

UNESCO/WIPO/WG.1/FOLK/4
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WORKING GROUP ON THE INTELLECTUAL PROPERTY ASPECTS
OF FOLKLORE PROTECTION

(Geneva, January 7 to 9, 1980)

DRAFT REPORT

prepared by the Secretariat

Introduction

1. In accordance with the deliberations of the Executive Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union) and the Intergovernmental Committee of the Universal Copyright Convention at their sessions held from February 5 to 9, 1979, and to the decisions of the respective Governing Bodies of Unesco and WIPO, the Secretariat of Unesco and the International Bureau of WIPO convened the Working Group to study a draft of model provisions intended for national legislation as well as international measures for the protection of works of folklore. The Working Group was attended by experts from 16 countries invited in a personal capacity by the Directors General of Unesco and WIPO. The meeting was also attended by representatives of two intergovernmental and seven international non-governmental organizations as observers. The list of participants will be annexed to the final report.
2. The documentation available to the Working Group consisted of documents prepared by the International Bureau of WIPO containing Model Provisions for National Laws on the Protection of Creations of Folklore and the Commentary on these model provisions (documents UNESCO/WIPO/WG.1/FOLK 2 and 2 Add.) as well as of a document prepared by the Secretariat of Unesco, with the assistance of Professor Jean Carbonnier, containing a Study on the International Regulation of Intellectual Property Aspects of Folklore Protection (document UNESCO/WIPO/WG.1/FOLK 3).

Opening of the Meeting

3. The meeting was opened by Dr. Arpad Bogisch, Director General of WIPO and, on behalf of the Director-General of Unesco, by Miss Marie-Claude Dock, Director of the Copyright Division, who welcomed the participants.

4. The representative of the Director-General of Unesco mentioned that in accordance with the decisions of the Governing Bodies of Unesco and of the Intergovernmental Committee of the Universal Copyright Convention, a study had been undertaken on an interdisciplinary basis within the framework of a global approach, and that this study was in an advance stage of completion enabling Unesco also to participate along with WIPO in efforts aiming at establishing of legal protection of folklore.

5. In a brief introductory address, the Director General of WIPO described the purpose of the meeting, in so far as the national aspects were concerned, as aiming at carrying further the thoughts as to how to protect creations of folklore. He emphasized the desirability of protection of the creations of folklore against unauthorized and unwarranted exploitation and distortion. This protection in order to be meaningful, had to be established in a legally sanctioned form. For that purpose, the International Bureau of WIPO had prepared tentative provisions for consideration by the Working Group. **It was explained that in these provisions the difficulty in finding a definition valid for all purposes was sought to be surmounted by suggesting a definition serving specifically the purpose of legal protection.**

6. The representative of the Director General of Unesco explained the position in regard to the need for protection of folklore at the international level and mentioned the present status of the work done by Unesco in this field.

Election of Officers

7. The Working Group unanimously elected Dr. J. O. Alende (Argentina) as Chairman; Mr. P. Banki (Australia) and Dr. E. P. Gavrilov (Soviet Union) as Vice Chairmen.

Model Provisions for National Laws on the Protection of Creations of Folklore

8. Discussion was based on documents UNESCO/WIPO/WG.1/FOLK 2 and 2 Add.

9. In the course of a general discussion it was agreed that (i) adequate legal protection of folklore was desirable; (ii) such legal protection could be promoted at the national level by model provisions for legislation; (iii) these model provisions should be so elaborated as to be applicable both in countries where no relevant legislation was in force and in countries where existing legislation could be further developed; (iv) the said model provisions should also allow for protection by means of copyright and neighboring rights where such form of protection could apply and (v) the model provisions for national laws should pave the way for sub-regional, regional and international protection of creations of folklore.

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10. The general debate was followed by detailed sectionwise discussion of the said model provisions during which one or more experts suggested the following in connection with the respective sections.

ad Section 1(1): (i) instead of speaking of "creations" of folklore, one should speak about "works" or "manifestations" or "expressions"; (ii) the words "through forms which have been evolved from generation to generation" be omitted; (iii) one should omit the word "indigenous" or that one should not speak of "indigenous" communities of the "nation" but rather of the "ethnic" communities in a "country" (although one expert expressed the view that the use of the word "ethnic" was undesirable for political reasons and that "national communities" would be preferable); (iv) whether something was to be regarded as folklore or not should be decided upon the basis of what the interested community thinks about the question: in other words, the consensus of that community would be the determinative factor; (v) the requirement of "authenticity" be mentioned; (vi) any definition of folklore be omitted or at least be made clear that the (more restricted) definition of the notion of folklore is only for the purposes of legal protection and does not affect that notion's (larger) scope in common parlance or for the purposes of social or cultural disciplines;

ad Section 1(2): that (i) the examples given should include riddles, rituals and musical instruments; (ii) in the Spanish version, the word "songs" was not translated and the word "plays" was improperly translated;

ad Section 2: that the Section should appear after the substantive provision or that the provisions on appeal should be incorporated in Section 5;

ad Section 2(1): that the reference to Author's Societies and National Museums be omitted or that these references be placed between square brackets;

ad Section 2(2): that the reference to a Ministry should not be used, that the need for the provision on appeals be re-examined (as possibly superfluous), and that the need for a provision on appeal to the courts be considered;

ad Section 2(3): that the provision be omitted as superfluous;

ad Section 2(4): that the provision be omitted as superfluous;

ad Section 3: (i) that identifying elements of creations of folklore or maintaining their inventory was largely a matter of preservation of folklore; (ii) that the requirement of inventories in connection with the special purpose of legal protection could result in an avoidable overlapping and unreasonable burden on the competent authorities and (iii) that it appears unrealistic to require special kinds of inventories of creations of folklore separately from the general cataloguing of the manifold body of folklore which already existed in certain countries. Consequently, as suggested by the Secretariats, Section 3 should be

deleted from the text of the draft model provisions; instead it should be mentioned in the Commentary on the Model Provisions that whenever the competent authority was in doubt concerning the identification of creation of folklore, it should consult all available sources, including existing catalogues, other records, expert opinion, witnesses, including elders of a community;

ad Section 4: (i) that utilization of the creations of folklore with gainful intent should be exempt from authorization if made by members of the community from which the creation originated; also in other cases than mentioned as exceptions in Section 6 (ii), that the terminology used in this section should be in harmony with that in Section 1;

ad Section 5: (i) that at the beginning of this section provision might also be made for a direct obligation in respect of application for authorization; (ii) that the last sentence of Section 2(2) concerning appeals against decisions of the competent authorities regarding creations of folklore should be transferred as a subsection (between subsections 2 and 3) of Section 5;

ad Section 5(1): that a written application for authorization may not be made obligatory; on the other hand the contents of such an application might be prescribed in greater detail;

ad Section 5(3): that this provision should be made more flexible by providing for different options in respect of utilization of the collected fees, be it for promotion of folklore, for the support of national authors or for other cultural purposes; (ii) that the fees to be collected by the competent authority under this subsection may not be according to a tariff to be established necessarily by the supervisory Ministry and that this should be optional as between the competent authority and the supervisory Ministry; (iii) that a possibility should also be allowed for a contractual solution of the amount of the fees; (iv) that the term "fees" should, at least in French, be replaced by the term "redevances";

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...*It was decided that in respect of the Model Provisions for National Laws on the Protection of Creations of Folklore, the Secretariats would prepare a revised draft and commentary thereon, taking into consideration all the interventions, whether or not reflected in this Report, and that such a draft with its Commentary shall be presented for further consideration at a subsequent meeting.

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ad Section 6(1): the Secretariats announced that taking into consideration several statements made by experts in the course of preceding discussions, this paragraph should read as follows: "Section 4 shall not apply where any member of the community performs or reproduces creations of folklore of his own community." During the deliberations on this point, it was suggested that (i) uses of creations of folklore permitted without authorization should also be subject to payment; (ii) such payment, if required, should be provided for in a flexible manner allowing adaptation of the respective provision to existing national legislation; (iii) as regards exception from Section 4, difference should be made between exploitation of folklore by means of modern technology, and its utilization in the traditional ways; (iv) the exception should become the rule and cases subject to authorization the exceptions; (v) some control should be provided for also over free utilization of creations of folklore;

ad Section 6(2): that (i) the expression "incidental use" is too vague for sufficiently determining the scope of free use; (ii) some types of free use established by copyright legislation should also be enumerated; (iii) reference should be made to cases of free use as established in the copyright law; (iv) the interpretation of the term "incidental use" should be left to competent authorities; (v) the commentary on the Model Provisions should refer in detail to cases to which this exception applies;

ad Section 7: the Secretariats proposed to drop this provision since it was not legally binding due to the lack of appropriate sanctions; instead the Commentary would suggest methods recommended for indicating of the origin of the creation utilized;

ad Section 8: that the title of the section should be revised to cover all the contents of this section; that the last sentence relating to recidivism should be deleted from each of the subsections; (iii) that the words after the words "punishable by....." in each of the subsections should be deleted;

ad Section 8(1): that this provision be redrafted to make it clear that it is limited to cases where there is deception;

ad Section 9: that it should be amalgamated with Section 8;

ad Section 10: that (i) it should be more directly stated that "this Law shall in no way limit or prejudice" protection under another title; (ii) reference should also be made to protection offered by legislation in the field of industrial property (designs, marks, etc.).

.....Suggestions were also made to add some further provisions to the existing sections, setting out that (i) the protection of creations of folklore is not limited in time; (ii) no provisions of the law should have the effect of hindering the normal use of creations of folklore.

Addenda [to be inserted in the proper places]:

.....that the draft should clarify whether the law would apply only to folklore originating in the country or also to foreign folklore;
that the meaning of the word "imitation" in Section 4(1) be clarified;
that penal sanctions were abhorrent.

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.....With reference to the general discussion on the model provisions concerning consideration of subregional and regional requirements, the expert from Bolivia suggested that a Latin American pilot meeting to be held in La Paz to consider the best ways of providing for the protection of folklore on a regional, rather than purely national, basis.

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