

UNESCO/WIPO/FOLK/ASIA/4
Original : English
New Delhi, February 2, 1983

REGIONAL COMMITTEE OF EXPERTS
ON MEANS OF IMPLEMENTATION IN ASIA OF MODEL PROVISIONS
ON INTELLECTUAL PROPERTY ASPECTS OF PROTECTION OF
EXPRESSIONS OF FOLKLORE

New Delhi, January 31 to February 2, 1983

DRAFT REPORT
prepared by the Secretariat

I. Introduction

1. In pursuance of resolution 5/01 adopted by the General Conference of Unesco at its twenty first session (Belgrade, September-October 1980) and the decisions taken by the Governing Bodies of WIPO at their November 1981 sessions, the Directors General of UNESCO and WIPO convened a Regional Committee of Experts on Means of Implementation in Asia of Model Provisions on Intellectual Property Aspects of Protection of Expressions of Folklore (hereinafter referred as "the Committee") which met, at the invitation of the Government of India, in New Delhi from January 31 to February 2, 1983.
2. The purpose of the meeting was to consider the text of Model Provisions for National Laws on the Protection of Expressions of Folklore against illicit exploitation and other prejudicial actions, adopted by the Committee of Governmental Experts convened by the Directors General of UNESCO and WIPO from June 28 to July 2, 1982 at Geneva, and to make suggestions on the possible means of implementation in Asia of the said text.
3. Experts from six countries of Asian and Pacific Region (Australia, India, Indonesia, Pakistan, Philippines and Thailand) participated in the meeting. One international non-governmental organization International Federation of Phonogram and Videogram Producers (IFPI) attended the meeting as observer.
4. The list of participants will appear in Annex to the final Report.

II. Opening of the meeting

5. On behalf of the Directors General of WIPO and Unesco, Mr. Masouyé, Director, Public Information and Copyright Department, WIPO and Mr. E. Guerassimov, Legal Officer, Copyright Division, UNESCO, respectively, welcomed the participants in the meeting.

UNESCO/WIPO/FOLK/ASIA/4

page 2

III. Election of the Chairman

5. On the proposal of Mr. Bell, the expert from Australia, supported by Mr. S.D. Quiason, the expert from Philippines, Mrs. K. Vatsyayan, the expert from India, was unanimously elected Chairman of the Committee.

IV. General Discussion

6. The expert from Australia informed the Committee the question of protection of aboriginal folklore in his country was under discussion since 1973. In December 1982 representatives of a number of Government Departments in Canberra formed in a Working Party produced a report on the matter which investigates how Aboriginal artists and their work can be protected under Australian and international laws. The Working Party defined Aboriginal folklore as traditions, customs and beliefs of Aborigines as expressed in their music, dance, craft, sculpture, painting, theatre and literature. The Australian Working Party noted that commercial use of Aboriginal folklore is widespread and in many cases it is done without the artist's consent or payment of royalties. It came to conclusion that such use can cause great harm and distress to Aboriginal people particularly where their designs are used in the wrong way (e.g. display of secret/sacred designs). It also deprives the traditional owners of their rights to a financial return from the use of their folklore, it can also be damaging to their culture and arts forms. The Working Party found that Australian copyright legislation does not adequately protect Aboriginal folklore and concluded that new legislation is required. It suggested that its objectives of proposed Aboriginal Folklore that would be:

- (a) the provision of safeguards against certain uses of folklore offensive to Aboriginal people and their traditions;
- (b) encouragement of the use of Aboriginal folklore throughout the community in a way that is fair to Aboriginal people, including ensuring payment of fair compensation to traditional owners for the reproduction of works of Aboriginal folklore.

On the advice of the Minister the Governor General would appoint the Commissioner for the Aboriginal folklore whose position would be established by statute and who would be chiefly responsible for administering the Scheme. This would include the handling of claims by traditional owners and assisting Aboriginal owners of copyright. He would have statutory powers and functions and would report regularly to the Aboriginal Folklore Board and the Minister. The Aboriginal Folklore Board would comprise five Aboriginal members desirably possessing a knowledge of Aboriginal customary law and art. The Board's general function would be to advise the Minister on the protection and promotion of Aboriginal folklore. In addition it would advise the Commissioner, on request, whether an item was an item of Aboriginal folklore; whether it was sacred/secret; whether it considered that a proposed use would result in debasement, destruction or mutilation; and who are the traditional owners or customary users of different aspects of Aboriginal folklore.

UNESCO/WIPO/FOLK/ASIA/4

page 3

The Act would regulate "uses" of Aboriginal Folklore by banning certain described "uses" except where such a "use" is by a customary "user" exercising his customary rights. It would do so by creating offences in regard to "uses" where they are offensive to traditional owners and customary "users". Thus, subject to certain defences, the Scheme would prohibit the "use" of an Aboriginal folklore item which is sacred/secret according to Aboriginal custom. It would also be an offence to "use" an Aboriginal folklore item in a way that debases, destroys or mutilates it.

An intending "user" could receive a clearance by applying to the Commissioner. If the clearance were granted, the Commissioner would state that in his opinion the proposed "use" would not be an offence.

Traditional owners would be entitled to make a "claim" to the Commissioner regarding any prospective use of an item of folklore for commercial purposes, which belonged to them by Aboriginal custom. The Commissioner in determining claims would have a wide range of powers including receiving remuneration for "uses" for distribution to owners or seeking for injunctions to prevent prescribed "uses".

The Australian Government will be considering the Report in developing measures to protect Aboriginal folklore and wishes to get as many views possible of Aboriginal people and others who have special interests in the Aboriginal folklore, to assist in its development of the above measures.

7. The expert from Indonesia informed the Committee that in principle protection of folklore is granted under Article 10 of the new (1982) Indonesian Copyright Act but until now no implementation act has been adopted. General opinion in the country is that not all the expressions of folklore can be qualified as protected. But this question will be studied by a Special Commission. The latter will also consider whether copyright law provides for sufficient protection of the expressions of folklore and whether protection at the international level is desirable.

8. The expert from Thailand informed the Committee that her country is very rich of folklore which serves as a most vital factor in promoting better understanding within the Society. Formerly it was used without any supervision and control, academic circles did not pay much attention to it. This situation has changed in recent years and different circles, including government officers, academicians and researchers assigned increasingly greater importance to the role in the modern society. Preservation and safeguarding of the rich cultural endowment have become an important element of the national policy in the continuing efforts to perpetuate cultural and national identity. The technocrats and academicians in the cultural field became interested in exploring, gathering and synthesizing of information and data on folklore and their classification by the subject. Efforts were made to group all the existing subjects in major orderly headings following the pattern of the regional geographical division (e.g. "compilation of Folklore of Southern Thailand", "collection of Folklore of Lam Na Thai", etc.) Literature on folklore or the subjects relating to it are being included into the curriculum for high education level, including bachelor and master degrees. In certain major universities and many provincial

UNESCO/WIPO/FOLK/ASIA/4

page 4

colleges in high vocational education level folklore is the major option for selection by students. Apart from that, administrative efforts have been made towards the enhancement of support and promotion of safeguarding of folklore. Fine Art Department has formulated a plan for preservation and promotion of musical arts and for preservation programme for Thai entertainments and games. Currently it is seeking for an opportunity to interperate into the Fifth Five Years Economic and Social Development Plan. The Fine Art Department hopes to finalize formality of a project to train ten Thai traditional crafts so that it becomes operational in the near future. Apart from that, support formulation to safeguard and promote the most valuable folk crafts in various part of Thailand was established by Her Majesty the Queen. With regard to promotion of folklore, the Division of Cultural Relations in the Office for Cultural Affairs of the Ministry of Education has set up a provincial Cultural Centre with divisional status within the framework of existing organization such as Teacher Training Colleges. Its main aims are to collect and collate information and data on the indigenous village culture, to take active role in safeguarding, reviving folklore and tradition. At the provincial level the project also involved the maintenance of 93 provincial centres of which the main objectives were given great emphasis on the indigenous culture including folklore.

In the case where it has proven evidence that the indigenous culture has been infiltrated by the influence of foreign or non-indigenous culture thus resulting in the decline of the former, attempts will be made to stimulate or organize a public campaign for the revival or restoration of the vanishing traditional folklore and culture. For instance, should there be any films or advertisings that are deemed to cause a detriment to Thai culture, then protest or report will then have to be submitted to the respective related agencies which are responsible for its rectification and remedy.

Nevertheless, the actual problem faced by Thailand at the moment is the fact that no particular law exists in so far as the protection of folklore is concerned and in effecting the regulation and control over the illicit utilization of folklore or folk works. To put in a simpler term no folklore legislative is being anticipated at this point in time. It is so far deliberately well taken by all that the right to access to the use of folklore which its creator or inventor and which the time of creation cannot be traced back and or unknown is free and unlimited. The only way and the practical way that can be thought of and mistakenly put into practice has been the measure for the conservation of folklore that may help enliven it for an everlasting future. However, those folklore which their creation ti times are within the duration of the provision of the Copyright Act are protected under the Copyright Act of 1978.

Looking into the aspect related to the work of WIPO in this regard, the Former Director-General of the Fine Arts Department Mr. Dejo Savanananda attended the WIPO Executive Committee meeting in 1977 upon his return, this related matter was then derected to the Division of Literature and History of the Department of Fine Arts to study into the possibility of introducing the folklore protection system into Thailand. At this juncture, the Division of Literature and History recommended that in the protection of folklore care should be taken into consideration not to jeopardizing the well established principle for the determination of the legal duration of copyright. Therefore, in paving the way for effective

UNESCO/WIPO/FOLK/ASIA/4

page 5

legal enforcement on folklore protection steps should, and must be taken for the review and amendment to the Copyright Act of 1978 by adding new clauses or articles to effect the required protection of folklore. The other workable option was to proceed to full scale overhaul and to come up with a new draft for a special law specifically applicable to folklore protection alone.

Apparently, one cannot avoid problems that may arise from adopting both options. The Division of Literature and History for that matter then offered a compromising solution in serving the immediate need by suggesting the advisability to continuing on with the allowance for free utilization of folklore works by citizens of Thai nationality for some time until the objectives of the revised Copyright Acts 1978 is fully accomplished. However, suggestion was also made with due compliance to appropriate regulations to ascertain the legitimate usage. In so far as the enforcement and supervision at the international level is concerned, the way out for this matter is to issue the official regulation effecting the control on the usage of Thai folklore works, much similar to the basic approach currently being applied to the case of the control of the cinema making which requires prior approval from the government body before its dissemination to the public as well as the provision of necessary advice and guidance from the respective government agencies to ensure proper compliance to the related laws and regulations.

9. The expert from Pakistan informed the Committee that in his country folklore is not protected under Copyright Law. National Institute for Preservation and Promotion of Folklore has recently been created. Special Committee will be created to consider the question of protection of folklore. It will have to suggest whether Copyright Act should be amended to provide for such protection or a separate should be adopted. The Committee will consider also these Model Provisions.

10. The expert from Philippines informed the Committee that in his country as well folklore is not protected neither under Copyright Act nor under the Presidential Decree No. 89. Presently it is being considered whether these Acts should be amended to provide for protection of folklore or a special act should be adopted. Also being considered creation of an Institute or of a Society on folklore which would make research work, hold seminars on folklore, encourage teaching on folklore at the university level, etc.

V. Discussion Section by Section

11. The general discussion was followed by examination, section by section, of Model Provisions and the relevant commentary, submitted to the Committee. The experts made a number of observations and suggestions were made by one or more experts to be reflected in the completed version of the Commentary in these Model Provisions to be finalized by the Secretariat. These observations and suggestions are summarized as follows.

UNESCO/WIPO/FOLK/ASIA/4

page 6

Section 1: Principle of Protection

No comment.

Section 2: Protected expressions of folklore

The experts suggested that definition of the subject of protection should comprise not only the "community" which develops and maintains the traditional artistic heritage but also "individuals reflecting the expectations of the community as an adequate expression of its cultural and social identity". They noted that reference to such individuals rightly made in the Report adopted by the Committee of Governmental Experts on the Safeguarding of Folklore convened by the Director General of Unesco from February 22 to 26, 1982. One expert observed that for practical purposes the definition of the expressions of folklore should be more narrow. Broad definition as given in this Section may cause some difficulties in his country. Another expert was against a uniform definition which would cover as much aspects as possible because of existing plurality of cultures and traditions. In her opinion, the definition should be given only in very general terms to allow national legislator to include into the list of protected items all local manifestations of folklore to ensure their continuation, to preserve identity of all ethnic groups. Therefore, she suggested that traditional beliefs, scientific views (e.g. traditional cosmogony, unlike modern science) on even merely practical traditions, which are given in the Commentary to the Model Provision as examples of non-protected items, should also be accorded protection. This view was supported by some other experts.

Section 3: Utilization subject to protection

The experts were unanimous in recognizing that this Section should also cover such use as displaying or exhibiting of secret and sacred materials of community. One expert stated that only this latter use should be subject to prior authorization. In his opinion authorization as such is not needed for other uses which subject to payment of remuneration only. In such cases simple notification on the intention to use expressions of folklore will be sufficient. Competent authorities should be aware of what is used and that the payments are made but should not be entitled to grant authorization for use. This is to encourage extensive use of the expressions of folklore and their development. Another expert agreed that exploitation of the expressions of folklore should not be restricted too much not to hamper their development. Other experts observed that although in their countries considerable efforts are made to identify and preserve folklore, no authorization is required for its exploitation. This question is under consideration and it is not excluded that future decisions will be based on the approach established under this Section. But it is up to governmental bodies to decide on that.

Section 4: Exceptions

The experts were of the opinion that the provisions of this Section should neither apply to the use for philanthropic purposes as well as to incidental use in legal proceedings. But use of secret and sacred items should be excluded even in incidental cases.

UNESCO/WIPO/FOLK/ASIA/4

page 7

Section 5: Acknowledgement of Source

It was suggested that indication of source of expressions of folklore should also include mention of the country from which the expressions utilized has been derived. This will be of particular importance if international instrument on protection of the expressions of folklore is adopted in future.

Section 6: Offenses

It was suggested that only wilful offences established in paragraphs 1 and 2 of this Section should be subject to liability. One expert observed that injunction may be issued in the case provided for under paragraph 1. Three other experts stated that in their countries the liability will include damages. It was also observed that distortive actions mentioned in paragraph 4 of this Section should not include various interpretations, faithful adaptations and similar actions. (In any case the community concerned should be involved in consideration of the distortive action and provide for expert evidence.)

Section 7: Seizure or Other Actions

It was suggested that the community concerned should benefit from any receipts of the person violating the established norms of protection of the expressions of folklore. "Other actions" should include unscrupulous use (such as the distortive use damaging the interests of the community but authorized in order to get profit).

Section 8: Civil Remedies

The experts suggested that the civil remedies provided for under this Section should include injunction, damages and account.

Section 9: Authorities

It was underlined that establishment of supervisory or competent authority requires compliance with actual national legal system, administrative structure, etc. The competent authority may be of administrative nature and the supervisory authority of judiciary nature. There may be plurality of such authorities.

Section 10: Authorization

Here again it was commented that the order for application or fixation of corresponding amounts and the purposes of their use should be established in conformity with national legal systems, but countries concerned should always benefit from the use. Two experts observed that fixation and collection of fees should not be obligatory. Competent authority should be entitled to authorize free use in some cases.

Section 11: Jurisdiction

It was suggested that appeals against the decisions of the authority in question should also be admissible to administrative bodies before the matter is brought to the court.

UNESCO/WIPO/FOLK/ASIA/4

page 8

Section 12: Relation to other forms of protection

The experts observed that in some countries protection of folklore is granted under copyright laws. If two means of protection are established under national laws they would be complimentary rather than competitive. The observer from the International Federation of Producers of Phonograms and Videograms stated that the modal provisions are fully acceptable to her Organization. In her opinion, what is important is the freedom of composers and recording companies to create and produce new works borrowing expressions of folklore. She emphasized the need to distinguish oral transmission of folklore and the musical or literary productions inspired by folklore. She added that the phonographic industry agrees with the requirements to obtain the authorization by the competent authority before recording expressions of folklore; however, the recording itself should be protected as such under the legislation on neighboring rights. Finally, she mentioned the existence of standard agreements between the producers and the authors and performers, these agreements being applied with regard to the payments of fees.

Section 13: Interpretation

No comments.

Section 14: Protection of Expressions of Folklore of Foreign countries

These experts were unanimous in recognising that the interests of national communities require adoption of an international agreement on protection of expressions of folklore.

Adoption of the report

(End of document)