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Editorial

Protection and Administration of Folklore in Nigeria[*]

Introduction

Discussions on intellectual Property rights recently extended to traditional Knowledge issues and the protection of folklore. Generally, globalisation and the information Technology revolution have pushed the demand for intellectual property protection beyond the borders of sovereign nations. In the same trend, liberalization, international treaties, tourism, the media and the steady shift to free market economies enables greater movements of goods across the world and the need for better intellectual property protections. Complaints by American and European companies about rampant intellectual property piracy and counterfeiting in developing countries are an indication of the extent to which the world famous brands and Hollywood cinema and music has penetrated foreign lands, supplanting and in some cases even obliterating the traditional culture and custom of different people in the process-particularly in the cities.[1] On the other hand many developing countries complain that

[*] Paper delivered at Edinburgh.

[1] William O Hennessey 'Towards a Conceptual Framework for Recognition of Rights for the Holders of Traditional Knowledge and Folklore' prepared for 'Protecting Traditional Knowledge and Folklore A review of progress in diplomacy and policy formulation' organized by UNCTAD/ICTSD OCTOBER 2002 page 1.

lots of copyrights and patents emanating from the developed world are unauthorized exploitation of their Traditional Knowledge and Folklore. Technological advances have only fanned this fire. Indigenous motifs are used to sell every thing from Japanese automobiles like the Mazda Navajo to Barbie dolls and back-to-school clothes. Indigenous art has been reproduced and sold as art reproduction and as craft items, but more commonly, it has been reproduced and sold as cheaper commodities, such as T-shirts, tea, towels and other souvenirs. Indigenous arts has also been reproduced and used in advertising and marketing. Thus, we are seeing indigenous designs more often and in new contexts.[2] In essence traditional knowledge has attracted widespread attention from an enlarged audience; and other traditional-based creations, such as expressions of folklore, have at the same time taken on new economic and cultural significance with a globalised information society.[3] This has brought to fore an increased agitation at the international level for a system of protection for folklore. Opinions are however sharply divided on the nature and framework of protection to be accorded to folklore. While some favour protection under the conventional intellectual property subjects, others believe that an entirely new system is required.

The intention of this paper therefore is to examine the existing framework of protection of folklore in the context of Intellectual Property Rights particularly from the perspective of the Nigerian experience. The efforts of the international community to forge a new protection framework will also be discussed.

Folklore and its Exploitation

Folklore has been defined as a living phenomenon, which evolves overtime; A basic element of our culture which reflect the human spirit thus a window of a community's cultural and social identity, its standard and values transmitted orally, by imitation and other means.[4] The Cambridge International Dictionary of English language defines folklore as traditional stories and culture of a group of people. It will be difficult to arrive at one single all-embracing definition, which will enjoy universal acceptance. However, for every ethnic group folklore is its identity; for a country, it is the root of the nations cultural tradition or national civilization; for all mankind, it is the rich and varied but non-regenerative resources as well as the incomparably valuable heritage of human society.[5] Works of art, sculpture and artefacts have been priced throughout history not just for their aesthetic worth, but also because they represent the talent and endurance of man and the history of diverse civilization. Folklore is actually a compendium of the genius of mankind and demonstrates mans diversity and artistic nature. WIPO/UNESCO defines folklore (or traditional and popular culture) as the totality of traditional-based creation of a cultural community, expressed by a group of individual and recognized as reflecting its cultural and social identity; its standards

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[2] Christine Haight Farley 'Protecting Folklore of Indigenous People: Is Intellectual Property the Answer?' Connecticut Law Review Vol. 30 Fall 1997 No 1 page 8.

[3] Meeting Statement of the WIPO Inter-Regional Meeting on Intellectual Property and Traditional Knowledge held in Chiangray, Thailand, Nov. 9 to 11 2000, at p. 1.

[4] Kanwal Puri, quoted in Berryman, C A 'Towards More Universal Protection of Intangible Cultural Property' (1994) Journal of Intellectual Property Law. 293.

[5] Terlumun A Yagba 'Protection of Folklore in Nigeria: Issues of Administration and Enforcement' Nigerian Copyright Forum Poth-Harcourt Nigeria November 1999 unpurblished.

and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, Literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts. It has been observed that the WIPO/UNESCO definition unnecessarily limited folklore to verbal expression, musical expression, expression by action and tangible expression leaving out important items like folk medicine, agriculture, techniques of manufacture, designs, etc.[6]

The exploitation of folklore is extensive and diverse. Many designs in cloths, rugs, work of art, carvings etc are derived from folklore of one community or the other. In the same vein, many musical works and film works have their root in folklore. Nearly all these reproductions are done without permission. Unfortunately, these unauthorized reproduction not only denies indigenous community economic benefit but offend their religious believes. Art is central to the practice of religion in most indigenous communities. Most spiritual rituals involve visual displays, dance, and/or music and song.[7] In the words of W. Marika "in song and dance, in rock engraving and bark painting we re-enact the stories of the Dreamtime, and myth and symbol come together to bind us inseparably from our past, and to reinforce the internal structures of our society".[8] For the indigenous communities, the theft of their folklore represents the final blow to their civilization from "invaders". It is an extension of the plunder mentality. It signifies that culture is open to pillage in the same way that Aboriginal lands and resources have been for over 200 years. Survival for indigenous people the world over is not merely a question of physical existence, but depends upon maintaining spiritual links with the land and the communities.[9]

Protection of Folklore Under the Intellectual Property System

It has been widely stated that intellectual property rights is not suitable for the protection of Folklore because folklore will not meet its prescribed prerequisites. Protection in intellectual property rights is usually for a period of time while folklore is timeless. Fixation is also required which is not available in folklore works. Furthermore, ownership of intellectual property is to a given author while folklore generally belongs to the community. The WIPO Fact Finding Mission on Traditional Knowledge conducted in 1998 and 1999 conceded that Intellectual Property Rights are unsuitable for TK protection because they protect only the right of individuals and do not recognize collective rights. The collectivity of TK certainly poses challenges for the IP system[10] Mould Iddrissu however observed that many earlier definition of folklore insist that all folklore is necessarily the creation of the community at large …such a view of folklore is now out of date … it is presently recognized that works

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[6] N S Gopalakrishnan 'Protection of Traditional knowledge the Need for a Sui Generis Law in India' The Journal of World Intellectual Property Vol. 5 No 5 Sept. 2002.

[7] Christine H Farley ibid at 9.

[8] Copyright in Aboriginal Art, Aboriginal News Feb. 1976 at 7.

[9] Christine H Farley ibid at 11.

[10] Wend B Wendland 'Intellectual Property, Traditional Knowledge and Folklore: WIPO's Exploratory Program' International Review of Industrial Property and Copyright Law Vol. 33 May 2002 at 606.

of folklore were created by individuals. Works of folklore were, however, communally used and enjoyed.[11]

One major obstacle preventing the easy extension of intellectual property protection to folklore is the lack of a consistent definition. We cannot protect what we cannot identify.[12] This is more apparent in the concept of ownership. Intellectual property rights seek to create exclusive rights for the owner of the rights and prevent others from reproducing the same. Folklore on the other hand seeks to control the usage of a particular work and ensures that such works are used within a particular context and on some occasions within a particular locality. It could also be limited to particular occasions and in some instances to particular persons or family. In most cases, people who come within the limitation of exploitation of a particular folklore could exploit it and take both moral and financial benefit of the expression of the particular folklore. In the Eastern part of Nigeria for example, a dance called 'Igede' can only be performed by elderly men of some communities and only when some body is taking an 'Ozor' title or at the burial ceremony of an 'Ozor' title holder. When this dance is being performed, only the 'Ozor' titleholders can dance to it. This dance cannot be performed outside the communities because one cannot take the title outside the community and a titleholder cannot be buried outside the community. Similarly, within the Yorubas' of Southwest Nigeria, the recitation of 'oriki', a praise-singing poetry was preserved exclusively for certain families.[13] Consequently, if a group performs a folk song, folk dance etc within the given limited area, they are entitle to exclusive benefit of any payment made for that performance but they do not have the exclusive right to restrain any other group within the restricted area to also perform the same folk. It is therefore clear that the intellectual property concept of proprietary right is western and cannot protect folklore as presently conceived. Intellectual property rights provide indigenous people with few legal causes of action to assert ownership of knowledge because the law simply cannot accommodate complex non-western systems of ownership tenure and access.[14] This does not mean that folklore cannot be effectively protected but the content and nature of the protection will differ from what is available under the present intellectual property system.

Some manner of protection had existed in certain area for the protection of folklore. According to WIPO, IPR proprietary system do exist in many traditional societies but, equally, any assumption that there is a generic form of collective/community IPRs ignores the intricacies and sheer diversity of indigenous and traditional proprietary systems.[15] The point therefore is not that Traditional Knowledge and Folklore holders do not recognize intellectual property concepts, but rather that the formal intellectual property system is a type of intellectual property system which they are not familiar

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[11] 'The Experience of Africa' WIPO-UNESCO World Forum on the Protection of Folklore April 8-10 1997 at 18 WIPO Publication No 758.

[12] Lucy M Moran 'Folklife Expressions- will remedies become available to cultural authors and communities' University of Baltimore Intellectual Property Law Journal Spring 1998, at 2.

[13] Paul Kuruk 'Protecting Folklore Under Mordern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States' American University Law Review Vol. 48 April 1999 Number 4 at 784.

[14] D. Posey 'Protecting Indigenous Rights to Diversity' 38/3 Environment (1996) at 7.

[15] WIPO Draft Report on fact-Finding Mission on Intellectual Property Traditional Knowledge (1998-1999) at 13.

with.[16] This situation was further exemplified by the four Directions Council, a Canadian indigenous peoples trade association when it asserted that 'indigenous people possess their own locally-specific systems of jurisprudence with respect to the classification of different types of knowledge proper procedures for acquiring and sharing knowledge, and the rights and responsibilities which attached to possessing knowledge all of which are embedded uniquely in each culture and its language.[17]

Daniel J Gervais argued that the challenge of protecting traditional knowledge forces intellectual property experts to think about what intellectual property actually is. An 'intellectual property-like' system could be adopted, but this would beg the question of what it is; if not intellectual property in other words, why is it not intellectual property.[18] It is conceded that folklore belongs to the genre of intellectual creation which IPR is meant to protect. However, the special nature of folklore makes it difficult for the international community to appreciate. For instance, Professor Michael Brown once dismissed calls for greater intellectual property protection for indigenous property as part of 'a polemical romanticism that produces memorable bumper-sticker slogans ("Give the natives their culture back") without due regard to the need to maintain the flow of information'. He further argues that allowing indigenous communities to maintain a shroud of secrecy with regard to the use of certain cultural items would be an affront to the cherished "political ideals of liberal democracy".[19] It is important for international community to understand that the aspect of folklore that could be shrouded in secrecy will be those ones that pertain to spiritual believe. It is their religion and the right to free speech must be balanced with the right to religious believes. Outside this, native communities do not object to use of their folk but it has to be done in such a manner that protect their moral rights and ensure economic benefits.

WIPO Initiative

In 1982 the United Nations Educational, Scientific and cultural Organisation (UNESCO) and the World Intellectual Property Organisation (WIPO) made initial efforts to put in place a set of norms for the protection of expressions of folklore against illicit exploitation and other prejudicial actions. Even though the attempt was to have an international treaty, it could achieve only an enunciation of general principle in wide and ambiguous terms for the guidance of legal systems.[20] The model provision for National laws on the protection of Expression of folklore encouraged nations to make provision for such protections. Such provision could either be a new law or an extension of its intellectual property law. It was made flexible so that nations could adapt it to their local realities. Under the provision five acts were

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[16] WIPO Draft Report on Fact-Finding Mission on Intellectual Property and Traditional Knowledge (1998-19999) supra at 14.

[17] H Marrie, The Convention on Biological Diversity, Intellectual Property Rights and protection of Traditional Ecological Knowledge, MastersDissertation, Macquarie University Law School, Australia July 20, 1998 at 5.4.

[18] Associate Professor, Faculty of Law (Common Law Section), University od Ottama in 'Traditional Knowledge: A Challenge to the International Intellectual Property System' unpublished.

[19] Paul Kuruk supra at 825.

[20] N.S.G Opalakpristnan 'protection of Traditional knowledge: The need for a sui Generis law in lndia supra.

defined as giving rise to a cause of action. The first is *"illegal exploitation"* defined as any utilization made for economic gain outside the traditional (proper artistic framework based on continuous usage of the Community) or customary (in accordance with everyday life practices of the community) context of folklore, without authorisation by a competent authority or the community concerned. The second act is a failure to acknowledge the source (community and/or geographical place) of any identifiable expression of folklore in all printed publication or in connection with any communication to the public containing that expression. The third cause of action is for failure to acquire a necessary authorisation. Fourth is passing off an expression as derived from a community when it is not from that community. Fifth is distorting an expression in any direct or indirect manner *"prejudicial to the cultural interest of the community concerned"*.[21] Recognising the shortcomings of the general principles as laid down in the model provisions and respecting increased pressure for protection of folklore, WIPO again renewed its effort at working out an acceptable formular for its protection. The fact finding mission which commenced work shortly after Dr. Idris took over leadership of the Organization in May 1998 provided a lot of incite to the diversity of folklore issues and the need for a global approach to harmonise its protection. They consulted stakeholders in 28 countries for a period of 18 months. The results of these consultations still form the basis of much of WIPO's work.. In this way, the perspectives of a wide cross section of TK holders have provided continuing guidance in the evolution of later activities.[22] Consequently WIPO General Assembly in October 2000 established the Inter-Governmental Committees on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) which is open to all member states of WIPO. Other United Nations member states, intergovernmental organizations and accredited non-governmental organizations (NGOs) may participate as observers. It is interesting to note that some 175 accredited NGOs took part in the IGC, including 83 NGOs especially accredited by the IGC, many of which represent the specific interests of indigenous communities and TK holders. The number of NGO's was later to increase to 200. The IGC's mandate is to discuss IP issues relating to access to genetic resources and benefit sharing, TK, and innovations; and traditional creativity and cultural expressions (expressions of folklore). At the expiration of the mandate of the WIPO Intergovernmental Committee (IGC) in 2003, The General Assembly, meeting from September 22 to October 1, 2003, decided to extend and expand the mandate. This new mandate requires the IGC to accelerate its work, and to focus in particular on the international dimension of intellectual property (IP) and genetic resources, traditional knowledge (TK) and folklore. The second phase of the IGC's work was aimed at developing more concrete and focussed outcomes at the international level in the form of two complementary sets of shared objectives and core principles respectively concerning the protection of traditional cultural expressions/expressions of folklore (TCEs/EoF) and the protection of TK.[23]

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[21] Lucy M. Moren "Folklife Expressions- will remedies become available to cultural authors and communities" supra at 4.

[22] WIPO Press Release 'WIPO MEMBER STATES GET TO GRIPS WITH PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE' Update 234 Geneva, November 9 2004 at 3.

[23] WIPO Press Release 'WIPO MEMBER STATES GET TO GRIPS WITH PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE' update 234 Geneva November 9, 2004 at page 4.

At its sixth session in March 2004, the Committee decided that the WIPO Secretariat should prepare drafts of 'an overview of policy objectives and core principles for protection of TCEs; and an outline of the policy options and legal mechanisms for the protection of TCE subject matter, based on the full range of approaches already considered by the Committee, together with a brief analysis of the policy and practical implications of each option.'[24] This draft sets out possible substantive elements of protection of expression of folklore in a manner, which leaves open and facilitates future decisions by Member States on the context and legal status that they may assume at the international, regional and national levels. According to the committee the material in the document is not, in substance, new to the Committee: it simply distils and structures the existing legal mechanisms and the extensive practical experience with protection of TCEs/EoF that have already been widely discussed by the Committee, and draws essentially on the Committee's own deliberations and the various materials put to the Committee.[25] It is important to observe that a lot of the concerns on folklore protection have been captured in this document. Member states and other interested parties have up till February 25, 2005 to submit their comments while the committees is expected to commence full deliberation on an international instrument by their June 2005 meeting.

While we await the final report of this committee, it is hoped that some essential provisions of the draft is sustained or further enhanced. Of importance to mention is the policy directive of the proposed law, which is that, the protection of traditional cultural expressions/expressions of folklore (TCEs/EoF) should not be undertaken for its own sake, as an end in itself, but as a tool for achieving the goals and aspirations of relevant peoples and communities and for promoting national and international policy objectives.[26] In discussing the time frame for protection, the report noted 'Continuing uses of TCEs/EoF that had commenced prior to the introduction of new measures that protect such TCEs/EoF should be brought into conformity with those measures within a reasonable period of time after the measures enter into force, subject to equitable treatment of rights and interests acquired by third parties through prior use in good faith.'[27] This provision is akin to suggestions in some quarters on documentation of folklore. Any introduction of measures may further hinder proper exploitation of folklore not minding what amount of time that is deemed to be reasonable. It is suggested that protection could still be effected without requirement of complying with any measure within a given period of time. We look forward to an early international instrument in the protection of folklore.

Protection of Expression of Folklore in Nigeria

The Nigeria Copyright Act in Section 28 protects expression of folklore against reproduction, communication to the public by performance, broadcasting, distribution by cable or other means, adaptations, translations and other transformation when such

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[24] Report of Sixth Session, WIPO/GRTKF/IC/6/14, para. 66.

[25] Document prepared by the Secretariat of WIPO for the seventh Session of IGC WIPO/GRTKF/IC/7/3 August 4,2004 page 3.

[26] Ibid page 23.

[27] ibid page 55.

expressions are made either for commercial purpose or outside their traditional or customary context. These rights were subjected to certain exception which include

1) The doing of any of the acts by way of fair dealing for private and domestic use, subject to the condition that, if the use is public it shall be accompanied by an acknowledgement of the title of the work and its source
2) The utilisation for purpose of education
3) Utilisation by way of illustration in an original work of an author provided that the extent of such utilization is compatible with fair practice
4) The borrowing of expressions of folklore for creating an original work or an author provided that the extent of such utilization is compatible with fair practise
5) The incidental utilization of expression of folklore

It further provides that in all printed publications and in connection with any identifiable expression of folklore, its source shall be indicated in an appropriate manner, and inconformity with fair practice, by mentioning the community or place from where the expression utilized has been derived. The right to authorise acts referred to in the law is vested in the Nigerian Copyright Commission. The Act in section 28 (5) defines folklore to mean a group – oriented and traditional –based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally by imitation or by other means including folklore, folk poetry, folk dance, folk plays and productions of folk arts in particular drawings, paintings, carvings, sculptures, poetry, terracotta, mosaic, woodwork, metal ware, jewellery, handicrafts, costumes and indigenous textile. Section 29 provides that any person who without the consent of Nigerian Copyright Commission uses an expression of folklore in a manner not permitted by Section 28 shall be in breach of statutory duty and liable to the Commission in damages, injunction and any other remedies as the court may deem fit to award in the circumstances. Section 29A criminalizes some violations of expression of folklore. It stated that any person who does any of the acts set out in Section 28 without the consent or authorisation of the Commission or wilfully misrepresents the source of an expression of folklore or distort the expression in a manner prejudicial to the honour, dignity or cultural interest of the community in which it originate commits an offence. A court before which the said offence is tried may order that the infringing or offending article be delivered to the Commission.

Issues of Administration in Nigeria

Nigerian experience at administration of folklore has left a number of issues unsettled. It is always difficult to determine the community /communities who are the owners of a given expression of folklore. Culture and consequently folklore of certain communities could be very similar. It is not uncommon to observe similar songs, craft, or painting in a given area covering a collection of communities. In the northwest and southwest part of Nigeria, similar cultures exist amongst communities strapping to areas in the neighbouring countries. It will therefore be difficult to single out the particular community from where a folklore work emanates. Even where ownership is shared between certain communities, delimiting such communities will still be difficult. In some occasions the meaning and usage of a particular folklore will

differ in these communities. This makes it even more difficult to protect the moral right.

Secondly, the Nigerian Copyright Commission has the exclusive right to grant authorization for usage of expressions of folklore. This will include some expressions that has spiritual connotation in the community of origin. This difficulty is heightened by the fact that the believes relating to a particular expression in a given area may not be the same to that applicable to a similar work in another community. It will therefore be difficult to ensure that the right decisions are made at all times.

Ownership and exercise of right of ownership remains unsettled. While the Nigerian Copyright Commission grants licences for usage of an expression of folklore, it is deemed to hold that right in trust for the several communities. If that right is not managed to the satisfaction of a given community, can the community challenge or compel the Commission to change its decision? For example, if the Commission grants licence to a T-shirt producer to use the picture of carvings in the place of worship of a community in the T-shirt, can the community challenge this? A similar case will be where the T-shirt producer did not obtain licence from the Commission before using it, can the community commence legal proceeding to restrain the usage of such work. Nigerian law only provided that the commission could have legal remedy for wrongful usage of folklore but did not make similar provision for the community. However, since the Commission is holding the right on trust, It is believed that the communities could be able to commence legal proceeding especially since there is no provision in the law restraining them from so doing.

Finally there have been comments that the right given to the commission to grant licenses for exploitation of folklore does not authorise her to charge fees for such licence. It has been observed that, 'Be that as it may, it is clear that the Act does not envisage that the Commission charge fees for its consent or authorisation. Thus the communities may not benefit thereby. This may explain why the administration of the folklore rights is vested in the Commission and not in the communities as a kind of public service.'[28] I do not agree with this opinion especially as there is nowhere in the law that it could have been inferred. The whole idea of administration of copyright and similarly folklore rights as in this case is to manage all the rights involved to the full benefit of the right owner. Since the law restricted reproduction, broadcasting, public performance and other public performance of expression of folklore, it necessarily means that the purpose of the restriction could not have been for the moral rights only. It must include economic right, which will involve charging of fees for the benefit of the right owners. Furthermore, in the usual fair dealing exception provided in section 28(2) and in section 28(3) provisions were made for moral rights. It then means that the general provision of the law could not have anticipated only moral rights. As to why the Nigerian Copyright Commission was chosen to administer the rights, this is in conformity with WIPOs' model for national laws and no body would have been more suited than the Commission. In any case, it would not have been tidy to vest the management of these rights on the communities because they neither have organised systems for such functions nor sufficient expertise.

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[28] See E.S. Nwauche 'A Critical Evaluation of the Provisions of Nigerian Copyright Law for Folklore' International Review of Industrial Property and Copyright Law Vol. 33 May 2002 at 599.

Conclusion

The essence of Intellectual Property Rights is two fold: to protect the economic and moral rights of authors on the one hand and to balance those rights against the legitimate needs of the society for access to information. This should be applied to folklore except that with folklore rights, a higher level of preservation of moral rights should be adopted. This could also mean the denial of the usage of certain folklore if such use would be so offensive to the host community.

The economic value of folklore lies in its unique socio-historical appeal, its richness and diversity, which make it inexhaustible resources for economic exploitation. Folklore consequently became the subject of predatory acquisition by trans-national entrepreneurs of artistes from the developed world. Indigenous communities do not really wish to deny the usage of their folklore but it is necessary that the usage be controlled. It is therefore important that a good system for the protection of folklore is entrenched. The guiding principle should be to develop its rules in such a way as to not to hinder legitimate utilization of folklore which also ensures that the proceeds from such utilization are partly invested in the originating community to encourage the development of folkloric materials. In the modern information age, no society can be an island unto itself. The process of globalisation enables businessmen to search worldwide for profitable investment opportunities in all sectors including the area of cultural property. The challenge therefore is not so much to shut out the rest of the world as to maximize the benefits offered by the emerging world order.

It is hoped that the present effort of WIPO will soon materialise into an international treaty for the protection of expression of folklore. This will include the provision of certain norms and standard for its protection while leaving national laws to make extra provision if it so desire.

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