



UNESCO-WIPO WORLD FORUM ON THE PROTECTION OF FOLKLORE



organized by
the United Nations Educational, Scientific and Cultural Organization (UNESCO)
and
the World Intellectual Property Organization (WIPO)
in cooperation with the Department of Intellectual Property
Ministry of Commerce Government of Thailand

Phuket, Thailand, April 8 to 10, 1997



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organisé par
l'Organisation des Nations Unies pour l'éducation, la science et la culture
(UNESCO)

et
l'Organisation Mondiale de la Propriété Intellectuelle (OMPI)

en coopération avec
le Département de la propriété intellectuelle
du Ministère du commerce
du Gouvernement de Thaïlande

Phuket, Thaïlande, 8 - 10 avril 1997

FÓRUM MUNDIAL UNESCO-OMPI SOBRE LA PROTECCIÓN DEL FOLCLORE

organizado por
la Organización de las Naciones Unidas para la Educación, la Ciencia y la Cultura
(UNESCO)

y
la Organización Mundial de la Propiedad Intelectual (OMPI)

en cooperación con
el Departamento de la Propiedad Intelectual
Ministerio de Comercio
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PREFACE

In the 1970's and 1980's, the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO) organized a series of meetings concerning the intellectual property protection of folklore, as a result of which the UNESCO/WIPO Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore adopted, in Geneva in July 1982, the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions.

In addition, the General Conference of UNESCO adopted at its 25th Session in 1989, the Recommendation on the Safeguarding of Traditional Cultures and Folklore, providing for measures that may be taken by the States for the identification, conservation, preservation and dissemination of folklore, its protection and the development of international cooperation.

On the basis of the above-mentioned Model Provisions and Recommendation, a number of member States of UNESCO and WIPO—particularly, developing countries—have introduced legal, administrative and other measures for the preservation and protection of folklore.

During the joint sessions of the WIPO Committee of Experts on a Possible Protocol to the Berne Convention and the WIPO Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, held in Geneva in February 1996, the delegations of a number of developing countries proposed that the issues of the protection of expressions of folklore should be addressed again at the international level. As a result of the discussions that followed, the Committees unanimously recommended to the Governing Bodies of WIPO 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. After the adoption of the recommendation, it was stated by some delegations that, due to the subject matter of the proposed forum, the involvement of UNESCO would be desirable.

Both the Director General of WIPO and the representative of UNESCO who attended the said joint session of the Committees expressed readiness to cooperate in this matter, and, in June 1996, final agreement was reached between the two Organizations on the joint organization of the UNESCO/WIPO World Forum on the Protection of Folklore.

At the invitation of the Government of Thailand, the World Forum was organized by UNESCO and WIPO in cooperation with the Department of Intellectual Property, Ministry of Commerce, Government of Thailand, in Phuket, Thailand, from April 8 to 10, 1997.

The present volume contains the texts of the speeches and papers presented at the World Forum as well as of the "Plan of Action" which the participants in the World Forum adopted.

The World Forum was attended by about 180 persons from 50 countries. A list of participants appears at the end of the volume.

UNESCO and WIPO are grateful to the Government of Thailand, and particularly to the Department of Intellectual Property, Ministry of Commerce, for hosting this important event, and express their thanks to the speakers and moderators who have contributed to the success of the World Forum.



Lourdes Arizpe
Assistant Director-General for Culture
United Nations Educational, Scientific and
Cultural Organization (UNESCO)



Mihály Ficsor
Assistant Director General
World Intellectual Property Organization (WIPO)

CONTENTS

	<i>Page</i>
<i>PREFACE</i>	iii
<i>CONTENTS</i>	v
<i>PROGRAM</i>	1
<i>OPENING SESSION</i>	5
<i>FIRST WORKING SESSION:</i> <i>PRESERVATION AND CONSERVATION OF EXPRESSIONS</i> <i>OF FOLKLORE</i>	13
<i>SECOND WORKING SESSION:</i> <i>LEGAL MEANS OF PROTECTION OF EXPRESSIONS OF FOLKLORE</i> <i>IN NATIONAL LEGISLATION</i>	105
<i>THIRD WORKING SESSION:</i> <i>ECONOMIC EXPLOITATION OF EXPRESSIONS OF FOLKLORE</i>	151
<i>FOURTH WORKING SESSION:</i> <i>INTERNATIONAL PROTECTION OF EXPRESSIONS OF FOLKLORE</i>	185
<i>CLOSING SESSION AND ADOPTION OF A PLAN OF ACTION</i>	233
<i>LIST OF PARTICIPANTS</i>	237

PROGRAM

Prepared by the Secretariat of UNESCO and the International Bureau of WIPO

Tuesday, April 8, 1997

- 10:00 Opening Session
- H.E. Somporn Asavahame, Deputy Minister of Commerce, Ministry of Commerce, Bangkok
M. Salah Abada, Chef, Section de la créativité et du droit d'auteur, Division de la créativité, des industries culturelles et du droit d'auteur, UNESCO
Dr. Mihály Ficsor, Assistant Director General, WIPO, Geneva
- 10:45 Break
- 11:15 First working session: Preservation and conservation of expressions of folklore
- Moderator: Mr. Weerawit Weeraworawit, Director of Technical and Planning Division, Department of Intellectual Property, Ministry of Commerce, Bangkok
- The experience of Africa
 Mrs. Betty Mould-Iddrisu, Copyright Administrator, Accra
- The experience of Asia
 Dr. Shubha Chaudhuri, Director, Archives and Research Centre for Ethnomusicology, American Institute of Indian Studies, New Delhi
- 13:00 Lunch break
- 15:00 First working session: (continuation)
- Moderator: Mr. Weerawit Weeraworawit
- The experience of the Pacific region
 Professor Kamal Puri, University of Queensland, Brisbane
- The experience of Latin America and the Caribbean region
 Sr. José Iturriaga, Director General de Culturas Populares, Consejo Nacional para la Cultura y los Artes (CONACULTA), México
- 16:15 Break
- 16:45 The experience of North America
 Mr. Yves Moreau, Projects Officer, Folklore Canada International, St. Lambert, Quebec, Canada
- The experience of Western Europe
 Sr. Enrique Cámara de Landa, Profesor, Titular de Etnomúsica, Departamento de Musicología Universidad de Valladolid, España
- 18:00 End of discussions

Wednesday, April 9, 1997

- 9:30 Second working session: Legal means of protection of expressions of folklore in national legislation
- Moderator: Dr. Mihály Ficsor
- Protection by copyright and neighboring rights
 Mr. Weerawit Weeraworawit
- Protection by industrial property law and by legal provisions concerning obligations
 Mr. Pierre-Yves Gautier, Professeur, Université de Paris II
- 11:00 Break
- 11:30 Protection of those who make available and of those who collect expressions of folklore
 Mr. Tomoaki Fujii, Professor and Deputy Director General, Chubu Institute for Advanced Studies, Tokyo
- Protection of the collection of expressions of folklore; the role of libraries and archives
 Ms. Marybeth Peters, Register of Copyrights, Copyright Office, Library of Congress, Washington, D.C.
- 13:00 Lunch break
- 15:00 Third working session: Economic exploitation of expressions of folklore
- Moderator: Mr. Salah Abada
- The experience of Africa
 Mr. Thomas Manou Yablaih, directeur de la culture de l'Agence de coopération culturelle et technique (ACCT), Paris
- The experience of the Americas
 Mr. Ricardo Gomes Lima, Chief Research Department, Coordinator of Folklore and Popular Culture, Rio de Janeiro
- 16:15 Break
- 16:45 The experience of Asia and the Pacific region
 Mr. Hong Yongping, Deputy Director and Associate Professor, Policy Research Division, Ministry of Culture, Beijing
- The experience of Europe
 Mr. Henry Olsson, Special Government Adviser, Ministry of Justice, Stockholm
- 18:00 End of discussions

Thursday, April 10, 1997

09:30 Fourth working session: International protection of expressions of folklore

Moderator: Mr. Weerawit Weeraworawit

UNESCO's action with a view to safeguarding and promoting traditional culture and folklore

Mrs. Noriko Aikawa, Chief of Intangible Heritage Section, Division of Arts and Cultural Life, UNESCO, Paris

Follow-up to the 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore

Mr. Marc Denhez, Barrister & Solicitor, Ottawa

10:45 Break

11:15 1967, 1982, 1984: Attempts to provide international protection for folklore by intellectual property rights

Dr. Mihály Ficsor

UNESCO's recommendation and the prospects for the international protection of folklore

Mr. Salah Abada

12:30 Closing Session

Mr. Banphot Hongthong, Director General, Department of Intellectual Property, Ministry of Commerce, Bangkok

Mr. Salah Abada

Dr. Mihály Ficsor

OPENING SESSION

Speakers: H.E. Somporn Asavahame, Deputy Minister of Commerce, Ministry of Commerce, Bangkok

M. Salah Abada, Chef, Section de la créativité et du droit d'auteur, Division de la créativité, des industries culturelles et du droit d'auteur, UNESCO, Paris

Dr. Mihály Ficsor, Assistant Director General, WIPO, Geneva

WELCOMING AND KEYNOTE ADDRESS

**by H.E. Somporn Asavahame
Deputy Minister of Commerce
Ministry of Commerce of Thailand**

On behalf of the Government and people of Thailand, I would like to extend our warmest welcome to all of you to Phuket at the World Forum on the Protection of Folklore. We were honored to learn that Thailand was chosen as the venue of this historic event. We are proud to serve as the venue where the spirit of cooperation will thrive and where intellectual property will be seen as the tool for common benefits of the developed and developing countries alike. Folklore knows no boundaries. It is not governed by the level of economic development but by the creativity in the mind of mankind through the endless span of time. Against this background, a number of us have already had common bonds through the sharing of similar expressions of folklore. In any case, we are really delighted to welcome all of you to the beauty and hospitality of Phuket and Thailand.

This Forum gives us a chance to prove that, if we want something done, we have to do it ourselves. The existing international standards of intellectual property protection do not cover folklore. It is treated as belonging to the public domain without any protection whatsoever. It has been a victim of its own success, that is, its popularity and long period of usage have worked against it. It is widely used and enjoyed in any given society for so long that it fails to satisfy the requirements of copyright or any intellectual property right known and enforced at the moment. In simple words, there is no international standard for the protection of folklore. If we want to have that kind of standard, we have to work for it. We have to establish it.

The Forum also shows very clearly that the process of creating or forging international standards is not a bed of roses. It is full of difficulties even with the very definition of folklore itself. That is why the presence of all of you here today is remarkable. You and I are here to face a challenge. A challenge of trying to do something different. We are embarking together on a very difficult journey. We start at the end of the Twentieth Century. I hope that our journey will not continue until the end of the Twenty-first Century. Our journey is difficult but it should be short. We are here to map out what we have to do in the near future at the turn of the century. We are here to prove that intellectual property is relevant to folklore, that it is relevant to the material and cultural well-being of both the developed and developing countries alike, and that it is possible to have international protection of folklore.

Distinguished participants, ladies and gentlemen, I truly believe that the only way to solve the difficulties I have mentioned is the common determination and genuine desire to cooperate closely. The starting point is to believe that it is fair to give protection to folklore. With this common belief, we will be able to use intellectual property to protect our common heritage in the form of folklore. At the dawn of the Twenty-first Century, we are witnessing the common attempt to protect folklore, some of which may have dated from the dawn of time.

At this point, I wish to express my most sincere thanks to WIPO and UNESCO for hosting this Forum and particularly, Mr. Ficsor and Mr. Abada, as well as their capable colleagues. My thanks also go to all the participants. You have the most important task of all. Through your combined experiences and efforts, you will contribute much to the success of this World Forum. I wish to offer my thanks and appreciation to the interpreters. Without your service, it will be difficult to create genuine understanding. My last thanks go to the administrators and the people of Phuket for the warm hospitality.

Distinguished participants, ladies and gentlemen, with this optimistic note in the power of the imagination of mankind and the respect for fairness, I wish all of you a successful deliberation and a happy stay in Phuket as well as our Songkran welcome. I now declare this World Forum open.

ALLOCUTION D'OUVERTURE

**de Salah Abada
Représentant du Directeur général de l'UNESCO, Paris**

Monsieur le Ministre,
Mesdames, Messieurs,

Il m'est agréable au nom du Directeur général de l'UNESCO, Monsieur Federico Mayor, de remercier le Gouvernement de Thaïlande pour l'accueil chaleureux qu'il nous a réservé et de le féliciter pour l'excellente organisation de ce Forum mondial UNESCO/OMPI sur la protection du folklore, dans ce cadre magnifique de Phuket, qui illustre bien la beauté et l'hospitalité légendaire de la Thaïlande.

Je voudrais aussi remercier les rapporteurs qui, par leur expertise exploitant les divers aspects du processus de sauvegarde, de promotion et de protection juridique du folklore dans le monde, éclairent utilement les thèmes que le Forum aura à traiter.

Nos remerciements vont également aux représentants des gouvernements, des organisations internationales intergouvernementales et non-gouvernementales et des milieux intéressés, qui ont bien voulu participer, aussi nombreux, à cet effort de relance de l'étude internationale sur la préservation et la conservation de la culture traditionnelle et populaire, en réponse au besoin d'une normalisation plus appropriée de la coopération internationale en la matière, en cette phase d'avènement de la société de l'information.

Le folklore en tant qu'expression de l'identité culturelle et sociale des nations, joue un rôle important dans l'épanouissement individuel et collectif de l'authenticité des peuples et de la promotion économique et sociale de la société en développement.

Source privilégiée de la connaissance de la richesse culturelle traditionnelle dans le monde, il fait également l'objet d'un attrait particulier dans les échanges entre les nations.

Le folklore est par ailleurs, en raison de sa nature de patrimoine culturel traditionnel, essentiellement immatériel, exposé à la disparition rapide, à la déformation et à l'appropriation illégitime.

Avec cette condition d'élément important du domaine culturel à sauvegarder et à promouvoir, le folklore est naturellement au centre des préoccupations de l'UNESCO.

Notre organisation s'est attachée, au cours des vingt dernières années, à promouvoir la normalisation des voies et moyens de protection physique et juridique du folklore et à développer dans le cadre de son programme propre ou, en coopération avec l'OMPI, une action générale de soutien à sa préservation dans la vie sociale.

L'action de normalisation a abouti à l'adoption de la Recommandation sur la sauvegarde de la culture traditionnelle et populaire, par la 25^e session de la Conférence générale de l'UNESCO, le 16 novembre 1989 et à la mise au point de dispositions types UNESCO/OMPI sur la protection nationale des expressions intellectuelles du folklore, adoptées par un Comité d'experts gouvernementaux en juillet 1982.

Dans son programme régulier d'action, l'UNESCO s'est attachée à développer l'expertise des pays en développement en matière d'identification, de conservation, de diffusion et de protection juridique du folklore au niveau national. Elle a aussi dynamisé la coopération entre les diverses Institutions régionales spécialisées dans la sauvegarde du folklore. L'objectif était de renforcer les capacités endogènes nationales et de coopération régionale, dans la préservation et la mise en valeur de la culture traditionnelle et populaire, dans le cadre des normes établies par le consensus international.

Des résultats appréciables ont accompagné cette action. L'expertise organisationnelle et la capacité des pays en développement à mettre en oeuvre les moyens de protection concrète de ce patrimoine ont été développés dans différentes régions du monde.

La promotion de la protection de la culture traditionnelle et populaire à l'échelle des besoins des pays en développement reste cependant une tâche de grande envergure qui s'inscrit dans la durée et nécessite l'intervention de moyens considérables.

Le problème aujourd'hui est de savoir comment répondre au besoin d'une prise en charge significative de la culture traditionnelle et populaire dans le monde, à travers une mobilisation appropriée des potentialités nationales, de la coopération inter étatique et du soutien international nécessaire, et quelles sont les perspectives d'une protection juridique internationale qui sécurise davantage les échanges de coopération en la matière.

Votre Forum a été organisé, avec un programme spécifique, pour prospector cette problématique. Nous espérons qu'à travers un débat fructueux autour de la diversité des expériences dans le monde, vos travaux éclaireront les moyens qui aideront au mieux les États à adapter leur politique et leur programme d'action et de coopération dans la prise en charge de la protection de leur folklore national, et indiqueront à l'UNESCO et à l'OMPI les directions d'actions à explorer pour adapter la coopération internationale en la matière, au nouveau contexte de la société de l'information.

Je souhaite plein succès à vos travaux à la recherche de cette contribution.

Et en terminant, j'aimerais renouveler au Gouvernement de Thaïlande nos sincères remerciements pour sa chaleureuse hospitalité et l'excellente organisation de ce Forum.

OPENING SPEECH

**by Mihály Ficsor
Assistant Director General
WIPO, Geneva**

His Excellency,
Ladies and Gentlemen,

It is a great honor and pleasure to me to greet, on behalf of the World Intellectual Property Organization (WIPO), the participants in this World Forum on the Protection of Folklore, which WIPO has organized in cooperation with UNESCO and the Department of Intellectual Property of the Ministry of Commerce of Thailand.

This is an extremely important meeting, and it may be even of a historical importance, both from the viewpoint of the preservation of our common cultural heritage and from the viewpoint of the establishment of a better balanced system for the protection of intellectual creations of all over the world. The Forum may serve as a basis and a source of further dynamic activities; it may offer a kind of new beginning in this field.

When I speak about a new beginning, I refer to certain attempts in the past at trying to work out a comprehensive protection system for folklore which might use certain means of intellectual property, but which, at the same time, would also take into account the particular features of folklore. When I refer to particular features, I mean, of course, that it is the result of creative contributions of a number of generations and that, therefore, any intellectual property type rights in it could hardly be related to certain individual—physical or legal—persons as it is the case with traditional intellectual property rights; any such rights may only be exercised at the level of the ethnic groups which are the source of the folklore creations, or at the level of the various nations to which this cultural heritage belongs.

We know very well that our efforts in the past did not bring about the desired results in the field of intellectual property protection of folklore and particularly not at the international level.

Now we are about to try again. And there are good reasons that we do so just now. In the last 10-15 years, a new situation has emerged in respect of the conditions and requirements of the protection of intellectual creations as a result of the impact of new technologies, particularly digital technology and the Internet, the globalization of the market, and the increasing role of trade considerations.

We may say that, in the traditional fields of intellectual property, the international community has responded to the new challenges relatively quickly, if we consider the adoption of the TRIPS Agreement in April 1994 and the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty in December 1996.

It was during the last period of the preparatory work of the latter treaties that the need for revisiting also the question of the protection of folklore was raised due to the new developments mentioned and that the organization of this Forum was proposed.

The proposal has come from developing countries mainly, and this is quite understandable since it is in developing countries mainly that folklore is not just something left over from the past, but a living tradition, a part of everyday's life and one of the main forms, or at least an important form, of creativity.

WIPO, along with UNESCO, has responded to this proposal positively and quickly and we are ready to continue our work in this field.

I thank, on behalf of WIPO, the Government of Thailand for the invitation addressed to us to organize the Forum in this country and in this beautiful island, for its decisive contribution to the organization of the meeting, and for its warm hospitality extended to the participants.

I also thank the folklore and intellectual property experts who have accepted our invitation and have traveled here from the various continents to share their knowledge and experience with the participants.

I wish you great success for this Forum and particularly that it fulfill our hopes and become a new start for something which later, and not in a very far-away time, may produce positive results for human creativity and culture.

***FIRST WORKING SESSION: PRESERVATION AND CONSERVATION OF
EXPRESSIONS OF FOLKLORE***

Moderator: Weerawit Weeraworawit, Director of Technical and Planning Division, Department of Intellectual Property, Ministry of Commerce, Bangkok

Speakers: Betty Mould-Iddrisu, Copyright Administrator, Accra

Shubha Chaudhuri, Director, Archives and Research Centre for Ethnomusicology, American Institute of Indian Studies, New Delhi

Kamal Puri, University of Queensland, Brisbane

José Iturriaga, Director General de Culturas Populares, Consejo Nacional para la Cultura y las Artes (CONACULTA), México

Yves Moreau, Projects Officer, Folklore Canada International, St. Lambert, Quebec, Canada

Enrique Cámara de Landa, Profesor, Facultad de Filosofía, Letras y Música, Universidad de Valladolid, Spain

THE EXPERIENCE OF AFRICA

by Mrs. Betty Mould-Iddrisu, Copyright Administrator, Accra

Like several academic concerns, there is no single definition of folklore that enjoys universal acceptance. Areas of controversy involve the materials that should count as folklore, as well as the people or sociological units whose cultural products should be so regarded. Folklore as a term has often provoked derogatory, and even hostile reactions among certain sections of the academic community.

On the more positive side, folklore was and is still held to be of great value to society. At the time the term emerged in Europe, concern had been expressed about the need to collect, document and preserve aspects of "folk ways" that stood the risk of being lost to an increasingly industrialized and urbanized modern life style. There was a strong belief that the very soul of the people was enshrined in those old ways of life, those aspects of culture that had survived the ravages of time, like traditionally transmitted manners, customs, superstition, proverbs, tales, songs, etc. should not be lost.

The term "folklore" then referred to a combination of customs, superstition, artifacts, as well as verbal art forms such as tales, legends, proverbs, songs, etc., and these were understood to be the products of marginalized, tradition-oriented people within the society, especially in Europe. This perception of folklore was roughly equivalent to culture, especially the so-called "sub-culture" of the lower classes, a perception that was soon to be challenged¹.

At the beginning of the 20th century, however when the discipline of anthropology emerged, anthropologists, particularly cultural anthropologists, attempted to differentiate their field of investigation from that of folklore, by equating folklore with verbal art, that aspect of artistic culture that was expressed or handed down orally, or by word of mouth, such as tales, proverbs, legends, songs. Thus to the anthropologist, folklore was equivalent to verbal art or oral literature. When folklore eventually emerged as an autonomous academic discipline, especially in the United States in the 1960s, not only was the content of folklore redefined but the folklorists began applying highly specialized skills and modes of analysis to the materials of folklore.

Currently the term folklore and the materials relevant to it range in scope from tradition-oriented items associated with old folks and old ways of life, to modern day artistic interaction and expressions of various types, such as jokes told at factories and other work places, student pranks and initiation rites, extending even to the expressive culture of drug addicts, and several other modern day phenomena.

We may observe for a start that at least some of these conceptions of folklore and the attitudes they imply, would little serve our purpose here in Africa. In any case, the concept of folklore in Africa has not been wholly accepted by some conservative Euro-American scholars. Presuming that Africa is still almost wholly rural or traditional, they argue that one cannot conceive of a meaningful study of folklore in an African context where the emergence of a plurality of cultures, or more specifically, the emergence of a so-called "high culture" is only just beginning.

Such arguments notwithstanding, not only are there trained African and other folklorists who are currently collecting, documenting and analyzing materials of folklore, there is a major Folklore Department in at least one African University, Khartoum in the Sudan. The Nigerian Folklore Society, which was founded in 1980, is now a well-established organization of professional folklorists, and has recently launched an ambitious nation-wide project "to sponsor research and publication of a multi-volume Nigerian Folklore Directory of all the genres and expressions of folklore in the 374 languages in the country."²

¹ Dr. Yankah, Dr. Asiamah, Dr. Owusu-Bempong & Prof. Anyidoho - Unpublished Report - National Folklore Board Ghana - 1992
² Nigerian Folklore News No. 2 [March 1991]

The materials which trained folklorists collect and study have also been documented by several other interested persons, scholars, missionaries, broadcasters, cultural workers and other individuals especially in the colonial era, who are not necessarily trained folklorists, but to whom we owe much of the pioneering work in the field.

It is not possible therefore in the light of the controversy and differing opinions to attempt a cut-and-dried definition of folklore. It should be recognized that the primary concern of folklore in Africa should be with a specific set of cultural traditions in oral circulation. However, it must be noted that there are many folklorists working in Africa and elsewhere who focus mostly on oral or verbal acts and traditions. Folklore in Africa should be understood as covering the complex total of cultural heritage.

Defined in this way, we would recognize that the field covers not just some simple forms of cultural expression, but many of the most complex and classic forms of our cultural legacy. The Ghanaian Copyright Law of 1985 actually defined folklore as thus:

"Folklore means all literary, artistic and scientific works belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic communities of Ghana or by unidentified Ghanaian authors and any such works designated under the Copyright law to be works of Ghanaian Folklore"

The Expert Committees of the UNESCO General Assembly of Technical and Legal Experts on the safeguarding of folklore defines folklore as follows:

"Folklore (in a broader sense, traditional and popular folk culture) is a group oriented and tradition based creation of group or individuals reflecting the expectations of the community as an adequate expression of its cultural and social identity; its standards and values are transmitted orally by imitation or by other means. Its forms include among others language, literature, music, dance, games, mythology, rituals customs, handicrafts, architecture and arts"³.

If folklore is socially based and communally owned, as suggested by the UNESCO definition, then it appears to be a legitimate exercise to go about the safeguarding of folklore through such measures as specific legislation to protect works of folklore such as is being done in several African countries.

It is important that any African regional attempt at a folklore documentation program be sensitive to the question of national authorship of various expressions of folklore. Many earlier definitions of folklore insist that all folklore is necessarily the creation of the community at large, thus it becomes a problem even nationally to determine ownership. This position seems to have been adopted by PNDC Law 110 the Copyright Law of Ghana. The fact, however, is that such a view of folklore is now out of date. Individual authorship and creativity is a recognized fact in current approaches to folklore. The examples of such figures as Vinoko Akpalu of the Ewe tradition of funeral songs and Maame Afua Abasaa of the Akan Nnwonkoro tradition, should leave us in no doubt about the role of individual creativity in certain forms of folklore. This point is clearly acknowledged in the now widely-publicized document of the World Intellectual Property Organization (WIPO), "Protection of Expressions of Folklore".

It is presently recognized that works of folklore were created by individuals. Works of folklore were, however, communally used and enjoyed. Such communal use over a long period of time took over the recognition or the role of individuals in the creation of works of folklore.

The definition in these Model Provisions embraces the results of both collective and individual development of the traditional artistic heritage, since the generally applied criterion of "impersonal" creativity does not always correspond to reality in the evolution of folklore. The personality of the artist is often an important factor in folklore expressions and individual contributions to the development and maintenance of such expressions may represent a creative source of enrichment of inherited folklore if

³ UNESCO Report 1982

they are recognized and adopted by the community as expressions corresponding to its traditional artistic expectations.⁴

We are all aware that the varied problems and the complexity inherent in attempting to document and preserve expressions of folklore lie at the very root of the community based nature of the subject. African folklore knows no boundaries, does not recognize the principle of nationality and national borders. It must be remembered that Africa was only partitioned by the superpowers in the nineteenth century. The scramble for a "slice" of Africa did not take into consideration ethnicity, language, color, religion or common traditions and culture. In the case of Ghana for example, our neighboring country, Togo, was carved away from us merely in order to satisfy the demand of Germany after World War I to have a share of the African Continent. Later, in some other imperialist wranglings, Togo was then handed over to France. Yet, the tribes in the southern part of Ghana and those now in present day Togo, are one and the same tribe - the Ewes; some of the Ewe Tribe even spreads as far as present day Benin. The borders are often completely artificial, and in the words of Dr. Julius K. Nyerere, completely "balkanized"⁵ houses straddle two countries; common languages, traditions and indeed families share life on both sides of the border, yet some are Ghanaian and others Togolese. Some speak English and come from an Anglo-Saxon jurisprudential background and others French with the Civil Law doctrine.

This same problem is multiplied all over the African continent, especially when one takes the situation in East Africa, specifically, Rwanda, Zaire and the resultant genocide between Tutsi and Hutu tribes who straddle the border of several countries in Southern Africa.

The major obstacle associated with the preservation of African expressions of folklore has always been in its documentation and preservation on a nation by nation basis. Take the example of the Ghanaian "Kente," which is the unique technique of weaving cloth. In West Africa, there are three countries which make and use various forms of "Kente" and its weaving traditions - Ghana, Côte d'Ivoire and Togo.

"Kente" is one of the most exploited forms of African folklore tradition that can be found world-wide, especially in the United States of America, yet, it is an acknowledged fact that in Ghana there is a tiny village in the largest Ghanaian Kingdom, the Ashanti, which has become associated with Kente, by the name of Bonwire. There, one finds the most unique forms of weaving cloth - the weavers there are those who weave the cloth or tartans for the "Ashantehene" or King of the Ashanti and other principal and sub-chiefs. In fact, in the olden days, there could be found one of the earliest forms of copyright.

It is trite to note that any attempt to document folklore on an African Regional basis must involve a concerted national effort in the first instance and the political will power at the regional basis. Nationally, most African countries have neither specific legislation protecting expressions of folklore nor a national register of folklore. It takes an enormous amount of political goodwill for states to cede part of their traditions and culture which is what would inevitably have to happen. It has been observed that, in some instances, folklore and its documentation may thus actually hinder national consolidation, and evolve with a troublesome or even dangerous degree of political jingoism. This is particularly true of countries constituted of several ethnic groups, language groups, or populations of different national background⁶ - this observation would hold true of the greater part of Africa.

In a program for documentation of folklore in Ghana, commissioned by the National Folklore Board of Trustees, the Technical Committee broke down four major areas of expressions of folklore in its attempt to document them. The experts contended that, especially for African culture, there is a considerable overlapping among the four divisions:⁷

⁴ WIPO/GIC/CNR/B/88DU17, p.5

⁵ Speech delivered by Dr. Julius Nyerere on 6th March 1997 - International Conference Centre, Accra, Ghana

⁶ Nationalism and Identity Workshop and Conference of National & Regional Audio-visual Archives - 1988 Oslo

⁷ Dr. Yankah, Dr. Asiamah, Dr. Owusu-Bempompong & Prof. Anyidoho - Unpublished Report - National Folklore Board Ghana - 1992

- A. **Material Culture:** representing the various manifestations of what is sometimes called "physical folk life." Material culture involves processes and products of our traditional techniques, skills, recipes, formulas, etc., such as were manifested in traditional architecture, crafts, costumes, cooking utensils, tools, furniture, etc., in short, basic folk or traditional technology. In the Ghanaian cultural context, one can immediately cite some well-known traditions of pottery, beads, linguist staffs, stools and other royal paraphernalia, adinkra, Kente, fuguo, masks and other sculpture, etc. In Uganda, the same traditions and adornments of their kings persist and also form part of their material culture which can be found in the palaces of their kings.

It must be noted here that the interest lies in the tools and implements of the past, the present, and the future. For the folklorist, some questions to be answered would be how these traditional materials were made, and the skills with which they were used to solve some of the fundamental problems of survival. What are the technical skills of the people who made these tools and implements? How, for instance, do the people make and keep their farms, build their homes, make their clothes, prepare their food, design their furniture, often relying mostly on materials available in their natural environment. Ultimately, how the accumulated knowledge in this aspect of life was transmitted from one generation to another, and what changes or adaptations may have become necessary in response to changing life styles and to changes in ecology and the general material conditions of life.

- B. **Social Folk Custom:** In this aspect of folklore, often, the "emphasis is on group interaction rather than individual skills and performance."⁸ In this regard, for the African cultural region, festivals represent probably the richest, and certainly the most complex expression of social folk custom. These are recurring moments of special significance during which small or large social units participate in celebrations, often with both secular and religious significance. Other manifestations of social folk custom are linked with traditional medicine, traditional religion, recreation and games.
- C. **Performing Folk Arts:** The performing arts in folk tradition include music, dance, drama, and mime. In the African context, one finds considerable interface between one performing art form and another, and also between the performing arts on the one hand, and other aspects of folklore, such as social folk custom (e.g. festivals) and especially oral literature or verbal art. African dance has often been described as poetry in motion. Such terms as festival drama, ritual drama, or drum poetry, alert one to the fact that some of the analytical categories are more theoretical than practically valid. Often one is reminded of the "integrative principle" in African performing arts tradition.
- D. **Oral Literature/Verbal Art:** This broad area covers what is sometimes called "expressive literature", described by one folklorist as "spoken, sung, and voiced forms of traditional utterance that show repetitive patterns";⁹ and they are generally transmitted through time and space by word of mouth. There are, however, certain specialized forms in Africa that may not necessarily be verbal, though they may have a verbal basis. The poetry of horns and drums are probably the best example. Under Oral Literature or Verbal Art, one may distinguish certain large subdivisions, some of which are identified below;

Folklore Narratives:

- Folk tales: e.g. Anansesem (Akan) or Gii (Ewe)
- Dilemma Tales: e.g. Alobalo (Ewe)
- Myths
- Legends
- Epics

⁸ Dr. Yankah, Dr. Asiamah, Dr. Owusu-Bempong & Prof. Anyidoho - Unpublished Report - National Folklore Board Ghana - 1992
⁹ Nketia African Tradition of Folklore INTERGU - Jahrbuch 1979

- Divination Narratives
- Oral Historical Narratives: e.g. family, town, clan/lineage narratives
- Jokes & Rumors
- Etiological Tales: Tales of origin/explanation
- Special Personal Experience Narratives: e.g. in Concert Party Drama

Folk songs/Poetry:

In ethnomusicology, three broad categories of song are sometimes identified:

1. *Occasional Songs:*
 - Life Cycle Songs: songs often identified with specific occasions in the life cycle, such as birth, naming/outdooring, puberty, death
 - Occupational Songs: songs often identified with specific occupations, e.g. hunting, fishing, weaving
 - Worship/Religious: songs of deities
 - Songs of the Court/Palace
 - War Songs
 - Songs of Abuse
2. *Recreational:* Songs performed mainly for leisure, though they may sometimes be performed on special occasions: e.g. borborbor (Ewe), ayabomo maiden songs (Nzoma), kpanlogo (Ga). kinka (Ewe), gome, game songs, note these forms have been influenced by popular music - "highlife"
3. *Incidental:* Performed mostly as incidental to some other act, e.g. lullabies, work songs.

To these three main types a special category may be added for such forms as mboguo, the sung story, etc. It is important to note that the classification of folk songs may be approached differently, and that most of the forms identified above are indeed not only songs in the general sense of the word, but are often highly specific forms of poetry.

Recited/Spoken Forms:

- Proverbs
- Riddles
- Appellations/Praise or Poetic Names
- Poetic Insults
- Praise Poetry, e.g. apae, amoma, etc.
- Libation Poetry
- Magical Formulas and Incantations, e.g. gbesa

Special Forms:

- Drum/Horn Poetry & related forms, e.g. the poetry of atumpan, dondon, xylophone

When a survey is conducted amongst various African countries which have attempted documentation and preservation of their experiences of folklore, we find the same or similar problems running through their attempts.

However, if individual countries are unable to do this as has been the experience in Africa until recently, can we then meaningfully ask the international community to compensate us for their economic exploitation?

An increasing number of countries have over the past ten years initiated documentation projects in respect of one or more of the subdivisions mentioned by Anyidoho in the Ghanaian Technical Committee's Report.

One finds the preservation of expressions of material or physical culture undertaken by national museums and in the palaces of the traditional rulers, shrines and homes of the community dotted all over Africa.

African experiences at Archives in the formal sense of the word have generally not proved that successful, because the National Archives is primarily set up in order to document and chronicle the government's affairs and not to preserve expressions of folklore which may be found as an ancillary activity of Archives.

The maintenance of an archival centre may be an extremely expensive and hazardous affair as the attempt at the computerization of the Information Centre of the International Centre for Bantu Civilization (CICABA) based in Gabon proved.

One of the Centre's objectives was the establishment of a regional information system in Central, Eastern and Southern Africa, that would help disseminate information and data on Bantu civilization.¹⁰ Among its top priorities were the promotion of information exchange and assistance to member states in the strengthening of the capacity for the collection, storage, and dissemination of cultural data.

The Centre initially employed eleven people; its material resources ranged from micro-computers to micro-filming equipment, including audio-visual equipment and international telecommunication facilities. Automation and the use of the of the latest technologies of data processing were decreed to be "basic" to the successful functioning of the Information Centre setup at CICIBA. Thus, international cooperation was forthcoming initially in the acquisition of appropriate materials. However, this cooperation-operation only envisaged sending the most sophisticated French technology and equipment to Gabon. The fact that the Centre lacked human resources in computerization of data processing, the pioneering features of the project and sophisticated equipment not always compatible with the existing technology in Gabon were acquired. It was a fact that, equipment came at random and could not fit into most of the preliminary needs. An example: a microbase from the USA never worked, because its use was never defined, and it was damaged after a thunderbolt!

The terminals for Minitel use which were acquired, could not be installed, since at the time of installation the appropriate Videotex equipment did not operate in Gabon.

To give more detail as to the malfunctioning basis of the Centre, the three Apple microcomputers proved to be a reasonable choice, but no maintenance service existed in Libreville or this equipment. After three years, when specially qualified personnel had to be recruited due to French cooperation-operation, it was discerned that the Apple microcomputers were obsolete as the volume of data to be processed could not be stored on such equipment. Two IBM personal computers XT then had to be acquired, offering an increased storage capacity of 10 megabytes each. Five years after the Centre was established, the Centre's data bank was able to offer on-line retrieval services, with the installation of two bimodal terminals. Questions could then be treated both by questioning the local files developed within CICIBA, and external databases hosted by on-line service dealers.

The audio-visual unit presently lacks qualified personnel, and its relationship with the department of ethnomusicology, which also possesses equipment for sound recording, is still to be defined. With the envisaged establishment of micro stations within member states, a program of sensing existing recordings on Bantu oral tradition, an ethnomuseology, is planned with a view to publishing catalogues on Bantu audio-visual archives. I am unable to say categorically whether this laudable idea ever saw the light of day!

¹⁰ The Computerization of the Information Centre of CICIBA - Sagbo P. Dandjinou 1988 - Oslo.

The above has only highlighted one attempt at archiving and the resultant problems, in first the establishment, and then maintenance, of such a system. You will find that many African folklorists in almost all their writings are optimistic about the impact that modern technology may have on their work. I would contend that this situation may rather work in reverse, especially in Africa. The problems enumerated above in the use of technology, often chosen by so called "experts" from developed countries are classic and widespread. These people, more often than not, hardly know anything about the environment in which the technology is going to be used in Africa; additionally, African nations have to develop a "culture of maintenance". We have all been witnesses to fancy state-of-the-art equipment standing unused or broken down merely for lack of regular maintenance, or a small part which has to be obtained from abroad. I am not going further into why we continue to choose the wrong things or accept projects which are unsuitable. As African experts, one must be able to now face the future with more optimism and know-how to avoid falling into such pitfalls.

There are many ways of preserving African expressions of folklore such as music today. The traditional ways of preserving music for example, in Africa have been through its practice and the traditional teaching of it. Generations hand down these expressions to other generations and the system and tradition are perpetuated and renewed over the years. It is in a way the same system by which our languages and life styles are preserved. Every new generation learns to speak as the generation before it did, learns to cook and eat the same kind of food their ancestors ate, and sing, dance and worship in the same way. But it is a fact that lifestyles alter with time: a language grows as new generations are born and add their own inventions to the store and use of words, even new methods of cooking the same foods emerge, just as some dance steps and musical styles get altered slightly, if not significantly. Preservation does not and should not, therefore mean stagnation. It does not necessarily negate continued growth and expansion. It is indeed this system of preservation that keeps African traditional forms alive, and continuously growing and developing.

Western civilization has brought some new ways of preserving music. Recorded samples of African music abound on tapes, phonograph records and now compact disc and CD ROM in the sound tape and record libraries of Broadcasting/Radio and Television Corporations, research and educational institutions and documentation centres all over the world. Also, attempts have been made to document African music in print - in books, monographs, and sheet music, and of course the 20th Century marvel, the film. I have already pointed out that in spite of their immense usefulness, some of those new ways are not without their drawbacks. However, when there is written evidence of a work of art, its preservation for posterity is ensured, in that one who reads can always go to the records to find out what they contain. Stories that are written down, for example, may be said to be subject to a lesser possibility of distortion than those handed down by oral tradition. So thus, a lot can be said for literary documentation as a process of preserving traditions.

In Africa today, there are various formats of traditional music (the indigenous music of the people), popular music, 'learned' or art music, both African and Western. Many young people are, however, growing up in Africa today in the tradition of the popular music which is widely disseminated by video/television, radio, gramophone discs, night clubs, dance halls, and touring music bands, rather than in a traditional music environment. The new African art, or "learned" music, which is the composed instrumental and vocal music by Western-educated African musicians, grows in popularity, especially during colonialism and post independence through its association with churches, educational institutions and organizations.

In spite of this, traditional music is still very alive, particularly in the rural areas, for there is a large section of the population for whom it has never lost its meaning. Nationalism during the post independence era began to foster a new pride and interest in traditional music. The other performing arts, popular music/dance bands and groups, as well as composers of art, music, dance experts and dramatists have all constantly turned to the traditional arts for source material.

The measures for preserving and ensuring continuity of musical life in traditional and contemporary societies in Africa should therefore include:

- a. programs of music education which will ensure continuity of the African arts traditions, as well as the creation and propagation of new musical knowledge and artistic values; and

- b. performance programs which will promote traditional music and the other arts, as well as the new artistic idioms in the communities.

Any discussion of folklore and dance preservation in Africa and elsewhere, inevitably touches on education, since it is this that ensures the continuity of the line of musicians, dancers and other performing artists through whom the performing arts can be preserved as living culture. The inclusion in the curriculum and the serious teaching of traditional music and other performing arts in educational institutions is, therefore, a measure for ensuring the continuity of musical life in Africa. The performing arts will survive, particularly in the urban centres, if the teaching, practice and performances of them become an essential part of the school curriculum.

In the past, the materials and techniques of these arts were passed on by oral tradition or learned through participation in performances. Although this has been maintained in some areas where the impact of acculturation on the arts is minimal, there are areas where this has broken down either because of the low prestige of the traditional arts or because of the lack of emphasis on the arts of Africa in formal education, as indicated above.

Creativity and performance are perhaps the prime factors of folklore preservation and the surest means of perpetuating music and other performing arts traditions in Africa and elsewhere. The preservation of the continuity of musical life and that of the related arts from a developmental point of view requires not only planning with clearly defined objectives in view, but also finding effective and adequate means of achieving these objectives within the resources - human and otherwise - available at any given period.

I would like to provide a brief synopsis of the steps some African countries have taken in the preservation of some aspects of the non physical expressions of folklore. It appears that over the past two decades, governments have taken a more sustained and determined approach to folklore conservation in the light of the impact of emergent technologies.

Zimbabwe

The study of oral materials such as folklore, riddles, proverbs, songs, praises, folk tales etc., has been conducted by the Department of African Languages and Literature at the University of Zimbabwe with some degree of success. Dr. Dembetembe of the University of Zimbabwe stated that these efforts were born out of the urgent need to preserve the oral art forms, since "most of these are to be found among the old folks who are our archives"¹¹. The Oral Traditions Association of Zimbabwe (OTAZ) was formed in March 1988, in order to co-ordinate research in oral material and keep an inventory of researchers and to document the materials collected.

Kenya

The Music Department at the Kenyatta University in Nairobi has had in place, over the past thirty years, a program for the collecting of traditional music and dance from the field. Additionally, the Institute of African Studies, the Kenya Institute of Education and all Training Colleges in Kenya, have undertaken collections and recording of traditional music and dance. However, even though the institutions and several collections are inundated with these field recordings, there are only limited facilities available in Kenya for their storage, analysis and study. The Kenya Arts Cooperative Society (ART-CO) established a small regional based archive in Kisumu, a region of Kenya. The collected materials were to be copied to the University of Kenya to form the basis of a National music archive. It has been felt that the establishment of small regional archives could assist the community in the central role of the preservation of their cultural heritage and ultimately form the basis of a National Music Archive¹².

¹¹ Dembetembe - Research Problems in Oral Material: Case of African Languages - Zimbabwe.
¹² Dr. Paul Kaoyu - Organization and functions of a small Sound Archive - 1988

Zambia

Zambia also has a strong non-physical heritage consisting of music, dance, story telling and oral literature. Several of the art and dance associations became instrumental in storing and disseminating oral traditions. In fact, the Nayama Music Archive in Zambia was set up in pursuance of this¹³. However, the Archive has had a rather checkered history and faced the usual constraints of equipment and expertise which is endemic in Africa, and thus, it has been unable to function in an optimum manner.

Tanzania

Research in Tanzania, in the area of oral traditions, began in pre-colonial times. For obvious reasons, most of the early research was done orally, preserved orally and passed orally. However, at least nine institutions dealing with oral traditions were created during the post-colonial era. They include the National Research Council, the Ministry of Culture, and the Bagaungo College of Arts. These were in addition to pre-existing institutions such as Radio Tanzania, the national museum, and the Zanzibar broadcasting station. In spite of this proliferation of institutions, research remained *ad hoc*; there was no coherent research policy or program defining clearly the objectives and priorities, and how they were to be achieved. Moreover, the funds provided by the government for research were inadequate. In spite of these shortcomings, a number of important field trips were undertaken, usually by scholars based at the University of Dar-es-Salaam. The research was mostly in the following areas:

- a. oral area histories
- b. sociology and anthropology
- c. oral literature

In the area of the preservation of traditional dance, the post-colonial Tanzania government's experiment with an institutional approach to the preservation proved unsuccessful. A populist approach to the cultural question emerged as a result of the changing political and economic relations between Tanzania and the Western Countries. This led to the commercialization of the traditional dance forms, and it has helped considerably in the preservation, albeit in a rather mutilated and distorted way (as some critics have alleged) of these forms.

Ghana

In Ghana, of course, there have been various attempts at the documentation of all the subdivisions of the expressions of folklore. These attempts have been made by the Institute of African Studies at the University of Ghana. Various museums and archives have also played a role since Ghana's independence 40 years ago; there are also large collections in the hands of private collectors which is most disturbing, since they are in danger of being lost or decayed because the preservation is not being undertaken under optimum conditions. Yet still, it is known that there are works outside the country, illegally, in the hands of foreigners.

It was in the light of this, and also to pre-empt the alarming exploitation of Ghanaian expressions of folklore abroad by foreigners, that in 1985, the attempt was made to render the administration of folklore more holistic by bringing it under the umbrella of the Copyright Law. Due to the complexity of the issues concerned, and because of the living nature of our oral tradition there is a constant interaction between folklore and popular performing arts. There is no clear demarcation between them as in the West. In Africa, where folklore permeates institutional life, one finds survival of traditions that were once extensive still abundant in some localities.

¹³ P.K. Likukela - Cultural Implications of the Collecting, storing and Disseminating of Non-Physical Heritage in Zambia.

The National Folklore Board of Trustees was established in Ghana in 1992 to facilitate the working of the Copyright Law to administer all expressions of folklore, maintain a register of such expressions, and actually collect, preserve and conserve same. The fundamental recognized principle adopted by the Board was the overriding need to put into place a systematic and comprehensive program making use of the technical resources and expert professionals. Obviously, the Technical Committee established to draw up the blue print for the program had, as its primary goal, that there should be meaningful access to what has been documented, since without such an approach, "documented information would not only be difficult to retrieve; it would serve more to confuse than to clarify or illustrate"¹⁴.

A systematic approach to documentation of folklore in Ghana should involve, among other things, the establishment of well-defined procedures and mechanisms for identifying the various forms and expressions of folklore; it will involve putting in place efficient and reliable mechanisms for physical recording and preservation, retrieval and reproduction of expressions of folklore; compilation of indexes, registers, directories, bibliographies, and biographies (of major authors and performers), etc.¹⁵

Modes of documentation take various forms, like tape recording; direct note taking; transcription, translation and annotation; graphic representation; photographic representation; phonographic recording; and scholarly monographs.

In the area of preservation, some of the modes observed are archival, library storage and retrieval; museums; publications; specially sponsored productions, performances, re-enactments; a comprehensive cultural program for the public at large, and for schools and colleges, through the Curriculum Enrichment Program.

The last two modes of preservation draw attention to the fact that for our society, folklore is not, need not, and should not be a carefully preserved fossil, but an integral part of the life-blood of society and individuals, alive, current, invigorating and very refreshing.

Ten recommendations were made by the Ghanaian Technical Committee mentioned above which deserves close attention:

1. Immediate steps to be taken towards designing and eventual construction of a modern and well-equipped archive-library building.
2. Basic technical equipment identified above must be acquired to enable initial acquisition and preservation to proceed.
3. A core staff of administrative and technical personnel and also research assistants should be employed with the guidance of a small technical committee of experts/research scholars.
4. The establishment and retention of a small technical committee of experts is highly recommended in order to:
 - a. work out a detailed master-plan or blue-print for the entire documentation program.
 - b. provide general technical advice on detailed planning and implementation of various phases of the program and of specific projects.
 - c. help plan and conduct training workshops for various personnel to be involved in the program.
 - d. personally undertake certain specific projects requiring high level expertise, such as the coordination and/or compilation of a series of indexes, registers, directories of Ghanaian folklore.

¹⁴ Dr. Yankah, Dr. Asiamah, Dr. Owusu-Bempong & Prof. Anyidoho - Unpublished Report - National Folklore Board Ghana - 1992

¹⁵ Dr. Yankah, Dr. Asiamah, Dr. Owusu-Bempong & Prof. Anyidoho - Unpublished Report - National Folklore Board Ghana - 1992

5. A broad pool of scholars, teachers, students, and others, with skills and projects relevant to folklore, should be identified to contribute to various aspects of a general documentation program.
6. The acquisition of original documentation or copies of folklore materials currently being held by various organizations and individuals.
7. Research vehicles should be acquired.
8. Formal and informal links should be established with various bodies in and outside of Ghana, whose programs and objectives coincide with those of the National Folklore Board of Trustees, e.g. the Nigerian Folklore Society, the Folklore Institute and Archives of Traditional Music, Indiana University, Bloomington.
9. Basic journals and other publications relevant to folklore, should be obtained to serve as the basis of a future Folklore Library Collection.
10. A comprehensive grant proposal should be developed soon to enable the Board to seek funding from both national and international sources to fulfill its program.

However, despite this excellent report, which was adopted by the Board, one is yet to see the concretization of the recommendations.

Lack of funding, is of course, the primary cause behind this inertia. It is impossible now to tout around the entire countryside with microphones and video cassette recorders and just document as President Kenyatta advocated in the 1960s during Kenya's post independence era.

It is important therefore to recognize the problems associated with this exercise. Otherwise, even with the best of intentions, states and public organizations can flounder along making little or no headway in the eternal quest of answering questions of the past.

Folklore in Africa is a vibrant and living work of intellectual creativity which has reached an opportune time for it to be documented and preserved. Some efforts are being made in Africa to preserve such a world-wide heritage which is enjoyed by all.

It is the responsibility of all of us here present to resolve to assist to get this precious and rare intellectual heritage preserved for the benefit of posterity. We dare not fail to discharge this responsibility. It is my hope, and am certain that as we have done in other international fora to protect other forms of intellectual creativity, we will do the same for works of folklore.

THE EXPERIENCE OF ASIA

*by Dr. Shubha Chaudhuri, Director, Archives and Research Centre for Ethnomusicology,
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India, like most countries in Asia which are industrializing, has a society and culture in a state of flux. This has been more true of the last decade perhaps than of any particular period in the last century.

As we are gathered here, with common concerns, talking of the threats and challenges faced by us, I am certain that we are going to find that we have more in common, and that countries in different parts of the world, institutions and those working in the oral and expressive arts, are facing similar challenges and hurdles. No meeting or conference in India or elsewhere of this nature fails to talk of the impact and changes brought about by the Internet. A few years ago, when we met in similar contexts, we expressed our concerns about the effect of the mass media and MTV. Though that may not be as hotly debated now as then, the influences of mass media and MTV remain, and we add more and more layers of similar and parallel developments to our cultures. Thus, what I represent as the experience from India today, may not be as distinctive as it would have been a few years ago. Communication today has taken the place of media, and we find that geographical distance, political boundaries and spaces are dissolving with the Internet, and that laws for use and copyrights have decreasing relevance if they apply only to the country of their origin.

There are many overlapping terms and concepts that we are attempting to examine here: protection, preservation, conservation. There are also the issues of copyright, intellectual property rights and royalties. These are no longer concepts that are restricted to commerce and industry. As an archivist and a researcher in the field, I find myself involved with these issues in a practical and theoretical way and find that our work touches all these aspects. As archives, we find that from a position regarded as a backroom, we are in a position where we are able to mediate between the performers and artists and the marketplace. Cultures and traditions that we are involved with—be it as collectors, researchers or archivists—are changing in ways and at a pace that we are not in a position to alter. We are, however, in a position to be able to use our experience, access to technology and communication in ways that protect the rights of performers, communities, researchers and archives, and in doing so, perhaps influence the course of change.

The Protection of Folklore : Copyright

In the post independence era in India, the changing pattern of patronage is perhaps one of the greatest factors to influence the oral traditions; as people migrated to cities, industrialization and media began to alter social institutions and thus inevitably, economic patterns. More than the recording industry, it was the All India Radio that was a major patron for performers of classical and folk music. The recording industry did not have the same impact in economic terms for artists. Recordings made by individuals and institutions, whether they were used for financial gain or not, are a considerably recent phenomena. The Copyright law in India has been weak on account of not being updated at regular enough intervals and from not being implemented with any rigor. Accounts of royalties not paid have been standard fare for many years. It was for this reason that recordings were considered a greater source of prestige and publicity for performers than of economic gain. A major change in the recording industry came in the advent of audio cassettes, which is a thriving industry today, consisting largely of cheap cassettes that have dominated the market, making up in numbers for the small profit margin. The amount of profits, or the perception of it, have changed the attitude to the recording industry in terms of bringing in a greater awareness of the copyright law. However, on the whole, litigation in this area tends to be concerned with popular music, or classical music at most. The law, when applied, has been directed to the issue of piracy, but very rarely to the violation of a performer's rights. The payment of royalties still remains a matter of contention, and many performers prefer to negotiate the payment of a lump sum as part of the recording contract, to assure themselves a level of certain remuneration, rather than attempt to bargain for a fair share of profits which they may never see.

There is a sudden upsurge of interest today in issues of intellectual property rights due to India's involvement in the GATT agreement. Though this has resulted in greater awareness of copyright issues, there is not much evidence of this having a tangible impact in the area of folklore and oral traditions.

In this sphere, in the past few years, the most important development has been the amendment of the Indian Copyright Act of 1957, which was amended on 9 June 1994. I quote here the most significant amendments:

Chapter 1

(d) "author" means , (ii) in relation to a musical work, the composer.

(ffa) "composer" in relation to a musical work, means the person who composes the music regardless of whether he records it any form of graphical notation;

(p) "musical work" means a work consisting of music and includes any graphical notation of such work but does not include any words or any action intended to be sung, spoken or performed with the music;

(q) "performance", in relationship to performer's right, means any visual or acoustic presentation made live by one or more performers.

(qq) "performer" includes an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture or any other person who makes a performance;

(xx) "sound recording" means a recording of sounds from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced;

Chapter VIII 38.

1. Where any performer appears or engages in any performance, he shall have a special right to be known as the "performer's right" in relation to such performance.

2. The performer's right shall subsist until twenty-five years from the beginning of the calendar year in which the performance is made.

3. During the continuance of a performer's right in relation to any performance, any person who, without the consent of the performer, does any of the following acts in respect of the performance or any substantial part thereof, namely :-

a. makes a sound recording or visual recording of the performance; or

b. reproduces a sound recording or visual recording of the performance which sound recording or visual recording was -

(i) made without the performer's consent

(ii) made for purposes different from those for which the performer gave his consent; or

(iii) made for purposes different from those referred to in section 39 from a sound recording or visual recording which was made in accordance with section 39: or

- c. broadcasts the performance except where the broadcast is made from a sound recording or a visual recording other than made in accordance with section 39 or is a re-broadcast by the same broadcasting organization of an earlier broadcast
- d. communicates the performance to the public otherwise than by broadcast, except where such communication to the public is made from a sound recording or a visual recording or a broadcast, shall subject to the provision of section 39, be deemed to have infringed the performer's right.

A further welcome development is the clear definition of "fair dealing."

39 (1) No broadcast reproduction right or performer's right shall be deemed to be infringed by

- a. the making of any sound recording or visual recording for the private use of the person making such recording, or solely for purposes of *bona fide* teaching or research; or
- b. the use, consistent with fair dealing, of excerpts of a performance or of a broadcast in the reporting of current events or for *bona fide* review, teaching or research: or
- c. such order acts, with any necessary adaptations and modifications, which do not constitute infringement of copyright under section 52.

These revisions have been a major breakthrough, as performers have automatic rights without having to register them, and the concept of "performer" has been defined more widely. As can be noted, the definitions related to music also constitute a major departure from a text based approach to copyright and notation as a basis for composition. The 1994 amendments have thus strengthened the cause of protection of oral traditions to a great extent.

Though preferable to the earlier situation, there are drawbacks to the Copyright Law even today which makes it difficult to ensure that the profits, if accrued, go to the rightful recipient. An important drawback, faced not only in India, but in many other countries, that the law does not make a provision for dealing with a community, but only an individual. There is also no provision which allows for successfully dealing with traditional texts and melodies, and recordings frequently copyright traditional melodies and texts which are not really the performer's to copyright. The concept of community, or rightful ownership of repertoire, is not easy to define, as it does not always consist of a small cohesive group conveniently located in a particular geographical area.

The lack of implementation of these laws is greatly based on the lack of information. Performers in rural and urban areas more often than not do not have a realistic picture of their rights. The perceptions swing from not realizing that the performance has economic value, to imagining that untold amounts of money can be made through the recording of any performance. The low levels of literacy of many performers also are an impediment, and leave them open to exploitation by unscrupulous agents and recording companies. To cite an example, I have known the case of a well known performer of Rajasthani music who signed a recording contract for a very paltry sum, which prevented him from recording with any other label for his lifetime, and controlled his public performances. It was through the intervention of a scholar and supporter that the contract was withdrawn as a case could be made for his having signed the contract in ignorance of the terms which he could not read. It is most common that cases of this kind are settled out of court and thus few legal precedents are set, and there is less attendant publicity.

The lack of information about the law and copyright also leads to a situation that is fraught with misconceptions. There is a widespread belief that an extract of under one and a half minutes is permissible for any kind of use without the payment of royalties. Most people have no idea that permissions are required even if they do not intend to make a profit. This is due to the fact that litigation only focuses on the loss of income and does not give the same emphasis to "mere" infringement of a cultural or ethical nature.

The limitation of the Copyright Act, and in fact the entire legal framework, can at best prevent misuse in terms of financial exploitation alone and does not help us to “conserve”, or “preserve” traditions and their practitioners. Laws such as these tend to be, and perhaps only can be, oriented to what cannot be done rather than what can or should be done.

Preservation and Change

The preservation and conservation of expressive arts and oral traditions in terms of trying to ensure their “purity” and “authenticity” are unrealistic. In most cases, the changing pace of life, migration, and urbanization with all its complexities, have a wide and sweeping impact on social and cultural patterns. In India, most oral and performing traditions are rooted in a ritual or ceremonial context. When these contexts do not exist in the lives of the people, we find that the traditions change as they find newer contexts or cease to exist. Urbanization and the exposure to the media penetrates the most remote regions of the country today and creates new and changing definitions of entertainment. Since it is not within our power, even if we find it desirable to stall social change, it is meaningless to talk of preserving traditions in the sense of protecting them from change. If we are to participate in the process of change, we have to analyze the causes and factors contributing to this process and share our findings and awareness, perhaps collaborating with these agents of change.

The new patrons of oral traditions and folklore are the recording industry, broadcasting and tourism. It is through these agencies that the traditions finally survive in economic terms. The power and impact of media as a result exist and influence the nature of change even in contexts where economic support is not relevant. When cassettes are played at weddings instead of songs being sung by family or friends, or when they are sung to popular film song melodies, it is not because there is any economic gain, but it is a reflection of tastes that are being shaped by the media.

Though cultural tourism is a relatively recent phenomenon in India, we can observe that all these forces meet in creating a new context, based on what is construed by them as popular taste and mass appeal. All of these are dependent on the “packaging” of the art to appeal to an audience for whom the context or content is not very significant. Catchy melodies, or colorful costumes and synthesizers have their place in ensuring the popularity of recorded or live performances.

Advertising is another factor that has a growing impact. Jingles and melodies are usually of a very short duration, but represent the largest economic factor. They may not be agents in being able to influence change but represent a growing sector where the infringement of copyright represents sums of money that were hitherto unimaginable.

However, recordings of music and other performing traditions are language based, and thus it is not surprising that these have the largest market in the area where the traditions are performed. There is some marketing that is aimed at migrant communities in cities or abroad, but the largest consumers are those who are in a sense participants and performers of the traditions themselves. We see thus that the recording of a certain individual from within a group or a particular group from an entire village or community, creates a performer status where none existed. The status of being recorded and being broadcast or being available on cassettes imparts a certain legitimacy to the style of performance, the contents, melody, structure and becomes a model for other performers.

Regional traditions and the film industry have had a long and complicated relationship. Film music in India represents the highest selling form of popular music that crosses regional and even national boundaries. Indian film music along with its films are finding growing markets not only to its migrant and expatriate communities but in the local markets of Africa, Indonesia and the Middle East. Composers and music directors of the film industry have long used traditional melodies and songs, and there has never been any instance of the community being paid or compensated in any way. The difficulty and impracticability of a group of snake charmers suing a film magnate for rights to a popular film tune are unimaginable. There are countless cases where the film version replaces the version originally sung by the community. However, the film version is usually copyrighted by the “composer” who is able to claim royalties.

Archives and their Role in a Changing World

It is no coincidence that the last few decades have seen the growth of archives being established in many developing countries. The changing pace of development and its impact leaves us the option of recording the traditions and expressions of cultures and people or not having any record of these for posterity. In the years to come, much more so than at this time, archives will be the only repositories of entire cultures, providing a link to future generations, an access to their historical roots. We witness even today the impact of recorded music in reviving traditions. The influence of mass media also creates an ever growing market, creating an appetite for the unusual, the exotic and the unfamiliar.

The process of documentation, research and archiving cannot be seen as totally "pure," as these processes also have their own area of influence and bring about change as surely as the forces of media and tourism, though on a more modest scale. The role of researchers and institutions also as purveyors and agents of change needs to be examined, as it has in recent times. However, the major difference that separates them from the media is that there is no direct economic connection, and even if there are economic conditions that play a role from time to time, they do not form the basis or rationale of their existence.

Collection, Preservation and Dissemination

The concepts of conservation and preservation of expressions of folklore as defined here includes the areas of collection, preservation and dissemination, all of which usually fall into the domain and territory of archives. Archives can be the appropriate catalysts in bringing awareness and in supporting dissemination while safeguarding the rights of the practitioners. The actual recording, photographing or filming of the arts by commercial agencies tends to involve the local scholar, the local institution or the researcher who is reputed for expertise. Though there would perhaps be countless cases where this is not the case, the role of researchers and archives is considerable and will increase as they emerge as centers of cultural wealth of a bygone era.

If this is to be the case, institutions working in the field of documentation, researchers and archives have to be aware themselves and be able to implement policies of fair use. If this can be achieved, it would represent a very major advance in the protection of the cultural heritage of all peoples.

Collection

In India, there are a few archives on a national scale, but a lot of documentation projects are carried out by the numerous regional research centers, and those archives are very closely connected with the region and communities that they record and study. As most of what is documented and recorded was not considered of commercial value and was not being recorded for commercial gain, most institutions do not have any method of seeking permission or granting the rights to the performers or communities. It is not uncommon for researchers or institutions who make the recording to assume that they own it. This is even more the case if there is any payment made.

We do need to also understand that in most situations it is not possible to seek formal permissions and unfair to ask people to sign release forms of which they do not understand a word. It is, however, possible to explain the purpose of the recording and record the conversation along with the performance. Details of the name and locale should also be noted with care, in the event there is the likelihood of payments that are to be made. Archives which are not directly concerned with the making of recordings find themselves dealing with collectors and researchers with whom they have to negotiate an agreement. This is an ambiguous situation, as the collector or researcher may not have the right and has no legal right over the use of the material.

At the ARCE¹ where I work, we try to work with the depositor to get permissions where possible and try to understand the implications of assigning the degree of access. We amended our forms, which were based on the model of many international archives, to give the final right to the performer, so that a depositor could not restrict access to the performer under any circumstances. We have also in some cases written to each performer recorded in a particular collection, that the researcher or recordist had deposited the recordings at ARCE and that they were held in safe keeping for future generations and used only for research.

Preservation

Once recordings are made, no matter in what circumstances and for what purpose, the physical preservation of these is of paramount importance. At the time recordings are made, the traditions or expressions recorded do not often seem unusual or threatened by extinction. Tapes, films and photographs often do not immediately show the effects of poor storage and preservation techniques. Those of us who work in tropical countries especially need to work harder to ensure that collections made painstakingly are assured permanence. Information on preservation is often not accessible and not emphasized sufficiently.

Preservation does not only include archival conditions of storage, but policies of handling and access and thorough documentation. A well preserved artifact, or a perfect recording, will not be of any use in the years to come if we do not know where it came from, who made it and why.

It is the moral duty of archives to ensure the preservation, seek deposits and make sure that the rights of all those who are involved are documented and protected. Similarly, individual researchers should deposit their collections in archives, assuring their preservation and access to the performers and their communities. Funding agencies and sponsoring bodies could be the appropriate vehicles for implementing these as policy. Professional bodies which involve archives can also play an active role in assuring the implementation of policies aimed at ensuring preservation. In India we have a fledgling organization of 12 institutions which have an archive component of "expressive arts" called the Archives Resources Community. The first task we faced was to establish a cooperative network so that the involved archives attempted to model themselves as professionally run archives, instead of storehouses of recordings, manuscripts and artifacts.

Dissemination

Dissemination is the most critical aspect of running an archives and the most riddled with pitfalls. Archivists face the often contradictory roles of having to protect the material - physically as well as in terms of rights and ownership, and at the same time, ensure its availability and access.

Archives and museums are most often accused of wanting to protect their holdings to the extent of blocking access. Thorough documentation of the legal status of all holdings is the first step towards being able to develop a successful policy of dissemination. There is no reason to preserve if we cannot disseminate, though it may require inventive ways and means to do so. It is in many cases extremely difficult to establish cultural ownership, when there is no direct contact with the creator of the work of art or performer.

However, if policies can be properly drawn up and implemented, archives can play an important role in the publishing of recordings, and of collaborating with the media and tourism to create support and preserve the quality of the traditions that they hold. As community memory changes, especially in the case of oral traditions, we deny people the right to their heritage by not being able to disseminate our holdings. As we know from the effects of media, successful dissemination creates and sustains interest and an audience, and hence a patronage that helps the art to survive.

¹ Archives and Research Centre for Ethnomusicology. American Institute for Indian Studies

Though archives have release forms, they cannot physically ensure that the material is used for the purpose for which it is requested.

These are problems that are common to us all, and clear solutions are not available. As it is with the Copyright Law, we have to establish our intentions. It is however exceedingly important that we work towards developing policies that aid successful dissemination, so that future generations can have access to their past to better shape their future.

These have been the concern of UNESCO and WIPO, and form the subject of our following sessions. I would like to express my gratitude and deep appreciation of the WIPO/UNESCO forum for being able to participate in these meetings. I am here with the hope of finding solutions to take back and to strengthening ties with others who are involved in a common cause.

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THE EXPERIENCE OF THE PACIFIC REGION

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The Australasian intellectual property regime is concerned primarily with the protection of economic interests. It does not fit in well with the indigenous peoples' concept of protection of folklore. In Aboriginal culture, there is not the same distinction between real property and intellectual property as understood in Australasian copyright law. Traditional visual designs, music, drama and dance are intimately connected with indigenous peoples' religion. Land and art are intertwined. Ownership of artworks is not based on individual rights as postulated by the *Copyright Act 1968* (Cth), but instead on a system of collective rights which are managed on a custodial basis according to Aboriginal customary laws. Viewed from this perspective, the recent developments, particularly the decision of the Federal Court of Australia in *Milpurrurru v. Indofurn Pty. Ltd. and Others*¹ is a formidable one.

Introduction

Significance of Folklore

The topic of folklore has been attracting attention lately because of the UN-led emphasis on the rights of the indigenous peoples of the world. In Australia, the impetus has been provided by the landmark judgment of the High Court in *Mabo v. State of Queensland [No. 2]*.² Furthermore, in the fast-growing multicultural society of Australia, it is now widely believed that protection of folklore is important in creating and maintaining identity, and in promoting self-confidence and pride.

For Australia's Aboriginal and Torres Strait Islander populations, the protection of folklore is a fundamental issue. Without effective protection of the special interests indigenous peoples have in their folklore and cultural heritage, that culture is open to pillage in the same way that Aboriginal lands and resources have been for over 200 years. Survival for indigenous peoples the world over is not merely a question of physical existence, but depends upon maintaining spiritual links with the land and their communities.

The Native Title legislation³ is a welcome step, since the control of land and sacred sites is essential to protection of cultural heritage. However, land alone is not enough; further specific measures dealing with the rights of Aboriginal and Torres Strait Islander peoples to control their folklore and cultural heritage are also required.

At present, Aboriginal communities are principally governed by the same intellectual property regime as all Australians. While this is effective in some cases, it does not cater for the unique relationship which indigenous peoples have with their cultural heritage. Artistic works, traditional designs and oral folklore are not simply viewed as commodities owned by individuals, to be protected for the economic benefits they may yield, but as integral parts of the heritage and identity of the community to which they belong. Thus, current protection of intellectual property, based on the assumption that intellectual property is a transferable commodity "are not only inadequate for the protection of indigenous peoples' heritage but inherently unsuitable".⁴ Intellectual property protection for the Aboriginal and Torres Strait Islander peoples which recognises their close and continuing links to their cultural heritage is vital because Indigenous peoples cannot survive, or exercise their fundamental human rights as distinct nations, societies and peoples, without the ability to conserve, revive, develop and teach the wisdom they have inherited from their ancestors.⁵

¹ (1995) A.I.P.C. ¶91-116 at 39,051-39,085. The decision was handed down on 13 December 1994.

² (1992), 66 A.L.J.R. 408.

³ *Native Title Act 1993* (Cth). The Act came into force on 1 January 1994. The main purpose of the Act is to provide a mechanism, through the National Native Title Tribunal, for resolving native title issues without resort to litigation.

⁴ E-I Daes, *Discrimination Against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples* (Sub-Commission on Prevention of Discrimination and Protection of Minorities, Economic and Social Council, United Nations, 28 July 1993) at para. 32.

⁵ *Ibid.* at para 1.

Issues and Objectives

The impetus for protecting Aboriginal folklore is a deep-seated but inchoate concern to Australian legal reformers, which does not translate easily into clear-cut issues.⁶ However, there are five broad issues:

- **Authentication.** Aboriginal people condemn the reproduction of their folklore and traditional crafts in Australian and overseas factories, which mass-produce the items with cheap labour. This causes not only an economic but also a cultural and psychological threat to authentic practitioners of Aboriginal arts and to the Aboriginal peoples whose values those arts and crafts express.
- **Ownership.** "Copyright in Western society is attributable to each individual person, and is originate by a single person, even in those circumstances where the copyright is jointly owned."⁷ The current intellectual property regimes fail to recognise that indigenous communities rather than individual members of a tribe, create and own cultural heritage and intellectual property rights relating to it.
- **Expropriation.** Expropriation represents a concern about the removal of valuable artifacts and other items of cultural heritage and folklore from their place of origin. A more specific problem which this raises relates to works which have sacred and secret character under Aboriginal laws. Should the aim be to forbid reproduction or disclosure of works where this offends Aboriginal beliefs? Aboriginal people are gravely anxious that some segments of their culture are being destroyed, mutilated or debased.
- **Protection of economic interests.** Inevitably, items of folklore get into circulation. To a large extent, Aboriginal people do not mind sale and circulation of their folklore, unless the works are of a sacred or secret nature. However, there is a widespread resentment that the individuals and groups whence the items originated are not given a fair economic return for that from which others profit.
- **Appropriate protection.** This is the most slippery of the issues: what kind of legal protection may be most appropriate for Aboriginal cultural property and folklore?

Among the several branches of intellectual property, copyright law seems most relevant to deal with the protection of the creative expressions of folklore. But as we shall see later, the copyright mould is not well-suited to provide adequate protection.⁸

This paper critically reviews existing legal mechanisms for the protection of Aboriginal culture and intellectual property rights in Australia, including copyright law and heritage legislation. It then analyzes alternative proposals and developments put forward both there and internationally. Finally, it proposes solutions, drawing from the pool of research completed both in Australia and abroad, and makes suggestions as to the most appropriate measures to be adopted locally as a basis for future action.

⁶ The matter of the rights of individuals and communities in relation to their folklife has both an ethical and an economic dimension, and their intertwining has produced a Gordian knot with which the United Nations Educational, Scientific and Cultural Organisation (UNESCO) has been grappling for over a decade." Report of the Committee of Inquiry into Folklife in Australia: *Folklife - Our Living Heritage* (Australian Government Publishing Service, Canberra: 1987) at 256 [hereinafter cited as "*Report on Folklife - Our Living Heritage*"].

⁷ G.C. O'Donnell, *A Short Note on Anti-Copyright* (Australian Copyright Council, 1985) at 1.

⁸ For an excellent discussion of the Canadian situation, see A. Pask, "Cultural Appropriation and the Law: An Analysis of the Legal Regimes Concerning Culture" (1993) 8 I.P.J. 57.

Folklore and its importance in the lives of indigenous peoples

Meaning of Folklore

Links with the past strengthen and sustain individuals and communities. The desire for roots is a basic human urge. Folklore is a mode by which culture is expressed.⁹ Many see folklore as, in effect, archaeology of the mind.¹⁰ Folklore is a powerful means of bringing people together and of asserting their cultural identity. It enables the present generation to appreciate the highly creative genius of past generations and acts as a mirror that reflects their psychic make-up and explains the primeval civilization of a race.¹¹

Today, although Aboriginal artifacts are visible in the Australian market place, Aboriginal customary laws and folklore continue to suffer from neglect. Aboriginal folklore, like Aboriginal artifacts, is strikingly original, particularly in its characteristic fusion of pragmatism and myth.¹²

For indigenous peoples, folklore has its source in the life of their people and, like life, it evolves continuously. One of the common ways in which folklore manifests itself is through artistic creations. The fact that works of folklore draw upon custom and tradition for their basis means that the works produced by later Aboriginal artists represent a unique continuation of their time-honoured myths and legends.¹³

Folklore is Living Heritage

In spite of folklore's antiquity, ageing has not made it extinct. Folklore is a testimony of the past without which the present would have no future. Aboriginal peoples have deep spiritual and emotional attachment to folklore and regard it as their communal "property". Folklore is constantly evolving and there are many works of folklore that are new, either because of their recent origin or because they are directly or indirectly derived from the older works.¹⁴

Traditional visual designs, music, drama, and dance are closely linked to Aboriginal religion. A dance or drama may form part of a sacred ceremony; a rock painting may depict an ancient myth at a sacred site. Certain works of folklore are therefore either regarded as sacred in their own right or are so closely associated with sacred places that they cannot be shown, nor can the themes in them be disclosed, except to those few who have been admitted to knowledge of ritual secrets and mysteries by undergoing initiation or other special ceremonies.

Aboriginal Art

Aboriginal art is the world's oldest continuous living art tradition. In central Australia, much traditional art takes the form of ground designs, produced for particular ceremonies and created with natural materials used to make spectacular patterns in the desert sand, e.g., clumps of dried spinifex grass are matted together into a papier-mâché type consistency and moulded into shapes such as circles and curved lines. This form of art is not meant to be permanent and is destroyed partly by being

⁹ J. Brunvand, *The Study of American Folklore* (N.Y.: 1968) at 84. See also K. and M. Clarke, *Introducing Folklore* (N.Y.: 1963) at 28; C. Carpenter, "Folklore as a Tool of Multiculturalism" in S. Hryniuk (ed.), *Twenty Years of Multiculturalism: Successes and Failures* (St. John's College Press, 1993) at 150, where the author describes folklore as the oral traditions of a people. For the purposes of this paper, "cultural heritage" and "folklore" have been used as alternative phrases, although the former is arguably a much broader term.

¹⁰ W.P. Murphy, "Oral Literature" (1978) VII Annual Review of Anthropology 115. See generally, R. Dorson, *American Folklore* (Chicago: 1959) 1; B. Toelken, *The Dynamics of Folklore* (Boston: 1979) 4; J. Rogerson, *Anthropology of the Old Testament* (Oxford: 1978) at 23.

¹¹ B. Ndoye, "Protection of Expressions of Folklore in Senegal" [1989] Copyright 374 at 375.

¹² M.P. Ellinghaus, A.J. Bradbrook and A.J. Duggan (eds.), *The Emergence of Australian Law* (Butterworths, 1989) at x (citing Burnum Burnum, *Aboriginal Australia*, (Angus & Robertson, 1988) 8). An artefact may broadly be defined as something man-made, such as a tool or work of art, whereas folklore refers to unwritten literature of a people as expressed in stories and songs.

¹³ See *Report of the Working Party on the Protection of Aboriginal Folklore* (Department of Home Affairs and the Environment, Canberra: 1981) at para. 1003 (hereinafter referred to as the *Report of the Working Party on the Protection of Aboriginal Folklore*).

¹⁴ See S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*, (Kluwer, London: 1987) at 313.

danced upon during a ceremony and completely at the end of the ritual, because its sacred significance carries an obligation that it be kept secret from the uninitiated.

Dance and music are integral parts of tribal existence and are performed together in the form of a *corroboree*. Song is a most important component of Aboriginal music, although to Western ears its form is more accurately described as a mixture of chanting, cries or shouts, humming and other vocalisations, invoking the names of spirits and clans or imitating the sounds of birds and other animals. Dancers typically decorate their bodies with red and yellow ochres, white clay and charcoal applied to the greased face, torso and limbs. A feature of Aboriginal compositions is that many are "message" songs, addressing social issues affecting Aborigines and so helping reinforce traditional cultural values. Aboriginal art differs from Western art in that, within a particular group, the designs and motifs are homogeneous and there is a firm relationship between the pattern and its symbolism. This implies that personal interpretation is not possible, but the work represents a traditional imagery. Because Aboriginal art communicates ideas and beliefs, or can be "read", it has been described as a kind of "visual literacy".

Popularity of Aboriginal Art

Twentieth century Australian history reveals the "discovery" of Aboriginal art. The 1930s saw the advent of true appreciation of Aboriginal art due to the efforts of anthropologists and missionaries.¹⁵ The 1960s saw the birth of the commercial marketing of Aboriginal art¹⁶ and the 1980s saw the increasing acceptance of Aboriginal art as fine art.¹⁷ Over the past decade the Aboriginal arts and crafts industry has enjoyed an unprecedented boom. There are few industry statistics available but data on the arts and crafts industry in 1987-1988 revealed that Aboriginal people received just over \$7 million per year from the sales of their art and craft.¹⁸

However, no boom comes without cost. Anthropological studies reveal that the Aboriginal art industry is unlike others: its products are a cultural embodiment of the living heritage of its producers. Visual art, song and dance represent outward manifestations of Aboriginal religious beliefs. Market growth has led to what has been termed as the "second crime" of the non-Aboriginals: "Having taken away the land, children and lives, the only thing left is identity through art and this is now being abused."¹⁹ The "crime" is the unauthorised reproduction of Aboriginal designs.²⁰

Significance of Folklore and Issues Arising out of its Abuse

For Aboriginal people, folklore performs several important social functions. It helps them to release cultural tensions and ambivalences, and it provides amusement and education.²¹ It is a sort of "social cement" that exists outside the formal or official structures. It strengthens social cohesiveness, raises the quality of life and assists in the development and articulation of cultural identity. Aboriginal people use folklore to reflect the past and make improvements for their future. Folklore gives them a chance for creative self-expression through music, song, dance, speech, and many other avenues. Such cultural manifestations create an invisible bond among individuals and groups and forge social and spiritual contact.

¹⁵ See H. Morphy in P. Cook (ed.) *Aboriginal Art at the Top* (1982) at 6.

¹⁶ P. Cook (ed.) *Aboriginal Art at the Top* (1982) at 26.

¹⁷ Report of the Review Committee, *The Aboriginal Arts and Crafts Industry* (1989) at 15 [hereinafter cited as the *Altman Report*].

¹⁸ *Ibid.* at 12.

¹⁹ D. Scott-Mundine, "Cultural Sustainability" in *Marketing Aboriginal Art in 1990's* at 52.

²⁰ For the purposes of this study, the word "design" incorporates visual design, musical design, theatrical design (dance and ceremony) and verbal designs (myths).

²¹ See *Report on Folklife - Our Living Heritage*, above, note 4 at 73 et seq.

A form of judicial recognition of Aboriginal customary laws regarding ancestral designs can be discerned from three Australian Federal Court cases.²² In *Bulun Bulun v Nejjam Investments and Others*,²³ an Aboriginal artist, Johnny Bulun Bulun, succeeded in having a manufacturer of T-shirts withdraw the T-shirts from sale. The defendant had reproduced one of the artist's paintings, known as *At the Waterhole*. The case also involved reproductions of artworks which incorporated elements of other Aboriginal artists' paintings, from books and postcards. Although the case was settled prior to trial, its significance lies in "breaking the drought" in this area of litigation and drawing media attention to infringement of copyright in indigenous peoples' artistic works. The manufacturers and two distributors gave undertakings to the court, a substantial payment was made to the artists, and the clothing was withdrawn from sale and delivered up.²⁴

The second case, *Yumbulul v. Aboriginal Artists Agency Ltd.*²⁵ was more definitive. It demonstrated the limitations of the current law to address Aboriginal customary law and notion of communal ownership of designs. This involved a Northern Territory artist, Terry Yumbulul who commenced proceedings against the Reserve Bank of Australia for infringement of copyright arising from the reproduction of his artwork, *The Morning Star Pole*, on the Bicentennial \$10 plastic currency note. He also sued the agent who negotiated the arrangements. The artist claimed that the Reserve Bank had not obtained his permission before reproducing the artwork. The Reserve Bank relied on an agreement entered into between Yumbulul and the agent under which the Bank maintained that permission to reproduce Yumbulul's works had been obtained. Nevertheless, the Reserve Bank settled the dispute with Yumbulul by agreement.²⁶

The action between Yumbulul and the agent continued with Yumbulul alleging unconscionable or misleading conduct on the part of the agent. The subsequent action was dismissed by French J. in the Federal Court of Darwin. However, some important dicta can be extracted from this judgment which point to the need to recognize customary laws dealing with ancestral designs. His Honour stated that, "There was evidence that Mr, Yumbulul came under considerable criticism from within the Aboriginal community for permitting the reproduction of the [design] And it may ... be that Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially commercial in origin."²⁷

The third case, *Milpururru v. Indofurn Pty. Ltd. and Others*²⁸ is most formidable. It involved the exploitation of Aboriginal artwork without the artists' permission, culminating in substantial reproductions occurring in the form of woven carpets produced in Vietnam and imported into Australia. An action for breach of copyright was filed by three living Aboriginal artists and the Public Trustee, representing five deceased Aboriginal artists. The case centred around section 37 of the *Copyright Act 1968*, which prohibits parallel importation of copyrighted works.

²² Another case that considered aspects of indigenous arts and cultural expressions is *Foster v. Mountford* (1976) 29 F.L.R. 233. It demonstrated that restrictive requirements prevent the use of copyright infringement as the basis for an action where sacred-secret materials have been published unwantedly; instead, a breach of confidence action must be relied on. In this case, the Supreme Court of Northern Territory issued an interlocutory injunction to members of the Pitjantjatjara Council on the basis of breach of confidence, restraining the publication of a book entitled, *Nomads of the Australian Desert*. The plaintiffs successfully argued that the information published in the book, divulged 35 years previously by tribal elders, had been supplied in confidence to the anthropologist, Dr. Mountford. Copyright infringement could not have been relied upon by the plaintiffs because the book in question was not written by them.

²³ Unreported, Federal Court of Australia, Darwin (NTG 3 of 1989). Noted in C. Golvan, "Aboriginal Art and Copyright: The Case of Johnny Bulun Bulun" [1989] 10 E.I.P.R. 346. See also, by the same author, "Aboriginal Art and Copyright - An overview and commentary concerning recent developments" (1996) 1 Media and Arts Law Review 151.

²⁴ For another case with similar facts, see *Bancroft v. Dolina Fashion Group Pty Ltd.* unreported, Federal Court of Australia, 12 December 1991. There, the defendant had supplied to Grace Bros., one of Australia's largest retailers, dresses with an "Aboriginal look" from a famous Japanese fabric maker. The plaintiff alleged that the print supplied by the fabric maker was a direct copy of "External Eclipse", a painting which she had permitted to be published in a book entitled, *Aboriginality: Contemporary Aboriginal Paintings and Prints* by Jennifer Isaacs. The defendant (clothing manufacturer) and the retailer claimed that they were innocent of the infringement and argued that the Japanese fabric maker was liable. The case was settled out of court with the defendant paying the sum of \$8,000 to the plaintiff and agreeing to destroy the remaining stock.

²⁵ (1991) 21 I.P.R. 481.

²⁶ *The Weekend Australian*, 3-4 November 1990 at p. 11.

²⁷ *Yumbulul v. Aboriginal Artists Agency Ltd.*, above, note 25 at 490. French J. also made certain comments on the operation of ss. 65 and 68 of the *Copyright Act 1968*, which are referred to in the text accompanying notes 70-72, below.

²⁸ Above, note 1.

Apart from the outcome of this decision in awarding injunctions, delivery up, and damages, the judgment is also important in the way that Von Doussa J. awarded additional damages to the Aboriginal artists for culturally based harm following infringement of copyright in their artworks. This is perhaps the most significant aspect of the judgment because it reflects the court's willingness to acknowledge the cultural sensibilities of the Aboriginal people, and protects those sensibilities accordingly, by means of orders for exemplary damages.²⁹ The judgment discusses at great length the difficulty of applying the Western copyright regime to indigenous peoples.

Whilst stopping short of recognizing Aboriginal customary law in relation to intellectual property, Von Doussa J. nevertheless made a number of significant concessions to Aboriginal custom, most notably: (i) the observance of an Aboriginal custom not to use the names of deceased Aboriginal artists in the proceedings - they were referred to in the judgment by their skin names only; (ii) the award of additional damages under section 115(4) of the *Copyright Act 1968* to reflect culturally based harm; (iii) the award of damages as a lump sum to enable Aboriginal clans to take account of collective ownership of the designs in the allocation of damages amongst the members of the clan;³⁰ (iv) the award of additional damages for humiliation or insulting behaviour with reference to a particular cultural group rather than to the community at large.³¹

Obviously, this judgment of the Federal Court of Australia is commendable in that it recognizes Aboriginal culture and customary law within the usually inflexible boundaries of Western laws and generally illustrates a sensitive approach to Aboriginal customs and traditions. It gives a clear warning to all concerned that dealings in Aboriginal intellectual property should be handled with utmost care. Although Aboriginal artists may continue to encounter difficulties framing their claims under the *Copyright Act*, the courts in future are likely to exhibit a much more sensitive and flexible approach toward the cultural barriers confronted by Australia's indigenous peoples. It will be no exaggeration to describe this decision as a "mini *Mabo*" since it has the potential to do for Aboriginal intellectual property rights what *Mabo*³² has done for Aboriginal land rights.³³

As the above cases illustrate, there has been a widespread commercial exploitation of Aboriginal designs which have been used, for example, on tea towels, T-shirts, sarongs, table mats, decorations on restaurant menus, postcards, a range of souvenirs, wall hangings, posters, fashion items, interior decorating, shorts, towels and carpets. These cases have been a vehicle for drawing public attention to the limits of the present law. It is against this background of deprivation and dislocation that any examination of legal protection of folklore should take place.

²⁹ "In the present case the infringements have caused personal distress and, potentially at least, have exposed the artists to embarrassment and contempt within their communities if not to the risk of diminished earning potential and physical harm. The losses arising from these risks are a reflection of the cultural environment in which the artists reside and conduct their daily affairs. Losses resulting from tortious wrongdoing experienced by Aborigines in their particular environments are properly to be brought to account." (Ibid. at 39,081).

³⁰ It is noteworthy that the court did not recognize this collective ownership overtly but accommodated the Aboriginal position to the fullest extent possible. Whilst therefore under the present law the collective ownership of intellectual property as recognized in Aboriginal law cannot be acknowledged by the court in establishing a breach of the *Copyright Act*, it is something that the court may take into account in the award of damages.

³¹ Together with an award of damages under s. 116 of the *Copyright Act 1968* for loss of commercial exploitation (conversion damages), the court also made an award of additional damages in the nature of exemplary or punitive damages under s. 115(4) of the Act to reflect the harm suffered by the Aboriginal artists "in their cultural environment." (Ibid. at 39,083).

³² *Mabo v. The State of Queensland (No. 2)*, above, note 2.

³³ For two thought-provoking comments on this case, see M. Blakeney, "Protecting Expressions of Australian Aboriginal Folklore under Copyright Law" [1995] 9 E.I.P.R. 442 and D. Miller, "Collective Ownership of the Copyright in Spiritually-Sensitive Works: Milpururru v. Indofum Pty Ltd" (1995) 6 A.I.P.J. 185. One commentator has hailed the decision in *Milpururru* as "the creative equivalent of *Mabo*." See Ruth Hessey, "Designs on the future" *The Sydney Morning Herald* (15 December 1994) at 15. However, it should be noted that an appeal by two (dormant) directors against a finding of personal liability for copyright infringement against them has been successful: see *King & Another v. Milpururru & Others* (1996) AIPC ¶91-219 at 37,227.

Current Legal Protection of Folklore

Overview of the Current Position

Copyright does not subsist in Australia otherwise than by virtue of the *Copyright Act 1968* (Cth) or the *Designs Act 1906* (Cth).³⁴ No mention is made of folklore or folk music or folk art of any kind in the copyright and design statutes. "Aboriginal works are not excluded from protection, but they are not given any special protection either. This means that a painting by Albert Namatjira is protected in the same way as a painting by say, Brett Whitely."³⁵ Such works are only covered by implication to the extent that they do not fall within the generic category of works in the "public domain."

There is an economic value in cultural heritage, apart from its cultural significance. Where a work is within the public domain there may largely be unrestricted commercial exploitation of that work. Items of cultural heritage can therefore fall an easy prey to enterprising persons who may use these works without constraints or limitations. In Australia, where the law does not yet protect moral rights,³⁶ exploiters of Aboriginal folklore can even distort the essence of the work and its authenticity with impunity. Like commercial goods and services, such works have therefore become consumer goods.

Variance Between the Aboriginal Customary Law and Copyright Law

Non-exclusive rights are a peculiar feature of Aboriginal customary law and are not readily compatible with the exclusive rights of copyright. Aboriginal communities follow the custom of tribal ownership of art forms and designs, whereas the right to depict designs is determined by tribal customs and practices.³⁷ Between themselves, Aborigines have their own customs and practices governing copyright matters.³⁸ There are severe sanctions imposed on painting images not permitted by the tribe.

Aboriginal Customary Laws

There is no systematic collection available of Aboriginal customary laws nor has anyone prepared any manuals or handbooks compiling all aspects of Aboriginal law.³⁹ Despite this lack of written laws there is a good collection of material on Aboriginal traditions and ways of life including detailed studies of kinship, religion, and family structures.⁴⁰

³⁴ See s. 8(1), *Copyright Act 1968* (Cth).

³⁵ Australian Copyright Council, *Aboriginal Arts and Copyright*, Bulletin 75 (1991) at 4.

³⁶ But note that the Commonwealth government is presently considering introducing moral rights legislation, see Discussion Paper, *Proposed Moral Rights Legislation for Copyright Creators*, (Attorney-General's Legal Practice, Canberra: 1994).

³⁷ K. Maddock, "Copyright and Traditional Designs - An Aboriginal Dilemma" (1989) 2 I.P. 7. However, the following statement by the author dismisses the common misconception: "Although individual creativity is not stressed in traditional communities, it would be wrong to jump to the extreme and suppose that designs are subject to a generalised communal right. Communities are internally differentiated to quite a high degree, and their members should not be seen as interchangeable units. On any matter some people are likely to have rights of a certain kind, others rights of another kind, and yet others no rights at all." (ibid. at 8-9). See generally, R. McLaughlin, "Some problems and issues in the recognition of indigenous customary law" (1996) 3 *Aboriginal Law Bulletin* 4, where the author discusses the place of indigenous customary law in the wider Australian legal landscape; and M. Dodson, "From 'Lore' to 'Law': Indigenous Rights and Australian Legal Systems" (1996) 21 *Alternative Law Journal* 2.

³⁸ See M.C. Suchman, "Invention and Ritual: Notes on the Interrelation of Magic and Intellectual Property in Pre-literate Societies" (1989) 89 *Columbia L. Rev.* 1264 at 1265, where the author has argued that, far from being nonexistent, intellectual property rights actually pervaded pre-literate societies and figured "prominently in the complex of magical beliefs surrounding numerous aspects of daily life."

³⁹ According to one researcher, Aboriginal tribes had "no hereditary chieftains, no police force, no lawyers, and no judges appointed by a central government. Yet strict norms of behavior were enforced among them, and offenders could even be put to death by local councils of elders. These derived their power from their guardianship of the sacred ceremonial sites and their knowledge of the ancient traditions. The decisions of these elders were obeyed only if they rested on the traditional norms and on what may be termed legal precedents." See N.M. Williams, "Studies in Australian Aboriginal Law 1961-1986" in R.M. Berndt & R. Tonkinson, *Social Anthropology and Australian Aboriginal Studies* (Aboriginal Studies Press, Canberra: 1988) at 192 (citing T.G.H. Strehlow, *Aranda Traditions* (Melbourne University Press, 1947) at 1).

⁴⁰ The Australian Institute of Aboriginal Studies in Canberra maintains within its library the largest collection in existence of archival material relating to the Aboriginal and Torres Strait Islander peoples of Australia. According to a recent study, "Whether this [material] can be regarded as 'Aboriginal customary law' may be thought a rather and definitional question, and it is one to which lawyers and anthropologists, in Australia and elsewhere, have tended to give different answers." See Australian Law Reform Commission's report, *The Recognition of Aboriginal Customary Laws* (Australian Government Publishing Service, Canberra: 1986) at 75-76. See also K. Maddock, "Aboriginal Customary Law" in P. Hanks and B. Keon-Cohen (eds.), *Aborigines and the Law* (George Allen & Unwin, Sydney: 1984) at 212.

There is a spiritual relationship between Aborigines and their land.⁴¹ The High Court of Australia in its historic judgment in *Mabo v. The State of Queensland (No. 2)* observed that the traditional law or custom is not frozen as at the moment of the arrival of Europeans in Australia in 1788.⁴² Subsequent developments or variations do not make the traditional customs or laws less effective provided any changes do not diminish or extinguish the relationship between a particular tribe or group and particular property, e.g., land or folklore.

Folklore belongs to Aboriginal groups, or certain members of them, but under the customary law there is no right of ownership which is distinct from other rights and is equivalent to the concept of property rights under Australian laws. Some have considered non-exclusive rights concept under the Aboriginal law incompatible with the exclusive rights of copyright.⁴³

Aboriginal customary law has no distinct right of ownership equivalent to the Anglo-Saxon legal concept of property.⁴⁴ As the chair of the Working Group on Indigenous Populations, Erica-Irene Daes has pointed out:

A song, for example, is not a "commodity", a "good", or a form of "property", but one of the manifestations of an ancient and continuing relationship between a people and their territory. Because it is an expression of a continuing relationship between the particular people and their territory, moreover, it is inconceivable that a song, or any other element of the people's collective identity, could be alienated permanently or completely.⁴⁵

Traditional Aboriginal societies were not materialistic.⁴⁶ Nevertheless, land and intellectual property were of great significance.⁴⁷

The ownership of Aboriginal cultural property is governed by a complex system of rights. Aboriginal artists paint according to strict traditional rules of ownership. They are authorized to paint only certain stories and even though there is room for individual creativity, certain subjects must be portrayed in particular ways according to Aboriginal customary law. An important distinction between Aboriginal and Western ownership concepts is the distribution of rights in Aboriginal society amongst groups. Ownership of certain works may vest in a particular clan member, or members, whilst the rights to use the work may vest in various other members for various purposes. Daes goes as far as to suggest that:

[I]ndigenous peoples do not view their heritage in terms of property at all - that is, something which has an owner and is used for the purpose of extracting economic benefits - but in terms of community and individual responsibility. Possessing a song, story or medicinal knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places with which the song, story or medicine is connected. For indigenous peoples, heritage is a bundle of relationships rather than a bundle of economic rights.⁴⁸

It is not easy to reconcile the two very different legal systems - that of Aboriginal customary law having its group ownership, community involvement and consensus decision-making and the Anglo-Saxon legal system which lays heavy emphasis on personal rights and negotiations and, particularly, the concept of an individual artist's intellectual property. One Canadian researcher expounds the legal setting in an eloquent manner, stating thus:

⁴¹ *Aboriginal Land Rights Commission - Second Report* (Australian Government Publishing Service, Canberra: 1974) at paras. 50-51.

⁴² Above, note 2 at 422.

⁴³ *Altman Report*, above, note 17 at 298.

⁴⁴ Generally on Aboriginal customary laws, see R.M. Berndt and C.H. Berndt, *The World of the First Australians* (4 ed., Rigby, 1985) especially chapter 10.

⁴⁵ Daes, above, note 4 at para. 22.

⁴⁶ "The range of directly useful material objects is not large.... Basically for women there is the digging stick. For men there are spears, spear-thrower, and perhaps the boomerang and club.": Berndt and Berndt, above, note 44, at 117.

⁴⁷ *Report on the Recognition of Aboriginal Customary Laws*, above, note 40 at 222.

⁴⁸ Daes, above, note 4 at para. 26.

Their [First Nations peoples] claims can be heard neither in the international regimes governing cultural property, nor in the domestic regimes governing intellectual property. In cultural property law the competing legal values which frame every question are those of national patrimony and the "universal heritage of mankind"; in intellectual property law the interests to be balanced are those of "authors," conceived of on an individualistic model, and "the public" interest of preserving a common public domain. In all these arenas aboriginal peoples must articulate their interests within frameworks which obliterate the position from which they speak.⁴⁹

What follows is a critical evaluation of the present Australian *Copyright Act 1968* (Cth) and its deficiencies in relation to Aboriginal customary laws relating to ancestral designs and folklore.

The Viability of Copyright Protection

Probably most works of the *individual* Aboriginal artists will be protected under the *Copyright Act*. But, in so far as it does that, the law will be operating at variance with customary law which embraces the principle of non-exclusive group rights.⁵⁰ Moreover, the folklore which lies behind its individual manifestations of culture receives no protection at all, and hence is open to abuse.

Further difficulties arise from the fact that under the copyright system, it is essential to show that the work originated from the author and that it was original. Can a design derived from traditional artistic practices dating back possibly millennia, be subject to protection as an original work? And who could claim authorship and ownership of such works? These points are noted below.

Authorship and Ownership under the Copyright System

Authorship and ownership are distinct concepts in copyright law. However, even though the author of a work and the owner of the copyright in that work may be two different persons, the basic rule is that the author is the first owner of the copyright. This position is in stark contrast to that of Aboriginal customary law which emphasises the concept of group or collective ownership of tribal designs. The lauding of individual artists is very much a Western response to Aboriginal art, and a facet of Aboriginal artistry which Aboriginal people find quaint.

The social organization of Aboriginal societies⁵¹ reveals the Aboriginal system of collective ownership. As stated earlier, the issue of clan ownership of a sacred design arose in the *Yumbulul* case.⁵² The plaintiff had argued that the right to permit the reproduction of the morning Star Pole design rested with the clan which was represented by the elders of the Galpu clan of North-East Arnhem Land. The right did not rest with himself. Therefore with respect to any reproduction of clan-owned sacred designs one must not only obtain the permission of the artist but also the clan managers. If all are not in agreement then one may not reproduce the design. If an artist authorizes the reproduction without prior consultation or in defiance of the clan then that artist is likely to suffer sanctions imposed by the clan. The individual artist will be punished even if he does not knowingly authorize the reproduction as occurred in that case.

It is submitted that in *Milirrupum v. Nabalco Pty Ltd.*,⁵³ Blackburn J.'s error lay in his perception that proprietary rights in land can only be vested in individuals. There, a group of Aborigines had sued a mining company and the Commonwealth claiming relief in relation to the possession and enjoyment of areas of land owned by them under customary laws. His Honour never recognized the Aboriginal clan as more than an indeterminate collection of individuals and no statute provided for the vesting of title in such a group. This non-recognition of collective ownership of land was corrected by *Mabo*⁵⁴ and

⁴⁹ See Pask, above, note 8 at 63.

⁵⁰ *Report of the Working Party on the Protection of Aboriginal Folklore*, above, note 13 at para. 705.

⁵¹ The conception that all Aboriginal people are one is considered far too simplistic a notion by most Aboriginal people. Within and between communities, Aborigines have always recognized both cultural unity and diversity.

⁵² *Yumbulul v. Aboriginal Artists Agency Ltd.*, above, note 27.

⁵³ (1971), 17 F.L.R. 141 (also known as the *Gove Land Rights* case).

⁵⁴ *Mabo v. The State of Queensland (No. 2)*, above, note 2.

now the copyright legislation must likewise accommodate for the collective ownership of folklore, including ancestral designs.⁵⁵

One of the factors which is omnipresent in the growth, development and shaping of folklore, is its anonymity. Most works of folklore are the product of the community or group as a whole, and not the creation of individuals. However, it is conceivable that folklore, say a folk song, may owe its origin to a single author, but it does not acquire its folklore character until it submits to the reworkings and reformulations of the community to which the author belongs.⁵⁶ This leads to the common belief on the part of various commentators that anonymity creates a barrier for copyright protection. They argue that it is very difficult, often impossible, to identify the author or authors.⁵⁷ Many works are the result of collective effort, and are often not thought of as the creations of individuals, but of a family, tribal or other social grouping.⁵⁸

One argument which has been put forward time and again in refusing copyright protection for folklore is that folklore has no identifiable author and therefore in some ways it is a spontaneous folk creation.⁵⁹ However, one commentator has forcefully refuted this misconception in the following words:

This opinion does not stand up under critical examination, however, either in copyright or in ethnographic doctrine. Cultural phenomena are generally speaking individual creations, even if they have undergone modification and have been absorbed by a community to the extent of becoming its own cultural property. There are in fact limits to the "collectivization" of creative activity: the making of a judgment, and the combining in a single act of the design and planning of the whole, can indeed only be the work of a single thinking being, which no creative group could ever replace.⁶⁰

In the present author's view, it should be of no consequence that Aboriginal artists draw upon their cultural tradition because no such criterion is used for evaluating non-Aboriginal or European art.⁶¹ Furthermore, in Aboriginal communities two or three people often work on the one painting - the end result being a cooperative endeavour. However, in some clans the tradition is that the person who initiates the choice of ancestral design to be depicted will always be presented as the author even if that person had been assisted by others and occasionally even if that person had not personally done the actual painting.⁶² Hence an author can be readily identified for the purposes of protection under the copyright system. However, the problem remains that the underlying folklore, of which individual works are expressions, is not protected under the *Copyright Act* because it is communally owned, and no author/group of authors can be isolated.⁶³

⁵⁵ A difficulty in affording copyright protection to folklore is that it is often not possible to identify the author of the work. Aboriginal artists customarily do not sign their work. In accordance with the Aboriginal concept of tribal ownership, works that are created by a member of the tribe will, depending on the nature of the work, be "owned" by the tribe or clan. Although joint authorship is recognized by the copyright law, this situation whereby an Aboriginal person draws on the "Dreamtime" or the works of his ancestors or other members of his clan, could not be described as having been "produced by the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contribution of the other authors." (s. 10(1), *Copyright Act 1968*). The Aboriginal concept is rather of joint tribal ownership. Therefore, it is not enough to locate the artists since they cannot rightfully claim to be the joint authors (hence owners) under Aboriginal customary law.

⁵⁶ B. F. Klarman, "Copyright and Folk Music - A Perplexing Problem" (1965) 12 *Bulletin of the Copyright Society of the U.S.A.* 277 at 278.

⁵⁷ For an excellent analysis, see B. Ziff, "Acting Appropriately: A Property Law Perspective on the Cultural Appropriation Debate" (unpublished paper presented at the Law and Society Conference, Phoenix, Arizona, 1994) at 45. A copy of this paper is held by the author.

⁵⁸ E.g., see S. Ricketson, *The Law of Intellectual Property* (Law Book Co, Sydney: 1988) at 313.

⁵⁹ Similar difficulties of identification are encountered in situations involving creation of software, but no one has ever argued that copyright protection of software should be denied on that ground. Furthermore, copyright law has long recognized the system of protecting anonymous works.

⁶⁰ M. Niedzielska, "The Intellectual Property Aspects of Folklore Protection" [1980] *Copyright* 339 at 344.

⁶¹ Again, it is of no consequence that the creativity of an individual Aboriginal artist is controlled by folkloric themes or in some other manner, e.g., selection from a particular clan. These factors do not disqualify non-Aboriginal artists from the protection of copyright law, even if their creativity is kept within the bounds of certain (cultural) norms.

⁶² This is consistent with Rodin's practice discussed in R.E. Krauss, *The Originality of the Avant Garde and other Modernist Myths* (MIT Press, Cambridge, Mass.: 1985) at 181, where the author states: "Take, for example, the testimony of George Bernard Shaw. Like everyone else, he was conversant with the facts of Rodin's production and the paradox that the sculptor with the "inimitable touch" was famous for works that he himself had never laid hands on." See also at 178 and 183.

⁶³ C. Golvan, "Aboriginal Art and the Protection of Indigenous Cultural Rights" [1992] 7 *E.I.P.R.* 227 at 229.

Originality

The requirement of originality is said to create another hurdle in the way of copyright protection of folklore. It is argued that since folklore usually draws upon pre-existing tradition and "results from a constant and slow impersonal process of creative activity exercised through consecutive imitation" within a traditional community, the condition of originality may not be met under the copyright law.⁶⁴ This may be so with sacred restricted ancestral designs which must be replicated precisely. These designs are said to have been given to humankind by the original creator's ancestors and must be reproduced with unfailing accuracy if they are to retain their power in the ceremonial context. Such designs however are not produced for the commercial "open" art market and hence are not of our present concern.

The issue of originality has not been raised in the case law. The *Bulun Bulun*⁶⁵ approach amounted to legal acknowledgment that Aboriginal artistic works are capable of being original within the meaning of the *Copyright Act*. This acknowledgment was affirmed in the *Yumbulul*⁶⁶ case where the Northern Territory Federal Court held for the first time that originality existed in an Aboriginal artistic work. In the words of French J.: "In the sense relevant to the Copyright Act 1968 (Cth), there is no doubt that the pole was an original artistic work, and that he [Yumbulul] was its author, in whom copyright subsisted."⁶⁷

Many works of folklore are produced from traditional themes derived from the *Dreamtime*. The continual re-creation of these themes serves to sustain spiritual connection to the land. Transmission of themes through Aboriginal folklore from one generation to the next safeguards the authenticity of the *Dreamtime*. The degree of variations in transmission of these themes varies greatly from one group to another and from one medium to another.⁶⁸

Transmission requires creative reinterpretation of themes by individual artists. Evidently, nowhere is an Aboriginal artist merely an automaton.⁶⁹ Nor are new themes completely ruled out. Inevitably, changes occur in depicting the same stories in various artistic forms. These changes often are imbued by each artist's individuality, hence giving the work its "originality" in the copyright sense. It is noteworthy that in the words of the Supreme Court of the United States "[T]he requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be."⁷⁰ To deny that Aboriginal artists produce "original works" will be to deny the dynamic nature of the living Aboriginal culture.

Fixation

Many items of cultural heritage exist solely in collective and individual memories, e.g., "folk" songs and stories. Although the real substance of traditional songs, stories and genealogies may be relatively unchanged down through the ages, they do not have any material form.⁷¹ In this regard, folklore suffers from an inherent contradiction: while its actual existence is solely for the duration of each occasion, it exists and lasts, notwithstanding its ephemeral character, in the collective memory of

⁶⁴ See C. Masouyé, "La protection des expressions du folklore" (1983) 115 *Revue Internationale Du Droit D'Auteur* [R.I.D.A.] 3 at 10. See also, J.G. Weiner, "Protection of Folklore: A Political and Legal Challenge" (1987) 18 *I.I.C.* 56 at 70.

⁶⁵ Golvan, above, note 23 at 349-351.

⁶⁶ *Yumbulul v. Aboriginal Artists Agency Ltd.*, above, note 27.

⁶⁷ *Ibid.*, at 484.

⁶⁸ J. Riedel, "Folklore of the Americas" (1979) 4 *INTERGU Yearbook* 239 at 144-145, appears to support this: "[F]olk music, in order for it to be truly that, must be kept alive through continuous transmission and reception If a song is created and performed only once, such a song is not a folksong. ... One of the tests of the validity of any given folk song is the existence of varying versions in oral circulation."

⁶⁹ *Report of the Working Party on the Protection of Aboriginal Folklore*, above, note 13 at para. 505.

⁷⁰ See *Fiest Publications, Inc v. Rural Telephone Service Co, Inc* (1991), 41 *B.N.A.'s Patent, Trademark and Copyright Journal* 453 at 454; 20 *I.P.R.* 129 at 132. In this case, copyright protection was denied to a compilation (a telephone directory) on the basis that "sweat of the brow" alone is insufficient to give rise to an original work.

⁷¹ This is true not only of Aboriginal folklore, but also of folklore of other indigenous people, e.g., Maori, Torres Strait Islanders, Polynesian people. See generally, Pask, above, note 8 at 65-66, and K. Puri, "Copyright Protection of Folklore: A New Zealand Perspective" (1989) *XXII Copyright Bulletin* 19.

a people.⁷² The oral nature of much folklore does not, therefore, appear to agree with the fixation requirement of copyright.⁷³

One of the fundamental principles of copyright law is that ideas and themes are not protected; the form and not the substance is protected. Nor are artistic styles and techniques protected as such. This means that, for example, the acrylic dot style which Aboriginal painters commonly use is not protected by copyright. Similarly, the copyright law will not prevent non-Aboriginal persons from taking traditional themes and using them for their own works. However, a remedy may be available under the *Trade Practices Act 1974* (Cth) or through the common law action of passing off, e.g., if the use of the style would mislead the public about the identity of the artist or that it is Aboriginal work.⁷⁴

It should be noted that a class action can now be instituted in the Federal Court of Australia by a person called "the representative party", not only on his/her own behalf but also on behalf of other persons (called "group members") who have claims against the same respondent in respect of, or arising out of, the same, similar or related circumstances and giving rise to a substantial common issue of law or fact.⁷⁵ Furthermore, the identity of the group members need not be known when the proceeding is commenced. Group members need not consent to involvement in the proceeding. "The notion is that they are entitled to take the benefit of, and are bound by, the result of the proceeding unless they opt out of the proceedings by a specified date."⁷⁶

The fixation requirement is construed to imply that unless a work takes a material form, one cannot tell whether it has passed the "idea" phase. This absence of protection has led to what one commentator terms the "new bastardization" of Aboriginal art as commercial manufacturers create their own versions of Aboriginal art.⁷⁷ Tourist shops now stock T-shirts having designs which may appear to be works of Aboriginal art. The use of another person's ideas, artistic style or technique does not infringe copyright. Therefore the Aboriginal community has no legal recourse where a non-Aboriginal artist produces his or her own rendition of a sacred Aboriginal design which appears as an "Aboriginal" artwork but is not copied from a particular Aboriginal artist. Yet in such a scenario Aboriginal customary laws have been breached and great offence is incurred by the community.⁷⁸

Why should a European artist be prevented from altering or interpreting an Aboriginal design? Why should Aboriginal ideas be protected while European religious icons have been made the subjects of interpretation in art work? One possible answer is that sacred Aboriginal designs are not "ideas" in the same sense as Cubism or Dadaism - they are "property" in the most basic sense. The distinction between real and intellectual property is of no significance under Aboriginal customary law. It is a property right, not just a mere idea, which is infringed when a sacred design is employed in an unauthorised way.⁷⁹ More importantly, as a Canadian researcher points out eloquently:

⁷² Niedzielska, above, note 60 at 344. See also, G. Blain and R. De Silva, "Aboriginal Art and Copyright" (1991) 75 Copyright Bulletin at 6.

⁷³ The *Copyright Act 1968* precludes oral works from having copyright protection. Therefore, copyright attaches when the ancestral design is fixed in material or tangible form. Section 22(1) provides that copyright will subsist from the time when "the work was first reduced to writing or to some other material form."

⁷⁴ See *Milpururu v. Indofum Pty. Ltd. and Others*, above, note 1 at 39,084, where the Federal Court of Australia held that the contraventions of ss. 52, 53(c) and 53(d) of the *Trade Practices Act* had been made out. In that case, the respondents had imported into Australia woolen carpets which depicted Aboriginal artworks without the licence of the owners of the copyright. The court concluded that the swing tags attached to the carpets which stated, "Proudly designed in Australia by Australian Aboriginals - Made in Vietnam" made false and misleading statements about those carpets.

⁷⁵ The relevant statutory provisions governing class actions or representative proceedings are contained in Pt IVA of the *Federal Court of Australia Act 1976* (Cth). Note that this Part was added by the *Federal Court of Australia Amendment Act 1991* (Cth) and commenced operation on 4 March 1992. For a comprehensive critique on "representative actions", see D. Abrahams, "The Relevance of Representative Proceedings to Aboriginal Tribes in Arts Cases" (1996) 1 Media and Arts Law Review 155. The author argues that the representative procedure is appropriate in virtually every case of Aboriginal arts abuse. The primary reason for this is because of the essentially "communal nature of ownership of Aboriginal art and designs under Aboriginal customs and law" (at 166). The author concludes that at present the representative procedure is unworkable with respect to most Aboriginal arts claims as a result of statutorily imposed limitations." (at 172).

⁷⁶ See *Tropical Shine Holdings Pty Ltd. v. Lake Gesture Pty Ltd. and Others* (1993) 118 A.L.R. 510 at 511 per Wilcox J.

⁷⁷ Golvan, above, note 63 at 229.

⁷⁸ Further support for this analysis can be found in Terry Yumbulul's comment that the Morning Star Pole "is a sacred object. When someone copies it, it is like stepping into someone else's property." See *Time* (16 July 1990) at 61.

⁷⁹ See S. Gray, "Aboriginal Designs and Copyright: Can the Australian Common Law Expand to Meet Aboriginal Demands?" [1992] Law Institute Journal 47 at 49.

There is ... a significant difference in the scope of the claims that can be made on behalf of a culture, and those that can be made on behalf of an individual author. Copyright laws enable individual authors not only to claim possession of their original works as discrete objects, but to claim possession and control over any and all reproductions of those works, or any substantial part thereof, in any medium. Cultural property laws, however, enable proprietary claims to be made only to original objects or authentic artifacts.⁸⁰

A remedy may be available under the consumer protection provisions of the *Trade Practices Act 1974* (Cth). The relevant provisions prohibit deceptive or misleading conduct in trade. An action under these provisions may apply where a person sells artwork representing it to be the work of Aboriginal artists when in fact that is not the case.⁸¹

The need for material form leads to difficulties in protecting not only visual ancestral designs but the other forms of ancestral design, viz. music, dance, myths. Since these are not recorded (e.g., on tape, video or film, paper), they are not protected. Another vexed question is regarding the use of tape recorders by participants in secret ceremonies as the person who reduces the ceremony to material form (e.g., via a film) is the copyright owner of that particular film.

Likewise, folk tales which have been passed down orally are not protected by copyright unless they are recorded in a material form. There would be difficulties in protecting visual art as well since it is not usually in a tangible form, such as body painting and ground painting. The need for material form can, however, be overcome by making sound recordings or films of performances of music or dance. If that was done, the act of recording works would be the technical determinant of the time of the making of the works and hence copyright protection would be available, assuming that other copyright requirements will be met. But this is not always practical or desirable, given the secret and sacred nature of some ceremonies or other works.

It is submitted that the fixation requirement should not apply to ancestral designs and works of folklore. Such works form part of cultural heritage of Aborigines and their very nature lies in their being handed on orally or visually from generation to generation. Interestingly, unlike the countries following the Anglo-Saxon legal tradition, in countries which follow the continental legal system (e.g., Germany), works need not be fixed in some material form to be protected. It is worth noting that the *Tunis Model Law on Copyright 1976* made an exception to the fixation rule (as applicable in countries following the Anglo-Saxon legal approach), particularly since, if this requirement were sustained, the copyright in such works might well belong to the person who takes the initiative of fixing them.⁸² Therefore if comprehensive copyright protection for ancestral designs is to be attained, the need for writing, notation, printing and publishing of the work must be removed.

Duration of Protection

In the light of the cultural and religious significance of ancestral designs, the term of 50 years after the death of the author is grossly inadequate. For thousands of years prior to colonialism in Australia, ancestral designs, which have imbued individuals with kinship ties, religious beliefs, and land ownership, were passed on and continue to be passed on from one generation to the next.

Unless the copyright law is amended to incorporate the need for protection in perpetuity for ancestral designs, there exists a very real possibility that in the next two to three decades, recorded and/or published ancestral designs could be bought on the open market, which in turn would result in non-Aboriginal people owning works of traditional Aboriginal culture, custom, language and history. Hence with the present limitation under the *Copyright Act*, Aboriginal descendants, who in a traditional context would be the owners of such works, may become culturally dispossessed and impoverished to

⁸⁰ R.J. Coombe, "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy" (1993) VI *Canadian Journal of Law and Jurisprudence* 249 at 264 (footnote omitted). For another excellent article in which the author explores every avenue which could assist native peoples to reclaim from Canadian public institutions certain items of great significance to their cultural survival, see R. Clements, "Misconceptions of Culture: Native Peoples and Cultural Property under Canadian Law" (1991) 49 *Univ. of Toronto Faculty of Law Rev.* 1.

⁸¹ E.g., *Milpurruru v. Indofum Pty. Ltd. and Others*, above, note 1.

⁸² See s. 1(5bis), *Tunis Model Law on Copyright for Developing Countries* (Unesco-WIPO 1976) (reproduced in [1978] *Copyright* 165 at 167.)

the point that they must seek permission to use or have access to information once owned and/or created by their ancestors. Significantly, the Working Group on the Intellectual Property Aspects of Folklore Protection, established under the joint auspices of Unesco and WIPO, felt that the duration of protection should not be limited in time.⁸³

Other Problems under the Copyright System

Under the provisions of section 65 of the *Copyright Act 1968* (Cth) where a sculpture or a work of artistic craftsmanship is on public display "other than temporarily", anyone may photograph, film, draw or paint the work without permission from the owner of copyright. There is no requirement that the reproduction be for private or non-commercial purposes. Section 68 allows the reproduction to be published without permission. The problems created by these provisions were aired in the *Yumbulul* case.⁸⁴ The agent had argued that the reproduction in question was permitted under sections 65 and 68 of the *Copyright Act*, as those sections permitted the reproduction of a sculpture which is on permanent public display.⁸⁵ The applicant's response had been that the pole was not a sculpture and therefore the sections did not apply. While French J. did not have to decide the question, his Honour stated that if the agent's argument was correct, "then it may be the case that some Aboriginal artists laboured under a serious misapprehension as to the effect of public display upon their copyright in certain classes of works. "This question and the question of statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators."⁸⁶

The *Copyright Act* is deficient in its application to works of Aboriginal art also because it fails to recognize the fact that even though an individual artist may purport to assign copyright ownership to a non-Aboriginal person, the community retains the underlying right to the folklore - the *Madayin* - represented in the work. It has been suggested that this problem could be avoided by recognizing in the traditional owners equitable rights in copyright over traditional Aboriginal designs.⁸⁷ However, under the current legislation problems would arise "where a 'legal' owner of copyright cannot be identified, or where the legal copyright owner is not able to be joined with the equitable owners for the purposes of obtaining a permanent injunction."⁸⁸

Other Legislative Protection: *Designs Act*

Another area of concern is the interaction between copyright and designs law. The *Designs Act 1906* (Cth) is relevant to the protection of artistic works in respect of industrial applications. Because of a policy to prevent simultaneous protection of a design under both laws, it is easy for an artist to find himself or herself with no legal protection at all for a design. Furthermore, legal protection offered under the *Designs Act* is inherently limited in its ability to meet the needs of protecting works of folklore. Duration of protection is less than for copyright, and "[t]his can be inadequate for designs of special

⁸³ Working Group on the Intellectual Property Aspects of Folklore Protection [1981] Copyright 111 at 113. Reference should also be made to section 33(3) of the *Copyright Act 1968* (Cth) which provides that the copyright in literary, dramatic and musical works that have not been published, performed in public, broadcast or recorded (and these records sold to the public) during the author's lifetime "continues to subsist until the expiration of 50 years after the expiration of the calendar year in which the work is first published, performed in public, or broadcast, or records of the work are first offered or exposed for sale to the public, whichever is the earliest of those events to happen." It is to be noted that this provision does not apply to artistic works. On the face of it, therefore, it would be theoretically possible for copyright in an ancient Aboriginal work (other than an "artistic work") which has not been published, etc., to continue to subsist in perpetuity. However, section 33(3) would not save ancient Aboriginal artistic works from falling into public domain. See, *Report of the Working Party on the Protection of Aboriginal Folklore*, above, note 13 at para. 707. Query, whether Aboriginal paintings could be considered to be "literary" works within the meaning of the *Copyright Act*. Given the highly symbolic nature of Aboriginal art, and given the absence of any other form of written Aboriginal language, it may be contended that these artistic works in fact constitute "literature".

⁸⁴ *Yumbulul v. Aboriginal Artists Agency Ltd.*, above, note 27.

⁸⁵ The "Morning Star Pole" design was on permanent public display in the Australian Museum, Sydney.

⁸⁶ Above, note 27 at 492.

⁸⁷ Golvan, above, note 63 at 230. Interestingly, Von Doussa J. observation in *Milpururu v. Indofum Pty. Ltd. and Others*, above, note 1 at 39,081 that "[n]o attempt was made in the proceedings to advance an argument that beneficiaries of the estates held interests as equitable owners in the copyright sufficient to support claims by them for personal harm suffered in their communities, being claims which the Public Trustee as legal owner could bring on their behalf" seems to suggest that the court will give careful consideration to any argument put forward in the future that rested on equitable ownership by traditional owners.

⁸⁸ S. Gray, "Wheeling, Dealing and Deconstruction: Aboriginal Art and the Land post-Mabo" (1993) 63 *Aboriginal Law Bulletin* 10. Note that Golvan (above, note 63 at 229) has argued for the extension of heritage protection under the *Aboriginal and Torres Strait Islander Heritage Act 1984* (Cth) to protect works of Aboriginal art.

cultural and spiritual significance, where protecting the integrity of the design may be of greater importance than exploiting its commercial value.⁸⁹

Heritage Legislation

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) sets out procedures for the protection of Aboriginal places, objects and remains, and provides heavy penalties for offences under the Act. Under the Act, the Minister for Aboriginal Affairs, on the request of Aboriginal people, may declare that a certain site or object is protected as part of Australia's Aboriginal heritage.⁹⁰

It is submitted that the approach taken under heritage legislation of piecemeal declarations on request does not address the fundamental issues involved in indigenous peoples' rights to control and preserve their own cultural heritage.⁹¹ As Daes notes it is difficult to attempt to nominate specific sites of cultural importance since "[a]ll lands and resources are, to a greater or lesser extent, sacred and integral to indigenous peoples' cultures and spiritual life, and often the most important places cannot be revealed to outsiders."⁹² In short, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* is administratively cumbersome and it is questionable whether it overcomes the inadequacies of the *Copyright Act*.

Proposals for Reform

Clearly there are a number of ways in which Aboriginal and Torres Strait Islander people can seek protection under existing legal structures. Yet, none of these is completely comprehensive in securing their cultural heritage and folklore. Several committees at the international level have enquired whether copyright was the right framework for folklore protection, e.g., the Joint Committee of WIPO and UNESCO of 1975.⁹³ In Australia, the need for such an inquiry arose following well-publicised concern in the early 1970s about the unauthorised reproduction of original artworks particularly as designs on tea-towels and souvenir products.⁹⁴

Recommendation of the Australian Working Party of 1981⁹⁵

The Working Party concluded that it was essential to protect the Australian Aboriginal folklore which, in the committee's view, was a national resource deserving protection both in the interests of Aboriginals and of the general public. It found that the present Australian copyright and designs laws offered inadequate protection, and that mere amendment of the *Copyright Act* was an unsatisfactory solution. The committee stated that the existing Australian law did not in general provide adequate legal protection for Aboriginal artists when drawing upon their tradition. It made reference to the hurdles in protecting folklore under the *Copyright Act*, viz., difficulties relating to originality, ownership, fixation, and term. Copyright protection was also considered unsuitable in principle from a customary perspective.

⁸⁹ Daes, above, note 4 at para. 145.

⁹⁰ In *Wamba Wamba Local Aboriginal Land Council v. Minister Administering The Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (1989), 86 A.L.R. 161 at 169, the Court stated that the power given under the Act is facultative, not imperative.

⁹¹ See Pask, above, note 8 at 78-81.

⁹² Daes, above, note 4 at para. 186. See also, Pask, *ibid.* at 81: "Perhaps the most glaring point of dislocation is between the demand of Native Communities for control over access and the demand of the legal system for disclosure."

⁹³ "The issue of legal protection of folklore was very much to the fore in initial stages of the UNESCO process during the 1970s and culminated in the final formulation of *Model Provisions for National Laws*, UNESCO-WIPO, 1985. Since then little has happened on this 'prohibitive' line of folklore protection because of mounting criticism against the Model Provisions and, above all, the obvious difficulties encountered in their implementation." L. Honko, "Australia in the Frontline of the Safeguarding Process" [1989] *Australian Folklore* 3 at 9. Note that the 1987 inquiry opposed the idea of applying the Model Provisions on a broad basis in Australia, see *Report on Folklife - Our Living Heritage*, above, note 6 at 271.

⁹⁴ See *Altman Report*, above, note 17 at 296.

⁹⁵ Above, note 13.

The Working Party recommended that there be a special, *sui generis*, legislation, i.e., an Aboriginal Folklore Act which should provide for (i) prohibition on non-traditional uses of sacred-secret material; (ii) prohibitions on debasing, mutilating or destructive uses; (iii) payments to traditional owners of items being used for commercial purposes; (iv) a system of clearances for protective users of items of folklore; (v) an Aboriginal Folklore Board to advise the Minister on policy matters; and (vi) a Commissioner for Aboriginal Folklore to issue clearances and negotiate payments. The report suggested a mechanism for the examination by the Aboriginal Folklore Board of proposed uses of items of folklore by non-customary users on a case-by-case basis.

No special legislation has been enacted in pursuance of the recommendations of the Working Party.⁹⁶ Instead, the issue of protection of Aboriginal folklore has been debated, albeit in passing, by three other inquiries since the 1981 Report of the Working Party.⁹⁷

The Working Party defined "folklore" in its broadest sense. The definitional aspects lead to the two prime characteristics of Aboriginal folklore which uniquely present the legal difficulties in protection: the manner in which it is developed and depicted, and the notion of collective ownership.

The Working Party's recommendations amounted to an acceptance of a notion akin to the moral rights concept in copyright law of certain countries of the world, particularly those with civil law background. The main recommendation was for legislative recognition of the integrity of works of folklore and a scheme of remuneration for traditional owners. It is most unfortunate that to date the Working Party's recommendations have not been implemented by the successive Australian federal governments.⁹⁸

In 1986, the Australian Law Reform Commission published a major report recommending recognition of Aboriginal law in a number of specific situations.⁹⁹ A recent Australian inquiry on folklife has raised the important issues of economic and moral rights regarding the collection and use of folklore.¹⁰⁰

"Stopping the Rip-offs" Issues Paper¹⁰¹

This paper sought to discern and define appropriate measures for effective intellectual property protection in order to stop the exploitation of indigenous peoples' works. After detailing the current copyright protection available for Aboriginal and Torres Strait Island peoples' cultural expressions under the copyright and designs legislation, the paper sets out the inadequacies and limitations of this form of protection. However, it does little to advance the position outlined in the Working Party report

⁹⁶ It is interesting to note that the *sui generis* alternative has not received universal endorsement: "Critics of any one of the proposed forms of *sui generis* protection of folklore are quick to point out that it is difficult enough to enforce and continually revise the existing forms of intellectual forms of intellectual property protection, such as the Berne Convention, the Universal Copyright Convention or the Paris Convention, to mention just a few. This logistics argument is both plausible and persuasive": Weiner, above, note 64 at 91.

⁹⁷ See *Report on the Recognition of Aboriginal Customary Laws*, above, note 40; *Report on Folklife - Our Living Heritage*, above, note 4; and *Altman Report*, above, note 17. It is interesting to note that the last-mentioned committee recommended piecemeal reform, instead of reform through comprehensive legislation. Its recommendations included (i) increased dissemination of information within the Aboriginal arts and crafts industry; (ii) establishment of a centralized artists' collection agency on the lines of several existing collection agencies in Australia (e.g., Aboriginal Artists Agency [AAA], Australasian Performing Right Association [APRA], Australasian Mechanical Copyright Owners' Society [AMCOS], Copyright Agency Limited [CAL], Australian Contemporary Music Development Company [ACMDC]). It is to be noted that the committee did not favor a specialist Aboriginal copyright collection agency; (iii) increased legal assistance to Aboriginal artists; and (iv) increased participation by art centers and representative bodies in issuing reproduction licenses and addressing copyright infringements. On the whole, it seems that the committee found the existing legal framework satisfactory, but that increased awareness and administration were desirable.

⁹⁸ See P. Banki, "The Report of the Working Party on the Protection of Aboriginal Folklore" [1983] Copyright Reporter 8. See also, R. Bell, "Protection of Aboriginal Folklore: Or do they Dust Reports?" [1985] Aboriginal Law Bulletin 6-8.

⁹⁹ Above, note 40. Issues of intellectual rights were treated as being outside the scope of the Law Commission's reference, but it noteworthy that the Commission endorsed the need for adequate legal protection for Aboriginal folklore (*ibid.* at 338).

¹⁰⁰ *Report on Folklife - Our Living Heritage*, above, note 4. It is to be noted that this inquiry was confined to Anglo-Celtic Australia and did not cover Aboriginal cultures. The report presented 51 recommendations to the government regarding the study, conservation, preservation, and extension of folklife. The report dwelled at length on the possibility of applying existing copyright principles to folklore materials and suggested numerous solutions, e.g., a system of public domain payments, a legal deposit requirement ensuring the acquisition of copies of all materials for the national collections, a formal set of ethical standards, and codes of practice in the documentation, archiving and use of folklore materials, etc.

¹⁰¹ International Trade Law and Intellectual Property Branch, Business Law Division, Attorney-General's Legal Practice, October 1994. See further, C. Hawkins, "Stopping the rip-offs: Protecting Aboriginal and Torres Strait Islander Cultural Expressions" (1995) 20 *Alternative Law Journal* 7.

published in 1981. Like the Working Party, the paper proposes several measures to overcome the inadequacies in copyright legislation, including amendments to the *Copyright Act*. However, the paper recognises that there would be practical difficulties in incorporating the concept of communal ownership in the copyright legislation. The paper also suggests that the *Aboriginal and Torres Strait Islander Heritage Protection Act* should be amended in a manner that allows communities a right of action to protect artistic works of traditional significance, with no limit on the term of the protection for such works and no requirement of material form.

Among the other options suggested in the paper for addressing the limitations in present protection, the one relating to introduction of an "Authentication" mark seems to have led to some follow-up action on the part of Aboriginal people. The authentication mark aims to combat proliferation of articles that falsely represent aboriginal origin or influence.¹⁰² Of course, the effectiveness of this depends on how effectively the authentication mark is administered, and the way in which the public reacts to its use. Finally, two points are noteworthy. One, the paper does not favour the use of the word "Folklore"; instead, it refers to "arts and cultural expressions." And two, there is emphasis on works of an artistic nature rather than "cultural expressions" in the form of song, dance, myth, etc., that comprise folklore.

Moral Rights¹⁰³

Copyright, in countries with the Anglo-Saxon legal system, including Australia, is primarily concerned with economic rights. Protection of moral rights (*droit moral*) does not exist in these countries. However, for Aboriginal folklore, moral rights are very significant for preventing debasement, mutilation or destruction of such cultural works. Under the present Australian copyright law, there is no obligation to acknowledge the creator of an artwork when the work is displayed in public or a reproduction is published, although sections 189 to 195 of the *Copyright Act 1968* (Cth) do require that works not be attributed incorrectly to a person other than the artist or author. Where the artist owns the copyright, proper attribution can be made a condition of the permission to use the work. The artist who does not own the copyright (or who does not have the negotiating power) does not have the opportunity to ensure attribution. Nor does any artist have the general legal right to ensure that their name appears where the original work is displayed.

Another moral right is the right to prevent distortions or alterations to the work (original or reproduction) that may not only damage the artist's reputation but in Aboriginal art spheres cause grave offence being a disrespectful act or disregard to Aboriginal religious beliefs. What must be understood is that almost all Aboriginal artistic objects have a meaning which, with varying degree, expresses Aboriginal religious beliefs. Sacred art, which the clan managers permit sale of, possesses a sacred meaning and general public meaning. The art buying public is told the public meaning, whereas the sacred meaning is kept secret by the Aborigines.¹⁰⁴ While expressly recognizing moral rights along the lines of civil law countries, which in Australia would have to be achieved by statute, attention would need to be given to the collective rights of the clan, in addition to effectively protecting the rights of individual Aboriginal artists.

¹⁰² See K. Wells, "The Development of an Authenticity Trade Mark for Indigenous Artists" (1996) 21 *Alternative Law Journal* 38.

¹⁰³ For an interesting review of the concept of moral rights in the Australian context, see D. Vaver, "Authors' Moral Rights and the Copyright Law Review Committee's Report: W(h)ither such rights now?" (1988) 14 *Monash Law Rev.* 284. See generally, A. Dietz *Copyright Law in the European Community* (Sijthoff & Noordhoff, 1978) 66-78, for an excellent analysis of *droit moral* in the Continental-European countries. It is noteworthy that New Zealand has already introduced moral rights protection for creators in the *Copyright Act 1994* (NZ). For a comment on the new provisions, see A. van Melle, "Moral rights: The right of integrity in the Copyright Act 1994" [1995] *N.Z.L.J.* 301.

¹⁰⁴ According to Ms. Anne Marie Brody, curator of the Holmes à Court collection, there is "an enormous imbalance between what is known about Aboriginal art and what there is to be known. The culture remains inaccessible despite the art. Aborigines jealously guard all that is secret and sacred." *Time* (16 July 1990) at 59.

Conclusions and Recommendations

European settlement of Australia brought about the dispossession and dispersal of Aboriginal people from their lands and the destruction of much of their cultural heritage. Of all the injustices done to Aboriginal people, expropriation of their traditional land and flagrant exploitation and destruction (without recompense) of their culture are the losses they feel most keenly.¹⁰⁵

Changes in government policy towards Aborigines have been slow and half-hearted.¹⁰⁶ Until the Australian legal system fully appreciates and recognizes the Aboriginal folklore, the indigenous peoples of Australia, like their counterparts of Anglo-Celtic background will forever remain victims of the dreaded "cultural cringe."¹⁰⁷ However, there seems to be the acceptance of the idea that Aborigines have (within certain limits) the "choice" to retain their racial identity and their folklore.¹⁰⁸ The pressures for change gained impetus from the 1967 national Referendum, which, by an overwhelming majority, empowered the federal parliament to enact special laws for Aborigines.¹⁰⁹

Degradation of images through inappropriate use or application, such as the classic instance of reproducing sacred or semi-sacred images on tea towels or T-shirts, is an offence for which the Australian law provides no remedy. Many Aboriginal commentators place the wholesale appropriation of Aboriginal art in the context of wider cultural colonisation and dispossession.¹¹⁰ This has the potential of breeding disharmony among people. This takes variety of forms including the commodification of Aboriginal art and culture, in particular its packaging as Australia's number one tourist resource, and a proliferation of Aboriginal-style works by non-Aborigines.¹¹¹ This abuse has a two-fold significance. Firstly, it deprives Aboriginal people of an important economic base. And, secondly, if trivialised, it can undermine the autonomy of unique Aboriginal traditions. "It is reflective of our legal order that the sacrilegious use of sacred objects and images is neither a civil nor a criminal offence, while the re-introduction of the Summary Offences Act makes swearing in public an offence punishable by imprisonment."¹¹²

Aboriginal people can be excellent "cultural ambassadors" for Australia. Already, Aboriginal and Torres Strait Islander dance groups and craftspeople have toured and gained public acclaim in countries in Europe, Asia, North America, and the Pacific. This will give rise to direct and indirect economic benefits - through tourism, employment creation, multiplier effects, and above all, it will make the original inhabitants of this vast continent feel at home in their "own" home.¹¹³

There is a strong case for the argument that the *Mabo* judgment can be broadened beyond the realm of real property rights and extended to cultural and intellectual property rights, provided that there has been a continued observance of Aboriginal customary laws despite the existence of the common law. Recognition by the Australian common law of "Aboriginal native title" in land must necessarily imply recognition of Aboriginal communal rights in sacred designs.

¹⁰⁵ This sentiment has been expressed succinctly by Deane and Gaudron JJ. in their decision in *Mabo*, above, note 2 at 449 in the following words: "An early flash point with one clan of Aborigines illustrates the first stages of the conflagration of oppression and conflict which was, over the following century, to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame."

¹⁰⁶ This continuing failure is in stark contrast with the position in the United States, Canada and New Zealand, e.g., the North American Indians have for a long time been recognized "as collectivities with their own legal status and powers, and with collective title to their lands." See J. Crawford, "The Aboriginal Legal Heritage: Aboriginal Public Law and the Treaty Proposal" (1989) 63 A.L.J. 392 at 398.

¹⁰⁷ A stern warning has been given recently in these words: "Over the ages, indigenous peoples have developed innumerable technologies and arts. They have devised ways to farm deserts without irrigation and produce abundance from the rain forest without destroying the delicate balance that maintains the ecosystem; they have learned how to navigate vast distances in the Pacific using their knowledge of currents and the feel of intermittent waves that bounce off distant islands; they have explored the medicinal property of plants; and they have acquired an understanding of the basic ecology of flora and fauna. Much of this expertise and wisdom has already disappeared, and if neglected, most of the remainder could be gone within the next generation." E. Linden, "Lost Tribes, Lost Knowledge" *Time International*, vol. 138 no. 12 (23 September 1991) at 50.

¹⁰⁸ See generally, *Report on the Recognition of Aboriginal Customary Laws*, above, note 40 at 18.

¹⁰⁹ See s. 51 (xxvi) of the *Australian Constitution*.

¹¹⁰ See Weiner, above, note 64 at 57, 65. See generally, Ziff, above, note 57. In his comprehensive treatment of the topic, the author warns that arguments against cultural appropriation must be not dismissed lightly.

¹¹¹ *Altman Report*, above, note 17 at 301-303.

¹¹² *Editorial* (1988) 34 *Aboriginal Law Bulletin* 3.

¹¹³ The Australian history reveals that "the Aborigines have been treated as trespassers to be driven by force if necessary, from their traditional homelands." per Deane and Gaudron JJ. in *Mabo*, above, note 2 at 450. In the same vein, Toohey J. remarked that it was a startling consequence that, upon annexation, all indigenous people became trespassers on their own land. "That was not a consequence the common law dictated; if it were thought to be, this Court should declare it to be an unacceptable consequence, being at odds with basic values of the common law." *Ibid.* at 484.

As we have seen above, in the past 20 years or so various committees have debated the matter regarding protection of indigenous peoples' cultural and intellectual property rights and suggested different solutions, ranging from a *sui generis* protection to all-out protection under the copyright law. But this debate has generated more heat than light and until the path breaking decision in *Mabo*, this had left a bitter residue of distrust. Be that as it may, what is remarkable is that no one has voiced any opposition to giving protection to Aboriginal culture and folklore. It is hoped that this *consensus* would lead to some legislative activity in this matter of national and global significance. The present author perceives that a "native intellectual property right" similar to the *Mabo* "native title" will be the best solution. Truly, there is a need for a new approach in this area, viz., a *sui generis* legislation dealing exclusively with expressions of folklore. In drafting such legislation, consultation with indigenous communities is vital. The primary aim of the new law should be to enhance the preservation and conservation of expressions of folklore. It should acknowledge the role of community ownership and control within that culture, where appropriate. Furthermore, the new legislation should include moral rights provisions, recognizing a communal interest as distinct from an individual artist's moral rights. Finally, a note of optimism - it is gratifying that the Federal Court of Australia in its recent judgment in *Milpurruru*¹¹⁴ has followed the lead of *Mabo* by exhibiting a sensitive and flexible approach towards the cultural barriers confronted by Australia's indigenous peoples.

¹¹⁴ Above, note 1 and the accompanying text.

LA EXPERIENCIA DE LA REGIÓN DE AMÉRICA LATINA Y EL CARIBE

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Del concepto de culturas populares

En el caso particular mexicano se ha desarrollado un extenso debate conceptual en torno a los términos folklóre y culturas populares por ello parece conveniente iniciar esta exposición elaborando algunas precisiones sobre los conceptos mismos que permitan enmarcar las políticas culturales de la región.

El término folklóre, si bien se gesta en un contexto general reivindicativo de la diversidad sociocultural, tiene una historicidad que lo acota ya sea a la vocación erudita en el rescate de una realidad pintoresca presente en las culturas tradicionales, fundamentalmente campesinas; o al sueño romántico que abandera la pureza esencial del "buen salvaje".

El término folklóre enfatiza la tradición y lo hace, por lo general, desde una perspectiva esencialista. La realidad cultural de México con 62 lenguas vivas por ejemplo¹, y de Latinoamérica con más de 414 grupos étnicos contemporáneos², requiere de un abordaje en donde la tradición y los procesos de innovación no estén confrontados, ni se presenten como vertientes excluyentes en el campo de las culturas populares.

El término de cultura popular se hace presente a nivel latinoamericano a partir de la introducción, en las ciencias sociales, de la obra de Antonio Gramsci en la década de los 60 y su interlocución, en el caso mexicano, con un amplio campo teórico desarrollado por la antropología mexicana.

Hasta ese momento y en el contexto de las políticas culturales, la relación entre cultura y pueblo estaba definida por una acción unilateral que significaba llevar la cultura al pueblo; la capacidad de creación cultural de los sectores populares era pocas veces conocida, reconocida o menos aún promovida y estimulada.

Con la introducción del pensamiento gramsciano se desarrollan nuevos estudios con un enfoque relacional³ entre cultura dominante y cultura subalterna.

La crisis mundial del 68—que en el caso mexicano constituye un parteaguas—provoca la irrupción de las culturas populares tanto en el escenario del que hacer del Estado, como en el académico y dentro de las industrias culturales.

Con anterioridad, las expresiones de las culturas populares habían sido reivindicadas sólo parcialmente, como es el caso del arte popular en México que cobra un impulso y revaloración significativos a partir de los años 20.

Desde la perspectiva del Estado mexicano y en un afán de recomposición hegemónica, por un lado se recuperan las culturas populares como elemento constitutivo de un nuevo nacionalismo⁴, y por otro lado se crean diversas instituciones y programas culturales que se desarrollan con una buena dosis de autonomía frente a las políticas gubernamentales⁵.

Desde la perspectiva de la academia, se multiplican las investigaciones sobre las culturas populares; las definiciones tautológicas tienden a abandonarse y las culturas se estudian ya sea por sus características propias—fundamentalmente investigaciones sobre culturas indígenas—o a partir de

¹ Instituto Nacional Indigenista, México.

² Cifra tomada de *Educación, Etnias y Descolonización en América Latina*, vol. II, UNESCO-Instituto Indigenista Interamericano, México, 1983.

³ González, Jorge, *Más (+) Cultura(s)*, CNCA, 1994, México.

⁴ Monsiváis, Carlos, "Las tribulaciones del nuevo nacionalismo", en: *Nexos* No. 50, febrero de 1982, México.

⁵ Warman, Arturo, "Entre las vacas gordas y el vacío", en: *Nexos* No. 37, enero de 1981, México.

las relaciones desiguales que guardan frente a otras formas culturales—burguesa, nacional, universal, de masas o la "alta cultura".

Dentro de las teorías sobre la desigualdad cultural, se expresan dos tendencias divergentes: la primera identifica a la cultura popular como ámbito nutrido por las culturas mestizas (obreras y campesinas) y las culturas indígenas, y a ambas como formas culturales de las clases subalternas⁶. La segunda tendencia identifica de igual manera a la cultura popular como la de las clases subalternas, pero la distingue de las culturas indígenas; se argumenta que las clases populares participan del mismo sistema sociocultural que las clases dominantes y la lucha cultural (o sea la relación que se establece entre cultura y poder) se caracteriza por la persecución de la hegemonía, en tanto que las culturas étnicas son culturas diferenciadas (con una matriz cultural distintiva) y la lucha se libra en pos de la autonomía⁷.

En el contexto de esta discusión, la diversidad cultural cobra un nuevo enfoque: no es producto tan sólo de las diferencias que se expresan a partir de formas asimétricas de producción, apropiación y recreación de elementos y procesos culturales entre las diversas clases sociales. Es producto de la coexistencia de culturas con orígenes civilizatorios distintos.

Finalmente, desde la perspectiva de las industrias culturales y particularmente desde los medios masivos de comunicación, se recuperan elementos de las culturas populares e indígenas en un proceso de descontextualización y resignificación: la cultura popular interesa como mercancía, como cultura para el consumo y su valor reside en su popularidad.

Con la irrupción de las culturas populares en estos diversos ámbitos (más como actor sociopolítico que cultural), se desarrolla un amplio espectro de estudios y debates en torno al pluralismo cultural, las necesidades de democratización y autonomía que permite configurar la actual política cultural del Estado mexicano en materia de culturas populares, indígenas y regionales.

Fortalecimiento y difusión de las culturas populares: el caso mexicano

El campo de las culturas populares en México no refiere únicamente a un sujeto individual de la creación—danzantes, músicos, artesanos, pintores, etc.—sino también refiere a un sujeto social y político que de manera colectiva crea y recrea, en la cotidianidad o en momentos festivos y extraordinarios, una forma particular de ver y significar el mundo. La promoción y difusión de estos procesos culturales históricos, más que de sus productos, constituye uno de los objetivos prioritarios.

Las culturas indígenas son portadoras de múltiples tradiciones centenarias y hasta milenarias que enriquecen a la cultura nacional; son también culturas vivas en permanente renovación que incursionan formas inéditas de creación cultural y artística—como se ejemplifica a través de la literatura contemporánea en lenguas indígenas. Ambas dimensiones, la tradicional y la moderna, demandan una atención de la mayor envergadura para su preservación y desarrollo.

El universo de las culturas populares, sin embargo, no se agota con la presencia e importante contribución de las culturas indígenas. México ha dejado de ser un país mayoritariamente rural; la formación de las ofertas y públicos culturales se gesta y desarrolla en buena medida en los principales centros urbanos del país. En éstos, se da una compleja convivencia de formas culturales diversas que dan lugar a nuevas manifestaciones culturales: se nutren, por una parte, de la confluencia de diversas culturas regionales y étnicas que interactúan en función de los flujos migratorios que han dado vida a las ciudades contemporáneas; y, por otra parte, de la conformación cosmopolita característica de las urbes.

Los cambios derivados del crecimiento y desarrollo nacional redefinen constantemente los campos de la acción cultural. Los citados flujos migratorios internos han generado el crecimiento de

⁶ Entre otros autores y sin negar diferencias internas, dentro de esta tendencia se puede ubicar a Rodolfo Stavenhagen, Leonel Durán y Néstor García Canclini.

⁷ Bonfil, Guillermo, "Lo propio y lo ajeno: una aproximación al problema del control cultural", en: *La Cultura Popular*, México, 1982.

colonias indígenas en las ciudades del país, entre las cuales destaca la misma ciudad de México con una población indígena cercana a los dos millones de habitantes. Las ciudades fronterizas con los Estados Unidos tienen problemática similar que da lugar a la configuración de un corredor cultural que demanda, igualmente, el desarrollo de mecanismos específicos de atención.

En este contexto, el conjunto de acciones que se desarrollan—mediante la instrumentación de programas de amplia cobertura nacional y paulatina operación descentralizada—persigue moderar la desigualdad de oportunidades existente para el desarrollo y difusión de las diversas expresiones culturales de los grupos populares, así como para su acceso a otras formas de expresión y creación cultural y artística.

En la República Mexicana se creó desde hace ocho años el Consejo Nacional para la Cultura y las Artes, órgano gubernamental que conjunta 27 diferentes dependencias culturales. Una de ellas es la Dirección General de Culturas Populares (que, por su parte, existe desde hace 20 años) y esta institución federal opera en todo el país a través de sus oficinas centrales y 21 oficinas en provincia, laborando en todas ellas casi 800 personas.

Sus programas específicos se llevan a cabo en el marco de cinco líneas generales de acción: 1) Apoyo a la creación popular; 2) Preservación del patrimonio cultural popular; 3) Investigación cultural; 4) Capacitación y educación; 5) Difusión de las culturas populares.

En respuesta a la demanda cultural reiterada de amplios sectores populares, se requiere la instrumentación de programas específicos para su atención. A partir de diagnósticos elaborados con la información que fluye del conjunto de los estados, se tipifica la demanda para que dé lugar a una oferta institucional de programas de tema específico para el desarrollo cultural.

Esta oferta institucional, además, no se agota en los programas monográficos o temáticos, sino que genera adicionalmente un mecanismo de financiamiento directo que permite atender la diversidad de iniciativas culturales que se gestan entre los protagonistas de las culturas populares de México.

Los programas de apoyo a la creación popular se estructuran a partir de estas dos vertientes: la oferta particular y temática y la oferta abierta.

El *Programa de Apoyo a las Culturas Municipales y Comunitarias* (PACMYC) constituye un esquema amplio de atención financiera a la demanda abierta generada por los grupos y creadores artísticos y culturales que inciden en el fortalecimiento de nuestras raíces e identidades locales, con el fin de ofrecer recursos económicos y asesoría para el desarrollo de proyectos culturales.

Este programa de financiamiento por concurso a proyectos culturales de carácter autogestivo, desde su primera emisión en 1989 a la fecha, ha

apoyado un total de 4,887 proyectos en todo el país por un monto de \$9,899,467 dólares de los EE. UU.⁸

Este conjunto de proyectos se distribuyen por campo temático de la siguiente manera:

Arte Popular	55.4%
Memoria Histórica	16.0%
Organización Social	10.2%
Comunicación	6.5%
Medicina Tradicional	5.2%
Ecología	4.4%
Proyectos Productivos	2.3%

⁸ Tomándose las paridades promedio de cada año.

La demanda en el campo del arte popular se conforma en primer lugar por proyectos de música, le siguen proyectos artesanales y en tercer lugar proyectos vinculados a danzas tradicionales.

El financiamiento (complementario a los recursos propios de autogestión) va acompañado de talleres de capacitación para la elaboración, administración y desarrollo de proyectos culturales, dirigidos tanto a individuos como a organizaciones y grupos comunitarios.

Asimismo, se llevan a cabo a nivel regional y nacional, encuentros entre las organizaciones y grupos culturales que desarrollan proyectos PACMYC, con el fin de generar un amplio intercambio de experiencias y enriquecer el desarrollo y perspectivas de los proyectos comunitarios.

Entre los programas de carácter temático cuyo objetivo se centra en el apoyo a la creación popular, tenemos los siguientes:

El *Programa de Lenguas y Literatura Indígenas*, que persigue difundir y ampliar los espacios para la expresión de la riqueza y creatividad de las lenguas y la literatura indígena. Cabe destacar que las naciones que tienen más lenguas vivas en todo el mundo son la India, México y China. En nuestro país se hablan 62 idiomas indígenas y cerca de 200 variantes dialectales.

El Programa desarrolla diversas actividades en dos vertientes. La primera es la referida a la ampliación de los usos y espacios de las lenguas indígenas; persigue desarrollar un contexto social y cultural de revaloración de las lenguas, tanto en su aspecto oral como de escrituración y presencia gráfica. Para ello se promueven concursos infantiles de creatividad y expresión literaria en lenguas autóctonas, se imparten cursos y talleres de creación y valoración cultural y lingüística, se desarrollan acciones especiales para rescatar lenguas en peligro de extinción y se editan diversas publicaciones bilingües que dan cuenta de la riqueza del patrimonio cultural indígena, entre otras actividades más.

Una segunda vertiente sobre la cual trabaja este Programa está dirigida a la consolidación de un movimiento cultural inédito en nuestro país, que es la creación literaria (novela, cuento, poesía, teatro) en lenguas indígenas; los apoyos se concretan mediante el otorgamiento de becas a creadores, la emisión anual del Premio Nezahualcóyotl como reconocimiento a la mejor obra literaria indígena contemporánea, el apoyo a academias de lenguas indígenas—en la actualidad son ya 23—que realizan actividades vinculadas al desarrollo y difusión de las lenguas, y por último, la realización de encuentros y recitales que permiten enriquecer el panorama nacional de creación literaria e insertar las obras de mayor calidad en los circuitos culturales de difusión nacional e internacional.

Es importante resaltar que la población objetivo de este Programa no es sólo la indígena (10% del total), sino también la población mestiza. Se trata de despertar la conciencia y el orgullo nacionales acerca de la enorme pluralidad cultural de México, en este caso evidenciada por los numerosos idiomas que sobreviven después de cinco siglos del "encuentro de los dos mundos".

El *Programa de Apoyo a la Música Popular* persigue fortalecer un importante elemento del entramado cultural y social de la vida comunitaria en la gran mayoría de los poblados del país, como es la creación musical. Con este fin se instrumentan acciones encaminadas al mejoramiento profesional entre los músicos, la ejercitación de nuevos repertorios y el contacto con diversos géneros musicales tradicionales a nivel local, regional y nacional.

El Programa ha iniciado la creación de centros regionales de formación musical como espacios en los que los músicos, sobre todo niños y jóvenes, pueden abundar en la investigación, ejecución y renovación de los diversos géneros musicales de la tradición popular. En estos centros se imparten también talleres para la reparación de instrumentos musicales y se pretende su futuro equipamiento para contar con instalaciones adecuadas para la producción de grabaciones sonoras y audiovisuales.

Este Programa apoya a géneros musicales populares poco difundidos o en peligro de extinción; no se ocupa de las manifestaciones que divulgan ampliamente la radio y la televisión comerciales, aunque sean también expresiones populares de la música.

El *Programa de Arte Popular* persigue ensanchar el reconocimiento público de las expresiones de las culturas populares en el terreno de la plástica, como una producción respetable, digna y

constitutiva del sentido de identidad cultural de los mexicanos; asimismo pretende incidir en el desarrollo de esquemas de capacitación y difusión que permitan elevar la calidad y ampliar los espacios y canales para la comercialización de los productos artesanales.

Las acciones emprendidas para el cumplimiento de estos objetivos han consistido en:

- a. la conformación de una exposición que ilustra el conjunto de tradiciones del arte popular en cuanto a ramas de la producción, estilos, épocas y regiones del país; la exposición itineraria trimestralmente por distintos puntos del país;
- b. la organización de encuentros y talleres de artesanos de diversas partes del país de una misma rama artesanal, para el intercambio de experiencias e impartición de cursos;
- c. el desarrollo de estudios especializados que abarcan desde la generación de un directorio de productores hasta la edición de una extensa crónica ilustrada del arte popular mexicano desde los tiempos prehispánicos hasta el siglo XX;
- d. la próxima creación de un Centro Nacional de Diseño y Capacitación Artesanal que permita elevar la calidad de la producción, al igual que enriquecer e innovar la creación artística;
- e. actualmente, el Programa impulsa el diseño e instalación de un Museo Nacional de Arte Popular, para el cual ya se tiene el edificio; ésta es una ausencia notable, dada la importancia del arte popular mexicano y la considerable infraestructura museística de México;
- f. también se promueve un sistema de reconocimientos a grandes maestros del arte popular mexicano.

Dentro de la segunda línea general apuntada, relativa a la preservación del patrimonio cultural popular, se procura la adecuada conservación y difusión del mismo, se reconoce la capacidad de las propias comunidades culturales para la custodia y preservación de su patrimonio tangible y se fomentan las actividades de documentación y registro.

El *Programa de Museos Comunitarios* retoma la rica experiencia en museología alternativa que se genera en México desde la década de los años 70. Se busca, mediante el apoyo a iniciativas autogestivas, la creación y fortalecimiento de museos comunitarios que den cuenta de la diversidad cultural del país; que se constituyan en espacios de reflexión y difusión de la cultura propia; y que permitan a las comunidades desarrollar un proceso de apropiación consciente y valoración de su patrimonio cultural tangible e intangible.

Cabe señalar de manera destacada, que la apertura de un museo comunitario es la culminación de un largo proceso de promoción y organización realizado por integrantes de la misma comunidad apoyados por asesores institucionales. En la mayoría de los casos, implica años de trabajo de gestión, de adaptación o construcción de locales, de promoción, investigación, diseño, producción y montaje museográfico.

En la actualidad existen 72 museos que han sido abiertos, asesorados por el Programa, y 10 más se encuentran en proceso de apertura al público.

Las líneas generales sobre las cuales se desarrollan las actividades de este Programa son: conservación preventiva, registro arqueológico, registro de comités, planeación, producción de bienes y servicios, difusión, documentación, museografía, edición de manuales de apoyo técnico y encuentros estatales y nacionales de responsables de museos.

Un segundo programa que se enmarca dentro de la preservación del patrimonio es el relativo a la operación del *Centro de Información y Documentación (CID)* y la instalación de una red nacional de documentación sobre culturas populares.

El CID se crea en 1978 como iniciativa para la sistematización y registro de la información que se produce en distintos ámbitos sobre las culturas de México, y con el fin de socializar las fuentes y generar nuevos productos documentales para fortalecer e impulsar la difusión y el estudio de las culturas populares, étnicas y regionales.

A partir de 1993 imperó la necesidad de ordenar la información existente para brindar un mejor servicio a los usuarios del Centro; se inició entonces el proceso de catalogación automatizada de los fondos documentales, desarrollando un sistema *ex profeso* con base en el formato MARC (Machine Readable Cataloging), que facilite el acceso internacional.

Actualmente el Centro está conformado por cinco acervos: fonoteca, fototeca, biblioteca, hemeroteca y fondo documental, con un total de 151,871 documentos gráficos, sonoros e impresos, que dan cuenta de los procesos de creación, preservación, promoción y difusión de las culturas populares en distintos campos, temas y momentos.

Finalmente, se ha iniciado el proceso de conformación de una red nacional de documentación que prevé la instalación de 19 centros regionales especializados en cultura y arte popular; durante 1997 entrarán en operación ocho centros.

En el campo de la investigación cultural—señalado como tercera línea de acción—se desarrollan diversos programas que persiguen, en su mayoría, abrir nuevos campos de atención, promoción y difusión de las culturas populares, que implican una fase inicial de investigación diagnóstica. Estos programas tienen importantes productos editoriales.

El *Programa Afroamérica: Nuestra Tercera Raíz* ha desarrollado extensas investigaciones que señalan la influencia africana presente en las culturas populares de México en diversos ámbitos, como son la música, las festividades, las creencias religiosas, la producción artesanal, la tradición oral, etcétera.

El *Programa Culturas Populares y Biodiversidad* persigue reforzar los procesos sociales que tienden a optimizar y racionalizar los vínculos entre los ecosistemas y el patrimonio conformado por los conocimientos y tecnologías tradicionales que poseen particularmente las culturas indígenas de México.

Para ello se requiere el desarrollo de distintas actividades como son foros, seminarios y coloquios nacionales y regionales; apoyo financiero y técnico a proyectos que preserven los recursos naturales y redunden en el beneficio comunitario; y esquemas de capacitación en materia de ecoturismo cultural de iniciativa comunitaria.

El *Programa de Memoria Histórica y Vida Cotidiana* apoya y estimula la vocación de los sujetos sociales por conocer y comprender la historia propia

- en la que a la vez fungen como actores y relatores—enriqueciendo, a través de la investigación, la diversidad de perspectivas y formas de autopercepción en el devenir histórico de los pueblos.

Finalmente, el *Programa Mesa de la Cultura Popular* promueve la discusión y reflexión sistemática y periódica entre creadores populares, intelectuales, líderes comunitarios e instituciones comprometidas con la cultura popular en torno a aspectos problemáticos o de interés regional. En el marco de este Programa se llevan a cabo cerca de 60 mesas redondas anuales en distintas ciudades del país que dan como resultado un amplio y rico panorama sobre las formas de pensar, estimular y difundir las culturas populares.

Dentro de la cuarta línea de acción mencionada, la relativa a capacitación y educación, la Dirección General de Culturas Populares, además de las acciones específicas de capacitación que se brindan en el contexto de cada uno de los programas, ha diseñado un *Programa Nacional de Capacitación*. Este Programa tiene como objetivo facilitar a las personas, grupos e instituciones culturales su interrelación con el trabajo de las culturas populares, generando diversas opciones de capacitación y actualización en la metodología de la promoción cultural.

En materia de difusión, la instancia principal la constituye el Museo Nacional de Culturas Populares en la ciudad de México. Abre sus puertas al público en 1982, renovando la museografía mexicana y la concepción misma de los museos como espacios vivos de representación de procesos culturales, así como de eventos culturales y de reflexión que los complementan.

Al poner el acento en los procesos, más que en los productos culturales de los sectores populares, se persigue captar a las culturas en movimiento a través de una metodología interdisciplinaria comprometida en el estudio, documentación y planeación museográfica, que acude a fuentes de primera mano e involucra a diversos sectores sociales, organizaciones populares, investigadores, creadores e instituciones.

El Museo trabaja con exposiciones-eje de gran formato con duración de un año; se complementan con producciones y actividades paralelas, tanto de animación como de registro. Se organizan asimismo cuatro exposiciones cada año de formatos mediano y pequeño, además de un conjunto amplio de montajes museográficos que refieren a fechas importantes dentro del calendario festivo y religioso característico de las culturas populares en nuestro país.

La Dirección General de Culturas Populares cuenta con una larga tradición editorial de casi dos décadas que ha cobrado una presencia significativa tanto a nivel regional como nacional. Las publicaciones de Culturas Populares han atendido en los estados de la República tanto las necesidades y demandas de capacitación de diversos grupos populares e indígenas, como la recuperación de tradiciones y manifestaciones culturales importantes para el entorno local y regional. Las ediciones de carácter nacional expresan los resultados de los programas nacionales, así como los productos de coloquios y estudios individuales con aportaciones significativas para la comprensión y análisis de las culturas populares en México.

En el rubro de la difusión se impulsa actualmente un nuevo programa denominado *Diálogos Culturales*, que persigue una difusión educativa que permita el conocimiento intercultural.

La diferencia cultural ha constituido históricamente en México un factor de exclusión social y desigualdad. Para revertir esta tendencia—cimentada en una concepción de la cultura nacional homogénea y monolítica—se asume la necesidad de instrumentar un intenso programa de difusión permanente que abarque y se dirija a todos los grupos sociales, cuyo objetivo fundamental sea aumentar la conciencia de la diversidad y así promover el orgullo y respeto a las diferencias entre los mexicanos.

Antes de concluir este segundo apartado, es necesario señalar que han sido descritas únicamente las acciones culturales desarrolladas por la Dirección General de Culturas Populares; sin embargo, en México hay diversas instancias federales que impulsan importantes proyectos vinculados a la materia, como son: el Instituto Nacional Indigenista, el Instituto Nacional de Antropología e Historia, la Secretaría de Desarrollo Social y el Fondo Nacional para la Cultura y las Artes.

Las experiencias de Latinoamérica y el Caribe

Existe un conjunto de experiencias desarrolladas en distintos países de la región, que han contribuido de manera significativa a la comprensión y profundización de acciones en el terreno de las culturas populares. Algunas de estas experiencias se gestaron en el marco de movimientos y revoluciones sociales; otras, más recientes, han sido fruto de la progresiva toma de conciencia del valor de las culturas indígenas o de minorías culturales y de la composición pluricultural que guardan la mayoría de los estados nacionales.

Frente a la imposibilidad (por razones de tiempo) de hacer una revisión, aún sinóptica, de cada una de ellas, señalaré únicamente dos grandes momentos: 1º El de las revoluciones y movimientos sociales, y 2º El de la redefinición de los Estados-Nación en cuanto a su composición cultural.

En la región latinoamericana y en el Caribe, los años 60 marcan un parteaguas en cuanto al papel de los sectores populares o clases subalternas en la construcción de identidades y políticas nacionales de cultura y desarrollo social. Es éste un período de revoluciones y movimientos sociales en varios países de la región.

A manera de ejemplo, en el contexto revolucionario se encuentra en primer lugar el caso de la Revolución Cubana, que asume al socialismo como opción económica. La política cultural que deviene de este proceso revolucionario es la de recuperación de la cultura que portan originalmente las clases oprimidas, ahora en condiciones de expansión y desarrollo y liberadas del contexto e ideología colonizadora o imperialista. La descolonización de la cultura popular y su libre desarrollo son la pauta a seguir. La cultura popular es concebida como la depositaria de las tradiciones vitales, combativas y libertarias del nacionalismo cubano⁹.

México y Argentina viven en los años 70 un periodo populista producto de importantes movimientos sociales que promueven, en términos de política cultural, un nacionalismo renovado nutrido de algunos valores de las culturas populares en cada país.

Este periodo de movimientos sociales y revoluciones marca también la producción cultural de la región; así, en el caso de la literatura por ejemplo, las obras de Jorge Luis Borges, Carlos Fuentes, Juan Rulfo, Gabriel García Márquez o Vargas Llosa recuperan y expresan las tradiciones de sus sociedades. En la música se experimenta también un renacimiento que está íntimamente ligado al folklore y a la música popular. En Argentina se crea el movimiento denominado cancionero popular; en él se recupera de manera sistemática la tradición musical con exponentes como Atahualpa Yupanqui. Asimismo se desarrolla un movimiento de canción brasileña con Chicho Buarque, Caetano Veloso o Milton Nascimento. En Chile, florece la canción de protesta con compositores como Víctor Jara y Violeta Parra.

Una última revolución social en la región marca importantes cambios en las políticas culturales: la Nicaragüense. Con el triunfo de la Revolución Popular Sandinista, se crea en 1979 el Ministerio de Cultura que persigue desarrollar una cultura democrática y anti-imperialista a través de la cual el pueblo se convierta en creador y protagonista de su propia cultura¹⁰. Al igual que en la Revolución Cubana, se instrumentan importantes campañas de alfabetización, educación popular, preservación del patrimonio cultural y promoción del desarrollo cultural y artístico; estas campañas también se operan y articulan con los organismos de masas surgidos de la revolución.

El caso nicaragüense cobra particular importancia por el movimiento de las minorías étnicas de la Costa Atlántica de ese país y por la resolución final de carácter autonómico que se le da al conflicto que representa una nueva vía de respuesta a las demandas étnicas en el contexto de un Estado nacional. Al planteamiento de solución de las contradicciones clasistas que ofrecen las revoluciones socialistas, se agrega una nueva necesidad: dar una salida a la contradicción étnico-nacional. Esto se logró garantizando a los grupos miskito y sumo el derecho al libre desarrollo político, social, económico y cultural en el marco de la nación pluriétnica nicaragüense y dentro de los principios impulsados por la Revolución Sandinista¹¹.

Es durante el periodo de los años 60 a los años 80 cuando—al tiempo que se desarrollan movimientos de corte socialista y las estructuras de gobierno se endurecen, desatando largos procesos de violencia y represión—se desarrollan movimientos indígenas que en su trayectoria de consolidación van perdiendo su carácter campesino y adoptando una perspectiva global y claramente étnica.

Los movimientos de reivindicación étnica en América Latina, a diferencia de Europa, no se plantean como movimientos de secesión o intolerancia; por el contrario, en su gran mayoría proponen una ampliación de los márgenes de la tolerancia dentro de los estados nacionales y un enriquecimiento de los procesos de democratización.

⁹ Departamento de Orientación Revolucionaria, PC Cuba, *Sobre la Cultura Artística y Literaria*, La Habana, 1976.

¹⁰ Ministerio de Cultura, *Hacia una Política Cultural*, Managua, 1982.

¹¹ Díaz Polanco, Héctor, *La cuestión étnico-nacional*, Fontamara, México, 1988.

Lo popular deja de pasar necesariamente por el análisis económico desde la perspectiva de las clases sociales y se inserta en una nueva discusión que tiene que ver con las demandas socioculturales de las minorías nacionales.

A la par de esta discusión, se desarrolla el debate entre lo global y lo local. La globalización es un término que de manera estricta se acota a dos ámbitos: la economía y la ecología; no obstante, en el terreno cultural y a partir del desarrollo de los medios de comunicación y los cambios que los procesos migratorios generan en la geografía humana de las naciones latinoamericanas, la cuestión de la globalización ocupa también un lugar en el debate cultural regional.

Frente a ambas realidades: la emergencia de identidades locales con demandas socioculturales específicas y la globalización e integración regional supranacional, se adoptan medidas importantes que repercuten en las políticas culturales y educativas en cada país y a nivel regional.

En este contexto, México y Bolivia, por ejemplo, a raíz de importantes reformas constitucionales y legislativas instrumentadas en esta década, se reconocen como naciones pluriculturales. En el caso mexicano, se iniciaron desde 1992 reformas constitucionales que tienden a modificar la propia autopercepción como Estado nación; el proceso aún no ha concluido y se encuentran en la agenda de la discusión nacional nuevas reformas dentro de las cuales las sociedades indígenas luchan por su autonomía, dentro de un marco nacional.

Bolivia ha aportado a nivel regional una rica experiencia en materia indigenista y educativa que ha significado la innovación de planteamientos en otros países. La propuesta de Reforma Educativa asumió el enfoque intercultural para el conjunto de la población, es decir, abandonó el planteamiento de una educación especial dirigida a un sector poblacional (el indígena) y se diseñaron estrategias que articulan las particularidades étnicas locales con la pluralidad nacional total.

En el ámbito de las integraciones nacionales, cabe destacar la Declaración de Liberia suscrita por Costa Rica, El Salvador, Nicaragua, Honduras y Guatemala. Constituye un esfuerzo de coordinación supranacional que tiene como lema el de "La cultura popular como contribución a la paz"; persigue, entre sus objetivos, los siguientes¹²:

- Reafirmar y asumir una historia común.
- Sumar esfuerzos para el logro de la paz.
- Permanecer atentos a los proyectos de integración regional, de manera que la cultura popular, como vida y esencia de la identidad de los pueblos centroamericanos, forme parte de esta acción.

Brasil, desde 1995, ha iniciado una revisión a fondo de su política cultural en materia de cultura popular, renovando el documento intitulado "Carta do folclore Brasileiro", cuya primera versión apareció en 1951. Esta Carta señala la importancia del folclore como legado cultural y como cultura viva, y propone diversas acciones entre las cuales se incluyen las de investigación, documentación, salvaguarda y promoción (y derechos de autor, en materia de creación musical).

En suma, las culturas populares en Latinoamérica y el Caribe hoy en día requieren ser materia central de las políticas culturales, tanto en lo relativo a la transformación interna de cada uno de los estados nacionales, como dentro de las perspectivas de integración regional. Con base en los ejemplos citados, podemos señalar al menos tres grandes campos de acción que demandan investigación y atención:

- 1° La integración de políticas interculturales.
- 2° La educación para la tolerancia y respeto a la diversidad.
- 3° El diseño de marcos jurídicos que garanticen los derechos colectivos: lengua, cultura, derechos de autor, etc.

¹² Declaración de Liberia, octubre de 1989, Costa Rica.

Permítaseme una reflexión final. En esta época de globalización y desaparición de fronteras económicas, también la cultura tiende a globalizarse y a perder los distingos particulares de cada país. En tal situación, el mejor escudo para preservar la identidad nacional son las culturas populares. Su protección, preservación, promoción y difusión tienen una importancia que rebasa el ámbito de lo cultural y trasciende a lo social y a lo político.

THE EXPERIENCE OF NORTH AMERICA

*by Mr. Yves Moreau, Projects Officer, Folklore Canada International,
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My paper will focus on the present situation in Canada in regards to the preservation and protection of folklore. Firstly, I will attempt to describe government policies and programs in this field and will then give other examples on how a certain number of national or provincial institutions and organizations have also developed concrete actions. While Canada and the United States may share certain common historical, geographical and commercial particularities, there are nonetheless numerous and significant differences in regards to culture and education. I will therefore dwell uniquely on the Canadian situation based on my own experience working with various organizations on various programs in the past twenty years.

Canadian Culture and Folklore

It is almost impossible to establish what is truly Canadian culture. Canadian sociologists tend to agree on the notion of a *mosaic* of various cultures whose interrelations and juxtaposition constitute what is Canadian culture. We therefore often refer to *Canadian cultures*. In fact, in 1971, the Canadian Government officially established policies on multiculturalism and bilingualism. The Canadian cultural mosaic manifests itself first on a geographical basis. Because of its vast territory, it is not surprising that Canada actually possesses several regional subcultures. There is a definite difference in mentality between Canadians living on the Pacific West Coast and those living in the Central prairies or the Eastern or Atlantic regions. And within those major regional subcultures new divisions can also be drawn to illustrate differences in mentality, traditions and attitudes.

However, when defining the Canadian mosaic, we tend to think primarily in terms of *ethnic pluralism*. Today, Canadians tend to distinguish four main cultural family entities. The first two are the cultures of those we call the *founding peoples*, referring to the culture of French origin and the Anglo-Saxon culture. The latter can be subdivided into several cultures representing various groups: English, Scottish, Irish, Welsh. The culture of French origin is more homogeneous. Originating primarily from various provinces of Central and Western France, French Canadians rapidly blended into one main culture under French rule to form a "Canadian" culture. Today, there are nonetheless important cultural differences between the French-speaking people in Manitoba or Ontario and those who inhabit Quebec or the Maritime Provinces. The third Canadian cultural family is made up of all the other ethnocultural groups who have immigrated to Canada since the beginning of the 19th century. Their cultural vitality has constantly grown in recent years. It is a very complex entity which includes cultures of various origins: European, Middle Eastern, Asian, Latin American, African etc. It is a fact that most of these immigrants have adopted English as the basic language for communication and eventually as a mother tongue. Many of these cultural communities work hard at maintaining their native languages and traditions. Finally, the fourth cultural family is that of the Native peoples (Amerindians and Inuit) and the Metis. This group can also be subdivided into several smaller groups. The 20,000 or so Inuit people live across a wide stretch of territory but have maintained a certain homogeneity. Amerindians have a more complex historical past with distinct particularities which have often divided them.

The notion therefore of "Canadian folklore" is also complex and is based primarily on the earlier mentioned four major cultural groups. Several factors have also been favorable to the conservation and evolution of folklore across Canada: predominance of a rural population (up to the end of the Second World War); high level of illiteracy within certain groups in earlier times and the use of folk traditions to create a sense of belonging to a particular local or national community. French Canada for example until recently, was living its "Golden Age" of oral literature due in part to the French colonial policy which did not allow the establishment of printed newspapers in New France and later, due to imposition by British authorities of the English language and its related institutions. Thus, the absence of French-language publications and schools contributed to the survival of a culture rooted in folklore. Early French-Canadian writers also introduced numerous customs and legends in their works and thus promoted folk heritage. The enriching contacts which French Canada established with the native peoples and the marked preference of English Canada for the sea helped to further distinguish the two

cultural communities. Since the 19th century, the sporadic influx of immigrants and refugees from all regions of the world have greatly enriched Canadian folklore with new elements.

There are other current factors in Canada which presently make it difficult to describe the exact nature of cultural and folklore activity in Canada. Firstly, policies pertaining to cultural development are not the sole responsibility of the Federal Government. Each Canadian province has a fair autonomy in establishing its cultural policies and programs and the situation can vary greatly from one province to another. Secondly, the use of the term "folklore" has been the subject of many debates and as a result several other terms have also been used and applied at various times to express the same thing, thus creating a certain climate of confusion. In recent years, the following expressions or terms have appeared and disappeared in both official publications and daily usage: *folklore*, *folk arts*, *folk culture*, *traditional culture*, *folklife*, *folkways*, *heritage* (both tangible and intangible), *living heritage*, *expressive heritage*.

For the purpose of this World Forum, I will mostly be using the general term *folklore* as well as *living heritage* or *expressive heritage* to describe the situation in Canada currently and the work undertaken by government agencies, educational institutions, private organizations and individuals.

The Federal Government

All aspects pertaining to Canadian culture, including folklore, are primarily regrouped under the responsibility of the Department of Canadian Heritage. Established in June 1995, this is the Ministry which oversees all matters relating to Canadian identity and values, cultural development, heritage, and areas of natural or historical significance. Some of the agencies under its jurisdiction include: The Canadian Broadcasting Corporation, the National Film Board, the Canada Council, Multiculturalism Canada, National Museums, National Archives and Library, Canadian Studies program, etc. On the Federal level, the main institution which is concerned with the preservation and conservation of folklore and ethnology material is the Canadian Museum of Civilization (formerly known as the Museum of Man) located near Ottawa, the National Capital. Its Canadian ethnology service contains a collection of some 54,000 artifacts on 110 different Native peoples and some 10 Inuit regions. The Canadian Centre for Folk Culture Studies specializes in folklife and multicultural aspects of Canada and its collection contains some 23,000 artifacts. It has also helped fund and publish dozens of research projects on various aspects of Canadian folklife in its *Mercury* publication series. The Museum's library and archival collection on archaeology, ethnology and folklore includes some 50,000 books, more than half a million photographs as well as films, videos and 15,000 hours of sound recordings.

The Canadian Ethnic Studies Program administered by the Multiculturalism Directorate has also provided funding for various research projects. Some of the funded research includes: *Ethnomusicology of the Métis in Alberta and Saskatchewan*; *Traditional Doukhobors folkways*; *Gaelic Language and Folklore in the Cape Breton Islands*; and *Italian Songs in Toronto*. The Multiculturalism Department also offers grants and contributions to organizations, institutions and individuals in the field of Heritage cultures and languages. Funding may be for research, writing, editing, translation, publication or promotion, or for the organization of conferences. Some folklore related projects have also received Federal funding through the Canada Council (*Explorations* program) or through the National Film Board of Canada which has produced excellent documentary films on various aspects of Canadian folklife.

1964 saw the creation of the *Canadian Folk Arts Council* which received operational funding through the Multiculturalism Directorate. This organization was to offer programs and services for the many folk artists and groups (mostly in the field of music and dance). The CFAC established several national and regional folk arts festivals and initiated a series of training programs and international exchanges. The organization ceased to exist in 1986. A National Folk Arts Conference was convened in 1988 in Winnipeg to try to develop a new comprehensive policy on the folk arts in Canada. Because of the complexity of the issue and the wide scope of activities and applications ranging from scientific research to education, to community and leisure activities to the performing arts, not to mention the political implications, no consensus was reached and as of today, no official National Government supported agency oversees the coordination of folklore activity in Canada. Also, as of now, the

Canadian Government has not issued any official document stating its position or intentions on the 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore.

A private organization, *Folklore Canada International*, has been in existence since 1987. FCI has been active in establishing international folklore festivals in Canada and cultural exchanges in this field. It is the Canadian section of CIOFF (International Council of Folklore Festivals and Organizations). Its Director General is Mr. Guy Landry who is also the current President of CIOFF which has over 65 member countries. FCI has been responsible in the past three years for the organization of an annual *Canadian Expressive Heritage Conference*. It also maintains in Montreal a folklore documentation center and library with books, documents and audio-visual documents which the public can consult. Other national organizations in the field of folklore are: The *Canadian Society for Traditional Music* and the *Canadian Folklore Studies Association*.

As part of the 3rd *Canadian Expressive Heritage Conference* held in Montreal in March of 1996, Folklore Canada International convened a special meeting to implement a lobbying strategy aimed at encouraging the federal and provincial governments to develop a global national and provincial vision with specific policies on living heritage. The goal of the meeting was to explore possible means of protecting and enhancing expressive heritage and to recommend actions, propose solutions and define a strategy of action for investing in the future and more effectively meeting the challenges ahead for expressive heritage as the third millennium approaches. The major recommendations which were presented at the end of the meeting were:

1. That the Government of Canada, through its Department of Canadian Heritage, recognize, in keeping with its support for the 1989 UNESCO Recommendation in Paris:
 - 1.1. expressive heritage forms part of the universal heritage of humanity and of Canada just as natural, historical and architectural heritage does; and
 - 1.2. expressive heritage should be managed in accordance with the standards that are generally applied by budgeting and guaranteeing the funds required for listing, conservation, preservation, dissemination, protection of transmitters and disseminators, and international cooperation.
2. That the Department of Canadian Heritage, in keeping with its mission, play its major role as a leader and catalyst of all the country's efforts to list, conserve, recognize, preserve, disseminate and protect the expressive heritage:
 - 2.1. By creating as soon as possible a national *ad hoc* committee, in partnership with Folklore Canada International, to develop and propose a structure and operating methods for an *Issue Table* and
 - 2.2. By providing the administrative and financial support required to manage this *Issue Table*.
3. That the Department of Canadian Heritage, through its contributing programs and grants, provide substantial support to the management of expressive heritage:
 - 3.1. By taking all necessary steps to provide the financial, human, professional, scientific and technical resources required for listing, conservation, preservation, dissemination, protection and international cooperation in the area of expressive heritage; and
 - 3.2. By directly investing, by helping the community obtain funding from other departments and levels of government, by encouraging the private sector to invest in studies, research and training, and by developing events, shows and tour packages, by publishing materials for dissemination and by producing consumer goods.
4. That Folklore Canada International, in cooperation with the Department of Canadian Heritage, establish partnerships with various groups in the community to:

- 4.1. Develop comprehensive computerized directories of all activities and of all stakeholders related to Canadian expressive heritage, updated regularly and distributed as the needs of the community so require;
- 4.2. Through a committee of experts, develop a strategy to encourage the provinces, departments of education, educational institutions and the private publishing sector to develop:
 - a. a school curriculum, support programs and appropriate instructional materials to support stakeholders in the field of education;
 - b. university and college courses in fields related to expressive heritage management; and
- 4.3. produce visual and audio-visual documents enabling potential partners, tourist groups, private companies and others to recognize, discover and enhance the Canadian expressive heritage.
- 4.4. develop a major national plan to enlist the Canadian public's participation in expressive heritage, with the support of national and provincial association partners.
5. That the Department of Canadian Heritage promote international cooperation and exchanges:
 - 5.1. By delegating and hosting groups, performing companies and experts and by financially participating in creating review panels, conferences, festivals and documents for dissemination, as well as enhancement, training and research activities in other countries;
 - 5.2. By financially participating in the creation and management of a permanent CIOFF secretariat in Canada operating through FCI; and
 - 5.3. By informing embassies and other diplomatic agencies about the activities of expressive heritage groups and activities in Canada, and of Canadian groups and artists abroad.

The above-listed recommendations are currently being studied by officials at Canadian Heritage and FCI is confident that new developments will be implemented in the near future.

Canada and the Copyright Law

Most countries have enacted some form of legislation governing copyright. Each country has to ensure that its citizens respect its specific values and rights. Canada has since 1928 reiterated its adherence to the *Berne Convention* of 1886 which it had originally agreed to as a British colony. Several modifications to the *Berne Convention* have been implemented in the past decades and Canada does not necessarily adhere to all of them. It must be noted however that by the *North American Free Trade Agreement* (NAFTA), Canada has agreed to respect the modified version of the *Berne Convention* implemented in 1971.

In recent years, staff of the *Canadian Museum of Civilisation* (CMC) has been confronted with the difficult task of trying to apply the Canadian Copyright Law to the established regulations and procedures governing the access and use of archived material such as photographs, manuscripts, and audio visual documents. In March 1996, a guidebook on Copyright matters was put together for CMC staff. The first part of the guidebook is a theoretical one which looks at the fundamental rules governing Canadian Copyright Law. It is divided in fourteen sections which interpret the various pertinent articles of the Law putting emphasis on the legislative dispositions most likely to have an impact on CMC administration. Though primarily theoretical, Section I also includes numerous examples illustrating the stated principles.

Part II of the guidebook is entitled *Practical application of the Canadian Copyright Law at the CMC* and illustrates the specific manner in which Copyright must be addressed according to the various types of works administered and acquired by the CMC. This section is divided into seven distinct chapters each covering a specific type of work.

Part III of the guidebook answers specific questions which have been submitted by Museum staff. Most of these particular questions involve legal notions which extend beyond Copyright Law and this is why these particular issues are being treated separately.

Finally, several annexes supply complimentary information such as the lists of countries adhering to the *Berne Convention*, procedures for application for registration of copyright, tariffs of the *Society of Composers, Authors and Music Publishers of Canada (SOCAN)*. The guidebook is completed with models for various forms to be used by Museum staff for such purposes as: purchase agreement, donation agreement, request form, agreement relating to the recording of oral interview (license); the recording of musical work; the photographing of the interviewee and videotape, photographic and sound release etc.

Since 1968, the ethnology and folk culture divisions at the Canadian Museum of Civilisation (CMC) have been collecting primarily contemporary creations on which there often applies a copyright. In all cases the following questions must be addressed: a) are we in the presence of a *work of art* in the sense of the Copyright Law ? b) who is the owner of the copyright of the said work ? c) which copyrights must the CMC obtain ? d) which rights are attached to the said work ? e) what use can be determined by the CMC ?

The guidebook also discusses the question of possession of copyright. It states that it is the specific agreement which governs the implied parties as long as it complies to public order. This means that even if the Copyright Law says that the original holder of the copyright is generally the person having created the said work, the contract will have precedence if it bestows upon the purchaser the said copyright. But who owns the copyright on works sold by their author to the CMC and for which the agreement is silent in this regard or simply does not exist ? The author is the holder of the copyright unless it is a Crown (Government) work. For CMC purposes, Crown work must be created or published under the control and supervision of the CMC. Thus, all works created by CMC staff as part of their duties are considered Crown works. The situation becomes more complex as we have to consider whether a work is Crown property or an independent one.

What is protected ? The CMC collection includes numerous works by recognized native artists such as carvings, lithographs, drawings, sculptures etc. The *native peoples collection* also includes creations of utilitary objects such as clothing, weapons, tools, pottery etc. created by artisans. "Non-native" collections mostly consist of works by amateur artists said to be *folk art*. The CMC distinguishes between these works of folk art and those created by professional artists, categorized as *contemporary crafts*.

To effectively apply the Copyright Law, we must disassociate the works from the designations given by the CMC. Thus, a painting done by an amateur artist remains a painting as per Copyright Law definition and can benefit from the same protection as those produced by Picasso. Each work must thus be examined individually before judging whether it is protected by the Copyright Law. Article 2 of the Copyright Law defined as *work of art*: paintings, drawings, sculptures and artistic works attributed to artisans (craftsmen), architectural works, carvings and photographs, graphics, geographical and marine maps, plans and compilations of artistic works. Most of the sub-categories mentioned are clear and do not pose application problems except for works of art attributed to craftsmen. A sculpture be it beautiful or "ugly" created by a famous artist or a lesser known amateur artist falls within the category of "sculptural work". One must therefore initially look at the art object itself and not the creator. If the object can be then placed in a sub category it is not necessary to go further. But what about a quilt or a woven blanket ? This type of creation is not mentioned specifically in the definition of a work of art. It is in such cases that one must go through an additional step.

We must then ask ourselves: Is this artistic work attributed to craftsmen as defined in article 2 ? The Copyright Law does not specify or define what is work attributed to a craftsman. We must therefore look at the definition of craftsman: a person who performs a manual task and who is self employed such as: potter, embroider, seamstress, cabinet maker etc. Some of the objects which are the products of this type of activity may be qualified as artwork created by craftsmen. We speak of "certain objects" since a work of art attributed to a craftsman (artisan) must be "attractive to the eye". Though this results in a very objective criteria, the Copyright Law insists on a certain degree of visual aesthetics. Jurisprudence takes into account the intention of the artisan to create an object of beauty.

The CMC applies the general rule that the duration for protection of independent works of art is the lifespan of the artist plus fifty (50) years following the death of the said artist.

The CMC's voluminous (200 pages) document also covers such situations as reproduction rights, exhibition rights, moral rights, acquisitions by the CMC, usage, photographs, audio-visual documents, sound archives, films, literary works, access to archives etc.

As a Crown Corporation, The CMC is subject to the applications of the *Canadian law governing the access to information* as well as the *Law on the protection of personal information* . Under these laws, Canadian citizens and permanent residents have access to most documents of the Federal Administration. This right can be refused by Federal authorities in just a few limited and precise cases defined by the above legislations. Such a case is the "personal data" concerning an identifiable person. Specific articles of these laws on the other hand stipulate that the said laws do not apply to the following two types of documents: "Library or museum documents which are conserved solely for reference purposes or for public exhibition". There are however certain types of documents especially in the ethnology collections which are not accessible to the public because of restrictions which have been applied to them. This is the case for example with a certain number of Native Indian artifacts which cannot be viewed by the public for religious motives. Even in such cases however public access of these works can sometimes be granted as the *Canadian Access to Information Law* shall predominate ! In this complex domain there are obviously many gray zones especially in defining what constitutes a *donation* as opposed to a *deposit* .

Other very complex legal issues arise here as well since the CMC is located physically within the territory of the Province of Quebec (just outside Ottawa) and that Quebec authorities may argue that the CMC should first comply to the dispositions of the Quebec Civil Code !

Folklore Research

The most significant pioneer in the field of folklore research in Canada was undoubtedly Charles Marius Barbeau (1883-1969) who initiated the first professional folklore studies in Canada and helped develop folklore collections at the National Museum. Most of his work centered on folk songs and traditions of the French-Canadians and of Pacific Northwest Indians. He also founded the Folklore Archives at Laval University in Quebec City. Other prominent folklorists include the late Edith Fowke, Carole Henderson Carpenter and Helen Creighton.

Academic folklore studies programs now exist in several Canadian Universities throughout Canada. The most important are *Laval University* in Quebec and *Memorial University* in Newfoundland. Other programs are also offered at the Universities of *Moncton* (New Brunswick), *Trois-Rivières* (Quebec), *York University* and *Laurentian University* (Ontario), *University of Manitoba* , *University of Saskatchewan* and *University of Calgary* (Alberta). There are also undergraduate and graduate programs in ethnomusicology offered at several Canadian universities.

Provincial Governments - the Quebec Experience

As stated earlier, cultural and educational activity falls under both the jurisdiction of the Canadian Federal Government and of the provincial Governments. Some provinces like Quebec, Ontario and Alberta have determined elaborate cultural programs and policies. In the field of folklore and intangible heritage, Quebec has undertaken some significant steps which I would like to briefly mention.

All along its history, Quebec has always developed its own distinct cultural forms of expression. More than twenty years ago Quebec enacted a law pertaining to Cultural monuments, *Loi des biens culturels*, which established guidelines making it compulsory to maintain an inventory in order to better evaluate what should be conserved for future generations. Among those goods figured not only historical monuments but works of art, archaeological relics as well as those of ethnological value. But this notion was only limited to *artifacts* and neglected what could be called *mentefacts* meaning intangible: words and gestures giving sense and life to objects.

Heritage cannot be limited only to include material culture. Today, an increasing number of people believe that the knowledge and know-how which form the process for building objects should also be protected and promoted in the same way as the latter; thus the art form and technique of the weaver or the woodcarver would be considered in the same way as the objects they create.

This increased awareness of intangible heritage is now part of the new Quebec policy on Culture (*Politique culturelle du Québec*) and it thus opens wide the door which will establish a permanent link between the tangible and the intangible. Furthermore, there are basically two ways of ensuring conservation for the intangible heritage. The first consists in the preservation process as in the case of objects of *noble culture*, meaning in a museum or national archive. Thus, an object is separated from its creators or owners or daily users; it becomes sterilized, untouchable and kept intact for future generations and for historians. Many countries have taken this pathway to centralization of traditional folk arts and many such establishments and State institutes are also experiencing a constant drop in the number of visitors. The second way to preserve intangible heritage is not to extract it from its original setting but to preserve it *in situ*, in other words encouraging individuals and communities to become themselves the guardians of their collective knowledge and know-how and to develop on the local level *valorization centres* which would act as repositories of archives of our collective words and deeds, accessible at all times and which would act more as documentation and information centres than inert archival deposits.

Since the concept is relatively new one, the intangible dimension of cultural heritage needed to be better defined. In the last decade, specialists from around the world have dealt with this question and have exchanged ideas and reflections during international meetings such as those initiated by UNESCO. In this spirit, several Quebec organizations and specialists have also contributed to increasing public awareness of this notion through studies and public forums like the *National Living Heritage Summit* which took place in 1992.

All of these recent efforts have helped to better understand and describe this notion. There is however a constant need to deepen our knowledge in this field and to develop an inventory of resources. Legacy of the worlds' peoples, intangible heritage has evolved in time adapting itself to the changes within our society and has gone through a process of transformation and enrichment to become part of the present through the actions of "transmission agents" which we now refer to as *carriers of tradition*.. It is therefore important not only to recognize but to valorize those among us who play this role and thus contribute to the enrichment and development of our cultural heritage.

There is currently an obvious will on the part of the Quebec Ministry of Culture to support the cultural milieu in its quest towards recognition of intangible heritage within the spirit of the Quebec Cultural Policy which states that "... the State must, in cooperation with its partners, support and develop the cultural dimension of our society..."

In various parts of the world several steps have been undertaken to recognize, encourage and promote living heritage. In Quebec the path to collective consciousness in this field has been long and difficult. The period of 1980-1990 has now matured to a full recognition of the notion of intangible and

living heritage, first within the framework of universities where ethnologists and folklorists pursue their work as well outside through the activities of various organizations such as the Society for the Promotion of traditional dance, the Quebec Association for Folklore Leisure Activities, the Valorization Centre for Living Heritage and *Heritage et patrimoine vivant du Quebec* whose activities are aimed at the understanding, appreciation and conservation of cultural practices tied to our traditional and collective knowledge. 1993 saw the establishment of the *Conseil québécois du patrimoine vivant* (Quebec Council for Living Heritage) whose mission is to ensure the safeguarding, promotion and transmission of the living heritage of our collectivity. It aims at regrouping and representing the organizations and individuals concerned with preservation, research and dissemination of living heritage. The Council publishes a quarterly newsletter entitled *Paroles, Gestes et Mémoires* (Words, gestures and memories), and organizes regular meetings and events. It has recently launched a new project for a *National inventory of Living Heritage in Quebec* which will be undertaken by grassroots organizations in cooperation with the Council. The purpose of this national inventory is to identify and promote the persons who act as *bearers of tradition*, researchers, and promoters in the framework of a general living heritage directory which will cover the entire territory of Quebec. This will be followed by a National Registry where "national treasures" will be identified along with the publication of living heritage collections.

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LA EXPERIENCIA DE EUROPA OCCIDENTAL

*Ponencia del Sr. Enrique Cámara de Landa, Profesor Titular de Etnomúsica,
Departamento de Musicología, Universidad de Valladolid, España*

Cuando en 1977 Charles Boilès y Jean-Jacques Nattiez publicaron en París la "Pequeña historia crítica de la etnomusicología" -un texto destinado a convertirse en referencia inevitable de los estudios historiográficos de esta disciplina-¹ se propusieron dedicar capítulos a las principales áreas geográficas del Hemisferio Norte (Occidental) en las que se desarrolló la actividad de los investigadores durante los últimos cien años. Se refirieron, por lo tanto, a los primeros trabajos específicos publicados en Europa y América, a la llamada Escuela de Berlín, a los estudiosos de Estados Unidos y a los de Europa Oriental. En la sección dedicada a los trabajos desarrollados en Europa Occidental escribieron lo siguiente:

"Hay que admitir que en Europa Occidental uno no encuentra esos grandes ejes de referencia como los que trazaron Merriam, Hood o Bartók; no se encuentran revistas especializadas que tengan la dimensión y la audiencia de *Ethnomusicology*; no se encuentran tampoco grandes proyectos colectivos de larga duración, como la edición de los corpus nacionales en Europa Central. La viva experiencia de los Coloquios de Wégimont, en los años cincuenta, propulsados por Collaer, no dieron nacimiento a estructuras permanentes de intercambio y de discusión. Respecto a América, la actividad etnomusicológica europea parece resultar de empresas individuales que se inscriben en la continuación de las grandes tendencias ya citadas" [1977: 41, el subrayado es mío]

Hoy, a veinte años de distancia de la publicación de estos conceptos, me veo obligado a repetirlos en parte, ya que la situación no parece haber cambiado substancialmente. La iniciativa individual sigue predominando sobre los proyectos colectivos y, si bien sigue siendo erróneo afirmar que la investigación solitaria produzca frutos más maduros que los surgidos del estudio interdisciplinario, no deja de ser cierto que éstos aún se cuentan en número muy inferior a aquellas. Para convencerse de ello basta con hojear los repertorios bibliográficos de las áreas temáticas relacionadas con estudios sobre folclore. Y otro tanto puede afirmarse, en principio, con respecto a la actividad de los archivos, museos e instituciones de diverso tipo dedicadas a conservar, exponer y difundir los patrimonios de las tradiciones populares. La sola enumeración de los centros de documentación total o parcialmente dedicados a estas actividades y hoy funcionasen en los países de Europa Occidental excedería el tiempo asignado a esta exposición sintética. Por lo tanto puede bastar con mencionar sólo algunos de ellos a manera de ejemplo. He elegido centros españoles para este apartado, porque mi residencia en este país me permite conocer con mayor detalle su situación con respecto al tema que estamos tratando aquí².

El Museo Escolar Agrícola de Elche (Alicante), fue fundado en 1972 con el objetivo de recuperar el acervo cultural del Campo de Elche³. Recibe subvenciones de las Consejerías de Educación y de Cultura de la localidad. Cuenta con más de 12.000 objetos de la vida tradicional, que se encuentran en proceso de catalogación por parte del Servicio Valenciano de Inventarios. Dedicó especial atención a las actividades de formación de investigadores y de divulgación de este patrimonio entre los estudiantes. Como sucede en otros centros, los responsables de ese museo desearían acceder a la ayuda económica de la Comunidad Económica Europea, pero por el momento ni siquiera han conseguido encontrar el cauce apropiado para solicitarla.

¹ Charles BOILES & Jean-Jacques NATIEZ, "Petite histoire critique de l'Ethnomusicologie", *Musique en Jeu* 28, septiembre 1977, p 26-53.

² Los datos que siguen han sido tomados del dossier de participantes en el Iº Encuentro Nacional de centros de Cultura Tradicional que fue proporcionado al autor por Joaquín Díaz, director del Centro Etnográfico que lleva su nombre en la localidad de Uruéña (Valladolid, España).

³ Director actual Fernando García Fontanet.

El **Museo de la Gaita** tiene sede en Gijón (Asturias)⁴, de cuyo ayuntamiento depende. Es miembro del CIMCIM (Comité Internacional de Museos y Colecciones de Instrumentos Musicales) y de otras instituciones españolas e internacionales. Se dedica a la conservación, exhibición, documentación, estudio y difusión de instrumentos musicales tradicionales e históricos -de modo especial cornamusa- y a sus contextos sociales musicales y paramusicales. Cuenta con biblioteca, fonoteca, videoteca, archivo iconográfico y de planos técnicos de instrumentos, así como de un taller para la conservación, restauración y construcción de instrumentos. Organiza exposiciones temporales, cursos, seminarios, reuniones profesionales y conciertos. Sus funcionarios lamentan la imposibilidad de acceder a una sede más espaciosa y adecuada a sus necesidades, debido a carencias presupuestarias⁵.

El **Museo Etnográfico del pueblo de Asturias** también tiene sede en Gijón y depende de su Ayuntamiento⁶. Fue fundado en 1968 y cuenta con biblioteca especializada en etnografía, fototeca y colección de objetos de etnografía asturiana. Realiza exposiciones temporales de fotografía y promueve la investigación etnográfica en Asturias.

La **Asociación Española de Organizaciones de Festivales de Folklore (CIOFF-España)** fue creada en 1982 como sección española del Consejo Internacional de Organizaciones de Festivales de Folklore y de las Artes Tradicionales. Es miembro de la UNESCO y tanto su composición como sus principales actividades son conocidos por los aquí presentes⁷.

La **Federación Extremeña de Grupos Folklóricos** cuenta con sede en Ribera del Fresno (Badajoz) y, además de publicar la revista extremeña de folclore *Saber popular*, dicta cursos de metodología de la investigación, organiza encuentros de especialistas y otorga el premio "García Matos"⁸ a la investigación folclórica.

El **Museu d'Artes, Industries i Tradicions Populares de Barcelona**⁹ cuenta con 32.000 objetos recogidos desde los años 40, 8000 fotos y 730 dibujos originales. Depende del Ayuntamiento de Barcelona. Dicta seminarios sobre conservación, documentación y restauración destinados a museólogos etnográficos. En el futuro será vinculado al Museo de Historia de la Ciudad de Barcelona - en el ámbito de la historia social- y extenderá sus actividades a los barrios de la ciudad.

El **Museo do Pobo Galego**¹⁰ tiene sede en Santiago de Compostela (La Coruña). Lleva a cabo con regularidad actividades educativas, científicas y de divulgación. Cuenta con biblioteca especializada, archivo documental y audiovisual y depósitos visitables por estudiosos. Organiza cursos a cargo de artesanos.

El **Centro de Documentación Musical de Andalucía**, con sede en Granada, cuenta con un fondo documental, bibliográfico, audiovisual y sonoro especializado. Realiza y promueve tareas de recogida de datos, análisis, investigación, conservación, informatización y difusión. Convoca premios de investigación sobre etnomusicología, publica la revista internacional *Música oral del Sur*, organiza el Encuentro de Etnomusicología del Mediterráneo y colabora en los congresos de folclore andaluz.

Fundados en 1984 por la Conselleria de Cultura, Educación y Ciencia de la Generalitat Valenciana, a propuesta de Vicent Torrent, los **Talleres de Música Popular de la Generalitat Valenciana**¹¹ publican la *Fonoteca de materials* -importante colección discográfica de música tradicional valenciana- y llevan a cabo la llamada "*Campanya escolar de Recerca*", en la que alumnos de 12 a 14 años de distintas localidades de la comunidad entrevistan a vecinos de su pueblo y graban

⁴ Directores: Alfonso García y Oliva Mascarós

⁵ Esta situación se presenta en varios de los centros mencionados aquí.

⁶ Director: Joaquín López Úlvarez

⁷ Director: Rafael Maldonado Hinchado. Principalmente se dedica a la celebración de festivales internacionales de folklore, exposiciones, conferencias, muestras artesanales y gastronómicas. Envía expertos a encuentros internacionales de folklore, promueve la concesión de becas de investigación y la publicación de conferencias y de los trabajos becados.

⁸ Uno de los principales investigadores de folklore con que ha contado España

⁹ Directora: María Dolors Llopart

¹⁰ Dirigido por Antonio Fraguas Fraguas.

¹¹ Director: Vicent Torrent Centelles.

su repertorio tradicional. Esta singular iniciativa moviliza a más de 10.000 alumnos de 350 centros de enseñanza.

El Centro Etnográfico "Joaquín Díaz" está ubicado en la localidad de Urueña y fue creado bajo los auspicios del Gobierno de Valladolid con el objeto de recoger, estudiar y difundir la cultura tradicional de Castilla y León. La biblioteca que su director -el estudioso e intérprete de folclore Joaquín Díaz- ha donado a la institución contiene más de 7000 volúmenes y 3000 pliegos de cordel. La hemeroteca cuenta con un centenar de revistas especializadas y se enriquece con el vaciado diario de noticias etnográficas de periódicos¹². En el archivo audiovisual hay casi 1000 cintas de cassette con 1200 horas de grabaciones de campo, 250 vídeos, 2300 discos y 500 cassettes comerciales. El archivo fotográfico incluye 3800 imágenes, en varios soportes y la colección de estampas de trajes abarca 630 ejemplares de los siglos XVIII, XIX y XX. Los 540 instrumentos musicales tradicionales expuestos en la sede del centro conforman la mayor colección de este tipo en España. Edita la revista *Folklore* y frecuentes publicaciones monográficas. Desarrolla cursos de estudios sobre la tradición y convoca un premio anual para la realización de trabajos de investigación. En estos momentos se está efectuando la catalogación informatizada de sus fondos.

Otras instituciones dedicadas al patrimonio folclórico de ámbito español, muchas de ellas de reciente creación, son:

- La Fonoteca de Música Tradicional (Barcelona),¹³
- la Associació de Recerca Etnomusicològica (Barcelona),¹⁴
- el Museo de la Música (Barcelona),¹⁵
- el Servicio de Etnografía de la Diputación Provincial de Burgos,¹⁶
- La Federación Regional de Asociaciones de Folclore de Castilla y León,¹⁷
- La Escuela Municipal de dulzaina y otros instrumentos populares, con sede en Burgos,¹⁸
- el Museo Etnográfico Comarcal de la Sierra y la Campiña Sur,¹⁹
- el Centro de Investigaciones Etnológicas "Angel Ganivet",²⁰
- la Escuela Provincial de Folclore de la Diputación de Guadalajara,²¹
- el Centro de Cultura Tradicional del Ayuntamiento de León,²²
- el Centro Coordinador de Etnografía y Cultura Popular de La Rioja,²³
- el Colectivo Cultural "María Castaña" de Lugo,²⁴
- el Centro de Estudios Tradicionales de la Universidad Popular, con sede en San Sebastián de los Reyes (Madrid),²⁵
- el Museo Nacional de Antropología, (Madrid)²⁶

¹² Comenzado en 1982.

¹³ Creada en 1987. Cuenta con colección de instrumentos de música y con archivos sonoros y visuales de ámbito catalán.

¹⁴ Creada en 1986. Contiene grabaciones de campo principalmente de Cataluña

¹⁵ Creado en 1943. Cuenta con instrumentos de música tradicional -300 de España y 200 de otros países- y con más de 5000 grabaciones en cilindros y discos.

¹⁶ Directora: Marta González Bueno. Dispone de un fondo audiovisual sobre etnografía de Burgos. Organiza viajes de campo y asesora a estudiantes y asociaciones sobre temas, lugares y metodologías de estudio.

¹⁷ Fundada en 1992 y actualmente dirigida por María Rosa Do Barros Martínez.

¹⁸ Creada en 1979, con sede en Burgos y actualmente dirigida por Miguel Alonso Gómez. Actividades docentes, conciertos, muestracertamen provincial de instrumentistas de dulzaina y tambor.

¹⁹ Director: Javier Marcos Arévalo. Tiene sede en Azuaga (Badajoz)¹⁹. Cuenta con 6000 objetos etnográficos de la región de Extremadura, de cuyo Gobierno recibe esporádicas ayudas (además de contar con una subvención fija del Ayuntamiento de Badajoz). Se dedica a la recogida y restauración de piezas y promueve publicaciones, exposiciones, conferencias y actividades de investigación.

²⁰ Director: José Antonio González Alcantud. Fundado en 1991. Cuenta con fonoteca especializada, archivo oral, videoteca y sala de exposiciones. Realiza congresos internacionales, ciclos de conferencias y exposiciones sobre temas de antropología social, folclore e historia contemporánea. Tiene suscritos acuerdos de colaboración científica e institucional con la Universidad de Granada, la Fundación Machado (Sevilla) y el Centre d'Ethnologie Française (C.N.R.S., Francia).

²¹ Director: José Antonio Alonso Ramos. Fundada en 1984. Dedicada a la recopilación, catalogación, estudio, difusión y enseñanza de la cultura tradicional de Guadalajara. Cuenta con casi 1000 alumnos.

²² Fundado en 1993 para preservar, conservar, mantener y desarrollar la cultura tradicional leonesa. Director: Francisco Javier Emperador y Marcos.

²³ Director: Emilio Maraño Yécora. Fundado en 1991 para investigar, promover y difundir el folclore riojano.

²⁴ Fundado en 1993. Director: Isidoro Rodríguez Pérez. Objetivos: Recopilación, investigación, estudio y difusión de la cultura tradicional y de la gallega en particular.

²⁵ Fundado en 1984 para estudiar la cultura tradicional madrileña. Director: Isauro Manzano Cuesta. Organiza muestras de música, baile y villancicos tradicionales, así como cursos sobre cultura tradicional en la escuela. Lleva publicados varios volúmenes de la antología sonora *Madrid Tradicional*.

²⁶ Fue fundado en 1934. Depende del Ministerio de Cultura a través de la Dirección General de Bellas Artes y Archivos. Organiza exposiciones, congresos y cursos, promueve publicaciones y cuenta con una interesante biblioteca especializada.

la Universidad Popular de Palencia,²⁷
 la Fundación para la Etnografía y el Desarrollo de la Artesanía Canaria (F.E.D.A.C.), con sede en Las Palmas de Gran Canaria,²⁸
 el Centro de Cultura Tradicional de la Diputación de Salamanca,²⁹
 la Fundación Machado, con sede en Sevilla,³⁰
 el Centro de documentación "Carrutxa" de Reus (Tarragona),³¹
 la Asociación Etnográfica "Bajo Duero"³², el Consorcio de Fomento Musical³³ y las Aulas de música de Alise y tras-os Montes,³⁴ las tres funcionantes en Zamora,
 la Escuela de Folklore "Semblante aragonés" de Zaragoza³⁵ y muchas otras.

Interdisciplinariedad

Sin embargo, es necesario señalar que el trazado de un panorama de las actividades desarrolladas en el ámbito del estudio, conservación y difusión de la cultura tradicional que contemple sólo las iniciativas individuales de los estudiosos y el funcionamiento aislado de las instituciones proporcionaría una visión parcial de la realidad. El incremento de las comunicaciones de todo tipo que se viene registrando en los más diversos ámbitos de la actividad humana produce, entre otros, el efecto de aumentar la urgencia experimentada por los agentes individuales y sociales de la cultura de abrir los propios contenidos al diálogo y a la interacción como única posibilidad de supervivencia en un mundo cada vez más dominado por los procesos convergentes de globalización y diversificación de todos los productos culturales. Hoy más que nunca la identidad -en cualquiera de sus modalidades- se construye y afianza sólo a través de la confrontación crítica con el "otro" -ya sea étnico, religioso o social-, del cuestionamiento consciente del patrimonio propio con los ajenos y de la profundización en las vías de acceso al conocimiento tanto intracultural como transcultural.

Asimismo, la interdisciplinariedad se impone hoy como exigencia epistemológica, es decir, como recurso inevitable para quienes se proponen acceder al conocimiento de un modo lo más completo y real posible. Esta interdisciplinariedad -que ha sido también denominada transdisciplinariedad con la intención de aludir a una interacción de aportes que supere la mera yuxtaposición de enfoques [García Canclini, 1995]- es reconocida por todos los implicados en el estudio del hombre y de la cultura y cuenta en algunos países de Europa Occidental con una tradición nada despreciable en el ámbito de las ciencias humanas y sociales. Como ejemplo de ello puede citarse la labor desarrollada por el antropólogo Ernesto De Martino quien, en colaboración con un etnomusicólogo, un psicólogo y un sociólogo, condujo interesantes investigaciones entre los campesinos del Sur de Italia. Gracias a la labor interdisciplinaria llevada a cabo por estos especialistas, sus interpretaciones de los fenómenos estudiados reflejaron un nivel de comprensión cultural no alcanzado hasta entonces³⁶

En esta línea de colaboración interdisciplinaria tiende a desarrollar sus cometidos una de las instituciones más importantes de Italia en cuanto al volumen de documentación de ámbito folclórico que posee. Se trata de los *Archivi di Etnomusicologia dell'Accademia Nazionale di Santa Cecilia*, con sede en Roma, que nacieron en 1948 con el nombre de *Centro Nazionale Studi di Musica Popolare*, bajo los auspicios de la Accademia di Santa Cecilia y de la RAI (Radio Televisione Italiana)

²⁷ Fundada en 1984. Director: Cándido Abril Merino. Actúa en las áreas de educación, cultura tradicional, salud comunitaria, medio ambiente, promoción e inserción laboral, artes, extensión cultural, mayores y jóvenes.

²⁸ Fundada en 1990 y función. Ante desde 1991. Dirigida por Caridad Rodríguez Pérez-Galdós. Depende del Cabildo Insular de Gran Canaria. Realiza tareas de investigación, divulgación, comercialización, formación de especialistas y promoción. Cuenta con biblioteca y se propone publicar estudios y catálogos.

²⁹ Director: Angel Carril Ramos. Fundado en 1974 con funciones de docencia, recuperación, investigación y divulgación de la cultura tradicional, principalmente de ámbito salmantino. Cuenta con una biblioteca especializada de 3500 volúmenes, videoteca, fototeca, fonoteca y archivo de artículos de prensa

³⁰ Director: Salvador Rodríguez Becerra. Fundada en 1985 para impulsar el conocimiento de la cultura tradicional andaluza. Es una institución privada. Organizada por áreas (artesanías, literatura oral, antropología). publica la revista *Demófilo*. Organiza cursos y exposiciones. Promueve la investigación.

³¹ Asociación privada creada en 1980 y dirigida por Salvador Palomar. Actualmente trabaja en un proyecto de investigación integral sobre el patrimonio etnológico de la comarca del Priorat, por encargo del Departament de Cultura de la Generalitat de Catalunya.

³² Director: Miguel Montalvo Martín. Fundada en 1980.

³³ Director: Pablo Madrid Martín. Fundado en 1988.

³⁴ Directora: María Teresa Martín Villoria. Fundada en 1991.

³⁵ Director: Juan Carlos Serrano Sierra. Fundada en 1981.

³⁶ Véase, en particular, el análisis de los rituales asociados al tarantismo pugliese en: *La terra del rimorso*

y gracias al empeño plurianual del investigador Giorgio Nataletti, quien había promovido a escala nacional el censo del patrimonio folklórico italiano entre 1933 y 1933. El centro fue creado con los siguientes objetivos:

- a. la preservación y difusión de la música popular en Italia,
- b. la recolección y el estudio comparativo de la música folclórica³⁷ italiana,
- c. el desarrollo de la comprensión y amistad de las naciones hacia Italia a través del interés de la música popular.

Para lograr tales objetivos, el centro se propuso:

- a. efectuar una documentación general de la música folklórica italiana,
- b. fundar un archivo nacional de la música popular, con biblioteca, museo de instrumentos populares, fonoteca, discoteca y filmoteca,
- c. promover el estudio y recogida de la música folklórica y de sus problemas afines,
- d. desarrollar toda acción oportuna tendiente a un mayor conocimiento y valorización de dicha música. [Ferretti, 1993].

Desde su fundación hasta 1972 el Centro promovió la realización de numerosos³⁸ viajes de campo a diversas regiones de Italia, con una impostación marcadamente monográfica e interdisciplinaria³⁹. Con la muerte de Nataletti en julio 1972 el Centro -que contaba entonces con más de 7000 grabaciones de música folklórica, principalmente italiana- atravesó una etapa de relativa inactividad⁴⁰ que cesó cuando en 1980, gracias a la intervención del Ministero per i Beni Culturali e Ambientali, se reanudaron las tareas de investigación y archivo. Diego Carpitella -el etnomusicólogo que participara con Ernesto De Martino en las investigaciones anteriormente citadas- fue nombrado Conservador del Centro en 1989, pero murió al año siguiente. Sus discípulos Giorgio Adamo, Sandro Biagiola, Francesco Giannattasio, Giovanni Giuriati, Rosanna Ferretti y Annalisa Bini se reparten actualmente las funciones que permiten el funcionamiento del Centro. Entre otras actividades, publican desde 1993 un Anuario en el que encuentran espacio artículos firmados por investigadores de distintos países.

En la presentación del 1º Nº de dicho Anuario Bruno Cagli -actual director de la Accademia Santa Cecilia- recuerda que hoy los objetivos de la institución son salvaguardar y enriquecer el rico patrimonio de música popular que se constituyó con dichos Archivos (objetivo al que Carpitella dedicó esfuerzos en los últimos años de su vida). El centro, explica Cagli, "pretende ser "un moderno archivo operante como centro de documentación y de investigación a la vez, sobre todo a través del empleo de nuevas tecnologías informáticas en el campo de la catalogación y del análisis de las fuentes etnomusicológicas"[Cagli, 1993:6]. "Los primeros pasos se cumplieron gracias a un proyecto financiado por el CNR y por el empeño de la Accademia Nazionale Santa Cecilia (...), lo cual consintió ante todo emprender una actividad de sistematización y primer fichado en ordenadores personales, del material no catalogado presente en el archivo. A continuación se comenzó a adquirir nuevos materiales, empezando por una serie de colecciones de viajes de campo dirigidos por Diego Carpitella en el ámbito de la cátedra de Historia de las Tradiciones Populares primero y de Etnomusicología después en la Universidad de Roma La Sapienza" [Adamo et al, 1993: 9]. Actualmente se está procediendo a revisar y duplicar todo el archivo según un criterio cronológico, es decir, empezando por las más viejas colecciones, para la realización de esta tarea la Discoteca di Stato -fonoteca Nacional Italiana- proporciona la asistencia técnica e informática⁴¹.

Paralelamente, en los Archivos de la Accademia di Santa Cecilia se desarrolla una actividad científica impostada sobre varios aspectos relacionados entre sí: la investigación con metodologías

³⁷ En Italia se denomina *musica popolare* a lo que en Francia se designa con la expresión *musique traditionnelle* y en Inglaterra *Folk music*.

³⁸ Un total de 135 colecciones obtenidas en sendos viajes de documentación.

³⁹ La colaboración ente el etnomusicólogo Diego Carpitella y el antropólogo Ernesto De Martino inauguró una serie de iniciativas en las que la interdisciplinaria permitió el enriquecimiento de los resultados de las investigaciones.

⁴⁰ Sólo se llevó a cabo la actualización del catálogo, que se publicó en 1977.

⁴¹ El principal enlace entre ambas instituciones es el etnomusicólogo Giorgio Adamo, quien estudiara con Carpitella y actualmente es funcionario en la Discoteca.

específicas en el campo de la catalogación, el análisis y clasificación del material; la promoción de nuevos estudios e investigaciones (...) [y] la confrontación sobre las cuestiones metodológicas generales de la investigación etnomusicológica, con particular atención en los problemas de la documentación y del uso de nuevas tecnologías" [p 10]. Se organizan también, con periodicidad regular, conferencias y seminarios de especialistas extranjeros, con la doble intención de permitir la circulación de información científica en el ámbito internacional y de aumentar el número de potenciales usuarios del Archivo.

Por lo tanto, la institución se propone como archivo y centro de investigación a la vez, a partir de la toma de conciencia por parte de los promotores y organizadores de la importancia que poseen tanto la documentación etnomusicológica como la producción científica. Estos advierten "la exigencia de que un lugar de conservación de un patrimonio cultural tan rico no se convierta en una especie de depósito o de museo arqueológico", p 10) y por ello se proponen hacer del Anuario "un instrumento común de información y de reflexión sobre los métodos y las técnicas de la investigación etnomusicológica, abierto a la experiencia de otras instituciones y de estudiosos, con una particular atención dirigida a los problemas de la investigación de campo, de la documentación sonora y audiovisual, del tratamiento de los datos y del análisis de las fuentes" [p 11]. Y por ese motivo dedican parte de los capítulos del primer número a contenidos que permitan el tipo de reflexión propuesto en las primeras líneas del mismo.

Colaboración interinstitucional

Entre los numerosos casos de actividades de preservación y conservación llevadas a cabo en los centros de documentación, museos y archivos de países de Europa Occidental que contienen objetos, grabaciones y representaciones de elementos pertenecientes a la cultura popular, quiero citar un ejemplo de colaboración interinstitucional e internacional. Se trata de la consultoría llevada a cabo por Dietrich Schuller, del *Phonogrammarchiv* de la Academia Austríaca de Ciencias, en las dependencias de la Discoteca di Stato de Roma -otra institución de primera importancia entre las de ámbito italiano- sobre la conservación de soportes de documentos sonoros.

La *Discoteca di Stato* fue creada en 1928 con el objeto de "recoger y conservar para las futuras generaciones la viva voz de los ciudadanos italianos que han ilustrado la patria en todos los campos y por ello hayan sido beneméritos". El "núcleo histórico" de grabaciones está constituido por testimonios orales de protagonistas de la Primera Guerra Mundial. Tras haber desarrollado actividades como la de confeccionar un atlas dialectológico fue, en 1939, designada como archivo sonoro nacional. Después de la guerra se creó el *Archivio Etnico Lingüístico-Musicale*, destinado a conservar los resultados de las investigaciones de campo llevadas a cabo tanto en territorio italiano como en otros países. Desde el 1975 la Discoteca depende del Ministero per i Beni culturali e Ambientali. Hoy desempeña la función de adquirir, conservar y divulgar el patrimonio sonoro nacional y las fuentes orales de la historia italiana. Contiene alrededor de 200.000 soportes (principalmente: cilindros de cera, cintas, discos de varios materiales y compactos). El *Archivio Nazionale del Disco* conserva más de 190.000 discos (35.000 de los cuales son de 78 rpm) En la *Nastroteca dell'Archivio Etnico Lingüístico Musicale* se conservan más de 25.000 sonogramas de tradición oral recogidos en el transcurso de viajes de campo. Cuenta además con una valiosa Colección de Instrumentos de Reproducción del Sonido y una biblioteca con 5000 volúmenes, 50 publicaciones periódicas y catálogos de casas discográficas desde 1930 al presente⁴². La Discoteca opera en varios sectores: la conservación, el incremento de adquisiciones, la catalogación informatizada, la difusión (por medio de publicaciones y de las *Settimane per i Beni Musicali*) y la apertura a la consulta por parte del público.

La consultoría del profesor Dietrich Schuller fue solicitada por la *Discoteca di Stato* a raíz de la toma de conciencia de una serie de problemas vinculados de modo particular con la conservación de los fondos y se llevó a cabo durante los años 1995 y 1996; el resultado de la misma figura en la *Relación definitiva sobre la conservación de las conexiones discográficas y de cintas*⁴³. La experiencia

⁴² Informe de la actual directora, Maria Carla Cavagnis Sotgiu publicado en el catálogo de la exposición *Tu, musica divina, canzoni e storia in cento anni d'Italia*, Torino-Londres, Umberto Allemandi & C, 1996

⁴³ *Rapporto conclusivo sulla conservazione delle collezioni disco-nastrografiche*, Roma-Wien, Discoteca di Stato, 1996

del especialista austríaco puesta al servicio de una observación detallada de las instalaciones y soportes de la Discoteca di Stato le permitió al mismo emitir una serie de recomendaciones sobre la conservación y mejora de los depósitos, mobiliario y equipos (tocando aspectos concretos tales como el peso de los pisos, el grado de aireación, las infiltraciones de agua, la conveniencia de habilitar depósitos para alojar duplicados, medidas antiincendio, aire acondicionado, control del grado de humedad eliminación de polvo, neutralización de campos magnéticos y esterilización).

Asimismo, la *relación* abunda en consejos relativos a la conservación de los soportes (discos de cartón, lacas, discos "Decelith", matrices, vinilos, cubiertas de plástico, cilindros, colecciones de cintas), sin descuidar el aspecto de la prioridad de intervenciones a considerar en función del grado de urgencia de las mismas determinado por la probabilidad de deterioro de los soportes. También se dedicó una sección del informe a los pasos a seguir para la transferencia de grabaciones históricas a soportes modernos.

Redes

El hecho de las experiencias italianas ocupen un espacio de tanta importancia en este informe depende exclusivamente de que conozco las mismas de un modo particular por haber vivido diez años en este país. Y por ese motivo incluyo aquí un nuevo ejemplo que ve implicada a la *Discoteca di Stato* de Roma, siempre en relación con el tema de la promoción de proyectos bilaterales o multilaterales en la esfera de la documentación relativa a la cultura tradicional y popular contemporánea (aspecto éste que, como es sabido, está recogido en la Recomendación emitida por la UNESCO en París el 15 de noviembre de 1989. Se trata del proyecto denominado **JUBOX**, que fue implementado durante estos dos últimos años y que consistió en la constitución de un punto de acceso a fondos sonoros de tradición oral. El proyecto, financiado por la Comunidad Europea⁴⁴, fue llevado a cabo por instituciones de Italia, Reino Unido, Dinamarca y Noruega y por lo tanto en la base de datos interactiva -cuya novedad reside en que proporciona, además de las informaciones que se le solicitan, los ejemplares sonoros mismos- se incluyeron piezas musicales pertenecientes al folclore de estos países.

Actualmente, la Discoteca di Stato italiana participa en un proyecto multilateral e internacional de transvase de fondos sonoros y de información relativa a la conservación, catalogación y difusión de los mismos. El proyecto, que recibe el nombre de HARMONICA, está constituido por varios países de Europa y tiene su sede operativa central en Holanda .

La **Asociación Española de Documentación Musical (Aedom)** se constituyó entre los principales archivos musicales del país con el objeto de promover y coordinar las actividades de los mismos⁴⁵. Por lo tanto, la colaboración interinstitucional es la razón de ser de la Asociación, que en la actualidad se propone potenciar la formación de profesionales de la documentación musical, promover proyectos bibliográficos, apoyar la investigación musical y aumentar la accesibilidad de los documentos y publicaciones relacionados con la música⁴⁶. El Aedom, que se constituyó como rama española de la **Asociación Internacional de Bibliotecas Musicales (AIBM)**, está formado por el archivo de compositores vascos -ERESBIL-, la Sección de Música de la Biblioteca de Catalunya y la de la Biblioteca Nacional, la Biblioteca Musical de Madrid, el Departamento de Musicología del Consejo Superior de Investigaciones Científicas -CSIC-, el Centro de Documentación Musical de Andalucía y el del Instituto Nacional de Artes Escénicas y Música -INAEM-, bibliotecas privadas y públicas de conservatorios, universidades y fundaciones y otras instituciones similares. Publica un boletín con periodicidad semestral, promueve encuentros de profesionales y persigue el intercambio de información.

Si bien las principales actividades del AEDOM han estado relacionadas hasta ahora con los fondos que contienen música escrita, la conservación y difusión de los patrimonios populares y de tradición oral figura entre sus objetivos. Entre otras iniciativas que se han llevado a cabo se puede mencionar el Simposio europeo que se celebró en Toledo, durante los días 28 y 29 de noviembre de

⁴⁴ Proyecto de la DGXIII.

⁴⁵ Presidente: Jon Bagüés Erriondo (Archivo de compositores vascos ERESBIL)

⁴⁶ Bagüés, Jon, "Presentación", *Boletín de AEDOM* Año 1, nº 1, enero-junio 1994:3

1991, con el tema: "La promoción de los patrimonios musicales populares y tradicionales de Europa", en el que participaron estudiosos y funcionarios de centros de documentación y archivos de países de Europa Occidental, Central y Oriental.

Función de las instituciones privadas

Como ejemplo de la función que pueden desempeñar las instituciones privadas en la preservación, conservación y difusión del folclore -aspecto cuyo reciente crecimiento en los países del Hemisferio Occidental ha sido subrayado en varias ocasiones-mencionó la iniciativa tomada en 1996 por la **Fundación Marcelo Botín**, ubicada en la ciudad española de Santander. Esta institución privada llamó a un concurso para la creación de un Centro de Documentación musical en Cantabria. Esta tarea fue encomendada al Departamento de Música de la Universidad de Valladolid, que presentó el proyecto más convincente. Como director fue nombrado el musicólogo Julio Arce Bueno, autor de un libro de reciente publicación sobre la música en Cantabria.

El Centro acaba de ser creado con el objeto de recopilar, proteger y difundir el patrimonio musical de la región en sus distintas vertientes (música culta profana y religiosa, teatro lírico, movimiento coral, folclore, etc.). Se organiza en torno a tres secciones perfectamente definidas e interrelacionadas: una unidad de conservación y documentación, una unidad de investigación y una unidad de gestión y difusión.

La Unidad de conservación y documentación contará con los fondos manuscritos, impresos, sonoros, materiales visuales e iconográficos y especiales organizados según una distribución por áreas de servicio (Archivo, Biblioteca, Fonoteca, Fondo iconográfico, Videoteca, Museo-colección). La conservación de los fondos se realizará por medio de copias de seguridad realizadas en diversos soportes: grabaciones, microfilmes, microfichas, etc., así como por un sistema informático de archivo de imágenes digitalizadas almacenable en disco óptico que permita el acceso libre a los documentos más frágiles o en peor estado eliminando las reticencias de no visualizar el documento original. La conservación de los fondos se establecerá, también, por su propia disposición y almacenaje en armarios ignífugos y depósitos de seguridad con regulación de las condiciones ambientales: niveles de humedad, temperatura e iluminación.

La Unidad de Investigación se articulará en tres niveles: recuperación de materiales en estado precario o en manos privadas, inventario y catalogación; por otro lado ofrecerá la posibilidad de realización de trabajos de encargo; finalmente se ocupará de todos los pasos previos a la edición de obras por parte del Centro.

Por último, la Unidad de Gestión e Información desarrollará las actividades administrativas y económicas; será artífice de la difusión comunitaria, nacional e internacional del CDM en todas sus facetas a través de dos vías fundamentales: una red eficiente de colaboraciones y contactos interinstitucionales, y el establecimiento de relaciones con la infraestructura de la producción (comercialización e industria). Además, dentro de esta organización y siguiendo la corriente de proyección centrípeta y centrífuga del CDM, sería conveniente una variada gama de actividades formativas relacionadas con cualquier aspecto que pueda contemplar temática o funcionalmente el CDM: cursos, jornadas, congresos, exposiciones, muestras, conciertos, recitales, etc. El área Otros Servicios proporcionará una información interactiva con otros centros documentales, bibliográficos o académicos a través de la vía informática. Facilitará la reproducción inmediata de materiales a través de la reprografía. Ofrecerá los beneficios de un fichero siempre actualizado de trabajos de investigación realizados en el Centro o sobre aspectos con él relacionados; un fichero informativo de cursos, concursos, oposiciones, becas, congresos, jornadas, etc. Por otra parte este área se ocupará de las publicaciones: catálogos o ediciones del Centro, trabajos de investigación, ponencias de los cursos organizados por la propia Unidad.⁴⁷

⁴⁷ Son funciones y objetivos generales del CDM.
Recuperación del material musical y de danza, bien escrito, sonoro o en imágenes creado o relacionado con Cantabria en todas sus formas: partituras, literatura musical, fuentes iconográficas, grabaciones sonoras y audiovisuales, manuscritos y toda clase de textos y objetos con ellos relacionados.
• Custodia, catalogación, clasificación e indización de las obras y fondos relativos a partituras, literatura musical y producciones sonoras.

El Centro de Documentación Musical centra su interés en todos aquellos ámbitos que considere interesantes para la historia y el desarrollo de la música en Cantabria, ya sea por su relación directa con la región o porque contribuyan de forma indirecta a su conocimiento. Por tal motivo, considera el fenómeno musical en un sentido amplio que comprende todo tipo de manifestaciones y que incluye, en consecuencia, los repertorios tradicionales rurales y los populares urbanos.

La Unidad de Conservación y Documentación se articula en dos niveles básicos: el proceso técnico y los fondos. El proceso técnico se subdivide, a su vez en dos ramas: la adquisición de fondos -compra, intercambio, donación o depósito de materiales documentales, bibliográficos, partituras, literatura musical, fuentes iconográficas, grabaciones sonoras y audiovisuales, manuscritos y toda clase de textos y objetos relativos al interés del centro- y el tratamiento de dichos fondos-análisis, circulación y conservación (es decir, el inventario y catalogación de los distintos soportes, el servicio externo de la información a través de un sistema de gestión de bases de datos de consulta interactiva y las tareas de conservación de los materiales).

No corresponde proseguir ahora con la exposición detallada de los aspectos organizativos y de funcionamiento del centro -en su múltiple articulación que comprende tanto la existencia de biblioteca, hemeroteca, museo, fonoteca, videoteca e iconoteca, como la promoción de publicaciones y trabajos de investigación- por cuanto todos los presentes tienen conocimiento de similares instituciones en distintos países. Objetivos como otorgar a los investigadores y público en general la máxima difusión de los fondos y un fácil acceso a los mismos, la actualización constante de contenidos y de formación del personal y el incremento de la capacidad de absorción de nuevos criterios para la realización de las distintas funciones del centro - conservación, catalogación, difusión, gestión, la búsqueda de la máxima eficacia en la gestión de intercambio y cesión de fondos reproducidos con otras instituciones nacionales o extranjeras, son perseguidos por esta institución y por otras similares en todos los países de Europa Occidental y de otros subcontinentes y responden de una manera u otra a las propuestas para la identificación, conservación, salvaguardia, difusión y protección de la cultura tradicional y popular contenidas en la Recomendación emitida por UNESCO en 1989.

Centros en otros países europeos

Aunque hasta este momento he mencionado instituciones pertenecientes a los dos países que conozco por experiencia directa prolongada, no puedo dejar de recordar la acción que desarrollan los centros de documentación musical más antiguos y prestigiosos de Europa Occidental y por lo tanto me referiré brevemente a dos de ellos, caracterizados por el enorme volumen de fondos que poseen y la formación e implicación de sus profesionales.

The British Library National Sound Archive (NSA) es uno de los archivos sonoros más grandes del mundo. Fue abierto en 1955 como *British Institute of Recorded Sound* y en 1983 pasó a depender de la *British Library*. Contiene alrededor de 900.000 discos y 125.000 cintas, así como una creciente colección de vídeos. Las colecciones proceden de los cinco continentes y cubren el máximo ámbito espacial -escala mundial- y temporal (desde fines del siglo XIX hasta hoy) abarcable por los registros sonoros⁴⁸. Sus modernos y ágiles servicios de información y consulta cuentan con espacio en Internet. A partir de la toma de conciencia por parte de los responsables del funcionamiento del *National Sound Archive* de que "preservar grabaciones sonoras de todo el mundo -tanto del pasado

[Footnote continued from previous page]

- Mantenimiento de los fondos de documentación y de referencias que complementen y posibiliten el estudio y conocimiento de la música y los músicos de Cantabria y en Cantabria.
- Adquisición de un fondo sobre la música y todas sus manifestaciones en Cantabria en particular y en España en General.
- Elaboración de programas de investigación según la triple vía antes mencionada: bien como parte integrante de un plan de actuación en el patrimonio musical, bien como parte del desarrollo de trabajos de encargo, o bien como objeto de publicaciones.
- Censado de los recursos musicales existentes en Cantabria.
- Difusión del patrimonio musical cántabro, de los fondos propios del centro y de los trabajos de investigación por éste promovidos o en él realizados mediante actos públicos, ediciones, impresión o grabación con o sin imagen, o cualquier medio que permita alcanzar este fin. En este sentido se incluía toda la información en el Censo Guía de los Archivos Españoles para, con la difusión informatizada de dicho Censo, adscribir los fondos a la información de los PIC (Puntos de Información Cultural) de acceso libre y gratuito.
- Organización de actividades relacionadas con las materias propias del Centro: cursos, congresos, jornadas, exposiciones, conciertos, recitales, etc.
- Cuantas tareas se deriven de las funciones atribuidas en los apartados anteriores.

como del presente- significa también documentar la historia mundial"⁴⁹ esta institución desarrolla una serie de actividades que tienen relación con las áreas consideradas en la Recomendación de la UNESCO de 1989. El *Festival of Traditions*, el *World Music Festival Hornimania*, las ediciones locales de *Womad* y el *Sidmouth International Festival of Folk Arts* son sólo algunos de los eventos de difusión e incentivación organizados recientemente por el National Sound Archive.

Los archivos sonoros del Musée de l'Homme (París) son los actuales herederos de la fonoteca fundada en 1932 por André Schaeffner en el *Musée d'Ethnographie du Trocadéro*. Desde entonces y hasta hoy, dicha institución ha recibido 600 cilindros, 200 discos de grabación directa, 2.300 discos de 78 rpm, 2.100 discos microsurco, 4.500 cintas magnéticas y 200 discos compactos. En ellos se contiene repertorio sonoro de más de 300 etnias o grupos sociales pertenecientes a varios centenares de países, lo cual es resultado de la "vocación planetaria" de los promotores del centro [Pitoëff, 1993]. No voy a desarrollar aquí la historia de esta y de otras instituciones similares, porque figuran en todos los textos historiográficos de la etnomusicología y son sobradamente conocidas por todos. Sólo menciono que la fonoteca del Musée de l'Homme cuenta hoy con dos fondos de distinto estatuto jurídico (uno es objeto de contratos con la fonoteca, el segundo está sometido a copyright), que cuenta con materiales históricos de primerísima importancia (como los 388 cilindros grabados por el Dr. Azoulay en la Exposición Universal de 1900 en París; los cilindros procedentes de misiones en Sudamérica⁵⁰, Arabia del Norte⁵¹, Africa Occidental, Camerún, Sudán, Etiopía⁵² y Argelia⁵³; las grabaciones efectuadas durante la Exposición Colonial de 1931 en París; y los 160 discos editados por Gramophone durante el Congreso de Música Árabe de 1932 en El Cairo) [Pitoëff, 1993].

La siguiente es sólo una lista incompleta de instituciones de Europa Occidental que conservan documentos relativos al folclore musical. Algunas duraron pocos años, como el *Centro Internazionale per la Musica Tradizionale Liturgica*, fundado por Carlo Levi bajo los auspicios del Consejo Internacional de la Música de la UNESCO y del *International Folk Music Council* (1963-1967) [Ferretti, 10993]. Otras dependen de universidades, como el DAMS (*Dipartimento Arte, Musica ed Spettacolo* de la Universidad de Bolonia), dirigido por el etnomusicólogo Roberto Leydi, que publica periódicamente los resultados de trabajos de investigación sobre temas de cultura musical tradicional⁵⁴, o el *Dipartimento Studi Glotto-Antropologici*, donde entre las iniciativas impulsadas por Diego Carpitella merece destacarse la creación de los archivos de antropología visual por cuanto representan una respuesta a las exigencias actuales del estudio y conservación de la cultura popular. Otras dependen de gobiernos regionales, como el *Assessorato Alla Cultura della Regione Lombardia*, donde también operó Roberto Leydi en la publicación de libros, discos y folletos sobre temas de investigación folclórica.

Archives Suisses de la Chanson Populaire, **Basel**

Musée d'Ethnographie, Archives Internationales de Musique Populaire, **Genève**

Ateliers d'Ethnomusicologie, **Genève**

Music of Man Archive, **Wädenswil**

Humboldt Universität **Berlin**, Sektion Kunstwissenschaften, Bereich Musikwissenschaft

Freie Universität **Berlin**, Institut für Musikwissenschaften

International Institute for Comparative Music Studies and Documentation, **Berlin**

Museum für Völkerkunde, Abteilung Musikethnologie, **Berlin**

Universität Hamburg, Musikwissenschaftliches Institut, **Hamburg**

Universität Innsbruck, Institut für Musikwissenschaft, **Innsbruck**

Hochschule für Musik und darstellende Kunst, Institut für Volksmusikforschung, **Wien**

Phonogrammarchiv der Österreichischen Akademie der Wissenschaften, **Wien**

Musée de la Vie Wallone, **Liège**

Archives of Danish Folksong, Musikvidenskabeligt Institut, **Arhus**

Dansk Folkemindesamling (Danish Folklore Archives), **København**

⁴⁹ Manigand, Marie-Laure, "International Music Collection. An Historical Perspective", *International Music Connection* 1, primavera 1995: 4.

⁵⁰ 58 cilindros de la misión Créqui-Montfort et Sépéchal de la Grange, 1903.

⁵¹ 14 cilindros grabados por Schaeffner en París en 1933.

⁵² 30 cilindros, misión Griaule-Dakar-Yibuti, 1931-1933. Sudán, 1935, 19 cilindros de la misión Griaule Sahara-Camerún.

⁵³ Aurés, 1936, 49 cilindros e la misión Th. Rivière y G. Tillon.

⁵⁴ Para ello cuenta con la colaboración del CIDIM (Comitato Nazionale Italiano Musica), dependiente del CIM (Consejo Internacional de la Música de la UNESCO) y con sede en Roma.

Kansanmusiikki Instituutti (Institut de Musique Folklorique), **Kaustinen**
 Centre International de Documentation Occitane, **Béziers**
 Musée du Berry, **Bourges**
 Chasse-Marée, **Douarnenez**
 La Talvera, Groupement d'Ethnomusicologie en Midi-Pyrénées, **Gaillac**
 Centre de Recherche sur les musiques traditionnelles, **Jenzat**
 Musée de l'Homme, Département d'Ethnomusicologie, **Paris**.
 L.A.C.I.T.O. (Langues et Civilisations à tradition orale), Département d'Ethnomusicologie, **Paris**
 Musée National des Arts et Traditions Populaires, Phonothèque, **Paris**
 Université de Poitiers, Département de Musicologie, **Poitiers**
 Conservatoire Occitan, **Toulouse**
 Université de Tours (François Rabelais), Département de musique et musicologie, **Tours**
 Associazione Folkstudio, **Palermo**⁵⁵
 Museo Nazionale delle Arti e Tradizioni Popolari, **Roma**⁵⁶
 Hellenic Folklore Research Centre, Academia de Atenas, **Atenas**
 The M. Merlier Folk Music Archives, **Atenas**
 Peloponnesian Folklore Foundation, **Navplion**
 Università di Roma "La Sapienza" dipartimento di Studi Glotto Antropologici, **Roma**
 Universitetet i Bergen, Etno-Folkloristisk Institut, Arne Bjørndals Samling, **Bergen**
 University of Oslo, Norsk Folkemusikksamling, **Oslo**
 Universidade de Coimbra, Instituto de Antropologia, **Coimbra**
 Museu de Etnologia, **Lisboa**
 University of Edinburgh, Faculty of Music, **Edinburgh**
 University of Edinburgh, School of Scottish Studies, **Edinburgh**
 Ulster Folk & Transport Museum, **Hollywood**,
 City University, Department of Music, **London**
 English Folk Dance & Song Society, Vaughan Williams Memorial Library, **London**
 Dialekt-, Ornamns- Och Folkminnesarkivet i Göteborg, **Göteborg**
 Lunds Universitete, Department of European Ethnology, **Lund**
 Kungliga Musikaliska Akademien, **Stockholm**
 The Swedish Centre for Folk Song & Folk Music Research, **Stockholm**.

Muchas de las actividades de estos y otros centros de documentación europeos relativas a las áreas de acción que estamos considerando se publican regularmente en los boletines de la **I.A.S.A. (International Association of Sound Archives)**, organización no gubernamental afiliada a la UNESCO que fue fundada en Amsterdam en 1969 como instrumento de cooperación internacional entre archivos que conservan documentos sonoros. Se recomienda la lectura de estos boletines no solo para conocer detalles del funcionamiento e iniciativas de los archivos sonoros ubicados en distintos continentes, sino también para acceder a artículos de reflexión teórica y metodológica sobre temas directamente relacionados con la conservación de documentos sonoros del mundo⁵⁷.

La mención de las sociedades de antropología, folklore, etnografía, etnomusicología y similares que operan en cada uno de los países de Europa Occidental excedería los límites impuestos a este informe. Más allá de los juicios que merezcan el funcionamiento de estas sociedades y los resultados y publicaciones que emanan de sus periódicas reuniones científicas, se advierte una general ausencia de comunicación entre agrupaciones de distintos países. En este sentido sería provechoso para todos que se extendieran iniciativas como la que dio origen al **Seminario Europeo de Etnomusicología**, fundado por John Blacking en Belfast en 1981, que reúne a profesionales de esta disciplina que por razones de trabajo, residencia o formación están vinculados al continente europeo. El **ESEM** realiza encuentros anuales en distintas ciudades de este continente y constituye en

⁵⁵ Fundado en 1970. Presidente: Paolo Emilio Carapezza. Posee uno de los archivos de materiales del folclore más importantes de Italia. Funciona en colaboración con el Archivo etnofónico del CIMS y el Istituto di Scienze antropologiche e geografiche de la Università di Palermo. Promueve investigaciones y publicaciones especializadas.

⁵⁶ Fue fundado por el antropólogo Tullio Tentoni, cuya acción ha sido determinante en la incorporación de los estudios de Antropología Cultural en las universidades italianas.

⁵⁷ Adamo, Giorgio, "La sezione italiana della International Association of Sound Archives", *IASA Bulletin* 61m noviembre 1992: 11-13.

la actualidad una de las más interesantes oportunidades que tienen los etnomusicólogos de acceder al diálogo científico⁵⁸.

Colaboración con pequeños centros

Asimismo, se impone impulsar el aumento de ocasiones similares a nivel interdisciplinario, así como desarrollar propuestas de colaboración interinstitucional en ejes verticales, es decir, promoviendo la articulación entre las instituciones nacionales y regionales y los pequeños centros de provincia, investigadores y aficionados recolectores. La existencia de estructuras no institucionales, generalmente formadas por pocas personas⁵⁹—incluso unipersonales— que trabajan en la recolección y conservación de materiales folclóricos es característica de los países de Europa Occidental (en los que, además, los portadores del folclore son conscientes del propio patrimonio). A menudo los archivos de estas pequeñas asociaciones o de estas personas llegan a ser numéricamente mayores que los de grandes instituciones y esto es debido a la posibilidad de alcanzar equipos de documentación en el campo sin erogaciones excesivas para los investigadores locales⁶⁰. Estos recogen y archivan sonogramas, vídeos, entrevistas, materiales hemerográficos y de otro tipo, materiales con los que guardan estrecha relación de conocimiento y que a menudo no figuran -repite- en los grandes archivos regionales o estatales. En los países de Europa Occidental el movimiento de folk-revival a partir de los años 60 ha sido consistente y sus efectos incluyen las actividades que estoy comentando, actividades que en muchas zonas llenan las lagunas del ámbito oficial y que son motivadas por las veloces transformaciones que el boom industrial de la postguerra produjo en los patrimonios folclóricos. Hoy, mientras algunas instituciones oficiales ven disminuidos sus presupuestos, muchos investigadores que operan según iniciativas de ámbito personal o local acumulan interesantes materiales procedentes de las culturas tradicionales de su entorno, materiales que en muchos casos proceden de trabajos de calidad científica no despreciable. Las falencias metodológicas verificadas a este nivel deberían motivar a las instituciones para implementar cursos de formación de aspirantes a profesionales de la investigación folclórica que actúan movidos por la vocación y que por diversas razones no pueden afrontar estudios específicos a nivel universitario.

Es necesario hacer un llamado a las instituciones oficiales para que consideren la posibilidad de llevar a cabo estas actividades de formación y de implementar redes de intercambio de materiales en las que participen los responsables de estos pequeños archivos. Nadie niega la importancia y urgencia de establecer contactos interinstitucionales a nivel internacional. Por el contrario, lo acabo de señalar en este informe, pero ello no impide -o no debería impedir- la creación de redes que conecten las grandes instituciones con las pequeñas que lo merezcan. A través de dichas redes se podría establecer una serie de intercambios que enriquecerían a todos los participantes (por ejemplo, a través de la formación en investigación de campo y en actividades de archivo, información sobre un uso de los materiales que sea a la vez correcto y respetuoso de los derechos de los informantes, copia y conservación de dichos materiales, acceso a los mismos, etc.). En definitiva, se trata de capitalizar esfuerzos, utilizar la agilidad de las estructuras pequeñas que operan con facilidad en territorios próximos a su sede, coordinar su actividad y sus fondos patrimoniales con los de otros centros de similares características y rescatar sus adquisiciones y aportes. Esta problemática, que me ha sido presentada por el etnomusicólogo italiano Erasmo Treglia, requiere la constitución de instituciones federativas que agrupen los centros e investigadores privados, actividad que en parte ya ha sido comenzada en España por el comité del C.I.O.F.F. en ese país (al menos en lo que respecta a los centros provinciales y regionales).

Reflexión final

Conviene terminar recordando que estos datos y propuestas responden a una realidad en permanente transformación. Y la transformación a menudo supone o implica crisis de identidad (o, al

⁵⁸ El ESEM suele publicar las actas de sus encuentros.

⁵⁹ incluso unipersonales

⁶⁰ La adquisición de un grabador DAT o de una cámara de vídeo es un hecho cada vez más accesible y frecuente a nivel de usuarios individuales.

menos, peligro o posibilidad de crisis). La identidad está directamente relacionada con los temas que estamos tratando. Las operaciones de preservación, restauración y difusión del patrimonio folclórico "son la base más secreta de la simulación social que nos mantiene juntos" [García Canclini, 1995: 150]. Este presupuesto lleva a ciertos sectores tradicionalistas asociados al folclore en cuanto disciplina a un cierto desconocimiento del pasado: se niega la complejidad de la historia de las sociedades rurales, se ignora la existencia de procesos de mestizaje, se encuentra dificultad en articular las realidades llamadas folclóricas con las exigencias y los límites que son propios de las actuales culturas [García Canclini, op cit], y terminamos por aceptar la falacia de que los objetos reemplazan a la realidad y de que las conmemoraciones congelan el movimiento.

Creo que hoy se impone más que nunca reflexionar acerca de la función de las instituciones de cualquier tipo y nivel que operan -o podrían intervenir- en el mundo del llamado folclore. Creo que deberíamos formularnos preguntas como éstas: ¿Quiénes deciden lo que hay que preservar y cómo? ¿nosotros?

¿Quiénes somos nosotros y dónde nos ubicamos en relación con aquello sobre lo que pretendemos intervenir?

¿Decidimos sobre lo que queremos salvar perteneciente a nuestra cultura o a algunas de las subculturas en las que participamos o a las que pertenecemos?

¿Salvamos nosotros, miembros pertenecientes a elites urbanas, lo que consideramos asociado al patrimonio tradicional, a la cultura nacional, a lo que es a nuestro juicio emblema o esencia de la nación?

¿Interrogamos a aquellos que consideramos portadores del folclore sobre lo que quieren conservar y sobre las estrategias a implementar para lograrlo?

Entre los pueblos de Europa Occidental la conciencia de propiedad de las tradiciones es un fenómeno extendido a todos los niveles y aceptado en todas las jerarquías. El folclorismo persigue la preservación, el rescate y la re-propuesta de lo que considera patrimonio tradicional (y lo hace con distintos fines, según la corriente o la tendencia política). Hoy son cada vez menos los que ignoran o fingen ignorar que los contactos transculturales y los procesos de hibridación entre repertorios, sistemas, géneros y objetos son inevitables.

¿Qué salvamos entonces?

¿objetos pertenecientes a la cultura material o espiritual de "nuestros" pueblos? ¿o copias o representaciones de esos objetos? (transcripciones, fotografías, reproducciones) ¿creamos copias "escritas" de los objetos sometidos a transmisión oral para colocarlos en los anaqueles de las bibliotecas con la ilusión de haberlos dignificado y salvado del olvido?

¿o salvamos fenómenos afectados por procesos de contaminación, intercambio, transplante, aculturación, transformación, difusión, socialización?

¿teorías, etnoteorías, hábitos de comportamiento individuales y sociales?

¿fenómenos "puros"?, ¿porciones de significado de ámbito consensual?

¿Qué protegemos o debemos proteger?

¿derechos de los creadores? ¿o de los portadores de las culturas tradicionales?

¿la formación/educación/inculturación de los habitantes de nuestros países en el respeto de determinados valores?

¿el conocimiento, respeto y aprecio del patrimonio "ancestral"?

¿la capacidad de asimilación, de adecuación al cambio, de recreación, de incorporación de las novedades que poseen los portadores del folclore?

¿la reformulación crítica de los valores? [reformulación axiológica crítica]

¿Promovemos determinadas prácticas socioculturales?

¿Estimulamos el conocimiento real del pasado cultural, o visiones idealizadas del mismo? ¿o tal vez alguna actitud existente o deseable ante los patrimonios de nuestras culturas propias y de las ajenas?⁶¹.

⁶¹ No mencionaré aspectos legales y económicos relacionados con el mundo del folclore, porque será tratado en otras mesas, pero quisiera recordar que el hecho de usar materiales tradicionales para re-proponerlos a un público -con o sin elaboración- no es una excusa para no

Sabemos que nadie investiga hoy -o nadie debería- las culturas vivientes, a las que es total o parcialmente ajeno, sin tener en cuenta los aspectos *emic*, es decir, la conceptualización, visión crítica y opinión de los miembros de la cultura observada. Pero ¿se indaga sobre cómo quieren esos "informantes" que se "escriban" sus objetos y que se construyan los relatos sobre su cultura?

¿se indaga sobre lo que quieren salvar, promover, conservar (y, de modo complementario, sobre lo que quieren asimilar de otras culturas, el grado de tolerancia y expectativa de transformación del propio patrimonio)?

¿Quiénes quieren conservar? ¿qué y cómo? ¿cuándo, por qué y para qué?

Habría que interrogar sobre todo esto a las instituciones oficiales y a las alternativas, a los "informantes" de todo tipo. Los centros de documentación y las redes son hoy un medio para que todos conozcan cada vez más (para facilitar el acceso a la información a un número cada vez mayor de "usuarios"). Pero ¿a quiénes están dirigidas estas redes? Hay que revisar los conceptos y las dicotomías: culto/popular, rural/urbano, folklórico/académico (considérese, por ejemplo, el caso de localidades en las que estas fronteras son variables en función del observador y del usuario).

Con respecto a la disciplina a la que pertenezco quisiera agregar que los etnomusicólogos, no sólo en cuanto estudiosos de las culturas tradicionales, sino también como cómplices ingenuos y eslabones de la cadena de aprovechamiento comercial de los patrimonios tradicionales populares [Feld, 1996], debemos considerar, a la luz de ésta y otras interrogantes, los conceptos y propuestas contenidos en la Recomendación de la UNESCO de 1989. Estos tienen plena vigencia y sentido aun hoy en la medida en que no solo no fuerzan los procesos que afectan a los objetos y fenómenos a conservar y salvaguardar, sino que estudian estos procesos de un modo dialógico tanto intracultural como transcultural, es decir, en la medida en que entienden las fuerzas que operan sobre la cultura tradicional y popular desde dentro y fuera y en la medida en que impulsan y facilitan el conocimiento mutuo entre las culturas y subculturas.⁶²

[Footnote continued from previous page]

mencionar las fuentes (p.ej.: los informantes de medios rurales cuando utilizamos alguna porción de su cultura en nuestra producción, véase el caso del rock de raíz étnica)

⁶² Sobre temas relacionados con la acción de las instituciones internacionales hablarán los colegas, por eso no me referiré a las disposiciones, directivas y recomendaciones emanadas por la Comunidad Europea sobre estos temas. Solo me permito mencionar:

- las conclusiones del Consejo del 17 de junio de 1994 relativas a un plan de acción comunitario en el ámbito del patrimonio cultural, en las que se propone la implementación de acciones específicas en los ámbitos de conservación y salvaguardia del patrimonio cultural europeo, la difusión de la información, la formación, la sensibilización del público, la consideración del patrimonio en el desarrollo regional y en la creación de empleo, el turismo y el medio ambiente, la investigación, los multimedia y las nuevas tecnologías)⁶²
- la resolución del Consejo y de los Ministros de Cultura reunidos en el seno del Consejo, del 14 de noviembre de 1991 sobre el incremento en la formación de redes culturales europeas⁶²
- La resolución del Consejo y de los Ministros de Cultura reunidos en Consejo del 7 de junio de 1991 sobre la formación de administradores culturales⁶²
- La resolución del Consejo del 14 de mayo de 1992 encaminada a fortalecer la protección de los derechos de autor y derechos afines⁶²

Apéndice

Conclusiones del Simposio Europeo: "La promoción de los patrimonios musicales populares y tradicionales de Europa", Toledo, 28 y 29 de noviembre de 1991⁶³. En dicho simposio fueron leídas las siguientes ponencias:

- "La etnomusicología en España y en Europa: Métodos de trabajo y estudio" (Ramón Pelinski, Universidad de Montreal),
- "Estrategias en la Comunidad Europea sobre el estudio y recuperación del patrimonio musical tradicional y popular" (Andrés Ricros, Director del Departamento de Investigación del Instituto Cultural Europeo),
- "La música tradicional y sus cauces de difusión. La promoción del patrimonio musical en la sociedad actual" (Joaquín Díaz, Director del Centro Etnográfico de Documentación, Valladolid),
- "Proyectos de Trabajo y Mecanismos de Coordinación Internacional relativos a la Música Tradicional Oral (MTO), en función de la importancia fundamental de las MTO" (Jean G. Papaioannou, Catedrático de Musicología en la Universidad de Atenas y Vicepresidente del Centro de Investigación Musical Contemporánea, Grecia).

Una copia de los textos de estas ponencias en inglés se encuentra a disposición de quien desee consultarlos. Pero añadido aquí las **conclusiones de los grupos de trabajo**:

Grupo 1. Métodos de investigación y recuperación de los patrimonios culturales.

"Propuestas para la recuperación y difusión de la música de tradición oral.

Consideramos urgente, dada la importancia de las tradiciones orales para la construcción de la identidad europea, fomentar el impulso que permite la existencia y la continuidad de las músicas tradicionales y populares. Para ello proponemos:

1. Que el Parlamento y la Comisión de la Comunidad Europea declaren las expresiones de tradición oral como patrimonio de la cultura europea.
2. Estudiar la posibilidad de crear un Instituto Europeo de Música Tradicional y Popular que se encargue de promover y coordinar una red de estructuras que, con metodología y objetivos comunes, posean una dinámica de investigación, de creación y de desarrollo del patrimonio.
3. Considerar la posibilidad de crear y una red europea de centros encargada:
 - de la recuperación e investigación
 - de la conservación
 - de la transmisión
 - de la construcción y restauración de instrumentos
 - de la difusión
 - de la producción y de la comercialización
 - y de la comunicación de esas culturas." [p. 71]

Grupo 2. "Música culta y música popular, relaciones e influencias"

"Propuesta de discusión conceptual:

- Se trata de categorías acríicas incorporadas al ámbito de los estudios de estas materias, tal como otras que conciernen a la dicotomía religioso-profano, hablado-cantado, etc., y que en muchos casos responden a una representación y proyección de la sociedad.
- Se propone abrir un ámbito para la reflexión con la participación de especialistas en la materia.
- Objeto: la confrontación "supuesta" con la historia musical.

⁶³

Madrid, Centro de Documentación Musical del INAEM (Ministerio de Cultura, s/f.

Programa posible:

1. Reuniones académicas sobre "Lo popular en la Historia e Historiografía Musicales".
2. La visión desde la etnomusicología hacia la historiografía.
3. Discusión sobre revisión de conceptos básicos de la actual historiografía musical.
4. Análisis crítico de esas categorías conceptuales y tradicionales en la historiografía."

Grupo 3. "La coordinación europea de los sistemas de información y documentación"

"Recomendaciones:

Proceder a un inventario de organizaciones tanto institucionales como privadas que actúan a nivel internacional, nacional, regional o incluso microregional, que hayan reunido fondos documentales sobre la Música Europea de Tradición Oral.

Este inventario permitiría hacer un estado de los fondos reunidos, de los trabajos ya realizados, de los sistemas de descripción y análisis documentales puestos a punto con el fin de identificar las posibilidades de montaje de una red documental a escala europea.

A la vista de los resultados de este inventario:

1. Proceder a la creación de un organismo encargado de coordinar el montaje de esa red documental.
2. Otorgar ese poder a un organismo ya existente, que cobraría un carácter federativo y en el que todos los miembros asociados (países, diferentes tipos de organizaciones, etc...) deberían estar representados.
3. Este organismo habrá de estar dotado de los medios humanos, técnicos y económicos indispensables⁶⁴ para el cumplimiento de su misión, que será:
 - 3.1. Fomentar la constitución de nuevos centros de archivo y documentación, fonotecas, bibliotecas, videotecas, mediatecas, etc... donde sea necesario.
 - 3.2. Sensibilizar a los poderes públicos en torno a la urgencia de proceder a la conservación física de los documentos, teniendo en cuenta la fragilidad de ciertos soportes existentes y asignar a los diferentes centros de presupuestos necesarios para la realización de ese poder patrimonial.
 - 3.3. Trabajar por el montaje de un sistema normalizado de descripción y de análisis documental que permita el intercambio de información y la elaboración de bancos de datos informáticos y telemáticos armonizados.
 - 3.4. Ayudar al conjunto de centros de documentación que administran los fondos de la Música de Tradición Oral, a implantar y a adaptar ese sistema normalizado al fondo de archivos cuya responsabilidad asume, a fin de concretar la red de intercambio a escala europea y eventualmente internacional.
 - 3.5. Estimular a los responsables de archivos de Música de Tradición Oral para que definan y apliquen una política de apertura de sus fondos documentales a la consulta pública.
 - 3.6. Contribuir a la publicación de un corpus de la Tradición Musical Oral Europea en forma de inventario enciclopédico... y a la creación de un Museo de Instrumentos Musicales.

⁶⁴ En mayúscula en el original.

3.7. Difundir lo más ampliamente posible todas las informaciones de orden legal, deontológico y técnico, relativas a la recogida, la gestión documental, la práctica y la explotación de la música europea de tradición oral."

Grupo 4. "Políticas de fomento de las instituciones públicas y privadas"

"-Como infraestructura para la política de fomentos se requiere la creación de centros de documentación, museos y centros de formación.

-Creación de una comisión europea que sensibilice y coordine a las instituciones y proyectos comunes de las distintas regiones.

-Potenciar los trabajos de recogidas de campo. Documentos sonoros y visuales.

-Creación de comisiones científicas, nacionales y europeas que colaboren en:

- a. Censo de música popular europea.
- b. La bibliografía europea de música y danza popular.
- c. Un catálogo colectivo de documentos sonoros y visuales de esta música.

-Todo ello articulado a través de las instituciones regionales coordinadas a nivel nacional e internacional.

Grupo 5. "Nuevas estrategias de cooperación musical en la comunidad europea"

"Los participantes han decidido subrayar que:

-Existe cierto número de instituciones europeas reconocidas y capacitadas con las que se debe tomar contacto, que en el momento actual son representativas de la música popular y tradicional.

-Los participantes son conscientes de que existe todavía una dificultad de expresión en el término: 'música tradicional, música popular, música folklórica, músicas extraeuropeas, etc...'

Sin embargo, conviene subrayar que, según los países, los musicólogos se ocupan de la música tradicional, al contrario que en otros países donde la divergencia aumenta hacia la etnomusicología. Se ha constatado, en el ámbito de la información, que una masa voluminosa de documentos se enfrenta a una armonización del lenguaje musical y de relación del pensamiento (subrayado por M. Papaioannu) a experiencia griega, para que la información se pueda redistribuir sin un pesado aparato utópico.

Lo que explica que nuestros amigos del norte de Europa expresen una participación más regionalista, más imbricada de lo que nosotros la sentimos, en los países del sur de Europa, donde los medios de comunicación aparecieran más sensibles al consumo televisivo de masas (influencia de la lengua anglosajona)

Los participantes han accedido al deseo del representante de Francia de proponer la redacción de una moción.

Los participantes han subrayado la necesidad de formar animadores que serían las 'locomotoras mediáticas de las músicas tradicionales y populares'."

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**SECOND WORKING SESSION: LEGAL MEANS OF PROTECTION OF
EXPRESSIONS OF FOLKLORE IN NATIONAL LEGISLATION**

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Speakers: Weerawit Weeraworawit, Director of Technical and Planning
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Pierre-Yves Gautier, Professeur, Université de Paris II

Tomoaki Fujii, Professor and Deputy Director General, Chubu
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Marybeth Peters, Register of Copyrights, Copyright Office, Library of
Congress, Washington, D.C.

PROTECTION BY COPYRIGHT AND NEIGHBORING RIGHTS

*by Mr. Weerawit Weeraworawit, Director Technical and Planning Division
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Folklore could be protected by the Copyright Act of 1994 but in a very roundabout way to such an extent that the society or community which owns the folklore is not the recipient of any economic benefits derived from the provisions of the said Act. One could say that folklore as such is not afforded the legal protection in Thailand. So it is the aim of this paper to outline the features of the Copyright Act of 1994 and their relevance (though not directly) or irrelevance to the protection of folklore.

What Is Protected Under the Copyright Act ?

The Copyright Act of 1994 is very true to its title as it treats everything as copyright work. The only exception is the performer's rights which are treated as neighboring rights. They are the only neighboring rights in the Act.

Article 6 stipulates the non-exhaustive list of copyright works, namely, literary, dramatic, artistic, musical, audio-visual, cinematographic, sound recording, sound and video broadcasting work or any other work in the literary, scientific or, artistic field irrespective of the manner or form of the expression of such work. The last category seems to be the catch-all provision but there has been no jurisprudence so far on this very flexible category. Perhaps there might not be any need to resort to this category when the scope of literary work seems to be extended all the times.

The above categories are the work of authorship. For cinematographic and sound recording works, authorship means entrepreneurial authorship. There are two other categories of works which are treated as copyrightable works, although they are derived from other works with or without copyright protection. The first one is the work which is an adaptation of a copyright work by virtue of Article 11 stipulating that " Copyright in any work which is an adaptation of a copyright work under this Act done with the authorization of the right owner shall be vested in the person who carries out such adaptation. However, the foregoing shall not prejudice the rights of the copyright owner in the work of original authorship which has been adapted. " The other category is the compilation work by virtue of Article 12 which stipulates that " Any copyright in the work which is a compilation or an assemble of the copyright works under this Act done with authorization of the right owner or a compilation or an assemble of data or any other materials which are readable or transmissible through machinery or any other equipment shall be vested in the person who has compiled or assembled such work under the Act provided that he has done so by the process of selection or arrangement which is not an imitation of a work of another person. However, the foregoing shall not prejudice the rights of the copyright owner in the works, data, or any other materials of original authorship which have been compiled or assembled. "

The Copyright Act dedicates one chapter to the provisions on the performer's rights. These rights are in line with those in the Rome Convention as Article 44 of the Act stipulates the three exclusive rights of the performer, namely :

1. Sound and video broadcasting or communicating his performance to the public unless such sound or video broadcast or communication to the public is done from a recording of such performance;
2. Recording the performance not yet recorded.
3. Reproducing the recording material of the performance already recorded without authorization of the performer or the recording material of the performance made with authorization for another purpose or the recording material of the performance eligible for exception from infringement by virtue of Article 53.*

* Article 53 refers to the application mutatis mutandis of the general provisions on exceptions in Articles 32, 33, 34, 36, 42, and 43

The Copyright Act also provides the right to remuneration similar to that in Article 12 of the Rome Convention as its Article 45 stipulates that " Any person making the sound broadcast or direct communication to the public of the audio recording material of the performance already distributed for commercial purposes or a copy of such work shall pay fair remuneration to the performer. In the case that there is no agreement on the remuneration, the Director General** shall make an order stipulating the rate of remuneration by paying due regard to the normal rate of remuneration in such business concerned....."

In the light of the above, the range of works granted protection by the Copyright Act is very extensive. The works of original authorship including those relying mainly on entrepreneurial skills are treated as copyright works. Performance enjoys protection in line with and even above the requirements* of the TRIPS Agreement since the performer also has the right to remuneration for the sound broadcast and direct communication to the public of the audio recording of the performance or in another word, phonogram.

Copyright Works

The above copyright works have to satisfy the basic test of whether they are works within the meaning of the Copyright Act of 1994. Article 4 deals with definitions. It defines "copyright" as the exclusive right to commit any act permitted under the Copyright Act with regard to the work which the author has created. It defines "author" as the person who makes or causes any creative work which is a copyright work under the Copyright Act. So there are two elements for the test, namely, work and creativity. The jurisprudence in Thailand shows that to constitute a copyright work, there must be both reasonable efforts and creativity on the part of the author. Either element alone will not suffice.

Folklore could very well fit into the various categories of copyright works particularly literary, dramatic, artistic, musical ones. But the test of the work and creativity elements tends to preclude folklore from the scope of copyright. This is due to the fact that folklore is a result of efforts and creativity not of a person or a group of persons but of generations of people over a long span of time. It is a communal work and communal creativity. Thus, it is impossible for a person or a group of persons to claim copyright ownership. One could not find an author within the meaning of Article 4 of the Copyright Act as far as folklore is concerned. In other words, it is not possible to prove the authorship of folklore.

Besides, the very nature of folklore is implicit in its name. It is something to do with the folk, that is, the people. It is a matter of common ownership, whereas copyright is more concerned with the efforts and creativity of an individual.

Term of Protection

For most copyright works, the term of copyright protection lasts for the life of the author and continues to subsist for fifty years after the death of the author. Copyright in a photographic work, audio-visual work, cinematographic work, sound recording work, or audio and video broadcasting work lasts for fifty years from its creation. However, copyright in an applied art work lasts for twenty-five years from the creation unless such work is published during the said period, copyright term will be fifty years from the date of publication.

** The Director General means the Director General of the Department of Intellectual Property

* Article 14 of the TRIPS Agreement stipulates that "In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance."

The works attracting the longest term of protection are literary, dramatic, and artistic works, namely, life of the author plus fifty years. The exception is the photographic work and the applied art work under the category of artistic work. However, even the longest term of protection are of no avail to the folklore. The usage and expression of folklore through the ages have precluded folklore from having copyright protection. The term of protection is counted from the date of creation*. Even if folklore is to be treated as copyright work, it will not enjoy any copyright protection due to its own antiquity.

At this point, it is obvious that the copyright law of Thailand cannot give copyright protection to folklore due to the special nature of folklore itself and the international standard on the term of protection. Direct use of copyright does not afford protection to a community to which a particular folklore belongs. However odd it may seem, indirect protection is possible by the very provisions of the Copyright Act itself.

Possible Protection of Folklore By the Copyright Act ?

Ironically, anyone not remotely connected with the folklore in terms of communal ownership could rely on certain provisions of the Copyright Act to have the copyright protection of the works they have adapted or compiled from the folklore.

When folklore is not a copyright work, the person which creates a copyrightable work* drawing on the idea from such expression of folklore will have copyright in such work. This is by virtue of Article 6 of the Copyright Act which stipulates very clearly that copyright protection does not extend to ideas. This is also in line with the requirements of the TRIPS Agreement*. So in this light, any person can make use the expressions of folklore such as folk songs or folk tales can have copyright in the work he has made provided that he can satisfy the test of reasonable efforts and creativity.

In the case of an adaptation of an expression of folklore, the situation is more curious. One has to look into the matter by looking at Articles 4, 11, and 26 of the Copyright Act. Article 11 as mentioned earlier is about the adaptation of a copyright work with the authorization of the author of such work. But in most cases of folklore, the original author cannot be identified since folklore is a communal work. So the person undertaking the adaptation needs not seek any authorization. In fact, even if he wishes to do so, it will be extremely difficult. Article 11 is silent in the case of the adaptation of the non-copyrighted work or a work in the public domain. However, Article 26 stipulates that the publication of a copyright work after the expiration of the term of copyright protection shall not cause anew the said copyright in such work. Adaptation is not the act of publication, so Article 26 does not apply to the situation of adaptation of an expression of folklore. This situation is the creation of new copyright through the act of adaptation.

What is the meaning of adaptation under the Thai copyright law ? The answer is provided in Article 4 of the Copyright Act. Adaptation means a reproduction by conversion, modification or emulation of the original work on the substantial part without creating a new work either in whole or in part. Article 4 also deals specifically with the literary, computer program, dramatic, artistic, and musical works. This provision when read in conjunction with the actual business practices result in copyright not falling into the hands of the community which owns the folklore.

In the case of literary works, Article 4 stipulates that adaptation shall include a translation, a transformation or a compilation of literary works by selection and arrangement. So in this light, and expression of folklore can be translated and there will be copyright in the translation work. It is the same in the case of collection of folk tales or poetry.

* Articles 19-23 clearly specify the time of creation as the starting point of the term of protection.

* Article 6 has specified 9 categories of copyright works, namely, literary, dramatic, artistic, musical, audio-visual, cinematographic, sound recording, sound and video broadcasting work, or any other work in the literary, scientific or artistic field irrespective of the manner or the form of the expression of such work.

* * Article 9(2) stipulates that copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

In the case of dramatic works, Article 4 stipulates that adaptation shall include the transformation of a non-dramatic work to a dramatic work or a dramatic work to a non-dramatic work, whether in the original language or a different language. In this case, the use of folk dances by the process of adaptation will result in the creation of copyright for the person doing the adaptation.

In the case of artistic work, Article 4 stipulates that adaptation shall include the transformation of a two-dimensional work or a three-dimensional work into a three-dimensional work or a two-dimensional work or the making of a model from the original work. In this light, any mural painting constituting an expression of folklore can be commercialized through the process of adaptation. Consequently, the copyright will vest in the person carrying out the adaptation.

In the case of musical works, Article 4 stipulates that adaptation shall include an arrangement of tunes or an alteration of lyrics or rhythm. In this light, folk songs and traditional instrumental music seem to be most vulnerable to commercial exploitation without any economic return to the community which has such expressions of folklore. The person who makes a musical arrangement of the traditional instrumental music will have copyright in such arrangement. And by virtue of the fact that sound recording is a copyright work under the Thai copyright law, the so-called producers of phonograms will have copyright in the sound recordings of such rearranged music.

The provisions of Article 12 on compilation could also be relied on. It is the compilation of any data. Folklore is data. However, the copyright protection is given to the whole database of folklore, not the individual data in it if such data are not copyright work.

With copyright ownership by means of adaptation, the person making the adaptation can enjoy the various exclusive rights provided by Article 15* of the Thai Copyright Act. One possible way for the community which owns folklore to acquire copyright is to make adaptation of its own expressions of folklore.

Use of Performer's Rights?

Article 4 of the Copyright Act defines the meaning of "performer" as a performer, musician, vocalist, choreographer, dancer, and a person who acts, sings, speaks, dubs a translation or narrates or gives commentary or performs in accordance with the scripts or performs in any other manner. So the performance of folklore (i.e. the expressions of folklore which could be performed) enables the performer to enjoy the rights stipulated in Articles 44 and 45 mentioned earlier. The bottom line is that the expressions of folklore have to be performed to make use of the rights conferred in the two articles. In other words, the expressions of folklore themselves are not protected but the performance is protected. Although the rights conferred are not as extensive as the rights of copyright under Article 15.

Conclusion

The legal regime of protection under the Thai copyright law is not earmarked to afford legal protection to folklore which is a communal rather individual work. It affords copyright protection to those who can make use of the adaptation and compilation provisions of the Copyright Act. However, it affords direct protection to those who perform the expressions of folklore, those who make folklore alive. But there is a glaring vacuum, folklore as such is not protected. There must be an international regime with a clear system of identification of the folklore, the process of authorization, and the process of distribution of any royalties (which may not be a correct term) fairly among those who own the folklore.

* The owner of copyrights has the exclusive rights of (1) reproduction or adaptation (2) communication of the work to the public (3) rental of the original or copies of a computer program, an audio-visual work, a cinematographic work and sound recordings (4) giving benefits deriving from copyright to another person (5) licensing the rights mentioned in (1),(2), and (3) with or without conditions provided that such conditions do not unfairly restrict competition.

**LA PROTECTION DU FOLKLORE PAR LE DROIT DE LA PROPRIÉTÉ
INDUSTRIELLE ET CELUI DES OBLIGATIONS**

par M. Pierre-Yves Gautier, Professeur, Université de Paris II

Savez-vous qui est *Kokopelli* ? C'est un petit bonhomme, en forme de haricot, avec une crête d'Iroquois au sommet du crâne et qui joue souvent de la musique, ou danse avec des amis. Chez les Indiens d'Amérique, il représente le symbole de la fertilité, apportant bonheur et récoltes abondantes - mais c'est un dangereux séducteur de jeunes filles !

Et le *cheveu Pueblo* ? C'est un immense et unique cheveu, qui part de la tête d'un guerrier, pour finir sur celle de sa femme. Il représente l'harmonie de la famille, mais aussi sa puissance, à l'intérieur de la tribu.

Ces deux dessins, parmi de nombreux autres, je les ai trouvés il y a quelques semaines sur l'Internet, en tapant sur les annuaires de recherche : "*Indian folklore*". Je suis alors parvenu sur un site commercial de vente par correspondance, proposant aux Internaute des chemises, des collants et des chapeaux.

Et voici ce qui était écrit sur la page d'accueil : "*P. Design a été créé par les gens qui aiment le désert. Nous grimpons sur les canyons et y campons. Les Indiens ont gravé des messages sur les parois. Ceux-ci servent à nous inspirer dans la ligne de produits que nous vous proposons*".

Voilà des fabricants astucieux, qui se servent à bon compte, car gratuitement, de l'esthétique millénaire du folklore Indien, pour vendre leurs vêtements à un public de "visages pâles".

Restons sur l'Internet (puisque'il est désormais et sans conteste la plus grande vitrine, le plus grand écran du monde). La recherche sur le folklore Indien n'est pas terminée. L'annuaire consulté nous propose un site géré cette fois directement par les Nations Indiennes ("*Indians organization*") ; le "menu" est très riche : on y trouve tout d'abord plus d'une centaine de légendes et d'histoires, émanant d'une grande variété de tribus (Creeks, Navajos, Pieds Noirs, etc.), auxquelles s'ajoutent celles des Indiens Maya du Mexique - On y trouve notamment la délicieuse histoire de l'insolent lapin qui voulut tuer le Soleil.

Ensuite, sont recensés et exposés un nombre considérable de langages, propres à chacune des Nations et à ses sous-groupes. Puis est proposé l'accès à une base de données épigraphique, c'est-à-dire un Thesaurus de la plupart des inscriptions utilisées depuis des millénaires par les Indiens.

Après cela, des cartes géographiques ou spirituelles peuvent être consultées, etc. Vous connaissez tous le mécanisme très simple de l'Internet : toute la planète peut consulter ces données, les reproduire sur les ordinateurs individuels et en prendre copie, grâce à l'imprimante papier.

Cette fois, ce sont les intéressés eux-mêmes, qui prennent le risque - sublime de générosité et de gratuité - de livrer en une seule fois et pour le globe terrestre dans son entier le fruit d'une culture qui se perd dans la nuit des temps.

Ne faut-il pas trembler pour eux ? N'ont-ils pas été suffisamment exploités, au cours de leur histoire, douloureuse, pour la plupart ? Il faudrait tâcher de les protéger : le droit privé, comme bouclier de la dignité humaine, se superposant à ceux du droit constitutionnel et du droit international public - car n'en doutons pas, la possibilité de vivre décemment, est incluse dans les droits fondamentaux de la personne ; alors que l'argent facile, pour ceux qui exploitent les idées des autres, est un sommet d'indécence et d'immoralité.

C'est ce que je voudrais ici tenter de démontrer, sur la base de la propriété industrielle et de la responsabilité délictuelle.

Commençons par délimiter notre sujet : qu'est-ce que le "*folklore*" ? Le terme est assez récent, il n'apparaît qu'à la fin du siècle dernier, en Angleterre ; il signifie "*la science du peuple*", expression

qui convient assez bien à notre propos, puisqu'elle renvoie au savoir, première source de la propriété intellectuelle.

Cette science du peuple est tournée vers sa culture et s'exprime dans ses traditions les plus marquantes : dans la tradition orale, on trouvera d'une part les histoires, contes et légendes, d'autre part, les chants ; dans la tradition instrumentale, les musiques ; dans la tradition gestuelle, les danses, rites coutumiers et sacrés ; dans la tradition graphique, les dessins et inscriptions, sculptures et peintures, mais aussi les vêtements, les objets, tels les bijoux, poteries, tapis, les jeux, etc., ainsi que les habitations, temples ; il y a encore les traditions nuptiales, culinaires, etc.

On pourrait le définir comme *l'ensemble des signes extérieurs, d'ordre culturel, rassemblé et perpétué par un peuple déterminé*¹.

En bref, un enracinement spirituel, dont le droit remplirait mal sa fonction, s'il ne s'employait pas à l'encadrer.

Sous bien des aspects, cette science touche au Beau et ne peut donc que tenter ceux qui en font commerce, comme le fabricant susnommé de chemises et collants² ; j'aurais pu aussi prendre l'exemple des publicitaires, friands de tout ce qui peut faire vendre³. Et de tous ceux qui ont recours à des " *designers* " ⁴. Quant à l'utilisation de l'Internet, pour permettre par exemple au plus petit Français du village le plus reculé de tout savoir ou presque sur la tradition Maya, j'ai dit qu'elle est splendide, mais devant l'écran de l'ordinateur, il peut aussi y avoir à nouveau un publicitaire, ou des commerçants_ qui n'aiment pas camper dans les canyons, à cause des fourmis rouges !

Je n'envisagerai pas la protection par le droit d'auteur, traitée par M. Weerawit Weeraworawit, tout au plus l'évoquerai-je incidemment, lorsque le besoin s'en fera sentir.

Nous allons utiliser le langage du " *Shaman* ", l'homme-médecin aux pouvoirs surnaturels, en nous interrogeant tout d'abord sur *Les " pouvoirs " de la propriété industrielle (I)*, puis sur *Les " pouvoirs " du droit des Obligations (II)*.

Le cadre juridique que j'utiliserai sera le plus souvent celui du droit européen et du droit français; mais certains développements touchent proprement aux principes généraux communs aux États, tel est le droit des Obligations, " *law of the tort* ", connu de tous.

Les " pouvoirs " de la propriété industrielle

Nous rechercherons si la solution n'est pas dans le *dépôt des signes du folklore (A)*. Mais il restera à nous interroger très pratiquement *par qui - celui qui fera valoir en justice leur protection (B)*.

¹ Rappr. la définition plus élaborée donnée par la Recommandation de l'UNESCO de 1989 : " *ensemble des créations émanant d'une communauté culturelle, fondées sur la tradition, exprimées par un groupe ou des individus- expression de l'identité culturelle. Ses formes comprennent entre autres la langue, la littérature, la musique, la danse, les jeux, la mythologie, les rites, les coutumes, l'artisanat, l'architecture et d'autres arts* ". Et celle du Comité d'experts de l'OMPI, *Droit d'auteur* oct. 1982, p. 276, " *productions se composant d'éléments caractéristiques du patrimoine artistique traditionnel développé et perpétué par une communauté.*" V. encore *Actes du Centenaire de l'OMPI*, 1886/1986.

² V. l'ex. donné par A. Jabbour de l'exploitation des motifs de tapis Navajos par des commerçants sans lien avec la tribu : Protection du folklore national, *Bulletin du droit d'auteur*, n° 1, 1983.

³ Ainsi, en France, j'ai recensé près d'une demi-douzaine de publicités cinéma ou télévision, toutes axées sur le café, pour des annonceurs différents, mettant en scène des Indiens d'Amazonie, du Pérou, d'Amérique, etc. La dernière en date nous fait voir le fils du dernier Shaman (sorcier), racontant que lorsqu'il était petit, son père lui avait dit que, etc. (en général, le lien entre le produit vanté et la tradition représentée, est plutôt mince.)

⁴ Par exemple, il y a une mode qui fait de plus en plus fureur, consistant à décorer les avions, les autocars, même les voitures, avec des dessins primitifs - on en dénombre plusieurs cas en Australie (graphismes aborigènes) et même en France.

Le dépôt des signes du folklore

J'entends par " signe " toutes les manifestations tangibles, graphiques ou figuratives de la tradition culturelle d'un peuple, selon la définition livrée plus haut. Le génie populaire s'exprime en effet par excellence dans l'art plastique ⁵.

On peut commencer par envisager la très puissante protection donnée par la législation sur les *dessins et modèles*, qui confère à leur propriétaire une action pénale en contrefaçon à l'encontre de ceux qui les reproduiraient sans autorisation ⁶. Ainsi que de procédures énergiques de saisie-contrefaçon, saisie en douane, etc.

Le dessin est un signe graphique porté sur une surface quelconque, le modèle est une forme plastique à trois dimensions ⁷.

Ils sont protégés par le biais d'un dépôt auprès d'un organisme public (en France, *Institut national de la propriété industrielle*), pour une durée non négligeable (en général 50 ans à compter de l'enregistrement).

Seraient ainsi susceptibles d'être déposés : les dessins du type de ceux rapportés dans l'introduction, représentant notamment les divinités - bref, toute l'épigraphie. Les modèles de vêtements traditionnels (des femmes, des enfants, des guerriers, y compris ceux utilisés pour les danses). Les modèles d'habitations (tentes, huttes, cabanes). Les modèles d'objet (intérieur domestique, y compris pour l'art culinaire, couvertures, lits, etc., mais aussi instruments pour l'agriculture, l'élevage, la guerre).

Cela étant, pour bénéficier de la protection légale, les dessins et modèles doivent être nouveaux (en France, art. L. 511-3 *c. prop. int.*). Comme son nom l'indique, la nouveauté exprime la nécessité d'une innovation du créateur, par rapport à la production artistique antérieure ⁸.

Or, s'agissant des représentations graphiques du folklore, remontant à des centaines d'années, utilisées par le clan, la nation ou la tribu, il pourrait être considéré qu'elles ne peuvent plus être déposées, comme partie intégrante du *domaine public*.

C'est loin d'être évident, au moins pour trois raisons.

- D'abord, il n'est pas sûr du tout que les dessins du folklore soient effectivement tombés dans le domaine public : en effet, pour qu'une production artistique ou industrielle de l'esprit tombe dans le domaine public, il faut 1) qu'elle ait été portée à la connaissance et à l'usage du public et 2) que la période de protection privative accordée à son créateur ou inventeur se soit écoulée.

On peut se demander, à propos des traditions populaires (et c'est une réflexion qui vaudra pour les marques, *infra*, n°s 7 s.) si, *propres au cercle du clan* et sauf communication massive auprès des touristes, par l'exposition ou la vente d'objets - phénomène de toute façon récent - les dessins et modèles exprimant de diverses façons ces traditions (vêtements, objets, etc.) ont *bien été communiqués au public*, au sens où l'entend la propriété intellectuelle ⁹. " Public " qui est ici tout groupement de personnes en nombre significatif, extérieur au clan.

⁵ V. M. Niedzielska, Les aspects de propriété intellectuelle du folklore, *Droit d'auteur* nov. 1980, p. 280.

⁶ En France, art. L. 511-1 s. du *code de la propriété intellectuelle* et en Europe, bientôt un règlement communautaire. Les dessins et modèles entrent dans le domaine de la propriété industrielle (2^e partie du code), même si leur protection se cumule avec celle du droit d'auteur. V. P.Y. Gautier, *Précis de propriété littéraire et artistique*, 2^e éd., Presses Universitaires de France, 1996, n°s 59 s.

⁷ V. par ex. A. Chavanne et J.J. Burst, *Précis de droit de la propriété industrielle*, 4^e éd. (Daloz 1993), n°s 716 et 735.

⁸ V. par ex. Chavanne et Burst, *op. cit.*, n°s 736 s.

⁹ Sur la discussion à ce sujet, V. A. Gobin, *Le folklore musical*, Les cahiers du droit (Pessac 1984), p. 57 s. ; K. Nikiema, *La protection des expressions du folklore par la propriété intellectuelle* (thèse Paris II 1988), p. 116 s.

On notera à cet égard que dans un arrêt du 20 déc. 1976, la Cour d'appel de Paris a estimé qu'une épreuve rituelle faite en public aux Nouvelles-Hébrides devant des touristes " a perdu le caractère secret qu'elle a eu sans doute jadis vis-à-vis des premiers visiteurs de l'île de la Pentecôte " ¹⁰. Est ainsi retenu le critère de l'attraction touristique.

A cette condition négative, on pourrait admettre que le représentant habilité du clan (*infra*, B), ne serait-ce que pour éviter que des commerçants avisés le fassent à sa place, dépose de telles expressions graphiques du folklore.

- Ensuite, même si on devait admettre qu'elles appartiennent au domaine public, il faut rappeler la règle selon laquelle la *transformation d'un dessin en un modèle en trois dimensions* (reprenez l'ex. de Kokopelli et du cheveu Pueble), par ex. T. shirt, sac à dos, peut faire naître une nouvelle protection, dès lors que le déposant est le premier à opérer ce passage à la troisième dimension ¹¹.

- Enfin et de toute façon, les juges admettent que toute *variation ou emprunt* un tant soit peu substantiel, par rapport à des représentations graphiques appartenant au domaine public, peut faire l'objet d'un dépôt valable ¹². Comme le soulignait Roubier, " on en est arrivé à dire que la copie d'une oeuvre antérieure du domaine public, si elle ne se présente pas sous la forme d'une copie mécanique, représente une propriété personnelle, limitée à vrai dire à ce qu'elle présente d'original " ¹³ - dans notre cas, très certainement la *stylisation* du dessin supposé déjà connu. La Cour d'appel de Paris l'a ainsi jugé, à propos d'un meuble du fameux Ruhlmann, inspiré du style XVIII^e siècle ¹⁴ ; ou d'un costume " Petit marquis ", du couturier Jacques Estérel, puisé dans les lignes vestimentaires du même siècle ¹⁵.

Dans ces conditions, un groupement donné pourrait déposer le dessin ou le modèle, fût-il " enrichi " par rapport à la tradition, afin d'en garantir la protection.

Que se passe-t-il si un tiers décide de procéder de même, en introduisant ses propres variations, afin d'échapper au grief de contrefaçon ? Les juges apprécieront les ressemblances et les différences, puis en feront la balance ¹⁶.

On notera qu'en Australie, plusieurs décisions de justice ont été prononcées, principalement en faveur des aborigènes des Îles du Détroit et de Torres : ainsi, pour l'utilisation sans droit d'oeuvres artistiques, reproduites sur des T. shirts, dans l'affaire " *Bulun Bulun* " (1989), où il s'agissait d'un artiste aborigène qui avait reproduit, selon sa touche personnelle (rev. ci-dessus) des " images de rêves " de sa tribu, comportant notamment des représentations animales (serpent, tortue, oie) réutilisées sans son accord par un commerçant australien ¹⁷.

De même, à propos de la commercialisation de tapis ¹⁸.

Et l'on rappellera qu'en France, la contrefaçon de dessins et modèles est un délit pénal, puni de deux ans d'emprisonnement et d'un million de francs d'amende (art. L. 521-4 c. *prop. int.*)

¹⁰ D. 1978. 373, note E. Agostini.

¹¹ V. A. Bertrand, *La propriété intellectuelle*, Livre II (Delmas 1995), § 4-11.

¹² V. Bertrand, *ibidem* ; J. Schmidt-Szalewski et J.L. Pierre, *Droit de la propriété industrielle* (Litec 1996), n° 343. Rapp. en droit d'auteur : Civ. 1^{ère} 1^{er} juill. 1970, " Manitas de Plata ", D. 1970. 734, note B. Edelman (variations protégées, à partir de chants primitifs andalous).

¹³ *Le droit de la propriété industrielle* (Sirey 1954), n° 226.

¹⁴ Paris 29 févr. 1932, *Ann. prop. industr.* 1933. 80 : " utilisation licite d'éléments connus, tombés dans le domaine commun ".

¹⁵ Paris 16 juin 1987, *PIBD* 1988 III 52 (à propos d'un conflit avec Y. Saint-Laurent) : " réunion inédite d'éléments du domaine public ".

¹⁶ V. Chavanne et Burst, *loc. cit.*, n° 810, sur la méthode à suivre et la limite de l'absence de contrefaçon, " lorsque la similitude ne provient que d'un style du domaine public ".

¹⁷ V. C. Golvan, *Aboriginal art and copyright : the case for Johnny Bulun Bulun*, *European intellectual property review* (1989), vol. 11, p. 346 s. - V. égal. la chronique d'Australie de Samuel Ricketson à la *RIDA* oct. 1995, p. 206 et 224.

¹⁸ Aff. " *Milpururu* " (1995), V. la chron. préc. de S. Ricketson.

Mais peut-être la protection sera-t-elle encore meilleure et plus forte sur le terrain des *marques*¹⁹. Rappelons tout d'abord que les représentations graphiques peuvent être déposés en tant que *marques figuratives* ou *emblématiques* (art. L. 711-1)²⁰ - ce qui peut donc valoir pour tous les dessins de l'art populaire, que nous avons énoncés à plusieurs reprises.

On peut même y ajouter depuis quelques années la protection des *marques sonores* ou *auditives* (même article)²¹ - donc probablement des extraits et refrains des chants populaires. En revanche, même s'il ne faut pas complètement l'exclure, il est moins sûr qu'une odeur (parfum, fumet de cuisine) puisse faire l'objet d'un dépôt²².

L'avantage d'un dépôt à titre de marque est double :

- Tout d'abord, la protection devient *indéfinie* et permet d'échapper aux pièges du domaine public : en effet, si les marques sont généralement valables dix ans, elles peuvent être renouvelées autant de fois que leur propriétaire le désire (en France, art. L. 712-1 *c. prop. int.*).

- Certains s'en sont inquiétés, car n'est-ce pas une façon bien commode de passer de la propriété artistique, lorsque le dessin tombe dans le domaine public, à la propriété industrielle des marques, pour obtenir une protection *ad infinitum*, à la limite de la fraude à la loi ?²³

- Au début du siècle, la Cour de cassation française avait pourtant semble-t-il admis une telle passerelle, dans un *obiter dictum* fameux, relatif aux représentations de Lourdes : " *un dessin ou une photographie quelconques peuvent, en général, alors même qu'ils sont au point de vue artistique, tombés dans le domaine public, constituer une marque de fabrique.* " ²⁴
Mais il y a controverse²⁵.

- La deuxième raison de préférer les marques réside dans le fait que la condition de nouveauté n'y est *même pas requise* : il suffit que la marque présente " un caractère distinctif " - " *le droit sur la marque n'est pas un droit de création, mais d'occupation* " ²⁶ ; " *le signe constituant la marque n'a besoin ni d'être nouveau, ni d'être original* " ²⁷.

Ainsi, un personnage du folklore populaire français, " Guignol ", peut constituer un signe valable, appliqué à une publication²⁸.

La seule barrière à ne pas franchir est que la marque déposée par une entreprise n'empêche pas les autres d'utiliser le signe pour désigner leur propre activité, en d'autres termes lorsque le signe est trop attaché au produit ou le service qu'il désigne, pour qu'une seule personne puisse se l'approprier égoïstement - " *ce qu'il faut, c'est que (son) choix ne retire pas du domaine public des signes qui sont nécessaires à tous les commerçants.* " ²⁹

Par ex., si on déposait les mots " *mocassin* ", " *wigwam* ", etc., utilisés par tous. On voit nettement la différence d'avec " *Kokopelli* " et " *cheveu Pueble* ".

¹⁹ On raisonnera essentiellement en droits français et communautaire, puisqu'on sait que depuis 1996, le système de dépôt de marque communautaire, valable pour l'ensemble de l'Union européenne et établi par un règlement, est en vigueur - les deux droits sont très proches l'un de l'autre (V. Schmidt-Szalewski et Pierre, *op. cit.*, n°s 781 s.)

²⁰ V. Chavanne et Burst, *loc. cit.*, n°s 929 s. ; Bertrand, *op. cit.*, § 24-31 s.

²¹ V. Chavanne et Burst, *eod. loc.*, n° 890 ; Bertrand, *loc. cit.*, § 24-2 ; P. Mathély, *Le nouveau droit français des marques* (JNA 1995), p. 37 et 38.

²² V. Chavanne et Burst, *ibidem*, avec les réf. au droit comparé.

²³ Sur le débat, V. P.Y. Gautier, *op. cit.*, n° 163 ; Chavanne et Burst, *eod. loc.*, n° 724 ; Roubier, *op. cit.*, n° 260 ; et les actes d'un Colloque international sur ce sujet, *RIPIA* 1966, p. 251 à 253, avec la discussion, notamment sur le dépôt de dessins ou photographies représentant des monuments publics, statues, oeuvres d'architecture, etc.

²⁴ Civ. 13 janv. 1904, *Ann. prop. industr.* 1904. 26.

²⁵ V. par ex., annulant le dépôt d'une marque représentant une oeuvre d'architecture, Besançon 5 juin 1970, *ibid.* 1972. 20.

²⁶ Bertrand, *eod. loc.*, § 25-11.

²⁷ Schmidt-Szalewski et Pierre, *loc. cit.*, n° 438.

²⁸ Com. 9 déc. 1980, *Ann. prop. industr.* 1981. 36 ; V. égal. Mathély, *op. cit.*, p. 60.

²⁹ Chavanne et Burst, *eod. loc.*, n° 971.

Ceci pour les marques nominales. Car sur le cas des marques figuratives, à partir du moment où existe une stylisation, à supposer même que les dessins soient très connus, les variations introduites par le déposant rendent le signe suffisamment distinctif.

Cela étant, la protection ne sera pas toujours parfaite : ainsi, celui qui veut s'approprier à son tour le signe déposé, peut lui-même y introduire des variations, en utilisant cependant les mêmes caractéristiques de base.

Une telle pratique a par exemple réussi à un fabricant de riz, qui avait repris le fameux Panda, emblème de la *World Wild Fund for nature*, en changeant son style : " *la reprise de l'image du Panda, malgré la notoriété du sigle de WWF, n'est pas en soi répréhensible* ".³⁰

Le problème peut également se poser pour les *légendes* : ainsi, y a-t-il eu en France des litiges à propos de l'Indienne *Pocahontas*, dont la légende, basée sur une histoire vraie, date de plusieurs siècles. La société Walt Disney se l'est appropriée - y compris par le droit des marques - lorsqu'elle a sorti un dessin animé inspiré de cette légende. Toutefois, ont plaidé des commerçants français, y ayant largement puisé, comme elle, un lucratif " *merchandising* " (livres pour enfants, poupées, emballages d'aliments, jeux, etc.), les légendes n'appartiennent-elles pas à tous ?

Les légendes, mais aussi les dessins : ainsi, des vêtements de la jeune fille, de ses bijoux, etc.

On voit ici que les contrefacteurs ne sont pas dénués de ressources juridiques - sans qu'ils soient cependant assurés d'échapper à la condamnation.

On rappellera que la contrefaçon de marques est un délit pénal, susceptible de deux ans d'emprisonnement et d'un million de francs d'amende (art. L. 716-9 *c. prop. int.*)

Quoi qu'il en soit, il est incontestable que le droit de la propriété industrielle peut être d'une grande utilité pour la protection du patrimoine immatériel des nations.

Je me demande même, si, compte tenu de sa particularité fondamentale - il n'appartient pas à un seul individu, mais à la *collectivité* dont il est le fruit - si on ne pourrait pas envisager le dépôt de *marques collectives* (art. L. 715-1 *s. c. prop. int.*), qui sont des signes désignant une catégorie de produits et de services proposés par une collectivité donnée, professionnelle ou géographique, qui se plie à un certain nombre de normes de qualité³¹.

Ainsi, on pourrait imaginer le dépôt d'une marque collective, au titre des différentes activités économiques des membres d'un clan ou d'une tribu, pour des gammes de vêtements, d'objets de folklore, etc.

C'est en ce sens que s'est récemment prononcé le professeur Ricketson : il s'agirait de " *mettre au point une marque d'authentification qui aiderait le consommateur à distinguer les oeuvres d'art authentiques des faux.* " ³²

On n'est pas très loin non plus des *appellations d'origine*, certifiant l'origine géographique et la qualité d'un produit - terrain de protection qui a au demeurant été lui aussi envisagé, pour protéger les produits du folklore³³.

Cela devrait certainement valoir pour tout ce qui relève des productions alimentaires, cultures, etc.

Rappelons encore que la protection de la culture populaire par la propriété intellectuelle est depuis plusieurs années une des préoccupations majeures de l'UNESCO : c'est un patrimoine

³⁰ TGI Paris 4 déc. 1991, *PIBD* 1992 III 256.

³¹ V. Chavanne et Burst, *eod. loc.*, n°s 1296 s. ; Mathély, *loc. cit.*, p. 385 s.

³² *Chronique d'Australie préc.*, p. 208.

³³ V. M. Niedzielska, *op. cit.*, p. 286.

immatériel qu'il faut diffuser, mais " sans porter atteinte aux intérêts légitimes concernés " (recommandation susvisée de 1989).

De façon encore plus précise, le texte du Comité d'experts de l'OMPI, de 1982, propose de soumettre à autorisation de la communauté concernée " les utilisations des expressions du folklore lorsqu'elles sont faites à la fois dans une intention de lucre et en dehors de leur contexte traditionnel ou coutumier ", notamment par reproduction et exécution publique. Ce qui devrait inclure toutes les formes d'utilisation des productions culturelles, y compris sur l'Internet (rev. notre exemple d'introduction).

Ces expressions sont celles, très variées, qu'on a vues plus haut (n° 3). Quant à la personne habilitée à donner les autorisations, c'est un point que l'on va aborder dans un instant.

Ces restrictions, essentiellement portées sous l'angle du droit d'auteur, devraient trouver naturellement leur écho sous celui de la propriété industrielle. Le texte du Comité d'experts de l'OMPI réserve de ce point de vue de façon expresse la compétence des " lois protégeant la propriété industrielle ".

Il reste à savoir qui peut déposer et faire valoir les droits en justice.

Qualité pour déposer et agir en justice

A priori, c'est un véritable casse-tête : le folklore est en effet " impersonnel au double motif qu'il est l'attribut d'une collectivité et qu'on ne lui connaît pas d'auteur individualisé ".³⁴ Et pourtant, si on admet qu'il peut produire des biens immatériels protégeables, il faut bien trouver une solution.

En droit d'auteur, celle-ci a consisté à considérer les productions du folklore comme des variétés d'oeuvres anonymes, dont on ignore - ce qui est effectivement le cas - le ou les auteurs véritables. L'étonnant et peu connu art. 15-4° de la Convention de Berne permet de ce point de vue à chaque État de désigner " l'autorité " chargée de " sauvegarder " les droits du ou des auteurs de l'oeuvre anonyme, non encore publiée³⁵. Cette autorité pourra de ce fait être une personne morale - association, fondation, Ministère, ou groupement représentatif.

Cela étant, il s'agit d'une disposition supplétive, laissée à la discrétion des États, libres de désigner ou non cette autorité. En outre, il reste la propriété industrielle. De sorte qu'il faut se demander quels sont ceux qui pourraient se prévaloir d'un droit de propriété intellectuelle, pour faire protéger le patrimoine immatériel d'une collectivité.

Il est remarquable que la question des droits du groupement ait déjà été envisagée par les tribunaux et la doctrine française, principalement à l'occasion des affaires " Tribu de Bunlap " et " Clan Marhareu ".

Les cérémonies rituelles d'une tribu de l'Île de la Pentecôte, aux Nouvelles-Hébrides, avaient été filmées, puis diffusées en Europe, sans le consentement des intéressés ; le chef de la tribu agit alors en France en réparation du dommage, pour violation du droit à l'image des membres de la tribu, ainsi que de leur droit de propriété intellectuelle sur la cérémonie. Encore faut-il savoir si la tribu est un groupement organisé, au sens du droit de la procédure civile, ayant qualité pour agir en justice.

Le tribunal de Paris, par jugement du 12 mars 1975, suivant une doctrine française familière de la coexistence du droit écrit avec le droit coutumier, a considéré que la tribu " est un groupement

³⁴ A. Gobin, *op. cit.*, p. 41 ; V. égal. Nikiema, *thèse préc.*, p. 27.

³⁵ V. les commentaires de Desbois, A. Françon et A. Kerever, *Les conventions internationales du droit d'auteur et des droits voisins* (Dalloz 1976), n°s 148 s. ; S. Ricketson, *The Berne convention* (Kluwer 1987), § 6-82 s. et 7-23 ; A. et H.J. Lucas, *Traité de propriété littéraire et artistique* (Litec 1994), n°s 1024 et 1081. Les États ayant décidé de faire jouer ce texte se comptent malheureusement sur les doigts de la main : V. K. Puri, La protection du folklore en Nouvelle-Zélande, *Bulletin du droit d'auteur* vol. XXII, n° 3, 1988, p. 22.

organisé d'individus de race mélanésienne, doté d'une unité religieuse et coutumière, de droits patrimoniaux et d'un représentant qualifié en la personne de son chef, ses membres ont des intérêts collectifs licites que le groupement est légitimement fondé à défendre en justice".

Cependant, dans son arrêt déjà cité du 20 déc. 1976, la Cour d'appel de Paris a infirmé sur ce point le jugement, considérant que la tribu devait rapporter la preuve de ce que selon son statut coutumier, tel que coordonné avec la loi des Nouvelles-Hébrides, elle jouirait effectivement de la personnalité morale ³⁶.

C'est exiger beaucoup - des critères de texte et de formalisme propres aux Occidentaux - qui sont par définition à des années-lumière du statut souvent complètement coutumier et non écrit de ce type de peuples ³⁷.

Et c'est surtout contraire à la tradition posée par la Cour de cassation, aux termes de laquelle la personnalité morale d'un groupement, nécessaire pour qu'il puisse agir en justice, peut être *déduite par le juge* des conditions de son organisation et de son fonctionnement - ce qu'on appelle la "réalité" des personnes morales ³⁸.

Quelques années plus tard, il s'est agi pour la Cour d'appel de Nouméa dans un arrêt du 9 avril 1987 de statuer sur une querelle de propriété entre deux clans rivaux. A nouveau, le problème de la personnalité morale s'est posé. Mais cette fois-ci, le clan était reconnu comme tel par une décision de l'Assemblée territoriale calédonienne, de sorte que la recevabilité de l'action a été admise sans difficulté ³⁹.

La personnalité civile des tribus, clans et nations doit donc être à mon sens largement accueillie, dès lors qu'ils sont suffisamment organisés, selon la coutume à laquelle ils entendent se conformer et qui leur vient de leurs traditions ancestrales. C'est, semble-t-il, en ce sens que l'on se dirige également en Australie, où des concepts français comme celui de l'oeuvre collective, ont retenu toute l'attention de la doctrine ⁴⁰.

En Nouvelle-Zélande, la protection collective du folklore Maori se présente à peu près dans les mêmes termes ⁴¹.

Les juges australiens ont au demeurant admis de façon générale, dans l'affaire "*Foster c/Mountford*" (1977), le droit d'action d'une tribu contre un archéologue ayant divulgué des données qui lui avaient été confiées ⁴².

Qui les représentera ? Celui ou celle que cette même coutume désignera : ici le chef, là le conseil de clan, etc. ⁴³

De la sorte, toute violation des droits appartenant au groupement (droit d'auteur, dessins et modèles, marques), susceptible d'être punie pénalement ou civilement - contrefaçon - pourra être poursuivie au nom de ce groupement, par son organe habilité, devant toutes juridictions locales ou étrangères.

Il ne faudrait pas, de ce point de vue, ainsi qu'il a été relevé dans l'introduction, que des commerçants avisés et peu scrupuleux profitent à bon compte des richesses immatérielles d'un peuple

³⁶ Paris 20 déc. 1976, D. 1978. 373, note crit. E. Agostini, GP 1977. 1. 261, concl. av. gén. Simon.

³⁷ En ce sens, V. la note préc. Agostini.

³⁸ Arrêt fondateur : Civ. 28 janv. 1954, D. 1954. 214, note G. Levasseur : " la personnalité civile n'est pas une création de la loi ; elle appartient en principe à tout groupement pourvu d'une possibilité d'expression collective pour la défense d'intérêts licites, dignes par suite d'être juridiquement reconnus et protégés ".

³⁹ JCP 1987 II 20880, obs. J.L. Vivier, qui s'interroge sur le cas où il n'y aurait pas eu de texte et se prononce, comme E. Agostini, en faveur de la reconnaissance de la personnalité du groupement.

⁴⁰ V. l'article préc. de C. Golvan, relatif à l'affaire Bulun Bulun, spéc. p. 353.

⁴¹ V. la *chron.* préc. de K. Puri.

⁴² V. Golvan, *passim*.

⁴³ V. les notes susvisées d'E. Agostini et de J.L. Vivier ; dans l'affaire " Foster ", les juges australiens ont reconnu la qualité pour agir des représentants désignés par la tribu.

- après les massacres physiques, les pillages des biens matériels de bien des ethnies, le XXI^e siècle serait celui du pillage de leur patrimoine immatériel ?

Il faut à tout prix l'éviter. Et l'UNESCO, avec sa division du patrimoine immatériel, ainsi que l'OMPI, avec sa vocation naturelle à protéger la propriété intellectuelle, ont montré - ce symposium en est une nouvelle manifestation éclatante - qu'elles sauront protéger ceux qui sont encore trop souvent démunis, y compris juridiquement.

Ce que nous venons de voir pour l'action en justice devrait valoir, par *a fortiori*, pour le dépôt en amont des productions du folklore, lorsque ce dépôt est indispensable, ce qui est le cas pour les marques et recommandé pour les dessins et modèles.

La qualité pour procéder au dépôt ne pose en général pas problème, y compris lorsqu'il s'agit d'étrangers⁴⁴. Et il suffira de reprendre la solution ci-dessus dégagée : dépôt au nom du groupement auquel appartient la tradition qui s'exprime dans l'objet ou le signe pour lequel protection est réclamée par le représentant qu'il a désigné.

De même, si pour une protection efficace des droits du groupe, son représentant qualifié décide d'adhérer à une ou plusieurs sociétés de gestion collective.⁴⁵

Il reste un point important à examiner : ainsi protégée, la collectivité pourra tirer profit du monopole sur les signes, dessins, objets, productions locales, etc. tirés de sa tradition - c'est-à-dire les commercialiser, consentir des licences, etc.

Tout cela va conduire au versement à l'organe habilité (pour la même raison, il signera les contrats) de *sommes d'argent* de toutes provenances - *Que va-t-il en faire ?* Les règles spéciales de la propriété intellectuelle sont complètement muettes à ce sujet⁴⁶.

Imaginons que le chef du clan ait reçu 15.000\$ de royalties, pour l'exploitation de la gamme de sweaters Kokopelli.

A mon sens et une fois de plus, la solution devra être puisée dans le droit coutumier de la collectivité concernée - que fait-on, lorsque des richesses arrivent dans la tribu ? On n'est pas si loin que cela des terres gorgées de pétrole ou de minerai, des forêts, etc., dont le cas peut constituer un bon précédent. Le partage se fera selon les règles ancestrales. Et quel plus bel hommage à la tradition, qui aura précisément permis la collection de cette source légitime de revenus ?

Il semble que tel soit déjà le cas chez les Aborigènes d'Australie, relativement au partage de l'argent reçu par l'exploitation artistique des créations provenant de groupes tribaux⁴⁷. Il est en tout cas exclu que ce soit l'État du lieu où vit le groupe tribal, qui s'approprie les sommes, autrement que par la fiscalité et pour une fraction seulement⁴⁸.

Il faut maintenant examiner le cas où la propriété intellectuelle ne serait d'aucun secours.

Les " pouvoirs " du droit des obligations

Notre shaman est un homme très prudent. Il voudrait savoir si, au cas où l'idée de domaine public, attachée au folklore, resterait trop imprégnée dans l'esprit des juges, il n'y aurait pas une solution de secours, permettant de faire protéger l'expression artistique des traditions de la tribu à laquelle il appartient.

⁴⁴ V. par ex. pour les marques Chavanne et Burst, *eod. loc.*, n° 1041. L'art. R. 712-3 impose la réciprocité de traitement, mais " sous réserve des conventions internationales ".

⁴⁵ Sur le rôle des sociétés de gestion collective dans la protection des créations indigènes, V. Ricketson, *chron. d'Australie préc.*, p. 208.

⁴⁶ V., soulignant ce point en droit d'auteur, Ricketson, *op. cit.*, § 6-84.

⁴⁷ V. Golvan, *op. cit.*, p. 346.

⁴⁸ Rapp. A. Jabbour, *chron. préc.*

Reprenons le cas du " cheveu Pueble " : des dizaines de milliers de T. shirts ont été vendus de par le monde, rapportant à ceux qui les commercialisent des centaines de milliers de dollars. Est-il normal que grâce à une promenade dans les canyons américains et le recopiage de dessins qu'ils n'ont pas créés, sans demander d'accord à la tribu ni lui proposer d'argent, des chefs d'entreprise puissent profiter du génie artistique ancestral de la collectivité? Celle-ci ne pourrait-elle pas se prévaloir de la violation d'un vieux principe juridique, tout aussi millénaire que le folklore, selon lequel *nul ne saurait s'enrichir aux dépens d'autrui* ? Ce principe trouve aujourd'hui deux applications, que je voudrais évoquer.

En premier lieu, la théorie de *l'enrichissement sans cause*, en vertu de laquelle l'équité commande de rétablir l'équilibre rompu entre deux patrimoines, lorsque l'un se trouve appauvri au profit de l'autre, sans raison légitime, ce qui doit conduire au versement d'une juste indemnité⁴⁹.

En France, c'est un des rares cas où l'équité peut être valablement invoquée devant les Tribunaux. Ce qui explique que pour que l'action soit couronnée de succès, il faut que l'appauvri soit complètement démuné de moyens juridiques, pour faire valoir ses droits - l'action est " subsidiaire ".

Il a été proposé d'appliquer cette théorie dans le domaine de la propriété intellectuelle, dans les cas où les créateurs ne pourraient se prévaloir d'un véritable droit d'auteur juridiquement protégé (par ex. idées non protégeables), alors qu'ils n'en auraient pas moins été à l'origine de valeurs culturelles et économiques, sources d'exploitations et de profits auprès du public, dont un tiers se serait emparé pour son usage personnel⁵⁰.

Cette théorie très souple - et non écrite - pourrait sans doute rendre des services relativement aux oeuvres du folklore, dont il serait prétendu par exemple par leurs utilisateurs illégitimes, qu'elles ressortiraient au domaine public.

Dans notre hypothèse, les membres de la tribu et/ou leurs ancêtres sont les auteurs - anonymes - des dessins ; ils n'ont donné à personne l'autorisation de prendre des photographies ou de reproduire les effigies des divinités ou emblèmes du clan - pourquoi ferait-on de l'argent " sur leur dos ", sans avoir à les indemniser collectivement ?

C'est la question que je veux ici poser, afin d'ouvrir un débat de théorie des obligations.

En deuxième lieu, une autre institution du droit des obligations, qui entre dans les cas de responsabilité civile, délictuelle, est celle que l'on a coutume d'appeler en France le " *parasitisme* ", ou les " *agissements parasitaires* ". Il s'agit, selon l'un de ses promoteurs, " *de condamner quiconque usurpe sensiblement une valeur économique d'autrui, même non concurrent, réduisant ainsi notablement ses investissements matériels et intellectuels* ".⁵¹

C'est ici que l'on constate à quel point le vocabulaire juridique est clair, imagé et proche de la nature, donc des traditions : le " parasite ", c'est l'organisme animal ou végétal qui vit aux dépens d'un autre, en lui portant préjudice, mais sans le détruire. Telles sont par exemple la puce et la chenille.

Sur ce point également, il a été proposé d'appliquer cette théorie au domaine des propriétés intellectuelles, même dans les cas où " l'organisme " attaqué ne serait pas couvert par le manteau du droit d'auteur strict, ou des signes distinctifs⁵².

Cet instrument de responsabilité civile couvre de ce point de vue également le domaine de la propriété industrielle - c'est ainsi que l'on sait que l'utilisation du mot " *Champagne* " par Yves Saint-Laurent pour désigner son nouveau parfum, a été condamnée sur ce terrain⁵³.

⁴⁹ V. par ex. F. Terré, Ph. Simler et Y. Lequette, *Les obligations*, 6^e éd. (Dalloz 1996), n^os 968 s.

⁵⁰ P.Y. Gautier, *loc. cit.*, n^o 269.

⁵¹ Ph. Le Tourneau dans *Le droit de la responsabilité* (Dalloz 1996) avec L. Cadet, n^o 3262 et la définition plus sophistiquée du n^o 3271.

⁵² P.Y. Gautier, *eod. loc.*, n^os 30 et 269, avec les exemples et références.

⁵³ Paris 15 déc. 1993, *JCP* 1994 II 22229, obs. F. Pollaud-Dulian.

On se rapproche ici du folklore, avec ce qu'on a vu plus haut, tenant à l'origine locale de productions artistiques.

Peut-être, de ce fait, une décision de ce type pourrait-elle constituer un précédent dans des cas où des tiers se seraient appropriés les emblèmes notoires d'une tribu, ses totems ou statues divines ou sa dénomination même.

Il faut de ce point de vue insister sur la souplesse des conditions de mise en oeuvre du parasitisme : il n'est pas nécessaire que le parasite soit en situation de concurrence avec sa victime, bien au contraire, c'est parce qu'il est allé chercher ses idées ou les signes attractifs qu'il convoite ailleurs que dans son domaine de prospection, qu'il démontre ainsi sa malice condamnable.

Tel sera bien souvent le cas entre d'un côté les commerçants (vêtements, objets, voyages, etc.) et de l'autre, les groupements à forte tradition, pas nécessairement tournés vers le commerce, a fortiori à l'échelon international (mais peut-être l'Internet, leur donnant une audience planétaire, va-t-il changer les choses).

Cependant, on doit maintenant évoquer une décision française inquiétante, relative à l'usage du folklore et ayant précisément statué sur le terrain du parasitisme : il s'agit d'un arrêt rendu par la Cour d'appel de Paris le 14 janvier 1992.⁵⁴ Un universitaire français, passionné par le folklore Cadjin de la Louisiane et spécialement par son langage, ses histoires, fait une longue enquête sur place, interroge les anciens, prend des notes et enregistre des conversations.

Il en fait d'abord une thèse à la Sorbonne, sur " la littérature spontanée de Louisiane ". Puis il publie deux ouvrages, à destination du public.

Voici un romancier à succès qui décide que son prochain roman se passera en Louisiane, chez les Cadjins. Il n'a pas le temps ni l'envie de faire le voyage et de collecter sur place les informations qui lui permettront de donner à son livre un aspect de vérité.

Il va donc acheter chez son libraire les ouvrages de l'universitaire et y puise l'essentiel du vocabulaire employé pour camper ses personnages, ainsi que des légendes et contes. Mais ne sollicite pas l'accord du premier.

L'universitaire l'assigne en justice, principalement pour contrefaçon, subsidiairement du chef des agissements parasitaires.

Mais les premiers juges, puis la Cour d'appel, le déboutent impitoyablement : d'abord, sur le fondement du droit d'auteur, " *il ne saurait se prévaloir d'un droit exclusif sur les éléments du domaine public ainsi recensés* ".

On se permettra de n'être pas complètement d'accord, en tout cas d'attendre une motivation plus poussée : en effet, on a vu plus haut (n° 4) que la question de l'appartenance au domaine public des productions du folklore mérite une recherche circonspecte.

Le malheureux chercheur n'a pas plus de succès sur le fondement du parasitisme : d'abord, " *les oeuvres en litige ne se trouvent pas en situation de concurrence, dans la mesure où elles ne s'adressent pas au même public* ". On est un peu sidéré de lire cette affirmation, alors qu'ainsi qu'on l'a vu, c'est précisément la caractéristique même de l'agissement parasitaire, que les deux parties ne soient point en situation de concurrence.

Ensuite, " *il ne saurait être interdit à l'auteur d'un roman de puiser dans des ouvrages documentaires les termes et expressions propres au milieu social de ses personnages ainsi que les détails permettant de reconstituer avec le plus de vraisemblance possible leur cadre de vie* ".

⁵⁴ RIDA, avr. 1992. 198 ; GP 1992. 2. 570, concl. av. gén. Delafaye.

Au contraire : il est allé, sans bourse délier, rechercher la substance de son livre dans les fruits du travail et de l'expérience d'autrui, s'épargnant ainsi le voyage en Amérique, un séjour qui n'aurait pu être bref, de multiples rencontres avec ceux qui cultivent et transmettent le folklore cadjin, des dépenses, etc. *C'est la définition même du parasitisme.*

Ici, il ne s'agit pas comme dans l'affaire " Champagne ", de s'approprier une notoriété, mais un *savoir-faire*, des informations qu'il aurait été beaucoup plus difficile et onéreux de collecter par soi-même. Or, sont susceptibles de tomber sous le coup du parasitisme les captations " *d'un savoir-faire, d'un travail intellectuel et d'investissements*".⁵⁵ (On voit qu'on n'est pas très loin non plus de l'enrichissement sans cause susvisé).

Enfin, " *alors que le parasite se borne à reproduire le travail d'autrui en s'épargnant tout effort personnel, l'importance du travail de création effectué par J. V. d'après les matériaux recueillis, ne peut être contestée*".

Attention aux risques de confusion juridique : que l'écrivain ait créé une oeuvre originale, personnelle, est une chose peu contestable, surtout s'il a du talent. Mais *qu'à l'intérieur* de cette oeuvre, il y ait un nombre important d'éléments empruntés au travail d'autrui, qui aient facilité considérablement la confection de son ouvrage, en est une autre - la seule qui doit être examinée sous l'angle du parasitisme.

Ce type d'agissement mérite donc la condamnation.⁵⁶ Et il serait souhaitable que des décisions comme celle-ci ne se renouvellent pas, car on voit bien dans quelle brèche lucrative, toutes sortes de personnes pourraient s'engouffrer, pour exploiter directement ou indirectement les productions du folklore.

Ainsi, on a donné dans l'introduction le cas des agences de publicité, si " gourmandes " d'idées et de références à la tradition, la nature, la beauté, etc.

On pourrait également imaginer le cas d'un chorégraphe auquel il aurait été demandé de monter un spectacle, à l'occasion d'un événement important, historique (anniversaire politique), sportif (Jeux olympiques), etc. - ce qui se fait de plus en plus en Occident.

Et qui serait directement allé puiser son inspiration, au cours d'un voyage, dans les rites de tel ou tel peuple autochtone.

Et bien entendu, l'immense secteur du " *merchandising* ", évoqué en tête de l'introduction. Ou celui de la couture⁵⁷.

Rappelons que ce critère de l'activité lucrative développée par un tiers, " *en dehors du contexte traditionnel ou coutumier* " est celui-là même que le Comité d'experts de l'OMPI a retenu, pour poser la nécessité de passer par une autorisation de la communauté concernée (*supra*, n° 9). Ce même texte réserve en outre, de façon très large, après avoir énoncé la qualification principale de propriété artistique retenue pour les oeuvres du folklore, " *les autres formes de protection qu'appellent la conservation et la préservation du folklore* ".

⁵⁵ Le Toumeau, *op. cit.*, n° 3271, qui approuve cependant la décision, du fait de " *la liberté de la création littéraire et artistique ; l'emprunt par le romancier était certes intéressé, mais il n'entraîne pas dans une activité commerciale* " (n° 3280). C'est entendu, mais la liberté de l'auteur, comme de tout être humain ou peuple, s'arrête là où elle empiète sur les droits des autres ; et même s'il n'est pas commerçant au sens strict, l'écrivain entend bien faire vendre son livre. On ne peut pas dire de ce point de vue qu'il ne recherche pas de profit - y compris moral, pour l'accroissement de son rayonnement et de sa propre notoriété.

⁵⁶ V. P.Y. Gautier, *ibid. loc.*, n°s 30 et 37. A noter que les juges français ont récemment déclaré recevable et bien-fondée une action pour agissement parasitaire à l'encontre de la principale chaîne française de télévision, qui avait repris à titre d'illustration de la coupe du monde de rugby, une " *musique tribale* ", inspirée de traditions africaines, consistant à frapper sur des bidons de récupération avec un maillet : trib. com. Nanterre 25 juin 1996, *RIDA* janv. 1997. 402.

⁵⁷ Un grand couturier français a ainsi récemment repris, en ne s'en cachant pas, au demeurant, des motifs du folklore africain.

On notera encore que dans l'affaire des Cadjins, c'était un européen qui avait collecté les données folkloriques, mais qu'il ne semble pas que les termes du débat auraient changé si c'était un représentant de la communauté cadjin qui avait directement agi - relisez la motivation très générale, ci-dessus.

Si on admet par conséquent, comme il est proposé, d'explorer au maximum l'ouverture judiciaire des agissements parasitaires, il reste à se poser à nouveau le problème de la recevabilité de l'action : certains se sont ainsi demandés, à propos de l'art. 1382 Code civil français (qui est le texte sur lequel s'appuie l'action de parasitisme) qui donc peut être la " victime ", alors qu'on ignore tout de l'auteur de la tradition folklorique à laquelle il est emprunté ⁵⁸.

La solution ? On a précisément tenté de la dégager dans la première partie (n°s 10 s.), lors de l'étude des titulaires des droits de propriété intellectuelle sur les productions de la tradition artistique des peuples.

Par identité de motifs, *raisonnement analogique*, on doit ici admettre que tout groupement organisé, auquel appartient la tradition ainsi pillée, a la qualité de victime, souffrant personnellement et directement du dommage. Il sera représenté, ainsi qu'il a également été vu, par l'organe, physique ou moral, qu'il considère comme habilité à faire valoir ses droits devant les autorités et juridictions étatiques, locales ou étrangères.

Quant aux dommages-intérêts compensatoires alloués par le juge s'il entre en condamnation, ils représenteront les dommages matériel (manque à gagner) et moral (préjudice affectif, considération) soufferts par la collectivité. Ils seront redistribués selon les règles propres au clan, ainsi qu'il a déjà été suggéré.

On rappellera que le parasitisme n'est pas un délit pénal, mais un cas de responsabilité civile, ne pouvant être porté que devant les tribunaux civils, afin de réparation du préjudice et point de punition sociale - mais des publications judicieuses dans les journaux nationaux ou internationaux, aux frais des parasites, peuvent avoir des vertus à la fois préventives et coercitives.

Concluons : le charmant Kokopelli, que j'évoque depuis le début de ce rapport, est souvent présenté de profil, en train de jouer d'un instrument de musique, qui semble être une flûte rudimentaire.

Je propose qu'on le figure désormais avec une trompette. Vous savez tous que la trompette, outre sa vocation artistique, a souvent pour fonction d'avertir, prévenir autrui, ou de lui signaler quelque ordre à accomplir ou danger qu'il encourt.

Voici la traduction des sons émis par la trompette de Kokopelli : " *Amis étrangers, jouissez de notre patrimoine immatériel, mais prenez garde de ne pas en faire de l'argent pour votre compte. Faute de quoi la Justice - et notre shaman - seront terribles !* "

⁵⁸ V. la discussion dans Gobin, *loc. cit.*, p. 72.

**PROTECTION OF THOSE WHO MAKE AVAILABLE AND OF THOSE WHO
COLLECT EXPRESSIONS OF FOLKLORE**

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INTRODUCTION

Including folklore, the term "cultural properties" refers to the important cultural assets of the Japanese people which have been created and nurtured over the course of our country's long history and preserved and handed down to the present generation. They are indispensable for an understanding of the history, tradition and culture of our country and at the same time form the basis for the development and advancement of future culture.

The present administrative system for the protection of cultural properties in Japan was developed in the Meiji era (1868-1912) and has been revised several times to reflect the times. In the process, protection has been extended to a broader variety of cultural properties and much consideration has been given to the methods of protection.

The nation, local public bodies, owners of protected properties and the Japanese people have worked together not only to preserve these cultural properties and pass them on to the next generation but also to ensure that they are actively exhibited and utilized.

TYPES OF CULTURAL PROPERTIES, THEIR DESIGNATION AND SELECTION

The Law for the Protection of Cultural Properties defines cultural properties as belonging to one of the following five categories: tangible cultural properties, intangible cultural properties, folk-cultural properties, monuments and groups of historic buildings. From these categories the Government designates and selects those items which have particularly high historic or artistic value for special national protection as Important Cultural Properties, Historic Sites, Places of Scenic Beauty and/or Natural Monuments.

In the case of intangible cultural properties and intangible folk-cultural properties, in addition to designation, the Commissioner for Cultural Affairs selects those items for which such measures as recording, documenting and photographing should be taken and carries out these activities.

Protection is also provided for cultural properties that remain buried underground ("buried cultural properties") and for conservation and transmission of traditional techniques and skills essential for the preservation and repair of cultural properties (Cultural Properties Conservation Techniques).

Designation, selection and listing of cultural properties is made by the Minister of Education, Science, Sports and Culture based on the findings of the council for the Protection of Cultural Properties. This system is outlined in Chart 1 (see below, at the end of this exposé).

It gives the number of cultural properties designated and/or selected and listed by the nation as of December 1, 1996. This number has been steadily increasing to reflect advances in scholarly research, new archaeological discoveries and the changing cultural milieu.

Number of Designated Important Cultural Properties (as of December 1, 1996)

Important cultural properties	11,961
Fine and applied arts	9,827
Architectural Structures	2,134
National Treasures	1,045
Fine and applied arts	838
Architectural Structures	207
Historic sites, places of scenic beauty and/or	2,537

natural monuments			
Historic sites		1,358	
Places of scenic beauty		262	
Natural monuments		917	
Special historic sites, places of scenic beauty and/or natural monuments		2,537	
Special historic sites		57	
Special places of scenic beauty		28	
Special natural monuments		72	
Important tangible folk-cultural properties		187	
Important tangible folk-cultural properties		169	
Important intangible folk-cultural properties			
Performing Arts	(individuals)	30 specific skills	45 individuals
	(groups)	11 specific skills	(collective recognition)
Craft techniques	(individuals)	32 specific skills	41 individuals
	(groups)	12 specific skills	(collective recognition)

Number of Selected Important Cultural Properties
(as of December 1, 1996)

Important Preservation Districts for Groups of Historic Buildings		42	
Selected Conservation Techniques		33 specific skills	35 individuals 18 groups

Number of Listed Tangible Cultural Properties
(as of November 15, 1996)

Architectural Structures (Buildings, civil engineering structures, other structures)		118	
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The Government has devised a variety of measures necessary for the preservation and utilization of nationally designated or selected cultural properties including regulations, such as prohibition of alterations to their existing state, and the provision of subsidies from the national treasury for their preservation or utilization.

The total budget related to the protection of cultural properties for the Agency for Cultural Affairs during the fiscal year 1996 is 54,213 billion yen; of this amount, 24,500 billion yen (or 45%) is used to maintain and use historic sites; 10,802 billion yen (or 20%) is used to promote programs to preserve national treasures and important cultural properties; 7,597 billion yen (or 14%) is used to transmit the traditional performing arts, etc.; 10,905 billion yen (or 20%) is used to maintain and operate expenses for national museums, etc.; and 409 billion yen is used to maintain an information system for cultural properties.

To encourage ownership of cultural properties by the nation or local public bodies and to promote their preservation and utilization, a system of tax incentives that includes tax exemptions, deduction on capital gains and reduction of inheritance tax has been devised.

POLITICAL ACTIVITIES FOR PROTECTION FOR CULTURAL PROPERTIES BY LOCAL PUBLIC BODIES

Because cultural properties are located throughout the country, close cooperation and coordination between the Government and local public bodies are essential in the protection of cultural properties. Since cultural properties are intimately connected with the culture of the area in which they are found, their preservation and utilization are extremely important for the development and advancement of local culture. For these reasons, the ultimate responsibility for the protection of cultural properties within a given area rests with the local public bodies.

Many local public bodies have passed ordinances to protect the cultural assets within their jurisdiction that have not been designated as cultural properties by the nation. Under these ordinances, the local public bodies designate items that are of value to the community and devise measures to preserve and utilize them.

Number of Selected and Designated Cultural Properties by Prefectures and Municipalities (as of May 1, 1996)

Tangible cultural properties		
Architectural Structures		
Prefectures		2,164
Municipalities		7,535
Fine and applied arts		
Prefectures		838
Municipalities		8,438
Municipalities		33,454
Intangible cultural properties		
Prefectures		166
Municipalities		987
Folk-cultural properties		
Tangible Properties		
Prefectures		593
Municipalities		4,696
Intangible Properties		
Prefectures		1,528
Municipalities		4,886
Monuments		
Historic sites		
Prefectures		2,549
Municipalities		12,462
Places of scenic beauty		
Prefectures		223
Municipalities		871
Natural monuments		
Prefectures		2,834
Municipalities		10,234
Preservation Districts for Groups of Historic Buildings		
Prefectures		-
Municipalities		13

Cultural Properties Conservation Techniques

Prefectures	10
Municipalities	66

In many cases they provide subsidies for projects related to the custody, repair and public display of cultural properties undertaken by owners and others entrusted with their care. They also facilitate public exhibitions of cultural properties by establishing art galleries, museums, and historical and ethnological archives and conduct research of cultural properties; execute excavation studies of buried cultural properties; and promote educational programs, projects to nurture and appreciation of cultural properties and a wide range of other activities aimed at furthering interest and awareness among the general public.

In addition, local public bodies make preliminary studies of cultural properties that are being considered for designation by the nation and assist and supervise local groups responsible for protecting intangible folk-cultural properties. Many have also been entrusted with the safekeeping of cultural assets that have been designated by the nation.

IMPORTANCE AND NEED FOR PROTECTION FOR INTANGIBLE CULTURAL PROPERTIES

The term "intangible cultural properties" first appeared in Japan in 1950 with the enactment of the Law for the Protection of Cultural Properties. Even today, it is thought that except for Japan's Law for the Protection of Cultural Properties and similar legislation in Korea, there are very few similar cases around the world of the protection of intangible cultural properties being regulated under a country's domestic laws.

The following provides definitions pertinent to the understanding of intangible cultural properties and folk-cultural properties and explains the aims of protection these, along with the legislative process by which these properties have been protected. In the course of these explanations, it is also hoped that the importance of and need for protection will be made clear.

DEFINITIONS OF INTANGIBLE CULTURAL PROPERTIES AND FOLK-CULTURAL PROPERTIES

In considering the significance of protecting cultural properties, it is useful to first define these terms.

In the *Kojien*, one of Japan's most authoritative dictionaries of the Japanese language, "cultural properties" is defined as "any object or phenomenon which is an objective product of cultural activities."

Also, in the guidebook issued when the law was first enacted, "cultural properties" are defined as "objects or phenomena of spiritual value or historical significance to the Japanese people which would be likely to disappear or to suffer damage unless protected."

According to the definition in today's Law for the Protection of Cultural Properties, the broad meaning of intangible cultural properties comprises "intangible cultural properties" and "intangible folk-cultural properties."

"Intangible cultural properties" are defined as "intangible objects of drama, music, craft techniques that are historically and artistically valuable," referring to skills of high historical and/or artistic value.

Also, "intangible folk-cultural properties" are defined as "those items which are indispensable in understanding the transition of Japanese life, including manners and customs related to food, clothing and housing; traditional occupations; religious faiths; festivals and other annual observances; and folk performing arts."

From these definitions it is clear that among cultural products, the emphasis is on historical/artistic value and on the need to understand the transition of the lifestyle of the Japanese people.

As an international definition, in its recommendations on the protection of traditional culture and folklore the twenty-fifth UNESCO Committee Meeting in 1989 defined "folklore (i.e., traditional culture of the people) as the sum of creations based on the traditions of the cultural community, expressed through particular individuals or groups, reflecting their cultural or social identity and expected and recognized as such by the community." From these definitions, it may be said that intangible culture is traditionally transmitted by specific individuals or groups, representing the group's identity.

AIMS OF PROTECTION

Examining the aims of Japan's Law for the Protection of Cultural Properties, there are two aims given in the first article.

The first aim is the cultural improvement of the Japanese people. This definition is extremely abstract and simple, but when thought of in connection with the stipulations of the definitions given above, the aim is to maintain and raise the standard of Japanese culture transmitted from the past by protecting those aspects of Japanese culture of artistic, historical, or academic value, which are indispensable for understanding the lifestyle or identity of the Japanese people, and which are cultural properties representing the abundant creativity of the nation and Japanese race.

The second aim is to contribute to the advancement of global culture. Instead of viewing culture within the narrow confines of nationalism (as commonly occurs), this approach views the national culture as part of the diverse, precious common property of mankind, which is to be protected in order to contribute to the maintaining and raising of the level of global culture.

THE BACKGROUND BEHIND THE PROTECTION OF INTANGIBLE CULTURAL PROPERTIES AND FOLK-CULTURAL PROPERTIES IN JAPAN

(1) *Up to the enactment of the Law for the Protection of Cultural Properties*

Next, by examining how intangible cultural properties and folk-cultural properties came to be protected under Japan's cultural property protection policies, let us clarify the needs for protection of intangible cultural properties as well as the problems therein.

Cultural property protection policies did not exist in Japan prior to the tumultuous latter half of the nineteenth century, as the *Edo* Shogunate came to an end through the Meiji Restoration. In the Meiji era there were two significant trends: the veneration of Western culture on the one hand, and (under the auspices of the State Shinto religion) an anti-Buddhist movement which led to the destruction of many Buddhist temples. In 1871, a Cabinet Proclamation was issued as a countermeasure toward the conservation of art objects amid the destruction of traditional Japanese art and architecture. The first pertinent modern law was the "Ancient Shrine and Temple conservation Act" of 1897, which dealt with the conservation of the architecture and art objects in shrines and temples.

Amid the economic depression in Japan during the 1920s, in order to prevent the outflux of art objects overseas, in 1929 the "National Treasure Conservation Act" was promulgated, along with other laws. However, up until the end of the Second World War, the focus of all these laws was on tangible cultural properties such as archaeological sites, buildings, art objects, etc.

In the immediate postwar period, with terrific monetary inflation and a land ravaged by war, due to the economic bankruptcy of individuals and religious organization which had owned and managed many cultural properties up until that time, many cultural properties could not be appropriately managed, and there was a danger of some of these being lost. In 1949, a mural in the Golden Pavilion of the *Horyuji* Temple--the world's oldest wooden structure--was lost due to a fire that started from the

carelessness of a Buddhist monk, and this led to widespread recognition of the urgent need for legislation to comprehensively protect cultural properties. As a result, the Law for the Protection of Cultural Properties was passed in 1950. This marked the first time that intangible cultural properties were also dealt with in such legislation. The reason for this was that after the end of the Second World War, the lifestyle and attitudes of the Japanese people became increasingly Westernized at a rapid pace, and tradition in general was widely looked down upon, so that many people took little interest in skills associated with valuable traditional culture, and there was a danger of these skills being lost. However, the original focus of these protective efforts was on aspects of culture of the highest artistic and historical value, such as *kabuki* and *noh* theater. Also, whereas for tangible cultural properties the protective efforts included official designations such as "national treasures," for intangible cultural properties there was no corresponding system of designations--only the requirement that support measures such as granting of subsidies and assistance with procurement of materials be made.

(2) *Creation of the system for the designation of important intangible cultural properties*

Three years after the enactment of the Law for the Protection of Cultural Properties, Japan finally pulled out of the postwar period of chaos and the life of the Japanese people restabilized, and with this people's lifestyles became increasingly Westernized and modernized. On the other hand, with the stabilization of life, desire for the protection of traditional culture also became more widespread, so based on the results of three years of implementation, the Law for the Protection of Cultural Properties was revised in 1954.

Concerning the protection of intangible cultural properties, a system was created for the designation of important intangible cultural properties similar to that for tangible cultural properties. Since intangible cultural properties exist through their embodiment of skills within specific persons, the law called for the specification of people or groups which transmit these skills, and for the preparation of records of these skills as well as for government financial support of the training of successors for the continued transmission of these skills. Also at this time, in addition to important intangible cultural properties (performing arts, craft techniques, etc.), measures were introduced for the selection and recording of intangible cultural properties of significant value.

Furthermore, cultural properties necessary for the understanding of the transition of the life of the Japanese people were defined as "folk materials;" important items among these were designated as important folk materials and measures were drawn up to manage and repair these. Also, measures called for valuable intangible folk-cultural properties to be selected and records compiled concerning them.

(3) *Creation of the system for the designation of important intangible and tangible folk-cultural properties*

Until 1975 there were no additional significant revisions to the Law for the Protection of Cultural Properties, but the intervening 20 years marked Japan's period of high economic growth, throughout which urban centers grew huge, with extensive redevelopment and demographic shifts from the country to the cities. Extensive urbanization nationwide led to the destruction of many traditional buildings and entire town sections through rebuilding. Also, rapid industrialization and other transformations of the industrial structure led to dramatic shifts in agricultural, fishing and forestry practices, along with the continued rapid advance of the Westernization of people's lifestyles. Particularly among young people, there was a massive shift of population from farming villages to the cities, accompanied by a shift away from the large, multi-generational family patterns of previous generations to more nuclear families, and the traditional community social structure was greatly changed. As a result, manners, customs, annual events, folk performing arts and other types of folk-cultural properties and traditional arts and crafts were rapidly being lost.

In order to accommodate these changes, in 1975 the Law for the Protection of Cultural Properties was revised once again.

Through these revisions, what had been previously referred to as "folk materials" were reclassified as "folk-cultural properties" so that manners and customs related to food, clothing, housing, traditional occupations, religious faiths, festivals and other annual observances as well as folk performing arts came to be classified as intangible folk-cultural properties, and the clothing, utensils, furniture and other items were classified as tangible folk-cultural items. Furthermore, among these the more important were able to be designated as important intangible folk-cultural properties and important tangible folk-cultural properties.

Previously, the more valuable among folk performing arts were considered to be classifiable as intangible cultural properties, but because of a sort of elitism none had ever actually been classified as such; instead only records of them were kept. Through this revision, however, even if they could not be considered such for artistic purposes, for their value in understanding the transition of the life of the people, certain folk performing arts came to be designated as cultural properties and support provided for the raising of successors to perpetuate them.

(4) Achievements and problems of intangible cultural property protection under the designation and recognition of systems

(a) Concerning designations of important intangible cultural properties:

Designations and recognition under these systems have raised public awareness concerning important intangible cultural properties and have made significant contributions toward their protection. However, there is a danger of society taking a special view of the "living national treasure" designations granted in recognition of the embodiments of the highest levels of Japan's traditional arts for purposes of protection, with the people losing interest in the objects of protection themselves. In other words, there is currently a trend toward the separation of intangible cultural properties and the individuals and groups which embody them.

(b) In the case of sophisticated traditional culture and under the national government, it is necessary to start recruiting people to be trained in increasing numbers in each of the fields of the traditional performing arts in addition to traditional recruiting. In keeping with this, the Japan Art Culture Promotion Association is conducting training operations to foster successors.

Also, toward the improvement of specialized techniques and knowledge used in manufacturing materials and tools for the expression of intangible cultural properties, and to ensure the continued smooth transmission of cultural property conservation and repair techniques into the future, from last year domestic training programs were begun so that young technicians might acquire sophisticated skills more quickly.

Concerning folk performing arts, demographic movements out of transmission locales and particularly the shrinking numbers of children have caused many places to suffer a dearth of successors. As a countermeasure many locales are attempting to transmit folk performing arts to children through school club activities, but many children quit these activities upon entering high school or college.

Also, from FY 1997 next year, there are plans to implement new subsidy operations to support local public organizations responsible for undertaking measures to foster successors in each region.

(c) The problem of preparing survey records:

This point has proceeded to a fairly advanced level in the case of traditional performing arts protected as sophisticated intangible cultural properties by the national performing arts protected as sophisticated intangible cultural properties by the national governments. However, folk performing arts, folk songs and other intangible folk-cultural properties lag behind, and the Agency for Cultural

Affairs is now implementing the preparation of records on a prefectural basis. However, this is limited to the preparation of written records and oral recordings, and in the future it will be necessary to emphasize the preparation of video recordings. Another future issue is the organization and utilization of records prepared by various organizations.

Furthermore, from this year operations have begun to collect, organize, digitize and publish (in a CD-ROM called *Furusato no Densho Denshi Zukan*) information about images of precious folk-cultural properties recording traditional life and industry.

(d) Problems of public exhibition:

In the case of traditional culture treated as intangible cultural properties, public performances are being held at the Japan Art Culture Promotion Association's National Theater Main Hall, National Performing Arts Museum, Nation *Noh* Theater and National *Bunraku* Theater. Performances of those folk performing arts which are intangible folk-cultural properties are held at various types of folk performing art festivals, regional promotional events, etc., but sometimes it is to be wished that care would be taken to prevent these from being transformed away from their traditional forms into "spectacles." There are also cases where joint performances are held with overseas folk performing arts, but frequently the content of the invited performing arts are not carefully planned, but rather somewhat of a hodgepodge.

In 1996, the three local regions organized an exhibition entitled "The International Folk-Cultural Performing Arts Festival" with the Agency for Cultural Affairs to develop and diffuse folk-cultural performing arts. It was joined by some Japanese performing groups and Asian groups. It is very active in international cultural exchanges.

(e) The problem of the position of intangible cultural properties related to modern culture:

With regard to the cultural heritage of modern Japan, while many aspects of traditional culture are threatened with extinction or dispersion due to the pace of development and changes in modes of living, because people do not share a consensus concerning the value of cultural properties, protection measures are not always being adequately taken. Appropriate conservation measures should be taken for those times in our modern cultural heritage about which there is a certain amount of agreement concerning their value. For this reason, efforts are being made to implement necessary studies and other measures concerning the conservation status for protecting our modern cultural heritage, including intangible cultural properties.

As explained above, the historical background in Japan, including the economic development, demographic shift from the countryside to the cities, Westernization of lifestyles and modernization are all patterns which Japan shares in common with many countries in Asia or other regions.

As well as in Japan, the loss of successors to perpetuate traditional performing arts remains a problem as urbanization, the shift of population from the country to the city and change of generations continues.

It is greatly to be hoped that Japan's thinking and efforts concerning the protection of intangible cultural properties and folk-cultural properties, and the historical background behind the protection of cultural properties, will prove useful to the corresponding efforts of people in other countries.

(5) Activities for protection for tangible cultural properties:

(a) Architectural structures, fine and applied arts:

"Tangible cultural properties" is the general term used to refer to tangible cultural works like architectural structures, paintings, applied art works, sculptures, works of calligraphy, classical books, ancient documents, archaeological materials, and historical materials that possess high historic, artistic

or scholarly value for our country. All items in this category, with the exception of architectural structures, are generally referred to as "fine and applied arts."

Among these tangible cultural properties, those which are considered particularly significant are designated as important cultural properties by the nation; those that are of particularly high value from the standpoint of world culture are designated as national treasures and protected by the nation.

Approximately 90% of the designated cultural property buildings are wooden structures that periodically require major or minor repairs or preservation. Repair projects are carried out by the owners or organizations entrusted with the safekeeping of the buildings, but subsidies are granted by the nation for most of these projects, with the exception of minor repairs. Because almost all the historic buildings in Japan are made of wood and in many cases have roofs made of plant materials like thatch and cypress bark, they are extremely vulnerable to fire. For this reason the Agency for Cultural Affairs provides necessary subsidies to install fire-prevention facilities and executes other measures for their protection.

In addition to the types of buildings listed above, architectural structures related to industry, transportation and public works which played a major role in the modernization of Japan are being torn down as a result of technological innovations, changes in industrial structures and other reasons. The Agency for Cultural Affairs is carrying out investigations to specify these structures that were once the backbone of Japanese modernization and are now in the process of being lost in an effort to preserve them as monuments of the Japanese modernization period. The Government designates them as cultural properties based upon such studies.

The custody and repair of National Treasures and Important Cultural Properties for Fine and Applied Arts are carried out by their owners or organizations entrusted with their safekeeping (local public bodies and other organizations appointed by the Commissioner for Cultural Affairs to take proper care of designated cultural properties).

Approximately 60% of the National Treasures and Important Cultural Properties (fine and applied art objects) are owned by shrines and temples.

Any unauthorized alterations to the existing state of these designated cultural properties or their export other than for exhibitions overseas deemed necessary is prohibited. The Government grants subsidies from the national treasury and provides other forms of support for the preservation and repair of cultural properties, and the Commissioner for Cultural Affairs may issue instructions about their custody, repair and exhibition.

(b) The history of activities for protection for material folk-cultural properties:

According to the Law for the Protection of Cultural Properties, folk-cultural properties are considered indispensable to an understanding of the transformation in lifestyles of the people. It recognizes both intangible cultural properties including manners and customs like annual events, beliefs and festivals, and folk-performing arts, as well as tangible cultural properties including costumes and objects used on such occasions and buildings. Intangible folk-cultural properties are by their nature subject to change according to the historical and social background of time because they are passed down by people through generations. therefore, conservation through documentation was the only means employed until the law was amended in 1975, whereas tangible cultural properties used for these events and ceremonies were protected in a similar manner as other tangible cultural properties. folk-cultural properties were first regarded as objects for protection after the establishment of the Law for the Protection of Cultural Properties in 1950, but the actual enactment of the law occurred even after that. This was mainly because folk-cultural properties which include tools or facilities found in our ordinary life do not possess a strong sense of antique character. While works of fine and applied art or buildings had been regarded as the Meiji period, the idea of protecting folk-cultural properties had not well penetrated to the general public in a consistent manner. Moreover, the fact that folk-cultural properties were categorized as part of tangible cultural properties under the 1950 Law for the Protection of Cultural Properties also contributed to the delay in administrative action. Unlike works of fine and applied art or buildings that are evaluated historically and artistically, folk-cultural properties by

their nature require a different set of standards for evaluation. The law was thus amended in 1954 and folk-cultural properties were set in a category of their own, independent of outside of tangible cultural properties. In the present, the Government designates significant items in this category as important folk-cultural properties and grants subsidies for the building of repositories and disaster prevention facilities for the repair of tangible folk-cultural properties.

(6) Conclusion:

In the present, the protection of cultural properties is an extremely important in Japan. Maintaining and developing traditional culture and boosting creative artistic activities and making an international cultural contribution is requested as national political activities. The Committee's report, "Toward the Establishment of the New Cultural Nation—Immediate Priority Strategies for Promoting Culture, delivered in July 1995, will form the basis of future endeavors by the Agency for Cultural Affairs toward the promotion of culture. Advisory Committee for Promoting Cultural policy has identified the following issues in the administration of culture. These are shown together with specific proposed strategies.

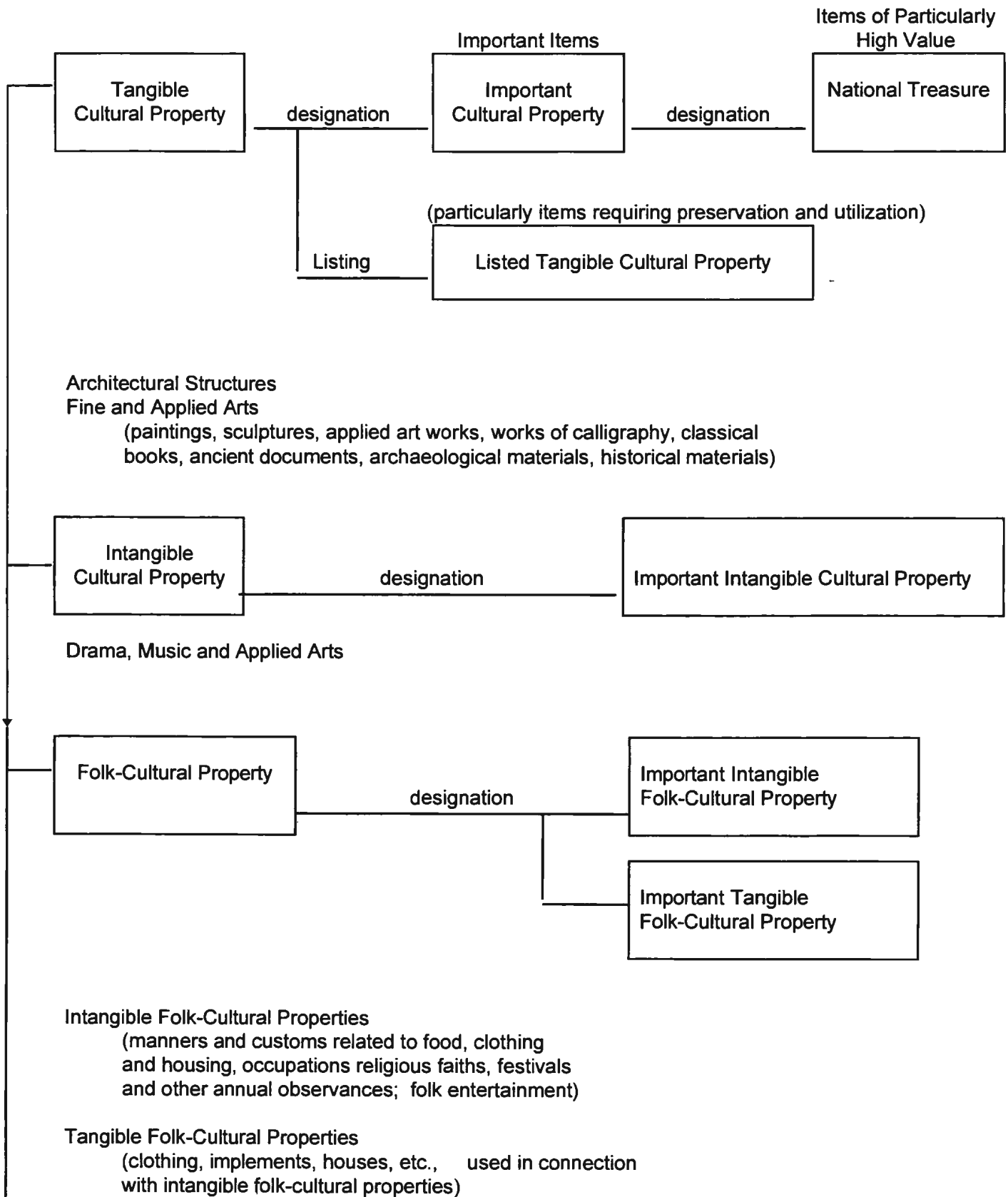
- Boosting creative artistic activities
- Maintaining and developing traditional culture
- Promoting regional culture and "lifestyle culture"
- Training and nurturing human resources to sustain culture

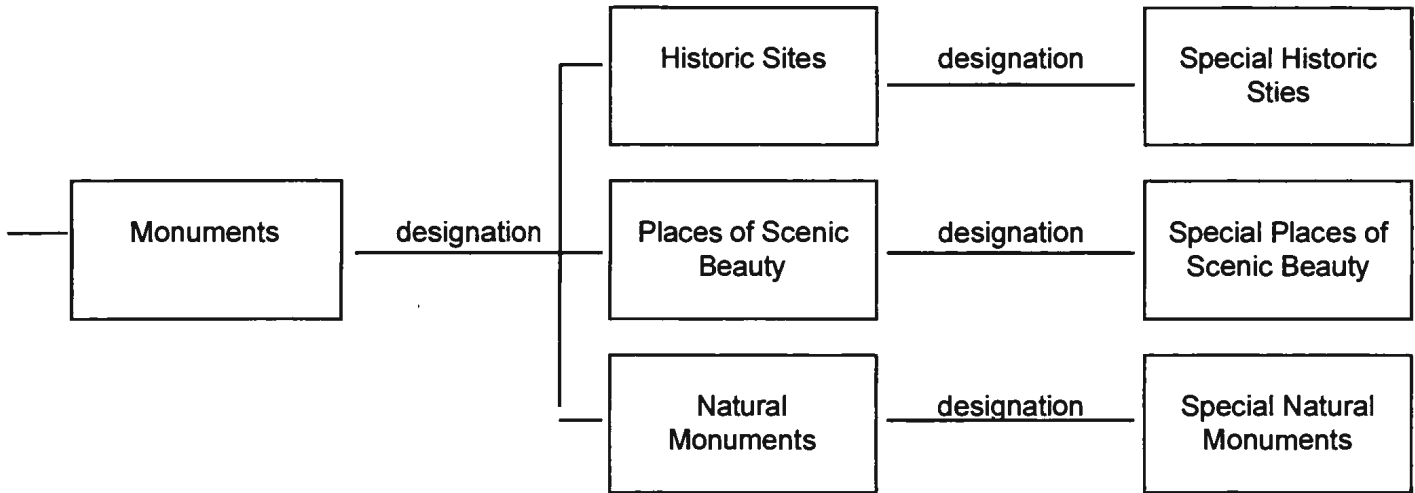
Developing the infrastructure for conveying Japanese culture to the world

Then, in FY 1996, local regions will work together with the Agency for Cultural Affairs on town planning, "Community Development through Culture" to develop measures designed to boost unique local artistic and cultural activities, and to enable people to enjoy closer access to outstanding arts and culture while utilizing the cultural inheritance of the region.

In addition, the Government is making an effort in various political activities for cultural properties in change in the age when cultural properties are surrounded.

The System of Designation, Selection and Listing of Cultural Properties





Historic Sites

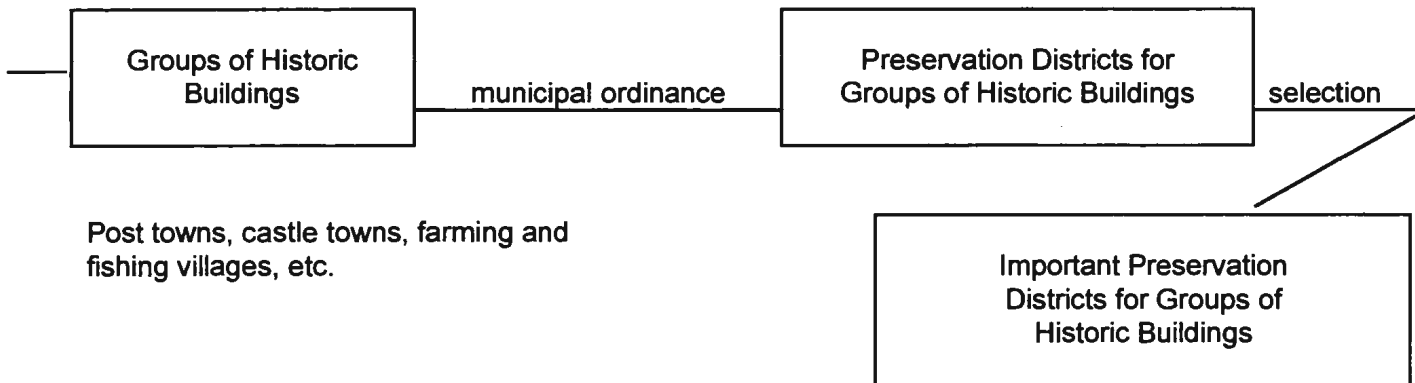
(shell mounds, ancient tombs, sites of palaces, sites of forts and castles, monumental dwelling houses, etc.)

Places of Scenic Beauty

(gardens, bridges, gorges, seashores, mountains, etc.)

Natural Monuments

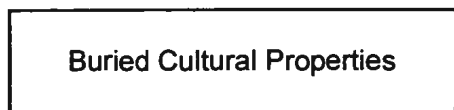
(animals, plants and geological features and minerals)



Post towns, castle towns, farming and fishing villages, etc.



Production of materials and restoration of techniques necessary for the preservation of cultural properties



Cultural properties that remain buried underground

**LEGAL MEANS OF PROTECTION OF EXPRESSIONS OF FOLKLORE IN
NATIONAL LEGISLATION: PROTECTION OF THE COLLECTIONS OF
EXPRESSIONS OF FOLKLORE; THE ROLE OF LIBRARIES AND ARCHIVES**

*by Ms. Marybeth Peters, Register of Copyrights, Copyright Office,
Library of Congress, Washington, D.C.*

I. Introduction

It is with some trepidation that I explore this subject since I am neither a librarian nor an archivist. Rather I am an expert in copyright law. I head the United States Copyright Office, which is located in the Library of Congress (the Library) which serves as the de facto national library in the United States. I have worked in the Library for over 30 years, which has what I believe to be the most preeminent folklore archive in the United States, the American Folklife Center. My paper is based on the work of that center, and in preparing this paper I worked with Dr. Alan Jabbour, the director of this center, who represented the United States at earlier meetings on the subject of protection of folklore.

II. Background

The United States is a relatively young country—it's just over 220 years old. From the beginning it was a nation made up of many cultures and nationalities, transformed by the experiences in America. The United States celebrated its 200th anniversary in 1976 and the 1970s was a period of increased attention to "roots," that is, "those aspects of heritage that lie between the individual and the nation, and that connect individuals to communities while defining the nation, and that connect individuals to communities while defining the nation as a whole pluralistically."¹ Also in 1976 the United States Congress passed the "American Folklife Preservation Act,"² which created the American Folklife Center in the Library of Congress.

The Center was charged with preserving and "presenting American folklife," which according to that law, means the traditional, expressive, shared culture of various groups in the United States: familial, ethnic, occupational, religious, and regional; expressive culture includes a wide range of creative and symbolic forms, such as custom, belief, technical skill, language, literature, art, architecture, music, play dance, drama, ritual pageantry, and handicraft. These expressions are mainly learned orally, by imitation, or in performance, and are generally maintained without benefit of formal instruction or institutional direction.

This legislation recognizes that expressions of folklore are extremely important to the United States both for their historical and artistic value; it does not address or try to protect the commercial value that these expressions may have.

Collection of folklore materials was not new to the Library of Congress. The Library had been in the folklore business since 1928 when it founded the Archive of American Folk-Song in the Music Division. The archive was renamed in the 50s; the new name was simply the Archive of Folk Song in recognition of its international scope.

The 1976 legislation specifically authorized the creation of an archival center for folklife, and the Folk-Song archive was transferred to the new Center in 1978. In 1979 the archive was again renamed to recognize the breadth of the Center's activities; it became the Archive of Folk Culture. This archive has grown to become one of the most significant collections of cultural research materials in the world; it includes over one million items consisting of manuscripts, sound and video recordings, still photographs, and related ephemera.

The Center has a staff of professionals who conduct programs under the general guidance of the Librarian of Congress and a Board of Trustees. It serves federal and state agencies; national, international, regional, and local organizations; scholars, researchers, and students; and the general

¹ "The American Folklife Center: A Twenty Year Retrospective," Alan Jabbour, *Folklife Center News*, Winter-Spring 1996, Vol. XVIII, Nos. 1 & 2, p. 5.

² Public Laws 94-201, January 2, 1976.

public. The Center's programs and services include field projects, conferences, exhibitions, workshops, concerts, publications, archival preservation, reference service, and advisory assistance.

A. Acquisition

The Center acquires materials that are consistent with its mission and which further its goals. One major criterion is usefulness to researchers. Materials are acquired by gift, bequest, purchase, and field work. The focus is on American materials, with 80% of the collections American.

To the extent possible, the Archive attempts to obtain materials that contain no restrictions as to use or disposition. The goal is to make the materials that are acquired available as widely as possible. However, if the materials are of exceptional value, then restrictions will be accepted. Efforts are made to place time limits on restrictions or to define the donations under which they may be terminated. Restrictions are documented and noted in the records. Also, if a work is protected by copyright, that too would be noted. Most of the materials in the archive are not currently subject to copyright protection.

In a gift or purchase situation, there is a legal instrument of conveyance which sets forth an adequate description of the objects or materials involved and the conditions of the transfer. In certain cases evidence of the right of possession and the appropriateness of the acquisition, provenance or history, may be requested.

A key part of the Center's acquisition program is its field activities. The Center began to conduct field projects in 1977. In that year there were projects to document such things as artistic expression in rural Georgia and Chicago's ethnic communities and traditional life. Over the years the Center's fieldwork has ranged from documentation of folk arts to immersion in community cultural planning. The hallmarks of the Center's field projects are:

- Use of teams working together in the field;
- Emphasis on professional documentation, including high quality sound recordings and professional photography;
- Attention to the full span of expressive culture in all forms;
- Interest in documenting the full range of everyday life;
- Interest in documenting the full range of everyday life;
- Development of publications, exhibitions, and other public products from the fieldwork;
- Cooperation with other federal and state agencies;
- Involvement of local people in defining the thrust of field work and in developing plans and recommendations;
- Creation of large multi-format ethnographic collections as a major product of the fieldwork;
- Creation of reference archives in regional repositories; and
- Strengthening local capacity to continue the work in the future.³

Importantly, permissions are obtained from those who are recorded or photographed. Documentation in the field, which includes the creation of sound recordings, photographs, and film footage, manuscript field notes and logs, and today computer disks, is a major activity of the Center, and field projects have added over a half million items to the Archive's collections.

B. Records (Catalog) and Inventory

Organizing and cataloging is done by collection. Thus, one finds an item through a collection rather than by mere physical item number. Each item is identified by there is no separate catalog record for the items contained in a collection.

³ See Jabbour, *supra* note 1, at p. 19.

C. Access to Materials

The collections in the Folklife Reading Room receive heavy use. The Center provides comprehensive reference services with many visitors, telephone calls, letters, faxes and e-mail queries. In addition to materials of the past, there is much information about contemporary traditions, for example, displaying yellow ribbons for absent loved ones. There is an extensive file on this tradition, which is regularly consulted by historians and journalists.

The goal of the Center is to make its collections as widely available as possible. It, therefore, loans materials; the "loan," however, is usually in the form of a reproduction rather than to loan the actual item.

The Center is turning to the Internet to disseminate some of its collections. In the near future, the Center will make a collection of music from ethnic groups in California available on the Internet.

To make materials more accessible, the Archive produces bibliographies, directories, and finding aids for researchers. In 1983 the Archive launched a new series, LC Folk Archive Finding Aids; the series provides detailed surveys of Archive holdings on particular subjects or from particular geographical regions. There are state by state finding aids, prepared by interns and other volunteers; these provide coverage for holdings from twenty-seven states and territories. These aids are published in print editions and are made available electronically on the Center's Gopher and Web pages.

D. Preservation

The Center has the same preservation interests as the Library of Congress. An interesting preservation (and cataloging) project involved ten thousand turn of the century waxed cylinder recordings of American Indian music. These recordings were copied on to magnetic tape. Copies of many of these recordings were returned to the tribal groups in which they were originally made, thus helping to restore the priceless elements of tribal heritage to their hereditary homes. This follows the spirit of repatriation that is the key in the domain of tangible, physical cultural property.

E. Additional/Outreach Activities

1. *Concerts and workshops.* The legislative mandate for the Center includes "presenting American folklife." The Center construes this to include concerts, and in 1977 it instituted an outside concert series at the Library which took place on the Neptune Plaza. That series included 130 concerts and spanned 19 years.⁴ Eventually the concerts were broadcast, first live and later delayed, over a local radio station.

The programs at first emphasized blues, bluegrass, gospel and Hispanic and Caribbean traditions. More ethnic traditions came later, as did performing groups from abroad. Dance and drama increased over time.

During the cooler months, workshops, lectures and other programs are held. Many workshops have featured crafts, spoken-word traditions, and foodways.⁵ There have been interviews with crafts people and hands-on demonstrations. Several were accompanied by informative brochures on the subject (rag rugs, paper-cutting or the like) that later served as reference materials.

2. *Exhibitions.* Exhibitions are used to present aspects of folklife, and there have been a large number. Some included the preparation of interactive videodiscs, which later were published. The contents of these may be made available online through the World Wide Web of the National Digital Library of the Library of Congress.

⁴ The concerts ended with the 1995 season because of budget constrictions.

⁵ This is the customary cultural behavior regarding food. It includes procedures from the garden to the pot to the table. Source: Jabbour.

3. *Publications.* There are substantial publishing activities. The first effort was to canvass folklife activities in the U.S. government agencies; the result was the publication "Folklife and the federal Government" (1977). This was the first of a series known as Publication of the American Folklife Center, which continues to this day. Studies in American Folklife, a second series, are scholarly publications. The third publication, a quarterly newsletter, "Folklife Center News" is aimed at the center's constituency: it focuses on the activities of the center.

In addition, in collaboration with the Library's Publishing Office, the Center launched a series of annual volumes containing general essays on folklife accompanied by color and black-and-white illustrations. The first "Folklife Annual" was published in 1985, however, publication was discontinued in 1991 because of a lack of public funds.

With the dwindling of appropriated funds, the Center has to rely much more heavily on public-private partnership arrangements to accomplish some of its purposes. Concomitantly, the Center realized that nationwide distribution would be accomplished more effectively by private-sector partners.

The Archive's most famous series of publication is its series of documentary folk music recordings issued from its collections. An interesting venture began in 1982 when the Center organized a meeting with the private-sector record companies responsible for production and distribution of folk recordings and libraries who acquire such recordings. The Center asked how it could help these companies accomplish their mission. The answer was that the companies wanted help in placing their records in libraries. On the other hand, libraries told the Center that they wanted to buy recordings but they didn't know what to choose. The result of this meeting was the production of the "American Folk Music and folklore Recordings: A Selected List." The list, issued and widely distributed each year from 1983 through 1992, contained thirty to thirty-five recordings selected by a panel of experts of the year's folk records. The program ended in 1992 because of lack of funding. Also, in the late 1980s the Center's production of recorded publications ceased. The Center now works with private sector partners rather than publishing and distributing directly. There have been a number of collaborative efforts. A recent effort is with Rounder Records for the re-issue of recordings originally released as LPs in CD format.

In addition to its own publishing activities, the Archive has yielded hundreds of recordings that have been published by the private sector over the years; more and more books and articles have drawn on Archive holdings; and film, television, and radio programs regularly use archive materials. The digital age promises to increase this pattern of heavy use.

IV. Funding

The experience of the Center is that its first ten years were characterized by an expanding budget and an emphasis on field-work and public programming. The next ten years were characterized as a time of a shrinking budget, which required the Center to get into fundraising and forging partnerships for its programming. Given the downsizing efforts of the United States Government, it seems likely that this trend will continue.

V. How Well Do Libraries and Archives Protect Folklore?

It is important to note that much of the emphasis in the past has been on legal protection of folklore. To that end there has been consideration of copyright, moral rights, unfair competition, public domain, and *domaine public payant* as existing forms of protection. Other forms of protection include neighboring rights, trademarks, trade secrets, plant breeders' rights and geographic appellations of origins.

It has been acknowledged that copyright law provides the least available protection, and that most countries offer little protection beyond copyright protection alone or copyright protection coupled

with unfair competition and/or moral rights. Analysis has focused on the basic nature of folklore—that it is passed from generation to generation and developed or modified over time; that expressions of folklore are generally not attributable to an individual author, and that it is perceived as belonging to a group.

My task is not to go over this ground even from a United States perspective; thus, issues about moral rights (integrity) and compensation for commercial use are beyond the scope of this paper. Rather my task is to look at the role of libraries and archives in protecting folklore and assess how well they are doing and to suggest what they could do to improve the situation.

I have identified the following as the critical roles of libraries and archives: conservation, preservation, identification, use or dissemination, international cooperation, and maintenance or nurturing of the vitality of folk culture in the face of modernization and internationalization in the flow of commerce and culture. UNESCO has done considerable work in the area of safeguarding folklore.⁶

Conservation is concerned with documentation to help in understanding the process through which tradition evolves and changes. Libraries and archives excel at this. Libraries and archives are also exceptional at preserving a country's cultural works in the manner that their creators intended so that their inherent cultural value is not lost or distorted, and libraries and archives are good at identifying, indexing, cataloging and documenting the proximate origin⁷ of a work. Libraries and archives also are equipped to make materials available in an appropriate manner, and these institutions are natural for maintaining and nurturing folklore. Finally, they are incredible resources which can provide help and assistance to each other through cooperative projects, exchanges, training courses, internships and technical assistance programs. This would raise the analytical and theoretical level of folklore work, and lead to substantive ethnographic expertise in all countries.

VI. Future Roles

I agree with the UNESCO recommendation that it would also be desirable if each country could designate a national library or archive that would serve as the central point for the folklore in its country. It would also be desirable if each country would also establish a network of institutions that have and that will receive and conserve folklore materials. Eventually an international network spanning all countries and all appropriate institutions as well as folklore specialists and ethnologists could be created.

Taking the above one step further, there should be further consideration of the creation of official registries of folklore. Alan Jabbour at a Committee of Experts meeting on the Protection of Folklore in 1984 stated that a registration system would be needed to define the corpus of protected expressions of folklore and to assist in the enforcement of any rights. He suggested that these registries be tied to the designated national inventories or archives.

Libraries and archives play a critical role in the protection of folklore; that role should be celebrated and enhanced. The American Folklife Center and the Library of Congress are most interested in furthering these goals.

⁶ Recommendation on the Safeguarding of Traditional Culture and Folklore. Adopted by the General Conference of UNESCO at its Twenty-Fifth Copyright Session, Copyright Bull., vol. 23, no. 1, at 8 (1990).

⁷ Alan Jabbour has coined this phrase in distinguishing what he calls "ultimate origin" to the place from which the collector obtained the work. He uses the example of the Navajo rug whose proximate origin would be Navajo tribe but whose ultimate origin is far beyond that tribe. The rug evolved from "earlier borrowings from other tribes, thence from Mexico, thence from Spain, and thence from Moorish North Africa." Alan Jabbour, "Folklore Protection and National Patrimony: Developments and Dilemmas in the Legal Protection of Folklore," Copyright Bull., vol. 17, no. 1, at 13, 14.

***THIRD WORKING SESSION: ECONOMIC EXPLOITATION OF
EXPRESSIONS OF FOLKLORE***

Moderator: Salah Abada, Chief of Creativity and Copyright Section, Division of Creativity, Cultural Industries and Copyright, UNESCO, Paris

Speakers: Thomas Manou Yablaih, directeur de la culture de l'Agence de coopération culturelle et technique (ACCT), Paris

Ricardo Gomes Lima, Chief Research Department, Coordinator of Folklore and Popular Culture, Rio de Janeiro

Hong Yongping, Deputy Director and Associate Professor, Policy Research Division, Ministry of Culture, Beijing

Henry Olsson, Special Government Adviser, Ministry of Justice, Stockholm

**L'EXPLOITATION ÉCONOMIQUE DES EXPRESSIONS DU FOLKLORE :
L'EXPÉRIENCE DE L'AFRIQUE**

*par M. Thomas Manou Yablaih, directeur de la culture de l'Agence de
coopération culturelle et technique (ACCT), Abidjan*

En français, le terme folklore est ambigu, parce que désignant, dans les sociétés des pays développés, des survivances, des îlots de pratiques et de cultures appartenant à des groupes souvent minoritaires qui mettent tout en oeuvre pour les préserver et les maintenir.

En Afrique, cette acception n'a pas de sens. Ce qui est considéré ailleurs comme folklore imprègne ici toute la vie sociale et culturelle. C'est le fondement de la créativité.

Permettez-moi donc de ne pas employer, dans mon exposé, le terme folklore mais, plutôt l'adjectif traditionnel, ce qualificatif n'excluant pas les concepts d'évolution, de dynamisme et de créativité.

Mon exposé portera sur deux expériences africaines régionales réussies d'exploitation économique des expressions traditionnelles. La première concerne les arts vivants, c'est-à-dire le théâtre, la danse et la musique, c'est le projet « Marché des Arts du Spectacle Africain » d'Abidjan, ou MASA.

La deuxième s'intéresse à l'artisanat, c'est le Salon International de l'Artisanat de Ouagadougou ou SIAO. Je m'appesantirai davantage sur la première que je connais le mieux et me contenterai d'évoquer la deuxième.

A) Le MASA

Le MASA est un projet multilatéral francophone destiné à développer les arts vivants africains. Il a été décidé par la Conférence des Ministres de la culture de l'Agence de la Francophonie (organisation intergouvernementale des pays ayant le français en partage) tenue à Liège, en Belgique, en 1990.

Événement biennal organisé par l'Agence de la Francophonie et la Côte d'Ivoire, les deux premières éditions du MASA ont eu lieu, en 1993 et 1995, à Abidjan et concerné exclusivement les pays francophones. La troisième édition, qui vient de se tenir, du 1er au 8 mars dernier encore à Abidjan devenue définitivement le siège du MASA, s'est ouverte à trois pays anglophones (Ghana, Zimbabwe, et Afrique du Sud), marquant ainsi désormais l'extension du projet à tous les pays africains, sans distinction d'appartenances linguistiques.

I - Objectifs

L'objectif principal du MASA est de mettre en présence les professionnels du théâtre, de la danse et de la musique, tant du nord que du Sud, d'une part, et d'autre part, les meilleures productions africaines, les plus originales de théâtre, danse et musique, en vue de favoriser des contacts fructueux et des contrats privés, pour la diffusion et la circulation du spectacle africain en Afrique et à travers le monde. C'est la valorisation de la dimension économique d'un projet culturel.

A côté de cet objectif central, le MASA est le plus grand festival africain de théâtre, de danse et de musique, le plus grand forum d'échanges et de rencontres entre professionnels, et un lieu de formation professionnelle des créateurs, des producteurs et diffuseurs, des régisseurs et des techniciens des arts de la scène.

Devant le succès des trois premières éditions, le MASA est devenu un véritable projet de développement global des arts vivants africains.

II - Organisation du MASA

Organisé en 1993 et 1995 par l'Agence de la Francophonie et le Ministère de la Culture de Côte d'Ivoire, le MASA est maintenant mis en oeuvre par une Direction du projet basée en permanence à Abidjan, avec un siège comportant une dizaine de bureaux et des salles de conférences.

Les deux questions auxquelles doit répondre l'organisation sont les suivantes :

- Comment faire venir à Abidjan le plus grand nombre de professionnels des arts du spectacles ? Directeurs de festivals, de salles de concert, de théâtre, de tournage, d'agents musicaux, de responsables de réseaux culturels, de journalistes culturels, de directeurs de labels discographiques ?
- Comment amener à Abidjan les meilleures créations de théâtre, de danse et de musique, les plus originales, qui justifient le déplacement intéressé des programmateurs du monde entier ?

1/ Stratégie de l'information et de la communication

Sur la base d'un fichier de plus de 7 000 noms et adresses de professionnels, nous diffusons sur une année, périodiquement, toutes les informations sur la tenue du MASA par prospectus, dépliants, télécopieurs et même par Internet.

Cette stratégie a abouti à l'arrivée au MASA 97 de près de 500 professionnels et de 250 journalistes.

2/ Stratégie de la sélection des groupes artistiques

La sélection des spectacles à présenter au MASA se fait essentiellement sur la base de l'originalité de la création musicale, chorégraphique et dramaturgique, laquelle doit puiser sa source dans la créativité africaine, mais à travers un langage artistique nouveau. Il ne s'agit pas de reproduire du déjà vu ou entendu, ce qui a un intérêt limité, mais de faire oeuvre de création à partir de ce qui est propre à l'Afrique.

Au MASA 97, 47 groupes artistiques ont été ainsi sélectionnés : 10 de danse, 11 de théâtre et de 26 de musique, parmi les meilleurs du continent.

3/ La rencontre entre les programmateurs de spectacle et les artistes

Ces 47 groupes se sont produits devant les 750 programmateurs et journalistes, pendant les 7 jours que dure le MASA, dans quatre salles de spectacles. Il faut ajouter à cela plus de 120 groupes non sélectionnés, qui ont participé à un festival à travers les dix quartiers de la ville d'Abidjan, pour le bonheur des professionnels internationaux et de la population abidjanaise.

III - Bilan des MASA

1/ Le MASA 97

A la fin du MASA 97, au soir du 8 mars, 150 projets de contrats entre artistes et programmateurs ont été enregistrés. Les mois à venir permettront d'avancer des statistiques plus élevées et plus affinées.

2/ Bilan des MASA précédents

Au MASA 93, il y avait 32 troupes sélectionnées. 26 ont obtenu des contrats fermes de tournées et/ou de réalisation de supports phonographiques, soient 81 % sur la saison 93-94.

Au MASA 95, 27 troupes sur les 38 présentes ont obtenu des contrats fermes sur la saison 95-96.

IV - Que retenir de la mise en oeuvre du MASA ?

1/ Tout n'est pas exploitable, économiquement, dans les expressions traditionnelles. Les arts du spectacle, (théâtre, danse et musique) peuvent l'être. Il faut veiller à ce que les retombées économiques et financières puissent profiter aux porteurs des traditions et à leurs créateurs. Les artistes, qui créent à partir de la tradition, qui voient leurs créations circuler dans le monde entier, peuvent vivre de leur création tout en continuant à perpétuer la tradition et leurs racines et références identitaires.

2/ Quand on aborde l'exploitation économique des productions musicales, chorégraphiques et théâtrales, il est primordiale de mettre en place les dispositifs législatifs et juridiques qui garantissent les droits des porteurs des traditions et leurs créateurs et acteurs, qui les protègent. Si cela n'est pas fait, ce sont les intermédiaires et les prédateurs de toutes sortes qui prospéreront sur le dos et les ruines des traditions.

En Afrique, les lois sur les droits d'auteurs existent. Le problème réside dans la difficulté à les appliquer, les mentalités et les pratiques y faisant obstacle. Le développement du MASA a mis à nu ce fléau qui ne peut être combattu que par une politique de concertation régionale, voire continentale. C'est dans ce cadre que le Ministre de la Culture de la Côte d'Ivoire convoque, la semaine, prochaine, à Abidjan, ses homologues de l'Afrique de l'Ouest, autour du thème : les droits d'auteur et la lutte contre la piraterie.

3/ Le MASA pose également, avec acuité, le problème de la circulation des artistes d'abord en Afrique, et ensuite, entre l'Afrique et le reste du monde. Malheureusement, la mondialisation de l'économie ne s'accompagnant pas de la libre circulation des hommes, les artistes du MASA qui obtiennent des contrats à l'étranger ne peuvent pas toujours les honorer : difficultés voire impossibilité à obtenir des visas et des permis de travail. Des solutions doivent être recherchées au niveau bilatéral et multilatéral pour permettre aux artistes de tirer le maximum de profit des expressions artistiques des traditions.

Si le Marché des Arts du Spectacle Africain s'intéresse aux arts de la scène, le Salon International de l'Artisanat de Ouagadougou, lui, s'intéresse à l'objet du même nom.

B) Le SIAO

Salon international de l'artisanat de Ouagadougou - (Ouagadougou = capitale du Burkina Faso).

C'est la deuxième expérience régionale d'exploitation économique des expressions traditionnelles que je voudrais vous citer. Il s'agit de la valorisation commerciale des productions artisanales.

Par cette manifestation biennale, dont la prochaine édition aura lieu en 1998, le Gouvernement du Burkina Faso a créé un véritable marché des oeuvres artisanales africaines : travail du textile et du tissage, travail du cuir, travail du bois et du bronze, travail de la statuaire et du masque, etc. Une intense campagne d'information à travers l'Afrique et le monde amène à Ouagadougou tous les professionnels intéressés par le marché de l'artisanat, à la rencontre des échantillons des artisanats africains sélectionnés par chaque pays représenté. C'est une opportunité immense offerte aux créateurs de la tradition de tirer profit de la vente de leurs oeuvres.

Conclusion

J'ai choisi de vous exposer deux projets de dimension continentale africains, l'un le Marché de Arts du Spectacle Africain d'Abidjan (MASA) et l'autre, le Salon International de l'Artisanat de Ouagadougou, (SIAO) pour montrer la dimension économique de ces deux projets culturels de promotion des arts vivants, une part, et des productions artisanales d'autre part.

Les expressions musicales, chorégraphiques théâtrales et artisanales de la tradition constituent un gisement de richesses inépuisables en Afrique. Il faut certes collecter, archiver, protéger par des lois ces expressions issues de la tradition ainsi que leurs porteurs, mais il est urgent de promouvoir ces expressions au sein de nos sociétés en mutation rapide, de les amener à s'y référer et à s'y identifier. En le faisant, on contribue à développer des secteurs importants de la vie économique nationale. C'est ce que montrent les exemples du MASA et du SIAO.

Pour vous en rendre compte, je vous invite tous au MASA 99 et au SIAO 98.

THE EXPERIENCE OF THE AMERICAS

*by Mr. Ricardo Gomes Lima, Chief Research Department,
Coordinator of Folklore and Popular Culture, Rio de Janeiro*

When we think of the universe of folklore and its relationship with other stances of the Brazilian social reality, no matter how hard we may try, it is impossible to avoid the common place of saying that Brazil is a country of continental dimensions.

Brazil covers an area of over 8.5 million square kilometers. Originally, upon this immense territorial base, lived Indian groups of various ethnic origins. Discovered by the Portuguese in 1500, the land started to be colonized on an agricultural basis, which explains the arrival of African slaves, brought from various parts of that continent.

Since then, the country has attracted other peoples - the "last-to-arrive Brazilians": Germans, Italians, Spanish, Arabs, the Japanese, Koreans and various other groups made up especially of Europeans and Asians. Bearing particular cultural values, these groups ended up by integrating themselves to the country, thereby adding new habits to the Brazilian culture.

The coexistence of different ethnic sources has brought forth, with the passing of generations, the sharing of varied cultural elements, although, in a general way, the cultural dominance of the first group of settlers, the Portuguese, prevails. At the same time, it is possible to witness the assertion of specific local features, when we refer to cultural expressions, among which folklore is found.

Thus, the Brazilian folklore universe is inexhaustible. Each group, each social segment, each community is capable of creating its own symbols, of identifying itself with them and, through these symbols, communicating with the whole of the society. The songs and dances, the music and the theater plays, the rites and the feasts, the objects of material culture, the foods and drinks present themselves in a different fashion throughout the country, thus making any attempt at generalization a rash attitude.

How can we talk about a national folklore? By excluding the specific features of each genre and keeping only to what is generally found from North to South of the country? By listing and adding up everything we find under different conditions for observation?

Questions such as the above, albeit extremely relevant, seem to be outside the aims of this Forum. Within the scope of the so-called Brazilian folklore genres, we have opted for handicrafts to reflect upon the slated issue.

The Different Handicrafts and their Relations with the Market

In spite of providing a significant contribution to the country's economy, as the main financial support and complement for the family income of a sizable portion of the population, the handicraft activity in Brazil is part of the "informal sector" of the economy, there being no precise statistics on it.

According to the data contained in the Pluriannual Plan, 1996-1999, of the Brazilian Handicraft Program (PAB), by the Ministry of Industry, Trade and Tourism, "it is estimated that one million producers are directly involved, generating five indirect jobs, comprising a total of five million people in the various stages of production and marketing." That would correspond to approximately 5% of the Brazilian population. The same source estimates at US\$5 billion per year the value of the Brazilian handicraft production.

In spite of the lack of quantitative data, what happens throughout the country, both in the rural area and in the urban environment, is the profusion of handicrafts made of a wide variety of materials: from raw material, such as clay, vegetable fibers, wood, stone, leather, seashells, to industrial waste products such as plastic, rubber, cans, cloth and glass. Directly acquired from manufacturers, or through the middlemen who market them, mainly at fairs and village markets in small towns, and at stores in large urban centers, these objects are present in the daily routine of the Brazilians, as utility

items, especially within the lower income groups and as decorative objects within the middle and upper levels of the society.

Added to the diversity of materials with which handicrafts are made and their intended use, we place the different contexts in which they are produced.

Lélia Gontijo Soares already pointed to the broad range of Brazilian handicrafts, in a document drawn up in 1983, for a meeting of handicrafts specialists, sponsored by the then National Folklore Institute (INF), currently the Folklore and Popular Culture Coordination/FUNARTE,

Referring to the various social and economic contexts of the country, Ms. Soares, a researcher and then director of INF, mentions the vast series of artifacts which, in an initial stance, are produced and absorbed by the same regional, neighboring population. We may cite, as examples, the votive figures of the northeastern hinterland or miracles, as they are also called, modeled in clay or carved in wood, deposited in shrines or churches as fulfillment of vows. They comprise depictions of the human figure, of parts of the body, of animal figurines. These kinds of religious handicrafts tend to disappear in the country, being replaced by photographs and by votive figures molded in wax.

Another example of these series of artifacts is the noteworthy figurehead - a fantastic figure used in the bows of the São Francisco river boats, common until mid-century, whose purpose was to scare away the bad water spirits, thereby protecting the vessels.

This figure, whose originals are currently found in museums as well as in private collections, have lately been made popular by craftsmen dedicated to catering to the tourist demand. Made especially into key rings and ashtrays, the figureheads are currently found in countless, varied shapes and dimensions at souvenir shops throughout the country, particularly at airports.

Votive figures and figureheads used in boats are part of a world in which the handicraft is basically absorbed by the group which produces it. This universe also includes objects linked to production techniques, such as agriculture, animal breeding, fishing, in addition to pots, pans, and various kitchen utensils.

In a second range - which actually interests us most in this Forum - we find objects made by individuals and communities, which are not geared to the group's domestic consumption but to the supplying of the outside demand. The buyer is not the neighboring user anymore, but rather, the tourism industry. Lélia Gontijo Soares sets the formal individualization of the production as the landmark of this second phase, contrasting it to the greater uniformity of the pieces, as found in the previous case.

The author also refers to a third traditional handicraft production range characterized by the extreme individualization of works which, already under the label of popular art, are sold to high income people in art galleries in large centers like Rio de Janeiro and São Paulo.

The Universe of Handicrafts: Different Views

Just as there are different types of handicrafts which are defined as to specific production and consumption contexts, there are also in Brazil different ways to approach this universe.

One of them, which we shall call romantic, sees handicrafts as the survival of cultural forms which, that used to be operational. According to the romantics, the current handicrafts should be understood as a residual originated in the past, thriving, most usually in the rural, poorest areas of the country which regarded as conservative and thus less liable to changes.

As a result, this angle brings forth the mystifying of the notion of handicrafts. The object is idealized as being 'authentic', 'pure', 'unique', a witness of a past, more noble reality. Hence, there would bring a need to preserve and protect it from extraneous influences, as the melancholy role of

survival doomed to extinction or the redeeming role of representing the 'roots' of the Brazilian people is assigned to it.

Such view contains a criticism to the modern world, ruled by machines and automation. Typical of this world are the mass-made, manufactured objects to which we contrast the hand-made ones.

The sacred condition that the romantic view often assigns to the handicrafts turns them into icons. This view imposes the risks of undervaluing its creator, the human being, by highlighting the material object. In the struggle for keeping the crafts "pure" and "authentic", the observation and a possible change on the often subhuman living conditions of their makers are frequently left behind.

A second approach, very common in Brazil, especially used by governmental and non-governmental institutions dedicated to the assistance of low-income communities is the one which we call economic.

This approach aims at developing and strengthening the potential of the Brazilian handicraft sector, by implementing projects, actions and activities which may increase the quality level and enhance the production process, the marketing system, and the improvement of living conditions of the human resources involved. According to those who advocate it, the handicraft segment is one of the productive sectors with the greatest capacity of mustering and absorbing labor. It comprises a potential work market, especially in regions of the country in which jobs are not yet available in sufficient number to absorb the available labor force.

Those who favor interference in the handicraft sector argue that this segment:

- generates jobs using less capital than the formal sector;
- uses manpower that would not otherwise be used by modern industries and that would be doomed to unemployment;
- use Brazilian raw materials;
- requires little investment in facilities, machines and equipment;
- encourages population settling;
- favors the domestic market;
- comprises an important support element to tourism;
- allows for the export of large part of production;
- determines cultural identity value.

This view, although excessively emphasized nowadays, could already be noticed in previous decades, as mentioned by Heye and Mello & Souza (1987), when referring to the growing interest in handicrafts which arose in Brazil in the 1970's. The writers attributed their appraisal to the increase in tourism and, consequently, in the consumption of "typical" products, in addition to the crisis in the national economy, which prompted the search for new forms of labor usage and resource generation. The same researchers related this product to the formulation of institutional programs geared to the increase in handicraft production and training of specialized labor:

"The increase in production was reached with the introduction of new forms of work, generally the parts being produced in series, in specially equipped sites. The professional training was frequently given by experts outside the general community, who did not know the latter's handicraft traditions and all knowledge bestowed on them through previous generations."

What has been seen in Brazil throughout the years is that a great number of incentive programs for handicraft production has failed, as they were based on exclusively economic factors, "even leaving in their wake a path of destruction of previously prevailing cultural systems and greater impoverishment in all senses" (Frota, 1996).

The complete development of a nation depends on the respect for its cultural identity, as stated Amadou Mathar M'Dow, transcribed by Gontijo Soares on the previously mentioned document:

"It is recognized nowadays that the concept of cultural identity is the very basis of development, but this is something that has been fully accepted by the international community only recently. It is only in the past few years that our manner of viewing development and its pathways and goals has acquired scope and perspective. Equated initially with mere linear growth of the economy - essential as it undoubtedly is, since increased material production makes a decisive contribution to the improvement of living conditions of people, if output is equitably distributed - development has now come to be envisaged as an infinitely more complex, all-encompassing and multi-dimensional process, which can be effective only if based on the will of each society to make its own way and properly express the identity that characterizes it."

Thus, projects which aim to be successful in dealing with the realm of handicrafts should not close their eyes to the cultural identity issue, even more so because they themselves comprise the certainty of the good marketing of handicrafts directed to higher income customers. Reality has shown that the first world market, a potential buyer of Brazilian handicrafts has an expectation for quality and authenticity when buying cultural products from other countries, which the organizing of production, on a supposedly rational basis, threatens to destroy.

"If local handicrafts do not keep the natural and spontaneous rhythm of their bloom, - which does not mean they should not change their technology, if desired - the same markets will lose interest in the short run . Consequently, craftsmen will be even more pressed: they will have to either quit or transform their traditional work, refusing to master any other cultural technology that could make their survival possible."

Handicrafts are a permanent source of tourist attraction thanks to the identity which they keep with their original cultural roots. The cultural identity is the inherent value of traditional handicrafts. The sale of handicrafts to national and overseas tourists may generate a sizable revenue together with a national resource acquisition policy if, and only if, its status as cultural product is kept.

On account of its cultural roots, the Brazilian handicraft activity has its own, well defined features, and is an original, popular and artistic manifestation, being able to compete in the international market with products from other countries.

For this to happen, the official support action towards the production agent is paramount. This support may not have interferences which disorganize the concept and production of objects which, above all, stem from peculiar and specific world views.

This is what the Folklore and Popular Culture Coordination, an agency of the Ministry of Culture of Brazil, has proposed upon developing the Popular Artist Hall project.

The Popular Artist Hall, an Experiment

The Popular Artist Hall in Rio de Janeiro is dedicated to the diffusion of popular arts and crafts. It exhibits objects which, on account of either their symbolic significance, manufacturing technology, or the prime materials employed, are witnesses of the life and labor of individuals and specific groups. In this Hall, artists/craftsmen display their works and demonstrate, in small workshops, the manufacturing techniques. Moreover, they decide freely on the sale of what they produce and display as well as the price of the objects and take full benefit of the income accrued with the sales.

All exhibitions are preceded by a research aiming at giving an ethnographic treatment to the objects shown, placing their producers in the social and cultural environment in which they act, as well as showing the relations which they keep with groups in which they are found. Although many objects, especially those which usually receive an "artistic" label, may be shown on account of their esthetic or technical qualities, the Hall's primary objective is to show the cultural identity aspect found in the

objects and their creators. Next, it means to foster specially for artists and craftsmen with little experience in marketing, either directly or through middlemen, bringing them together with the spectator and the purchasing public.

The project was started in 1983, having carried out, until today, 69 exhibitions at the Folklore and Popular Culture Coordination, named, until 1990, The National Folklore Institute/Ministry of Culture. Most of the exhibitions are documented in catalogs.

Conceived and installed as from the ascertaining of the need to renew the supporting mechanisms to the diffusion and marketing of popular art and crafts in large urban centers, like Rio de Janeiro, the project has had a staff comprising coordinators, educators, museologists, photographers and visual programmers.

The experience shows that, in addition to the financial result of sales during the exhibition period, the interaction with visitors and the divulgation, on a larger scale, of the artist's work brings forth lasting benefits to the participants. These benefits may come as invitations to display his/her work in other places or to give technical demonstrations and lectures in schools and other institutions or as orders from stores. These activities contribute to a clearer perception, by the craftsman/popular artist, of the value of his work.

The project has also warned the artist/craftsmen about the realities of their potential market. A good example of that is the case of José Casemiro da Silva, considered the leather master in Juazeiro do Norte, a small town in the Northeast of Brazil. Having been invited to exhibit his work in the Hall, he brought with him a very beautiful saddle. On looking at the cars and buses going up and down the street, where the Hall is located, and seeing no horses, he shook his head and said: "Yeah, nobody is going to be buying this here, no way!" And he was right. Mr. Silva's experience was transmitted directly to his peers, by himself. That convinced them that their market for saddles and accouterments is regional and should not be directed to big cities (for a more in-depth discussion of local, regional and metropolitan markets, see Heye and Mello & Souza, 1987).

Thus, the project plays a direct role in the field of popular art /Crafts, by articulating production groups or individuals, the visiting Hall public and, more specifically, buyers and collectors, through shows with an average duration of one month. The project aims at achieving a nationwide coverage, by hosting artists/craftsmen from several units of the Federation. Private and Governmental cultural agencies also have an important role in promoting greater integration by sharing among themselves, the necessary tasks to a successful performance at each show. It is important to point out the joint effort with local craftsmen bodies, such as cooperatives and guilds. In addition, the Hall seeks to multiply similar initiatives in other cities.

The ethnographic character of the exhibitions gives the public the chance to not only enjoy and acquire objects, but also, and mainly, come to know very unfamiliar or unknown realities. The publication and the direct contact between craftsmen/artists and the public allows for the former's effective participation in the process of appreciating and marketing their work as well as expanding their market.

Parallel to the research directed towards the organization of shows, the work requires systematic reflection on the theme and the knowledge of other projects directed to popular arts/crafts in Brazil and overseas.

This work proposal joins the fields of Anthropology and Museology in activities which have, as an immediate purpose, the divulgance and valorization of the work of artists/craftsmen in ethnographically-oriented shows. In this sense, they come close to Applied Anthropology, as the knowledge is promptly linked to the operation. This perspective gives the Hall its dynamic character, as it requires that specialized know-how and social intervention mechanisms and procedures be permanently renewed.

The joint work of anthropologists, museum specialists and photographers establishes opportunities for the discussion of the simultaneous use of several languages - verbal, museum -

oriented, photographic. That enlarges the chances the visitors have of "reading" the objects exhibited. The choice of participants is done by the project team based on requests, forwarded by artists/craftsmen and local agencies to the institutions taking into account variety of themes, the raw materials, the techniques, and the benefits it brings at the social level.

As to the quality of the works, the selection is guided by an ethnographic criterion, according to which the choice between 'beautiful' and 'correct' stems from the evaluation of the production and user groups, this evaluation may deviate very much from the criteria applied to 'scholarly' art or our own subjective criteria. These principles give the Hall the possibility of drawing public attention to the diversity of technical and esthetic solutions elected by distinct social groups. Moreover, the popular artists/craftsmen approach a wide range of world views extending much farther than the 'past/rural/nostalgia' stereotypes frequently linked to the folklore and popular art concepts. The life stories and the social background of the participants also vary: we have, among the artists/craftsmen who have exhibited their work at the Hall, stories of migration from the country to the city, with or without a return to the rural environment, as well as the reverse way, leading from the cities to the hinterland; we may find, in this last group, representatives from the local elite as well as peasants who are currently part of the artistic universe of Rio de Janeiro.

The researching and the holding of the exhibitions raise a series of problems leading to reflection. Each show makes us revisit questions like, "who is the craftsman and/or the popular artist?" and "what is handicraft and/or popular art in Brazil today?". The relevance of these questions is not limited to the simple classification or to a mere abstract definition of terms, but has to do with the participation of Folklore and Popular Culture Coordination and its position in the midst of State cultural policies.

Conclusion

Seen as a potential income generator, able to alleviate the effects of unemployment or to supplement the low income of rural and urban worker families, handicrafts have been the target of performances whose emphasis are the rationalization of production and the widening of outflow channels.

Obviously, crafts/popular art may be seen under this prism and the approach of economic aspects may undoubtedly contribute to the solution of the question. However, we advocate a perspective which tries to understand crafts/popular art as a cultural phenomenon. Involved in this arena are not only the low income producers and the urban, middle-class public attracted by "rustic", "exotic", "handmade" objects, but also groups of different social and cultural backgrounds. The artists and craftsmen, in turn, produce by responding to diversified and complex motivation such as the expectation for a market and the improvement of living conditions, among others.

We are not overvaluing the cultural component of the production of handicrafts at the expense of its economic aspect or any other social factor. Actually, we should underestimate the absolutism of economic factors which downgrade the cultural core of crafts.

By giving the Popular Artist Hall as an example, we believe we have brought to this Forum elements which allow us to reflect and open up safe paths to the actual development of handicrafts and of the folklore universe of our countries.

THE EXPERIENCE OF ASIA AND THE PACIFIC REGION

*by Mr. Hong Yongping, Deputy Director and Associate Professor,
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Rationally Exploring the Treasures of Traditional Culture: Report on China's Economic Exploitation of Folklore

China is a multi-nationality country with 56 nationalities, among whom customs and cultures differ. The folk culture as the main body of each ethnic culture is generally known as the ethnic and folk culture. The most basic and common form of the ethnic and folk culture is the folklore.

Folklore is a kind of culture based on tradition. It is born in the daily life of the broad masses of people and is produced as a result of their daily needs. It imitates and depicts their daily life and reflects the values and aesthetic demands of the common people in a ethnic group, a region or even a village. It originates from daily life, also changes as the latter does, and vanishes to some extent with the disappearance of some forms of daily life. With the passage of time, folklore gradually forms and becomes folklore tradition, present in the national languages, works of folk literature, folk music and dance, fairy tales and legends, properties and customs, folk arts and crafts, architecture and decorations of civilian houses, even national costumes and personal adornments and local delicacies and cuisine. For an ethnic group, folklore is its identity; for a country, it is the root of the national cultural tradition, national traits as well as national civilization; for all mankind, it is the rich and varied but non-regenerative resources as well as the incomparably valuable heritage of human society. How to properly preserve and exploit the resources of folklore has indeed become an important and extremely urgent issue confronting all mankind.

The Chinese Government attaches great importance to the protection and utilization of cultural heritage. Our country's first cultural law, The Law of the People's Republic of China on the Protection of Cultural Relics promulgated in 1982, is a special law governing historical and cultural heritage, symbolizing that the protection of cultural heritage has got onto the right track of legality. The Law on the Protection of Cultural Relics has provided some tangible expressions of an important and historical value, such as folklore architecture and folk arts and crafts, with direct and powerful legal protection.

Our general and specific policies on the protection of cultural relics are the norms and standards to correctly handle the relationship between the preservation and protection of cultural heritage on one side and their exploitation and utilization on the other. These policies are also of equal importance regarding the protection of folklore with intangible cultural heritage as the dominant factor. As to these policies, the following three points are the most important:

1. The government shall act as the main body in the preservation work while the general public shall be encouraged to share the responsibility. This principle defines the main responsibility and leading position of the government in the protection of cultural relics.
2. "Using the protection as priority while putting the rescue work on top of the list" is the guiding principle. This principle clearly defines the management of cultural relics with protection as the core and at the same time the rescue work of cultural heritage as the most pressing task. So far as intangible cultural heritage are concerned, the idea of "putting the rescue work on top of the list" is of more important significance, because with the socio-economic changes, intangible cultural heritage, if not rescued in time, will die out much faster than tangible ones.
3. It is the idea of "effective protection with reasonable use". It is also of the utmost importance to handle well the relationship between protection and utilization regarding the preservation of intangible cultural heritage. Utilization on the basis of protection may, in a sense, result in more effective protection. It has been proved to be an effective method of preservation by making use of cultural heritage to engage in educational training and develop artistic and scientific research. Since our country entered a new stage of carrying out the reform and open policy in the 1980s, the commercial exploitation and use of traditional folklore and ethnic and folk art has in varying degrees brought funds, been a driving force and brought about successors, so far as the preservation of intangible cultural heritage is concerned. This commercial exploitation and utilization are first made in the exploitation of

traditional skills and works of arts and crafts and then in the restoration of various national traditional activities, such as temple fairs, flower fairs, etc. as well as the construction of many models of "ethnic culture (folklore) villages". Of course, mishandling of exploitation and utilization will also cause destruction. This is exactly what we need to avoid by correctly handling the relationship between protection and utilization.

China's well-known painter and educator of fine arts Liu Haisu once said, "Lack of transport facilities and much difference in languages are unfavorable factors of cultural exchanges. They may perhaps become favorable factors in the preservation of ancient traditions and formation of special artistic qualities." The development at top speed of modern economy and expansion of social contacts have to a certain degree destroyed the foundation of existence of traditional culture, so the rescue of cultural heritage has become an urgent task that brooks no delay. In this respect, China should make and has already made great contributions to humanity. Here, I would like to avail myself of this opportunity to brief you on a giant project by China to protect traditional culture, namely The Ten Collections of the Chinese National Folk Literature and Arts. The ten collections include: Collection of Chinese Folk Songs, Collection of Traditional Chinese Operas' Music, Collection of Chinese National and Folk Instrumental Music, Collection of the Chinese Quyi Music, Collection of Traditional Chinese Operas, Collection of Chinese Folk Dance, Collection of Chinese Folk Tales, Collection of Chinese Ballads, Collection of Chinese Proverbs and Annals of Chinese Quyi. The Ten Collections are made up of volumes for each of the Provinces. Each Province, Autonomous Region or Municipality directly under the central government has 10 volumes and altogether 300 volumes (no Taiwan volumes for the time being). Some of these volumes comprise two books (book 1 and book 2). So altogether there will be 450 books with a wordage of nearly 500 millions. The compilation of this set of Collections and Annals started in 1979 under the joint sponsorship of the Ministry of Culture, the State Nationalities Affairs Commission and all related societies for the study of folk literature and art. 50,000 people including cultural workers of China's 56 nationalities have taken part in the work from general survey, in-depth exploration and systematic sorting of the material in the grass-roots level to final compilation and publication. Approximately 100 million yuan RMB (approximately US\$12,200,000) have been invested, of which around 8 million yuan RMB (approximately US\$980,000) are from the Central Government. To date, 102 volumes or 142 books have been published, and the entire work is planned to be completed in the year 2003. The Collections and Annals contain all the fruits of national folk literature and art in the above-mentioned 10 fields, which are recorded, compiled and published in the forms of words, notations, illustrations and sound recordings. In the meantime, many of the source material (written notes, sound and video recordings) being used as elementary material have been exploited and preserved by rescue measure. What the Collection and Annals have collected includes almost everything in the field of folklore except arts and crafts, architecture and decorations, local delicacies and cuisine. In the field of ethnic and folk culture, such a project, having so wide-ranging contents, employing so tremendous amount of manpower and costing so huge sum of money, is both unprecedented and rare at home and abroad, and is known as "the Great Wall of national traditional culture. "

II

As mentioned above, traditional exploitation and utilization of folklore is moreover an effective method of preservation and protection. As viewed from the angle of economics, folklore is also a kind of social resources, very rich in potentialities for economic exploitation. Many in the economic circles think that contemporary economic competition is focused on high technology and as well on high cultural content. The exploitation of economic value of folklore is without doubt one of the important aspects of economic growth in modern society.

The essence of economic value of folklore lies in its unique socio-historical value. Mass participation is the basic feature of folklore and its richness and diversity are shown where its glamour lies. By grasping these features and making good use of the distinctive glamour of folklore, we can make folklore become the inexhaustible resource in economic exploitation.

The richness of folklore is self-evident. Take the national folk dances in Yunnan Province as an example, dances that merely imitate animals are those of fish, peacock, dragon, butterfly, elephant, tiger, white crane, lion, zhima (horses etc. made of paper and burned as offerings to the dead),

monkey, (playing with) cow, (respect for) sheep, egret, roc, and so on. Stage properties for the dances include drum, sword, fan, shield, handkerchief, towel, oxtail etc. and altogether more than 40 different kinds. Drum dance alone has a great variety, such as the Dai nationality's dances of big drum, water drum, xiangjiao drum (a drum on a pedestal shaped like an elephant's leg) and bee drum; the Bai nationality's dance of octagonal drum; the Zhuang nationality's dance of bronze drum; the Hani nationality's dances of big drum, mang (busy) drum; yiche (carriage used by the Yis) drum; the Yi nationality's dances of flower drum, four-tube drum; the Va nationality's dances of wooden drum, bamboo drum, and so on. According to research, in Henan Province which is located in the Central Plains of China, there are as many as over 240 kinds of ethnic and folk dances, very varied and colorful, including over 10 kinds of dances of the lantern such as wei (enclosure) lantern, ground lantern, dragon lantern, nine-lotus lantern, cloud lantern; approximately 20 kinds of dances of the drum as swinging drum, battle drum, waist drum, flower drum, and also fan dance, umbrella dance, dragon dance and so on and so forth.

In the final analysis, the property of diversity is precisely that of difference, and is the prerequisite for different cultures to assimilate, complement and depend on each other. Different regions of a nation, different nationalities of a country and different areas and countries of the world rely exactly on the property of difference to prove their identity and existence. Today when globalization appear in many spheres of our world, this piece of the Pure Land, having been preserved on account of individual differences of various cultural units among the pluralistic cultures has even more become the only place deeply cherished by people. What is most fascinating of folklore is its characteristic full of distinctive individuality and the colorful world it has formed. People who travel as tourists to all parts of the world are after nothing but the uncanny workmanship and ever-changing phenomena of Nature, or the skillful craftsmanship and artistic conception of the personified Nature, or the enchantment, loveliness and radiant splendor of local conditions and customs. According to the statistics of the World Travel Organization, tourism has sustained and sped up its growth since 1990s and demonstrates that it is the most vigorous sector of the economy. As viewed from the fact that the Middle East region has the highest growth rate (12%) in tourist earnings, the role played by culture especially folklore cannot be underestimated. China's tourist industry has readjusted its strategy of development since 1980s and achieved great success by taking national style, folk customs and local conditions as the focal point of development of tourist resources. According to China Statistic Yearbook, the number of tourists in 1980 reached 5,702,500 and foreign exchange earnings amounted to 617 million US dollars; and in 1990 the number increased to 27,461,800 and foreign exchange earnings to 2,218 million US dollars, then in 1995 the National Tourism Administration launched the activities of "'95 Tourist Year of Folk Customs" by concentrating on the tourist hot spots and in 1996 foreign exchange earnings amounted to 10.2 billion US dollars, ranking ninth in the world.

Broad mass participation is the basis of economic potentialities of folklore. For example, a temple fair was originally a kind of mass sports activities to worship and offer sacrifices to temple gods, later has become a sort of surroundings relatively centralized with various folklore activities, and some economic factors have gradually been infiltrated too. The difference in economic results is quite obvious, and lies in whether there are activities of temple fairs or not. For instance, the Laojun Temple in Jiasong Township of Zhenping County, Henan Province collected 6,303 yuan RMB (US\$770) of worshippers' donations in the whole year of 1987, however, in 1988 a temple fair was held for three days and collected nearly 10,000 yuan RMB (US\$1,220). In addition, catering services and commodity trading activities in coordination with the temple fair had a lot of extra earnings. Visitors to the three-day fair totaled about 100,000, and the volume of sales of cooked food reached more than 20,000 kilos. This example of a rather traditional flavor can prove that folklore activities possess fairly large economic potentialities. For the past several years, in cases of promotional sales of "culture as the stage, economy as the actor", folklore is always one of the indispensable supporting roles. Whether it is "Dalian Clothing Festival", "Qingdao Beer Festival", "Beijing Daxing Watermelon Festival" or "Hainan Coconut Festival", all are like that without exception, not to mention various new and developing activities during festivals and celebrations where culture is playing the leading role more and more often, such as "Harbin Ice and Snow Festival", "Yueyang Dragon Boat Festival of Hunan Province", "Weifang Kite Festival of Shandong Province" and "Merry-making Festival of Guangdong Province", etc. At all these festivals, activities related to ethnic and folk culture and art were what fascinated people most. "The Merry-making Festival of Guangdong Province" in 1988 attracted 350,000 tourists, Chinese and foreigners.

III

Traditionally folklore of our nationalities bears a character of public good. Firstly, it originates from people's daily life, its purpose is to help people relax, amuse themselves and to make their wishes, but not for commercial profit. Secondly, our country has the tradition to attach more importance to agriculture than commerce, even today, some of our minority nationalities, like some Tibetan groups, regard it a shame if their goal of activities is to make money.

There are mainly three occasions of traditional folklore activities: 1. Patriarchal clan gatherings, such as marriages, funeral rites, birthday ceremonies and other important events of the patriarchal clans. 2. Religious rites, such as receiving God and warding away evil spirits, worshipping Buddhism and ancestors rituals, etc. 3. Folklore festivals, for example, Spring Festival, Mid-Autumn Festival of Han nationality, Xuedun Festival of Tibetans, Water Splashing Festival of Dais, Torch Festival of Yi nationality, etc. In connection with this, the traditional folklore activities and their economic support are fundamentally divided into two patterns: First, the individual is the basic unit, it raises funds by itself and makes fun itself, for instance, flying kites, making paper-cuts of window decoration, making Zongzi (a pyramid-shaped dumpling of glutinous rice wrapped in bamboo or reed leaves, eaten during the Dragon Boat Festival), pasting up Spring Festival couplets, doing knitting and embroidery, etc. Second, it is completely organized by people, it raises funds from public and gets the public to be involved, for example, tournaments, village theatrical performances, temple fairs and other festivals. In the latter pattern, in case the time, the occasion, the size and the necessity are considered appropriate, the Government is also involved in the organizing work and giving financial support.

Owing to the strong influence of tradition, folklore in our country still remains fundamentally to be the type of public welfare, even when the country has already embarked on a socialist market economy. But, by reviewing the past, the economic value of some types of folklore has been exploited in various degrees. Let's compare the two patterns of activities and their economic support which as mentioned above, the exploitation degree of the first pattern is much higher than that of the second. For instance, there are always people down the history who are engaged in such trades as making and selling New Year pictures, Spring Festival scrolls, paper-cuts, clay figurines, dough figurines, kites, gold and silver ornaments, knitting and embroidery goods, and even others like making paper banknote burned for the dead, grave-clothes, firecrackers, joss sticks and candles, local delicacies, etc. Since we carried out the reform and open policy with economic construction as the center from early 1980s, this pattern of folklore has developed and the traders benefited ahead of all the others.

In the new period of development, the economic value of folklore is more and more recognized by the people. More manpower, investments and materials are pooled in gradually and it presents a characteristic of diversity in management and forms.

In respect of management, it changes from mainly individual exploitation to individual, collective and state exploitation concurrently. Individual exploitation remains mainly to be centered in arts and crafts, small commodities, food, unique skill performances, etc. There are some wealthy individuals, who have opened folklore museums. While displaying and selling folklore products, they also invite craftsmen to make and show their products on the spot, and develop their business in combination with tourism. The Wanbo Culture City situated in Nandaihe, beautiful summer resort of Hebei Province, belongs to this category. The priority of state exploitation is mainly large scale folklore festivals and grand celebrations such as the Memorial Ceremony for the Mausoleum Xuanyuan Huangdi sponsored by Shanxi Province, and China Folk Arts Festivals since 1989, and the like.

Through exploration and management for a period of time, the folklore activities either sponsored by the individual, the collective or the state have accumulated rich experiences and the economic returns are steadily rising. Since Beijing started to resume the Ditan (Altar of Earth) Temple Fair for celebrating the Spring Festival in 1985, it has been followed by the Longtan Temple Fair, Baiyun Temple Fair and Grand View Garden "Dream of the Red Mansions" Temple Fair, but all these Temple Fairs lost money without exception in the earlier years. Now more and more Temple Fairs, large and small, have appeared, each has found ways to make money, the economic benefits are generally good. The Longtan Temple Fair, the largest in size at present, received a certain amount of Government financial support in 1986 and 1987, but only several tens of thousand people visited because its activities were not so attractive. Since 1988, a kind of mechanism called "official

supervision and operation by the people" was gradually introduced which means the organizers assume sole responsibility for the profits or losses and participating units share the risks together, it has gradually formed its own folklore characteristics, the number of visitors has shot up to a million, 1.2 million people in 1997, the income from the admission tickets only amounted to 6 million yuan RMB (approximately US\$740,000).

There are more and more ways used to exploit folklore and varieties of innovations added to the activities. It becomes very common that folk songs and dances are performed in hotels and restaurants to entertain and solicit customers. It is already very popular that flower fairs, lantern fairs, Yangge dance (a popular rural folk dance), folk songs and dances appear simultaneously at commodity fairs to promote trade. Ethnic Culture Villages, Folklore Gardens, Nationality Parks in Beijing, Shenzhen, Guizhou and Yunnan Provinces together with World Window and World Park with folklore performances have become very thriving and profitable business. Recently in Beijing, there appears a kind of "Handicrafts Buffet Restaurant" which requires customers to join and make fun by doing crafts. The restaurant provides the customers with raw materials, such as clay, unbleached and undyed cloth, paper, flowers and tools and lets the customers make by their own hands this kind of crafts: potteries, wax printings, artificial flowers, flower arrangements, colored drawings, clay sculptures, and so on. The customers are satisfied because of their participation in person and the organizers make profit from it.

In short, the economic potential of folklore exploitation has already shown good momentum in its development.

IV

Of course, in the process of economic exploitation of folklore, in dealing with the relationship between protection and exploitation and between protection of folk culture heritages and economic construction, we are still faced with problems and contradictions, some hard to solve. There are five aspects of problems which should be solved at the moment.

1. To speed up the process of legalization. The two important statutes: "Regulations on the Preservation of Ethnic and Folk Cultural Traditions of the People's Republic of China" and "Regulations on the Protection of Folk Literature and Art Copyright of the People's Republic of China" were drafted and proofed since 1985 up to now, they are still in the stage of soliciting opinions. The latter Regulations won high appraisal in January 1996 from WIPO that had been asked for criticisms. But both Regulations have not been promulgated and put into effect owing to different reasons. If we have such regulations like the above two which have clear limits for application and full legal effect in respect of folklore preservation and exploitation, it will undoubtedly help us to do the work better.

2. To further define the main department of administrative jurisdiction. There are so many departments related to folklore, such as those of culture, tourism, gardens and parks, religion, commerce, physical culture, public health, public security and people's Associations of Literature and art and some scientific research institutions, all of which are involved to varying degrees in the economic exploitation of folklore as the main administrative department needs to be defined, the contradiction between protection and exploitation can not be effectively solved by coordinated and joint efforts of the departments concerned. The related departments are prompted by their respective interests and are not liable to consider from a long-term point of view the problem of preserving folklore resources. Such being the case, the economic exploitation of folklore on the whole still remains in a spontaneous and semi-spontaneous state. An obvious example is that there is still no department at the moment to analyze and assess matters relating to the scope of the trade, the employed, input and output as well as the methods and results of economic operation of different types of folklore, not to speak of carrying out reasonable exploitation and utilization step by step in a planned way and with protective measures.

3. To tap new financial resources in order to solve the basic need of funds. Owing to lack of adequate financial support, many important folklore resources can not be properly protected. With regard to the above-mentioned the "The Ten Collections the Chinese National Folk Culture", due to shortage of funds, necessary conditions for protection cannot be guaranteed, a great number of basic materials have again been scattered among the people or have become moth-eaten and mildewy, thus being gradually reduced to waste. About 150,000 reels of audio-video tapes are in danger of being

demagnetized. In the past, people's cultural organizations or government departments in charge were often not the chief beneficiary of folklore or folklore-related activities, therefore, only a small amount of money earned could be used for preservation, protection and development of folklore. This situation should be changed. When the country is not rich enough and unable to put more money to the use of protection of folklore, it seems advisable that a proper ratio of the income mainly from the folklore activities may be drawn to set up a folklore protection and development fund.

4. To strengthen the management of cultural resources to prevent infringement to folklore. Some organizations and individuals have little awareness to preserve cultural resources and some even forget what is right at the sight of profit, they engage in improper exploitation of folklore, and thus play a destructive role with respect to folklore. In some places, some people have pop songs and karaoke songs to be recorded on audio-video tapes of source materials; some sell or transfer the possession of the basic materials of the Ten Collections and Annals just for a pittance of profit; some overseas people try every means fair or foul to gain by cheating the basic materials of the Ten Collections and Annals for seeking exorbitant profits, thus infringing the copyright and other rights of folklore. In certain places, some economic bodies lure away by higher pay a great many performers from professional folk song and dance ensembles, such kind of exploitation—the method of "killing the hen to get the eggs"—greatly affects the work of collection and collation of folk arts. Some performances by incompetent people have also reduced many valuable folklore treasures depreciatory. Some substandard products passed off as good ones have damaged the reputation of genuine excellent folk arts and crafts. Some feudal superstition activities under the guise of folklore could not carry forward but on the contrary corrode and destroy the national cultural tradition. To solve this problem, it is necessary to strengthen the publicity of preserving cultural resources on the one hand, and to perfect relevant policies, adopt effective measures and further enhance the management on the other.

5. To carry out appraisal work of the important and valuable heritage of folklore. The World Commission on Culture and Development in its report *Our Creative Diversity* pointed out that it is a universal problem that the protection of intangible cultural heritage lags behind that of tangible one. However, "It is both physically and economically impossible to preserve all the vestiges of the past. And dare we even attempt to do so when the money and energy may be better spent helping people meet basic needs?"(page 177) The contradiction between the rich folklore heritage in our country and its not too strong comprehensive national power as a developing country is outstanding, and it is even more so if China is compared with other countries. Perhaps it is most sensible to discriminate and appraise folklore by pooling together some efforts and to carry out effective protection and reasonable utilization in order of priority, then step by step, in a planned way and in an orderly arrangement. In line with the "Guidelines for the Establishment of a Living Human Treasures" of UNESCO and by making reference to experiences of some other countries, we are now doing preparatory work in this respect.

Folklore is not only the national property of its birth place, but also the valuable wealth of all mankind. With the rapid changes of modern society, it is disappearing in great quantity, but it is a good fortune in the midst of bad ones that this situation has aroused serious attention of the international community. As a member state of the UNESCO and WIPO, Chinese Government greatly praises the two organizations for their efforts in this field and has made a positive response to the series of demands raised by them. We have achieved great success too. While we keep our promise to the international community, we also expect that the latter will further strengthen their cooperation and take a special interest in and render support to this ancient Oriental country which has a civilization of 5,000 years with one quarter of world population and possesses numerous tangible and intangible cultural heritage.

***ECONOMIC EXPLOITATION OF EXPRESSIONS OF FOLKLORE:
THE EUROPEAN EXPERIENCE***

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SOME INTRODUCTORY REMARKS

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

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

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

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

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

As is well known, the need for protection of expressions of folklore emerged in developing countries, in particular in Africa. As is mentioned in paragraph 3 of the introductory observations to the Model Provisions mentioned above: "In the industrialized countries, expressions of folklore are generally considered to belong to the public domain. This approach explains why, at least so far, industrialized countries generally did not establish a legal protection of the manifold national or other community interest related to the utilization of folklore."

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

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

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

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

It should be mentioned in this context that another Directive within the European Community may offer a kind of protection also for expressions of folklore, namely the Council Directive 93/98 of October 1993 harmonizing the term of protection of copyright and certain related rights, which is now implemented by the member States of the European Community and of the European Economic Area. Article 4 of that Directive provides: "Any person who, after the expiration of copyright protection, for the first time lawfully publishes or lawfully communicates to the public a previously unpublished work, shall benefit from a protection equivalent to the economic rights of the author. The term of protection of such rights shall be 25 years from the time when the work was first lawfully published or lawfully communicated to the public." This provision may apply, for instance, in the case of unprotected anonymous works which could qualify as expressions of folklore, and the first publisher of such works would enjoy an economic copyright for a term of 25 years.

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

Speaking about the European Community member States, there is a further Directive which may be of some relevance in this context, namely the so-called Data Base Directive (Directive 96/9/EC of the European Parliament and of the Council, of March 1996, on the legal protection of data bases). Under that Directive "database shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means." Protection under the Directive applies also to non-electronic data bases. Consequently, data bases consisting of expressions of folklore may well fall within the ambit of that Directive (which has to be

implemented by the member States by January 1, 1998). The Directive provides for protection in two respects. One operates for the benefit of the author of the base who through the selection or arrangement of the contents of the base has exercised an intellectual creation in respect of the base. The other one applies to the maker of the data base who has made a qualitative or quantitative investment in the base. The rights in the base for those two categories include, generally speaking, the traditional rights under copyright law. Those provisions apply to data bases regardless of what the individual parts consist of, for instance also to bases of expressions of folklore. The so-called Data Base Treaty which is presently under consideration in the context of WIPO incorporates the same main ideas as the Data Base Directive.

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

Folklore serves essentially cultural and social values. It should be recognized, however, that folklore, in whatever form it appears, does not only serve such purposes. Like all other forms of intellectual expressions it also has an economic value in the sense that such expressions may be exploited, for an economic consideration, both directly in relation to the public and indirectly through its adaptation into other expressions, for instance music, textile designs, literary narrations, etc. The fact that folklore protection also has an economic aspect is recognized in, for instance, the Model Provisions. In, for instance, Article 10 of those Provisions, reference is made to the fees to be received in return for authorizations granted by the communities concerned or from the competent authority entrusted with the task of granting such authorizations.

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

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

FACTORS WHICH DETERMINE THE ECONOMIC IMPORTANCE OF COPYRIGHT-PROTECTED WORKS

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

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

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

The Basic Rights

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

The reproduction right is in a way the classical right under copyright law. This right is of primordial importance for the printed works and the one whose value risks to become undermined by unrestricted reproduction in the form of photocopying or other acts of so-called reprography. For other types of works, for instance musical and dramatic works, the right of public performance and broadcasting could be more important. For instance, it has recently been stated that for the music industry broadly speaking only about 30 per cent of the income results from the selling of records while the remaining 70 percent results from the exploitation of other rights.

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

Limitations on the Rights

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

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

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

Adaptation of Rights to New Technologies

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

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

Implementation and Enforcement

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

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

The Duration of the Rights

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

The International Coverage of the Rights

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

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

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

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

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

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

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

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

***FOURTH WORKING SESSION: INTERNATIONAL PROTECTION OF
EXPRESSIONS OF FOLKLORE***

Moderator: Weerawit Weeraworawit, Director of Technical and Planning Division, Department of Intellectual Property, Ministry of Commerce, Bangkok

Speakers: Noriko Aikawa, Chef de la Section du patrimoine immatériel, UNESCO, Paris

Marc Denhez, Barrister and Solicitor, Ottawa

Mihály Ficsor, Assistant Director General, WIPO, Geneva

Salah Abada, Chef, Section de la créativité et du droit d'auteur, Division de la créativité, des industries culturelles et du droit d'auteur, UNESCO, Paris

**L'ACTION DE L'UNESCO EN FAVEUR DE LA SAUVEGARDE ET DE LA
PROMOTION DE LA CULTURE TRADITIONNELLE ET POPULAIRE**

par Mme Noriko Aikawa, Chef de la Section du patrimoine immatériel, UNESCO, Paris

Le sens du terme "folklore" utilisé dans l'appellation du présent "forum", varie selon les langues. Certains parmi vous se rappelleront sans doute les discussions très vives à ce sujet juste avant l'adoption, en 1989, de la Recommandation sur la sauvegarde de la culture traditionnelle et populaire par la Conférence générale de l'UNESCO. En effet, il avait été décidé que, selon les langues, différents termes seraient utilisés dans le titre de la Recommandation. En anglais et en russe **Traditional culture and folklore**, en français et en espagnol **la culture traditionnelle et populaire**, en arabe et en russe **folklore** et en chinois **création populaire**. Nous nous souvenons de l'insistance des délégués des pays francophones pour que ne soit pas utilisé le terme folklore, qui, en français, revêt une légère connotation péjorative.

En outre **le folklore ou la culture populaire** a une signification différente d'un pays à l'autre ou d'une région à l'autre en fonction de la formation et des composantes de sa culture. Par exemple pour la plupart des pays d'Asie, d'Europe et les États arabes, la culture populaire se définit par opposition à la culture traditionnelle, voire à la culture savante. Tandis qu'en Afrique et en Amérique latine l'on ne fait pas de distinction entre culture populaire et culture traditionnelle.

La Recommandation de 1989 donne une définition de la culture traditionnelle et populaire comme suit :

"La culture traditionnelle et populaire est l'ensemble des créations émanant d'une communauté culturelle fondées sur la tradition, exprimées par un groupe ou par des individus et reconnues comme répondant aux attentes de la communauté en tant qu'expression de l'identité culturelle et sociale de celle-ci, les normes et les valeurs se transmettant oralement, par imitation ou par d'autres manières. Ses formes comprennent, entre autres, la langue, la littérature, la musique, la danse, les jeux, la mythologie, les rites, les coutumes, l'artisanat, l'architecture et d'autres arts".

Devant cette gamme étendue de manifestations culturelles, l'UNESCO a la volonté de concentrer ses programmes, à court et à moyen terme, sur les **langues, la tradition orale, les arts de représentation tels que la musique et la danse et les savoir-faire de l'artisanat**.

Quel est le rôle de la culture traditionnelle et populaire aujourd'hui ?

Tout d'abord ce patrimoine culturel constitue pour de nombreuses populations et notamment pour les minorités et les populations autochtones la source essentielle d'une identité profondément ancrée dans l'histoire. La philosophie, les valeurs, le code éthique et le mode de pensée véhiculés par les langues, les traditions orales et les différentes manifestations culturelles constituent les fondements de la vie communautaire.

En outre, dans le monde d'aujourd'hui où la mondialisation socio-économique et technique a favorisé la montée en puissance d'une globalisation culturelle, la revitalisation de la culture traditionnelle et populaire, spécifique à chaque communauté, pourrait garantir le maintien des cultures locales. Cela est indispensable pour perpétuer la **diversité culturelle** sur terre. Le maintien de cette diversité est en effet une condition sine qua non pour développer la stratégie du **pluri-culturalisme** qui pourrait être une des clefs pour **construire la paix dans le monde : la mission principale de l'UNESCO et des Nations Unies**.

Par ailleurs, la connaissance approfondie du fonctionnement des sociétés locales et des modes traditionnels de production est nécessaire pour adapter les **stratégies de développement** aux contextes socio-culturels. En outre, certaines expressions culturelles traditionnelles et populaires pourraient contribuer directement au développement économique et plus particulièrement les arts du spectacle ainsi que l'artisanat.

Enfin, la mémoire est un ressort essentiel de la créativité. La préservation et la promotion des cultures traditionnelles et populaires serviront à la recherche des **sources de créativité contemporaine**.

Quels sont les défis pour le programme de sauvegarde du patrimoine culturel immatériel ?

Comme l'a dit le philosophe malien "Lorsqu'un vieillard meurt en Afrique, c'est une bibliothèque entière qui brûle". L'expression traditionnelle et populaire est sauvegardée dans la mémoire des hommes. Celle-ci ne peut survivre que par la transmission de génération en génération ou grâce aux enregistrements sous forme tangible. Bref, la nature intangible du patrimoine immatériel le rend **vulnérable. Il est donc urgent d'agir**.

Le deuxième défi concerne les détenteurs des savoir-faire. Les détenteurs du patrimoine immatériel sont les seuls acteurs capables d'assurer la vraie survie des expressions traditionnelles et populaires. Si l'on veut que certains patrimoines immatériels survivent en dehors des musées et des archives, il faut inciter les détenteurs à continuer à exercer, pratiquer et progresser dans leur forme d'expression. Il est donc **urgent d'identifier les détenteurs du savoir** du patrimoine immatériel et de les mettre en valeur.

Le troisième défi sera d'être **ouvert aux nouvelles cultures** sans être enfermé dans un concept étroit d'authenticité. La culture est en évolution permanente. Grâce au progrès de la technique de la communication et des transports ont émergé **de nouvelles expressions culturelles métissées** qui deviendront à leur tour le patrimoine de l'avenir. L'on doit être attentif à cette évolution. Voici enfin le défi difficile. Il porte sur le **choix des cultures traditionnelles à préserver et à promouvoir**.

Quelle tradition préserver ? Qui va sélectionner ? L'on ne peut pas ou l'on ne doit pas s'efforcer de préserver toutes les cultures traditionnelles et populaires, car elles représentent un domaine immensément vaste. Nous rencontrons parfois des exemples malheureux de cultures traditionnelles qui vont à l'encontre du respect des droits de l'homme, de la démocratie ou de la justice. Cela montre clairement que nous ne devons pas chercher à préserver à tout prix toutes les cultures traditionnelles. Il est parfois nécessaire de faire une sélection. Il serait légitime que les populations directement concernées soient maîtres de cette sélection. Cependant, les populations concernées ne sont pas toujours suffisamment formées pour exercer cette responsabilité ou elles ne sont pas autorisées à le faire pour des raisons politiques ou socio-économiques.

Je voudrais maintenant vous parler du programme du patrimoine immatériel à l'UNESCO, tout d'abord vous en donner un bref historique.

Depuis sa création, l'UNESCO n'a cessé d'entreprendre un certain nombre d'activités relatives au patrimoine immatériel notamment dans le domaine des langues et plus particulièrement en Afrique. Il fallut pourtant attendre les années 80 pour que les États membres de l'UNESCO commencent à reconnaître la notion de "patrimoine culturel immatériel" et se mettent à reconnaître l'idée que ce patrimoine est en fait plus vulnérable que les monuments et les sites naturels.

Lorsqu'en 1984, l'UNESCO lança le programme sur le patrimoine immatériel, l'Organisation décida de l'étayer solidement par des études théoriques. Il fallut un certain nombre d'études pour définir le mot "patrimoine immatériel" et élaborer sa typologie. En 1989, la "Recommandation pour la sauvegarde des cultures traditionnelles et populaires" fut adoptée par la Conférence générale, au cours de sa 25e session.

Au début des années 90, les bouleversements vécus par de nombreux pays communistes transformèrent la situation politique et culturelle dans le monde. Différents groupes recherchant leur véritable identité culturelle en émergèrent. A présent, la question de la sauvegarde du patrimoine immatériel est devenue plus cruciale que jamais pour de nombreux États membres de l'UNESCO.

C'est alors que l'UNESCO ressentit l'urgence de redéfinir sa politique culturelle et de donner une nouvelle dimension à ses programmes. En 1992, elle réalisa une évaluation scientifique de toutes les activités entreprises au cours des deux décennies précédentes dans le domaine du patrimoine

immatériel et elle organisa, en 1993, une conférence internationale dans le but d'assigner aux programmes de nouveaux axes d'orientation. Cette conférence permit à l'UNESCO non seulement d'analyser les raisons pour lesquelles de nombreuses manifestations traditionnelles et populaires étaient menacées de disparition mais aussi de définir de nouvelles orientations de programme. La stratégie mise en oeuvre pour sauvegarder et préserver le patrimoine immatériel sera (a) de choisir **des méthodes de classification et des modalités d'action adaptées au contexte particulier de chaque pays** au lieu de lancer une action fédératrice et standardisée en tenant compte des résultats de l'évaluation scientifique de 1992, qui montrent combien les modèles standardisés n'étaient pas partout applicables ; et (b) d'inciter davantage les détenteurs des savoir-faire des différentes formes d'expressions culturelles traditionnelles et populaires à préserver et transmettre leur savoir plutôt qu'à se limiter de le conserver sous forme d'enregistrements et d'archives. Dans cette optique les détenteurs seront mis en valeur et leurs oeuvres seront rendues visibles à travers le monde. L'accent sera mis aussi sur la promotion des expressions traditionnelles ou populaires réactualisées, voire métissées au lieu d'être enfermées seulement dans le concept d'authenticité. C'est ainsi en se basant sur les réalités du monde actuel plutôt que sur le passé lointain, que l'Organisation pourra identifier une orientation future.

Le programme du patrimoine immatériel est composé de deux volets, d'une part le volet sur les langues et d'autre part celui sur le patrimoine oral, les musiques, danses, folklores et savoir-faire des artisanats traditionnels. Dans le domaine des langues l'UNESCO concentre ses actions sur la sauvegarde des **langues en danger de disparition**, la préservation des **langues de communication interculturelle** et l'élaboration de **politiques linguistiques en vue d'encourager le plurilinguisme**.

En ce qui concerne le second volet, les lignes principales d'action sont les suivantes :

- i) **Elaboration d'une stratégie en vue de sauvegarder, revitaliser et diffuser le patrimoine immatériel, plus particulièrement celui des groupes minoritaires et autochtones en se référant à la Recommandation sur la sauvegarde de la culture traditionnelle et populaire (1989).**
- ii) **Formation de spécialistes et de techniciens d'enquêtes sur le patrimoine immatériel et consolidation de réseaux d'institutions spécialisées.**
- iii) **Encouragement à la transmission des savoir-faire traditionnels par le biais de la promotion du système : Trésors humains vivants.**
- iv) **Sensibilisation, notamment des jeunes, aux valeurs du patrimoine immatériel et à sa revitalisation grâce à l'encouragement à l'organisation de festivals consacrés aux arts traditionnels et populaires et à la publication des Collections UNESCO de musique traditionnelle (CD), des arts du spectacle (DVD) et à celle consacrée au patrimoine immatériel des minorités (CD-ROM).**

En outre, nous nous efforçons de **lier le programme du patrimoine matériel et immatériel en vue de développer une nouvelle approche** en matière de conservation et de maintenance des sites qui fasse appel aux traditions, aux techniques et aux savoir-faire locaux. Dans cette optique les nouveaux projets sur la sauvegarde des **traditions orales liées aux monuments** et sites et à la **revitalisation du patrimoine immatériel dans des centres historiques** seront lancés.

Je voudrais maintenant vous citer les activités principales récentes :

Dans le domaine des langues : publication de l'"Atlas mondial des langues en danger de disparition" et création d'un "Centre international d'information et de bases de données sur les langues en danger de disparition" au sein de l'Université de Tokyo.

Par ailleurs, la tenue de la Conférence intergouvernementale sur les politiques linguistiques en Afrique" organisée à Harare en mars 1997 s'est traduite par l'adoption de politiques linguistiques dans certains États africains. La préparation de cette conférence a suscité la réalisation de nombreuses études et l'organisation d'un séminaire à Addis-Abeba en 1995 sur "la définition de stratégies relatives à la promotion des langues africaines dans un contexte multi-lingue".

En ce qui concerne les activités relatives à la sauvegarde, la revitalisation et la diffusion des différentes formes d'expressions culturelles traditionnelles et populaires, deux réunions d'experts ont été organisées au Viet Nam et en République démocratique populaire lao en vue d'établir un plan de sauvegarde du patrimoine immatériel des groupes minoritaires. Les recommandations formulées lors de ces réunions d'experts ont permis à l'UNESCO de mettre en oeuvre plusieurs actions concrètes.

Plusieurs réseaux ont été constitués dont un réseau d'institutions musicales spécialisées en musique traditionnelle pour l'Afrique, un réseau d'institutions du folklore en Europe sur la base du Centre Européen des Cultures Traditionnelles établi par l'UNESCO en 1995 à Budapest ainsi que sur la base des archives sur le folklore balkan établi par l'UNESCO à Sofia en 1995. Un réseau d'artisans de l'Asie orientale spécialisés dans la production des objets en laque a également été constitué. Région par région des enquêtes approfondies ont été réalisées afin de dresser l'état des lieux de la préservation du patrimoine immatériel. La "Recommandation sur la sauvegarde de la culture traditionnelle et populaire" adoptée en 1989 a été utilisée comme outil de travail. Un manuel méthodologique sur la protection de la culture populaire traditionnelle contre une commercialisation improprie est en cours d'élaboration. Afin d'assurer la transmission du savoir-faire des expressions culturelles traditionnelles et populaires un nouveau projet "Trésors Humains Vivants" a été lancé. L'UNESCO cherche tout d'abord à encourager chaque État membre à identifier le patrimoine immatériel à sauvegarder d'urgence et ses détenteurs de savoir-faire ainsi qu'à prendre les mesures nécessaires pour établir un tel système. En ce qui concerne le patrimoine populaire et oral, un projet pilote a été lancé pour des manifestations culturelles de la Place Djemaa-El-Fnâ de Marrakech au Maroc. Comme stratégie prioritaire de mise en oeuvre du Programme, l'Organisation a insisté sur la formation. Le "Guide pour la collecte des musiques et instruments traditionnels" a été publié et de nombreux stages en vue de collecter le patrimoine musical ont été organisés.

Afin de diffuser les trésors du patrimoine immatériel, 80 disques compacts ont été publiés dans le cadre de la prestigieuse Collection UNESCO de musique traditionnelle du monde. En outre, 7 vidéos de la Collection des arts traditionnels du spectacle et un CD-ROM sur les cultures des groupes minoritaires du Viet Nam ont été réalisés. Par ailleurs, le soutien apporté par l'UNESCO au Marché des Arts du Spectacle Africain (MASA) a contribué à son élargissement en permettant la participation de pays non francophones. A cette occasion l'UNESCO a également publié dans un double CD des enregistrements de tous les musiciens africains sélectionnés au MASA en 1997. L'UNESCO a aussi publié sur disques compacts des enregistrements du Festival international de musiques sacrées et du Festival international du Ramayana d'Angkor Vat.

Following the adoption of the Recommendation in 1989 a number of activities, forums and projects have been implemented. First of all, in response to the UNESCO Secretariat's circular letter of 8 April 1991, several Member States submitted reports on the implementation of the Recommendation in their countries. These outlined the measures taken to familiarize the concerned national authorities with the Recommendation and attested the relevance of existing legislation to the provisions of the Recommendation. In order to make UNESCO's Recommendation known to the general public, some Member States published the entire text of the document in their languages. Thus it appeared in "Bulgarian Folklore", N/ 3, 1990 Bulgaria, "Folklore Studies", 1992 Lithuania, "Folklorism Today", 1993 Hungary and "The National Literature Review", 1992 Czech Republic.

At its initiative, the International Council of Organization for Folklore and Folk Art (an international non-governmental organization of category B) organized in co-operation with UNESCO two conferences on the implementation of the Recommendation in Fribourg (Switzerland) on 10 October 1990 and at Gorizia (Italy) on 30 and 31 August 1991. Those meetings focused the attention of public and private circles in the two countries on the need to actively implement the UNESCO Recommendation for the safeguarding of traditional culture and folklore. Sponsored by the Spanish authorities, a national conference on Spain's traditional and popular cultures was held at Caceres from 13 to 15 November 1992. The forum, which was attended by UNESCO's representative, dealt with a host of legal and institutional aspects and concrete problems, and made proposals relating to the implementation of the Recommendation in conformity with Spain's needs.

As an important part of the implementation of the Recommendation, a series of region/by/region evaluation seminars on the application of the Recommendation was planned. Before each seminar a detailed questionnaire was sent to each country and a synthesis of the replies presented to the seminar. In this respect it should be mentioned that a sub-regional seminar of Central and Eastern European Countries jointly organized by UNESCO and the Czech authorities was held in Straznice (Czech Republic) from 19 to 22 June 1995. During the meeting, many important observations were made to foster better understanding of the specific conditions and particularities that determine or influence policy and work for the safeguarding of traditional culture and folklore in the countries in transition. The work of the Straznice meeting focused mainly on identification of problems and improvement of means and ways of safeguarding, protection and revitalization of traditional culture viewed as heritage of the past (traditional) and as an incarnation of national and cultural identities of a country, people or ethnic groups. The regional seminars scheduled to take place in 1997 (at Queretaro, Mexico, for the region of Latin America) and the Caribbean and in 1998-1999 (for the African, Asian region and the Arab States) will continue a thorough region/by/region evaluation of the application of the above-mentioned Recommendation. At the same time, they will focus mainly on new cultural processes and phenomena (i.e. the emergence of new and popular creativity prompted by sudden changes in socio-cultural contexts), on new technological means and ways of dissemination and transmission of traditional and popular cultures, on new initiatives and projects carried out by UNESCO, Member States or NGOs in order to enhance the work on the intangible cultural heritage. The work, conclusions and recommendations of the forthcoming meetings, as we hope, will help the countries and regions concerned to work out a long-term strategy for the preservation and active use of their traditional cultures. During the preparation of these meetings we have faced a number of difficulties namely : some countries have not properly informed the bodies concerned about the UNESCO's Recommendation ; some countries are reluctant in replying our questionnaires based on the structure and contents of the Recommendation which, to some extent, is contrary to their existing practices and approaches to traditional culture and folklore.

In conformity with Resolution DR 104 adopted by UNESCO General Conference, at its 28th session (1995), the first meeting of experts on the preparation of a methodological manual on the protection of traditional culture and folklore against inappropriate commercialization took place at Straznice (Czech Republic) from 13 to 16 October 1996. The discussions held showed the actuality and various problems concerning the preparation of such a guide linked up with existing systems of legal protection of author's rights and interpreters of traditional culture and folklore in different countries. In view of that it was decided that the guide should look like a recommendation or principles allowing every country to adapt and to concretize them in accordance with its particular conditions. On the basis of the meeting's debates a questionnaire was worked out and then sent to Member States and experts concerned. The replies to this questionnaire will enable to prepare the draft text of the manual and to discuss it at the second meeting of experts due to take place at Straznice, in May 1997.

The encouragement to the transmission of traditional know-how is being done through the promotion of the system "Human Living Treasures". It was initiated by the Republic of Korea and supported by other Member States of UNESCO. At its 142nd session (October 1993), the Executive Board of UNESCO discussed the item on the establishment of a system of "Living cultural properties" and decided in favour of the proposed system as one of the ways of implementing the Recommendation on the Safeguarding of Traditional Culture and Folklore. In his letter addressed recently to Member States, the Director-General invites them to establish a system of "living cultural properties" in their respective countries and to submit to UNESCO their lists of Living Human Treasures once such a system has been established. Enclosed with this letter was the guide prepared by UNESCO for introducing the system of Living Human Treasures by Member States and specifying UNESCO's expert and other assistance in this field. Several examples of similar systems existing in different countries (7) of the world were also enclosed with the above-mentioned documents.

In February 1997, UNESCO entrusted Attorney Marc Denhez to undertake an evaluation on the preparation, adoption and application of the Recommendation and advise UNESCO in planning its future programme. I would now like to ask Mr. Denhez to present himself the results of his evaluation and recommendations for future programmes.

**INTERNATIONAL PROTECTION OF EXPRESSIONS OF FOLKLORE:
UNESCO FOLLOW-UP TO THE 1989 RECOMMENDATION ON
THE SAFEGUARDING OF TRADITIONAL CULTURE AND FOLKLORE**

by Marc Denhez, B.A., B.C.L., Barrister and Solicitor, Ottawa

EXECUTIVE SUMMARY

The 1989 UNESCO *Recommendation on the Safeguarding of Traditional Culture and Folklore* is generally recognized as the highest profile declaration on the importance of intangible heritage in the world.

The urgency of that initiative is more obvious today than it was at the time of the Recommendation (1989). The growing threat of ethnocentrism to world peace makes the international conservation, exchange and appreciation of intangible heritage more important to international and intercultural understanding than it ever was in the past. These expressions of traditional culture and folklore play a significant role in the overall UNESCO objective of a "culture of peace."

That is the conclusion, when the Recommendation is viewed as a *unit*. However, when it is broken down into its component parts, it becomes obvious that the document has six action areas, with varying objectives, methodologies and results:

- a) **A viable international institutional network:** this is arguably the single most important feature of the Recommendation. Significant work has been done in this area since 1989, but considerable work still lies ahead to create such a network internationally and regionally (electronically, in writing, or by whatever other means), including creators and interpreters.
- b) **Common typology:** UNESCO has carried that task as far as any non-user could be expected.
- c) **Training:** Much progressive work is still to be done.
- d) **Cooperation:** These initiatives are continuing, e.g. UNESCO's "Living Human Treasures" program.
- e) **Preventing distortion:** For historical reasons, the Recommendation refers only to the dissemination of the *Model Provisions* (1982), which evolved from what was originally a copyright-type model of protection, but
 - the companion documentation repeated that this subject was "complex," that its success would depend upon the technical "definitions" used, etc. In the face of this single option, and of the warnings above, very few Member States replied when asked how they would implement this part of the Recommendation.
 - This model offers protection against *verbatim* reproduction and *modest* distortion assuming that the original has been accurately recorded, and assuming that the original has been withdrawn from "the public domain" and duly registered as such.
 - This model is more awkward to apply in case of *massive* distortion (mere emulation of a general "style", i.e. "pastiche"). In fact, under copyright notions of "fair dealing," copyright-type protection might not have existed at all under such circumstances.
 - There are, however, other legislative options (e.g. "consumer-type" legislation) which can potentially address cases of "pastiche." It would be in the interests of Member States to learn *what all their options are*, what the pros and cons of each option may be, and what

precedents are available for each option. Member States may then feel more *comfortable* in selecting a strategy suited to their own purposes

- f) **Remuneration:** the *intent* was to create a system of remuneration so that creators/interpreters of folklore would be on an even footing with e.g. copyright-holders. The Recommendation again referred only to the *Model Provisions*, which had evolved from copyright concepts. As in the case of "protection" above, these concepts were originally designed to compel authorization (and usually payment) for *verbatim* reproduction, or reproduction with only modest variations. They were not designed for "pastiche".
- It has been argued that the overwhelming majority of misappropriations of folklore are in the form of pastiche, not of *verbatim* reproduction.
 - It is possible to legislate for "pastiche" (see above); but if the intent is to create a system of *remuneration* when a culture borrows the "style" from another culture, then that triggers an element of risk.
 - The risk is simple: on any given day, "dominant cultures" export more cultural expression to "threatened cultures" than vice versa (that is precisely why the former are called "dominant" and the latter are called "threatened"). If *remuneration* must accompany the transfer of these cultural expressions, lawyers within the dominant cultures may quickly argue that since they are exporting more than they are importing, the "balance of payments" , for transfers of cultural "styles" , should favor the "dominant cultures" at the expense of the "threatened cultures". That would be the diametric opposite of what the Recommendation had intended.
 - The only way to reverse that balance of payments would be to have such subtle drafting that (a) payment would be owing when "dominant cultures" borrowed expressions from the "threatened cultures", but (b) payment would *not* be owing when the "threatened cultures" borrowed idioms from the "dominant cultures". To date, no one has shown *how* such an arrangement could be worded.

Logically, the next steps for the international community are:

- to continue raising the profile of folklore;
- to continue building the networks for intangible heritage at the international, regional and national levels;
- to continue training, cooperation etc.;
- to inform Member States more fully on their *options* for protective legislation (including pros and cons);
- to explain the pros and cons of remunerative systems.

1. INTRODUCTION

On February 12, 1997, this writer was engaged by UNESCO to review the preparation, adoption and implementation of the *Recommendation (UNESCO, 1989) on the Safeguarding of Traditional Culture and Folklore.* It can be divided into several distinct parts:

-
- (A) Definition: "the totality of tradition-based creations of a cultural community (reflecting) social identity ... transmitted orally, by imitation or by other means (including) language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts."
- (B) "Identification":
- (a) inventory of institutions
 - (b) identification and recording systems
 - (c) standard typology
- (C) "Conservation":
- (a) archives
 - (b) archival services
 - (c) exhibits
 - (d) presentation within cultural context
 - (e) harmonization of archives
 - (f) training staff
 - (g) secure copies
- (D) "Preservation":
- (a) curricula
 - (b) self-documentation
 - (c) national folklore councils
 - (d) support for dissemination
 - (e) research
- (E) Dissemination:
- (a) events
 - (b) media
 - (c) hiring folklorists
 - (d) educational materials
 - (e) information centers
 - (f) meetings and exchanges
 - (g) a researcher's Code of Ethics
- (F) Protection: "Folklore constitutes manifestations of intellectual creativity [and] ... deserves to be protected in a manor inspired by the protection provided for intellectual productions. Such protection of folklore has become indispensable as a means of promoting further development, maintenance and dissemination."
- (a) Publicize UNESCO/WIPO *Model Provisions* (1982) and related work
 - (b)
 - (i) protect privacy of folklore informants
 - (ii) collections in good condition
 - (iii) protect against misuse
 - (iv) archives to monitor subsequent use
- (G) International:
- (a) cooperate with international and regional organizations
 - (b)
 - (i) exchanges
 - (ii) training
 - (iii) joint projects
 - (iv) meetings and courses
 - (c) ensure internationally the economic, moral and so-called neighboring rights
 - (d) provide copy of research/materials to host country
 - (e) no damage
 - (f) risk avoidance

As described by one organization, some countries interpreted it as a call to reassess and develop the capacity of countries to

- create networks for their folklore institutions
- develop synchronized typologies
- synchronize cataloguing
- do sufficient training
- allow ethnic communities to have access to their own culture
- have a national voice for folklore
- support dissemination
- assure freedom of research
- disseminating folklore (and infrastructure for same)
- disseminate information on folklore
- meeting and exchanges of folk artists
- develop appropriate legal frameworks to assist folk artists
- a legal framework for collections
- international cooperation

2. UNESCO's ROLE

Technically speaking, under the exact wording of the Recommendation,

- UNESCO itself is not given any specific mandate, and
- the Recommendation imposes obligations on Member States, but provides no explanation of how to implement them.

In actual *practice*, the UNESCO action areas could be summarized as follows:

SIX PRIMARY ACTION ITEMS:

1.	A VIABLE NETWORK OF SUPPORT/ACTIVITIES
2.	A COMMON TYPOLOGY
3.	TRAINING

4. PROTECTION AGAINST DISTORTION
5. REMUNERATION FOR CREATORS/INTERPRETERS
6. FURTHER CO-OPERATION

3. HISTORY

The desire to create a viable international framework for traditional culture is as old as the Organization itself. As early as 1948, the question of the protection of languages was already being discussed at the meetings around the founding of UNESCO. The first symposium on languages occurred in 1951. The issue of protecting folklore was also being discussed at the time of adoption of the Universal Copyright Convention in 1952.

In 1972 the General Conference of UNESCO resolved to adopt a "ten-year plan for the systematic study of oral traditions and the promotion of African languages," soon followed "by similar efforts in Asia and Latin America." UNESCO also responded to a 1973 overture by Bolivia, by calling for analysis of the "intellectual property" dimension of folklore. UNESCO's comprehensive program on the intangible (non-physical) cultural heritage was officially launched in 1976 under the auspices of Programme Resolution 4.111 adopted by the General Conference (Nairobi, 1976).

After many expert meetings hosted by WIPO and UNESCO, in 1979 the Director General of UNESCO also contacted Member States with a questionnaire identifying five problem areas concerning "folklore":

- Definition
- Identification
- Conservation
- "Exploitation"
- "Use" (later called "Protection")

After still further meetings, UNESCO and WIPO jointly developed (in 1984) the *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*.

As a follow-up, a new survey was launched in 1986 "among Member States to find out about the situation of their non-physical heritage and what safeguarding actions were most badly needed." After still further meetings and reports, the text of a Recommendation was finalized and was adopted unanimously by the General Conference on November 15, 1989.

Not all background legal opinions were equally unanimous. The various legal implications of the Recommendation, for Member States, were outlined in detail in the *First Draft of a Recommendation on the Safeguarding of Culture: Final Draft Prepared in Accordance with Article 10(3) of the Rules of Procedure* (1988). During the consultation process immediately leading up to the adoption of the Recommendation, countries were invited to comment on the draft. One country objected to the

assimilation of folklore protection to copyright, and finally objected to the draft's definition of folklore itself. Another insisted that if a country wished to confer intellectual property rights on its folklore, it should use Article 15.4 of the Berne Convention instead. That country therefore suggested that the entire section dealing with intellectual property and protection be deleted altogether. "Unless this is analyzed more carefully, these questions cannot give rise to a Recommendation."

As mentioned, the Recommendation was nonetheless adopted unanimously. However, when the UNESCO Secretariat sent a circular letter on April 8, 1991, asking countries about their follow-up to the Recommendation, only six Member States replied, and even there, most answers were so general as to be essentially meaningless. UNESCO therefore evaluated its position in 1992-93, and again in 1997. The outcome is described in this report.

4. FOLLOW-UP ACTIVITIES

In all, during the almost eight years since adoption of the Recommendation, UNESCO has undertaken a variety of supportive initiatives at the international, regional and sub-regional levels, including:

a) Support for Institutional Infrastructure:

- The European Centre for Traditional Culture was established in Budapest.
- The Archives Data Bases of Balkan Folklore was created in Sofia.
- A joint project was launched with the Centre of Data Bases on Endangered Languages (University of Tokyo) on a *Red Book of Endangered Languages*.
- The support for the International Clearing House for Endangered Languages (University of Tokyo).
- Support for MASA (African Performing Art Market) for its extension to English and Portuguese-speaking countries in Africa.
- Establishment of a network for institutions specializing in folk culture in "countries in transition."
- Establishment of a network of institutions for traditional Arab music.
- Establishment of a network of institutions for traditional Andean music.
- Support for the Network of African Music Institutions.
- Feasibility study of transferring some of UNESCO's music collection to CD-ROM.
- Feasibility study of transferring UNESCO's audio-visual material on intangible heritage to the Internet.
- "An international fund of intellectual property of the traditional populations, (in) tribute to (their) biological and scientific contribution."
- Assistance to classification of Arab musical documents.
- Encouragement of institutions to prepare "a preliminary inventory of priority research."

- Encouragement for the circulation of works “in their authentic form and do not convert them for circulation on the pretext of making them more readily ‘understandable’ to tourists.”
- Encouragement for specialists to write in a manner which is more accessible to the general public (and) film producers (to) produce films that are more popular.

b) Support for Training:

- Training courses (sub-regional) on terminology (Africa, Latin America, the Pacific) and publication of works devoted to languages.
- African workshop on teaching traditional music in primary grades.
- African workshop on training traditional musicians.
- Support for regional and sub-regional training courses for teacher educators and specialists (notably women) on traditional cultural forms.
- A seminar on drawing up an inventory of endangered Arctic languages.
- Regional seminars (Africa, Asia, Europe) on policies on use of national languages.
- Symposium in Asia on traditional music/dance.
- Assistance for systematic archiving (e.g. training of sound archivists, management training etc.).

c) Strategic Publications:

- A guide on strengthening protection against ill-advised commercialization.
- Collected data on linguistic policies in Africa.
- Encouragement for the adoption of linguistic policies by certain African countries.
- Establishment of a protective plan for intangible heritage of minority groups in Laos, and of traditional techniques related to bamboo.
- An overview of language initiatives under the title *Sauvegarde des langues à l'Unesco*.
- *A Guide for the Collection of Traditional Music and Influence*.

d) Festivals, etc.:

The question of festivals was studied by the Secretariat in 1987, and again in 1993. There was also:

- A Festival in Africa on traditional music/dance.
- An international central Asia saga festival will be organized for Mongolia.
- UNESCO will participate in sacred music festivals and in the African Art and Theater Fair.

e) Special Recognition:

- Financial and moral support for national and international competitions.
- A diploma of honor and an international award for leading exponents.
- A prize for “masterpieces of the universal heritage.”
- Compilation of interdisciplinary encyclopedias of the knowledge of traditional societies.”
- A new program entitled “**System of Living Human Treasures**” (outlined in further detail in a folder package which UNESCO distributes under the same name).

f) Encouragement for Protection

- Encouragement to Member States for framework legislation on national phonographic collections.
- Collection of mechanisms, by Member States, “designed to protect the traditional intangible cultures against uncontrolled and excessive commercial exploitation.”
- Encouragement for/by NGOs at the national level.
- Reminders that the intangible culture of ethnic minorities is “like monuments are works of the plastic arts, ... part of the national heritage and that of all mankind.”

g) Miscellaneous Projects

- Aid to certain southeast Asian countries for intangible heritage of minorities.
- 30 new compact discs in the UNESCO Collection of Traditional Music.
- Support for books on traditional forms of cultural expression.
- Support for the Association of Lacquer Crafts People of East Asia.
- Assistance for artists' equipment when a performing art had been “abandoned.”
- The *Stages of Life* project, discussed by Gruzinski and discontinued.
- Support for an *audiothèque* in Mali.
- The Griot Recording Project in Gambia.
- A program pertaining to the Nahuatl language, etc.
- Support for a music center in Niger.
- Support for cultural projects in Tunisia and Mexico City.
- Support for a traditional theater center in the Crimea.
- One CD-ROM on intangible heritage and minorities in Vietnam.

- Four videos for the UNESCO collection on traditional theater.
- A catalogue on traditional crafts of the Sedang population of Vietnam.

For the 1998-99 biennium, the Executive Board has adopted a number of priority policies, including the following:

- to reinforce training;
- to devote particular attention to the development and implementation of strategies pertaining to the safeguard, revitalization and dissemination of intangible heritage;
- focusing attention on traditional cultural expressions and folk arts;
- exchanges of experience on cultural management techniques.

In all, the intangible heritage initiatives are estimated to focus 20% of their activities on southeast Asia, 30% on sub-Saharan Africa, 20% on "countries in transition," and 20% on Andean countries. The program estimates that some 40% of its activities would be occurring in Africa, Asia, the Pacific region, Latin America and the Arab states, as occurred in the previous biennium. In terms of UNESCO's priorities, the Intangible Heritage Section estimates that its activities focus 30% of its attention on "least developed countries" (LDCs), 20% on women, 30% on Africa, and 20% on youth.

5. PROTECTION OF FOLKLORE

For decades, the international community has spoken out against the distortion of folklore. That concern did not dissipate. When folklore is artificially reproduced out of context far from its roots, it risks undergoing caricature which one delegation to UNESCO described as "mediocrization." Others call it "fakelore."

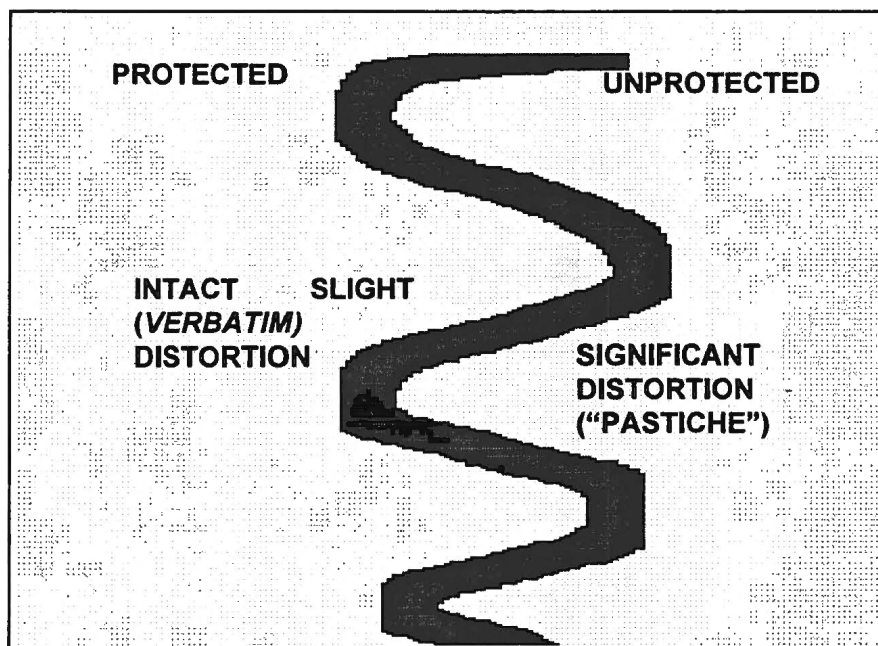
However, no one ever promised that the remedial legislation would be easy to draft. In the *Model Provisions* and the lead-up to the Recommendation,

- no one ever labeled this a *comprehensive survey* of legal techniques, beyond the "intellectual property" techniques (*one legal field* among several);
- the legal field chosen was described as "complex".
- The adaptability of "intellectual property" to folklore was said to hinge on "*definitions*" requiring further technical thinking.

However, there were dissenting voices

- objecting to the selection of "intellectual property" rules, *on principle*;
- arguing that "intellectual property" rules address only *part* of the problem of distortion; and/or
- preferring a *different category* of legal tools.

In assessing the potential impact of "intellectual property" instruments, it is essential to understand the classic concepts. When looking at the work of an *individual* creator, it is possible to conceive a number of scenarios:



If a third party wishes to use the work of another person in its **intact state (i.e., *verbatim*)**, then

- the creator's consent must be obtained (and often paid for) because the classic concepts of copyright recognize that the creator has a *proprietary* interest in that creation.
- Since it is his/her "*intellectual property*," the creation cannot be "borrowed" without the owner's consent.
- To take it without consent would be theft ("plagiarism").

These rules continue to apply even if the work has been **somewhat distorted**.

However, if the work has been *dramatically* distorted (what is **sometimes called "pastiche,"** although that is not a technical term), then it might fall into the category of a "new" work.

- Under classic concepts, massive tampering is called "**fair dealing**" which could lead a court to conclude that the product has now become a "new" work.
- The question is then the following: how much distortion must have occurred, in order to classify a work as a "new" creation ...
- and hence *exclude* it from the protection (associated to *previous* works) normally offered by "intellectual property"?
- Under classic concepts, that is a gray area where the line of demarcation is not always easy to define.

So three primary scenarios are conceivable:

- (a) **verbatim reproduction**, e.g., note-for-note copying of a folk song, word-for-word repetition of a folk tale, etc.;
- (b) **partial distortion**, and
- (c) **"pastiche,"** e.g., an unrecognizable composite or alternatively an "interpretation" based upon the broad *style*, without any *single* discernible model, etc.

a) **Verbatim Reproduction**

Copyright-type protection of folklore confronts the generally-accepted rule, in many western countries, that artistic creations fall into the **public domain** after a certain time. One possible solution, in *theory*, would be for these governments to announce that, as arbitrary as it may sound,

- some older works will fall into the public domain and
- others will not.

Most works might pass into the public domain after a certain lapse of time; but a minority (perhaps an infinitesimal minority) would instead be relegated to a new original ("*sui generis*") legal category whose philosophy was

- closer to that of historic *cultural property* statutes
- than of *copyright* statutes.

It may presuppose

- the creation of a kind of **Register** in which there was a perfectly unambiguous portrayal of the folkloric item in question, i.e., with a level of *precision* that could later satisfy a court of law, on a par with copyright cases.
- This kind of Register is *feasible*, although politically sensitive in some countries.
- Other countries create a "blanket" protection for folklore via a requirement for authorization on a much broader basis (e.g., requirement for approval on anything that *might* be considered folkloric). This presupposes a different form of administrative infrastructure.

So far, this description has focused on protection, not money. However, if the national legal protection (or a future hypothetical Convention) triggers a copyright-type royalty (e.g., "PLRs," i.e., "Public Lending Rights") in the case of *verbatim* reproductions of registered expressions of traditional culture (but not "pastiche"), then the total amount of money changing hands in any given year is likely to be small, for three reasons:

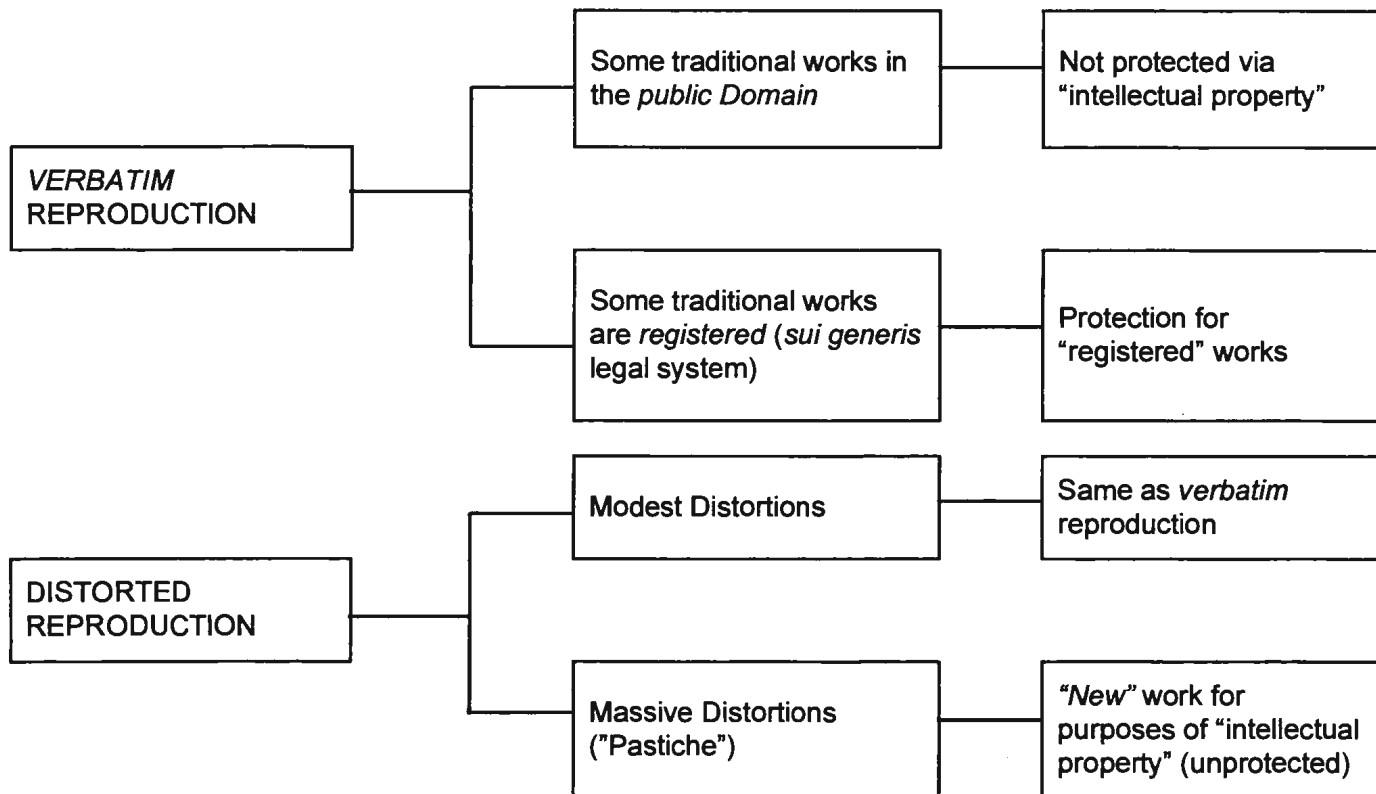
- a) it will take some *time* to physically register (for legal purposes) a very significant number of different expressions of traditional culture;
- b) there is nothing in UNESCO's files to indicate that in any given year there are very many *instances of verbatim* appropriation of a traditional cultural expression for gainful intent;
- c) if the appropriating party wanted to avoid liability for payment, all that it would have to do is *tamper sufficiently* with the folkloric expression ("fair dealing"), thereby turning it into "pastiche" and excluding it from normal "intellectual property" obligations.

b) Modest Distortions:

This can usually be dealt with in the same way as *verbatim* reproduction. Indeed, the intellectual property community has developed computer programs helping identify plagiarism when it occurs.

c) Massive Distortions ("Pastiche"):

When there is more than a slight change in a work of intellectual property, the normal rules usually refer to this re-interpretation as "fair dealing," i.e., it can normally be used as the "inspiration" or a "basis" for a new work, without permission. This is why, under normal intellectual property approaches, it is difficult to protect a given "style" as an offshoot of copyright.



There have been alternative legislative solutions for years, e.g.:

- a) **Legislation for the protection of "sacred" symbols:** this exists in a number of countries, and relates to items such as flags, religious symbols, heraldry, etc.
- b) **Extension of "industrial design" legislation:** this is one of the few kinds of legislation which deals specifically with "style," although it is not the only one. Another kind of legislation which often deals with style is ...
- c) **Consumer protection legislation:** it is not uncommon for such statutes to address style and "pastiche" when there is a possibility that buyers could be misled. Sometimes, this legislation takes the form of a Code of Ethics; and in other cases, it takes a different form.

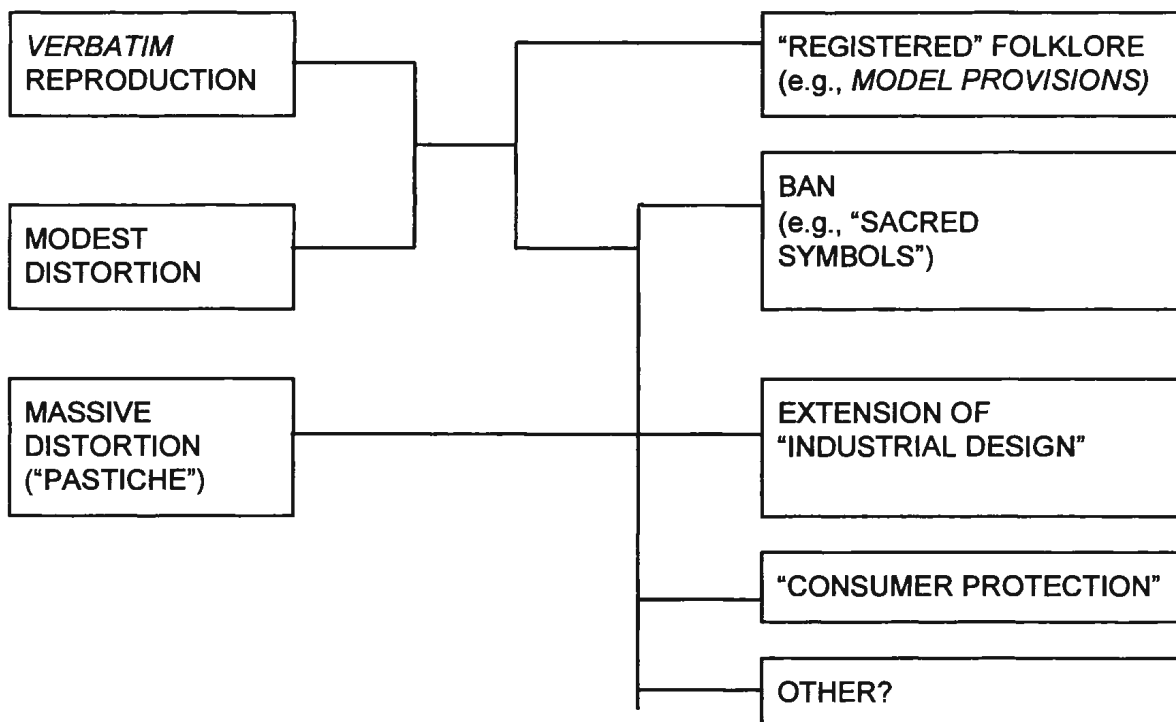
There are different ways in which legal documents can spell out terms of reference unambiguously. "Style" is not impossible to regulate (it is already used in the industrial design legislation in several countries), but is sometimes difficult to interpret. An easier course of action (in drafting terminology which

is unambiguous) is to refer to, e.g., materials. One strategy for defining intangible heritage, but this time *including* "pastiche," is to focus on a combination of two elements:

- traditional *materials* (which are usually relatively easy to define for legal purposes, e.g., lacquer, soapstone, turquoise, etc.) and
- a particular *style* on the same basis as industrial design legislation.

Of these two factors, "materials" are obviously easier to define for the purposes of a statute. "Style" is more tricky, but not impossible: there are many countries which protect "style" under their industrial design legislation and/or their consumer protection legislation.

The time has probably come for the full range of conceivable legislative measures, both inside and outside the realm of "intellectual property" to be **outlined to the Member States**; and to inform the Member States on the **pros and cons** of each approach, with actual **precedents** for each. If that were done, it is possible that a given country may choose to adopt a version of the *Model Provisions* almost *verbatim*; or it may pick a different formula which is more or less interventionist, depending on its own choice.



6. REMUNERATION

One major reason why some countries wanted

- legislation to follow the model of "intellectual property" (as opposed to, say, the "consumer protection" model) was that
- under classic intellectual property rules, there are usually payments for the items used ("royalties" or "PLRs").

The hazards of imprecise drafting are considerable; indeed, loose definitions could produce the diametric opposite result to what was intended by the Member States which advocated this Recommendation. This drafting problem can be illustrated by one example which may initially appear absurd, but closer examination will disclose how tricky this wording can be. Let us suppose that "costume" is agreed to constitute an important element of "traditional culture," and let us further assume that under hypothetical legislation and treaties, "costume" could be considered "intellectual property" in the sense that the "borrowing" of one country's costume with gainful intent by another country could trigger a liability for a royalty or the like.

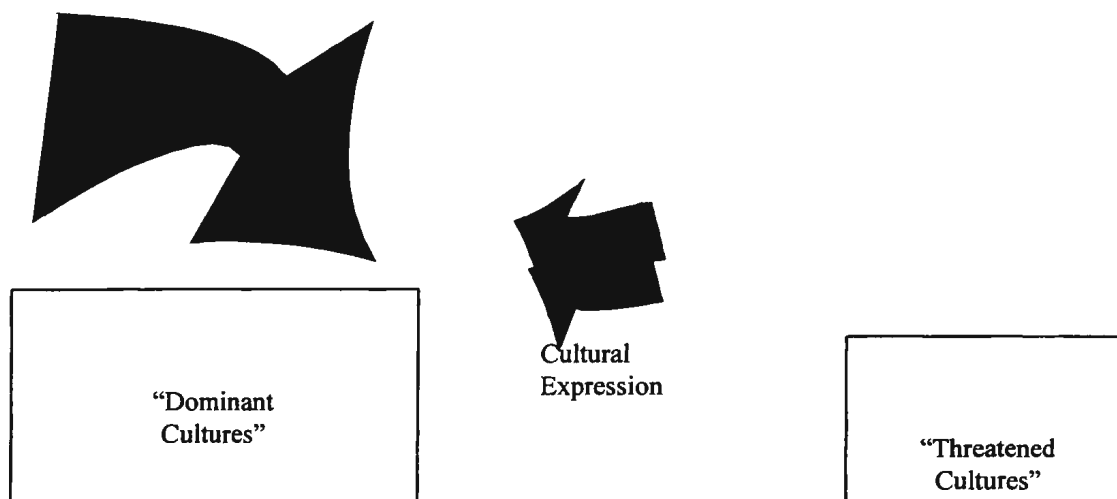
- Would that imply that every time a tailor in Hong Kong made a dress shirt, a token payment would need to be sent to Jermyn Street in London?
- Would it mean that when the respected Inuit entertainer Charlie Panigoniak performed for money (which is his profession), and which is done in the Inuktitut language (thereby advancing another of UNESCO's objectives), he would have to send a payment to Spain for the use of his guitar, one to Africa for the use of his rhythms, and one to Nashville USA for the use of his musical idiom?

If that is *not* the intended result, then exactly how are the rules supposed to be drafted?

The fundamental problem is that in the case of the world's "dominant cultures," the practices which are being absorbed into minority cultures (and sometimes engulfing the latter) often have a so-called "folkloric" root of their own. Indeed, if one adds so-called "syncretic urban cultures" to the equation (as some have suggested for the purposes of the Recommendation), then how is it possible to draft a legal document which would *not* impose a royalty liability whenever a "minority" population chose to "popularize" itself with the help of idioms borrowed from the dominant cultures?

Similarly, if the very threat to minority cultures (e.g., in "Least Developed Countries" or "LDCs") is precisely because they "borrow" more daily from the dominant cultures than vice versa, then how would the international community prevent the *lawyers* from the dominant cultures from

- demanding more money from the LDCs (for borrowing these cultural expressions) than the LDCs can demand back?



That is the risk in attempting to construct a system of remuneration around the “borrowing” of “expressions of folklore,” like styles. At any given time,

- the “dominant cultures” are being borrowed from most frequently: that is precisely why they are called “dominant”.
- In the meantime, the “threatened” cultures are doing most of the borrowing; that is precisely why they are considered “threatened”.

If legal instruments merely entrenched a monetary liability every time that one culture “borrowed” so-called folkloric expressions from another, how long would it take before the *cash flow* favored the dominant cultures, at the expense of the minorities? One may add, parenthetically, that it is usually the “dominant cultures” who also have the largest number of intellectual property lawyers at their disposal, to argue that a given item deserves remuneration.

7. CONCLUSION

UNESCO has adopted a wide range of initiatives to pursue the goals of the *Recommendation on the Safeguarding of Traditional Cultures and Folklore*. These focus on items like **networking, training and cooperation**; but there is still work to be done in this vitally important area.

Member States have not responded to UNESCO's requests for information on **follow-up protective legislation**. Models derived from “intellectual property” are not easy (particularly in the common case of “pastiche”). To increase the comfort level of Member States, the time has come to outline

- their *options*,
- *pros and cons*, and
- alternative *precedents*.

Remuneration (for appropriations of folklore) is a laudable goal. Certain technical hurdles would need to be overcome, to establish systems that work, e.g., for *verbatim* reproduction of folklore (and some countries have done this). In the case of “pastiche,” however, countries must understand the *risk* of linking the borrowing of a “style” or “idiom” to the payment of money. Lawyers within “dominant cultures” could immediately argue that since their clients “export more cultural idioms” to “threatened minorities” than they import, the balance of payments should favor the dominant cultures at the expense of the minorities. No one has yet offered legal wording that is so subtle that it would avoid this counterproductive prospect. There are, however, other legal mechanisms (aside from intellectual property) which are available to combat folklore.

**ATTEMPTS TO PROVIDE INTERNATIONAL PROTECTION FOR
FOLKLORE BY INTELLECTUAL PROPERTY RIGHTS**

by Dr. Mihály Ficsor, Assistant Director General, WIPO

I. ATTEMPTS TO PROTECT EXPRESSIONS OF FOLKLORE BY MEANS OF COPYRIGHT

Introduction

The need for intellectual property protection of expressions of folklore emerged 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 those countries, folklore is truly a living and still developing tradition, rather than just a memory of the past.

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, and so on) have multiplied abuses. Folklore is 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.

National laws

Those developing countries which made the first attempts to regulate the use of folklore creations tried to provide protection in the framework of their copyright laws (Tunisia, 1967 and 1994; Bolivia, 1968 and 1992; Chile, 1970; Iran, 1970; Morocco, 1970; Algeria, 1973; Senegal, 1973; Kenya, 1975 and 1989; Mali, 1977; Burundi, 1978; Côte d'Ivoire, 1978; Sri Lanka, 1979; Guinea, 1980; Barbados, 1982; Cameroon, 1982; Colombia, 1982; Congo, 1982; Madagascar, 1982; Rwanda, 1983; Benin, 1984; Burkina Faso, 1984; Central African Republic, 1985; Ghana, 1985; Dominican Republic, 1986; Zaire, 1986; Indonesia, 1987; Nigeria, 1988 and 1992; Lesotho, 1989; Malawi, 1989; Angola, 1990, Togo, 1991; Niger, 1993; Panama, 1994). The 1990 Copyright Law of China indicates that it is the intention to protect expressions of folklore by copyright but Article 6 of the Law only provides that "[r]egulations for the protection of copyright in expressions of folklore shall be established by the State Council." The 1994 Copyright Ordinance of Viet Nam contains a similar provision: "Protection of copyright granted to folklore works shall be prescribed by the Government."

The majority of the above-mentioned national laws provide for the protection of what they call "works of folklore"; some other laws (the laws of Benin, Indonesia, Kenya, Mali, Morocco, Senegal, Tunisia and Zaire) refer simply to "folklore," and two of them (the laws of Chile and China) use the term that the International Bureau of WIPO consider the most appropriate one: "expressions of folklore."

Some national laws (those of Chile, Ghana, Indonesia, Madagascar, Mali and Tunisia) do not undertake giving a substantive definition; at most, they mention that what is involved is common national heritage. The other laws provide more or less detailed definitions. The Copyright Law of China contains no definition, but this seems to only follow from the fact that the regulation of the protection of expressions of folklore is left to another piece of legislation.

Only two national laws (the laws of Algeria and Morocco) provide definitions that, in substance, correspond to Article 15(4)(a) of the Berne Convention, quoted below, in the sense that they use the general notion of literary and artistic works, and only add one element to differentiate folklore creations from other works, namely that the authors are unknown, but there is reasonable ground to presume that they are citizens of the country concerned.

All the other national laws include into the definitions those more essential elements which differentiate "folklore" or "work of folklore" from literary and artistic works proper; namely, that it is traditional cultural heritage *passed on from generations to generations*; which means that—in contrast with the individual, personal nature of the creativity represented by literary and artistic works proper—it is the result of impersonal creativity of unknown members of the nation or communities thereof. The definitions in some of those laws (the laws of Burundi, Côte d'Ivoire, Guinea, Kenya, Rwanda and Senegal) refer to unknown authors as creators, some others (the laws of Barbados, Cameroon, Central African Republic and Sri Lanka) to communities, or groups of communities, while the Law of Congo to both unknown authors and to communities. The law of Zaire does not deal with the question of who are the creators of national folklore.

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

It follows from the fact that folklore is part of traditional heritage that it would not be appropriate to leave its protection to some individual "owners of rights." In principle, it could be a solution to entrust the communities concerned with exercising—through their representatives—the rights granted for the protection of the folklore developed by them. However, all the national laws providing for "copyright" protection of folklore rather authorize various national bodies to exercise such rights. In certain countries, those bodies are the competent ministries or similar national authorities, while in some other countries (in Algeria, Benin, Cameroon, Central African Republic, Congo, Côte d'Ivoire, Guinea, Morocco, Rwanda and Senegal), the national (state) bureaux for the protection of author's rights.

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

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

Certain national laws (those of Benin, Cameroon, Central African Republic, Chile, Congo, Ghana, Guinea, Morocco and Senegal) prescribe that, in cases where folklore creations are used for profit-making purposes, fees determined by the law or by the competent authority, respectively, must be paid, while other laws (those of Algeria, Mali, Rwanda and Tunisia) only provide that payment of fees *may* be required.

A few national laws also determined the purposes for which the fees collected are to be used; those laws, in general, provide that the fees must be used for cultural and welfare purposes of national authors. Under the laws of the Central African Republic, Guinea and Senegal, a part of the fees is to be paid to those who have collected the "works of folklore" concerned, and only the rest of the fees is to be used for the said purposes of national authors.

It follows from the very nature of folklore—namely, from the fact that it is the result of creative contributions of usually unknown members of a number of subsequent generations—that its protection could not be reasonably limited in time. In the case of the majority of laws providing for the protection of folklore creations, it can be deduced from the context of the various provisions that such protection is perpetual, but the laws of some countries (Congo, Ghana and Sri Lanka) also state this explicitly.

The sanctions of infringements of the rights in “works of folklore,” in many countries, are the same as in the case of infringements of authors’ rights. The laws of some countries, however, provide for special sanctions; they include fines and seizures, and, in certain cases, also imprisonment.

Article 15(4) of the Berne Convention

The 1967 Stockholm Diplomatic Conference for revision of the Berne Convention made an attempt to introduce copyright protection for folklore also at the international level. As a result, Article 15(4) of the Stockholm (1967) and Paris (1971) Acts of the Berne Convention contain the following provision: “(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.” This article of the Berne Convention, according to the intentions of the revision conference, implies the possibility of granting protection for expressions of folklore.

Difficulties in applying copyright to the protection of folklore

It seems that copyright law is not the right means for protecting expressions of folklore. This is because, whereas an expression of folklore is the result of an impersonal, continuous and slow process of creative activity exercised in a given community by consecutive imitation, works protected by copyright must, traditionally, bear a mark of individual originality. Traditional creations of a community, such as the so-called folk tales, folk songs, folk music, folk dances, folk designs or patterns, hardly fit into the notion of literary and artistic works. Copyright is author-centric and, in the case of folklore, the author—or at least in the way in which the notion of “author” is conceived in the field of copyright—is practically missing.

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

II. WIPO/UNESCO MODEL PROVISIONS FOR NATIONAL LAWS ON *SUI GENERIS* PROTECTION OF EXPRESSIONS OF FOLKLORE AGAINST ILLICIT EXPLOITATION AND OTHER PREJUDICIAL ACTIONS

At the meeting of WIPO’s Governing Bodies in 1978, it was felt that, despite concern among developing countries as to the need to protect folklore, few concrete steps were being taken to formulate legal standards. Following that meeting, the International Bureau of WIPO prepared a first draft of *sui generis* model provisions for intellectual-property-type protection of folklore against certain unauthorized uses and against distortion.

At their sessions in February 1979, the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention noted that the International Bureau of WIPO had prepared the said draft provisions and approved the proposal made by WIPO that special efforts should be made to find solutions to the intellectual property protection aspects of folklore, notwithstanding the global interdisciplinary study of the questions of identification, material conservation, preservation and reactivation of folklore, which had been undertaken by UNESCO since 1973.

In accordance with the decisions of their respective Governing Bodies, WIPO and UNESCO convened a Working Group in Geneva in 1980, then a second one in Paris in 1981, to study the draft Model Provisions intended for national legislation prepared by WIPO, as well as possible international measures for the protection of works of folklore. The outcome of those meetings was submitted to a Committee of Governmental Experts, convened by WIPO and UNESCO at WIPO headquarters in Geneva in 1982, which adopted—under the chairmanship of the author of this paper, at that time the head of the Delegation of Hungary—what are called “Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions” (hereinafter referred to as “the Model Provisions”).

The Model Provisions were submitted to the joint meeting of the Executive Committee of the Berne Convention and the Intergovernmental Copyright Committee of the Universal Copyright Convention in Geneva in December 1983. The Committees welcomed the development of the Model Provisions as a first step in establishing a *sui generis* system of intellectual-property-type protection for expressions of folklore; they found them a proper guidance for national legislation.

Basic principles taken into account for the elaboration of the Model Provisions

The Committee of Governmental Experts which worked out the Model Provisions did not lose sight of the necessity of maintaining a proper balance between protection against abuses of expressions of folklore, on the one hand, and of the freedom and encouragement of further development and dissemination of folklore, on the other. The Committee took into account that expressions of folklore formed a living body of human culture which should not be stifled by too rigid protection. It also considered that any protection system should be practicable and effective, rather than a system of imaginative requirements unworkable in reality.

It was emphasized at the meeting of the Committee of Governmental Experts that the Model Provisions did not necessarily have to form a separate law; they might constitute, for example, a chapter of an intellectual property code or of a law dealing with all aspects of the preservation and promotion of national folklore. The Model Provisions were designed with the intention of leaving enough room for national laws to adopt a system of protection best corresponding to the conditions existing in the countries concerned.

Expressions of folklore to be protected

The Model Provisions do not offer any definition of folklore. For the purposes of the Model Provisions, Section 2 defines the term “expressions of folklore” in line with the findings of the Committee of Governmental Experts on the Safeguarding of Folklore, convened by UNESCO in Paris in February 1982, and provides that “expressions of folklore” are understood as productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community.

This definition also embraces the results of individual development of the traditional artistic heritage, since the generally applied criterion of “impersonal” creativity does not always correspond to reality in the evolution of folklore. The personality of the artist is often an important factor in folklore expressions, and individual contributions to the development and maintenance of such expressions may represent a creative source of enrichment of inherited folklore if they are recognized and adopted by the community as expressions corresponding to its traditional artistic expectations.

The Model Provisions use the words “expressions” and “productions” rather than “works” to underline the fact that the provisions are *sui generis*, rather than part of copyright. It is another matter that expressions of folklore may, and often do, have the same artistic forms as “works.”

Only “artistic” heritage is covered by the Model Provisions. This means that, among other things, traditional beliefs, scientific views (e.g. traditional cosmogony) or merely practical traditions as such, separated from possible traditional artistic forms of their expression, do not fall within the scope of the proposed definition of “expressions of folklore.” On the other hand, “artistic” heritage is

understood in the widest sense of the term and covers any traditional heritage appealing to our aesthetic sense. Verbal expressions, musical expressions, expressions by action and tangible expressions may all consist of characteristic elements of the traditional artistic heritage and qualify as protected expressions of folklore.

The Model Provisions also offer an illustrative enumeration of the most typical kinds of expressions of folklore. They are subdivided into four groups according to the forms of the "expressions," namely expressions by words ("verbal"), expressions by musical sounds ("musical"), expressions "by action" (of the human body) and expressions incorporated in a material object ("tangible expressions"). The first three kinds of expressions need not be "reduced to material form," that is to say, the words need not be written down, the music need not exist in musical notation and the dance need not exist in choreographic notation. On the other hand, tangible expressions by definition are incorporated in a permanent material, such as stone, wood, textile, gold, etc. The Model Provisions also give examples of each of the four forms of expressions. They are, in the first case, "folk tales, folk poetry and riddles, " in the second case, "folk songs and instrumental music," in the third case, "folk dances, plays and artistic forms of rituals," and in the fourth case, "drawings, paintings, carvings, sculptures, pottery, terra-cotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes; musical instruments; architectural forms."

The words "architectural forms" appear in the Model Provisions in square brackets to show the hesitation which accompanied their inclusion, and to leave it up to each country to decide whether or not to include such forms in the realm of protected expressions of folklore.

Acts against which expressions of folklore should be protected

There are two main categories of acts against which, under the Model Provisions, expressions of folklore are protected; namely, "illicit exploitation" and "other prejudicial actions" (Section 1).

"*Illicit exploitation*" of an expression of folklore is understood in the Model Provisions, (Section 3) as any utilization made both with gainful intent and outside the traditional or customary context of folklore, without authorization by a competent authority or the community concerned. This means that an utilization—even with gainful intent—within the traditional or customary context should not be subject to authorization. On the other hand, an 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.

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.

Section 1 of the Model Provisions specifies the acts of utilization which require authorization where the circumstances described above exist. It distinguishes between cases where copies of expressions are involved and cases where copies of expressions are not necessarily involved. In the first category of cases, the acts requiring authorization are publication, reproduction and distribution; in the second category of cases, the acts requiring authorization are public recitation, public performance, transmission by wireless means or by wire and "any other form of communication to the public."

Indigenous communities should not be prevented from using their traditional cultural heritage in traditional and customary ways and in developing it by continuous imitation. Keeping alive traditional popular art is closely linked with the reproduction, recitation or performance of traditional expressions in the originating community. An unrestricted requirement for authorization to adapt, arrange,

reproduce, recitate or perform such creations could place a barrier in the way of the natural evolution of folklore and could not be reasonably enforced in communities in which folklore is a part of everyday life. Thus, the Model Provisions allow any member of a community of the country to freely reproduce or perform expressions of folklore of his own community in their traditional or customary context, irrespective of whether he does it with or without gainful intent.

The Model Provisions do not hinder the use of expressions of folklore without gainful intent for legitimate purposes outside their traditional or customary context. Thus, for instance, the making of copies for the purpose of conservation, research or for archives is not hampered by the Model Provisions.

Section 4 of the Model Provisions determines four special cases regarding the acts restricted under Section 3. In those cases, there is no need to obtain authorization, even if the use of an expression of folklore is made against payment and outside its traditional or customary context. The first of these cases is used for educational purposes. The second case is used "by way of illustration" in an original work, provided that such use is compatible with fair practice. The third case is where an expression of folklore is "borrowed" for creating an original work by an author. This important exception serves the purpose of allowing free development of individual creativity inspired by folklore. The Model Provisions do not want to hinder in any way the creation of original works based on expressions of folklore. The fourth case in which no authorization is required is that of "incidental utilization." In order to elucidate the meaning of "incidental utilization," paragraph 2 mentions (not in an exhaustive manner) the most typical cases considered as incidental utilizations: utilization in connection with reporting on current events and utilization of images where the expression of folklore is an object permanently located in a public place.

The Committee of Governmental Experts was of the opinion that a general reference to copyright to the effect that, in all cases where copyright law allows free use of works, the use of expressions of folklore should also be free, would not be of much help since many cases of free use in respect of works protected by copyright are irrelevant to the proposed *sui generis* protection of expressions of folklore (for example, reproduction in the press or communication to the public of a political speech or a speech delivered during legal proceedings; or reproduction for personal or private use, an act, which is not covered by the notion of the utilization of expressions of folklore subject to authorization, and needs no exception from the rule laid down in Section 3 of the Model Provisions).

"Other prejudicial actions" detrimental to interests related to the use of expressions of folklore are identified by the Model Provisions, as four cases of offenses subject to penal sanctions (Section 6).

Firstly, the Model Provisions provide for the protection of the "appellation of origin" of expressions of folklore. Section 5 requires that, in all printed publications, and in connection with any communication to the public, of any *identifiable* expression of folklore, its source be indicated in an appropriate manner by mentioning the community and/or geographic place from where the expression utilized has been derived. Under Section 6, non-compliance with the requirement of acknowledgment of the source is a punishable offense.

Secondly, any unauthorized utilization of an expression of folklore where authorization is required constitutes an offense. It is understood that such an offense may also be committed by using expressions of folklore beyond the limits, or contrary to the conditions of an authorization obtained.

Thirdly, misleading the public by creating the impression that what is involved is an expression of folklore derived from a given community when, in fact, such is not the case is also punishable. This is essentially a form of "passing off."

Fourthly, it is an offense if, in the case of public uses, expressions of folklore are distorted in any direct or indirect manner "prejudicial to the cultural interests of the community concerned." The term "distorting" covers any act of distortion or mutilation or other derogatory action in relation to the expression of folklore.

All four acts mentioned above only qualify as offenses if they are committed willfully. However, as regards non-compliance with the requirement of acknowledgment of source and the need to obtain authorization to use an expression of folklore, the Model Provisions also refer (in square brackets) to the possibility of punishment of acts committed negligently. This takes account of the nature of the offenses concerned and the difficulties involved in proving willfulness in cases of omission.

Authorization of utilizations of expressions of folklore

When the Model Provisions determine the *entity entitled to authorize the utilization* of expressions of folklore, they alternatively refer to “competent authority” and “community concerned,” avoiding the term “owner.” They do not deal with the question of the ownership of expressions of folklore since this may be regulated in different ways from one country to another. In some countries, expressions of folklore may be regarded as the property of the nation, while in other countries, a sense of ownership of the traditional artistic heritage may have developed in the communities concerned. Countries where aboriginal or other traditional communities are recognized as owners fully entitled to dispose of their folklore and where such communities are sufficiently organized to administer the utilization of the expressions of their folklore, authorization may be granted by the community itself. In the latter case, a community may grant permission to prospective users in a manner similar to authorizations granted by authors, that is, as a rule, at its own full discretion. In other countries, where the traditional artistic heritage of a community is considered a part of the cultural heritage of the nation, or where the communities concerned are not prepared to adequately administer the use of their expressions of folklore, “competent authorities” may be designated to give the necessary authorizations in form of decisions under public law.

Section 9 of the Model Provisions provides for the designation of a competent authority, where that alternative is preferred by the legislator. The same Section also provides, in a second paragraph in square brackets, for designation of a “supervisory authority,” if this should become necessary owing to the adoption of certain subsequent alternative provisions as regards activities to be carried out by such an authority (see paragraph 48, below). “Authority” is to be understood as any person or body entitled to carry out functions specified in the Model Provisions. It is conceivable that more than one competent or supervisory authority may be designated, corresponding to different kinds of expressions of folklore or utilizations thereof. Authorities may be already existing institutions or newly established ones.

The tasks of the competent authority (provided such an authority has been designated) are to grant authorizations for certain kinds of utilizations of expressions of folklore (Section 3), to receive applications for authorization of such utilizations, to decide on such applications and, where authorization is granted, to fix and collect a fee—if required by law—(Section 10, paragraphs (1) and (2)). The Model Provisions also provide that any decision by the competent authority is appealable (Section 10, paragraph (3), and Section 11, paragraph (1)).

The Model Provisions offer the possibility (in square brackets, that is, as an option) of providing in the law that a supervisory authority shall establish tariffs payable for authorizations of utilizations or shall approve such tariffs (without indication in the Model Provisions as to who will, in such a case, propose the tariffs, although it was understood by the experts adopting the Model Provisions that the competent authority would propose the tariffs) (Section 10), and that the supervisory authority’s decision may be appealed to a court (Section 11, paragraph (1)).

Where the community as such is entitled to permit or prevent utilizations of its expressions of folklore subject to authorization, the community would act in its capacity of owner of the expressions concerned and would be free to decide how to proceed. There would be no supervisory authority to control how the community exercises its relevant rights. However, the Committee of Governmental Experts was of the opinion that, if it was not the community as such, but a designated representative body thereof, which was entitled by legislation to give the necessary authorization, such a body would qualify as a competent authority, subject to the relevant procedural rules laid down in the Model Provisions.

As regards the *process of authorization*, it follows from Section 10, paragraph (1), of the Model Provisions that an authorization must be preceded by an application submitted to the competent authority. The Model Provisions allow oral applications too, by placing the words "in writing" within square brackets. They also imply that the authorizations to be applied for may be "individual" or "blanket" authorizations, the first meaning an *ad hoc* authorization, and the second intended for customary users such as cultural institutions, theaters, ballet groups and broadcasting organizations.

As far as the contents of the applications are concerned, it is advisable to require the following data, indispensable to enable the competent authority to take a decision: (i) information concerning the prospective user of the expression of folklore, in particular his name, professional activity and address; (ii) information concerning the expression to be used, properly identifying it by mentioning also its source; (iii) information as regards the intended utilization, which should comprise, in the case of reproduction, the proposed number and the territory of distribution of the copies; and, in the case of recitals, performances and communications to the public, the nature and number of such acts, as well as the territory to be covered by the authorization. It will be easier to comply with such requirements if applications are required to be submitted in writing.

The Model Provisions (Section 10, paragraph (2)) allow, but do not make mandatory, collecting *fees for authorizations*. Presumably, where a fee is fixed, the authorization will be effective only when the fee is paid. Authorizations may be granted free of the obligation to pay a fee. Even in such cases, the system of authorization may be justified since it may prevent utilizations that would distort expressions of folklore.

The Model Provisions also determine the purpose for which the collected fees must be used. They offer a choice between promoting or safeguarding national folklore or promoting national culture, in general. Where there is no competent authority and the community concerned authorizes the use of its expressions of folklore and collects fees, it seems obvious that the purpose of the use of the collected fees should also be decided upon by the community.

Section 10, paragraph (3), provides that any decision of the competent authority is appealable. It specifies that the appeal may be made by the applicant (typically, where authorization is denied) and by "the representative of the interested community" (typically, where authorization is granted). This paragraph is in square brackets since it does not apply where the authorization is granted directly by the community concerned.

Sanctions

Sanctions should be provided for each type of offense determined by the Model Provisions, in accordance with the penal law of each country concerned. The two main types of possible punishments are fines and imprisonment. Which of these sanctions should apply, what other kinds of punishment could be provided for, and whether the sanctions should be applicable separately or in conjunction, depends on the nature of the offense, the importance of the interests to be protected and the regulations adopted in a given country concerning similar offenses. Consequently, the Model Provisions do not suggest any specific punishment; they are confined to the requirement of penal remedy, leaving it up to national legislation to specify its form and measure.

As regards seizure and other similar measures, the Model Provisions are somewhat more explicit. Section 7 providing for such measures applies, in the case of any violation of the law, to both objects and receipts. "Object" is understood as meaning "any object which was made in violation of this [law]," while the receipts are "receipts of the person violating it [that is, violating the law]"; typical examples are the receipts of the seller of an infringing object and the receipts of the organizer of an infringing public performance.

It should be noted that seizure and other similar measures are not necessarily considered under the Model Provisions as confined to sanctions under penal law. They may be provided as well in other branches of the law, such as the law on civil procedure. Seizure should take place in accordance with the legislation of each country.

III. ATTEMPTS TO ESTABLISH AN INTERNATIONAL SYSTEM OF *SUI GENERIS* PROTECTION OF EXPRESSIONS OF FOLKLORE

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

In order to further such a process, the Model Provisions provide for their application as regards expressions of folklore of foreign origin either subject to reciprocity or on the basis of international treaties (Section 14). Reciprocity between countries already protecting their national folklore may be established and declared more easily than mutual protection by means of international treaties. However, 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 participants had at their disposal a draft treaty which had been based on the Model Provisions and had outlined a similar protection system at the international level, applying the principle of "national treatment."

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.

However, the great majority of the participants considered it premature to establish an international treaty since there was no sufficient experience available as regards the protection of expressions of folklore at the national level, 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.

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

The problem of "regional folklore" raises even more complex questions. To the competent authority of which country would a user have to turn if he wanted to utilize a certain expression of folklore being part of the national heritage of several countries? What would the situation be if only one of those countries which share certain elements of folklore acceded to the treaty and the others did not? How could the questions of common expressions of folklore be settled among the countries of the regions concerned? Appropriate answers should be given to those and similar questions at the regional level before the idea of an international treaty for the protection of expressions of folklore might emerge in a more or less realistic manner.

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 would be 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.

IV. THE USE OF THE ROME, PHONOGRAMS AND SATELLITES CONVENTIONS FOR AN INDIRECT PROTECTION OF CERTAIN EXPRESSIONS OF FOLKLORE

As discussed above, there are various categories of expressions of folklore as possible subjects of a copyright-type—but *sui generis*—protection. Some of them and particularly the productions of “folk art” (drawings, paintings, carvings, sculptures, pottery, terra-cotta, mosaic, woodwork, metalware, jewelry, textiles, carpets, etc.) obviously cannot enjoy indirect protection by means of “neighboring rights.” However, in the case of many other important categories of expressions of folklore, “neighboring rights” may be used as a fairly efficient means of indirect protection. Folk tales, folk poetry, folk songs, instrumental folk music, folk dances, folk plays and similar expressions actually live in the form of regular performances. 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. The same can be said about the protection of the rights of producers of phonograms and broadcasting organizations in respect of their phonograms and broadcasts, respectively, embodying such performances.

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

The Rome, Phonograms and Satellite Conventions, in general, offer an appropriate basis for such an indirect protection at the international level. The notion of “phonograms” under the Rome and Phonograms Conventions as discussed above, is sufficiently broad and clearly covers phonograms embodying performances of expressions of folklore. The same can be said about the notions of “broadcasting” and “broadcast” under the Rome Convention as they extend to the transmission of any kinds of sounds, or of images and sounds, including, of course, sounds, or of images and sounds, of performances of expressions of folklore. Also the notion of “program-carrying signals” under the Satellites Convention is sufficiently neutral and general; it includes any kinds of programs.

Interestingly enough—and unfortunately—there is, however, a slight problem just in respect of the key notion of “performers” (and the notion of “performances” following indirectly from the notion of “performers”) as determined in the Rome Convention. As discussed above, 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 discussed above, expressions of folklore do not correspond to the concept of literary and artistic works proper. Therefore, the somewhat casuistic and rigid definition of “performers” in the Rome Convention does not seem to extend to performers who perform expressions of folklore.

The not quite fortunate definition of “performers” in the Rome Convention does not mean, however, that “neighboring rights” could not be used for the international protection of performers of expressions of folklore. The definition only determines the minimum scope of protection. If national laws define—as many of them do—“performers” in a more general and flexible manner to also clearly include performers of expressions of folklore, then, on the basis of the principles of national treatment,

also foreign performers enjoy protection. The fact that the scope of application of the Rome Convention and, thus, also the obligation to grant national treatment, extend to the rights of all performers covered by such more general and flexible definitions is confirmed by Article 9 of the Conventions which provides that “[a]ny Contracting State may, by its domestic laws and regulations, extend the protection provided for in this Convention to artists who do not perform literary or artistic works.”

There is growing agreement at the international level that the protection of performers should extend to the performers of expressions of folklore. This agreement was reflected in paragraphs 17 and 28(a) of the memorandum prepared by the International Bureau of WIPO for the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms (WIPO document INR/CE/I/2). The memorandum proposed that the definition should explicitly include the performers of expressions of folklore. When the Chairman of the Committee prepared the basic proposal concerning the “New Instrument,” he accepted this idea and included the proposed extended definition into the draft treaty (see Article 2(a) in WIPO document CRNR/DC/5). Such definition (as Article 2(a)) is included in the WIPO Performances and Phonograms Treaty adopted in Geneva on December 20, 1996 (see WIPO document CRNR/DC/95).

V. REVISITING THE ISSUE OF THE INTERNATIONAL PROTECTION OF FOLKLORE: THE FORTHCOMING UNESCO/WIPO WORLD FORUM

The 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, at their sixth and fifth sessions, respectively, jointly held in Geneva from February 1 to 9, 1996, adopted the following recommendation:

“The Committees of Experts,

“*considering* that the matters concerning expressions of folklore were, according to the decisions of the Governing Bodies of WIPO, subject to deliberations in the regional consultation meetings dealing with matters on the Possible Protocol to the Berne Convention and the Possible Instrument for the Protection of the Rights of the Performers and Producers of Phonograms, organized by the WIPO prior to the present sessions of the two Committees, and taking into consideration the proposals which were resulting from these regional consultation meetings,

“*considering* the comments and suggestions made on these issues in the present sessions of the two Committees,

“unanimously agreed on the following recommendation on the matters concerning the expression of folklore:

“Recommendation

“The Committees recommend to the Governing Bodies of WIPO 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.” (See document BCP/CE/VI/16-INR/CE/V/14, paragraph 269.)

After the adoption of the recommendation, the Delegation of Nigeria expressed the view that, due to the subject matter of the proposed forum, the involvement of UNESCO would be desirable (see the same document, paragraph 270).

The Director General of WIPO stated that WIPO would be glad to offer to UNESCO to cooperate with it in that matter, and the representative of UNESCO attending the said joint sessions of the Committees approved the idea of cooperation between WIPO and UNESCO in that field (see the same document, paragraphs 271 and 274).

The Director General of the Department of Intellectual Property, Ministry of Commerce of Thailand, still before the adoption of the above-quoted recommendation, in a letter addressed to the Director General of WIPO and dated January 5, 1996, indicated the readiness of the Government of Thailand to host a WIPO World Forum on the protection of folklore. This was confirmed after the adoption of the above-quoted recommendation by a letter addressed to the Director General of WIPO and dated June 4, 1996; the letter also contained specific alternative proposals concerning the venue and dates.

In June 1996, the representatives of WIPO and UNESCO agreed on the joint organization of the "UNESCO/WIPO World Forum on the Protection of Folklore" to deal with the issues mentioned in the above-quoted recommendation. On the basis of a proposal of the Government of Thailand, it was agreed that the World Forum would be held in Phuket from April 8 to 10, 1997.

The present World Forum may serve as a basis for a new reconsideration of the legal protection of folklore at the international level.

**LA RECOMMANDATION UNESCO DE 1989 ET LES PERSPECTIVES DE LA
PROTECTION INTERNATIONALE DU FOLKLORE**

*par M. Salah Abada, Chef, Section de la créativité et du droit d'auteur, Division de la créativité,
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Le Folklore est la culture populaire et traditionnelle d'un groupe humain que son histoire fait évoluer en fonction des nécessités de la vie du groupe et à laquelle il s'attache fortement en tant que source de la vie communautaire.

Le rôle du folklore en tant qu'expression de l'identité culturelle et sociale des nations s'est vu considérablement valorisé au cours des vingt dernières années. Son importance ne cesse de grandir en raison principalement de la multiplication des échanges dont il fait l'objet, de l'intérêt culturel et esthétique qu'il représente et de la volonté des peuples de se connaître et de communiquer avec les autres civilisations. Les technologies modernes de reproduction, de représentation et de diffusion massive contribuent fortement à cet échange et en sont les instruments privilégiés.

La Recommandation UNESCO sur la sauvegarde de la culture traditionnelle et populaire, adoptée en 1989, marque une étape importante dans l'intérêt de la communauté internationale pour la mise en valeur du folklore. Aboutissement d'un gigantesque effort qui a mobilisé des spécialistes de toutes les régions du monde depuis 1973, elle intègre une double dimension politico-culturelle et normative.

La recommandation est d'abord la consécration d'une évolution remarquable dans la prise de conscience générale quant à l'importance et au rôle du folklore dans le devenir des peuples. Dans les pays industrialisés comme dans les pays en développement, la culture populaire et traditionnelle s'est émancipée du complexe vis à vis de la culture savante. Son utilité dans l'épanouissement individuel et collectif et son rôle dans la promotion économique et sociale des communautés concernées, ont été mis en valeur par la sagesse des valeurs qu'elle véhicule et l'élégance de son esthétique. Le folklore apparaît comme un des facteurs importants de l'évolution harmonieuse de la société en développement et un grand espoir de contrepoids démocratique à la culture élitiste dominante par la diffusion industrielle. Il s'affirme aussi comme une source privilégiée de connaissance de la richesse culturelle traditionnelle dans le monde.

Dans sa dimension normative, la Recommandation est le premier instrument international qui détermine des principes et des règles de sauvegarde et de protection juridique du folklore au niveau national et au plan international. Elle consacre à cet effet une définition internationale du folklore qui engage 185 États de la Communauté internationale, membres de l'UNESCO. Cette définition intègre toute l'étendue matérielle et immatérielle de la culture populaire et traditionnelle. Elle indique aussi les mesures essentielles que les États membres devraient suivre dans tout le processus de leur action de sauvegarde du folklore qui intègre sa définition, sa préservation, sa conservation, sa diffusion et les règles de coopération internationale en la matière.

Le problème aujourd'hui est de savoir (i) comment renforcer et accélérer davantage la mise en oeuvre de cet instrument de promotion du folklore dans les pays en développement notamment, pour asseoir sur des bases solides la protection internationale de la culture traditionnelle et populaire (ii) et quelles sont les perspectives d'évolution vers une protection juridique internationale plus affirmée, de ce patrimoine de plus en plus exploité dans les échanges internationaux.

I. La promotion de la sauvegarde nationale du folklore

La sauvegarde du folklore au niveau national, dans le cadre des règles indiquées par la Recommandation, appelle désormais que l'aspiration culturelle légitime très forte qui anime beaucoup de pays, soit reliée par une volonté politique aussi forte et par une action concrète et régulière des communautés locales intéressées, des Institutions et Associations de la société civile et des autorités locales, régionales et nationales. La communauté internationale se devant de soutenir et promouvoir cette action des Nations.

Les communautés locales et les divers instances de la société civile, sont appelées à se sentir plus concernées que quiconque par le recensement des différentes catégories de créations et valeurs folkloriques de leur environnement social. Cette action stratégique est bien à leur portée. Il existe dans toutes les communautés locales des initiatives dynamiques qui ne demandent qu'à être mobilisées pour se dévouer à la sauvegarde de leur folklore. Des guides de collecte des données, publiés par l'UNESCO et les

autres institutions spécialisées, sont largement diffusés et peuvent utilement développer l'expertise locale. Les moyens techniques d'enregistrement sont aujourd'hui disponibles dans toutes les régions du monde à des coûts raisonnables et sont d'utilisation très aisée. Les communautés locales sont aussi appelées à dynamiser l'expression de leurs besoins en soutien national ou international. Elles devraient se mobiliser pour exprimer les besoins, notamment en formation, en équipement et en expertise, et défendre avec persévérance leur prise en charge au niveau des autorités nationales.

Les autorités locales, régionales et nationales devraient de leur côté, institutionnaliser leurs programmes d'action pour la sauvegarde du folklore national. Dans ce cadre, il est de la plus haute importance que leurs besoins en formation, en équipement et en organisation des systèmes d'identification, de classification, de conservation et de préservation du patrimoine folklorique, adaptés à leurs réalités, soient régulièrement évalués et inscrits dans des programmes d'actions réalisables à court et à moyen termes. Elles devraient aussi affecter régulièrement des ressources financières, même limitées, pour soutenir la permanence des initiatives locales en la matière.

La recherche de l'expertise et du soutien matériel et financier international des pays en développement, devrait être maîtrisée dans son contenu et dans sa démarche. Les demandes de soutien devraient être préparées avec le plus grand soin. Elles devraient s'inscrire dans le cadre de programmes d'actions réalisables, et être communiquées aux Institutions Internationales compétentes aux périodes appropriées d'élaboration de leur programme et budget à adopter par les Organes Directeurs. Cette démarche facilite grandement la prise en compte des demandes dans les programmes réguliers de ces Institutions. Elle les aide aussi à développer leur dynamisme dans la mobilisation des ressources extrabudgétaires nécessaires à l'élargissement de leur programme, auprès d'autres institutions internationales publiques ou privées et auprès d'autres États intéressés par la promotion de la culture populaire et traditionnelle dans le monde.

C'est par cette mobilisation continue des potentialités endogènes et de la recherche éclairée du soutien international approprié, que les pays en développement pourront prendre en charge au mieux la sauvegarde de leur culture traditionnelle et populaire et contribueront de façon décisive, à promouvoir la protection des expressions de leur folklore, exploitées dans le cadre des échanges internationaux.

II. Les perspectives de la protection internationale du folklore

La protection internationale du folklore qui a besoin d'être soutenue par l'aptitude des États à identifier et à diffuser leur folklore dépend, pour sa prise en charge réelle, de la protection juridique du folklore dans le droit national et de l'existence de règles juridiques internationales couvrant la protection des expressions du folklore, à l'occasion des différentes formes de leur exploitation hors du territoire national.

La protection juridique nationale des expressions du folklore dans ce contexte est une nécessité. Aucun État ne peut en effet raisonnablement prétendre obtenir la protection de son folklore à l'étranger s'il ne le protège pas lui-même dans son droit interne. La protection juridique nationale du folklore peut être assurée au moyen de plusieurs techniques juridiques, comme l'ont démontré les exposés consacrés à ce thème au cours de la deuxième séance de travail de ce Forum mondial. Cependant, il est bien admis que les expressions intellectuelles du folklore ainsi que leurs interprétations ou exécutions, relèvent plutôt de la protection du droit d'auteur et des droits voisins. Avec bien sûr des adaptations propres à leur nature. Les expressions folkloriques du domaine de la littérature orale, de la musique traditionnelle, des arts populaires et de l'architecture, sont en effet de la même famille que les oeuvres littéraires et artistiques du domaine protégé par le droit d'auteur.

Plusieurs lois nationales, notamment en Afrique, comme la Loi type de Tunis sur le droit d'auteur, prévoient en effet la protection des aspects de propriété intellectuelle du folklore dans ce cadre. Les dispositions types de législation nationale sur la protection du folklore adoptées en juillet 1982 par un comité d'experts gouvernementaux sous l'égide de l'UNESCO et de l'OMPI, confirment également cette vocation de la technique du droit d'auteur à protéger le folklore avec des adaptations spécifiques à sa nature. Vingt huit législations nationales africaines ont suivi cette démarche. Les États aspirant à la protection juridique de leur folklore à l'étranger, ont donc besoin de promulguer une législation nationale en la matière. L'intérêt de la protection internationale du folklore mérite d'être observé à la lumière des possibilités qu'offre le droit international en vigueur et des perspectives de promotion de cette protection eu égard aux besoins d'une coopération internationale équilibrée en la matière.

Les possibilités de la protection juridique internationale des expressions du folklore au regard du dispositif juridique en vigueur sont variées, mais de portée bien limitée. La Convention universelle sur le droit d'auteur et la Convention de Berne pour la protection des oeuvres littéraires et artistiques en tant qu'instruments internationaux ayant le plus de rapport avec ce domaine, intègrent des dispositions qui ouvrent des possibilités réelles à la protection des expressions intellectuelles du folklore.

A travers son article 1er engageant les États membres à assurer une protection suffisante et efficace "à tous autres titulaires de droits sur les oeuvres littéraires, scientifiques et artistiques" et en application du traitement national prévu par l'article II, paragraphe 3, la Convention universelle pourrait raisonnablement être invoquée pour couvrir la protection des expressions intellectuelles du folklore relevant de la famille des oeuvres littéraires et artistiques, déterminées dans leur contenu et dont les titulaires de droits ont été judicieusement identifiés.

La Convention de Berne offre d'avantage de possibilités à la protection internationale des expressions intellectuelles du folklore. Son article 15.4 vise directement la protection des oeuvres du folklore. Les oeuvres non publiées dont l'auteur est inconnu sont en effet protégées dans tous les pays de l'Union dès lors que la loi nationale détermine le titulaire des droits et que le pays concerné de l'Union notifie au Directeur général de l'OMPI une déclaration écrite indiquant le titre de l'oeuvre folklorique et le titulaire des droits ; le Directeur général devant communiquer cette déclaration à tous les autres pays de l'Union. Cependant, la protection des expressions du folklore dans le cadre de ces deux conventions ne peut être que limitée dans le temps, selon la nature du système du droit d'auteur. Les oeuvres du folklore étant par nature sans auteur connu, la durée maximum qui peut être invoquée dans ce cadre ne pourrait être supérieure à 25 ans ou 50 ans après la publication de l'oeuvre selon le cas. Alors que les oeuvres du folklore ont vocation d'être protégées sans aucune limitation dans le temps. L'exercice pratique de la protection, dans le cadre des deux conventions, pourrait aussi s'exposer souvent à la nécessité d'une confirmation jurisprudentielle.

La Recommandation UNESCO de 1989 sur la sauvegarde du folklore est le troisième Instrument international qui contient des prémices d'une possible protection juridique internationale du folklore. Elle appelle les États membres de l'UNESCO, soit actuellement 185 États, à coopérer pour assurer la protection des droits pécuniaires et moraux attachés aux oeuvres du folklore étranger, exploitées dans leurs territoires respectifs. Dans l'esprit de la Recommandation, la protection du folklore étranger devrait être effective. Elle devrait pouvoir être assurée chaque fois que les oeuvres du folklore sont l'objet d'une exploitation publique qui implique le respect des droits moraux et pécuniaires qui leur sont attachés.

Eu égard à la nature des oeuvres folkloriques et à la finalité de tout le système de leur préservation mis en place par la Recommandation, la protection reconnue n'a pas vocation à être limitée dans le temps et devrait être assurée constamment par les États membres. Cependant, la faiblesse de la protection à laquelle appelle la Recommandation, est qu'elle est formulée dans un texte sommaire de caractère général. Sa nature de Recommandation ne lui confère pas aussi une force obligatoire. Son application relève de l'appréciation discrétionnaire de chaque État qui peut s'abstenir de la mettre en oeuvre sans aucune conséquence juridique inhérente au non respect des engagements internationaux conventionnels. En l'absence de toute législation nationale de protection du folklore, cette protection pourrait difficilement être invoquée devant les tribunaux.

Compte tenu de ce contexte juridique international limité, quelles sont les possibilités d'une protection internationale plus adaptée du folklore, eu égard aux perspectives de développement de son exploitation dans le contexte de la société de l'information?

Il convient essentiellement dans cette alternative, d'explorer la faisabilité et l'intérêt d'un instrument international visant la protection de tous les aspects du folklore par rapport à un instrument limité aux seules expressions intellectuelles de ce patrimoine culturel traditionnel.

L'élaboration d'un éventuel instrument international protégeant tous les aspects du folklore soulève une problématique de complexité et d'attraits variés.

La matière nécessaire à la préparation d'un tel instrument est vaste et très variée. Elle est cependant disponible. Elle peut être puisée dans les travaux qui ont été menés sur le sujet au cours des vingt

dernières années et notamment de la Recommandation UNESCO de 1989, en ce qui concerne les principes et mesures permettant la codification des règles devant régir l'identification, la préservation et la conservation du folklore, des dispositions types de législation nationale UNESCO/OMPI de 1982 et du projet de traité UNESCO/OMPI de 1984, concernant les aspects de propriété intellectuelle.

L'élaboration d'un instrument international unique a l'intérêt de susciter une dynamique internationale de coopération dans la sauvegarde et la protection de l'ensemble du folklore, à travers toutes les régions du monde.

La conclusion d'un tel instrument peut cependant s'avérer très ardue. Les problèmes d'identification et de classification typologique nécessaires à une gestion internationale maîtrisée de la sauvegarde du folklore, sont très variées et complexes, à la mesure de la diversité du folklore. Ils se prêtent difficilement à une harmonisation normative internationale. L'effort à mener pour la recherche d'un consensus international normatif couvrant toute l'étendue du domaine folklorique, serait nécessairement long et risque de conduire à des résultats difficilement applicables. Le débat sur la question mérite cependant d'être bien approfondi.

Un éventuel instrument international limité à la protection juridique des seules expressions intellectuelles du folklore soulève moins de difficultés. L'objet de sa protection serait circonscrit aux expressions folkloriques de la littérature orale, de la musique et des expressions corporelles populaires, aux arts et à l'architecture populaires. Le régime de protection qu'il pourrait instituer, aurait essentiellement à régler les questions de l'identification du contenu et des titulaires de droits des expressions du folklore, de leur intégrité, de leur rémunération et du suivi de leur exploitation à l'étranger. L'étude de cette problématique pourrait être inspirée des dispositions types UNESCO/OMPI de 1982 et du projet de Traité pour la protection des expressions du folklore contre leur exploitation illicite et autres actions dommageables examiné par le Comité d'Experts UNESCO/OMPI, de décembre 1984.

La grande question, dans le cadre de cette approche, est cependant la fixation des critères identifiant les expressions du folklore, relevant de fonds folkloriques communs aux États appartenant à une même région géographique. Il convient aussi de se demander si l'efficacité de la protection des expressions nationales du folklore à l'étranger, ne dépendra pas de l'institution et de la tenue d'un centre international d'information en la matière.

Un débat approfondi, forcément de longue durée, est nécessaire pour éclairer tous les aspects de cette problématique, identifier les choix à retenir et tirer les conséquences qui s'imposent quant au domaine du folklore à protéger et à la nature et à l'étendue d'un éventuel instrument international assurant cette protection.

L'on peut dire en conclusion, qu'expression culturelle et sociale des Nations et patrimoine de l'humanité, la culture traditionnelle et populaire a besoin, aujourd'hui d'une action d'envergure de promotion de sa sauvegarde, par la mobilisation de l'effort national, la coopération inter étatique et le soutien régulier des Institutions internationales compétentes.

Les États devraient mobiliser leurs capacités endogènes pour assurer l'identification, la préservation, la conservation, la diffusion et la protection juridique de leur folklore national. Les pays en développement devraient pouvoir bénéficier d'un plus grand soutien des États des pays industrialisés sensibles aux besoins de sauvegarde de cette richesse de la civilisation humaine. Les institutions internationales concernées devraient développer leur expertise et leur soutien en formation et en équipement pour aider les pays en développement à organiser efficacement leur système national de sauvegarde de la culture traditionnelle et populaire.

La protection juridique internationale du folklore, soutenue par la capacité des États à identifier et à sauvegarder leur folklore national, devrait viser à établir des règles réalistes par rapport aux exigences d'exploitation du folklore, et se développer en fonction des besoins d'une coopération internationale fructueuse pour la sauvegarde et le respect de la culture traditionnelle et populaire dans le monde.

CLOSING SESSION
AND
ADOPTION OF A PLAN OF ACTION

During the Closing Session, under the chairmanship of Mr. Weerawit Weeraworawit, in addition to the brief closing remarks made by Mr. Banphot Hongthong, Mr. Salah Abada and Dr. Mihály Ficsor, the following Plan of Action was adopted:

"The participants from both the public and private sectors of the member countries of WIPO and UNESCO made an extensive exchange of views and experiences at the UNESCO-WIPO World Forum on the Protection of Folklore from 8 to 10 April, 1997, in Phuket, Thailand. They noted the welcoming and keynote address by H.E. Somporn Asavahame who invited the participants to meet a challenge of creating a new international standard for the legal protection of folklore. They also took into account the Recommendation on the Safeguarding of Traditional Culture and Folklore adopted by the UNESCO General Conference at its twenty-fifth session in Paris on 15 November, 1989.

"The participants were of the view that at present there is no international standard protection for folklore and that the copyright regime is not adequate to ensure such protection. They also confirmed a need to define, identify, conserve, preserve, disseminate, and protect folklore which has been a living cultural heritage of great economic, social, and political significance from time immemorial. They emphasized the importance of striking a good balance of interests between the community owning the folklore and the users of expressions of folklore. They were convinced that closer regional and international cooperation would be vital to the successful establishment of a new international standard for the protection of folklore.

"The participants also urged both WIPO and UNESCO to pursue their efforts to ensure an effective and appropriate international regime for the protection of folklore.

"In the light of the above, most participants wish to suggest the following actions.

"A Committee of Experts should be set up in cooperation with UNESCO as soon as possible consisting of experts in both the conservation and protection of folklore and representing a fair balance of global geographical distribution.

"Regional consultative fora should take place.

"The Committee of Experts should complete the drafting of a new international agreement on the *sui generis* protection of folklore by the second quarter of 1998, in view of the possible convocation of a Diplomatic Conference, preferably in the second half of 1998.

"The 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."

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