

UNITED NATIONS EDUCATIONAL,  
SCIENTIFIC AND CULTURAL ORGANIZATION

COMMITTEE OF EXPERTS ON THE LEGAL PROTECTION OF FOLKLORE

(Tunis, 11 - 15 July 1977)

Study of the various aspects involved in the  
protection of folklore<sup>(1)</sup>

Introduction

1. The question of the protection of folklore at the international level was placed by the Director-General of Unesco on the agenda of the Intergovernmental Copyright Committee established under Article XI of the Universal Copyright Convention, in response to a memorandum he had received in 1973 from the Government of Bolivia requesting that the possibility of preparing an international instrument for the protection of folklore be examined<sup>(2)</sup>.
2. At the conclusion of its discussion on this subject, at its session held in December 1973, the Intergovernmental Committee decided to entrust the Unesco Secretariat with the task of studying the problem and reporting thereon to the Intergovernmental Committee and the Executive Committee of the International Union for the Protection of Literary and Artistic Works at their next sessions<sup>(3)</sup>.
3. Pursuant to this decision, the Unesco Secretariat submitted to the Intergovernmental Copyright Committee and the Executive Committee of the Berne Union at their sessions in December 1975 a study on the desirability of providing protection for folklore at the international level<sup>(4)</sup>. The attention of the Committees was drawn to the fact that the first stages in devising a system of protection for folklore were, on the one hand, the examination in depth of the actual concept of folklore, in order to work out a definition of this part of the cultural heritage of nations, and, on the other hand the identification of the characteristic elements constituting each of the categories coming under the heading of "folklore". As for protection itself, which the Committees considered necessary, essential and urgent, it was recognized that a distinction should be drawn between the material protection of this heritage, that is to say its conservation, and the legal protection to be afforded with a view to preserving it and regulating its exploitation.
4. In the light of their discussions, the Committees expressed the view that this was basically a cultural problem, which went beyond the specific field of copyright, and hence beyond their sphere of competence. They accordingly requested Unesco to carry out an exhaustive study of all the questions inherent in the protection of folklore and decided, in view of the links that such protection could have with copyright, to include this item on the agenda of their next sessions<sup>(5)</sup>.

(1) The Secretariat was assisted in the preparation of this study by Mr. Alain Gobin.

(2) The text of the memorandum sent to the Director-General by the Government of Bolivia is contained in the Annex to this document.

(3) Report of the Twelfth Session of the Intergovernmental Copyright Committee, document IGC/XII/17, paragraph 103.

(4) Document B/EC/XI/11 - IGC/XR.1(1971)/15.

(5) Report of the First Extraordinary Session of the Intergovernmental Copyright Committee, document IGC/XR.1(1971)/17, paragraphs 99 to 115.

5. This document therefore contains the study requested. The various aspects involved in the protection of folklore would appear to be as follows:

- (i) the definition of folklore
- (ii) its identification
- (iii) its conservation
- (iv) its preservation
- (v) its exploitation.

## I. Definition of folklore

### 1. Etymology

6. The word folklore means, literally, science (lore) of the people (folk).

It was introduced into the English language in 1846, when W.J. Thomas, writing under the pseudonym of Ambrose Merton<sup>(1)</sup>, proposed the use of the Saxon compound "folk-lore" for "what we...designate as Popular Antiquities, or Popular Literature"<sup>(2)</sup>. This term was rapidly adopted by English-speakers who assimilated it to that of ethnology, and by the French who used it "to designate the study of the manners and customs of contemporary primitive peoples"<sup>(3)</sup>. Science of the people to some, the people's knowledge of things to others, the term was no longer questioned after the middle of the nineteenth century.

7. These explanations of a terminological nature do not, however, dispel either the imprecision of the term folklore or its ambiguity.

8. The word folklore is imprecise, as it covers a multitude of folkloristic situations. Each country, province or locality possesses, to mention a few examples, a religious, legal, musical and agrarian folklore. The term folklore, without specification of the particular field of application, is thus so general that it creates confusion as to the constituent elements of the phenomena to which it applies.

9. The term is ambiguous, as it designates both the science (lore) and its subject (folk). This being the case, one is subject to the combined uncertainties of the science (since one speaks of "folklore research" as well as "French folklore" or "legal folklore") and of its subject (since the term "folk" signifies at the same time the nation, politically defined, and the units which it contains or the races of which it is composed).

10. The question which therefore arises is whether folklore is the knowledge we have of the people, or on the contrary the people's knowledge of things and the "nature of the world". It is most definitely the second meaning which is being used by Sebillot in his "Folklore de France", which records folk ideas of the sky, the earth, the sea, the waters, flora and fauna; but it is just as definitely the first meaning which applies to the work of Van Gennep, for whom the term folklore refers to "the study, knowledge and science of the people"<sup>(4)</sup>.

(1) Athenaeum magazine, August 1846.

(2) Christina Stanley Hole in Encyclopaedia Britannica, 1966, Vol.9 p.578.

(3) Louis, Le folklore et la danse, pub. Larose 1963, p.35.

(4) Van Gennep. Manuel de folklore français contemporain. Paris, Ed. Picard, 1938.

Similarly, some German-speaking folklorists have tried to draw a distinction between the terms "Volksbund" and "Volkslehre". But as noted by Nicole Belmont "Theoretically, the problem is less 'Byzantine' than it seems"<sup>(1)</sup>, since the subject-matter of folklore indeed constitutes a branch of knowledge in the strictest sense of the word.

11. This being the case, the best way of identifying folklore is to define its characteristics and origins.

## 2. Characteristics of folklore

12. It appears to be unanimously recognized today that the fundamental feature of folklore is that it represents a form of artistic expression of the people, its basic elements being its impersonal, traditional and oral character.

(i) Impersonal character of folklore: Folklore is impersonal, because it is collective - if not in authorship, certainly in its function - and has no known individual author. It is the culture of populations of varying size where individualities mingle and disappear, if only by reason of the uniformity of their preferences. This uniformity is reflected in the anonymity of the works produced. In the absence of a material medium of transmission, all research concerning individual authorship is a matter of very recondite scholarship, or even mere guesswork.

(ii) Traditional character of folklore: Folklore is traditional in so far as it is transmitted by means of stereotyped patterns, formulae or structures to which the performer, under pain of losing his audience, must conform. This characteristic is explained by reasons of a sociological nature: folklore is rooted in very coherent social milieux whose members are all more or less of the same cultural level. Manifesting his sensitivity in this way, the story-teller, dancer, singer or musician expresses ideas and feelings common to all. His artistic sensibility reflects that of the group. He is a collective mouthpiece whose aim is not to innovate, but to conserve and at the same time preserve the heritage that has been handed down to him.

(iii) Oral character of folklore: As well as being impersonal and traditional, folklore is also orally transmitted. Its propagation is through the oral channel, the sole temporal and spatial route open in this culture, which leaves on it its own unique imprint, for folklore does not simply circulate unchanged, but undergoes many transformations as it spreads like a creeping plant.

13. This oral character seems to be the criterion for an important distinction.

Any folklore-type phenomenon in any material form belongs to folk art, not to folklore in the strict sense of the term, so that costumes, drawings, rugs, altars, masks and generally speaking, all three-dimensional forms fall into a neighbouring but not identical category.

## 3. Origins of folklore

14. As regards the question of the origins of folklore, it is not yet solved and continues to divide the experts. While some set the basic problem aside, those, who study it support one of two theses, either that of individual authorship or that of collective authorship. Developments in the study of folk music are revealing in this respect of the issues concerning folklore as a whole.

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(1) Nicole Belmont. Arnold Van Gennep, Le créateur de l'ethnographie française. Paris, 1974, (Petite bibliothèque Payot), p.102.

15. One school of thought rejects the assumption of the people's role in the creation of musical folklore. In so doing, it takes no account of the question of the people's creative gifts. John Meier defines folk songs as "songs which have been adopted and are sung by the people, which live in the people, and over whose form and content the people has acquired a certain dominant influence"<sup>(1)</sup>. Provenance and origin are subsidiary matters. What is important is not that the tune should have been born among the people, but that it should be adopted by it. In this way it loses its individual character and becomes collective. St. Yves concurs with this opinion when he writes: "For a song to be a folk song, it is not necessary that it should have been created entirely by the people or even entirely refashioned or changed by it. Anything is 'folk' which, having been created for the people by literate or near-literate individuals, has been adopted by uncultured groups of peasants or craftsmen, and then transmitted orally over a fairly long period"<sup>(2)</sup>. But this theory, however attractive it may appear, entirely fails to prove that the people is not "the elusive author" of the music it sings, "created by it and for it". Leaving aside the question of form of expression, we must therefore turn to that of creation, where we note with Brăiloiu: "Here we reach the heart of the major controversy, which is the most divisive of all"<sup>(3)</sup>. Is the authorship of folklore individual or collective? Unanimity is far from having been reached. What we have in fact are two opposing theories, which cannot be reconciled with each other. The first is based on the postulate that folklore has its source in individual acts of creation. The second aims to prove that on the contrary, there is a form of creation which is collective in nature.

16. The supporters of the individualist theory admit that the author is unknown, but argue that it is because in the course of transmission his name has been accidentally forgotten. This is actually of little importance, since he has really existed, and what he has created, though anonymous, remains his own. The anonymity of the author is thus fortuitous.

Some of the most eminent French folklorists have concurred with this view. In particular Tiersot writes: "Let us take it as axiomatic that folk song is anonymous. This obviously does not mean that it had no author, or that it wrote itself"<sup>(4)</sup>. Thus it is not the people as a whole which creates its own art, but a few specially gifted individuals, in whom the group of which they are members recognizes itself. The works they create are adopted by the community, which then transmits them.

17. This view has come in for some lively criticism. It has been argued that it confuses cause and effect. To say that folklore is an individual creation because there is no proof to the contrary is admittedly an over-simplification; but it is equally unconvincing to say that where a work is handed down in an anonymous form it is because the name of the author has been lost by accident - if oral tradition can hand down the works, one fails to see why it could not also hand down the authors' names. When all is said and done, none of this gives us any real insight into the nature of the creative act.

18. These arguments have led those who hold the individualist theory to put forward a more convincing argument. Supposing, they say, the author were identified, would the artistic embodiment cease to be folklore? The idea is an interesting one, since it confirms that folklore is a specially complex phenomenon, in which individual creation is only one ingredient. But however far one probes

(1) John Meier. Kunstlied und Volkslied in Deutschland. Halle 1906, p.14.

(2) St. Yves in Brăiloiu, Le folklore musical. In: Musica Aeterna, Zurich 1949, p.284.

(3) Brăiloiu, op.cit. p.285.

(4) Tiersot. La chanson populaire. In: Encyclopédie Lavignac, Second Part, IV, p.268, Paris, Delagrave, 1912.

into the thinking of the proponents of this theory, individual creation still precedes the phenomenon of folklore. This view is nevertheless contested by the proponents of the theory of the collective authorship of folklore.

19. The idea that folklore is collectively created has been written about and defended at length. Laszlo Lajtha notes that it is not so much a question of anonymity as of the absence of an author, to which Bela Bartók added that there is no indication whatever that individual peasants ever invented melodies<sup>(1)</sup>. Thus, in the view of those who support this thesis, such music is primarily collective, some thinking it is "received" from elsewhere and others that it comes from an act of creation.

20. The theory that it is "received" claims that "all art dwells on the heights of the social edifice, whence it filters down slowly towards the depths where, reduced to its rudiments, it lives an obscure existence"<sup>(2)</sup>. Folklore is thus only a reflection, an attenuated echo, of the dominant art. It is imitation. In support of this argument, Vincent d'Indy says that the people borrows its repertoire from liturgical chants, which are the only music it knows<sup>(3)</sup>. Meier, after identifying the written originals of thousands of pieces of folk music, concludes that the people is totally devoid of any creative ability, and that its heritage originates from cultivated urban milieux.

21. These arguments, which place, not the collective creation, but the collective adoption by the people of musical themes in the foreground, are not decisive; and a second, more relevant, explanation has been given of the phenomenon of folklore, to the effect that the people secretes its own works and has its own separate collective creative ability, and that no one can determine who is the author of the works it perpetuates. There is, in fact, collective creation.

22. These theories on the origins of folklore, however, leave unanswered our questions as to the innermost nature of works of folklore, and their relationship with other works of the mind.

#### 4. The nature of works of folklore

23. Consideration of the nature of the creation of folklore leads us to re-examine the concepts traditionally employed, which evoke the concepts of creation of a work, author, even performer or adaptor, with a view to determining how far these concepts apply to folklore.

24. The notion of creation is usually based on that of originality. While originality does not signify novelty, it usually relates to the identity of the author, which can in this respect be defined as being that which distinguishes one author from another and that which confers on his work the outstanding value of uniqueness. It should be added that a principal characteristic of a work of art is its gratuitousness, the fact that it has no practical utility whatever. The act of creation thus generates works, "finished products" made complete in every detail, which as soon as they have been given lasting form, part company with their creator and make their own way in the world.

25. The question then arises whether a work of folklore is of a similar nature. A reply which takes account of the conditions specific to these two types of creation shows the distance which separates the literary or artistic work from a work of folklore.

(1) Bela Bartók in Encyclopaedia Britannica, (1966, edition), Vol. 9, p.523, Albert Lancaster Lloyd.

(2) Brăiloiu, op.cit. p.282.

(3) Seeman. Völklied und Urheberrecht. Typescript, Freiburg im Breisgau, p.55.

26. The fact is that folklore chiefly finds expression in strongly integrated social milieux, so that the performer is expressing not only his own sensibility, but also that of the group to which he belongs. He is the voice of a collective individuality, from which he does not try to set himself apart. Musicologists have tried to define this collective musical entity, and determine the process which brings it into being. From the initial results of their studies, they thought that, by patient research, they could work back to the origin of a song and its authorship, and thus that there existed an ur-work the form of which could be reconstructed; but the great mass of information compiled over recent decades has pushed back the frontiers of research into the more and more distant past. The clues to the solution of the problem have thus been dispersed afresh in time and space, since as far back as it is possible to go, there always remains something irreducible, a residual fund common to all mankind.

27. In addition, the absence of any material medium of transmission so modifies the phenomenon of creation that it is difficult to understand how it works. "Unless it is written down, the created work can only endure by the general consent of those who keep it alive, which is itself the outcome of uniformity of tastes. An oral work exists only in the memory of the person who adopts it, and takes concrete form only by his will"<sup>(1)</sup>. In any case, since there is no permanent record to stabilize its form once and for all, this work is not a "finished product", but is constantly made and remade. In other words, all the individual performances of one model are equally authentic and carry equal weight in the scales of judgement. As a result, innovation does not have the same place as in the creation of a literary or artistic work, as these terms are understood in copyright legislation. This being the case, variations on major themes are explained not by the desire for variation, but by the absence of one incontestable model. The performer's concern is not so much to innovate as to preserve, in order to perpetuate, and the objective determination of folklore is based on the criterion of authenticity, this concept applying by definition to that which cannot be contested.

28. The use of this criterion makes it possible to distinguish between various types of work covered by the generic term of folklore.

29. The most authentic form is the actual work of folklore. This is by definition a musical, literary or other artistic composition which has been handed down from generation to generation by oral means with variations which do not change its basic character. The written record is often only of secondary importance, but it may, in some cases, arrest the development of a folk composition at a particular stage.

30. At a lower level of authenticity is the work which is derived from folklore. This should be understood to mean a musical, literary or other artistic composition which derives its existence from that of a work of folklore. It gravitates around the folk model without itself being folklore. This is the case of improvisations, settings of folk music, collections of folk melodies, musical anthologies and transcriptions.

31. The next level consists of works based on or inspired by folklore.

Taking the example of music, the source of a work based on folklore would be a tune, a theme or a motif taken from the folk repertoire which is systematically developed and harmonized in scholarly fashion by a composer. This type of work can be clearly distinguished from a work which is derived from folklore in that the folk model is no longer predominant, becoming merely secondary, part of the background. It nevertheless owes more to its source than a musical work inspired by the folk tradition, which, without drawing on the repertoire of traditional folk

(1) Brăiloiu. Réflexion sur la création musicale collective. Diogenes. Ed. Gallimard, 1959, No.25.

melodies, is related to it by its style, its melodic developments, its harmonies and its rhythms. Though an original composition, it is linked with the folk tradition by affinities or reminiscences due to the creative talent of the composer, who, far from being a prisoner of the form, has succeeded in recreating the essence, the spirit and the soul of folk music.

32. To conclude, it seems that folklore could be defined as an impersonal, oral and traditional form of artistic creation the source of which is according to some individual and according to others a collective. Its formalization, which varies from place to place and period to period, differentiates it from the normal type of work. It is not a ready-made work but a work in the making, and can be of varying degrees of authenticity, ranging from actual works of folklore through works derived from it, works based on it and works inspired by it to modern "folk" compositions.

## II. The identification of folklore

33. Once folklore has been defined and the different components of the phenomenon determined, it is time to leave the field of concepts for that of reality and the problem of identification. This is a complex problem, and one involving a considerable amount of work, which, although it is already under way in some fields, in others has not yet begun. Thus any attempt to solve the problems arising from the existence of folklore, whether in the short or long term, must be based on a methodological foundation one essential feature of which is the determination of the analytical framework to be selected. To be precise, two questions must be answered:

- (i) On what sectors will attention be focused, i.e. what forms of expression will be counted as belonging to folklore?
- (ii) What methods will be used to determine, in each of the chosen sectors, the content and forms of this folklore?

### 1. Forms of expression belonging to folklore

34. It is immediately obvious that the field to be covered is very large. One is even tempted to say that any form of expression, any composition of whatever order and in whatever sector may turn out to be folklore. We have seen, however, that one criterion is crucial in respect of folklore, its oral nature: folklore is first and foremost an oral tradition, which means that it exists only in the memory of social groups, only to emerge on the occasion of a specific performance or a particular event. This certainly does not mean that it leaves no trace, but it must be agreed that it is not transmitted by means of a physical medium in the same way as other works of the mind.

35. This would seem to exclude from our definition of folklore such physical manifestations of folk culture as traditional tools, cooking utensils, furniture and all kinds of other objects. These are really the concern of ethnology, like musical instruments, costumes, carpets, textiles and textile designs, votive offerings, statuettes, amulets, totems, ritual masks and, in general, everything related to the plastic arts. It seems necessary, therefore, to draw some distinction between the physical products of folk art and non-material compositions to which the strict definition of folklore can be applied.

36. It must be agreed that the oral forms of folk culture are many and various. Without drawing up a complete list, we can mention a number of genres which belong indisputably to folklore, such as stories, fairy stories, tales of the supernatural, legends (relating to saints or heroes), beliefs connected with particular periods or places, myths and symbols. Music, whether instrumental or

choral - songs connected with the activities of everyday life in a particular community or with the events which have affected the history of the group, whether these songs are religious or profane - are also part of folklore. If songs are included, poetry must also be considered as folklore; and poetry automatically subsumes linguistics, which is undoubtedly, as Van Gennep(1) has maintained, the discipline most closely related to folklore, as "linguists are aware that every language, whether general or special, is in a constant state of transformation". We must therefore consider the question of dialects and patois and decide whether or not they should be defined as folklore. On an even more general level, it seems that some regard as belonging to folklore, although they also come within the scope of ethnology, religious and pagan ceremonies, rituals and customs of the charivari type, carnivals, and also practices such as sorcery, wagic and medicine (although reliable surveys have proved that some of the incantatory formulas used by folk healers had been taken from books sold by pedlars, various alterations and additions having been made to the texts. Such books as the Grand and Petit Albert, although printed, circulated only among the ordinary people. The same phenomenon is to be observed in connection with music and singing, where families hand down from one generation to the next "notebooks" containing annotations or mnemonics for songs or pieces of music). Rituals, including transition rites marriage and death rites, etc., fertility rites, engagement ceremonies and sexual practices may also be seen as belonging to folklore. Two other types of activity also clearly belong to folklore: games and dance. A. Louis(2) has conducted a remarkable study of this subject, making an inventory of different types of folk dance which have existed since the Middle Ages: liturgical dances, processional dances, danses macabres, devil dances, horse dances, fire dances, sword dances, etc.

37. This brief enumeration shows that the first job is to draw up as detailed a list as possible of all the different forms of folklore and then to organize them into a more general classification by sector, field or type.

The work of drawing up an inventory within each group should then be undertaken.

2. Methods for establishing an inventory of the content and forms of folklore

38. As long as fifty years ago, Brăiloiu outlined a method for collecting musical folklore (archives of the Society of Romanian Author-Composers) which complements the methods proposed by Van Gennep in his Manuel de folklore français contemporain(3). In fact, there are two basic and complementary approaches:

(i) The historical method

39. Folklore relates to living, contemporary phenomena, but these always have their origins. Recourse to history may make it possible to determine with greater accuracy the antecedents of a contemporary or "emergent" phenomenon.

However, the historical method should be used with circumspection. Folklore is living and exists in the present. History is the past. Even if there is no contradiction between the two, there may be some ambiguity, for "folklore is not only concerned with living contemporary phenomena but assigns to them their place in the chain of tradition. Antecedents must therefore be found for them which will form the preceding links in the chain, and as for the succeeding links, although the folklorist does not know what they will be, he knows that they will come, and that the chain will continue to grow".

(1) Manuel du folklore, p.38.

(2) Le folklore et la danse, Ed. Maisonneuve, Paris, 1963.

(3) Van Gennep, Manuel du folklore, p.35.

40. In Van Gennep's words "the feeling of folklore is that the observed phenomenon contains latent possibilities, whereas the historical phenomenon gives the feeling that all its possibilities have already been expressed"<sup>(1)</sup>. Thus the living phenomenon has a past, but it also has a future. In this sense any folkloric phenomenon has both a static and a dynamic element.

41. The historic method is nevertheless very useful, for it makes it possible to apply the diachronic approach to the collective psychology of a given group. To quote Van Gennep once more, "the customs studied as folklore are the real links in this chain of tradition, which constitutes the constant factor in the life of a nation considered as a whole"<sup>(2)</sup>.

(1) The comparative method

42. Modern media facilitate the use of this method at its three levels: the collection of information, its filing and its classification.

(a) Collection

43. This is based on the tried and tested methods of the direct survey, which may have various different aspects: direct note-taking by the researcher, prepared questionnaires or mapping, but also recordings on tape and film which may then be transferred to another medium in clear or in coded version (microfilm, punched cards or computer memory). In general, the maximum of information should be collected on the phenomenon in question (time, place, performers). Each item collected should be accompanied by a filing card situating it in its environment, without which it would be meaningless.

(b) Filing

44. Once the information has been collected the material must be filed to make it possible to integrate it into a system. Mechanical transcription of the item, including variations which may have been noted, will often be necessary.

45. In fact the filing system depends on the field concerned. In the field of music, for example, a "double-entry" system, grouping on one side all tunes from the same geographical area and on the other all belonging to the same musical genre, would seem to be the most appropriate.

46. Generally speaking, it will be sufficient for the purposes of filing by region to use the administrative divisions of the country, in alphabetical order, which will make it possible easily to identify the melodies of any region.

47. Two questions must, however, be settled: the question of interpolations and that of terminology:

still in the field of music, does a Moldavian melody sung by a Moldavian in Bucharest, for example, belong to the Moldavian repertoire or should it be considered as belonging to the musical repertoire of Bucharest at the time of its collection?

the terminology used often varies from one province or even from one locality to another. Thus, for example, the asymmetrical, monotonic melody described by Bartók in one of its versions (that of the province of Maramureş) and commonly called "doina" is called by another name in the very areas in which it abounds: in Oltenia as well as in the Maramureş, it is said to be a long

(1) Van Gennep, Manuel du folklore, p.35.

(2) In the review Connaissance des Arts, 1977.

song (example taken from Brăiloiu's Methodology of musical folklore). Conventional terms must therefore be employed and their meaning clearly defined in the key to the code used. The file which is drawn up must thus re-establish the authentic terminology.

(c) Classification

48. Once the information has been ordered, it should be classified by means of an exhaustive geographical catalogue or directory using either alphabetical or chronological order, each category of which should include a classification by type and theme (unless a special directory is drawn up for this purpose).

49. Let us take as an example the classification adopted by Danielle Dumas in her thesis on the folk poetry of the Andalusian gypsies (Montpellier, 1971):

lyrical themes: the definitions of love; the effects of love; love and passion; love and sensuality; love and women; the power of love;

mythical themes: etiological myths; myths concerned with purity; pantheistic myths;

sociological themes: money; poverty; mother and family;

religious and philosophical themes: superstitions; idolatry; religious history; punishment; awareness of time; the vanity of earthly things; moral judgements; fate; death;

historical themes: persecutions; the price of freedom; death and imprisonment; references to crafts;

anecdotal themes;

themes with esoteric symbolism.

III. The conservation of folklore

50. Two basic aspects must be examined: the maintenance of the social milieu which produces the phenomena of folklore and the recording of its manifestations by all suitable means.

1. Maintenance of the social milieu which produces the phenomena of folklore

51. Folklore, like language, is a living thing, and its habitat must be protected. In fact this cultural heritage can be seen, in some parts of the world, to be dying out as a result of the gradual deterioration of its natural environment and of encroachments from the outside. Here, however, we touch on a social problem: all-out urbanization has often destroyed known habitats of folklore, but it has also created others, and one can speak of urban, as opposed to rural, folklore.

52. The best way to keep traditions alive is certainly to be aware of the importance of folklore and to take the measures necessary to preserve this cultural heritage. This was, indeed, the conclusion of the international conferences on cultural policies in Europe, Asia and Africa which were convened by Unesco in Helsinki in 1972, at Yogyakarta in 1973 and at Accra in 1975 respectively.

53. In this connection, Africa offers a remarkable example of the integration of traditional standards with the changes of the modern world; and indeed to maintain the conditions for the continued existence of folklore cannot imply a desire to preserve the past without making any allowance for change.

2. The recording of folklore

54. Modern media facilitate such a vast enterprise. This work has already begun as regards folk arts and crafts, but the bulk of the work still has to be done for non-material manifestations of folk culture.
55. The first step is to provide for the publication of as many documents as possible on folklore. An example of this approach is the gypsy review "Etudes tziganes", which regularly publishes gypsy stories in order to form the basis for a record of the creative genius of a people.
56. Even more important is the centralization of heterogeneous and scattered information which is often difficult to use. The logic of this situation requires that each State create facilities for the study and collection of folklore. The processing of information by means of filing cards, microfilm or computer which is now possible has removed many of the obstacles.
57. In fact substantial progress has already been achieved in this respect.
58. For example, a considerable amount of work has been put in to prospection, collection, analysis, indexing, numbering, filing and records management in the field of music and dance. The International Folk Music Council co-ordinates the work of a large number of national institutes for this purpose.
59. In Argentina the National Institute of Musicology, founded in 1931 by Carlos Vega, has made a complete inventory of the folk music of the indigenous inhabitants of all the provinces of Argentina, and of all that of Bolivia, Peru, Chile, Venezuela and Paraguay. Its archives contain more than 10,000 recordings on magnetic tape or disc.
60. The Society of Romanian Author-Composers, founded in 1936, has applied itself to the collection and inventorying of Romanian folklore.
61. In Czechoslovakia, the Institute of Musicology of the Slovak Academy of Sciences in Bratislava has already collected the phenomenal number of 120,000 tunes, of which more than 10,000 have already been published.

Over the next few years this Institute is to devise a system of classification and ordering and a typology of musical folklore.

62. Similar work and achievements can be pointed to in the field of dance<sup>(1)</sup>.
63. In some fields the trail has thus already been blazed, but more remains to be done to ensure the conservation of folklore, which is one of the prerequisites for its preservation.

IV. The preservation of folklore

64. Conservation and preservation may at first appear to be synonymous as far as folklore is concerned, but in reality this is far from being the case since the idea of preservation implies the existence of a threat, in a way which that of conservation does not.

(1) On this point see: Foundations for the analysis of the structure and form of folk dance in Yearbook of the IFMC, 1974, p.115; Method and theory in dance research - An anthropological approach in Yearbook of the IFMC, 1975, p.116.

65. Folklore is a vulnerable cultural asset, open to various forms of attack, mainly from two quarters: time and man.
66. Two different approaches seem to be called for: (i) the preservation of folklore by the adoption of measures to ensure its continued existence and development; and (ii) the preservation of folklore against the risk of distortion.
1. Measures to ensure the continued existence and development of folklore
67. Various types of action can be taken to ensure the continued existence and development of folklore. The first should be a policy of incentives to promote knowledge of folklore and encourage its forms of expression and its dissemination.
68. The promotion of knowledge means introducing children to folklore at the earliest possible age, i.e. making provision for education to include channels of contact with the oral civilization. School curricula, which now include a wide range of subjects, should allow time for the study of or contact with folklore.
69. The promotion of knowledge of folklore also necessitates means of getting hold of that knowledge. The collecting of folklore phenomena needs to be put on a more solid basis. It would, for example, be possible and indeed advisable to train collectors who would have a clearly defined status.
70. The promotion of knowledge of folklore means, lastly, organizing access to the material collected and allowing study and research. There seems to be a case for integrating folklore sections into the existing or yet to be established structures of institutes of ethnology or musicology. A choice may be made between creating a folklore sector which would cover all forms of expression or creating a folklore unit in each department of an institute.
71. Encouragement of the different forms of expression of folklore could be given at two levels. Firstly, budgetary incentives could be provided: it would indeed be possible to allocate part of the budget of local authorities for the perpetuation of old forms of expression or to encourage the development of new ones. Secondly, tax incentives could be provided: it would also be possible to devise fiscal arrangements to encourage performances devoted entirely or in part, the proportion in question to be determined, to folklore.
72. Encouraging the dissemination of folklore calls for action at both national and international level.
73. Comprehensive action at national level to preserve folklore could form part of a clearly defined national cultural policy. In many Western countries, the preoccupations of the ecologists have brought to light a desire, indeed a determination, to control man's relationship with his natural environment within the context of industrialization. The same problem also arises in connection with the cultural environment, the traditional substrate of which must be maintained.
74. At international level, action to preserve folklore could take the form of bilateral or, even better, multilateral legal instruments. Folklore in fact seems better suited than any other matter to this kind of generalized action, as its geographical origin is clearly apparent, which makes it easier to organize flows between countries.

## 2. The preservation of folklore against the risk of distortion

75. In the second place steps must be taken to preserve folklore against the erosion of its authenticity. The dangers of distortion are real, arising from the commercialization of folklore. In its customary setting, folklore undergoes a natural growth which ensures its authenticity, but when it is transplanted from its native soil and used for commercial purposes, it may lead a double life. It is then open to the same risks as other works of the mind: plagiarism, amputation, misappropriation, unlawful reproduction or use, etc. Such distortion must be opposed by strictly applied regulations, which should enable folklore to regain its identity and its authenticity. A certain flexibility is necessary, however, so as not to impede the dissemination of this heritage.
76. With this in mind, it would be advisable to determine precisely the sectors of activity or creation where folklore is involved and where there is a serious possibility of commercial exploitation. From this point of view there is no doubt that the arts lend themselves most readily to exploitation of a commercial nature. Folk music and folk dances, like folk poetry or folk tales, are easy to exploit, as also are certain religious or pagan rites which can be performed before an audience or filmed. Generally speaking, it would be advisable to draw up a list of the different forms of expression of folklore which might be reproduced in print, on tape, through recordings or films. Actually any reproduction involves potential exploitation of the work or happening reproduced. In this way it will be possible to distinguish forms of expression of folklore for which there is no material medium of transmission from those which can be recorded and the recording of which may be used to make a saleable reproduction. The two extreme examples are, on the one hand, music, which can be directly exploited, and, on the other, beliefs, which cannot be recorded but are only practised, such practices being seldom amenable to commercialization.
77. This being said, the attitude to commercial exploitation should not be wholly negative: although the abuse or fraudulent use of folklore should be prevented, it is a source of income which many countries quite rightly wish to exploit, so long as some prior or retrospective control is exercised.
78. The prior control is of the cultural type, i.e. the use to be made of a particular category of folklore is accurately ascertained by means of selection, canalization, or even authorization. The emergence of folklore on the commercial market should be facilitated by incentives to prevent "under-the-counter" dealing in folklore as a commodity to be filched from a country. So it would seem that the emphasis should be placed on improving our knowledge of the uses to which folklore might be put; more needs to be known about supply and demand and a better understanding is required of the commercial system for the dissemination of folklore, while the means of obtaining folklore material should be controlled. In this way, action can be taken against the distortion, plagiarism and unlawful or fraudulent use of folklore. This presupposes solidarity between countries, which should try to localize folklore phenomena accurately and exchange information on the ways in which folklore is used.

## V. Exploitation of folklore

79. There are two aspects to the exploitation of folklore. In the first place, it is understandable and desirable that a disinterested exploitation of folklore should be developed. Outside of its natural setting, folklore can be a factor in cultural exchanges between countries.

80. The commercial question is a more sensitive issue as it has considerable financial implications. How can commercialization be authorized without prejudice to the nature and the form of the folklore heritage? The question is in fact twofold: how can the social group in which it originated participate in the financial proceeds of a work of folklore? And how, when authorization to use a work has been given, can the use made of it be controlled?
81. The geographical origin of the work concerned might be indicated when it is reproduced or performed, on the basis of full information obtained through the setting up of a commercial network subject to strict professional rules. Some way of associating the community concerned in the financial benefits accruing from the use of the work might then be contemplated. This could be done in various ways. In the first place, it could be done through copyright. Some States have indeed adopted this means of dealing with folklore problems. Algeria is a case in point (Ordinance on Copyright of 3 April 1973), as also Kenya (Law No.5 of 1975 amending the Law on Copyright), Morocco (Law on Copyright of 24 July 1970), Senegal (Law on Copyright of 4 December 1973) and Tunisia (Law on Copyright of 14 February 1966).
82. At international level, the Berne Convention for the Protection of Literary and Artistic Works contains in its versions adopted at Stockholm in 1967 and in Paris in 1971 a provision which, although not using the word, concerns works of folklore, since Article 15, paragraph 4, provides:
- "(4) (a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.
- (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director-General by means of a written declaration giving full information concerning the authority thus designated. The Director-General shall at once communicate this declaration to all other countries of the Union".
83. However, folklore is such a complex phenomenon that the application of copyright is difficult from the point of view of legal logic. For a work of the mind, literary or artistic, to be protected by copyright it must have an author and be original.
84. Folklore is certainly an artistic creation. It is not necessary to stress this point except to observe that works of folklore are not quite the same as works covered by national copyright laws or international copyright conventions in that they are not finished and definitively fixed works. Time plays an important role in their genesis.
85. The second requirement to satisfy is that of originality. To be eligible for protection, an artistic work should be original, but this concept is understood in a relative rather than absolute way. It is difficult to determine whether a work of folklore is absolutely or relatively original since an antecedent always exists. Thus, in most countries, folk melodies are based on a theme or a tune which pre-dates them. As a result, with respect to copyright principles, a given work is considered relatively original. This qualification does not automatically apply but should be assumed in the absence of objective proof to the contrary.

86. The determination of the author of works of folklore is a sensitive issue. It may without difficulty be admitted that a work of folklore is formed by successive acts of creation. The closer one comes to the present, the more clearly the methods of investigation make it possible to identify the respective proportions of the various contributions. The legal situation of these works should thus be clarified; but tradition, which constitutes an anonymous "common fund", provides an already developed basis for the present formalization of folklore. This creative multiplicity inherent in folklore which leads to the fragmentation of the notion of author, replaced by a multiplicity of transmitters, is the basic source of difficulty when attempting to devise an unambiguous legal status for works of folklore.
87. It should also be noted that: (i) copyright being essentially individual, the collective character of the works in question tends to exclude them from traditional classifications; (ii) to the discussion of the legal nature of works of folklore is added a conflict of views with respect to the application of copyright in systems which make publication of a work of the mind the criterion for its protection.
88. Finally, while a community might conceivably be invested with a moral right exercised by a representative, it is more difficult to accept the idea of a pecuniary right, which rewards the work of the author, in this case unknown.
89. Yet remuneration in exchange for the use of folklore seems only fair. It might take the form of a financial interest (such as a commission) agreed to on the signing of a contract, or a tax levied on the occasion of its use. Something similar to a licensing procedure might also be envisaged. The fact remains, however, that a problem will undoubtedly arise as to the allocation of the financial resources thus generated. It will have to be decided whether these sums should revert to a national, regional or local body, and then to what use they should be put. Should they be used for unspecified general purposes, cultural purposes or for folklore itself? In the latter case, should they be used to finance study and research or dissemination?
90. In this connection it may be noted that a very sophisticated legal procedure already exists in Bolivia. The provisions governing musical folklore are grouped together in the Supreme Decree of 19 June 1968, which sets forth the principles applicable to this subject, and the regulations thereunder of July 1968, which specify the procedure for the application of the Supreme Decree.
91. Supreme Decree No. 08396 declares folk music (anonymous, popular and traditional) of which the author has not been identified and which is performed at the present time in Bolivia by peasant and other folk groups, and the music of Bolivian composers deceased 30 or more years ago to be the property of the State. With respect to the use of folk music, the Supreme Decree requires that any printed or recorded version of folk music mention the name of the collector and/or the Folklore Department of the Ministry of National Education and Culture (Art. 6). A royalty is collected for such uses. Thus, any person who records or publishes folk music must pay into the "Preservation of Folklore" account at the Bolivian Central Bank a sum equivalent to the royalties which would be collected by a living author for his composition (Art. 3). The proceeds from this royalty are allocated exclusively for the preservation and study of Bolivian folk music (Art. 5). From these sums, the registrar receives 40% (Art. 4). Finally, in order to keep an accurate inventory of folk melodies, the Folklore Department of the Ministry of National Education and Culture and the Public Prosecutor's Office are authorized to investigate the appropriation of melodic themes from folk music by third parties as "original" compositions prior to the Decree (Art. 7).

92. The regulations of July 1963 specify the uses which may be made of the national folklore, the measures for its registration and the procedure for the restitution to the national community of melodies improperly appropriated by third parties.
93. The exploitation of folklore may, then, be summed up in two simple questions:
- (i) Is it possible to control the commercial system which uses folklore?  
Is it possible to obtain a clear knowledge of this system?
  - (ii) Can the countries of origin of the folklore be given some form of involvement in, and a right of inspection of, the ultimate use made of an expression or work of folklore of which the authenticity might be affected, an association which would include participation in the profits accruing from such use?
94. There is no doubt that the familiar copyright procedures can be combined with new rules and that the exploitation of folklore can be regulated by different means, to be left to the discretion of the States concerned.
95. A study by major economic regions or even by countries seems, then, essential for examining the nature of the commercial systems which use folklore and also the compatibility of the legal rules which are taken from copyright law or commercial, civil or international law. In the last resort it seems essential that any status worked out for folklore should be fitted into a relatively binding legal framework, otherwise the efforts made to identify, conserve and preserve folklore would be in vain because out of touch with the manifest commercial realities.
96. In any case it seems certain that any satisfactory solution demands that all the difficulties raised by folklore - definition, identification, conservation, preservation and exploitation - must be considered together and as a whole.

ANNEX

Republic of Bolivia  
Ministry of Foreign Affairs and Religion

Ref. No. D.G.O.I.1006-79

La Paz, 24 April 1973

My Ministry has made a careful survey of existing documentation on the international protection of the cultural heritage of mankind, including the Universal Copyright Convention, signed in Geneva in 1952; the Interamerican Copyright Convention, Washington 1946; and, in particular, the Recommendation on the protection of property of artistic, historical or archaeological value<sup>(1)</sup>, approved by Unesco in 1964. All these instruments, as also other Unesco conventions, are aimed at the protection of tangible objects, and not of forms of expression such as music and dance, which are at present undergoing the most intensive clandestine commercialization and export, in a process of commercially oriented transculturation destructive of the traditional cultures, which do not even have the benefit of statements of provenance.

Bolivian legislation on the heritage of folk arts effectively fills this blank observable in the international legislation and it is for this reason that my Government has decided to submit a formal inquiry of a technical order on the feasibility of including, in the instruments for the protection of national cultural heritages, certain measures which if they enlist sufficient support to be adopted by the General Conference, could supplement the existing instruments and reinforce the commendable efforts of those who are endeavouring to defend this category of cultural property against all kinds of depredations which are not only destructive of the traditional artistic culture of the peoples but also affect possible sources of legitimate economic gain. Hence the endeavour to have folk art forms removed from the public domain and reclassified as property of the concerned States.

The purpose of my inquiry is to seek your advice on the form for incorporating in the international legislation on the protection of national cultural heritages some principles found in the laws of Bolivia. I think that the first step would be to include on the agenda of the next meeting devoted to this subject a draft resolution incorporating the following points:

1. Addition to the Geneva Convention of a new protocol declaring all rights in cultural expressions of collective or anonymous origin which have been elaborated or acquired traditional character in the territory of particular Member States to be the property of such States.
2. Signature of a Convention to regulate the aspects of folklore preservation, promotion and diffusion and establishment of an "International Register of Folkloristic Cultural Property on the lines of the Recommendation of 1964.

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(1) The two 1964 Recommendations adopted by the General Conference were: (1) on the means of prohibiting and preventing the illicit export, import and transfer of ownership of cultural property; (2) on the international standardization of statistics relating to book production and periodicals.

3. Extension of the field of competence of the Intergovernmental Committee envisaged by Article XI of the Geneva Convention to include the study of the problems which might arise in connection with the proposed protocol such as the research-based assignation of paternity between two or more States in respect of common forms of expression.

As is clear from the above outline resolution the aim is to secure the right instrument for the protection of folk arts and this consideration moves me to seek your support and collaboration, for the pursuit of the aim stated in the form you consider most appropriate. I for my part shall endeavour to co-ordinate action with certain friendly governments undoubtedly affected by the lack of effective protection for this type of property, so that we may unite our efforts with a view to obtaining approval of the requisite instrument.

APPENDIX A

Republic of Bolivia  
Ministry of Foreign Affairs and Religion

MEMORANDUM

Ref: Protection of Cultural Heritage

1. Background

1.1 The Bolivian State, through the intermediary of its special service, the National Directorate of Anthropology, Department of Ethno-musicology and Folklore, has verified the urgent necessity of submitting for consideration by the Executive Board of Unesco the present request for the adoption of regulations for the protection of the people's folklore.

Folklore, viewed as the cultural substratum of human groups with expressions characterized by anonymous authorship, traditionality and popular origin (International Congress of Folk Arts held in Buenos Aires), constitutes part of the cultural heritage of the peoples and so far has not rated specific attention either by the international organizations or by the majority of States.

1.2 The current revalorization of folk arts to their notable invasion of the consumer market is currently giving rise to the de facto situation of which the following examples afford a rundown:

1.2.1 In the musical sphere, there are instances of melodies being wrongfully appropriated by persons unconnected with their creation who register them as their own compositions to secure to themselves the benefits conceded by the copyright regulations. This leads, amongst other things, to the debasement of the folkishness of the piece which, losing its anonymous or collective character, will no longer be regarded as "folk music" but as the "creation" of the person who appropriated and registered under his own name an artistic property belonging, by tradition and right, to a certain folk group.

Existing international legislation on copyright makes no provision for cases such as the above, folk arts being accordingly relegated implicitly to the public domain. We consider that this notion of public domain should apply to folk music - as to all other forms of folk arts - exclusively in respect of its diffusion, conferring no right of appropriation in respect of a work's actual paternity, which is the situation arising additionally at present.

1.2.2. In the sphere of the dance, folk dances, deemed as collective creations, historically localized in specific geographical zones, to belong to groups of people who, traditionally, hold them in usufruct - are thanks mainly to the commercial aspect already mentioned and the mobility of the folk groups touring programmes which include these dances - being appropriated by other countries wholly unconnected with their genesis to be passed off by them, even in international competitions, as folk dances of their own. In the particular case of Bolivia which, owing to its geographical situation, suffers greatly from depredations of this kind, certain organizations from neighbouring countries go so far as to send here complete sets of costumes for the main Bolivian folk dances, and engage "embroiderers", "mask makers" and even choreographers (of peasant "folk" origin) to organize this switching or deliberate non-spontaneous transculturation process which amounts to the filching and clandestine transfer of another people's culture. In this way the creator peoples gradually lose their folk art assets, while others, with better

financial facilities, present as their own what was never a part of their tradition. The themes may, in some cases, be similar, but the décor and choreography are usurped.

It should be noted that spontaneous acculturation and cultural diffusion is a different question. The latter may very well be complemented by an indication of origin in such a form as to make folk art a means for unity and understanding between the peoples and not an element of discord, which is at present due to the justified reactions of the peoples injured by the filching process described.

1.2.3 In the realm of popular art, which likewise forms part of national folklore and which has, at present, a large consumer market, there are similar filchings, as in the case of countries which reach the point of industrializing themes and techniques from the traditional patterns of the cultures of particular population groups and offering them at cut prices on the international markets with no statement of origin - a process which, in addition to lowering the quality of the objects, means the "submarginalization" of large population groups who often depend for their livelihood on this paying work.

## 2. Cultural and juridical situation of folk arts

As its folk arts belong to the traditional culture of each people, they are part of the cultural heritage of mankind and, as such, should be the subject of protective measures, both internationally and within every State.

As regards the international instruments established by Unesco for the protection of the cultural heritage of mankind nothing concrete is found about folk arts. Although in the definition of cultural property the recommendation stipulates the protection of cultural, historical or archaeological property, ethnological documents etc., actual primacy is given to the archaeological and plastic art aspects, and nothing explicit is said about the important folk art element in the culture of peoples which - particularly in the case of music, dance and folk art - has been revalorized, and has swiftly gained a place in consumer markets.

The Universal Copyright Convention, signed at Geneva in 1952, protects the creative work of individuals but, so far, no steps have been taken to provide for the protection of works of collective or anonymous authorship as would be the case with current folkloric creation actually proceeding.

The international conventions drawn up by Unesco now provide protection for anonymous works in the domains alike of archaeology and of the plastic arts, but it has only been thought fit to do this in respect of tangible objects, and not of forms of artistic expression transitory in time and space, such as music and dance, but none the less, works of art which are, today, subject to the most intense clandestine commercialization and export, despite the fact that they form part of States' cultural heritage.

It is to be noted that in the Treaty of Washington on Copyright (1947) concluded by the American States, there are special dispositions on collectors or compilers which, if complied with, would benefit folk music which would retain its anonymous character. In practice, however, only a small percentage of people comply with this provision, and the whole range of folk music themes is freely mixed with all the characteristics of improper appropriation when the pseudo composers register these anonymous compositions under their own names with the organs responsible for keeping the Register of Intellectual Property and Copyright. This is patently contrary to Unesco's Recommendation (1964) on "the means of prohibiting and preventing the illicit export, import and transfer of ownership of cultural property".

3. Measures adopted by the Bolivian Government

In accordance with the Recommendation of 1964, which urges Member States to fulfil their obligations of ensuring the protection of the property constituting their cultural heritage, the Bolivian Government, by Supreme Decree No. 08396 of 19 June 1968, has proclaimed State ownership of the folk music (anonymous, popular and traditional) of its territory, of the music currently being produced by unidentified composers in peasant and general folk groups and of the music of Bolivian composers deceased 30 or more years ago.

Legislation extending the application of these measures to folk dance, popular art and traditional literature is in process of enactment.

The Government of Bolivia, in informing the Director-General of Unesco of these decisions taken in the exercise of its legitimate authority and of its ownership of expressions of folk art, ancient or modern, which have grown up or become traditional on its territory, of anonymous works at present performed by ethnic or folk groups, and of works by composers deceased 30 or more years ago, would indicate that the national registers of these forms of cultural property are scientifically checked by specialist researchers.

4. Request from the Government of Bolivia to Unesco

Having regard to the foregoing explanatory memorandum and to the internal legislation adopted by the Government of Bolivia, the following action is requested:

1. Addition to the Geneva Convention of a new Protocol, declaring cultural expressions of collective or anonymous origin which have been elaborated or become traditional in the territory of a Member State to be the property of such State.

2. Signature of a Convention for the regulation of the conservation, promotion and diffusion of folk art, and establishment of an "International Register of Folkloristic Cultural Property" on the lines of the 1964 Recommendation.

3. Extension of the powers of the Intergovernmental Committee provided for by Article XI of the Geneva Convention to include the study of the problems which might arise in connection with the proposed protocol, such, for instance, as the research-based attribution of paternity in respect of forms of a cultural expression common to both or all to two or more States.

La Paz, April 1964

APPENDIX B

Ministry of Education and Culture,  
Bolivia

MEMORANDUM

Ref: Protection of Folk Arts

FOR PRESENTATION TO INTERNATIONAL BODIES  
COMPETENT IN THE MATTER OF NATIONS' CULTURAL HERITAGE

Explanatory Memorandum

1. Background

(same text as for previous memorandum.)