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WORKING GROUP ON THE INTELLECTUAL PROPERTY ASPECTS
OF FOLKLORE PROTECTION

(SECOND MEETING)

(Paris, 9 - 13 February 1981)

COMMENTARY ON THE REVISED MODEL PROVISIONS FOR NATIONAL LAWS ON THE PROTECTION OF EXPRESSIONS OF FOLKLORE

I

INTRODUCTORY OBSERVATIONS

Need for the legal protection of expressions of folklore

1. Developing countries have more and more recognized folklore as a basis of the cultural identity and a most important means of self-expression of their peoples both within their own communities and in their relationship to the world around them. Folklore became to these countries increasingly important from the point of view of their political self-assertion; in developing countries folklore is a living, functional tradition, rather than a mere souvenir of the past.

2. The integrity of folklore as a living functional tradition in developing countries is seriously endangered by the accelerating development of technology, especially in the fields of sound and audiovisual recording, broadcasting, cable television and cinematography. Expressions of folklore are being commercialized by such means on a world-wide scale without due respect for the cultural or economic interests of the communities which produced them and without conceding any share in the returns from such exploitations of folklore to the peoples from whom the expressions of folklore utilized originate. At the same time, they are often also distorted in order to what is believed to be better for marketing them.

3. In a number of the industrialized countries folklore tends to be generally regarded as souvenirs of a bygone civilization and, in such countries, expressions of folklore are generally considered to belong to the public domain. This approach explains why, at least so far, industrialized countries generally do not consider it necessary to establish a legal protection of the manifold national or other community interest related to the utilization of folklore.

4. During the last decade or two, however, it became obvious that in order to foster folklore as a source of creative expressions, special legal solutions must be found both nationally and at the international level for the protection against any improper utilization of expressions of folklore, including the general practice of making profit by exploiting them outside their originating communities without any recompense to such communities. It has also been clear from the earlier efforts to this end that legal protection concerning the exploitation of expressions of folklore cannot solve, in itself all problems involved in maintaining folklore as

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an essential part of human life. The problem has many aspects, and it comprises questions of material preservation, as well as sociological, psychological, ethnological, politico-historical and other aspects. All related problems are interdependent and should be handled with due regard to their connections. This does not mean, however, that no special efforts should be made to cope with sufficiently defined urgent needs crystallizing within the whole interdisciplinary riddle of the phenomenon folklore.

Attempts to protect expressions of folklore under Copyright Law

5. The first attempts to regulate the use of creations of folklore were made in the framework of several copyright laws (Tunisia, 1967; Chile, 1970; Morocco, 1970; Algeria, 1973; Senegal, 1973; Kenya, 1975; Ivory Coast, 1978; regarding only musical folklore in a Bolovian Decree, 1968; in the Annex No. VII to the OAPI Convention, 1977; and in the Tunis Model Law on Copyright for Developing Countries, 1976). All these texts consider works of folklore as a part of the cultural heritage of the nation (traditional heritage, cultural patrimony; in Chile: "cultural public domain" the use of which is subject to payment). The Mexican Copyright Law of 1956 makes but a general reference to "the safeguarding of the cultural wealth of the nation."

6. The meaning of folklore as covered by these laws is understood, however, in different ways. No definition is given by the Tunisian Law. An important copyright-type common element in the definitions according to the other laws in question is that the works considered should have been created by authors of unknown identity but presumably being or having been nationals of the country; this requirement corresponds to the provisions of Article 15 of the Paris Act (1971) of the Berne Convention. The Annex to the OAPI Agreement mentions creation by communities instead of authorship, more adequately delimitating creations of folklore from works protected by conventional copyright. The Tunis Model Law defines folklore using both of these alternatives.

7. According to the Law of Morocco, folklore comprises all unpublished works of this kind; Algeria and Tunisia do not restrict the scope of folklore to unpublished works. The Senegalese Law explicitly understands the notion of folklore as comprising both literary and artistic works. The OAPI Annex and the Tunis Model Law emphasize that folklore comprises scientific works too. Most of the statutes in question recognize the distinct category of "works inspired by folklore" which they consider as works falling under the copyright law, making the use of such works conditional on the approval of a competent body. The Copyright Law of Senegal provides for a special law regulating the relevant protection; this law, however, has not been promulgated so far.

8. The "works" of folklore themselves are substantially protected under the above mentioned national laws against fixations for profit-making purposes, which are subject to prior authorization. The Law of Senegal also requires prior authorization for public performance of folklore with gainful intent. The Tunis Model Law suggests protection on the lines of the usual rights in works under copyright. The Annex to the OAPI Convention, on the other hand, mainly concentrates on questions of preservation of existing works of folklore and other cultural patrimony, as well as on measures promoting folklore.

9. An attenpt to protect expressions of folklore by means of copyright law has also been undertaken at the international level in 1967 at Stockholm, during the revision of the Berne Convention. As an outcome of this effort, Article 15 (4) of the Paris Act (1971) of the Berne Convention contains 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."

10 The existing provisions of national laws concerning protection of expressions of folklore do not appear to have been effectively implemented so far and no notification has been deposited with the Director General of WIPO as yet concerning designation of a national authority to protect in other countries of the Berne Union the rights in works of authors of unknown identity. The measures taken so far in the field of copyright did not prove sufficient to control the use of folklore: copyright law does not seem, by its very nature, to be the right kind of law for protecting traditional expressions of folklore. As a rule, an expression of folklore is the result of an impersonal continuity of a slow process of creative development upheld in a given community by consecutive imitation, lacking the decisive mark of personal originality as required by the law of copyright for works protected by it. And, naturally, traditional creations of a community, such as the so-called folk tales, songs, music, dances, designs or patterns, etc., are much older than the duration of copyright protection granted by States with regard to author's works. For this reason too, a copyright-type protection does not fit folklore.

Indirect protection by means of protecting the so-called neighboring rights

11. Another existing legal means which may effect in many cases also protection of expressions of folklore is the protection of the so-called neighboring rights. To protect performers as regards their performances of creations of folklore, or producers of phonograms or broadcasting organizations as far as their fixations or broadcasts of performed creations of folklore are concerned, also means an indirect protection of the expression of folklore itself, in the given form of its performance, recording or broadcast.

12. It appears that up to recent times relatively few developing countries realized this auxiliary possibility of protecting folklore in certain cases. By the end of 1979, among the altogether 30 States which had granted specific rights to performers by law, only 12 were of the third world: Argentina, Brazil, Chile, Colombia, Ecuador, El Salvador, Fiji, Iraq, Mexico, Paraguay, Philippines and Uruguay. Considering the new draft copyright laws being prepared for the revision of existing statutes, it, however, becomes apparent that more and more understanding is being shown by developing countries in this eminently important context and it can be hoped that the number of laws protecting also performers, producers of phonograms and broadcasting organizations will considerably increase in future. Consequently, it can likewise be hoped that the number of adherences to the Rome Convention of 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations and to the Convention of 1971 for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms will also increase, favorably influencing the possibilities of protecting expressions of folklore too.

13. But even then, the need for legal protection against improper use of creations of folklore would not be fully satisfied: the protection of performers, phonograms and broadcasts of expressions of folklore is but an indirect means of safeguarding folklore and cannot help to prevent either unauthorized performances of expressions of folklore or fixation, reproduction and broadcasting thereof. The limited duration of the protection of neighboring rights does not fit folklore either.

14. For all these reasons, it appears to be necessary to establish sui generis legal instruments for an adequate protection of traditional expressions of folklore against unauthorized exploitation.

Search for an adequate system of protection expressions of folklore

15. 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 the decisions of the respective Governing Bodies of Unesco and WIPO, the Secretariat of Unesco and the International Bureau of WIPO convened a Working Group (referred to hereinafter as "the Working Group") at Geneva, from 7 to 9 January, 1980, 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 16 experts from different countries invited in a personal capacity by the Directors General of Unesco and WIPO.

16. 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 those Model Provisions (documents UNESCO/WIPO/WG.1/FOLK/2 and 2 Add.) as well as of a document prepared by the Secretariat of Unesco, containing a Study on the International Regulations of Intellectual Property Aspects of Folklore Protection (document UNESCO/WIPO/WG.1/FOLK/3). This latter mentioned document also referred to the conclusions of the Committee of Experts on the legal Protection of Folklore convened by Unesco in Tunis, from 11 to 15 July 1977.

17. 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) such 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 paye the way for sub-regional, regional and international protection of creations of folklore.

18. In conclusion, the Working Group recommended, in respect of the model provisions for national laws on the protection of creations of folklore, that the Secretariats should prepare a revised draft and commentary thereon, taking into consideration all the interventions made in the Working Group, and that such a draft with its commentary should be presented for further consideration at a subsequent meeting. (Report of the Working Group, Doc. UNESCO/WIPO/WG.1/FOLK/5, paragraph 21.)

19. Accordingly, the Secretariats elaborated a revised draft entitled "Revised Model Provisions for National Laws on the Protection of Expressions of Folklore," hereinafter referred to as the "Revised Model Provisions."

II

COMMENTS ON THE REVISED MODEL PROVISIONS

Regulated issues

20. The suggested Revised Model Provisions consist of substantive rules (Sections 1 to 7) and administrative ones (Sections 8 to 12). The substantive provisions determine the expressions of folklore to be protected, the utilizations subject to authorization, the exceptions to the rule, the way of indicating the source of the expressions of folklore utilized; these provisions also establish offences and sanctions, including seizure; finally, they provide for unlimited duration of the protection and regulate prescription of offences. The administrative rules provide for competent and supervisory authorities, set forth the rules of the process of authorizing utilizations. They deal with relevant jurisdiction, the relation of the sui generis protection under the suggested provisions to possible other forms of protecting expressions of folklore, and give a general rule of interpretation of the protection offered by the Revised Model Provisions.

In the provisions referring to the law in question, the term "law" appears in square brackets, allowing national legislations also to choose other legislative solutions (e.g. in the framework of a Chapter of a more broad-based Code, or by means of different forms of legal sources such as "decree" or "decree law").

Protected Expressions of Folklore (Section 1)

21. Experts of the Working Group proposed that (i) instead of speaking of "creations" of folklore, one should speak about "works" or "manifestation" or "expressions"; (ii) the works "through forms which have been evolved from generation to generation," as contained in the original draft should 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" should be mentioned; (vi) any definition of folklore should be omitted or at least it should 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; (vii) it should be clarified whether the law would apply only to folklore originating in the country or also to foreign folklore.

22. Considering these suggestions, the Secretariats adopted the following general approach:

22.1 It is obvious, that the manifold cultural heritage of folklore proves reluctant be being reduced to a single definition universally applicable for all related purposes. On the other hand, however, it is necessary to determine the subject matter of any protection granted by law. Thus, any national law aiming at the protection of expressions of folklore against their improper utilization should appropriately define the subject of such protection for the special purposes of the relevant law.

22.2 As regards the suggested coverage of the notion of expressions to be protected, the Revised Model Provisions concentrate on two main aspects:

Firstly, the definition should avoid all copyright-type approaches which would narrow the scope of applicability of the law to expressions of folklore likely to be assimilated to authors' works of individual originality. Consequently, the Revised Model Provisions do not even adopt the term "work" mainly used in the context of copyright protection, and make no reference whatever to individual authors, not even in the form of mentioning productions "where the identity of the author is unknown." Instead, the Revises Model Provisions take the cultural heritage approach to folklore and consider their subject as comprising all artistic expressions of this traditional cultural heritage.

Secondly, the Revised Model Provisions restrict the scope of protection under the national law to the limits of its territorial effect, by considering only expressions of folklore originating in a national community of the country. Such communities are not classified in the proposed text as either "indigenous" or "ethnic" ones.

23. For the purposes of the Revised Model Provisions separate definitions are given for the terms "folklore" and "expressions of folklore."

24. Folklore is understood as the totality of the traditional artistic heritage of the country. The term "traditional" is unfolded through the requirement that the relevant cultural values should both originate in and be developed by a national community; individual creations of the past, preserved by the nation in their original form, are not considered as belonging to folklore. As far as the scope of the traditional heritage is concerned, it has been confined, for the purposes of the Revised Model Provisions, to artistic values only; traditional beliefs, scientific or merely practical traditions do not fall within the coverage of this definition of folklore either.

25. Expressions of folklore are understood as creations consisting of characteristic elements of the folklore as defined before. Creations revealing their origin but equivocally or incidentally should not qualify as expressions of folklore.

26. Corresponding to the pragmatic approach of the Model Provisions, an illustrative enumeration of the most typical kinds of expressions of folklore is added to the basic definition. The notion of expressions of folklore under the Model Provisions should comprise all reproducible creations consisting of characteristic elements of traditional artistic heritage. Unlike the theoretical suggestions of some experts, the provisions in question do not only apply to expressions inherited from previous generations merely by oral or empirical transmission (immaterial expressions of folklore), but also to traditional folk art handed down by ancestors to posterity through tangible manifestations of them, such as traditional designs and patterns developed and maintained by manual art in a given community, such designs and patterns being especially easily reproduced and exploited. The non-limitative enumeration also contains riddles, artistic forms of rituals as well as musicla instruments, as proposed by experts of the Working Group.

27. The proposed definition does not explicitly refer to the "consensus" of the community as regards protectibility of a given expression of folklore. Making the application of the law, in each case, subject to the thinking of the community, would render it necessary to make further provisions on how and when such a consensus could be taken for granted. The same appears to apply to the requirement of "authenticity", which also would need some further interpretation. On the other hand, both the requirement of "consensus" and "authenticity" are indirectly covered by the objective reference to "characteristic" elements of the traditional cultural heritage. Elements which became generally recognized as characteristic ones, are as a rule authentic expressions of folklore, supported by the consensus of the community concerned.

28. As far as the identification of expressions of folklore originating in and developed by a national community is concerned, the experts of the Working Group were of the opinion, that maintaining a relevant inventory was largely a matter of preservation of folklore; 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. Whenever a competent authority was in doubt concerning the identification of an expression of folklore, it should consult all available sources, including existing catalogues, other records, expert opinion, witnesses, the views of elders of a community. Consequently, the Revised Model Provisions do not provide for any inventory of expressions of folklore.

29. This does not mean, however, that in case of doubt national inventories of expressions of folklore should not be referred to, if already available. As correctly stated by Prof. J.H. Kwabena Nketia (Ghana): "It is not enought to define folklore. The items of folklore or specific units of tradition that need legal protection must be identified. In the final analysis, this means extensive recording, transcription, documentation and cataloguing -- a task that has (already) begun on a small scale --." In this context it is important to emphasize that registration in a public national inventory of expressions of folklore should not be a condition of the protection of a given expression of folklore; it should, however, help to solve problems as regards authenticity of an expression of folklore utilized, and slso inform the public about the cultural patrimony of the country.

Utilizations Subject to Authorization (Section 2)

30. The idea of making certain forms of utilization of traditional expressions of folklore subject to authorization is not unfamiliar to creative communities in many countries. In Australia, Peter Banki reported to the Australian Copyright Council on October 3, 1978, that a "permission's mechanism is well established among tribal Aboriginals in the Northern Territory." In 1976, claims were made by certain Australian Aboriginal tribal elders that some photographs contained in a book of anthropological studies depicted subjects that have secret and sacred significance to their community and alleged that no proper permission had been given to publish them. As far as Africa is concerned, Prof. J.H. Kwabena Nketia reported that "because of the close identification of groups with folklore a sense of collective ownership of sets of material and repertoire is often generated

among such groups ..." and "... members of a community may regard folklore traditions in the public domain as their heritage ... Furthermore, in Africa, this sense of ownership is tied up with the notion of "performing rights" which tends to be more of an ethical issue than a purely legal one ..." and "Akan oral traditions make references to instances in the past in which some chiefs sought permission from other chiefs to "copy" their instruments of music ..." or "... in Ghana, there are chiefly designs and patterns associated with specific royal houses ... as well as patterns with various verbal interpretations that are restricted in respect of ... use."

31. As a general rule, the Revised Model Provisions would make subject to authorization any reproduction, and distribution, of copies, any public recitation, performance, transmission by wireless means or wire, or any other form of communication to the public of expressions of folklore, if made with gainful intent. The criteria of "gainful intent" covers any making accessible to the public of the expressions of folklore against payment, even if the main purpose of utilizing the creation is not profit-making; such would be the case, e.g., when the creation of folklore is published for scientific purposes, but distributed at a usual selling price.

Exceptions (Section 3)

32. The Revised Model Provisions would not hinder indigenous communities in using their traditional cultural heritage in customary ways and in developing it by continuous imitation. Keeping alive traditional folklore is closely linked with the reproduction, recitation or performance, stylistically varying presentation of traditional expressions in the originating community. An unrestricted requirement of authorization of the adaptation, arrangement, reproduction, recitation of performance of such creations would mean serious hindrance in the way of the natural evolving of folklore and would not become effective in societies where folklore is still an integral part of everyday life. Corresponding to the Revised Model Provisions' approach to folklore as living tradition, and in accordance with a relevant proposal of experts of the Working Group, a general exception has been made from the prohibition of use with gainful intent, allowing any member of a national community of the country to freely reproduce or perform expressions of the folklore of his own community irrespective of whether he does it with or without gainful intent or whether the utilization of expressions of folklore is undertaken in the traditional ways or by means of modern technology, corresponding to the general development influencing also the evolving of living folklore (subsection (1)).

33. During the deliberations on this point, one or two experts of the Working Group 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; (iii) as regards exception from authorization, 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.

It appears, however, that unhindered and modern development of living folklore, on the one hand, and efficient control of the utilization of the same, on the other hand, can be brought in harmony best when allowing free use of the expression of folklore by members of the community which has brought it into existence irrespective of the technology applied and without imposing upon the community any system of remuneration; this however, as an exception to the general rule of making the use of expressions of folklore subject to both authorization and payment if made with gainful intent.

34. It has further been suggested that some control be provided also for over free utilization of expressions of folklore. Such a control has been provided for in the Revised Model Provisions under Section 4 as well as 5, Subsection 2 and 4, protecting cultural interests related to the expressions of folklore used.

35. Incidental utilization shall also be free, even within the framework of undertakings with gainful intent. In this context certain experts of the Working Group remarked that (i) the expression "incidental use" was too vague for sufficiently determining the scope of free use; (ii) the interpretation of the term "incidental use" should be left to competent authorities; (iii) the commentary on the Revised Model Provisions should refer in detail to cases to which this exception applies.

In order to elucidate the meaning of "incidental utilization," Subsection (2) mentions in particular (not in an exhaustive manner) the most typical cases considered as incidental utilization of expressions of folklore: the utilization by way of illustration in the course of teaching; the utilization as mere illustration in an original work; creating a new original author's work by using motifs of expressions of folklore; accidental shooting of expressions of folklore in the framework of photographing, filming or televising events of the day for informatory purposes, and also sound-broadcasting expressions of folklore under the same conditions; filming or televising of expressions of folklore permanently located in public places. In this latter context, the Revised Model Provisions leave it up to national legislations to allow for such utilization only by way of background or incidentally to the essential feature.

36. Some experts also suggested, that (i) reference be made to cases of free use as established in copyright law; (ii) some types of free use established by copyright legislation be also enumerated. The Revised Model Provisions, however, avoid any general reference to cases of free use as established in the copyright law. The major part of the exceptions to copyright protection is irrelevant from the point of view of the proposed sui generis protection of expressions of folklore. For example, under the Revised Model Provisions, no utilization without gainful intent would be subject to authorization at all; thus the copyright exception favoring personal or private uses of protected works would become meaningless in this context. On the other hand, where appropriate, the Revised Model Provisions explicitly adapt to the utilization of expressions of folklore certain provisions on incidental use, developed in Copyright Law (Section 3, Subsection 2).

Acknowledgement of Source

37. One of the main reasons for the urgent need for the protection of expressions of folklore consists in the close identification of national communities with their cultural heritage. In order to strengthen the links between the originating group and its widely disseminating expressions of folklore, and also as a means of control in cases of free utilization of expressions of folklore, requested in general terms by certain experts of the Working Group, the Revised Model Provisions require that in all publications and in connection with all kinds of public use of an expression of folklore its origin should be indicated (as a rule also in cases exempt from authorization) by mentioning in an appropriate manner the community and/or the geographic place from where the expression utilized originates. The indication of the geographic origin might be of special importance in cases where the originating community extends over the territory of more than one country.

38. This requirement would only apply in cases where the source of the expression of folklore is identifiable, that is, where its user could be expected to know the origin thereof.

39. Furthermore, the acknowledgement of the source of the expression of folklore utilized shall not be required in specified cases where it would be unreasonable to insist on it: in connection with incidental utilizations in film and television, and where only motifs of expressions of folklore are borrowed for creating a new work.

40. Omission of acknowledgement of the source of folklore in cases where it is required would be subject to a fine, according to the relevant provisions under Section 5 on Offences.

Offences (Section 5)

41. Experts in the Working Group suggested, that (i) the title of the section determining the scope of protection by penal sanctions in the original draft should be revised to cover all the contents of this section; (ii) provision on recidivism should be omitted from each of the subsections; (iii) the mode of punishment should not be specified; (iv) penal sanctions were abhorrent; (v) administrative sanctions should be preferred to penal ones; (vi) financial sanctions should be preferred to imprisonment.

42. The Revised Model Provisions define, in a section entitled "Offences", four kinds of offences to the interests linked with the protection of the expressions of folklore. Considering the nature of the offences, the importance of the interests

to be protected and also the sanctions already established in a number of copyright laws as well as in the Tunis Model Law for developing countries for the infringement of copyright and also for the violation of national heritage, it appears necessary to penalize the respective acts also in the Revised Model Provisions, by making them subject partly to a fine, partly to to a fine or imprisonment or both. It would be a matter of national legislations to determine the maximum of such punishments, corresponding to the practice in each developing country concerned. The Revised Model Provisions do not suggest, however, to provide by national legislation also special sanctions for recidivism.

43. Any person who would utilize an expression of folklore without authorization in a way subject to it, would be liable to a fine only. Similarly, any person omitting to comply with the requirement of acknowledgement of the source of expressions of folklore, would be punishable by a fine.

44. The Revised Model Provisions provide for two special cases of deception and distortion of cultural values, respectively. One of these offences consists in "passing off," when a person creates the impression that his production is an expression of folklore originating from a community from which it does not. As suggested by some experts of the Working Group, it was made clear, that the provisions in question were limited to cases where there is deception. The other offence can be committed by any public utilization of the expression of folklore, prejudicially distorting the same. These two offences would be punishable also by imprisonment.

45. The offences under Section 5 can also be committed cumulatively, would it so happen.

Seizure (Section 6)

46. In connection with the original draft of the Model Provivions some experts suggested (i) that the section on penal procedure dealing also with seizure, be amalgamated with the section providing for protection against various acts by means of penal sanctions; (ii) if not amalgamated, it should not be dealt with in the framework of procedural provisions, seizure being a sanction rather than a procedural measure; (iii) the provision on seizure should be deleted; (iv) seizure was an important sanction and should be provided for by using a terminology consistent with the relevant constitutional provisions in various countries; (v) the meaning of the expressions "copies" and "discrediting" used in the original draft of the subsection on seizure should be harmonized with other section of the Model Provisions; (vi) in the section on procedure also other procedural aspects should be considered, as e.g. the deadline for deciding on applications for authorization.

47. The Revised Model Provisions provide seizure as a sanction applicable to all offences under Section 5, except for the omission of the identification of the expression of folklore utilized. Consequently, it was not amalgamated with the section determining the penalized actions themselves and special sanctions of them.

48. Seizure would extend to any tangible production resulting from the offence as well as to the receipts arising from it and the implements used for the perpetration of the violation.

49. The originally proposed section on penal procedure has not been maintained, all aspects of procedure are governed by the Revised Model Provisions in Part II (Administrative Provisions) according to their proper context.

Duration of Protection (Section 7)

50. One or two experts also proposed to set out that the protection of expressions of folklore was not limited in time. The protection under the Revised Model Provisions would be of unlimited duration; it would, however, be a matter of national legislations to determine the term of prescription of the offences provided for.

Authorities (Section 8)

51. The Revised Model Provisions do not contain anything on the question to whom the expressions of folklore belong, this aspect of the problem being dealt with in a different way from one country to the next. The Revised Model Provisions only provide for the designation of competent authorities authorizing the utilization of expressions of folklore whereas it is understood that they do so on behalf of the owner thereof whoever this be. In many developing countries, there still prevails in indigenous communities a strong feeling of ownership of their traditional cultural heritage which must not be hurt by simply declaring expressions of folklore property of the people of the country or of the nation as such; on the other hand, however, custody of all communities of the nation and safeguard of the whole body of cultural heritage existing in the country should be exercised in a centralized manner, so that it becomes effective both nationally and internationally.

52. Following the suggestion made by experts of the Working Group, the Revised Model Provisions leave it up to each country to designate such authorities in its national law. They only suggest providing for "competent authority" carrying out the administrative work resulting from the law protecting expressions of folklore, and for a "supervisory authority," giving the necessary guidance to the competent authorities at a higher level and possibly serving also as a second instance in disputed cases.

53. Competent authorities might differ according to the kinds of expressions of folklore the use of which is subject to authorization. It may appear useful to entrust different bodies with the authorization of the utilization of expressions prevailing in immaterial form, by oral or empirical tradition, and of expressions of folk art existing in tangible forms. In the first case a department of the Ministry of Culture, or the authors' organization of the country (provided it alreay exists) or a special body organized for the purpose of implementing the law on the protection of expressions of folklore could be designated; in the second case, also the National Museum, or an Ethnological Institution of the countries. The "supervisory authority" could either be a department of the presidential office or of a similar top office, or a ministry in the case of the competent bodies being a separate organization, or an authority specially established for that purpose.

54. The competent authority may ask the assistance of expert committees being in charge of questions relating to classification, identification, authenticity and evaluation of expressions of folklore, as well as their reproductions or performances. The experts of the Working Group suggested, however, that the Revised Model Provisions should not provide for statutory establishment of a special committee, for the implementation thereof.

55. As likewise suggested by experts of the Working Group, the Revised Model Provisions do not provide for a special statute governing the activities of the competent authority, either.

Authorization (Section 9)

56. Some experts of the Working Group suggested that at the beginning of the Section on the process of authorization provision should also be made for a direct obligation in respect of application for authorization. Such a provision has been set forth in Subsection (1).

57. Some experts also mentioned that the contents of the application for authorization might be prescribed in greater detail than originally proposed. Subsection (2) complies with this requirement.

58. The Revised Model Provisions contain rather detailed rules concerning the process of authorization itself. In certain respects, alternative solutions are offered in square brackets. So, for example, experts proposed that a written form of the application for authorization should not necessarily be made obligatory; accordingly this has been proposed in brackets only. Other experts suggested that the fees to be collected by the competent authority should not necessarily be according to a tariff to be established by the supervisory ministry and this should be optional as between the competent authority and the supervisory ministry. Thus, the Revised Model Provisions contain alternative provisions also in the context

of fixing the fees for the utilization of expressions of folklore. They do not provide, however, for contractual solutions of the fees to be paid, as also suggested by an expert of the Working Group. The control of the utilization of expressions of folklore in an eminently public concern and its conditions should not become subject to bargaining.

59. In respect of the utilization of the fees collected the experts suggested that the relevant provisions should be flexible enough so as to allow for their employment for the promotion or safeguard of folklore or for other cultural ends. Subsection (4) complies with this requirement; it provides, however, that a certain share, to be determined by each country deliberately, should in any case be granted to the community from which the expression of folklore utilized originates; ant that the competent authority is entitled to deduct from the fees collected a part corresponding to its costs arising from its activities related to the authorisation of utilizing expressions of folklore.

60. Some experts of the Working Group wondered if it was necessary to specifically provide for appeals to the supervisory authority, supposing, that the procedure of administrative appeals was sufficiently governed in each country by general rules of public law. Thus, the relevant rule is being proposed in the Revised Model Provisions in square brackets only.

Jurisdiciton (Section 10)

61. Some experts also suggested to consider the need for a provision on appeal to the courts. Such a provision has been set forth in the section on jurisdiction. In this context, it is a matter for national legislation to decide which courts shall have jurisdiction in case of appeals against the decisions of the authorities concerned and in cases of offences, respectively. It is understood that in the former case the laws and rules on civil procedure, in the latter the laws and rules on penal procedure apply.

Relation to Other Forms of Protection Offered by Legislation (Section 11)

62. It was strongly recommended by experts of the Working Group that the Model Provisions make it clear directly and explicitly that the sui generis protection of expressions of folklore shall in no way limit or prejudice the protection by copyright whenever it is applicable to creations by members of indigenous communities or the protection available in certain cases in the form of neighboring rights or in the field of industrial property (protection of designs, marks, appellations of origin, etc.), under domestic law or any relevant international agreement. Thus also the possibility of having expressions of folklore protected under Article 15, paragraph (4), of the Berne Convention, as unpublished works, the identity of the author of which is unknown remains open. It has also been set forth that the Revised Model Provisions should not be applied in a manner conflicting with other legal provisions aiming at the preservation of folklore.

Interpretation (Section 12)

63. Following a suggestion made by experts of the Working Group, the last section of the Revised Model Provisions emphasizes an underlying principle of the whole system of sui generis protection of expressions of folklore: this protection should in no way hinder the normal development of expressions of folklore in national communities. The ultimate purpose of an adequate protection of expressions of folklore consists in fostering the natural evolution of the traditional cultural heritage.

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