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Second Session
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PRELIMINARY REPORT ON NATIONAL EXPERIENCES WITH THE LEGAL
PROTECTION OF EXPRESSIONS OF FOLKLORE

prepared by the Secretariat

I. INTRODUCTION

1. The first session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (April 30 to May 3, 2001) (“the Intergovernmental Committee”) considered under Agenda Item 5.3 (“Protection of Expressions of Folklore”) certain issues and possible tasks related to intellectual property and expressions of folklore that had been suggested for discussion in a document entitled “Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Expressions of Folklore – An Overview” prepared by the Secretariat of the World Intellectual Property Organization (WIPO).¹ These issues and tasks had been identified and suggested in previous WIPO and other activities.

2. One of the suggestions considered at the first session was that the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, which were adopted in 1982 under the auspices of WIPO and the United Nations Educational, Scientific and Cultural Organization (UNESCO) (“the Model Provisions”), be updated to take into account developments and new forms of commercial exploitation that have taken place since 1982, as had been recommended in four Regional

¹ WIPO/GRTKF/IC/1/3.

Consultations on the Protection of Expressions of Folklore organized by WIPO and UNESCO in 1999.² In addition, the first session of the Intergovernmental Committee considered a suggestion that, once updated, the Model Provisions could constitute a basis for effective protection for expressions of folklore at national, regional and international levels, as had also been referred to at the Regional Consultations.³

3. In the course of such discussions, several Member States indicated that further information on national experiences with the protection of expressions of folklore, including more specifically with implementation of the Model Provisions, would be desirable before further consideration be given to the various intellectual property issues related to expressions of folklore referred to in previous WIPO activities.⁴

4. Accordingly, the Secretariat of WIPO prepared and issued a “Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore” (WIPO/GRTKF/IC/2/7) (“the questionnaire”).⁵

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

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

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

8. Those Member States of WIPO and other Members of the Intergovernmental Committee which have not yet completed the questionnaire are invited to do so before December 31, 2001. Thereafter, a final report on all the questionnaires received before that date will be prepared and issued by the Secretariat. The final report will summarize and analyze the responses received, draw conclusions and suggest tasks and activities that the

² See WIPO/GRTKF/IC/1/3, paras. 92 to 101.

³ *Idem*, paras. 107 – 114.

⁴ See WIPO/GRTKF/IC/1/13 (Report of first session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore), paras. 156 to 175.

⁵ The questionnaire was distributed to all WIPO’s Member States and other Members of the Intergovernmental Committee, and is also available on WIPO’s web site at <http://www.wipo.int/globalissues/igc/documents/index.html>

Intergovernmental Committee may wish to undertake. The final report will be issued before February 28, 2002.

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

(i) Section II. Overview of Intellectual Property Needs and Issues Related to Expressions of Folklore. This part provides an overview of the various legal, conceptual, operational and administrative needs and issues related to intellectual property and expressions of folklore that Member States and other stakeholders have identified in previous WIPO activities and processes. This part aims to provide a context within which the questionnaire and the responses to it can be viewed.

(ii) Section III. The Questionnaire on National Experiences with the Protection of Expressions of Folklore. This section provides brief information on the nature, scope and format of the questionnaire.

(iii) Section IV. Preliminary Summary of the Responses Received to the Questionnaire. This section provides a preliminary summary of the responses to the questionnaire received by the WIPO Secretariat on or before September 30, 2001.

(iv) Annex I comprises a table setting out the names of the States which submitted completed questionnaires on or before September 30, 2001, and the names of the relevant office or agency that was identified by the State as the contact for the matters referred to in the questionnaire.

(v) Annex II comprises a copy of the Model Provisions.

II. OVERVIEW OF INTELLECTUAL PROPERTY NEEDS AND ISSUES RELATED TO EXPRESSIONS OF FOLKLORE.

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

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

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

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

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

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

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

- (vi) the WIPO-UNESCO World Forum on Expressions of Folklore, Phuket, Thailand, 1997;
- (vii) the WIPO fact-finding missions on traditional knowledge, 1998-1999;
- (viii) the WIPO-UNESCO Regional Consultations on the Protection of Expressions of Folklore, 1999; and
- (ix) the first session of the Intergovernmental Committee.

International protection for “unpublished works” in the Berne Convention for the Protection of Literary and Artistic Works

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

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

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

13. This Article of the Berne Convention, according to the intentions of the revision Conference, implies the possibility of granting protection for expressions of folklore. Its inclusion in the Berne Convention responds to calls made at that time for specific international protection of expressions of folklore.⁶

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

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

⁶See Ficsor, M., “Attempts to Provide International Protection for Folklore by Intellectual Property Rights”, paper presented at the UNESCO-WIPO World Forum on the Protection of Folklore, Phuket, Thailand, April 8 to 10, 1997, p.17; Ricketson, S., *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London, 1987) pp. 313-315. Only one country, India, has made the designation referred to in the Article.

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

16. The Tunis Model Law provides specific protection for works of national folklore. Such works need not be fixed in material form in order to receive protection, and their protection is without limitation in time.⁷

The Model Provisions, 1982

17. The Model Provisions were adopted in 1982 by a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore, which had been convened by the Directors General of WIPO and UNESCO.⁸

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

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

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

21. However, it appears that the Model Provisions have not had extensive impact on the legislative frameworks of WIPO's Member States. Several reasons have been advanced for this, such as the scope of protected expressions in the Model Provisions. In this regard, for example, it has been suggested that the Model Provisions should also cover forms of "traditional knowledge" related to traditional medicine and medicinal practices, traditional

⁷ See particularly section 1 (^{5bis}) and section 6, Tunis Model Law.

⁸ See generally Ficsor, M., *op. cit.*

agricultural knowledge and biodiversity-related knowledge.⁹ The nature and scope of the rights granted over expressions of folklore by the Model Provisions has also been cited as a reason. It has been suggested, for example, that the Model Provisions are limited in their usefulness because of their not providing for exclusive ownership-type rights over folklore.¹⁰ In addition, as already noted, the possibility that the Model Provisions may be out of date, given technological, legal, social, cultural and commercial developments since 1982, has also been cited as a reason for the relatively low number of countries which appear to have implemented or followed the Model Provisions.¹¹

Attempts to establish an international treaty, 1982 to 1985

22. A number of participants stressed at the meeting of the Committee of Governmental Experts which adopted the Model Provisions that international measures would be indispensable for extending the protection of expressions of folklore of a given country beyond the borders of the country concerned. WIPO and UNESCO followed such suggestions when they jointly convened a Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property, which met in Paris from December 10 to 14, 1984. The Group of Experts was asked to consider the need for a specific international regulation on the international protection of expressions of folklore by intellectual property and the contents of an appropriate draft. The discussions at the meeting of the Group of Experts reflected a general recognition of the need for international protection of expressions of folklore, in particular, with regard to the rapidly increasing and uncontrolled use of such expressions by means of modern technology, beyond the limits of the country of the communities in which they originate.

23. However, the great majority of the participants considered it premature to establish an international treaty since there was not sufficient experience available as regards the protection of expressions of folklore at the national level, in particular, concerning the implementation of the Model Provisions. Two main problems were identified by the Group of Experts: the lack of appropriate sources for the identification of the expressions of folklore to be protected and the lack of workable mechanisms for settling the questions of expressions of folklore that can be found not only in one country, but in several countries of a region. The Executive Committee of the Berne Convention and the Intergovernmental Committee of the Universal Copyright Convention, at their joint sessions in Paris in June 1985, considered the report of the Group of Experts and, in general, agreed with its findings. The overwhelming majority of the participants was of the opinion that a treaty for the protection of expressions of folklore was premature. If the elaboration of an international instrument was to be realistic at all, it could not be more than a sort of recommendation for the time being.

⁹ See documents WIPO-UNESCO/FOLK/AFR/99/1, WIPO-UNESCO/FOLK/ASIA/99/1, WIPO-UNESCO/FOLK/ARAB /99/1 and WIPO-UNESCO/FOLK/LAC /99/1. See also Kutty, P. V., "Study on the Protection of Expressions of Folklore," 1999, study prepared for the World Intellectual Property Organization (WIPO), unpublished, pp. 76 and 77.

¹⁰ See Kutty, *op. cit.*, pp. 76 and 77.

¹¹ See in particular WIPO-UNESCO/FOLK/AFR/99/1, WIPO-UNESCO/FOLK/ASIA/99/1 and WIPO-UNESCO/FOLK/ARAB /99/1.

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

24. Folk tales, poetry, songs, instrumental music, dances, plays and similar expressions of folklore actually live in the form of regular performances. Thus, if the protection of performers is extended to the performers of such expressions of folklore—which is the case in many countries—the performances of such expressions of folklore also enjoy protection.

25. However, there was a slight problem in respect of the key notion of “performers” (and the notion of “performances” following indirectly from the notion of “performers”) as determined in the International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961 (the “Rome Convention”). Under Article 3(a) of the Rome Convention, ““performers” means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise *perform literary or artistic works*” (emphasis added). As expressions of folklore do not correspond to the concept of literary and artistic works proper, the definition of “performers” in the Rome Convention does not seem to extend to performers who perform expressions of folklore.

26. However, the WIPO Performances and Phonograms Treaty (the WPPT), which was adopted in December 1996, provides that the definition of “performer” for purposes of the Treaty includes the performer of an expression of folklore.¹² As at October 22, 2001, 26 States had ratified the WPPT.

27. At the Diplomatic Conference at which the WPPT, as well as the WIPO Copyright Treaty (the WCT) were adopted in December 1996, the WIPO Committee of Experts on a Possible Protocol to the Berne Convention and the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms recommended that “provision should be made for the organization of an international forum in order to explore issues concerning the preservation and protection of expressions of folklore, intellectual property aspects of folklore, and the harmonization of the different regional interests.”¹³

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

28. Pursuant to the recommendation made during the 1996 Diplomatic Conference, the UNESCO-WIPO World Forum on the Protection of Folklore was held in Phuket, Thailand, in April 1997. Many needs and issues related to intellectual property and folklore were discussed during this meeting.¹⁴ The meeting also adopted a “Plan of Action” which identified *inter alia* the following needs and issues:

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

¹² For the purpose of WPPT performers who are accorded protection include ““performers” who are actors, singers, musicians, dancers, and other persons who act, sing, deliver, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.”

¹³ See BCP/CE/VI/16-INR/CE/V/14, par. 269.

¹⁴ See WIPO Publication Number 758 (E/F/S).

29. In order to make progress towards addressing these needs and issues, the Plan of Action suggested *inter alia* that “Regional consultative fora should take place...”¹⁵

WIPO fact-finding missions, 1998-1999

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

31. The FFMs were conducted in 28 countries between May 1998 and November 1999. The results of the missions have been published by WIPO in a report entitled “Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions (1998-1999)” (the “FFM Report”).¹⁶

32. For purposes of these missions, “traditional knowledge” included expressions of folklore as a sub-set.¹⁷ “Expressions of folklore” included handicrafts and other tangible cultural expressions. Much of the information obtained on these missions related either directly or indirectly to expressions of folklore.

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

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

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

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

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

¹⁵ The Plan of Action records that “(t)he participants from the Governments of the United States of America and the United Kingdom expressly stated that they could not associate themselves with the plan of action.”

¹⁶ WIPO Publication 768E. The Report is also available at <http://www.wipo.int/globalissues/tk/report/final/index>

¹⁷ See chapter on “Terminology” in the FFM Report.

- (ii) the identification, classification, documentation and rights management in respect of expressions of folklore;
- (iii) the study of customary laws and protocols relating to the use, development, transmission and protection of expressions of folklore, and their relationship with intellectual property standards;
- (iv) in the shorter term, testing the applicability and use of existing intellectual property standards for the legal protection of expressions of folklore in practical case-studies and pilot projects;
- (v) the provision of practical training and information materials and workshops to governmental officials and holders and custodians of expressions of folklore;
- (vi) testing options for the collective acquisition, management and enforcement of intellectual property rights in expressions of folklore by the relevant community or association;
- (vii) the development and testing of specific intellectual property laws and systems for the protection of expressions of folklore at the national level, using *inter alia* the Model Provisions as a possible foundation;
- (viii) in the longer term, the elaboration of regional and international frameworks for the legal protection of expressions of folklore using *inter alia* the Model Provisions as a possible foundation;
- (ix) the adjustment of intellectual property standards and practices to the extent that they may permit, or do not prevent, the derogatory, offensive and fallacious use of expressions of culture;
- (x) assisting, in a practical manner, holders and custodians of expressions of folklore to acquire, manage and enforce rights and interests in their expressions of folklore; and
- (xi) the economic valuation of expressions of folklore.

WIPO-UNESCO Regional Consultations on the Protection of Expressions of Folklore, 1999

35. Pursuant to the suggestion included in the Plan of Action adopted at the UNESCO-WIPO World Forum on the Protection of Folklore, 1997, WIPO and UNESCO organized four Regional Consultations on the Protection of Expressions of Folklore in 1999.¹⁸ Each of the Regional Consultations adopted resolutions or recommendations which identify intellectual property needs and issues, as well as proposals for future work, related to expressions of folklore. They were addressed to States, and to WIPO and UNESCO. The main intellectual

¹⁸ The regional consultations were held for African countries in Pretoria, South Africa (March 1999); for countries of Asia and the Pacific region in Hanoi, Viet Nam (April 1999); for Arab countries in Tunis, Tunisia (May 1999); and for Latin America and the Caribbean in Quito, Ecuador (June 1999). The four regional consultations were attended by 63 Governments of WIPO's Member States, 11 intergovernmental organizations, and five non-governmental organizations.

property needs, issues and proposals referred to in the resolutions and recommendations are the following:

To States, the:

- (i) protection of expressions of folklore at the national level;¹⁹
- (ii) establishment of national structures to ensure the regulation, coordination and protection of expressions of culture;²⁰
- (iii) involvement of relevant communities, civil society, experts, academics and other interested groups;²¹
- (iv) support for communities which are responsible for the creation, maintenance, custodianship and development of expressions of folklore;²²
- (v) evaluation and use of measures for folklore protection in existing national legislation, and their adaptation or amendment where necessary;²³
- (vi) adaptation of existing legislation and the adoption of specific legislation taking into account the Model Provisions, updated to take into account technological, legal, social, cultural and commercial developments since 1982;²⁴
- (vii) development of a regional framework for the preservation, protection and maintenance of expressions of folklore;²⁵
- (viii) formulation of a legal mechanism for the protection of expressions of folklore at the international level;²⁶
- (ix) establishment of national and regional centers for the collection, classification, conservation, documentation and dissemination of expressions of folklore;²⁷ and,
- (x) preparation of an “open list” of expressions of folklore the protection of which is considered necessary.²⁸

To WIPO and UNESCO:

- (i) the provision of legal and technical assistance, specialized training and the provision of equipment and other financial resources;²⁹

¹⁹ WIPO-UNESCO/FOLK/AFR/99/1.

²⁰ WIPO-UNESCO/FOLK/AFR/99/1.

²¹ WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ASIA/99/1.

²² WIPO-UNESCO/FOLK/ASIA/99/1.

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

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

²⁴ WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ARAB/99/1.

²⁵ WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ASIA/99/1;

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

²⁶ WIPO-UNESCO/FOLK/ASIA/99/1; WIPO-UNESCO/FOLK/LAC/99/1.

²⁷ WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ARAB/99/1.

²⁸ WIPO-UNESCO/FOLK/ARAB/99/1.

- (ii) provision of legal-technical and financial assistance for the national projects for the identification, documentation, classification, preservation and dissemination of expressions of folklore;³⁰
- (iii) cooperation and support for national awareness-raising initiatives;³¹
- (iv) studies and projects for in-depth study of the issues, including pilot projects for the management of expressions of folklore;³²
- (v) increased budgetary resources to ensure the effective protection of expressions of folklore at the national level;³³
- (vi) assistance in initiating and supporting intra- and inter-regional cooperation and consultation;³⁴
- (vii) increased efforts to develop a broad consensus among States in favor of an adequate and effective international regime for the protection of expressions of folklore;³⁵ initiate steps for the development of a *sui generis* form of binding legal protection at national and international levels, taking into account the technological, legal, social, cultural and commercial developments which have taken place since the Model Provisions were concluded;³⁶ elaboration of an international convention on the protection of expressions of folklore;³⁷ continuation of work for nurturing expressions of folklore and their protection at the international level;³⁸
- (viii) establish a Standing Committee on Traditional Knowledge and Folklore to facilitate the process of establishing legal protection of folklore and traditional knowledge;³⁹ and,
- (ix) assist in the establishment of national centers, and creation of a pilot regional center, for the conservation, documentation and promotion of expressions of folklore.

First session of the Intergovernmental Committee

36. As already noted in paragraph 1, the discussion during the first session of the Intergovernmental Committee under Agenda Item 5.3 considered specifically certain suggested issues and tasks set out in the document entitled “Matters Concerning Intellectual

²⁹ WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ASIA/99/1; WIPO-UNESCO/FOLK/ARAB/99/1; WIPO-UNESCO/FOLK/LAC/99/1.

³⁰ WIPO-UNESCO/FOLK/LAC/99/1.

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

³² WIPO-UNESCO/FOLK/ASIA/99/1; WIPO-UNESCO/FOLK/LAC/99/1.

³³ WIPO-UNESCO/FOLK/AFR/99/1.

³⁴ WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ASIA/99/1.

³⁵ WIPO-UNESCO/FOLK/AFR/99/1.

³⁶ WIPO-UNESCO/FOLK/ASIA/99/1.

³⁷ WIPO-UNESCO/FOLK/ARAB/99/1.

³⁸ WIPO-UNESCO/FOLK/LAC/99/1.

³⁹ WIPO-UNESCO/FOLK/ASIA/99/1; WIPO-UNESCO/FOLK/ARAB/99/1; WIPO-UNESCO/FOLK/LAC/99/1.

Property and Genetic Resources, Traditional Knowledge and Expressions of Folklore – An Overview” prepared for the session by the Secretariat of WIPO.⁴⁰

37. The suggested issues and tasks concerned:

(i) the Model Provisions and their possible updating to take into account developments and new forms of commercial exploitation which have evolved since the adoption of the Model Provisions in 1982 (identified as task C.1);⁴¹

(ii) the improved protection of handicrafts,⁴² as had been proposed by certain Groups of Member States on previous occasions (identified as task C.2);⁴³

(iii) efforts to establish an international system of *sui generis* protection for expressions of folklore (identified as task C.3).⁴⁴

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

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

(i) a report on current forms of protection available for expressions of folklore;⁴⁵

(ii) the documentation of expressions of folklore;⁴⁶

(iii) work to address and understand what is the subject matter for which protection is sought, and, put differently, which elements of expressions of folklore deserve protection;⁴⁷

(iv) information on which areas of the populations are concerned with the protection of expressions of folklore;⁴⁸

(v) the identification of the objectives of protection of expressions of folklore;⁴⁹

⁴⁰ WIPO/GRTKF/IC/1/3.

⁴¹ WIPO/GRTKF/IC/1/3, paras. 92 to 101.

⁴² WIPO/GRTKF/IC/1/3, paras. 102 to 106.

⁴³ At the Thirty-Fourth Series of Meetings of the Assemblies of the Member States of WIPO, held from September 20 to 29, 1999, one Group of WIPO Member States expressed the view “that the need for a suitable mechanism and agreed norms for the protection of handicraft was shared by the developing countries” (A/34/16, paragraph 29). This need was further elaborated by another Group of WIPO Member States at the Twenty-Sixth Session of the WIPO General Assembly, held in Geneva from September 26 to October 3, 2000 (WO/GA/26/9, Annex II) with a view to specific proposals for the work of the Intergovernmental Committee. Document WO/GA/26/9 was subsequently also issued as a document for the First Session of the Intergovernmental Committee (WIPO/GRTKF/IC/1/5).

⁴⁴ WIPO/GRTKF/IC/1/3, paras. 107 to 114.

⁴⁵ WIPO/GRTKF/IC/1/13, par. 156.

⁴⁶ WIPO/GRTKF/IC/1/13, paras. 159, 161

⁴⁷ WIPO/GRTKF/IC/1/13, paras. 159, 163, 165.

⁴⁸ WIPO/GRTKF/IC/1/13, par. 165.

⁴⁹ WIPO/GRTKF/IC/1/13, par. 165.

- (vi) the collection and review of information on national experiences with the protection of expressions of folklore, including with implementation of the Model Provisions;⁵⁰
- (vii) the assessment of the use of existing intellectual property and common law tools, including in respect of handicrafts;⁵¹
- (viii) further work on terminological issues;⁵² and,
- (ix) the adoption of a *sui generis* regime to protect expressions of folklore.⁵³

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

“ . . . there had been some support for tasks C.1 to C.3, although some delegations had felt that certain tasks were premature. Since there appeared to be no objection to work proceeding on those tasks, the question was rather how and when it should begin. Several delegations had referred to the need for terminological clarity. In addition, as pointed out by Malaysia on behalf of the Asian Group and several delegations, the inclusion of handicrafts was necessary. Finally, the Co-Chair stated that a number of delegations had suggested that national experiences with regard to the protection of folklore should be collected and analyzed.”⁵⁴

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

42. With this overview of the main needs and issues that have previously been identified in WIPO activities and processes leading up to the issuance of the questionnaire, this document now provides information on the nature, scope and format of the questionnaire.

III. THE QUESTIONNAIRE ON NATIONAL EXPERIENCES WITH THE PROTECTION OF EXPRESSIONS OF FOLKLORE

43. The questionnaire seeks primarily to gather legal and practical information on national experiences with the legal protection of expressions of folklore, more generally, and with implementation of the Model Provisions, more specifically. As several Member States provide legal protection for expressions of folklore which is not necessarily based upon the Model Provisions, and other Member States may provide no form of legal protection for expressions of folklore, it was necessary to differentiate the questions to take into account such variances among Member States. Therefore:

⁵⁰ WIPO/GRTKF/IC/1/13, paras. 160, 163, 165, 166, 168, and 169.

⁵¹ WIPO/GRTKF/IC/1/13, paras. 160, 168.

⁵² WIPO/GRTKF/IC/1/13, paras. 171, 172.

⁵³ WIPO/GRTKF/IC/1/13, par. 161.

⁵⁴ WIPO/GRTKF/IC/1/13, par. 175.

(i) certain questions are addressed to those States which provide specific legal protection for expressions of folklore in their national laws, whether or not on the basis of the Model Provisions. These questions are designed to obtain information on lessons learned with the implementation of provisions in national laws for the legal protection of expressions of folklore, including those based upon the Model Provisions, and with the exercise, management and enforcement of the rights they provide;

(ii) in respect of those Member States which do not currently provide specific legal protection for expressions of folklore, a distinct set of questions seeks general information on national policies and practices relating to the protection of expressions of folklore, and to ascertain the views of such Member States on the Model Provisions, including reasons why they have not been implemented;

(iii) certain questions are addressed to all Member States, irrespective of whether they have implemented the Model Provisions, or whether they provide other forms of protection for expressions of folklore.

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

45. The questionnaire indicates that it is not exhaustive, and the questions contained in it are simply indications of the kind of information that is being sought. Respondents are requested to answer all the questions as fully as possible, and to provide, wherever possible, practical examples and lessons learned. It is also emphasized in the questionnaire that the primary purpose of the questionnaire is to obtain practical information and lessons learned.

46. The questionnaire was addressed to the Ministries of Foreign Affairs of WIPO's Member States and other Members of the Intergovernmental Committee. The Ministries were requested to refer, if necessary, the questionnaire to the relevant national offices for copyright and related rights and for industrial property. The offices which complete the questionnaire were also strongly encouraged to seek input from other relevant Government departments, agencies and offices and, where appropriate, non-governmental stakeholders, such as indigenous and local communities, research institutions, folklore archivists, folklore documentation centers, museums and the private sector.

47. The questionnaire is divided into three main sections, being:

- I. Application of the Model Provisions as a Whole;
- II. Application of the Principal Provisions of the Model Provisions; and,
- III. Modification and Adaptation of the Model Provisions.

Section II (Application of the Principal Provisions of the Model Provisions) is further sub-divided into the following sub-sections: (a) Basic principles taken into account for the elaboration of the Model Provisions; (b) Protected expressions of folklore; (c) Acts against

which expressions of folklore are protected; (d) Authorization of utilizations of expressions of folklore; (e) Sanctions, remedies and jurisdiction; (f) Relation to other forms of protection; (g) Protection of expressions of folklore of foreign countries. Each sub-section is introduced by a brief explanation of the relevant provisions and issues. In each sub-section, respondents are invited to include other information not specifically requested by any of the questions.

IV. PRELIMINARY SUMMARY OF RESPONSES RECEIVED TO THE QUESTIONNAIRE

48. As noted above, this document is a preliminary report on the questionnaires received on or before September 30, 2001. As a preliminary report, this document contextualizes and summarizes in a preliminary manner the responses received, without necessarily referring to each and every response. In addition, this preliminary report does not analyze the responses, nor draw any conclusions or suggest further activities or tasks that the Member States and other Members of the Intergovernmental Committee may wish to set themselves or undertake.

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

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

I. Application of the Model Provisions as a Whole

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

Summary of responses to Question I. 1

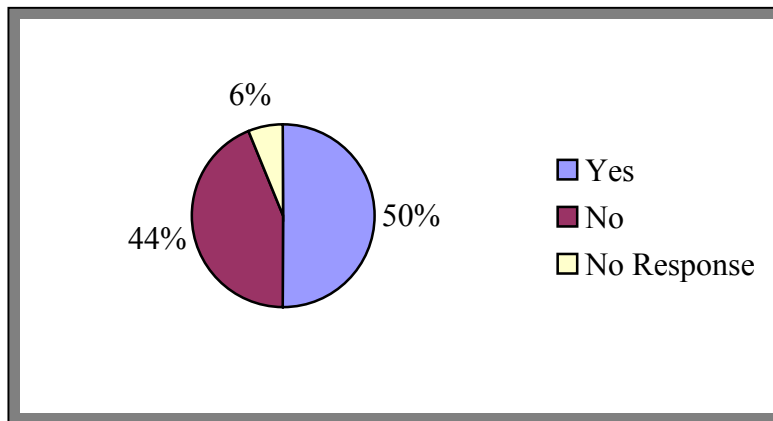
In many countries, more than one ministry, department, agency or office deals with questions concerning expressions of folklore. In most cases, the national intellectual property office, generally the copyright office, is one of the relevant offices.

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

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

Summary of responses to Question I. 2

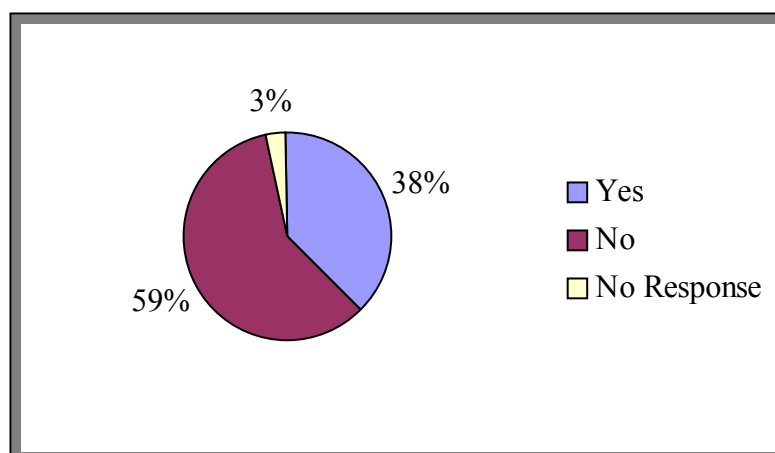
According to the 32 responses under consideration in this document, the Model Provisions are available in one of the official languages in 16 of those countries. This equals 50 per cent. 2 States did not respond to this question. 14 answered “No.”



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

Summary of responses to Question I. 3

Of the 32 responses under consideration in this document, 12 countries stated that they provide specific legal protection for expressions of folklore as intellectual property in their national laws or regulations.⁵⁵ This equals 38 per cent.



⁵⁵ Barbados; Burkina Faso; China; Côte d'Ivoire; Croatia; Indonesia; Iran (Islamic Republic of); Mexico; Namibia; Philippines; Sri Lanka; the United Republic of Tanzania. As indicated in the questionnaire, this question concerns specific legal protection of an intellectual property nature for expressions of folklore, and not indirect, or incidental, protection for expressions of folklore, such as may be provided in certain cases by copyright, related rights or industrial property laws. Thus, where a response may have answered “Yes” to this question, but refers to incidental protection provided by existing copyright, related rights or industrial property laws, the response has been evaluated as a “No” answer. Similarly, where a response may have answered “No” to this question, but refers to specific protection provided for expressions of folklore in existing copyright, related rights or industrial property laws, the response has been evaluated as a “Yes” answer. Laws enacted but not yet in force have been treated as if they are in force.

If yes:

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

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

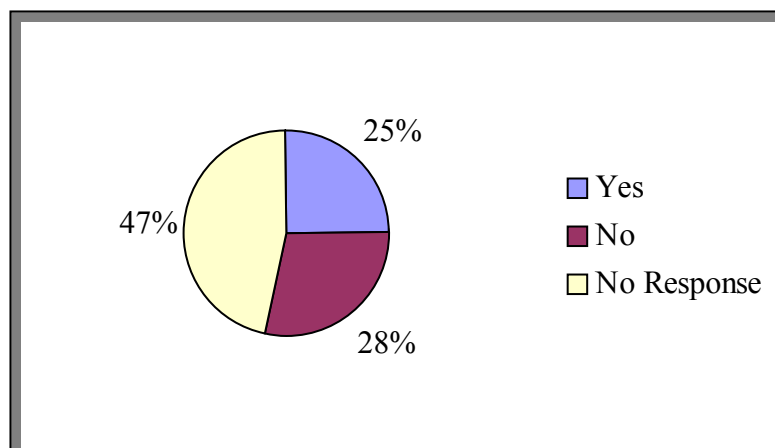
Most States which responded provided information on the relevant laws and regulations.

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

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

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

To this question, 8 countries responded “Yes”, 9 responded “No”, and 15 did not answer this question.



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

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

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

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

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

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

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

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

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

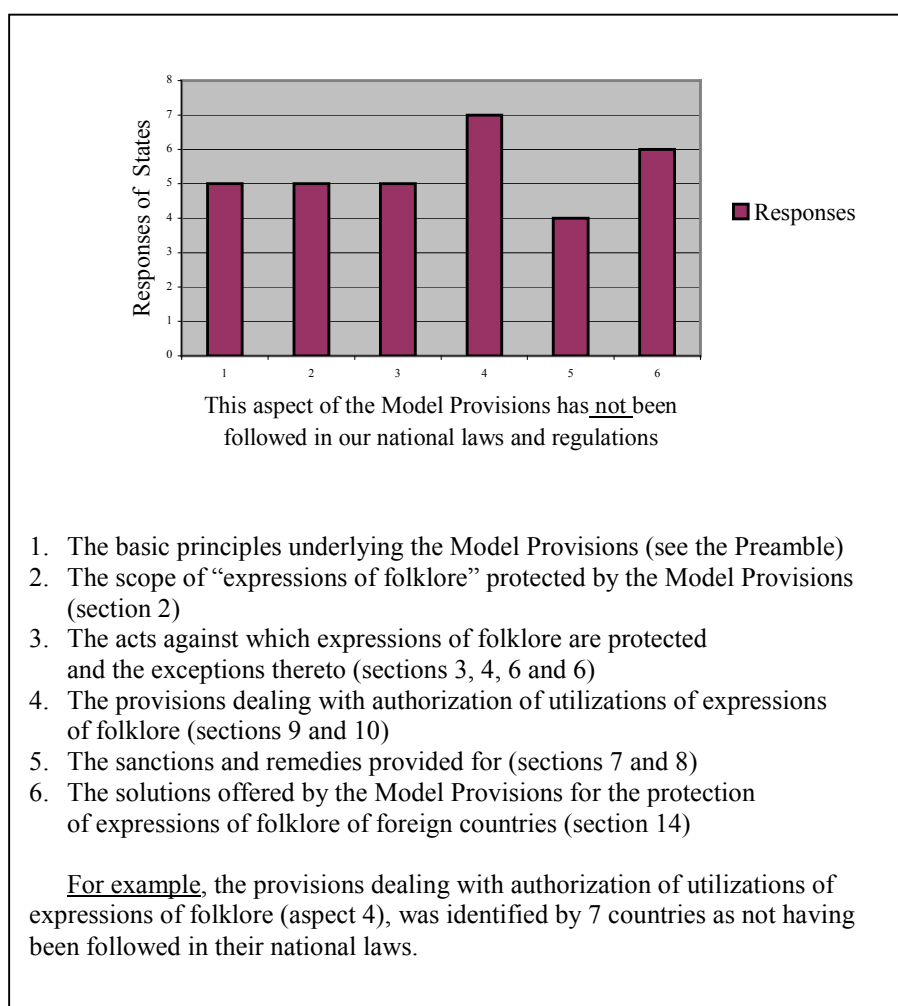
(iv) Please indicate any other reason(s) why certain aspects of the Model Provisions may not have been implemented in your country.

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

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

23 of the responses did not answer this question.

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



Those responses which provided further information stated *inter alia* that while certain boxes had been marked to indicate aspects of the Model Provision that have not been followed, it was often the case that their laws and regulations followed in general the Model Provisions but in a less detailed or specific way. One response indicated that certain aspects of the Model Provisions had not been implemented because those aspects are covered by the country's copyright law. The country stated that it was preparing further government regulations concerning folklore, which might cover further aspects of the Model Provisions.⁵⁶ A few countries advised that certain aspects of the Model Provisions are not reflected in the relevant national law because the law had been adopted before the adoption of the Model Provisions in 1982 and had not been amended since,⁵⁷ or because the Government had not yet received the Model Provisions when enacting the law.⁵⁸

⁵⁶ Indonesia.

⁵⁷ Iran (Islamic Republic of); Sri Lanka.

⁵⁸ Namibia.

If no.

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

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

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

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

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

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

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

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

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

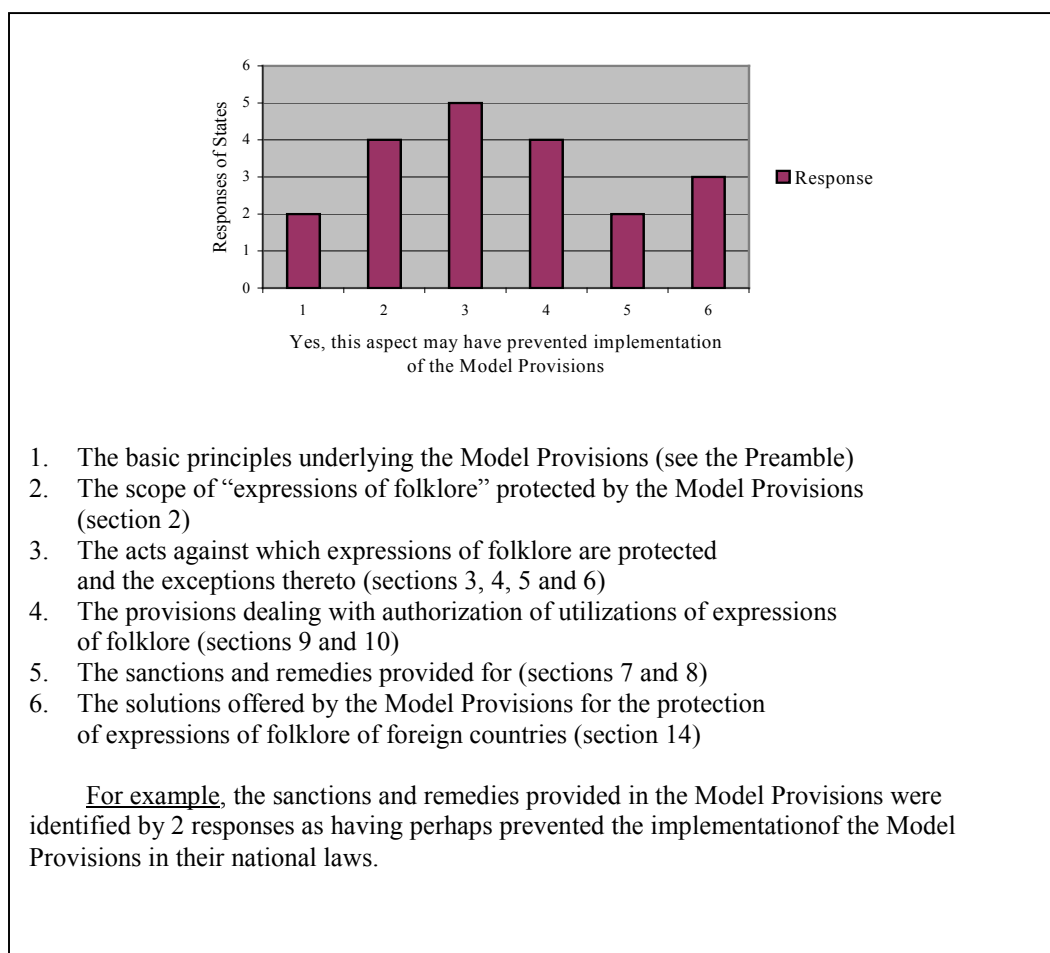
If you have marked any of the boxes, please provide further information.

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

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

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

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



(a) General comments and information provided by responses

The responses provided several general comments and information on why specific protection for expressions of folklore had not been established. These included:

(i) expressions of folklore are adequately protected by conventional intellectual property systems such as copyright, trademarks and designs law.⁵⁹ One response stated that: “The current direction of domestic policy development therefore is to protect Indigenous arts and cultural expression within existing legal frameworks rather than the implementation of *sui generis* laws.”⁶⁰ Another stated that expressions of folklore not protected under the existing intellectual property framework, which are in the public domain, are available without restrictions and thus serve to enrich the fabric of the country’s multicultural society.⁶¹ One response referred to national courts having provided a flexible interpretation of conventional intellectual property systems and common law principles, to provide further protection for folklore,⁶²

(ii) greater protection for folklore could be provided through encouraging public education relating to folklore, codes of conduct, assistance to Indigenous peoples in accessing and understanding formal intellectual property systems, and appropriate modifications of existing regimes to be more culturally sensitive;⁶³

(iii) expressions of folklore also receive protection by laws in other policy areas, such as cultural heritage laws;⁶⁴

(iv) there is no need for the legal protection of expressions of folklore. Folklore is seen as a part of the public domain. “Cultural heritage is universal property, therefore prohibition of its use is inappropriate since elements of traditional knowledge and culture are interwoven into everyday life in all places.”⁶⁵ Legal protection of an intellectual property nature can be too rigid and possibly withdraw folklore from the public domain. Certain countries referred to the importance of free access to information and cultural heritage, such as folklore;⁶⁶

(v) one response stated that specific protection for expressions of folklore was not provided for because the concept of proprietary rights and exclusive ownership of intellectual properties was a fairly new concept in the country concerned. In addition, the influence of Buddhism and the country’s relative isolation could account for a belief that culture would or could not be appropriated or misused by others for wrongful and gainful purposes;⁶⁷

⁵⁹ Australia; Canada; Switzerland.

⁶⁰ Australia.

⁶¹ Canada.

⁶² Australia

⁶³ Australia.

⁶⁴ Australia; Czech Republic.

⁶⁵ Russian Federation.

⁶⁶ Netherlands; Czech Republic; Kyrgyzstan.

⁶⁷ Bhutan.

(vi) a lack of awareness of the need to protect intellectual property in general, and expressions of folklore in particular, was the reason that no protection is provided, one response stated;⁶⁸

(vii) several responses stated that there was no specific protection for expressions of folklore because none had been requested. One stated: “There is lack of awareness and serious national clamor for folklore protection by interest groups.”⁶⁹ According to another: “. . . (N)o interest group or other body in [the country concerned] has ever expressed a wish to implement [the Model Provisions] into national law.”⁷⁰ In a similar vein, one response stated that since there is no group of people in the country concerned practicing traditional knowledge in everyday life and the country has not faced any illicit exploitation of its traditional knowledge, no system of legal protection of traditional knowledge and folklore has been established. Folklore is considered in the country as an expression of art. In answer to another question, the same response stated that “we have not thought of folklore as a subject matter of any property rights. We have not had any discussion among interested circles concerning this matter.”⁷¹

(viii) the matter is still under consideration. The Model Provisions may be adopted, but with modification to take into account the Internet and a more marketable licensing/authorization regime;⁷²

(ix) artists in the country concerned had not requested specific protection for expressions of folklore because they considered the protection provided by the existing forms of intellectual property protection, especially copyright, to be sufficient;⁷³

(x) expressions of folklore is new subject matter requiring to be studied in great detail;⁷⁴

(xi) lack of expertise on cultural legislation, and inadequate coordination between State law and cultural organizations;⁷⁵

(xii) no specific legal protection for expressions of folklore is provided because it is believed that expressions of folklore are protected when they are promoted and disseminated;⁷⁶

(xiii) the absence of a government agency to perform the functions envisaged by the Model Provisions prevents their implementation;⁷⁷

(xiv) implementation of the Model Provisions depends upon the preservation of expressions of folklore. Documentation is not possible because of the lack of national registers of expressions of folklore.⁷⁸

⁶⁸ Ethiopia.

⁶⁹ Gambia.

⁷⁰ Germany.

⁷¹ Latvia. See also the Russian Federation.

⁷² Jamaica.

⁷³ Switzerland.

⁷⁴ Malaysia.

⁷⁵ Pakistan.

⁷⁶ Philippines.

⁷⁷ Philippines.

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

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

(i) paragraph 4 of the Preamble to the Model Provisions may be interpreted to mean that protection must be granted in a *sui generis* form “inspired by the protection provided for intellectual productions.” On the other hand, this country stated, although it has no established position on folklore, “the current direction of domestic policy development is to protect Indigenous and cultural expression within existing legal frameworks, such as copyright and designs.”⁷⁹

(ii) regarding the scope of “expressions of folklore,” one response stated that the Model Provisions provide a scope that extends beyond what the country concerned would normally protect under its intellectual property system. The country stated that it would prefer a definition that focused on the expression of folklore as an artistic, literary, dramatic, musical work, or a performance, rather than protection of the actual idea itself comprising the folklore, which is not protected under systems such as copyright.⁸⁰ Another stated that: “The definition is limited to “artistic heritage” of a community rather than the cultural heritage of the nation thereby creating confusion with regards to what can be protected”;⁸¹

(iii) a response stated that the limitation described in Section 3 of the Model Provisions which requires specific authorisation by the competent authority or community concerned for the utilisation of expressions of folklore which are “outside their traditional or customary context” may be problematic. Such a limitation could be inconsistent with current national intellectual property systems which do not normally provide a general limitation relating to the “context” of the use of intellectual property;⁸²

(iv) regarding the provisions dealing with authorization of utilisations of expressions of folklore, a response stated that Section 10 of the Model Provisions may be problematic as it could require the payment of an additional royalty for the utilisation of an expression of folklore in addition to the normal royalty payment under the intellectual property system. Furthermore, the specific limitation that the “fees collected shall be used for the purpose of promoting or safeguarding national culture/folklore” may be problematic as the relevant national intellectual property systems do not normally provide such limitations.⁸³ Another response stated that: “The conclusion that utilization even with gainful intent within the traditional or customary context is not subject to authorization from the competent authorities can (in most cases) lead to abuse of the expression of folklore.”⁸⁴

⁷⁸ Sierra Leone.

⁷⁹ Australia.

⁸⁰ Australia.

⁸¹ Sierra Leone. See also Croatia.

⁸² Australia.

⁸³ Australia.

⁸⁴ Sierra Leone.

II. *Application of the Principal Provisions of the Model Provisions*

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

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

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

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

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

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

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

- (a) prior authorization for the exploitation of expressions of folklore belonging to the national cultural heritage;⁸⁵
- (b) royalty payments;⁸⁶
- (c) development and protection of the creation and dissemination of folklore;⁸⁷
- (d) prevention of the illicit exploitation and other prejudicial actions;⁸⁸
- (e) maintenance of a proper balance between protection against abuses of folklore and encouragement of further development and dissemination of folklore;⁸⁹
- (f) works of popular culture are protected. These are original manifestations of the languages, customs and traditions of the plural society concerned, where no identifiable author can be found. They are protected against distortion and prejudice to the reputation or image of the relevant community;⁹⁰

⁸⁵ Burkina Faso.

⁸⁶ Burkina Faso.

⁸⁷ China.

⁸⁸ China.

⁸⁹ China.

⁹⁰ Mexico.

(g) protection under copyright law but without time limit;⁹¹

(h) in response to Question II. 2, one country stated that, seeing its provisions for the protection of expressions of folklore have not been applied, it is necessary to sensitize indigenous communities as to the necessity to protect their folklore.⁹²

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

(a) the Model Provisions should safeguard ecological interests in addition to the cultural and economic interests referred to in their Preamble;⁹³

(b) the Model Provisions should be more specific about their purpose;⁹⁴

(c) the “principles should specifically take digital use and digital dissemination of folklore into account as a more urgent reason for providing international protection of expressions of folklore;”⁹⁵

(d) the Model Provisions could be effective and sufficient if some modifications were made to them. “By using it as a model, a mechanism should be established which must be capable of providing international protection for all kinds of expressions of folklore in the broad sense of the word;”⁹⁶

(e) it is necessary to include in the Model Provisions the principles of cultural diversity which is shared versus cultural specificity;⁹⁷

(f) it is important to preserve the balance between protection and the possibility of a free development of folklore;⁹⁸

(g) expressions of folklore form part of the traditional beliefs of the people and are part of the intangible heritage;⁹⁹

(h) there are a number of problems with the current principles. These include: certain definitions are not precise enough; governmental authority over use of folklore may be considered to be a form of censorship, and in multicultural societies, this could lead to conflicts; the relationship with copyright protection is unclear; and, authorization for the use of expressions of folklore should never be able to be exclusive. It might also be necessary to distinguish between what kind of protection is needed with regard to national folklore and the recognition of foreign systems of protection made necessary by the cultural and social situation in those countries. And, the risk to hinder further development and evolution of

⁹¹ Sri Lanka.

⁹² Burkina Faso

⁹³ Argentina.

⁹⁴ Croatia.

⁹⁵ Gambia. See also Malaysia.

⁹⁶ Iran (Islamic Republic of).

⁹⁷ Jamaica.

⁹⁸ Kyrgyzstan; Mexico.

⁹⁹ Philippines.

folklore should be examined more carefully (Section 13 of the Model Provisions was stated to be too general).¹⁰⁰

While not many of the responses addressed directly whether or not the principles underlying the Model Provisions are still current and viable, eight of the responses believed that the principles are still current and/or viable, even though the Model Provisions may require some modification.¹⁰¹

(b) Protected expressions of folklore

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

If yes:

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

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

Yes

No

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

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

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

¹⁰⁰ Switzerland.

¹⁰¹ Argentina; Barbados; China; Gambia; Indonesia; Jamaica; Kyrgyzstan; Mexico; Sierra Leone.

In respect of Question II. 4, several responses include the relevant definition from the applicable national law. In addition, responses contained the following observations and comments:

(i) in one country, the term “expressions of traditional cultural heritage” is used in preference to “folklore” because the legislature had considered that the latter term could have a pejorative connotation;¹⁰²

(ii) a response referred to the term “works of folklore” as being used to cover, regardless of whether the works have been fixed in tangible form, certain literary, artistic and scientific works (i.e., verbal expressions, musical expressions, expressions by action (such as folk dance) and tangible expressions (such as folk art)) where the author is unknown, but where there is every ground to presume that the author is a national of the country;¹⁰³

(iii) one response indicated that the term “works of unknown authors” is used in the country concerned to cover prehistoric remains, historical and other national cultural objects such as stories, legends, folktales, epics, songs, handicraft, choreography, dances and other artistic works;¹⁰⁴

(iv) the term ‘popular culture’ is used to refer to all creations of a cultural community which express its social and cultural identity;¹⁰⁵

(v) the legislation of one country covers the following subject matter:¹⁰⁶

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

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

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

(iii) language, script, histories, oral traditions and teaching and learning systems.

(b) Filipino historical and cultural heritage and resources.

(c) Traditional culture and its various creative.

¹⁰² Burkina Faso.

¹⁰³ China.

¹⁰⁴ Indonesia.

¹⁰⁵ Mexico.

¹⁰⁶ Philippines.

In respect of Question II. 5, 3 responses answered “No”, in other words, identification of the folklore to be protected has not presented any difficulties as yet.¹⁰⁷ Three responses answered “Yes” to this question.¹⁰⁸

One response identified difficulties in cases where there are communities in neighboring countries that share the same cultures and traditions, and the response provided certain examples of such cases.¹⁰⁹

Several responses provided information on folklore inventories, archives and databases.¹¹⁰

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

If yes:

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

Summary of responses to Question II. 6

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

(i) one response indicated that domestic preference is for use of the term “arts and cultural expression,” as being more consistent with the types of materials eligible for protection under intellectual property systems such as copyright. This term focuses on expressions of artistic, literary, dramatic, and musical works, and related performances, the response advised;¹¹¹

(ii) in one country, a term in a local language (“Mimangi Dhungtam”) is used to refer to both oral and written stories;¹¹²

(iii) a response advised that the terms in the country’s intellectual property legislation such as “artistic work”, “choreographic work”, “dramatic work” and “collective work”, which are defined in the copyright legislation, all have applicability to the protection of aspects of folkloric expressions;¹¹³

(iv) “creations of folklore, traditional custom” covers the protection and preservation of cultural goods;¹¹⁴

¹⁰⁷ Barbados; Iran (Islamic Republic of); Mexico.

¹⁰⁸ Burkina Faso; Namibia; Russian Federation.

¹⁰⁹ Namibia (see also response to Question II.3).

¹¹⁰ Barbados; Burkina Faso; Gambia; Iran (Islamic Republic of); Namibia.

¹¹¹ Australia.

¹¹² Bhutan.

¹¹³ Canada.

¹¹⁴ Croatia

(v) one country uses the term “creations of traditional folk culture” in its copyright legislation. The term covers works within the meaning of copyright only;¹¹⁵

(vi) a response advised that for the notion “expressions of folklore” two terms are used: “works of people’s traditional art” and “works of people’s creativity.” The term “expressions of folklore” is understood in a more narrow sense than is provided in the Model Provisions, and means basically the works of people’s oral art;¹¹⁶

(vii) the definition of folklore used in the UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore, 1989 was referred to in one response;¹¹⁷

(viii) the terms “popular creation”, “folklore industries” and “creative professions” are used rather than “expressions of folklore.” The subject matter protected is material expressions of folklore.¹¹⁸

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

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

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

These questions were addressed to all States.

While one response suggested that further analysis is needed,¹¹⁹ and certain others that the scope of the Model Provisions was sufficient.¹²⁰ The following items were suggested as other examples or forms of expressions of folklore or traditional culture and knowledge that ought to be protected:

(i) processes and methods for the making of tangible expressions of folklore (example, musical instruments);¹²¹

(ii) historical and archaeological sites, the alphabet, ceremonies and games;¹²²

¹¹⁵ Czech Republic.

¹¹⁶ Kyrgyzstan.

¹¹⁷ Latvia. The UNESCO definition is as follows: “Folklore (or traditional and popular culture) is the totality of tradition based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.”

¹¹⁸ Russian Federation.

¹¹⁹ Australia.

¹²⁰ Kyrgyzstan; Namibia.

¹²¹ Argentina.

¹²² Argentina.

- (iii) traditional medicines, medicinal practices, healthcare and methods of healing;¹²³
- (iv) traditional knowledge of a secret character;¹²⁴
- (v) scientific views in fields such as physics and molecular-biology;¹²⁵
- (vi) architectural forms and traditional knowledge;¹²⁶
- (vii) culinary recipes and processes;¹²⁷
- (viii) indigenous knowledge;¹²⁸
- (ix) traditional astrology;¹²⁹
- (x) the concept of cultural space, an anthropological concept, described as a place where popular and traditional cultural activities are concentrated;¹³⁰
- (xi) traditional beliefs;¹³¹
- (xii) proverbs, myths, epics, jokes and rumors, childbirth songs, death songs and songs sung during hunting, fishing etc.¹³²

In addition, one country advised it has recently provided appellation of origin protection for a specific regional pastry.¹³³ Another response stated that folklore is evolving and one cannot legislate protection of folklore “similar to the context of the Model Provisions.”¹³⁴

¹²³ Argentina; Burkina Faso; Bhutan; Indonesia; Iran (Islamic Republic of); Mexico; United Republic of Tanzania.

¹²⁴ Burkino Faso.

¹²⁵ Croatia.

¹²⁶ Czech Republic.

¹²⁷ Jamaica.

¹²⁸ Indonesia.

¹²⁹ Iran (Islamic Republic of).

¹³⁰ Philippines.

¹³¹ Philippines.

¹³² Sierra Leone.

¹³³ Czech Republic.

¹³⁴ Philippines.

(c) Acts against which expressions of folklore are protected

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

Summary of responses to Question II. 9

Several of the responses indicated that the rights granted in respect of expressions of folklore are all or some of the economic and moral rights granted in respect of copyright works. The rights granted in respect of expressions of folklore are generally also exclusive rights,¹³⁵ although in certain cases they may be rights to remuneration – for example, in one case the broadcast of a work by wireless or cable and the distribution of a published work that has been produced in the form of a phonogram do not require authorization but are subject to remuneration.¹³⁶ In one country, the rights are exclusive if the authors of the expressions are known.¹³⁷ In another country, protection is granted whether or not the author is known, and irrespective of whether the term of protection of the author has expired. The rights granted are not exclusive. No prior authorization is necessary provided the law's principles are not infringed.¹³⁸

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

Summary of responses to Question II. 10

Almost all the responses that answered this question advised that authorization is required when the expressions of folklore are used for commercial purposes and/or outside their traditional and customary context.¹³⁹ In other words, these responses indicated that their laws use the principles reflected in the Model Provisions.

¹³⁵ Barbados; Sri Lanka; United Republic of Tanzania.

¹³⁶ China.

¹³⁷ Burkina Faso.

¹³⁸ Mexico.

¹³⁹ Barbados; Burkina Faso; China; Iran (Islamic Republic of); Namibia; United Republic of Tanzania.

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

Summary of responses to Question II. 11

Specific examples were provided of uses of expressions of folklore and other forms of traditional knowledge and culture for which it is suggested protection should be available. These included the exploitation of indigenous plants; the use of a country's name in connection with unauthorized reproductions of the country's works; piracy of expressions of folklore by foreign film producers, rock paintings, publication of folktales, poetry and short stories told by forefathers to missionaries; the transformation of musical instruments into modern instruments and their being renamed; the unauthorized use of folk dances and rituals; and photography of traditional people and their dress for use on postcards.¹⁴⁰

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

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

Summary of responses to Question II. 12

Of the five responses that answered this question, three stated that their laws provide rights in respect of acknowledgement of source.¹⁴¹

Responses did not provide further information or examples, but one response referred at several points in the questionnaire to difficulties in dealing with expressions of folklore belonging to communities living in more than one country.¹⁴²

¹⁴⁰ Barbados; Burkina Faso; Namibia (see also responses to Questions II. 23 and II. 24).

¹⁴¹ Burkina Faso; Namibia; United Republic of Tanzania.

¹⁴² Burkina Faso (response to Question II.8); Namibia.

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

Yes

No

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

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

Summary of responses to Question II. 13

Of the 12 countries that provide specific protection for expressions of folklore, one responded “Yes” as to providing protection that is limited in time,¹⁴³ whereas 6 responded “No”¹⁴⁴ (the remainder of the 12 countries not having responded to this question).

Responses received so far did not provide further information or practical experiences.

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

Summary of responses to Question II. 14

Of the 12 countries that provide specific protection for expressions of folklore, many provide for exceptions that are the same as or similar to those applicable to copyright works. Certain of the responses list the relevant exceptions.¹⁴⁵

One response specifically stated that the exceptions in the law of the country concerned are regarded as adequate from the viewpoint of both the custodians of folklore and users in the country.¹⁴⁶ Another stated that no comments or complaints had been received from the public during the revision of the law.¹⁴⁷

¹⁴³ Iran (Islamic Republic of).

¹⁴⁴ Namibia.

¹⁴⁵ See for example Burkina Faso, China and Namibia.

¹⁴⁶ China.

¹⁴⁷ Namibia.

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

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

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

In respect of forms of exploitation, uses and actions for which protection is necessary, many responses stated that expressions of folklore should be protected against the acts protected in copyright law, such as reproduction, adaptation, public performance, publication, communication to the public, as well as the acts protected by moral rights. According to the law of one country, creations of traditional folklore culture may be used only in a manner which “does not depreciate their value.”¹⁴⁸

In addition, some specific examples were provided:

- (i) reproduction of artworks on t-shirts, imported carpets¹⁴⁹ and garments;¹⁵⁰
- (ii) the duplication and adaptation of traditional remedies;¹⁵¹
- (iii) copying and use of hand woven, traditional textile designs and patterns on factory made fabrics, which stifles local weaving practice mostly prevalent among women in the villages;¹⁵²
- (iv) one country reported on concerns and efforts for the preservation and protection of an indigenous woman’s parka (*amauti*). Indigenous women are attempting to promote commercial sales of handmade *amautis* in order to conserve traditional skills and knowledge while providing a source of income and a measure of financial independence;¹⁵³
- (v) the appropriation by authors of works which are common to all the country’s people;¹⁵⁴
- (vi) the use of shadow plays, and folk poetry, songs, music and dances;¹⁵⁵
- (vii) the trade and exportation of ethnographic material and artifacts, which are difficult to categorize and date;¹⁵⁶

¹⁴⁸ Czech Republic.

¹⁴⁹ Australia.

¹⁵⁰ Barbados.

¹⁵¹ Barbados.

¹⁵² Bhutan.

¹⁵³ Canada.

¹⁵⁴ Kyrgyzstan.

¹⁵⁵ Malaysia.

¹⁵⁶ Philippines.

(viii) use and exploitation of folklore for financial benefits, the distorting of expressions of folklore, and the deception of the public;¹⁵⁷

One response stated that “no need for any such kind of protection has been expressed, yet.”¹⁵⁸

In so far as additional general information is concerned, as requested in Question II.16, one response advised that the country’s courts have applied a flexible interpretation to intellectual property laws and common law principles to provide greater protection to expressions of folklore, and referred to the use of the doctrine of confidential information and finding of fiduciary obligations.¹⁵⁹ Another country stated that “cultural diversity is strengthened and promoted when the folkloric expressions of many different cultures are shared . . . in a manner that protects various aspects of the folkloric expressions without unduly restricting or limiting the dissemination thereof.”¹⁶⁰ One response referred to protection provided also in cultural heritage legislation.¹⁶¹ Another responded that its law is not clear on which forms of expressions are to be protected, and, therefore, the Model Provisions should be inserted as is.¹⁶²

A response stated that the promotion of an expression of folklore, by including a traditional epic in a film for example, is a form of protection even if other people may benefit financially because “the showing of the film will ‘protect’ the existence of such epic as it will be passed on to the next generations.”¹⁶³

(d) Authorization of utilizations of expressions of folklore

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

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

¹⁵⁷ Sierra Leone.

¹⁵⁸ Germany.

¹⁵⁹ Australia.

¹⁶⁰ Canada.

¹⁶¹ Czech Republic.

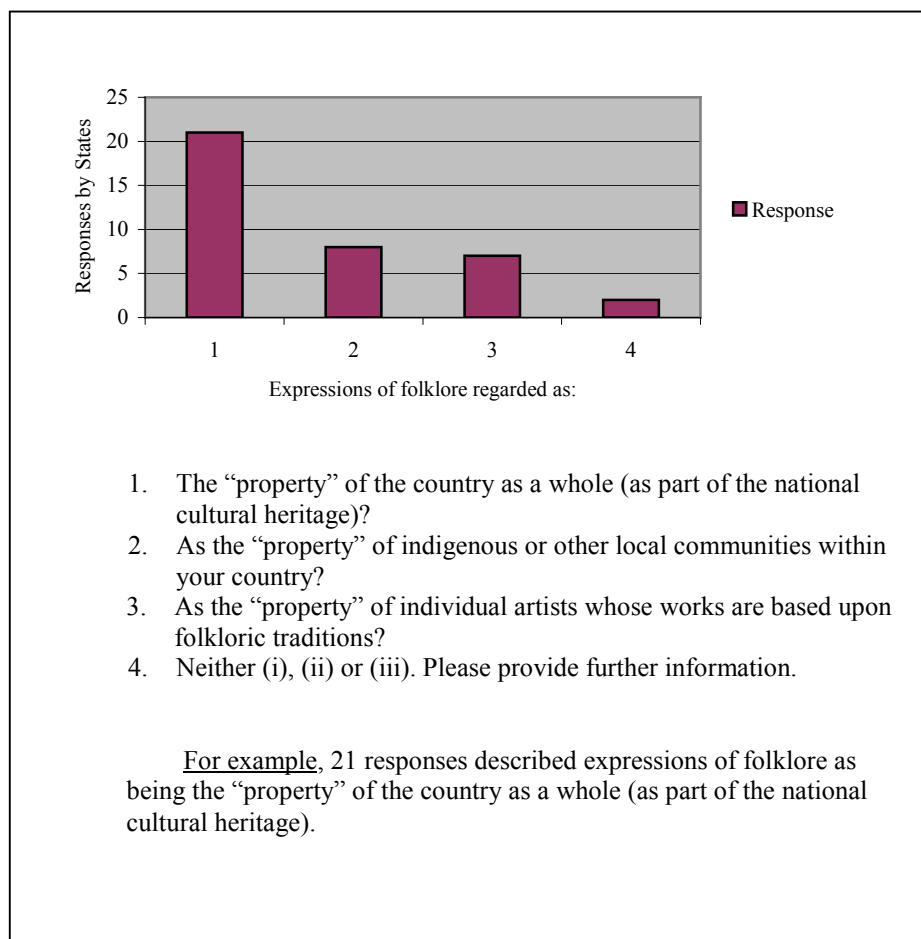
¹⁶² Namibia.

¹⁶³ Philippines.

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

Summary of responses to Questions II. 17 and II. 18

The responses are reflected in the table below:



Responses also provided the following additional information:

(i) the copyright law does not recognize communal ownership as such. However, in one case, the courts had held that an Indigenous artist owed a fiduciary obligation to his community. "The finding of this fiduciary duty could be seen as extending some form of communal ownership, as it requires the owner of the copyright in the work to enforce his rights so as to protect his community from cultural harm;"¹⁶⁴

(ii) expressions of cultural heritage of which the author is unknown belong to the country as a whole. They are the property of their authors only when the authors are known;¹⁶⁵

¹⁶⁴ Australia.

¹⁶⁵ Burkina Faso.

(iii) in one sense, expressions of folklore may be regarded as the “property” of the country as a whole. However, among Aboriginal peoples in the country, a sense of “ownership” of traditional artistic heritage often exists in the concerned communities. Under the national legal system, there are mechanisms available for collectivities (both Aboriginal and non-Aboriginal) to assert legal “property” rights in expressions of folklore (for example, contracts relating to trade secrets, corporations holding copyrights and patents).¹⁶⁶

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

(i) the Canadian Museum of Civilization is a federal Crown corporation which serves as the national museum of human history of Canada. The Museum’s Cultural Studies program collects tangible folkloric art as well as tapes of songs, languages, oral histories and personal narratives. To reflect the wishes of members of some Aboriginal groups regarding authorization of access to their expressions of folklore, the Museum’s Ethnology section restricts access to some collections of sacred Aboriginal materials to members of culturally affiliated groups, and does not make them available to members of the general public;¹⁶⁷

(ii) in another country, there is a system for the collective management of copyright and related rights and licensing is provided for the use of copyright subject matter. The organization for copyright management collects the fees for the use of works which are in the public domain. The fees are then transferred to the State Fund of Intellectual Property;¹⁶⁸

(iii) one response stated that the utilization of an expression of folklore depends upon the relevant community having been informed and permission from the elders or Paramount Chief obtained.¹⁶⁹ Another response regarded the free and prior informed consent of the relevant indigenous cultural community (ICC) and indigenous peoples (IP) as being required. A Memorandum of Agreement must be executed by and between the proponent, the host ICC/IP community, and the country’s National Commission on Indigenous People (NCIP), written in the dialect or language of the concerned ICCs/IPs, with corresponding English and Filipino translation.¹⁷⁰

¹⁶⁶ Canada.

¹⁶⁷ Canada.

¹⁶⁸ Kyrgyzstan.

¹⁶⁹ Sierra Leone.

¹⁷⁰ Philippines.

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

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

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

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

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

Summary of responses to Question II. 19

Responses to this question, which was addressed to those countries providing specific legal protection for expressions of folklore, indicated that:

(i) several countries stated that there is no single authority in relation to authorizing uses of folklore in the sense referred to in the Model Provisions, but in some cases various Government departments and offices can be approached for authorization;¹⁷¹

(ii) the copyright office, which also in some cases performs the functions of a copyright collective management society, acts as the type of authority envisaged in Articles 9 and 10 of the Model Provisions.¹⁷² Fees collected are paid into a fund for the promotion of culture¹⁷³ or alternatively, no fees are payable;¹⁷⁴

(iii) a country responded as to having a specific competent and supervisory authority and another is in the process of establishing such an authority.¹⁷⁵ The country with an authority stated that fees for the utilization of works of folklore must be no less than 7% of the profit made from the utilization, and must be used mainly for the following purposes: first, to support and assist the work of national folklore organizations, folklore artists, folklore research institutions, folklore museums, exhibition halls and archives; second, to subsidize the community creating and spreading folklore to carry out meaningful activities on traditional folklore; and, third, to protect and disseminate national folklore works.¹⁷⁶

¹⁷¹ Barbados; Iran (Islamic Republic of); Namibia (response to Question II. 20).

¹⁷² Burkina Faso; Mexico.

¹⁷³ Burkina Faso.

¹⁷⁴ Mexico.

¹⁷⁵ China; United Republic of Tanzania.

¹⁷⁶ China.

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

Summary of responses to Question II. 20

One country provided that when certain works of folklore produced by a community are being distorted to discredit or prejudice the reputation of the community, or the source of a literary or artistic work is not attributed to the relevant community, the communities may have recourse to the copyright office. However there has been no experience of such a situation to date.¹⁷⁷

(e) Sanctions, remedies and jurisdiction

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

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

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

A few responses indicated the various civil and criminal remedies and sanctions provided for.¹⁷⁸ They include fines, imprisonment and seizure of infringing items. In some cases, the sanctions and remedies are those applicable to copyright works.

No information on practical experiences was provided.

(f) Relation to other forms of protection

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

Yes

No

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

¹⁷⁷ Mexico.

¹⁷⁸ Barbados; China; Iran (Islamic Republic of); Namibia; Russian Federation; Sri Lanka; United Republic of Tanzania.

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

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

Of the 27 responses that answered Question II. 23, 10 answered “Yes” and 16 “No.”

Those countries that responded “Yes” referred to:

- (a) the protection provided by means of copyright and related rights legislation, particularly the protection of the rights of performers and sound recording producers;¹⁷⁹
- (b) protection afforded by trademark legislation. In one example, an Aboriginal First Nation has used trademarks legislation to protect ancient rock painting images;¹⁸⁰
- (c) copyright protection afforded to “works” originated from “expressions of folklore;”¹⁸¹
- (d) expressions of folklore being protected at common law.¹⁸²

Certain countries also referred to cultural heritage and indigenous peoples’ rights legislation.¹⁸³

(g) Protection of expressions of folklore of foreign countries

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

Yes

No

If yes:

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

¹⁷⁹ Australia; Canada; Czech Republic; Gambia; Germany; Indonesia; Jamaica; Netherlands; Philippines.

¹⁸⁰ Canada.

¹⁸¹ Croatia.

¹⁸² Gambia.

¹⁸³ Netherlands; Philippines; Russian Federation.

Summary of responses to Question II. 25

To this Question II. 25, 6 countries responded “Yes” and 2 responded “No.” One response stated that the country was unaware if any of its expressions of folklore had been or were being exploited abroad.¹⁸⁴

A few responses provided cases where expressions of folklore had been utilized abroad, and commercially exploited in foreign, as well as local, markets. Certain responses in addition called for proper legal procedures and mechanisms to prevent such utilization and exploitation of expressions of folklore in foreign countries.¹⁸⁵

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

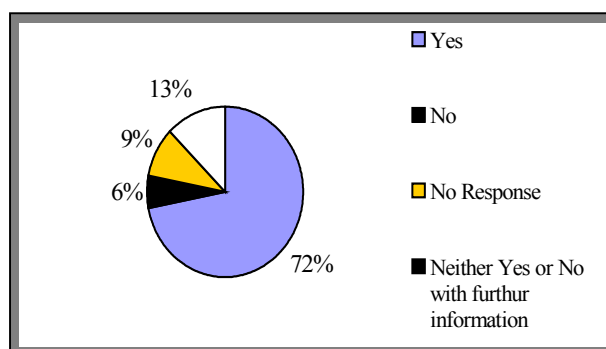
Yes

No

Please provide further information on your answer.

Summary of responses to Question II. 26

To this Question, there were 23 “Yes” responses, 2 “No” responses and three responses that did not answer this question. In addition, four responses did not respond “Yes” or “No” but provided further information. Of the four, one stated that the country concerned was still soliciting the views of concerned parties on which national and international mechanisms might be the most appropriate to balance the different considerations involved.¹⁸⁶ Another stated that no need for an international instrument had been expressed in the country and whether there is such a need remains to be seen.¹⁸⁷ One stated that in Europe, culture is a national affair, therefore, an international agreement is not the most obvious solution. The protection of the cultural heritage of developing countries is however important.¹⁸⁸



¹⁸⁴ Mexico.

¹⁸⁵ Barbados; Burkina Faso; Iran (Islamic Republic of); Namibia; Russian Federation; United Republic of Tanzania.

¹⁸⁶ Canada.

¹⁸⁷ Germany.

¹⁸⁸ Netherlands.

Those countries answering “Yes” provided various reasons for their answer. One country cautioned, however, that a possible treaty should link itself to intellectual property questions, and should not cover themes covered by other international treaties or processes, or else divergent solutions may be developed.¹⁸⁹

Those countries answering “No” stated that the endorsement of an international agreement would be premature at this stage.¹⁹⁰

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

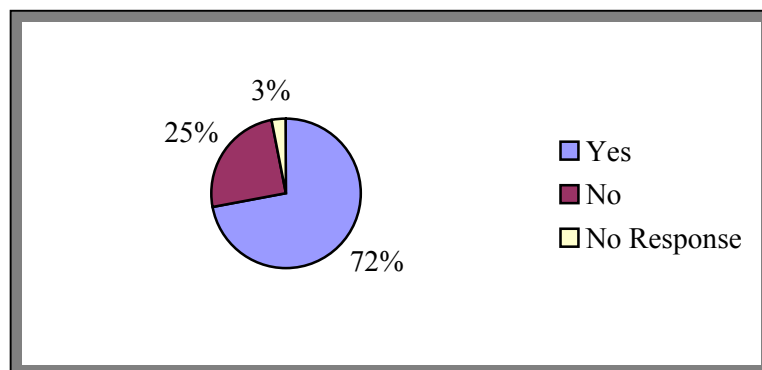
Yes

No

Please provide further information on your answer.

Summary of responses to Question II. 27

To this question, there were 23 “Yes” responses, and one “No” response. 8 of the completed questionnaires did not answer this question.



Countries provided additional information in their responses. For example, one country, which responded “Yes”, suggested the examination of the Peruvian Model of Community Rights Legislative System and Japan’s Ancient Shrine and Temple Act and National Treasure Act.¹⁹¹

¹⁸⁹ Argentina.

¹⁹⁰ Australia; Switzerland.

¹⁹¹ Jamaica.

Question II. 28: What practical proposals do you have regarding the two main problems that prevented the development of an international treaty in 1984 ((i) the lack of appropriate sources for the identification of the expressions of folklore to be protected and (ii) the lack of workable mechanisms for settling the questions of expressions of folklore that can be found not only in one country, but in several countries of a region.)

Summary of responses to Question II. 28

Several countries made proposals and/or suggestions, including:

- (i) a solution to these problems must be capable of universal application. A WIPO Standing Committee would be a useful forum to deal with both issues;¹⁹²
- (ii) one country would be open to discussing the establishment of databases regarding the lack of appropriate sources, and the use of alternative dispute resolution means, such as arbitration and mediation, for the resolution of folklore claims involving more than one country in a region. It was suggested that further discussions would be useful even though these practical suggestions may not necessarily facilitate the development of an international treaty;¹⁹³
- (iii) a proposal that an international institute be established to identify sources of expressions of folklore;¹⁹⁴
- (iv) a combined national and international effort should define appropriate sources for the identification of the expressions of folklore to be protected. National agencies that are responsible for the promotion and development of culture should be involved in research and documentation of sources. In the case of expressions of folklore that can be found in several countries of a region, a regional approach to settling such issues is preferred. A system of unified registration and notification by all those countries interested in exploiting the benefits of common folklore would go a long way in solving this problem. An equitable system of sharing the benefits could be established. Notification of one country's intent to register and protect common folklore should be communicated to other countries in the region where the folklore is found;¹⁹⁵
- (v) the setting up of national and/or international folklore databases;¹⁹⁶
- (vi) governments should cooperate with each other and with relevant international organizations, such as UNESCO;¹⁹⁷
- (vii) at the national level, what is needed is the adoption and implementation of policies favorable to protection, archiving, preservation, technical training, research, documentation and public awareness. At the regional level, the creation of a regional organization which would serve as a repository of data submitted from countries as a result of their national efforts. This organization would be comprised of Member States of the region and would be charged with the responsibility of establishing a regional methodology for

¹⁹² Barbados.

¹⁹³ Canada.

¹⁹⁴ Croatia.

¹⁹⁵ Gambia.

¹⁹⁶ Indonesia; Malaysia; Mexico; Russian Federation.

¹⁹⁷ Iran (Islamic Republic of).

researching culture, guidelines for benefit-sharing schemes, identifying common expression in the region and the exchange of information between Member States and other regions. In addition, assistance with funding and expertise is needed at the international level to facilitate these proposals. It may be necessary to consider the formation of a world court/tribunal for the preservation/protection of expressions of folklore;¹⁹⁸

(viii) regarding the criteria for determination (identification) of expressions of folklore, it might be useful to consider genre features. For example, epochs, fairy tales, legends have the people's heritage as origin, while, on the contrary, novels, essays have authors) and such a criteria might be the absence of an author. Regarding regional folklore, the foundation of Regional Centers for protection and examination of expressions of folklore was suggested. These Centers could deal with the protection of expressions of folklore of countries with similar traditional culture and make competent conclusions on the belonging of a particular expression of folklore to the nation of one or other country;¹⁹⁹

(ix) the competent and supervisory authorities envisaged in the Model Provisions should identify the expressions of folklore to be protected. Regarding regional folklore, expressions of folklore could be identified and licensed individually where two communities on either side of a border share the same cultures and traditions;²⁰⁰

(x) the issues should be tackled by two international committees and thereafter be referred to a WIPO Diplomatic Conference.²⁰¹

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

Summary of responses to Question II. 29

A few responses included some additional suggestions, such as:

(a) special reciprocal agreements between countries would be helpful in respect of foreign expressions of folklore, but they should not be the basis for overall protection of expressions of folklore;²⁰²

(b) it is necessary to resolve whether the term "competent authority" refers to an authorized representative of each cultural community or the highest political leader of such community.²⁰³

¹⁹⁸ Jamaica.

¹⁹⁹ Kyrgyzstan.

²⁰⁰ Namibia.

²⁰¹ United Republic of Tanzania.

²⁰² Namibia.

²⁰³ Philippines.

III. *Modifications or Adaptations to the Model Provisions*

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

Summary of responses to Question III. 1

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

- (i) define the terminology used to delimit clearly the ambit and meaning of the desired protection;²⁰⁴
- (ii) indigenous communities and other nationals of a country must understand their respective expressed and implied rights and obligations in cases where authorization to use an expression of folklore has been granted;²⁰⁵
- (iii) fees for the use of expressions of folklore should be variable, and other possible forms of remuneration should be investigated;²⁰⁶
- (iv) solutions must be found for cases where more than one community holds the same expression of folklore;²⁰⁷
- (v) the Model Provisions shall be made available to all States;²⁰⁸
- (vi) the inclusion within the scope of the Model Provisions of traditional medicinal practices and methods of healing, textile designs, scientific views and practical traditions, intangible heritage and cultural space;²⁰⁹
- (vii) determination of what kind of protection would be effective for expressions of folklore;²¹⁰
- (viii) where expressions of folklore form the basis of a creation that enjoys intellectual property protection, a form of *droite de suite* should accrue to the community or society that originally protected the expressions of folklore;²¹¹
- (ix) the Model Provisions should provide for international protection;²¹²
- (x) the Model Provisions should promote human culture and facilitate cultural relations among nations;²¹³

²⁰⁴ Argentina.

²⁰⁵ Argentina.

²⁰⁶ Argentina.

²⁰⁷ Argentina.

²⁰⁸ Burkina Faso.

²⁰⁹ Bhutan; Croatia; Philippines.

²¹⁰ Croatia.

²¹¹ Gambia.

²¹² Iran (Islamic Republic of).

²¹³ Iran (Islamic Republic of).

- (xi) the establishment of a code of ethics ensuring respectful approaches to and recognition of traditional scholars - creators, bearers and transmitters of expressions of folklore;²¹⁴
- (xii) the repatriation of compensation, *post facto*, in respect of traditional cultural folklore and traditional knowledge works that have been exploited;²¹⁵
- (xiii) the protection of indigenous peoples and endangered community spaces, such as burial sites;²¹⁶
- (xiv) WIPO should hold seminars and regional meetings in Member States;²¹⁷
- (xv) the Model Provisions should be translated into the official languages of the Member States;²¹⁸
- (xvi) the Model Provisions should be updated to suit the current technological environment;²¹⁹
- (xvii) WIPO should establish further Model Provisions that would serve as an example of a special reciprocal agreement on the protection of expressions of folklore of foreign origin;²²⁰
- (xviii) sanctions should be uniform and extend beyond national boundaries.²²¹

51. *The Intergovernmental Committee is invited to take note of the foregoing overview of intellectual property needs and issues related to expressions of folklore, the preliminary summary above of the responses to the questionnaire received on or before September 30, 2001, and the next steps as outlined in paragraphs 7 and 8, above, and to make general comments thereon.*

[Annexes follow]

²¹⁴ Jamaica.

²¹⁵ Jamaica.

²¹⁶ Jamaica.

²¹⁷ Kyrgystan; United Republic of Tanzania.

²¹⁸ Kyrgyzstan.

²¹⁹ Malaysia.

²²⁰ Namibia.

²²¹ Sierra Leone.

ANNEX I

LIST OF MEMBER STATES SUBMITTING RESPONSES TO THE QUESTIONNAIRE -
WIPO/GRTKF/IC/2/7 – ON OR BEFORE
SEPTEMBER 30, 2001

MEMBER STATE	NAME OF REPRESENTATIVE	TITLE
Argentina	María Georgina Gerde	Asesoría Legal de Patentes, Instituto Nacional de Propiedad Intelectual
Australia	Fiona Ey	Senior Legal Officer, Attorney-General's Department
Barbados	Christopher Birch	Deputy Registrar, Corporate Affairs and Intellectual Property Office
Bhutan	Kinley Wangchuk	Deputy Director, Intellectual Property Division, Ministry of Trade and Industry
Bosnia and Herzegovina	Melika Filipan	International Trademark Examiner, Institute for Standards, Metrology and Intellectual Property
Brunei Darussalam	Sharifah Sarinah binti Wan Ibrahim	Legal Counsel, Attorney General's Chambers
Burkina Faso	Assétou Toure Oussiené Compaore	Directrice, Bureau burkinabé du droit d'auteur Juriste, Direction nationale de la propriété industrielle
Canada	Michèle Gervais	Director, Intellectual Property Policy, Department of Industry
China	Shi Zongyuan	Commissioner, National Copyright Administration of China
Côte d'Ivoire	Yao Norbert Etranny	Directeur, Centre national des arts et de la culture
Croatia	Mr. Sc. Nikola Kopčić	Director General, State Intellectual Property Office of the Republic of Croatia

MEMBER STATE	NAME OF REPRESENTATIVE	TITLE
Czech Republic	Michal Beneš	Secretary of Cultural Affairs of UNESCO, Ministry of Culture
	Hana Masopustová	Head of Copyright Section, Ministry of Culture
Gambia	Fola H. Allen	Registrar General, Department of State for Justice
Germany	Irene Pakuscher	Head of the Copyright and Publishing Law Section, Federal Ministry of Justice
Indonesia	A. Zen Umar Purba	Director General of Intellectual Property Rights, Directorate General of Intellectual Property Rights
Iran (Islamic Republic of)	Mohammad Hassan Kiani	Director General, Office for Companies and Industrial Property, Registration Organization for Deeds and Properties
Jamaica	Natalie Wilmot	Manager of Copyright and Related Rights, Jamaica Intellectual Property Office
Kyrgyzstan	Roman O. Omorov	Director, State Agency of Science and Intellectual Property under the Government of the Kyrgyz Republic (Kyrgyzpatent)
Latvia	Mara Rozenblate	Head of PCT Section, Latvian Patent Office
Malaysia	Ismail Jusoh	Director, Intellectual Property Division, Ministry of Domestic Trade and Consumer Affairs
Mexico	Javier Tapia Ramírez	Director de Protección contra la Violación del Derecho de Autor, Instituto Nacional del Derecho de Autor

MEMBER STATE	NAME OF REPRESENTATIVE	TITLE
Namibia	Tarah Shinavene	Director, Audiovisual Media and Namibia Communications Commission, Ministry of Foreign Affairs, Information and Broadcasting
Netherlands	Mr. H. Y. Kramer	Director of Media, Literature and Libraries, Ministry of Education, Culture and Science
Pakistan	Dr. Shamim M. Zaidi	Director, Lok Virsa, Ministry of Culture
Philippines	Emma C. Francisco	Director General, Intellectual Property Office of the Philippines
Romania		Romanian Copyright Office
Russian Federation	L.N. Simonova Yu. G. Smirnov N.G. Ponomareva	Head of Division, Russian Agency for Patents and Trademarks (Rospatent)
Sierra Leone	Joseph Fofanah	Trade Marks and Patents Officer, Administrator and Registrar-General's Office
Sri Lanka	Kanaganayagam Kanag-Isvaran	Chairman, Advisory Commission, National Intellectual Property Office of Sri Lanka
Switzerland	Martin A. Girsberger	Co-Head, Legal Services, Patent and Design Law Division of Legal and International Affairs, Swiss Federal Institute of Intellectual Property
United Republic of Tanzania	Stephen Dominic Mtetewaunga	Copyright Administrator, Copyright Society of Tanzania

[Annex II follows]

WIPO/GRTKF/IC/2/8

ANNEX II

MODEL PROVISIONS
FOR NATIONAL LAWS
ON THE PROTECTION
OF EXPRESSIONS OF FOLKLORE
AGAINST ILLICIT EXPLOITATION
AND OTHER PREJUDICIAL ACTIONS

MODEL PROVISIONS FOR NATIONAL LAWS
ON THE PROTECTION OF EXPRESSIONS OF FOLKLORE
AGAINST ILLICIT EXPLOITATION AND OTHER PREJUDICIAL ACTIONS

prepared by the Secretariats of
the United Nations Educational, Scientific and Cultural Organization (UNESCO)
and the World Intellectual Property Organization (WIPO)

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions

[Considering that folklore represents an important part of the living cultural heritage of the nation, developed and maintained by the communities within the nation, or by individuals reflecting the expectations of those communities;

Considering that the dissemination of various expressions of folklore may lead to improper exploitation of the cultural heritage of the nation;

Considering that any abuse of commercial or other nature or any distortion of expressions of folklore are prejudicial to the cultural and economic interests of the nation;

Considering that expressions of folklore constituting manifestations of intellectual creativity deserve to be protected in a manner inspired by the protection provided for intellectual productions;

Considering that such a protection of expressions of folklore has become indispensable as a means of promoting further development, maintenance and dissemination of those expressions, both within and outside the country, without prejudice to related legitimate interests;

The following provisions shall be given effect:]

SECTION 1

Principle of Protection

Expressions of folklore developed and maintained in [insert the name of the country] shall be protected by this [law] against illicit exploitation and other prejudicial actions as defined in this [law].

SECTION 2

Protected Expressions of Folklore

For the purposes of this [law], “expressions of folklore” means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of the country] or by individuals reflecting the traditional artistic expectations of such a community, in particular:

- (i) verbal expressions, such as folk tales, folk poetry and riddles;
- (ii) musical expressions, such as folk songs and instrumental music;
- (iii) expressions by action, such as folk dances, plays and artistic forms or rituals;

whether or not reduced to a material form; and

- (iv) tangible expressions, such as:
 - (a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes;
 - (b) musical instruments;
 - [(c) architectural forms].

SECTION 3

Utilizations Subject to Authorization

Subject to the provisions of Section 4, the following utilizations of the expressions of folklore are subject to authorization by the [competent authority mentioned in Section 9, paragraph 1,] [community concerned] when they are made both with gainful intent and outside their traditional or customary context:

- (i) any publication, reproduction and any distribution of copies of expressions of folklore;
- (ii) any public recitation or performance, any transmission by wireless means or by wire, and any other form of communication to the public, of expressions of folklore.

SECTION 4

Exceptions

1. The provisions of Section 3 shall not apply in the following cases:

- (i) utilization for purposes of education;
- (ii) utilization by way of illustration in the original work of an author or authors, provided that the extent of such utilization is compatible with fair practice;
- (iii) borrowing of expressions of folklore for creating an original work of an author or authors;

2. The provisions of Section 3 shall not apply also where the utilization of the expressions of folklore is incidental. Incidental utilization includes, in particular:

- (i) utilization of any expression of folklore that can be seen or heard in the course of a current event for the purposes of reporting on that current event by means of photography, broadcasting or sound or visual recording, provided that the extent of such utilization is justified by the informatory purpose;

(ii) utilization of objects containing the expressions of folklore which are permanently located in a place where they can be viewed by the public, if the utilization consists in including their image in a photograph, in a film or in a television broadcast.

SECTION 5

Acknowledgement of Source

1. In all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, by mentioning the community and/or geographic place from where the expression utilized has been derived.
2. The provisions of paragraph 1 shall not apply to utilizations referred to in Section 4, paragraphs 1(iii) and 2.

SECTION 6

Offences

1. Any person who willfully [or negligently] does not comply with the provisions of Section 5, paragraph 1, shall be liable to ...
2. Any person who, without the authorization of the [competent authority referred to in Section 9, paragraph 1,] [community concerned] willfully [or negligently] utilizes an expression of folklore in violation of the provisions of Section 3, shall be liable to
3. Any person willfully deceiving others in respect of the source of artifacts or subject matters of performances or recitations made available to the public by him in any direct or indirect manner, presenting such artifacts or subject matters as expressions of folklore of a certain community, from where, in fact, they have not been derived, shall be punishable by
4. Any person who publicly uses, in any direct or indirect manner, expressions of folklore willfully distorting the same in a way prejudicial to the cultural interests of the community concerned, shall be punishable by

SECTION 7

Seizure or Other Actions

Any object which was made in violation of this [law] and any receipts of the person violating it and corresponding to such violations, shall be subject to [seizure] [applicable actions and remedies].

SECTION 8

Civil Remedies

The sanctions provided for in [Section 6] [Sections 6 and 7] shall be applied without prejudice to damages or other civil remedies as the case may be.

SECTION 9

Authorities

- [1.] For the purpose of this [law], the expression “competent authority” means ...
- [2.] For the purpose of this [law], the expression “supervisory authority” means ...]

SECTION 10

Authorization

1. Applications for individual or blanket authorization of any utilization of expressions of folklore subject to authorization under this [law] shall be made [in writing] to the [competent authority] [community concerned].
2. Where the [competent authority] [community concerned] grants authorization, it may fix the amount of and collect fees [corresponding to a tariff [established] [approved] by the supervisory authority.] The fees collected shall be used for the purpose of promoting or safeguarding national [culture] [folklore].
- [3. Appeals against the decisions of the competent authority may be made by the person applying for the authorization and/or the representative of the interested community.]

SECTION 11

Jurisdiction

[1. Appeals against the decisions of the [competent authority] [supervisory authority] are admissible to the Court of ...]

[2.] In case of any offence under Section 6, the Court of ... has jurisdiction.

SECTION 12

Relation to Other Forms of Protection

This [law] shall in no way limit or prejudice any protection applicable to expressions of folklore under the copyright law, the law protecting performers, producers of phonograms and broadcasting organizations, the laws protecting industrial property, or any other law or international treaty to which the country is party; nor shall it in any way prejudice other forms of protection provided for the safeguard and preservation of folklore.

SECTION 13

Interpretation

The protection granted under this [law] shall in no way be interpreted in a manner which could hinder the normal use and development of expressions of folklore.

SECTION 14

Protection of Expression of Folklore
of Foreign Countries

Expressions of folklore developed and maintained in a foreign country are protected under this [law]

- (i) subject to reciprocity, or
- (ii) on the basis of international treaties or other agreements.

[End of Annex II and of document]