UNESCO-WIPO/FOLK/PKT/97/19
ORIGINAL: English
DATE: March 21, 1997

DEPARTMENT
OF INTELLECTUAL PROPERTY
GOVERNMENT OF THAILAND

UNITED NATIONS EDUCATIONAL,
SCIENTIFIC AND CULTURAL
ORGANIZATION

WORLD INTELLECTUAL
PROPERTY ORGANIZATION

UNESCO-WIPO WORLD FORUM ON THE PROTECTION OF FOLKLORE

organized by
the United Nations Educational, Scientific and Cultural Organization (UNESCO)

and
the World Intellectual Property Organization (WIPO)

in cooperation with
the Department of Intellectual Property,
Ministry of Commerce,
Government of Thailand

Phuket, Thailand, April 8 to 10, 1997

1967, 1982, 1984: ATTEMPTS TO PROVIDE INTERNATIONAL PROTECTION FOR FOLKLORE BY INTELLECTUAL PROPERTY RIGHTS

Document prepared by the International Bureau of WIPO

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I. ATTEMPTS TO PROTECT EXPRESSIONS OF FOLKLORE BY MEANS OF COPYRIGHT

Introduction

The need for intellectual property protection of expressions of folklore emerged in developing countries. Folklore is an important element of the cultural heritage of every nation. It is, however, of particular importance for developing countries, which recognize folklore as a means of self-expression and social identity. All the more so, since, in those countries, folklore is truly a living and still developing tradition, rather than just a memory of the past.

Improper exploitation of folklore was also possible in the past. However, the spectacular development of technology, the newer and newer ways of using both literary and artistic works and expressions of folklore (audiovisual productions, phonograms, their mass reproduction, broadcasting, cable distribution, and so on) have multiplied abuses. Folklore is commercialized without due respect for the cultural and economic interests of the communities in which it originates. And, in order to better adapt it to the needs of the market, it is often distorted or mutilated. At the same time, no share of the returns from its exploitation is conceded to the communities who have developed and maintained it.

National laws

Those developing countries which made the first attempts to regulate the use of folklore creations tried to provide protection in the framework of their copyright laws (Tunisia, 1967 and 1994; Bolivia, 1968 and 1992; Chile, 1970; Iran, 1970; Morocco, 1970; Algeria, 1973; Senegal, 1973; Kenya, 1975 and 1989; Mali, 1977; Burundi, 1978; Côte d'Ivoire, 1978; Sri Lanka, 1979; Guinea, 1980; Barbados, 1982; Cameroon, 1982; Colombia, 1982; Congo, 1982; Madagascar, 1982; Rwanda, 1983; Benin, 1984; Burkina Faso, 1984; Central African Republic, 1985; Ghana, 1985; Dominican Republic, 1986; Zaire, 1986; Indonesia, 1987; Nigeria, 1988 and 1992; Lesotho, 1989; Malawi, 1989; Angola, 1990, Togo, 1991; Niger, 1993; Panama, 1994). The 1990 Copyright Law of China indicates that it is the intention to protect expressions of folklore by copyright but Article 6 of the Law only provides that "[r]egulations for the protection of copyright in expressions of folklore shall be established by the State Council." The 1994 Copyright Ordinance of Viet Nam contains a similar provision: "Protection of copyright granted to folklore works shall be prescribed by the Government."

The majority of the above-mentioned national laws provide for the protection of what they call "works of folklore"; some other laws (the laws of Benin, Indonesia, Kenya, Mali, Morocco, Senegal, Tunisia and Zaire) refer simply to "folklore," and two of them (the laws of Chile and China) use the term that the International Bureau of WIPO consider the most appropriate one: "expressions of folklore."

Some national laws (those of Chile, Ghana, Indonesia, Madagascar, Mali and Tunisia) do not undertake giving a substantive definition; at most, they mention that what is involved is common national heritage. The other laws provide more or less detailed definitions. The

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Copyright Law of China contains no definition, but this seems to only follow from the fact that the regulation of the protection of expressions of folklore is left to another piece of legislation.

Only two national laws (the laws of Algeria and Morocco) provide definitions that, in substance, correspond to Article 15(4)(a) of the Berne Convention, quoted below, in the sense that they use the general notion of literary and artistic works, and only add one element to differentiate folklore creations from other works, namely that the authors are unknown, but there is reasonable ground to presume that they are citizens of the country concerned.

All the other national laws include into the definitions those more essential elements which differentiate "folklore" or "work of folklore" from literary and artistic works proper; namely, that it is traditional cultural heritage *passed on from generations to generations*; which means that–in contrast with the individual, personal nature of the creativity represented by literary and artistic works proper–it is the result of impersonal creativity of unknown members of the nation or communities thereof. The definitions in some of those laws (the laws of Burundi, Côte d'Ivoire, Guinea, Kenya, Rwanda and Senegal) refer to unknown authors as creators, some others (the laws of Barbados, Cameroon, Central African Republic and Sri Lanka) to communities, or groups of communities, while the Law of Congo to both unknown authors and to communities. The law of Zaire does not deal with the question of who are the creators of national folklore.

The definitions, in general, only cover traditional literary and artistic creations; however, the definitions in the laws of Benin and Rwanda are much broader and also extend to other aspects of folklore; for example to scientific and technological "folklore" (such as, acquired theoretical and practical knowledge in the fields of natural science, physics, mathematics and astronomy; the "know-how" of producing medicines, textiles, metallurgical and other products; agricultural techniques). The protection of such elements of folklore is obviously alien to the purposes and structure of copyright.

It follows from the fact that folklore is part of traditional heritage that it would not be appropriate to leave its protection to some individual "owners of rights." In principle, it could be a solution to entrust the communities concerned with exercising–through their representatives–the rights granted for the protection of the folklore developed by them. However, all the national laws providing for "copyright" protection of folklore rather authorize various national bodies to exercise such rights. In certain countries, those bodies are the competent ministries or similar national authorities, while in some other countries (in Algeria, Benin, Cameroon, Central African Republic, Congo, Côte d'Ivoire, Guinea, Morocco, Rwanda and Senegal), the national (state) bureaux for the protection of author's rights.

Some national laws go so far in the assimilation of folklore creations to literary and artistic works that they do not contain any specific provisions concerning the rights protected in respect of folklore creations; thus, the general provisions on the protection of works seem to be applicable (this seems to be the case in Barbados, Burundi, Cameroon, Chile, Ghana, Indonesia, Kenya, Madagascar, Rwanda, Sri Lanka and Zaire). The other national laws provide for a special regime, different from the regime of the protection of literary and artistic works. The latter laws make certain specific acts, if carried out for profit-making purposes,

dependent on the authorization to be given by a competent authority, either only the fixation and reproduction of folklore creations (in Algeria, Mali and Morocco), or, in addition to those acts, also the public performance of such creations (in Benin, Central African Republic, Congo, Côte d'Ivoire, Guinea and Senegal).

The national laws of some countries (Barbados, Burundi, Congo and Ghana) also provide for a kind of "right of importation." Under those laws, it is forbidden to import and distribute in the countries concerned any works of national folklore, or translations, adaptations and arrangements thereof, without the authorization of the competent authorities.

Certain national laws (those of Benin, Cameroon, Central African Republic, Chile, Congo, Ghana, Guinea, Morocco and Senegal) prescribe that, in cases where folklore creations are used for profit-making purposes, fees determined by the law of by the competent authority, respectively, must be paid, while other laws (those of Algeria, Mali, Rwanda and Tunisia) only provide that payment of fees *may* be required.

A few national laws also determined the purposes for which the fees collected are to be used; those laws, in general, provide that the fees must be used for cultural and welfare purposes of national authors. Under the laws of the Central African Republic, Guinea and Senegal, a part of the fees is to be paid to those who have collected the "works of folklore" concerned, and only the rest of the fees is to be used for the said purposes of national authors.

It follows from the very nature of folklore–namely, from the fact that it is the result of creative contributions of usually unknown members of a number of subsequent generations–that its protection could not be reasonably limited in time. In the case of the majority of laws providing for the protection of folklore creations, it can be deduced from the context of the various provisions that such protection is perpetual, but the laws of some countries (Congo, Ghana and Sri Lanka) also state this explicitly.

The sanctions of infringements of the rights in "works of folklore," in many countries, are the same as in the case of infringements of authors' rights. The laws of some countries, however, provide for special sanctions; they include fines and seizures, and, in certain cases, also imprisonment.

Article 15(4) of the Berne Convention

The 1967 Stockholm Diplomatic Conference for revision of the Berne Convention made an attempt to introduce copyright protection for folklore also at the international level. As a result, Article 15(4) of the Stockholm (1967) and Paris (1971) Acts of the Berne Convention contain the following provision: "(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 [of WIPO] 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." This article of the Berne Convention, according to the intentions of

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the revision conference, implies the possibility of granting protection for expressions of folklore.

Difficulties in applying copyright to the protection of folklore

It seems that copyright law is not the right means for protecting expressions of folklore. This is because, whereas an expression of folklore is the result of an impersonal, continuous and slow process of creative activity exercised in a given community by consecutive imitation, works protected by copyright must, traditionally, bear a mark of individual originality. Traditional creations of a community, such as the so-called folk tales, folk songs, folk music, folk dances, folk designs or patterns, hardly fit into the notion of literary and artistic works. Copyright is author-centric and, in the case of folklore, the author–or at least in the way in which the notion of "author" is conceived in the field of copyright–is practically missing.

Because the existing system of copyright protection was not adequate for the protection of folklore, attention turned to the possibilities of a *sui generis* solution.

II. WIPO/UNESCO MODEL PROVISIONS FOR NATIONAL LAWS ON *SUI GENERIS* PROTECTION OF EXPRESSIONS OF FOLKLORE AGAINST ILLICIT EXPLOITATION AND OTHER PREJUDICIAL ACTIONS

At the meeting of WIPO's Governing Bodies in 1978, it was felt that, despite concern among developing countries as to the need to protect folklore, few concrete steps were being taken to formulate legal standards. Following that meeting, the International Bureau of WIPO prepared a first draft of *sui generis* model provisions for intellectual-property-type protection of folklore against certain unauthorized uses and against distortion.

At their sessions in February 1979, the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention noted that the International Bureau of WIPO had prepared the said draft provisions and approved the proposal made by WIPO that special efforts should be made to find solutions to the intellectual property protection aspects of folklore, notwithstanding the global interdisciplinary study of the questions of identification, material conservation, preservation and reactivation of folklore, which had been undertaken by Unesco since 1973.

In accordance with the decisions of their respective Governing Bodies, WIPO and Unesco convened a Working Group in Geneva in 1980, then a second one in Paris in 1981, to study the draft Model Provisions intended for national legislation prepared by WIPO, as well as possible international measures for the protection of works of folklore. The outcome of those meetings was submitted to a Committee of Governmental Experts, convened by WIPO and Unesco at WIPO headquarters in Geneva in 1982, which adopted what are called "Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions" (hereinafter referred to as "the Model Provisions").

The Model Provisions were submitted to the joint meeting of the Executive Committee of the Berne Convention and the Intergovernmental Copyright Committee of the Universal

Copyright Convention in Geneva in December 1983. The Committees welcomed the development of the Model Provisions as a first step in establishing a *sui generis* system of intellectual-property-type protection for expressions of folklore; they found them a proper guidance for national legislation.

Basic principles taken into account for the elaboration of the Model Provisions

The Committee of Governmental Experts which worked out the Model Provisions did not lose sight of the necessity of maintaining a proper balance between protection against abuses of expressions of folklore, on the one hand, and of the freedom and encouragement of further development and dissemination of folklore, on the other. The Committee took into account that expressions of folklore formed a living body of human culture which should not be stifled by too rigid protection. It also considered that any protection system should be practicable and effective, rather than a system of imaginative requirements unworkable in reality.

It was emphasized at the meeting of the Committee of Governmental Experts that the Model Provisions did not necessarily have to form a separate law; they might constitute, for example, a chapter of an intellectual property code or of a law dealing with all aspects of the preservation and promotion of national folklore. The Model Provisions were designed with the intention of leaving enough room for national laws to adopt a system of protection best corresponding to the conditions existing in the countries concerned.

Expressions of folklore to be protected

The Model Provisions do not offer any definition of folklore. For the purposes of the Model Provisions, Section 2 defines the term "expressions of folklore" in line with the findings of the Committee of Governmental Experts on the Safeguarding of Folklore, convened by Unesco in Paris in February 1982, and provides that "expressions of folklore" are understood as productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community.

This definition also embraces the results of individual development of the traditional artistic heritage, since the generally applied criterion of "impersonal" creativity does not always correspond to reality in the evolution of folklore. The personality of the artist is often an important factor in folklore expressions, and individual contributions to the development and maintenance of such expressions may represent a creative source of enrichment of inherited folklore if they are recognized and adopted by the community as expressions corresponding to its traditional artistic expectations.

The Model Provisions use the words "expressions" and "productions" rather than "works" to underline the fact that the provisions are *sui generis*, rather than part of copyright. It is another matter that expressions of folklore may, and often do, have the same artistic forms as "works."

Only "artistic" heritage is covered by the Model Provisions. This means that, among other things, traditional beliefs, scientific views (e.g. traditional cosmogony) or merely

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practical traditions as such, separated form possible traditional artistic forms of their expression, do not fall within the scope of the proposed definition of "expressions of folklore." On the other hand, "artistic" heritage is understood in the widest sense of the term and covers any traditional heritage appealing to our aesthetic sense. Verbal expressions, musical expressions, expressions by action and tangible expressions may all consist of characteristic elements of the traditional artistic heritage and qualify as protected expressions of folklore.

The Model Provisions also offer an illustrative enumeration of the most typical kinds of expressions of folklore. They are subdivided into four groups according to the forms of the "expressions," namely expressions by words ("verbal"), expressions by musical sounds ("musical"), expressions "by action" (of the human body) and expressions incorporated in a material object ("tangible expressions"). The first three kinds of expressions need not be "reduced to material form," that is to say, the words need not be written down, the music need not exist in musical notation and the dance need not exist in choreographic notation. On the other hand, tangible expressions by definition are incorporated in a permanent material, such as stone, wood, textile, gold, etc. The Model Provisions also give examples of each of the four forms of expressions. They are, in the first case, "folk tales, folk poetry and riddles, " in the second case, "folk songs and instrumental music," in the third case, "folk dances, plays and artistic forms of rituals," and in the fourth case, "drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes; musical instruments; architectural forms."

The words "architectural forms" appear in the Model Provisions in square brackets to show the hesitation which accompanied their inclusion, and to leave it up to each country to decide whether or not to include such forms in the realm of protected expressions of folklore.

Acts against which expressions of folklore should be protected

There are two main categories of acts against which, under the Model Provisions, expressions of folklore are protected; namely, "illicit exploitation" and "other prejudicial actions" (Section 1).

"*Illicit exploitation*" of an expression of folklore is understood in the Model Provisions, (Section 3) as any utilization made both with gainful intent and outside the traditional or customary context of folklore, without authorization by a competent authority or the community concerned. This means that an utilization–even with gainful intent–within the traditional or customary context should not be subject to authorization. On the other hand, an utilization, even by members of the community where the expression has been developed and maintained, requires authorization if it is made outside such a context and with gainful intent.

An expression of folklore is used in its "traditional context" if it remains in its proper artistic framework based on continuous usage of the community. For instance, to use a ritual dance in its "traditional context" means to perform it in the actual framework of the respective rite. On the other hand, the term "customary context" refers rather to the utilization of expressions of folklore in accordance with the practices of everyday life of the community, such as selling copies of tangible expressions of folklore by local craftsmen. A customary context may develop and change more rapidly than a traditional one.

Section 1 of the Model Provisions specifies the acts of utilization which require authorization where the circumstances described above exist. It distinguishes between cases where copies of expressions are involved and cases where copies of expressions are not necessarily involved. In the first category of cases, the acts requiring authorization are publication, reproduction and distribution; in the second category of cases, the acts requiring authorization are public recitation, public performance, transmission by wireless means or by wire and "any other form of communication to the public."

Indigenous communities should not be prevented from using their traditional cultural heritage in traditional and customary ways and in developing it by continuous imitation. Keeping alive traditional popular art is closely linked with the reproduction, recitation or performance of traditional expressions in the originating community. An unrestricted requirement for authorization to adapt, arrange, reproduce, recitate or perform such creations could place a barrier in the way of the natural evolution of folklore and could not be reasonable enforced in communities in which folklore is a part of everyday life. Thus, the Model Provisions allow any member of a community of the country to freely reproduce or perform expressions of folklore of his own community in their traditional or customary context, irrespective of whether he does it with or without gainful intent.

The Model Provisions do not hinder the use of expressions of folklore without gainful intent for legitimate purposes outside their traditional or customary context. Thus, for instance, the making of copies for the purpose of conservation, research of for archives is not hampered by the Model Provisions.

Section 4 of the Model Provisions determines four special cases regarding the acts restricted under Section 3. In those cases, there is no need to obtain authorization, even if the use of an expression of folklore is made against payment and outside its traditional or customary context. The first of these cases is used for educational purposes. The second case is used "by way of illustration" in an original work, provided that such use is compatible with fair practice. The third case is where an expression of folklore is "borrowed" for creating an original work by an author. This important exception serves the purpose of allowing free development of individual creativity inspired by folklore. The Model Provisions do not want to hinder in any way the creation of original works based on expressions of folklore. The fourth case in which no authorization is required is that of "incidental utilization." In order to elucidate the meaning of "incidental utilization," paragraph 2 mentions (not in an exhaustive manner) the most typical cases considered as incidental utilizations: utilization in connection with reporting on current events and utilization of images where the expression of folklore is an object permanently located in a public place.

The Committee of Governmental Experts was of the opinion that a general reference to copyright to the effect that, in all cases where copyright law allows free use of works, the use of expressions of folklore should also be free, would not be of much help since many cases of free use in respect of works protected by copyright are irrelevant to the proposed *sui generis* protection of expressions of folklore (for example, reproduction in the press or communication to the public of a political speech or a speech delivered during legal proceedings; or reproduction for personal or private use, an act, which is not covered by the

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notion of the utilization of expressions of folklore subject to authorization, and needs no exception from the rule laid down in Section 3 of the Model Provisions).

"Other prejudicial actions" detrimental to interests related to the use of expressions of folklore are identified by the Model Provisions, as four cases of offenses subject to penal sanctions (Section 6).

Firstly, the Model Provisions provide for the protection of the "appellation of origin" of expressions of folklore. Section 5 requires that, in all printed publications, and in connection with any communication to the public, of any *identifiable* expression of folklore, its source be indicated in an appropriate manner by mentioning the community and/or geographic place from where the expression utilized has been derived. Under Section 6, non-compliance with the requirement of acknowledgment of the source is a punishable offense.

Secondly, any unauthorized utilization of an expression of folklore where authorization is required constitutes an offense. It is understood that such an offense may also be committed by using expressions of folklore beyond the limits, or contrary to the conditions of an authorization obtained.

Thirdly, misleading the public by creating the impression that what is involved is an expression of folklore derived from a given community when, in fact, such is not the case is also punishable. This is essentially a form of "passing off."

Fourthly, it is an offense if, in the case of public uses, expressions of folklore are distorted in any direct or indirect manner "prejudicial to the cultural interests of the community concerned." The term "distorting" covers any act of distortion or mutilation or other derogatory action in relation to the expression of folklore.

All four acts mentioned above only qualify as offenses if they are committed willfully. However, as regards non-compliance with the requirement of acknowledgment of source and the need to obtain authorization to use an expression of folklore, the Model Provisions also refer (in square brackets) to the possibility of punishment of acts committed negligently. This takes account of the nature of the offenses concerned and the difficulties involved in proving willfulness in cases of omission.

Authorization of utilizations of expressions of folklore

When the Model Provisions determine the *entity entitled to authorize the utilization* of expressions of folklore, they alternatively refer to "competent authority" and "community concerned," avoiding the term "owner." They do not deal with the question of the ownership of expressions of folklore since this may be regulated in different ways from one country to another. In some countries, expressions of folklore may be regarded as the property of the nation, while in other countries, a sense of ownership of the traditional artistic heritage may have developed in the communities concerned. Countries where aboriginal or other traditional communities are recognized as owners fully entitled to dispose of their folklore and where such communities are sufficiently organized to administer the utilization of the expressions of their folklore, authorization may be granted by the community itself. In the latter case, a community may grant permission to prospective users in a manner similar to

authorizations granted by authors, that is, as a rule, at its own full discretion. In other countries, where the traditional artistic heritage of a community is considered a part of the cultural heritage of the nation, or where the communities concerned are not prepared to adequately administer the use of their expressions of folklore, "competent authorities" may be designated to give the necessary authorizations in form of decisions under public law.

Section 9 of the Model Provisions provides for the designation of a competent authority, where that alternative is preferred by the legislator. The same Section also provides, in a second paragraph in square brackets, for designation of a "supervisory authority," if this should become necessary owing to the adoption of certain subsequent alternative provisions as regards activities to be carried out by such an authority (see paragraph 48, below). "Authority" is to be understood as any person or body entitled to carry out functions specified in the Model Provisions. It is conceivable that more than one competent or supervisory authority may be designated, corresponding to different kinds of expressions of folklore or utilizations thereof. Authorities may be already existing institutions or newly established ones.

The tasks of the competent authority (provided such an authority has been designated) are to grant authorizations for certain kinds of utilizations of expressions of folklore (Section 3), to receive applications for authorization of such utilizations, to decide on such applications and, where authorization is granted, to fix and collect a fee–if required by law– (Section 10, paragraphs (1) and (2)). The Model Provisions also provide that any decision by the competent authority is appealable (Section 10, paragraph (3), and Section 11, paragraph (1)).

The Model Provisions offer the possibility (in square brackets, that is, as an option) of providing in the law that a supervisory authority shall establish tariffs payable for authorizations of utilizations or shall approve such tariffs (without indication in the Model Provisions as to who will, in such a case, propose the tariffs, although it was understood by the experts adopting the Model Provisions that the competent authority would propose the tariffs) (Section 10), and that the supervisory authority's decision may be appealed to a court (Section 11, paragraph (1)).

Where the community as such is entitled to permit or prevent utilizations of its expressions of folklore subject to authorization, the community would act in its capacity of owner of the expressions concerned and would be free to decide how to proceed. There would be no supervisory authority to control how the community exercises its relevant rights. However, the Committee of Governmental Experts was of the opinion that, if it was not the community as such, but a designated representative body thereof, which was entitled by legislation to give the necessary authorization, such a body would qualify as a competent authority, subject to the relevant procedural rules laid down in the Model Provisions.

As regards the *process of authorization,* it follows from Section 10, paragraph (1), of the Model Provisions that an authorization must be preceded by an application submitted to the competent authority. The Model Provisions allow oral applications too, by placing the words "in writing" within square brackets. They also imply that the authorizations to be applied for may be "individual" or "blanket" authorizations, the first meaning an *ad hoc* authorization,

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and the second intended for customary users such as cultural institutions, theaters, ballet groups and broadcasting organizations.

As far as the contents of the applications are concerned, it is advisable to require the following data, indispensable to enable the competent authority to take a decision: (i) information concerning the prospective user of the expression of folklore, in particular his name, professional activity and address; (ii) information concerning the expression to be used, properly identifying it by mentioning also its source; (iii) information as regards the intended utilization, which should comprise, in the case of reproduction, the proposed number and the territory of distribution of the copies; and, in the case of recitals, performances and communications to the public, the nature and number of such acts, as well as the territory to be covered by the authorization. It will be easier to comply with such requirements if applications are required to be submitted in writing.

The Model Provisions (Section 10, paragraph (2)) allow, but do not make mandatory, collecting *fees for authorizations*. Presumably, where a fee is fixed, the authorization will be effective only when the fee is paid. Authorizations may be granted free of the obligation to pay a fee. Even in such cases, the system of authorization may be justified since it may prevent utilizations that would distort expressions of folklore.

The Model Provisions also determine the purpose for which the collected fees must be used. They offer a choice between promoting or safeguarding national folklore or promoting national culture, in general. Where there is no competent authority and the community concerned authorizes the use of its expressions of folklore and collects fees, it seems obvious that the purpose of the use of the collected fees should also be decided upon by the community.

Section 10, paragraph (3), provides that any decision of the competent authority is appealable. It specifies that the appeal may be made by the applicant (typically, where authorization is denied) and by "the representative of the interested community" (typically, where authorization is granted). This paragraph is in square brackets since it does not apply where the authorization is granted directly by the community concerned.

Sanctions

Sanctions should be provided for each type of offense determined by the Model Provisions, in accordance with the penal law of each country concerned. The two main types of possible punishments are fines and imprisonment. Which of these sanctions should apply, what other kinds of punishment could be provided for, and whether the sanctions should be applicable separately or in conjunction, depends on the nature of the offense, the importance of the interests to be protected and the regulations adopted in a given country concerning similar offenses. Consequently, the Model Provisions do not suggest any specific punishment; they are confined to the requirement of penal remedy, leaving it up to national legislation to specify its form and measure.

As regards seizure and other similar measures, the Model Provisions are somewhat more explicit. Section 7 providing for such measures applies, in the case of any violation of the law, to both objects and receipts. "Object" is understood as meaning "any object which

was made in violation of this [law]," while the receipts are "receipts of the person violating it [that is, violating the law]"; typical examples are the receipts of the seller of an infringing object and the receipts of the organizer of an infringing public performance.

It should be noted that seizure and other similar measures are not necessarily considered under the Model Provisions as confined to sanctions under penal law. They may be provided as well in other branches of the law, such as the law on civil procedure. Seizure should take place in accordance with the legislation of each country.

III. ATTEMPTS TO ESTABLISH AN INTERNATIONAL SYSTEM OF *SUI GENERIS* PROTECTION OF EXPRESSIONS OF FOLKLORE

The Model Provisions were adopted with the intention of paving the way for regional and international protection, since many countries consider it of paramount importance to protect expressions of folklore also beyond the frontiers of the countries in which they originate. Of course, national legislation on the protection of expressions of folklore could also provide an appropriate basis for protecting expressions of folklore of communities belonging to foreign countries. By extension of their applicability, national provisions might contribute for promoting regional or international protection.

In order to further such a process, the Model Provisions provide for their application as regards expressions of folklore of foreign origin either subject to reciprocity or on the basis of international treaties (Section 14). Reciprocity between countries already protecting their national folklore may be established and declared more easily than mutual protection by means of international treaties. However, a number of participants stressed at the meeting of the Committee of Governmental Experts which adopted the Model Provisions that international measures would be indispensable for extending the protection of expressions of folklore of a given country beyond the borders of the country concerned.

WIPO and Unesco followed such suggestions when they jointly convened a Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property which met in Paris from December 10 to 14, 1984. The Group of Experts was asked to consider the need for a specific international regulation on the international protection of expressions of folklore by intellectual property and the contents of an appropriate draft.

The participants had at their disposal a draft treaty which had been based on the Model Provisions and had outlined a similar protection system at the international level, applying the principle of "national treatment."

The discussions at the meeting of the Group of Experts reflected a general recognition of the need for international protection of expressions of folklore, in particular, with regard to the rapidly increasing and uncontrolled use of such expressions by means of modern technology, beyond the limits of the country of the communities in which they originate.

However, the great majority of the participants considered it premature to establish an international treaty since there was no sufficient experience available as regards the protection

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of expressions of folklore at the national level, in particular, concerning the implementation of the Model Provisions.

Two main problems were identified by the Group of Experts: the lack of appropriate sources for the identification of the expressions of folklore to be protected and the lack of workable mechanisms for settling the questions of expressions of folklore that can be found not only in one country, but in several countries of a region.

It is quite obvious that no country could enter into an obligation under an international treaty for the protection of foreign expressions of folklore if it did not know what expressions of folklore of the other countries party to such a treaty should really be protected. Unfortunately, it is just in many developing countries that inventories or other appropriate sources for the identification of national folklore are not available.

The problem of "regional folklore" raises even more complex questions. To the competent authority of which country would a user have to turn if he wanted to utilize a certain expression of folklore being part of the national heritage of several countries? What would the situation be if only one of those countries which share certain elements of folklore acceded to the treaty and the others did not? How could the questions of common expressions of folklore be settled among the countries of the regions concerned? Appropriate answers should be given to those and similar questions at the regional level before the idea of an international treaty for the protection of expressions of folklore might emerge in a more or less realistic manner.

The Executive Committee of the Berne Convention and the Intergovernmental Committee of the Universal Copyright Convention, at their joint sessions in Paris in June 1985, considered the report of the Group of Experts and, in general, agreed with its findings. The overwhelming majority of the participants was of the opinion that a treaty for the protection of expressions of folklore would be premature. If the elaboration of an international instrument was to be realistic at all, it could not be more than a sort of recommendation for the time being.

IV. THE USE OF THE ROME, PHONOGRAMS AND SATELLITES CONVENTIONS FOR AN INDIRECT PROTECTION OF CERTAIN EXPRESSIONS OF FOLKLORE

As discussed above, there are various categories of expressions of folklore as possible subjects of a copyright-type–but *sui generis*–protection. Some of them and particularly the productions of "folk art" (drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, textiles, carpets, etc.) obviously cannot enjoy indirect protection by means of "neighboring rights." However, in the case of many other important categories of expressions of folklore, "neighboring rights" may be used as a fairly efficient means of indirect protection. Folk tales, folk poetry, folk songs, instrumental folk music, folk dances, folk plays and similar expressions actually live in the form of regular performances. Thus, if the protection of performers is extended to the performers of such expressions of folklore–which is the case in many countries–the performances of such expressions of folklore also enjoy protection. The same can be said about the protection of the rights of producers of

phonograms and broadcasting organizations in respect of their phonograms and broadcasts, respectively, embodying such performances.

Such a protection is indirect because what is protected is not the expressions of folklore proper. "Neighboring rights" do not protect expressions of folklore against unauthorized performance, fixation in phonograms, reproduction, broadcasting or other communication to the public. Therefore, the Rome, Phonograms and Satellites Conventions do not offer protection against national folklore being performed, recorded, broadcast, etc., by foreigners. However, folklore expressions are normally performed by the performers of the community of the country, where those expressions have been developed. If the performances of such performers and the phonograms and broadcasts embodying their performances enjoy appropriate protection, this provides a fairly efficient means for an indirect protection of folklore, that is, protection in the form in which they are actually made available to the public.

The Rome, Phonograms and Satellite Conventions, in general, offer an appropriate basis for such an indirect protection at the international level. The notion of "phonograms" under the Rome and Phonograms Conventions as discussed above, is sufficiently broad and clearly covers phonograms embodying performances of expressions of folklore. The same can be said about the notions of "broadcasting" and "broadcast" under the Rome Convention as they extend to the transmission of any kinds of sounds, or of images and sounds, including, of course, sounds, or of images and sounds, of performances of expressions of folklore. Also the notion of "programme-carrying signals" under the Satellites Convention is sufficiently neutral and general; it includes any kinds of programs.

Interestingly enough–and unfortunately–there is, however, a slight problem just in respect of the key notion of "performers' (and the notion of "performances" following indirectly from the notion of "performers") as determined in the Rome Convention. As discussed above, under Article 3(a) of the Rome Convention, "'performers' means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise *perform literary or artistic works*" (emphasis added). As discussed above, expressions of folklore do not correspond to the concept of literary and artistic works proper. Therefore, the somewhat casuistic and rigid definition of "performers" in the Rome Convention does not seem to extend to performers who perform expressions of folklore.

The not quite fortunate definition of "performers" in the Rome Convention does not mean, however, that "neighboring rights" could not be used for the international protection of performers of expressions of folklore. The definition only determines the minimum scope of protection. If national laws define–as many of them do–"performers" in a more general and flexible manner to also clearly include performers of expressions of folklore, then, on the basis of the principles of national treatment, also foreign performers enjoy protection. The fact that the scope of application of the Rome Convention and, thus, also the obligation to grant national treatment, extend to the rights of all performers covered by such more general and flexible definitions is confirmed by Article 9 of the Conventions which provides that "[a]ny Contracting State may, by its domestic laws and regulations, extend the protection provided for in this Convention to artists who do not perform literary or artistic works."

There is growing agreement at the international level that the protection of performers should extend to the performers of expressions of folklore. This agreement was reflected in

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paragraphs 17 and 28(a) of the memorandum prepared by the International Bureau of WIPO for the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms (WIPO document INR/CE/I/2). The memorandum proposed that the definition should explicitly include the performers of expressions of folklore. When the Chairman of the Committee prepared the basic proposal concerning the "New Instrument," he accepted this idea and included the proposed extended definition into the draft treaty (see Article 2(a) in WIPO document CRNR/DC/5). Such definition (as Article 2(a)) is included in the WIPO Performances and Phonograms Treaty adopted in Geneva on December 20, 1996 (see WIPO document CRNR/DC/95).

V. REVISITING THE ISSUE OF THE INTERNATIONAL PROTECTION OF FOLKLORE: THE FORTHCOMING UNESCO/WIPO WORLD FORUM

The Committee of Experts on a Possible Protocol to the Berne Convention and the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, at their sixth and fifth sessions, respectively, jointly held in Geneva from February 1 to 9, 1996, adopted the following recommendation:

"The Committees of Experts,

"*considering* that the matters concerning expressions of folklore were, according to the decisions of the Governing Bodies of WIPO, subject to deliberations in the regional consultation meetings dealing with matters on the Possible Protocol to the Berne Convention and the Possible Instrument for the Protection of the Rights of the Performers and Producers of Phonograms, organized by the WIPO prior to the present sessions of the two Committees, and taking into consideration the proposals which were resulting from these regional consultation meetings,

"*considering* the comments and suggestions made on these issues in the present sessions of the two Committees,

"unanimously agreed on the following recommendation on the matters concerning the expression of folklore:

"Recommendation

> "The Committees recommend to the Governing Bodies of WIPO that provision should be made for the organization of an international forum in order to explore issues concerning the preservation and protection of expressions of folklore, intellectual property aspects of folklore, and the harmonization of the different regional interests." (See document BCP/CE/VI/16-INR/CE/V/14, paragraph 269.)

After the adoption of the recommendation, the Delegation of Nigeria expressed the view that, due to the subject matter of the proposed forum, the involvement of Unesco would be desirable (see the same document, paragraph 270).

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The Director General of WIPO stated that WIPO would be glad to offer to Unesco to cooperate with it in that matter, and the representative of Unesco attending the said joint sessions of the Committees approved the idea of cooperation between WIPO and Unesco in that field (see the same document, paragraphs 271 and 274).

The Director General of the Department of Intellectual Property, Ministry of Commerce of Thailand, still before the adoption of the above-quoted recommendation, in a letter addressed to the Director General of WIPO and dated January 5, 1996, indicated the readiness of the Government of Thailand to host a WIPO World Forum on the protection of folklore. This was confirmed after the adoption of the above-quoted recommendation by a letter addressed to the Director General of WIPO and dated June 4, 1996; the letter also contained specific alternative proposals concerning the venue and dates.

In June 1996, the representatives of WIPO and Unesco agreed on the joint organization of the "Unesco/WIPO World Forum on the Protection of Folklore" to deal with the issues mentioned in the above-quoted recommendation. On the basis of a proposal of the Government of Thailand, it was agreed that the World Forum would be held in Phuket from April 8 to 10, 1997.

The present World Forum may serve as a basis for a new reconsideration of the legal protection of folklore at the international level.

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