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WORKING GROUP ON THE INTELLECTUAL PROPERTY ASPECTS
OF FOLKLORE PROTECTION

(SECOND MEETING)

(Paris, 9-13 February 1981)

REPORT

Introduction

- Pursuant to the deliberation 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 from 5 to 9 February 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 a Working Group on the Intellectual Property Aspects of Folklore Protection which met in 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. In conclusion, this Working Group recommended, in respect of the said Model Provisions that a revised draft of Model Provisions for National Laws on the above subject and Commentary thereon should be prepared by the two Secretariats and presented for further consideration at a subsequent meeting. Accordingly, the Secretariat of Unesco and the International Bureau of WIPO prepared the relevant texts and jointly convened the second meeting of the Working Group on the Intellectual Property Aspects of Folklore Protection composed of the same group of experts from nineteen countries for consideration of the same. This second meeting of the Working Group was held at Unesco Headquarters at Paris from 9 to 13 February 1981. Seventeen of the nineteen experts invited, participated in the meeting in their personal capacity. The meeting of the Working Group was also attended by representatives of two intergovernmental and ten international non-governmental organizations as observers. The list of participants is annexed to this Report (Annex II).
- 2. The documentation available to the Working Group consisted of the "Revised Model Provisions for National Laws on the Protection of Expressions of Folkiora" (document: UNESCO/WIPO/WG.II/FOLK/2) and Commentary on the said Revised Model Provisions (document: UNESCO/WIPO/WG.II/FOLK/3) prepared by the Secretariat of Unesco and the International Bureau of WIPO.

Opening of the meeting

3. The meeting was opened on behalf of the Director-General of Unesco by Miss Marie-Claude Dock, Director of the Copyright Division and on behalf of the Director-General of WIPO by Mr. Claude Masouyé, Director, Public Information and Copyright Department, who welcomed the participants.

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Election of officers

4. For this second meeting the Working Group unanimously confirmed the previous officers, namely Dr. J.O. Alende (Argentina) as Chairman and Mr. P. Banki (Australia) and Dr. E.P. Gavrilov (Union of Soviet Socialist Republics) as Vice-Chairman.

General discussion

- 5. The experts in the Working Group congratulated the two Secretariats on the preparation of the documents. The Revised Model Provisions for National Laws on the Protection of Expressions of Folklore and the Commentary on the same were generally held to be of high quality, reflecting a realistic as well as pragmatic balance of various approaches developed by the experts in the first meeting of the Working Group. The approach to the new concept of determining the subject matter of the Model Provisions and the concern for further development of folklore were particularly appreciated.
- 6. The experts agreed that:
 - (i) the preamble to the Revised Model Provisions should be optional, in view of the fact that various national legislators do not incorporate preambles in the national legislations;
 - (ii) relationship between the protection of expressions of folklore and the protection under intellectual property should be dealt with in the Commentary in a more detailed manner and appropriate mention of the intellectual creativity character of folklore should be made in the preamble;
 - (iii) exceptions complying with the developing countries' needs for use of expressions of folklore should be considered in a broader sense;
 - (iv) general guidance should be provided on the reasons for which authorization for the utilization of the expressions of folklore may be refused;
 - (v) contemporary aspirations with regard to interchange of expressions of folklore amongst different communities should be kept in mind; and
 - (vi) the international protection of intellectual aspects of the expressions of folklore should be given high priority and the Model Provisions should serve as a basis for further efforts aiming at regional and international regulation of such protection.

Discussion of the Revised Model Provisions section by section

- 7. The general discussion was followed by elaborate examination, section by section, of the Revised Model Provisions. The experts made a number of observations as well as proposals amending the proposed text and adding new sections to it. In conclusion the Working Group adopted the Model Provisions for National Laws on the Protection of Expressions of Folklore as annexed to this Report (Annex I).
- 8. In the course of the discussions the experts also considered the Commentary on the Revised Model Provisions. As regards the changes made in the said Provisions, the following observations and suggestions were made by one or more experts, in order to be reflected in the new version of the above-mentioned Commentary to be prepared by the Secretariats on the Model Provisions as adopted.

ad Section 2 (Draft Section 1):

- (i) the subject matter of the Model Provisions has been determined in a way so as to allow national legislators to decide whether the law would apply only to folklore originating in the country or also to foreign folklore; consequently a new provision was adopted to this end under Section 15;
- (ii) the protection in respect of musical instruments concerns the design of such instruments;
- (iii) the protection of architectural forms should be optional.

ad Section 3 (Draft Section 2):

- (i) the following three criteria and their combinations were considered as regards rendering the utilization of expressions of folklore subject to authorization: gainful intent; whether the utilization was made by members or non-members of the community where the expression used is derived from; utilization outside the context of the traditional or usual use of the expression concerned;
- (ii) utilizations with gainful intent outside their traditional or usual contexts were made subject to authorization, allowing for utilization with gainful intent within its traditional or usual context, but requiring authorization also for utilization by members of the community of origin of the expression used, if made outside such a context;
- (iii) besides reproduction and distribution of copies, publication of the expression was also explicitly mentioned as a form of utilization which may be subject to authorization.

ad Section 4 (Draft Section 3):

Utilization of expressions of folklore should be free for all educational purposes in general and not restricted to utilization by way of illustration in the course of teaching.

ad Section 5 (Draft Section 4):

The origin of the expression of folklore utilized shall be indicated by mentioning the community and/or the geographical place from which that expression has been derived, since it may be difficult to determine where it originates from.

ad Section 6 (Draft Section 5):

- (i) both the minimum and maximum of the applicable fine or imprisonment should be fixed;
- (ii) denaturation of expressions of folklore be made punishable only if committed on purpose;
- (iii) failure to apply for authorization to utilize expressions in cases where such utilization is subject to authorization should be sanctioned also by payment of the fee provided for the corresponding authorization;
- (iv) penal sanctions should be applied without prejudice to damages or other civil remedies: to this end a new provision (Section 9) was added to the Model Provisions.

ad Section 7 (Draft Section 6):

- (i) detailed explanations should be given in the Commentary concerning the alternative proposals adopted in the Model Provisions, with regard to countries whose legislation does not provide for seizure or where it is not consistent with their constitution; and corresponding other legal institutions be mentioned;
- (ii) possible implements subject to seizure be specified in the Commentary;
- (iii) the meaning of the term "object" be defined so as to cover not only artefacts, but also documents and other materials.

ad Section 8 (Draft Section 7):

- (i) one expert proposed to limit the duration of protection of expressions of folklore in cases where they were published;
- (ii) it was felt, however, the protection should not be limited in time;
- (iii) notwithstanding the fact that the protection of expressions of folklore was not limited in time, it appeared, to several experts, advisable not to declare this in view of the continuous changes in living tradition; this aspect should be explained in the Commentary;
- (iv) concerning time factor in the protection of expressions of folklore, national legislation should be confined to prescription as regards penal actions in view of offences.

ad Section 9:

The possibility to apply civil remedies, including damages, alc g with penal sanctions should be explained in detail in the Commentary.

ad Section 10 (Draft Section 8):

- (i) with regard to differences in the public law or private law system from one country to the other, the Model Provisions do not go into any detail concerning designation and competences of "competent" and "supervisory" authorities;
- (ii) the Commentary on these provisions should, however, draw the attention to the necessity of considering the intermediary role of such authorities, between the user of expressions of folklore and the community of origin of the expressions used; the authorities concerned should be designated on the basis of representativeness of the communities developing and maintaining folklore; the commentary should also underline the important position which the communities should hold in the composition of these authorities;
- (iii) the Commentary should enumerate possible tasks and competences of such authorities (besides authorizing and controlling the use of expressions of folklore, inter alia, also to initiate or maintain registers of them, to provide for the control of authenticity of reproduced expressions, to organize the employment of the fees resulting from authorized uses of expressions of folklore, etc.).

ad Section 11 (Draft Section 9):

- (i) legislation should provide, besides individual authorization, also for blanket authorization of qualified users;
- (ii) authorization should also serve the purpose of preventive protection against denaturation of expressions of folklore, thus, it should not be obligatorily made subject to payment of fees;
- (iii) not all communities have an appropriate system for administering the employment of fees which may result from the use of their expressions of folklore; thus their direct participation in such returns should be made optional for national legislation: the reasons should be explained in the Commentary;
- (iv) some experts were in favour of a delay of 60 days for decision on applications for authorization; others preferred, however, 15 or 30 days, not to hamper envisaged uses of expressions of folklore; an expert wished that a delay of 10 days, to be computed from the date of the decision, be provided for in order to enable the authority to explain the reasons therefor;
- (v) replacing authorization by a system of optional "clearance" should also be considered in the Commentary; the system could function as an action against infringements and in practice offer certain administrative advantages.

ad Section 15:

The Model Provisions should pave the way for subregional, regional and international protection.

Conclusion

9. In conclusion, the Working Group noted that the adopted Model Provisions and the Commentary to be prepared thereon by the Secretariats, will be presented and further consideration at a meeting of governmental experts to be convened jointly by Unesco and WIPO in 1982.

Adoption of the Report and closing of the meeting

- 10. This Report was unanimously adopted.
- 11. After the usual thanks the Chairman declared the meeting closed.

ANNEX I

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

Considering that folklore represents an essential part of the living cultural heritage of the nation, developed and maintained by the communities within the nation;

Considering that the dissemination of various expressions of folklore may lead to improper exploitation of the cultural heritage of the nation;

Considering that any abuse of commercial or other nature or any denaturation of folklore is prejudicial to the cultural and economic interests of the nation;

Considering that expressions of folklore constituting manifestation of intellectual creativity deserve to be protected in a manner inspired by the protection provided for literary and artistic works;

The following provisons shall be given effect:7

SECTION 1

Principle of Protection

Expressions of folklore originating in /Insert the name of the country/ shall be protected by this /Iaw/ against illicit exploitation and other prejudicial actions.

SECTION 2

Protected Expressions of Folklore

- 1. For the purposes of this <code>[law]</code>, "folklore" means the totality of the traditional artistic heritage developed and maintained by a community of <code>[name of the country]</code>.
- 2. For the purposes of this [law], "expressions of folklore" mean creations consisting of characteristic elements of folklore, including:
 - (i) verbal expressions, such as folk tales, folk poetry and riddles;
 - (ii) musical expressions, such as folk songs and instrumental music;
 - (iii) expressions by action, such as folk dances, plays and artistic forms of rituals;

whether or not reduced to a material form; and

- (iv) material expressions, such as:
 - (a) productions of folk art, including in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes;
 - (b) musical instruments;
 - /c) architectural forms7.

SECTION 3

Utilizations Subject to Authorization

Subject to the provisions of Section 4, the following utilizations of the expressions of folklore are subject to authorization by the competent authority mentioned in Section 10, paragraph 1, when they are made with gainful intent outside their traditional or usual context:

- (i) any publication, reproduction and any distribution of copies of expressions of folklore;
- (ii) any public recitation or performance, any transmission by wireless means or by wire, and any other form of communication to the public, of expressions of folklore.

SECTION 4

Exceptions

- 1. Section 3 shall not apply in the following cases:
 - (i) utilization for purposes of education;
 - (ii) utilization by way of illustration in the original work of an author, provided that the extent of such utilization is compatible with fair practice;
 - (iii) borrowing of elements of expressions of folklore for creating an original work of an author, provided such utilization is compatible with fair practice;
- 2. Section 3 shall not apply also where the utilization of the expressions of folklore is incidental. Incidental utilization includes, in particular:
 - (i) utilization of any expression of folklore that can be seen or heard in the course of a current event for the purposes of reporting on that current by means of photography, broadcasting, or sound or visual recording, provided that the extent of such utilization is justified by the informatory purpose;

(ii) utilization of objects containing the expressions of folklore which are permanently located in a place where they can be viewed by the public, if the utilization consists in including their image in a photograph, in a film or in a television broadcast.

SECTION 5

Acknowledgement of Source

- In all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore, its origin shall be indicated in an appropriate manner, by mentioning the community and/or geographic place from where the expression utilized has been derived.
- 2. The requirement set forth in paragraph 1 shall not apply to utilizations referred to in Section 4, paragraphs 1 (iii) and 2.

SECTION 6

Offences

- 1. Any person not complying with the requirement provided for in Section 5 shall be liable to a fine of a minimum of ... and a maximum of ...
- 2. Any person who, without the authorization of the competent authority referred to in Section 10, paragraph 1, utilizes an expression of folklore in violation of the provisions of Section 3, shall be obliged by the competent authority to cease such utilization. Besides the payment of the fees provided for under Section 11, paragraph 4, he shall be liable to a fine of a minimum of ... and a maximum of ... If he fails to comply with this injunction he shall be liable to a fine of a minimum of ... and a maximum of ...
- 3. Any person purposely deceiving others in respect of the origin of objects made or marketed by him, or in respect of public recitations or performances given or organized, broadcast or otherwise communicated to the public by him, presenting such objects, or the subject matter of such recitation or performances, as expressions of folklore of a certain community, where, in fact they do not so originate, shall be punishable /by a fine of a minimum of ... and a maximum of ... / by imprisonment not exceeding ... / by a fine of a minimum of ... and a maximum of ... and imprisonment not exceeding ... /
- 4. Any person who makes for public distribution, distributes or offers for sale objects, publicly recites or performs, or organizes the public recital or performance of, or broadcasts or otherwise communicates to the public expressions of folklore in a way that such objects, recitals or performances purposely denaturate the same in a manner prejudicial to the cultural interests of the community concerned, shall be punishable /by a fine of a minimum of ... and a maximum of ... / /by imprisonment not exceeding ... / /by a fine of a minimum of ... and a maximum of ... and imprisonment not exceeding ... /

SECTION 7

Seizure or other Actions

Any object which was made in violation of this /Taw/ and any receipts of the person violating it and corresponding to such violations, as well as any implements used mainly or solely for perpetrating the violation, shall be subject to /seizure/ /applicable actions and remedies/.

SECTION 8

Prescription

No action can be instituted concerning any offence under Section 6, after the lapse of ... years following the date on which the offence has been committed.

SECTION 9

Civil Remedies

The sanctions provided for in \sqrt{S} ection $6\sqrt{S}$ ections 6 and \sqrt{S} shall be applied without prejudice to damages or other civil remedies as the case may be.

SECTION 10

Authorities

- 1. For the purpose of this /Taw7, the expression "competent authority" means ...
- 2. For the purpose of this /Taw/, the expression "supervisory authority" means ...

SECTION 11

Authorization

- 1. Individual or blanket authorization of any utilization of expressions of folk-lore subject to authorization under this /law/ has to be applied for /In writing/ with the competent authority.
- 2. In the application, the applicant has to indicate his name, professional activity and address, specification and source of the expression of folklore intended to be utilized and the manner of the utilization intended. In the case of intended reproduction, the proposed number of copies and territory of distribution of the reproduced copies, have also to be indicated. As regards recitals, performances and other communications to the public, the nature and number of them, as well as the territory to be covered by the authorization, have to be specified.
- 3. The decision of the competent authority shall be communicated to the applicant in written form within <a>[157 <a>[207 days following the receipt of the application; any denial of authorization shall be accompanied by the reasons therefor. If no decision is made within the said time limit, the authorization shall be regarded as granted.

- 4. Where the competent authority grants authorization it may fix in its decision the amount of and collect fees corresponding to a tariff /established /approved by the supervisory authority. The fees collected shall be used for the purpose of promoting or safeguarding national /culture /folklore; /a share of ...% in the fees collected shall be granted to the community from which the expressions of folklore for the utilization of which the fees were paid originate /. /The competent authority is entitled to deduct from the fees collected a part corresponding to its costs arising from the administration of this Section /.
- 5. Appeals against the decisions of the competent authority are admissible by the person applying for the authorization and the representative of the interested community.

SECTION 12

Jurisdiction

- 1. Appeals against the decisions of the /competent authority/ /supervisory authority/ are admissible to the Court of ...
- 2. In case of any offence under Section 6, the Court of ... has jurisdiction.

SECTION 13

Relation to Other Forms of Protection

This /Taw/ shall in no way limit or prejudice any protection applicable to expressions of folklore under the copyright law, the law protecting performers, producers of phonograms and broadcasting organizations, the laws protecting industrial property, or any other law or international agreement to which the country is party. It shall in no way prejudice other forms of protection provided for the safeguard and preservation of folklore, either.

SECTION 14

Interpretation

The protection granted under this <u>\(\int \lambda \)</u> shall in no way be interpreted in a manner which could hinder the normal use and development of expressions of folklore.

SECTION 15

Protection of Expressions of Folklore of Foreign Countries

Expressions of folklore developed and maintained by a community of a foreign country are protected under this Zlaw7,

- (i) subject to reciprocity, or
- (ii) on the basis of international treaties or agreements.

ANNEXE II/ANNEX II/ANEXO II

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UNESCO/OMPI/WG.II/FOLK/4 Annexe II/Annex II/Anexo II page 3

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UNESCO/OMPI/WG.II/FOLK/4 Annexe II/Annex II/Anexo II page 4

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