Study unit 2
The protection of folklore

Overview

In this study unit you will be introduced to the concepts ‘traditional knowledge’, ‘indigenous knowledge’, and ‘folklore’. You will also be introduced to the customary protection of traditional knowledge, and the problems faced by the holders of traditional knowledge. You will also briefly explore the activities of WIPO in this context.

Learning outcomes

After completion of this study unit, you should be able to —

- ❏ appreciate the meaning and content of the concepts ‘traditional knowledge’, ‘indigenous knowledge’, and ‘folklore’
- ❏ understand the customary protection of traditional knowledge and the problems relating to it
- ❏ understand the problems faced by the holders of traditional knowledge
- ❏ acknowledge the attempts at international level to protect traditional knowledge

Setting the scene

Arguably the most popular song ever to emerge from Africa was *The Lion Sleeps Tonight*. In 1939, that song was composed and recorded by Solomon Linda, a Zulu singer who had hunted lions as a boy. He was trying to translate into English a traditional song called ‘Mbube’, for hunting the lion. On his third take in a recording studio, he came up with the memorable lines – ‘In the Jungle, the mighty jungle, the lion sleeps tonight...’. The studio obtained copyright in the song and sold it to a variety of record companies. In the 1960s, a folk group recorded the song as *Wimoweh*. Most recently the song was used in the film *The Lion King*. The total royalty income over the last 60 years is estimated at between $10 million and $20 million dollars. Solomon Linda was paid one pound in cash. Nothing was paid to the community from which the traditional song came.

Discussion

Need for the legal protection of expressions of folklore

cultural heritage

self-expression

social identity

Folklore is an important cultural heritage of every nation and is still developing — albeit frequently in contemporary forms — even in modern communities all over the world. It is of particular importance to developing countries which more and more recognize folklore as a basis of their cultural identity and as 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 is to these countries increasingly important from the point of view of their social identity, too. Particularly in developing countries, folklore is a living, functional tradition.

improper exploitation of cultural heritage

no financial return

The accelerating development of technology, especially in the fields of sound and audiovisual recording, broadcasting, cable television, cinematography, and global information networks (such as the Internet) may lead to improper exploitation of the cultural heritage of a people. 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 in which they originate, and without conceding any share in the returns from such exploitations of folklore to the people who are the authors of their folklore. In connection with their commercialization, expressions of folklore are often distorted to correspond to what is believed to be better for marketing them.

public domain

In developed countries, expressions of folklore are generally considered to belong to the public domain. This approach explains why, in the main, developed countries generally did not establish a legal protection of the manifold national or other community interests related to the utilization of expressions of folklore.

special legal solutions

But it has become obvious that, 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 of expressions of folklore. Such protection should be against any improper utilization of expressions of folklore, including the general practice of making profit by commercially exploiting such expressions outside their originating communities without any recompense to such communities.

copyright law

The first attempts to explicitly regulate the use of creations of folklore were made in the framework of copyright law (Tunisia, 1967 and 1994; Bolivia, 1968 and 1992; Chile, 1970; Iran, 1970; Morocco, 1970; Algeria, 1973; Senegal, 1973; Kenya, 1975 and 1989; Mali, 1977; Burundi, 1978; Côte d'Ivoire, 1978; Sri Lanka, 1979; Guinea, 1980; Barbados, 1982; Cameroon, 1982; Colombia, 1982; Congo, 1982; Madagascar, 1982; Rwanda, 1983; Benin, 1984; Burkina Faso, 1984; Central African Republic, 1985; Ghana, 1985; Dominican Republic, 1986; Zaire, 1986; Indonesia, 1987; Nigeria, 1988 and 1992; Lesotho, 1989; Malawi, 1989; Angola, 1990; Togo, 1991; Niger, 1993; Panama, 1994). The Tunis Model Law on Copyright for Developing Countries (1976) and the Bangui text of 1977 of the Convention Concerning the African Intellectual Property Organization ('the OAPI Convention') did the same. The 1990 Copyright Law of China indicates that it is the intention to protect expressions of folklore by copyright. However, article 6 of the Law provides merely that '[r]egulations for the protection of copyright in expressions of folklore shall be established by the State Council'. The 1994 Copyright Ordinance of Viet Nam contains a similar provision — '[p]rotection of copyright granted to folklore works shall be prescribed by the Government'.

terminology

The majority of these national laws provide for the protection of 'works of folklore'. Some other laws (of Benin, Indonesia, Kenya, Mali, Morocco, Senegal, Tunisia, and Zaire) refer simply to 'folklore', whereas two of them (of Chile and China) use the term: 'expressions of folklore'.

common national heritage

Some national laws (of Chile, Ghana, Indonesia, Madagascar, Mali, and Tunisia) do not provide a substantive definition of the protected subject-matter. At best, they state that what is protected is common national heritage. The other laws provide more or less detailed definitions. The Copyright Law of China contains no definition, but this seems only to follow from the fact that the regulation of the protection of expressions of folklore is left to another statute.

use Berne Convention

Only two national laws (of Algeria and Morocco) provide definitions that substantively correspond with article 15(4)(a) of the Berne Convention for the Protection of Literary and Artistic Works (see below), in the sense that they use the

general notion of literary and artistic works, and then add one element to differentiate folklore creations from other works — the authors are unknown but there is reasonable ground to presume that they are citizens of the country concerned.

traditional cultural heritage

All other national laws include in their definitions those more essential elements which differentiate 'folklore' or 'works of folklore' from literary and artistic works proper — it is traditional cultural heritage passed from generation to generation. In other words, unlike the individual, personal nature of the creativity represented by literary and artistic works proper, 'folklore' (or works or folklore') is the result of the impersonal creativity of unknown members of a people or its communities. The definitions in some of those laws (of Burundi, Côte d'Ivoire, Guinea, Kenya, Rwanda, and Senegal) refer to unknown authors as creators, the definitions in others (of Barbados, Cameroon, Central African Republic, and Sri Lanka; also the OAPI Convention) to communities, or groups of communities, and the definitions in the law of the Congo to unknown authors and communities (see also the Tunis Model Law that refers to folklore creations 'by authors presumed to be nationals of the country concerned, or by ethnic communities'). The law of Zaire does not deal with who are the creators of national folklore.

unknown authors

Tunis Model Law

scientific and technological folklore

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

individual ownership

It follows from the fact that folklore is part of the traditional heritage that it would not be appropriate to leave its protection to some individual 'owners of rights'. In principle, it could be a solution to entrust the communities concerned with exercising (through their representatives, or leaders) the rights granted for the protection of the folklore developed by them. But all the national laws that provide for the copyright style of protection of folklore rather authorize various national bodies to exercise such rights. In certain countries those bodies are the competent ministries or similar national authorities, while in others (Algeria, Benin, Cameroon, Central African

competent authorities

Republic, Congo, Côte d'Ivoire, Guinea, Morocco, Rwanda, and Senegal), the relevant bodies are the state bureaus for the protection of authors' rights.

assimilation to literary and artistic works

Some national laws go so far in the assimilation of folklore creations to literary and artistic works that they do not contain any specific provisions concerning the rights protected in respect of folklore creations. So the general provisions on the protection of works seem to be apply. This seems to be so in Barbados, Burundi, Cameroon, Chile, Ghana, Indonesia, Kenya, Madagascar, Rwanda, Sri Lanka, and Zaire. The other national laws provide for a special regime, different from the regime of the protection of literary and artistic works. The latter laws make certain specific acts, if carried out for profit, dependent on the authorization to be given by a competent authority, either for the fixation and reproduction of folklore creations (in Algeria, Mali and Morocco), or, also for the public performance of such creations (in Benin, Central African Republic, Congo, Côte d'Ivoire, Guinea, and Senegal).

special regime

right of importation

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

fees payable

Certain national laws (of Benin, Cameroon, Central African Republic, Chile, Congo, Ghana, Guinea, Morocco, and Senegal) prescribe that where folklore creations are used for profit, fees determined by law or by the competent authority, must be paid. Other laws (of Algeria, Mali, Rwanda, and Tunisia) provide merely that the payment of fees may be required.

purposes of collecting fees

A few national laws also determine the purposes for which the fees collected should be used. Those laws, generally, provide that the fees must be used for cultural and welfare purposes of national authors. Under the laws of the Central African Republic, Guinea, and Senegal, part of the fees should be paid to those who have collected the 'works of folklore' concerned. The rest of the fees should then be used for these purposes of national authors.

no time limit

It follows from the very nature of folklore — it is the result of creative contributions of usually unknown members of a number of subsequent generations — that its protection

cannot reasonably be limited in time. With most of the laws that provide for the protection of folklore creations, it can be deduced from the context of the various provisions that such protection is perpetual. The laws of some countries (Congo, Ghana, and Sri Lanka) also state this explicitly.

infringement and sanctions

The sanctions for the infringement of the rights in 'works of folklore' are the same in many countries as for the infringement of authors' rights. But the laws of some countries provide for special sanctions. These include fines and seizures, and sometimes also imprisonment.

The Berne Convention

Stockholm revision

At international level, the Diplomatic Conference of Stockholm in 1967 for the revision of the Berne Convention also tried to introduce copyright protection for folklore. The Main Committee for the revision of the substantive provisions of the Berne Convention set up a special Working Group to elaborate relevant suggestions and to decide 'what would be the most suitable place in the Convention for a provision dealing with works of folklore'. The proposal of the Working Group was adopted unanimously, with six abstentions. As a result, article 15(4) of the Berne Convention contains the following provision:

unknown author

> '(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.

designated authority

> '(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 declaration to all other countries of the Union'.

covers more than folklore

It is interesting to note that the provision, as adopted, does not refer to folklore and that it certainly includes within its scope also works that are not part of folklore. It is only the legislative history of the provision that indicates that folklore was (also) intended to be covered.

Problems with a copyright style of protection for folklore

product of process of evolution

individual originality

author-centric

It seems that copyright law may not be the right, and certainly not the only, type of law to protect expressions of folklore. This is because, whereas an expression of folklore is the result of an impersonal, continuous, and slow process of creative activity exercised in a given community by consecutive imitation, works protected by copyright must, traditionally, bear a mark of individual originality. Traditional creations of a community (like its folk tales, folk songs, folk music, folk dances, and folk designs or patterns) often may not fit the mold of literary and artistic works. These traditional creations are generally much older than the duration of copyright. So for this reason alone, a copyright type of protection, limited to the life of the author and a relatively short subsequent period, does not offer expressions of folklore a sufficiently long protection. Also, copyright is author-centric. With folklore, an author (at least in the way in which the term is understood in copyright law) is absent.

sui generis solution

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

WIPO / UNESCO Model Provisions

protocol to UCC

On 24 April 1973, the Government of Bolivia sent a memorandum to the Director General of UNESCO requesting that it examines the opportunity of drafting an international instrument on the protection of folklore in the form of a protocol to be attached to the Universal Copyright Convention.

study

Following that request, and in pursuance of the decision of the Intergovernmental Committee of the Universal Copyright Convention in December 1973, the UNESCO Secretariat made a study on the desirability of providing for the protection of folklore on an international scale. It was submitted to that Committee and the Executive Committee of the Berne Union at their 1975 sessions. These committees referred the whole issue to the Cultural Sector of UNESCO, so that it might undertake an exhaustive study of all questions inherent in the protection of folklore. In view of the links that such protection could have with copyright, the committees also decided that the report on the results of that work should be submitted to

their next sessions, where they would re-examine the issue.

committee or experts

In 1977, the Director-General of UNESCO convened a Committee of Experts on the Legal Protection of Folklore. It agreed that it was necessary to submit folklore protection to a complete examination of all the problems posed by it.

issues

As recognized by the Executive Committee of the Berne Union, and the Intergovernmental Committee of the Universal Copyright Convention, at their 1977 sessions, the folklore issue had many aspects. It comprised questions of identification, material conservation, preservation and reactivation, as well as sociological, psychological, ethnological, politico-historical, and other aspects. All these aspects were interdependent and called for a global study of the protection of folklore. It was dealt with on an interdisciplinary basis within the framework of an overall and integrated approach by UNESCO. Still, special efforts had to be made to solve the problem of the intellectual property aspects of the legal protection of expressions of folklore. This was proposed by the International Bureau of WIPO and decided by the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention at their sessions in February 1979.

interdisciplinary work

working group

In accordance with 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 in Geneva, from 7 to 9 January 1980, to study draft model provisions intended for national legislation as well as international measures for the protection of expressions of folklore. The Working Group was attended by sixteen experts from various countries invited in their personal capacities by the Directors-General of UNESCO and WIPO.

agreement of working group

After considering the working documents, the working group agreed that:

- ❏ adequate legal protection of folklore was desirable;
- ❏ such legal protection could be promoted at the national level by model provisions for legislation;
- ❏ such model provisions should be so elaborated as to apply both in countries where no relevant legislation was in force and in countries where existing legislation could be developed further;
- ❏ the said model provisions should allow for protection by means of copyright and related rights, where such form of protection could apply; and
- ❏ the model provisions for national laws should pave the way for sub-regional, regional, and international

protection of expressions of folklore.

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 on it, taking into consideration all the interventions made in the group, and that such a draft with its commentary should be presented for further consideration at a later meeting.

draft with commentary

So the secretariats prepared a revised draft and a commentary on it.

committee of governmental experts

In the meantime, UNESCO convened a Committee of Governmental Experts on the Safeguarding of Folklore in Paris, from 22 to 26 February 1982. That committee adopted 30 recommendations, addressed to UNESCO, or the states, or both, concerning the definition, identification, conservation, and preservation of folklore. As regards the utilization of folklore, it was recommended that, with regard to the work currently being conducted jointly by UNESCO and WIPO on the ‘intellectual property’ aspects of folklore protection, those two organizations continue their work in that area.

Model Provisions

The Directors General of UNESCO and WIPO convened a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore. It met at the WIPO headquarters in Geneva from 28 June to 2 July 1982. The Committee discussed the model provisions along with the relevant commentary prepared by the secretariats. It adopted what is called the ‘Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions’ (‘the Model Provisions’).

Legal nature

legal nature

Although the Model Provisions are provisions for a law, the term ‘law’ appears in square brackets in order to make it clear that they do not necessarily have to form a separate law, but may constitute, for example, a chapter of an intellectual property code, and do not have to be a statute passed by the legislative body, but may be a decree or decree law, for example. The Model Provisions were designed with the intention of leaving enough room for national legislation to adopting the type of provision best suited to the conditions

adaptable to national conditions

existing in a given country.

Title

IP type of protection

In view of the wide scope of the protection of folklore, the title of the Model Provisions was decided on so as to adequately reflect their particular subject — the intellectual property type protection of expressions of folklore against illicit exploitation and other prejudicial actions. A rather detailed definition of the subject in the title itself is also necessary to avoid possible confusion with other documents that may be drawn up on the various other aspects of the protection of folklore.

Preamble

reasons for protection

The sections of the Model Provisions are preceded by a preamble (the recitals) that gives the reasons for establishing legal protection for expressions of folklore. This preamble is proposed in square brackets, in view of the fact that recitals are not usually in the statutes of many countries. The preamble is intended to summarize the main reasons for the proposed protection and its purpose. It is also intended to reflect a basic requirement, underlying the Model Provisions — the necessity of maintaining an appropriate balance between protection against abuses of expressions of folklore, on the one hand, and freedom and encouragement of its further development and dissemination, on the other.

Summary of the main provisions

The Model Provisions consist of fourteen sections. The principle of protection is stated in section 1. Section 2 defines ‘expressions of folklore’. Section 3 specifies the utilizations that are subject to authorization, whereas section 4 sets out the exceptions to the need for authorization. Section 5 determines the way in which the source of the expression of folklore utilized must be indicated. Sections 6 to 8 deal with offences, sanctions, and related measures. Section 9 determines the ‘competent’ and ‘supervisory’ authorities. Section 10 lays down the procedure for requesting and granting the required authorization. Section 11 establishes the jurisdiction of courts. Section 12 expressly maintains copyright and other possible forms of applicable protection. Section 13 provides for the unhindered use and development

of expressions of folklore where such use or development is ‘normal’. Section 14 determines the conditions under which expressions of folklore originating from a community in a foreign country are protected.

Principle of protection

protected in host country

Section 1 states that the subject of protection is any expression of folklore developed and maintained in the country granting the protection.

illicit exploitation & other prejudicial actions

This section also refers to the acts against which expressions of folklore are protected. They are ‘illicit exploitation’ and ‘other prejudicial actions’. Any utilization in violation of the provisions of section 3 (unless it is within the scope of the exceptions mentioned in section 4) would be illicit exploitation. Similarly, non-compliance with the provisions of section 5.1 (subject to section 4.1(iii) and 4.2) and commission of the acts described in section 6.3 and 6.4 would constitute other prejudicial actions that are illicit even if they occur in connection with an authorized utilization or with a utilization that does not require authorization.

It goes without saying that the protection is granted under the jurisdiction of the country concerned, and that it applies to nationals and foreigners.

Protected expressions of folklore

expressions of folklore

The Model Provisions do not offer any definition of the term ‘folklore’. The reason is to avoid possible conflict with relevant definitions that are or may be contained in other documents or legal instruments concerning the protection of folklore. However, for the purposes of the Model Provisions, section 2 defines the term ‘expressions of folklore’ in line with the findings of the 1982 Committee of Governmental Experts. ‘Expressions of folklore’ are understood as productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community.

distinct from copyright

The use of the words ‘expressions’ and ‘productions’ rather than ‘works’ is intended to underline the fact that the provisions are sui generis, rather than of copyright, since ‘works’ are the subject matter of copyright. Naturally, the expressions of folklore may, and actually usually do, have the same artistic form as ‘works’.

artistic heritage

community oriented

traditional cultural heritage

The definition of the term ‘expression of folklore’, adopted for the purposes of the Model Provisions, does not speak of the ‘cultural heritage of the nation’ referred to in the preamble. It is focused on artistic heritage, on the one hand, and is community oriented, on the other. Artistic heritage is a particular domain within the more extensive realm of cultural heritage. The Model Provisions are intended to centre around the protection of expressions of the traditional artistic heritage rather than to extend also to other forms of cultural heritage. Also, the artistic heritage of communities is a more restricted body of traditional values than the entire traditional artistic heritage of the nation. ‘Traditional artistic heritage developed and maintained by a community’ is understood as representing a special part of the ‘cultural heritage of the nation’.

outside scope of protection

The fact that only ‘artistic’ heritage is considered, means that, among other things, traditional beliefs, scientific views (such as traditional cosmogony), substance of legends (such as the commonly known course of the life of traditional heroes like King Arthur and his knights), or merely practical traditions as such, separated from possible traditional artistic forms of their expression, do not fall within the scope of the proposed definition of ‘expressions of folklore’. But ‘artistic’ heritage is understood in the widest sense of the term to cover any traditional heritage appealing to the aesthetic sense of man. Verbal expressions that would qualify as literature if created individually by an author, musical expressions, expressions by action, and tangible expressions may all consist of characteristic elements of the traditional artistic heritage and qualify as protected expressions of folklore.

origin of expression

The notion of expressions of folklore of a community covers both the expressions originating in that community and those originating elsewhere but having been adopted, further developed, or maintained through generations by that community. It is irrelevant whether an actual expression,

consisting of characteristic elements of the traditional artistic heritage, has been developed by the collective creativity of a community or by an individual reflecting the traditional artistic expectations of the community.

characteristic elements

'Characteristic elements' of the traditional artistic heritage, of which the production must consist to qualify as a protected 'expression of folklore', connotes in the given context that the element must generally be recognized as representing a distinct traditional heritage of a community. As regards the question of what has to be considered as belonging to the folklore of a 'community', one or two members of the Working Group suggested that the answer required a 'consensus' of the community that would certify the 'authenticity' of the expression of folklore. The proposed definition does not refer to such 'consensus' of the community, as making the application of the law subject in each case to the thinking of the community, would render it necessary to make further provisions relating to how such consensus would have to be verified, and when it must exist. The same would apply to the requirement of 'authenticity', which would also need further interpretation. But both the requirement of 'consensus' and 'authenticity' are implicit in the requirement that the elements must be 'characteristic'. This shows that the traditional cultural heritage elements which become generally recognized as characteristic are usually authentic expressions of folklore, recognized as such by the tacit consensus of the community concerned.

consensus

authenticity

typical kinds

An illustrative enumeration of the most typical kinds of expression of folklore is added to the definition. They are subdivided into four groups depending on the form of the 'expression':

words

music

action

tangible

- ❏ expression by words ('verbal'),
- ❏ expressions by musical sounds ('musical'),
- ❏ expressions 'by action' (of the human body), and
- ❏ expressions incorporated in a material object ('tangible expressions').

reduction to material form not needed

Each must consist of characteristic elements taken from the totality of the traditional artistic heritage. The first three kinds of expression need not be 'reduced to material form' — the words need not be written down, the music need not exist in the form of musical notation, and the bodily action (such as

dance) need not exist in a written choreographic notation. But tangible expressions must be incorporated in a permanent material, such as stone, wood, textile, or gold.

permanent material

The provision also gives examples of each of the four forms of expression. They are —

examples

- ❏ for the first, ‘folk tales, folk poetry and riddles’;
- ❏ for the second, ‘folk songs and instrumental music’;
- ❏ for the third, ‘folk dances, plays and artistic forms of rituals’; and
- ❏ for the fourth, ‘drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes; musical instruments; [and] architectural forms’.

The last appears in square brackets to show the hesitation that accompanied its inclusion.

Traditional sites of folklore events do not generally qualify as expressions of folklore, as they are not usually productions consisting of characteristic elements of the traditional artistic heritage of a community, but only places where expressions of folklore are performed regularly. But certain folklore events can be protected as artistic expressions by action — kinds of ritual — if they do not represent merely a traditional framework for the utilization of various expressions of folklore to be protected separately.

separate protection

The identification of expressions of folklore that originate in and are developed by a community can be achieved by keeping an inventory of them. But since such an inventory relates to the conservation of folklore, its regulation does not fall within the scope of the Model Provisions. Whenever a competent authority is in doubt whether a given expression is an expression of folklore, it should consult all available sources, including existing catalogues, other records, expert opinion, witnesses, and the elders of a community.

inventory

consult sources

Utilizations subject to authorization

The idea of making certain forms of utilization of traditional expressions of folklore subject to authorization is not

authorization

unfamiliar to creative communities in many countries. Two examples illustrate this point:

Australia

- In Australia, Peter Sanki reported to the Australian Copyright Council on October 3, 1978, that a 'permission, mechanism is well established among tribal Aboriginals in the Northern Territory' (*Report to the Australian Copyright Council* (30 October 1978) 7). In 1976, Australian Aboriginal tribal elders claimed that photographs in a book of anthropological studies depicted subjects that had secret and sacred significance to their community. They alleged that no proper permission had been given to publish them.

collective ownership

- As far as Africa is concerned, Professor JH Kwabena Nketia ('African Traditions of Folklore' 1979 *INTERGU Yearbook* 225--227) 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,

Africa

> '... 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.... 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.... [I]n 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'

relevant questions

The following questions were considered to be potentially relevant in deciding what kinds of utilization of expressions of folklore should be subject to authorization:

- whether there is gainful intent;
- whether the utilization is made by members or non-members of the community from which the expression utilized comes; and
- whether the utilization occurs outside the traditional or customary context.

In the end it was agreed that utilizations made both with

gainful intent

outside context

gainful intent and outside their traditional or customary context should be subject to authorization. This means, among other things, that an utilization — even with gainful intent — within the traditional or customary context is not subject to authorization. But an utilization, even by members of the community of origin of the expression, requires authorization if it is made outside that context and with gainful intent.

traditional context

'Traditional context' is understood as the way of using an expression of folklore in its proper artistic framework based on continuous usage by the community. For example, to use a ritual dance in its traditional context means to perform it in the actual framework of the rite. By contrast, the term 'customary context' refers rather to the utilization of expressions of folklore according to the practices of the everyday life of the community, such as the usual ways of selling copies of tangible expressions of folklore by local craftsmen.

authorization required

Section 3 then specifies the acts of utilization which require authorization where such circumstances exist. In doing so, it distinguishes between the case in which copies of the expressions are involved and the case in which copies of such expressions are not necessarily involved:

- ❏ in the first case, the acts requiring authorization are publication, reproduction, and distribution;
- ❏ in the second case, the acts requiring authorization are public recitation, public performance, transmission by wireless means or by wire, and 'any other form of communication to the public'.

publication

'Publication' is understood in the broadest sense of the term, so as to cover any form of making available to the public the original, a copy, or copies of an expression of folklore reduced to material form. For the purposes of the Model Provisions, publication covers exhibition, sale, or hire of one or more copies of tangible expressions of folklore.

reproduction

Reproduction and distribution of expressions of folklore have been made subject to authorization as separate acts, not merely as components of publication. For example, reproduction of an expression of folklore, with gainful intent and outside its traditional or customary context, is also subject to authorization if made in a single copy for a given

distribution

buyer, or for the purpose of communication to the public at a distance in immaterial form. The notion of reproduction also covers recording of sounds, images, or both. Distribution is mentioned separately in view of the possible distribution with gainful intent of existing copies of expressions of folklore not intended for distribution at all, or not by the person who made them.

use by indigenous communities

The Model Provisions would not prevent indigenous communities from using their traditional cultural heritage in traditional and customary ways and in developing it by continuous imitation. Keeping alive traditional popular art is closely linked with the reproduction, recitation, or performance, in a stylistically varying presentation, of traditional expressions in the originating community. An unrestricted requirement for authorization to adapt, arrange, reproduce, recite, or perform such creations could place a barrier in the way of the natural evolution of folklore and could not be enforced in societies in which folklore is a part of everyday life. So the Model Provisions allow any member of a community freely to reproduce or perform expressions of the folklore of his own community within their traditional or customary context, irrespective of whether he does it with or without gainful intent, and even if he does so by means of modern technology, if such technology has been accepted by the community as one of the means of the evolution of its living folklore. During the deliberations on this point, some experts suggested that a distinction should be made between utilization by means of modem technology, and utilization in traditional ways. But in the end this distinction was discarded to facilitate the evolution of folklore.

free to reproduce and perform

not hinder where without gainful intent

The Model Provisions would not hinder uses of expressions of folklore without gainful intent for legitimate purposes outside their traditional or customary context. So, for example, making copies for purposes of conservation or research, or for archives would not be hampered by the Model Provisions.

But certain obligations exist even where the utilization of expressions of folklore does not require any authorization. These are dealt with in sections 5.1, section 6.3, and 6.4.

During the deliberations of the experts the advantages of

system of authorization

preliminary authorization of certain kinds of use of expressions of folklore were weighed against the feasibility of a system of mere checks on their utilization. In the latter case, the exploitation of expressions of folklore remains free, provided that it does not constitute an offence specified by law, or is not otherwise prejudicial to the legitimate interests of the community in which they have been developed and maintained. But a system of mere subsequent checks entails serious disadvantages from the point of view of both the users of expressions of folklore and the communities, and other entities or individuals with protected interests in the expressions used. A prospective user of an expression of folklore may not always be sure whether the intended use will conflict with legitimate interests. This would necessitate a system of previous clearance, which would require the regulation of a series of substantive and administrative problems, in order to minimize the factor of uncertainty involved. But the entities supervising the utilization of expressions of folklore and safeguarding all related interests would remain without any system of forewarning and could intervene only when the harm had been done and denounced. Under a system of subsequent checks, special difficulties would be met in countries where remuneration for commercial use of expressions of folklore is held just and reasonable. So the experts adopted a combined system of authorization and sanctions. The advantages of such a combined system may be demonstrated by the particular case of utilizing secret expressions of folklore. The requirement of previous authorization may help to prevent the use of such expressions, at least for commercial purposes, and subsequent sanctions would become necessary only where authorization was not required by law, or where the requirement had been disregarded.

competent authority

ownership

In section 3, reference is also made to the entity entitled to authorize intended utilizations of expressions of folklore. The Model Provisions alternatively refer to ‘competent authority’ and ‘community concerned’. They avoid the term ‘owner’ of the expression concerned. They do not deal with questions of ownership of expressions of folklore, as this aspect of the problem may be regulated in different ways from one country to another. In some countries, expressions of folklore may be regarded as the property of the nation; in others, the sense of ownership of the traditional artistic heritage may have been

more strongly developed in the communities concerned themselves. Who should be entitled to authorize the utilization of expressions of folklore depends very much on the situation as regards ownership of them and necessarily varies according to different statutes on the subject. Countries where aboriginal or other traditional communities are recognized as owners fully entitled to dispose of their folklore and where such communities are sufficiently organized to administer the utilization of the expressions of their folklore, such uses may be subject to authorization by the community itself. This would grant permission to prospective users in a manner similar to authorization given by authors, usually at full discretion. In other countries, where the traditional artistic heritage of a community is basically considered as a part of the cultural heritage of the nation, or where the communities concerned are not prepared adequately to administer the use of their expressions of folklore themselves, 'competent authorities' may be designated to give the necessary authorizations in form of decisions under public law. Questions relating to the determination of competent authorities and the process of authorization are dealt with below in more detail in connection with sections 9 and 10 of the Model Provisions.

Exceptions

The Model Provisions set out four instances where there is no need to obtain authorization:

education

- Utilization for purposes of education: in this case there is no need for authorization even if the expression of folklore is made accessible against payment, like selling text books, or offering teaching in exchange for tuition fees. Such free utilization of expressions of folklore is allowed for all and any educational purposes and is not restricted — as is the case in some copyright laws for protected works — to utilization 'by way of illustration' in the course of teaching.

illustration

- Utilization 'by way of illustration' in the original work of an author, provided that such utilization is compatible with fair practice: the limits of fair practice can best be determined by applying the same standards that exist

in the country in connection with the free use of authors' works protected by copyright. But unlike most copyright laws the Model Provisions do not confine the use by way of illustration to utilization 'for purposes of teaching'.

borrowed for original work

- Expressions of folklore are 'borrowed' to create an original work: this important exception serves the purpose of allowing the free development of individual creativity inspired by folklore. The Model Provisions should not hinder in any way the birth of original works based on expressions of folklore, whether in the visual arts (like some wooden sculptures of Barlach), music (like some compositions by Bartok), or literature (like many adaptations of folk tales).

incidental utilization

- 'Incidental utilization': to elucidate the meaning of 'incidental utilization', paragraph 2 mentions expressly (but not exhaustively) the most typical cases considered to be incidental utilization — utilization in connection with reporting on current events, and utilization of images where the expression of folklore is an object permanently located in a public place.

free use

Some experts suggested that the Model Provisions should refer to copyright law to the effect that, in all cases where the latter allowed free use of works, the use of expressions of folklore should also be free. Others suggested that the Model Provisions should take over the typical free use provisions of copyright law. But neither suggestion was accepted, since many cases of free use in respect of works protected by copyright are irrelevant to the proposed sui generis protection of expressions of folklore, such as reproduction in the press, or communication to the public of any political speech or a speech delivered during legal proceedings. It seemed to be more appropriate to adapt to the utilization of expressions of folklore those provisions of copyright laws that were relevant to folklore. But from this does not follow that national legislation cannot also apply other limitations adopted under the copyright law of the country in so far as they are consistent with the sui generis system to protect expressions of folklore.

Acknowledgement of source

source acknowledged

To strengthen the links between the originating community and its expressions of folklore, and also to facilitate control over the use of such expressions, section 5 requires that in all printed publications, and in connection with any communication to the public, of an expression of folklore its source must be indicated by mentioning in an appropriate manner the community and/or the geographic place from which the expression utilized has been derived. The words 'source' and 'derived' have been used because of the fact that it may often be difficult to determine where the given expression of folklore actually originated, especially where the originating community extends over the territory of more than one country, or where the community adopted, maintained, or further developed an expression that ultimately originated elsewhere.

source identifiable

This requirement would apply only where the source of the expression of folklore is 'identifiable' — where its user can be expected to know where such expression comes from, or from which community it derives.

not required

Acknowledgement of the source of the expression is not required —

- ❏ where it would be unreasonable to insist on it in connection with incidental utilizations, and
- ❏ where expressions of folklore are adapted to create an original work of an author.

omission

Omission of acknowledgement of the source in cases where such acknowledgement is required is subject to a fine (see section 6).

indicate authorship ito copyright law

Complying with the requirement of acknowledgement of the source of an expression of folklore used does not give exemption from the obligation under copyright law also to indicate authorship whenever the expression of folklore has been derived in an original form, created by an individual reflecting the traditional artistic expectations of the community in a way which entitles that individual also to copyright protection.

Offences

not acknowledged

Section 6.1 deals with non-compliance with the requirement of acknowledgement of the source of the expression of folklore. Section 6.2 deals with the unauthorized utilization of an expression of folklore, where authorization is required. It is understood that the offence of using an expression without authorization is also constituted by uses going beyond the limits, or that are contrary to the conditions, of an authorization obtained.

not authorized

deception of public

Section 6.3 and 6.4 provide for two special cases — deception of the public, and distortion of the expression of folklore. The first is essentially passing off — creating the impression that what is involved is an expression of folklore derived from a given community when it is actually not the case. The second offence can be constituted by any kind of public utilization that distorts the expression of folklore, directly or indirectly, in a manner 'prejudicial to the cultural interests of the community concerned'. The term 'distort' covers any act of distortion or mutilation or other derogatory action in relation to the expression of folklore published, reproduced, distributed, performed, or otherwise communicated to the public by the perpetrator.

distortion

It goes without saying that more than one of these offences may be committed cumulatively.

intention required

All four kinds of offence require intention. But as regards non-compliance with the requirement of acknowledgement of source and the need to obtain authorization to use the expression of folklore, the Model Provisions also allow (in square brackets) for negligence. This takes account of the nature of the offences and the difficulties involved in proving intent in cases of omission.

negligence

criminal sanctions

The sanctions for each type of offence established by the Model Provisions should be determined in accordance with the criminal law of the country concerned. The two main types of possible punishments appear to be fine and imprisonment. Which of these sanctions should apply, what kinds of other punishments could be provided for, and whether the sanctions should apply separately or concurrently, depends on the nature of the offence, the

country practice

importance of the interests to be protected, and the solutions already adopted in the country for similar offences. The minimum and maximum fines or terms of imprisonment likewise depend on the practice in each country. So the Model Provisions do not suggest any kind of relevant solution.

unlimited duration of protection

Note that the protection afforded by the Model Provisions is unlimited in time. This is one of the interesting differences between the Model Provisions and copyright law. Protection of unlimited duration is justified on the basis that the protection of the expressions of folklore is not for the benefit of individual creators but for a community the existence of which is not limited in time. But whether an action can be brought before a court without regard to the time elapsed since the date when the infringement or offence was committed, is another question. Since prescription (or statutes of limitation) often applies to criminal sanctions and civil actions in the applicable national law, the Model Provisions do not contain any rule of prescription.

prescription or statute of limitations

Seizure and other actions

Section 7 applies in the case of any violation of the law both to objects and receipts.

objects

The term ‘object’ connotes ‘any object which was made in violation of this [law]’. This includes, for example, copies of written expressions of folklore, sound recordings of musical expressions of folklore, videocassettes of a folklore dance performance, copies of drawings belonging to folklore, provided they were made in violation of section 3 (simply, without authorization and with gainful intent), section 5 (where objects are published, an so on, without indicating their origin in an appropriate manner), or section 6.3 and 6.4 (in a manner deceiving the public in respect of their source, or distorting the expression of folklore that they embody).

receipts

The ‘receipts’ are ‘receipts of the person violating it [that is to say, violating the law]’. Typical examples are the receipts of the seller of any infringing object, and the receipts of the organizer of an infringing public performance.

seizure

Such objects and receipts are subject, according to one alternative, to ‘seizure’, and according to another, to ‘applicable actions and remedies’. Such actions or remedies may, for example, consist of a prohibition on stocking, importing, and exporting. It should be noted that seizure and other similar actions are not necessarily considered under the Model Provisions as confined to sanctions under penal law. They may also be provided in other branches of the law, including the law of civil procedure. Seizure takes place according to the legislation of each country.

implements used for infringement

The Model Provisions do not provide for seizure of implements used for perpetrating the violation of the law, as is often found in other types of protection of intellectual property. But a sanction of this type is not contrary to either the spirit or wording of the Model Provisions. So seizure or some other similar action may extend to implements used mainly or solely for unlawful utilization of expressions of folklore. Such articles may include plates, matrices, films, or copying devices, sound or video recorders, and various other tools.

Civil remedies

damages

Section 8 emphasizes that the penal sanctions provided for in section 6 are no substitute for damages or other civil remedies. On the contrary, section 6 is without prejudice to the availability of such remedies. Such remedies typically include compensation for any damage caused by the unlawful utilization of the expression of folklore, such as the loss of fees normally requested for proper authorization. They also include compensation for any harm done to the reputation of the community concerned on account of the distortion of the expression of folklore.

compensation

Authorities

designation of authority

Section 3 subjects certain utilizations of expressions of folklore to authorization by a ‘competent authority’ or, the ‘community concerned’. Section 9 provides for the designation of the competent authority, if that alternative is

preferred by the legislator. The same section also provides, in a second paragraph in square brackets, for the designation of a 'supervisory authority', if this should become necessary because of the adoption of certain subsequent provisions suggested alternatively as regards activities to be carried out by such an authority. The term 'authority' is to be understood as any person or body entitled to carry out functions specified in the Model Provisions.

functions

According to those provisions, the functions of the competent authority are (if such an authority has been designated) —

- ❏ to grant authorizations for certain kinds of utilization of expressions of folklore (section 3),
- ❏ to receive applications for authorization of utilizations (section 10.1,
- ❏ to decide on them (section 10.2), and,
- ❏ where authorization is granted, to fix and collect a fee, where required (section 10.2).

appeal

The Model Provisions also provide that any decision of the competent authority is subject to an appeal (sections 10.3 and 11.1).

tariff of fees

As far as the supervisory authority is concerned, the Model Provisions offer the possibility (in square brackets) of providing in the law that the supervisory authority should establish a tariff of the fees payable for authorizations of utilizations, or should approve such tariff (section 10.2). The authority's decision is subject to appeal to a court (section 11.1).

country specific

The aim of the section under consideration (section 9) is that the legislator (or other body issuing the provisions) should specify the identity of the relevant authority, if the legislator wants to designate such authority. Which authority will be designated in a given country depends largely on the legal system in that country.

ministry

A possible solution is to set up a special authority to deal with the tasks laid down in the Model Provisions and to designate a ministry (like the Ministry of Culture) as the supervisory authority. As far as the competent authority is concerned, it can be the Ministry of Culture or Arts, any public institution for matters related to folklore, an authors' society, or a similar

body representing community

institution. A representative body of the community concerned could likewise be designated, even where, for whatever reason, the legislator had preferred not to recognize the community itself, in its capacity as owner of its expressions of folklore, as being entitled directly to authorize utilizations of such expressions.

community acting itself

If the legislator decides that the community itself — rather than the 'competent authority' — is entitled to permit or prevent utilizations of its expressions of folklore subject to authorization, the community will act in its capacity as owner of the expressions concerned and will be free to decide how to proceed. There will be no supervisory authority to control how the community exercises its relevant rights. But the experts believed that if it was not the community as such but a designated representative body of it that was entitled by legislation to give the necessary authorization, such a body would qualify as a competent authority, subject to the relevant procedural rules laid down in the Model Provisions.

It is also possible that instead of one authority, specially set up for the purpose, one or more institutions, already existing or newly established, can be designated as competent authorities.

association of community representatives

It seems useful and logical for representatives of the various folklore communities of the country to be associated and given an important role in the work of any competent authority. Also, representatives of cultural and ethnological institutions (including museums) with experience in certain aspects of the protection of folklore can likewise be associated in the work of the competent authority.

Authorization

writing

Section 10.1 implies that an authorization required under section 3 must be preceded by, and be the consequence of, an 'application' submitted to the competent authority or the community concerned. By placing the words 'in writing' in square brackets, the Model Provisions invite reflection on whether oral applications should be allowed.

individual or blanket

The paragraph permits the authorization to be 'individual' or 'blanket'. The first connotes an ad hoc authorization, the second is intended

for customary users such as cultural institutions, theatres, ballet groups, and broadcasting and television organizations. In this latter context, legislators may also consider the application of non-voluntary licensing that may exist concerning the utilization of works protected by copyright, with special regard to certain types of use by broadcasting organizations and cable systems.

national conditions

The Model Provisions do not give any guidance as regards the information any application for authorization has to contain. An appropriate regulation on applications to be submitted to the competent authority or the community concerned can be issued by each country in accordance with the conditions existing in that country. It is advisable to require the following information to enable the competent authority or the community concerned to make its decision:

- ❏ information concerning the prospective user of the expression of folklore (especially his name, professional activity, and address);
- ❏ information concerning the expression to be used (it should properly identify it by also mentioning its source); and
- ❏ information as regards the intended utilization (this should comprise, in the case of intended reproduction, the proposed number of copies, and territory of distribution of the reproduced copies; 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).

writing

Of course, it is easier to comply with these requirements if applications are required to be submitted in writing.

process of granting authorization

The Model Provisions do not contain provisions concerning the process of granting the authorization. But it is advisable that the decision should be required, by a decree implementing the law, within a certain number of days (fifteen or 30 days have been suggested by several experts). The period should be long enough to give sufficient time for the examination of the application but short enough not to hamper the envisaged utilizations of expressions of folklore. If the competent authority or community concerned does not communicate the decision — in writing — to the applicant within the applicable period, the authorization applied for

should be regarded as granted.

reasons for rejection

It should be required that, if the application is rejected, the rejection be accompanied by the reasons for such rejection. Such reasons may, amongst others, relate to the proposed kind of utilization, such as where the use of artistic forms of a religious ritual is intended for a show in a night club.

collecting fees

Section 10.2 allows, but does not make it mandatory, for fees to collected for authorizations. Presumably, where a fee is fixed, the authorization is effective only on payment. Authorizations may be granted for free. Even in such cases, the system of authorization is justified, as it may prevent such utilizations as would distort the expressions of folklore or otherwise be unworthy of their dignity. Where fees are charged, they must be fixed according to a tariff established or approved by the supervisory authority.

tariff

purpose of collecting fees

Section 10.2 also deals with the purpose for which the collected fees must be used. It contains some alternatives. It offers a choice between promoting and safeguarding of national culture or folklore. Of course, national folklore is part of national culture, but national culture concerns a greater number of potential beneficiaries than national folklore. It is advisable, in any case, to secure by decree that a certain percentage of any fee collected — if it is a competent authority that is designated — should go to that community from which the expression of folklore for the utilization of which the fee was paid originates. The relevant decree may allow, in such case, the competent authority to retain part of the collected fees to cover the costs of administering the authorization system. Where there is no competent authority designated and the authorization is given and the collection of the fees is carried out by the community itself, it seems obvious that the employment of the collected fees should also be decided by the community. The state should secure its share of such revenues, if at all, by imposing taxes or providing for other appropriate measures.

part to go to relevant community

subject to appeal

Section 10.3 states that any decision of the competent authority is subject to appeal. It specifies that the appeal may be made by the applicant (typically, where the authorization is denied) and by ‘the representative of the interested community’ (typically, where the authorization is granted) The

paragraph is put in square brackets, since it does not apply where the authorization is granted by the community concerned. The decisions of such community are not subject to appeal.

Jurisdiction

court of competent jurisdiction

The aim of section 11.1 is that the legislator (or other body issuing the provision) should specify a court that will be competent to hear appeals against decisions of the authority concerned. Which court will be specified in any given country will largely depend on the existing court system of that country. The fact that the expressions ‘competent authority’ and ‘supervisory authority’ appear in square brackets seems to indicate that, in the second case, a system may be adopted in which an appeal against a decision of the competent authority must be submitted to the supervisory authority, and that appeal to the court is possible only from a decision of the supervisory authority. Section 11.1 applies only where making decisions falls within the competence of an ‘authority’ and is not within the power of the relevant community If such community is entitled to make decisions as regards the utilization of its expressions of folklore, section 11.1 does not apply.

depends on legal system of country

The aim of section 11.2 is that the legislator (or other body issuing the provision) should specify a court that will be competent for the procedures laid down by section 6. Which court will be specified in any country largely depends on the existing court system of that country.

Relation to other forms of protection

other laws & treaties

concurrent protection

Section 12 is intended, essentially, to provide that, if anything that is protected by the Model Provisions (because it is an expression of folklore) can also be protected under other laws and international treaties (because it is also something other than an expression of folklore), it will also be protected under such laws and treaties. In other words, in such cases, the protection offered by the law of the country containing provisions corresponding to those of the Model Provisions will

be concurrent with the protection offered by other laws of the country, or by treaties to which such country is a party.

A few examples of such other laws are the following:

copyright

- ❏ copyright law, which applies if the expression of folklore is also a 'work' (such as where an individual develops an expression of folklore that reflects the traditional artistic expectations of the community concerned (so it becomes part of the body of expressions of folklore of that community) and has sufficient originality given to it by its author;

performers' rights

- ❏ the law protecting performers, which applies to performers who perform expressions of folklore (especially actors, dancers, and musicians in plays that are expressions of folklore, dancing folk dances, or singing or playing folk songs or instrumental folk music);

producers of sound recordings

- ❏ the law protecting producers of sound recordings (phonograms) that contain, for example, the recordings of performances of recitals of folk tales, folk poetry, folk songs, instrumental folk music, or folk plays;

broadcasters

- ❏ the law protecting broadcasting organizations that broadcast an expression of folklore;

industrial property

- ❏ the law protecting industrial property, which applies, for example, if the expression of the folklore is used as an industrial design, a mark, or an appellation of origin, or where the use of an expression of folklore is the object of unfair competition;

cultural heritage

- ❏ the law protecting cultural heritage, which applies to protect, for example, architectural expressions of folklore in forms like groups of separate or connected buildings which, because of their architecture, homogeneity, or place in landscape, are of outstanding universal value from the point of view of history, art, or science; and

- ❏ certain laws aimed at the preservation of moving images, which applies to protect, for example,

cinematograph films

cinematographic, television, or video productions of expressions of folklore (such protection is over and above that provided for by copyright).

Examples for international treaties or other forms of protection referred to by this section, are:

treaties

- ❏ the Berne Convention
- ❏ the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;
- ❏ the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms;
- ❏ the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite;
- ❏ the Paris Convention for the Protection of Industrial Property;
- ❏ the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods;
- ❏ the WIPO Copyright Treaty
- ❏ the WIPO Performances and Phonograms Treaty
- ❏ various agreements concluded under the aegis of the Paris Union;
- ❏ the Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted by the General Conference of UNESCO in 1972, which recognizes that the duty of ensuring protection of the cultural and natural heritage belongs primarily to the state and recommends that states take appropriate measures to this end; and
- ❏ the Recommendation for the Safeguarding and Preservation of Moving Images, adopted by the General Conference of UNESCO in 1980, which considers that moving images are an expression of the cultural identity of the peoples and form an integral part of the cultural heritage of the nations, and which invites states to take all necessary steps to safeguard and preserve effectively this heritage.

Interpretation

principle of interpretation

Section 13 emphasizes a principle underlying the whole system of sui generis protection of expressions of folklore —

such protection should in no way hinder the normal use and development of expressions of folklore. This probably means that the community by which and in which certain expressions of folklore have developed should be free to use this — their 'traditional artistic heritage' (section 2) and to develop it, without the need for authorization. The experts also agreed that no use of an expression of folklore within the community that has developed and maintained it should be taken as distorting it, if the community identifies itself with the current use of that expression and its consequent modification.

identifies with current use

Protecting expressions of folklore of other countries

regional & international protection

The Model Provisions should pave the way for subregional, regional, and international protection. It is important to protect expressions of folklore against illicit commercialization and distortion beyond the frontiers of the country in which they originate. Regional and international protection of expressions of folklore serves to protect expressions of folklore against illicit use that takes place abroad. But national legislation on the protection of expressions of folklore also provides the best basis for protecting the expressions of folklore of communities that belong to foreign countries. By appropriate extension of their applicability under the principle of national treatment, national provisions may provide the substance of regional or international protection.

national treatment

reciprocity

To further such a process, section 14 provides for the application of the Model Provisions to expressions of folklore of foreign origin either subject to reciprocity, or on the basis of international treaties. Actual reciprocity in the relations of two or more countries that already protect their national folklore may sometimes be established and declared more easily than mutual protection by means of concluding and ratifying international treaties. But a number of experts stressed that international measures indispensable to extending the protection of expressions of folklore of a given country beyond the borders of that country. In this context, the possibility of developing existing intergovernmental cultural or other appropriate agreements also to cover reciprocal protection of expressions of folklore should likewise be considered. On the question of international regulation, some experts expressed the opinion that, while they were in favour

of considering the possibility of adopting international regulation, priority should be given to regulation at national and regional levels.

Transitional provisions

possible solutions

The Model Provisions do not contain transitional rules. But each country that adopts a law along the lines of the Model Provisions will need to enact such rules regarding utilizations of expressions of folklore subject to authorization under the new law but which lawfully commenced before its entry into force. Parliament will have to choose one of three basic solutions:

retroactivity

- ❏ retroactivity of the law, which means that such utilizations of expressions of folklore would also become subject to authorization as have been lawfully commenced earlier but continued after the entry into force of the law, as for instance series of performances or distribution of copies of an expression of folklore;

non-retroactivity

- ❏ non-retroactivity of the law, which means that only those utilizations would come under the law that had not been commenced before its entry into force; and

intermediate solution

- ❏ an intermediate solution: utilizations which became subject to authorization under the law but were commenced without authorization before its entry into force should be brought to an end before the expiry of a certain period if no relevant authorization was obtained by the user in the meantime.

Attempts at an international system of sui generis protection of expressions of folklore

facilitate international development

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

to promoting regional or international protection.

group of experts

WIPO and UNESCO jointly convened a Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property in Paris, from 10 to 14 December 1984. The experts were asked to consider the need for a specific international regulation on the international protection of expressions of folklore by intellectual property and the contents of an appropriate draft.

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

need for protection

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

considered premature

But a clear majority of participants considered it premature to establish an international treaty, since there was no sufficient experience available as regards the protection of expressions of folklore at the national level, especially concerning the implementation of the Model Provisions.

problems

The experts identified two main problems:

- ❏ the lack of appropriate sources for the identification of the expressions of folklore to be protected; and
- ❏ the lack of workable mechanisms for settling the questions of expressions of folklore that can be found not only in one country, but in several countries of a region.

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

regional folklore

‘Regional folklore’ raises even more complex questions:

- ❏ To the competent authority of which country will a user have to turn if he wants to utilize a certain expression of folklore that is part of the national heritage of several countries?
- ❏ What will be the situation if only one of those countries that share certain elements of folklore accedes to the treaty and the others do not?
- ❏ How can the questions of common expressions of folklore be settled among the countries of the regions concerned?

recommendation

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

The use of related rights conventions for the indirect protection of certain expressions of folklore

Three related rights conventions are relevant here:

other relevant conventions

- ❏ the (Rome) Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations;
- ❏ the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms; and
- ❏ the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite.

folk art

There are some categories of expressions of folklore that are possible subjects of a copyright type — but sui generis — protection. Some of them, especially productions of ‘folk art’ (drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, textiles, carpets, and so on) obviously cannot enjoy indirect protection by means of related rights. But with many other important categories of

expressions of folklore related rights may be used as a fairly efficient means of indirect protection. Folk tales, folk poetry, folk songs, instrumental folk music, folk dances, folk plays, and similar expressions actually live in the form of regular performances. So if the protection of performers is extended to the performers of such expressions of folklore — which is the case in many countries — the performances of such expressions of folklore also enjoy protection. The same can be said about the protection of the rights of producers of sound recordings and broadcasting organizations in respect of their recordings and broadcasts, respectively, that embody such performances.

performers' protection

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

indirect protection

The above three conventions, generally, offer an appropriate basis for such indirect protection at the international level. The notion of 'phonograms' under the Rome and Phonograms Conventions is sufficiently broad and clearly covers sound recordings that embody performances of expressions of folklore. The same can be said about the terms 'broadcasting' and 'broadcast' in the Rome Convention — they extend to the transmission of any kinds of sounds, or of images and sounds, including, of course, of performances of expressions of folklore. Also, the notion of 'program-carrying signals' under the Satellites Convention is sufficiently neutral and general — it includes any kind of program.

appropriate basis

But interestingly — and unfortunately — there is a slight

definition of 'performers'

problem in respect of the key term 'performers' (and the notion of 'performances' following indirectly from that term) in the Rome Convention. In terms of article 3(a), '"performers" means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise *perform literary or artistic works*' (emphasis added). Expressions of folklore do not correspond to the notion of literary and artistic works proper. So the rather casuistic and rigid definition of 'performers' in this convention does not seem to extend to performers who perform expressions of folklore.

minimum level of protection

But the rather unfortunate definition of 'performers' in the convention does not mean that related rights cannot be used for the international protection of performers of expressions of folklore. The definition only determines the minimum scope of protection. If national laws define (and many of them do) 'performers' in a more general and flexible manner to also clearly include performers of expressions of folklore, then, on the basis of the principle of national treatment, also foreign performers enjoy such protection. That the scope of application of the Rome Convention, and hence also the obligation to grant national treatment, extends to the rights of all performers covered by such more general and flexible definitions is confirmed by article 9 of the Convention. It

extend protection

states that '[a]ny Contracting State may, by its domestic laws and regulations, extend the protection provided for in this Convention to artists who do not perform literary or artistic works'.

WPPT

There is growing agreement at the international level that the protection of performers should extend to the performers of expressions of folklore. So it is hardly surprising that the WIPO Performances and Phonograms Treaty, adopted in 1996, now expressly states that the term 'performers' includes those who perform expressions of folklore (article 2(a)).

Paying public domain

community right of authors

Professor Adolf Dietz has proposed the payment of remuneration for the use of works and performances in the public domain – the creation of a community right of authors

& performers

living authors benefit

foundation or non-profit corporation

distribution schemes

may include expressions of folklore

and performers ('Term of protection in copyright law and paying public domain: a new German initiative' [2000] *European Intellectual Property Review*, 506). The underlying notion is that the community of living authors and performers should benefit from the use of works and performers of their predecessors that are no longer protected, as the term of protection had expired. Such a remuneration right can be established by legislation, in favor of an authors' and performers' fund administered by a foundation or non-profit corporation. Such foundation or corporation, in turn, should largely be managed and administered by the authors' and performers' organizations themselves. Existing collecting societies, where they exist, can collect the remuneration in the same way as they do for the use of protected works and performances. The money will then not be distributed according to the individual distribution schemes, though, but will rather be forwarded to the foundation or corporation concerned.

For developing countries, this is an attractive proposal. Nothing prevents the extension of this proposal to include expressions of folklore, which would then attract a similar right of remuneration.

Conclusion

You should now be able to appreciate the meaning and content of the concepts 'traditional knowledge', 'indigenous knowledge', and 'folklore'; understand the customary protection of traditional knowledge and the problems relating to it; understand the problems faced by the holders of traditional knowledge; and acknowledge the attempts at international level to protect traditional knowledge.