The conversation took place in April 2019 at the sidelines of the festival "Find the File" in April 2019 at the House of World Cultures in Berlin, where both participated in a panel discussion about accessibility and reuse of archival material. Legal expert Ouma and artist researcher Sollfrank discuss different concepts and traditions of a collaborative responsibility for intangible cultural heritage. The conversation was initiated and moderated by by Lina Brion. A German translation was published in: 100 Years of Copyright, Detlef Diederichsen and Lina Brion (eds.), Matthes & Seitz, Berlin.

Caring Instead of Owning: About Intangible Commons

Marisella Ouma in conversation with Cornelia Sollfrank

Berlin / April 2019

Lina Brion: You are both working with the concept of the commons in relation to intellectual property, but within rather different frameworks. Cornelia, you are an artist and scholar working in a research project at the Zürcher Hochschule der Künste that looks at different artistic practices of creating commons. Marisella, you are an intellectual property consultant and have contributed to several policies in Kenya, such as a new commons-based Act passed in 2016 for the "Protection of Traditional Knowledge and Cultural Expressions". Why is this concept of the commons interesting for you and where does it come into play in your work?

Marisella Ouma: There is a revival in the use of traditional music to create new copyrighted works. Looking for unique sounds, many musicians today go back to what we call the Traditional Knowledge (TK) or the Traditional Cultural Expressions (TCE) of indigenous communities in order to create contemporary music. When I worked in the Kenya Copyright Board, we often experienced that artists would come seeking permission to use a particular work and that it was very difficult to assert first and foremost identification of what this particular work is and then who actually owns it. So it was necessary to have a very specific framework to guide the current artists to be able to access this particular work. In the recent time now I've been working in the policy space to ensure a legal framework for communities in Kenya to protect and to share their traditional knowledge and cultural expressions. We have to understand this as part of an oral tradition. But today, when somebody, who is the custodian of the knowledge of a certain community, dies, the knowledge disappears with him or her. So, to ensure that this knowledge is not lost but still accessible, the Traditional Knowledge policy encompasses the principle of a commons. With it you are able to create a repository of works, but within specific guidelines in terms of regulating and facilitating the access and utilisation of the works specified by the communities.

Take for instance the Maasai culture in Kenya. By now most of their cultural expressions are recorded, put in a digitized repository and can be accessed by third parties such as contemporary musicians for commercial purposes. One of the different protection mechanisms under the TK law is to provide for a database. At the county level, there are people who bring in the information and

have it recorded and somebody who takes care of the repository. At the national level, you have the Kenya copyright board which collects all this information, stores it and provides the necessary levels of accessibility. I worked with the policy framework, to see how this procedure can actually be implemented, because prior to that it was very haphazard. Either the community would have to engage with an NGO or just private people who made the collections but then it wouldn't have been a commons, because they would hold it as their own property.

Brion: What are the defining parameters for what you call traditional knowledge, traditional cultural expressions?

Ouma: It's basically something that has been handed over from generation to generation. Most times it's identified as coming from the community as opposed to an individual. But especially with regard to music, you'd still be able to identify a composer within a particular community, because there are very specific people who'd compose the music. But the work was created very many years ago. Owing to the oral nature of handing down the information from generation to generation, the music would still be identified as coming from and being owned by that particular community. So, we wouldn't say the author of some work is unknown but still that it is communally supported. Another very important characteristic is that it forms part and parcel of the cultural identity of that particular community. You might find something that is a very peculiar common thread amongst a particular group of people; it's part and parcel of their cultural heritage.

Cornelia Sollfrank: You mentioned the rules that are made by the community. Usually, those are informal but I think it's always very important to formalise those rules and that's where the legal framework comes in. How do you solve this problem of formalisation if there is no individual author identifiable but it's rather a community who takes the ownership? I can imagine that even the given work itself is not like a typical copyrighted work, but more complex. How do you align these factors with the rules of copyright or intellectual property in general?

Ouma: In the current legal system we don't put it under copyright. We came up with a completely different regime to manage it. In the previous legal regime, the older copyright law defined what traditional knowledge and cultural expression means, it provided everything from art works to folk music to poetry, etc., and then it basically just said that anyone who wants to use that particular work would have to get authority from the office of the attorney general. But it didn't give any specific protection. Because the protection granted in the copyright law would not extend to the traditional cultural expressions for the simple reason that they wouldn't qualify for it. So, we went through the whole procedure of having a sui generis system and came up with the traditional knowledge act that specifically deals with issues of traditional cultural expressions, it's completely different.

Sollfrank: What are the parameters that need to be specified to protect something?

Ouma: The act doesn't grant protection it recognises what ought to be protected. The work is defined by the community where it has been passed on from generation to generation. When you identify that it belongs to a certain community, this community defines whether you need to get their permission or whether you have to use it within specific parameters. So as opposed to other IP

rights that are granting rights, this law just recognises what ought to be protected and who the beneficiaries of the protection would be.

Sollfrank: That's interesting, usually in order to be protected it needs to be something original and new. Here, it's exactly the opposite. How is the punishment regulated if you don't follow these rules? If I take a traditional cultural expression and turn it into a pop song, who is going to sue me then?

Ouma: The community will sue you. But it has more to do with compensation for use instead of punishment for infringement, because the protection is against misappropriation, misuse of that particular work. So, if someone misappropriates it or misuses it, then they ought to compensate the owner.

Brion: Do I still have to consider this as a kind of private property but owned by a community?

Ouma: Yes. The proprietary concept still does exist. The closest analogy would probably be a corporate entity.

Sollfrank: Or it could be collective ownership like in a cooperative, maybe that's closer. We know this form a lot in housing, when people buy a property together which they then own as a cooperative, and usually it's not possible that one part just sells its share. But we don't really know it in relation to cultural goods.

Ouma: But the interesting thing is that it's not even an issue of ownership. It's about custodianship, the community being the custodian of this particular work, because they're holding it for the next generation.

Sollfrank: So, it's a responsibility more than a right.

Ouma: I guess that's one of the things that make it very difficult. Initially it was about trying to fit it into the existing IP system, but this doesn't work. For instance, if you just take the concepts of originality and authorship, which are important for copyright protection: where does one start with regard to traditional cultural expressions? Yes, it is an expression of an idea. But it's something that has been there for generations, so if it had been copyright protected, that would have expired. It would fall within the context of public domain.

Brion: Hasn't this been the case with folklore, which had been declared as part of the public domain throughout the history of copyright?

Ouma: Folklore could be publicly available, but that does not necessarily mean that there's nobody who has custody over it.

Sollfrank: Public domain is a legal concept that stands for the pool of cultural goods whose copyright has expired, orphaned works, or works that have been released by their authors into this field. Commons, on the other hand, is a cultural concept; it emphasises the value of commonly managed goods – be they material or immaterial. The commons is not legally codified but rather

refers to different customs in the different cultural environments it exists. While copyright and IP laws are all about ownership and derived rights, one could say that the commons concept is more about responsibility and care.

Ouma: That's why the discussion now advances more toward the tiered approach: There is the publicly available, for instance a folk song which is played and known by everybody, but it is still identified with the particular community. It's publicly available but anybody else who wants to use it has to compensate the community. Then there is that which is secret. This means there are only very specific people who know about it within the community. So, they'll only hand it over from one generation to the other in one family, and the rest of the community doesn't know. And then there is the sacred. If it's sacred and secret, we are not going to bother with it because it's for religious purposes, you can't commercially use it. But then there is the sacred which is publicly available, everybody within the community knows about it. So, if you are to give protection first you have to know if it's publicly available. Then chances are that the community has no concerns about commercialisation. But what they are seeking to stop is misappropriation. When I come and pick something from some community, create something out of it, do a sound recording and create an IP over it, make lots of money with it without crediting the community from where it came from, without acknowledging them.

Sollfrank: Do you know of other countries who have adopted a similar legal concept?

Ouma: Yes, Peru was one of the first countries to do that. Zambia also passed a Traditional Knowledge bill. South Africa has the Indigenous Knowledge systems. And at the regional level we have ARIPO (The African Regional Intellectual Property Organisation) and its protocol on traditional knowledge and traditional cultural expressions. It covers about 19 countries. But for most of them the whole commons-concept is pretty new. The ARIPO legislation mainly follows very closely to what you'd have under copyright, they define the rights which are granted to the custodian, the beneficiaries, the administrative measures. But they're also embracing the whole idea of the commons because they recently carried out a feasibility study of having a Traditional Knowledge database where people can actually access the work. The biggest problem that we've had over the years is lack of documentation. But once you have a documentation system which allows people to access this particular knowledge, they can use it, they can modify it; it keeps that knowledge alive.

Sollfrank: Do you use the term commons in the legal act itself?

Ouma: No, we don't use it. But the database itself is seen as something close to the commons. It's a space created in order to put the community's knowledge in a repository, accessible for third parties, but within specific rules and guidelines. For instance, if it's something that is sacred and secret, it's just for you to know that it exists. But if it's publicly available, then it's been documented and if you want to use it, you'd find out which community you'd have to interact with, either to get further information or to get permissions for you to use that work and to come up with a system of remuneration.

Sollfrank: I am asking because in the context where I'm working the term commons is getting more and more popular but everyone uses it in a different way and often for a different purpose. There are urban commons, people talk about commons in housing projects… And there is of course the

big domain of digital commons, that's what we are working on in our research project Creating Commons.[1] We were thinking a lot about how we apply the term commons and were looking for a definition, which is not ideologically overloaded. The political scientist Massimo de Angelis developed a structural definition based on three components: First, the resource it relates to, which can be anything, tangible, non-tangible, material, immaterial. Second, it needs a community of people who take care of it, who are custodians for this resource, and as third element, he suggests the practice of commoning. Commoning is the process of negotiating within the community the terms of use and the rules. So, it's not an exterior institution like the state or the law who says these are the rules that apply, but the specificity of the commons is that the community who is responsible for the resource decides how the resource should be used and decides upon the respective rules. We found this a very useful definition; it leaves a lot of space and can be applied in many different circumstances. We use it as an analytical framework for the projects we are working on. In an actual sense, those projects should rather be called speculative commons. The communities never really own the resources, in many cases their projects are based on an appropriation. The community who runs the project and takes care of the resources consists of people that feel a responsibility to make knowledge available – it's a custodianship more than actual ownership, which shows a strong relation to what you were explaining earlier regarding the responsibility for cultural heritage.

Ouma: The three predicaments that you mentioned is a thread that runs through all the commons concepts, including the Traditional Knowledge commons: having the resource, the community, the practice of negotiation. And I agree, there's also a parallel in terms of custodianship as opposed to authorship. But I was just wondering, when you have the Creative Commons…

Sollfrank: This is no commons.

Ouma: Yes, basically the Creative Commons are not an alternative but based on copyright, to allow people to freely access the creative works, but within specific licences. But the Commons that you're looking at seems to be something completely different. Just to have that very clear distinction between the concept of commons within your project and commons as it's understood within copyright.

Sollfrank: We actually called our project Creating Commons to generate some "creative" misunderstanding. In my opinion, the problem with Creative Commons is that it has the term commons in its name. It's really misleading, and we are actually critical of that, because it is completely based on the individual author's copyright. Every author automatically has copyright protection and with Creative Commons you have the option to choose a licence which provides different degrees of openness. But this is based on individual authorship and a conventional understanding of the work. It's your property and you decide to share it, but it's not held by a collective and the process of commoning is missing.

Brion: In what way do the projects that you are working on in your research project create commons?

---

[1] See http://creatingcommons.zhdk.ch/

Sollfrank: The ones that are most obviously related to the topic of intellectual property are the artistic shadow libraries. You probably know the big digital shadow library sci-hub, that has millions of scientific articles and books. There has been the "Radical Open Access Manifesto" by Aaron Swartz. He addressed people in privileged situations like scholars who work at universities or are in a context where they can access information freely, and asked them to use their privilege to download the information and create resources for other people who don't have the privilege. That's exactly what these artistic shadow libraries do, too. Aaaaarg, for example, is a project that is run by the artist Sean Dockray. They're specialised on academic texts and books, e.g., in the area of art, architecture, philosophy, or media theory. Most of the texts in this library are copyright protected, but the value of the project is exactly this unrestricted provision of access to knowledge. When I started to use Aaaaarg, it was a nice thing to have, but it was not so essential for me, because I also have other means of access to information. But for example, when I travelled in Asia, I was really touched how many people that I met told me they could not have done their studies or their artworks without Aaaaarg. Not all university libraries in the world can afford to have all these books. Aaaaarg was the platform that provided all the contemporary theory they needed and that was the link which connected these people and their work to academic life. That's why for them it was an essential infrastructure which was basically provided by a small and illegal art project.

Ouma: Are they "pirate libraries" so to speak?

Sollfrank: Yes. Well, these artist's libraries are smaller and if rights-holders say, I don't want my book in this context, then they take it down and the problem is solved. They try to be cooperative when people want take-downs but that doesn't mean they are safe; it's totally precarious. The archive can really go away any minute – if any publisher with a lot of power comes, he can destroy them easily. This is also why we do this research project, it's to build a context around these archives and libraries and to make them known not only for their function of providing access but for their discursive value as well, which for us is almost the more important issue. These projects ask all the important questions regarding access, not theoretically but by doing something that needs to be done–which happens to be illegal. It's not a theory, but a practice: the statement is the practice itself.

Brion: So, it's a community-based organisation, though one that doesn't own what it has and provides access to.

Sollfrank: Like all libraries it has two components. One is the infrastructure, in the case of the shadow libraries, it's usually a server and a software that organises the information, and these components are owned by the small communities that take care of them. And the other component is the actual items that are in the database. These are provided and uploaded by the community.

Ouma: So, it's the third party-users who form the community. But do you have any artists that belong to that community, or is it just exclusive for users?

Sollfrank: It's the people who run the infrastructure, who initiated the projects, that we call artists in this context. They consider it to be an aesthetic practice to build an infrastructure in which this resource can be made available. Another artistic pirate library is UbuWeb. This is a different story,

because it's mainly one artist who started an online collection of things that he personally liked and wanted to assemble in one resource. Kenneth Goldsmith started the project in 1997 and says he adds a little bit every day. The infrastructure that is run by him is very basic, it's just html, very low maintenance. He puts things in the archive that he calls avant-garde, things that are out of print or hard to access. The project accumulated to a really massive archive and source for all people who do research in the field of 20thcentury avant-garde. No museum in the world can have a similar collection, simply because of copyright restrictions. UbuWeb, therefore, has a different function. It's not only about providing access, but also about preserving things, because it digitises objects and preserves them and makes them accessible in a way not even Museums can. It's a different purpose and justification.

Ouma: You can draw a parallel here to the case of Traditional Knowledge, in terms of preservation and the fear of it all disappearing. When you have the commons set up, at least the knowledge is preserved. And it creates the space whereby that information can be accessed. So, there's a bit of a parallel here again because the information has been held for quite a while somewhere else, but it can actually be put out there for other people to be used. But a huge difference is that UbuWeb is user-orientated, while the Traditional Knowledge commons' focus is on the custodians. They're the ones who hold the resource, they're the ones who will approve putting the work up on a digital platform, who put it out there, who decide what rules will govern the use of that particular work. Regarding the commons you are talking about, I'm not too sure about the rules and the guidelines, but the works are just put out there by the users for other people to be able to access the work.

Sollfrank: Especially in the case of Aaaaarg, there is a strong community. It grew from a small group of people and started as their virtual bookshelf but continued to grow through word-of-mouth recommendation. There are also discursive formats on the website, online reading groups and so on. People really talk about the things that are on there, it's not just like a peer-to-peer download website, where anyone can add or take anything. It's not a service; it's not just pure consumption. It's really a culture around reading. But still it is in tension with copyright.

Brion: As an artist you ran into copyright problems yourself in the past

Sollfrank: Yes, in my artistic work I build on already existing material. I experienced extreme constraints to my practice; an exhibition that I had planned was cancelled because of legal reasons. That was my first contact with copyright, and it made me wonder how it is generally related to artistic practice. Usually copyright is justified as enabling creation and being an incentive for new works. In my case it was the opposite. After a few years of exploring the mutual relationship between copyright and aesthetic theory and the relationship between my own practice and the larger systems it collides with, I started to feel very uncomfortable. The discourse was centred around the notion of artistic freedom and the question what material an author or artist could use... At one point, it occurred to me that this is not the core problem. Maybe in the 1980s it was conceptually interesting, when Appropriation Art appeared within the context of post-modern theory. It was an interesting intellectual and aesthetical problem, but very self-referential and had hardly any relevance for society at large. And it was also a trap, because this discourse still presupposed the individual author and their rights. In fact, I believe we need to open up aesthetic theory to concepts of collaboration, of re-working, and most importantly, to sharing knowledge in a very different way as we have learned to. We are in the digital age now, and we are facing

enclosures of knowledge which affect a whole population, everyone, not just artists. So, I turned around my question from "what can artists take" to the question of "what can artists give" and contribute to "free" culture or however you want to call it. In our research, we were looking for projects and practices that were inspiring in this respect. We look at aesthetic practices that create commons, while, at the same time, being aware of all the problems, complexities and contradictions that come with the practices and with naming them "commons." It serves as a conceptual framework. In reality, the potential of these projects to create real commons is limited, but it is exactly these limitations that are of interest, because they point to the larger problem of enclosures of knowledge in our society. It's more their discursive value which brings in the notion of the commons in relation to knowledge and how knowledge is treated in copyright regimes. That's really the crucial point of the research project.

Brion: Would you say that commons-based concepts should replace copyright systems?

Sollfrank: I'm a pragmatist. I'm not so much interested in making bold claims, but really in asking what is the actual problem, and what could work in practice? A lot of the legal scholars who work in this field with commons and open source, free software licences, and things like that, say intellectual property is a necessary evil. We cannot do without it, but we should try to contain it. So that it's not always extending, expanding, entering and regulating more and more areas – but rather keep it really basic. I do support these shadow library projects which are obviously in a problematic situation. But I find it ridiculous to say we need to abolish copyright. That's too easy. The real challenge lies in making something work that fits the need of society at large and not just some corporate interests. Also, as an artist I really don't like the idea that I have to turn my work into a piece of property that I have to sell as the only way of creating an income. I would prefer to have a parallel system in which I can decide whether I want to work for profit or for the common good in another form of exchange. There should be other mechanisms of renumeration in place than the market.

Ouma: To play the devils' advocate: One of the things you can do as an artist is to renounce your copyright. Basically, do your work and then you tell people it's up there, you can do whatever it is that you want to do with it. It does exist in the copyright system.

Sollfrank: What I give away is only half of the story. The other half is where I get from what I need. Of course, you can give away everything if you are in a position that allows you to do it; you can work for free like all these artists who work on these projects I mentioned. No one gets any funding for any of this work, which means they are in a way in a privileged position, because they can afford to work for free, for the common good. At the moment, they very often work in universities, they do research; so, they have other sources of income. But this is not a sustainable model for a society.

Ouma: Maybe with fine art it's a little different, but if you take music and film, those are most times outright commercial undertakings. They're basically relying on the proprietary right to make money out of it. How do you speak to this particular group of people who have created works with the hope that they'll get remunerated? How do you get the creatives to buy into that kind of commons?

Sollfrank: Of course, I'm totally for artists making money with their work, but I think it's a lie to say we need stricter copyright laws so that the artists can make more money. Because stricter laws are made for the industry and not for the artists. Any artist who allows to be made into a leading figure for a pro-copyright campaign doesn't understand that dynamics. He or she is totally abused by this industry. And that's only the classical content industry, the music and the film business. We have the platform industry on the other hand, which has totally different interests. They want free licences; they want endless free content… I think that Creative Commons licences are a nice gesture of saying, okay, if you're non-commercial you can use it. But it doesn't answer the question of how artists can make a living. This question is implied in the commons-discourse, too. That it is not just about giving away but also about the people who do the care-work for preserving and making accessible, because that is what these shadow libraries also do. Care work, custodianship – it's not productive work, it's reproductive work. That has always been the realm of economy that has been overlooked, even by Karl Marx, as the feminist economists have pointed out. With the shadow libraries I draw a parallel to that.

Ouma: If you're looking at the Traditional Knowledge commons, one of the objectives is basically to get income out of it. It's not really creating a proprietary right, but a system whereby the community controls the use of the works and actually has a commercial benefit out of it. The main purpose of having the Traditional Knowledge Act was for preservation. But a number of countries now are looking at Traditional Knowledge in terms of a resource, a huge resource for the creative industry. You have to consider that this is born out of the capitalistic tendencies. Prior to capitalism, there was no need for terms like Traditional Knowledge or Traditional Cultural Expressions. Because there was no problem, there were already systems in place that worked very well. The communities had their customs and taboos that helped to deal with it, there were no issues with appropriation. It was very rare for a third party to come and take the knowledge or cultural expression from a particular community to go and use it somewhere else. But people are now moving towards the traditional knowledge and using it outside the traditional context. Many creatives have started looking for sounds in the digital libraries where the traditional cultural expressions have been recorded and stored, in order to create new and unique works. So, the question is how you regulate that use and how you protect Traditional Knowledge from misappropriation and misuse. The commons-based approach allows for accessibility, but at the same time you still have control of how the community's works are used.

Sollfrank: It's interesting. We are in very different positions but we are still operating with the same terms. For me, the central political question is, whether human beings within a social structure are competitive individuals or cooperative, and if markets and property dynamics are the only possibility to organise life, or if there is anything else. As people realise more and more that our capitalist system is becoming so crazy at the moment, people are looking for alternatives and I think commons is a way to learn to live in a different way. If everything crashes tomorrow there would be total anarchy, because we don't know how to organise ourselves. I think, with commons you have a different perspective; it is also a way of learning, a learning project of deep democracy.

Marisella Ouma is one of the leading experts in Intellectual Property in Kenya and Africa. She has contributed to the development of various Intellectual Property Policies and laws in Kenya as well as on an international level, and has actively participated in different committees of the World Intellectual Property Organization (WIPO) for over 20 years. She was the Deputy Solicitor General in the Office of the Attorney General and Department of Justice in Kenya until

November 2018 when she joined the Central Bank of Kenya as the Head of Legal. Up until 2015 Ouma was the Executive Director of the Kenya Copyright Board which she helped establish. She has worked with various artists on matters of copyright and related rights and traditional knowledge. She has taught at the University of Nairobi, the Africa University in Mutare in Zimbabwe and the Strathmore University in Nairobi.

Cornelia Sollfrank is an artist, researcher and teacher living in Berlin. Recurring themes in her work with and about digital media and net cultures are artistic infrastructures, new forms of (political) organization, authorship and intellectual property, gender theory and practice, and technofeminism. Her book The Beautiful Warriors. Technofeminist Praxis in the Twenty-First Century was published in English in 2019.