

Legal issues regarding tradition archives: the Latvian case study

Līga Ābele, Anita Vaivade

Latvian Academy of Culture

A legally uncharted and potentially challenging territory is reached when the tradition archives, while implementing their digitation projects and because of the more and more varied nature of the collection items (text, audio, video, images, games, maps), find themselves at the crossroads between the computing and the cultural heritage, where the digital humanities are situated, i.e. by creating digital data bases of their collections and putting them on the Internet. It also happens when a tradition archive reaches out to the public to incite digital cooperation in encountering, transmitting and interpreting the collections. Because of the trans-border nature of the Internet, national and international legal framework can influence digitisation projects of the tradition archives and their possible interconnection.

Due to abundance and variety of materials, lack of sufficient resources to deal with these materials, possibilities provided by the Internet environment, as well as the general aim to involve more and more the public into its cultural heritage safeguarding, non-commercial crowdsourcing is increasingly present in the work of tradition archives and other cultural institutions, both in dealing with the existing data and making them accessible, as well as in encountering new testimonies and broadening the collections. Every time a social relationship is formed in a social environment, it can have a legal nature attached to it. It means, there is a possibility to qualify legally this relationship, in terms of its nature (its subject matter, mutual relationship between the parties and with the third persons as well as consequences). In crowdsourcing projects of tradition archives, the forming relationship could be devised in the following manner. The subjects (parties) of the relationship are archive institution and the members of the public. The subject matter of the relationship (a set of duties and obligations of the parties) may consist of entrusting of specific tasks to participants, such as transforming the content, describing the objects, synthesizing the knowledge and skills.

In order to achieve more clarity and overview of the crowdsourcing process, one of the ways to structure the legal statuses and relationships forming within the process, would be by vectors of the data streams (encountering/gathering/processing of data and its further transferring): roles of the parties – rights, obligations, mutual responsibility and responsibility towards third persons;

legal nature of the relationship. It would not only be interesting to take a closer look at the set of legal relationship forming within the process, if any, but also useful, for the project management to foresee the possible legal amplifications. It would be important to apprehend the legal nature of relationship between the organiser of the project and the participant, in order to understand legitimate mutual expectations and consequences, including in case of malfeasance. This regards the quality required for the result of the task, confidentiality, intellectual property issues etc. It may also regard consequences in relation to the third parties. It is useful to apprehend the legal environment also for the sake of knowledge about the default regulatory framework, any given project would fall within, in case no action is taken by the project management.

Crowdsourcing is not regulated as such in the Latvian law. However, there are several types of contractual relationship that involve one party entrusting other one with a specific task that *prima facie* might possess certain similarities with the relationships forming within a crowdsourcing project in the sphere of private law: *employment, voluntary work, assignment*. Taking a closer look at these contractual relationship permits to leave out at once the employment contract and the assignment contract for the following reasons. The very definition of the work involves the remuneration clause as a mandatory requirement for a relationship to be qualified as an employment contract (Latvian Labour Law, article 3 and 28, paragraph 1), as for the non-commercial crowdsourcing activities the voluntary participation is the key. The very reason the employment contract is mentioned here relates to its possibly beneficial aspect regarding the copyrights and long-term crowdsourcing projects. According to the Article 12, paragraph 1, of the Latvian Copyright Law “*if an author has created a work performing his or her duties in an employment relationship, [...] the economic rights of the author may be transferred, in accordance with a contract, to the employer.*” In contrast, outside the employment relationship there is a possibility to revoke these rights. In order to obtain the right to use a work, it is necessary for the user of the work to receive the permission of the right holder, issued both as a licensing agreement and as a licence. If a licensing agreement or a licence is not restricted as to time, the author or other right holder may terminate the licensing agreement or revoke the licence, giving a notice six months in advance. (Article 40, paragraph 1 and 2 and Article 44, paragraph 2 of the Latvian Copyright Law). Not considering this copyright aspect, taking into account the nature of a particular project or of data encountering, could prove to be a problematic aspect in future given the general long-term aim of the cultural heritage safeguarding which is to transfer the cultural heritage values to the future generations.

Because of its voluntary nature the contractual relationship formed between the organiser and the participant would also lack a basic element required in order for it to be qualified as the assignment contract (contract of work-performance) as stated in Article 2212 of the Civil Code of Latvia (one party undertakes, using its tools and equipment and *for a certain remuneration*, to perform for another party an order, the production of some product or the conducting to its completion of some activity.) Neither is the Civil Law helpful with its regulations of a gifting (donating), as according to its regulations a gift is a legal transaction whereby one person grants *valuable property* to another through generosity and without remuneration (Article 1912).

The closest legal description of a relationship forming in a crowdsourcing project of a tradition archive could be found in the Law on Voluntary Work applicable in Latvia since January 1st, 2016. According to its Article 2 the voluntary work is described as organised and voluntary physical or intellectual work performed in good will by a person without remuneration for the grater good of society without aim of gaining profit (unofficial translation). There are restrictions in its Article 3 on who can be the organisers: the NGO's, state and municipal institutions, political parties. According to this restriction the Latvian Archives of Folklore could not qualify for the status of organiser. There are also several restrictive aspects that need to be considered. Firstly, the voluntary work cannot replace work of an employee. Second, for a person between age 13 – 16 to legally participate in a project, there must be a written permission from this person's legal guardians. The law does not require a written agreement (with specific exceptions), the institution officially charged with implementing the law provides model agreement forms for short-term and long-term tasks.

Even though currently this law contains the closest legal definition to describe the relationship formed by the crowdsourcing activities between the organisers and participants, however in its text it does not consider and even contradicts specificity of the digital crowdsourcing projects, which would render problematic of not impossible its direct application. The obligations this law sets for organisers, including requirements on working environment safety etc. are not consistent with the very nature of the digital crowdsourcing. However, this law could be interesting for the tradition archive crowdsourcing projects to be used as a sort of a roadmap for framing the relationship between organisers and participants, as it provides formulations as to the beginning and end of a legal relationship, rights and obligations of the parties, including obligation to inform, confidentiality and quality requirements etc. It could be used in the agreement forms to be accepted before the person can register as participant to a crowdsourcing project.

It can be concluded that within current legal framework, there is no apparent legal instrument in Latvia to be applied directly (without interpreting) to the factual relationship arising between organiser and participant in a crowdsourcing project of tradition archives. Which means that specific care should be accorded by the project organisers from one hand – not to overcomplicate its implementations, on the other hand – to ensure that the basic aspects of the cooperation are established, notified and agreed. In case of tradition archives these framework provisions should also tackle two of the most important issues governed by the specific laws – copyright and data protection, as the activities of the parties are susceptible to fall within the scope of these regulations.

One of the main concerns while digitising the existing collections of tradition archives is the compliance of these databases with the regulatory framework of data protection. In case of Archives of Latvian Folklore, its institutional status is neither that of an archive, a museum or a library. Thus, there would be no specific public law provisions directly applicable to its activities in the field of personal data protection regulations reserved for these institutions. For instance article 12 of the Law on Archives titled “Accessibility and Use of Archival Records” is stated that a person has the right to request and obtain the information regarding other person's data subject, if *a written permit* has been received from that persons, as well as in cases specified by the Law. Also access is restricted for records containing sensitive personal data or other information on the private life of a person, if the use of personal data or information contained therein can significantly touch the private life of a person.

The Archive of Latvian Folklore is obliged to follow the general regulations of data protection. At the European Union level this field has undergone a legislative reform, hence starting May 25, 2018 a new General Data Protection Regulation will come into force (Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC). As it is stated in Article 4 of the regulation, personal data means any information relating to an identified or identifiable natural person (data subject) and an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. In turn “processing” means any

operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

The terms of personal data protection a role of data holder is taken by the institution of tradition archives, and participants are users. Moreover, the very crowdsourcing project may fall within the scope of the Data protection regulations, in terms of the rights of its participants (i.e. right to erasure “right to be forgotten” according to Article 17 of the Regulation). Attention should be given to situations when natural person becomes identifiable while processing a specific item of a collection (for example, while transcribing etc.). Another case is when the content of a collection is co-created by the participant and the personal data of another natural persona might be processed without consent. Also specific rules apply through transmitting the databases to free access on the internet (for instance – how the participant is to insure that no data protection or copyright law is infringed in a material, submitted for collection). In this case – the participants should be very clearly notified about their obligations and possible consequences of breach, because the lack of accountability is identified as one of the major risks in crowdsourcing project.

The copyright law is the second issue arising from the factual relationship. In case of crowdsourcing projects of tradition archives, there are two main scenarios that could realise involving the copyright issues. In one case the item of the collection is object of copyright law, in another – work of the participant is object of copyright law. In creating the databases of tradition archives the organisers should take into account that especially in co-creative projects the work submitted by participants would most likely fall within the scope) of the protected works under copyright law (article 4 of the Copyright Law of the Republic of Latvia). The database itself would be considered as derived work and would be protected as such. In digitising data bases and transmitting them to public access, for the sake of continuity of collections the organisers should consider that among inalienable moral right of author there are right to the revocation of a work, that can be issued at any given time. There is specific (*sui generis*) regime in the law of protection of databases that regard the creation of databases of tradition archives, determining the rights of database developers and users. Also, the regulation of orphan works might be specifically interesting in case of tradition archive databases.

Use of a work of an author without the consent of the author and without remuneration is permitted among others in cases of a work is used for educational and research purposes and for the needs of libraries, archives and museums (Article 19). It is worth noting that only such works that have been published in Latvia and are not available commercially are permitted to be reproduced in a digital format, unless an agreement with the author determines otherwise. (Article 23, paragraph 1). To obtain the right to use a work, it is necessary to receive permission of the right holder in form of licensing agreement or a licence. The law determines requirements for the term, territorial scope and form of those agreements and licences. In case of crowdsourcing a thought should be given to the use of the Creative Commons copyright licenses that is a standardized tool to grant copyright permissions to a person's creative work with the emphasis of non-commercial use.

Even though discussion of the legal aspects of the crowdsourcing projects launched by the tradition archives still might seem to be too much of a theoretical kind of exercise, starting to apprehend the potential legal consequences just might support more confident managing of the future crowdsourcing projects in cultural heritage, i.e. tradition archives.