E

WIPO/CR/KRT/05/8
ORIGINAL: English
DATE: February 2005

REPUBLIC OF THE SUDAN

WORLD INTELLECTUAL PROPERTY ORGANIZATION

WIPO NATIONAL SEMINAR ON COPYRIGHT, RELATED RIGHTS, AND COLLECTIVE MANAGEMENT

organized by
the World Intellectual Property Organization (WIPO)

in cooperation with
the Ministry of Culture

Khartoum, February 28 to March 2, 2005

THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE

Prepared by Dr. Mihály Ficsor, Director,
Center for Information Technology and Intellectual Property (CITIP), Budapest

I. INTRODUCTION

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.*

II. ATTEMPTS TO USE THE COPYRIGHT SYSTEM

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.

II. WIPO-UNESCO MODEL PROVISIONS AND DRAFT TREATY

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).

III. NEW START: FROM THE PHUKET WORLD FORUM TO THE ESTABLISHMENT OF THE INTERNATIONAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

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 *programs of WIPO for 2002-2003 and 2004-2005* followed the same objectives and have even extended them. As a promising new step, the Assemblies of Member States of WIPO established a permanent body: the *International Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*. Since then the Standing Committee has held seven sessions. It was 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 a truly detailed manner. Since then the

Committee has held thorough discussions on these issues, including at its last, seventh, session in November 2004, and it will certainly continue doing so at its next, eighth, session in June 2005.

14. Since the second session of the Intergovernmental Committee, Mr. Henry Olsson, who is one of the speakers at this seminar, has always been elected and reelected as Chairman Committee. Thus, he will speak about these new developments.

[End of document]