

## “CANZONE NAPOLETANA”: THE CONTROVERSIAL ROOTS OF A POWERFUL IDENTITY TOOL \*

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**SUMMARY:** 1.- Introduction; 2.- “Canzone Napoletana”: a fairy tale at its beginnings; 2.1.- Caruso and his own sun; 2.2.- The recording industry and its democratisation process; 3.- “Canzone Napoletana” and its controversial origin; 3.1.- The roots of the “Canzone Napoletana”; 4.- Legal aspects of the “Canzone Napoletana”: between protection and appropriation; 4.1.- Cultural rights: the international legal framework; 4.2.- IP protection and its inadequacy; 4.3.- The limits of IP-based solutions: “Canzone Napoletana” as a form of cultural appropriation; 5.- Conclusions.

### 1.- Introduction.

At the beginning of the XX century, Naples and Southern Italy in general have been experiencing high level of emigration, especially to North America.

Many neighbourhoods called ‘Little Italy’ were formed in the United States as well as in Canada.

Notably, these immigrants, in an attempt to maintain a link with their homeland, found foothold in the ancient and deep-rooted Neapolitan traditions including music (opera), theatre and the figurative arts. Thereafter, Neapolitan song (“Canzone Napoletana”) became a tool to remain Italian for those who were now permanently linked to their status as immigrants and who tried to export some aspects of their cultural roots.

The first part of this paper describes the recent developments of the “Canzone Napoletana” as an identity tool, a precious instrument allowing Italian immigrants to identify themselves and therefore survive in the US. We then go back to the origins of the “Canzone Napoletana”, with the aim of highlighting both its historical roots and its corresponding legal treatment.

In this respect, in the second part, the Authors will point out that the nature of the “Canzone Napoletana” is different from local folk music as it responds to different needs. Indeed, folk music is conceived as a part of a ritual, and it fulfils a function within such ritual. On the other hand, “Canzone Napoletana” is closely connected to the economic interests of the middle class and music publishers, with the declared intention of becoming an internationally recognized artistic form. Furthermore, the “Canzone Napoletana” took many inspirations from the Neapolitan folk music, even if strongly influenced the style of the “chanson française”.

In the third part of this work, the Authors will deal with the legal aspect of the phenomenon, suggesting that this is an area where we assist to a singular interplay between appropriation and call for protection, with the ‘complicity’ of the copyright law of the Kingdom of the Two Sicilies and with the first Italian copyright law, once Naples was annexed to the Reign of Italy. Indeed, on the one hand “Canzone Napoletana” borrowed or better ‘appropriated’ most of the Neapolitan songs in the public domain. On the other hand, the question of protectability still arises given that, as things now stand, Italian law does not seem to pay much attention to the protection of traditional works, limiting itself to the application of the Berne Convention.

Eventually, in their conclusions, moving from their legal and cultural analysis, the Authors will assess to what extent the existing legal framework adequately address the phenomenon of the “Canzone

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Napoletana” and will propose a mixed model based on the integration between copyright laws and cultural rights.

## 2.- “Canzone Napoletana”: a fairy tale at its beginnings.

When Italian immigrants first moved to the US at the beginning of the twentieth century, their establishment in this new, totally different context was not an easy one. In this respect, as pointed out by some scholars<sup>1</sup>, the Italian immigrants originally constituted a rather complex ethnic group, often defined as ‘people in the middle’ because of having both of their identities negated: while they were no longer Italian, they were not yet American. «The self-image of this generation of immigrants was characterized by a never-ending mobility - no longer there, but not yet quite here». Plus, in many cases, American prejudices did not make it easy for Italian immigrants to find their own dimension in the country.

Indeed, while this is not a ‘sugar&spice&everythingnice’ tale, somebody might argue that migration never is. And we must agree. Migration is a universal tale and its drawbacks and complexities - as well as the chances it might offer for the bravest ones - are very well known. Migration is not a new phenomenon but when people move en masse, their cultural traditions move with them and this can be unsettling for host communities. As new people and cultures take root in old, established communities, it is not surprising that feelings of alienation can occur on both sides. Music can act as a valuable tool for integration, especially community music-making, as it offers a fun and engaging way to connect people from different backgrounds with varying levels of skills and knowledge. It can also mobilise communities around common issues

However, in the present paper we will focus on the specific phenomenon of Italian migration. This only partly depends on the fact that Italy is also the country where this paper originated. We sincerely believe that Italian culture, its externalisations (such as music) as well as its perception throughout the general public is one of the most complex and interesting one.

Notably, the racial ambiguity of the Italian immigrants, their being Caucasian due to geographic provenance but dark-skinned in terms of physical attribute derives in part from prejudices among northern Italians against southern Italians that predate the era of immigration. It is perhaps because of this that American culture promoted a distinct separation in its perception of the Italy that was a tourist destination and a symbol of cultural refinement as opposed to the Italy that was the country from which the emigrants came, a barbarous land, inhabited by violent individuals. This distinction inevitably accompanied Italian immigrants during their first steps in the USA and was also at the basis of the ‘Johnson-Reed Act’, i.e. the so called ‘Immigration Act’ that established a fixed quota for immigration into the United States with a pronounced bias against southern Europeans.

This is also the context where the first immigrants, in their uncertain to-be-defined status started to use culture - and specifically music - for the purpose of showing their own connection with their Italian roots and, by this building their identity as autonomous social group. In this respect, one might argue that the history of migrations is the story of its representation in the theatre, in the cinema and above all, in music<sup>2</sup>. In particular, during the 1940s, along with the theatre, also the radio proved itself to be an important instrument for spreading Italian political ideas and music. In particular, the radio station for Italian residents in New York was WOV, in Manhattan, and it had a crucial role for the purpose of communicating and sharing a new version of the collective historical memory of the immigrants.

From the outset, the Neapolitan song was therefore used as an export item to identify the entire city with its music. From a stylistic point of view, as will be explained, the ‘song form’ was soon adopted, with strophes and refrain (i.e. verses and chorus), on the model of the French song. Similarly, as far

<sup>1</sup> S. Frasca, *Italian birds of passage: the diaspora of Neapolitan musicians in New York*, New York 2014.

<sup>2</sup> In New York, most entertainment venues were concentrated in Harlem and in Little Italy.

as harmony was concerned, operatic styles were mostly taken up, adapted to the ‘song form’. Its usability and ability to express a universal language, then, contributed to the rapid spread of the Neapolitan song and this was supported, inter alia, by a very lively music publishing industry.

### 2.1.- Caruso and his own sun.

‘*La Follia di New York*’, a weekly devoted to humour, was one of the main entertainment publications in the Italian language in the first decades of the XX century. The tone of the weekly was strongly oriented toward the integration of cultures and its members aimed at presenting a positive image of the Italian community as one composed of artists and intellectuals who were fully aware of the difficulties encountered in the process of integration. Notably, the role of Naples and its culture, already emerged in this publication as in an issue published in 1910 the paper announced the American version of the popular Neapolitan feast of Piedigrotta (discussed further below), to be held in the middle of September.

In this context, Enrico Caruso played a fundamental role in defining the positive prototype of the Italian immigrant as one who achieved social status and was self-determined—within the dimensions that define the model of an immigrant ‘self-made man’. Enrico Caruso provided important support in communicating a positive image of the southern Italian immigrant in New York. His sunny, confident, and reassuring face was used in periodicals and leaflets of the Italian community in America to sponsor every type of Italian product from pasta to coffee, from oil to newspapers, and, obviously, the gramophone and the recordings manufactured by Victor. He received numerous acclamations in New York: the more his fame increased in the city, the more the demands for his appearance grew. It was nothing about music, Caruso was celebrated as a star: a chain of Caruso restaurants sprang up; spaghetti à la Caruso, was a regular item on the menu. Therefore, the raising of the Italian to the state of ‘being human to’ was accomplished through the arts, and in this music played a primary role. Music, became in a short time a symbol of the Italian community, representing the means by which it reached a more prosperous standard of living and, at the same time, a heightened level of acceptability.

From the end of the nineteenth century to the beginning of the twentieth century, at the historical period when Neapolitan songs were at the height of their popularity, about four million Italians landed in North America, 70 per cent of whom came from the southern regions. Neapolitan music was an element of identity for the communities that were created in the USA. Neapolitan songs became, in fact, a means to remain Italian for those who were now permanently linked to their status as immigrants and who tried to export some aspects of their cultural roots. It is no coincidence, therefore, that in New York at the beginning of the twentieth century, an American Piedigrotta festival was organised. This festival certainly furthered the reputation of the Neapolitan song, even among Americans. Enrico Caruso, the famous tenor who revived some Neapolitan songs, giving them popularity and success also in the American territory, played a very important role, along with other artists. Caruso also embodied a ‘good’ Italian stereotype, as opposed to the narrative of the Italian “mafioso”, and for this reason, he was widely supported not only by his fellow countrymen abroad, but also back at home.

The popularity of the “Canzone napoletana” was cemented when Elvis Presley translated the iconic Neapolitan song ‘*O sole mio*’ into his ‘*It’s Now or Never*’, which made its way to number one in the music charts in the USA, the UK and many other countries around the world<sup>3</sup>.

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<sup>3</sup> Elvis Presley also frequently performed another famous Neapolitan song, “Torna a Surriento”, under the title ‘Surrender’.

## 2.2.- The recording industry and its democratisation process.

People move, migrate, change and so music does. The dynamic character of music is self-evident and one of its main expressions is the evolution from a theatre-based model to the record industry phase. Indeed, while Edison's phonographs had already been invented in the XIX century, it was only at the start of the new century, that these machines started to be employed in the field of music and grew their popularity as a means of mass entertainment capable of reproducing sound faithfully.

The possibility of reproducing pieces of music in infinite number and bring it into the daily lives of people radically transformed the social dimensions of listening to music. Plus, it represented the perfect synthesis between European tradition and American innovation. Likewise, Caruso was the symbol of the very same synthesis: he was an Italian, proud of his cultural roots and, at the same time, he was one of the first immigrants to somehow overcome the America prejudice and transmit a positive image of Italian culture. Notably, the transcendent value of music and its democratic connotation would not have been as transcendent as it was if recording industry had not emerged meanwhile. This is because this new instrument of making music did not require all the components to belong to the same person, country or ethnic group. By this, a certain level of freedom and with-it differentiation, mix-up and integration was somehow promoted or, at the very least, accepted.

## 3.- “Canzone Napoletana” and its controversial origin.

“Canzone Napoletana” therefore played a crucial role for the Italian immigrants. Indeed, while on the one hand this form of music allowed individuals to keep in contact with their country (and their national identity), on the other it also allowed them to build their own identity elsewhere and, by this, to slowly integrate themselves in a new context.

In this respect, while scholars often disagree on the modalities in which this process took place and on whether music constituted a differentiating instrument rather than an integration tool, they all agree on the extraordinary power and potentialities offered by music compositions.

Yet, what is far from being clear is what is meant by the “Canzone Napoletana” and how this specific genre originated. In other words, the very subject matter of this paper.

It has been noted that Neapolitan music does not exist as such or, in any case, it is not a single, unified, discrete phenomenon. Naples is a city that has always had a very strong artistic and musical tradition, which distinguishes it from the rest of Italy. However, the artistic expressions by which this tradition is manifested are heterogeneous. In particular, a fundamental distinction can be drawn between art music, including opera, and a huge corpus of folk music. “Canzone napoletana” and Neapolitan traditional folk music do not share the same background. On the one hand, Neapolitan song is the product of a middle-class revolution and of the advent of an entertainment industry, while on the other hand local folk music fulfils not a commercial function, but often a religious and ritual one<sup>4</sup>. The highlighted distinction results in a different style and, *inter alia*, in the fact that while traditional folk music is often combined with dance, this is not the case when it comes to “Canzone Napoletana”. This being said, the birth of Neapolitan song is conventionally traced back to 1839, the year when the first Piedigrotta song festival is said to have taken place. This festival, very well-known in Naples, is symbolic of the relationship between paganism and Christian religiosity, and between folk music, conceived mainly for religious purposes, and a flourishing music industry, which would benefit from a pre-existing tradition to turn it to its aims. The story of Piedigrotta is emblematic, because it highlights aspects that are characteristic of Neapolitan culture and contributes to an understanding of the Neapolitan musical phenomenon. There is a similarity between a pagan festival, supplanted by the advent of Christianity, refusing to transfer its symbolic meaning to the Virgin Mary, who performs

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<sup>4</sup> This approach follows the seminal work of research by M. Stazio, *Osolemio. La canzone napoletana – 1880/1914*, Roma 1991.

a function which was once allotted to Isis, Demeter and Venus, and the folk tradition that influenced the first Neapolitan songs. However, the folk tradition survived mostly in a marginal role: a sort of reference to a naive and picturesque population which had to be ‘educated’ to be useful for the middle-class hegemonic project. In this process, the advent of music publishing and the birth of an entertainment industry that would support the musical phenomenon was crucial. A popular rite is transformed into a national festival, purified of pagan elements, which survive only in clandestine form, and made attractive to the whole population: we see the abandonment of music as part of a rite and its replacement with a ‘song form’. Thus, music shifts from being functional for both pagan and, later, Christian rituals to a commodity.

### 3.1.- The roots of the “Canzone Napoletana”.

“Canzone Napoletana” was born at the time of unification of Italy in 1861, and therefore at the end of the Regno delle Due Sicilie (the ‘Kingdom of the Two Sicilies’). Historically, the first half of the nineteenth century marked the rise of the bourgeoisie, the social class responsible for the commodification of literary and musical works. It also saw the birth of the publishing market, which prospered thanks to the diffusion of Neapolitan music outside the Kingdom of the Two Sicilies. While the existing literature on the “Canzone napoletana” has focused on an alleged connection to the folk music in the area surrounding Naples, this link appears ephemeral and overestimated. Indeed, some scholars have correctly pointed out that the rise of the “Canzone napoletana” is closely linked to the economic interests of music publishers, who eventually contributed significantly to the creation of a relevant market. “Canzone napoletana” adopted the song form and was built around repeated sections (verses and chorus/refrain) typical of the French and German music traditions.

As a result, “Canzone napoletana” is different from local folk music and responds to different needs. Folk music is a part of a ritual, and it fulfils a function within this ritual. Conversely, “Canzone Napoletana” “addresses other needs<sup>5</sup>, with its primary purpose being pure entertainment and the aspiration of becoming an internationally recognised artistic form. Not surprisingly, as a consequence of the shift from folk music to the “Canzone Napoletana”, there was also a change in the themes addressed. For example, in addition to “*Je te voglio bene assaje*”, “*Funiculi Funiculà*”, written in 1880 by the journalist Giuseppe Turco with music by Luigi Denza, celebrated the inauguration of the first funicular railway, which took place in 1879, and allowed people to climb up to Vesuvius, the Neapolitan volcano. This song is particularly meaningful in view of its text, highlighting modernity: the new line of transport starting from the “villanelle” and leading both Neapolitans and tourists to the slopes of Vesuvius. This is something very different from the expressions of rural and popular themes within the folk tradition. It is not by chance that the song was presented again a few years later, also in Italian, nor that it is one of the Neapolitan songs that has witnessed the greatest popularity abroad<sup>6</sup>. The text is not based on the real life of the local people, but is a sort of postcard for foreign countries, a vehicle for the diffusion of Neapolitan culture and, at the same time, an advertisement for the natural beauties of the place. Thus, “Canzone Napoletana” from its beginnings represented a new Naples, which, due to the representative intentions of the emerging middle class, was not directly connected to the rural, provincial world.

In this context, Guillaume Cottrau had a crucial role for the purpose of understanding the genesis of Neapolitan song. In 1824, he published a book entitled “*Passatempi musicali*” (‘Musical Pastimes’), which was a combination of popular traditional pieces transcribed and arranged by musicians with an academic education and original folk-style compositions. ‘Folk-style’ achieved great popularity

<sup>5</sup> At least in its genesis, it subsequently became an interclass art form.

<sup>6</sup> The song was also turned into orchestral form by Nikolaj Rimskij-Korsakov in 1907 with the title “*Canzone napoletana*” (Op. 63) and incorporated into the final movement of Richard Strauss’s symphonic poem ‘*From Italy*’.

following the book's publication, giving birth to a new editorial genre<sup>7</sup>. Other collections were published, including "*L'eco di Napoli*" ('The Echo of Naples'), edited by Vincenzo De Meglio and published by the famous publisher Ricordi<sup>8</sup>. These publications were designed for the city middle class and the music had a purely entertainment function. Although these pieces were written anonymously, authorship was often 'plundered' by arrangers who claimed to be their creators. The authorship of these songs is indeed a complicated issue: they were folk songs, almost always written by an unknown author or created by multiple people, over time, adding sections to the modular structure of the piece of music.

After the inauguration of the Piedigrotta festival, the "copielle", which were an evolution of the "fogli volanti"<sup>9</sup>, became very popular. The "copielle" were illustrated sheets on which the lyrics of the songs and the sheet music, normally tablature for the mandolin, were printed to facilitate the dispersion even among those who could not read music. "Copielle" were sold for a few pennies and were often given as gifts. The Piedigrotta festival attracted not only citizens from the city, but also many tourists. The "copielle", therefore, served as an instrument for the dissemination of the "Canzone Napoletana" amongst the bourgeois class, not only in Naples, but nationally and internationally<sup>10</sup>. In the following decades, additional reasons spurred the spread of Neapolitan song throughout the world. At the beginning of the century, Naples, and southern Italy in general, were experiencing high levels of emigration, especially to North America. Thereafter, not only did Neapolitans recognise themselves in the "Canzone Napoletana", but so did all Italian immigrants – or, at least, all those coming from the southern regions of Italy.

#### **4.- Legal aspects of the "Canzone Napoletana": between protection and appropriation.**

As mentioned above, "Canzone Napoletana" is a sector where we assist to a singular interplay between appropriation and call for protection. This is because, on the one hand, "Canzone Napoletana" borrowed or better 'appropriated' most of the Neapolitan songs in the public domain. Yet, on the other hand, the question of protectability still arises given that, as things now stand, Italian law does not seem to pay much attention to the protection of traditional works, limiting itself to the application of the Berne Convention.

In this paragraph we will focus in turn on each of these aspects, first illustrating the current legal framework when it comes to protection of music – both in terms of copyright law and cultural rights and secondly considering the issue, or rather the aspect, of appropriation.

##### **4.1.- Cultural rights: the international legal framework.**

The legal analysis of community-based music is a very specific task, insofar as involves the combined analysis of typical proprietary schemes such as copyright law and other less traditional models. Indeed, while the music industry is typically conceived as the copyright kingdom this might not be the case anymore, when it comes to community-based music, i.e. those songs and melodies originated by multiple efforts, as is the case when it comes to the "Canzone Napoletana".

In this respect, the question arises of whether the existing legal framework sufficiently regulates the

<sup>7</sup> Scialò, n 4.

<sup>8</sup> V. De Meglio, *L'eco di Napoli*, Milano 1877.

<sup>9</sup> The 'fogli volanti' (literally, flying sheets or broadsides) were publications sold on the streets that took up the lyrics and music of popular songs. The flying sheets are important because they represented a tool to affirm the Neapolitan song within the bourgeois salons, paving the way to the affirmation of music publishing, first Neapolitan and then coming from the regions of northern Italy. See R. Del Prete, *La città del loisir. Il sistema produttivo dello spettacolo dal vivo a Napoli tra '800 e '900*, in A. Pesce, M Stazio (curr.), *La canzone napoletana. Tra memoria e innovazione*, Napoli 2013, 147.

<sup>10</sup> *Ibid.*, 161.

phenomenon and whether a cultural right exists and is enforceable in this specific context.

Indeed, «Indigenous people have been asserting for over three decades their special rights in cultural property»<sup>11</sup>. In the same sense, the link between the law, the community and its identity<sup>12</sup> has always been recognised by legal tradition<sup>13</sup>. However, as noticed by the World Intellectual Property Organization (WIPO), the opportunity of protecting traditional<sup>14</sup> forms of knowledge and creativity is a controversial topic, mainly because of the difficulty in determining the role and the boundaries of public domain. As a result, the first attempts of actually safeguarding the community collective rights upon its Intangible Cultural Heritage (ICH) are quite recent.

More in detail, the UNESCO Convention on the Protection and Promotion of the diversity of Cultural Expressions (CCD)<sup>15</sup> and the Convention for the Safeguarding of Intangible Cultural Heritage (ICH)<sup>16</sup> are the first international instruments recognising the specific value of intangible heritage. In this respect, the ICH Convention in its article 2<sup>17</sup> provides a definition of ICH which has been regarded as based on five main factors. Namely, (i) self-identification; (ii) constant recreation «in response to the environment, the interaction with the nature and the history»; (iii) connection with the identity of the creators; (iv) authenticity; and (v) relation with human rights<sup>18</sup>. Then, in its Article 5<sup>19</sup> it establishes a Committee (IGC) whose main purpose consists in encouraging and monitoring the actual enforcement of these provisions<sup>20</sup>. Despite the IGC work in this direction<sup>21</sup>, at the moment there is not an international instrument providing specific measures of safeguard.

This raises several issues in so far as<sup>22</sup> the current IP framework does not adequately guarantee ICH protection. At the same time, an international instrument would be required in order to solve the legal uncertainty, establishing a common definition of the protectable subject matter.

#### 4.2.- IP protection and its inadequacy.

In the lack of an international instrument of protection<sup>23</sup>, the recognition of collective rights through IP laws, due to the intangible nature of the latter<sup>24</sup>, has been regarded in the legal debate as the most suitable solution<sup>25</sup> for ICH protection.

In this regard, the UNESCO Convention on Cultural Diversity (CCD) in its Preamble expressly recognises the importance of such a connection, stressing «the importance of intellectual property

<sup>11</sup> E. Burns Coleman, *Aboriginal Art, Identity, Appropriation*, Aldershot 2005.

<sup>12</sup> F. MacMillan, *The protection of cultural heritage: common heritage of humankind, national cultural 'patrimony' or private property?*, in *Northern Ireland Legal Quarterly* 64.3 (2013) 351ss.

<sup>13</sup> M. Goffe, *Protecting the Traditions of the Maroons and Rastafari: An Analysis of the Adequacy of the Intellectual Property Laws of Jamaica and Proposals for Reform*, in *SCRIPTed* 6.3 (2009) 575ss.

<sup>14</sup> «While it is often thought that tradition is only about imitation and reproduction, it is also about innovation and creation within the international framework». WIPO Consolidated Analysis, 10.

<sup>15</sup> UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Paris, 20 October 2005 (CCD).

<sup>16</sup> UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage, Paris 2003 [Hereinafter: 'ICH Convention'].

<sup>17</sup> P.D. Farah, R. Tremolada, *Conflict Between Intellectual Property Rights and Human Rights: A Case Study on Intangible Cultural Heritage*, in *Oregon Law Review* 94.1 (2015) 125ss.

<sup>18</sup> *Ibid.* This is an implicit feature, which is justifiable because of ICH role as fundamental element of creators' identity.

<sup>19</sup> Article 5 of the ICH Convention.

<sup>20</sup> Article 7 of the ICH Convention.

<sup>21</sup> WIPO (2015), 44.

<sup>22</sup> Farah, Tremolada, *Conflict cit.*, 158; WIPO (2015), 35.

<sup>23</sup> This was justified in the light of two main considerations: «the lack of appropriate sources for the identification of the expressions of folklore and of workable mechanisms for settling the questions which can be found not in one country but in several countries of a region». WIPO IGC, *Preliminary Report on National Experiences with the Legal Protection of Expressions of Folklore*, Geneva, 2001, 6.

<sup>24</sup> Farah, Tremolada, *Conflict cit.*, 146; Goffe, *Protecting the Traditions cit.*, 597.

<sup>25</sup> WIPO IGC, *Preliminary Report cit.*

rights in sustaining those involved in cultural creativity». More specifically, it has been noticed, by protecting artistic, literary and musical expression, copyright<sup>26</sup> would protect also photographs and contemporary works inspired by traditional culture<sup>27</sup>. Further, through moral rights, it would provide protection against «the insulting use » which ‘degrades spirituality’<sup>28 29</sup>.

However, some specific aspects of ICH make difficult its inclusion in an IP framework. The main problems<sup>30</sup> highlighted by the scholars are connected to the individual nature<sup>31</sup> of IPRs, a feature that is difficult to accommodate with the commonly shared character of ICH<sup>32 33</sup>. This different notion of ownership and the grant of exclusive rights to the creator are circumstances that justify, in the IP system, the limited length of protection. However, this feature is considered as ‘wholly incompatible’<sup>34</sup> with the nature of Traditional Cultural Expressions (TCEs), whose main purpose is not a short-term economical one but, instead, consists in the perpetual transmission of ancestral traditions to future generations. In more general terms, as pointed out by Diarmuid O’ Giollain and J. Leach, what has to be considered is the impact that a similar privatisation<sup>35</sup> of culture would have on the nature of ICH, by breaking the chain of transmission and interrupting the ‘recreation process’ which constitutes its specific substance. Then, with respect to the specific attempt to protect TCEs under Copyright<sup>36</sup> Law<sup>37</sup>, this solution would present additional shortcomings. In particular, the need for fixation and the originality<sup>38</sup> criterion can be regarded as the principal obstacles of a similar solution.

Specifically, the originality criterion could bring to the paradoxical outcome that while protection would not be accorded to ‘original’ traditional expression<sup>39</sup> coming from the community, it would be granted, instead, to the works, which are based on the exploitation, sometimes unauthorised<sup>40</sup>, of this culture<sup>41</sup>. Indeed, according to multilateral treaties and emerging case law, the current copyright regime’s exclusive absorption of individuality is incompatible with the process of cultural production accepted in developing countries.

An example of this is taken from Tamil folk music, “Gaana”, a genre of music that was popularized

<sup>26</sup> This is supported by the amendment 1967 Stockholm Conference for Revision of Berne Convention in order to protect works of unknown authorship.

<sup>27</sup> B. Vézina, *WIPO Practical Workshop on Tces: Existing Protection, Gaps and Approaches to Fill the Gaps*, Geneva 2014, slide 11.

<sup>28</sup> WIPO (2015), 32.

<sup>29</sup> This view is reflected in the Draft TCE Instrument, Article 3 (a) (v).

<sup>30</sup> WIPO (2015), 20; Farah, Tremolada, *Conflict* cit., 147.

<sup>31</sup> As noticed by the European Commission, «copyright is based on the identification of the person originating the work, whereas folklore is distinguished by the anonymity of the originator of the tradition or by the fact that the tradition is the attribute of a community».

<sup>32</sup> Goffe, *Protecting the Traditions* cit., 598. Moreover, the difficulty in recognising a collective notion of ownership is exacerbated by the uncertainty on the determination of the entity, which would be allowed to manage it.

<sup>33</sup> One of the issues in this respect is to determine who should exercise these rights. See *Saramaka People v. Suriname*, 48-49.

<sup>34</sup> Goffe, *Protecting the Traditions* cit., 599.

<sup>35</sup> J. Leach, *Modes of Creativity and the Register of Ownership*, in R.A. Ghosh (cur.), *CODE: Collaborative Ownership and the Digital Economy*, Cambridge 2006, 29ss.

<sup>36</sup> CCD Preamble, n. 17.

<sup>37</sup> F. MacMillan, *Cultural diversity, copyright and international trade*, in V.A. Ginsburgh, D. Throsby (curr.), *Handbook of the Economics of Art and Culture*, New York 2014, 411ss.

<sup>38</sup> D. Zografos, *The legal protection of traditional cultural expressions: Is copyright the answer?*, in F. MacMillan (cur.), *New Directions in Copyright Law*, Cheltenham 2006, 181ss.

<sup>39</sup> «An expression of folklore is the result of an impersonal, continuous, slow process of creative activity, exercised in a community by consecutive imitation’ and thus it will probably lack of a ‘decisive mark of distinctive originality»: WIPO Model Provisions, 12.

<sup>40</sup> Farah, Tremolada, *Conflict* cit., 153.

<sup>41</sup> As a result, the only protection available under copyright would take place through the Article 2(a) of the WIPO Performances and Phonograms Treaty (WPPT), expressly protecting «actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform ... expressions of folklore».



by Tamil cinema. “Gaana” is the city folk music that comes straight from the soul of Chennai specifically from the hearts of the marginalized people, mostly slum dwellers or fishermen communities who sing about their daily lives and problems with up-beat and fast-paced beats. It is a genre of music that is so intertwined with the lives of the people. Music producers have sampled and borrowed this music style and have incorporated it into musical works that belong to a completely different genre. Therefore, the original art becomes diluted<sup>42</sup>.

#### **4.3.- The limits of IP-based solutions: “Canzone Napoletana” as a form of cultural appropriation.**

Not only the limits of adopting purely IP-based solutions when it comes to cultural creations are self-evident but, when it comes to the “Canzone Napoletana”, such limits have already been highlighted by many scholars. Indeed, “Canzone Napoletana” itself represents a peculiar case of appropriation, insofar as over the time its authors and publishers have been appropriating traditional Neapolitan music<sup>43</sup>. Yet, in this case, we assist to a very specific form of appropriation, which is not at the expense of non-western countries but rather takes place in western societies, at the expenses of the poorest classes.

Coming to the merits, “Canzone Napoletana” songs’ (texts or music) are in the public domain, as generally composed in the seventeenth century, and the phenomenon mainly embraces works which originally belonged to the folk music (i.e. with an anonymous author), but was then taken and slightly modified by other authors. Some themes of traditional folk music were incorporated into newer songs, then credited to specific authors, without paying any reference to the fact that they were works excerpted from the traditional repertoire. It is interesting that collectors and publishers of these songs reused certain aspects of traditional songs, purifying folkloric materials and making them attractive for an upper-class audience, both Neapolitan and international.

“*Michellemmà*” is an example of the misappropriation of the paternity of a work by other musicians. In fact, in the SIAE repertoires<sup>44</sup>, it is possible to find 22 works entitled “*Michelemmà*”<sup>45</sup>. Some of

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<sup>42</sup> One of the instances in South Africa is the modernization of traditional music, which highlights how current copyright laws may diminish the value of traditional culture. This lawsuit is a dispute between the estate of Solomon Linda, a Zulu songwriter, and Disney Enterprises, Inc. over the usage of a song (Disney). Linda died a well-known but underprivileged Zulu singer/songwriter and his family is still poor today. Linda’s estate claims copyright to the song ‘*The Lion Sleeps Tonight*’, which was featured in Disney’s 1994 film ‘*The Lion King*’. The allegation stems from Disney’s failure to recognize the purported copyright derived from Solomon Linda and his band, The Evening Birds’ 1939 recording of ‘*Mbube*’.

<sup>43</sup> It is uncertain whether the plagiarism of the works exclusively involved the lyrics or also the musical part of the compositions, considering that recordings of the original works are not available.

<sup>44</sup> According to the Italian law, the deposition of the work is not a prerequisite for granting the rights to the authors.

<sup>45</sup> The SIAE (“Società degli autori e degli editori”) is the oldest Italian copyright collecting society, founded in 1881. Article 180 of the Italian Copyright Law granted an exclusive right to the SIAE in the sense that the SIAE was the only entity entitled to collectively manage copyright. The Italian legislator amended Article 180 through Article 19 of the Decree-Law No 148/2017 (as amended by Law No 172 of 4 December 2017), which holds: ‘The intermediation activity – however implemented, be it any direct or indirect form of intervention, mediation, mandate, representation or even transfer for the exercise of the rights of representation, performance, acting, broadcasting (including satellite communication to the public) and mechanical and cinematic reproduction of protected works – is reserved exclusively to SIAE and to other collective management organisations referred to in Legislative Decree No. 35 of 15 March 2017.’ Furthermore, Article 19(3) of the Decree-Law No. 148/2017, amending Article 20(2) of the Decree No 35/2017, has removed the reference to CMOs established in other Member States: ‘The collection of rights revenue on the national territory by independent management entities established abroad is regulated by representation agreements, as referred to in this section’; therefore, the current wording of the provision explicitly provides that IMEs established in another Member State (but not CMOs, given that the specific reference has been removed) can collect rights in Italy exclusively through a representation agreement with an Italian CMO. Likewise, the wording of Article 42(2) of the Decree assumes the possibility for CMOs established in other Member States to directly intermediate in Italy solely in relation to the rights related to copyright.

these works are original, while others simply take up both the music and the text of Cottrau's version. The most famous examples are the versions from 'Osanna', a musical group of the 1970s, who published their version in 2015; Roberto Murolo, a legendary singer within Neapolitan music; and another singer, Fausto Cigliano. In all these cases, the authorship of both the music and the text were attributed to the registrant, without reference to the fact that it is a folk song in the public domain and without attributing the paternity to Cottrau.

This is not to say that there are not authors with great intellectual honesty, who have filed pieces with the Italian Copyright Office (SIAE) that were indeed original works. Artists like Gabriella Rinaldi, Massimo Carola and the band calle Osanna, belonging to the Neapolitan new wave scene of the 1980s, adapted traditional text and came up with their own musical compositions. All this is faithfully reflected in the SIAE repertoires, which show that the songs were registered, reporting the author of the upstream work as anonymous<sup>46</sup>.

Roberto De Simone is a fundamental figure in the evolution of Neapolitan music. He was a piano graduate, composer and former director of the San Carlo Theatre in Naples. De Simone, while respecting the tradition in his scholarly research, progressively elaborated it in his operas. It is interesting to note that the songs from the theatre play in the SIAE registers are all attributed to De Simone. Is this an appropriation of the work? Or does folklore constitute an important influence, a starting point to produce new creative work? In other words, is it possible to grant protection only to folk and tradition influence (as in the construction of the story, which, although modified, follows that of Basile), or should the dominant aspect be the content of composer's subsequent interventions? Regardless of whether these are cases of appropriation of traditional textual or musical works or of works in the public domain, registering them with the SIAE grants the registrants the copyright, in addition to neighbouring rights which are due to them as performers. The main issue is that the SIAE does not control the filed works beyond formal checks; consequently, royalties are granted to the registrants by the collecting society even though the works are in the public domain<sup>47</sup>.

A noteworthy copyright case is the song "*O Marinariello*" (literally, 'The Little Sailor'). The first version was entitled "*O mare 'e ba*"<sup>48</sup> and the text was authored by Diodato Del Gaizo. The song was published by the editor Bideri, who was accused of 'plagiarism' by Del Gaizo for modifying the words of the song. However, there are no official documents confirming any judicial proceeding. It is likely that the dispute was settled, considering Del Gaizo's low patrimonial capacity and the unfounded accusations made against the publisher, who had only replaced the original text with another text. Del Gaizo's story also highlights an interesting comparison. On the one hand, we have the advent of the publishing sector, where music loses its magical and ritual function and becomes commodified, especially for the upper classes. It becomes music for export that, despite the language barriers, can be appreciated even outside the Neapolitan area. On the other hand, copyright is presented as an instrument of the rich middleclass, creating proprietary barriers that oppose the transmission of knowledge. As a matter of fact, copyright overlaps anonymous works with those that are the result of collective creativity, which is typical of folk music. In this manner, those who want

<sup>46</sup> The registration is not reported with an ISWC (International Standard Musical Work Code) number in the SIAE's repertoire.

<sup>47</sup> Furthermore, since these are works that have fallen into the public domain, there are no heirs who can oppose the registration of the works. However, moral rights relating to the authorship of the works could be claimed by the heirs, even if there are no cases where the owners of the moral rights took legal actions in order to claim the authorship of the works of their ancestors.

<sup>48</sup> The title cannot be translated. Infact, "o mare" means the sea, while "e ba" is a phoneme used by the traditional folk music in order to keep the metrics of the lyrics.

to take possession of folk songs have a free pass, caging the music within proprietary schemes that grant rights only to some, to the exclusion of others<sup>49</sup>.

As a result, “Canzone Napoletana” represents an example of how the mechanics of appropriation of popular creativity by the dominant classes works to the detriment of the subordinate classes. Notably, the folkloric material is translated into musical styles, accessible to the middle class, that are deprived of the characters associated with ritual (it is not a coincidence that the diffusion of the refrain replaces a modal structure) and, in the legal field, the copyright works as a mechanism to deprive the people, the collective authors of the different and traditional versions of the songs, of the rights on their original creations.

## 5.- Conclusions.

The present paper, by looking at the “Canzone Napoletana” as a powerful tool for Italian immigrants in the US, aimed at assessing to what extent from a legal standpoint these compositions should be protected and, if so, which instruments are suitable for such purpose.

Indeed, as we have seen in the first part of the work, playing their own music made it possible for Italian immigrants to retain their own identity and, as a result, to earn the recognition and respect of other ethnic groups. In this sense, “Canzone Napoletana” assumed a democratic, transcendent role as it was able to put together people with a different background in their fight for a new life and recognition.

Yet, as highlighted in the second part of this work, the origins of the “Canzone Napoletana” are far from being democratic. This is because the “Canzone Napoletana” was built by the middleclass as a new genre, through the appropriation of traditional, folk music. It follows that the origin itself of *Canzone Napoletana* and its close link with the tradition makes it difficult to protect it by using the typical structure of IP laws.

Moving from this premise, in the third part of this paper we have been analysing the phenomenon of the “Canzone Napoletana” from a legal standpoint, in order to understand which legal instruments are more adequate to protect this specific form of creation. In this context, it has been noted that a copyright-centric structure, affording legal protection to the first person registering the work with the Italian Copyright Office risks to inevitably betray the contributions of the community, for the benefit of the middle class. Yet, on the other hand, copyright laws may indeed play a role insofar as while the “Canzone Napoletana” borrows from the tradition, it also claims to be a new, different genre.

Against this background, in the Authors’ view a specific, two folded protection should be afforded to the “Canzone Napoletana”, which is able to combine both the typical proprietary inputs of intellectual property law and a cultural rights approach. Yet, this is a difficult solution to implement taking into account that while copyright law is recognised under national and international laws, as things now stand, no legal protection is afforded to indigenous communities’ rights on their TCEs. In this context, a real shifting for the benefit of indigenous stakeholders was represented by the adoption of the UN Declaration, which has been regarded as the ‘culmination of a process where indigenous have turned from victims to actors’<sup>50</sup>. In particular, according to its Article 31, indigenous people have «the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional

<sup>49</sup> D. Carpitella, *Folklore e diritto d'autore*, in *EM. Rivista degli Archivi di Etnomusicologia dell'Accademia Nazionale di Santa Cecilia. Nuova Serie* 1 (2003) 89ss. (the original article was published in 1978) pointed out (p. 92) that copyright law regulations are based on the logic of profit resulting from an individualistic aesthetic, which is the opposite of popular artistic creativity.

<sup>50</sup> M. Barelli, *The Role of Soft Law in The International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples*, in *International and Comparative Law Quarterly* 58 (2009) 957ss.: the declaration «is the only instrument based on the recognition of collective rights».

cultural expressions»<sup>51</sup>. Further, «they also have the right to (...) their intellectual property»<sup>52</sup> over such a heritage<sup>53</sup>. Thus, *de iure condendo*, to extend protection to TCEs and folklore they should be first identified. Similar to the ‘Traditional Knowledge Digital Library’, which is a digitalized library containing around 3,30,044 traditional medicinal formulations, the TCEs and folk music should be registered in an online library and classified with the community or communities that practice and safeguard it. This requires extensive study about the TCEs and their communities. Such a registry will act as a sort of defensive protection by way of acknowledging the TCE and its users. Likewise, and in addition to this, an international instrument should be adopted, able to recognise the key role played by the Customary Law, in shaping the protection according to the community views contributing to the actual enforcement of the guarantee represented by Article 31 of the UNDRIP.

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<sup>51</sup> Article 31 of the UNDRIP.

<sup>52</sup> *Ibid.*

<sup>53</sup> See also Articles 11.1, 12.1 and 13.1 of the UNDRIP.