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**INTERGOVERNMENTAL COMMITTEE ON
INTELLECTUAL PROPERTY AND GENETIC RESOURCES,
TRADITIONAL KNOWLEDGE AND FOLKLORE**

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FINAL REPORT ON NATIONAL EXPERIENCES WITH THE LEGAL PROTECTION OF
EXPRESSIONS OF FOLKLORE

prepared by the Secretariat

TABLE OF CONTENTS

	Page
EXECUTIVE SUMMARY	5
I. INTRODUCTION	6
II. CONTEXTUALIZING THE FINAL REPORT	8
II.A. Overview of Intellectual Property Needs and Issues Related to Expressions of Folklore	8
(a) Provision of international protection for “unpublished works” in the Berne Convention for the Protection of Literary and Artistic Works in 1967	9
(b) Adoption of the Tunis Model Law on Copyright for Developing Countries, 1976	9
(c) The Model Provisions, 1982	10
(d) Attempts to establish an international treaty, 1982 to 1985	11
(e) The adoption of the WIPO Performances and Phonograms Treaty (WPPT), 1996	11
(f) WIPO-UNESCO World Forum on the Protection of Folklore, 1997	12
(g) WIPO fact-finding missions, 1998-1999	12
(h) WIPO-UNESCO Regional Consultations on the Protection of Expressions of Folklore, 1999	14
(i) First session of the Intergovernmental Committee	16
(j) Second session of the Intergovernmental Committee	18
II.B. Other Relevant Activities of WIPO	19
(a) Domain names	19
(b) Non-original database protection	20
(c) Related rights	21
II.C. Relevant Work of Other Intergovernmental Organizations and Agencies	22
(a) United Nations Educational, Scientific and Cultural Organization (UNESCO)	22
(b) International Trade Center (ITC)	24

(c)	Office of the High Commissioner for Human Rights (OHCHR)	25
(i)	Working Group on Indigenous Populations (WGIP)	25
(ii)	Permanent Forum on Indigenous Issues	26
(d)	International Labour Organization (ILO)	26
(e)	World Trade Organization (WTO)	26
II.D.	Relevant Work of Regional Organizations	27
(a)	The African Intellectual Property Organization (OAPI)	27
(b)	Secretariat of the Pacific Community (SPC)	28
(c)	The Andean Community	27
III.	GENERAL SUMMARY, CONCLUSIONS AND SUGGESTED TASKS	28
A.	Conceptual and Operational Issues	29
(a)	Subject matter	30
(b)	Objectives for protection	32
(c)	Subjects of protection	33
(d)	Scope of protection – exceptions and limitations	33
(e)	Effective participation by indigenous peoples and local communities	34
B.	General Summary	35
(a)	States which provide specific legal protection for expressions of folklore	35
(b)	States which do not provide specific protection for expressions of folklore	39
(c)	Non-intellectual property forms of protection	43
(d)	The Model Provisions, 1982	45
(e)	Extra-territorial protection	46
(f)	Proposals for modifications to existing intellectual property standards and for <i>sui generis</i> standards	47
(g)	Documentation	49

C.	Conclusions and Suggested Tasks	52
(a)	Establishment, strengthening and effective implementation of national systems of protection	52
(b)	Extra-territorial protection	57
(c)	Relationship between customary laws and protocols and the formal intellectual property system	59
Annex I:	Detailed Statistics and Summary of Responses Received to the Questionnaire	
Annex II:	List of Member States Submitting Responses to the Questionnaire as at January 31, 2002	
Annex III:	WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982	
Annex IV:	Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1985	
Annex V:	List of Suggested Tasks	

EXECUTIVE SUMMARY

This document is a final report on responses received from States to the “Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore” (WIPO/GRTKF/IC/2/7) issued by the Secretariat of the World Intellectual Property Organization (WIPO) in June 2001. Such a questionnaire had been suggested at the first session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore which took place from April 30 to May 3, 2001.

By January 31, 2002, which was the final deadline for completion of the Questionnaire as determined by members of the Intergovernmental Committee at its second session from December 10 to 14, 2001, the WIPO Secretariat had received 64 responses to the Questionnaire. This final report summarizes, draws conclusions on and suggests tasks that the Intergovernmental Committee may wish to approve or undertake based on the 64 responses received.

Subsequent to the Introduction (section I), section II “Contextualizing the Final Report” provides information on previous activities in which intellectual property needs and issues related to expressions of folklore have been identified. In addition, this section briefly describes other relevant WIPO activities, and the relevant work of other intergovernmental and regional organizations.

Section III “General Summary, Conclusions and Suggested Tasks” suggests four tasks that the Intergovernmental Committee may wish to approve or undertake. The first two tasks relate to the perceived need for the establishment, strengthening and effective implementation of national systems for the protection of expressions of folklore. In this respect, two tasks are suggested. The first (referred to as Possible Task 1) is for enhanced legal-technical assistance, to be provided by the WIPO Secretariat upon request, for the establishment, strengthening and effective implementation of existing systems and measures for the legal protection of expressions of folklore at the national level. The second suggested task (referred to as Possible Task 2) is the updating and modification of the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982, as has been suggested by States and other stakeholders in previous WIPO activities, the first two sessions of the Intergovernmental Committee and in responses to the Questionnaire.

Many States and other stakeholders have also identified a strong need for States and/or indigenous peoples and local communities to be able to exercise rights in respect of expressions of folklore in foreign countries, in other words, a need for the extra-territorial (or, international) protection of expressions of folklore. Thus, the third suggested task (referred to as Possible Task 3) concerns the Intergovernmental Committee examining elements of possible measures, mechanisms or frameworks for the functional extra-territorial protection of expressions of folklore.

Finally, in previous WIPO activities, at previous sessions of the Intergovernmental Committee and in responses to the Questionnaire, States and other stakeholders have suggested that the relationship between customary laws and protocols and the formal intellectual property system, insofar as they relate to the legal protection of expressions of folklore, be further examined. Possible Task 4, therefore, proposes that the WIPO Secretariat commission a practical study on this matter, for further consideration by the Intergovernmental Committee.

I. INTRODUCTION

1. At the first session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (April 30 to May 3, 2001) (“the Intergovernmental Committee”), Members indicated that further information on national experiences with the legal protection of expressions of folklore would be desirable. In particular, Members requested information on practical experiences with implementation of the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, which were adopted in 1982 under the auspices of the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) (“the Model Provisions”).¹

2. Accordingly, the Secretariat of WIPO prepared and issued a “Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore” (WIPO/GRTKF/IC/2/7) (“the Questionnaire”).²

3. The closing date for the submission of completed questionnaires was originally set at September 14, 2001. The date was subsequently extended to September 30, 2001. By September 30, 2001, completed questionnaires had been received from the following Member States: Argentina, Australia, Barbados, Bhutan, Bosnia and Herzegovina, Brunei Darussalam, Burkina Faso, Canada, China, Côte d’Ivoire, Croatia, Czech Republic, Ethiopia, Gambia, Germany, Indonesia, Iran (Islamic Republic of), Jamaica, Kyrgyzstan, Latvia, Malaysia, Mexico, Namibia, Netherlands, Pakistan, Philippines, Romania, Russian Federation, Sierra Leone, Sri Lanka, Switzerland, and the United Republic of Tanzania (32).

4. The first 32 responses received formed the basis of a “Preliminary Report on National Experiences with the Legal Protection of Expressions of Folklore” (WIPO/GRTKF/IC/2/8) which was considered at the second session of the Intergovernmental Committee which took place from December 10 to 14, 2001. As a preliminary report, the document contextualized and summarized the responses received up to September 30, 2001, but did not analyze them, nor draw any conclusions or suggest further activities or tasks that the Members of the Intergovernmental Committee may wish to set themselves or undertake. The Intergovernmental Committee was invited to note and make general comments on the preliminary report, and those States that had not yet completed the Questionnaire were invited to do so before December 31, 2001. Thereafter, it was proposed that a final report on all the questionnaires received before that date would be prepared and issued by the Secretariat before February 28, 2002. The final report would summarize and analyze the responses received, draw conclusions and suggest tasks and activities that the Intergovernmental Committee may wish to undertake.³

¹ See WIPO/GRTKF/IC/1/13 (Report of first session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore), paras. 156 to 175.

² The questionnaire was distributed to all WIPO’s Member States and other Members of the Intergovernmental Committee, and is also available on WIPO’s web site at <<http://www.wipo.int/globalissues/igc/documents/index.html>>

³ See paragraphs 7, 8, and 51 of the Preliminary Report (WIPO/GRTKF/IC/2/8).

5. At the second session of the Intergovernmental Committee, the steps as outlined above in the Preliminary Report were endorsed, save that the deadline for the completion of responses to the Questionnaire was extended to January 31, 2002 and it was recorded that the final report would be issued some time after February 28, 2002.⁴

6. By January 31, 2002, the Secretariat of WIPO had received an additional 32 responses. The total number of responses received is therefore 64. These are from the following States: Antigua and Barbuda, Argentina, Australia, Barbados, Belgium, Bhutan, Bosnia and Herzegovina, Brunei Darussalam, Burkina Faso, Burundi, Canada, Chad, China, Colombia, Costa Rica, Côte d'Ivoire, Croatia, Czech Republic, Ecuador, Egypt, Ethiopia, Gambia, Germany, Ghana, Greece, Guinea, Honduras, Hungary, Indonesia, Islamic Republic of Iran, Italy, Jamaica, Japan, Kenya, Kyrgyzstan, Latvia, Lithuania, Malaysia, Mexico, Monaco, Mozambique, Namibia, Netherlands, New Zealand, Norway, Pakistan, Panama, Philippines, Portugal, Republic of Korea, Romania, Russian Federation, Senegal, Sierra Leone, Sri Lanka, Switzerland, Togo, Tunisia, United Kingdom, United Republic of Tanzania, United States of America, Venezuela, Viet Nam, and Zimbabwe (64).

7. Copies of the completed questionnaires, in the languages in which they were received, are available from the Secretariat of WIPO, and also electronically at <http://www.wipo.int/globalissues/igc/questionnaire/index.html>.

8. States which did not submit a completed Questionnaire by the final deadline are invited to do so. Further responses so received will be posted on the website and taken into account in future WIPO activities.

9. The remainder of this document will follow this structure:

II. Contextualizing the Final Report

This section provides a context within which the work of the Intergovernmental Committee in respect of expressions of folklore and in particular this Final Report can be viewed. The first part traces previous WIPO and other activities directly relevant to the legal protection of expressions of folklore; the second part describes certain other developments in WIPO that are or may be related to this question; and the latter two parts scope the relevant activities of certain other intergovernmental and regional organizations. Accordingly, this section follows this structure:

- II.A. Overview of intellectual property needs and issues related to expressions of folklore
- II.B. Other relevant ongoing activities of WIPO
- II.C. Relevant work of other intergovernmental organizations and agencies
- II.D. Relevant work of regional organizations

III. General summary, conclusions and suggested tasks

While Annex I contains a detailed and statistical account of the responses, question by question, to the Questionnaire, this section provides a general summary,

⁴ See paragraphs 183 and 184, WIPO/GRTKF/IC/2/16 (Report of the Second Session).

draws conclusions and suggests tasks that the Intergovernmental Committee may wish to undertake.

IV. Annexes

II. CONTEXTUALIZING THE FINAL REPORT

II.A. Overview of Intellectual Property Needs and Issues Related to Expressions of Folklore

10. Previous activities of WIPO in the field of intellectual property and expressions of folklore, several of which were undertaken in cooperation with UNESCO, have over a period of more than 30 years, identified, and sought to address in some cases, several legal, conceptual, operational and administrative needs and issues related to intellectual property and expressions of folklore.

11. This section presents an overview of these needs and issues by tracing chronologically the main activities and processes in which they were identified or addressed. These are:

(i) the provision of international copyright protection for “unpublished works” in the Berne Convention for the Protection of Literary and Artistic Works in 1967;

(ii) the adoption of the Tunis Model Law on Copyright for Developing Countries, 1976;

(iii) the adoption of the Model Provisions, 1982;

(iv) attempts to establish an international treaty, 1982 to 1985;

(v) the adoption of the WIPO Performances and Phonograms Treaty (the WPPT), 1996;

(vi) the WIPO-UNESCO World Forum on Expressions of Folklore, Phuket, Thailand, 1997;

(vii) the WIPO fact-finding missions on traditional knowledge, 1998-1999;

(viii) the WIPO-UNESCO Regional Consultations on the Protection of Expressions of Folklore, 1999;

(ix) the first session of the Intergovernmental Committee; and

(x) the second session of the Intergovernmental Committee.

(a) Provision of international protection for “unpublished works” in the Berne Convention for the Protection of Literary and Artistic Works in 1967

12. The 1967 Stockholm Diplomatic Conference for Revision of the Berne Convention for the Protection of Literary and Artistic Works (the “Berne Convention”) made an attempt to introduce copyright protection for folklore at the international level. As a result, Article 15(4) of the Stockholm (1967) and Paris (1971) Acts of the Berne Convention contains the following provision:

“(4)(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.”

“(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General [of WIPO] by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.”

13. This Article of the Berne Convention, according to the intentions of the revision Conference, implies the possibility of granting protection for expressions of folklore. Its inclusion in the Berne Convention responds to calls made at that time for specific international protection of expressions of folklore.⁵

(b) Adoption of the Tunis Model Law on Copyright for Developing Countries, 1976

14. To cater for the specific needs of developing countries and to facilitate the access of those countries to foreign works protected by copyright while ensuring appropriate international protection of their own works, the Berne Convention was revised in 1971. It was deemed appropriate to provide States with a text of a model law to assist States in conforming to the Convention’s rules in their national laws.

15. Thus, in 1976, the Tunis Model Law on Copyright for Developing Countries was adopted by the Committee of Governmental Experts convened by the Tunisian Government in Tunis from February 23 to March 2, 1976, with the assistance of WIPO and UNESCO.

16. The Tunis Model Law provides specific protection for works of national folklore. Such works need not be fixed in material form in order to receive protection, and their protection is without limitation in time.⁶

⁵See Ficsor, M., “*Attempts to Provide International Protection for Folklore by Intellectual Property Rights*”, paper presented at the WIPO-UNESCO World Forum on the Protection of Folklore, Phuket, Thailand, April 8 to 10, 1997, p.17; Ricketson, S., *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London, 1987) pp. 313-315. Only one country, India, has made the designation referred to in the Article.

⁶ See particularly section 1 (^{5bis}) and section 6, Tunis Model Law.

(c) The Model Provisions, 1982

17. The Model Provisions were adopted in 1982 by a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore, which had been convened by the Directors General of WIPO and UNESCO.⁷

18. During the course of the development of the Model Provisions, it had been agreed by a Working Group convened by WIPO and UNESCO that: (i) adequate legal protection of folklore was desirable; (ii) such legal protection could be promoted at the national level by model provisions for legislation; (iii) such model provisions should be so elaborated as to be applicable both in countries where no relevant legislation was in force and in countries where existing legislation could be further developed; (iv) the said model provisions should also allow for protection by means of copyright and neighboring rights where such forms of protection could apply; and, (v) the model provisions for national laws should pave the way for sub-regional, regional and international protection of creations of folklore.

19. The Model Provisions were developed in response to concerns that expressions of folklore, which represent an important part of the living cultural heritage of nations, were susceptible to various forms of illicit exploitation and prejudicial actions. More specifically, as stated in the Preamble to the Model Provisions, the Expert Committee believed that the dissemination of folklore might lead to improper exploitation of the cultural heritage of a nation, that any abuse of a commercial or other nature or any distortion of expressions of folklore was prejudicial to the cultural and economic interests of the nation, that expressions of folklore constituting manifestations of intellectual creativity deserved to be protected in a manner inspired by the protection provided for intellectual productions, and that the protection of folklore had become indispensable as a means of promoting its further development, maintenance and dissemination.

20. Regarding implementation of the Model Provisions, several countries have used the Model Provisions as a basis for national legal regimes for the protection of folklore. Many of these countries have enacted provisions for the protection of folklore within the framework of their copyright laws.

21. However, it has been suggested that the Model Provisions have not had extensive impact on the legislative frameworks of WIPO's Member States. Several reasons have been advanced for this, such as the scope of protected expressions in the Model Provisions. In this regard, it has been suggested that the Model Provisions should also cover forms of "traditional knowledge" related to traditional medicine and medicinal practices, traditional agricultural knowledge and biodiversity-related knowledge.⁸ The nature and scope of the rights granted over expressions of folklore by the Model Provisions has also been cited as a reason. It has been suggested, for example, that the Model Provisions are limited in their usefulness because of their not providing for exclusive ownership-type rights over folklore.⁹

⁷ See generally Ficsor, M., *op. cit.*

⁸ See documents WIPO-UNESCO/FOLK/AFR/99/1, WIPO-UNESCO/FOLK/ASIA/99/1, WIPO-UNESCO/FOLK/ARAB/99/1 and WIPO-UNESCO/FOLK/LAC/99/1. See also Kutty, P. V., "Study on the Protection of Expressions of Folklore," 1999, study prepared for the World Intellectual Property Organization (WIPO), unpublished.

⁹ See Kutty, *op. cit.*

In addition, the possibility that the Model Provisions may be out of date, given technological, legal, social, cultural and commercial developments since 1982, has also been cited.¹⁰

(d) Attempts to establish an international treaty, 1982 to 1985

22. A number of participants stressed at the meeting of the Committee of Governmental Experts which adopted the Model Provisions that international measures would be indispensable for extending the protection of expressions of folklore of a given country beyond the borders of the country concerned. WIPO and UNESCO followed such suggestions when they jointly convened a Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property, which met in Paris from December 10 to 14, 1984. The Group of Experts was 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 discussions at the meeting of the Group of Experts reflected a general recognition of the need for international protection of expressions of folklore, in particular, 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.

23. However, the great majority of the participants considered it premature to establish an international treaty since there was not sufficient experience available as regards the protection of expressions of folklore at the national level, in particular, concerning the implementation of the Model Provisions. Two main problems were identified by the Group of Experts: 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. 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, in general, agreed with its findings. The overwhelming majority of the participants was of the opinion that a treaty for the protection of expressions of folklore was premature. If the elaboration of an international instrument was to be realistic at all, it could not be more than a sort of recommendation for the time being.

24. The draft treaty considered at that time is annexed as Annex IV.

(e) The adoption of the WIPO Performances and Phonograms Treaty (the WPPT), 1996

25. Folk tales, poetry, songs, instrumental music, dances, plays and similar expressions of folklore actually live in the form of regular performances. Thus, 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.

26. However, there was a slight problem in respect of the key notion of “performers” (and the notion of “performances” following indirectly from the notion of “performers”) as determined in the International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961 (the “Rome Convention”). Under Article 3(a) of the Rome Convention, “‘performers’ means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise *perform*

¹⁰ See in particular WIPO-UNESCO/FOLK/AFR/99/1, WIPO-UNESCO/FOLK/ASIA/99/1 and WIPO-UNESCO/FOLK/ARAB/99/1.

literary or artistic works” (emphasis added). As expressions of folklore do not correspond to the concept of literary and artistic works proper, the definition of “performers” in the Rome Convention does not seem to extend to performers who perform expressions of folklore.

27. However, the WIPO Performances and Phonograms Treaty (the WPPT), which was adopted in December 1996, provides that the definition of “performer” for purposes of the Treaty includes the performer of an expression of folklore.¹¹ As at February 25, 2002, 31 States had ratified the WPPT. The WPPT will come into force on May 20, 2002.

28. At the Diplomatic Conference at which the WPPT, as well as the WIPO Copyright Treaty (the WCT) were adopted in December 1996, the WIPO Committee of Experts on a Possible Protocol to the Berne Convention and the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms recommended that “provision should be made for the organization of an international forum in order to explore issues concerning the preservation and protection of expressions of folklore, intellectual property aspects of folklore, and the harmonization of the different regional interests.”¹²

(f) WIPO-UNESCO World Forum on the Protection of Folklore, 1997

29. Pursuant to the recommendation made during the 1996 Diplomatic Conference, the WIPO-UNESCO World Forum on the Protection of Folklore was held in Phuket, Thailand, in April 1997. Many needs and issues related to intellectual property and folklore were discussed during this meeting.¹³ The meeting also adopted a “Plan of Action” which identified *inter alia* the following needs and issues:

- (i) the need for a new international standard for the legal protection of folklore; and
- (ii) the importance of striking a balance between the community owning the folklore and the users of expressions of folklore.

30. In order to make progress towards addressing these needs and issues, the Plan of Action suggested *inter alia* that “(r)egional consultative fora should take place...”¹⁴

(g) WIPO fact-finding missions, 1998-1999

31. During 1998 and 1999, WIPO conducted fact-finding missions to identify as far as possible the intellectual property-related needs and expectations of traditional knowledge holders (the “FFMs”). Indigenous and local communities, non-governmental organizations, governmental representatives, academics, researchers and private sector representatives were among the groups of persons consulted on these missions.

¹¹ For the purpose of WPPT performers who are accorded protection include “‘performers’ who are actors, singers, musicians, dancers, and other persons who act, sing, deliver, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.”

¹² See BCP/CE/VI/16-INR/CE/V/14, par. 269.

¹³ See WIPO Publication Number 758 (E/F/S).

¹⁴ The Plan of Action records that “(t)he participants from the Governments of the United States of America and the United Kingdom expressly stated that they could not associate themselves with the plan of action.”

32. The FFMs were conducted in 28 countries between May 1998 and November 1999. The results of the missions have been published by WIPO in a report entitled “Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions (1998-1999)” (the “FFM Report”).¹⁵

33. For purposes of these missions, “traditional knowledge” included expressions of folklore as a sub-set.¹⁶ “Expressions of folklore” included handicrafts and other tangible cultural expressions. Much of the information obtained on these missions related either directly or indirectly to expressions of folklore.

34. In general, the traditional knowledge (“TK”) holders and their representatives consulted during the FFMs articulated two main sets of needs and concerns:

(i) first, some wish to benefit from the commercialization of their cultural expressions. They wish for protection of their cultural expressions in order to be compensated for their creativity, and to exclude non-indigenous or non-traditional competitors from the market. This group may be said to desire “positive protection” of their cultural expressions;

(ii) second, some are more concerned with the cultural, social and psychological harm caused by the unauthorized use of their art. They wish to control, and even prevent altogether, the use and dissemination of their cultural expressions. For this group, the commercial exploitation of their cultural expressions will cause them to lose their original significance which will in turn lead to a disruption and dissolution of their culture. This group may be said to desire “defensive protection” of their cultural expressions.

35. These two main sets of needs and concerns translate into several questions for intellectual property. The FFM Report identifies the main intellectual property needs and expectations that were expressed to WIPO during these missions. Certain of these were legal or conceptual in nature; others were more operational and administrative. Those that either apply specifically to expressions of folklore, or that were expressed in respect of traditional knowledge systems in general, would include:

(i) greater understanding and clarity on the subject matter for which protection is sought;

(ii) the identification, classification, documentation and rights management in respect of expressions of folklore;

(iii) the study of customary laws and protocols relating to the use, development, transmission and protection of expressions of folklore, and their relationship with intellectual property standards;

(iv) in the shorter term, testing the applicability and use of existing intellectual property standards for the legal protection of expressions of folklore in practical case-studies and pilot projects;

¹⁵ WIPO Publication 768E/F/S. The Report is also available at <<http://www.wipo.int/globalissues/tk/report/final/index>>

¹⁶ See chapter on “Terminology” in the FFM Report.

- (v) the provision of practical training and information materials and workshops to governmental officials and holders and custodians of expressions of folklore;
 - (vi) testing options for the collective acquisition, management and enforcement of intellectual property rights in expressions of folklore by the relevant community or association;
 - (vii) the development and testing of specific intellectual property laws and systems for the protection of expressions of folklore at the national level, using *inter alia* the Model Provisions as a possible foundation;
 - (viii) in the longer term, the elaboration of regional and international frameworks for the legal protection of expressions of folklore using *inter alia* the Model Provisions as a possible foundation;
 - (ix) the adjustment of intellectual property standards and practices to the extent that they may permit, or do not prevent, the derogatory, offensive and fallacious use of expressions of culture;
 - (x) assisting, in a practical manner, holders and custodians of expressions of folklore to acquire, manage and enforce rights and interests in their expressions of folklore; and
 - (xi) the economic valuation of expressions of folklore.
- (h) WIPO-UNESCO Regional Consultations on the Protection of Expressions of Folklore, 1999

36. Pursuant to the suggestion included in the Plan of Action adopted at the WIPO-UNESCO World Forum on the Protection of Folklore, 1997, WIPO and UNESCO organized four Regional Consultations on the Protection of Expressions of Folklore in 1999.¹⁷ Each of the Regional Consultations adopted resolutions or recommendations which identify intellectual property needs and issues, as well as proposals for future work, related to expressions of folklore. They were addressed to States, and to WIPO and UNESCO. The main intellectual property needs, issues and proposals referred to in the resolutions and recommendations are the following:

To States, the:

- (i) protection of expressions of folklore at the national level;¹⁸
- (ii) establishment of national structures to ensure the regulation, coordination and protection of expressions of culture;¹⁹
- (iii) involvement of relevant communities, civil society, experts, academics and other interested groups;²⁰

¹⁷ The regional consultations were held for African countries in Pretoria, South Africa (March 1999); for countries of Asia and the Pacific region in Hanoi, Viet Nam (April 1999); for Arab countries in Tunis, Tunisia (May 1999); and for Latin America and the Caribbean in Quito, Ecuador (June 1999). The four regional consultations were attended by 63 Governments of WIPO's Member States, 11 intergovernmental organizations, and five non-governmental organizations.

¹⁸ WIPO-UNESCO/FOLK/AFR/99/1.

¹⁹ WIPO-UNESCO/FOLK/AFR/99/1.

- (iv) support for communities which are responsible for the creation, maintenance, custodianship and development of expressions of folklore;²¹
- (v) evaluation and use of measures for folklore protection in existing national legislation, and their adaptation or amendment where necessary;²²
- (vi) adaptation of existing legislation and the adoption of specific legislation taking into account the Model Provisions, updated to take into account technological, legal, social, cultural and commercial developments since 1982;²³
- (vii) development of a regional framework for the preservation, protection and maintenance of expressions of folklore;²⁴
- (viii) formulation of a legal mechanism for the protection of expressions of folklore at the international level;²⁵
- (ix) establishment of national and regional centers for the collection, classification, conservation, documentation and dissemination of expressions of folklore;²⁶ and,
- (x) preparation of an “open list” of expressions of folklore the protection of which is considered necessary.²⁷

To WIPO and UNESCO:

- (i) the provision of legal and technical assistance, specialized training and the provision of equipment and other financial resources;²⁸
- (ii) provision of legal-technical and financial assistance for the national projects for the identification, documentation, classification, preservation and dissemination of expressions of folklore;²⁹
- (iii) cooperation and support for national awareness-raising initiatives;³⁰
- (iv) studies and projects for in-depth study of the issues, including pilot projects for the management of expressions of folklore;³¹

²⁰ WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ASIA/99/1.

²¹ WIPO-UNESCO/FOLK/ASIA/99/1.

²² WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ARAB/99/1.
WIPO-UNESCO/FOLK/LAC/99/1.

²³ WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ARAB/99/1.

²⁴ WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ASIA/99/1;
WIPO-UNESCO/FOLK/LAC/99/1.

²⁵ WIPO-UNESCO/FOLK/ASIA/99/1; WIPO-UNESCO/FOLK/LAC/99/1.

²⁶ WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ARAB/99/1.

²⁷ WIPO-UNESCO/FOLK/ARAB/99/1.

²⁸ WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ASIA/99/1;
WIPO-UNESCO/FOLK/ARAB /99/1; WIPO-UNESCO/FOLK/LAC/99/1.

²⁹ WIPO-UNESCO/FOLK/LAC/99/1.

³⁰ WIPO-UNESCO/FOLK/ASIA/99/1; WIPO-UNESCO/FOLK/LAC/99/1.

³¹ WIPO-UNESCO/FOLK/ASIA/99/1; WIPO-UNESCO/FOLK/LAC/99/1.

(v) increased budgetary resources to ensure the effective protection of expressions of folklore at the national level;³²

(vi) assistance in initiating and supporting intra- and inter-regional cooperation and consultation;³³

(vii) increased efforts to develop a broad consensus among States in favor of an adequate and effective international regime for the protection of expressions of folklore;³⁴ initiate steps for the development of a *sui generis* form of binding legal protection at national and international levels, taking into account the technological, legal, social, cultural and commercial developments which have taken place since the Model Provisions were concluded;³⁵ elaboration of an international convention on the protection of expressions of folklore;³⁶ continuation of work for nurturing expressions of folklore and their protection at the international level;³⁷

(viii) establish a Standing Committee on Traditional Knowledge and Folklore to facilitate the process of establishing legal protection of folklore and traditional knowledge;³⁸ and,

(ix) assist in the establishment of national centers, and creation of a pilot regional center, for the conservation, documentation and promotion of expressions of folklore.

(i) First session of the Intergovernmental Committee

37. The discussion during the first session of the Intergovernmental Committee under Agenda Item 5.3 considered specifically certain suggested issues and tasks set out in the document entitled “Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Expressions of Folklore – An Overview” prepared for the session by the Secretariat of WIPO.³⁹

38. The suggested issues and tasks concerned:

(i) the Model Provisions and their possible updating to take into account developments and new forms of commercial exploitation which have evolved since the adoption of the Model Provisions in 1982 (identified as task C.1);⁴⁰

(ii) the improved protection of handicrafts,⁴¹ as had been proposed by certain Groups of Member States on previous occasions (identified as task C.2);⁴²

³² WIPO-UNESCO/FOLK/AFR/99/1.

³³ WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ASIA/99/1.

³⁴ WIPO-UNESCO/FOLK/AFR/99/1.

³⁵ WIPO-UNESCO/FOLK/ASIA/99/1.

³⁶ WIPO-UNESCO/FOLK/ARAB/99/1.

³⁷ WIPO-UNESCO/FOLK/LAC/99/1.

³⁸ WIPO-UNESCO/FOLK/ASIA/99/1; WIPO-UNESCO/FOLK/ARAB/99/1;

WIPO-UNESCO/FOLK/LAC/99/1.

³⁹ WIPO/GRTKF/IC/1/3.

⁴⁰ WIPO/GRTKF/IC/1/3, paras. 92 to 101.

⁴¹ WIPO/GRTKF/IC/1/3, paras. 102 to 106.

⁴² At the Thirty-Fourth Series of Meetings of the Assemblies of the Member States of WIPO, held from September 20 to 29, 1999, one Group of WIPO Member States expressed the view “that the need for a suitable mechanism and agreed norms for the protection of handicraft was shared by the developing countries” (A/34/16, paragraph 29). This need was further elaborated by another Group of WIPO Member States at the Twenty-Sixth

(iii) efforts to establish an international system of *sui generis* protection for expressions of folklore (identified as task C.3).⁴³

39. These issues and tasks were among those identified as requiring further attention during previous WIPO activities and processes as described above.

40. Regarding Agenda Item 5.3 (“Expressions of Folklore”) at the first session, several delegations expressed support for one or more of the suggested tasks C.1, C.2 and C.3. Other delegations expressed reservations about the suggested tasks, at least regarding when and how they should be undertaken. In addition, a number of delegations identified other issues and needs requiring further attention. These included:

- (i) a report on current forms of protection available for expressions of folklore;⁴⁴
- (ii) the documentation of expressions of folklore;⁴⁵
- (iii) work to address and understand what is the subject matter for which protection is sought, and, put differently, which elements of expressions of folklore deserve protection;⁴⁶
- (iv) information on which areas of the populations are concerned with the protection of expressions of folklore;⁴⁷
- (v) the identification of the objectives of protection of expressions of folklore;⁴⁸
- (vi) the collection and review of information on national experiences with the protection of expressions of folklore, including with implementation of the Model Provisions;⁴⁹
- (vii) the assessment of the use of existing intellectual property and common law tools, including in respect of handicrafts;⁵⁰
- (viii) further work on terminological issues;⁵¹ and,
- (ix) the adoption of a *sui generis* regime to protect expressions of folklore.⁵²

Session of the WIPO General Assembly, held in Geneva from September 26 to October 3, 2000 (WO/GA/26/9, Annex II) with a view to specific proposals for the work of the Intergovernmental Committee. Document WO/GA/26/9 was subsequently also issued as a document for the First Session of the Intergovernmental Committee (WIPO/GRTKF/IC/1/5).

⁴³ WIPO/GRTKF/IC/1/3, paras. 107 to 114.

⁴⁴ WIPO/GRTKF/IC/1/13, par. 156.

⁴⁵ WIPO/GRTKF/IC/1/13, paras. 159, 161

⁴⁶ WIPO/GRTKF/IC/1/13, paras. 159, 163, 165.

⁴⁷ WIPO/GRTKF/IC/1/13, par. 165.

⁴⁸ WIPO/GRTKF/IC/1/13, par. 165.

⁴⁹ WIPO/GRTKF/IC/1/13, paras. 160, 163, 165, 166, 168, and 169.

⁵⁰ WIPO/GRTKF/IC/1/13, paras. 160, 168.

⁵¹ WIPO/GRTKF/IC/1/13, paras. 171, 172.

⁵² WIPO/GRTKF/IC/1/13, par. 161.

41. At the conclusion of the discussion, the Co-Chair summarized the discussion as follows:

“ . . . there had been some support for tasks C.1 to C.3, although some delegations had felt that certain tasks were premature. Since there appeared to be no objection to work proceeding on those tasks, the question was rather how and when it should begin. Several delegations had referred to the need for terminological clarity. In addition, as pointed out by Malaysia on behalf of the Asian Group and several delegations, the inclusion of handicrafts was necessary. Finally, the Co-Chair stated that a number of delegations had suggested that national experiences with regard to the protection of folklore should be collected and analyzed.”⁵³

42. Pursuant to the observation made by the Co-Chair that a number of delegations had suggested that national experiences with regard to the protection of folklore be collected and analyzed, the questionnaire was prepared and issued by the WIPO Secretariat as previously described.

(j) Second session of the Intergovernmental Committee

43. The second session of the Intergovernmental Committee (December 10 to 14, 2001) considered under Agenda Item 7 (“Folklore”) the “Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore” (WIPO/GRTKF/IC/2/7) and the “Preliminary Report on National Experiences with the Legal Protection of Expressions of Folklore” (WIPO/GRTKF/IC/2/8) prepared by the Secretariat of WIPO. The Secretariat drew the attention of the Intergovernmental Committee to paragraph 51 of document WIPO/GRTKF/IC/2/8 which invited the Committee to take note and make general comments on the contents of the document and the proposed next steps contained in paragraphs 7⁵⁴ and 8⁵⁵ of the document.

44. Several Delegations stressed the importance of expressions of folklore as being part of the national heritage, identity and culture. Certain Delegations stated that further work should focus on updating the Model Provisions for national laws and that a *sui generis* system of protection would be needed. Several Delegations requested assistance in the collection, maintenance, archiving, and the creation of databases and classifications, of expressions of folklore.

⁵³ WIPO/GRTKF/IC/1/13, par. 175.

⁵⁴ WIPO/GRTKF/IC/2/8 - paragraph 7: “This document is a preliminary report on the questionnaires received on or before September 30, 2001. As a preliminary report, this document contextualizes and summarizes the responses received, but does not analyze them, nor draw any conclusions or suggest further activities or tasks that the Member States and other Members of the Intergovernmental Committee may wish to set themselves or undertake. The Intergovernmental Committee is invited to note and make general comments on this preliminary report (see paragraph 51, below).”

⁵⁵ WIPO/GRTKF/IC/2/8 - paragraph 8: “Those Member States of WIPO and other Members of the Intergovernmental Committee which have not yet completed the questionnaire are invited to do so before December 31, 2001. Thereafter, a final report on all the questionnaires received before that date will be prepared and issued by the Secretariat. The final report will summarize and analyze the responses received, draw conclusions and suggest tasks and activities that the Intergovernmental Committee may wish to undertake. The final report will be issued before February 28, 2002.”

45. In this context, a Delegation stated that a number of important questions needed to be answered, namely, what should be protected?; who should be protected?; what should be the means of protection?; and, what should be the term of protection? Other proposals made by several Delegations were for WIPO to conduct studies on different aspects of folklore, including on those aspects which could not be supported within the existing intellectual property rights system, and to develop an effective and practical approach by cooperating with other international organizations, such as UNESCO. One Delegation stated that there appeared to be three major issues at stake: (i) a defensive commercial interest; (ii) an active commercial interest; and, (iii) ethical concerns.

46. The Representative of UNESCO referred to various UNESCO activities in this area. Particular reference was made to the decision at the 31st General Conference of UNESCO held in October and November 2001 to establish a new international treaty in respect of intangible cultural heritage. This treaty, the Representative stated, would aim to create international and national obligations relating to the identification, preservation and protection of intangible cultural heritage. The Representative stated that WIPO would be invited to be associated with this process in so far as intellectual property aspects were concerned.

47. Finally, it was noted that several requests had been made for additional time within which to complete the questionnaire, and the deadline for completion of the Questionnaire was extended to January 31, 2002. Furthermore it was agreed that the final report on those responses received to the Questionnaire would be made available sometime after February 28, 2002 for consideration at the third session of the Intergovernmental Committee.

II.B. Other Relevant Activities of WIPO

48. Certain other ongoing developments at WIPO are or may be related to the legal protection of expressions of folklore. They are briefly described in this section.

(a) Domain names

49. Domain names are a simple form of Internet address, designed to enable users to locate sites on the Internet in an easy manner. There are essential differences between trademarks and domain names. Trademarks are always business identifiers, are of territorial character and relate to specific goods or services, are registered by a public authority on the basis of an industrial property law and are protected by special industrial property rights after an examination procedure. In June 1998, WIPO undertook an international process to develop recommendations concerning the intellectual property issues associated with Internet domain names, including domain name dispute resolution. The WIPO Internet Domain Name Process was finalized on April 30, 1999 with the publication of a report entitled "The Management of Internet Names and Addresses: Intellectual Property Issues."⁵⁶ The Uniform Dispute Resolution Policy (UDRP) subsequently adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) has established a uniform and mandatory administrative dispute-resolution system to address cases of bad faith and abusive registration of trademarks as domain names, also known as "cybersquatting." It addresses also the reverse domain name hijacking cases, namely the attempt in bad faith to deprive a registered domain-name holder of a domain name. These streamlined procedures for resolving cases of clear abuse of trademark holders' rights have so far proved to be very efficient and cost-effective. One of the four Domain Name Dispute Resolution Service Providers approved by ICANN is

⁵⁶ WIPO Publication No. 439.

WIPO. The panelists of the WIPO Arbitration and Mediation Center generally have expertise in trademark law and/or dispute resolution.

50. The Second WIPO Internet Domain Name Process Report, “The Recognition of Rights and the Use of Names in the Internet Domain Name System,”⁵⁷ addressed a number of issues not covered in the first process, including the registration of indigenous names as domain names. The Report points out that numerous well-known indigenous names already registered as domain names are not connected to that of the indigenous peoples nor are they registered by persons representing any indigenous community. Some examples of these names include *aborigines.com*, *cherokee.com*, *inuit.com*, *maasai.com*, amongst many others.⁵⁸ The Report made few recommendations as this issue is still at an early stage of consideration. Currently, indigenous peoples affected have not had the opportunity to participate actively in the debate nor voice their opinions in the matter, the Report states. The Report thus recommends efforts be focused on sensitizing indigenous peoples to this issue.

51. At their meeting held from September 24 to October 3, 2001, WIPO Member States decided to submit the Report of the Second WIPO Internet Domain Name Process for comprehensive analysis by the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, meeting in two Special Sessions for this purpose. The first Special Session was held from November 29 to December 4, 2001, whilst the Second Special Session is scheduled to take place from May 21 to 24, 2002.

(b) Non-original database protection

52. Compilations of data and information can be the subject of copyright protection as provided for in Article 2(5) of the Berne Convention and Article 10(2) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). Article 5 of the WIPO Copyright Treaty of 1996 (WCT) contains a substantially similar provision.

53. In addition to copyright protection, Member States of WIPO have been discussing the possible introduction of international protection of databases which presently do not qualify for protection under copyright law. Databases that do not meet the originality requirement by reason of the selection or arrangement of their contents are not protected under copyright, even if substantial investment has been made for their creation. It has been discussed whether such investment should also be protected, for example, by a *sui generis* right. The European Community has adopted a Directive which contains provisions for the *sui generis* protection of databases.

54. During previous WIPO activities on traditional knowledge and expressions of folklore, it has been suggested by some that the protection afforded to databases (whether under copyright or other measures) might be relevant to the protection of traditional knowledge and folklore data captured in compilations, collections and other databases.

55. Within WIPO, efforts to address issues related to the protection of databases took place during the WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions which took place in Geneva in December 1996. The Conference had among its documents a “Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases to be Considered by the Diplomatic Conference.”⁵⁹ The

⁵⁷ <<http://wipo2.wipo.int>> (September 3, 2001).

⁵⁸ See Annex XIV of the Second WIPO Internet Domain Name Process.

⁵⁹ CRNR/DC/6

proposals for this Treaty focused on the creation of a *sui generis* right similar to that created in the European Database Directive. Although agreement could not be reached on this Treaty, the conference adopted a Recommendation concerning Databases.⁶⁰

56. Most recently, five studies on the Economic Impact of the Intellectual Property Protection of Non-Original Databases have been prepared and will be submitted to the SCCRR at its seventh session which will be held in May 2002.

(c) Related rights

57. Related rights, it is often suggested, may provide indirect protection for expressions of folklore. Folk tales, folk poetry, folk songs, instrumental folk music, folk dances, folk plays and similar expressions actually live in the form of regular performances. Therefore, if the protection of performers is extended to the performers of such expressions of folklore 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 sound recordings and broadcasts, respectively, embodying such performances. 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 sound recordings 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.⁶¹

58. As noted earlier in this document, there was, however, a problem in respect of the key notion of “performers” (and “performances” as determined in the International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961 (the “Rome Convention”). Under Article 3(a) of the Rome Convention, “ ‘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). As expressions of folklore do not correspond to the concept of literary and artistic works proper, the definition of “performers” in the Rome Convention does not appear to extend to performers who perform expressions of folklore.

59. The WPPT updates and supplements the Rome Convention. The definition for “performers” in the WPPT includes performers of “expressions of folklore.”⁶² There is no definition of “performers” or “performance” included in the TRIPS Agreement which looked to the definition in the Rome Convention. The WPPT will come into force on May 20, 2002.

60. Further developments in the area of related rights includes the proposal for a new WIPO Treaty on the Protection of Broadcasting Organizations which is to be discussed further by the WIPO Standing Committee on Copyright and Related Rights in May 2002.⁶³

⁶⁰ CRNR/DC/100

⁶¹ WIPO/IPTK/MCT/02/INF.5

⁶² Article 2 (a): “ ‘performers’ who are actors, singers, musicians, dancers, and other persons who act, sing, deliver, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.”

⁶³ See also Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, signed at Brussels, May 21, 1974, which notes within its articles the importance of the interests of authors, performers, producers of phonograms and broadcasting organizations.

61. With regard to the protection of audiovisual performances, States were unable to conclude a treaty in December 2000. The WPPT does not extend the protection of performers to their performances fixed in audiovisual fixations, such as film and video. A resolution had been adopted in 1996 which called for the WPPT to be complemented by a Protocol on the protection of audiovisual performances. The possible Treaty is to be discussed further at the WIPO General Assembly in September 2002.

II.C. Relevant work of other intergovernmental organizations and agencies

62. The programs and activities of certain other intergovernmental organizations and agencies are or may be relevant to the protection of expressions of folklore. They have been, and will continue to be, taken into account in WIPO's activities.

(a) United Nations Educational, Scientific and Cultural Organization (UNESCO)

63. UNESCO has undertaken several initiatives at the international, regional and national levels concerning the identification, conservation, preservation and dissemination of expressions of folklore (or, as is referred to in UNESCO's activities, "intangible cultural heritage" and/or "traditional culture and folklore").

64. A number of instruments, recommendations and programs have been adopted and established by UNESCO over the years:

(i) the 1966 Declaration on the Principles of International Cultural Cooperation⁶⁴ states in Article 1: "1. Each culture has a dignity and value which must be respected and preserved. 2. Every people has the right and the duty to develop its culture. 3. In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind;"

(ii) the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970 seeks to protect "cultural property"⁶⁵ against theft, illicit export and wrongful alienation. States which are

⁶⁴ <http://www.unesco.org/culture/laws/cooperation/html_eng/page1.shtml>

⁶⁵ "Cultural property" as defined in Article 1 of Convention "...means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:

- a. rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
- b. property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
- c. products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
- d. elements of artistic or historical monuments or archaeological sites which have been dismembered;
- e. antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
- f. objects of ethnological interest;
- g. property of artistic interest, such as:
 - (i.) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
 - (ii.) original works of statuary art and sculpture in any material;
 - (iii.) original engravings, prints and lithographs;
 - (iv.) original artistic assemblages and montages in any material;
- h. rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
- i. postage, revenue and similar stamps, singly or in collections;
- j. archives, including sound, photographic and cinematographic archives;
- k. articles of furniture more than one hundred years old and old musical instruments.

party to the Convention are bound to return to other State Parties cultural property that has been stolen from a museum or similar institution and is inventoried, to take measures to control the acquisition of illicitly traded cultural objects by persons and institutions in their country, to co-operate with other States having severe problems of protection of their heritage by applying import controls based on the export controls of other States Parties, and to take steps to educate the public. In furtherance of the Convention, UNESCO requested the International Institute for the Unification of Private Law (UNIDROIT) to draw up a new treaty to complement the 1970 UNESCO Convention by providing minimal rules of uniform law. This resulted in the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, 1995.⁶⁶ UNESCO's International Code of Ethics for Dealers in Cultural Property is a voluntary code designed to harmonize practice in the art trade along the principles of its international standard setting instruments to prevent illicit traffic in cultural goods;

(iii) the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage ("the World Heritage Convention") was adopted by the General Conference of UNESCO in 1972. The Convention defines the kind of natural⁶⁷ or cultural⁶⁸ sites which can be considered for inscription on the World Heritage List, and sets out the duties of States Parties in identifying potential sites and their role in protecting and preserving them. By signing the Convention, each country pledges to conserve not only the World Heritage sites situated on its territory, but also to protect its national heritage. The Convention further explains how the World Heritage Fund is to be used and managed and under what conditions international financial assistance may be provided;

(iv) UNESCO's work on the protection of folklore resulted in 1989 in the Recommendation on the Safeguarding Protection of Traditional Culture and Folklore. This Recommendation encourages international collaboration, and considers measures to be taken for the identification, conservation, preservation, dissemination and protection of traditional culture and folklore. In 1999, an International Conference was held in order to assess the implementation and application of the Recommendation;⁶⁹

(v) the Living Human Treasures program began in 1996 for the purpose of promoting the transmission of traditional knowledge and skills by artists and artisans before they are lost through disuse or lack of recognition. The guidelines define 'Living Human Treasures' as "persons who embody, who have in the very highest degree, the skills and techniques

⁶⁶ <<http://www.unesco.org/culture/legalprotection/>>

⁶⁷ The Convention defines "natural heritage" as follows: Article 2 "... *natural features* consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view; *geological and physiographical formations* and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation; *natural sites* or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty."

<<http://www.unesco.org/whc/nwhc/pages/doc/main.htm>>

⁶⁸ The Convention defines "cultural heritage" as follows: Article 1 "... monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view." <<http://www.unesco.org/whc/nwhc/pages/doc/main.htm>>

⁶⁹ UNESCO and the Smithsonian Institution co-organized an international Conference entitled "A Global Assessment of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore: Local Empowerment and International Cooperation", held in Washington D.C., June 27-30, 1990.

necessary for the production of selected aspects of the cultural life of a people and the continued existence of their material cultural heritage;”

(vi) in 1998, a program on Masterpieces of the Oral and Intangible Heritage of Humanity was created to honor the most remarkable examples of cultural spaces (defined as places in which popular and traditional cultural activities are concentrated or as the time usually chosen for some regularly occurring event) or forms of popular and traditional expression such as languages, oral literature, music, dance, games, mythology, rituals, costumes, craftwork, architecture and other arts as well as traditional forms of communication and information.⁷⁰ In addition, it is to encourage governments, NGOs and local communities to take the lead in identifying, preserving and drawing attention to their oral and intangible heritage;

(vii) the UNESCO Programme for the Preservation and Revitalization of Intangible Cultural Heritage has launched a publication series to help specialists catalogue and compile inventories of cultural forms, since they are constantly changing and may disappear forever on the death of their creators. The first volume in this series is a *Handbook for the Study of Traditional Music and Musical Instruments*.⁷¹ A handbook for the study of vernacular architectural styles is in preparation.

65. Most recently, at UNESCO’s General Conference, 31st Session, a Resolution was adopted according to which a new standard-setting instrument on the protection of traditional culture and folklore will be developed.⁷² The Resolution invited the Director-General to submit to the General Conference at its 32nd session, scheduled to take place in late 2003, a report on the possible scope of such an instrument, together with a preliminary draft international convention.⁷³

(b) International Trade Centre (ITC)

66. The International Trade Centre (ITC) is operated jointly by the World Trade Organization (WTO) which created the body, and the United Nations Conference on Trade and Development (UNCTAD). The ITC focuses on technical cooperation with developing countries in the promotion of trade. The main programme areas of ITC include product and market development, development of trade support services, trade information, human resource development, international purchasing and supply management, and needs assessment and programme design for trade promotion.

67. In collaboration with UNESCO, in 1996, ITC published a report entitled “Overview of Legal and Other Measures to Protect Original Craft Items.”⁷⁴ The Report proposed the establishment of a structure which should provide two-fold protection, namely protection of the artisans and craftspeople (the professionals) and the protection of intellectual property rights. The Report further stated that the protection of the professionals should be entrusted to a guild chamber, which should be set up in each country and would serve to defend the

⁷⁰ <<http://www.unesco.org/culture/heritage/intangible/index.shtml>>

⁷¹ Dournon, Geneviève. *Handbook for the Study of Traditional Music and Musical Instruments*. Paris: UNESCO, 1999.

⁷² 31 C/Resolution 30. 17 Member States formally expressed in written form their reservations in relation to the adoption of the resolution on this item: Argentina, Barbados, Denmark, Finland, France, Germany, Grenada, Greece, Mexico, Netherlands, Norway, Portugal, Saint Lucia, Spain, St. Vincent and the Grenadines, Sweden, Switzerland.

⁷³ See <<http://unesdoc.unesco.org/images/0012/001246/124687e.pdf>> - Records of the General Conference - 31st Session - Paris, 15 October to 3 November - “Resolutions”

⁷⁴ CLT-96/WS/5, 1996.

interests of its members.⁷⁵ In addition, the protection of intellectual property rights in the crafts should be under the responsibility of a national society for original craft items (NSOCI). It would supervise and guide the guild chamber and provide the link between the bodies in question.⁷⁶ More recently, in July 2000, the ITC published a report “Legal and Other Measures to Protect Crafts”, based upon work undertaken, in collaboration with WIPO, in Bolivia, Colombia and Peru.

68. In respect of artisanal products (or handicrafts), in 2000 the ITC adopted a new World Customs Organization (WCO) recommendation, which requested countries to codify artisanal products in national statistical nomenclatures.⁷⁷

69. In January 2001, a workshop organized by the ITC and WIPO took place in Havana, Cuba on the legal protection of original craft items. The development of effective national systems for the protection of craft items was advised, as well as the need to develop a relationship of trust with the members of the craft sector.⁷⁸

(c) Office of the High Commissioner for Human Rights (OHCHR)

(i) Working Group on Indigenous Populations (WGIP)

70. The Working Group on Indigenous Populations was established in 1982 as a subsidiary organ of the Commission of Human Rights’ Sub-Commission on Prevention of Discrimination and Protection of Minorities.⁷⁹ The WGIP meets annually in Geneva. The WGIP has two objectives, namely: (i) to review developments with respect to the promotion and protection of human rights and fundamental freedoms of indigenous peoples, (ii) to give attention to the evolution of international standards concerning indigenous rights.⁸⁰ The Working Group consists of five independent experts who are also members of the Sub-Commission. It has conducted several studies mainly on the relationship of indigenous peoples to land, treaties and agreements, and the protection of cultural heritage.

71. In furtherance of its mandate, the Working Group has elaborated a Draft Declaration on the Rights of Indigenous Peoples.⁸¹ The Draft Declaration protects the collective rights of indigenous peoples to practice and revitalize their cultural traditions and customs, including the right to maintain, protect and develop past, present and future manifestations of their cultures (Article 12). The Declaration also recognizes the full ownership and control of the cultural and intellectual property of indigenous peoples (Article 29).

72. In 1991, the Sub-Commission requested a study of measures which should be taken by the international community to strengthen respect for the cultural property of indigenous peoples.⁸² The study, *Discrimination Against Indigenous Peoples*,⁸³ was completed by Special Rapporteur, Erica-Irene Daes, and discussed various contemporary issues involving indigenous heritage. One of the main recommendations made was the drafting of principles and guidelines related to the protection of “indigenous heritage.” The *Principles and*

⁷⁵ ITC/UNESCO. *op.cit.*

⁷⁶ *Ibid.*

⁷⁷ ITC/AG(XXXIV)/185, February 27, 2001.

⁷⁸ WIPO-ITC/DA/HAV/01/03, January 30- February 1, 2001.

⁷⁹ Now named the Sub-Commission on the Promotion and Protection of Human Rights.

⁸⁰ <http://www.unhchr.ch/indigenous/ind_wgip.htm>

⁸¹ E/CN.4/Sub.2/1994/2/Add.1.

⁸² E/CN.4/Sub.2/1991/32, August 29, 1991.

⁸³ E/CN.4/Sub.2/1993/28, July 28, 1993.

Guidelines for the Protection of the Heritage of Indigenous People was included in the final report.⁸⁴ The Principles and Guidelines focus on the effective protection of the heritage of indigenous peoples, which is broadly defined.⁸⁵

(ii) Permanent Forum on Indigenous Issues

73. The Permanent Forum is a subsidiary organ of the Economic and Social Council (ECOSOC), consisting of sixteen members. Its establishment was one of the central objectives of the International Decade of the World's Indigenous People (1995-2004). The Forum serves as an advisory body to the Council with the mandate to discuss indigenous issues within the mandate of the Council. In addition, the Forum provides expert advice and recommendations to the Council on indigenous issues and raises awareness with the promoting of the integration and coordination of activities relating to indigenous issues within the UN system. "Indigenous issues" includes economic and social development, culture, environment, education, health and human rights. The first session of the Forum will take place in May 2002.

(d) International Labour Organization (ILO)

74. The ILO formulates international Labour standards setting minimum standards of basic Labour rights and provides technical assistance, training and advisory services to independent employers' and workers' organizations.⁸⁶ The ILO is responsible for two international instruments relating to indigenous peoples and local communities: the Indigenous and Tribal Populations Convention, 1957 (No. 107) and the Indigenous and Tribal Peoples Convention, 1989 (No. 169). The latter Convention notes that traditional activities of the indigenous peoples are considered important in the maintenance and development of their cultures and economies (Article 23), and the importance of protecting indigenous knowledge. The Convention has been ratified by 14 countries.⁸⁷ Currently, the Small Enterprise Development (SEED) division of the ILO is conducting a project on small enterprise development and job creation in the cultural sector. The project has commenced with studies in five cultural sub-sectors, namely, film and TV, music, ethno-tourism, crafts, and performing arts and dance, in the Southern African region. The International Programme to Support Self-Reliance of Indigenous and Tribal Peoples through Cooperatives and Self-Help Organizations (INDISCO) was launched in 1993 under a DANIDA/ILO Framework Agreement. The objective of the programme is to contribute to the improvement of the socio-economic conditions of indigenous and tribal peoples through demonstrative pilot projects and dissemination of best practices for policy improvement.

(e) World Trade Organization (WTO)

75. Certain WTO Members have requested various bodies of that organization, such as the Committee on Trade and Environment (CTE), the Council for TRIPS and the General Council, to address the protection of traditional knowledge. In the lead-up to the Third Ministerial Conference of WTO Members in Seattle on November 30 to December 3, 1999, a number of WTO Members submitted proposals, both in the context of the review of Article

⁸⁴ E/CN.4/Sub.2/1995/26, June 21, 1995.

⁸⁵ See Brown, Michael F. "Can Culture be Copyrighted?", *Current Anthropology*, Volume 39, Number 2, April 1998, p.202.

⁸⁶ <<http://www.ilo.org/public/english/about/mandate.htm>>

⁸⁷ Argentina; Bolivia; Colombia; Costa Rica; Denmark; Ecuador; Fiji; Guatemala; Honduras; Mexico; Netherlands; Norway; Paraguay; Peru.

27.3(b) of the TRIPS Agreement and of an eventual new round of negotiations, that the TRIPS Agreement should contain provisions on the protection of traditional knowledge.

76. At the Fourth Ministerial Conference of WTO Members in Doha, November, 2001, WTO Members adopted a Ministerial Declaration, launching a new round of trade negotiations. With reference to the Trade-Related Aspects of Intellectual Property Rights (Item 19), Ministers “instructed the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this declaration, to examine, *inter alia*, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.”

77. The TRIPS Council, at its most recent meeting from March 5 to 7, 2002, requested the Secretariat of WTO to prepare a short paper on *inter alia* the protection of traditional knowledge and folklore summarizing the relevant material that had been presented to the Council during its earlier discussions, whether in written or oral form, and listing all the relevant documentation.⁸⁸

II.D. RELEVANT WORK OF REGIONAL ORGANIZATIONS

78. The agreements, instruments and processes of certain regional organizations refer explicitly to expressions of folklore, or forms thereof. By way of example, some are briefly described in the following paragraphs.

(a) The African Intellectual Property Organisation (OAPI)

79. OAPI was established by the adoption of a new convention signed in Bangui on March 2, 1977.⁸⁹ The “Bangui Agreement” legislates patents, utility models, products and service marks, industrial designs and models, trade names, geographical indications and copyright. In Chapter I of Annex VII, which deals with copyright and related rights, specific protection is provided for expressions of folklore and for works inspired by expressions of folklore. The form of protection is based on the *domaine public payant* model.⁹⁰ The Agreement deals also with the protection for expressions of folklore in Chapter II on the Protection and Promotion of Cultural Heritage. The Agreement serves as national law for each of the 15 member states which now make up OAPI.⁹¹ The Bangui Agreement provides for national treatment. Therefore, all 15 States that are members of OAPI are bound to protect each other’s expressions of folklore as intellectual property under the national treatment principle.

⁸⁸ WTO Briefing Notes, No. 19, March 2002 (II).

⁸⁹ Formerly “The African and Malagasy Patent Rights Authority (OAMPI) (13th September 1962) by the agreement known as the “Libreville Agreement.”

⁹⁰ See Article 59.

⁹¹ Benin, Burkina Faso, Cameroon, Central Africa, Chad, Congo, Cote d’Ivoire, Gabon, Guinea Bissau, Guinea, Mali, Mauritania, Niger, Senegal, Togo.

(b) Secretariat of the Pacific Community

80. The Secretariat of the Pacific Community, jointly with the Pacific Islands Forum Secretariat, is developing a Pacific Regional Model Framework on the Protection of Traditional Knowledge and Expressions of Culture. The framework comprises draft regional guidelines and a draft *sui generis* Model Law.⁹²

(c) The Andean Community

81. The Andean Community, established in 1969, comprises five Member Countries, namely Bolivia, Colombia, Ecuador, Peru and Venezuela. The highest body of the Andean Community is the Commission. It is mandated to adopt legislation, that is binding on the Member Countries, on matters relating to the development and coherence of the Andean common market. Andean common legislation issues are mainly in the form of Commission “Decisions.” A Common Regime on Copyright and Neighbouring Rights was established by Decision No. 351. The Decision provides protection to works of applied art, including handicrafts,⁹³ and provides for national treatment.⁹⁴

III. GENERAL SUMMARY, CONCLUSIONS AND SUGGESTED TASKS

82. As previously mentioned, the responses to the Questionnaire are summarized in detail in Annex I to this document. In this Section, the responses are discussed in a more general manner and certain conclusions are drawn. Based thereon, and on previous WIPO activities as outlined in Section II, certain tasks are proposed for consideration by the Intergovernmental Committee.

83. The number of States that responded directly to the Questionnaire was 64. Certain additional States provided information in response to the Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge (WIPO/GRTKF/IC/2/5) which applies to “expressions of folklore” as referred to in the Questionnaire. Where indicated, this information has also been taken into account in preparing this document.

84. The Questionnaire was intended to elicit information on national experiences from States which provide specific legal protection for expressions of folklore, and those that do not. In particular, views on the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, which were adopted in 1982 (the “Model Provisions, 1982”) were requested. Responses to the Questionnaire and the results of previous WIPO activities also referred to needs for the extra-territorial protection of expressions of folklore.

85. In addition, in their responses to the Questionnaire, at previous sessions of the Intergovernmental Committee and during other WIPO activities, States and other stakeholders have raised certain “cross-cutting” conceptual and operational issues. While these are not necessarily susceptible of specific conclusions or distinct tasks and activities at this stage, they confront all efforts to develop or improve measures for the legal protection of

⁹² See WIPO/GRTKF/IC/2/16, paras. 41 and 42.

⁹³ Article 3(14): “work of applied art” means an artistic creation with utilitarian functions or incorporated in a useful article, whether a work of handicraft or one produced on an industrial scale.

⁹⁴ Article 2.

expressions of folklore, whether using intellectual property rights or other systems. At the outset, therefore, these conceptual and operational issues are briefly described.

86. Accordingly, it is proposed to summarize, draw conclusions and suggest tasks within the following framework:

A. Conceptual and Operational Issues

- (a) Subject matter
- (b) Objectives for protection
- (c) Subjects of protection
- (d) Scope of protection – exceptions and limitations
- (e) Effective participation by indigenous peoples and local communities

B. General Summary

- (a) States which provide specific legal protection for expressions of folklore
- (b) States which do not provide specific protection for expressions of folklore
- (c) Non-intellectual property forms of protection
- (d) The Model Provisions, 1982
- (e) Extra-territorial protection
- (f) Proposals for modifications to existing intellectual property standards and for *sui generis* standards
- (g) Documentation

C. Conclusions and Suggested Tasks

- (a) Establishment, strengthening and effective implementation of national systems of protection
- (b) Extra-territorial protection
- (c) Relationship between customary laws and protocols and the formal intellectual property system

87. The suggested tasks are also listed separately in Annex V to this document.

A. Conceptual and Operational Issues

88. At the first and second sessions of the Intergovernmental Committee, certain States identified a number of “cross-cutting” questions which they believe require further consideration. These may best be summarized as: What should be protected?; Why protect expressions of folklore?; Who should be protected?; What should be the means of protection?; What should be the scope of protection? (in other words, what exceptions and limitation should there be?).⁹⁵ States and other stakeholders have also referred to the need for effective participation of indigenous peoples and local communities in the deliberations of the Intergovernmental Committee and WIPO activities.

⁹⁵ See for example WIPO/GRTKF/IC/1/13, paras. 159, 163 and 165; WIPO/GRTKF/IC/2/16, par. 169.

89. While these issues are not necessarily susceptible of conclusions, or distinct tasks and activities, at this stage, they confront all efforts to develop or improve measures for the legal protection of expressions of folklore, whether using intellectual property rights or other systems.

(a) Subject matter

90. The responses to the Questionnaire and the results of previous WIPO activities such as the fact-finding missions, show that States, indigenous peoples and local communities, and other stakeholders have wide and diverse understandings of what is covered by the term “expressions of folklore.”

91. Clarity in the area of subject matter and terminology has long been called for. A wish to identify the expressions of folklore for which legal protection is sought was clearly articulated at the four Regional Consultations on the Protection of Expressions of Folklore organized by WIPO and UNESCO in 1999.⁹⁶ Other inter-regional and regional activities of WIPO have referred to the same need. For example, the WIPO Inter-Regional Meeting on Intellectual Property and Traditional Knowledge, held in Chiangrai, Thailand from November 9 to 11, 2000, recommended that “*an important task of the Intergovernmental Committee [on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore], among others, should be to discuss and reach broad agreement on the meanings to be assigned to the various relevant terms and concepts (such as “genetic resources”, “traditional knowledge” and “folklore”), their respective and mutual relationships with each other and with intellectual property and a methodology of working which would take into account the links and distinctions between the subject areas falling within the Committee’s scope.*”⁹⁷ Various academic writers and commentators have also referred to terminological issues in relation to intellectual property and traditional knowledge.⁹⁸

92. It is essential for future progress in this area that an understanding be reached on the scope and meaning of “expressions of folklore” for which protection is sought by intellectual property rights. While a precise definition of “expressions of folklore” may not be necessary, there is a primary need to identify the criteria which they should meet as a condition for protection by intellectual property rights. Much in the same way, international and national copyright treaties and laws do not define “literary, artistic and scientific works” but establish the conditions or criteria according to which they may be protected.

⁹⁶ The regional consultations were held for African countries in Pretoria, South Africa (March 1999), for countries of Asia and the Pacific region in Hanoi, Viet Nam (April 1999); for Arab countries in Tunis, Tunisia (May 1999); and for Latin America and the Caribbean in Quito, Ecuador (June 1999). See documents WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ASIA/99/1; WIPO-UNESCO/FOLK/ARAB/99/1; WIPO-UNESCO/FOLK/LAC/99/1.

⁹⁷ Chiangrai, Thailand Meeting Action Plan and Meeting Statement. See <<http://www.wipo.int/eng/meetings/2000/tk/index.htm>> (August 31, 2001)

⁹⁸ See, for example, Janke, T., *Our Culture, Our Future* (Report prepared for the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, 1999), pp. 2 to 12; Simpson, T., *The Cultural and Intellectual Property Rights of Indigenous Peoples* (IWGIA, 1997), pp. 18 to 22; Blakeney, M., “The Protection of Traditional Knowledge under Intellectual Property Law”, E.I.P.R. 6 [2000], p. 251; Mould-Idrussu, B. “The Experience of Africa”, paper presented at WIPO-UNESCO World Forum on the Protection of Folklore”, held in Phuket, Thailand, in April 1997, published in WIPO Publication Number 758; McDonald, I., *Protecting Indigenous Intellectual Property* (Australian Copyright Council, Sydney, 1997, 1998); Kuruk, P., “Protecting Folklore Under Modern Intellectual Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States”, 48 *American University Law Review* 769 (1999); Mugabe, J., “Intellectual Property Protection and Traditional Knowledge”, *Intellectual Property and Human Rights* (WIPO, 1999), p. 97.

93. In this respect, a distinction, made in several national laws, between the folklore “base” (the truly anonymous, communal and orally preserved cultural base), and derivative works (works inspired by or derived from the “base”, by identifiable individuals, whether traditional or not) is relevant.

94. A second question relating to subject matter raised by States in their responses to the Questionnaire and at other opportunities, is the relationship between “expressions of folklore” and other forms of traditional knowledge, such as medicinal, biodiversity-related and agricultural knowledge. As is noted in detail in Annex I, several States suggested that these other forms of traditional knowledge should be included within the scope of the notion “expressions of folklore.” This suggestion recognizes that the structure and content of traditional knowledge are intimately linked with local biological resources and ecosystems, and that the protection of rights to cultural heritage is closely linked to the protection of the environments and living resources of indigenous peoples and local communities. Similar points were made at the first and second sessions of the Intergovernmental Committee.⁹⁹ The fact-finding missions conducted by WIPO in 1998 and 1999,¹⁰⁰ as well as the Regional Consultations on Folklore organized by WIPO and UNESCO in 1999¹⁰¹ reached similar findings. And, as has been noted in respect of the rights of indigenous peoples: “*It is thus also inappropriate to try to subdivide the heritage of indigenous peoples into separate legal categories such as ‘cultural’, ‘artistic’ or ‘intellectual’, or into separate elements such as songs, stories, science or sacred sites. . . all elements of heritage should be managed and protected as a single, interrelated and integrated whole.*”¹⁰²

95. Indeed, the separate treatment of “expressions of folklore” from other forms of traditional knowledge may be artificial and not in accordance with reality. To give one example only. The *amauti*, referred to in Canada’s response to the Questionnaire, is an Inuit woman’s parka that is designed with a large hood and a pouch in which a child can be carried while allowing the woman’s hands to remain free. A child can be nursed and tended without leaving the warmth of the *amauti*. The parka was made using traditional skills and know-how, from caribou hair and sealskin. The *amauti* reflects the practical and functional adaptations of the Inuit to their environment. It is thus a product of biodiversity-related traditional knowledge. Today, Inuit women are attempting to promote commercial sales of handmade *amautis* in order to conserve traditional skills and knowledge while providing a source of income and a measure of financial independence. It is also intrinsically linked to Inuit culture. Inuit women are concerned about the misappropriation and loss of cultural heritage. They fear that if they lack effective legal tools to protect their works, they will be denied appropriate credit and compensation, they will lose control over traditional designs and motifs, and their market will be usurped by mass-produced articles.¹⁰³

96. However, as previously noted,¹⁰⁴ it has been suggested that the advanced stage of the work on expressions of folklore merits the distinct consideration of this subject matter as a

⁹⁹ See WIPO/GRTKF/IC/2/16 (Final Report of Second Session), par. 167.

¹⁰⁰ See WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (WIPO, 2001).

¹⁰¹ See documents WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ASIA/99/1; WIPO-UNESCO/FOLK/ARAB/99/1; and, WIPO-UNESCO/FOLK/LAC/99/1.

¹⁰² Daes, Erica-Irene, “Study on the protection of the cultural and intellectual property of indigenous peoples”, 1993, UN document E/CN.4/Sub. 2/1993/28, par. 31.

¹⁰³ See also Draft Final Report and other documents from the “Inuit Women’s Traditional Knowledge Workshop on the Amauti and Intellectual Property Rights”, Rankin Inlet, Nunavut, May 24 to 27, 2001.

¹⁰⁴ WIPO/GRTKF/IC/1/3, par. 90.

separate theme, and this is why the Intergovernmental Committee presently treats “expressions of folklore” as a distinct theme. The sheer breadth and diversity of what may be included within the notion “traditional knowledge” suggest too that a more limited focus for “expressions of folklore” may be desirable and more productive, at least for the present. The rights, too, that would be relevant in respect of artistic/cultural materials are different from those relevant to technical/scientific materials. In the case of materials of an artistic and literary nature, right holders could be entitled to prevent others from adapting, reproducing, fixing, performing and making available the materials. But when unauthorized use is made of technical components of traditional knowledge, right holders should be capable of preventing their use (meaning the making, using, offering for sale, selling, or importing of the protected traditional product, or, where the subject matter of protection is a traditional process, of the product obtained directly by the traditional process).

(b) Objectives for protection

97. Once again, previous activities have identified various objectives articulated by States, indigenous peoples, local communities for the protection of expressions of folklore.¹⁰⁵ A scoping of objectives for protection is useful *inter alia* to assess the effectiveness and relevance of options for protection.

98. These objectives include, in brief:

- (i) control over disclosure and use;
- (ii) commercial benefit;
- (iii) promotion of and incentives for continued tradition-based creativity;
- (iv) acknowledgment and attribution; and,
- (v) prevention of derogatory, offensive, and fallacious use.

99. It has been repeatedly stated that objectives in this area are not only (or purely) commercial. As Costa Rica points out in its response to the Questionnaire:

It should not be overlooked that, in the case of folklore and indigenous knowledge, the prime interest of their creators lies not in deriving some economic benefit from them but rather in having their creations recognized as being part of their community, their culture, their identity.

100. Relevant objectives have also been classified as: a defensive commercial interest, an active commercial interest and ethical concerns. A defensive commercial interest is relevant where cultural communities wish to protect their folklore from being exploited commercially by others. An active commercial interest would be relevant where communities wish to benefit from the economic advantage attached to treating their expressions of folklore as a commodity. Ethical concerns arise when cultural communities wish to protect their folklore so that its evolution faithfully respected their traditions and modes of life.¹⁰⁶

¹⁰⁵ See response of Costa Rica, for example; WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (WIPO, 2001).

¹⁰⁶ Statement of the European Commission at the second session of the Intergovernmental Committee (WIPO/GRTKF/IC/2/16, par. 169). The Commission indicated in its intervention that discussions within the framework of intellectual property should concentrate on the more transactional, commercial aspects of folklore rather than on ethical issues.

101. The various objectives articulated in respect of folklore demonstrate too that intellectual property approaches may not meet all objectives, or establish the only appropriate incentive measures for continued tradition-based creativity. Intellectual property-type solutions may meet some objectives, but frustrate others. The development and strengthening of national, regional and international systems for the legal protection of expressions of folklore would need to take into account these diverse objectives.

(c) Subjects of protection

102. As the responses to the Questionnaire show (see responses to Question II. 17), the vast majority of States regard expressions of folklore as the “property” of the country as a whole (as part of the national cultural heritage). The remaining responses are more or less evenly divided between those States treating expressions as belonging to indigenous and local communities, and as the “property” of individual artists.

103. In another approach to this question, it has been suggested that special consideration should be devoted to protecting the performers, recorders and archivists of expressions of folklore, as these are the three major entities – the major links in the value chain – that require protection.¹⁰⁷

104. The subjects (holders) of rights in expressions of folklore is a key question that needs to be addressed in the development of effective systems of protection.

(d) Scope of protection – exceptions and limitations

105. Numerous States argued for a proper balance between protection against abuses of folklore and the encouragement of further development and dissemination of folklore, as well as individual creativity inspired by folklore.¹⁰⁸

106. The thrust of such comments are that both copyrightable works and folklore expressions require protection that is neither too broad to be practical and effective, nor too rigid to prevent bodies of culture and knowledge to expand and regenerate their creativity. The Model Provisions, 1982 provide for an exception in respect of “*the borrowing of expressions of folklore for creating an original work of an author or authors.*”¹⁰⁹ This exception was specifically crafted to allow free development of individual creativity inspired by cultural expressions. The Model Provisions, 1982 were not intended to hinder in any way the creation of original works based on cultural expressions. In addition, Section 13 of the Model Provisions, 1982 provides as follows: “*The protection granted under this [law] shall in no way be interpreted in a manner which could hinder the normal use and development of expressions of folklore.*”

¹⁰⁷ Santova, Mila, “Problems of the Protection of Folklore as Intellectual Property at the Dawn of the 21st Century”, paper presented at WIPO International Conference on Intellectual Property, the Internet, Electronic Commerce and Traditional Knowledge, Sofia, Bulgaria, May 29 – 31, 2001, pp. 4-5

¹⁰⁸ For example, Canada; China; Ecuador; Kyrgyzstan; Malaysia; Mexico; Republic of Korea; Romania; Switzerland; United States of America.

¹⁰⁹ Section 4 (1) (iii), Model Provisions, 1982.

107. In this respect, it is suggested by some that the existing intellectual property system already meets similar balancing needs. For example, in its response the United States of America stated that:

“The United States believes that proper balance must be maintained between the needs of particular communities and the promotion of individual creation, development of a living culture and freedom of expression. Flexibility must be maintained so that the needs and concerns of various communities may be addressed. The principal means of protecting expressions of folklore should be conventional intellectual property legislation, supplemented, as necessitated by the conditions/needs of local communities, by specific laws that address specific problems. The balance inherent in intellectual property laws may be thus incorporated into the protection of expressions of folklore.”

108. On the other hand, it is recognized by others that one of the primary concerns regarding cultural expressions is precisely to prevent their adaptation or the borrowing of their “style,” particularly by non-traditional communities. Thus, calls are made to strictly control derivative works, being works inspired by or based on folklore expressions. But there may be consequences for the implementation of these rights. By overprotecting cultural expressions, the public domain diminishes, which means that there are fewer works to build on. Therefore, indigenous artists who want to develop their artistic traditions by reinterpreting traditional motifs in non-traditional ways, and want to compete in the arts and crafts markets, may be inhibited by these regimes. The consequence is that these laws may “freeze” the culture in a historic moment, and deny traditional peoples a contemporary voice.¹¹⁰

109. It would seem that measures for the protection of expressions of folklore should aim to ensure that, insofar as inspiration is drawn from traditional cultural expressions, it respects the boundaries between unfair use, on the one hand, and legitimate inspiration from the richness and diversity that cultural expressions from around the world can offer. Achieving this balance is complex, however.

(e) Effective participation of indigenous peoples and local communities

110. At previous sessions of the Intergovernmental Committee, and on numerous previous WIPO activities related to traditional knowledge and expressions of folklore, the need has been expressed for the effective and full participation of indigenous peoples and local communities in the consideration of whether systems and mechanisms to legally protect expressions of folklore would be appropriate, and, if so, what forms such systems and mechanisms could take.¹¹¹

¹¹⁰ See Farley, Christine Haight, “Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?” Connecticut Law Review, Fall, 1997.

¹¹¹ See WIPO/GRTKF/IC/1/13, paragraph 87; WIPO/GRTKF/IC/2/16, paras. 75, 91, 117; Position Paper of the Asian Group and China (WIPO/GRTKF/IC/2/10). See also WIPO-UNESCO African Regional Consultation on the Protection of Expressions of Folklore, Pretoria, March 23 to 25, 1999 (WIPO-UNESCO/Folk/AFR/99/1) p.3; See WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge* (1998-1999) pp. 80, 128, and 142.

111. For example, as the representative of the First Nations Development Institute stated at the second session of the Intergovernmental Committee:

*(The representative) urged that the necessary resources and logistical support be made available to ensure the full and effective participation of Indigenous expertise throughout these discussions. She emphasized that Indigenous elders, lawyers, and activists had been working for decades to articulate the intellectual property rights needs of Indigenous peoples and provide guidance on how these needs could be met. They knew the formal intellectual property rights system and its limitations. They knew customary law and traditions. Indigenous peoples knew what they wanted, they knew what worked and what did not, and to ignore this expertise would be not only to the detriment of Indigenous peoples, but also to the detriment of the Committee in developing solutions that would work on the ground.*¹¹²

112. Certain States have supported such calls. For example, at the second session of the Intergovernmental Committee, the delegation of Belgium, speaking on behalf of the European Community, stated that the active participation of indigenous and local communities was necessary to encompass views of all stakeholders who were relevant to the work of the Committee. However, the Delegation added, a prerequisite for such participation was the availability of financial assistance. It pointed out that such assistance could in many cases be properly ensured by Member States. It stated that nevertheless the appropriateness of setting up a general mechanism for financial assistance through funds should also be considered.¹¹³

B. General Summary

(a) States which provide specific protection for expressions of folklore

113. Question I. 3 of the Questionnaire asked States to indicate whether or not they provide specific legal protection for expressions of folklore.

114. As indicated in the questionnaire, this question concerns specific legal protection of an intellectual property nature for expressions of folklore, and not indirect, or incidental, protection for expressions of folklore, such as may be provided in certain cases by copyright, related rights or industrial property laws. In the following cases the responses were evaluated as indicating that a country provides such protection, if:

(i) the country explicitly provides protection for expressions of folklore in its copyright or other intellectual property legislation. Such protection may be, but need not be, based upon or derived from the Model Provisions, 1982 and/or Article 15.4 of the Berne Convention for the Protection of Literary and Artistic Works, 1971 (the Berne Convention);

(ii) the country provides protection of a *sui generis* nature (in other words, not within the country's existing intellectual property legislation); or,

(iii) the country has established specific measures or mechanisms for legally protecting certain aspects of expressions of folklore (such as indigenous and traditional insignia, symbols and marks).

¹¹² WIPO/GRTKF/IC/2/26, par. 152.

¹¹³ WIPO/GRTKF/IC/2/16, par. 186

115. Draft laws and provisions have not been evaluated as if already in force. In other words, countries that advised of draft laws and provisions are not included in the number of countries providing specific protection. These countries are Chad, China, Egypt, New Zealand, Venezuela and Zimbabwe.

116. Of the 64 States which responded to the Questionnaire, 23 were evaluated as providing specific legal protection for expressions of folklore as intellectual property in their national laws or regulations. This equals 36%.

117. Of these States, the vast majority provides protection within their national copyright legislation. However, the modalities of protection differ widely.

118. In some cases, expressions of folklore are simply referred to as a form of copyright work, and most of the normal rules of copyright apply to them. Apart from perhaps affording expressions of folklore an unlimited term of protection, there are few or no additional provisions crafted specifically to take into account the special character of expressions of folklore. Examples of these countries would include Barbados, Côte d'Ivoire, Indonesia and the Islamic Republic of Iran.

119. Another group of States has included within their copyright legislation provisions specifically designed for expressions of folklore. Examples would include Burkina Faso, Ghana, Kenya, Namibia, Mozambique, Mexico, Senegal, Sri Lanka, Togo, the United Republic of Tanzania, and Viet Nam. In most of these cases, the provisions are based, to differing degrees, upon the Model Provisions, 1982, and they deal in some detail with issues such as acts in respect of which expressions of folklore are protected, exceptions and limitations, the authorization of utilizations of expressions of folklore, and, sanctions, remedies and jurisdiction. Some of these States have a provision or provisions that correspond with Article 15.4 of the Berne Convention – for example, the United Kingdom.

120. A third category comprises States that provide protection for expressions of folklore in legislation other than existing intellectual property legislation. They may be said to provide *sui generis* protection. It is not necessarily clear in all cases, however, to what extent the protection provided for is legal protection of an intellectual property nature (as described in paragraph 5 of the Questionnaire.¹¹⁴) The role of more general cultural heritage laws is discussed below in section (c) on “Non-intellectual property forms of protection.”

121. There are four States which provide what appears to be *sui generis* legal protection of an intellectual property nature (although some overlap with more general cultural heritage protection is possible). They are Croatia, Panama, the Philippines and Viet Nam:

(i) in its response to the Questionnaire, Croatia responded that it provides specific protection for expressions of folklore and referred to its Law on the Protection and Preservation of Cultural Goods, which came into force in 1999. The Law protects *inter alia*

¹¹⁴ Paragraph 5 of the Questionnaire (WIPO/GRTKF/IC/2/7) stated as follows: “The questionnaire concerns national experiences with the legal protection of expressions of folklore as intellectual property. This means specific legal protection of an intellectual property nature for expressions of folklore. Such protection may, but need not be, provided for in a State’s intellectual property laws. It may be provided for by *sui generis* (of its own kind) legislation, or as part of a law dealing with national cultural heritage, for example. The questionnaire is, therefore, not concerned with indirect, or incidental, protection for expressions of folklore, such as may be provided in certain cases by copyright, related rights or industrial property laws. It is also not concerned with the identification, preservation, promotion and dissemination of folklore, save to the extent that these may be relevant to the legal protection of expressions of folklore as intellectual property.”

“non-material cultural goods”, which are defined as goods comprising various forms and phenomena of spiritual creativity transmitted traditionally or in another way, especially folklore creativity, in the field of music, dance, tradition, games, rituals, customs, and other traditional national values;

(ii) Panama¹¹⁵ has given a detailed explanation of its “Special Intellectual Property Regime on Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity as their Traditional Knowledge,” established by Law No. 20, of June 26, 2000 and regulated by Executive Decree No. 12, of March 20, 2001. The Law creates the Department of Collective Rights and Expressions of Folklore within the relevant intellectual property office. Panama’s *sui generis* regime covers indigenous peoples’ creations, such as inventions, designs and innovations, cultural historical elements, music, art and traditional artistic expressions. Panama’s response advises that the general aims and principles of the Model Provisions, 1982 are followed in the new Law. However, the exceptions provided for in section 4 of the Model Provisions are not followed. The Department of Collective Rights and Expressions of Folklore has started a program for the archiving of expressions of folklore, and the functions and powers of this new authority are set out in some detail. The possibility to register collective exclusive rights is also provided for. The Kuna Yala territory has expressed interest in the registration of the handicraft known as the *mola* but no expression of folklore has been registered to date. The authority to attribute rights is vested upon the Congress(es) or the Traditional Indigenous Authority(ies). Some elements of knowledge may be co-owned by various communities, in which case benefits will be jointly shared. The Law also provides for exceptions to rights conferred as well as measures of enforcement (available provisions to enforce intellectual property rights may be applied as subsidiary mechanisms). Collective indigenous rights may also be a basis for opposing unauthorized third party claims to intellectual property rights, such as copyright, trademarks and geographical indications. The response of Panama also refers to Law No. 27 of July 24, 1997, “Provisions on the Protection, Promotion and Development of Handicraft.” Chapter VIII of this Law establishes protection for national handicrafts by prohibiting the import of craft products or the activity of those who imitate indigenous and traditional Panamanian articles and clothing;

(iii) in the Philippines,¹¹⁶ the 1987 Philippine Constitution mandates the recognition, respect and protection of the rights of the indigenous cultural communities and indigenous peoples (referred to as “ICCs/IPs”). This mandate was realized with the passage of the Indigenous Peoples Rights Act (Republic Act No. 8371) in October 1997. The law provides protection for “community intellectual property rights” described as:

- a) *The past, present and future manifestations of their cultures, such as but not limited to, archeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature as well as religious and spiritual properties;*
- b) *Science and technology including but not limited to, human and other genetic resources, seeds, medicines, health practices, vital medicinal plants, animals, minerals, indigenous knowledge systems and practices, resource management systems, agricultural technologies, knowledge of the properties of flora and fauna, and scientific discoveries; and*

¹¹⁵ Information also obtained from Panama’s response to the WIPO Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge.

¹¹⁶ Information obtained from response of the Philippines and Daoas, D., “Efforts at Protecting Traditional Knowledge: the Experience of the Philippines”, paper presented at WIPO Roundtable on Intellectual Property and Traditional Knowledge, November 1 and 2, 1999.

c) *Language, music, dance, script, histories, oral traditions, conflict resolution mechanisms, peace building processes, life philosophy and perspectives and teaching and learning systems.*¹¹⁷

According to the response of the Philippines, community intellectual property rights also includes Filipino historical and cultural heritage and resources, and traditional culture and its various creative.

The right of the indigenous peoples to their indigenous knowledge systems and practices and to develop their own science and technologies is provided by Section 34 of the Act which states that:

“Indigenous cultural communities/indigenous peoples are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights. They shall have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of flora and fauna, oral traditions, literature, designs and visual and performing arts.”

Regarding the protection of “manifestations of indigenous culture”, it is stated that indigenous culture shall not be commercialized or used for tourism and advertisement purposes without the free and prior informed consent of the indigenous peoples concerned. The indigenous peoples shall have control over the indigenous cultural and artistic performances, and to share equitably in the benefits of such presentation or performance. All funds so collected shall be managed directly by the community concerned or shall be held in trust by the National Commission on Indigenous Peoples for the benefits of the relevant community.¹¹⁸

Customary laws and practices are referred to several times in the Act and the implementing Rules and Regulations, and have primacy in disputes involving indigenous cultural communities and indigenous peoples;¹¹⁹

(iv) in addition to the Civil Code of 1995, which, in its chapter dealing with copyright, protects folk arts and literature, Viet Nam advised of a new Cultural Heritage Law which was adopted in June 2001, and came into force on January 1, 2002. In terms of this law, prior authorization for the exploitation of expressions of folklore belonging to the national cultural heritage is required; the development and the creation and dissemination of folklore are protected; and, the illicit exploitation and other prejudicial actions in respect of expressions of folklore are prevented.

122. While the previous group of countries have enacted general and comprehensive legislation, one country, the United States of America, has established specific measures or provisions which, according to its response, aim to “*protect and preserve cultural heritage and to prevent commercial interests from falsely associating their goods or services with indigenous peoples.*” This has been done in accordance with the country’s view that “*The United States has found that the most effective means of protection of expressions of folklore*

¹¹⁷ Section 10, Rule VI, Rules and Regulations Implementing Republic Act No. 8371.

¹¹⁸ Section 16, Rule VI, Rules and Regulations Implementing the Republic Act No. 8371.

¹¹⁹ Section 65, Indigenous Peoples Rights Act, 1997.

is to address the specific concerns that have arisen in this country. As is the case of all nationals, members of Indian tribes and Alaskan natives have full access to elected representatives who are in the position to propose legislation to meet their particular needs. Accordingly, we have not felt that a one-size-fits-all approach is desirable or appropriate.” Additionally, in its response, the country advised that:

(i) the Indian Arts and Crafts Act, 1990 (the IACA) protects Native American artisans by assuring the authenticity of Indian artifacts under the authority of an Indian Arts and Crafts Board (the IACB). The IACA, a “truth-in-marketing” law, prevents the marketing of products as “Indian made” when the products are not made by Indians as they are defined by the Act. The response advised that *“it has been the experience of Native American tribes that many commercial enterprises, both in the United States and in other countries, essentially attempt to counterfeit Native American arts and crafts and/or falsely indicate some association between the non-Indian product and a Native American tribe. In fact, many counterfeits of Indian arts and crafts products are both made and sold outside of the United States, but the United States of course has no ability to stop trafficking in such counterfeit products;”*

(ii) under Section 2(a) of the Trademark Act, 1946, as amended, a proposed trademark may be refused registration or cancelled (at any time) if the mark consists of or comprises matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute. The United States Patent and Trademark Office (USPTO) may refuse to register a proposed mark which falsely suggests a connection with an indigenous tribe or beliefs held by that tribe. The response stated that such provision provides not only protection for folklore aspects of Native American tribes, but also *“those of other indigenous peoples worldwide.”* The Trademark Law Treaty Implementation Act, 1998 required the USPTO to complete a study on the protection of the official insignia of federally and state-recognized Native American tribes. As a direct result of this study,¹²⁰ on August 31, 2001 the USPTO established a Database of Official Insignia of Native American Tribes. The Database of Official Insignia of Native American Tribes may be searched and thus prevent the registration of a mark confusingly similar to an official insignia. “Insignia” refers to *“the flag or coat of arms or other emblem or device of any federally or State recognized Native American tribe”* and does not include words.¹²¹ The response gave some examples of trademark applications which had been denied on the bases of likely false association with a Native American Tribe and/or possible disparagement of the tribe and its beliefs, or Native American Tribes in general.

(b) States which do not provide specific protection for expressions of folklore

123. Approximately a half of respondents to the Questionnaire do not provide specific legal protection for expressions of folklore. 41 respondents, equaling 62% of the respondents, answered that they do not provide specific protection or did not answer the question (Question I. 3). 33, or 52%, were evaluated as answering ‘No’ to the question.

124. Those States that do not provide specific protection advanced a number of reasons. At the risk of generalizing, one could identify three main clusters of reasons. These are: Adequate protection provided by existing intellectual property rights; Legal protection for expressions of folklore not appropriate or requested; and, Legal protection for expressions of

¹²⁰ Available at <<http://www.uspto.gov/web/menu/current.html>> (30Nov99 entry).

¹²¹ *Ibid.*, pp. 24-26.

folklore awaiting enactment or still under consideration. These clusters overlap in some respects and a State's views may be reflected in more than one cluster.

Adequate protection provided by existing intellectual property rights

125. One group of States believes that expressions of folklore are adequately protected by conventional intellectual property systems. Particular reference is made to copyright (including moral rights and the *domaine public payant* system) and related rights, trademarks, designs law, geographical indications,¹²² unfair competition, particularly passing off and trade secrets protection, and other common law remedies.¹²³ One response stated that: “*The current direction of domestic policy development therefore is to protect Indigenous arts and cultural expression within existing legal frameworks rather than the implementation of sui generis laws.*”¹²⁴ Another stated that expressions of folklore not protected under the existing intellectual property framework, which are in the public domain, are available without restrictions and thus serve to enrich the fabric of the country's multicultural society.¹²⁵

126. A few of these responses provided information on actual and practical examples in which current intellectual property standards have been used:

(i) Australia¹²⁶ identified four cases which, in its view, demonstrate the ability of the Australian intellectual property regime to protect traditional knowledge: *Foster v Mountford (1976) 29 FLR 233*,¹²⁷ *Milpurrurru v Indofurn Pty Ltd (1995) 30 IPR 209*,¹²⁸ *Bulun Bulun & Milpurrurru v R & T Textiles Pty Ltd (1998) 41 IPR 513*¹²⁹ and *Bulun Bulun v Flash*

¹²² The term “geographical indications” is used in this document in a broad sense to include: “indications of source” as referred to in the Paris Convention for the Protection of Industrial Property, 1883 and the Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods, 1891; “appellations of origin” as used in the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 1958; and, “geographical indications” as used in the TRIPS Agreement, 1994. See generally WIPO document WIPO/GEO/MVD/01/1 and WIPO Publication L 450 GI.

¹²³ Australia; Canada; Czech Republic; Gambia; Germany; Indonesia; Jamaica; Japan; Kyrgyzstan; Norway; Philippines; Portugal; Republic of Korea; Romania; Switzerland; United States of America.

¹²⁴ Australia.

¹²⁵ Canada.

¹²⁶ Australia's response to the WIPO Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge (WIPO/GRTKF/IC/2/5) is also taken into account here.

¹²⁷ In this case the Court used common law doctrine of confidential information to prevent the publication of a book containing culturally sensitive information.

¹²⁸ This case involved the importation into Australia of carpets manufactured in Viet Nam which reproduced (without permission) either all or parts of well-known works, based on creation stories, created by Indigenous artists. The artists successfully claimed infringement of copyright as well as unfair trade practices, for the labels attached to the carpets claimed that the carpets had been designed by Aboriginal artists and that royalties were paid to the artists on every carpet sold. In awarding damages to the plaintiffs, the judgement recognized the concepts of “cultural harm” and “aggregated damages”.

¹²⁹ This case arose out of the importation and sale in Australia of printed clothing fabric which infringed the copyright of the Aboriginal artist, Mr. John Bulun Bulun. A parallel issue was whether the community of the Ganalbingu people, to which Mr. Bulun Bulun and his co-applicant Mr. Milpurrurru belong, had equitable ownership of the copyright. The court said that, given that relief had been granted to Mr. Bulun Bulun, through a permanent injunction, there was no need to address the issue of community's ownership. The assertion by the Ganalbingu of rights in equity depended upon there being a trust impressed upon expressions of ritual knowledge, such as the art work in question. The court considered there to be no evidence of an express or implied trust created in respect of Mr. Bulun Bulun's art. Nonetheless, in a *dictum*, the court recognized that the artist, as an Indigenous person, had a fiduciary duty to his community. Therefore, there were two instances in which equitable relief in favor of a tribal community might be granted in a court's discretion, where copyright is infringed in a work embodying ritual knowledge: first, if the copyright owner fails or refuses to take appropriate action to enforce the copyright; and second, if the copyright owner cannot be identified or found.

Screenprinters (discussed in (1989) EIPR Vol 2, pp. 346-355).¹³⁰ From these cases, the response suggested, protection under the Australian Copyright Act can be as valuable to Aboriginal and Torres Strait Islander artists as it is to other artists.¹³¹ Furthermore, other intellectual property rights are available for traditional knowledge protection, namely certification marks (see below), the trademark system as a whole, and the designs system. A number of these cases are the subject of studies commissioned by WIPO, which will be published during 2002.¹³²

(ii) Australia, Canada, New Zealand and Portugal gave examples of the use of trademarks, particularly certification marks, to protect traditional knowledge and expressions of folklore. In Australia, certification marks have been registered by the National Indigenous Arts Advocacy Association (NIAAA)). In Canada, trademarks, including certification marks, are used by Aboriginal people to identify a wide range of goods and services, ranging from traditional art and artwork to food products, clothing, tourist services and enterprises run by First Nations. Many Aboriginal businesses and organizations have registered trademarks relating to traditional symbols and names. In Portugal, the Association of Carpet Producers of Arraiolos has registered a collective trademark in respect of its products. And, in New Zealand, *“Te Waka Toi - the Maori Arts Board of Creative New Zealand is making use of trade mark protection through the development of the ‘Maori Made Mark.’ It is intended to be a [trade] mark of authenticity and quality, which will indicate to consumers that the creator of goods is of Maori descent and produces work of a particular quality. It is a response to concerns raised by Maori regarding the protection of cultural and intellectual property rights, the misuse and abuse of Maori concepts, styles and imagery and the lack of commercial benefits accruing back to Maori.”* As pointed out by the New Zealand response, the proposed mark is regarded by many as an interim means of providing limited protection to Maori cultural property. The mechanism will not prevent the actual misuse of Maori concepts, styles and imagery but may decrease the market for “copycat” products, the response stated;

(iii) in Canada,¹³³ copyright protection under the Copyright Act has been widely used by Aboriginal artists, composers and writers of tradition-based creations such as wood carvings of Pacific coast artists, including masks and totem poles, the silver jewelry of Haida artists, songs and sound recordings of Aboriginal artists and Inuit sculptures. Canada also provided the following practical case study: *“One practical example of how existing intellectual property laws can safeguard expressions of folklore involves the Snuneymuxw First Nation of Canada, which in 1999 used the Trade-marks Act to protect ten petroglyph (ancient rock painting) images. Because the petroglyphs have special religious significance to the members of the First Nation, the unauthorized reproduction and commodification of the images was considered to be contrary to the cultural interests of the community, and the petroglyph images were registered in order to stop the sale of commercial items, such as T-shirts, jewelry and postcards, which bore those images. Members of the Snuneymuxw First Nation subsequently indicated that local merchants and commercial artisans had indeed*

¹³⁰ Mr. Bulun Bulun brought a copyright infringement action in relation to the unauthorized reproduction of his artistic works on t-shirts by the defendant. The government of Australia informed that this was a clear-cut case of copyright infringement and that the case was settled out of court.

¹³¹ The government of Australia has advised that further information regarding these and other cases can be located at <www.austlii.edu.au>.

¹³² These studies, entitled “Minding Culture: Case-Studies on Intellectual Property and Traditional Knowledge” were written by Ms. Terri Janke, Sydney, Australia, and will be published on WIPO’s website during the course of 2002.

¹³³ Canada’s response to the Survey on Existing Forms of Protection for Traditional Knowledge (WIPO/GRTKF/IC/2/5) is also taken into account here.

stopped using the petroglyph images, and that the use of trade-mark protection, accompanied by an education campaign to make others aware of the significance of the petroglyphs to the Snuneymuxw First Nation, had been very successful.” In contrast, Canada advised, industrial designs protection under the Industrial Design Act had not been widely used by Aboriginal persons or communities. The West Baffin Eskimo Cooperative Ltd. filed over 50 designs in the late 1960s for fabrics using traditional images of animals and Inuit people;

(iv) in Kazakhstan,¹³⁴ the external appearance of national outer clothes, head dresses, carpets, decorations of saddles, national dwellings and their structural elements, as well as women’s apparel accessories, like bracelets, national children’s cots-crib-cradles and table wares, are protected as industrial designs. The designations containing elements of Kazakh ornament are registered and protected as trademarks.

127. In addition to these examples of use of existing standards, New Zealand reported that a new Trade Marks Bill, which was being considered by Parliament, would allow the Commissioner of Trade Marks to refuse to register a trademark where its use or registration would be likely to offend a significant section of the community, including Maori.

128. Certain of these countries also referred to complementary programs such as encouraging public education and awareness relating to folklore, codes of conduct, and assistance to Indigenous peoples in accessing and understanding formal intellectual property systems.¹³⁵ For example, the United States of America referred to a guide entitled “How to Buy Genuine American Indian Arts and Crafts” published by the Federal Government.¹³⁶

Legal protection for expressions of folklore not appropriate or requested

129. A second group of States stated there is no need for the legal protection of expressions of folklore, and that their intellectual property protection would be inappropriate. Folklore is seen as a part of the national cultural heritage and the public domain.¹³⁷ “*Cultural heritage is universal property, therefore prohibition of its use is inappropriate since elements of traditional knowledge and culture are interwoven into everyday life in all places.*”¹³⁸ It was believed that legal protection of an intellectual property nature can be too rigid and possibly withdraw folklore from the public domain. Certain countries referred also to the importance of free access to information and cultural heritage.¹³⁹

130. In some cases, expressions of folklore are expressly excluded from protection (while on the other hand works derived from expressions of folklore may be protected as original works under copyright law).¹⁴⁰ Expressions of folklore are excluded because the authors are unknown; they are the “*collective cultural wealth of peoples and ethnic groups;*”¹⁴¹ they are not “original” as required in copyright law; and, the limited terms of protection in intellectual property law do not apply to them. For example, in Colombia, Law 23 of 1982 (the copyright and related rights law) expressly considers “*folklore works and traditions of unknown*

¹³⁴ Kazakhstan’s response to the Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge (WIPO/GRTKF/IC/2/5) is taken into account here.

¹³⁵ Australia; Colombia; Costa Rica; United States of America.

¹³⁶ Available at <<http://www.ftc.gov/bcp/online/pubs/products/indianart.htm>>

¹³⁷ Australia; Belgium; Canada; Colombia; Czech Republic; Italy; Netherlands; Honduras; Japan; Kyrgyzstan; Republic of Korea; Viet Nam.

¹³⁸ Russian Federation.

¹³⁹ Netherlands; Czech Republic; Kyrgyzstan.

¹⁴⁰ Colombia; Greece; Hungary.

¹⁴¹ Hungary.

authors” to be in the public domain.¹⁴² Another article of the same law states: “*Indigenous art in all its forms, including dances, songs, handicraft, designs and sculptures, shall belong to the cultural heritage.*”¹⁴³

131. In others, there appears to be no protection because, according to the responses, none had been requested.¹⁴⁴ One stated: “*There is lack of awareness and serious national clamor for folklore protection by interest groups.*”¹⁴⁵ According to another: “. . . (N)o interest group or other body in [the country concerned] has ever expressed a wish to implement [the Model Provisions] into national law.”¹⁴⁶ In a similar vein, one response stated that since there is no group of people in the country concerned practicing traditional knowledge in everyday life and the country has not faced any illicit exploitation of its traditional knowledge, no system of legal protection of traditional knowledge and folklore has been established. Folklore is considered in the country as an expression of art. In answer to another question, the same response stated that “*we have not thought of folklore as a subject matter of any property rights. We have not had any discussion among interested circles concerning this matter.*”¹⁴⁷

Legal protection for expressions of folklore awaiting enactment or still under consideration

132. Finally, while the first two groups of countries do not see the need for specific protection of expressions of folklore for their various reasons, a third group may be interested in or considering such protection but is still in the process of consultation, or has not yet been able to enact the necessary legislation and implement it. This group would include States such as Burundi, Chad, China, Gambia, Jamaica, Lithuania, Malaysia, New Zealand, Pakistan, Philippines, Venezuela and Zimbabwe. Some of these States advised they are considering *sui generis* legislation. Reasons for not yet having enacted specific protection included that: the Model Provisions, 1982 first require updating and improvement; the need to raise awareness of the need to protect expressions of folklore; lack of expertise in the area and inadequate coordination between the relevant Government Ministries and agencies; the absence of Government institutions to administer provisions such as those envisaged in the Model Provisions, 1982; the need to consult with the State’s indigenous people; and, the absence of documentation and registries of expressions of folklore.

(c) Non-intellectual property forms of protection

133. Several States provided information on laws, policies, schemes and programs in other policy areas, principally cultural heritage, which provide protection for expressions of folklore, or complement the protection provided for in intellectual property. These include Australia, Canada, Chad, Colombia, Czech Republic, Guatemala,¹⁴⁸ Honduras, Hungary, Japan, New Zealand, Norway, Panama, Republic of Korea, Romania, and Senegal (the responses of Chad and Senegal referred to draft cultural heritage laws which they stated will complement the protection already provided by copyright legislation). Information on such laws, policies, schemes and programs was also provided on the fact-finding missions.¹⁴⁹

¹⁴² Article 187.

¹⁴³ Article 189.

¹⁴⁴ See for example Belgium; Gambia; Germany; Japan; Latvia; Republic of Korea; and the United Kingdom.

¹⁴⁵ Gambia.

¹⁴⁶ Germany.

¹⁴⁷ Latvia.

¹⁴⁸ Information obtained from Guatemala’s response to the Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge.

¹⁴⁹ See, for example, the missions to the Arab States and Central America. See WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (WIPO, 2001).

These do not appear to provide legal protection of an intellectual property nature. They are more concerned with the preservation, safeguarding and promotion of folklore (this has been described as the “material protection” of folklore as opposed to “legal protection.”¹⁵⁰)

134. Reference could also be made here to marketing and labeling laws that have been referred to in responses to the Questionnaire, such as that of the United States of America. The relevant law is described above in section (a) “States which provide specific protection for expressions of folklore.”

135. It is not intended to summarize all the information provided on cultural heritage laws. However, by way of example only:

(i) in Australia, the country’s response stated, some Indigenous arts and cultural expressions may also be protected by cultural heritage law. Certain indigenous arts and cultural expressions specified by the Protection of Moveable Cultural Heritage Act, 1986 are protected. Further, the response added, *“legislation was introduced in Parliament in December 2000 to provide a new system of heritage protection for Australian places of national heritage significance. Under the new heritage laws, a place’s national heritage values may comprise a number of tangible and intangible elements. All listed values for a national heritage place will be managed and protected once these laws are passed;”*

(ii) Guatemalan law (Cultural Heritage Protection National Law (No. 26-97, as amended in 1998)) provides for protection of traditional knowledge from a national cultural heritage approach. This means that expressions of national culture (which comprise all intangible expressions of cultural heritage, including traditions, medicinal knowledge, music, performances, culinary) included in the “Culture Goods Registry” are under the protection of the State and thus cannot be disposed of by means of contractual arrangements: they cannot be sold and there is no right for remuneration, as the government of Guatemala informed. The system is managed by the Ministry of Cultural Affairs;

(iii) in its response, Hungary provided detailed information on the protection afforded to “cultural goods,” which, in terms of the relevant legislation, would include “expressions of folklore.” The response also provided information on other measures in place to protect cultural goods, such as prizes awarded by the Ministry of National Cultural Heritage for the recognition of outstanding artistic and other cultural activities, the vetting of works of applied folk arts and a lower value-added tax rate in respect of objects of folk art and applied art;

(iv) in Romania, expressions of folklore are protected as a part of national cultural heritage. Relevant institutions include the Institute of Ethnography and Folklore under the authority of the Romanian Academy, and the Centre for Preservation and Capitalization of Folklore Tradition and Creation. A Law on the Protection of Tangible Cultural National Heritage protects also tangible expressions of folklore. In addition, according to the response of Romania, *“as a form of protection, there is a fee so-called “folkloric stamp” which is collected as a percent, 5% of the price of the ticket to a folkloric show or 2% of the price of each cassette, CD, printings, etc., containing expressions of folklore. This fee is used to highlight the folkloric and ethnographic heritage of Romania.”*

¹⁵⁰ UNESCO, “Study of the International Regulation of the ‘Intellectual Property’ Aspects of Folklore Protection”, December 4, 1979, UNESCO/WIPO/WG.1/Folk/3, p. 1.

(d) The Model Provisions, 1982

136. Of the 23 States that provide specific protection for expressions of folklore, 15 (or 65%) have used, to some or other degree, the Model Provisions in establishing their legislation.

137. Some States argued that the Model Provisions had not been used because they were not appropriate. For example, New Zealand stated in its response: “*New Zealand would not implement the Model Provisions on the basis that they are outdated and not applicable to New Zealand's domestic situation.*” Hungary stated: “*The Model Provisions have not been implemented in Hungary, because the protection, preservation and the administration, as part of the public domain, of the expressions of folklore can be solved not under copyright law but by applying the rules of cultural administration.*”

138. States provided many useful comments and suggestions on the Model Provisions and on their updating and improvement. See the detailed summary of responses to Question III.1 in Annex I. The updating and improvement of the Model Provisions has also been referred to in previous WIPO activities and at previous sessions of the Intergovernmental Committee.¹⁵¹ In general, the comments and suggestions for modification relate to almost all aspects of the Model Provisions, particularly: the use of the term “expressions of folklore” and the scope of the term as used in the Model Provisions (many States wished for the term to encompass also technical and scientific knowledge systems, such as traditional medicine); the limitation of the Model Provisions to the “artistic heritage” of a community (a few countries wished for the Provisions to apply to the “cultural heritage” of a nation); the relationship between the type of *sui generis* system envisaged by the Model Provisions and conventional intellectual property systems; and, the need for the Model Provisions to be updated to take into account technological developments and new forms of commercial exploitation that have arisen since the early 1980's.

139. Certain additional observations are:

(i) Question II.12 enquired of those countries which provide specific protection whether or not they have incorporated in their national laws or other measures acknowledgement of source provisions (such as in section 5 of the Model Provisions). It is interesting to note that only six of the 13 countries which responded to the Question have done so. Yet, as is often pointed out in relation to objectives for the protection of expressions of folklore, one of the more important objectives appears to be having the source of an expression of folklore acknowledged;

¹⁵¹ See Statements of States at the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO/GRTKF/IC/1/13, WIPO/GRTKF/IC/2/16), and Responses to Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore (for example, Burundi; Chad; Côte d'Ivoire; Colombia; Ecuador; Iran (Islamic Republic of); Jamaica; Kyrgyzstan; Malaysia; Mexico; Namibia; New Zealand; Pakistan; Panama; Philippines; Poland; Romania; Sri Lanka; Togo; Tunisia; Venezuela; Viet Nam and, the African Group). See also WIPO-UNESCO Regional Consultation on the Protection of Expressions of Folklore for countries of Asia and the Pacific, Hanoi, April 21 to 23, 1999 (WIPO-UNESCO/FOLK/ASIA/99/1); WIPO-UNESCO African Regional Consultation on the Protection of Expressions of Folklore, Pretoria, March 23 to 25, 1999 (WIPO-UNESCO/FOLK/AFR/99/1); See WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (WIPO, 2001). pp.77 and 93.

(ii) a further aspect of the Model Provisions that some States commented on is the principle referred to in section 3, namely that utilizations of expressions of folklore require authorization when they are “*made both with gainful intent and outside their traditional or customary context.*”¹⁵² According to the Commentary to the Model Provisions, this means that a utilization—even with gainful intent—within the traditional or customary context should not be subject to authorization. On the other hand, a utilization, even by members of the community where the expression has been developed and maintained, requires authorization if it is made outside such a context and with gainful intent. As pointed out by some, the distinction between “traditional context” and “customary context” is perhaps not clear. According to the Commentary to the Model Provisions, an expression of folklore is used in its “traditional context” if it remains in its proper artistic framework based on continuous usage of the community. For instance, to use a ritual dance in its “traditional context” means to perform it in the actual framework of the respective rite. On the other hand, the term “customary context” refers rather to the utilization of expressions of folklore in accordance with the practices of everyday life of the community, such as selling copies of tangible expressions of folklore by local craftsmen. A customary context may develop and change more rapidly than a traditional one, according to the Commentary;

(iii) the exception provided for in section 4(1)(iii) in the Model Provisions is another aspect that may require further consideration. As pointed out elsewhere in this document, this exception allows for the creation of works based upon expressions of folklore, in short, derivative works. This, as pointed out, was specifically crafted to allow free development of individual creativity inspired by cultural expressions. The Model Provisions, 1982 were not intended to hinder in any way the creation of original works based on cultural expressions. In addition, Section 13 of the Model Provisions, 1982 provides as follows: “*The protection granted under this [law] shall in no way be interpreted in a manner which could hinder the normal use and development of expressions of folklore.*” On the other hand, it is precisely the “borrowing from” expressions of folklore that is often complained of.

(e) Extra-territorial protection

140. The Questionnaire contained four questions specifically addressing the international protection of expressions of folklore. These were questions II. 25 (which requested information on actual cases in which folklore has been exploited or otherwise utilized in a foreign country); II. 26 (which asked whether it was believed that an international agreement for the protection of expressions of folklore is necessary); II. 27 (which asked whether the Model Provisions, 1982 might serve as an adequate starting point for the development of such an international agreement); II. 28 (which called for practical proposals regarding the two main problems that prevented the development of an international treaty in 1984 ((i) the lack of appropriate sources for the identification of the expressions of folklore to be protected and (ii) 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); and, II. 29 (which requested any further comments or practical experiences regarding the protection of expressions of folklore of foreign countries). The responses to these questions are detailed in Annex I to this document.

141. In summary:

(i) several countries provided practical examples of cases in which expressions of folklore originating in their countries have been exploited or utilized in a foreign country.

¹⁵² Australia; Panama; Sierra Leone.

See, for example, the responses of Barbados; Burkina Faso; Burundi; Chad; Costa Rica; Ghana; Guinea; Iran (Islamic Republic of); Namibia; Panama; Russian Federation; Senegal; and, the United Republic of Tanzania;

(ii) 39 responses (or 61%) answered “Yes” to the question whether or not an international agreement for the protection of expressions of folklore is necessary. There were 13 countries that did not respond “Yes” or “No” but appear to be open to the possibility of an international agreement, subject to clarity on certain legal and conceptual question such as definition of subject matter, ownership, allocation and exercise of rights, “regional folklore” and the like. And, it can be noted that only four of the 64 responses (6%) to the Questionnaire answered clearly “No” to this question. Taking these statistics together, it may be said that the majority of States are either expressly in favor of an international agreement, or are at least open to considering the matter further. This conclusion bears out the many previous calls for the effective international protection of expressions of folklore in previous WIPO and other activities as described in this document. It has been observed that it is mostly appropriation (or “borrowing”) of cultural expressions *between* traditions and cultures, rather than within them, that causes the most offence;¹⁵³

(iii) many countries did not reply to the question whether or not the Model Provisions could serve as an adequate starting point for the development of an international agreement. However, of the 41 countries which did reply, 38 answered “Yes;”

(iv) in respect of practical proposals for dealing with the two issues that prevented the adoption of an international treaty in 1984, States made several proposals detailed in Annex I. For example, States proposed the setting up of national and/or international folklore databases, the use of alternative dispute resolution, systems of registration and notification, collective management and the establishment of dispute-resolution organizations.¹⁵⁴

(f) Proposals for modifications to existing intellectual property standards and for *sui generis* standards

142. In responses to the Questionnaire, during the first and second sessions of the Intergovernmental Committee and in other WIPO activities, it has frequently been suggested that existing intellectual property standards be modified. For example, it has been stated that once the usefulness of existing intellectual property standards has been investigated, consideration could be given to modifications to close any “gaps” or limitations found in existing standards.¹⁵⁵

143. It appears that there are the following concrete suggestions:

(i) specific suggestions have been made in relation to the protection of handicrafts and other tangible expressions of folklore.¹⁵⁶ It has been proposed that the Intergovernmental

¹⁵³ See, for example, Sandler, Felicia, “Music of the Village in the Global Marketplace – Self-Expression, Inspiration, Appropriation, or Exploitation?”, Ph.D. Dissertation, University of Michigan, 2001, p. 6.

¹⁵⁴ See for example the responses of Canada; Colombia; Egypt; Gambia; Indonesia; Jamaica; Kyrgyzstan; Malaysia; Mexico; Romania; Russian Federation

¹⁵⁵ See WIPO/GRTKF/IC/1/5, WIPO/GRTKF/IC/1/13, paras. 20, 21, 28, 40, 50, 71; responses of Australia and Canada; Chang Rai, Thailand Meeting Action Plan and Meeting Statement. See <<http://www.wipo.int/eng/meetings/2000/tk/index.htm>>.

¹⁵⁶ At the Thirty-Fourth Series of Meetings of the Assemblies of the Member States of WIPO, held from September 20 to 29, 1999, one Group of WIPO Member States expressed the view “*that the need for a suitable mechanism and agreed norms for the protection of handicraft was shared by the developing countries*” (A/34/16, paragraph 29). This need was further elaborated by another Group of WIPO Member States at the Twenty-Sixth

Committee could consider the extent to which they could receive greater protection against unauthorized copying, use and commercial exploitation, and specific reference has been made to protecting the style, production methods and other specific characteristics of works of art and textile and three-dimensional craft. In this respect, the possibilities offered by copyright, industrial designs, trademarks, trade names and geographical indications have been mentioned. Second, the Committee could study and recommend ways of streamlining the industrial design protection systems embodied in national and regional laws, inclining them towards procedures involving a deposit or registration without any novelty examination or anticipation search. In this regard, a relevant provision in that connection is Article 25.2 of the TRIPS Agreement, concerning the simplification of procedures for textile designs. It has been proposed that the same kind of solution could be promoted for any kind of design originating in indigenous communities;¹⁵⁷

(ii) during previous WIPO activities, Member States and representatives of traditional knowledge holders have indicated that many traditional societies have developed highly sophisticated and effective customary intellectual property systems. Some examples of these in relation to traditional designs, songs, dances and art are contained in the WIPO Report on the fact-finding missions conducted in 1998 and 1999.¹⁵⁸ To a large extent these systems have, until now, remained invisible from the point of view of the formal intellectual property system. However, customary legal systems, including those pertaining to traditional knowledge, are referred to in many traditional knowledge-related declarations¹⁵⁹ and international instruments.¹⁶⁰ Certain *sui generis* systems, such as that of the Philippines, refer to customary law. Hence, Member States have identified a need to further study the relationship between customary protection of traditional knowledge and the intellectual property system. Some have presented the recognition of informal regimes and customary law as “a third approach” to addressing the intellectual property needs of TK holders: “*What is now advocated by Indigenous communities is protection of traditional cultural expression by the application of customary intellectual property law on its own terms, as of right.*”¹⁶¹ It has been suggested that, for example, traditional forms of ownership be recognized and used within the context of the formal intellectual property system to determine who is the “author” or a cultural expression, or at least who is an owner and entitled to exercise control over it. This perhaps ties in with a suggestion made in a response to the Questionnaire that consideration be given to “*appropriate modifications of existing regimes to be more culturally sensitive.*”¹⁶²

Session of the WIPO General Assembly, held in Geneva from September 26 to October 3, 2000 in the form of specific proposals for the work of the Intergovernmental Committee (WO/GA/26/9, Annex II).

¹⁵⁷ WIPO/GRTKF/IC/1/5.

¹⁵⁸ WIPO, FFM Report. See WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (WIPO, 2001).

¹⁵⁹ See, for example, the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (1992) and the Julayinbul Statement on Indigenous Intellectual Property Rights (1993).

¹⁶⁰ See, Article 8, ILO Convention 169; Articles 12 and 33, Draft United Nations Declaration on the Rights of Indigenous Peoples (1994); and Principle 4, ‘Principles and Guidelines for the Protection of the Heritage of Indigenous People,’ United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities.

¹⁶¹ Australian Copyright Council (ACC). *Protecting Indigenous Intellectual Property. A Discussion Paper*. Redfern: ACC (September 1998), p. 11.

¹⁶² Response of Australia to the Questionnaire.

(iii) a further issue concerns the collectivity of creation, ownership and custodianship which prevails in certain communities and traditional knowledge systems.¹⁶³ It is felt that cultural expressions are communally developed, transmitted, and shared, and that the current intellectual property system does not fully address the need of traditional communities for collective or community rights. While collectivity of creation and ownership may not be characteristic of traditional knowledge systems in all cases,¹⁶⁴ Member States have still identified the need to develop legal solutions which address the needs of the communities for a recognition of their collective rights to their collective knowledge. A concrete suggestion in this regard, which is in relation to handicrafts, is one made by the International Trade Centre and UNESCO - a proposed “Structural Framework for the Protection of Crafts”¹⁶⁵ has been developed that proposes a tripartite structure, in which existing guild chambers of crafts people and a “National Society for Original Crafts Items” (NSOCI) would answer to a “National Crafts Directorate.” Within this institutional arrangement, the NSOCI would be located under the national intellectual property office and would have the task of administering and enforcing intellectual property rights of craftspeople.¹⁶⁶ Such a role could be undertaken by the same institutions which act as the “competent authority” in respect of granting authorizations for the utilization of expressions of folklore, as proposed in the Model Provisions, 1982.

144. In addition to the above specific proposals for modifications to existing intellectual property standards, several States in their responses to the Questionnaire,¹⁶⁷ at sessions of the Intergovernmental Committee¹⁶⁸ and elsewhere¹⁶⁹ have called for the development of new *sui generis* rights to protect expressions of culture (and traditional knowledge more generally). Most recently and in particular, at the second session of the Intergovernmental Committee, the Secretariat of WIPO was requested to prepare a document on “*elements of sui generis protection for traditional knowledge*.”¹⁷⁰

(g) Documentation

145. The need to identify, document, classify, and register expressions of folklore (and the concomitant establishment of inventories, databases and archives) has been identified many times, both in responses to the Questionnaire and in previous WIPO activities, such as the

¹⁶³ See, for example, Colombia, Ecuador, Gambia, Namibia, New Zealand, Panama, Philippines, Portugal, Russian Federation, Viet Nam.

¹⁶⁴ See Mould-Iddrussu, “The Experience of Africa”, WIPO-UNESCO World Forum on the Protection of Folklore”, April 8 to 10, 1997, p. 18 (WIPO Publication No. 758 E/F/S)

¹⁶⁵ See, Part III, International Trade Center (ITC) and UNESCO. *Overview of Legal and Other Measures to Protect Original Craft Items*. ITC/UNESCO, 1996 (document no. CLT-96/WS/5).

¹⁶⁶ See, *ibid.*, 10-11.

¹⁶⁷ Argentina, Burundi, Colombia, Costa Rica, Ethiopia, Gambia, Iran (Islamic Republic of), Romania, Tanzania, Togo.

¹⁶⁸ WIPO/GRTKF/IC/1/13, paras. 22, 33, 37, 38, 50, 56, 63, 65, 70, 74, 75, 85, 159, 161;

WIPO/GRTKF/IC/2/16, paras. 17, 166, 171, 172, 178, 188, 189, 190, 191.

¹⁶⁹ See documents WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ASIA/99/1; WIPO-UNESCO/FOLK/ARAB/99/1; and, WIPO-UNESCO/FOLK/LAC/99/1; See WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (WIPO, 2001), pp. 54, 72, 76, 97, 155, 198, 217, 223, 232; Chiang Rai, Thailand Meeting Action Plan and Meeting Statement. See <<http://www.wipo.int/eng/meetings/2000/tk/index.htm>>.

¹⁷⁰ WIPO/GRTKF/IC/2/16, par. 194.

fact-finding missions conducted by WIPO in 1998 and 1999,¹⁷¹ as well as the Regional Consultations on Folklore organized by WIPO and UNESCO in 1999.¹⁷²

146. Responses to the Questionnaire (for example, the responses of Antigua and Barbuda, Barbados, Burkina Faso, Gambia, Ghana, Honduras, the Islamic Republic of Iran, Namibia, Panama, Senegal and the United States of America), the results of other WIPO activities and the WIPO Report on the fact-finding missions are replete with examples of what will broadly be referred to as “documentation initiatives.” A few examples from different regions are cited here:

(i) the Canadian Museum of Civilization is a federal Crown corporation which serves as the national museum of human history of Canada. The Museum’s Cultural Studies program collects tangible folkloric art as well as tapes of songs, languages, oral histories and personal narratives. To reflect the wishes of members of some Aboriginal groups regarding authorization of access to their expressions of folklore, the Museum’s Ethnology section restricts access to some collections of sacred Aboriginal materials to members of culturally affiliated groups, and does not make them available to members of the general public;

(ii) the Oman Center of Traditional Music, Muscat, Oman was created in 1983 to document, conserve and promote traditional Omani music. Since then the Center has documented more than 80% of Oman's musical traditions, including more than 23 000 photographs, 580 audiovisual recordings and a large number of sound recordings. The Center has also compiled digitized databases of these documentation materials. The Center has developed a two-step approach to documentation: first, the Center maps which traditions are still alive by speaking to traditional musicians and, second, the traditional music and dances are recorded in sound recordings, audiovisual recordings, photographs or a combination thereof. The Center takes a comprehensive approach to the documentation of musical traditions, which includes not only a recording of a particular musical work, but also of associated dances, social customs and gatherings, healing methods, planting and farming methods, fishing methods, handicrafts, etc. This comprehensive approach to documentation is necessary because “in Oman traditional music is part of traditional lifestyles,” which include healing, fishing, planting and other work techniques.¹⁷³ In its documentation work, the Center has identified more than 130 different types of traditional music in Oman, which can be classified, however, as expressions of four main traditions of Omani song: sea and fishing songs, celebration songs, Bedouin traditional music and traditional mountain music;

(iii) in China, national folk literature and arts are being recorded in the Ten Collections of the Chinese National Folk Literature and Arts (referred to as the “Great Wall of Civilization”). These Ten Collections comprise some 300 volumes of collections of Chinese songs, proverbs, operas, instrumental music, ballads, dances, and tales;¹⁷⁴

¹⁷¹ See WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (WIPO, 2001).

¹⁷² The regional consultations were held for African countries in Pretoria, South Africa (March 1999); for countries of Asia and the Pacific region in Hanoi, Viet Nam (April 1999); for Arab countries in Tunis, Tunisia (May 1999); and for Latin America and the Caribbean in Quito, Ecuador (June 1999). The four regional consultations were attended by 63 Governments of WIPO’s Member States, 11 intergovernmental organizations, and five non-governmental organizations. See documents WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ASIA/99/1; WIPO-UNESCO/FOLK/ARAB/99/1; and, WIPO-UNESCO/FOLK/LAC/99/1.

¹⁷³ Meeting with officials of the Oman Center of Traditional Music, Muscat, February 27, 1999.

See WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (WIPO, 2001).

¹⁷⁴ International Symposium on the Protection and Legislation of Folk/Traditional Culture (Beijing, December 18-20, 2001).

(iv) the Archive of Folk Culture at the American Folklife Center, Library of Congress, United States of America was established in 1928 and today maintains a multi-format, ethnographic collection that includes over two million photographs, manuscripts, audio recordings and moving images. The other major government repository for ethnographic material is the Center for Folklife and Cultural Heritage at the Smithsonian Institution. Established in 1967, its archive holds over 1.5 million photographs, manuscripts, audio recordings and moving images;¹⁷⁵

(v) in Ghana, the International Center for African Music and Dance (ICAMD), based at the University of Ghana in Legon aims at the promotion of international scholarship and creativity in African music and dance. One of its main priorities is to serve as an archival, documentation and study center for African music and dance. The center's primary goal in this respect is to develop a unique library of oral texts (interviews, song texts, stories etc.), unpublished manuscripts and documentation of musical events (such as festivals, rituals and ceremonies), and the acquisition of manuscripts, books and audio-visual materials on African music, dance, drama as well as general works in the field of ethnomusicology and music education. The documented works include anthropological and historical materials on African societies and cultures, dictionaries and encyclopaedias of music, language dictionaries and a substantial collection of audio and video recordings of African music, dance and oral literature;¹⁷⁶

(vi) in Guatemala, efforts have been made to record and document certain expressions of traditional culture and folklore. A Registry of Archaeological, Historical and Artistic Property has been in operation since 1954, and its importance has grown in recent times. Its purpose is to record and thus maintain information on the historical origin, meaning and features of cultural expressions. The Registry records not only artifacts, monuments and other tangible objects of the national cultural heritage (including all pre-Hispanic, Mayan objects), but also intangible expressions of national culture such as traditional *fiestas*, oral traditions and legends. In Guatemala, the latter were being compiled and documented in particular by the *Centro de Estudios Folclóricos* of the *Universidad de San Carlos*;¹⁷⁷

(vii) the Centre of Arab and Mediterranean music "Ennejma Ezzahra", Sidi Bou Said, Tunisia was established in 1991 with the objectives of: documentation and conservation of expressions of traditional Arabic and Mediterranean music; establishment of a database comprising an extensive and almost exhaustive set of recordings of traditional Tunisian music; publication and making available of such music to the public; publication of studies and research on traditional Tunisian, Arabic and Mediterranean music; and, organization of concerts. The Centre has compiled an impressive collection of documents through a systematic approach for such purpose. These documents are classified and made available to

¹⁷⁵ Response of the United States of America. See also Bulger, P., "Preserving American Folk Culture at the Library of Congress", paper delivered at International Symposium on the Protection and Legislation of Folk/Traditional Culture (Beijing, December 18-20, 2001).

¹⁷⁶ ICAMD Newsletter, September, 1998 and at meeting with Professor J.H. Kwabena Nketia, Director, ICAMD, January 25, 1999. See WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (WIPO, 2001). On documentation of expressions of folklore in Africa, see also Mould-Idrussu, B., "The Experience of Africa", WIPO-UNESCO World Forum, Phuket, 1997, p. 17 ff.

¹⁷⁷ Meeting with representatives of the Ministry of Culture, Guatemala, January 18, 1999. See WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (WIPO, 2001).

the public. It includes at its premises a Research Center, which offers research facilities for students and scholars in the field of musicology.¹⁷⁸

147. There are also several documentation initiatives at the international level. For example, UNESCO has produced, jointly with the African Cultural Institute, a guidebook entitled *Crafts: methodological guide to the collection of data*.¹⁷⁹ Using this guidebook, and following its wide distribution to UNESCO Member States in English, French, Spanish and Arabic, computerized databases will gradually be established by UNESCO, which will be accessible through international networks. This network for the worldwide collection and dissemination of data on craft forms and techniques will have its focal point in the International Centre for the Promotion of Crafts, which was established in September 1996 in Fez, Morocco. The UNESCO Programme for the Preservation and Revitalization of Intangible Cultural Heritage has launched a publication series to help specialists catalogue and compile inventories of cultural forms, since they are constantly changing and may disappear forever on the death of their creators. The first volume in this series is a *Handbook for the Study of Traditional Music and Musical Instruments*.¹⁸⁰ A handbook for the study of vernacular architectural styles is in preparation.

148. On the fact-finding missions and in other activities, a note of caution was sounded. It was pointed out by several persons consulted on the fact-finding missions that the documentation of expressions of culture would not necessarily benefit their “protection.” The documentation of cultural expressions would simply make them more readily available and accessible, and, therefore, contribute to their unauthorized exploitation and dissemination. Another concern raised is that documentation “freezes” traditional creativity and creates what have been referred to as “mausoleums of knowledge.”¹⁸¹ In regard to both these concerns, the importance of obtaining the prior approval and full involvement of the bearers and custodians of the cultural expressions for documentation initiatives was stressed.¹⁸²

C. Conclusions and Suggested Tasks

(a) Establishment, strengthening and effective implementation of national systems of protection

149. While a number of countries provide specific legal protection for expressions of folklore (23, or 36%, of the 64 that responded to the Questionnaire), it appears that there are few countries in which it may be said that such provisions are actively utilized and functioning effectively in practice. There appears to be little practical experience with the implementation of existing systems and measures which countries have established in law.

¹⁷⁸ See also intervention of Tunisia at First Session of the Intergovernmental Committee (WIPO/GRTKF/IC/1/13, par. 36) and WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (WIPO, 2001).

¹⁷⁹ UNESCO/ICA, *Crafts: methodological guide to the collection of data* (by Jocelyn Etienne-Nugue) Paris: UNESCO/ICA, 1990.

¹⁸⁰ Dournon, Geneviève. *Handbook for the Study of Traditional Music and Musical Instruments*. Paris: UNESCO, 1999.

¹⁸¹ Agrawal, A., “Indigenous and scientific knowledge: some critical comments”, <http://www.nuffic.nl/ciran/ikdm/3-3/articles/agrawal.html> (February 27, 2002).

¹⁸² See for example fact-finding mission to West Africa in WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (WIPO, 2001), p. 151.

150. It is unfortunately not possible to identify any single reason for this. States have cited a variety of legal, conceptual, infrastructural and other operational difficulties they experience in establishing and implementing workable and effective legislative provisions at the national level. The needs in this regard are diverse, and there are no single solutions or approaches.

151. These conclusions strongly suggest, first, the need for the strengthening and more effective implementation, at the national level, of existing systems and measures for the protection of expressions of folklore, taking into account the diverse legal, conceptual, infrastructural and other operational needs of countries. Comprehensive and integrated legal-technical assistance would be needed, utilizing, where appropriate, the full breadth of the intellectual property system and other existing and available measures, and taking into account States' respective international intellectual property obligations. The success of such assistance would depend upon the full and committed involvement of national governments. The need for inter-ministerial approaches is made clear by the diversity of Ministries, departments, agencies and offices with jurisdiction over the protection of expressions of folklore (see the responses to Question I.1 of the Questionnaire). The affected peoples and communities, and other stakeholders, such as the local legal profession, should also be consulted and involved where appropriate.

152. The need for strengthened and functioning protection at the national level does not derogate from the strong need expressed by States for the extra-territorial (or, international) protection of expressions of folklore and this is addressed further below. Effective international protection may provide the resources that States could use to put in place functioning national systems. On the other hand, effective and functioning national systems among a greater number of countries may facilitate the extra-territorial protection of expressions of folklore based on principles such as national treatment or reciprocity.

153. It is proposed, therefore, that upon request, and on a project basis, the WIPO Secretariat make itself available to provide enhanced intellectual property legal-technical assistance to States, their peoples and communities and, where relevant, regional organizations, in regard to the strengthening and more effective implementation, at the national level, of existing systems and measures for the protection of expressions of folklore. Such advice and assistance could, by way of example only, draw from some or all of the following:

(i) from the concrete examples provided by some States, it can be seen that existing intellectual property rights can play a role in the protection of expressions of folklore, and strengthened national systems of protection should also include greater understanding of and use of existing intellectual property rights. In this regard, particular attention could be paid to copyright (including moral rights and the *domaine public payant* system) and related rights, trademarks, designs, geographical indications, unfair competition (particularly passing off and trade secrets protection) and other common law remedies. It follows that the protection of expressions of folklore should not be considered only within the frame of copyright law.

Perhaps a striking feature of the information provided by the responses to the Questionnaire is the certain flexibility inherent in the intellectual property system. For example, several States which protect expressions of folklore within their copyright legislation provide for an indefinite term of protection. This does not appear to cause any conceptual or legal difficulty (as noted, however, there are few practical experiences with such provision so their application in practice is difficult to evaluate). Further, while the fixation requirement in many national copyright laws is often cited as an impediment to the protection of expressions of folklore, there is no such requirement in international law, and

several countries, particularly the civil law countries of Europe, protect original works as copyright whether or not fixed in material form – such as France, Spain and Germany. The originality requirement “problem” may also not be as formidable as first meets the eye in all cases, as the level of creativity required in many national systems is not that high. And, of course, the Model Provisions, 1982, adopted by Member States of WIPO and UNESCO two decades ago, establish a *sui generis* intellectual property system which does not require originality *per se*, provides for an indefinite term of protection and accommodates the rights and interests of communities. The Tunis Model Law on Copyright, adopted in 1976, protects folklore and works derived therefrom as original works, for an indefinite period, whether or not the expression of folklore is fixed in a material form;¹⁸³

(ii) a further lesson from the responses to the Questionnaire is the need for awareness-raising programs and specialized training for indigenous peoples and local communities in accessing, understanding and using formal intellectual property systems and other legal tools available to them. This set of need was identified as “operational issues” during the fact-finding missions conducted by WIPO in 1998 and 1999. Persons consulted on the fact-finding missions suggested a variety of measures in this respect, such as wider dissemination of intellectual property information to indigenous and local communities, public information activities aimed specifically at indigenous peoples and local communities, and other activities carried out by national intellectual property offices and other agencies designed to explain intellectual property rules and systems clearly, and to facilitate access to the national intellectual property offices and the intellectual property system. In certain countries, applications for certain national trademark offices offer reduced application fees to individuals and small and medium-sized enterprises. If such schemes do not already apply to members of indigenous and local communities, the possibility of extending them to such persons and communities could be explored by national offices. For example, in the United States of America, the Indian Arts and Crafts Board is not charged a fee to register Government trademarks of genuineness and quality for Indian arts and crafts products or for arts and crafts products of federally recognized Indian tribes and their members;¹⁸⁴

(iii) the workable and effective implementation of national systems depends also upon the establishment and strengthening of the institutional structures necessary to implement legislative provisions and other measures, and WIPO’s activities could include assistance and advice in this respect. In relation to this, the possible relevance of current collective management systems in the copyright area to the management of interests in expressions of folklore has also been suggested and requires further practical testing as part of such legal-technical assistance programs. States have also suggested national consultations among producers of handicrafts and other expression of folklore, and the establishment of national focal points;¹⁸⁵

(iv) non-intellectual property measures (such as cultural heritage, marketing and labeling laws) also have an important role to play in complementing and buttressing intellectual property measures. In fact, it would appear that in some cases non-intellectual property measures meet, or could meet, many of the objectives often expressed in relation to expressions of folklore. The type of protection provided by intellectual property is, however, distinct (in essence, intellectual property provides for private property rights) and an

¹⁸³ See discussion in Kuruk, P., “Protecting Folklore Under Modern Intellectual Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States”, 48 American University Law Review 769 (1999), pp. 814-815.

¹⁸⁴ USPTO, Official Insignia of Native American Tribes: Statutorily Required Study, p. 31. The study is available at <<http://www.uspto.gov/web/menu/current.html>> (30Nov99 entry).

¹⁸⁵ Position Paper of the Asian Group and China (WIPO/GRTKF/IC/2/10), p.4.

important exercise in strengthening national systems of protection would be to determine in what circumstances non-intellectual property measures, on the one hand, and intellectual property measures, on the other, are appropriate and relevant in meeting needs and objectives;

(v) regarding the many calls for the identification, documentation, classification and registration of expressions of folklore, it seems that while many institutions, communities and others have developed or wish to develop compilations and databases, intellectual property options or strategies to protect the expressions of folklore themselves or compilations thereof have not been elaborated. Intellectual property needs may also be identified in relation to the establishment of registers and databases of cultural expressions, and procedures for their registration, in order to identify, promote and protect them. For example, such registers, databases and procedures are provided for in the laws of Panama and the Philippines. In the response of Costa Rica, detailed proposals are set out for how such registers could be established and managed. (Certain other countries also provide for registries, such as Cuba.¹⁸⁶). Where requested, the legal-technical assistance program referred to could provide intellectual property and advice and assistance on such questions.

154. Subject to budgetary considerations, such legal-technical assistance could already be initiated in a limited number of countries (2 or 3) in the 2002-03 biennium, and be continued in the 2004-2005 biennium and beyond. Brief reports on requests for such assistance received by WIPO and progress made would be prepared by the WIPO Secretariat for the intervening sessions of the Intergovernmental Committee.

155. A useful output of such a program could be the publication by WIPO in due course of a practical manual, written in a “How To” format, containing case-studies, guidelines and “best practices” for national lawmakers, peoples and communities, on the legal protection of expressions of folklore at the national level. It is envisaged that such a publication would draw upon *inter alia* the experiences gained learned from the legal-technical assistance program referred to above; responses to the Questionnaire; the results of the fact-finding missions conducted by WIPO in 1998 and 1999; the case-studies commissioned by WIPO on the use of intellectual property rights to protect cultural expressions of folklore;¹⁸⁷ and, other such materials and studies. The manual would be a valuable resource for national lawmakers, peoples and communities, particularly those in countries that were not covered by the country-specific legal-technical assistance program referred to.

156. *Possible Task 1: Enhanced legal-technical assistance for the establishment, strengthening and effective implementation of existing systems and measures for the legal protection of expressions of folklore at the national level.* It is proposed that the WIPO Secretariat provide, upon request, enhanced intellectual property legal-technical assistance to States, their peoples and communities and, where relevant, regional organizations, in regard to the establishment, strengthening and more effective implementation, at the national level, of

¹⁸⁶ The Cuban Copyright Law, Law No. 14, in effect since 1977, provides specific protection for folklore including handicrafts. By Resolution No. 2, of 1993, the National Copyright Centre (CENDA) makes provision for the registration and optional legal deposit of protected works. A document received upon registering a work may be used as proof in dealing with third parties in the event of violation of copyright. See Dolores Isabel Aguero Boza, “Artisanal Works and Copyright”, paper presented at WIPO/ITC Workshop on Legal Protection of Original Craft Items, Havana, January 30 to February 1, 2001, WIPO-ITC/DA/HAV/01/6.

¹⁸⁷ These studies, entitled “Minding Culture: Case-Studies on Intellectual Property and Traditional Knowledge” were written by Ms. Terri Janke, Sydney, Australia, and will be published on WIPO’s website during the course of 2002.

existing systems and measures for the legal protection of expressions of folklore, as described in paragraphs 151 to 155 above.

157. The second main need in respect of the national protection of expressions of folklore is to update and improve upon the Model Provisions, 1982.

158. Although a few States believed the Model Provisions, 1982, are inappropriate, most States found the Model Provisions useful, at least as one possible starting point in developing national provisions. 65% of States have already used them, in one form or another.

159. Many States have suggested, however, amendments to the Model Provisions, as well as the need to update them given technological advances and new forms of commercial exploitation since the early 1980's. The updating and improvement of the Model Provisions have also been referred to in previous WIPO activities and at previous sessions of the Intergovernmental Committee.¹⁸⁸ As noted earlier in this document, several States believe that existing rights and approaches cannot accommodate all the needs and expectations of indigenous peoples and local communities. In this regard, the protection afforded by existing systems, particularly copyright, is most often limited to works based upon or derived from traditional materials (in short, derivative works) where there is an identifiable author and the term of intellectual property protection has not expired. The cultural expressions "base" – the truly anonymous, communally held and orally transmitted pre-existing material – is not as well served by existing rights and approaches. References have also been made to particular needs in respect of certain expressions of folklore such as handicrafts.

160. The updating of the Model Provisions could take into account these various views, as well as the experiences with and opportunities presented by specific models and other measures, such as those developed by Panama, the Philippines, the United States of America and others.¹⁸⁹ Account could also be taken of the results in due course of the proposed customary law study (see Possible Task 4 below).

161. It seems appropriate, therefore, to update the Model Provisions, and consider other proposed suggestions for their modification. This work would parallel and could eventually feed into the legal-technical assistance program referred to in Possible Task 1.

162. *Possible Task 2: Updating the Model Provisions, 1982.* The Intergovernmental Committee may wish to update the Model Provisions, 1982, taking into account technological advances and new forms of commercial exploitation since they were adopted in 1982, as well as other modifications proposed by States and other stakeholders in previous WIPO activities, previous sessions of the Intergovernmental Committee and responses to the Questionnaire.

¹⁸⁸ See Statements of States at the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO/GRTKF/IC/1/13, WIPO/GRTKF/IC/2/16), and Responses to Questionnaire (for example, Burundi; Chad; Côte d'Ivoire; Colombia; Ecuador; Iran (Islamic Republic of); Jamaica; Kyrgyzstan; Malaysia; Mexico; Namibia; New Zealand; Pakistan; Panama; Philippines; Poland; Romania; Sri Lanka; Togo; Tunisia; Venezuela; Viet Nam and, the African Group). See also WIPO-UNESCO Regional Consultation on the Protection of Expressions of Folklore for countries of Asia and the Pacific, Hanoi, April 21 to 23, 1999 (WIPO-UNESCO/FOLK/ASIA/99/1); WIPO-UNESCO African Regional Consultation on the Protection of Expressions of Folklore, Pretoria, March 23 to 25, 1999 (WIPO-UNESCO/FOLK/AFR/99/1); See for example fact-finding mission to West Africa in WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (WIPO, 2001), p. 151.

¹⁸⁹ As mentioned, New Zealand is considering certain measures. In addition, as described elsewhere in this document, certain regional organizations have developed or are developing *sui generis* laws, such as the Organization of African Unity and the Secretariat of the Pacific Community.

(b) Extra-territorial protection

163. While Possible Tasks 1 and 2 refer to strengthening *national* systems of protection, many States and other stakeholders have expressed the need for an international agreement for the protection of expressions of folklore. However, while many States expressed this general need, a certain number of countries appear not ready to embark upon the development of such an agreement. Indeed, several legal and conceptual questions remain (such as those described briefly in Part A. of this Section III), and the diversity of approaches at the national level, coupled with the fact that there appear to be few examples of functioning and effective national systems of protection, further complicates attempts to reach broad international agreement.

164. Nevertheless, given the large number of States expressing the need for extra-territorial protection, it appears appropriate to begin examining existing and future possibilities in this regard.

165. As a start only, certain existing mechanisms could be examined further, such as:

(i) Article 15.4 of the Berne Convention for the Protection of Literary and Artistic Works, 1971 (the Berne Convention) allows a designated authority of a Berne Member State to protect and enforce rights in unpublished and anonymous works, the authors of which are presumed to be nationals of the State concerned, in all other Berne Member States. As noted earlier in this document, this Article was specifically introduced with the international protection of expressions of folklore in mind. In other words, to turn this into a practical example: India, which is the only country to have formally made the designation referred to in the Article, can designate an authority to protect and enforce rights in expressions of folklore of which the authors are presumed to be Indian nationals, in any other Berne Convention country. In effect, an international system of protection appears to exist, in theory at least, for expressions of folklore that are “works.” It does not seem as if this mechanism has ever been used, however, and there are some practical limitations in using it. The relationship with Article 7 of the Convention on the term of protection may require further analysis, particularly Articles 7.3 and 7.8. For example, under the comparison of terms provision in the Berne Convention,¹⁹⁰ the term of protection applicable in the country where protection is claimed, is the shorter of the terms applicable in that country or in the country of origin of the work. Therefore, unless the country in which protection is sought protects expressions of folklore indefinitely, the term of protection afforded to the work may have expired in that country. There may be other such limitations in applying Article 15.4. Such protection, applying as it does to anonymous works and operating for the benefit of States, is also not attractive to indigenous peoples and local communities who wish directly to exercise rights. However, it would seem that the practical workings of the Article, and its various advantages and disadvantages, deserve some further consideration, if only because it is an existing measure found in a convention to which many States are party;

(ii) for those countries that provide protection for expressions of folklore as copyright works, the Berne Convention provides that all States that have ratified the Convention must protect foreign works according to the principle of national treatment. This means in effect that those countries that protect folklore as copyright works and are signatories to the Berne Convention enjoy protection for their expressions of folklore in each other’s countries.

¹⁹⁰ Article 7.8, Berne Convention.

However, the comparison of terms and other provisions may again limit the practical relevance of this observation;

(iii) under the intellectual property treaties of certain regional organizations, expressions of folklore are protected in the territories of the States signatories to those agreements according to the principle of national treatment. For example:

(a) in Chapter I of Annex VII of the Bangui Agreement specific protection is provided for expressions of folklore and for works inspired by expressions of folklore. The form of protection is based on the *domaine public payant* model.¹⁹¹ The Agreement deals also with the protection for expressions of folklore in Chapter II on the Protection and Promotion of Cultural Heritage. The Agreement makes provision for national treatment. Therefore, the 15 countries that are members of the African Intellectual Property Organization (OAPI) and have ratified the accord are bound to protect each other's expressions of folklore according to the national treatment principle. Many of the countries are neighboring. It is not known, however, if there has ever been any practical application of these provisions; and,

(b) Decision 351 on Copyright and Neighbouring Rights of the Andean Community provides protection *inter alia* to handicrafts based on the national treatment. In other words, the five States bound by the Decision are obliged to protect each other's handicrafts in a manner no less favorable than that accorded to their own nationals. It is not known whether this possibility has been used in practice;

(iv) certain national laws, such as that of Panama, provide for a form of national treatment, but as the law is new, this aspect may not yet have been tested in practice.

166. It is noteworthy that few, if any, States referred in their responses to the questions in the Questionnaire on the international protection of expressions of folklore, to Article 15.4 of the Berne Convention, or the Bangui Agreement or the Andean Decision 351 (as relevant). These existing measures appear little used and/or known.

167. However, these existing measures aside, other possibilities could be explored, taking into account that the extra-territorial protection of expressions of folklore, particularly the question of "regional folklore," raises complex legal and administrative challenges, as pointed out in many responses to the Questionnaire. These include: (1) defining the legal competence of national or regional authorities to authorize the utilization of folklore which may form part of the national heritage of several countries; (2) establishing administrative rules and regulations which would regulate authorization procedures for several communities and even countries; (3) defining arrangements in a situation where folklore is shared by two or more countries, some of which are parties to an international treaty on folklore protection and others which are not; (4) defining the allocation of royalties that may arise from authorized commercial exploitation of regional folklore between different concerned communities and/or countries; (5) defining criteria, and procedures for their application, to determine when an element of folklore is national or regional; and (6) settling disputes that may arise about such determinations. It will also be recalled that the lack of appropriate sources for the identification of folklore proved another obstacle to reaching agreement on an international treaty in 1985. Responses to the Questionnaire suggested *inter alia* systems of

¹⁹¹ See Article 59.

registration and notification, alternative dispute resolution, databases, collective management and the establishment of dispute-resolution organizations, as a means of dealing with these issues.

168. *Possible Task 3: Extra-territorial protection.* The Intergovernmental Committee may wish to examine elements of possible measures, mechanisms or frameworks for the functional extra-territorial protection of expressions of folklore.

(c) Relationship between customary laws and protocols and the formal intellectual property system

169. In relation to customary laws and protocols, it is suggested that there is a lack of concrete, practical and useful information on (i) customary laws and protocols in so far as they regulate specifically the ownership, control, and management of expressions of folklore, and (ii) how in practice such customary laws and protocols could be recognized and enforced as part of effective and workable systems for the legal protection of expressions of folklore. It would appear that the gathering of such information, in the form of a practical study focused perhaps on the customary laws and protocols of a specific community, would be a useful first step.¹⁹² Such a study would require the full and effective participation of the relevant indigenous people or community.

170. Certain issues have been identified as requiring further consideration, and these could be among those addressed in such a study: (i) the traditional concepts of group ownership and the non-unitary nature of traditional ‘property’ ownership; (ii) a lack of homogeneity in the customary laws of various traditional owners within and between communities; (iii) the possibly adverse affects that systems for the legal protection of cultural expressions may have upon traditional communities, whether traditional or urban, and their art; and, (iv) the relationship between customary systems of protection and overlapping protection provided by existing intellectual property laws.¹⁹³

¹⁹² The WIPO Program and Budget for 2000-2001 provided for “a study on customary law and regulatory systems that apply to the protection of knowledge, innovations and creativity in local and traditional communities, including conclusions relevant for the formal intellectual property system” (Main Program 11).

¹⁹³ See Ellinson, Dean “Unauthorised Reproduction of Traditional Aboriginal Art”, UNSW Law Journal, 1994, p. 327.

171. *Possible Task 4: Practical case study on relationship between customary laws and protocols and the formal intellectual property system.* It is proposed that the WIPO Secretariat commission a case study on customary laws and protocols of an indigenous or local community relevant to the protection of expressions of folklore, specifically addressing their relationship with and conclusions relevant for the formal intellectual property system. This study would be presented to the Intergovernmental Committee for consideration.

172. The Intergovernmental Committee is invited to take note of the foregoing final report on the legal protection of expressions of folklore, and to approve or adopt as the case may be the Possible Tasks 1 to 4 identified in paragraphs 156, 162, 168 and 171 above.

[Annex I follows]

ANNEX I

DETAILED STATISTICS AND SUMMARY OF RESPONSES RECEIVED TO THE QUESTIONNAIRE

The structure of this part of the document follows the structure of the questionnaire. Questions are in italics and are followed by a summary of the responses.

I. Application of the Model Provisions as a whole

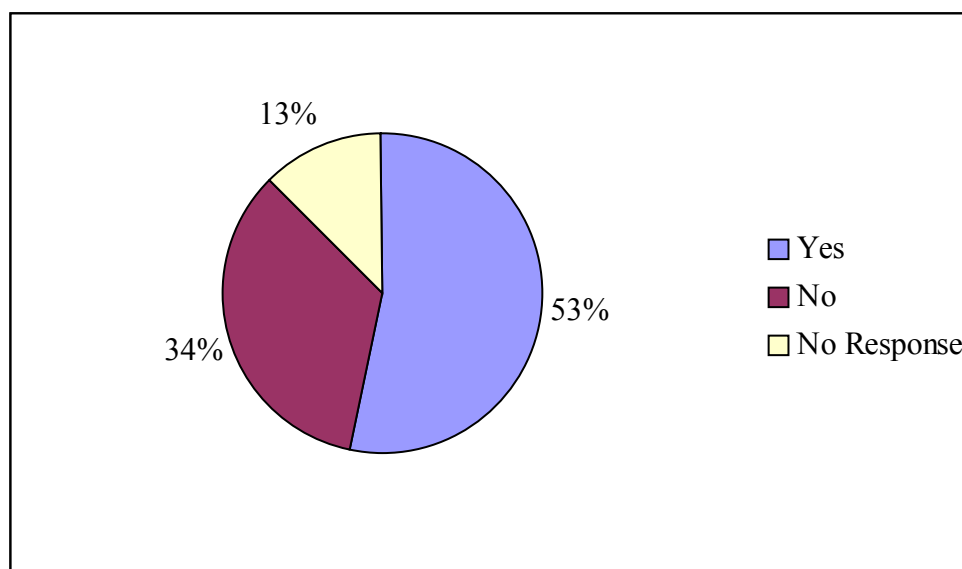
Question I. 1: Which Government ministry(ies), department(s), agency(ies) and office(s) in your country deals with questions concerning the legal protection of expressions of folklore?

Summary of responses to Question I. 1

In many countries, more than one ministry, department, agency or office deals with questions concerning expressions of folklore. In most cases, the national intellectual property office, generally the copyright office, is one of the relevant offices.

The other ministries, departments, agencies and offices are those working within a diverse range of policy areas, such as education, industry, environment, commerce, technology, culture, natural resources, tourism, the arts, indigenous peoples, foreign affairs, broadcasting, information, justice, and museums.

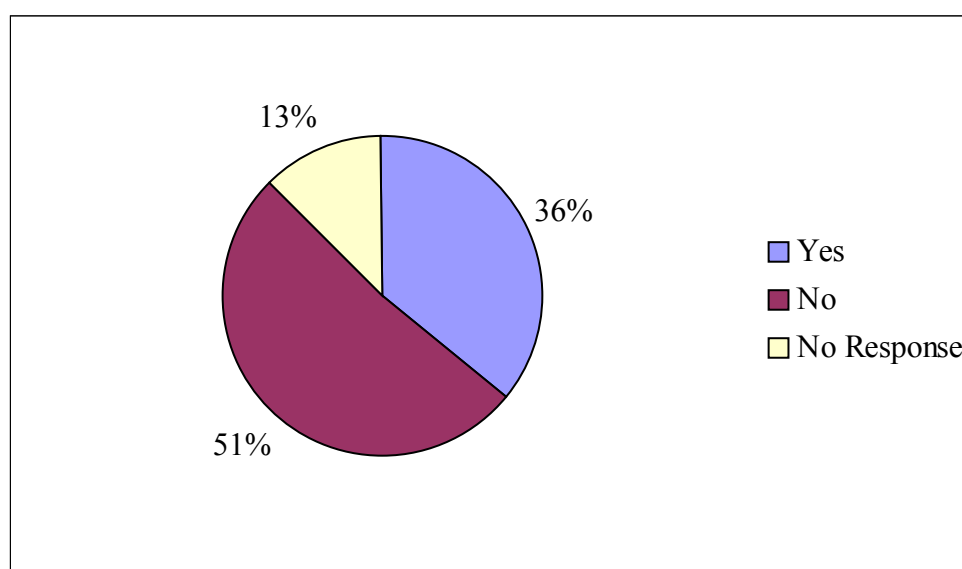
Question I. 2: Are the Model Provisions available in (one of) the official languages of your country?

Summary of responses to Question I. 2

According to the 64 responses under consideration in this document, the Model Provisions are available in one of the official languages in 34 of those countries. This equals 53 per cent. 22 States answered “No” to this question.

Question I. 3: Do “expressions of folklore”, either as described in the Model Provisions, or as the term is understood in your country, receive specific legal protection as intellectual property in your national laws or regulations (whether the laws or regulations are related to intellectual property or not)?

Summary of responses to Question I. 3



Of the 64 responses under consideration in this document, 23 countries provide specific legal protection for expressions of folklore as intellectual property in their national laws or regulations.¹⁹⁴ This equals 36 per cent.

Of the remaining responses, six of the countries were either still in the process of drafting laws which provided specific protection for expressions of folklore, or were awaiting the enactment of laws already drafted. These are not included within the 23 countries evaluated as providing specific protection.¹⁹⁵

¹⁹⁴ Barbados; Burkina Faso; Côte d’Ivoire; Croatia; Ecuador; Ghana; Guinea; Indonesia; Iran (Islamic Republic of); Kenya; Mexico; Mozambique; Namibia; Panama; Philippines; Senegal; Sri Lanka; Togo; Tunisia; United Kingdom; United Republic of Tanzania; United States of America; Viet Nam.

As indicated in the questionnaire, this question concerns specific legal protection of an intellectual property nature for expressions of folklore, and not indirect, or incidental, protection for expressions of folklore, such as may be provided in certain cases by copyright, related rights or industrial property laws. Thus, in the following cases the responses were evaluated as indicating that a country does provide such protection, if:

- (i) the country explicitly provides protection in its copyright or other intellectual property legislation. Such protection may be, but need not be, based upon or derived from the Model Provisions, 1982 and/or Article 15.4 of the Berne Convention;
- (ii) the country provides protection of a *sui generis* nature (in other words, not within the country’s existing intellectual property legislation); or,
- (iii) the country has established specific measures or mechanisms for legally protecting certain aspects of folklore (such as indigenous and traditional names, symbols and marks).

Draft laws and provisions have not been evaluated as if already in force. In other words, countries that advised of draft laws and provisions are not included in the figure of 23 countries providing specific protection. These countries include Chad, China, Egypt, New Zealand, Venezuela and Zimbabwe.

¹⁹⁵ Chad; China; Egypt; New Zealand; Venezuela; Zimbabwe.

If yes:

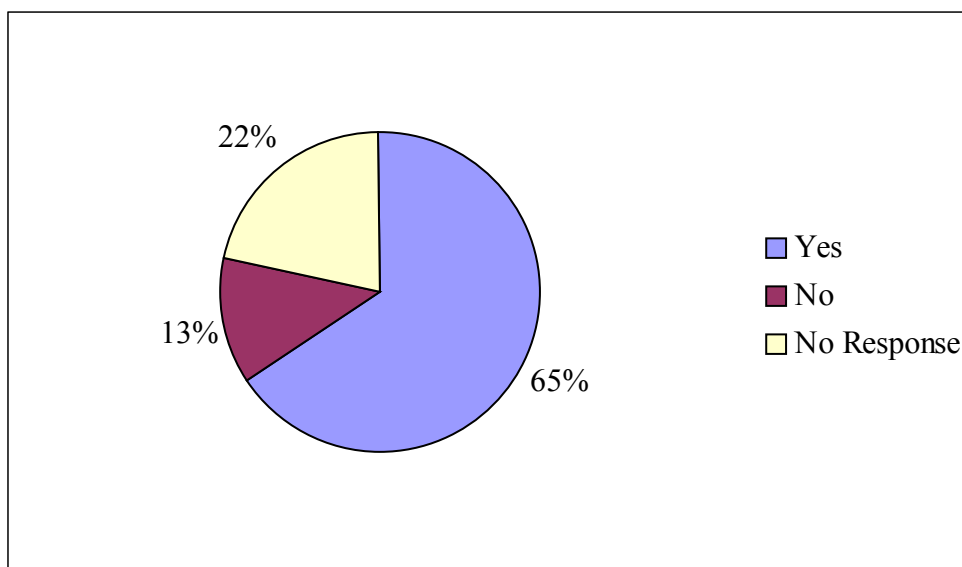
(i) *Please provide information on the relevant laws and regulations, such as their full titles, the relevant sections or paragraphs, dates of coming into force and the name and details of the Ministry, department, agency or office responsible for administering the laws and regulations. Please provide the WIPO Secretariat with copies of the laws and regulations.*

Summary of responses to Question I. 3 (If yes) (i)

Most States which responded provided information on the relevant laws and regulations.

The names and details of the relevant laws and regulations, and in some cases copies of the relevant provisions, are contained in the completed questionnaires. Copies of the completed questionnaires, in the languages in which they were received, are available from the Secretariat of WIPO, and also electronically at <http://www.wipo.int/globalissues/igc/questionnaire/index.html>.

(ii) *Are the relevant laws and regulations based, at least to some degree, upon the Model Provisions?*

Summary of responses to Question I. 3 (If yes) (ii)

Of the 23 responses to this question, 15 countries responded “Yes”, three responded “No”, and five did not answer this question.

(iii) Please indicate below which aspect(s), if any, of the Model Provisions are not followed in your national laws and regulations:

This aspect of the Model Provisions has not been followed in our national laws and regulations

The basic principles underlying the Model Provisions (see the Preamble)

The scope of “expressions of folklore” protected by the Model Provisions (section 2)

The acts against which expressions of folklore are protected and the exceptions thereto (sections 3, 4, 6 and 6)

The provisions dealing with authorization of utilization of expressions of folklore (sections 9 and 10)

The sanctions and remedies provided for (sections 7 and 8)

The solutions offered by the Model Provisions for the protection of expressions of folklore of foreign countries (section 14)

If you have marked any of the boxes, please provide further information.

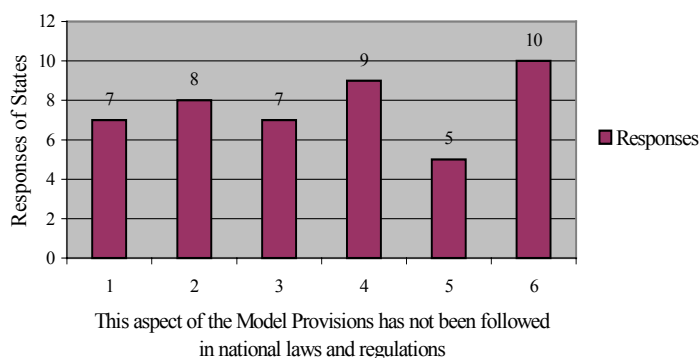
(iv) Please indicate any other reason(s) why certain aspects of the Model Provisions may not have been implemented in your country.

Summary of responses to Questions I. 3 (If yes) (iii) and (iv)

These questions were addressed to those countries providing specific legal protection for expressions of folklore. The questions aimed at identifying to what extent the Model Provisions had served as a basis for those countries' laws or regulations.

Nine of the 23 countries that provide specific protection did not give a response to this question.

The number of times that a response identified each aspect of the Model Provisions is set out below in the following graph:



1. The basic principles underlying the Model Provisions (see the Preamble)
2. The scope of “expressions of folklore” protected by the Model Provisions (section 2)
3. The acts against which expressions of folklore are protected and the exceptions thereto (sections 3, 4, 5 and 6)
4. The provisions dealing with authorization of utilizations of expressions of folklore (sections 9 and 10)
5. The sanctions and remedies provided for (sections 7 and 8)
6. The solutions offered by the Model Provisions for the protection of expressions of folklore of foreign countries (section 14)

For example, the provisions dealing with authorization of utilizations of expressions of folklore (aspect 4), was identified by 9 countries as not having been followed in their national laws.

Certain countries stated that they were preparing government regulations concerning folklore, which might cover further aspects of the Model Provisions.¹⁹⁶ A few countries advised that certain aspects of the Model Provisions are not reflected in the relevant national law because the law had been adopted before the adoption of the Model Provisions in 1982 and had not been amended since,¹⁹⁷ or because the Government had not yet received the Model Provisions when enacting the law.¹⁹⁸

Some responses stated that while their laws were not based directly on the Model Provisions, they nevertheless coincided with the principles of the Model Provisions.¹⁹⁹ Several responses noted that their law provides expressly for the protection of folklore but not

¹⁹⁶ Antigua and Barbuda; Egypt; Indonesia.

¹⁹⁷ Iran (Islamic Republic of); Sri Lanka.

¹⁹⁸ Namibia.

¹⁹⁹ Ghana; United States of America; Venezuela.

for folklore of foreign countries.²⁰⁰ Another noted that it was difficult for them to implement the Model Provisions.²⁰¹ One responded that the acts against which protection is afforded are contemplated (Section 3 of the Model Provision), but not the exceptions provided for in Section 4 of the Model Provisions.²⁰²

If no,

(i) *Please indicate, if possible, the reasons why such protection has not been established.*

(ii) *In relation specifically to the Model Provisions, please indicate below which aspect(s) of the Model Provisions may have prevented their implementation in your country:*

Yes, this aspect may have prevented implementation of the Model Provisions

The basic principles underlying the Model Provisions (see the Preamble)

The scope of “expressions of folklore” protected by the Model Provisions (section 2)

The acts against which expressions of folklore are protected and the exceptions thereto (sections 3, 4, 5 and 6)

The provisions dealing with authorization of utilizations of expressions of folklore (sections 9 and 10)

The sanctions and remedies provided for (sections 7 and 8)

The solutions offered by the Model Provisions for the protection of expressions of folklore of foreign countries (section 14)

If you have marked any of the boxes, please provide further information.

(iii) *Please indicate any other reason(s) why the Model Provisions have not been implemented in your country.*

²⁰⁰ Croatia; Ghana; Guinea; Iran (Islamic Republic of); Mexico; Namibia; Senegal; Togo; United Republic of Tanzania; United States of America.

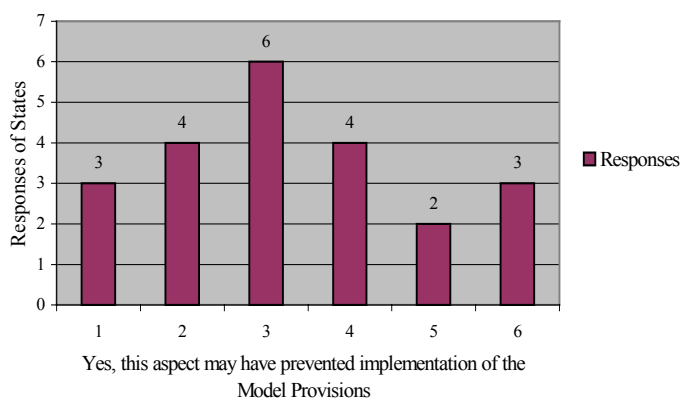
²⁰¹ Kenya.

²⁰² Panama.

Summary of responses to Questions I. 3 (If no) (i) – (iii)

This group of questions was addressed to those States that do not provide specific legal protection for expressions of folklore. The questions aimed at establishing (i) general reasons why protection for folklore has not been established and (ii) any specific reasons why the Model Provisions, or aspects of them, have not been implemented.

The number of times that a response identified each aspect of the Model Provisions is set out below in the relevant graph:



1. The basic principles underlying the Model Provisions (see the Preamble)
2. The scope of “expressions of folklore” protected by the Model Provisions (section 2)
3. The acts against which expressions of folklore are protected and the exceptions thereto (sections 3, 4, 5 and 6)
4. The provisions dealing with authorization of utilizations of expressions of folklore (sections 9 and 10)
5. The sanctions and remedies provided for (sections 7 and 8)
6. The solutions offered by the Model Provisions for the protection of expressions of folklore of foreign countries (section 14)

For example, the sanctions and remedies provided in the Model Provisions (aspect 5) were identified by 2 responses as having perhaps prevented the implementation of the Model Provisions in their national laws.

(a) General comments and information provided by responses

Several general comments and information on why specific protection for expressions of folklore had not been established were provided:

(i) many of the responses stated that expressions of folklore were adequately protected by conventional intellectual property systems such as copyright, trademarks and designs law.²⁰³ One added that the “current direction of domestic policy development therefore is to protect Indigenous arts and cultural expression within existing legal frameworks rather than the implementation of *sui generis* laws.”²⁰⁴ Expressions of folklore also receive protection by laws in other policy areas, such as cultural heritage laws.²⁰⁵ In one response, artists had not requested specific protection for expressions of folklore because they

²⁰³ Australia; Canada; Kenya; Mozambique; New Zealand; Switzerland; United Kingdom.

²⁰⁴ Australia.

²⁰⁵ Australia; Czech Republic.

considered the protection provided by the existing forms of intellectual property protection, especially copyright, to be sufficient;²⁰⁶

(ii) countries also responded that expressions of folklore were not protected under the existing intellectual property framework because they were in the public domain, available without restrictions and served to enrich the fabric of the country's multicultural society.²⁰⁷ One country referred to national courts having provided a flexible interpretation of conventional intellectual property systems and common law principles, to provide further protection for folklore.²⁰⁸ "Cultural heritage is universal property, therefore prohibition of its use is inappropriate since elements of traditional knowledge and culture are interwoven into everyday life in all places."²⁰⁹ Certain countries stated that legal protection of an intellectual property nature can be too rigid and possibly withdraw folklore from the public domain, and referred to the importance of free access to information and cultural heritage, such as folklore.²¹⁰ They stated that expressions for folklore could never be works of authorship since their main characteristic was not a reflection of the unique personality of the author but the unchanged representation of the features of cultural public domain and therefore the limited term of protection did not apply to them;²¹¹

(iii) numerous countries provide as yet no specific protection for expressions of folklore but are in the process of drafting legislation or are currently awaiting the necessary legislation to be enacted.²¹² The Model Provisions may be adopted, but with modification to take into account the Internet and a more marketable licensing/authorization regime.²¹³ Another stated that a new Trade Marks Bill was currently being considered by Parliament and if enacted would allow the Commissioner of Trade Marks to refuse to register a trade mark where its use or registration would be likely to offend a significant section of the community thus providing additional protection to some traditional or cultural expressions. It added that the possibility of developing *sui generis* models was also being considered;²¹⁴

(iv) several responses stated that there was no specific protection for expressions of folklore because none had been requested.²¹⁵ One stated: "There is lack of awareness and serious national clamor for folklore protection by interest groups."²¹⁶ According to another: "... (N)o interest group or other body in [the country concerned] has ever expressed a wish to implement [the Model Provisions] into national law."²¹⁷ In a similar vein, one response stated that since there is no group of people in the country concerned practicing traditional knowledge in everyday life and the country has not faced any illicit exploitation of its traditional knowledge, no system of legal protection of traditional knowledge and folklore has been established. Folklore is considered in the country as an expression of art. In answer to another question, the same response stated that "we have not thought of folklore as a subject

²⁰⁶ Switzerland.

²⁰⁷ Belgium; Canada; Italy; Viet Nam.

²⁰⁸ Australia.

²⁰⁹ Russian Federation.

²¹⁰ Czech Republic; Kyrgyzstan; Netherlands.

²¹¹ Colombia; Hungary.

²¹² Chad; China; Egypt; New Zealand; Venezuela; Zimbabwe.

²¹³ Jamaica; Venezuela; Zimbabwe.

²¹⁴ New Zealand.

²¹⁵ Belgium; Gambia; Japan; Latvia; Republic of Korea; Russian Federation; United Kingdom.

²¹⁶ Gambia.

²¹⁷ Germany.

matter of any property rights. We have not had any discussion among interested circles concerning this matter.”²¹⁸

(v) another replied that the reason why the Model Provisions had not been implemented was in addition to expressions of folklore being part of the public domain, they could not be protected under copyright laws but rather by applying the rules of cultural administration. They further stated that there would be a problem should a legal instrument be introduced, mainly the fact that ethnic groups and frontiers of countries do not coincide and that cannot identify the “migration” of motifs.²¹⁹ Greater protection for folklore could be provided through encouraging public education relating to folklore, codes of conduct, assistance to Indigenous peoples in accessing and understanding formal intellectual property systems, and appropriate modifications of existing regimes to be more culturally sensitive.²²⁰ Another response stated that the State shall guarantee the collective rights of authorship of the ethnic groups, support ethnic education processes and promote the dissemination of their heritage by means of communication media.²²¹ One country stated that their laws expressly provide that expressions of folklore are excluded from the protection afforded by copyright laws, but can however can still obtain protection as derivative works but expressions of folklore must still meet the requirement of originality.²²²

In addition to the above, the following factors were mentioned: the concept of proprietary rights and exclusive ownership of intellectual properties was a fairly new concept in the country concerned. In addition, the influence of Buddhism and the country’s relative isolation could account for a belief that culture would or could not be appropriated or misused by others for wrongful and gainful purposes;²²³ lack of awareness of the need to protect intellectual property in general, and expressions of folklore in particular;²²⁴ expressions of folklore is a new subject matter requiring further study;²²⁵ expressions of folklore are protected when they are promoted and disseminated;²²⁶ lack of expertise on cultural legislation, the inadequate coordination between State law and cultural organizations,²²⁷ and the absence of a government agency to perform the functions envisaged by the Model Provisions;²²⁸ implementation of the Model Provisions depends upon the preservation of expressions of folklore. A response stated that there are a number of goods that belong to their cultural heritage but which cannot be protected, as designs or models, even though they are considered works of handicraft, for lack of novelty.²²⁹

²¹⁸ Latvia. See also the Russian Federation.

²¹⁹ Hungary.

²²⁰ Australia.

²²¹ Colombia

²²² Greece; Hungary.

²²³ Bhutan.

²²⁴ Ethiopia.

²²⁵ Malaysia.

²²⁶ Philippines.

²²⁷ Pakistan.

²²⁸ Philippines.

²²⁹ Portugal.

(b) Specific comments and information on the Model Provisions provided by responses

The following specific comments were made on the main aspects of the Model Provisions:

(i) paragraph 4 of the Preamble to the Model Provisions may be interpreted to mean that protection must be granted in a *sui generis* form “inspired by the protection provided for intellectual productions.” On the other hand, this country stated, although it has no established position on folklore, “the current direction of domestic policy development is to protect Indigenous and cultural expression within existing legal frameworks, such as copyright and designs;”²³⁰

(ii) in relation to the following principle contained in the preamble “(c)onsidering that the dissemination of various expressions of folklore may lead to improper exploitation of the cultural heritage of the nation,” a country suggests adding: “and this exploitation grew up lately in geometrical progression because of the technological progress;”²³¹

(iii) regarding the scope of “expressions of folklore,” one response stated that the Model Provisions provide a scope that extends beyond what the country concerned would normally protect under its intellectual property system. The country stated that it would prefer a definition that focused on the expression of folklore as an artistic, literary, dramatic, musical work, or a performance, rather than protection of the actual idea itself comprising the folklore, which is not protected under systems such as copyright;²³²

(iv) another stated that: “(t)he definition is limited to “artistic heritage” of a community rather than the cultural heritage of the nation thereby creating confusion with regards to what can be protected;”²³³ another stated that the scope in Section 2 of the Model Provisions was considered to be overly broad. It was difficult to determine what deserved protection and what did not, and in most cases expressions of folklore are used outside the traditional or customary context and also used with gainful intent.²³⁴ A response stated that in regards to Section 2 the definition limited to “artistic heritage” of a community was not consistent and should refer rather to “the cultural heritage of nation.” The same response stated that Section 13 of the Model Provisions was too general;²³⁵

(v) a response stated that the limitation described in Section 3 of the Model Provisions which requires specific authorisation by the competent authority or community concerned for the utilisation of expressions of folklore which are “outside their traditional or customary context” may be problematic. Such a limitation could be inconsistent with current national intellectual property systems which do not normally provide a general limitation relating to the “context” of the use of intellectual property;²³⁶

²³⁰ Australia.

²³¹ Romania.

²³² Australia.

²³³ Sierra Leone. See also Croatia.

²³⁴ Republic of Korea.

²³⁵ Viet Nam.

²³⁶ Australia.

(vi) regarding the provisions dealing with authorization of utilisations of expressions of folklore, a response stated that Section 10 of the Model Provisions may be problematic as it could require the payment of an additional royalty for the utilisation of an expression of folklore in addition to the normal royalty payment under the intellectual property system. Furthermore, the specific limitation that the “fees collected shall be used for the purpose of promoting or safeguarding national culture/folklore” may be problematic as the relevant national intellectual property systems do not normally provide such limitations.²³⁷ Another response stated that the conclusion that utilization with gainful intent within the traditional or customary context would not be subject to authorization from the competent authorities could (in most cases) lead to abuse of the expressions of folklore.²³⁸

II. Application of the Principal Provisions of the Model Provisions

(a) Basic principles taken into account for the elaboration of the Model Provisions

Question II. 1: What are the principles underlying the protection of folklore in your national laws or regulations?

Question II. 2: Do you have any comments on the principles taken into account in elaborating the Model Provisions? Do you believe that the principles are still viable? Are there any additional principles that should be taken into account in the any further development of the Model Provisions?

Question II. 3: Please provide any additional information, comments or practical experiences on the basic principles taken into account for the elaboration of the Model Provisions.

Summary of responses to Questions II. 1, II. 2 and II. 3

Although not all of the responses addressed these questions, countries generally indicated (i) the principles that their national laws take into account, and (ii) additional principles that laws should take into account, as well as views concerning the currency and viability of the principles underlying the Model Provisions.

In so far as (i) is concerned, the following principles that underpin current national laws were mentioned:

- (a) prior authorization for the exploitation of expressions of folklore belonging to the national cultural heritage and royalty payments;²³⁹
- (b) development and protection of the creation and dissemination of folklore;²⁴⁰
- (c) prevention of the illicit exploitation and other prejudicial actions;²⁴¹
- (d) maintenance of a proper balance between protection against abuses of folklore and encouragement of further development and dissemination of folklore;²⁴²

²³⁷ Australia.

²³⁸ Sierra Leone.

²³⁹ Burkina Faso.

²⁴⁰ China; Togo.

²⁴¹ China.

(e) the protection of works of popular culture are protected. These are original manifestations of the languages, customs and traditions of the plural society concerned, where no identifiable author can be found. They are protected against distortion and prejudice to the reputation or image of the relevant community;²⁴³

(f) protection under copyright law but without time limit.²⁴⁴

Regarding (ii), several additional principles that should underlie the protection of folklore, and views on the currency and viability of the principles underlying the Model Provisions, were suggested. Certain of these responses are already summarized above in respect of Question I. 3. In addition:

(i) One country stated that, seeing its provisions for the protection of expressions of folklore had not been applied in practice, it was necessary to sensitize indigenous communities as to the necessity to protect their folklore.²⁴⁵ Another responded that the provisions should be practical, applicable and active and that licenses should be granted by national organizations and not by communities for the collective management of copyright.²⁴⁶

(ii) Responses stated that the Model Provisions should safeguard ecological interests in addition to the cultural and economic interests referred to in their Preamble,²⁴⁷ and be more specific about their purpose.²⁴⁸ The Model Provisions could be effective and sufficient if some modifications were made to them, it was stated. "By using it as a model, a mechanism should be established which must be capable of providing international protection for all kinds of expressions of folklore in the broad sense of the word."²⁴⁹ It was necessary to include in the Model Provisions the principles of cultural diversity that is shared versus cultural specificity, it was stated in another response.²⁵⁰ Expressions of folklore form part of the traditional beliefs of the people and are part of the intangible heritage.²⁵¹

(iii) A number of problems with the current principles were identified in one response. These included: certain definitions were not precise enough; governmental authority over the use of folklore may be considered to be a form of censorship, and in multicultural societies, this could lead to conflicts; the relationship with copyright protection was unclear; and the authorization for the use of expressions of folklore would not be able to be exclusive. It might also be necessary to distinguish between what kind of protection is needed with regard to national folklore and the recognition of foreign systems of protection made necessary by the cultural and social situation in those countries.²⁵²

²⁴² China; Ecuador; Gambia; Kyrgyzstan; Malaysia; Mexico; Romania.

²⁴³ Mexico.

²⁴⁴ Sri Lanka.

²⁴⁵ Burkina Faso.

²⁴⁶ Togo.

²⁴⁷ Argentina.

²⁴⁸ Croatia.

²⁴⁹ Iran (Islamic Republic of).

²⁵⁰ Jamaica.

²⁵¹ Philippines.

²⁵² Switzerland.

One response stated that it believes that a proper balance should be maintained between the needs of particular communities and the promotion of individual creation, development of a living culture and freedom of expression. Flexibility must also be maintained so that the needs and concerns of various communities can be addressed. The principal means of protecting expressions of folklore should be conventional intellectual property legislation, supplemented, as necessitated by the conditions/needs of local communities, by specific laws that address specific problems. The balance inherent in intellectual property laws may be thus incorporated into the protection of expressions of folklore,²⁵³ as well as the balance between protection against abuses and freedom and encouragement of further development and dissemination of folklore.²⁵⁴ The risk to hinder further development and evolution of folklore should be examined more carefully (Section 13 of the Model Provisions was stated to be too general).²⁵⁵ Several responses added that the Model Provisions should "...specifically take digital use and digital dissemination of folklore into account as a more urgent reason for providing international protection of expressions of folklore;"²⁵⁶ and preserve the balance between protection and the possibility of a free development of folklore.²⁵⁷

Another country responded that expressions of folklore are regarded constitutionally as part of the cultural heritage of the nation, but are not subject to a special protection regime or eligible for protection by intellectual property legislation. That said, the constitutional provisions do not prevent them from being made subject to such a regime, it was stated.²⁵⁸

While not many of the responses addressed directly whether or not the principles underlying the Model Provisions were still current and viable, 19 of the responses believed that the principles were still current and/or viable, even though the Model Provisions may require some modification²⁵⁹ and some had based their legislation on the Provisions.

(b) Protected expressions of folklore

Question II. 4: *Is a term other than "expressions of folklore" used in your national laws or regulations to describe the kind of subject matter referred to in Section 2 of the Model Provisions?*

If yes:

- (i) *What is the term?*
- (ii) *What subject matter does it cover?*
- (iii) *Why was that term selected?*
- (iv) *What subject matter would the term "expressions of folklore" cover in your country?*

²⁵³ United States of America.

²⁵⁴ Republic of Korea.

²⁵⁵ Switzerland.

²⁵⁶ Ecuador; Gambia; Malaysia; Romania.

²⁵⁷ Kyrgystan; Mexico.

²⁵⁸ Honduras.

²⁵⁹ Argentina; Barbados; China; Croatia; Egypt; Ecuador; Gambia; Ghana; Indonesia; Jamaica; Kenya; Kyrgyzstan; Mexico; Panama; Republic of Korea; Romania; Sierra Leone; Viet Nam; Zimbabwe.

Question II. 5: *In the practical application of your national laws and regulations, has identification of the folklore to be protected presented any difficulties?*

Yes

No

Please provide further information and, if possible, examples. How are expressions of folklore identified in your country (for example, are they registered as such? Are there folklore inventories, archives and databases?)

Summary of responses to Questions II. 4 and II. 5

These questions, II. 4 and II. 5, were addressed to those 23 countries providing specific legal protection for expressions of folklore.

In respect of Question II. 4, several responses include the relevant definition from the applicable national law.

In addition, responses contained the following observations and comments:

(i) terms such as “works of Ghanaian folklore”²⁶⁰, “expressions of folklore”²⁶¹, “traditional culture”²⁶², “collective marks”, “certification marks”, “Indian products”, “official insignia of Native American tribes”²⁶³ were named as some of the terms used by the countries;

(ii) “expressions of traditional cultural heritage” is used in preference to “folklore” because the legislature had considered that the latter term could have a pejorative connotation;²⁶⁴

(iii) “works of folklore” is used to cover, regardless of whether the works have been fixed in tangible form, certain literary, artistic and scientific works (i.e., verbal expressions, musical expressions, expressions by action (such as folk dance) and tangible expressions (such as folk art)) where the author is unknown, but where there is every ground to presume that the author is a national of the country;²⁶⁵

(iv) “works of unknown authors” is used in the country concerned to cover prehistoric remains, historical and other national cultural objects such as stories, legends, folktales, epics, songs, handicraft, choreography, dances and other artistic works;²⁶⁶

²⁶⁰ Ghana.

²⁶¹ Panama; Senegal; Venezuela.

²⁶² Viet Nam.

²⁶³ United States of America.

²⁶⁴ Burkina Faso.

²⁶⁵ China; Togo.

²⁶⁶ Indonesia.

(v) “popular culture” is used to refer to all creations of a cultural community which express its social and cultural identity;²⁶⁷

(vi) in one country “expressions of folklore” includes productions incorporating characteristic elements of the cultural heritage, popular and customary, artistic and scientific manifestations, traditional medicine, innovations, gastronomy, traditional know-how and the rituals conducted and perpetuated by a cultural community of country. The country’s response added that the term was chosen because the Constitution of the country demarcates the cultural heritage of the country thus: it consists of artistic, philosophical and scientific manifestations produced by mankind over the ages. The country added in its response a definition of handicrafts to consist of ornamental and utilitarian handicraft, consumer handicraft (gastronomy, traditional medicine) and service handicraft;²⁶⁸

(vii) The legislation of one country covers the following subject matter:²⁶⁹

1. ‘Community intellectual rights.’ This refers to the rights of indigenous cultural communities and indigenous peoples to own, control, develop and protect:

(a) The past, present and future manifestations of their cultures, such as, but not limited to, archaeological and historical sites, artifacts, designs, ceremonies, technologies, visual and performing arts and literature as well as religious and spiritual properties;

(b) Science and technology including, but not limited to, human and other genetic resources, seeds, medicine, health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, resource management systems, agricultural technologies, knowledge of the properties of fauna and flora, oral traditions, designs, scientific discoveries; and

(c) Language, script, histories, oral traditions and teaching and learning systems.

2. Filipino historical and cultural heritage and resources.

3. Traditional culture and its various creative.

In respect of Question II. 5, six responses answered “No”, in other words, identification of the folklore to be protected has not presented any difficulties as yet.²⁷⁰ Four responses answered “Yes” to this question.²⁷¹

One response identified difficulties in cases where there are communities in neighboring countries that share the same cultures and traditions, and the response provided certain

²⁶⁷ Mexico.

²⁶⁸ Panama.

²⁶⁹ Philippines.

²⁷⁰ Barbados; Iran (Islamic Republic of); Mexico.

²⁷¹ Burkina Faso; Namibia; Russian Federation.

examples of such cases.²⁷² Several responses provided information on folklore inventories, archives and databases.²⁷³

Another stated that the protection and promotion of expressions of folklore were taken care of in their country by a number of governmental agencies, namely the National Institute of Culture (INAC) and more specifically for handicraft the Ministry of Commerce and Industries. The subject matter is registered as such, but no inventories or archives are kept. With regard to traditional and folklore dances, INAC has started an inventory; a non-governmental agency, the National Folklore Commission, is sponsoring an inventory of manifestations of folklore. In pursuance of their law, the Department of Collective Rights and Expressions of Folklore has started a program for the implementation of an archive.²⁷⁴

Question II. 6: *Is a term other than “expressions of folklore” usually used in your country to describe the subject matter referred to in Section 2 of the Model Provisions?*

If yes:

- (i) *What is the term?*
- (ii) *What subject matter does it cover?*

Summary of responses to Question II. 6

This question was addressed to countries that do not provide specific protection for expressions of folklore. The following information was provided in response to this question:

(i) the domestic preference is for use of the term “arts and cultural expression,” as being more consistent with the types of materials eligible for protection under intellectual property systems such as copyright. This term focuses on expressions of artistic, literary, dramatic, and musical works, and related performances, the response advised;²⁷⁵

(ii) a term in a local language (“Mimangi Dhungtam”) is used to refer to both oral and written stories;²⁷⁶

(iii) the terms in the country’s intellectual property legislation such as “artistic work”, “performance”, “choreographic work”, “dramatic work” and “collective work”, which are defined in the copyright legislation, all have applicability to the protection of aspects of folkloric expressions;²⁷⁷

(iv) “creations of folklore, traditional custom” covers the protection and preservation of cultural goods;²⁷⁸

²⁷² Namibia (see also response to Question II.3).

²⁷³ Antigua and Barbuda; Barbados; Burkina Faso; Gambia; Ghana; Honduras; Iran (Islamic Republic of); Namibia; Senegal; United States of America.

²⁷⁴ Panama Law No. 20 of June 26, 2000, regulated by Decree No. 12 of March 20, 2001: “Special Intellectual Property Regime governing the collective rights of indigenous peoples with respect to the protection and defense of their cultural identity and their traditional knowledge and other provisions.”

²⁷⁵ Australia.

²⁷⁶ Bhutan.

²⁷⁷ Canada; Japan.

²⁷⁸ Croatia

(v) “creations of traditional folk culture” is used in the country’s copyright legislation. The term covers works within the meaning of copyright only;²⁷⁹

(vi) one response advised that for the notion “expressions of folklore” two terms are used: “works of people’s traditional art” and “works of people’s creativity.” The term “expressions of folklore” is understood in a more narrow sense than is provided in the Model Provisions, and means basically the works of people’s oral art;²⁸⁰

(vii) the definition of folklore used in the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore, 1989 was referred to in one response;²⁸¹

(viii) “popular creation”, “folklore industries” and “creative professions” are used rather than “expressions of folklore.” The subject matter protected is material expressions of folklore;²⁸²

(ix) “folk-cultural properties” is defined as “manners and customs related to food, clothing and housing, to occupations, religious faiths, festival, etc., to folk-entertainment and clothes, implements, houses and other objects used therefore, which are indispensable for the understanding of changes in our people’s modes of life.” On the other hand “intangible cultural properties” is defined as “art and skill employed in drama, music and applied arts, and other intangible cultural products, which possess a high historical and/or artistic value in and for this country.” Among these intangible cultural properties, the properties, which are considered having special importance, are designated as important intangible cultural properties, and those persons and bodies that highly embody these skills are also recognized and protected;²⁸³

(x) one response stated that it did not consider that the term “expressions of folklore” appropriately or adequately reflected those aspects of traditional or cultural property and practice that it might seek to protect. It also did not support the use of the term “folklore”, used in the Model Provisions, which related only to “artistic” heritage, and excluded traditional beliefs and traditional knowledge more generally. As a result the terminology used in their country did not tend to separate artistic heritage from traditional knowledge. In addition, they considered that the term “folklore” did not appropriately describe or apply to what might be considered the artistic aspects of the culture of the Indigenous Peoples thus their domestic preference is to use the term “taonga Maori”. The term “cultural property” is used to refer to Maori arts, language and customs and practices. The term “cultural property” might be the closest substitute to “folklore”, however it is more encompassing.²⁸⁴

²⁷⁹ Czech Republic.

²⁸⁰ Kyrgyzstan.

²⁸¹ Latvia. The UNESCO definition is as follows: “Folklore (or traditional and popular culture) is the totality of tradition based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.”

²⁸² Russian Federation.

²⁸³ Japan. (see response to Question II.23)

²⁸⁴ New Zealand.

(xi) “cultural goods”²⁸⁵, “goods with ethnological value”²⁸⁶, “expressions of folklore”, “cultural heritage” and “traditional culture/knowledge”²⁸⁷, “manifestations” or “expressions”²⁸⁸, and “folklore and traditional works of unknown authors”, “indigenous art”²⁸⁹ also featured.

Question II. 7: Are there “expressions of folklore” or other examples or forms of traditional culture and knowledge which the Model Provisions do not protect, and which you believe ought to be protected?

Question II.8: Please provide any additional information, comments or practical experiences on the scope of protected expressions of folklore.

Summary of responses to Question II. 7 and II. 8

These questions were addressed to all States.

The following items were suggested as other examples or forms of expressions of folklore or traditional culture and knowledge that ought to be protected:

(i) processes and methods for the making of tangible expressions of folklore (example, musical instruments);²⁹⁰

(ii) historical and archaeological sites, the alphabet, ceremonies and games;²⁹¹

(iii) traditional medicines, medicinal practices, healthcare and methods of healing.²⁹² One response added that it was not fair to leave traditional herbal medicine to be protected under the patenting system mainly because the patenting system has provisions which makes it impossible to protect herbal medicines. The response stated that things like novelty, and the need to analyze the chemical composition of medicines for disclosure purpose excludes traditional herbal medicines from being patentable and the owner of a patent also excludes others from using the medicines;²⁹³

(iv) traditional knowledge of a secret character;²⁹⁴

(v) scientific views in fields such as physics and molecular-biology;²⁹⁵

(vi) architectural forms;²⁹⁶

²⁸⁵ Hungary.

²⁸⁶ Romania.

²⁸⁷ United Kingdom; Republic of Korea.

²⁸⁸ Panama.

²⁸⁹ Colombia.

²⁹⁰ Argentina.

²⁹¹ Argentina; Togo; Viet Nam.

²⁹² Argentina; Burkina Faso; Bhutan; Honduras; Indonesia; Iran (Islamic Republic of); Mexico; Panama; United Republic of Tanzania.

²⁹³ Zimbabwe.

²⁹⁴ Burkina Faso.

²⁹⁵ Croatia.

²⁹⁶ Czech Republic.

- (vii) culinary recipes and processes;²⁹⁷
- (viii) indigenous knowledge;²⁹⁸
- (ix) traditional astrology;²⁹⁹
- (x) the concept of cultural space, an anthropological concept, described as a place where popular and traditional cultural activities are concentrated;³⁰⁰
- (xi) traditional beliefs;³⁰¹
- (xii) proverbs, myths, epics, jokes and rumors, childbirth songs, death songs and songs sung during hunting, fishing etc.³⁰² and;
- (xiii) headdresses, hairdressing, clothing and jewelry.³⁰³

In addition, one country advised it has recently provided appellation of origin protection for a specific regional pastry.³⁰⁴ Another responded that folklore is evolving and one cannot legislate protection of folklore “similar to the context of the Model Provisions.”³⁰⁵

One country treats the expressions of folklore as a part of the cultural heritage under the relevant legislation and not as works to be protected under copyright law.³⁰⁶

Another country believed that free use, though exploitative on the communities concerned, has helped to preserve folklore in the absence of any legal provisions and that folklore has not died down because of this use.³⁰⁷ They were protected as a part of national cultural heritage and their experience regarding the folklore protection consist of identification, inventory, evidence, preservation, and conservation.³⁰⁸

Another replied to these questions that expressions of folklore can be protected against some prejudicial actions, and also against some illicit exploitation, when compromising or damaging the authenticity of the tradition or the heritage itself. In these cases, the object of the protection is not the exclusive right of the owner (or the stakeholder) of the expressions of folklore, but the integrity of the tradition itself, or the individuality of the community (for example, the holy religious image, as a significant design typical of a religious community, or the national flag etc.). It was stated that it was a question of liability if somebody uses an expressions of folklore distorting or offending the cultural interests or the heritage of the community concerned.³⁰⁹

²⁹⁷ Jamaica; Togo.

²⁹⁸ Indonesia.

²⁹⁹ Iran (Islamic Republic of).

³⁰⁰ Philippines.

³⁰¹ Philippines.

³⁰² Sierra Leone; Togo.

³⁰³ Senegal.

³⁰⁴ Czech Republic.

³⁰⁵ Philippines.

³⁰⁶ Hungary.

³⁰⁷ Zimbabwe.

³⁰⁸ Romania.

³⁰⁹ Italy.

In one country, a proposed trademark may be refused registration or cancelled (at any time) if the mark consists of or comprises matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.³¹⁰

(c) Acts against which expressions of folklore are protected

Question II. 9: Please provide information on the nature of the protection granted in respect of expressions of folklore in your laws or regulations. For example, which acts require authorization? Are the rights granted exclusive rights?

Summary of responses to Question II. 9

Several of the responses indicated that the rights granted in respect of expressions of folklore are all or some of the economic and moral rights granted in respect of copyright works. The rights granted in respect of expressions of folklore are generally also exclusive rights,³¹¹ although in certain cases they may be rights to remuneration – for example, in one case the broadcast of a work by wireless or cable and the distribution of a published work that has been produced in the form of a phonogram did not require authorization but were subject to remuneration.³¹² In one country, the rights are exclusive if the authors of the expressions are known.³¹³ In another country, protection is granted whether or not the author is known, and irrespective of whether the term of protection of the author has expired.³¹⁴ One country which has not yet promulgated the regulations necessary to implement the relevant legislation stated that if promulgated, regulations would protect folklore from commercial unauthorized use as well as illicit exploitation just as the Copyright Act protects against unauthorized use and grants moral rights.³¹⁵

Another response stated that under their Copyright laws the owner is granted exclusive rights “to do and to authorize” reproduction, adaptation, distribution, performance and display. Under trademark laws a third party may not, without authorization from a trademark owner, use a confusingly similar mark on similar goods.³¹⁶

One country responded that the rights granted were also exclusive and that the acts were those specified in their law, as well as the inclusion of traditional knowledge for the purposes of commercial and industrial application.³¹⁷

On the contrary, one country responded that their rights were not exclusive and that certain acts required authorization by the country’s Institute of Anthropology and History. Acts which required authorization in the country were the excavation work, the ploughing of land, the clearing of forests, the making of replicas, and alterations to monuments or the demolition or structural redesign of property that forms part of the cultural heritage with

³¹⁰ United States of America.

³¹¹ Barbados; Sri Lanka; United Republic of Tanzania; Viet Nam.

³¹² China.

³¹³ Burkina Faso.

³¹⁴ Mexico.

³¹⁵ Kenya.

³¹⁶ United States of America.

³¹⁷ Panama.

respect to ownership rights.³¹⁸ Another response stated that the rights are non-exclusive and the use of folklore work beyond the permitted use also required prior authorization and was subject to the payment of fees.³¹⁹ Another response stated that no prior authorization was necessary in their country provided that the law's principles were not infringed.³²⁰

Question II. 10: Which principles are used in your laws and regulations to determine which utilizations require authorization (for example, in Section 3 of the Model Provisions, the principles are whether or not there is gainful intent, and whether or not the utilization occurs outside the traditional or customary context.)

Summary of responses to Question II. 10

Almost all the responses that answered this question advised that authorization is required when the expressions of folklore are used for commercial purposes and/or outside their traditional and customary context.³²¹ In other words, these responses indicated that their laws use the principles reflected in the Model Provisions.

One country advised that with respect to the trademark regime, only the owner of a trademark may assert rights in a trademark and that trademark principles would apply with respect to use in commerce of a proposed mark. The response added that *mens rea*³²² might be relevant to the issue of damages or a finding of willful infringement as opposed to unintentional infringement, but is not relevant to the issue of ownership. With respect to Indian arts and crafts the country stated that the principle was that of truth-in-advertising. Only an enrolled member of federally recognized tribe may offer or display for sale, or sell any art or craft product in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the country.³²³

Another responded that there should be protection against gainful intent whether or not utilization occurred outside the traditional or customary contexts, including when there is the distortion of the socio-cultural values of indigenous cultures and local communities, and the pirating of traditions.³²⁴

³¹⁸ Honduras.

³¹⁹ Ghana.

³²⁰ Mexico.

³²¹ Barbados; Burkina Faso; China; Costa Rica; Ghana; Iran (Islamic Republic of); Namibia; Togo; United Republic of Tanzania; Viet Nam.

³²² The term '*mens rea*' is derived from Latin meaning a guilty mind and refers to the state of mind required to constitute a particular crime. Therefore there must be intention to bring about a particular consequence.

³²³ United States of America.

³²⁴ Panama.

Question II. 11: *Based upon your experiences with implementing your national laws and regulations, against which forms of exploitation, uses and actions in respect of expressions of folklore should protection be granted? Please provide practical examples. Are there any practical experiences with implementing the relevant provisions in your laws and regulations that would be helpful for a wider audience?*

Summary of responses to Question II. 11

Specific examples were provided of uses of expressions of folklore and other forms of traditional knowledge and culture for which it is suggested protection should be available. These included the exploitation of indigenous plants; the use of a country's name in connection with unauthorized reproductions of the country's works; piracy of expressions of folklore by foreign film producers, and piracy of rock paintings, publication of folktales, poetry and short stories told by forefathers to missionaries; the transformation of musical instruments into modern instruments and their being renamed; the unauthorized use of folk dances and rituals; and photography of traditional people and their dress for use on postcards.³²⁵ Reference was also made to reproduction; communications to the public by performance; broadcasting; distribution by cable or other means and adaptations; translations or other transformation and unauthorized reproductions.³²⁶

One response referred to its Indian Arts and Craft Act (IACA) which prohibits misrepresentation in the marketing of Indian arts and crafts products within the country. The response stated that it was also the experience of Native American tribes that many commercial enterprises attempted to counterfeit Native American arts and crafts and/or falsely indicate some association between the non-Indian product and a Native American tribe.³²⁷

Question II. 12: *If your laws or regulations provide rights in respect of acknowledgment of source (such as those envisaged in Section 5 of the Model Provisions), please indicate, referring to practical examples where possible, whether such rights have been useful, effective and workable in practice.*

For example, how is the requirement that the expression of folklore be "identifiable" (as being derived from a known community or place) implemented in your country? How is this requirement implemented if in your country there may be various communities sharing similar expressions of folklore? Or perhaps communities in your country also live in neighboring countries, and/or communities in your country may have adopted and developed an expression of folklore that originated in another country?

Summary of responses to Question II. 12

Of the 13 responses that answered this question, six countries stated that their laws provide rights in respect of acknowledgement of source.³²⁸ Seven of the responses made no such provision.³²⁹

³²⁵ Barbados; Burkina Faso; Burundi; Chad; Namibia (see also responses to Questions II. 23 and II. 24); Senegal; Togo; Viet Nam.

³²⁶ Ghana; Guinea; Viet Nam.

³²⁷ United States of America.

³²⁸ Burkina Faso; Kenya; Namibia; Panama; United Republic of Tanzania; Viet Nam.

³²⁹ Barbados; Ghana; Guinea; Mexico; Senegal; Togo; United States of America.

While responses did not provide further information or examples, some made the following comments:

(i) one response referred to difficulties in dealing with expressions of folklore belonging to communities living in more than one country;³³⁰

(ii) one response stated that the Indian Arts and Crafts Act in its country prevented the marketing of products as “Indian made” when the products were not made by Indians as defined by the Act. The country stated that their Trademark Act of 1946, as amended, provides the statutory basis for protecting folklore aspects of Native American tribes as well as those of other indigenous peoples worldwide;³³¹

(iii) another country stated that there are various communities that share expressions of folklore and this is provided for under their Regulations, but the registration of expressions of folklore is the responsibility of the representatives of the indigenous congresses or authorities that file the application. The response stated that the traditional knowledge of indigenous peoples consisted of creations shared among the members of various communities, and the benefits were intended to accrue to them all collectively. In its response the country made the following distinction:

(a) where non-indigenous communities share expressions of folklore that are similar to indigenous ones (replicas) and market them, the law of their country provides that non-indigenous communities can continue that practice, but they cannot claim the collective rights accorded to the indigenous peoples;

(b) with regard to indigenous communities that share an expression of folklore, they are not prevented them from continued use of the expression of folklore and the rights of present and future generations are not affected, allowing them to continue using expressions of folklore and developing them;

(c) with regard to other countries, it is provided in the law of the country that indigenous artistic and traditional expressions from other countries enjoy the same benefits as nationals, on the condition that there are reciprocal international agreements amongst the countries concerned.³³²

³³⁰ Burkina Faso (response to Question II.8); Namibia.

³³¹ United States of America.

³³² Panama.

Question II. 13: *Is the protection afforded by your laws and regulations limited in time?*

Yes

No

If yes, for how long? How is the starting point of protection determined? What happens to the expression of folklore after the expiry of the period of protection (for example, does it fall into the public domain so that it may be freely copied and used by anyone without restriction?)

If no, are there any national experiences in this respect that may be helpful for a wider audience?

Summary of responses to Question II. 13

Of the 23 countries that provide specific protection for expressions of folklore, one responded “Yes” as to providing protection that is limited in time,³³³ 11 responded “No,”³³⁴ and one responded both “Yes” and “No.”³³⁵

In one response, works of folklore exist in perpetuity, and as such they do not fall into the public domain.³³⁶ However, another response stated that protection provided under copyright law was limited in time and the duration of protection runs for the life of the author plus 70 years, for 95 years from the date of publication or for 120 years from creation. Protection provided under trademark law continues as long as the mark is properly used as a trademark. It should be noted that a trademark may be cancelled at any time if it is demonstrated that the mark is disparaging or falsely suggests a connection.³³⁷ Another response stated that it is important that people be able to arrange folklore to be handed down from generation to generation while at the same time ensuring that its identity is preserved.³³⁸

Question II. 14: *Please provide information on the exceptions, if any, to the rights referred to immediately above in your laws or regulations. Are they regarded as adequate from the view point of both the custodians of folklore and users in your country?*

Summary of responses to Question II. 14

Of the 23 countries that provide specific protection for expressions of folklore, many provide for exceptions that are the same as or similar to those applicable to copyright works. Certain of the responses list the relevant exceptions.³³⁹

³³³ Iran (Islamic Republic of).

³³⁴ Barbados; Ghana; Kenya; Mexico; Mozambique; Namibia; Senegal; Sri Lanka; Togo; Tunisia; United Republic of Tanzania.

³³⁵ Guinea.

³³⁶ Ghana.

³³⁷ United States of America.

³³⁸ Senegal.

³³⁹ See for example Burkina Faso; China; Namibia; United States of America; Viet Nam.

One response specifically stated that the exceptions in their draft law are regarded as adequate from the viewpoint of both the custodians of folklore and users in the country.³⁴⁰ Another stated that no comments or complaints had been received from the public during the revision of the law.³⁴¹

Two responses provided examples on the exceptions to the rights referred to in their law:

(i) the use of folklore by a national public entity for non-commercial purposes and the importation of any work made abroad which embodies folklore;³⁴²

(ii) use in connection with teaching activities by public institutions with the consent of the indigenous traditional authorities; for school exhibitions and sales arranged by students; rights recognized earlier on the basis of relevant legislation; for dance in ensembles giving folklore displays, but they have to include members of the indigenous peoples when an indigenous artistic show is presented and/or performed.³⁴³

Question II. 15: Taking into account the expressions of folklore in your country, against which forms of exploitation, uses and actions may protection for expressions of folklore be necessary? Please provide practical examples.

Question II. 16: Please provide any other comments or practical experiences regarding the nature of the protection afforded to expressions of folklore in your country.

Summary of responses to Questions II. 15 and II. 16

In respect of forms of exploitation, uses and actions for which protection is necessary, many responses stated that expressions of folklore should be protected against the acts protected in copyright law, such as reproduction, adaptation, public performance, publication, communication to the public, as well as the acts protected by moral rights. According to the law of one country, creations of traditional folklore culture may be used only in a manner which “does not depreciate their value.”³⁴⁴

In addition, some specific examples were provided:

(i) reproduction of artworks on t-shirts, imported carpets³⁴⁵ and garments,³⁴⁶

(ii) the duplication and adaptation of traditional remedies;³⁴⁷

(iii) copying and use of hand woven, traditional textile designs and patterns on factory made fabrics, which stifles local weaving practice mostly prevalent among women in the villages;³⁴⁸

³⁴⁰ China.

³⁴¹ Namibia.

³⁴² Kenya.

³⁴³ Panama.

³⁴⁴ Czech Republic.

³⁴⁵ Australia.

³⁴⁶ Barbados.

³⁴⁷ Barbados.

- (iv) one country reported on concerns and efforts for the preservation and protection of an indigenous woman's parka (*amauti*). Indigenous women are attempting to promote commercial sales of handmade *amautis* in order to conserve traditional skills and knowledge while providing a source of income and a measure of financial independence;³⁴⁹
- (v) the appropriation by authors of works which are common to all the country's people;³⁵⁰
- (vi) the use of shadow plays, and folk poetry, songs, music and dances;³⁵¹
- (vii) the trade and exportation of ethnographic material and artifacts, which are difficult to categorize and date;³⁵²
- (viii) use and exploitation of folklore for financial benefits, the distorting of expressions of folklore, and the deception of the public;³⁵³
- (ix) unauthorized exploitation of works of folklore, such as reproductions, dissemination, presentation on stage, recitation, or any other form of performance or direct public presentation;³⁵⁴
- (x) the inappropriate or unauthorized use of indigenous text and imagery to promote tourism. The response reported that concerns have also been expressed about the use of indigenous designs by non-indigenous persons in the fashion industry, and the use of lyrics in the music industry, and the souvenir industry where a range of products are considered to denigrate the indigenous culture, or undervalue authenticity of their works. The response added that thought might also be given to digital technology issues such as the manipulation of cultural property including images and music uploaded, downloaded or reproduced from a website, outside of the "traditional or customary context;"³⁵⁵
- (xii) abusive forms of exploitation, uses and actions which do not respect the dignity of the community concerned, or are offensive against their respectability or their honor.³⁵⁶

Another response stated, in answer to these questions, that there was no protection as there appeared to be no need therefore. It added that granting intellectual property rights could impede the promotion and further development of folklore as culture must continuously change to develop and survive.³⁵⁷

One responded that it agreed with the scope of Section 3 of the text of the Model Provisions, as far as uses subject to authorization were concerned, and Section 6 of the same

³⁴⁸ Bhutan.

³⁴⁹ Canada.

³⁵⁰ Kyrgyzstan.

³⁵¹ Malaysia.

³⁵² Philippines.

³⁵³ Sierra Leone.

³⁵⁴ Egypt; Honduras; Romania; Zimbabwe.

³⁵⁵ New Zealand.

³⁵⁶ Italy.

³⁵⁷ Republic of Korea.

text regarding practices that would be considered contrary to the rights in expressions of folklore.³⁵⁸

In so far as additional general information is concerned, as requested in Question II.16, one response advised that the country's courts have applied a flexible interpretation to intellectual property laws and common law principles to provide greater protection to expressions of folklore, and referred to the use of the doctrine of confidential information and finding of fiduciary obligations.³⁵⁹ Another country stated that “cultural diversity is strengthened and promoted when the folkloric expressions of many different cultures are shared . . . in a manner that protects various aspects of the folkloric expressions without unduly restricting or limiting the dissemination thereof.”³⁶⁰ One response referred to protection provided also in cultural heritage legislation.³⁶¹ Another responded that its law is not clear on which forms of expressions are to be protected, and, therefore, the Model Provisions should be inserted as is.³⁶²

A response stated that the promotion of an expression of folklore, by including a traditional epic in a film for example, is a form of protection even if other people may benefit financially because “the showing of the film will ‘protect’ the existence of such epic as it will be passed on to the next generations.”³⁶³

In one country, the Supreme Court had decided on the issue whether the known “author” of a “folk tale” had created an individual and original work. The Court held that as regards folk tales, originality and authorship must be judged taking into account the special rules of folk poetry. In this respect, the variability of folk tales are important: folk tales are handed down and maintained orally, therefore they are exposed to continuous changes. A tale-teller is not entitled to copyright protection if his role in the formation of tales does not go beyond the traditional frames of telling tales.³⁶⁴

However, according to another response, the country's Law on the Protection of Tangible Cultural National Heritage ensures the protection of the goods belonging to the national cultural heritage including “goods with ethnological value” as defined. The response stated that it also ensures the material base and financial resources to discover, book keep, examine, classify, research, store, conserve, restore, and protect. According to the same law, if a good is classified as belonging to the national cultural heritage, nobody could make any kind of copy of it without the permission of the right holder even if it is public or private property.³⁶⁵

Another responses stated that it has found that the most effective means of protection of expressions of folklore was to address the specific concerns that have arisen in their country. The response added that “(a)s is the case of all nationals, members of Indian tribes and

³⁵⁸ Colombia.

³⁵⁹ Australia.

³⁶⁰ Canada.

³⁶¹ Czech Republic.

³⁶² Namibia.

³⁶³ Philippines.

³⁶⁴ Hungary.

³⁶⁵ Romania.

Alaskan natives have full access to elected representatives who are in the position to propose legislation to meet their particular needs.”³⁶⁶

Cultural properties designated as ‘national or local properties’ are protected from destruction and maintained for purposes of good preservation and not in terms of intellectual property.³⁶⁷

The protection of folklore and expressions of folklore, as far as their integrity, promotion and dissemination were concerned, are among the policy objectives for the preservation of the nation’s cultural heritage. Such protection is the responsibility of the authorities entrusted with the implementation of the policies.³⁶⁸

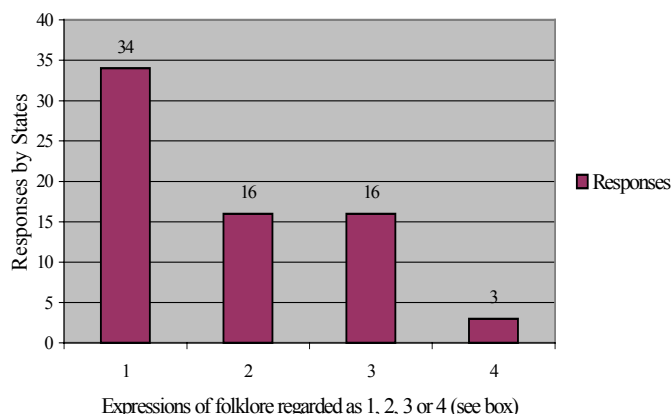
(d) Authorization of utilizations of expressions of folklore

Question II. 17: Are expressions of folklore regarded in your country as:

- (i) *The “property” of the country as a whole (as part of the national cultural heritage)?*
- (ii) *As the “property” of indigenous or other local communities within your country?*
- (iii) *As the “property” of individual artists whose works are based upon folkloric traditions?*
- (iv) *Neither (i), (ii) or (iii). Please provide further information.*

Summary of responses to Questions II. 17

The responses are reflected in the table below:



1. The “property” of the country as a whole (as part of the national cultural heritage)?
2. As the “property” of indigenous or other local communities within your country?
3. As the “property” of individual artists whose works are based upon folkloric traditions?
4. Neither (i), (ii) or (iii). Please provide further information.

For example, 34 responses described expressions of folklore as being the “property” of the country as a whole (as part of the national cultural heritage).

³⁶⁶ United States of America.

³⁶⁷ Republic of Korea.

³⁶⁸ Colombia.

Responses also provided the following additional information:

(i) the copyright law does not recognize communal ownership as such. However, in one case, the courts had held that an indigenous artist owed a fiduciary obligation to his community. “The finding of this fiduciary duty could be seen as extending some form of communal ownership, as it requires the owner of the copyright in the work to enforce his rights so as to protect his community from cultural harm;”³⁶⁹

(ii) expressions of cultural heritage of which the author is unknown belong to the country as a whole. They are the property of their authors only when the authors are known;³⁷⁰

(iii) in one sense, expressions of folklore may be regarded as the “property” of the country as a whole. However, among Aboriginal peoples in the country, a sense of “ownership” of traditional artistic heritage often exists in the concerned communities. Under the national legal system, there are mechanisms available for collectivities (both Aboriginal and non-Aboriginal) to assert legal “property” rights in expressions of folklore (for example, contracts relating to trade secrets, corporations holding copyrights and patents);³⁷¹

(iv) one response stated that folklore belongs to the country only when the author is unknown.³⁷² Others stated that expressions of folklore are the property of the individual artist,³⁷³ whereas one stated that it was the property of the local of indigenous communities.³⁷⁴ Further responses stated that ownership fell usually under one of three parties, namely country, community or individual depending on the particular expression of folklore and the circumstances.³⁷⁵

Question II. 18: Please provide any other comments or practical experiences regarding the authorization of utilization of expressions of folklore in your country.

Summary of responses to Questions II.18

Regarding practical experiences with the authorization of utilization of expressions of folklore, responses provided the following information:

(i) the Canadian Museum of Civilization is a federal Crown corporation which serves as the national museum of human history of Canada. The Museum’s Cultural Studies program collects tangible folkloric art as well as tapes of songs, languages, oral histories and personal narratives. To reflect the wishes of members of some Aboriginal groups regarding authorization of access to their expressions of folklore, the Museum’s Ethnology section restricts access to some collections of sacred Aboriginal materials to members of culturally affiliated groups, and does not make them available to members of the general public;³⁷⁶

³⁶⁹ Australia.

³⁷⁰ Burkina Faso.

³⁷¹ Canada.

³⁷² United Kingdom; Viet Nam.

³⁷³ New Zealand; Viet Nam; Zimbabwe.

³⁷⁴ Panama.

³⁷⁵ Honduras; Republic of Korea.

³⁷⁶ Canada.

(ii) in another country, there is a system for the collective management of copyright and related rights and licensing is provided for the use of copyright subject matter. The organization for copyright management collects the fees for the use of works which are in the public domain. The fees are then transferred to the State Fund of Intellectual Property;³⁷⁷

(iii) one response stated that the utilization of an expression of folklore depends upon the relevant community having been informed and permission from the elders or Paramount Chief obtained.³⁷⁸ Another response regarded the free and prior informed consent of the relevant Indigenous Cultural Community (ICC) and Indigenous Peoples (IP) as being required. A Memorandum of Agreement must be executed by and between the proponent, the host ICC/IP community, and the country's National Commission on Indigenous People (NCIP), written in the dialect or language of the concerned ICCs/IPs, with corresponding English and Filipino translation;³⁷⁹

(iv) the institution of vetting the works of 'professional' artists also exists with respect to the works of applied folk arts, it was stated. In this case, the work is protected under copyright law, since the requirements of legal protection exist. There are sometimes disputes of plagiarism between folk artists (who created earlier the given motif or object). In this case the only possible solution is – beside a settlement – to come up for trial;³⁸⁰

(v) one country gave the following practical scenarios:

(a) an informant may give expressions of folklore to a collector which may actually "belong" to someone else in the community, a specific group within the community, or to a group outside the informant's community. Obtaining a release form signed by the informant may prevent further use of the folklore if there is such a tradition of ownership that extended beyond the informant, and a user would have to acquire further permission;

(b) an informant may impart expressions of folklore to a collector with the understanding that performing or using that expressions of folklore should occur only under specific conditions, for example, for a season of the year; only among men or women; or only in conjunction with a specific ritual. The response stated that this made the use of the folklore in a publication or other mass-mediated production difficult or impossible, since control of the use of the folklore would no longer be possible;

(c) an informant may impart an expression of folklore to a collector with the understanding that only that collector may use the material. This leaves open to question how much control the collector should exercise in the subsequent use of the folklore by others, since the collector will probably not be as aware of the implications of ownership as the original informant, it was stated.

³⁷⁷ Kyrgyzstan.

³⁷⁸ Sierra Leone.

³⁷⁹ Philippines.

³⁸⁰ Hungary.

The response added that in the country concerned, an informant may mandate the destruction of a recording some years after it was made. This was because the informant may have a feeling of unease on issues of ownership and use after he/she died, or may “will” the recording or the information on it to someone else, it was stated. The response added that in the first case, the collector or repository would have to decide between honoring the wishes of someone within the culture that produced the folklore or honoring the mandate to “collect and preserve” demanded by the state, and in the second case renegotiate permissions with the heir to the folklore;³⁸¹

(vi) in one country, authorizations for the use of expressions of folklore are given by indigenous peoples and local communities in the form of license contracts for third-party use.³⁸²

Question II. 19: *Does your law establish a “competent authority” and/or “supervisory authority” as referred to in Sections 9 and 10 of the Model Provisions?*

Please provide information on the powers, funding, mandates, composition, responsibilities, functions and activities of such bodies in your country.

Please describe the procedure for obtaining authorizations to use expressions of folklore.

Are any fees payable for utilizations of folklore, and, if so, how are they determined and to which purposes are the fees applied (for example, for promotion of national culture)?

In general, what practical lessons and examples would benefit a wider audience?

Summary of responses to Question II. 19

Certain countries, which provided specific legal protection for expressions of folklore, stated that:

(i) there is no single authority in relation to authorizing uses of folklore in the sense referred to in the Model Provisions, but in some cases various Government departments and offices can be approached for authorization,³⁸³

(ii) the copyright office in some instances performs the functions of a copyright collective management society, and acts as the type of authority envisaged in Articles 9 and 10 of the Model Provisions.³⁸⁴ Fees collected are paid into a fund for the promotion of culture³⁸⁵ or alternatively, no fees were payable.³⁸⁶ Another responded that they had a collective management organization, and it was only that organization that has the power to organize and oversee the exploitation of expressions of folklore. The response stated that the

³⁸¹ United States of America.

³⁸² Panama.

³⁸³ Barbados; Iran (Islamic Republic of); Mozambique; Namibia (response to Question II. 20); Panama; Viet Nam.

³⁸⁴ Burkina Faso; Mexico.

³⁸⁵ Burkina Faso.

³⁸⁶ Mexico.

proceeds from the royalty were also managed by the organization and set aside for cultural and social purposes;³⁸⁷

(iii) a specific competent and supervisory authority was either established or in the process of being established.³⁸⁸ One response that in their draft law fees for the utilization of works of folklore must be no less than 7% of the profit made from the utilization, and must be used mainly for the following purposes: first, to support and assist the work of national folklore organizations, folklore artists, folklore research institutions, folklore museums, exhibition halls and archives; second, to subsidize the community creating and spreading folklore to carry out meaningful activities on traditional folklore; and, third, to protect and disseminate national folklore works.³⁸⁹ Another response required persons wishing to use folklore works for use other than permitted under the law, to apply to the Secretary responsible for culture and to pay the prescribed fee. The response added that their new Copyright Bills required persons wishing to use works of folklore for a commercial purpose to apply to the National Folklore Board of Trustees for permission in a prescribed form and to pay the requisite fees.³⁹⁰ One country stated that they have an Arts and Crafts Board which operates as an agency within the Department of the Interior and administers their relevant Act. The response stated that under copyright and trademark laws it is the rights holder that is the relevant authority.³⁹¹

Question II. 20: If indigenous or other local communities within your country are regarded by your law as “owners” of their respective forms of traditional artistic heritage, how in practice do the communities concerned exercise, manage and enforce their rights under the law? What practical lessons and examples would benefit a wider audience?

Summary of responses to Question II. 20

One country advised that when certain works of folklore produced by a community are being distorted to discredit or prejudice the reputation of the community, or the source of a literary or artistic work is not attributed to the relevant community, the communities may have recourse to the copyright office. However, there has been no experience of such a situation to date.³⁹²

In one country the State accords the local communities and indigenous peoples a right that allows them to refuse their consent to the collection of biological and genetic material, access to traditional knowledge and plans and projects of biotechnological character on their territory if they have not previously been given sufficient information on the uses and related benefits.³⁹³

Another response stated that complaints about protected products alleged to be offered or displayed for sale or sold in a manner that falsely suggests that they are Indian products may be made to the Indian Arts and Crafts Board for action under the Indian Arts and Crafts Act. Civil suit may also be pursued and the government also takes steps to educate

³⁸⁷ Togo.

³⁸⁸ China; United Republic of Tanzania.

³⁸⁹ China.

³⁹⁰ Ghana.

³⁹¹ United States of America.

³⁹² Mexico.

³⁹³ Venezuela.

consumers to help them avoid counterfeit arts and crafts products.³⁹⁴ However, as referred to previously in Question II.17, one country responded that the local communities were considered no more than custodians as the original ownership of expressions of folklore was vested in the national heritage.³⁹⁵

(e) Sanctions, remedies and jurisdiction

Question II. 21: *Which remedies and sanctions are provided for in your national laws and regulations?*

Question II. 22: *Please provide any other comments or practical experiences regarding remedies, sanctions and jurisdiction.*

Summary of responses to Questions II. 21 and II. 22

The sanctions and remedies referred to by the responses were mainly the statutory penalties established for copyright infringement or criminal infringement.³⁹⁶ One responded that in the event of a second offence the fine was double the previous amount. The response added that sanctions were imposed in addition to confiscation and destruction of the means that were used to commit the offence.³⁹⁷

Many countries stated that the sanctions and remedies were either fines or imprisonment or both, and were similar to those provided for in their legal system including actions for damages and prejudice or other appropriate civil remedies depending on the property and the extent of the infringement.³⁹⁸

One country also added that of the fines imposed, half accrued to the National Treasury and the other half went towards the investment cost of the indigenous territories or peoples concerned or the local communities.³⁹⁹

No further information on practical experiences was provided.

(f) Relation to other forms of protection

Question II. 23: *Are there instances in which expressions of folklore have received protection in your country by indirect means, such as under related rights?*

Yes

No

³⁹⁴ United States of America.

³⁹⁵ Togo.

³⁹⁶ Ghana; Panama; United States of America.

³⁹⁷ Chad; Panama.

³⁹⁸ Barbados; Chad; China; Iran (Islamic Republic of); Namibia; Russian Federation; Sri Lanka; United Republic of Tanzania; United States of America; Venezuela; Viet Nam.

³⁹⁹ Panama.

Please provide further information, and, where possible, practical examples to illustrate your response.

Question II. 24: *Please provide any other comments or practical experiences regarding other forms of protection afforded to expressions of folklore in your country.*

Summary of responses to Questions II. 23 and II. 24

Of the 49 responses that answered Question II. 23, 24 answered “Yes” and 25 “No.”

Those countries that responded “Yes” referred to:

- (a) the protection provided by means of copyright and related rights legislation, particularly the protection of the rights of performers and sound recording producers;⁴⁰⁰
- (b) protection afforded by trademark legislation. In one example, an Aboriginal First Nation has used trademarks legislation to protect ancient rock painting images;⁴⁰¹
- (c) copyright protection afforded to “works” originated from “expressions of folklore;”⁴⁰²
- (d) expressions of folklore being protected at common law.⁴⁰³

Certain countries also referred to cultural heritage and indigenous peoples’ rights legislation.⁴⁰⁴

Many of the countries responded that it had instances where expressions of folklore received protection by indirect means, such as related rights.⁴⁰⁵ One response stated that expressions of folklore can obtain protection as derivative works, such as translations, adaptations, arrangements and other alterations. The response added that collections of expressions of folklore are also protected provided that the selection or the arrangement of their content is original.⁴⁰⁶ In one response protection was also given to performers, who perform the work of folklore as well as producers or works which embody folklore.⁴⁰⁷

According to the judicial practice of another country, the result of the valuable and useful activity of researchers of folk songs is protected by copyright as a collection of works. The panel of the Body of Experts on Copyright of the country gave the following answer in 1985: “Remuneration is due to the performer even in the case of performing works of folk music, if the performer is professional artist. On the other hand, if an amateur takes part in the recording of folk music (or of any other genre), in principle no remuneration is due to him/her in return for his/her consent to the fixation of the performance, however, in practice

⁴⁰⁰ Australia; Canada; Czech Republic; Gambia; Germany; Indonesia; Jamaica; Netherlands; Philippines.

⁴⁰¹ Canada.

⁴⁰² Croatia.

⁴⁰³ Gambia.

⁴⁰⁴ Ghana; Netherlands; Philippines; Russian Federation; Senegal; Togo.

⁴⁰⁵ Ghana; Greece; Hungary; Italy; New Zealand; Norway; Republic of Korea; Romania; United Kingdom; Viet Nam; Zimbabwe

⁴⁰⁶ Greece.

⁴⁰⁷ Ghana.

the country's phonogram producer company remunerates amateurs as well." Since the amendment of their copyright law from 1994 there is no distinction anymore between amateur and professional artists, so from that time the related rights protection is due to all kind of performer's performance.⁴⁰⁸

One response stated that tax allowance and exemption from tax was the other form of protection afforded to expressions of folklore. The response added that "(c)oncerning value added tax, single objects of folk art and applied art, or those manufactured in a limited number of copies by non-industrial technology and which are given a number by the jury, belong to the preferential tax rate of 12%." The normal tax rate is 25% and only pharmaceutical products and therapeutic equipment belong to the rate of 0%, it was stated.⁴⁰⁹

One response is currently undertaking a review of its performers rights regime. The review will consider whether the current definition of performance should specifically refer to "cultural performances." The review is also considering the issue of whether some form of collective ownership might be more appropriate for rights that arise from "cultural performances."⁴¹⁰ Another responded that their law does not make a distinction between copyright and neighboring rights.⁴¹¹

(g) Protection of expressions of folklore of foreign countries

Question II. 25: Have there been instances in which folklore originating in your country has been exploited or otherwise utilized in a foreign country?

Yes

No

If yes:

- (i) *Please provide details of these cases.*
- (ii) *Was it possible for any legal action to be taken by the relevant authorities and/or the affected nationals of your country to prevent, or seek redress for, such exploitation or utilization? If yes, please provide details, including the legal basis for such action was taken (for example, on the basis of reciprocity established in your national laws and regulations).*

Summary of responses to Question II. 25

To this Question II. 25, 13 countries responded "Yes". Three of the responses indicated that they had experienced exploitation of their expressions of folklore mainly on a commercial basis across the globe.⁴¹² Two responded "No" and one response stated that the country was unaware if any of its expressions of folklore had been or were being exploited abroad.⁴¹³

⁴⁰⁸ Hungary.

⁴⁰⁹ Hungary.

⁴¹⁰ New Zealand.

⁴¹¹ United States of America.

⁴¹² Costa Rica; Ghana; Panama.

⁴¹³ Mexico.

A few responses provided cases where expressions of folklore had been utilized abroad, and commercially exploited in foreign, as well as local, markets. In addition, these responses called for proper legal procedures and mechanisms to prevent such utilization and exploitation of expressions of folklore in foreign countries.⁴¹⁴

Question II. 26: Do you believe that an international agreement for the protection of expressions of folklore is necessary?

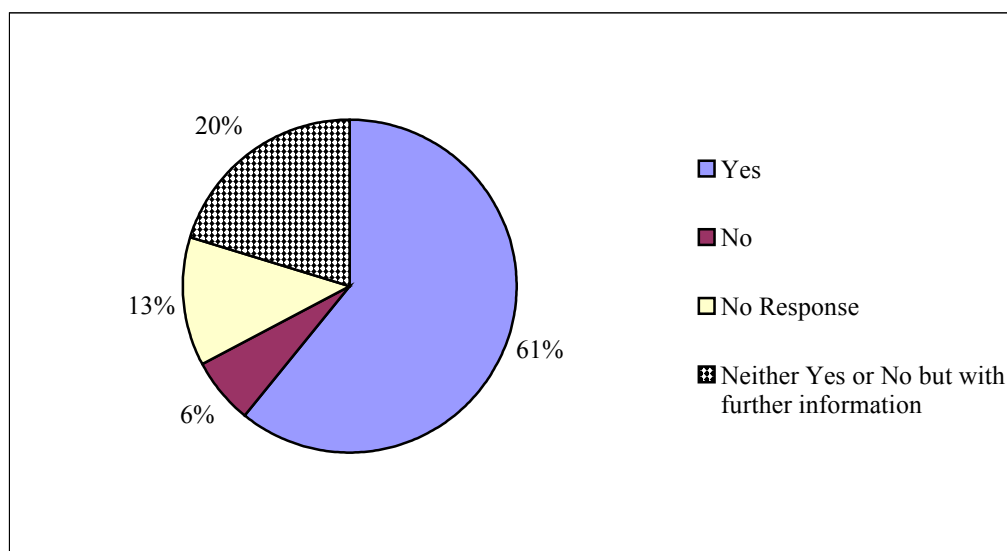
Yes

No

Please provide further information on your answer.

Summary of responses to Question II. 26

To this Question, there were 39 “Yes” responses, four “No” responses⁴¹⁵ and eight responses did not answer this question. In addition, 13 responses did not respond either “Yes” or “No” but provided further information.⁴¹⁶



Those countries answering “Yes” provided various reasons for their answer:

(i) an international agreement would help discover and act against the illegal exploitation of folklore since it will give a chance to detect the foreign abuse;⁴¹⁷

⁴¹⁴ Barbados; Burkina Faso; Burundi; Chad; Costa Rica; Ghana; Guinea; Iran (Islamic Republic of); Namibia; Panama; Russian Federation; Senegal; United Republic of Tanzania.

⁴¹⁵ Australia; Hungary; Switzerland; United States of America.

⁴¹⁶ Antigua and Barbuda; Belgium; Canada; Germany; Greece; Italy; Latvia; Netherlands; New Zealand; Norway, Portugal; Republic of Korea; United Kingdom.

⁴¹⁷ Chad; Colombia; Costa Rica; Mozambique; Zimbabwe.

(ii) two responded that it would lead to a better protection because it was an issue that involved not only a single country, but also several countries of a region;⁴¹⁸

(iii) another responded that greater respect for the intellectual property rights in the traditional knowledge and expressions of folklore of indigenous peoples and local communities, especially at the international level, would preserve and maintain them and protect them against wrongful exploitation through appropriation. The response added that such respect does preserve them, because without respect they would be bound to disappear. The country stated that in addition to mere protection, it would also become a means of defending national cultures;⁴¹⁹

(iv) one country responded that the protection of national character was not sufficient to provide an adequate level of protection for expressions of folklore. The response suggested that an instrument of international law should be adopted to give them eligibility, mainly in countries where the expressions of folklore of other countries were being used commercially;⁴²⁰

(v) one response cautioned, however, that a possible treaty should link itself to intellectual property questions, and should not cover themes covered by other international treaties or processes, or else divergent solutions may be developed.⁴²¹

Those countries answering “No” stated that the endorsement of an international agreement would be premature at this stage.⁴²² For example, one country stated that it was unclear whether it was possible or even desirable to establish a comprehensive, uniform set of rules at the international level to govern the protection of expressions of folklore. The response added that it appeared premature to begin such activity before individual countries have, in collaboration with the communities within their borders, established their own fledgling national regimes for protection within their borders and have gained useful experience in the application and effect of that protection.⁴²³

Of the 13 countries that responded neither “Yes” or “No”, one stated that the country concerned was still soliciting the views of concerned parties on which national and international mechanisms might be the most appropriate to balance the different considerations involved.⁴²⁴ Another country stated that no need for an international instrument had been expressed in the country and whether there is such a need remains to be seen.⁴²⁵ In addition:

(i) one country stated that, in Europe, culture is a national affair, therefore, an international agreement is not the most obvious solution. The protection of the cultural heritage of developing countries is, however, important;⁴²⁶

⁴¹⁸ Costa Rica; Romania.

⁴¹⁹ Panama.

⁴²⁰ Colombia.

⁴²¹ Argentina.

⁴²² Australia; New Zealand; Switzerland; United States of America.

⁴²³ United States of America.

⁴²⁴ Canada.

⁴²⁵ Germany.

⁴²⁶ Netherlands.

(ii) one country stated that it remained positive to the work being undertaken at international level at present. It added that it was important to focus on identifying any insufficiencies of various intellectual property rights of existing international regimes and improving information on existing international regimes and improving information on existing rights and sanction possibilities to communities concerned;⁴²⁷

(iii) another responded that the discussion for international legal framework of protection of folklore might not be unnecessary in the future. The response added that it might, however, be too premature to initiate the discussion because there were quite a few fundamental questions that had to be answered. The country stated that discussions should be focused upon basic issues such as definition, ownership, allocation and exercise of rights, treatment of folklore existing beyond borders. And that it might be much more important to develop common understandings on these issues among WIPO member countries, rather than initiating the discussion for international legal framework;⁴²⁸

(iv) one country was ready to participate constructively in discussions on international initiatives in this area, and remained sympathetic to the aims of some countries to establish a proper international protection regime. The response added that the basic questions which should be addressed first were: what is folklore?; what are the gaps in existing protection?; what acts should be protected?; and who should benefit (given culture spans national boundaries)?;⁴²⁹

(v) one country did, however, support further work in this area by the Intergovernmental Committee to determine whether there is a need for such an international agreement.⁴³⁰

⁴²⁷ Belgium; Norway.

⁴²⁸ Japan.

⁴²⁹ United Kingdom.

⁴³⁰ New Zealand.

Question II. 27: If yes, do you believe that the Model Provisions could serve as an adequate starting point for the development of such an agreement?

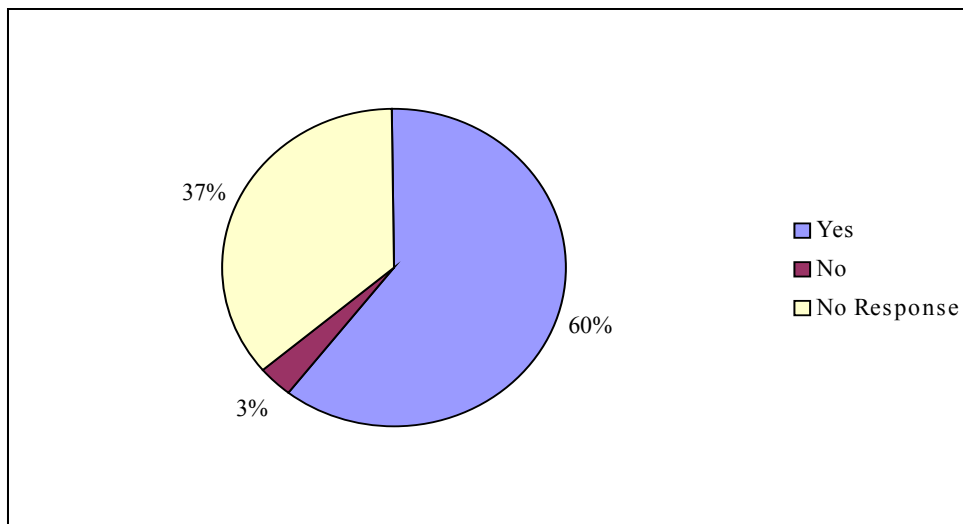
Yes

No

Please provide further information on your answer.

Summary of responses to Question II. 27

To this question, there were 38 “Yes” responses and 2 “No” responses. 23 of the completed questionnaires did not answer this question while one answered neither yes nor no.



Countries provided additional information in their responses:

(i) one country, which responded “Yes”, suggested the examination of the Peruvian Model of Community Rights Legislative System and Japan’s Ancient Shrine and Temple Act and National Treasure Act;⁴³¹

(ii) some responses considered that the Model Provision would provide guidelines for a harmonized legal framework in all member countries and make it possible to have common ground for an agreement. The responses stated that it was an adequate starting point;⁴³²

(iii) one responded that the Model Provisions were the result of substantial work done by experts in the field, and this was why the document had served to make countries more aware of the situation at present and also strengthened the protection afforded to expressions of folklore. The response added that 17 years had already elapsed since the Model Provisions were issued, and due account must be taken of new technology and a

⁴³¹ Jamaica.

⁴³² Colombia; Italy; Zimbabwe.

globalized world in which knowledge of biodiversity is of interest to a great many people, and yet does not benefit the actual holders of the knowledge,⁴³³

(iv) another response stated that the Model Provisions alone would not provide a suitable starting point but should be considered along with other source documents and submissions.⁴³⁴

Question II. 28: What practical proposals do you have regarding the two main problems that prevented the development of an international treaty in 1984 ((i) the lack of appropriate sources for the identification of the expressions of folklore to be protected and (ii) 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.)

Summary of responses to Question II. 28

Several countries made proposals and/or suggestions with regard to the two main problems that prevented the development of an international treaty, these included:

(i) a solution to these problems must be capable of universal application. A WIPO Standing Committee would be a useful forum to deal with both issues;⁴³⁵

(ii) the setting up of national and/or international folklore databases.⁴³⁶ One country stated that it would be open to discussing the establishment of databases regarding the lack of appropriate sources, and the use of alternative dispute resolution means, such as arbitration and mediation, for the resolution of folklore claims involving more than one country in a region. It was suggested that further discussions would be useful even though these practical suggestions may not necessarily facilitate the development of an international treaty.⁴³⁷ Another response stated that the documentary record of expressions of folklore that could qualify for protection should constitute an information system for universal use, which could be modelled on the parameters of the world archive of works protected by copyright, with a view to their collective management. It added that the work of identifying and documenting expressions of folklore in developing countries should be backed up by international cooperation through organizations such as WIPO and UNESCO;⁴³⁸

(iii) a proposal that an international institute be established to identify sources of expressions of folklore.⁴³⁹ One response stated that an international institute should include representatives of all state concerned, possible specialists from the national agencies that are responsible with folklore protection. It was stated that its responsibilities could include the setting up of an international database of expressions of folklore, intermediating conflicts generated by the expressions of folklore that belongs to several countries of a region;⁴⁴⁰

⁴³³ Panama; Togo.

⁴³⁴ New Zealand.

⁴³⁵ Barbados.

⁴³⁶ Egypt; Indonesia; Malaysia; Mexico; Romania; Russian Federation.

⁴³⁷ Canada.

⁴³⁸ Colombia.

⁴³⁹ Croatia; Togo.

⁴⁴⁰ Romania.

(iv) a combined national and international effort should define appropriate sources for the identification of the expressions of folklore to be protected. National agencies that are responsible for the promotion and development of culture should be involved in research and documentation of sources. In the case of expressions of folklore that can be found in several countries of a region, a regional approach to settling such issues is preferred. A system of unified registration and notification by all those countries interested in exploiting the benefits of common folklore would go a long way in solving this problem. An equitable system of sharing the benefits could be established. Notification of one country's intent to register and protect common folklore should be communicated to other countries in the region where the folklore is found;⁴⁴¹

(v) governments should cooperate with each other and with relevant international organizations, such as UNESCO;⁴⁴²

(vi) at the national level, what is needed is the adoption and implementation of policies favorable to protection, archiving, preservation, technical training, research, documentation and public awareness. At the regional level, the creation of a regional organization which would serve as a repository of data submitted from countries as a result of their national efforts. This organization would be comprised of Member States of the region and would be charged with the responsibility of establishing a regional methodology for researching culture, guidelines for benefit-sharing schemes, identifying common expression in the region and the exchange of information between Member States and other regions. In addition, assistance with funding and expertise is needed at the international level to facilitate these proposals. It may be necessary to consider the formation of a world court/tribunal for the preservation/protection of expressions of folklore;⁴⁴³

(vii) regarding the criteria for determination (identification) of expressions of folklore, it might be useful to consider genre features. For example, epochs, fairy tales, legends have the people's heritage as origin, while, on the contrary, novels, essays have authors) and such a criteria might be the absence of an author. Regarding regional folklore, the foundation of Regional Centers for protection and examination of expressions of folklore was suggested. These Centers could deal with the protection of expressions of folklore of countries with similar traditional culture and make competent conclusions on the belonging of a particular expression of folklore to the nation of one or other country;⁴⁴⁴

(viii) the competent and supervisory authorities envisaged in the Model Provisions should identify the expressions of folklore to be protected. Regarding regional folklore, expressions of folklore could be identified and licensed individually where two communities on either side of a border share the same cultures and traditions;⁴⁴⁵

(ix) the issues should be tackled by two international committees and thereafter be referred to a WIPO Diplomatic Conference;⁴⁴⁶

⁴⁴¹ Gambia.

⁴⁴² Iran (Islamic Republic of).

⁴⁴³ Jamaica.

⁴⁴⁴ Kyrgyzstan.

⁴⁴⁵ Namibia.

⁴⁴⁶ United Republic of Tanzania.

(x) the setting up of national committees on cultural heritage can help in identifying expressions of folklore.⁴⁴⁷ One responses added that professional consultants who can undertake surveys in the communities could also be hired;⁴⁴⁸

(xi) one country stated that it had to consider not only the lack of appropriate sources for identification of such expressions, or the lack of workable mechanisms for settling the questions of expressions of folklore operating in one country, but also the identification of the legal rightsholder (which could be, for instance, legitimate to act judicially), and the exclusivity of the origin of such expressions in one country;⁴⁴⁹

(xii) one response stated that cases in which an expression of folklore might be common to two or more countries, or specific to ethnic communities settled on the territory of two or more states, could be a problem bearing in mind that it is governments that exercise the rights in expressions of folklore. It added that if it was to be considered that the peoples or ethnic communities were the owners of the rights in expressions of folklore, and not the governments, the difficulty that arises is obvious, as the recognition and exercise of the rights on behalf of such communities would not be subject to their originating in one particular country or another.⁴⁵⁰ One response stated that on the question of lack of workable mechanism for settling questions of folklore found in more than one country, the proceeds could be ploughed into projects of common interest by both countries instead of trying to share them.⁴⁵¹

Question II. 29: Please provide any other comments or practical experiences regarding the protection of expressions of folklore of foreign countries.

Summary of responses to Question II. 29

A few responses included some additional suggestions, such as:

(a) special reciprocal agreements between countries would be helpful in respect of foreign expressions of folklore, but they should not be the basis for overall protection of expressions of folklore;⁴⁵²

(b) it is necessary to resolve whether the term “competent authority” refers to an authorized representative of each cultural community or the highest political leader of such community;⁴⁵³

(c) national laws should make express provision for the protection of expressions of folklore of foreign countries.⁴⁵⁴

⁴⁴⁷ Romania; Zimbabwe.

⁴⁴⁸ Zimbabwe.

⁴⁴⁹ Italy.

⁴⁵⁰ Colombia.

⁴⁵¹ Zimbabwe.

⁴⁵² Namibia.

⁴⁵³ Philippines.

⁴⁵⁴ Ghana.

III. *Modifications or Adaptations to the Model Provisions*

Question III. 1: *Please provide any suggestions for modifications or adaptations that could be made to the Model Provisions in order that they may be more useful as a model for national, regional or international laws and standards.*

Summary of responses to Question III. 1

Several suggestions for modifications to or adaptations of the Model Provisions were made, such as:

- (i) the Model Provisions should define the terminology used to delimit clearly the ambit and meaning of the desired protection;⁴⁵⁵
- (ii) the Model Provisions should be made available to all States;⁴⁵⁶
- (iii) the inclusion within the scope of the Model Provisions of traditional medicinal practices and methods of healing, textile designs, scientific views and practical traditions, intangible heritage and cultural space;⁴⁵⁷
- (iv) the Model Provisions should provide for international protection;⁴⁵⁸ promote human culture and facilitate cultural relations among nations;⁴⁵⁹ and protect indigenous peoples and endangered community spaces, such as burial sites;⁴⁶⁰
- (v) the Model Provisions should be translated into the official languages of the Member States,⁴⁶¹ and should be updated to suit the current technological environment;⁴⁶²

The following more general suggestions were made:

- (i) indigenous communities and other nationals of a country must understand their respective expressed and implied rights and obligations in cases where authorization to use an expression of folklore has been granted;⁴⁶³
- (ii) fees for the use of expressions of folklore should be variable, and other possible forms of remuneration should be investigated;⁴⁶⁴
- (iii) solutions must be found for cases where more than one community holds the same expression of folklore;⁴⁶⁵

⁴⁵⁵ Argentina.

⁴⁵⁶ Burkina Faso.

⁴⁵⁷ Bhutan; Croatia; Philippines; Viet Nam; Zimbabwe.

⁴⁵⁸ Iran (Islamic Republic of).

⁴⁵⁹ Iran (Islamic Republic of).

⁴⁶⁰ Jamaica.

⁴⁶¹ Kyrgyzstan.

⁴⁶² Malaysia.

⁴⁶³ Argentina.

⁴⁶⁴ Argentina.

⁴⁶⁵ Argentina; Italy.

(iv) where expressions of folklore form the basis of a creation that enjoys intellectual property protection, a form of *droite de suite* should accrue to the community or society that originally protected the expressions of folklore;⁴⁶⁶

(v) WIPO should hold seminars and regional meetings in Member States⁴⁶⁷ and should also establish further Model Provisions that would serve as an example of a special reciprocal agreement on the protection of expressions of folklore of foreign origin;⁴⁶⁸

(vi) the determination of what kind of protection would be effective for expressions of folklore;⁴⁶⁹ the establishment of a code of ethics ensuring respectful approaches to and recognition of traditional scholars - creators, bearers and transmitters of expressions of folklore;⁴⁷⁰ and the repatriation of compensation, *post facto*, in respect of traditional cultural folklore and traditional knowledge works that have been exploited;⁴⁷¹

(vii) protection is to be afforded to expressions of folklore that are also used in the digital environment, on the global information network, the concepts of reproduction and communication to the public, contained in Section 3 of the Model Provisions, should be brought up to date in a manner comparable to what has been done in the WIPO Performances and Phonograms Treaty;⁴⁷²

(viii) the creation of a *sui generis* protection concept within intellectual property.⁴⁷³ One response called for the design of policies, amendments or adaptations in that field so that folklore and indigenous knowledge were specifically mentioned. It stated that one *sui generis* concept would be a kind of protection that is special in relation to what already exists, but was not necessarily different;⁴⁷⁴

(ix) sanctions should be uniform and extend beyond national boundaries.⁴⁷⁵

[Annex II follows]

⁴⁶⁶ Gambia.

⁴⁶⁷ Kyrgyzstan; United Republic of Tanzania.

⁴⁶⁸ Namibia.

⁴⁶⁹ Croatia.

⁴⁷⁰ Jamaica.

⁴⁷¹ Jamaica.

⁴⁷² Colombia.

⁴⁷³ Costa Rica; Lithuania.

⁴⁷⁴ Costa Rica.

⁴⁷⁵ Sierra Leone.

ANNEX II

LIST OF MEMBER STATES SUBMITTING RESPONSES TO THE
QUESTIONNAIRE – WIPO/GRTKF/IC/2/7 - AS AT JANUARY 31, 2002

MEMBER STATE	NAME OF REPRESENTATIVE	TITLE
Antigua and Barbuda	-	Ministry of Justice and Legal Affairs, Office of the Attorney General
Argentina	María Georgina Gerde	Asesoría Legal de Patentes, Instituto Nacional de Propiedad Intelectual
Australia	Fiona Ey	Senior Legal Officer, Attorney-General's Department
Barbados	Christopher Birch	Deputy Registrar, Corporate Affairs and Intellectual Property Office
Belgium	Alain Tacq	Conseiller adjoint, Ministère de la Justice – Service droit d'auteur
Bhutan	Kinley Wangchuk	Deputy Director, Intellectual Property Division, Ministry of Trade and Industry
Bosnia and Herzegovina	Melika Filipan	International Trademark Examiner, Institute for Standards, Metrology and Intellectual Property
Brunei Darussalam	Sharifah Sarinah binti Wan Ibrahim	Legal Counsel, Attorney General's Chambers
Burkina Faso	Assétou Toure	Directrice, Bureau burkinabé du droit d'auteur
	Oussiené Compaore	Juriste, Direction nationale de la propriété industrielle
Burundi	Gabriel Ntagabo	Chef de service des Arts, des spectacles et du droit d'auteur, Ministère de la jeunesse, des sports et de la culture.
Canada	Michèle Gervais	Director, Intellectual Property Policy, Department of Industry

Chad	Oumar Nene Tassy	Directeur, Bureau tchadien du droit d'auteur (BUTDRA)
China	Shi Zongyuan	Commissioner, National Copyright Administration of China
Colombia	Fernando Zapata López	Director General, Dirección Nacional de Derecho de Autor
Costa Rica	Virginia Marín N.	Directora a.i., Registro de la Propiedad Industrial
Côte d'Ivoire	Yao Norbert Etranny	Directeur, Centre national des arts et de la culture
Croatia	Sc. Nikola Kopčić	Director General, State Intellectual Property Office of the Republic of Croatia
The Czech Republic	Michal Beneš Hana Masopustová	Secretary of Cultural Affairs of UNESCO, Ministry of Culture Head of Copyright Section, Ministry of Culture
Ecuador	Nelson Velasco Izquierdo	Presidente del Instituto Ecuatorino de la Propiedad Intelectual (IEPI)
Egypt	Dr. Ahmed Aly Morsi	Professor of Folk Traditions, Cairo University and Advisor to the Minister of Culture
Ethiopia	Getachew Mengistie	Head, Patent Technology Transfer and Development Department
The Gambia	Fola H. Allen	Registrar General, Department of State for Justice
Germany	Irene Pakuscher	Head of the Copyright and Publishing Law Section, Federal Ministry of Justice
Ghana	Kamei Anyimadu-Antwi	Assistant Copyright Administrator, Copyright Office
Greece	D. Kallinikou	Director, Copyright Organization Ministry of Culture

Guinea	Challoub Riad	Directeur général, Bureau guinéen du droit d'auteur
Honduras	Camilo Bendeck	Director General de Propiedad Intelectual, Dirección General de Propiedad Intelectual
Hungary	Dr. Zoltán Kiss	Head of Division, Hungarian Patent Office, Department of Law and International Affairs, Division of Copyright and Harmonisation
Indonesia	A. Zen Umar Purba	Director General of Intellectual Property Rights, Directorate General of Intellectual Property Rights
Iran (Islamic Republic of)	Mohammad Hassan Kiani	Director General, Office for Companies and Industrial Property, Registration Organization for Deeds and Properties
Italy	Raffaele Foglia	Legal Counsellor, Ministry of Foreign Office
Jamaica	Natalie Wilmot	Manager of Copyright and Related Rights, Jamaica Intellectual Property Office
Japan	Ken-Ichiro Natsume	Assistant Director, Ministry of Foreign Affairs, First International Organization Division.
Kenya	Paul Omondi Mbago	Registrar General, Attorney General's Office
Kyrgyzstan	Roman O. Omorov	Director, State Agency of Science and Intellectual Property under the Government of the Kyrgyz Republic (Kyrgyzpatent)
Latvia	Mara Rozenblate	Head of PCT Section, Latvian Patent Office
Lithuania	-	State Patent Bureau
Malaysia	Ismail Jusoh	Director, Intellectual Property Division, Ministry of Domestic Trade and Consumer Affairs

Mexico	Javier Tapia Ramírez	Director de Protección contra la Violación del Derecho de Autor, Instituto Nacional del Derecho de Autor
Monaco	-	Direction de l'expansion économique
Mozambique	Boaventura Afonso	Director, Instituto Nacional Du Livro e Du Disco
Namibia	Tarah Shinavene	Director, Audiovisual Media and Namibia Communications Commission, Ministry of Foreign Affairs, Information and Broadcasting
The Netherlands	H. Y. Kramer	Director of Media, Literature and Libraries, Ministry of Education, Culture and Science
New Zealand	Kim Connolly-Stone	Senior Advisor, Intellectual Property, Ministry of Economic Development
Norway	Maria Duna	Assistant Director General, Norwegian Ministry of Cultural Affairs
Pakistan	Dr. Shamim M. Zaidi	Director, Lok Virsa, Ministry of Culture
Panama	Luz Celeste Ríos de Davis	Directora general del Registro de la Propiedad Industrial (DIGERPI)
The Philippines	Emma C. Francisco	Director General, Intellectual Property Office of the Philippines
Portugal	Jaime Andrez	President du CA, Instituto Nacional da Propriedad Industrial (INPI), Ministerio da Economia
The Republic of Korea	Young-Ah Lee	Deputy Director, Copyright Division, Ministry of Culture and Tourism
Romania	Ionela Naftanaila	Expert, Romanian Copyright Office

The Russian Federation	L.N. Simonova Yu. G. Smirnov N.G. Ponomareva	Head of Division, Russian Agency for Patents and Trademarks (Rospatent)
Senegal	Ndèye Abibatou Youm Diabe Siby	Directeur général, Bureau sénégalais du droit d'auteur
Sierra Leone	Joseph Fofanah	Trade Marks and Patents Officer, Administrator and Registrar-General's Office
Sri Lanka	Kanaganayagam Kanag-Isvaran	Chairman, Advisory Commission, National Intellectual Property Office of Sri Lanka
Switzerland	Martin A. Girsberger	Co-Head, Legal Services, Patent and Design Law Division of Legal and International Affairs, Swiss Federal Institute of Intellectual Property
Togo	Komi Amétépé Ayi	Directeur général, Bureau togolais du droit d'auteur (BUTODRA)
Tunisia	Latifa Mokaddem	Chargée de Mission, Ministère de la Culture
The United Kingdom	Dr. Brian Simpson	Assistant Director, Copyright Directorate, The Patent Office
The United Republic of Tanzania	Stephen Dominic Mtetewaunga	Copyright Administrator, Copyright Society of Tanzania
The United States of America	Robert L. Stoll	Administrator for External Affairs, United States Patent and Trademark Office
Venezuela	Thaimy M. Marquez	Directora del SAPI, Servicio Autónomo de la Propiedad Intelectual (SAPI)

Viet Nam	Do Thanh Bih	Patent Examiner, National Office of Industrial Property of Vietnam
Zimbabwe	E. Munaiwa	The Controller of Patents, Trade Marks and Industrial Designs, Ministry of Justice

[Annex III follows]

ANNEX III

MODEL PROVISIONS FOR NATIONAL LAWS
ON THE PROTECTION OF EXPRESSIONS OF FOLKLORE
AGAINST ILLICIT EXPLOITATION AND OTHER PREJUDICIAL ACTIONS

prepared by the Secretariats of
the United Nations Educational, Scientific and Cultural Organization (UNESCO)
and the World Intellectual Property Organization (WIPO)

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions

[Considering that folklore represents an important part of the living cultural heritage of the nation, developed and maintained by the communities within the nation, or by individuals reflecting the expectations of those communities;

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

Considering that any abuse of commercial or other nature or any distortion of expressions of folklore are prejudicial to the cultural and economic interests of the nation;

Considering that expressions of folklore constituting manifestations of intellectual creativity deserve to be protected in a manner inspired by the protection provided for intellectual productions;

Considering that such a protection of expressions of folklore has become indispensable as a means of promoting further development, maintenance and dissemination of those expressions, both within and outside the country, without prejudice to related legitimate interests;

The following provisions shall be given effect:]

SECTION 1

Principle of Protection

Expressions of folklore developed and maintained in [insert the name of the country] shall be protected by this [law] against illicit exploitation and other prejudicial actions as defined in this [law].

SECTION 2

Protected Expressions of Folklore

For the purposes of this [law], “expressions of folklore” means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of the country] or by individuals reflecting the traditional artistic expectations of such a community, in particular:

- (i) verbal expressions, such as folk tales, folk poetry and riddles;
- (ii) musical expressions, such as folk songs and instrumental music;
- (iii) expressions by action, such as folk dances, plays and artistic forms or rituals;

whether or not reduced to a material form; and

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

SECTION 3

Utilizations Subject to Authorization

Subject to the provisions of Section 4, the following utilizations of the expressions of folklore are subject to authorization by the [competent authority mentioned in Section 9, paragraph 1,] [community concerned] when they are made both with gainful intent and outside their traditional or customary context:

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

SECTION 4

Exceptions

1. The provisions of Section 3 shall not apply in the following cases:

- (i) utilization for purposes of education;
- (ii) utilization by way of illustration in the original work of an author or authors, provided that the extent of such utilization is compatible with fair practice;
- (iii) borrowing of expressions of folklore for creating an original work of an author or authors;

2. The provisions of Section 3 shall not apply also where the utilization of the expressions of folklore is incidental. Incidental utilization includes, in particular:

- (i) utilization of any expression of folklore that can be seen or heard in the course of a current event for the purposes of reporting on that current event by means of photography, broadcasting or sound or visual recording, provided that the extent of such utilization is justified by the informatory purpose;

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

SECTION 5

Acknowledgement of Source

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

SECTION 6

Offences

1. Any person who willfully [or negligently] does not comply with the provisions of Section 5, paragraph 1, shall be liable to ...
2. Any person who, without the authorization of the [competent authority referred to in Section 9, paragraph 1,] [community concerned] willfully [or negligently] utilizes an expression of folklore in violation of the provisions of Section 3, shall be liable to
3. Any person willfully deceiving others in respect of the source of artifacts or subject matters of performances or recitations made available to the public by him in any direct or indirect manner, presenting such artifacts or subject matters as expressions of folklore of a certain community, from where, in fact, they have not been derived, shall be punishable by
4. Any person who publicly uses, in any direct or indirect manner, expressions of folklore willfully distorting the same in a way prejudicial to the cultural interests of the community concerned, shall be punishable by

SECTION 7

Seizure or Other Actions

Any object which was made in violation of this [law] and any receipts of the person violating it and corresponding to such violations, shall be subject to [seizure] [applicable actions and remedies].

SECTION 8

Civil Remedies

The sanctions provided for in [Section 6] [Sections 6 and 7] shall be applied without prejudice to damages or other civil remedies as the case may be.

SECTION 9

Authorities

- [1.] For the purpose of this [law], the expression “competent authority” means ...
- [2.] For the purpose of this [law], the expression “supervisory authority” means ...]

SECTION 10

Authorization

- 1. Applications for individual or blanket authorization of any utilization of expressions of folklore subject to authorization under this [law] shall be made [in writing] to the [competent authority] [community concerned].
- 2. Where the [competent authority] [community concerned] grants authorization, it may fix the amount of and collect fees [corresponding to a tariff [established] [approved] by the supervisory authority.] The fees collected shall be used for the purpose of promoting or safeguarding national [culture] [folklore].
- [3. Appeals against the decisions of the competent authority may be made by the person applying for the authorization and/or the representative of the interested community.]

SECTION 11

Jurisdiction

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

SECTION 12

Relation to Other Forms of Protection

This [law] shall in no way limit or prejudice any protection applicable to expressions of folklore under the copyright law, the law protecting performers, producers of phonograms and broadcasting organizations, the laws protecting industrial property, or any other law or international treaty to which the country is party; nor shall it in any way prejudice other forms of protection provided for the safeguard and preservation of folklore.

SECTION 13

Interpretation

The protection granted under this [law] shall in no way be interpreted in a manner which could hinder the normal use and development of expressions of folklore.

SECTION 14

Protection of Expression of Folklore
of Foreign Countries

Expressions of folklore developed and maintained in a foreign country are protected under this [law]

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

[Annex IV follows]

ANNEX IV

DRAFT TREATY FOR THE PROTECTION OF EXPRESSIONS OF FOLKLORE
AGAINST ILLICIT EXPLOITATION AND OTHER PREJUDICIAL ACTIONS⁴⁷⁶

The Preamble

The Contracting States,

Considering that expressions of folklore, developed and maintained by communities of various countries or by individuals reflecting the expectations of those communities, represent an important part of the living cultural heritage of mankind,

Considering that modern technology facilitates the commercialization of expressions of folklore beyond the frontiers of the countries in which they originate,

Considering that such commercialization of expressions of folklore may lead to the improper exploitation and distortion of the cultural heritage involved,

Considering that the international regulation of the protection of expressions of folklore against illicit exploitation and other prejudicial actions has thus become indispensable as a means of promoting their further development, authentic maintenance and dissemination, without prejudice to legitimate interests in having access to them,

Considering that expressions of folklore constituting manifestations of intellectual creativity deserve legal protection in a manner analogous to that provided for works protected by copyright,

have agreed as follows:

ARTICLE 1

Protected Expressions of Folklore

For the purposes of this Treaty, “expressions of folklore” mean productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community, or by individuals reflecting the traditional artistic expectations of their community, in particular:

- (i) verbal expressions, such as folk tales, folk poetry and riddles;
- (ii) musical expressions, such as folk songs and instrumental music;
- (iii) expressions by action, such as folk dances, plays and artistic forms or rituals, whether or not reduced to a material form; and
- (iv) tangible expressions, such as

⁴⁷⁶ UNESCO/WIPO/FOLK/GEI.1/2, 2off.

Annex IV, page 2

- (a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes;
- (b) musical instruments;
- (c) architectural forms.

ARTICLE 2

National Treatment

Each Contracting State shall accord the same protection to expressions of folklore originating in other Contracting States as it accords to expressions of folklore originating in its own territory, subject to the protection specifically guaranteed, and the exceptions specifically provided for, by this Treaty.

ARTICLE 3

Competent Authorities

1. Each Contracting State shall designate one or more competent authorities (hereinafter referred to as “the competent authority”) which shall administer the protection, under this Treaty, of expressions of folklore and to ask for the enforcement of the protection in other Contracting States of such expressions originating in its own territory.

2. Each Contracting State shall, at the time of depositing its instrument of ratification, acceptance or accession, notify the Secretary-General of the United Nations, by means of a written declaration, of all designations made in accordance with paragraph (1) and giving full information concerning the rights and obligations of the authority thus designated. Any subsequent changes in the designation, or in the said rights and obligations, shall be promptly notified in like manner.

ARTICLE 4

Utilizations Subject to Authorization

1. The following utilization of the expressions of folklore shall require written authorization by the competent authority of the Contracting State in which the expression of folklore originated, if the utilization is intended to be made for profit in another Contracting State:

- (i) the publication, reproduction, distribution or importation, for the purpose of distribution to the public, of reproductions or recordings of recitations or performances of expressions of folklore;
- (ii) the public recitation or performance of expressions of folklore, as well as any transmission to the public by wireless means, by wire, or by any other means, of expressions of folklore or of their recitations or performances, whether live or recorded.

2. Each Contracting State shall, at any time of depositing its instrument of ratification, acceptance or accession, notify the Secretary-General of the United Nations, by means of a written declaration, of the kinds the main characteristics and the source of the artistic expressions of folklore originating in its territory the utilization of which is subject to the written authorization of its competent authority. Subsequent changes shall be notified in like manner.

ARTICLE 5

Request and Grant of Authorization

1. The application for authorization under article 4 shall be submitted by the prospective utilizer of the expression of folklore (hereinafter referred to as “the applicant”), [through the competent authority of the Contracting State of which the utilizer is a national or where he or it has his or its habitual residence or headquarters] to the competent authority of the Contracting State in which the expression of folklore originates, duly in advance; the application shall unequivocally specify, in written form, the expression of folklore intended to be used, its source, as well as the nature and extent of the intended utilization.

2. The authorization shall be given in written form without undue delay; it may be made conditional upon the payment of an equitable remuneration whose amount, in the absence of agreement, shall be fixed by the competent authority of the Contracting State in which the expression of the folklore originates. No application shall be refused, except where the intended use would be prejudicial to the honour or dignity of the originating country or community. Any refusal shall be justified in writing.

ARTICLE 6

Exceptions

1. The provisions of Article 4 shall not apply where the utilization is:

- (i) for purposes of education;
- (ii) for creating an original literary or artistic work.

2. Furthermore, the provisions of Article 4 shall not apply where the utilization is incidental. Incidental utilization includes, in particular:

- (i) utilization of any expression of folklore that can be seen or heard in the course of a current event for the purposes of reporting on that current event by means of photography, broadcasting or sound or visual recording, provided that the extent of such utilization is justified by the informatory purpose;
- (ii) utilization of objects containing the expressions folklore which are permanently located in a place where they can be viewed by the public, if the utilization consists in including their image in a photograph, in a film or in a television broadcast.

ARTICLE 7

Acknowledgement of Source

1. In all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, by mentioning the community and/or geographic place in which it has originated.
2. The provisions of paragraph (1) shall not apply in the case of creation of original works inspired by expressions of folklore or in the case of the incidental use of expressions of folklore.

Article 8

Offenses

Each Contracting State shall punish by penal sanctions any act of

- (i) willful or negligent non-compliance with the requirement obtaining authorization under Article 4;
- (ii) willful or negligent non-compliance with the requirement of acknowledgement of source according to Article 7;
- (iii) willful deception of others in respect of the origin of expressions of folklore;
- (iv) willful distortion, in any direct or indirect manner, of an expression of folklore in a way prejudicial to the honour, dignity or cultural interests of the community in which it originates.

ARTICLE 9

Seizure

Each Contracting State shall provide for the possibility of the seizure of any object which was made or imported in a way constituting an offence under this Treaty and any returns from such offenses.

ARTICLE 10

Civil remedies

Each Contracting State shall provide for the possibility of claiming damages or other civil remedies where the utilization was made without the required authorization or payment or in any other manner causing economic harm to the State or community in which the utilized expression of folklore has originated.

ARTICLE 11

Relations to Other Forms of Protection

This Treaty shall in no way limit or prejudice any protection applicable to expressions of folklore under national laws or any international treaty protecting copyright, the rights of performers, producers of phonograms and broadcasting organizations, or industrial property, nor shall it in any way prejudice other forms of protection provided for the safeguard and preservation of folklore.

ARTICLE 12

Deposit and Signature of the Treaty

This Treaty shall be deposited with the Secretary-General of the United Nations and shall be open until... for signature by any State that is [a member of the United Nations, any of the Specialized Agencies brought into relationship with the United Nations, or the International Atomic Energy Agency, or is a party to the Statute of the International Court of Justice] [a party to the Berne Convention for the Protection of Literary and Artistic Works or the Universal Copyright Convention].

ARTICLE 13

Entry into Force of the Treaty

1. This Treaty shall be subject to ratification or acceptance by the signatory States. It shall be open for accession by any State covered by Article 12.
2. Instruments of ratification, acceptance or accession shall be deposited with the Secretary-General of the United Nations. The Treaty shall enter into force three months after the deposit of the fifth instrument of ratification, acceptance or accession.
3. For each State ratifying, accepting or acceding to this Treaty after the deposit of the fifth instrument of ratification, acceptance or accession, the Treaty shall enter into force three months after the date of the deposit of the respective instrument with the Secretary-General of the United Nations.
4. It is understood that at the time a State becomes bound by this Treaty, it will be in a position in accordance with its domestic law to give effect to the provisions of the Treaty.

ARTICLE 14

Denunciation of the Treaty

Any Contracting State may denounce this Treaty. Denunciation shall take effect 12 months after the date on which the Secretary-General of the United Nations has received the relevant declaration.

ARTICLE 15

Notifications by the Secretary-General of the United Nations

1. The Secretary-General of the United Nations shall promptly notify the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director-General of the World Intellectual Property Organization of:

- (a) signatures of this Treaty;
- (b) the deposit of instruments of ratification, acceptance or accession;
- (c) the date of entry into force of this Treaty;
- (d) notifications and declarations received from Contracting States under this Treaty.

2. The Directors General of the United Nations Educational, Scientific and Cultural Organization and the World Intellectual Property Organization shall promptly communicate to the Contracting States any notification received from the Secretary-General of the United Nations.

ARTICLE 16

Languages of the Treaty

1. This Treaty shall be signed in a single copy in...[specify the language(s)], [all texts being equally authentic].

2. Official texts of this Treaty shall be established, after its having entered into force, jointly by the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director-General of the World Intellectual Property Organization, in consultation with the interested Governments, in...[specify the languages].

[Annex V follows]

ANNEX V

LIST OF SUGGESTED TASKS

Possible Task 1: Enhanced legal-technical assistance for the establishment, strengthening and effective implementation of existing systems and measures for the legal protection of expressions of folklore at the national level.

Possible Task 2: Updating the Model Provisions, 1982.

Possible Task 3: Extra-territorial protection.

Possible Task 4: Practical case study on relationship between customary laws and protocols and the formal intellectual property system.

[End of Annex V and of document]