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THE PROTECTION OF FOLKLORE

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PAST ATTEMPTS TO WORK OUT INTELLECTUAL PROPERTY PROTECTION

FOR FOLKLORE CREATIONS

1. *The protection of expressions of traditional culture is not supposed to be a "South-North" issue* since each nation has valuable and cherished traditions with corresponding cultural expressions, *but* it may not be a surprise that*the need for intellectual property protection of expressions of folklore is more strongly perceived in developing countries*. Folklore is an important element of the cultural heritage of every nation. It is, however, of particular importance for developing countries, which recognize folklore as a means of self expression and social identity. All the more so since, in many of those countries, folklore is truly a living and still developing tradition, rather than just a memory of the past.

2. Improper exploitation of folklore was also possible in the past. However, *the spectacular development of technology,* the newer and newer ways of using both literary and artistic works and expressions of folklore (audiovisual productions, phonograms, their mass reproduction, broadcasting, cable distribution, Internet transmissions, and so on) *have multiplied abuses*. Folklore is frequently commercialized without due respect for the cultural and economic interests of the communities in which it originates. And, in order to better adapt it to the needs of the market, it is often distorted or mutilated. At the same time, *no share of the returns from its exploitation is conceded to the communities who have developed and maintained it.*

3. The absence of appropriate protection particularly concerns the creators and manufactures of objects of genuine folk arts. Without such protection, *markets are frequently inundated by falsified and low-quality counterfeit "folk-art" products manufactured by mass-production technology and distributed through aggressive marketing methods*. This kind of piratical activity is a serious attempt against the very phenomenon of folk art, it seriously prejudices the legitimate moral and economic interests of the communities concerned and, *as one of the consequence, it undermines the chance for survival of those indigenous artisan SMEs without which the very existence of a given kind of folklore is endangered.*

4. The issue of the intellectual protection of folklore has been on the agenda time and again since the 1967 Stockholm revision of the *Berne Convention*, where a provision was included in the Convention (Article 15(4)) which was said to settle this issue. This provision reads as follows: "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"

5. Since 1967**,** *a number of developing countries have provided in their statutory law for "copyright" protection of folklore* (mainly in Africa, where there are nearly 30 countries whose copyright laws contain provisions to this effect). *Nevertheless, it seems that copyright is not the right means for protecting expressions of folklore*. The problem is, of course, not with the forms, the esthetic level or the value of folk creations. Just the opposite, their forms of expression do not differ from those of literary and artistic works enjoying copyright protection, and they are frequently even more beautiful than many creations of identifiable authors. The basic difference may be found in the origins and the creative process of folklore. Many folklore expressions were born much time before copyright emerged, and

they went through a long-long chain of imitations combined with step-by step minor changes as a result of which they were transformed in an incremental manner. *Copyright categories, such as authorship, originality or adaptation simply do not fit well into this context*. (It cannot be said that the creator or creators of artistic folklore is an unknown author or are various unknown authors. The creator is a community and the creative contributions are from consecutive generations. In harmony with this, many communities and nations regard their folklore as part of their common heritage and being in their ownership, rightly so. It is obvious that it is not an appropriate solution to protect these creations as "unpublished works" with the consequence that, 50 years after publication, their protection is over. The nature of folklore expressions does not change by the incidental factor that they are "published"; they remain the same eternal phenomena. And, if they deserve protection, it should be equally eternal.)

6. The legislators of the above-mentioned developing countries seem to have recognized this, and the provisions adopted by them are in harmony with this recognition. Sometimes their regimes are characterized as special *domaine public payant* systems. In the reality, however, "works of folklore" are not necessarily in the *domaine public* in the sense that they could be used without authorization just against payment; authorization systems exist and are operated on behalf of some collective *ownership* (the collectivity or the nation concerned). Neither are these systems necessary "*payant*". In fact, although these regulations are included in copyright laws, they represent specific *sui generis* regimes.

7. *Since it turned out that the copyright model offered by the Berne Convention is not suitable for the international protection of folklore, attention turned towards some possible sui generis options*. A series of meetings were held under the aegis of WIPO and UNESCO between 1978 and 1982, and finally in June 1982 a big UNESCO/WIPO Committee of Governmental Expert meeting -- of which the author of this paper happened to be the Chairman – adopted *"Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Acts*". The Model Provisions, *inter alia*, foresaw a *sui generis system* with a certain authorization procedure for any utilization made both with gainful intent and outside the traditional or customary context of folklore (which means that, for example SMEs established within the given communities to create and manufacture artistic folklore objects in harmony with folklore traditions and customs do not need authorization according to the Model Provisions even if they are working for market use with gainful intent) Among the *acts against which adequate protection is requred*, the Model Law indicated (i) use without authorization, (ii) violation of the obligation to indicate the source of folklore expressions, (iii) misleading the public by distributing counterfeit objects as folklore creations (a kind of "passing off"), and the public use of distorted or mutilated folklore creations in a manner "prejudicial to the cultural interests of the community concerned" (violation of a kind of collective "moral right").

8. In December 1984 a WIPO/UNESCO Group of Experts considered *a draft treaty for the international protection of expressions of folklore* based on the provisions of the Model Provisions. This idea, however, *was rejected* by industrialized countries (which raised two realistic problems; namely the absence of any reliable source of identification of folklore creations in many countries; and the thorny question of "regional folklore", that is, folklore shared by more than one – or sometimes many – countries).

9. The issue of international protection for folklore creations was *raised during the preparatory work of the so-called WIPO "Internet treaties***"** mentioned below. Several developing countries proposed that a new attempt should be made to try to work out some kind of *sui generis* system. This request was repeated at *the UNESCO/WIPO World Forum on the Protection of Folklore* held in Phuket, Thailand, in April 1997.

10. The above-mentioned suggestions were, of course, taken into consideration during the preparation of *WIPO's program for the 1998-1999 biennium*. That was the first program in which the visions of the new Director General, Dr. Kamil Idris, how to lead the Organization and the international intellectual properly system into the third millennium were already reflected and developed.

11. The program contained *responses to the issues raised concerning the intellectual property aspects of the protection of the expressions of traditional culture*. It had taken into account the experience of the inefficient solution included in the Berne Convention and of the fiasco of the 1984 draft treaty, and reflected the recognition that any international settlement might only have a chance for success and be workable if it was preceded by a truly thorough preparatory work.. The relevant sub-program provided for a number of fact-finding missions and thorough studies, for regional consultations and for active contribution to the establishment of adequate databases and regional cooperation schemes. All this was *built in a more general program extending to all possible intellectual property issues of "traditional knowledge, innovation and culture***".**

12. The ambitious program of WIPO in this field has brought about the first positive tangible results. In July 2000, a very thorough *study* was published *by the International Bureau of WIPO on "Intellectual Property Needs and Expectations of Traditional Knowledge Holders"* containing a report on a number of fact-finding missions in various parts of the world. It reviews in detail also the different legal means applied for the protection of folklore, which extend beyond copyright or copyright-type *sui generis* protection also to certain industrial property means particularly relevant from the viewpoint of the creation, manufacture and distribution of tangible folklore creations, such as collective trademark, protection of geographical indication and the protection against unfair competition.

13. The current biennial *program of WIPO for 2002-2003* follows the same objectives and has even extended them. What is especially promising is that, the Assemblies of Member States of WIPO have established a new permanent body: the *International Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*. Since then the Standing Committee has held fourth sessions and just at it was just at the fourth one, in December 2002, that the issues of intellectual property protection of expressions of folklore (or, as in the documents and debates of the Standing Committee it is frequently called, "traditional cultural expressions") were discussed, for the first time in quite a detailed manner.

II. THE PROTECTION OF FOLKLORE ON THE AGENDA OF THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE (OUTLINE)

14. At the December 2002 session of the Intergovernmental Committee, several documents dealt specifically with the issues of the legal protection of expressions of folklore (or as the documents frequently referred to them, "traditional cultural expressions"). In particular, three documents may be recommended to those who are interested in this subject matter; namely the following ones:

-- "Preliminary systematic analysis of national experiences with the legal protection of expressions of folklore" (document WIPO/GRTKF/IC/4/3).

-- "Presentations on national and regional experiences with specific legislation for the legal protection of traditional cultural expressions (expression of folklore)" (documents WIPO/GRTKF/IC/4/INF/2-5.

-- "Technical cooperation on the legal protection of expressions of folklore – brief report" (document WIPO/GRTKF/IC/4/4).

15. The framework of this paper would not be sufficient to reflect the very rich contents of these documents (which, with the exception of the last one, are quite voluminous). They are available at request at the International Bureau of WIPO. Here only a list of the questions covered is offered as an outline, mainly on the basis of the first document.

16. The meaning, scope and nature of "expressions of folklore " and "traditional cultural expressions"

17. Practical examples of traditional cultural expressions for which legal protection is desired

18. Objectives of indigenous peoples and traditional communities.

19. Analysis of use of existing intellectual property rights and *sui general* approaches:

a) literary and artistic productions – copyright law:

-- traditional cultural expressions as "productions in the literary and artistic domain,"
-- limitations on the use of copyright,
-- the originality requirement,
-- the identifiable author requirement,
-- the fixation requirement,
-- limited term,
-- concerns that copyright fails to provide defensive protection.

b) *sui generis* approaches.

c) regional and international protection.

d) performances of traditional cultural expressions – performers' rights

e) collection, recordal and dissemination of traditional cultural expressions:

-- experiences of existing archives,
-- legal protection of collections and databases.

f) distinctive signs – law of trademarks and geographical indications

-- registration by third parties of indigenous words, names and marks as trademarks,
-- measures to prevent such registration,
-- registration of trademarks by indigenous peoples and traditional communities,
-- geographical indications.

i) traditional designs – industrial designs law

-- positive protection of traditional designs,
-- design registration procedure and its implications for indigenous peoples and traditional communities,
-- facilitating use of industrial design law
-- defensive protection
-- *sui generis* protection of designs

ii) unfair competition (including passing off).

20. Paragraphs 180 to 185 of the document contained the following conclusions:

"181. In so far as literary and artistic productions are concerned:

(i) Copyright protection is available for tangible contemporary traditional cultural expressions, and also for intangible contemporary expressions in jurisdictions not requiring fixation. However, the limited term of protection and certain other features of (such as that it does not protect style or method of manufacture) makes copyright protection less attractive to Indigenous peoples and traditional communities and individuals. In addition, divergences between the rights of a copyright holder and parallel customary responsibilities can cause difficulties for Indigenous creators. Therefore, while copyright protection is possible in certain cases, it may not meet all the needs and objectives of Indigenous peoples and traditional communities.

(ii) For those States that do not wish to provide further protection for traditional cultural expressions beyond that already provided by copyright, further efforts could be directed towards enabling and facilitating access to and use of the copyright system by Indigenous peoples and traditional communities, as discussed in Part V.

(iii) Pre-existing traditional cultural expressions, and mere imitations and recreations of them, are unlikely to meet the originality and identifiable author requirements. They remain for copyright purposes in the public domain.

(iv) States which wish toprovide fuller protection for traditional cultural expressions beyond current copyright could either consider whether certain amendments to copyright law and practice are necessary and justified, and/or they may consider establishing *sul generis* systems, as some have already done. While it may be possible to improve upon the protection already provided by copyright to contemporary tradition-based cultural expressions by means of amendments to copyright law and practice, it seems that a more thorough evolution of existing standards in the form of a *sui generis* system may be necessary in order to protect pre-existing folklore. Specific systems could seek to build upon existing institutional processes and structures, such as existing collective management societies and existing cultural heritage archives.

> "182. With regard to performances of traditional cultural expressions, the WPPT now makes it clear that performances of "expressions of folklore" are also protected. Use of performers' rights can indirectly protect the performed cultural expression itself. However, the TRIPS Agreement, 1994 and the WPPT, 1996 do not extend to the visual aspects of performances. The extension of performers' rights to the audiovisual sphere would significantly strengthen the protection of traditional cultural expressions.
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> "183. Further exploration is needed on the relationship between the activities of researchers and archives, on the one hand, and the legal protection of traditional cultural expressions on the other. The ultimate goal should be to promote complementarity by establishing appropriate legal and structural linkages between the activities of fieldworkers and archives, and the national and regional systems for the legal protection of traditional cultural expressions. The legal-technical cooperation program offered by the WIPO Secretariat will include working closely with existing cultural heritage archives and institutions in this regard.
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> "184. In so far as distinctive Indigenous or traditional signs are concerned, States are already experimenting with certain specific mechanisms to prevent their unauthorized or inappropriate registration as trademarks. Positive use is also being made of the trademark system by Indigenous peoples to guarantee the authenticity of their arts and crafts. The kind of practical measures discussed above in Part V and which concern easing use of the IP system apply here too.
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> "185. Regarding traditional designs:

(i) The requirement of "newness" or "originality" can present difficulties for those traditional designs already commercialized and/or disclosed to the public. However, there are national experiences which show that traditional designs can be registered under industrial design laws. It would seem, however, that contemporary designs made by current generations of society could more easily meet the "new" or "original" requirement than would truly old and well-known designs. Further empirical information would be helpful.

(ii) Aside from this and other more technical questions, there are other conceptual and practical disadvantages to the industrial design system from the viewpoint of Indigenous peoples and traditional communities.

(iii) In respect of the conceptual issues (such as limited time period and collective rights protection), *sui generis* mechanisms have been established in some cases, and further experience is needed with them. Regarding the more practical questions (such as costs of acquisition and enforcement of rights), States could if they so wishes address these in various way - see further Part V above."

21. The next fifth session of the Intergovernmental Committee will be held in Geneva from July 7 to 15, 2003.

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