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ECONOMIC EXPLOITATION OF EXPRESSIONS OF FOLKLORE: THE EUROPEAN EXPERIENCE

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SOME INTRODUCTORY REMARKS

1. Ever since the British archaeologist Thomson as the first one used the term "folklore" in 1846 this phenomenon has gained more importance and attracted more and more interest. Generally speaking, folklore is an essential element of any nation's cultural heritage and an important means of expression of that nation's identity. As is said in the introductory observations to the Model Provisions established by WIPO and UNESCO in 1985: "the accelerating development of technology, especially in the fields of sound and audiovisual recording, broadcasting, cable television and cinematography may lead to improper exploitation of the cultural heritage of the nation." The evolution of these modern technologies as well as other present-day developments in the international copyright field form the basis for the new and increased interest for creating more efficient regimes for protection of folklore.

2. As is well known, the protection of expressions of folklore can be achieved by various legal and other means. Thus, protection may, as is the case in a number of developing countries, particularly in Africa, be given under copyright law using the concept of "works of folklore" or just "folklore".

3. Protection of expressions of folklore may also be given indirectly under the concept of neighboring rights. In this latter case the protection of performing artists and phonogram producers and also of broadcasters through the vehicle of neighboring rights may provide also an indirect protection of expressions of folklore. This trend has been encouraged in the recent WIPO Treaty on Performances and Phonograms, where, for example, the definition of a performer has been extended to include also performers of expressions of folklore. As is noted (p. 77) in the study on the financial and other implications of the implementation of the TRIPS Agreement for developing countries, of September 1996, commissioned by WIPO and prepared by UNCTAD, "(E)ven mandatory recognition of neighboring rights offer opportunities to countries whose music, dance and folklore are important components of the national heritage, as attested by the fact that over half of the parties to the Rome Convention are developing countries."

4. A third possibility to provide for protection of expressions of folklore is through some kind of *sui generis* right which is close to or similar to copyright.

5. Whatever the legal means are for providing protection, they have in common a wish to protect expressions of folklore against two kinds of exploitations. One such kind is the unauthorized exploitation of expressions of folklore which takes place, sometimes on a world-wide scale, through new means of communication and without consent from those communities or countries from where they emerge. The other kind of exploitation where control is felt to be necessary concerns such acts of exploitation which result in mutilations or distortions or other acts which are prejudicial to the cultural, religious or social interests of the communities which are the source.

6. As is well known, the need for protection of expressions of folklore emerged in developing countries, in particular in Africa. As is mentioned in paragraph 3 of the introductory observations to the Model Provisions mentioned above: "In the industrialized countries, expressions of folklore are generally considered to belong to the public domain.

legal protection of the manifold national or other community interest related to the utilization of folklore."

7. The observation just mentioned still holds true. With some exceptions for countries where there are particularly important indigenous populations, the intellectual property protection of expressions of folklore is absent in most industrialized countries. This is, generally speaking, also the case in Europe. No country in Western Europe has specific provisions in this respect. On the other hand, some countries of the Central and Eastern Europe have copyright laws which contain some elements of protection of folklore.

8. Even in countries where there are no specific provisions on the protection of expressions of folklore but those expressions are in the public domain, there may nevertheless exist an indirect protection.

9. Thus, in countries where there is no specific protection of expressions of folklore, such protection may be granted, as mentioned above, through the neighboring rights scheme, in particular through the protection of performing artists and producers of phonograms. As regards Western Europe it should be mentioned that within the European Community--and the European Economic Area--neighboring rights are to a large extent harmonized, through the so-called "Rental and Lending Directive" of November, 1992 (Council Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property). That Directive does not contain any definition of what a performing artist is; generally speaking performing artists are, in the countries where the Directive applies, understood as those who perform literary and artistic works; on the other hand, nothing prevents those states from expanding the notion to cover also performers of folklore. Furthermore, a phonogram is generally understood as recordings of any kinds of sounds, including sounds emanating from expressions of folklore.

10. In addition to the indirect protection of expressions of folklore through neighboring rights, expressions of folklore may enjoy protection also in another indirect way, through copyright law. Thus, collections and compilations of expressions of folklore may be protected under copyright law. In this case, copyright in those productions belongs to the person who has exercised an intellectual skill in the selection or arrangement of the collection or compilation and the protection applies to that production as such; the individual parts of that collection do not obtain a protection which they may not otherwise have. In practice, most frequently, however, copyright protection of collections and compilations applies to such productions where the individual parts are literary and artistic works. Under both the TRIPS Agreement (Article 10.2) and the new WIPO Copyright Treaty (Article 5) compilations/collections of data or other material, regardless of whether they are in machine-readable or other form, which by reasons of the selection or arrangement of their contents constitute intellectual creations, shall be protected as such. Such protection does not extend to the data or material itself and shall be without prejudice to any copyright subsisting in those data or material itself. These provisions may apply also to compilations or collections of expressions of folklore, which may well qualify as "data or other material."

11. It should be mentioned in this context that another Directive within the European Community may offer a kind of protection also for expressions of folklore, namely the Council Directive 93/98 of October 1993 harmonizing the term of protection of copyright and certain related rights, which is now implemented by the member States of the European Community

and of the European Economic Area. Article 4 of that Directive provides: "Any person who, after the expiration of copyright protection, for the first time lawfully publishes or lawfully communicates to the public a previously unpublished work, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully published or lawfully communicated to the public." This provision may apply, for instance, in the case of unprotected anonymous works which could qualify as expressions of folklore, and the first publisher of such works would enjoy an economic copyright for a term of 25 years.

12. That Directive also contains, in its Article 5, a provisions under which the States may (not "shall") provide protection for: "critical and scientific publications of works which have come into the public domain. The maximum term of protection of such rights shall be 30 years from the time when the publication was first lawfully published." Only a few of the member States have, however, chosen to provide for such protection.

13. Speaking about the European Community member States, there is a further Directive which may be of some relevance in this context, namely the so-called Data Base Directive (Directive 96/9/EC of the European Parliament and of the Council, of March 1996, on the legal protection of data bases). Under that Directive "database shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means." Protection under the Directive applies also to non-electronic data bases. Consequently, data bases consisting of expressions of folklore may well fall within the ambit of that Directive (which has to be implemented by the member States by January 1, 1998). The Directive provides for protection in two respects. One operates for the benefit of the author of the base who through the selection or arrangement of the contents of the base has exercised an intellectual creation in respect of the base. The other one applies to the maker of the data base who has made a qualitative or quantitative investment in the base. The rights in the base for those two categories include, generally speaking, the traditional rights under copyright law. Those provisions apply to data bases regardless of what the individual parts consist of, for instance also to bases of expressions of folklore. The so-called Data Base Treaty which is presently under consideration in the context of WIPO incorporates the same main ideas as the Data Base Directive.

14. All those solutions which have been mentioned now have one thing in common, namely that the protection which they provide is granted to persons who have taken certain actions in relation to expressions of folklore (performed them, selected/arranged them, published them, etc.) and not to the communities or entities as such which are the source of those expressions. Furthermore, these protection measures apply, generally speaking, to such expressions of folklore which would qualify as works; those works may, however, be in the public domain and be anonymous and therefore in some cases constitute expressions of folklore. In any case, those protection provisions do not provide any intellectual property protection for the expressions of folklore as such. From this follows that the protection of expressions of folklore in those countries where no specific protection exists for them, is fragmented, incomplete and not particularly effective.

15. Folklore serves essentially cultural and social values. Is should be recognized, however, that folklore, in whatever form it appears, does not only serve such purposes. Like all other forms of intellectual expressions it also has an economic value in the sense that such expressions may be exploited, for an economic consideration, both directly in relation to the

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public and indirectly through its adaptation into other expressions, for instance music, textile designs, literary narrations, etc. The fact that folklore protection also has an economic aspect is recognized in, for instance, the Model Provisions. In, for instance, Article 10 of those Provisions reference is made to the fees to be received in return for authorizations granted by the communities concerned or from the competent authority entrusted with the task of granting such authorizations.

16. Under the Model Provisions those fees shall be used for the purpose of promoting or safeguarding national culture or folklore. In this respect the approach is similar to the *domaine public payant*. It is also suggested that the fees may be established or approved by a supervisory authority.

17. What has been said now means that certainly there is an economic aspect of folklore. Fees or other economic remunerations for authorizations to use expressions of folklore may, as just mentioned, be established or approved by the relevant competent authorities. They may, however, of course also be determined by the parties concerned, that is, most frequently, the communities concerned and the users. This raises the question of the "market value" of expressions of folklore. In this respect it may be of some interest to look at the question of how to determine the economic value of a copyright proper in a work.

FACTORS WHICH DETERMINE THE ECONOMIC IMPORTANCE OF COPYRIGHT-PROTECTED WORKS

18. In respect of copyright the basic philosophy is that the law designs--in addition to the moral rights--certain economic rights for the benefit of the author of a work. The contents and thereby also the economic value of those rights seems to depend primarily on six main factors:

- the acts for which authorization is needed (the "exclusive rights")
- the limitations on the rights
- the adaptation of rights to new technologies
- the implementation and enforcement of those rights
- the duration of the rights
- the international coverage of the rights.

In the following some remarks are made in respect of these elements.

The Basic Rights

19. Traditionally, the economic rights under copyright law are of two basic types. One consists of rights which relate to the making of copies of the works (the "reproduction right"). The other one consists of rights which relate either to copies already produced (e.g. the *droit de suite*) or to acts where no copying is involved, for instance, public performance, broadcasting or other communication to the public. Sometimes this right is described as a right of making available to the public either of works as such or of copies of works.

20. The reproduction right is in a way the classical right under copyright law. This right is of primordial importance for the printed works and the one whose value risks to become undermined by unrestricted reproduction in the form of photocopying or other acts of so-called

reprography. For other types of works, for instance musical and dramatic works, the right of public performance and broadcasting could be more important. For instance, it has recently been stated that for the music industry broadly speaking only about 30 per cent of the income results from the selling of records while the remaining 70 percent results from the exploitation of other rights.

21. The classical rights which have been mentioned now have, however, proved not to be altogether sufficient in the new technological environment. New ways and means of exploiting protected works have necessitated the recognition of new rights which were not known or at least were not considered as very important before. One example is the on-going discussion on the so-called "importation right", that is, the right of the author to control the importation of lawfully made copies of his work to a certain country. Another example is the "distribution right" and the "rental right" which have also become important with the advent of new exploitation technologies. Also, the new WIPO Copyright Treaty includes a specific provision in relation to the exclusive right of making available of works through so-called on-demand services.

Limitations on the Rights

22. As just mentioned, the rights under copyright law are generally designed as exclusive rights to authorize or prohibit certain acts in relation to the protected work. On the other hand, public or private interests have to be recognized in order to take care of the needs to use, in clearly defined cases, works without authorization and without payment ("free use") or without authorization but against payment ("non-voluntary licenses"). The extent of such limitations clearly have an impact on the economic value of the rights. If, for instance, photocopying in educational establishments, is not properly regulated from a copyright point of view, the economic value of the reproduction right and thus the financial viability in respect of certain important types of productions risks to be undermined.

23. The Berne Convention contains provisions enabling States to provide for certain limitations. For instance, non-voluntary licenses are generally considered permissible as regards broadcasting and permissible are also certain "minor exceptions" to the right of communication to the public. A general limitation on the possibilities for States to provide for limitations on the reproduction right is contained in Art. 9.2 of the Berne Convention. Such limitations may be imposed only under three conditions, namely that they apply only in certain special cases, only when they do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. That general "limitation on limitations" is also included in the new WIPO Copyright Treaty.

24. Thus this provision, together with the other provisions in the Berne Convention and in the WIPO Copyright Treaty and also in the WIPO Performances and Phonograms Treaty, provides a guarantee at the international level against expropriation of the economic value of the reproduction right and the other rights provided for in the treaties and thus also a guarantee for the author's economic interests at the national level.

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Adaptation of rights to new technologies

25. In recent decades there has been an enormous increase in the number of technological means which can be used for the production and dissemination of protected works and other contributions. Sound radio and television, combined with satellite and cable transmissions (in a near future also in a digital form), have made it possible to broadcast or communicate works to enormous populations in a scale and in a quality which was unknown just a few decades ago. The video recording technique has created new markets for audiovisual works and the sound recording technique--cassettes or CD-discs--has made it possible for music to reach new audiences. About 300,000 pages of literary works can be stored on one single CD-ROM and with the help of a form of so-called molecular storage, for instance the whole Library of Congress could in the future be stored on one single A 4-size sheet. Computer technology has created ever more sophisticated computer programs and has made possible storage of enormous quantities of protected works and other information in data bases which bases can be accessed in a comparatively simple way. Electronically stored documents and other information can be transmitted and printed ("electrocopying") and documents need not any more be printed or published; they can be stored in an information data base and from there delivered electronically ("electronic publishing" and "electronic delivery").

26. This development has necessitated a review of the system for the international protection of works, performances and phonograms. As is well known, this has recently been achieved through the adoption of the two new treaties, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. These treaties clarify existing rights and introduce new rights in those fields where new technology plays a particularly important role for the exploitation of the protected works and other contributions. Certainly, the fact that the legal protection system is improved and clarified means that the economic value of the rights in individual works and other productions.

Implementation and Enforcement

27. Concerning all rights, their real economic value lies in the fact that they can be implemented in practice and that they can be duly enforced. By their nature, the economic rights are exclusive and, consequently, should in principle be implemented on an individual basis. This is still true for most of the rights, for instance as regards reproduction rights in literary works or public performance rights in dramatic or audiovisual works. Some other rights, on the other hand, are best exercized collectively, for instance rights in respect of public performance of music and the excercise of reproduction rights in respect of reprography through collective administration organizations set up for this purpose.

28. Another important element in this context is the possibilities to enforce the rights, that is, that efficient, quick and inexpensive measures are available so that the copyright owner can take action against those who use his works without his authorization. If such measures do not exist, the rights loose much of their value and remain a "paper tiger." purely on paper. The importance of this aspect is made clear in the Model provisions which contain detailed provisions on how to enforce the rights provided for in respect of folklore. Also, the enforcement aspect is dealt with in the TRIPS Agreement and in the two new WIPO treaties.

The Duration of the Rights

29. In contrast to the ownership of physical things or of immovable property, rights in works as well as performers and producers' rights are limited in time. This limitation naturally has an impact on the value of the right, because after the expiration of that period the work is free and the copyright owner can no longer control its use or obtain any economic benefit from such use. Therefore, for instance, the extension of the term of protection for works within the countries of the European Community from 50 to 70 years from the death of the author has a considerable importance for copyright owners. In principle, this extension of the term of protection is applied also to works which have fallen into the public domain but where the 70-year period has not yet expired. This longer period of protection has proved to have far-reaching economic consequences; one reason for this is that more and more works maintain their attraction also after a comparatively long period; many examples have been seen where the interest in old works has been revived and they have started to become exploited again.

The International Coverage of the Rights

30. The economic value of a right under copyright law depends also on whether its owner can control the use of it in countries other than his own. Such rights are at the outset granted under national law but by means of the international conventions in this field and their national treatment principle, the rights enjoy protection also in other countries and the exploitation there can be controlled. Consequently, the principle of national treatment (foreign right-owners shall be guaranteed the same rights as the national ones), combined with the principle of minimum rights (that certain rights must be granted to the foreign right-owners) has an enormous economic importance for the international exploitation of economic rights under copyright law. The Berne Convention to-day has more than 120 member States. This means that rights in literary and artistic works are protected in all those States, something which if of a considerable economic significance for the right-owner. It means that he can assign the rights to use the work in some or all of those countries or license works for such use, etc. Consequently, each time a country accedes to the Berne Convention, this means that the economic value of the authors' rights in other countries increases.

SOME REMARKS ON THE FACTORS WHICH WOULD DETERMINE THE ECONOMIC IMPORTANCE OF EXPRESSIONS OF FOLKLORE

31. As mentioned above, it is rare that the laws of the European countries contain specific provisions on the protection of expressions of folklore. Bilateral and multilateral agreements on mutual protection of expressions of folklore are non-existing. Consequently it is hardly possible to give any indications about the economic aspects of the protection of folklore from a European point of view. Therefore, only a few remarks shall be made on the factors which could be important in assessing the economic aspects of this protection.

32. To the extent that expressions of folklore in the future will enjoy protection under any sui generis system, most likely the factors which will determine the economic value of the various specific folklore expressions will, broadly speaking, be the same as in respect of works under copyright law. Thus such factors as the rights provided for, their duration and their international coverage will determine that economic value.

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33. As mentioned above it is, at least in the Western European countries, a long-standing tradition to consider expressions of folklore as part of the public domain. Such folklore productions are rather much used. According to some information such use is even increasing, for instance music, textile designs and dances. As follows from what has been said above, to the extent that the music is adapted or arrangements made, the use of the music will be treated as other works which are protected and presuppose authorization and remuneration.

34. Performers very often perform folklore either in the form of arrangements or as "pure" folklore. This happens particularly in the field of music. In practice the performers' collecting societies at least in Sweden have received remuneration for performances of "pure" folklore in the same way and to the same extent as such performers who perform works (even if the law as such does not protect performers who perform folklore). The societies consider, in other words, the performance as such as worthy of protection regardless of subject matter performed. This leads in practice to the situation where such a performer receives remuneration as a soloist and not as an "ordinary" musician.

35. Of course the performers' organizations in my country welcome very much the new WIPO Performances and Phonograms Treaty which puts performers of folklore at the same level as other performers. Also, the introduction of performers' moral rights in that treaty is of great importance for the protection in this respect. In practice, however, as just mentioned, the societies in this field have tried to deal with the problem in practical terms, not least because of the economic unfairness of treating certain performers in a less favorable way than others.

36. Also in the field of authors' rights in music, the European societies seem to try to solve the issue of possible rights in folklore in practical terms. First, even as the situation differs, the level of originality required seems to give some room for protection of and remuneration for performances of, subject matters which would strictly speaking fall within the concept of folklore. At least in some cases there is actually no checking of whether a production is pure folklore or something else but the "author's" indication in this respect is accepted unless there are circumstances which indicate the contrary. Secondly, in most cases those subject matters would fall within the scope of "arrangements" and the arranger would get 1/3 of the normal remuneration. It does not seem that European societies in practice pay what is called *Ausfall* that is, in the case referred to, the remaining two thirds of the ordinary remuneration would in practice be paid and used for various general purposes in the field of music. Nor does the concept of *domaine public payant* be used in the field of music in Europe.

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