nel mondo non si contano più i festival nati nel corso degli ultimi anni,[...] La questione principale, semmai, è rappresentata dalla difficile identificazione dei criteri di classificazione (si veda ad esempio il pionieristico tentativo di Getz and Frisby 1988), che rende problematica qualsiasi opera di censimento (Frey 2000,); per i soli festival musicali europei, ad esempio, le stime oscillano tra i 1000 ipotizzati da Pahlen (1978) e Dümling (1992) e i 2000 censiti da Galeotti (1992), [...] L'indeterminatezza semantica si riflette sulla variabilità delle stime: uno studio sistematico condotto da Heather Rolfe (1992,) individuò nel 1992 529 festival musicali nella sola Europa, laddove Cécile Maillard (1994,) ne censì 864, di cui 350 dedicati alla musica colta; un numero largamente superiore a quello fornito per lo stesso anno dal Ministero della Cultura transalpino, che per il medesimo genere asserì l'esistenza di 245 manifestazioni. In Italia questi problemi hanno superato da tempo una soglia critica, dacché il fenomeno tende a connotarsi come un'autentica mania: il numero delle iniziative è ormai incalcolabile (causa l'elevato tasso di natalità e mortalità di esperienze spesso circoscritte ad ambiti locali), tanto da rendere vano qualsiasi tentativo di censire in modo rigoroso le manifestazioni che costellano il territorio nazionale e di comprenderne l'effettiva portata, vuoi per la genericità della formula "festival", che rende problematiche le comparazioni, vuoi per il debordante successo di quelli culturali e segnatamente letterari, se è vero che l'Associazione Italiana Editori nel 2005 ne ha censiti ben 193." Guido Guerzoni, *I festival di apprendimento culturale in Italia nel 2006/2009*, in *Economia della Cultura*, 2009, 367-368.

sense of this multi-faced phenomenon is still a difficult task and even in the economic literature, there is no single definition.

This paper intends to give a deeper insight on the world of art festivals, through an empirical and legal analysis that aims at highlighting the main features and issues regarding it, and at assessing the cultural characteristics and managerial complexities that recur in the organization process of such events. The first part presents the benchmark analysis and the methods and criteria utilized for the collection of data and the importance of an empirical study for legal purposes. The second part of the work focuses on the legal questions, regarding the protection of these events, taking grounds on all the relevancies given by the benchmark results.

## 1. Benchmark analysis

As already mentioned, a festival is no doubt a complex and multiform cultural product. Accordingly, the only way to face this phenomenon is to gradually dismantle all the disciplinary boundaries and to watch and analyze what experience and general knowledge would suggest. Thus, it is important to widen the field of research, to analyze not only the economic effects for various stakeholders, but especially the intangible benefits of these events in regard to arts, culture and society.

In order to find a definition of festival, an empirical analysis has been carried out through the construction of a benchmark. Creating a benchmark and collecting data from reality have been a useful tool to compare the recurring characteristics of festivals, their different forms of representation and their implications in terms of legal protection. The analysis of the managerial asset can support the formulation of a definition of festival and of hypothesis of protection consistent with the specificities of festivals that rise at empirical level.

In particular, the sample is composed by fifty European festivals. In order to have the most balanced assorted scenario as possible, festivals have been chosen from various references, starting from the following criteria: genre, fame and geographical location. Since this work is concentrated on the phenomenon of art festivals, the analyzed events belong to the main common categories, i. e. literary festivals, festivals of ideas, cinema festivals, music festivals, theatre and other performing arts festivals.

Another fundamental factor in the choice of these festivals is their fame both at a national and international level since it can be interesting to watch how the festival practice, which, in spite of its quasi typical structure, changes accordingly to the notoriety and the relevance of the event.

The last criterion adopted for the construction of the benchmark is the geographical location of the festivals. The events are collected from the international panorama especially from the UK world. In fact, UK is increasingly focusing on festivals as they are seen as an emerging phenomenon and a very remunerative sector both economically and for developing cultural policies. It is important to state that the benchmark does not claim to be wholly representative of all the existing art festivals, but intends to be a deep source for a wide comparison of data.

Since the investigation aims at outlining the principal topics of art festivals, the data were collected accordingly to certain criteria: (a) territory; (b) theme and genre; (c) audience involvement; (d) fundraising; (e) visibility and participation; and (f) accessibility. These parameters were chosen



among others as they are believed to be pertinent to the task by contributing to the knowledge of real details on the cases and they comprise a large number of issues deriving from the use of festivals for spreading culture. Namely, the territory parameter underlines the relevance of the cultural patrimony of a place and the sense of belonging to a community. In addition, analyzing the different types of festival and dividing them accordingly to the kind of artistic expression can help in pointing out how the theme of the event might influence the outcome of the festival. The audience involvement, i. e. whether the attending public is an active subject or just a passive consumer of the festival “adventure”, the visibility and participation considerations draw the attention to the visiting public and provide an overview on the contents of festivals, how they are presented to the public, what the major points of interest are and why some events are more popular than others. Finally, fundraising and accessibility are extremely significant with regard to culture development and people participation since funds deeply influence the organization of the happening and the terms of access give an idea of how concretely attendance is involved.

Among these criteria, three of them resulted more relevant and characterizing than the others, namely: the territory, the audience involvement and the public financial support. As a matter of fact, the common features that raise repeatedly in the analysis of all different case studies are: (i) the importance of the territory and of the cultural background; (ii) the live experience of the cultural products both on the supply side and the consumption side; (iii) the public initiative in organizing and supporting festivals.

(i) The territory is actually one of the components for building the cultural identity of a community. Culture is fundamental to promote the continued renaissance of the city and has a role to play in creating a more inclusive and sustainable community. A festival brings distinction to the image and profile of the city: it enriches the experience of the city centre and makes each community unique in history or sense of place. Some destinations are automatically associated with the festival they usually host (e.g. Glastonbury and its music festival).

Moreover, the reciprocal relationship of a territory with its community is of major interest: the morphology and the landscape of a place deeply influence the cultural development of its population. In fact, a congruence can be seen between festivals and the changes in a national self-image on different aspects of the society. Positive legacies of festivals include the establishment or the strengthening of traditions and values held by residents. Hence, it can be said that it is the community that owns the event as the festival is more than just a celebration: it is instead a reflection of the community’s social and political culture and values, demonstrating mechanisms for the accommodation of a variety of interests within an event framework. Sometimes, festivals can be a great occasion of revitalizing a specific territory, giving new direction to its cultural and economic context. In this sense, there is an irreplaceable *locus* concept which means that a festival must be set in that particular location because often times places can relate stories better than people can. A double implication exists among festivals and places; on the one hand, a matter of great importance, is the capacity of the territory to create a space adequate for cultural exchange; on the other hand festivals, as much as any historical phenomenon, can influence and transform the normal roles and functions of the sites and can help to define and characterize the social and political structures of cities and towns.

(ii) The second relevant feature relates to the audience involvement: festivals are based on people participation (artists, audience and operators) and the live experience is a crucial element of the nature of any event. A way to measure the depth in the public involvement may be seen in the various models of festival and their programs. As a general rule, a strong program is essential not

solely for the event's success, but also to understand better the differences on the level of participation of the public. It is very demanding to differentiate on the basis of audience involvement as a festival is something with layered experiences of diverse nature wrapping it up. Basically, it is possible to recognize three main different types of formats:<sup>6</sup> the *window*, the *genre mix* and the *cultural project*. The *window model* is used in order to display cultural productions: a film, a music concert, a drama production or works of art. It is a wide-spread type of festival and often used as a launch in national contexts combining performances and competitions among artists. Sometimes festivals do not have a precise assignment in terms of audience involvement, however, they are a flourishing of genres and themes and they offer a global experience to the public. The *mix of genre* and ventures can create a massive involvement of the audience stimulated by the continuous variations of the program. Frequently, these festivals have a multidisciplinary program yielding different genre and a large number of activities such as exhibitions, talks, debates with scholars and lectures with artists. In this case, the festival experience is totally different from a traditionally cultural consumption as it provides a different way of being involved: the spectator requires a more direct interaction with the artistic contents and wants to be part of the event.

The *cultural project model* refers to those festivals that are oriented to create fluid context where the audience, the artists and the works are in a constant reciprocal becoming. In this case, the audience and the artists involvement is maximized. These manifestation can be seen as an engine of cooperative ideas, i. e. the festival is the occasion to gather artists, a way to let them meet and discuss. In this sense, they have the same role that a symposium had in the past, a mix of entertainment and culture in order to create works of art in the midst of a definitive moment of time. Moreover, in this apparently creative disorder, the public plays a key role in defining this practice.

(iii) Finally, as any other project, festivals need to have a solid financial base to exist. Bearing in mind that the costs increase as the events become more complex and elaborate in their program, it is necessary to seek a wide range of resources in order to raise the indispensable funds. As far as public funding is concerned, its role of inspiring and involving local communities is fundamental. Some events are organized by the public authority in order to achieve its purposes. Therefore, ever more frequently in the name of public policies, local authorities organize or commission festivals, lavishing resources on these happenings. The relationship between events and public policy is evidenced in the fact that sometimes the main sponsor is the local government itself. Public sponsorship is immensely significant for granting the right to culture as specified in the Universal Human Rights Declaration and many UNESCO Conventions. Article 6 of the Covenant on the Protection and Promotion of the Diversity of Cultural Expression states that national governments must provide all the necessary measures aimed at protecting and promoting culture.

As previously stated, finding parameters and trying to categorize art festivals is a difficult task due to the fact that art itself is a various and composite topic. The collected data show an “apparently” heterogeneous and motley prospect. However, the confrontation of the information points out some critical elements that can help in defining the concept of festival. The definition of festival deriving from the survey says that a festival is *a manifestation taking place in a limited period of time, composed of a series of original and artistic events linked to the same topic or genre which take into account all the tradition and cultural heritage of a specific place in the presence of a participating audience with the goal of spreading education and culture, and which is funded, at least partially, with public funds.*

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<sup>6</sup> Mimma Gallina, *Organizzare teatro*, FrancoAngeli, 2003.

The definition comprises the recurring elements emerged from the analysis:

- *a series of original and artistic events*: it is the whole set which is relevant, each show is important, but the festival is made when the events are taken globally;

- *linked to the same topic or genre*: the manifestation is usually based on a specific theme explored in every artistic form, or the events are connected as they promote a particular artistic expression;

- *take into account all the tradition and cultural heritage of a specific place*: generally, the setting is chosen according to its history and cultural context. These intangible goods have great impact on the festival output;

- *in the presence of a participating audience with the goal of spreading education and culture, and which is funded, at least partially, with public funds*: the live experience and the active participation of the “*festival community*” make the event a cultural moment. The main purpose of public financial support of festivals is to contribute to the promotion of culture and to pursue significant artistic value.

This definition takes into account all the considerations revealed by the empirical analysis. Thus, in this sense, it is accurate and complete. However, at the same time, the definition is extremely broad and inclusive. Each element of the given notion could comprise a great number of situations and cases, so that it is harder to satisfy the search for clarity. This point deeply influences the juridical and legal aspects involved. It seems that festivals are double-faced: on one hand, they can be considered as a format with a precise structure and recurring elements. On the other hand, they can be defined according to the contents created at the event venues. Therefore, this duplicity paves the way to the issue of what is to be protected and how. The legal analysis is then based on the two main sides of the phenomenon, the structure and the contents of festivals. Each aspect needs to be analyzed and studied, so that it will be possible to explore whether legal protection is available.



## 2. Legal Protection

The legal examination analyses the topic by reasoning on how to protect festivals as a whole and how to protect festivals' creations.

### 2.1. *Festivals as Formats*

As far as the structure is concerned, we must say that a festival is a complex product: it is the result of a creative process based on concept (i.e., the initial idea), involving artistic and management aspects. Sometimes, festivals are not merely an aesthetic presentation of works of art but the festival setting can have more than functional value since it is a sort of work of art itself. In these cases, when the festival structure is independent from the single content of the cultural production, the festival itself may be worthy of protection as it could represent a complete and exhaustive expression on a chosen theme.

As festivals can be considered firstly as structures which comprise recurring elements, copyright protection for this subject matter should be explored. Copyright law protection for “structures” or “formats” is highly debated. In principle, copyright law could be invoked when a structure meets the requirements for copyright protection, namely a work belongs to one of the subject matter categories and it is creative.<sup>7</sup> However, in copyright law there are few cases in which “structures” happen to be protected, the most known case being that of television formats.<sup>8</sup> Although the word “*format*” suggests a scheme of TV shows belonging to the same cycle, genre, theme, however, this term could be assigned to every product of intellectual activity which forms an ideal (and structured) “box” for diverse contents.

Taking into account the given definition of festivals, there are some elements which may recall the definition of format. Even in festivals a precise structure exists. Moreover, the ways in which contents are presented, e.g. the structure of the program, is defined, and the ways in which the involvement of the audience is managed can be so original that the format of a festival can become an element of personalization, identification and uniqueness.

For festivals, thus, to belong to the category of protected formats, it is necessary to have a fixed common scheme with no modifications that can be applied to all cases (because copyright would cover this structure which, in its turn, should be an original and creative expression). The category of festivals recalls that of formats because of the presence of fixed elements that make a certain

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<sup>7</sup> In general, when the Berne Convention uses the term “*literary and artistic works*”, the reference is to all categories of works protected under the Convention. However, a satisfying and detailed list is given by Article 2(1) of the Convention. According to this article the expression “*literary and artistic works*” includes every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic and musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawings, paintings, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography, works of applied art; illustrations, maps, plans, sketches and three dimensional works relative to geography, topography, architecture or science. See J.A.L. Sterling, *World Copyright Law*, Sweet and Maxwell, 1998, 766.

<sup>8</sup> Ute Klement, *Protecting Television Show Formats under Copyright Law. New Developments in Common Law and Civil Law Countries*, 29 E.I.P.R., 2007, 52-60; Macario, *Il format*, AIDA, 1998, 50-72; Grandinetti, *La tutelabilità erga omnes del format di programmi radiotelevisivi*, IDA, 2000, 30-80; Gaia Mari, *La tutela del format: situazione attuale e prospettive concrete*, IDA, 2009, 292-307.

product recognizable. In other words, if by “format” one intends all those ingenious realizations which constitute the ideal container for whatever type of show, in effect, even the festival is a container in which the contents can be realized in various ways. There is, in fact, a certain creativity in choosing how to develop the festival concept so that some festivals are a kind of inspiration for others. However, festivals as formats do share the same issue of formats in general: the less the structure is articulated, the more it enters the realm of uncopyrightable ideas.

In addition festivals present a further element of complexity that move them away from protectability as formats: even if there are features that remain constant, these elements are developed in explicit ways that the geographic and individual particularities of the single festival eliminates the risk for a festival to be copied. The absence of risk of reproduction suggests that it is not necessary to protect the festival in this sense. When a format is developed, the outcome is known, this being the reason for presuming that it is worthy of protection. The characteristics of festival and events are unique and as such no one standard model fits all. These characteristics include intangibility, production often taking place at the same time as consumption and perishability. Festival features depend on the local context and are characterized by the peculiarities of the hosting place itself.<sup>9</sup>

In sum, given the fact that festivals are similar to format for they both are a sort of “structured box”, in principle protection for festivals could be sought in analogy to format protection. However, the peculiarity of each festival makes such protection not needed in practice, and the absence of litigation can be seen as a confirmation that it is not necessary to protect festivals as formats.

## 2.2. *Festival as contents*

Festivals are not just a structure. The other aspect to take into account regarding festivals is that they encompass an ample and diverse amount of contents whose protectability under copyright law deserves consideration and may vary according to the kind of festivals considered.

For example, in the case of a *window model* festival, the usual intellectual property protection can be applied to the already created works that contribute to constitute the festivals (this is the case of film festivals).

On the opposite, many challenging questions arise in relation to *cultural project* festivals as they are artistic expressions which have an innate community nature and where tradition-based creativity stimulation is boosted.<sup>10</sup> Its main characteristics are the cultural background, the source and the creative process and the public scope.

The first characteristic of these typologies of festivals is the extreme importance of the cultural background: specificity of the place and community involvement are fundamental elements which permeate all the festival concept and therefore deeply influence and characterize artistic contents that are displayed or performed at the festival venues. Moreover, given the relevance of the setting, these events revive the folklore lying at the heart of community’s identity and constantly stimulate re-creation of traditional knowledge as the festival practice brings fresh perspectives to traditional background.

<sup>9</sup> Marco Paiola, Roberto Grandinetti, *Città in festival. Nuove esperienze di marketing territoriale*, FrancoAngeli, 2009, 56.

<sup>10</sup> “Festivals are cultural sites in which meaning is produced. Historical context is important, since they are product of particular traditions. As such they have histories and identities.” M. Sassatelli, *Art Festivals and the European Public Culture*, Project no 215747, University of Sussex, 2008, 43.

Another crucial point is that *cultural project festivals* are characterized by their ongoing process of creative adaptations.<sup>11</sup> Creativity is marked by a dynamic interplay between collective and individual creativity so that in the creative festival context, it can be difficult to establish what constitutes independent creation.<sup>12</sup>

Finally, the educational scope and public involvement is maximized since the event is expressly part of cultural policies. These happenings can be conceived as “*organization of creation or production of cultural events, cultural performances or even of cultural discourses*”<sup>13</sup> whose task is to maintain the balance between the protection and preservation of cultural expressions and the free exchange of cultural experiences.

These features generates issues on protection and ownership. With regard to protection, the first issue is to verify whether the artistic expressions fall into copyright subject matters and the contents can be subject to copyright law. At first sight, it may be clear that the performances and the works of art under scrutiny fall into the copyright subject matters since these creative and artistic productions can fall into the categories of dramatic or literary works, paintings, sculptures and musical compositions depending on the festival at stake. Nevertheless, the exceptional circumstances under which these works are presented or performed can make copyright law not adapted to the task of supporting cultural project festivals’ as in these contexts the measurement of the degree and value of originality in a continually worked and reworked context can be extremely difficult.<sup>14</sup> Even though under copyright law contemporary adaptations of pre-existing materials can often be sufficiently original to qualify as a protected copyright work, some forms of privatization in the festival context must be carefully avoided:<sup>15</sup> another crucial point is thus where to draw the line between borrowing legitimate inspiration from a traditional culture and the inappropriate adaptation or copying of the productions created at festivals.

Assuming that it could be possible to include festivals and performances into the subject matters of copyright, the second issue to deal with would be the ownership of the rights. Generally, creativity

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<sup>11</sup> “Festivals are a form of ‘collective effervescence’ where the solidarity of collective consciousness found both expression and consolidation.” Durkeim, *The Elementary Forms of the Religious Life*, 1912.

<sup>12</sup> “Festivals are themselves means of constructing a history (or a specific field or school of arts, or, indeed, of a certain collective identity).” M. Sassatelli, *Art Festivals and the European Public Culture*, Project no 215747, University of Sussex, 2008, 57.

<sup>13</sup> Sassatelli, *supra* note 12, at 48.

<sup>14</sup> “Every creator and performer uses the cultural heritage and adds something to it. This addition cannot be an argument for giving an artist an exclusive, monopolistic ownership right for decades on a creation that is in reality based on the work of many other artists before him or her, from the past and even from yesterday. In most societies this notion of individual ownership of a creation or a performances does not exist. Artistic creations and performances are shared in common. For this specific quality of the work the Western concept of ownership is not appropriate, because this suggests that a strict borderline exists between who is entitled to the ownership and who is excluded. The reality in most of the countries is fluid and not concerned with those rigid forms of exclusion.” Joost Smiers, *Creative Improper Property: Copyright and the Non-Western World*, in F. Macmillan (ed.), *New directions in Copyright Law*, Edward Elgar Publishing, 2005, 17.

<sup>15</sup> “Justifications for these restrictions to access and restrictions to freedoms become particularly difficult to sustain the identity of community is premised upon this possessory relationship to resources as distinct from a relationship of belonging and collective subjectivity.[...] As one critic suggest, the failures of public sympathy, state institutions, and lawful forms of property become the failures of local people to maintain their culture.” Johanna Gibson, *Freedoms and Knowledge, Access and Silence: Traditional Knowledge and Freedom of Speech*, in F. Macmillan, *supra* note 14, at 200.

and performances are becoming individualized and this leads to intellectual property rights.<sup>16</sup> Nevertheless, in the context analysed, it is difficult to find the authorship concept as we know it from the copyright system. In those festivals where it is not possible to separate ongoing creativity production from people relationship, it is difficult to determine who is the author and some form of collective copyright should be established as contents are created in a sort of “*public sphere*.”<sup>17</sup> The notion of collective property rights has been mentioned in “*Our Creative Diversity. Report of the World Commission on Culture and Development*” published in 1996:<sup>18</sup> “*traditional cultural groups possess intellectual property rights as groups. This leads to the radical idea that there can be an intermediary sphere of intellectual property rights between individual rights and the (national or international) public domain.*” Nevertheless, the “*group idea*” can be problematic as well since it raises the issue of what is to be protected.

### 2.3. *Traditional Knowledge, Traditional Cultural Expressions & Art Festivals*

Along with the copyright system, the other field which deals with the protection of artistic works and expressions and serves to define the cultural patrimony of a community of a specific place is the one of traditional knowledge and traditional cultural expressions (or expressions of folklore).

Traditional knowledge (TK), as it is now defined by WIPO, includes “*tradition based literary, artistic and scientific works, performances, inventions, scientific discoveries, designs, marks, names and symbols, undisclosed information and all the other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic field.*”<sup>19</sup>

A working description of Traditional Cultural Expressions (TCE) is “*productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such a community*”<sup>20</sup> such as verbal, musical expressions, expressions by actions including all artistic forms or rituals whether or not reduced to a material form and tangible expressions (drawings, paintings, carvings, sculptures etc.).

The two definitions share the idea of protecting the products of the culture of people. In fact, traditional knowledge notion comprises all “*tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic field*” and traditional cultural expressions encompass also artistic forms not reduced to a tangible expression. This calls to mind festival definition which clearly states “*a manifestation[...]takes into account all the tradition and cultural heritage of a specific place*”.

<sup>16</sup> Joost Smiers, *supra* note 14, at 8.

<sup>17</sup> “*Public culture, therefore takes mainly the form of discourses (narratives, concepts, ideologies, signifying practices, expressed through several types of cultural objects, texts or scenes) more or less explicitly addressed to an audience with an aim. In this sense the notion of public culture is both more specific and more inclusive with respect to the related one, and recently much theorized and studied, of the public sphere. More specific, because it concentrates on the cultural dimension, whilst the public sphere contains other ones, with a strong focus on a political dimension in particular.*” Sassatelli, *supra* note 12, at 16.

<sup>18</sup> J. Perez de Cuellar, *Our Creative Diversity. Report of the World Commission on Culture and Development*, UNESCO Publishing, 1996, 196.

<sup>19</sup> WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders – WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge*, 2001, 25.

<sup>20</sup> WIPO, *Intellectual Property & Traditional Cultural Expressions Folklore*, available at [http://www.wipo.int/freepublications/en/tk/913/wipo\\_pub\\_913.pdf](http://www.wipo.int/freepublications/en/tk/913/wipo_pub_913.pdf).

According to WIPO directions, the main characteristics of traditional cultural expressions are that they are handed down from one generation to another, either orally or by imitation; that they reflect a community's cultural and social identity; that they consist of characteristic elements of a community heritage; that they are made by "*authors unknown*" and/or by individuals communally recognized as having the right, responsibility or permission to do so; that they are often created not for commercial purposes, but as vehicles for religious and cultural expression; eventually that they are constantly evolving, developing and being recreated within the community. In fact, traditional cultural expressions are "*often the product of inter-generational and fluid social and communal creative processes, reflect and identity a community's history, cultural and social identity, and values.*"<sup>21</sup>

The relationship among TK, TCE and festivals is evident especially when the event is a cultural project which maximizes the connection with the cultural background and the territory.<sup>22</sup> Content issues are strictly connected to event's aim, audience participation and links to cultural background of a place. During festivals, territory is affirmed not through historical, legal, or classical anthropological renditions of place, but through ongoing community expression of space. In fact, "*territory is not just the physical parameters of rivalrous place, but emerges through community practice and cultural knowledge.*"<sup>23</sup> Thus, the relationship of community to territory and resources is realized not through the linkage of territory as object with an individual legal subject, but in its sense-making through customary law and cultural expression, which will differentiate territory (understood not just as land, but as knowledge and culture) according to subjects who are recognized by the community and perform within the community.<sup>24</sup> As previously stated, the definition of festival emphasizes the influence of the place and of its cultural patrimony.<sup>25</sup> Traditional cultural expressions comprise physical expressions such as performances and artistic expressions of rituals and festivals can be included in these kinds of aesthetic interpretations.

Given the analogy of some types of festival contents with expressions of cultural traditions, the same need for protection arises. The issue is to grant protection to the contents presented, displayed

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<sup>21</sup> Id., at 5.

<sup>22</sup> "*Space is a practiced place. This is the territory of community resources. Space, the territory of community, is created by community and its movements rather than reduced by the law. Indeed, it is precisely through the movements of community that territory is also re-affirmed, rather than lost.*" Gibson, *supra* note 15, at 26.

<sup>23</sup> "*The ongoing expression of tradition is vital to the dynamic concept of community, but inextricable from this connection to and expression through territory and its resources (cultural, natural, intellectual, and otherwise).*" Gibson, *supra* note 15, at 28.

<sup>24</sup> "*Furthermore, the notion of community as a localized geographical creation, confined by house, neighborhoods, settlements, families, and so on-that is place, in the conventional sense is problematic in understanding traditional knowledge[...] Indeed, rights to land (and the possible cultural knowledge therein) are more or less de-limited by place as a means by which to prevent the perceived proliferation of adversarial and competitive use. Thus, the attachment to place continues the process of simplification and objection of community knowledge, in ways not unlike the simplification of creativity and the legitimation of information through intellectual property requirements of origination (authorship, inventor-ship, the personality of information) and in-imitativeness (originality, inventiveness, novelty).*" Gibson, *supra* note 15, at 26-28.

<sup>25</sup> "*While belonging to incorporeal, infinite, and timeless territory as a province of knowledge, community nevertheless refers to finite place that may be identified by ancestry, heritage and practice[...] Traditional resources are inextricably linked to the land (including traditional cultural expressions embodied in the land both literally, in the form of rock art, and performatively in the relationship between the production of expressions, knowledge in the land, and practice associated with the land.*" Gibson, *supra* note 15, at 29.



or performed in order to assure guardianship for traditional aspects used in festival performances and the contents to be protected not only from mere reproduction but also against misappropriation and illicit use. At international level, WIPO and UNESCO proposed a *sui generis* model for IP-type protection of TCE which takes into account national customary laws. Nevertheless, there is still debate on whether copyright can be the answer to the protection of these kind of cultural expressions.<sup>26</sup> A copyright protection extended to these production is concerning as it enhances the risk of co-modifying contents which should be considered common cultural patrimony.<sup>27</sup> Even a stronger intellectual property covering does not mean adequate protection:<sup>28</sup> the use of intellectual property protection for certain cultural productions at festivals might have a reduction of creativity and common knowledge.<sup>29</sup>

Traditional cultural rights are the rights which regard the protection of TK and TCE. *The Model Law for the Protection of Traditional Knowledge and Expression of Culture*<sup>30</sup> defines these rights as the “uses of traditional knowledge or expression of culture”. Such uses provide the possibility to reproduce, to publish, to perform or display, to adapt or modify and to fixate traditional knowledge or expression of culture. Moreover, the Model identifies the owners of these rights in the group, clan or community of people underlying the fact that these cultural rights must belong to the public as a whole and promote freedom and space for creativity, innovation and cultural conservation.

One of the questions which may arise is: even if the works are not in the public domain, why should they be accessible to the public? The key point is that the access to knowledge can deeply affect the creative process itself. Therefore, accessibility to cultural activities should be provided and favoured. There are many international covenants about the so-called “right to culture” which affirms people’s right of enjoying culture, encompassing interests in cultural property, cultural identity and cultural heritage. Article 15 of the Covenant on Economic and Social and Cultural Rights states that “*the States parties to the present Covenant recognize the right of everyone: to take part in cultural life[...]*”. Moreover, Article 27 Universal Declaration of Human Rights provides that: “*Everyone has the right to freely participate in the Cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.*”

Hence, copyright cannot be the only law applied in the case of festivals since it tends to concentrate the ownership of cultural goods in private hands. Controlling the market of culture, this system becomes a cultural filter and contributes to homogenizing the types and the contents of cultural products. Other alarming impacts on the public domain of the private control on culture are the limitations on the right to culture and on the freedom of speech. National governments should be more vigilant in preventing the impoverishment of the tradition and cultural heritage of their own

<sup>26</sup> Daphne Zografos, *The Legal Protection of Traditional Cultural Expressions: is Copyright the Answer?*, in F. Macmillan, *supra* note 14.

<sup>27</sup> Brad Sherman and Leanne Wiseman, *Towards an Indigenous Public Domain?*, in L. Guibault & P. Bernt Hugenholtz, *The Future of the Public Domain-Identifying the Commons in Information Law*, Kluwer Law, 2006, 261-262.

<sup>28</sup> “*The assimilation of traditional knowledge within intellectual property models persists as a questionable and frequently problematic objective of current international discussions.*” Gibson, *supra* note 15, at 15.

<sup>29</sup> “*The objects of knowledge are not independent from the creators of traditional knowledge. Therefore, non-traditional and/or inappropriate use of traditional cultural expressions and knowledge fractures that relationship, and transforms the value of the knowledge (through misidentification of self and community).*” Gibson, *supra* note 15, at 23.

<sup>30</sup> *The Model Law for the Protection of Traditional Knowledge and Expression of Culture*, 2002, 7, available at <http://www.forumsec.org.fj/resources/uploads/attachments/documents/PacificModelLaw,ProtectionofTKandExprsnsnfCulture20021.pdf>.

country protecting the local cultural production. This is clearly stated by Article 6 of the Covenant on the Protection and Promotion of the Diversity of Cultural Expression which provides measures aiming to preserve and promote cultural expressions, provide opportunities for the spreading of cultural activities, provide public financial assistance and establish public institutions. The above mentioned measures demonstrate that international law recognizes cultural rights which belong to communities and that one of these rights' tasks is to prevent or limit the privatization of cultural property.

Festivals' importance for spreading culture and consolidating civic consciousness is extremely noteworthy.<sup>31</sup> *"They are a significant expression of contemporary public culture"*<sup>32</sup> and even though festivals have commercial aspects (sometimes quite prominent), *"they are still public cultural events[...]. Even if they presume and circulate large amount of money, festivals are in fact usually non-profit enterprises, sponsored by foundations or public bodies, and this requires an approach which is less focused on economic factors and more on symbolic and normative, or institutional ones."*<sup>33</sup> In fact, *cultural project festivals* themselves are an expression of cultural tradition since they are communal celebration and organized with the explicit intent of promoting culture and tradition, involving the audience in a community ritual. Therefore, the rights applied to traditional knowledge and expression of culture such as traditional cultural rights, should be considered also as far as festival contents are concerned. Even in festivals context, a balance between the right to culture and economic exploitation needs to be found.

### 3. Final considerations

The goal of this paper was to find a definition in order to generalize the notion of art festival. However, it is impossible to bring all the types of art festivals under the same definition as they are a multifaceted phenomenon *where cultural, aesthetic and political values are constantly created, stabilized and redefined* (Dowd et al. 2005).<sup>34</sup>

The definition found through the empirical analysis comprises the main characteristics of festivals, namely the cultural aim, the connection with the territory and its cultural background and the public support. The features are noteworthy as they highlight the cultural function of festivals.

With regard to the legal aspects, the reasoning revealed how difficult it is to find protection for festivals. In particular, regarding the protection of festival contents, the variegated scenario of art festivals make a unique normative solution impossible. It is necessary to provide a case by case analysis interpreting the elements of the definition according to the concrete relevance they have in each specific case. Much depend on the type of festival and on the contents. In fact, certain works presented at window model festivals or peculiar artistic expressions covered by copyright do not cause any particular concern. On the contrary, when festivals are more like a community rite it is necessary to take into account the contents are strictly connected with the cultural patrimony of the hosting place. This leads to link these creative outputs with the forms of traditional knowledge and cultural expressions as these festivals are the result of an impersonal, continuous and slow process of creative activity exercised in a given community and a source of inspiration and creativity.

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<sup>31</sup> *"This is probably nowhere as clear as it is for major festivals established in Europe in the aftermath of World War II. The best – and most studied – example is certainly the Edinburgh International festival that was explicitly established in 1947 as a contribution to the reconstruction of European society and culture that had been destroyed by the two wars."* Sassatelli, *supra* note 12, at 26.

<sup>32</sup> Sassatelli, *supra* note 12, at 24.

<sup>33</sup> *Id.*, at 31-49. In fact, *"an organizational field is defined as "those organization that in the aggregate, constitute a recognized area of institutional life: key suppliers, resource and product consumers, regulatory agencies, and other organizations that produce similar services or products" (1991: 64). Indeed, we can say that festivals both constitute an organizational field, and are part of larger fields – be they local, national, or genre-specific. What this concept helps us to understand is the strong similarity existing among so many organizations, that is their isomorphism, which could be explained according to DiMaggio and Powell as the effect of normative pressures, of coercion, and of mimicry. This isomorphism is clearly visible also in the field of festivals, where a pool of features are common across genres and countries – including the use of the name "festival" to identify a certain kind of organizational form."*

<sup>34</sup> Sassatelli, *supra* note 12, at 82.

Therefore, given that art festivals are an essential tool for the implementation of the right to culture, it is risky to transfer the divulgation of art forms to private ownership. Festivals become a way of guarding the common patrimony.

However, the topic is particularly subject to compromise: the protection of festivals needs a kind of balancing mechanism as it is necessary to fulfil the requirement for equitable sharing of the benefits as these events promote well being and continuity of cultural development for a community. Therefore, the present issue should be observed in two related settings, the legal and the political. From a legal point of view, there are rationales for legal protection with regard to the exploitation of intangible goods deriving from the subject matter of cultural heritage.<sup>35</sup> Moreover, legal provisions should provide prevention of unauthorized exploitation, protection from misappropriation, distortion and other prejudicial actions and protection of the dignity and the moral rights of traditional innovators and creators. On the other hand, the policy objectives take into account other important aspects such as the conservation of traditions and the stimulation and promotion of innovation and creativity.<sup>36</sup> The problem of the lack of protection is not an unitary challenge: legal remedies cannot set aside cultural policies. Overprotection could conflict with the general interest of access to knowledge and artistic development. Measures should provide opportunities to promote exchange and circulation of ideas and production, distribution and enjoyment of cultural activities.

Art festivals leave many questions to be answered by legislative solutions. Whether and how should the law empower festivals in preserving cultural tradition? What responsibilities should the law impose on festivals to maximize the public benefits? What kind of accommodations would be necessary to protect the economic interests of copyright owners? Effective positive protection is likely to require a completely new system whose development would demand the active and committed participation of governments. An integration of all the aspects and of all the players involved in the festival practice is necessary to enhance festival benefits.

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<sup>35</sup> Reto M. Hilty, *Rationales for the legal protection of intangible goods and cultural heritage*, 40 IIC, 2009, 883.

<sup>36</sup> Micheal Blackeney, *Protecting Traditional Cultural Expressions: the International Dimension*, in F. Macmillan, *supra* note 15.

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