

# PROTECTION OF FOLKLORE EXPRESSIONS : A POSSIBLE MECHANISM\*

**Mitsue DAIRAKU\*\***

## I. INTRODUCTION

The issue of protection of folklore expressions is very challenging. It is so challenging that we have not yet reached any practical international scheme despite the efforts of WIPO and UNESCO for more than 30 years<sup>(1)</sup>.

Certainly, there was some progress in the meantime. First, "Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (Model Provisions)" were adopted in 1982, and have been followed by several countries. Second, "Phuket Plan of Action" was adopted at the "UNESCO-WIPO World Forum on the Protection of Folklore", which was held in Phuket, Thailand in April 1997. The Action Plan confirmed "a need to protect folklore which has been a living cultural heritage of great economic, social, and political significance

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\* Document prepared for, and revised after, "the 3rd ASIA-PACIFIC Copyright and Neighboring Rights Seminar (Tokyo Seminar)" organized by the Japan Copyright Office (JCO) of the Government of Japan and the copyright Research and Information Center (CRIC), and held in Tokyo, Japan, March 10-12, 1999. The presentation was made by the author on March 11, 1999, and the original paper was included in the proceedings of the seminar.

\*\* Professor of Law, Faculty of Law, Hokuriku University.

(1) See attached Table 1 (Developments at WIPO and UNESCO).

from time immemorial”, and called for three actions<sup>(2)</sup> :

1. Setting up of an Expert Committee in cooperation with UNESCO as soon as possible ;
2. Regional consultative fora ; and
3. Completion 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.

However, there has not been any active development since then.

The issue is challenging because it forces us to reexamine the fundamental role of the copyright system and boundaries of copyright protection.

Let me show you an example of Japanese folklore expressions. This is a doll called “Okiagari-Koboshi”, which literally means “recovering-original-posture baby boy”, or a tumbler. Since it regains its original position whenever you push it forward or backward to tumble, people believe it is lucky and encouraging to have one with them. It symbolizes healthy and persistent life. This particular doll is one of its local varieties. It is shaped as a baby of a good rich family wrapped in vermilion-colored bunting. They say the color and shape were adopted from the legendary style of an ancient emperors’ babyhood of almost 2000 years ago. This could make a good gift to celebrate a newly-wed couple or to a family with a new born baby, wishing a healthy and rich life for them. In addition, for some reasons,

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(2) “UNESCO-WIPO World Forum on the Protection of Folklore (UNESCO Publication No. CLT/CIC/98/1, UNESCO 1998, WIPO Publication No.758, WIPO 1998)” [hereinafter, “World Forum”], p.235. The participants from the Governments of the United States and the United Kingdom “expressly stated that they could not associate themselves with the plan of action (id.)”.

they also believe the doll helps you to enrich your wardrobe. So, why don't we get one for each of us? Why not?

But, who is the original author? We don't know. Its attached pamphlet says that a local shogun, a tycoon, encouraged to make those dolls as one of their local specialties about 400 years ago. Is it original? It could be, in terms of the expression of its face and flower painting on the surface, but it is also likely that it simply imitates their local traditional way of making and painting. Shouldn't we put it in the public domain, because it is after all, a part of the local cultural heritage? Wouldn't it be better if we could freely use the expressions of this doll, so that the tradition could be maintained and developed in our society in large?

Like this small doll, folklore expressions immediately give us a series of difficult questions, once we start considering their possible protection by copyright. Our first question is how to define the folklore expressions.

## **II. DEFINITION AND CHARACTERISTICS OF “FOLKLORE EXPRESSIONS”**

“Folklore” could cover a very wide range of things (cf. Table 2). It could be a method to prepare a unique secret tribal medicine, or to make an excellent boat suitable for local fishing. But, if we consider a copyright-type protection for folklore, we have to draw a line somewhere between idea and expression. Even if we exclude idea-related folklore, we are amazed at the wide variety of the “folklore expressions” as the Table 1 shows. Then, how do we define them?

The Berne Convention gave up the definition due to its difficulty of defining “folklore” at the time of Stockholm amendment in 1967. Instead, Article 15, Paragraph 4 pointed out some features of “folklore”, namely, an

unpublished work, unknown identity of the author, and good reasons to believe the author is a national of a member country. Many countries adopted this style (e.g. Angola<sup>(3)</sup>, Bolivia<sup>(4)</sup>, Kenya<sup>(5)</sup>, Malawi<sup>(6)</sup>, Panama<sup>(7)</sup>).

The Model Provisions do not expressly define folklore, either, but define the term “expressions of folklore” 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”<sup>(8)</sup>. The Provisions do not use the term “works”, but use the words “expressions” and “productions” instead, because they offer a *sui generis* regime rather than a genuine copyright system<sup>(9)</sup>. The Provisions indicate four categories of folklore expressions to be protected under them : 1) verbal expressions (e.g. folk tales, folk poetry and riddles) ; 2) musical expressions (e.g. folk songs and instrumental music) ; 3) expressions by action (e.g. folk dances, plays and artistic forms for rituals) ; and 4) tangible expressions (e.g. drawings, paintings, carvings, sculptures, pottery, terra-cotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes, musical instruments and architectural forms)<sup>(10)</sup>. For the first three categories,

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( 3 ) Law on Authors' Rights, No.4/90 of March 10, 1990, Art.4(f).

( 4 ) Law on Copyright, No.12 of April 29, 1992, Art.21.

( 5 ) The Copyright Act, 1966, No.3 of 1966 as amended by the Copyright (Amendment) Acts No.5 of 1975, No.5 of 1982 and No.14 of 1989, Art.15(4).

( 6 ) Copyright Act, 1989, No.9 of April 26, 1989, Art.2.

( 7 ) Law on Copyright and Neighboring Rights and Enacting Other Provisions, Law No. 15 of August 8 of 1994, Art.2(11).

( 8 ) Section 2 of the Model Provisions.

( 9 ) Mihaly Ficsor, Attempts to Provide International Protection for Folklore by Intellectual Property Rights, “World Forum”, p.218.

(10) *Supra* note 3.

fixation is not required<sup>(11)</sup>. Their definition is followed by such countries as Lesotho<sup>(12)</sup>.

Regardless which approach has been taken, existing national legislations seem to share common understandings about the characteristics of folklore expressions. That is: (1) they constitute a part of traditional cultural heritage of a country; (2) they are handed down from generation to generation; and (3) they are an expression of the people's cultural identity. In other words, folklore expressions are, as the Nigerian Copyright Act correctly describes, essentially "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 as transmitted orally, by imitation or by other means"<sup>(13)</sup>. A "community" could be a family, clan, village or even a nation. But, this very nature, "group-oriented" and "transmitted by imitation", conflicts with the copyright system, because the copyright system is individualistic. Folklore expressions, whether they are sacred, religious, philosophical, customary or just for daily convenience of life, are living cultural heritage representing a cultural identity of a community, and to be expected to exist perpetually, holistically and harmoniously within the community.

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(11) Under the Japanese Copyright Law, fixation is not required for subsistence of copyright (Art. 2(1)①), except for cinematographic works (Art. 2(3)). However, many countries such as the United States still require fixation as a condition for copyright protections, because the Berne Convention leaves it as a matter for national legislation (Art. 2(2)).

(12) Copyright Order, 1989, No.13 of 1989, Art.2.

(13) Copyright Act as last amended by the Copyright (Amendment) Decree No.96 of 1992, Sec.28(5).

### **III. CURRENT FRAMEWORKS FOR POSSIBLE PROTECTION OF FOLKLORE EXPRESSIONS**

#### **1. International Framework**

##### **(1) Berne Convention and Other Copyright Treaties**

Article 15(4)(a) of the Berne Convention provides for a system of designation, by national legislation, of the competent authority representing the author for enforcing his rights in member countries. The same paragraph, in (b), requires such country so designated to notify the Director General of WIPO of the designation, and the Director General is expected to communicate it to other member countries.

It seems to be good, but there remains a fundamental problem. In order to utilize this system, the subject matter should be a “work”. It should be “original”, not imitated, but as I said before, folklore expressions are transmitted by imitation. Moreover, under the copyright system, the duration of protection is limited, but the notion of duration is contradictory with the preservation of folklore expressions, which are important elements of our cultural heritage and expected to be perpetually maintained.

##### **(2) Rome Convention and Other Neighboring Rights Treaties**

Protections of performers could give indirect protections to some of folklore expressions such as folk dances. But there are still some obstacles. First, what shall we do with, for example, textiles? It is useless for those folklore expressions which are not performed. Second, “performers” under the Rome Convention are supposed to perform “literary or artistic works”. Here again, we stumble at the wall of “works”. However, WPPT, or the WIPO Performances and Phonograms Treaty, cleared this problem by

adding “or expressions of folklore”<sup>(14)</sup>. Still, the limitation of “performance” remains as to non-performed type folklore expressions.

## 2. National Legislations

National legislations on folklore expressions could be divided into several groups.

- (1) Those with no specific provisions (most of advanced countries).
- (2) Those which have provisions classifying folklore expressions as works in the public domain, and give no particular protection therefor (e.g. Dominican Republic<sup>(15)</sup>).
- (3) Those classifying folklore expressions as works in the public domain, but designating some office (e.g. King in Saint Vincent and the Grenadines<sup>(16)</sup>, the State acting through the Ministry in charge in Qatar<sup>(17)</sup>) for such protections.
- (4) Those with special provisions for such protections. For example, in Malawi, copyright in folklore expressions are vested in perpetuity in the Government, which authorizes uses such as publication, reproduction and communication to the public for gainful purposes or outside their traditional and customary context<sup>(18)</sup>.
- (5) Those with provisions promising separate regulations on such protection (e.g. China<sup>(19)</sup>). Kenya also provides for possible regulations for licensing

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(14) Art. 2(a).

(15) Law on Copyright, No.32-86 of July 4, 1986, Art.138.

(16) Copyright Act, 1989, No.53 of December 27, 1989, Sec.16.

(17) Law No.25 of 1995 concerning the Protection of Works of the Intellect and Authors' Rights, Art.39.

(18) Sections 24, 25.

(19) Copyright Law of September 7, 1990, Art.6.

of use of folklore, except by a national public entity for non-commercial purposes, and for importation of any work made abroad which embodies folklore<sup>(20)</sup>. Lesotho has similar provisions on possible regulations for authorization by the Minister in charge for publication, reproduction, etc. of folklore expressions for both with the commercial purposes and outside their traditional context<sup>(21)</sup>.

#### **IV. PROBLEMS OF COPYRIGHT PROTECTION FOR FOLKLORE EXPRESSIONS**

The copyright system could protect folklore expressions to some extent. For example, you can protect a newly created work, which has been inspired by a folklore expression, if it preserves the core features of that particular folklore expression, and still shows some individual creativity. Moreover, you can protect some of them, those expressions which can be performed, indirectly through neighboring rights by protecting performers who perform them.

However, the copyright system falls short of appropriate protection for folklore expressions in many ways. Let me sum up here the major obstacles of copyright protections when applied to folklore expressions.

First, the notion of “individual creativity”. This is also related to the concepts of “works”, “authors” and “ownership”. The inherent nature of folklore expressions as “group-oriented creation”, which necessarily lead to communal ownership, and “being inherited by imitation” are totally contradicting to the basic concepts of the copyright system.

Second, the notion of “duration”. Since the copyright legislation is a

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(20) Sec.15(3).

(21) Sec.19.



division of the whole intellectual property system of a country, it is destined to impose the time limit on a copyright in order to facilitate public use of the formerly-protected work, and to promote cultural development. But, folklore expressions need to be protected without any time limits by its nature as representing a community's cultural identity. They should also be protected against distortion, false representation of originating community, and importation of pirated products.

Therefore, we need a *sui generis* scheme for protection of folklore expressions as some countries have already adopted. Let us review the Model Provisions as a model scheme of that kind.

## **V. "WIPO / UNESCO Model Provisions for National Legislations": COPYRIGHT-TYPE SUI GENERIS PROTECTION**

### **1. Suggested Scheme**

We should note first that the model provisions are just a model for national legislations. They are not a treaty or even a draft treaty, and as such, they do not offer a sufficient international scheme.

As basic principles, they intended : (1) not to stifle folklore expressions, a living body of human culture, by too rigid protection, and (2) to make the protection system a practicable and effective one leaving enough room for national laws to adopt a system which best corresponds to their own conditions<sup>(22)</sup>.

They aim at protecting folklore expressions against "illicit exploitation" and "other prejudicial actions"<sup>(23)</sup>. Any utilization made both with gainful intent and outside the traditional or customary context of folklore

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(22) *Supra* note 9 at 218.

(23) Sections 1, 3.

without authorization by a competent authority or the community concerned is “illicit exploitation”. There are some exceptions for this such as the following : (1) uses for educational purposes, (2) uses by way of illustration, (3) borrowing for creating an original works based on folklore expressions, and (4) incidental use<sup>(24)</sup>. For “other prejudicial actions”, the Model provisions identify four kinds of actions, which are subject to criminal sanctions when committed willfully : (1) violation of requirement of indication of appellation of origin, (2) unauthorized use of folklore expressions, (3) misrepresentation of the source, and (4) distortion which is prejudicial to the relevant community<sup>(25)</sup>.

As the authorizing body, the Model Provisions provide for a competent authority and a community concerned. This way, they avoid possible confusions and conflicts among countries in terms of interpretation of ownership<sup>(26)</sup>. “Supervisory authority” is also suggested<sup>(27)</sup>. The designated competent authority or community concerned has tasks such as : (1) to grant authorizations, and (2) to fix and collect a fee, if any. The fees shall be used for promoting or safeguarding national culture or folklore<sup>(28)</sup>. Any decision by the competent authority is appealable<sup>(29)</sup>. The Model Provisions require national laws to provide for criminal sanctions.

For international protection, the Model Provisions provide for international extension of protection, based on reciprocity<sup>(30)</sup>.

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(24) Sec.4.

(25) Sec.6.

(26) *Supra* note 9 at 221.

(27) Sec.9.

(28) Sec. 10.

(29) Sections 10(3), 11(1).

(30) Sec.14.

## 2. Remaining Problems

The Model Provisions' scheme is well thought in striking a balance between the protection of folklore expressions on one hand and free development of individual creativity on the other hand. They also suggest a practical and flexible scheme for protection.

Nevertheless, there are still three remaining problems: (1) that they do not suggest how to identify the "folklore expressions" to be protected, (2) that they left open the issue of how to deal with "regional folklore"<sup>(31)</sup> such as Batiks which are cherished in many countries, and (3) specific management system, for example, how to allocate the collected fees to the communities concerned<sup>(32)</sup>.

## VI. A POSSIBLE MECHANISM FOR INTERNATIONAL PROTECTION OF FOLKLORE EXPRESSIONS

I would like to suggest a possible mechanism for international protection of folklore expressions by adding some details to the Model Provisions.

1. First, we need a domestic level of scheme. In order to solve the problems of identification of folklore expressions and effective distribution of collected fees, we need a well organized system.

We could establish a national supervisory organization, which supervise the whole domestic system including the fixation of rates for fees or royalties for authorization of use as well as the identification of the subject

(31) We cannot avoid this problem, because most of our national borders have been drawn artificially without considering actual distribution of various cultures.

(32) Togo, for example, has detailed provisions for distribution of collected royalties (Law on the Protection of Copyright, Folklore and Neighboring Rights, No. 91-12 of June 10, 1991, Art.72). In the case of exploitation with arrangement or adaptation, 75% to the author and 25% to the Togolese Copyright Bureau.

matter with the assistance of experts and representatives of local communities.

In this relation, designation of custodians for specific folklore expressions could be useful. A custodian could be an eldest person in a tribe which has maintained a specific folklore expression for the tribe, a young son qualified to succeed by his lineage in a family, which is in charge of a village's rituals, or whoever qualified and recognized as the successor of a specific folklore.

We also need collective administration Organization(s) for actual authorizing and collecting businesses, for which national supervisory body could give a permission for the establishment. Then, they distribute the collected fees, after deducting operational expenses, to custodians and the supervisory body. The Supervisory body is in turn expected to spend it for promotion of folklore expressions. Those organizations could keep their own registers of folklore for which they are responsible, and notify new entries to the supervisory body, where a national register is kept.

In terms of enforcement, we will still have to rely on national laws for criminal sanctions and possible civil remedies for a while, and among all, with an emphasis on border controls.

2. Second, for international level, protection through reciprocity is not quite effective. An international system of sui generis protection under a treaty will be necessary. We could then imagine a mechanism of international registrations at WIPO. This registration at international level would be effective, if there will be established an international classification (e.g. "B-ID 3" indicates "Batik pattern registration No.3 originating from Indonesia"), because that way, we could properly deal with regional folklore expressions, while maintaining the identity of each particular expression

originating from a specific community. We may have to pay for actual operating fees for maintaining the international register, desirably set proportionately to the GDP figures of member countries in order to decrease the financial burdens of developing countries.

These networks of registrations may sound very cumbersome, but computer networking would make the whole procedures much easier in the future than we expect now.

3. Under such a treaty, we will be able to enjoy national treatment and minimum protections for folklore expressions in other member country. For that purpose, though, we have to make every efforts towards the realization of such a treaty.

4. Then, do we have to just wait doing nothing but those efforts aiming at the realization of such an international treaty? No, I don't think so, because we can start our "Asia-Pacific Regional Registration Network", for instance. "Asia-Africa Network" might also be interesting. So, why don't we give it a try to take a first step forward? Why not?

Thank you.

**Table 1 : Developments at WIPO and UNESCO**

<b>1967</b>	<b>WIPO</b>	Stockholm Diplomatic Conference for Revision of the Berne Convention (→Stockholm Act, §15(4), Copyright protection for folklore).
<b>1978</b>	<b>WIPO</b>	First draft of sui generis Model Provisions for intellectual-property type protection of folklore against certain unauthorized uses and against distortion (by WIPO International Bureau).
<b>1980-81</b>	<b>WIPO / UNESCO</b>	Working Group to Study the Draft.
<b>1982</b>	<b>WIPO / UNESCO</b>	“Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions” adopted by a Committee of Governmental Experts.
<b>1984</b>	<b>WIPO / UNESCO</b>	An Expert Committee convoked for examination of possible international protection of folklore as intellectual property.
<b>1985</b>	<b>WIPO / UNESCO</b>	Joint Conference generally accepted the Expert Committee’s Report, but concluded too early for an international treaty for the protection of folklore expressions.
<b>1989</b>	<b>UNESCO</b>	“Recommendation on the Safeguarding of Traditional Culture and Folklore” adopted by the General Conference.
<b>1997</b>	<b>WIPO / UNESCO</b>	World Forum on the Protection of Folklore (Phuket, Thailand).

**Table 2 : Examples of “Folklore”**

<b>Folklore</b>	<b>Scientific &amp; technological Methods</b>	<b>Agricultural techniques</b>	
		<b>Preparation of medicines</b>	
		<b>Production of textiles</b>	
	<b>Artistic Expressions</b>	<b>Verbal</b>	<b>Folk poetry</b>
			<b>Folk riddles</b>
			<b>Folk tales</b>
		<b>Musical</b>	<b>Folk music</b>
			<b>Folk songs</b>
		<b>By action</b>	<b>Folk dance</b>
			<b>Folk plays</b>
			<b>Rituals</b>
		<b>Tangible Expressions</b>	<b>Basket weaving</b>
			<b>Carpets</b>
			<b>Carvings</b>
			<b>Costumes</b>
			<b>Drawings</b>
			<b>Jewelry</b>
			<b>Metal wares</b>
			<b>Mosaic</b>
<b>Needle works</b>			
<b>Paintings</b>			
<b>Pottery</b>			
<b>Sculptures</b>			
<b>Terra-cotta</b>			
<b>Textiles</b>			
<b>Woodworks</b>			