
NATIONAL EXPERIENCES
WITH THE PROTECTION OF
EXPRESSIONS OF FOLKLORE/
TRADITIONAL CULTURAL EXPRESSIONS

> > India, Indonesia and the Philippines

*Written by
Mrs. P.V. Valsala G. Kutty
for the
World Intellectual Property Organization (WIPO)*

Study n° 2

This is one of a series of Studies dealing with intellectual property and genetic resources, traditional knowledge and traditional cultural expressions/folklore

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* The views expressed in this Study are those of the author, and not necessarily those of the WIPO Secretariat or its Member States. The Study is current at the time of preparation of the initial draft (1999). It was initially published as WIPO document WIPO/GRTKF/STUDY/1, dated November 25, 2002.

TABLE OF CONTENTS

	<i>Pages</i>
PREFACE	1
ACKNOWLEDGEMENTS	3
CHAPTER I Introduction	4
CHAPTER II Expressions of Folklore – Concept and Scope	7
CHAPTER III UNESCO/WIPO Model Provisions – An Analysis	11
CHAPTER IV Model Provisions and National Experiences	17
<i>Section I: India</i>	17
<i>Section II: The Philippines</i>	23
<i>Section III: Indonesia</i>	30
CHAPTER V Conclusions and Recommendations	33
ANNEX I Questionnaire Used for Eliciting Information from Experts and Other Groups	35
ANNEX II Extracts from the Indigenous Peoples Rights Act of 1997 Republic Act No. 8371 – Republic of the Philippines	37
ANNEX III Extracts from the Rules and Regulations Implementing the IPRA of 1997	39
BIBLIOGRAPHY	42

PREFACE

The last quarter of the twentieth century witnessed an unprecedented pace of activities in the area of legal protection of folklore. Developing countries considered folklore as an important component of their cultural heritage and perceived the threats posed by its improper exploitation as a matter of grave concern. Realizing the magnitude of the problem, efforts were made by the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO) to find out a long-lasting solution through a mechanism for protection and preservation of folklore. This resulted in the formulation of Model Provisions for national laws relating to legal protection of folklore. Some national governments enacted legislation based partially on these Model Provisions adopted by UNESCO and WIPO, namely the Model Provision for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, 1982 ("the Model Provisions").

Technological developments have always had their impact on the intellectual property regime. Newer forms of exploitation facilitated by modern technologies, especially in the fields of information technology and biotechnology, posed new challenges for the protection of folklore. Realizing the sentiments of the member countries, WIPO launched certain new initiatives as reflected in its Program and Budget for the biennium (1998-1999) for exploration of the issues relating to intellectual property rights of holders of indigenous knowledge. As part of these initiatives, WIPO asked me to conduct a study to evaluate the national experiences of some selected countries in respect of expressions of folklore, so as to come to terms with the problem, its solutions and the future course of action at the international level. The three countries selected by me for the study were India, Indonesia and the Philippines.

The objectives of the Study were to examine how effective protection of folklore is being achieved in these countries so as to derive directions for future work in this field and also to assess the relevance of the Model Provisions already drawn up for framing legislation, in these countries.

The methodology adopted for the study included legal research methods and field visits in the selected countries. The following issues were identified for research:

- (i) Study of the national experiences based on literature, expertise and other material available so as to understand the perception of expressions of folklore.
- (ii) Rational analysis of the Model Provisions.
- (iii) A deep look into the national laws of the countries with a view to assessing the adequacy, relevance and efficacy of the legal mechanisms adopted for protection of folklore.
- (iv) Scrutiny of the provisions in the national legislation *vis-à-vis* the Model Provisions with a view to see how far these provisions have been incorporated into the national legislation.
- (v) An overview of the level of implementation of the national laws in the countries concerned.
- (vi) Formulation of suggestions for modifications in the Model Provisions based on national experiences of the three countries in question.

The scope of the research extended to protection offered through laws on copyright and related rights, other laws on intellectual property (IP), and non-IP laws like the laws relating to biodiversity issues and rights of indigenous people. Review of the Model Provisions was also within the scope of the study conducted.

The specific work steps followed for conducting the study included two major parts, *viz.*: (1) a detailed study of the literature available on the legal and non-legal issues relating to folklore, and (2) field visits for gathering first-hand information through discussions and consultations with various agencies concerned, including officials of government departments, experts from academic and non-governmental organizations, beneficiary groups, collecting societies and other social activists. The literature survey covered the constitutions of the countries, their IP laws, books and folklore and other traditional knowledge bases, reports and proceedings of various symposia and seminars besides the publications, monographs and papers prepared by both UNESCO and WIPO.

The period of study was three months commencing from December 9, 1998. The field visits to Indonesia and the Philippines were for the duration of five working days each during the month of January 1999.

This report has been prepared on the basis of the field study, correspondence with institutions, non-governmental organizations and individual experts, and literature survey. The views and opinions expressed in the report are the author's own and do not in any way reflect that of any government or organization.

The introductory chapter elucidates the context in which the issues of folklore protection have come to the fore. It also gives a brief account of the international efforts to extend protection to expressions of folklore, resulting in the Model Provisions.

The introduction is followed by a conceptual analysis of expressions of folklore and its scope in Chapter II. This situates the study in its proper context by defining the parameters.

In Chapter III, a critical analysis is made of the Model Provisions keeping in mind the present day requirements.

In Chapter IV, the national experiences of India, the Philippines and Indonesia in protecting their folklore are examined in three sections. In section 1, the Indian scenario is examined by analyzing the different kinds of folklore, the constitutional provisions which are relevant for protection of folklore and the national laws on protection of folklore of specific experiences in case laws. A similar structure is followed in sections 2 and 3 dealing with the Philippines and Indonesia respectively. An attempt has been made in each section to look into the extent to which the Model Provisions have been made use of by each country.

Chapter V brings out the conclusions and recommendations of the study.

It is hoped that the findings of the study will be useful for the international community in its efforts towards putting in place a legal mechanism for protection of folklore.

Mrs. P.V. Valsala G. Kutty
Deputy Secretary
Department of Education
Ministry of Human Resources Development
Government of India
New Delhi,
March 8, 1999

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This paper documents a study on the protection of the rights of holders of folklore. The study is the outcome of an assignment from the World Intellectual Property Organization (WIPO).

Folklore itself is as old as humanity with much of it passed on orally from generation to generation. Hence, in a vast ancient country like India alone with its diverse cultural and religious beliefs and traditions, there is a veritable treasure house of folklore. A study on protecting the rights of holders of such folklore, therefore, appeared absolutely abstract and thereby all the more challenging. I would, therefore, like to thank very specially Dr. Kamil Idris, Director General, WIPO, for the confidence he placed in me by assigning me this prestigious study as well as for actually initiating concrete steps towards protection of such rights.

I am extremely grateful to the Government of India, especially the Ministry of Human Resource Development, Department of Education headed by Mr. P.R. Dasgupta, IAS,* for permitting me to accept this challenging study and extending all facilities.

My sincere thanks to the Governments of Indonesia and the Philippines for making necessary arrangements for my visits to these countries and extending wholehearted cooperation.

I must specially place on record my sincere thanks to the people of India, Indonesia and the Philippines for literally provoking me into sensitizing myself to the issues and problems involved in a study of this sort. I recall with pleasure and a sense of achievement the many stimulating and interacting sessions I had with different cross-sections of people in these countries. My discussions with the people of Indonesia and the Philippines were as stimulating and thought provoking as my interaction with my own people in India, despite some language constraints.

These discussions have left a lasting impact on me which I have sincerely tried to bring out in this paper with the hope that others would also get similarly sensitized.

Last but not least, I am deeply indebted to my family, friends and well wishers who were always very supportive and displayed incredible patience

P.V. Valsala G. Kutty
March 8, 1999

* IAS (Indian Administrative Service). The title IAS is generally written after the name of an officer who belongs to this Service.

CHAPTER I

INTRODUCTION

Every nation claiming to be a part of the civilized world is proud of its cultural heritage. Folklore is probably the most important and well-acclaimed component of the cultural heritage of a nation. It can reflect the essentials of a nation's cultural attributes as in a mirror and is recognized as a basis for its cultural and social identity. Nations all over the world are quite possessive about this valuable heritage and express very strong sentiments about the management of the rich resource.

Respect and regard for products of human creativity, ingenuity, and talent have always been part of human civilization. However, the need for protecting intellectual property as a right of the creator was unknown to the patrons of creativity. In fact, the basic cultural premise was that knowledge and the fruits of learning are God-given and should be shared for the benefit of the community. The need for protection of intellectual property (IP) arose as a direct consequence of its potential for exploitation for economic benefits. There was no need for providing for 'neighboring rights' or 'related rights' until phonographic and broadcasting techniques caught up with the world and put at stake the economic returns of the performers and producers of phonograms. The concept of protection of folklore too has a similar history. Technological developments in the 1980's especially in the fields of sound and audiovisual recording, broadcasting, cable television and cinematography, posed a global threat to the hitherto sacrosanct world of cultural heritage. Expressions and elements of folklore were subjected to wide-scale commercial exploitation without any economic benefit flowing to the community who were the creators and preservers of the folklore. Minimal respect or regard was shown to the custodians of the folklore in the worldwide commercialization process. As a progressive marketing strategy many of the exploiters resorted to mass-scale distortion hurting the cultural and social and even religious sentiments of the communities who had preserved the elements of folklore for centuries as their precious possessions.

The revolutionary changes taking place in genetic engineering pose new threats to folk science and technology. The hitherto unexplored fields of folk medicine, folk agricultural seeds, plants, etc., are subjected to scientific analysis for the creation of new products based on biotechnology. The new products are protected under the modern IP laws based on the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) thus lack of protection for folklore is increasingly noticed.

Commercial exploitation of folklore has been viewed as a threat to cultural heritage mainly in the developing countries. The perception of some of the developed countries in this regard is one of pragmatism and based on the notion that expressions of folklore with origins dating back to the distant past, have fallen into public domain and are outside the purview of protection. This view is perhaps the result of a mindset more in tune with the existing laws on IP conceptualized during the industrial revolution to safeguard the interests of the commercial exploiters of new products of intellectual labor. As a result, a legal system for protection of folklore against commercial utilization was not a practical or emotional necessity for these nations. However, a totally different viewpoint was available in the developing world which perceived commercial exploitation of folklore outside their community, without adequate recompense, as a moral, cultural and economic wrong.

International Efforts at Protection of Folklore

Since the traditional attitude of the societies was to keep folklore as part of the common heritage of the community without individual ownership, there were no formal or informal (customary) laws in many developing countries which specifically bestowed ownership rights of folklore on any community or group of persons and prohibit its commercial exploitation without their consent. The concept of private property rights, whether collective or individual, over a common heritage is anathema to the traditional societies. This leads to the commercial exploitation of the folklore by the members outside the community even within a nation.

The strong sentiments of the developing countries on the need for a legal mechanism for the protection of folklore, found expression when many countries in the African continent made appropriate provisions within their copyright laws. An international treaty, i.e., the Bangui Agreement (March 2, 1977), which establishes the African Intellectual Property Organization (OAPI), reflected the collective thought of many of the like-minded nationals of

Africa on the legal protection of creations of folklore. These legal provisions, in unambiguous terms, declared folklore as part of the cultural heritage of a nation. An important principle followed in most of these legal mechanisms is that the creations of communities are protected rather than that of the authors, thereby making a deviation from copyright laws.

The Stockholm Diplomatic Conference of 1967 for revision of the Berne Convention for the Protection of Literary and Artistic Works ("the Berne Convention") did reflect in a limited way, for the first time, the aspirations of the developing world on protection of folklore when it adopted the following provisions in Article 15 (4) of the Berne Convention:

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

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

This fact perhaps leads one to the conclusion that protection under copyright law is not the answer to the question of how to preserve the community-owned, cultural heritage expressed as folklore due to a variety of reasons. The principle of originality considered as the acid test for being qualified for protection, the term of protection having been restricted to the life time of the author plus limited period after his death and, more importantly, the significance attached to the concepts of 'author,' 'work,' etc., in the copyright laws make them inadequate to protect the wealth of knowledge and tradition, handed down from generation to generation over a period of time and collectively owned by the community.

Another attempt to address the desperate need for effectively protecting the expressions of folklore has been to provide for such provisions under the laws relating to neighboring or related rights. What is envisaged under the laws governing neighboring rights is indirect protection, as in the International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961 (the "Rome Convention") providing for protection of rights of performers, producers of phonograms and broadcasters. In respect of performances of expressions of folklore, developing countries were advised to adhere to the Rome Convention and the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms (1971) so as to protect performances and broadcasts of expressions of folklore. However, 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." 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.

Thus the attempts to evolve a system for protection of some elements of folklore within the regimes of copyright and neighboring rights have not been successful to fully achieve the goal of an effective mechanism for adequate protection against unauthorized exploitation and this has convinced many countries of the need for a *sui generis* system for the protection of folklore.

The beginning of a dialogue for a separate piece of legislation exclusively to deal with protection of folklore was marked by the request made in 1973 by the Government of Bolivia to the Director General of the United Nations Educational, Scientific and Cultural Organization (UNESCO) for examining the possibility of drafting an instrument for the protection of folklore as a protocol to the Universal Copyright Convention (UCC). The developments in UNESCO and WIPO that followed in the subsequent years resulted in the setting up of a Working Group in 1980 to study a draft of Model Provisions intended for national legislations as well as international measures for the protection of works of folklore. The working groups deliberated on the relevant

basic documents prepared by WIPO and UNESCO and came to some broad understanding on the following points:

- (i) It is desirable to offer adequate legal protection to folklore.
- (ii) Model provisions should be framed for promoting such legal protection at national levels.
- (iii) Such model provisions should be so elaborated as to be applicable for adoption in countries having no existing legislation for protection, as well as those where there is scope for development of existing laws.
- (iv) Such model provisions should allow for protection under copyright and neighboring rights wherever possible.
- (v) Model provisions for national laws, should lead to sub-regional, regional and, ultimately, international protection of creations of folklore.

Following the recommendations of the Working Group more elaborate discussions were arranged by both UNESCO and WIPO through Expert Committees enabling threadbare discussion on a clause by clause basis of the Model Provisions.

The Expert Committee of Governmental Experts on the Intellectual Property Aspects of Protection of Expressions of Folklore finally adopted the Model Provisions in 1982 (Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions) and these provisions were submitted to the Joint Meeting of the Expert Committee of the Berne Convention and Inter-Governmental Copyright Committee of the UCC in 1983. These were then recommended to the nations for consideration and adoption.

It is disappointing to note that the international attempt concluded with developing model legislative provisions for national law rather than an international treaty for the protection of folklore. Even though a draft treaty for protection of folklore in line with the Model Provisions was prepared, it was not adopted.

CHAPTER II

EXPRESSIONS OF FOLKLORE – CONCEPT AND SCOPE

Expressions of folklore are defined in the Model Provisions as follows:

“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 of 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, jewelry, basket weaving, needlework, textiles, carpets, costumes;*
 - (b) *musical instruments;*
 - [(c) *architectural forms.*]

The term ‘folklore’ was first coined by William Thoms in 1846. He referred to folklore in his letter to the *The Athenaeum* to replace ‘popular antiquities’ and ‘popular literature.’ Initially the word had been used in hyphenated form ‘folk-lore,’ but later on the hyphen was discarded. William Thoms meant to include manners, customs, observations, superstitions, ballads, proverbs and so on, in the term ‘folklore,’ which he summarized as the lore of the people. Indeed, the pioneering work done by Thoms did lead to increasing awareness about the characteristics of folklore and the second half of the 19th century witnessed a large interest shown by eminent scholars in understanding the fundamentals of the vast subject. Since the introduction of the term ‘folklore,’ scholars all over the world put their head together to offer a rational definition of the word. The controversy that emerged in satisfactorily defining the term was so intense that in the *Standard Dictionary of Folklore*, edited by Maria Leach, there are twenty-one definitions given by different scholars.

While going through the definitions one can attribute the reasons for the dispute mainly to the oral tradition of folklore. In a society where the masses are illiterate, the oral tradition is the means through which propagation of the necessary elements of culture takes place. In such a society, scholars used the term ‘folklore’ to refer to the language of the people, the system of their livelihood like hunting, agriculture, customs relating to marriages, deaths, etc., and the basic code of conduct, all of which are transmitted orally. According to scholars, all elements of learning that are passed through an oral tradition from generation to generation in a society belong to the domain of folklore. However, it may not be wise to consider all that is passed on orally as folklore. It is, perhaps, more reasonable to limit folklore to the creative aspects of a society, as reflected in its day-to-day life and expressed in material or non-material forms, rather than referring purely to the form of transmission, whether written or oral. Alan Dundes observes rightly when he states:

Since materials other than folklore are also orally transmitted, the criterion of oral transmission by itself is not sufficient to distinguish folklore from non-folklore.

While upholding the fact that not all that is transmitted orally is folklore one must also try to analyze whether the reverse of this position can be accepted as a base for the purpose of argument, that is, whether it is correct to interpret that only those elements of learning which are transmitted orally form part of folklore. If this thesis is correct, most of those parts of folklore, which have evolved through the written method, fall outside the pasture of folklore. Indian literature has a sizeable share of folk songs, folk tales, poems, riddles and even many stories forming part of great epics like *The Ramayana* and *The Mahabharata* and the *Panchatantra* and *Betal*

stories, all of which form part of the rich heritage of folklore, but are still essentially expressed and communicated in written form. It is only preposterous to deny the status of folklore to these manifestations solely on the ground that they are in written form. Again a quote from Alan Dundes proves this point beyond doubt:

There are some forms of folklore which are manifested and communicated almost exclusively in the written as opposed to oral form, such as autograph-book verse, book marginalia, epitaphs, and traditional letters. In actual practice a professional folklorist does not go so far as to say that a folktale or a ballad is not folklore, simply because it has at some time in its life history been transmitted by script or print. But he would argue that if a folktale or a ballad had never been in the oral tradition, it is not folklore. It might be a literary production based upon a folk model.

As in the case of other parts of the world, in India too ballads, folktales and folk music have passed through the oral and written traditions. Even though some of these forms of folklore are authored by famous personalities they were accepted by the folk and have become part of the folklore.

Yet another category of folklore is that which is neither oral nor written. Folk dances, folk arts and crafts, folk paintings, sculptures, etc., are transmitted not orally or through written medium, but through visual tradition, imitations, observations, through training and performances. As such, the attempt to define folklore purely on the basis of the form in which it is transmitted or passed from generation to generation is also not a satisfactory or foolproof solution for arriving at a rational definition of the term of folklore.

There are some social scientists who hold the view that folklore is the creation of a group of people who belong to the same contiguity of dwelling place and culture regardless of whether the location of residence is city, town or village. These scholars are of the view that folklore is the creative product of a community sharing similar habitat and culture. Their customs and beliefs, the language spoken and the traditional patterns of livelihood share certain common characteristics. Their folklore is reflected in their creative ideas and is the common property of the community.

Folklore, thus, is the product of human creativity, creation of people who live in a particular geographical area, sharing the same language, culture, mechanism of livelihood and living conditions. The life styles and traditions of the folk are characterized by a common identity. Folklore is the product of the creative ideas of the people who express such creativity through verbal, artistic or material forms, and this in turn is transmitted orally or in written form or through some other medium from one generation to another, belonging to a literate or non-literate society, tribal or non-tribal, rural or urban people.

In order to fully understand the depth and width of the term 'folklore', one must analyze the elements that constitute folklore. Those who view folklore as 'verbal art' confine the term to art forms which are transmitted orally, and folk arts like dance forms, painting or sculpture fall outside of the purview of such a term. Folk beliefs, customs, chants and charms are verbal and not art. Similarly, we have elements of folklore, which are neither art nor verbal namely, folk games, folk technology and folk medicine.

Based on the characteristics that have been identified as essential attributes of folklore it may be possible to categorize the following elements of folklore:

Folk Literature

A very important and popular component of folk literature is folk tales. These include myths, legends, fairy tales, anecdotes, short stories, etc. In addition, proverbs, riddles, ballads, songs, rhymes, etymologies, folk titles, metaphors, chain letters, poetry, etc. are all part of the folk literature.

Most of these elements which form part of folk literature have been created and passed on by word of mouth, some of them have been essentially oral literature now preserved in script and some have been traditionally preserved in written form.

Folk Practices

Folk practices cannot be termed as folk literature or folk art. Folk beliefs, customs, superstitions, rites and rituals, folk festivals, etc., are folk practices forming part of a community's daily life. Folk games, folk sport, animal sports, etc., are related to the folk's life but are of occasional occurrence.

Folk arts or artistic folklore

Folk dances, folk theatre, folk gestures (typical examples are *Theyyam*, *Parayanthullal*, *Kootthu* of India) are all performing arts. Non-performing arts like painting, sculpture, embroidery, weaving, carpet making, costumes designing, archery are also forms of folklore.

Folk Science and Technology

Methods of folk treatment, folk medicines, preparation of dairy products, fertilizers, methods of agriculture and seed technology fall under folk science. Under folk technology, folk architecture, tool making, ornament making, pottery, etc., are some examples of the common forms.

Thus, to conclude, based on the characteristics that have been associated with it, 'folklore' can be defined as the sum total of human creativity. It encompasses the customs, games, beliefs, festivals, and practices which human societies have owned through tradition from generation to generation. It includes literature, performing and non-performing arts, paintings, sculptures, arts and crafts, embroidered quilts, *alpanas* and their related mechanisms and designs, which have been handed down by tradition to the societies from previous generations through word of mouth or traditionally by non-oral means. The patterns of houses, fences, tools, and many other materials being used by the societies, as well as those materials, their traditional manufacturing techniques and architectural designs, which the human societies have inherited from their forefathers; the medicines and other objects invented through experimentation and traditional scientific methods, which passed on as heritage to the societies through generations. The process of creation, making, designing and construction of these elements, as well as their sustenance in the societies, which has been in operation since ancient times and in a similar manner their transmission, diffusion, creation of variants, reshaping and renewal which have also been a continuous phenomenon since long past. Some of these elements were handed down orally, some in writing, some both orally and in writing and some through practice, imitation and observation, but all have been the products of tradition. The process of their transmission is still continuing in present-day societies and this will continue to be so in the days to come.

One of the important aspects of folklore is its impact on society as well as society's influence on folklore. Folklore has a symbiotic relationship with society in that it causes changes in the society and the social changes also effect modifications in folklore. Consequently, the nature of folklore has been transforming over the ages. It is true that this inter-relationship is inseparable. But experts argue that since folklore is the product of the society and not vice-versa, the influence of the society on the folklore is much greater than the influence of the folklore on the society. This makes folklore animate, substantially absorbing social changes and, in parallel, moving with the society.

It is also to be noted that there is an individual element in the creation of the folklore. It is a fact that one of the members of the society at a particular point in time created a particular object which later became the folklore of the people by means of acceptance by a society and subsequently followed by generations. So, for a period of time, it is possible that the identity of the individual who has created it may be associated with it even after it forms the folklore of a society. This makes it clear that for treating an item as folklore it is not mandatory that the creator must be unknown. There may not be any copyright protection for the work since it is old, but still it will fall under folklore and thus qualify for legal protection.

When one examines the concept of folklore in the above perspective, it appears that it serves two important functions; entertainment and social education. The entertainment value certainly made the folklore, as well as its underlying message for human society and philosophy of life, readily acceptable to the people. The

functional aspect of social education made folklore the integral part of the development process of society. This, in some cases, allows folklore to perform economic functions.

It is the appreciation of this multi-faceted nature of folklore that is important when one examines the question of legal protection of folklore. The failure to take note of all these elements will surely result in inadequate protection of folklore and the norms of legal protection unacceptable to society. The next chapter will examine whether the concept of the “expression of folklore” used in the Model Provisions has adequately addressed this issue.

CHAPTER III

UNESCO-WIPO MODEL PROVISIONS: AN ANALYSIS

Any law for protection of creativity should bear in mind the need for promoting and protecting intellectual efforts of authors of such creations and at the same time should ensure that the legitimate interests of the society are also taken care of adequately. The efficiency of a legal mechanism is reflected in the balancing of the two interests through a pragmatic approach. This basic principle has been incorporated in the Model Provisions as reflected in its preamble (although not titled as such). The opening sentence upholds the spirit of protecting the cultural heritage without “prejudice to related legitimate interests.” This is a well-conceived aspect duly reflected in the Model Provisions.

Section 1: Principle of Protection

Section 1 of the Model Provisions provides for the protection of expressions of folklore developed and maintained in the country concerned against illicit exploitation and other prejudicial actions which are defined in the law.

The term ‘law’ is made optional so that the Model Provisions can either be adopted as a separate law, as a chapter in an IP law, or as a decree or decree law which does not necessarily constitute a statute. This leaves enough flexibility to the nations concerned to adopt the provisions in a suitable manner. In fact, this element of flexibility is clearly visible throughout the Model Provisions.

The acts against which the expressions of folklore have been protected are identified in Section 1 as “illicit exploitation” and “other prejudicial actions.” Subject to the exceptions mentioned in Section 4, any utilization in violation of the provisions of Section 3 would be illicit exploitation. Non-compliance with the provisions of Section 5, paragraph 1, and commission of the acts described in Section 6, paragraphs 3 and 4, would constitute other prejudicial actions which are illicit even if those actions are in connection with an authorized utilization or utilization not requiring authorization. The protection granted is available in the country concerned, both to the nationals and to the foreigners.

Section 2: Protected Expressions of Folklore

Section 2 of the Model Provisions defines the term “expressions of folklore”. It is important to note that there is no definition offered in these provisions for “folklore”. Perhaps the complexity and heterogeneity of the term used in different documents or legal instruments rendered it difficult to offer a satisfactory definition. “Expressions of folklore” is understood in the Model Provisions to be “productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community.”

It is notable that the words used in Section 2 are ‘expressions’ and ‘productions’ and not ‘works’ as against the usage in legislation on literary and artistic works in the copyright regime. This is one area where the *sui generis* character of the Model Provisions has been maintained, although in practical terms most of the “expressions of folklore” as per the limited definition in Section 2, are more in line with ‘works,’ going by the artistic nature.

It is also relevant to note that what is protected is not the entire cultural heritage of a nation, but only artistic heritage, owned by the community concerned. In the preamble to the Model Provisions, there is acknowledgement of the position that folklore expression is an important part of the living cultural heritage of a nation. However, in the Model Provisions protection has been limited to expressions of folklore.

As stated in Chapter 1 and after, analyzing the essential characteristics of folklore, I would suggest that folklore encompass:

- (i) Folk literature including folk tales, myths, legends, anecdotes, riddles, songs, ballads, etc.

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- (ii) Folk practices such as beliefs, customs, superstitions, rites, rituals, folk festivals, folk games and sports, etc.
 - (iii) Folk arts like folk dances, folk theatre, folk gestures, painting, sculpture, embroidery, costume designing, archery, etc.
 - (iv) Folk sciences and technology including folk medicine, methods of agriculture, seeds technology, folk architecture, tool making, etc

In fact, folklore, when viewed as a way of life, adopted and accepted by a community as a reflection of its identity, has to have within its purview all creations of the human mind provided that they have withstood the test of time.

Viewed from the above, the coverage of the Model Provisions looks far from being adequate to provide protection to the vital elements of folklore. The arena needs to be enlarged so as to cover a wide spectrum of creative indigenous collections belonging to the community.

As stated earlier, the necessity for protection is directly proportional to the potential of the material to be protected against being misused. In the matter of including only elements of 'artistic heritage' as against creative 'cultural heritage' in the scope of protection provided in the Model Provisions, the above principle is evident. In the late 1970s and early 1980s the need for effective protection of folklore was evident due to the widespread illicit exploitation which became common in the fields of audio and audiovisual recording, television and broadcasting. As a logical follow up, the measures thought of as a means to plug the evils of the system concentrated on these aspects of exploitation, essentially those pertaining to artistic works. To that extent and so as to address the need in the given situation, the efforts of the international community found expression in the scope of protection adopted in the Model Provisions and was limited only to expressions of folklore. Whatever may be the rationale behind the decision, this limitation of the scope of protection is a major lacuna all through the Model Provisions.

The productions to be covered under 'expressions of folklore' have to have 'characteristic elements' of the traditional heritage. This, in general terms, means that these elements should be recognized as representing a particular community. The term 'characteristic' is intended to take care of the requirement of 'consensus' of the community for certifying the authenticity of the 'expressions of folklore.' Without getting into pronounced representation of these factors, the Model Provisions sought to achieve the objective, although not very explicitly, with the use of the term 'characteristic.'

Section 2 of the Model Provisions takes care to offer an illustration/enumeration of the commonly available kinds of expressions of folklore. These forms are divided into four groups such as:

1. Verbal expression (expression by words)
2. Musical expression
3. Expression by action
4. Expression in tangible forms

Under the above categorization, examples have been cited so as to offer clarity. Under 'verbal' expression, folk tales, folk poetry and riddles have been enumerated. 'Musical' expression is explained as expressions such as folk songs and instrumental music, whereas expression by 'action' is illustrated by folk dances, plays and artistic forms of rituals. The first three kinds of expression need not be reduced to material form, i.e., whether these words are written or not, whether or not the music is in notation or not, and whether or not the dance is in choreographic notation or not, all qualify for protection. However, in the case of the fourth category, it is necessary for the expressions to be in a tangible form, such as production of folk art, particularly drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, basket weaving, costumes, musical instruments and architectural forms. 'Architectural' forms have been included in square brackets reflecting the hesitation in the minds of the international community of their inclusion.

In continuation of the argument for expanded scope of protection, it is to be stated here that in line with the elements of folklore proposed to be included such as, folk beliefs, folk medicines, folk treatment, scientific beliefs,

etc., there is a need to include the non-tangible forms of these essential aspects of folklore, for example, the ideas and principles underlying the traditional knowledge basis including traditional scientific beliefs, medical practices, manufacturing techniques involved in weaving, carpentering, jewelry making, musical instruments, etc., in the Model Provisions, should they serve the purpose for which they have been thought of. This is needed in the context of scientific development in the area of biotechnology and illicit exploitation of the technical traditional knowledge base.

Section 3: Utilization Subject to Authorization

Section 3 of the Model Provisions speaks of utilization subject to authorization. These provisions are subject to the exceptions and limitations provided under Section 4. The utilization prescribed, subject to authorization, consists of:

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

The utilization is subject to authorization when it is for gainful intent and where it is outside the traditional or customary context.

It is to be noted that even if there is gainful intent, if utilization is within the traditional or customary context, it is not subject to authorization. Again, even the members of the community are not entitled to utilization without authorization when it is outside the context and also with gainful intent.

Traditional contexts refers to the way of using an expression of folklore in its proper artistic framework based on the continuous use of the community like the use in ritual dances or ways of worship forms. Whereas customary context refers to uses in the context of day-to-day life of the community like usual ways of selling copies of tangible expressions of folklore.

It is interesting to note that Section 3 has not recognized the rights of the owners of folklore in line with the owners of copyright, patent or design, even though the nature of the utilization identified in Section 3 is similar to that of the copyright of the authors in their works. Section 3 seems insufficient even to protect against the illicit exploitation of the tangible expressions of folklore identified in Section 2 (iv). The exploitation of tangible expressions without permission is similar to the violation of a patent or a design. For example, it is doubtful whether the use of the methods of manufacture, sale, offer for sale, etc. of pottery, woodwork, metalware, carpets, costumes, musical instruments, etc., without authorization, will fall within the scope of “publication, reproduction and any distribution of copies” as per section 3. It appears necessary to provide protection to tangible expressions in line with the protection afforded in patent and designs law. Section 3 also seems inadequate to protect the literary, musical and artistic expressions in the digital context.

As pointed out earlier, the suggestion for enlarging the scope of folklore, shows a need to provide for a variety of utilizations, keeping in view the enlarged elements proposed to be considered. When folk science and technology, like folk medicine, folk treatment and folk architecture, are included as elements of folklore deserving protection under the Model Provisions, the authorization provisions also need to be expanded to take care of the modes of exploitation of these elements. We need to prohibit the manufacture, sale, offering for sale, distribution, etc. of these elements of folklore without authorization.

While providing for utilization with authorization in certain customary and traditional contexts, the Model Provisions have taken care to see that the indigenous communities are not deprived of the opportunity to use and develop the essentials of folklore. Unrestricted requirement of authorization in rigid terms would have resulted in stunting the growth of folklore.

In the context of the developments taking place in digital technology and biotechnology, there is a need to recognize the use of folklore with the help of these technologies by the members of the communities owning the

folklore. This will not only enable them to enjoy the benefits of these new technologies, but also facilitate the process of change in folklore in a new context without affecting the cultural feelings of these communities.

In the deliberations of the committee set up for formulating the Model Provisions, there was discussion on providing for authorization of certain uses of expressions of folklore, or of having a system of frequent checks on their utilization. In the latter case, utilization would be free, provided it did not amount to an offence specified by law or did not prove prejudicial to the legitimate interests of the community. However, practical difficulties of administering the checks, from the point of view of both the user and the community, ultimately weighed in favor of utilization subject to authorization and sanctions.

It is to be noted that the entity entitled to authorize utilization has been referred to as 'competent authority' and 'community concerned', as against the term used in copyright parlance, 'owner.' This leaves enough room for the nations to decide as to who should be designated as the owner of the expression of folklore. Ownership can be vested in the State, a local body, the community itself, through any other authority found suitable, or through other functional arrangement.

Section 4: Exceptions

The exceptions provided in Section 4 relate to a situation where the creation of an original work of the author is intended to allow development of individual creativity inspired by folklore like adaptations of folk music, folk tales, folk sculptures, etc. Thus the use of folklore without authorization is permitted in the case of research, education, borrowing for creating original works, reporting of events, etc. The exception relating to incidental uses has been elucidated through typical cases although these need not be treated as an exhaustive list of such uses. The focus of these provisions is to allow *bona fide* use by researchers, students and so on, without affecting the economic returns of the owners of folklore. These provisions are comparable, and in many ways similar, to the fair use provisions in the copyright laws.

Section 5: Acknowledgement of Source

The requirement of acknowledging the source of the expression of folklore by mentioning the name of the community or the geographical place from where such expressions have been derived, is provided for in Section 5. However, there is no need to resort to such acknowledgements where the folklore expression is borrowed for creating an original work of an author, or where the utilization is for incidental uses. Considering the practical difficulties involved in determining the origin of the particular expressions (the community may be spread over a large territory) the terms 'source' and 'derived' are used.

Section 6: Offences

Section 6 of the Model Provisions deals with various offences. Paragraph 1 deals with the offence where the source of the expression of folklore is not acknowledged as provided under Section 5. Paragraph 2 refers to offences relating to non-compliance of the provisions of utilization subject to authorization provided for in Section 3. Paragraphs 3 and 4 provide for offences in respect of deception of the public and distortion of the expression of folklore.

The sanctions of each type of offence provided for in the Model Provisions are to be determined in accordance with the penal law of the country concerned. The two main types of possible punishment are perhaps imprisonment and fine. However, the nature and quantum of punishment have been left to the nation concerned to decide, depending upon the practices of each country.

Protection, under the Model Provisions, is not limited to any particular term given the special characteristics of folklore, for example, expressions of folklore is the property of the community whose existence is not limited in time. The principle of limitation, in terms of the time of the particular offences, has been left for national legislations to decide in line with the general laws of the land.

Section 7: Seizure and Other Actions

Section 7 stipulates that any 'objects' made in violation of the law and any 'receipts' by the person who violated the law are subject to seizure.

By the term 'objects' made in violation of the law, it is intended to cover materials like copies of written expressions folklore, and fixations of the musical expressions or performances, etc. made without authorization, without acknowledging the source, in a manner deceiving the public, or distorting such expressions of folklore contained in such objects.

'Receipts' referred to in this Section are the receipts of the person violating it, like the receipts of the seller of any infringing object or of an organizer who is responsible for public performance of the expression of folklore in violation of the provisions of the law.

The Model Provisions do not provide for the seizure of implements used for committing such infringing acts, although the copyright laws of many countries contain such provisions. The nations concerned can, depending on their practices, include or exclude such a provision in their respective legislation.

Section 8: Civil Remedies

Section 8 emphasizes that the penal provisions under Section 6 are without prejudice to the availability of civil remedies. This enables the nations to extend the civil remedies as well, in case of utilization without authorization.

Section 9: Authorities

As discussed earlier, Section 3 speaks of the utilization of the expression of folklore with the authorization granted by the 'competent authority' or the 'community concerned' leaving the option for the nations to have flexibility, as per their general legal system.

Section 9 provides for the designation of the 'competent authority' in cases where the nations choose to have a 'competent authority' designated for such purposes. In cases where there is a need to set up a 'supervisory authority', this section provides for the same in paragraph 2. The competent authority, if designated, would grant authorization as per Section 3, receive applications for authorization as provided for in Section 10 (1), and fix and collect fees whenever applicable. There is provision for appeals against the decision of the competent authority in Sections 10 and 11.

With regard to the supervising authority, the Model Provisions provide that this authority shall establish or approve of the tariffs proposed by, say, the competent authority.

If the legislation of the nation concerned decides that the community concerned should deal with the authorization, fees payable, etc., the community would act as the owner of the expression of folklore. In such cases there may not be any supervisory authority.

Section 10: Authorization

The modalities for the granting of authorization for utilization of expression of folklore are provided in Section 10. It also provides for use of the fees collected for the promotion and safeguard of the national culture/folklore.

Those who want to utilize the expression of folklore must make an application in writing to the competent authority or the community, as the case may be. The words 'in writing' have been put in bracket indicating the hesitation whether oral applications should also be considered. Again, the authorization can be individual or blanket, depending upon whether the use is of an *ad hoc* nature by the individual or whether it is for customary uses by an organization, theatre, ballet group, etc. This section can also accommodate provisions relating to non-voluntary licenses applicable in the case of copyright protection. The particulars to be given by the applicant

are not provided for in the Model Provisions, leaving it for the national governments to decide depending upon the general conditions available locally.

As stated earlier, there is a provision for utilization of fees for promoting or safeguarding national culture of folklore. It is, perhaps, advisable that the national governments specifically provide for a certain percentage of the fees collected to go back to the community who will be the primary beneficiary. In the alternative, it shall be left to the community to decide as to what way the proceeds should be put to use.

Paragraph 3 of Section 10 provides for appeals against the decisions of the competent authority. However, in cases where the utilization is granted by the community there is no provision for appeal.

Section 11: Jurisdiction

Section 11 provides for the legislation to specify a competent court to hear appeals against the authority concerned. Again, there is no provision regarding appeals where the decisions are taken by the community in question. In such cases paragraph 1 of Section 11 becomes applicable. In paragraph 2, the legislation should specify which court is competent in the procedures laid down under Section 6. The assumption seems to be that the normal laws available in a country will be extended to these situations as well.

Section 12: Relation to Other Forms of Protection

This Section provides that the provisions under folklore law will not be prejudicial to the protection granted under other laws like copyright and neighboring rights laws, treaties, or laws relating to industrial property. This is to take care of situations where some expression of folklore by its own right qualifies for protection under other IP laws like in the case of the rights of performers, producers of phonograms, broadcasting organizations.

As far as international conventions are concerned, the Berne Convention (Article 15(4)), the Rome Convention, the Convention for Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, the Paris Convention, all have provisions where some of the elements of folklore can be protected.

Section 13: Interpretation

Section 13 ensures that the protection rendered under the Model Provisions should in no way be a barrier to the normal use and development of expressions of folklore. This is to safeguard the interest of the community's desire to use and develop its expressions of folklore. In fact, the spirit behind this provision is that the community which has developed and maintained an expression of folklore should be free to use it, if the use has been recognized by the community as legitimate.

Section 14: Protection of Expressions of Folklore of Foreign Countries

This Section is parallel to the national treatment provisions in the IP laws. It provides for development and maintenance of folklore in a foreign country on a reciprocal basis and on the strength of international treaties.

It is evident from the above analysis of the Model Provisions that there is a lot of flexibility available for nations in the implementation of the provisions in their national legislation. But the major limitations, as already pointed out, are with the definition of 'expressions of folklore' and the nature of acts that require permission before utilization by others. There is also no attempt to recognize an ownership right in folklore by a community. It appears that this seems to be one of the major reasons for the non-implementation of these provisions by many developing countries. These issues are further examined in the following chapter with special reference to India, Indonesia and the Philippines.

CHAPTER IV

MODEL PROVISIONS AND NATIONAL EXPERIENCES

In order to make a critical assessment of the Model Provisions in the context of protection of folklore in the three countries studied, it is necessary to travel through the rich repository of national experiences in the present day context. With this in view, an attempt has been made to understand the basic attributes of the cultural traditions of these nations. The requirement of providing effective protection to folklore has been assessed in terms of the factors necessitating such a measure. The legal mechanisms already in place in these countries have also been subjected to a thorough analysis so as to get at the root of the existing provisions, if any, for dealing with the specific issues of the community's knowledge base. The essential aspects of the legal mechanisms available and the general requirement felt in the context of the national experiences have been analyzed vis-à-vis the Model Provisions.

SECTION I: INDIA

People and Folklore

India is a citadel of rich and diverse cultures and religions. It is a country of great contrasts where big cities, atomic power plants, sky scrapers, super computers, and hi-tech cities serve as a window to the tremendous potential for modern technology and co-exist peacefully with small village settlements and tribal communities. The rhythm and ethos of life are of amazingly different wavelengths, but the unity that emerges through the various diverse cultural forms is unbelievable. The villages and tribal settlements of India are living proof that it is possible for a culture depicting the essence of simplicity, rich artistic creativity, with a proud and historic past to not only exist, but also flourish along with a life style dominated by fast changing, complex technology and highly competitive commercial system.

Tribal culture is one of India's proudest symbols of heritage. Tribal art and crafts, languages, religious beliefs, scientific ideas, agriculture technologies, architectural designs, and medical practices all have had a profound impact on India's past history and constitute a major component of the composite culture of India. A strong value system which manifests itself in the form of self-respect, honesty, integrity, sincerity and contentment is the main force that sustains the tribal communities to tackle the complex problems attendant on human existence even today.

An underlying factor about the diverse types of tribes in India is that there is a common denominator in their social set up. A denominator which indicates a certain economic level, an emphasis on community living as a principle of organization, and a certain smallness of scale. There are millions of tribes in India and they can be divided into three main groups, namely, the North Eastern, the Central and the Southern Tribes. The North Easterners are the tribes like Lepcha, Daflas, Mikir, Naga, Khasi, Garos, Kuki and so on. The Central region tribes include the Santhals, Oraons, Hos, Juang, Gonds, Baiga and the Bhil. The Southern tribes include the Chenchus, Todas, Kadars, Kanis and Badaga, among others.

The tribal communities in India are the primary source of folk culture and folk tradition. Rich folk literature and handicrafts, handlooms, folk painting, etc., contributed by these communities are significant components of the folklore of India.

There is a misconception in certain quarters that the cultural traditions of India owe their existence solely to the tribal communities. This is far from being true when one looks at the diverse attributes of the composite culture of India. The contributions of communities from non-tribal belts are significant in the shaping of the vast resources of the country's cultural heritage, both in qualitative and quantitative contents. Folklore traditions in India bear testimony to the co-existence of tribal, non-tribal and even urban culture, many times influencing each other and developing into a common culture.

Over the years, the rhythm of life remains unchanged in these communities and the folk traditions remain intact, although modern institutions and civilization had some visible impact on the identities which have been preserved by these communities.

Handicrafts are a major element of folklore developed in India. These are objects made by the skill of the hand and depict the ingenuity of the creator and cultural heritage evolved over centuries. Created primarily to serve the ritual and personal needs of the community, these handicraft objects have entered the market for commercial trade. The variety of objects created by the deft hands of the tribal villagers cover large segments like textiles, floor coverings, pile carpets, pottery and terracotta, wood work, metalware, jewelry, stone carving, cane furniture, ivory and horn carving, basket making, mat weaving and many other festival and ritual crafts and wall decorations such as '*alpanas*' (*alpanas* are flowing linear patterns made on the floor of beaten clay by rice paste).

There are rich traditions under each of these categories of handicrafts, contributed by the folk communities through rigorous and regular practices. For example, there are different styles of textiles that have developed over the past centuries in different parts of the country and are being woven even today, like cotton fabrics and handlooms, silk weaves and brocades, tie and dye such as *bandhani* and *patola*, hand painted, dyed and painted fabrics, folk embroideries, shawls and woolen weaves and tribal weaves.

Folk agriculture practices again cover a wide spectrum of activities leading to the development of the most important occupation of India. The practices cover a range of sciences from appropriate weather forecast devices, seed development, animal husbandry to water management technologies, agricultural tools and pesticides, and fertilizers. There are well-developed cultivation practices like the *jhoom* and terrace cultivation patterns in the North East, and plantation cultivation programs in the South. These are vast resources contributed by the tribal communities transmitted through the generations, through practices which are mastered by the latest entrants to community, before being passed on to the next generation.

The entire Indian subcontinent, stretching from the Himalayas in the North to the Western Ghats in the South West, is rich in biodiversity. The flora and fauna of the subcontinent developed over a period of time is an inseparable part of the folk tradition and heritage.

Diseases and calamities play significant roles in the lives of human beings and it has been the endeavor of mankind to protect themselves from diseases, ailments, plagues, infections and other distresses. The tribes and villagers of India have very pronounced systems of prevention and cure. Many of these tribes have in their treasures some secret medical cures and practices acquired over a period of experimentation based on trial and error and form part of the collective wisdom of the community. Besides the two advanced medical systems of Indian origin, i.e., Ayurveda and Sidha, the tribal and folk medical systems also have a long history. They are still in vogue in the forest and rural areas. The potential of their being exploited commercially by pharmaceutical entrepreneurs, both Indian and foreign companies, is growing day by day. The tribes of the respective areas know the medical properties of the herbs and vegetables that grow in the region and have, therefore, become the repository of a large traditional knowledge base or a living database whose exploitation is resorted to on a large scale resulting in depletion of a rich resource.

There are 18 languages recognized in the Constitution of India. In addition, there are a numerous dialects and sub languages spoken in different parts of the country and each language is rich in literature. Folk art and literature also form a very vital component of the cultural heritage of the country. Collections of folk tales, myths, fairy tales, legends, animal tales, anecdotes, short stories, dramas, proverbs, riddles, ballads, songs, lullabies, rhymes, chants, charms, speeches, etc., form a major part of the literary treasure that each language or dialect can feel proud of. It is to be noted that the social, cultural or the geographical environment in different parts of the vast terrain stretching over 4000 kms, in length and breadth vary and these variations are duly reflected in the folk-creations of different regions or tribal groups/villages. The proverbs or riddles or folksongs find a place in the folk literature of one region while embodying the characteristics of the cultural environments of that area, and at times have many commonalties with those found in adjoining or sometimes far off communities due to cross cultural influences. It is, however, not difficult for folklorists to recognize the cultural identity of the folklore of a particular tribe or settlement.

Similarly, folk arts, both performing and non-performing categories like folk dances, drum beats, folk dramas, folk gestures, folk caricature and folk painting, and sculpture, have influenced the cultural image of the country drastically. The renewed interest among the modern urban culture to appreciate and to enjoy the folk creations is a recent phenomenon. This factor is reflected not only in urban art centers and homes, but also in music, film and architectural industries. Costumes, jewelry and household appliances are designed after the ethnic models in order to address the unprecedented demand for such creations by the sophisticated urban societies. Many of the music companies specialize in folk music albums or portfolios. Film industries are also keen to incorporate folk dances, martial arts, and folk rites and rituals to enhance realism and add ethnic flavor to their products taking into account the popularity these elements have acquired of late. Irrespective of all these developments, it is unfortunate to note that there is as yet no legislation in India providing specific protection for folklore.

Constitutional Provisions

The Constitution of India, the basic law of the land, has not directly addressed the issue of protection of the folklore. Article 29 of the Constitution recognizes as a "Fundamental Right" (Part III) the protection of the culture of minorities. According to Article 29, "any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same." It is possible to protect the folklore of the distinct groups in India based on this provision. However, the majority of the folklore existing and misused now in India belong to small communities who do not come under the scope of the aforementioned constitutional provision. But no legislation has been enacted to protect the same.

The only other general provision in the Constitution that can be identified as a source to protect folklore is Article 51A (f). It is the fundamental duty of every citizen of India "to value and preserve the rich heritage of our composite culture." There is also no legislation based on this provision for translating this constitutional objective into practice.

Considering the special cultural identity of the tribal population in India, the Constitution envisages special protection of the indigenous communities. Since they are scattered all over India, some living separately and others along with other sections of the society, the Constitution adopted different approaches to protect their cultural identity. The areas where there are only tribal communities, as per Article 371 read with the Schedule 6 of the Constitution, are permitted to have separate Autonomous Councils for self-governance in accordance with their customary laws. The normal laws of the land are applicable only if accepted by the community and the Council has the power to make laws even to protect their social customs. For other parts of the country, as per Schedule 5 of the Constitution, the government has the power to create scheduled areas to protect the interests of the tribes. The application of the normal laws, if they are in conflict with their customs, can be prohibited by the head of the State. The tribes not falling in the above categories are subjected to the normal laws of the land.

Laws for Protection of Folklore

Irrespective of the constitutional provisions envisaging protection and preservation of distinct cultural groups, there is no special law prohibiting the exploitation of folklore of these communities without permission. There are many customary norms in these communities prohibiting the use of some of their folklore by outsiders and of those that are confined only to customary practices. For example, some of the folklore practiced by the communities are confined to religious or social occasions such as marriages, death rituals, or birth ceremonies, etc. These are not to be used out of the definite context. As there is no law prohibiting the use of such folklore by outsiders, increasingly they are being used for commercial gain.

In India the legislation that takes care of the rights relating to literary and artistic works, sound-recordings, films, and the rights of performers and broadcasting organizations, is the Copyright Act, 1957. The Act has been amended a number of times with the most recent update in 1994.

The Indian Copyright Act does not contain any provisions for the protection of folklore or expressions of folklore. There is also no separate legislation along the lines of the Model Provisions, to serve the purpose of offering legal protection to expressions of folklore.

It is obvious, in my view, that there is no scope for the protection of tangible elements of folklore under the Patent Act or Designs Act.

Under the amendment incorporated in the Copyright Act in 1994, a certain amount of protection is offered to the performers. As per the Act, a performer includes, "an actor, singer, musician, dancer, acrobat, juggler, conjurer, snake charmer, a person delivering a lecture, or any other person who makes a performance."

Again, performance, in relation to a performer's right, is defined as "any visual or acoustic presentation made live by one or more performers."

It is to be noted that the concept of a performer is not limited to 'one who performs a literary or artistic work', as per provisions of the Rome Convention, rather the performer as per the Indian Act can be any one who makes a performance. To that extent, a person who performs folklore is a performer and his rights are protected under this Act.

The rights of performers given under the Act are limited and offer only the 'possibility of preventing' certain acts undertaken without the consent of the performer. Chapter VIII, Section 38, "Performer's right", of the Act provides as follows:

- (1) Where any performer appears or engages in any performance, he shall have a special right to be known as the "performer's right" in relation to such performance.
- (2) The performer's right shall subsist until twenty-five years from the beginning of the calendar year next following the year in which the performance is made.
- (3) During the continuance of a performer's right in relation to any performance, any person, who without the consent of the performer, does any of the following acts in respect of the performance or any substantial part thereof, namely:
 - (a) makes a sound recording or visual recording of the performance; or
 - (b) reproduces a sound recording or visual recording of the performance which sound recording or visual recording was:
 - (i) made without the performer's consent
 - (ii) made for purposes different from those for which the performer gave his consent; or
 - (iii) made for purposes different from those referred to in Section 39; or
 - (c) broadcasts the performance except where the broadcast is made from a sound recording or visual recording other than one made in accordance with Section 39, or is a re-broadcast by the same broadcasting organization of an earlier broadcast which did not infringe the performer's right; or
 - (d) communicates the performance to the public otherwise than by broadcast, except where such communication to the public is made from a sound recording or a visual recording or a broadcast, shall, subject to the provision of Section 39, be deemed to have infringed the performer's right.
- (4) Once a performer has consented to the incorporation of his performance in a cinematograph film, the provisions of sub-Sections (1), (2) and (3) shall have no further application to such performance.

Section 39 deals with certain fair use provisions in relation to performer's rights and the right of broadcasting organization, like private use, and the reporting of current events.*

Thus, it is evident that the rights granted under the Act to the performers seek to prevent, as mentioned earlier, certain acts being undertaken without the consent of the performer. However, in the case of audiovisual fixation, the act explicitly states that as soon as the performer consents for incorporation of his performance in a cinematograph film he ceases to have any rights in the film.

The above provisions go to show that although the performance of the expression of folklore can be covered under the definition of performances, the limited extent of the performer's rights itself, to a great extent, limits the operation of performer's rights in expressions of folklore. Thus, even though the expression of folklore as such is not protected in India, the performers of the folklore can claim these limited benefits. This is also not limited to the members of the community. So anyone, whether he belongs to the community or not, can enjoy the benefit of the protection of performer's right in the performance of expressions of folklore. There seems to be a need to limit it to the performers from the community or those who perform with its consent.

The provisions in relation to performer's rights are rather new additions in the Copyright Act of India. There is acute lack of awareness amongst the people about the general provisions of the Copyright Act itself, and much more in respect of the performer's rights. As a result even the limited rights provided to performers are respected in very few selected situations only. The fact that collective administration of copyright and neighboring rights has not taken root here is another factor which makes it difficult for administration and management of these rights.

Commercial Exploitation of Folklore

As explained earlier, there is no provision to protect expressions of folklore in the intellectual property laws or in any other legislation. As such, exploitation of folklore expressions without taking the permission of the communities and compensating the communities concerned, is not illegal. The general outlook of those business interests who extensively borrow from the collection of the folklore of the communities or tribal settlements is that of exploitation of material available in public domain.

In the music industry, there is a trend towards greater opportunity for pop music mixed with traditional music. This mix and match products have become very popular throughout the country, including the young music enthusiasts. Albums of popular folk songs orchestrated by folk music instruments like vibrant drums and other wind and string accompaniments are flooding the market. The companies concerned collect the music through the local communities, or many times, the performer himself takes the responsibility of arranging such music from the villages or tribal belts. The musical forms reproduced or adapted from folklore are of religious contents or those related to village traditions like harvest and festivals.

Like in the music industry, Indian films also have more of folklore contents in the new productions. High-tech films built on folktales or folk-themes as a basis take special care to shoot in typical tribal or village settlements to add a realistic touch to the films, with a view to earning public applause and entertainment value. Many times, folk dances and rituals are depicted by making use of artists from the communities concerned.

In the handicrafts and handloom industry, folk art and craft are also extensively used. In most of the State Governments, there are corporations or cooperatives for handloom products and handicraft items. These organizations play a vital role in the management and development of the community's interests in these traditional forms of folklore from a purely cultural or economic angle. There has been little or no attempt to protect the intellectual property contents of these creations and the communities are subjected to exploitation at

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

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

the hands of large textile and handicrafts companies, which through modern techniques, copy and replicate the artistic creations to the detriment of the interests of the societies concerned. Modern cotton, silk and polyester manufacturing units lose no time in commercially exploiting the famous tribal embroideries and brocade patterns, traditional printing techniques like tie and dye, without even considering the concept of benefit-sharing with the groups responsible for creation of art/craft forms.

Even in the realm of folk tradition relating to sculpture, paintings and architecture, there is mass-scale exploitation resorted to by industrial houses. In clay-modeling and terracotta creations also the modern decorative and utility items are copied from the traditional creations of some tribal settlements.

In the absence of any law to protect the intellectual property contents of the cultural heritage, there is no obligation from a purely legal perspective to reward or compensate the communities responsible for development and maintenance of such heritage. Business in folklore-based industries is considered profitable with little or no investment, and have high returns. The beneficiary communities are either not rewarded or are compensated at proportions grossly inadequate with regard to the returns.

Responses from Experts/Field Activists

In the absence of any legal framework for protection of folklore, I felt that it would be worthwhile to gather the responses of the people working in the area of preservation/ dissemination/development of folklore, academic institutions and non-governmental bodies. A questionnaire (see Annex I) was developed, by me, for the purpose and the reaction of the experts collected. While many of them responded formally, some conveyed orally during personal discussions the perception in which they looked at the underlying message of the questions put to them. Many of the responses centered on the concept of folklore, the elements that are exploited in their immediate environments, the beneficiaries of the utilization/commercial exploitations of folklore and the mechanism for exercise of the rights.

A large number of experts and social activists opted for a definition of folklore to mean folk tales, myths, legends, folk songs like harvest songs, festival songs, ballads, proverbs, riddles, puzzles, folk dances, folk theatre, folk beliefs, folk crafts, rituals, customs, folk music, agricultural knowledge, veterinary science, folk architecture, folk medicines, folk technology, and so on. In fact, the trend showed a move to include all necessary characteristics forming part of the day to day life of the community which have been handed down from generation to generation orally and otherwise.

Regarding the extent of commercialization of folklore and the entities resorting to such practices, the responses indicated that generally private entrepreneurs are in the forefront of the indiscriminate use of folklore material for furthering their interests. Many felt that the government agencies and political parties are also to be blamed for the total disregard of the community's interests in resorting to exploitation of folklore without even acknowledging the origin of the knowledge base. However, a majority of the responses indicated that the pharmaceutical and agricultural industries are the main source of threat in so far as exploitation of the knowledge is concerned. The communities concerned feel cheated as the commercial users did not bother to obtain the consent of the people, let alone share the benefits. More often than not, the communities were not aware of the commercial potential of their cultural heritage.

Most of the respondents asserted that the right over the elements constituting folklore should vest with the concerned communities themselves. Many of them could not suggest a working model to protect and manage the rights of the communities, while others felt that the communities have their own organizations which can function as nodal centres for this purpose. A few of those responded in favour of a special trust, established by the community, for the purpose of exercising their rights.

It is interesting to note that while almost all those who responded reported on the unscrupulous exploitation of folklore, no one could cite any single case which involved litigation. This may be because of the cultural mindset in the oriental belt that knowledge is for the use of communities and should not be traded or monopolized for economic gains. But the practical realities of the recent past are changing the thought process. General awareness about the need for the protection of IP in community's knowledge base is increasing.

Conclusions

The national experiences and the responses of the people associated with the communities responsible for the maintenance and development of folklore are indicative of certain trends. There is a strong demand for looking towards a mechanism for the protection of folklore in the Indian context. Folklore as conceived by communities in India is not confined to the limited scope offered in the definition of expressions of folklore in the Model Provisions. Folklore has to bring in its ambit beliefs, technologies and indigenous knowledge systems as a whole, if it has to serve the purpose for which protection devices are being thought of.

Another message that emerges from the experiences is that exploitation is not confined to the traditional types generally thought of in the context of copyright regime like reproduction or communication to the public indulged in by the cultural industries. The knowledge base in the folk traditions involving techniques of manufacturing evolved over years of trial and error. These products and techniques which are attributes of the folk culture are subjected to commercial exploitation by the competitive world dominated by manufacturing industries. The large-scale production based on modern techniques of the folk material, intangible forms, does affect not only the cultural but even economic and social fabric of the traditional societies. To that extent, a new legal framework for protection of folklore has to bring in its fold the manufacturing and marketing of the cultural and other products based on folk knowledge indiscriminately. Thus Model Provisions need appropriate modification for adoption in the Indian context.

Yet another dimension of the Indian experiences is the question relating to ownership of rights over folklore. The diversity of Indian culture and the large expansion of its territories calls for a system based on flexibility to build up on requirements based on the specific environments. While the rights can be operated upon by the communities themselves in clearly identifiable groups, geographically and traditionally confined to specific pockets, there may be a need to build or develop institutions with representatives of the communities to discharge the function of administration and management of the rights conferred over folklore.

SECTION 2: THE PHILIPPINES

People and Folklore

The indigenous people of the Philippines roughly form 10% of its population of approximately 60 million people. There are 110 tribes in the groups of islands that constitute the Republic of the Philippines. These tribal communities have lived in isolation for centuries and consist of about 30 percent in the mountain regions of Northern Luzon – the Cordillera Group, and about 70 percent in the South in the Islands of Mindanao, Sulu archipelago, Palawan and Mindorao. These two regions have vital cultural links to insular South-East Asia and to the mainland Asia.

Music is an integral part of the basic traditional life of the indigenous communities. The indigenous music culture reflects itself in the rituals, feasts, harvest festivities and other religious and social ceremonies and recreation. Flat gongs, bossed gongs, bamboo instruments, xylophones and jaw harps are some of the traditional music instruments used widely in expressing a wide variety of sounds and symbols typically depicting the ethos of the tropical life, its gods and goddesses, folk beliefs and customs. There are strong indications of influence of the contacts the Filipino indigenous people had with their counterparts in Malaysia, Indonesia and even as far as India, visible from myriad forms of music instruments based on bamboo. Indian scripts carved on bamboo tubes are found in some of the indigenous groups like Tagbanwa, Palawan and Hanunoo. The musical instruments made of bamboo are a common feature of the folk music in the countries of the South-Asian belt. These instruments made out of bamboo include the buzzers, clappers, scrapers, flutes, reed pipes, lutes, zithers, slit drums and jaw harps. They are widely used by the tribes in the islands like Jawa, Sumatra, Borneo, Sulawesi, Bali and indigenous communities of South and North Philippines, and variations of these instruments, resonating various degrees of sounds in the tribal musical traditions of India are also present.

Bronze instruments of the Philippines, generally the gongs, are of various types, sizes and styles. The flat gongs of Northern Luzon are very unique and are unlike the bossed gongs found in many other indigenous

cultures of South Asia. Some of the suspended gongs of the Philippines closely resemble those found in the Borneo Islands of Indonesia and in Malaysia.

Basketry is another important component of the folk craft which reflects the unique ways of life of the agricultural people of the indigenous communities in the Philippines, mainly of the Cordillera group. There are basket cradles for babies, vessels for daily and ritual use and containers for human remains. Plaited winnowing trays, carrying baskets and covered containers facilitate harvesting, transporting, storing and serving of grain, tubers and legumes for nourishment and survival. Basketry hats and rain caps are used for protection from sun and rain. Igorot groups are well-known for their excellence in creating pieces of unique artistic basketry articles and objects which are used as utility items in agriculture and in day to day life. They also serve as objects of ornamentation and decoration.

Social roles and group affiliations are often reflected in the basketry styles and shapes which are gender and group specific.

The unique textile designs of the minority cultural communities is another treasure that the Filipinos can be proud of. The tribes of central and eastern Mindanao are known primarily for their *abaca* clothes decorated with resist-dye techniques. In the coastal regions of western Mindanao and the Sulu archipelago, the colorful silks and the tapestry techniques are well-known. In the north-central Mindanao, a unique hybrid style of dress is very commonly produced with emphasis on applique embroidery decoration. The dyes used in textile coloring and design formation are derived from the root barks of trees and leaves of some plants. The *abaca* plant is widely used as a basic material for producing yarns of varying specifications.

Another important component of the folklore traditions of the Filipinos is the tribal dance traditions. These vibrant dance forms are reflections of the peoples' zest for life. The traditional dances of the Cordillera, Dinuya, Mandanao, Inagonu, the hunting dances, the age-old range of dances of dugso and banog banog dance, are popular and performed with the accompaniment of gongs and drums. In many of these dance performances, the whole community is involved and form an integral part of weddings, harvest festivities, religious ceremonies and rituals. The dancers use sumptuous make-up, colorful dresses and garlands of beads. Many of these traditional dances are linked to paddy-cultivation practices.

Like in the case of tribal music and art, the ethnic architecture of the Filipinos is very unique and responds to man's communal and social needs. Ethnic architecture is informal and intuitive, usually designed by the owner himself and executed with the manpower drawn from the family. Most of these ethnic houses conform to a general pattern with steep thatched roofs to facilitate drainage, elevated on posts or stilts to temper the earth's dampness and humidity. Bamboo, slates and solid planks are liberally used to construct light, airy, comfortable and functional one-room structures which are durable and stable. According to the social and environmental requirement, special houses are built, for example, houses over water in fishing communities, houses on trees in areas where inter-community clashes often take place, and so forth.

Folk literature of the Philippines is also another important factor contributing to the rich heritage of the Filipinos. Oral riddles, chants, poetry and proverbs reflect the influence of the Spanish colonial literature. Many well-known epics like *Guman* of the Subanen people and *the Dragen* of the Mindanao groups are well acclaimed popular pieces. Professional singers and orators entertain the villagers with the use of skillful expressions and actions while reciting from works of folk literature.

The Philippines has one of the most diverse ecosystems in the world. In its varied forms of habitat, about 25,000 species of animals, birds and insects sustain themselves. In addition, the seas provide for about 1,400 species of fish. The forests of the Philippines are rich with about 15,000 species of plants.

The folklore of the Filipinos is a dynamic phenomenon of their culture. While the contribution of the indigenous people to the maintenance and development of the strong heritage is tremendous, the local communities also imbibed many traditions partially drawing from the wealth of knowledge from their own traditional society and partially built upon the influence of the western colonizers. The mixtures of the cultures have reflected itself in strengthening the base for a heritage of the local Filipinos co-existing with that of the

indigenous people. Although the indigenous people and their culture have more coherent and distinguishable features, the cultures of the local Filipinos also contribute richly to the overall development of the Republic's composite cultural heritage.

Thus, the cultural traditions of the Filipinos are rich and bear the distinct marks of the influences of western colonization stretching over hundreds of years. The lifestyle of the people of the islands is moulded to reflect a composite culture, dynamic and, at the same time, traditional in content.

As a result of the advancement in technology especially in the field of communication, the sacred forms of folk art, craft, music and folk technologies of the Philippines are subjected to commercial exploitation. Initially, the response of the indigenous people at the attempts of the exploitation of their cultural traditions was one of exhilaration and contentment. Filipinos take pride in sharing their rich cultural and natural resources with the outside forces. However, over a period of time, the misappropriations of the traditional knowledge and technologies started evoking rays of suspicion in the psyche of the innocent tribal population. Slowly and steadily a sense of realization of the extent of illicit practices is dawning on the indigenous and local communities. The plundering of the vast biodiversity of the regions, indiscriminate copying of art, music and dance forms, commercialization of ritual practices and ceremonies all led to a situation where the inborn innocence of the communities gave way to a syndrome of mistrust and suspicion. Many Filipinos talk of the *ilang ilang flower*, used traditionally for garlands and decoration, been taken away and its ingredients isolated for manufacture of a perfume in some western countries. The patent claims of such products do not even acknowledge the source of the plant variety. Many of the fashion designers of the West extensively copy the textile designs of the Philippines. Similarly, the weaving techniques, like habalon, are copied by local industrialists. Similarly, music, dance forms, handicrafts and traditional medicines are all used in the production of modern commodities especially in the western markets. Bio-prospecting and bio-piracy have been taking place for years and multinational pharmaceutical firms secured patents for commercial distribution of medicines derived from indigenous knowledge system.

The Philippines have been subjected to colonization by the western powers over a long period of time. The culture, customs and beliefs of the people have thus been influenced greatly by the western value system. The influence of various cultures on the cultural face of the Philippines has been remarkably evident. However, the last decade saw an ever-increasing trend towards embracing pre-historic national elements of the heritage by the common population. Social activists, researchers, eminent artists, musicians and other followers of literary pursuit and the scientific community started persuading interest in the understanding, evaluating and adapting of the essentials of the Filipino culture. A movement to fathom the roots of the cultural treasures of the nation, its indigenous people and local communities and their ways of life gained unprecedented momentum during the late 1980s and 1990s. A deep appreciation of the knowledge system, customs, beliefs and practices of the indigenous people marked a distinct deviation from the earlier concept of assimilation of the western culture as a legacy on the prolonged colonial rule.

Constitutional Provisions

The framers of the Constitution of the Republic of the Philippines have incorporated provisions for the recognition and promotion of the rights of indigenous cultural communities within the framework of national unity and development (Article II – Section 22). There is also a provision for the creation of autonomous regions in certain selected areas which share common, distinctive historical and cultural heritage and other relevant characteristics, with a view to protecting and promoting the ethnic diversities of the indigenous people (Article X – Section 15). The Constitution calls upon the State to protect the rights of indigenous cultural communities to their ancestral lands with a view to ensure their cultural well being, among other things (Article XII – Section 5). Again, there is a reiteration of the State's resolve to foster the preservation, enrichment and dynamic evolution of a Filipino national culture based on the principles of 'unity in diversity' in a climate of artistic and intellectual expression (Article XIII - Section 14).

The broad framework of the provisions in the Constitution relating to the rights of indigenous people played a significant role in the development of the legal processes that were set in motion.

The social activists who concentrated on the preservation and development of the culture of the indigenous people organized themselves into vibrant, vociferous and unified groups and started asserting themselves for the establishment of the rights of indigenous people as laid down in the Constitution. The battle for a legal system to address the specific demand of the indigenous people of the Philippines lasted for over a decade and finally found expression when the Indigenous Peoples Rights Act of 1997 (IPRA) was enacted by the Senate and the Congress of the Republic of the Philippines on July 28, 1997. The IPRA has been described as an Act to recognize, protect and promote the rights of Indigenous Cultural Communities (ICCs)/Indigenous Peoples (IPs), creating a National Commission on Indigenous People (NCIP), establishing an implementing mechanism, appropriating funds therefore, and for other purposes.

In Chapter 1 of the Act, the State policies have been declared. These policies include the State's resolve to recognize, respect and protect the rights of the Indigenous Cultural Communities/Indigenous Peoples.

The definition offered in the Act for Indigenous Cultural Communities/Indigenous Peoples is very extensive and covers those ethnic communities living together. The concept of community living is the basic fabric on which the terms of ICCs and IPs have been based and gives shape to the legal definition which reads as follows:

Indigenous Cultural Communities/Indigenous Peoples – refers to a group of people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as organized community on communal bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed and utilized such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have through resistance to political, social and cultural inroads of colonization, non-indigenous religions and cultures, became historically differentiated from the majority of Filipinos. ICCs/IPs shall likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonization, or at the time of inroads of non-indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains.

The Act goes on to state the rights of ICCs and IPs with reference to ancestral domains, self-governance and empowerment, social justice, human rights, and cultural integrity.

The provisions relating to the intellectual property rights of the ICCs and IPs are contained in Chapter VI and the Rules framed under the Act. This includes community intellectual rights, right to indigenous knowledge systems, practices to develop their own sciences and technologies, and the norms regarding access to biological and genetic resources. In this study, I concentrate on indigenous knowledge, particularly expressions of folklore.

The community intellectual property rights recognize the right to practice and revitalize cultural traditions and customs of the indigenous communities. According to this provision, the State is bound to preserve, protect and develop the past, present and future manifestations of their cultures. The rules and regulations framed under the provisions of the Act further clarified the cultural manifestations to include archaeological and historical sites, artifacts, designs, ceremonies, technologies, visual and performing art, literature as well as religious and spiritual property. It is also obligatory on the part of the State to restore the cultural, intellectual, religious and spiritual property taken without the free and prior informed consent of the communities.

Full ownership, control and protection of the cultural and intellectual rights are recognized in Section 34 of the IPRA. To develop their own sciences and technologies, the indigenous communities have been given the right over them as well as other cultural manifestations. These include human and other genetic resources, such as seeds which also include derivatives of these resources, traditional medicines, health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of flora and fauna, oral traditions, designs, and scientific discoveries. They also have the right over visual and performing arts, literature (including language), script, history of oral traditions, teaching and learning systems, conflict-

resolution mechanisms, peace building processes, life philosophy, and many more. It is evident that though they have not used the word 'folklore', all the elements of the folklore of the community are brought within the ambit of protection.

The most important provision in the Act is the one relating to free and prior informed consent of the communities in accordance with the customary laws for the purpose of safeguarding the rights of IPs to their indigenous knowledge systems and practices. It is interesting to note that the rules define free and prior informed consent as "consensus of all members of the indigenous communities to be determined in accordance with their customary laws and practices." Thus they must be free from all external manipulations, interference, coercion and must be obtained after fully disclosing the intent and scope of the activity.

The rules also lay down some guidelines regarding the safeguarding of the rights of indigenous people and indigenous knowledge systems, these include (1) the right to regulate the entry of researchers and research institutions, (2) written agreement concerning the purpose, design and expected output of the research, (3) the need to recognize the source of the material taken in case the information regarding the material is published, (4) the supply of copies of research output to the communities concerned, and, most importantly, (5) sharing of the income derived from the research output with the community.

The main feature of the IPRA is a shift of paradigm from individual private property ownership to community ownership. Throughout the provisions of the Act, the predominance of the community as the owner of the various rights provided for in the Act is reflected effectively and in very bold and unambiguous terms. It has been established through a strong legislation that the dichotomy between private ownership and community ownership can be resolved with the balance tilting in favor of the community responsible for maintenance and development of the vast resources of cultural biological and social heritage of the indigenous people.

A laudable feature of the Philippine's legislation is the importance placed on the customary laws. All through the Act, the prevalence of customary laws of the community concerned has been established as a determinant factor for management and protection of the rights conferred by the Act. It is interesting to note that wherever there is an absence or gap in the customary laws, the formal laws can be applied. This brings a balance and avoids conflict in the legal system for protection of the knowledge of the community.

An Act, however well conceptualized and drafted, does require an implementing agency to give shape to various programs for implementation of the same in order to carry out the policies set out in the Act. The NCIP will serve as the primary government agency responsible for formulation and implementation of policies, plans and programs for protecting the rights of indigenous people. The Act clearly provides for the representation of the indigenous communities in the Commission.

While giving dominance to the customary laws of indigenous people to decide matters relating to ownership and protection of their rights, including intellectual rights, the Act and the Rules have, I believe, truly reflected the aspirations of the indigenous people and their serious concerns. It is true that the customary laws are not codified or well documented so as to serve as a necessary reference structure for the legal system to bank upon. Probably, it is not the intention of the State to codify the customary laws, as such a measure may freeze the vibrant and dynamic base of the very laws which have come to stay as the major determinant factor in the societal set-up of the community concerned. However, the need for documentation of the customary laws prevalent in each of the indigenous communities concerned has been felt without necessarily going through the process of codification of the same. The NCIP proposes to achieve this gigantic task through the efforts at the State level by funding research projects by selected expert groups. The councils or representative bodies of the indigenous groups and non-governmental organizations are expected to provide valuable input.

It is not out of place to mention here that the IPRA has evoked mixed responses from the people of the land. While a large majority of the population, especially those belonging to the indigenous groups, welcomed the initiative of the government and recognized the Act as a laudable gesture to establish the rights of the indigenous communities over a wide spectrum of resources, both tangible and non-tangible, there are others who questioned the fundamental principles underlying the Act. Some interested groups have already filed a petition in a court of law questioning the validity of the IPRA on the grounds that land and natural resources are the property of the

State. They contend that the principle of community ownership enshrined in the IPRA runs contrary to the doctrine of State ownership of common land/domain and resources. As at the time of writing, the suit is still pending and has not been decided upon.

Through the IPRA, the Republic of the Philippines has vindicated their resolve to recognize and respect the aspirations and concerns of the indigenous people and to protect their interests through a legal system. ICCs/IPs have been granted recognition of their full ownership not only over land domain and natural resources but also over the intellectual rights involved in the cultural heritage.

A question that arose in the context of the special rights granted to ICCs/IPs for protection of their cultural heritage relates to the contribution of non-indigenous people to the rich cultural heritage and traditions. The Act is silent on this poignant question. Social and cultural activists, academics and other experts hold the view that it is not the intention of the IPRA to ignore the contribution made by mainstream social groups for the maintenance and development of cultural heritage. The protection of the rights of indigenous people is only a reflection of the enormity of the special requirements needed for those indigenous groups who have been subjected to cultural aggression and economic/social imbalances at the hands of commercial interests.

The process of making law does not end in a society which claims itself to be forward looking. Newer initiatives for building on the edifice created by the IPRA are being conceived of by both the State and the communities themselves. A Bill, known as the Community Intellectual Property Rights (Protection) Act of 1998 (CIPRA), to further enlarge the scope of some of the provisions of IPRA has been introduced in the legislature by Senator Juan M. Flavio. In fact, the Bill was introduced in the last Congress (10th Congress) by Senator Mercadewhoc who also introduced another Bill on Bio-diversity Protection along with the Bill on CIPRA and both were not adopted in the 10th Congress. The Bill on CIPRA was however reintroduced by Senator Juan M. Flavio in 1998. As at the time of writing, the Bill is still pending for consideration.

The objective of the CIPRA as indicated in the Explanatory Note is to provide for a system of community intellectual rights protection in respect of the innovative contribution of both local and indigenous cultural communities in the matter of development and conservation of genetic resources and biological diversities. Although the emphasis is on the protection of rights relating to biodiversity innovation, the Bill does bring within its purview all elements of traditional knowledge. Section 4 of the Bill declares the following as Community Intellectual Property:

- a) Parent strains and genetic material discovered or selected and conserved by local communities, which were used in the development of new plant varieties, and which can be harnessed for other potential uses;
- b) Seeds and reproductive material selected, cultivated, domesticated and developed by local communities *in situ*;
- c) Agricultural practices and devices developed from indigenous material, customs and knowledge;
- d) Medicinal products and processes developed from the identification, selection, cultivation, preparation, storage and application of medicinal herbs by local communities and indigenous peoples;
- e) Cultural products from local communities, such as weaving patterns, pottery, painting, poetry, folklore, music and the like;
- f) All other products or processes not made by a single person or juridical personality, which was discovered through a community process, or when the individual making the innovation does not claim the knowledge as his own, provided that any individual or juridical personality making such a claim should present proof of innovation or a history leading to the discovery that would justify his claim.

It is proposed in the Bill that the communities of origin of these properties shall be the recognized holders of the intellectual rights.

It is interesting to note the definition offered in the Bill for the term 'community.' It states, "a community is any group of people living in a geographically defined area with a common history and definitive patterns of relationship." The Bill purports to recognize and protect the contribution of both indigenous and non-indigenous communities to the cultural diversities and heritage of the nation. It goes on to provide for a system of registration of the community as a tribal council, foundation, co-operative or any other organization that effectively represents

the interest of the community. The Senator has taken care to add that failure to organize a viable group and get it registered will not prejudice the group's status as custodians of traditional knowledge.

As owners of traditional knowledge, the communities concerned are entitled to get justifiable percentage of all profits derived from the commercial use of their knowledge for a period of ten years.

The Bill introduced by Mr. Flavier seeks to suggest various registers to be maintained by State agencies for registration of plant varieties, seeds and other plant reproductive materials, cultural products and heritage, inventions, industrial designs and utility models which form part of the communities' properties. There is also a provision envisaged in the Bill for the setting up of a National Commission on Plant Genetic Resources whose primary function is to record and recognize the contributions of local communities and indigenous peoples to the development and discovery of new plant varieties, and to provide for the protection of Philippine plant genetic resources from unfair and inequitable exploitation. The fate of the Bill is still uncertain, as it has yet to pass through the democratic process of adoption.

The Indigenous Peoples Rights Act and the rules and regulations formulated are new and have been put into force only in the very recent past and has yet to work on the ground. No doubt, implementation of the laws is a serious area of concern for many of the nations in the developing world. Despite apprehensions about the effectiveness of the implementation mechanism, it is a matter of great pride for the Republic of the Philippines to have taken the lead in putting in place legislation which addresses a large majority of the issues relating to protection of the rights of ethnic communities.

Case Law

There are no major cases involving litigation relating to protection of folklore or indigenous knowledge in the Philippines. A case relating to the patenting of a mat design, based on folklore traditions by a local designer, is pending for consideration in the Intellectual Property Office. The question that has come up for consideration is whether a traditional design can be patented by a designer as his own work.

Model Provisions and National Legislation

The analysis of the provisions of IPRA and related Rules and the provisions of the pending Bill indicate that the broad principles brought out through the Model Provisions have been substantially incorporated. The provisions in the Act, Rules and the Bill are similar in nature to the requirement relating to acknowledgement of source, offences, civil remedies, authorization and jurisdiction reflected in the Model Provisions even though the structure is not followed.

There are certain aspects where the Acts and Rules of the Philippines have gone beyond or deviated from the Model Provisions. Firstly, the IPRA and the rules have construed the indigenous people's knowledge to include much more than mere expressions of folklore, as defined in the Model Provisions. This point establishes the fact that folklore is to be viewed from a wider perspective than being limited to expressions of folklore, as incorporated in the Model Provisions. The Act and the Bill expressly recognize the ownership of the folklore with the community. The issue of ownership is referred to in both the Preamble and Section 2 of the Model Provisions. Consequently, the coverage of the acts requiring authorization is extended to include a wider spectrum of utilization. It is to be noted that the Philippines Act and Rules do not expressly provide for exceptions as in the Model Provisions. Since the full ownership right is vested in the communities, it is expected of them to decide the types of utilization which can be granted, dispensing with the sharing of benefits. It is to be noted that there is no provision in the IPRA or the Rules for protection of the folklore of foreign nations. One view can be that IPRA is an Act exclusively to take care of the rights of the indigenous people of the Philippines.

The Model Provisions provide for the option of the member countries to designate either the State or the community as the authority to give authorization. In the case of the IPRA, all such rights are vested in the communities. In addition, the customary laws have been accorded supremacy in the decision-making process thereby further strengthening the role of the community in deciding their own affairs.

The analysis offered in the preceding paragraphs bring to light the deficiencies and inadequacies in the Model Provisions to fulfil the aspirations and concerns of the communities for the protection of their cultural properties effectively leading to new or alternate legal framework.

SECTION 3: INDONESIA

Folklore and People

Indonesia, the world's largest archipelago stretches over 5,000 kms from the mainland of Asia into the Pacific Ocean. These islands are home to a multitude of diverse ethnic cultures, customs, value systems and ancestral heritages. This ethnic diversity is perhaps the most unique and fascinating aspect of this country which duly reflects itself in the doctrine of 'Pancasila' adopted by the Government. The towering mountains and little-known people of Irian Jaya and the terraced hills and highly sophisticated artistic culture of Bali are all parts of the rich cultural diversities that the country can boast of. Each ethnic group has its own distinct characteristics which define the everyday life of the community. There are islands like Java, Sumatra and Sulawesi having several major, distinct ethnic groups and many minority groups scattered all over the islands. Javanese and the Sudanese are examples of two major groups in Java and Badui. Tenggerese and Banteneese are some of the minor groups. The arts, crafts, music and dramas are all a way of life for the people of Indonesia. Because of its peculiar geographical location on the sea route between Europe and Asia, Indonesia has been exposed to a variety of diverse cultures. From the culture of those nations which had strong trade links with Indonesia through the sea route from Asia and Europe, the ethnic groups borrowed and adapted into their unique styles certain characteristics. For example, the Dongson artisans of southern China influenced the artistic designs and styles of the Indonesian ethnic groups. Similarly, the two epics from Indian literature, *The Mahabharata* and *The Ramayana* have contributed largely to the themes of many paintings, sculptures, dramas, dances and puppetry traditions of Indonesia. Despite profound influence of other cultures, Indonesia has been able to claim certain cultural traditions which are unique to their country. The Gamelan music, the performing arts of the Wayang puppet dramas and dances, handmade textiles, the art and mysticism about the Kris (ceremonial sword) are very specific aspects of the islands' artistic heritage.

Gamelan is a musical orchestra consisting of a number of traditional instruments like Gongs, drums (kendang), metallo-phones (saron, gender) and gong chimes (bonang), xylophone (gambang) flute, a two-stringed instrument like violin (rebab), etc. Human voice is the latest addition to the Gamelan music ensembles.

The art of Gamelan making has always been guarded as a secret and each instrument was made to order for the use of noble men. Only master craftsmen knew the whole process of making the individual instrument of Gamelan. These craftsmen use tin and copper for making the instruments, but the details of the exact process are not disclosed.

Wayang theatre performance is a popular visual art characterized by elusive shadows, ghosts and spirits. The themes of Wayang are generally based on stories of pre-historical times and the epics of India like *the Mahabharata* and *the Ramayana*. Finely perforated and decorated leather puppets are used in Wayang. The performances usually last for 6 to 8 hours and are characterized by noisy scenes. The total effect of the artistic beauty of the puppets, the active and involving role played by the artists and the accompaniment of the Gamelan render the Wayang performance a rich cultural experience. Another predominant aspect of the folklore of Indonesia is the beautiful sculptures generally used in decorating many of the ancient Hindu and Buddhist temples of Indonesia. Temples such as Borobudur and Prambanan are very rich in exquisite sculptures of gods and goddesses.

The folk crafts of Indonesia are equally famous especially the batik method of waxing and dying clothes to make beautiful multi-colored designs on fabrics. The diversity and excellence of the handmade textiles of Indonesia are world famous. Apart from the batik textiles, the bark clothes of Kalimantan and Suluwesi, Ikat dying and weaving found throughout the islands, Islamic-influenced silks and sangket weaving are also unique to the styles of textile-making in Indonesia. The exquisite textures and the variety of designs available in the textile industry in Indonesia is a living testimony of the influence of trade relations the islands had with the Chinese, Indians, Arabs and Europeans.

The folk literature of Indonesia has a rich contribution of folk tales and traditional stories from Hindu mythology and Islamic texts. The development of literature in regional languages is a comparatively recent phenomenon.

The ethnic differences in the indigenous groups is well recognized by the government. In order to accommodate the customary practices of various groups in the legal process, it has been established that the traditional/customary laws take precedent in social customs, ownership and inheritance of land, properties, etc.

Thus, the vast archipelago of Indonesia has served as a meeting place for many cultures and religions. Over a period of time, each of these cultures has left its mark on the composite culture of Indonesia and its spiritual view of the world. Animism and mysticism are the major components of the cultural beliefs of the people.

As in many other countries of the region, the cultural life of Indonesia has been witnessing attempts by commercial interests to exploit their cultural heritage. The Bali Island, which is the heartthrob of the tourists to Indonesia, was subjected to maximum exposure to outside interests looking for raw materials hidden in the folk creations of the indigenous people. The age-old cultural practices and expressions of art, craft and music were indiscriminately used by enterprising businessmen to further their own economic gains. The impact of this process did affect the mindset of the indigenous people at a slow pace. Although hesitantly, the people of Indonesia have started thinking in terms of providing legal protection to the rights of their intellectual creations.

Constitutional Provisions

There are provisions in the 1945 Constitution of the Republic of Indonesia, first edition, for the protection of national culture. Article 32 states that “the Government shall advance the national culture of Indonesia.” In the explanation that follows Article 32, it is stated that “the nation’s culture is the culture which grows as the outcome of the endeavours expressing the identity and vitality of the entire People of Indonesia. The ancient and indigenous cultures which are to be found as cultural heights in all the regions throughout Indonesia are part of the nation’s culture. Cultural efforts should lead toward advances in civilization, culture and unity without rejecting from foreign cultures new materials which can bring about the development of or enrich the nation’s own culture, as well as to raise the height of humanity of the Indonesian nation.” Based on the provisions under Article 32 and the explanation that followed, the Government of Indonesia has been following a two-step policy for maintaining and perpetuating the national cultural heritage from extinction and to promote and develop national culture.

Laws for Protection of Folklore

The government, in response to the aspirations of the people affected by the exploitation of their cultural heritage, geared itself to finding a solution to the requirement of effectively safeguarding the intellectual rights of the communities. As a result, Article 10 was incorporated into the Copyright Act of Indonesia to vest copyright in respect of popular cultural products representing communal property, such as folklore, narratives, fairytales, legends, annuals, folk songs, handicrafts, choreography, folk dances, calligraphy and other artistic works in the State. It was further provided that the State will hold such copyright only in respect of the outside world thereby attempting to find a solution to the unethical exploitation of cultural products.

The provision in the Copyright Act goes on to say that further provision is necessary for implementing the copyright in folklore against the use by foreigners, and it shall be laid down by the State. Attempts are being made to bring into focus the details on how the provisions can be implemented. However, to date, no final position has emerged.

In the absence of detailed regulations, as provided for under the Copyright Act, there is a vacuum in the legal framework for the implementation of copyright protection for cultural products representing communal properties. It is not clear as to what mechanism will be developed for the commercial or other use of cultural products by foreigners, and whether any fair uses will be contemplated, and in addition, if any royalty will be prescribed to be paid for use of such cultural products. If such a mechanism is developed, to which agency would payment be made? Perhaps, the rules and regulations under consideration of the government may come

out with an appropriate mechanism for answering these and many other related issues on the implementation of the provision in the Act.

The provisions in the Copyright Act of Indonesia speak of the copyright of the State in respect of communal property only as a means of safeguarding acts of misappropriation by foreign commercial interests. There is, however, no restriction on the exploitation of works by native business houses. The provisions are only intended to allow free use of the cultural products by citizens of Indonesia. When considered from the national experience, where local companies exploit cultural products/works such as folk art, folk dance forms and folk music, the provisions seem appear to be inadequate.

The customary laws or '*adat*' of Indonesia have been accepted by the Government as part of the legal framework. However, the customary laws governing property seem to be silent on the question of protection of intellectual property rights.

Given the limitations in the provisions of the Copyright Act, tangible elements of folklore are left without any protection. This facilitates the further exploitation of tangible elements of folklore by both local and foreign entities.

Case Law

Given that the limited provisions contained in the Copyright Act of Indonesia have not been enforced and, in the absence of specific regulations to implement the same, there have not been any litigation cases related to the protection of folklore. However, a few years ago there was a case involving a decorated wooden mask of Indonesian dancers, of folk creation, being manufactured and marketed in a foreign market for commercial gains. In fact, two different commercial groups indulged in the marketing of these artistic items. The aggressive competition between the two firms motivated one of the parties to claim copyright over the mask in question. The affected party objected to the claim of the first firm and the Copyright Office refused to grant copyright to the company in question on the grounds that artistic creations belonged to the people of Indonesia. It is thus evident that the Model Provisions have not been followed in framing a legal mechanism for the protection of folklore in Indonesia.

CHAPTER V

CONCLUSIONS AND RECOMMENDATIONS

The study of folklore and the need for its protection, based on the experiences in India, Indonesia and Philippines, has been, to say the least, an exciting experience in itself. The three countries in question are at varying levels of development and have many features of their composite cultures depicting a sense of unity in diversity. The cultural wealth of these nations, reflected abundantly in their folklore, have many components and characteristics which are shared on a common platform. There is a deep-rooted understanding of the concepts of folklore in these societies to include all intellectual creations and ideas affecting the lives of the people in their struggle for existence on a day-to-day basis. The food they cook and consume, the art and craft activities they pursue, the techniques they use in agricultural or medical practices are all part and parcel of the folklore they preserve and protect and more importantly use for the benefit of the communities without any eye on the commercial gains. This vision of folklore, as an essential element of the society's ways of life, is undoubtedly an important commonality that the study has brought to focus.

The rich cultural heritage is one of the most valuable resources of all three nations in question. Preservation, maintenance, and development of this heritage have been a matter of serious concern to these sovereign States and this concern has found expression in the basic laws of the Republics. The principles enshrined in the Constitutions of these nations relating to the policies of the governments clearly indicate the need to further resolve the civil, political, economic, social and cultural development of its communities. It is these provisions in the Constitutions that provide the basic framework for specific legal mechanisms to take care of the cultural traditions, including folklore.

The Philippines and Indonesia have taken some initiatives to address the question of protection of intellectual property rights of the communities relating to their cultural products like folklore. India has yet to embark upon any legal step to specifically address the question on the protection of folklore, although the need for such a mechanism is felt in the form of commercial exploitation which the communities are facing at the hands of industrial concerns.

The scenario available in these countries in the realm of protection of folklore reflects a wide spectrum. One has the Philippines, on the one end, with a strong legislation to protect the rights of the indigenous people in no uncertain terms and a strong will to put the same into force. On the other end, India where there is a reasonable degree of awareness amongst people on the need for the protection of folklore in the wake of widespread commercial exploitation. The position of Indonesia is in the middle; there has been reflection on the requirement of protecting folklore against commercial exploitation at the hands of foreigners and, accordingly, a modest attempt has been made to incorporate into copyright laws, provisions regarding protection of folklore against misuse by foreign elements. Thus, the three countries are at three distinct stages of evolution in the process of putting in place a legal umbrella for the protection of folklore.

The findings of the study all point to the fact that the Model Provisions have had very limited impact on the legislative frameworks adopted or proposed in these countries. This is evident from the fact that the Indonesian Act has not reflected the salient features of the Model Provisions. Similarly, in the case of the Indigenous Peoples Right Act of the Philippines, although it tries to comprehensively protect folklore of the indigenous communities, the Model Provisions were not followed for this purpose. Perhaps this is an indication that the perception of folklore and the needs for its protection as reflected in the Model Provisions is substantially on a different tangent from that of the communities' concern in these developing nations. The narrow scope of the concept of folklore and its elements provided in the Model Provisions is at the very base of this divergence in perception. As a corollary to the limited scope of term 'folklore', the provisions relating to acts requiring authorization also suffer from similar inadequacy. The fact that the Model Provisions do not speak of exclusive rights over folklore is also a reason why the Philippine and Indonesian legislations have, in no unambiguous terms, granted ownership rights over folklore to the community, as in the case of the Philippines and to the State, as in the case of Indonesia.

Technological developments have always necessitated re-adjustment in the IP regimes to address newer forms of exploitation of the creations of human ingenuity. Protection of folklore is no exception to this general reality. The serious limitations that the Model Provisions have with reference to the acts requiring authorization to accommodate the new technological changes, particularly in the field of biotechnology and life sciences, seems to be another reason why the said nations did not follow the Model Provisions. This calls for a review of some of the provisions of the WIPO-UNESCO Model Provisions which were formulated in the context of the threat perceived by the cultural industries in the 1980's given the technological developments at that time.

In the light of the observations made above, in my view, the Model Provisions need to be re-structured in the following areas:

1. The concept of folklore needs to be widened so as to include all products of human creativity such as folk literature, folk practices, folk arts, folk sciences and technologies, folk beliefs and folk medicines.
2. The types of exploitation requiring authorization need to be extended to cover manufacturing, sale, offering for sale, distribution and so on, of the elements of folklore.
3. The Model Provisions should in clear terms vest the ownership right of folklore with the community or the institution created by national legislation.

ANNEX I

QUESTIONNAIRE USED FOR ELICITING INFORMATION FROM EXPERTS AND OTHER GROUPS

prepared by Mrs. P.V. Valsala G. Kutty

1. What according to you are the various items covered by the term 'Folklore' as per the customary practices of your area/State?

- a.
- b.
- c.
- d.
- e.

2. What are the forms of folklore used for commercial purposes?

- a.
- b.
- c.
- d.
- e.
- f.

3. Who are the persons using?

- a. Members of the community
- b. Others (i) Individuals
(ii) Companies

4. Suggest, if possible, some examples indicating the ways of commercial exploitation of folklore in your area/State?

5. Is the community who is responsible for the creation of such folklore compensated adequately when subjected to commercial exploitation?

- a. Yes
- b. No
- c. In some cases
- d. No information

6. Is it possible to identify some instances?

7. What is the general attitude of the community towards such commercial use?

- a. Happy
- b. Not Happy
- c. Not bothered

8. Are they satisfied with the compensation, if any, normally extended or do they feel cheated?

- a. Satisfied
- b. Feel Cheated

9. Are they aware of the potential economic benefits coming out of their creation?

- a. Yes
- b. No

10. Have there been any instances where the matter regarding commercial exploitation of folklore in your area/State been taken to a Court of Law or informal Bodies like Panchayat, Village Pramukh?

- a. Yes
- b. No
- c. No Information

11. If the answer to question no.10 is in the affirmative, what is the decision?

12. Can you throw some light on such cases?

13. Is there any published literature in English/Hindi relating to folklore and its protection? If any, give details of the author, name of book, publisher and price.

14. Any other information regarding protection of folklore against unauthorised commercial exploitation from your practical experience?

ANNEX II

EXTRACT FROM THE INDIGENOUS PEOPLES RIGHTS ACT OF 1997 – REPUBLIC ACT NO.8371 REPUBLIC OF THE PHILIPPINES

CHAPTER II DEFINITION OF TERMS

SECTION 3(h) - Indigenous Cultural Communities/Indigenous Peoples

Refer to a group of people of homogenous societies identified by self-ascription and ascription by others, who have continuously lived as organized community on communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed and utilized such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have, through resistance to political, social and cultural inroads of colonization, non-indigenous religions and cultures, became historically differentiated from the majority of Filipinos. ICCs/IPs shall likewise include people who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonization, or at the time of inroads of non-indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains.

CHAPTER VI CULTURAL INTEGRITY

SECTION 32 - Community Intellectual Rights

ICCs/IPs have the right to practice and revitalize their own cultural traditions and customs. The State shall preserve, protect and develop the past, present and future manifestations of their cultures as well as the right to the restitution of cultural, intellectual, religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions and customs.

SECTION 34 - Right to Indigenous Knowledge Systems and Practices and to Develop own Sciences and Technologies

ICCs/IPs are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights. They shall have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of fauna and flora, oral traditions, literature, designs, and visual and performing arts.

SECTION 35 - Access to Biological and Genetic Resources

Access to biological and genetic resources and to indigenous knowledge related to the conservation, utilization and enhancement of these resources, shall be allowed within ancestral lands and domains of the ICCs/IPs only with a free and prior informed consent of such communities, obtained in accordance with customary laws of the concerned community.

CHAPTER VII NATIONAL COMMISSION ON INDIGENOUS PEOPLES (NCIP)

SECTION 40 – Composition

The NCIP shall be an independent agency under the Office of the President and shall be composed of seven (7) Commissioners belonging to ICCs/IPs, one (1) of whom shall be the Chairperson. The Commissioners shall be appointed by the President of the Philippines from a list of nominees submitted by authentic ICCs/IPs: *Provided*, that seven (7) Commissioners shall be appointed specifically from each of the following ethnographic areas: Region I and the Cordilleras; Region II; the rest of Luzon; Island Groups including Mindora, Palawan, Romblon, Panay and the rest of the Visayas; Northern and Western Mindanao; Southern and Eastern Mindanao; and Central Mindanao: *provided*, that at least two (2) of the seven (7) Commissioners shall be women.

CHAPTER IX JURISDICTION AND PROCEDURES FOR ENFORCEMENT OF RIGHTS

SECTION 65 - Primacy of Customary Laws and Practices

When disputes involve ICCs/IPs, customary laws and practices shall be used to resolve the dispute.

SECTION 66 - Jurisdiction of the NCIP

The NCIP, through its regional offices, shall have jurisdiction over all claims and disputes involving rights of ICCs/IPs: *Provided, however,* that no such dispute shall be brought to the NCIP unless the parties have exhausted all remedies provided under their customary laws. For this purpose, a certification shall be issued by the Council of Elders/ Leaders who participated in the attempt to settle the dispute that the same has not been resolved, which certification shall be a condition precedent to the filing of a petition with the NCIP.

SECTION 67 - Appeals to the Court of Appeals

Decisions of the NCIP shall be appealable to the Court of Appeals by way of petition for review.

**CHAPTER XI
PENALTIES**

SECTION 72 - Punishable Acts and Applicable Penalties

Any person who commits violation of any of the provisions of this Act, such as, but not limited to, unauthorized and/or unlawful intrusion upon any ancestral lands or domains as stated in Section 10, Chapter III, or shall commit any of the prohibited acts mentioned in Section 21 and 24, Chapter V, Section 33, Chapter VI hereof, shall be punished in accordance with the customary laws of the ICCs/IPs concerned: *Provided,* that no such penalty shall be cruel, degrading or inhuman punishment: *Provided, further,* that neither shall the death penalty or excessive fines be imposed. This provision shall be without prejudice to the right of any ICCs/IPs to avail of the protection of existing laws. In which case, any person who violates any provision of this Act shall, upon conviction, be punished by imprisonment of not less than One hundred thousand pesos (P100,000) nor more than Five hundred thousand pesos (P500,000) or both such fine and imprisonment upon the discretion of the court. In addition, he shall be obliged to pay to the ICCs/IPs concerned whatever damage may have been suffered by the latter as a consequence of the unlawful act.

SECTION 73 - Persons Subject to Punishment

If the offender is a juridical person, all officers such as, but not limited to, its president, manager, or head of office responsible for their unlawful act shall be criminally liable therefore, in addition to the cancellation of certificates of their registration and/or license: *Provided* that if the offender is a public official, the penalty shall include perpetual disqualification to hold public office.

ANNEX III

EXTRACTS FROM THE RULES AND REGULATIONS IMPLEMENTING THE IPRA OF 1997

RULE II DEFINITION OF TERMS

SECTION 1

(j) Community Intellectual Rights

Refer to the rights of ICCs/IPs to own, control, develop and protect:

- (a) the past, present and future manifestations of their cultures, such as but not limited to archeological and historical sites, artifacts, designs, ceremonies, technologies, visual and performing arts and literature as well as religious and spiritual properties;
- (b) 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 and teaching and learning systems.

(l) Indigenous Cultural Communities/ Indigenous Peoples (ICCs/IPs)

Refer to a group of people or homogenous societies identified by self-ascription and ascription by others, who have continuously lived as organized community on communally bounded and defined territory, and who have, under claims of ownership since time immemorial, occupied, possessed and utilized such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have, through resistance to political, social and cultural inroads of colonization, non-indigenous religions and cultures, became historically differentiated from the majority of Filipinos. ICCs/IPs shall, likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or colonization or at the time of inroads of non-indigenous religions and cultures or the establishment of present state boundaries who retain some or all of their own social economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettled outside their ancestral domains.

(p) Indigenous Knowledge Systems and Practices

Refer to systems, institutions, mechanisms, and technologies comprising a unique body of knowledge evolved through time that embody patterns of relationships between and among peoples and between peoples, their lands and resource environment, including such spheres of relationships which may include social, political, cultural, economic, religious spheres, and which are the direct outcome of the indigenous peoples, responses to certain needs consisting of adaptive mechanisms which have allowed indigenous people to survive and thrive within their given socio-cultural and biophysical conditions.

RULE VI CULTURAL INTEGRITY

SECTION 3 - Rights to Cultural Integrity

The rights of Indigenous peoples to cultural integrity shall include:

- a) Protection of indigenous culture, traditions and institutions;
- b) Right to establish and control education and learning systems;
- c) Recognition of cultural diversity;
- d) Right to name, identity and history;
- e) Community intellectual property right;
- f) Protection of Religious; Cultural Sites and Ceremonies;
- g) Right to indigenous spiritual beliefs and traditions;
- h) Protection of Indigenous Sacred Places;
- i) Right to protection of indigenous knowledge systems and practices;
and
- j) Right to science and technology.

SECTION 10 - Protection of Community Intellectual Property

The ICCs/IPs have the right to own, control, develop and protect the following:

- a) The past, present and future manifestations of their cultures, such as but not limited to, archeological and historical sites artifacts, designs, ceremonies, technologies and visual and performing arts and literature as well as religious and spiritual properties;
- b) Science and Technologies including, but not limited to, human and other genetic resources, seeds, medicines, indigenous knowledge systems and practices resource management systems, agricultural technologies, knowledge of the properties of flora and fauna, and scientific discoveries; and
- c) Language, Music, Dances, Script, Histories, Oral Traditions, Conflict Resolution Mechanisms, Peace Building Processes, Life Philosophy and Perspectives and Teaching and Learning Systems.

In partnership with the ICCs/IPs, and NCIP shall establish effective mechanisms for protecting the indigenous peoples' community intellectual property rights along the principle of first impression first claim, the Convention On Bio-diversity, the Universal Declaration of Indigenous Peoples' Rights, and the Universal Declaration of Human Rights.

SECTION 14 - Right to Indigenous Knowledge systems and Practices and to Develop Own Sciences and Technologies

Indigenous knowledge systems and practices (IKSP) are systems, institutions, mechanisms, technologies comprising a unique body of knowledge evolved through time embodying patterns of relationships between and among peoples and between peoples, the lands and resource environment, including such spheres of relationships which may include social, political, cultural, economic, religious, and which are the direct outcome of the indigenous peoples responses to certain needs consisting of adaptive mechanisms which have allowed indigenous peoples to survive and thrive within their given socio-cultural and bio-physical conditions.

The infusion of science and technology in the field of agriculture, forestry and medicine to ICCs/IPs is subject to their free and prior informed consent and shall build upon existing indigenous peoples knowledge and systems and self-reliant and traditional cooperative systems of the particular community.

SECTION 15 - Protection and Promotion of Indigenous Knowledge Systems and Practices (IKSPs)

The following guidelines, *inter alia*, are hereby adopted to safeguard the rights of IPs to their indigenous knowledge systems and practices:

- a) The ICCs/IPs have the right to regulate the entry of researchers into their ancestral domains/lands or territories. Researchers, research institutions, institutions of learning, laboratories, their agents or representatives and other like entities shall secure the free and prior informed consent of the ICCs/IPs, before access to indigenous peoples and resources could be allowed;
- b) A written agreement shall be entered into with the ICCs/IPs concerned regarding the research, including its purpose, design and expected outputs;
- c) All data provided by the indigenous peoples shall be acknowledged in whatever writings, publications, or journals authored or produced as a result of such research. The indigenous peoples will be definitively named as sources in all such papers;
- d) Copies of the outputs of all such researches shall be freely provided to the ICC/IP community; and
- e) The ICC/IP community concerned shall be entitled to royalty from the income derived from any of the researches conducted and resulting publications.

To ensure effective control of research and documentation of their IKSPs, the IPOs' initiatives in this regard shall receive technical and financial assistance from sources of their own choice.

SECTION 16 - Protection of Manifestations of Indigenous Culture

Indigenous Culture shall not be commercialized or used for tourism and advertisement purposes without the free and prior informed consent of the indigenous peoples concerned. Where consent is alleged, the NCIP will ensure that there is free and prior informed consent.

In instances where the presentation of indigenous culture and artistic performances are held, the IPs shall have control over the performance in terms of its content and manner of presentation according to customary laws and traditions, and shall have the right to impose penalties for violations thereof.

Indigenous peoples shall also have the right to equitably share in the benefits of such presentation or performance. All funds collected from these activities shall be managed directly by the community concerned through the registered IPO, otherwise, the same shall be held in trust by the NCIP for the benefit of the concerned IP community.

SECTION 17 - Protection of Biological and Genetic Resources

The ICCs/IPs may, on their own initiative, make an inventory of biological and genetic resources found inside their domains/lands, for their exclusive use. They shall retain and reserve all rights pertaining to the storage, retrieval, and

dissemination of the information, in whatever form and system, gathered as a result of the inventory. A certificate of free and prior informed consent shall be required in case the concerned ICCs/IPs may enter into a joint undertaking with natural or juridical persons for the use of biological and genetic resources for industrial, commercial, pharmaceutical and other profit-making purposes and ventures. Violation hereof shall be strictly prohibited and subject to penalties under customary law and as provided for by the Act. The NCIP shall assist the concerned ICCs/IPs in the enforcement hereof.

RULE XI PENALTIES AND SANCTIONS

PART III PENALTIES

SECTION 1 - Imposable Penalties in Accordance with Customary Law

The ICC/IP community whose rights have been violated may penalize any violator in accordance with their customary law, except:

- a) where the penalty is cruel; degrading or inhuman; or
- b) where the penalty is death or excessive fine.

SECTION 2 - Penalties Imposed by the Act

All violators shall be punished, as follows:

- a) Imprisonment for not less than nine (9) months but not more than twelve (12) years;
- b) Fine of not less than One hundred thousand Pesos (P100,000.00) but not more than Five hundred thousand Pesos (P500,000.00); or
- c) Both such fine and imprisonment at the discretion of the court.

SECTION 3- Accessory Penalties

In Addition to the penalties referred to in the preceding article, the following may be imposed:

- a) For all violators, payment of damages suffered by the ICCs/IPs as a consequence of the unlawful act;
- b) For corporations or other juridical persons, cancellation of their registration certificate or license; and
- c) For public officials, perpetual disqualification to hold public office.

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