JIMMYING THE LOCKE:
ON THE 1982 MODEL PROVISIONS FOR THE PROTECTION OF FOLKLORE, DECOLONIZING INTELLECTUAL PROPERTY RIGHTS, AND FORTY YEARS OF STASIS

by

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THESIS ABSTRACT

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In this work I chart the past forty years of efforts towards developing international policy for the protection of cultural property. I do so by firstly examining the 1982 Model Provisions on National Laws for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions and then, secondly, I consider the current state of negotiations within the Intergovernmental Committee (IGC) of the World Intellectual Property Organization (WIPO). I also give significant attention the Eurocentric disposition of the global intellectual property regime and argue that the international IP regulatory system is a colonial apparatus and a potent modernizing technology of the West. I propose that there has been little meaningful progress in international forums to develop protective mechanisms over the past forty years and that, in light of this failure, resources and collective efforts must be reallocated accordingly towards alternative means of safeguarding cultural production and recognizing non-Western modalities of authorship and property.

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Dedicated to my parents.

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CHAPTER I

INTRODUCTION

This project takes a retrospective look at the legal framework proposed in the influential 1982 *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*. From this outset, I come to challenge the current international efforts towards reforming the Eurocentric global intellectual property regime, which is an unambiguously colonial technology, and offer alternative pathways for more productively striving towards a pluralistic international system of property and authorship. The Model Provisions were drafted by the United Nations Educational Scientific and Cultural Organization and the World Intellectual Property Organization – both appendages of the United Nations – to design a policy framework that national governments could choose to adopt as their primary legislation concerning the legal protection of folklore from commercial exploitation (Model Provisions 7). The Model Provisions were my first exposure to legislation aimed at developing binding safeguards for folklore, or cultural products, to combat appropriation. Folklore, as defined here, is a vernacular mode of being and a term used for the designation for artifacts, customs, performances – limitless forms, genres, and expressions. A manifestation of human creativity, it is characterized by, paradoxically, both innovation and traditionality. This is not to poeticize but to recognize the challenge of defining something as abstract and ubiquitous as folklore, especially by the language of law and for the purposes of practical implementation. The project likens to composing a portrait of the wind; how does one define and formalize such a phantasmal subject?

The Model Provisions are authored by a Working Group on the Intellectual Property Aspects of Folklore Protection, convened by the secretariat of UNESCO and the International Bureau of WIPO, composed of "16 experts from different countries invited in a personal capacity by the Directors General of UNESCO and WIPO" (7). The group first met at Geneva in January of 1980. The UNESCO and WIPO secretariats prepared the final, revised draft of the provisions for publication with an accompanying commentary. When citing the authoring body of the document moving forward, I will refer to them simply as 'the Working Group.'

In 1982, WIPO and UNESCO presented the final Model Provisions document to a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore – again assembled by the Directors General – who made final observations and suggestions before formally adopting the document called "The Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions" (8). The Model Provisions comprise three core components: a set of introductory observations; the provisions themselves, as adopted by the Committee of Experts, which entail fourteen articles of one to four clauses apiece; and the final commentary, prepared by the Secretariats. Each of these elements reveal crucial insights into the ideological and political forces which shaped the provisions and their development, and which continue to inform intellectual property policy, operations, and discourse at the international level today.

The Provisions themselves are multifaceted and ambitious, but it is a simple enough premise that I may summarize them here and strike the heart of it. The prospective laws were designed to empower both nations and localized communities by providing them with administrative rights over their own folklore (9); the proposed rights are analogous to those an

author might hold over their copyrighted material. These entitlements center around the community's – or a designated proxy's – authority to deny or grant usage rights to another party seeking to use an expression of folklore in a commercial, non-traditional context (10). For instance, if a recording artist wished to publish and market their recording of a traditional folk song, and that song had been formally attributed to a particular community, the artist would in this case be required to submit an application requesting permission to commercially distribute their production of the given song. Given the abundance of notorious cases involving Western popular artists sampling ethnomusicological field recordings of indigenous or non-Western traditional musicians without requesting permission or providing compensation, this scenario is an adequate postulation (Rees 137).

The application would, ideally, go directly to the community or a representative committee. This adjudicating party may elect to require a fee as well, which would be allocated towards the benefit of the source community (12). The Provisions also establish a number of punishable offenses centered around foregoing the application process; failure to acknowledge a source community; the prejudiced misrepresentation of expressions of folklore; and other appropriations deemed exploitative or potentially damaging (11), The Authoring Group (whom I will address shortly) designed the Provisions to meet the swelling demands of several nations, primarily non-Western, newly-independent, and postcolonial states, for whom the liberal, privatizing, Eurocentric principles of Western intellectual property law were incongruent and predatory ("Recent Developments in Cultural Heritage Law" 62). This history and context of creation will be detailed in the second chapter.

At first blush, the Model Provisions drew me to imagine their actualization under the greatest of circumstances – unilateral ratification by the member states of UNESCO and WIPO,

and ideal implementation by said states. The promise of such a legislative instrument – an international framework for the protection and management of cultural materials that have been plundered and misappropriated interminably – prompted me to investigate the Provisions further. Ultimately, I confronted a much larger infrastructure, bound in international law, of colonial extraction, appropriation, and enclosure – a sprawling, Goliath system that the addendum of such Provisions could not begin to redeem. I then began to trace the decades-long Sisyphean project of developing legal safeguards to prevent the incessant pillaging and expropriation sanctioned and systematized by the global intellectual property regime.

While I have used this introduction to offer a brief overview of the Model Provisions and recount the beginnings of my inquiry, I leave the labor of providing a proper historical and theoretical context to the pages to come. Chapter Two of this text is largely explanatory; in it I detail the legislative history of the Model Provisions and cultural property protections more broadly; outline the scope of cultural property, particularly as it is delimited in the World Intellectual Property Organization (WIPO) today; illustrate the damages of appropriation; historicize Western intellectual property law; and bring into relief the Eurocentric, colonial operations of the global IP regime, including its discriminatory attribution of innovation and distribution of subjectivity. Cultural property refers to patrimonial cultural forms and resources. It is not a concept easily delineated, but, holistically, I conceive of these communal resources as cultural memories: contained in a people, their landscape, their creations and knowledge, artifacts and traditions. I define this and other key terminology in a more technical capacity in the second chapter.

Chapter Three is devoted to my analysis of the Model Provisions, in which I explore the policies of the text in greater detail, consider the document within the political and discursive

dynamics surrounding cultural property and intellectual property rights at the time, and offer my assessment of the proposed legislation and its reasoning, as articulated by the supplementary commentary. I argue that the Model Provisions fail in their purposes and are ultimately a counterproductive technology of modernization.

In Chapter Four I chart cultural property discourse and policy today, surveying the state of international negotiations, state legislation, and alternative means of protection, to consider the trajectory of this de-colonizing project over the past four decades and how this might inform efforts moving forward. I suggest that the negotiations of the IGC are a Sisyphean task, relegated to a powerless forum within a larger colonial construct, and that the Committee's efforts would be best directed towards alternative means of working towards the goals of *demandeur* countries and traditional communities.

This text presents a focused retrospective of the 1982 Model Provisions and their legacy after forty years of continued endeavors or attempts develop a substantive instrument for effectively protecting cultural property, or heritage, with the (theoretically) immutable force of binding law. I hope that this project provides a revealing perspective on the passivity of current operations for international instruments, the colonial architecture and epistemology of current intellectual property regimes, the seismic shift of power and capital posed by the prospect of such cultural property legislation, and alternative methods of advancing this rectifying enterprise. While much scholarship has been produced on the booming intangible cultural heritage regime of today, as best embodied by UNESCO operations, cultural property discourse has been notably muted. WIPO operations and the work of the IGC have also been well documented.

To my knowledge, this work is the first to chart the trajectory of cultural property discourse and international negotiations over the past forty years, setting the 1982 Provisions as its starting point and the contemporary state of the IGC as its endpoint. Perhaps the long-plateaued course of progress that this process brings into relief will help to reanimate cultural property discourse in light of the bleak forecast implied by this current path, and motivate interested parties to reconsider the current formulas for affecting change. Above all, the pursuit of protected cultural rights, whether analogous to IP entitlements or some other form and mechanism entirely, should not be conceded. My intention in this thesis is to contribute to the development of a pluralistic understanding of property and creativity that must ultimately be reflected in international law.

List of Abbreviations

CBD	Convention on Biological Diversity
GRs	Genetic Resources
ICC	International Copyright Convention
ICH	Intangible Cultural Heritage
IGC	Intergovernmental Committee
ILCs	Indigenous Local Communities
IP	Intellectual Property
IPRs	Intellectual Property Rights
MPs	Model Provisions
NGO	Nongovernmental Organization
TCEs	Traditional Cultural Expressions
TK	Traditional Knowledge
TMK	Traditional Medical Knowledge
TRIPS	Trade Related Aspects of Intellectual Property Rights Agreement
UN	United Nations
UNESCO	United Nations Educational Scientific and Cultural Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

CHAPTER II

A SYSTEM OF EXTRACTION

This chapter is to provide the basic architecture for the remainder of the text. Having introduced the featured document of this thesis, the *Model Provisions for the Protection of Expressions of Folklore from Illicit Exploitation and other Prejudicial Actions* in the previous section, I use this chapter to examine key concepts and frame the document within the political history and international discourse of cultural property, particularly as it relates to intellectual property rights (IPRs). Finally, I foreground the Eurocentric and colonial operations of global intellectual property regimes. The chapters to follow will draw upon the terraforming done here, which must begin by establishing the breadth and stakes of cultural appropriation.

Weighing The Damages

Disputes of cultural appropriation are so often legally and discursively irreconcilable for several reasons. Firstly, it is not feasible to accurately quantify the damage incurred by instances of cultural appropriation. Beyond economic considerations, intrinsic losses suffered by the source community are neither practically demonstrable nor empirically verifiable. In 1984, a staff photographer for the *Santa Fe New Mexican*, Michael Heller, captured a series of images of a private ceremonial dance of the Santo Domingo Pueblo by flying over their settlement at a low altitude. Photographs from the trespass were published on two occasions, in both cases labeling the event as a 'powwow,' a designation to which the charges referred as "denigrating and highly offensive" for Pueblo members ("Photos of Tribal Ritual Prompt Suit"). The Pueblo pressed charges, citing a violation of the Pueblo's ban on photography and invasion of privacy, among other alleged offenses. Nonetheless, the Santo Domingo community lacked a means to make

actionable or rectify the gravest transgression: the violation and commercial reproduction of a sacred, religious ritual (Scafidi 103). Detailing the incident, legal scholar Susan Scafidi writes the following of the potential damages of appropriation upon a source community:

> "Experiences like that of the Pueblo of Santo Domingo represent the worst-case scenario for cultural appropriation, a situation in which external use or copying of a cultural product may harm or destroy the intangible aspects of the original. The cultural value or message embedded in the product may be diluted or eliminated; in the extreme, public identification of the source community through the cultural product may disappear altogether as the item becomes generic. Within its community of origin, the cultural product may cease to be efficacious or to instantiate collective values (103).

When such expressions are jeopardized by incidents of appropriation, the source community not only faces threats of global misrepresentation due to the hijacking of its cultural production, but a greater existential loss is made possible in the form of alienation from its own culture, an ever more looming threat in a globalized world. By 1948, anthropologist A.L. Kroeber had written his observations on this form of cultural diffusion, specifically noting that once a dominant culture – the object of Kroeber's analysis here being White American culture and its myriad elements lifted from alternative communities – has accepted and embraced an outside cultural form, the original source is swiftly suppressed and purposefully downplayed until it is altogether forgotten (Kroeber 257). One need only look at the legend of the 'Mound Builder' race in America, and the racism behind the reattribution of Indigenous landscapes to a fictional community, to see this behavior boldly instantiated (Timmerman 88). As Timmerman says of the still ongoing narrative dispossessing Native Americans of these ancient sites,

> These modern Mound Builder myths follow a similar pattern as the early nineteenth century arguments, and have presumptive roots in American or even biblical exceptionalism. Each one of these modern arguments denies a clear connection of these spaces to American Indians, thus muddying the historical narrative of Indians and their significant place within broader American history (88).

These are the standard, often colonial, power relations of appropriation, and a telling instantiation of the overt will to sever source community from cultural product.

The naturalization of foreign expressions within borrower cultures and the dislocation of an expression from its origins contribute to the deprivation of communities from what was once their heritage (Fish 192). This threat prompts questions and concerns of cultural rights, an often referenced but rarely articulated 'right' expressed in state and international legislation. If communities do indeed have a natural right to their culture and heritage, then appropriation is perhaps the greatest hazard to its inalienability, and one to which it is routinely exposed. But, as has been shown to be the case with collective rights in general, cultural rights – which are largely exercised at the communal level – are not readily enforced or operationalized within modern Western legal frameworks ("Cultural Heritage Law" 60).

Folklorist Jason Baird Jackson is one of many scholars who have developed prospective typologies of appropriation in order to work towards a classificatory language for general models of cultural change as a heuristic which might be applied to cases as they are processed and negotiated in legal and cultural spheres ("On Cultural Appropriation" 79). A codified typology would benefit discourse addressing the regular flow of controversies that arise from appropriative activities. Jackson distinguishes cultural diffusion, in contrast to cultural appropriation, as applying to "cases in which all parties (to the extent that we can speak approximately and theoretically about "all" parties) are pleased with or indifferent about the transmission" (82). Cases of appropriation, then, are specifically sites of contestation. Additionally, in accordance with Jackson's system, parity in the power relations between parties characterizes cases of diffusion, which often occur via a piecemeal process of bidirectional exchange, in contrast to appropriation (87).

Considering the History of the 1982 *Model Provisions*

As mentioned in my introductory chapter, the 1982 *Model Provisions for the Protection of Expressions of Folklore from Illicit Exploitation and Other Prejudicial Actions* was cosponsored by the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO). The text was to provide state governments with a legal framework for instituting intellectual property protections for what the document terms 'expressions of folklore.' This was but one product of a long line of similar legislation produced by these international organizations for the purposes of integrating folklore into intellectual property law, a response to African and South American states' various attempts at accomplishing the same objective on a national level. To understand the context in which the Provisions were composed, I explore here the pivotal drafting efforts by which it is predated: the inaugural policy works of UNESCO and WIPO concerning folklore protections, which established the legislative tradition in which the central text of this inquiry was formed.

Early Efforts and Key Categories

In the 1960s and 1970s, UNESCO and WIPO began drafting a series of model provisions in response to major revisions of the Universal Copyright Convention (UCC) and the Berne Convention for the Protection of Literary and Artistic Works, the former sponsored by UNESCO, and the latter by WIPO. The revisions to these two principal copyright conventions were made specifically with "developing" and newly-independent nations in mind, but they in turn demanded significant revision of national legal codes in order for these 'developing' nations to come into full compliance (Provisions 4-5). Prior to the Berne Convention, a result of multiple

diplomatic conferences hosted by the Swiss Federal Council from 1884-1886, no treaty existed for the international protection of copyrighted materials. The Convention mandated that signatory states provide equitable protections to authors from other member countries as their domestic copyright law provides to national authors; domestic law was also required to comply with minimum unilateral standards concerning authors' entitlements ("The Constant Muse" 16). Folklorist Valdimar Hafstein notes the predominantly European makeup of the pioneering international treaty, and how this was accounted for by its colonial membership:

> The Berne Union was an exclusive club to begin with: very few countries in what is now referred to as the Global South were among its original members. The convention's reach was extended, however, by Article 19, the "colonial clause," which gave imperial centers the right to include their colonies and protectorates. Having wrestled their sovereignty from the colonial powers, newly independent states in the 1950s, 1960s, and 1970s were therefore "required to affirm (or denounce) their loyalty" to the Berne Union by declarations of "continued adherence (16-17).

At the Stockholm revision conference in 1967, the development of an amendment to the Convention for the protection folklore was tabled as a central point of deliberation. Granting folklore copyright-esque protections by such an unprecedented provision would have immediately cast several copyrighted works derived from folklore into precarity; the proposal was met with pushback and never gained substantive traction; ultimately, the Stockholm conference was characterized as a disaster (17).

In 1964, a committee of copyright experts convened in Geneva to craft a model copyright law for adoption across sub-Saharan Africa, and over the following decades UNESCO and WIPO sponsored or co-produced a series of such model laws, in time widening their scope from the African continent to all states designated as "developing" ("Committee of African Experts to Study a Draft Model Copyright Law"). These model laws were intended to accommodate what was seen as a greater dependence upon folklore in the non-Western, "traditional" world by

explicitly incorporating it into copyright legislation (“Cultural Heritage Law” 64). The legislation simultaneously served the alternative purpose of bringing these countries into compliance with major international copyright conventions (Tunis Model Law On Copyright for Developing Countries 3). By the drafting of the 1982 provisions, several countries had made efforts at developing legislation protecting folkloric property at the national level, primarily by manipulating copyright law, and integrating such policy within international IP negotiations (Model Provisions 4).

Critical legal and critical race studies scholar Boatema Boateng remarks that this effort to incorporate folklore into copyright law challenged conventional Western binaries of private and public goods: “These provisions ran counter to the standard view in intellectual property law that folklore belonged in the public domain and was therefore free for the taking. The model provisions lent valuable support to the premise that such cultural products should be subject to protections similar to those afforded by intellectual property law to other kinds of cultural production” (Boateng 154).

The supposed “developing” countries have historically been most active in efforts to reconfigure this standard view of intellectual property. Contingencies of African and Asian states have used their collective influence for decades to continue discourse surrounding cultural property in the form of TCEs (traditional cultural expressions), GRs (genetic resources), and TK (traditional knowledge) (“Cultural Heritage Law” 62). However, enforceable international protections remain limited as a result of colonial, “developed” countries firmly opposing giving legal credence to notions of collective authorship (Oguamanam 315).

Traditional Knowledge and Genetic Resources are typically removed from popular public discourse concerning cultural appropriation, but the two categories of production, both covered

by the Intergovernmental Committee (IGC) alongside traditional cultural expressions, are commensurably vulnerable to piracy for lack of legal safeguards. Status as collectively invented or owned materials binds the three general classifications (TCES, TK, and GRs) within the same legal space, wherein they are marooned from protected domains. To gain insight into the scope of the IGC's reformative undertakings – and those prior of UNESCO and WIPO jointly – and to uncover the breadth of exploitative phenomena against which safeguards must be implemented, it becomes necessary to consider each of these categories independently and examine standard cases of contested ownership within each respective cultural form.

Traditional Cultural Expressions, alternatively referred to as 'expressions of folklore,' are perhaps the most public facing category, and the controversies born of these materials often shape widespread discourse surrounding cultural appropriation. The expressive forms that constitute this category, according to WIPO, include performative and aesthetically centered genres extending from the likes of narrative and song to material forms such as architectural design and handicrafts ("Traditional Cultural Expressions"). The parameters of this expansive – and fairly nebulous – classification, and the significance of its legal positioning, are best understood by means of surveying the disparate instances in which rights to such cultural expressions became disputed grounds, as will be done throughout this chapter.

Historical efforts for the legal protection of folklore have privileged these same genres, though, as WIPO acknowledges, these expressions operate in concert with Traditional Knowledge and Genetic Resources to constitute a people's heritage ("Traditional Cultural Expressions"). The three categories of TCEs, TK, and GRs are convenient umbrella terms within a heritage discourse shaped by Western jurisprudence. Intellectual property instruments are mapped to Western categories of creation: copyright is the domain of artistic expression, while

scientific novelty and invention are allotted to patents (Boateng 8). Remaining forms of IP are distributed to trademarks, trade secrets, and other industrial property mechanisms. Virtually all of these instruments have been recruited in various attempts to protect cultural property in specific instances as well (Morolong). Current typologies of cultural property, particularly in international forums today, are delineated to align neatly with the criteria of copyright or patent protection in order to make these cultural resources legible to the Western rubric of intellectual property. Cultural property, however, is inadequately analogized in this way; doing so necessitates reductive processes of intellectualizing cultural forms that often cannot be understood comprehensively within limited framings as TCEs, TK, or GRs. Cultural products are not serviceably conflated by these means, which are products of a distinctly Western epistemology (Boateng 14). As anthropologist Darrell Posey and environmental lawyer Farhana Yamin write,

> it is difficult to classify indigenous knowledge innovations and practices into categories of intellectual property developed for use by commercial firms in an industrial and secular context because the lines between indigenous, religious, cultural, business, intellectual and physical property are not as distinct or mutually exclusive. For instance indigenous sacred sites are frequently both ecological reserves developed through human knowledge of management and conservation and cultural centres that have both physical as well as spiritual significance (Posey and Yamin 141).

The Vimbuza healing dance showcases the criticality of a holistic conception of cultural property. The dance, practiced by the Tumbuka people of Northern Malawi, was inscribed on UNESCO's list of intangible cultural heritage in 2008 ("Vimbuza Healing Dance"). Proceeding its UNESCO designation, the form was incorporated into heritage festivals in which it was performed as a display of cultural expression. While this formalized performance provided means of preserving the cultural form, which had faced historical oppression as a result of

missionary presences, the action ran contrary to the sentiments of its tradition bearers (Gilman 68).

While the Vimbuza dance was an expression of artistic merit, it was not perceived by its practitioners as an aesthetic display but a functional and actively deployed component of the healthcare system of the Tumbuka people, utilized as part of a diagnostic and treatment process for assorted mental illnesses. UNESCO's festivalization of the community practice, which interpreted the form purely as a traditional expression, independent of its medicinal services, ultimately did more to delegitimize the cultural object than protect it. This alienating reconfiguration of the dance proved to benefit the regional opposers and oppressors of the form more than its practitioners ("Learning to Live With ICH: Diagnosis and Treatment" 146). Herein lies the dangers of segregating traditional expression, typically conceived of as deriving its value from artistic and aesthetic merit, from other cultural systems.

This principle of holistically approaching cultural property is likely another governing factor informing the IGC's efforts towards an expansive scope of policy development. By grouping TCEs, GRs, and TK, and working towards drafting equitable and cooperative legislation for the respective categories, the Intergovernmental Committee (IGC) of WIPO partially mitigates dangers of stripping cultural objects of meaning and value or otherwise dislocating pieces of a community's cultural matrix. The IGC openly acknowledges the indissoluble relation between TCEs and TK as well, writing the following in a 2004 statement of core objectives: "This approach is accordingly compatible with and respectful and supportive of the traditional context in which TCEs/EoF and TK are often perceived as integral parts of an holistic cultural identity, subject to the same body of customary law and practices" (Overview of

Policy Objectives and Core Principles 12). But these components are by no means comprehensive or total.

Though cultural products might be essentialized enough to be shoehorned into one of these categories, it is often at the expense of cultural context. For example, Ghanian kente cloth, as a cultural product, cannot be reduced to its aesthetic pattern, or to its traditional production processes; these two identifiers, however, signify the constructs of both TCEs and TK, and this is without considering the material fabric with which it is made, the medium of the cloth itself – another integral component of the product (Boateng 55). Boateng writes that, "The social value of cloth in Ghana is such that the legal separation of cloth from its designs not only fractures such cultural production but also highlights the fragmentation inherent in intellectual property law" (62).

Unincluded elements such as communal histories, lines of apprenticeship, language, and physical landscape also inform a holistic understanding of cultural property; each form depends on engagement with and contextualization within a larger cultural framework. As Sita Reddy, a cultural sociologist of science, writes in her analysis of ongoing efforts towards the cultural documentation of traditional medical knowledge (TMK), "Focusing on a single system of medicine illustrates how matters that seem monolithic can often reveal a surprising complexity, even multiple pluralities, on the ground" (Reddy 164).

Diverging Operations: Intangible Cultural Heritage and Cultural Property

It is worth noting that the term 'folklore' is no longer a part of the policy discourse of either WIPO or UNESCO. UNESCO has turned its efforts to 'intangible heritage,' particularly following the 2003 Convention for the Safeguarding of Intangible Cultural Heritage (the heritage

movement will be addressed later in this chapter). Meanwhile, WIPO has relegated its efforts surrounding cultural property to its Intergovernmental Committee (IGC), an international forum which negotiates the crafting of legal instruments for the protection of Traditional Cultural Expressions (TCEs), Traditional Knowledge (TK), and Genetic Resources (GRs) ("Intergovernmental Committee"). WIPO's pivot away from 'folklore' as a central legal term was a sensible political maneuver; folklore has historically factored into propagandizing, nation-building agendas (Baycroft and Hopkin), and the term itself has assumed sharply negative connotations in several countries, with several European institutions having renamed educational and archival programs to omit the stigmatized term (Rogan 601).

This raises a larger semantic issue, one which is best addressed at the outset. While I, at times, engage Eurocentric language and binaries of "modern" and "traditional," "developing" and "developed," these terms are provisional, often fitted to discuss extant legislation with terminology concordant to that used by the authoring party and the epistemological framework in which they operate. The same may be said of "folklore," a notion born in nationalist sentiments, a term used as a pejorative in several countries, and a poorly received designation in others when applied to, or imposed upon, the cultural production of a community (Dundes 86). Those who challenge diagnoses of 'folklore' imposed upon their culture do so with warrant; the discipline, in its Enlightenment and Romantic era beginnings, concerned itself with recording the fading antiquities of peasantry before their presumed obliteration in the wake of encroaching industrialization and urbanization ("The Social Base of Folklore" 601).

While the discipline has evolved well beyond the problematic antiquarianism of its nascent stages, for those outside of the scholarship it may understandably remain associated with its autopsic (characteristic of an autopsy) origins. The same shadows loom today over the

discipline, and the designation of "folklore" in particular, that William P. Murphy detailed in 1978:

> It [folklore] sets up a derogatory distinction between oral and written forms of literature: calling the former folklore invokes connotations of something simple, crude, and less "civilized." These negative associations in the word "folklore" have adhered to the term throughout its intellectual history. Although professional folklorists argue that they use the term technically without these associations, it is an unavoidable fact that nineteenth century ethnocentrism weighs heavily on the term in its present-day usage (Murphy 114).

While one can attribute these frictions to misconstructions of the concept of folklore and its entailing discipline, historical precedent has contributed to the term being often interpreted by communities as a delegitimizing and reductive misattribution of living cultural artifacts. There is no definitive meaning of folklore codified in scholarship, but popular conceptions are particularly obstructive of its definition. I employ the term with regularity in Chapter Three in order to operate within the language of the Model Provisions, so I will further address the task of defining folklore as I discuss the Working Group's approach to delimiting the cultural production eligible for protection according to the drafted policy.

It becomes inescapable that designation as folklore, for some tradition bearers, carries derogatory connotations beyond the base sterilizing objectification characteristic of Western institutional and academic language *toto caelo*. If a contingent of folklorists were to academize narratives of Christianity within the language and framework of mythology – myth being often used idiomatically as a reference to falsehood – one can imagine that this would also be met with some measure of hostility or dispute by a community of practitioners. "Folklore" enjoys as much, if not more, circulation within non-institutional, popular discourse as it does within academic dialogues; this is another cause of the disparity in its conceptions. Within vernacular contexts, it is often characterized by archaism and irrationality, associated most closely with genres of superstition and legend.

Other scholars refer to indigenous local communities (ILCs) to identify groups whose cultural production is kept in precarity by current IP regimes, but "indigenous," much like "folklore," is not always well met by referents. Having been deployed almost exclusively to refer to non-Western communities, "indigenous" has been scrutinized for naturalizing Western, Eurocentric cultural production (Boateng 12). My general predilection for 'traditional' as a delineating term is equally flawed in reifying "modernity" as it is constructed by colonial powers and positioning that which is "traditional" as its antithesis. Philosopher Paulin Hountondji argues instead for the less connotated "endogenous" when referring to the internal production of such communities and I will adopt the term as well to compliment and nuance my use of "traditional" (Hountondji 18). These questions of terminology may appear pedantic, but, beyond addressing reductive and generalizing designations for the diverse communal bodies subject to the current inequities of which I am writing, they gesture towards the larger challenge of rendering alternative communities and their cultural property legible while operating within Western epistemologies and Eurocentric categories.

I refer to both heritage and cultural property interchangeably at times in this work, yet, despite this decision, I accept the contrasting definitions of these concepts set forth by Hafstein and Skrydstrup (Hafstein and Skrydstrup 10). And so it is important that I clarify what is meant by heritage in this context. The two terms have been operationalized differently over the past decades and developed into alternative regimes and discourses. Heritage and cultural property virtually never appear in legal texts simultaneously or in a complementary manner (10). Cultural heritage is standard place in designation and protection efforts that act to sustain singular cultural artifacts, tangible or intangible, via institutionalizing efforts, public projects within the realm of festivalization, cultural programming, public arts development, and

international recognition of heritage items on classifying instruments, such as UNESCO's World Heritage List or the Representative List of the Intangible Cultural Heritage of Humanity ("Seven Years of Implementing UNESCO's 2003 Intangible Heritage Convention" 243).

Heritage does not adopt a rights-based language, but an ethics-based rhetoric to incentivize state and community level organizational efforts through international recognition (Hafstein and Skrydstrup 10). Even within this single discourse, though, divergent and politicized definitions have emerged to serve separate, in fact opposing, purposes. One conception that has been instrumentalized as a counternarrative to state- or community-level heritage movements is the notion of a single universal heritage (*International Cultural Heritage Law* 4). In 2003, the same year of UNESCO's Convention for the Safeguarding of the Intangible Cultural Heritage, nineteen museums signed The Declaration on the Importance and Value of Universal Museums. The declaration, responding to calls of restitution and repatriation, took the position that a 'universal' museum exists for the people of the world – an encyclopedia of global culture. James Cuno, a chief curator of the J. Paul Getty Museum, asserting his preference for world heritage even more aggressively than the Convention, held that the recent development of national heritage and cultural property policies and UNESCO conventions amounted to nationalist movements (Hafstein and Skrydstrup 1). I will revisit repatriation discourse in distinguishing between heritage and property regimes, but this example suitably embodies the neo-Enlightment conception of heritage as supranational in nature – a holistically valued heritage of humanity, which happens to be predominantly housed in Western institutions.

Typically, heritage operations occur at the community level, though international organizations like UNESCO are interacting directly with the state, as representative of all communities situated within its boundaries. Safeguarding efforts sanctioned by UNESCO and

the state generally assume organizational efforts of a distinctly Eurocentric form. The state initializes efforts like this by institutionalizing the designated form and centralizing authority over its correct utilization, modernizing tactics that are often at odds with indigenous conceptions of authenticity and ownership ("The Judgment of Solomon: Global Protections for Tradition and the Problem of Community Ownership" 28). Several valid criticisms have been brought against these Western frameworks of management, the politics of obtaining designation, and the estrangement of communities from their expressions and traditions that has continually occurred through heritagization. Folklorist Barbara Kirshenblatt-Gimblett has outlined the metacultural relationship that is formed in designating an artifact as heritage, a process which also typically entails projects of museumification and commercialization, often operating within tourism industry spaces (Kirshenblatt-Gimblett 369).

These criticisms concern a discourse alternative to the focus of this thesis, but with protective efforts in their current bifurcated state, converging and splitting by the force of these two reformative currents, it is essential to define each regime by light of the other. Hafstein and Skrydstrup delineate the two – cultural property and cultural heritage – according to the manner in which they are instrumentalized; the authors classify cultural property as a "technology of sovereignty" and cultural heritage a "technology of reformation," arguing that the terms correspond to distinct governmental rationalities and modes of subject formation (10). While this partitioning is, in my opinion, a warranted and accurate clarification of the often conflated terms, the two contrasting modes of patrimoniality both remain patrimonialities nonetheless, and the objects and subjects of these patrimonialities are mutual. For this reason, when discussing the concepts themselves rather than their respective regimes, discourses, or instrumentalizations, one may safely essentialize the terms into one construct which may be referred to interchangeably as

both cultural property and cultural heritage. A people's heritage entails the same forms and expressions that constitute their cultural property, in theory if not in practice.

Having said that, in examining what makes cultural property a technology of sovereignty and cultural heritage one of reformation, one strikes at the foundational philosophical distinctions driving the two regimes, which, in their disparity, justify the efforts made in segregating the entangled terms. Cultural property typically denotes a rights-based claim to a cultural product by its source community, and it concerns the conferral or contestation of *ownership* (Skrydstrup 521). In cases of repatriation, it is the language often employed by countries asserting their right to a lost artifact created by or once belonging to them, in other words asserting claim to an item recognized as heritage by its source community. Nations and institutions rich in artifacts exported, legally or illegally, from their originating countries, justify retentionist policies with language of universal heritage and global cooperation, as has already been seen in the language of the Museum Convention (*International Cultural Heritage Law* 12). It is when these respective discourses of property and heritage are translated into policy that key distinctions become their defining and principle qualities.

Cultural property, as Skyrdstrup writes, refers to both a "discursive register, involving codified rights, enabling and hindering communities and nations to make claims in the name of culture, and an institution dedicated to the rights of distribution and allocation of tangibles and intangibles" (521). It is commonly characterized by notions of value and possessorship, in addition to being, as Jordanna Bailkin notes, a "finite, irreplaceable, depletable, scarce, and non-renewable resource," often guided by principles of "natural right" (Bailkin). Cultural Property work typically operates in the realm of intellectual property rights and other enforceable legal means at both state and international levels (Aragon 16-19). Cultural heritage, as it is

operationalized today, maneuvers in language of custodianship and sharing, though, as noted, its institutionalization often results in the centralizing of cultural authority within a community. Janet Blake writes that heritage "refers to an inheritance received from the past, to be held 'in trust' by the current generation (that may enjoy its value in the present) to be handed down" (*International Cultural Heritage Law* 7). Heritage policy is thus developed for purposes of preservation and community support, often by means of international recognition and institutional initiatives.

Hafstein and Skrydstrup compare heritage *at large* to cultural property as dual technologies, bug these classifications are far broader than the production with which intellectual property rights are concerned. Dominant cultural property categories of traditional cultural expressions – or folklore – and traditional knowledge are most closely associated with intangible cultural heritage (ICH). UNESCO's pivot away from cultural property as a technology and the development of alternative IPRs in recent decades is marked by an embrace of ICH as a mode of heritage representative of intellectually derived materials. Discourse surrounding intellectual property rights focuses on the immaterial, so while the principles of both technologies remain the same, and though I often refer to heritage without noting the qualifier of intangibility, it should be clarified that the nearest analogue to cultural property, as it exists within the IP regime, is ICH. I will also provide examples of material heritage/cultural property over the course of this text.

UNESCO's work has shifted its operations over the past decades towards heritage-oriented agendas, primarily built around its heritage lists. Recognition of heritage on such an international list is actively pursued by states for both political and economic incentives, but it does not produce enforceable protections; these lists are "intended primarily as an awareness-

raising mechanism and as an encouragement to states (a) to become parties and (b) to be active in applying the Convention's obligations" ("Seven Years of Implementing" 292). UNESCO's spotlight acts as a tool in fostering the metacultural relationship between a community – and state – and its heritage, invoking attitudes of responsibility as tradition bearers and custodians of singular cultural forms. Tracing the social and cultural ramifications of UNESCO designation, as folklorist Leah Lowthorp has done in the case of Kutiyattam in Kerala, India, reveals the uneven dimensions of surging pride and aggrandizement that results from such international recognition at both community and state level, and the intercommunal dissonance and marginalization as a result of the reorganization of authority caused by UNESCO and state-level intervention (Lowthorp 25-28).

Cultural property operations, conversely, involve the development of legislation for the purpose of redistributing ownership and control of cultural forms by authorizing the state, source community, or some alternative authoritative body as the legal proprietor and manager of a group's cultural property. These directives -- more fiercely contested, as I shall discuss – are more absolute in their empowerment of source communities and the autonomy over cultural resources with which they are conferred (Hafstein and Skrydstrup 14). This objective is pursued through several legal channels; the most well-tread legal grounds that have been explored extensively for the protection of cultural resources lie within the domain of intellectual property rights ("The Politics of Origins" 301). At the national level, postcolonial states such as Ghana, Panama, Vanuatu, and Indonesia have authored and developed IP laws that manage the ownership and utilization of folklore (Model Provisions 4). The World Intellectual Property Organization has continued to be a key forum for the cultural property movement at the international level (Robinson et al. 3).

Understanding Intellectual Property

The movement towards utilizing intellectual property rights became increasingly accepted by states during the 1980s, prompting UNESCO and WIPO to next convene a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore, which resulted in The Model Provisions for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1982), the focus of this analysis. As Lorraine V. Aragon explains, "Before the 1980s, the international legal community considered copyright law unsuitable to regulate or protect works of folklore… Of scant commercial interest, often easily replicable, and rarely claimed in proprietary language, lawyers had trouble recognizing the relevance of most non-western or traditional arts, much less declaring them cultural property under human rights law" (Aragon 16). Attempts at developing IP rooted mechanisms for the protection of TCEs, TK, and GRs continue today. On the international stage, WIPO facilitates these discussions through the IGC. Wend B Wendland, director of the Traditional Knowledge division at WIPO, writes that

> discussions within the WIPO committee address among other things, the possible recognition of enforceable IP-type rights in communally developed 'traditional knowledge' systems and artistic expressions that are currently guarded by IP law as 'public domain.' Measures to control the gaining and exercise of conventional IP rights over creations and innovations derived from or based upon [GRs] and [TCEs] are also under discussion ("Intellectual Property and the Protection of Traditional Knowledge and Cultural Expressions" 327)

The diverse means of potentially instrumentalizing IP for these purposes, and the challenges which have haunted these efforts for decades, shall be explored further in this chapter. In order to best understand the dynamics of trying, as legal scholar Chidi Oguimanam says, to "force the

square peg of TK into the round hole of the Eurocentric intellectual property model" (Oguamanam 311), the history, structure, and ideology of intellectual property law must first be brought into relief.

Intellectual Property law, as it is globally instituted today, betrays a distinctly Western genealogy. It is a relatively young legal field, formed by European Enlightenment and Romantic era thinking, establishing what James Boyle refers to as the 'myth of the author' (*Shamans, Software, and Spleens* 98). Legal scholar Susan Scafidi maps these intellectual movements to the character of modern IP law: "From its Romantic ancestry, intellectual property derives an emphasis on individual genius. From its Enlightenment parentage, it inherits a tremendous confidence in the ability of the rational mind to create, to solve, to progress, to assign value" (Scafidi 11). In examining the disparate treatments of individual versus collective authorship in IP law, it is unambiguous that the system privileges the notion of the solitary genius.

There are certain notable exceptions, for as Posey and Dutfield write, "In the twentieth century, modern societies are increasingly dominated economically by corporations that employ researchers and inventors. As a result, the [IPRs] often go not to individuals but to the corporations, government agencies, or universities that employ them or fund their research" (76). This courtesy, however, only extends to incorporated groups, as, in the United States and other 'modern' countries, a corporation may be granted the status of personhood in the eyes of the law (Boateng 9).

Intellectual property laws and rights concern information, expressive forms, and otherwise intangible products or abstract elements deemed a work of creativity, distinction, value, and utility. To draw from WIPO directly, "Intellectual property (IP) refers to creations of the mind, such as inventions; literary and artistic works; designs; and symbols, names and

images used in commerce" ("What is Intellectual Property?"). IP laws govern privileges of authorship by regulating the ownership and exploitation of such works in several diverse fields of industry and artistry (Boateng 7). It is primarily a means of granting limited monopolies, purportedly in order to economically incentivize creativity and innovation, ensuring the continuation of scientific and artistic enterprising (Scafidi 11). The US patent office states as much on their website: "At the U.S. Patent and Trademark Office, it is our job to make sure that American innovation and creativity continue to flourish" ("Copyright Basics").

Drawing from Locke's theory of intellectual property in particular ("The Politics of Origins" 305), IP recognizes a right to ownership arising from the individual expenditure of labor and the right of the laborer to the product of her work. Locke writes that "The labour of his body and the work of his hands, we may claim, are properly his. Whatever he has taken from the states that nature has given and left it in, he has mixed his labour with it and joined something that is his own to it, thus making it his property" (Locke 18). In applying labor to a public or natural resource, the 'raw material' of the commons, in other words, the finished product of one's toil and innovation belongs to the laboring individual, and the government in turn must acknowledge and enforce this natural entitlement, according to the Lockean theory. This philosophical framing of intellectual property supposes the individual to be the sole agent of laboring, creating, and possessing. As Boyle states, "at its base is the conception of the romantic author impressing her uniqueness of spirit on the work at the moment of writing. It is that expressive choice, not the facts or ideas on which the work is based, that copyright covers" (*The Public Domain* 163). The narrative or formula of property creation also plainly dichotomizes natural resources as a common right and that which arises from the individual's application of labor to these materials as private property. The individual is thus the agent of property creation,

and her labor is the interface by which common resources are converted into possessable goods

Decades of expanding global trade have accelerated the dispersal of intellectual property law (Aragon 15), and the birth of an Information Age has engendered a perspectival shift wherein, across the world, ideas have been increasingly reconceived as wealth-generating assets (Scafidi 11). The digital revolution forever altered the economics of information (Moahi 70). The rhetoric of intellectual property has commensurately spread with these developments, notably into countries for which its philosophical underpinnings are foreign and which lack the legal infrastructure to effectively enact these policies. As the Information Age has developed and cognizance of intellectual property rights has risen, ever more forms of intellectual property have become subject to privatization. The rise of the digital era prompted industrial nations to strengthen intellectual property protections at both national and international levels. In addition to a general expansion and reinforcement of the IP domain, intellectual property enforcement was integrated into sanctions regimes of international trade policy (Sunder 128). It became imperative for nations to adopt a legal framework that adheres to core components of intellectual property law. This international agreement has been administered via legal instruments including the Berne Convention (1896), the World Intellectual Property Organization Copyright Treaty (1996), and, most importantly today, the Agreement on Trade-Related Aspects of Intellectual Property Rights (1995), which will be detailed and considered further in a later chapter.

Intellectual property mechanisms constitute a diverse body of legal instruments; they may generally be divided into two subcategories: industrial property laws and copyright laws (Boateng 9). Copyright laws, generally applied to works of artistry, were the first IP devices by which nations attempted to regulate the utilization of folklore, or TCEs. These initial efforts were made by several African states enacting provisions within their copyright laws to protect folklore

(Boateng 1-2). This led to the development of the Tunis Model Copyright Law by UNESCO and WIPO in 1976; a predecessor of the 1982 Model Provisions, the Tunis Model Law was to be a guideline for states in drafting preventative measures in national legislation addressing the exploitation of folklore (Tunis Model Law 3-4). Traditional communities never themselves elected to allot their cultural production to the public domain – to cast them as the raw materials. Oguamanam describes the colonial logic of locating traditionally owned property as 'public domain': "Colonialism denied the essential humanity of ILCs. Consequently, in the eyes of the Europeans, the capacity of ILCs for intellectual creation and innovation remained dubious. In principle, under the Eurocentric narrative, ILCs exist in "nature." To that extent, they and their knowledge systems were part of the pre-appropriation public domain" (Oguamanam 309).

The imposition of this Western framework means Indigenous and other traditional communities are limited in their ability to acknowledge their own conception of the public domain, shaped by respective customary laws. As Hafstein attests, "Canonized in international law in the nineteenth and twentieth centuries, this Romantic norm [of individual creation] has little patience for cultural processes or with expressions developed in a more diffuse, incremental, and collective manner, where it is impossible to fix specific steps like invention or authorship at a given point in time or to assign them to one particular person" ("The Constant Muse" 18).

As discussed, much – though by no means all – of the ownership within traditional communities operates as a trust, decentralized and custodial in practice, with property being constantly manipulated and advanced by the larger communal network maintaining a natural equilibrium. As Oguamanam writes,

> the process of accessing knowledge [in ILCs] is negotiated under a delicate, complex and layered system ... under colonialism's later-day liberalism, capital and power are the

> determinants of knowledge production and acquisition. But among Indigenous Peoples, knowledge production and access to knowledge is decisively inclusive and participatory, integrating their entire community (314).

Developing a pluralistic, multicultural framework for the public domain within intellectual property law, one which incorporates and accounts for non-Eurocentric conceptions, is one possible means of reigning in the global Westernization of property occurring today.

The challenges of enfolding folklore protections within a copyright legal framing are the core criteria of copyright law itself. There are three principles of copyright and patent law that are largely irreconcilable with the nature of folklore: a work must credit a named author; it must be original; and it must be tangible (Rees 139). To be tangible, in this context, is to be of a fixed form, typically written, recorded, or otherwise inscribed by means of an interface, in other words a tangible medium, so that the work is permanent, unchanging, and reproducible as it is inscribed in this medium. Folklore instead operates by a principle of variation, un-fixedness, as much as one of tradition; expressions are routinely altered, localized, and reconfigured with other expressions and folkloric elements to form new variants. Folkloric expression is fundamentally dynamic, responding to changing environments, cultures, social movements, and political states. This facilitates the continual relevancy of folkloric behavior, allowing it to advance in step with a culture. The transmission of folklore is one critical aspect of this dynamism.

Transmission of cultural expressions has historically been by means of oral exchange. This informal means accommodates, if not necessitates, changes in each performance of an expression, such as a narrative or song. Vernacular culture does not generally diffuse by means of mass publication or commercial distribution but by a community's tradition bearers, and thus its potential codification is severely unnatural and limiting.

Finally, there is the component of originality, or novelty. This might seem to directly oppose the *traditional* aspect of traditional cultural expressions. For some, folklore is by definition "unoriginal," as it has been transmitted and met at least minimal criteria for traditionality. Despite the variance within each performance or manifestation of a cultural expression, such as an aged ballad or a local urban legend, every iteration nonetheless relays a form based in traditional precedents. The distinction between original and not, however, is not so neatly interpreted as Western IP law attests, and the false binary that has been created by the language surrounding originality shall be explored further later in this chapter.

As an instrument developed for incentivizing creation and protecting IPRs at the individual level, copyright length is bound to the lifespan of the author plus, during the time of the Provisions, fifty years (Boateng 58). This period of protection beyond the author's life has been extended in the proceeding decades – arguably at the behest of corporate lobbying – and the incongruity of these finite windows with folklore remains. Folklore, or TCEs, is held by communities and transmitted across generations. Expressions of folklore have endured in cultures for centuries and millennia. Kutiyattam, a UNESCO recognized expression and an ancient form of Sanskrit theatre, has persisted for over 1000 years (Lowthorp 20); if such a form were to be granted copyright protections, the standard duration of such protections would prove far too ephemeral. The requirement of a named originator is equally problematic. Most traditional expressions lack an identified author, perceived instead as a communally owned and practiced item.

As efforts to develop folklore-oriented IPRs continued, drafters began looking outside the framing of copyright and patent laws and considered alternative instruments. Most recently, Geographical Indications (GIs) have been utilized as a means of protecting certain cultural

property from industrial reproducers (Sunder 142). GIs delimit the use of a certain term or symbol in the national or global market to a designated locality or region as a means of protecting the authenticity of such a product from foreign imitations. Many of the earliest GIs were afforded to French regional wines and cheeses in order to protect the name brand value, so to speak, of the local products from foreign competitors assuming the same name and corresponding authority (Stevens 74).

The French government granted Monoï de Tahiti an appellation d'origine – France's GI equivalent – in 1992. Monoï de Tahiti, a cultural product of French Polynesia, refers to coconut oil scented with tiare. As Kate Stevens notes, it was the "first product from a French overseas territory to receive such a designation. This milestone formally recognized and protected the unique environmental and cultural heritage said to be embodied by the oil, together with its claims to ancestral virtues" (70). Stevens adds that despite the purpose of these labels of origin as "a means to protect and valorize traditional landscapes and traditional knowledge in developing nations, the vast majority of protected [cultural products] and most of the related scholarly literature still come from Europe" (70). The instrument has shown promise in particular instances for protecting local commodities from off-site mass production by foreign corporations (95). While GIs centralize a commodity's name to a particular region rather than a community or people, a notable imperfection for groups having undergone relocation and diaspora, it is an acknowledgment of unincorporated collective rights that deviates from standard Western jurisprudence.

The Puzzle of Valuation

The challenge to assessing the damage of appropriation is the abstract worth of forms valued as heritage or cultural property. There is no metric by which to gauge the innate value of

a cultural object; as heritage scholars Laurajane Smith and Natsuko Akagawa write: “All heritage is intangible, not only because of the values we give to heritage, but because of the cultural work that heritage does in any society” (Smith and Akagawa 6*).* What is unmistakable is that heritage is structurally integral to a culture and community, though it must be acknowledged that both heritage and community are regularly politically charged and contested sites as well. Returning to the initial challenge, in order to interpret the worth of such a form or cultural object, perhaps, as Munjeri states: “heritage should speak through the values that people give it and not the other way round” 12). This is the most sensible means of understanding the intrinsic value of cultural property as a force that sustains identity and cultural vitality. But these resources, nonetheless, have very tangible and demonstrable currency as well, and this is made clearest in sites of contestation and cases of appropriation wherein seizure of cultural property has incontrovertible economic consequence for the parties involved. Jean and John Comaroff, in Ethnicity, Inc., remark that “in an increasingly globalized world, cultural expressions have come to stand in for understandings of ethnicity and nationality, both of which subsequently have been transformed into marketable commodities.” This commodification is most prevalent, they continue, in national settings where “the attenuation of other modes of producing incomes has left the sale of culture products, and the simulacra of ethnicized selfhood, one of the only viable means of survival” (Comaroff and Comaroff, 139).

The latent value of cultural property within the international market is difficult to measure. What cultural production will be met with consumer demand is impossible to parse until it has already disseminated widely beyond the source community, often in a commodified form developed by some external Western party. Within the commercial health space, there is vast demand for natural remedies and supplements; the global Ayurvedic herbs market was

valued at $9.5 billion in 2020 according to one market report, with expectations of reaching over $21 billion by 2028. This growth rate, roughly 10% to 20% a year, has continued without deceleration for over a decade (Allied Analytics). As Reddy informs us of the traditional medical knowledge sector, “This, in other words, is heritage played at extremely high stakes; holders of traditional knowledge in the biodiversity-rich South often stand much to lose, and often do lose, against powerful pharmaceutical corporations in the North” (Reddy 167).

Even within settler colonies, including the US, states have developed legislation acknowledging the financial importance of unauthored or collectively attributed cultural production, as in the case of the Indian Arts and Crafts Act of 1990. The act functioned as a truth-in-advertising law and increased civil and criminal penalties for the sale of goods marketed as authentic Native American craftwork (“Indian Arts and Crafts Act of 1990”). The act further empowered the Indian Arts and Crafts Board simultaneously, which was established in 1935 to promote the economic welfare of tribes and individuals through the development and expansion of the market for material products of Native artistry and cultural derivation, in part through the creation and registration of trademarks. Despite the United States’ recent role as a primary antagonist to the legitimization of collective authorship via international protective policy, the nation is responsible for authoring early prototypes for community-oriented certifications of authenticity and implementing legislation to enforceably prohibit the sale of fakelore – traditional cultural production presented as authentic (*Who Owns Culture?* 57). Even colonial nations, such as the United States, cannot deny the criminality of commercial appropriation or the reality of communal rights to cultural property within its own borders.

TCEs such as those protected by the Arts and Crafts Act provide primary sources of income to many traditional communities. When artistically bent cultural property items are

commodified by source community members for external consumership, it is often via cottage industries leveraging local tourism. Sites such as the Portal program in Santa Fe, where Native American vendors sell traditional crafts, or the Jemaa el Fna marketplace in Marrakech, which was to be razed before its heritage designation, provide spaces partitioned for local traditional and indigenous communities to draw meaningful revenue for their TCEs (Evans-Pritchard 287) (*Making Intangible Heritage* 93). The economic boon provided by these enterprises underlines the dangers of Western appropriation of cultural expressions, or folklore, to use its previous designation, a sentiment echoed in Yudice's writing on what Jeremy Rifkin has termed 'cultural capitalism':

> The immaterialization characteristic of many new sources of economic growth (e.g., intellectual property rights as defined by the General Agreement on Tariffs and Trade [GATT] and the World Trade Organization) and the increasing share of the world trade by symbolic goods (movies, TV programs, music, tourism, etc.) have given the cultural sphere greater protagonism than at any other moment in the history of modernity (Yudice 9-10).

When the Santa Fe Portal, as a marketplace for Native artists and craftspeople, was placed into precarity by the arrival of white vendors selling imitative works, the economic sovereignty of the local Pueblo community was threatened.

While genetic resources and traditional medical knowledge have dominated cultural property discourse within international forums, the cultural expressions of a traditional community are not to be disregarded or overshadowed under a false pretense of having lesser economic or intrinsic value to a community. Despite some marginalization in political spaces, the appropriation of TCEs has historically been most prominent in public discourse amongst the three categories because its materials have regularly been mined and repurposed in popular media and consumer goods. Major corporate entities the likes of Disney have constructed

industrial empires by assembling portfolios of appropriated TCEs, comprising borrowed legendry, dance forms, crafts, and designs, to list only a few genres (Belkhyr; Giroux).

Traditional knowledge, within the context of heritage discourse, refers to the shared knowledge of traditional peoples and communities; as a category of cultural property, it is vast in scope and diverse in application. While recent controversies have centered traditional medical knowledge and ethnobotany, traditional epistemologies extend to more deeply varied subcategories: agriculture, craft skills, communal history, local landscape and ecology, technical innovations, and customary practices, to name a few. Scholars have wrestled with developing a consensus definition of the term – WIPO itself holds that no single definition would adequately serve the entirety of the forms of TK within a community ("Traditional Knowledge") – but certain criteria of locality and traditionality are generally accepted. TK is characterized by its transmission within a culture, typically over generations, though this is not to suggest that such a portfolio of knowledge ever exists in a static state. It is generally associated with a particular group or community, and the term is at times used synonymously with indigenous knowledge, the former, however, being broader in its application (Ebermann 12).

Because of the vast utility of certain items of TK, namely remedial knowledge and techniques, dominant cultures have a history of siphoning from knowledge systems at the sight of capitalistic prospects, as Oguamanam observes of the situation today:

> Without regard to understanding the complex customary law jurisprudence and practices of ILCs over their TK, colonial powers and other industrialized countries seek to extend Eurocentric intellectual property jurisprudence to TK. As glimpsed from the work of IGC, these attempts are evident in the very negotiating dynamic and resulting articles or architecture of the continually evolving drafts of all the three working IGC texts (316).

Industrial nations have efforted to delegitimize the sovereignty of TK by means of varied arguments. These arguments at times borrow from the lobbying of universal museums through

justifications of cultural cosmopolitanism – petitioning for open access in the name of universal heritage and multiculturalism – and principles of liberalism (*International Cultural Heritage Law* 12). Concurrently, industrial giants have routinely secured intellectual property rights to many of these cultural artifacts, often a result of the ignorance of a Western patent office and the disinterest of traditional communities in privatizing communal property (Fish 200).

Disinterest is not the only impediment for traditional communities; many non-Western communities have no relationship to the purposes, instruments, or properties of imposed intellectual property systems, a reality confirmed by several international fact-finding missions conducted by WIPO in 1998 and 1999: "Most TK holders consulted had little or no information on the IP system. Many requests were made for more information and for training on the IP system, particularly on options it may offer for the protection of TK for the benefit of TK holders" (Mosimege 98).

Genetic resources are the third and final category of cultural property that falls under the purview of the IGC, the primary forum for developing IP protections for cultural property today. Among the three overlapping and objectifying categories, that of genetic resources is the most urgently contested and controversial of the 21st century. This acute climate can be attributed to the decision to enfold living organisms into intellectual property regimes, rendering life forms ownable (Borowiak 511-12). Political scientist Craig Borowiak describes the most recent international agreements – as found in TRIPS – pertaining to biological property rights, in which "signatory countries became obligated to extend property rights protection to plant varieties. In effect, this means they are obligated to grant state-supported monopolies over the commercial distribution of scientifically engineered seeds. In the shadow of this IPR regime, a virtual seed war has emerged" (512). This new landscape of living property is not limited to plant varieties,

however; by 1997, over 190 pending patents were to be awarded to various corporations and researchers for genetically engineered animals (*Biopiracy: The Plunder of Nature and Knowledge* 20). The precedent was set by a 1980 supreme court decision that determined that a microorganism, which had been genetically altered by Ananda Mohan Chakrabarty, a genetic engineer at General Electric, was patentable because it was not a creation of nature – it was an invention. In Chakrabarty's own recounting, however, he states that "[he] simply shuffled genes, changing bacteria that already existed," a sentiment of which the court was seemingly unaware (*Biopiracy* 19).

This decision has led to a phenomenon of appropriation, known as biopiracy, of the genetic resources and biodiversity cultivated and developed by traditional communities – most notably resources of agricultural and medicinal purposes. This biological production has generally been developed over generations of refinement. It is often properly utilized only by means of local traditional knowledge systems (Ebermann 13). The current legal and political subtleties of genetic resources as a category of cultural property will be further explored in later chapters. For the time being, it is worth introducing two more complicating factors to the patenting of life: the endangerment of traditional agricultural practices within farming communities; and the lack of individual innovation required for propertizing genetic materials. Borowiak has written extensively on the former issue:

> For many farmers in developing countries, however, the expansion of IPRs to include plant varieties marks a departure from traditional practices and beliefs and poses a threat to their autonomy and established ways of life. Many are concerned about the implications if multinational agribusinesses are able to use IPRs over bioengineered seeds to legally prevent farmers who use the new seeds from reusing and trading seeds collected from their own fields, practices especially crucial for communities of small farmers who depend on small batches of traded seed to adapt to changing land conditions (512).

Patents extend to twenty years of coverage, which allows protections to hold over generations of life. Small farming communities have historically exchanged seeds and used the progeny of these seeds as a means of affordably maintaining production, but this practice is no longer legal for those buying seeds bred by corporations who have patented their engineered hybridizations; exchange of seeds constitutes theft under such conditions ("The Future of Food: Countering Globalisation and Recolonisation of Indian Agriculture" 719).

Often these biotechnological organisms are not themselves capable of regenerating life. Activist and scholar Vandana Shiva has written extensively on this watershed legal decision and the ensuing expansion of IPRs into biological resources. Shiva confirms that "the biotechnology revolution robs the seed of its fertility and self-regenerative capabilities, colonizing it in two major ways: through technical means and through property rights" (*Biopiracy 46).*

Another of Shiva's major criticisms of intellectual property regimes and the incorporation of GRs is that Western corporations and researchers are awarded patents on crucial resources, from the neem plant to genetically altered soya beans, for merely 'tinkering' with biodiversity that has been cultivated over generations to meet certain ends and often require the operations formed within traditional knowledge systems to be harnessed properly (*Biopiracy* 71). These operations, along with the genetic material formed by natural and communal processes, are dismissed as 'raw materials,' while the relatively arbitrary genetic reshuffling conducted by Western entities regularly merits patent protection on the basis of novelty and innovation. The same corporations who claim these patents, when faced with public scrutiny over the unnatural character of GMOs, often refute the logic of their own patents by insisting that such products are in fact natural in essence (22).

Finally, genetic resources are the site where the cultural environmentalism voiced by Boyle merges with environmentalism itself, as Shiva indicates in her admonition of the reductionist science prompted by the propertization of living organisms:

> At the species level, this reductionism puts value on only one species – humans – and generates an instrumental value for all others. It therefore displaces and pushes to extinction all species that have no or low instrumental value to humans. Monocultures of species and biodiversity erosion are the inevitable consequences of reductionist thought in biology, especially when applied to forestry, agriculture, and fisheries. We call this first-order reductionism (*Biopiracy* 25).

The pharmaceutical industry and the biotechnology sector as a whole operate at markets of such economic scale that contested claims of ownership, and the industrial monopolization of genetic resources, will continue to dominate cultural property discourse at international and national levels.

A Eurocentric Force

Many critics have attributed the limited success of integrating cultural property into intellectual property regimes to the eurocentric disposition of current IP systems (Oguamanam 311). Because IP law is authored by Western, industrial states and composed of the sensibilities thereof, it is alleged that the broad incongruity between the respective conceptualizations of ownership and property in Western and non-Western communities render IP law ultimately incompatible with the cultural property of traditional communities. Western conceptions of property are alien to those of many such 'developing,' non-industrial, or indigenous groups. The foremost partition between these dichotomous interpretations is the Western doctrine of liberalism, or individualism, which has shaped the core framework of intellectual property law and reified Western constructs of property, leaving other conceptions largely illegible before intellectual property systems. As Hafstein writes, "No one is entitled to speak for tradition. It is

impossible to make a claim to represent it in a way that is legible and logical within the legal regime of copyright" ("The Constant Muse" 20).

Delimiting intellectual property by this logic has produced a discursive polarization of individual and collective authorship, the former as the site of innovation and the inception of something from nothing and the latter as the site of tradition, reproduction, and raw material. As Alison Fish writes of this framing, "Intellectual property mechanisms, therefore, as derivatives of property law, assign ownership of valuable intangibles to a specific actor, usually the creator, to allow the actor to retain control of the work and the benefit derived from it. It is through the intertwining of these legal concepts that the myth of the singular author as the sole generator is fabricated" (193). Folklore scholar and former Icelandic UNESCO representative Valdimar Hafstein claims this myth of the singular author, governed by IP policy, has created a false dichotomy of originality versus tradition, wherein originality is attributed to individual authors according to Lockean notions of property, and traditional materials have come to be naturalized. Hafstein notes his surprise at the longevity of this bifurcation:

> I find it perplexing and paradoxical that this dichotomy should still reign supreme at a time when literature is generally thought of in terms of intertextuality, when the "network form" is all the craze in business (bringing attention to the fact that individual contributions make up a whole), and when innovation theory has long abandoned the flash of creative genius ("Eureka!") as an explanatory model, speaking instead of "communities of creation" and "distributed innovation" that are incremental and to which many contribute ("Politics of Origins" 307).

Hafstein instead argues, citing Bakhtinian notions of dialogue and polyphone and the theoretical work of Julia Kristeva, for a social process of creativity, claiming that the dynamics of tradition be understood as intertextual and, therefore, no different from other, privatizable categories of creativity (307). In other words, all works bear some measure of derivation and some degree of

collective authorship. Creativity is not a process occurring in a vacuum but a multidirectional exchange of ideas, a socially woven tapestry.

Nonetheless, the Western narrative of individual authorship has hardly receded, and its differentiating practice extends not only to works of creative expression. Communal genetic resources and forms of traditional knowledge are similarly marginalized and relegated to the commons for their failure to be attributable to an individual author or incorporated group, despite patentable or otherwise privatized materials of a parallel nature and purpose being commensurately derivative in their origins.

As might be surmised, this framework privileges the operations of industrial nations, corporate entities, and wealthy individuals (Oguamanam 310). It is according to this beneficiary status of developed nations that political battle lines have been drawn in the contestation of modern IP regimes. To turn once more to Hafstein, he states the following of this legislative inequity:

> It seems we are faced here with a categorical distinction-originality versus traditionality-that runs very much counter to the interests of those less privileged. This classification is manifest in our common conceptual apparatus as well as in legislation that systematically and a priori rules out the knowledge and resources of local communities, indigenous populations, and the inhabitants of poorer states. It places value only on knowledge and resources that persons (natural or corporate) in richer countries can privatize ("Politics of Origins" 305).

There are several reasons, each worthy of exploration, for the incompatibility of Western IP models with these groups, and several symptoms to be observed that should lead one to diagnose current IP regimes as colonial structures.

Opposition to modern intellectual property regimes have been captained by coalitions of developing nations, who have historically advocated for a greater acknowledgement of collective rights. In her discussion of such rights, legal scholar Janet Blake notes that the "increasingly

powerful voice of developing countries in international fora has contributed directly to the discussion on collective rights (cultural or related to genetic resources, for example) as is well illustrated by the work undertaken in the mid-1980s by the African Union … to develop a regional instrument on community-based rights" ("Cultural Heritage Law" 62). As Hafstein indicates with his proposal of copying as a creative act and creating as an act of reproduction, it is not the intangible products themselves that differ fundamentally, whether public domain or private property, but the legitimacy of individual, private rights over collective or cultural rights that determine the validity of an item as ownable property.

This is perhaps to be expected given its originating epistemology: much of the modern Western notions of property rights are born of the enclosure movement, which privatized the English commons over the centuries (*Public Domain* 43). The correspondence between this privatizing movement of the past and modern IP regimes is so great that James Boyle has argued that we are in a second enclosure movement ("The Second Enclosure Movement"). This privatizing, enclosing conception of ownership does not translate to many non-Western groups, and because the alternative, communal model of ownership practiced by indigenous and other marginalized groups is decentralized, custodial, and informally socialized, it does not comply with the enclosing principles of intellectual property law today. Cultural anthropologist Lorraine V. Aragon offers ethnographic examples of Indonesian tradition bearers that do not identify as creators in the Western sense: "For varied reasons, most Javanese gamelan musicians, choreographers, and puppeteers disavow authorship over even the most original contributions by presenting themselves as mere followers of their traditions" (Aragon 16). Alison Fish provides a useful example of this dissonance by considering the public domain status of yoga:

> For example, attempts to exclude cultural properties such as yoga from authorship protections indicate a naturalization of traditional practices and a denial of the effort and

> creativity that goes into indigenous knowledge production. This denial is illustrated by the exploitation of native populations' knowledge by multinational corporations, such as pharmaceutical companies, that patent traditional uses of local botanical remedies and use laboratory research and documentation to justify ownership over this information (Fish 192).

The surest evidence that it is not the constitution of a cultural product itself that determines its eligibility as intellectual property is the phenomena to which Fish alludes: the entrenching of traditional cultural products or heritage – TCEs, TK, and GRs – within intellectual property systems by *external* or non-native parties.

In many cases, these parties are corporations, though not exclusively, and instances of both corporate and individual annexation of cultural property occur routinely, from the biopiracy practices of pharmaceutical companies to the copyrighting of traditional songs by professional music groups (Rees 157-58). Of course, a corporation is itself an individual in legal contexts such as these. India, for instance, has actively pursued and developed means of preventing such cases in the wake of multinational corporations in both the United States and Europe registering patents for traditional resources and practices including basmati rice, the neem plant, and turmeric (Fish 200). As Oguamanam notes in his observations of biopiracy cases,

> Eurocentric or western trained formal scientists can easily obtain intellectual property protection based on the knowledge or insights of ILCs [indigenous local communities]. The last several decades have revealed how formal scientific researchers and corporations have obtained intellectual property protections over a spectrum of medicinal plants, crops and other genetic resources to the exclusion of ILCs, who are arguably the real innovator. Generally referred to as "biopiracy," resistance to this practice constitutes ILCs' countervailing response to the travesty of the intellectual property system (310).

These patterns of patenting abducted cultural property provide further evidence that it is not the property itself that disqualifies it from intellectual property protections but the prospective rights

holder. The cultural property of an indigenous group is, in content, coterminous with the patented materials of a pharmaceutical corporation.

Returning to the Western reluctance towards developing legislation asserting collective rights, we see in these cases an asymmetrical right to subjectivity within intellectual property rights. As Boateng writes, "notions of subjectivity within modernity privilege the autonomous individual whose actions (including creative work) can be distinguished from the actions of all other individuals" (46). Unincorporated groups and communities, as collectives, not identifying themselves or their intangible creations in this mold, do not receive the privilege of such protective rights because, as Boateng continues, they "belong to a different temporal mode," whether such groups are Western or non-Western (46).

Boateng's key insight here is the reframing of the subjects of intellectual property rights; it is not a matter of regionality or indigeneity, but of traditionality and modernity. While the marginalized parties of intellectual property regimes are primarily those of non-Western and non-European origins, the most encompassing designation for those to whom intellectual property rights are not granted is non-modern – modern here assuming its politicized usage as neoliberal, individualizing, and effectively Western in principle. By sanctioning cultural production that belongs to the "temporal mode of modernity," production outside of this privileged space is rendered deficient and deemed 'folklore' or 'traditional knowledge,' and as such, it is not afforded the status of property (45).

The flow of cultural production, as governed by intellectual property regimes, has long assumed the form of a simplex communication channel, in which information only travels in one direction, in this case from the traditional, often non-Western world, to the modern, 'developed' world (*Shamans, Software, and Spleens* 141). This channel predates the erection of intellectual

property mechanisms, and it is by no means limited to intangible products. The extraction of material cultural artifacts from the traditional world to Western powers has long been a global operation (*International Cultural Heritage Law* 2). It is a Eurocentric tradition of plundering upon which universal museums in the West are built, historically stemming from, according to David Lowenthal, the perspective of Western powers that "their Christian and scientific legacy was immeasurably superior to the barbarous customs of others" (Lowenthal 240).

This colonial mandate of heritage seizure was systematic in its constancy, so much so that by the mid-19th century Ottoman Turkish authorities had established legislation for the preservation of antiquities in direct response to the mass removal of heritage items by European forces (*International Cultural Heritage Law* 3). In more recent years, states continue to draft legislation supporting the preservation of their heritage upon achieving sovereignty from colonial forces. These nascent policies can be seen across the Caribbean in the 20th century, where states have responded to newfound independence by developing measures to protect what material heritage has not yet been dislocated to Europe and North America. The Bahamas is one such nation; as Peter E. Siegel writes,

> Early archaeologists (preindependence in 1973) often would seek permission to excavate or remove artifacts from landowners … or conduct coastline surveys via boat or motorcycle… with no oversight from the central government or permission to remove cultural artifacts. As a result of this, early collections are scattered throughout the United States and Europe, including prominent institutions such as the Smithsonian and the British Museum (2).

Early, pre-independence attempts at heritage preservation were largely dictated by foreign-born social elites, and consequently initial programs in the 1950s privileged the protection of buildings and sites with European, colonial heritage rather than Afro-Bahamian heritage. In 1998, Bahama's government passed its Antiquities, Monuments and Museums Act, which called for the preservation, restoration, documentation, and study of sites and objects of cultural import;

prohibited unlicensed destruction, excavation, or removal of heritage sites and artifacts; and established a protective agency by which Bahamians could directly influence the management of their cultural property (Siegel 5). We have witnessed centuries, then, of postcolonial nations developing policy to rectify a history of Eurocentric plundering; modern intellectual property regimes, designed by many of the very same powers, are best understood by the light of this history.

Universal museums preserve Western presumptions of global stewardship today, and contests of ownership dating back to the exportation of artifacts centuries ago, either illegally or by the alien authority of colonial rulers, continue to unfold in both public discourse and litigation. Disputed items have ranged considerably, from the marble sculptures of the Parthenon held in the British Museum – a result of Greece's time under Ottoman rule – to the skeletal remains of African and Oceanic indigenous people, extracted and kept in the natural history museums of Europe and North America (*International Cultural Heritage Law* 3). Outcomes of such disputes between source communities and propertizing museums range just as broadly. In those cases where ownership of cultural objects is conferred, either on loan or by formal transfer of ownership – the latter being the legal reclamation of property, the former an operation of heritage technologies – the source community typically must often undergo a long process of development of a preservation site that meets Western institutional standards for museums and curatorial spaces (Hafstein and Skrydstrup 76).

The terms of conferment are thus dictated by the holding party. Such is the case of the transference of historic Icelandic manuscripts to Iceland from Denmark over the late 20th century, which occurred only after several prerequisites set by Iceland's former colonizers were met, including the construction of an institution for Icelandic study, development of museums

with compatible standards to Denmark's, and professionalization of curatorial staff (Hafstein and Skrydstrup 63-64). This process of qualified transference may also be seen in the development of the U'mista Cultural Center which anteceded the transference of Kwakwaka'wakw potlatch paraphernalia from the British Museum in 1992, having been confiscated by Canadian authorities who banned the potlatch custom over 70 years prior (82).

As previously noted, these cases often result in *loans* of such artifacts after institutional standards have been met; the lending and receiving institutions engage in a system of cooperation and partnership, but one in which ownership unequivocally remains in the hands of the appropriating party. This is the distinction between how cultural property and cultural heritage, as two separate technologies, are operationalized: "[cultural heritage and cultural property] take a very different approach to the formation of patrimonial and political subjects (the one producing sovereign subjects in the mold of the liberal modern state, with rights, territories, borders, and property, the other producing subjects entangled in dense networks of neoliberal/postcolonial forms of governance)" (77-78).

However, even in cases where ownership is transferred in perpetuity, which is to say, within operations of cultural property as a technology of sovereignty, the terms of repatriation are governed by the colonial powers involved. As Halealoha, director of the Native Hawaiian organization Hui Malama, related to Skrydstrup about the repatriation of a ki'i, a ceremonial spear rest, to the Bishop Museum in Hawaii:

> The problem is that we happen to live in a society in which a ki'i is a precious artifact; that is the real problem. Otherwise, we could return the ki'i to the caves they came from. These objects were not made for aesthetic purposes. You know, when we contemporaries think of a ki'i we immediately picture it in a museum context, behind glass in a box with alarms. That is the Western frame of mind. Museums and education is part of Western secular thinking, which they are trying to impose upon us. Repatriation is about the original function of the object (38-39).

The power relations which first enabled the seizure of cultural materials still define and regulate the procedures of exchange. These postcolonial power structures continue to shape, and Westernize, the discursive and operational dynamics of cultural property within IP regimes at a global scale, just as they frame modern sites of contestation concerning material cultural property.

The Western, 'developed' world has advanced several lines of rhetoric in counterpoint to the demands for an intellectual property framework more accommodating of traditional forms of ownership. Two primary refrains that have been deployed by industrial nations concern the enclosure of the commons and the delegitimization of collective authorship. I will briefly discuss both to demonstrate how developed nations have fought to maintain a status quo, which, as James Boyle observes, disproportionately favors developed countries (Sunder 128-30).

Western Counterpoints

In 2002, at the fourth session of the Intergovernmental Committee on Genetic Resources, Traditional Knowledge, and Folklore at the Geneva headquarters of WIPO, the head of the United States delegation, Linda Lourie, sternly dismissed the notion of attributing authorship to a community, a general characteristic that had been accepted by the committee for all forms of cultural production within its scope. On this idea of collective invention, Hafstein's notes claim that "The chief delegate of the United States scoffed at what she described as 'nineteenth-century notions' and claimed that, on the contrary, folklore is 'always individually created and then adopted by the community'" ("The Politics of Origins" 300). Rather than dispute the merits of developing enforceable collective rights for cultural property, the US delegation opted in this instance to pronounce collective authorship a fiction. This viewpoint does not appear to hold true

for authorship attributed to incorporated groups, as corporations regularly credit multiple originators in approved US patents (Fish 193). Linda Lourie, the delegate relating this individualism-privileging logic, was head of the US Patent and Trademark Office at the time ("Politics of Origins" 300). While distinctions between an incorporated group and an unincorporated one are valid differentiators, it is a tall task to discern how incorporation reverses the ontology of collective authorship as it was laid out by the US delegation at the time.

More importantly, does this line of reasoning suggest that all individually-authored products protected under IP devices emerge from a wholly original epiphany, drawn from the air as if conjured? If not, then it fails to separate the authorship process of traditional products from those of any registered rights holder whose creation is supposed by the conceit of romantic authorship to be antisocial in its process and solitary in its genius.

Another line of rhetoric that has been deployed against the international campaign for a redistribution of property rights centers the enclosure of the commons. This counterpoint problematizes the property claims of traditional cultural production by suggesting that it will fence in the intangible resources of the world to a severely detrimental extent, effectively cordoning off the universal heritage of humanity. In his analysis of the IGC's draft text on traditional knowledge, Oguamanam writes that "some features of the text reflect the push by the United States and its allies to saddle the public domain moral high ground ostensibly as a counterpoise to the dedicated interest of developing countries and ILCs in TK protection" (317). Oguamanam proceeds to point out the irreflexive character of this positioning by the United States:

> It does not matter that the US, which champions the public domain blackmail of TK, has consistently led a global assault on the public domain since the early development of intellectual property law. In fact, renowned US academics acknowledge that the United

> States is the most influential country that has championed the "enclosure" movement of the public domain and the global commons (318).

This tactic appropriates the logic of Boyle's cultural environmentalism and trains its targets at a very different set of alleged perpetrators: indigenous local communities, to use Oguamanam's preferred term. It is a suspect reversal for the industrialized, 'modern' nation to assume the role of the staunch opponent of propertizing, but, if one may disassociate that which is voiced from the voice itself, it is a valid consideration worthy of analysis nonetheless.

It is indisputable that there has been and continues to be concern and criticism issued about the continual enclosure of resources by the expansion of propertization and the multiplying repertoire of privatizable forms. Within this landscape, states and traditional communities have themselves become much more active in ownership claims, as professor of biochemistry and molecular medicine, Sita Reddy, confirms:

> Ownership and control over TMK and biodiversity have become the new realities and tropes of medical globalization. If anything, the trend now is a move away from cultural internationalism and toward a more rigid cultural nationalism, even "cultural intra-nationalism," to use Joe Watkins' term—a move that parallels what legal scholars call the new enclosures movement in ownership of the global commons. States and communities are stronger players than ever before in successful ownership disputes over TMK (166-67).

Traditional groups, without question, have begun to contribute to the wave of propertization, and concern has emerged over the potential of what legal scholars refer to as hyperownership of a commons in which sites of contestation are endlessly generated, driven by a swelling volume of claimants (Sunder 127; Reddy 162).

The perpetuation of this climate could produce, as Reddy describes, "a situation in which state-based systems of ownership push the boundaries of sovereignty so far in unleashing a spiral of enclosures that they risk creating new property claims, new subjects, and the possibility of an anti-commons" (162). As established, the rapid growth of propertizable forms, from business

methods to forms of life, has evoked concern due to the implications it holds for the future of creativity and invention, as well as public access to essential information within a democratic society (Boateng 8). So, given this climate of unmitigated enclosure, it might be asked reasonably whether participating in this system, if such entitlements were ever granted, would be a worthwhile enterprise for traditional communities. Is it worthwhile, to return to Oguamanam's metaphor, to fit the square peg of heritage into the round hole of intellectual property? Even if those parties decrying the dangers of enclosure are the very states and institutions that catalyzed the second enclosure movement and forcefully propagated it across the world, is it a justifiable venture to join the party and seek inclusion in a privatizing, colonial system?

Provincializing Europe

One consistency across the early decades of drafting provisions for the legal ontology of cultural property (or folklore, a slightly less versatile, but essentially consistent, Western category to which the legal texts of the period typically referred) was the differentiation of "developing" and "developed" states – the prospective laws being expressly developed for the former (Model Provisions 3). Despite the ubiquity of folklore, which permeates the cultural ecology of every community, WIPO and UNESCO continually relied on the binary of developing and developed worlds. The distinction presents itself in the 1982 Provisions, but earlier model laws featured the same terminology, at times eponymously, as in the 1976 Tunis Model Law for Developing Countries. The introduction to the Tunis Law states the intent to "cater to the specific needs of developing countries" by protecting "national folklore" because "in developing countries national folklore constitutes an appreciable part of the cultural heritage and is susceptible of economic exploitation, the fruits of which should not be denied to those countries" (5).

Despite the prevalence of the "developing" qualifier, neither the Tunis Model Law nor the 1982 Model Provisions clearly establish criteria for the classification; in a 1973 draft report prepared by the secretariat of the Intergovernmental Copyright Committee of UNESCO, the delegation of France observed that "whereas the protection of folklore seemed feasible at the national level, it appeared to raise a number of problems at the international level…in the event of the benefit of protection being limited to the developing countries alone, the need for finding a precise criterion for determining which countries belonged to that category might give rise to difficulties" (Intergovernmental Copyright Committee, Twelfth Session, Paris, December 1973: Draft Report 6). As if demonstrating the arbitrarity of the false "development" binary, the delegation of Italy announced subsequently that if protective rights were so discriminative as to exclusively allocate safeguards to "developing" countries, that, despite its status as a "developed" nation, "Italy for its part would not renounce the protection of its national folklore" (ICC Twelfth Session Draft Report 7).

By enticing "developing" and newly independent nations to comply with international standards of copyright law, these drafted policies harness the prospect of folklore protections as a technology of assimilation. As the following chapters shall further illustrate, often the allure of legal and enforceable cultural property safeguarding is framed as a concession by so-called developed states to ensure the "modernization" of the othered nations by incorporating them into colonial intellectual property regimes (Boateng 166). This olive branch is rarely instantiated, but the measures of acquiescence that "developing" nations must satisfy to participate in the potentiality of propertizing cultural property require definitive implementation of neoliberal principles and structures (Boateng 18-19) ("The "Good Old Days" of TRIPS: The U.S. Trade Agenda and the Extension of Pharmaceutical Test Data Protection" 341).

In the next chapter, I will examine what ‘modernizing’ signifies in this context and what it means to become a “developed nation.” Then, in the fourth chapter, I look at current international mechanisms for safeguarding cultural property and the surrounding operations of intellectual property regimes in order to determine how this dynamic of imposed modernization as a tariff for “developing” countries still figures into the discourse and negotiation of cultural property and intellectual property rights.

It is critical to develop solutions outside of the manufactured polarities of ‘modern’ and ‘traditional, ‘developing and developed’– a solution to Western essentializing in international legislation will not be found within the same epistemological mode which bore the inequity. In order to develop a pluralistic rights system that might accommodate forms of cultural production alternative, or at least perceived as alternative, to those recognized by Western epistemologies, state actors and legislative authors would be tasked with rendering non-Western systems of knowledge, expression, and production legible within IP regimes. Postcolonial theory offers the potential means to develop such a radical transformation. The Epistemologies of the South framework developed by Boaventura de Sousa Santos is one explanatory model that draws into relief the systems of knowledge and cultural production in many communities that remain disregarded in Eurocentric, colonial regimes.

Detailing its architecture, developed over decades, is beyond the scope of this text, but the Epistemologies of the South framework entails acknowledging privileged monocultures, particularly those of Western modernity; revealing the multiplicity of knowledge and social experience; and enabling intercultural translation across various knowledges to negotiate the plurality of the world into more sympathetic relations (Escobar 67). Arturo Escobar argues that in this system one may find resources valuable towards the project of epistemological

reconciliation, particularly as it addresses the rigidizing force of Eurocentrism: “The Epistemologies of the South framework provides workable tools for all those of us who no longer want to be complicit with the silencing of popular knowledges and experiences by Eurocentric knowledge, sometimes performed even in the name of allegedly critical and progressive theory” (67). In order for intellectual property regimes to rectify the myopic treatment of the ontologies of these diverse knowledge systems and forms of cultural production, state actors will need to utilize such tools and address the failures of Western, colonial epistemologies by searching beyond them. International policy will ultimately need to provincialize Europe and the Western world if it is to protect a larger, pluralistic humankind.

CHAPTER III

WEIGHING THE PROVISIONS

I devote this chapter to my analysis of the 1982 Model Provisions. I take a linear approach to the first section of the document, proceeding through the subheadings of the initial pages; the Introductory Observations, while useful exposition, are largely perfunctory table-setting for the remainder of the document. For the provisions themselves, I adopt a more probing, contrapuntal process. Rather than isolate its sections at an individual, myopic level, I structure the text around analytical points of emphasis and frame the legal mechanisms and epistemological underpinning of the provisions within a larger theoretical and political system. I draw additional insight from the commentary supplied by the UNESCO and WIPO secretariats, which details the developmental process of the Working Group, sixteen experts personally invited by the Directors General of UNESCO and WIPO (Model Provisions 7), as they composed the Model Provisions and considers pivotal logistical implications posed by the legislation. I conclude my observations by arguing for the classification the Provisions as a colonial technology of modernization. To supplement my analysis, I turn to Ghana's 1985 national copyright reform and its inclusion of Ghanian folklore as a protected category, which drew from the 1982 Model Provisions in designing its policy.

Introductory Observations:

1. Need for the Legal Protection of Expressions of Folklore

The Observations waste little time in forwarding a Eurocentrically warped conception of folklore. While acknowledging that folklore, as a catchall for vernacular culture, is a universally generated entity, the authors then swiftly establish a narrative of differentiation that continues the

length of the document. The Working Group maps the bifurcated role of folklore in ‘developing’ versus ‘developed’ countries in the first article:

> It is of particular importance to developing countries which more and more recognize folklore as a basis of their cultural identity and as a most important means of self-expression of their peoples both within their own communities and in their relationship to the world around them. Folklore is to these countries increasingly important from the point of view of their social identity, too. Particularly in developing countries, folklore is a living, functional tradition, rather than a mere souvenir of the past (3).

Despite initially establishing folklore as core to the heritage of every nation and noting the ever-modernizing forms of folklore that continue to be produced ‘even in modern communities all over the world (3),’ the introduction’s messaging rather abruptly sets about distinguishing the influence and function of folklore between developed and developing states. Despite these claims of the dependence upon folklore in ‘developing’ states, ‘developed’ nations having evidently evolved beyond this reliance, the document very deliberately avoids defining folklore, a famously contested term. The Working Group also omits any identifying criteria of a ‘developing’ or ‘developed’ country, but one may hazard a guess as to what the terms imply. As the terms ‘developed’ and ‘modern’ are often deployed interchangeably, we may adopt Boateng’s definition of modernity as “the globally sanctioned form of political and social being and modernization as the means of attaining that form,” and modernization itself as “[referring] to a prescriptive set of principles for achieving Western-style development” (Boateng 18).

The Working Group identifies the greatest mounting threat to folklore and cultural sovereignty to be the rapidly developing technology of the time, particularly for facilitating the spread of recording and broadcasting capabilities (3). The four decades since 1982 have validated this concern: the emergence and popularization of the internet has democratized information, and the development of smart devices has provided the means to capture

unauthorized performance and redistribute it on a global platform instantaneously. It is now a trivial task to publicize cultural production beyond the local boundaries of a community, particularly in industrial nations. The Working Group notes that expressions of folklore are being commercialized on a global scale without consideration for the "cultural or economic interests of their source communities" (3).

The second article also insightfully notes that folklore subject to exploitation is regularly distorted from its emic forms in order to best comply with marketing interests. This trend has continued unabated, and sufficient examples can be mentioned from a single film studio: musicologist Robin Armstrong notes that the indigenous music of Disney's *Moana* is compositionally Anglicized in a larger colonial tradition (Armstrong); several scholars have written on the ahistorical design of Matoaka, or Pocahontas, in Disney's *Pocahontas,* to better curate the film to white audiences (Edgerton and Jackson 93); and Middle Eastern critics have rebuked the amalgamation of several Middle Eastern and North African peoples' material cultures for the production design of 2019's *Aladdin* remake (Albadrawi). These examples showcase the regular patterns of exoticization and reductionism that complement commercial appropriations of traditional cultural expressions (TCEs), often to maintain accessibility to white audiences while presenting a romantic facade of foreign cultural landscapes.

The introduction observes that "in the industrialized countries, expressions of folklore are generally considered to belong to the public domain" (4). While "generally considered to belong" is passive for a tailored and distinctly Western policy locating folkloric expressions as antithetical to subjects of intellectual property, the Model Provisions document correctly attributes, in its roundabout, naturalizing way, that industrialized countries have been primarily responsible for establishing the relationship between intellectual property and TCEs (4).

Concluding this initial section establishing the need for protections, the authors note the urgency of protecting TCEs "in order to foster folklore as a source of creative expressions" (4). This briefly referenced objective gestures towards a conceptualization of folklore as a raw material, a resource from which refined goods can be made, though it is endangered by unregulated quarrying. This perspective is reminiscent of James Boyle's notion of cultural environmentalism, but where Boyle's environmental analogue argued against the surging tide of IP forms, the provisions aim for a more substantive policing of folklore within the public domain. While the two visions are not antagonistic, there is friction between them, though Boyle himself understood the limitations of the cultural conservation discourse that he inspired (Sunder 131). Regardless, while the provisions do not aspire to an enclosure of the commons, they do call for the integration of authoritative bodies into the public domain for the regulation of folkloric materials.

2. Attempts to Protect Expressions of Folklore Under Copyright Law

This section primarily historicizes the Working Group's efforts to develop protective legislation by citing several precedents authored by assorted nations over the preceding decades, largely by means of copyright expansion or international treaty. The initial clause of the section notes that "All these nations consider folklore as part of the cultural heritage of the nation" (4), the acknowledgment of this fixture within the antecedent legislation reveals an important force upon the shaping of the Provisions. The phrase of consequence here is "of the nation," designating the state as the rightful possessor of the heritage in question.

While this observation within the Provisions may, at first glance, appear to be little more than rote description, the means by which this uniform state position is articulated, or at the very least accommodated, in the policies of the Model Provisions are critical, defining factors of the

legislation. The Provisions attempt to tread a challenging line of policy, one which, in its redistribution of ownership rights, must negotiate a legislative track both recognizing communities as sovereign custodians of their respective cultural production and recognizing the state as the authoritative actor to adopt any proposed legal structures and as the interface between international organizations and endogenous communities. This tension is a constant theme of the document and one to which I return as I encounter its instantiations throughout the provisions.

The Working Group next reviews the varied conceptions of folklore offered by these past legal texts. Different criteria are ensconced across the literature, but one prominent qualifier is the anonymity of the author; an item of folklore, according to several of the preceding texts, must be of unknown origin. Yet, for an individual nation to lay claim to an artifact of folklore, it must have some claim of jurisdiction over said artifact. The Tunis law incorporates two delimitations of state folklore that were popular in much of the national legislation: folklore here refers to creations "by authors presumed to be nationals of the country concerned, or by ethnic communities" (4).

Of course, the origins of such creations are often contested and conflicting claims are made by nations over when and where an urform, the original creation from which variants then derive and disperse, may have been penned. Nations and ethnic groups have disputed the authorship of the folk song 'Misirlou' for over a century as its popularity has grown. However, as folklorist Stephen D. Winick writes, "The origin of 'Misirlou' cannot be established with certainty; the lyrics are mostly in Greek, the title appears to originate in Turkish, and the lyrics include Arabic words and allude to the Muslim community in Egypt. Nevertheless, some people make passionate claims for their own ethnic community as the true originators and owners of 'Misirlou'" (475). An instrument such as the Provisions, though it operates at a national level,

would most likely intensify political maneuvering over attributions to folkloric creations by adding financial and authoritative incentives to securing rights to cultural production. This is one of several complicating factors to state-based folklore legislation; we will encounter further impediments of national protective systems as we proceed through our examination of the Provisions.

The section continues to outline a number of national folklore texts, most of which required the approval of some governing authority in order for someone to commercially publish or distribute a product or work rooted in folklore, or to perform folklore with gainful intent. The Working Group also cites international efforts for the protection of folklore, namely pointing out the ineffectiveness of the Berne Convention's Stockholm Conference. A special working group at the Diplomatic Conference of Stockholm for the revision of the Berne Convention developed a system, adopted unanimously, which allowed for the state to designate a representative for an anonymous work of folklore presumed to be authored by a national of the country. This designated representative would consequently assume the rights of authorship typical of copyright entitlements (5).

Ultimately, no members of the Berne Union attempted to designate such a representative to protect the rights of the phantom author; the provision was woefully moot. As the Working Group notes, "In any case and at least so far, legal protection of folklore by copyright laws and treaties does not appear to have been particularly effective or expedient" (5). Beyond providing historical precedent for the Model Provisions, the Working Group has established the insufficiency of integrating folklore protections into existing copyright law and begun to demonstrate the need for a *sui generis* legal system designed for the protection of folklore – justifying the creation of the Model Provisions.

3. Indirect Protection by Means of Neighboring Rights

This brief section continues to petition for the inauguration of a *sui generis* protective system with dedicated mechanisms for the safeguard of folklore (6). The Working Group first addresses neighboring rights that may offer marginal defenses for certain genres of folklore. The text advises the adoption, particularly in 'modern' nations, of laws "protecting the rights of performers, producers of phonograms and broadcasting organizations" (5). For cases in which broadcasts and performances et cetera contain expressions of folklore, these expressions may fall within the purview of the rights associated with that particular rights-protected medium or performance context.

The section, much like the previous one, concludes by asserting that these legal byways are also insufficient for the protection of folklore for a number of reasons, including a limited duration of protection that is incompatible with the generation-traversing life cycles of folklore. Given this finding, the Working Group determines that "as regards intellectual property aspects of expressions of folklore, a special (sui generis) type of law [is needed] for an adequate protection against unauthorized exploitation" (6). While the authors have hardly produced a systematic investigation into possible convergences of extant intellectual property devices and expressions of folklore, the introduction provides some insight into the Working Group's decision to develop a wholly original system for their purposes. Given the epistemological lacuna dividing Western and non-Western conceptions of ownership, property, and resource systems, it is a reasonable determination that the only means of grafting intellectual property rights (IPRs) onto expressions of folklore is via a freestanding and curated system of protections.

3. Search for an Adequate System of the Intellectual Property Aspects of the Protection of Expressions of Folklore

The closing section of the document's Introductory Observations concerns the genesis of the Model Provisions. The text credits the memorandum sent to the Director General of UNESCO in 1963 by the Bolivian Government as the catalyst of the Provisions' development process (6). This letter is also credited for prompting UNESCO initiatives for the inventorying of intangible cultural heritage (ICH), leading to the 2003 Convention for the Safeguarding of Intangible Cultural Heritage (*Making Intangible Heritage* 24). The circumstances that governed the Republic of Bolivia's memorandum, sent from its Ministry of Foreign Affairs and Religion, offer a fitting paradigm of the cases within the scope of the Model Provisions, demonstrating the urgency for protective legal mechanisms while concurrently betraying the perils of national entitlement to the traditional materials within a state's borders. I will return to the dispute further in the chapter, but to offer some initial context for this watershed case, I will provide a brief summation.

The Ministry, in its letter, claimed that Bolivia was facing an onslaught of recent appropriations wherein nationals from other countries were commercializing cultural production conceived within Bolivian borders, noting the willingness of neighboring states to do so in particular. During this process of appropriation, Bolivian cultural property was being registered under IP laws as newly begotten creations of these appropriators in order to procure royalties and other entitlements. Specifically, the Bolivian government was responding to the widespread commercialization of 'El Condor Pasa,' an indigenous Andean folk song, the most prominent examples of which was Simon and Garfunkel's reproduction of the traditional melody in their ultimate album, *Bridge over Troubled Waters* (*The Flight of the Condor* 5:00).

The ministry claimed that materials including this song, traditional literature, and other cultural production, needed to be recognized as national property by international law. The plea from the Bolivian ministry has been narrativized over the proceeding decades as the initializing spark of dichotomous heritage movements; as Hafstein notes in his film on the subject, "The Bolivian letter often serves as the opening salvo in UNESCO's own account of the origins of the Intangible Heritage Convention, and in WIPO's account, too, of its work to protect traditional knowledge" (3:20). The case of the Andean melody, however, is neither as simple nor convenient as this narrative might suggest, and the Model Provisions bear out these ambiguating factors effectively. I will return to the case as I draw into question certain determinations of the Provisions.

The Model Provisions

The provisions themselves are terse in comparison to the bookending segments of the document. Fourteen sections constitute the entire *sui generis* system. Legislation is not characterized by baroque language historically, but the sparsity and lack of elaboration here is a more deliberate play for versatility. The Working Group aimed to design a model of protection that could be mapped to a variety of national legal systems, and many impactful choices were made to this end. This includes, for example, omitting the term 'law' from the provisions except in bracketed usages, indicating that it is entirely optional. As the commentary states, "The Model Provisions were designed with the intention of leaving enough room for national legislations to [adopt] the type of provisions best corresponding to the conditions existing in a given country" (14).

The document first sets out to establish the parameters of its subject. As its title indicates, the Provisions are designed for the protection of *expressions* of folklore, not folklore itself. This

phrasing, I suspect, is partially to circumvent having to provide an authoritative and complete definition of folklore and instead delegate the task to individual states, though the commentary claims the absence of any base definition is to remain compatible with possible folklore legislation already enacted within a nation (15). Regardless, to forego any functional definition of 'folklore' in a legislative model committed to its protection is a surprising decision -- one which perhaps shirks the responsibilities of the drafters. The Working Group defines 'expressions of folklore' as "productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community" (9). The document classifies productions eligible for protection according to the following categories, for which no formal definitions are provided: verbal expressions, including folk tales, riddles, and poetry; musical expressions, such as folk songs and melodies; 'expressions of action,' including dances, plays, and rituals; and finally, tangible expressions, which traverses a variety of material genres and forms, but includes productions of folk art, musical instruments, and architectural forms (10). Expressions of folklore, then, narrow the field of protected forms to a limited inventory of vernacular artistic expressions.

The broad categories leave room for further scrutiny. Would a culture's mythic narratives be protected under the 'folk tales' classification? Would sacred symbols and signs find sanctuary within these designations? Do foodways not qualify as expressions of a culture's folklore? What about key figures from the cultural history of a community – would the depiction of Anansi or Pele qualify as an expression of action? 'Traditional artistic heritage' is not so neatly severed from the traditional knowledge, customs, and various resources of a community, which obligates both the Working Group and any hypothetical adoptive nations to impose fairly arbitrary

criterion upon the larger pool of cultural production in order to determine the scope of 'expressions of folklore.'

In a section which confuses more than clarifies, the commentary notes that 'artistic heritage' is meant to be interpreted in the broadest possible sense and "covers any traditional heritage appealing to the aesthetic sense of man" (15), yet in the same paragraph it states that a community's legends (citing the narratives of King Arthur and his Knights as an example) do not fall within the parameters of artistic heritage, nor does the mythology of a culture as it constitutes the "scientific views" of a community, and is thus devoid of aesthetic merit or artistry. Curiously, past model legislation, including the Tunis Model Law, had included scientific works within its conception of folklore (Tunis Model Law 19). Given the restrictive and uneven scope of protection offered by the Provisions, the decision to primarily refer to the protected forms as 'expressions of folklore,' and finding this qualifier distinction enough to withhold any definition of folklore, is difficult to justify.

The primary mechanism of the Provisions is to subject the use of folklore in commercial enterprises to authorization via an authorized source community or a designated 'competent authority' acting as representative for said community. Under the law of the provisions, any publication, reproduction, or distribution of expressions of folklore require prior authorization, provided they are made "with gainful intent" and "outside of their traditional or customary context" (10). Public performances that meet the same qualifiers of commercial interest and non-traditional context are also subject, as are performances transmitted to an audience electronically. The commentary reveals that the Working Group considered, but decided against, the additional or alternative criterion of membership to the given source community (18). This would have

permitted community members to utilize their own community's folklore with gainful intent and outside of its typical context without first requiring authorization from the designated party.

Several dynamics of the law are decided by the omission of membership-based exemptions; a non-member may utilize an expression of folklore with gainful intent if it is performed in the standard context without regulation, but a community member cannot draw upon their own folklore for commercial purposes outside of a traditional environment. This limitation is at odds with the Working Group's conviction that the Provisions not impede the continued development and advancement of a community's folklore (18). For an expression of folklore to evolve over time in step with its source community, the violation of traditional parameters is inevitable, so it is an unexpected choice to police community members' engagement with their own folklore.

Clause 45 of the document notes that the "Model Provisions would not prevent indigenous communities from using their traditional cultural heritage in traditional and customary ways and in developing it by continuous imitation" (18). The language suggests that there is no innovation in the development of folklore, but solely imitation – as if any development was a result of the organic variation of imitation, an incidental product of continued transmission. The passage reflects a Western epistemology that perceives indigenous innovation as a natural resource. Defining community does invite its own quagmires, as I will discuss further in this chapter. Perhaps in an effort to reconcile these frictions, section thirteen of the Provisions does offer this brief directive: "The protection granted under this [law] shall in no way be interpreted in a manner which could hinder the normal use and development of expressions of folklore" (13). This sentence constitutes the entirety of the section; no further guidelines are provided. It is more principal than provision.

Parties seeking to utilize expressions of folklore under the conditions requiring permission must apply to the designated authority to do so, and perhaps pay a flat fee. In complement, the Provisions erect a system of sanctions to which a community might turn to address transgressions "in cases where authorization was not required by law or where the requirement had been disregarded" (19), thus combining a system of preliminary authorization with one of checks on extant productions in order to have both preemptive and reactive mechanisms for depressing exploitative or otherwise offending utilizations. While establishing an application system presents an arduous administrative task and bureaucratizes artistic production by regulating utilizations this way, this dual system is likely to be the most effective instrument for preventing exploitation.

Deference is the defining characteristic of the Model Provisions. The majority of sections feature bracketed text containing policy to be included at the discretion of the adopting nation or offer multiple legislative alternatives from which a state can choose when tailoring the Provisions to their governmental dispositions. This quality is a practical one given the diversity of jurisdictions and legal systems for which the draft is composed, but this flexibility extends beyond that of an accommodating model; the Provisions become self-compromising by their optionality, for in doing so they present pathways for states to leverage the legislation towards further dispossessing communities of their cultural production and amassing all such property under state control, allowing for greater national intervention into communal practices and traditions.

By maintaining such a considerable measure of ambiguity and deference in the distribution of authority, the Provisions allow for scenarios in which a national legislation may elect to further empower and entitle the state itself rather than authorize sub-national

communities in the management of their respective cultural property. This is antithetical to the community-oriented framework at the center of the MPs, but, likely in a tactful effort to gain favor with the broadest company of state regimes, the softness of the prospective legislation offers no resistance to reconfiguring the authorizing system to monopolize the collective resources of a nation's various peoples and, if desired, to discriminatively tapestry them into a sutured national identity. This particularly endangers marginalized communities, whose expressions may become only further vulnerable to either state suppression or expropriation. Aggregating the cultural property of these communities into national inventories would abandon any stated desire of the Provisions to aid communities in preserving their folklore, and could instead further enable their active oppression by governments who have designated themselves owners of all folklore located within their borders.

Folklore bears an extensive history of instrumentalization in nationalizing agendas, and states often rely heavily on cultural programming to reconcile ethnic diversity by manufacturing a singular national identity, unifying its various peoples under a state banner (Baycroft and Hopkin). Clause 49 in the Commentary of the Model Provisions lays out this faulty open-endedness:

> In some countries, expressions of folklore may be regarded as the property of the nation, in other countries, the sense of ownership of the traditional artistic heritage may have been more strongly developed in the communities concerned themselves … Countries where aboriginal or other traditional communities are recognized as owners fully entitled to dispose of their folklore and where such communities are sufficiently organized to administer the utilization of the expressions of their folklore, such uses may be subject to authorization given by the community itself… In other countries, where the traditional artistic heritage of a community is basically considered as a part of the cultural heritage of the nation, or where communities concerned are not prepared to adequately administer the use of their expressions of folklore themselves, "competent authorities" may be designated, to give the necessary authorizations in form of decisions under public law (19-20).

A state regime may have a severely different perspective from a local indigenous community within its borders on whether that people's folklore is "basically considered as a part of the cultural heritage of the nation." Beyond that, depending on, among other factors, the relationship between national government and community, they might commensurately be of unsympathetic minds on whether this community is 'adequately prepared' to be authorized for the administration of their own folklore. As no concrete benchmarks are offered to articulate what adequate preparation entails, there are no grounds to challenge a state's interpretation on the matter.

The term 'adequately prepared' calls to mind the forced, Westernizing institutionalization that post-colonial states and communities are often required to undergo in order for a dislocated cultural artifact to be repatriated, and then still often only conditionally and on loan. Communities may be similarly compelled, in hopes to be granted stewardship over their own cultural property's administration, to adopt certain institutional standards and 'modern,' or Eurocentric, modes of operation. A government may also elect to appoint a 'competent authority' of their choosing, suggesting they have authority to judge an Indigenous community 'incompetent' (12). Such a ruling would most likely stem from again conflating Western, industrial standards with advancement and cultural maturation, and, in turn, competence. Given that Indigenous communities within settler colonies often experience othering from the larger, dominant settler culture, one can, and should, assume that state regimes may not be benevolent arbitrators of another people's preparedness because they may not wish to entitle and empower any traditional, marginalized community or to validate cultural production that counters the dominant culture of the state.

It cannot be overstated that folklore is an invaluable asset to a state regime. As folklorist Brigitta Schmidt-Lauber observes about the beginnings of European ethnology, or folkloristics, "The discipline was established in connection with the German nation-building process culminating in German unification in 1871. Known at the time as "Volkskunde" it provided knowledge of and legitimation for the "Volk" or "people" as a constructed unity of the nation (560). Fellow folklorist Bjarne Rogan argues that folklore has, in addition to its potential for economic development, "an especially great propagandistic value" because it is sourced from the collective identity and knowledge of a people (598). It has been weaponized by several authoritarian regimes and nationalist movements – the Third Reich is a notorious example – which gives cause for concern when entrusting state actors to willfully disseminate rights of ownership, analogous to copyright entitlements, for the usage of folklore (Rogan 599).

Leaving the distribution of authority to governmental discretion risks the possibility of state regimes further disenfranchising select, targeted communities; this is the case whether the folklore of concern is recognized as national folklore to be promoted by the state or that of an alternative, marginalized culture that the state may wish to censor. Previously in the chapter, I referred to the catalyzing letter sent by the Bolivian government to the UNESCO Director General, which demanded the creation of novel international instruments for the protection of folklore in order to prevent the "filching and clandestine transfer of another people's culture" (*Making Intangible Heritage* 22). There is a detail often omitted when crediting this event for spawning of the intangible cultural heritage movement; the Republic of Bolivia at the time was a fascist military dictatorship, a result of a military coup led by General Hugo Banzer in 1971. As Valdimar Hafstein remarks in his revealing documentary on the Bolivian letter as an object of UNESCO folklore:

> Banzer's military regime also had unfriendly relations with the country's Indigenous groups and leaders. The Aymara and the Quechua lived in abject poverty … their lands confiscated, and their identities actively suppressed. They were to identify not as Quechua, not as Aymara, but as Bolivian paisanos: peasants and compatriots. Meanwhile, their songs and their dances were good enough for the government. Their cultural practices were celebrated by the military regime, and appropriated as the national culture of Bolivia (*The Flight of the Condor* 22:30).

Bolivia was not acting on behalf of its indigenous communities when it demanded ownership rights over El Condor Pasa, but recognizing a cultural asset to which it had an arguable claim. Endowing states with entitlements over the folklore of its population is not a means to empower localized communities; it is often a means of greater dispossession. If states are inevitable as the interface between local communities and international, rights-based policy, the soft language forwarded by the Model Provisions offers far too lenient a template.

Protecting Innovation

Assessing a utilization of an expression of folklore, beyond key elements of gainful intent and non-traditional context, additionally depends on *how* the expression is used in the production. The Provisions cite several potential utilizations that shall not be subject to authorization; these exempted uses resemble the free use exceptions of copyright law, but once again the parameters of copyright law apply poorly to folklore's protection. Utilizations for educational purposes are not subject to authorization, for instance, and other uses compatible with the 'fair practice' or 'fair use' doctrines of a nation's copyright system (10), which grant the unlicensed usage of copyrighted materials under very limited circumstances, and primarily for the purposes of teaching ("Fair Use"), though the Provisions explicitly leave open the possibility of other uses deemed 'fair,' in keeping with the laissez-faire tendencies of the model laws.

The section also exempts "utilization of any expression of folklore that can be seen or heard *in* the course of a current event for the purposes of reporting on that current event by means of photography, broadcasting or sound or visual recording, provided that the extent of such utilization is justified by the informatory purpose" (11). The criteria of justification remain undefined, which invites cases like that of the Santa Fe newspaper and the Pueblo of Santo Domingo mentioned in the previous chapter; it is unclear whether the Provisions would subject such a utilization to authorization or if that case would still only be heard in civil court, which the provisions also permit (12). Most distressingly of all, the Provisions do not subject the "borrowing of expressions of folklore for creating an original work of an author or authors" to authorization (10).

This lone passage maims the potency of the Provisions. If works deemed 'original' may still appropriate expressions of folklore at will, then the entire safeguarding operation is undermined. This exception submits to the expressed desire that the Provisions not obstruct innovation and original expression in any way, but it accomplishes this by defanging and relegating the Provisions so as to render them immaterial. While the provisions may still cast a net broad enough to intercept 'fakelore,' reproductions of expressions of folklore crafted by non-members of a community and falsely marketed as a product from a given source community ("Nationalistic Inferiority Complexes and the Fabrication of Fakelore"), in the same class as a truth in advertising instrument like the Indian Arts and Crafts Act, it will fail to accomplish truly comprehensive reform. By rule of this exemption, the proper designated authority – whether a source community or some appointed 'competent authority' – may be able to prevent, theoretically, a company like Fine Art America from utilizing famous ancestral images of Māori tribal chiefs for $100 shower curtains sold in the United States (Solomon 221). But, given these

restrictions, the Provisions could not stop a conglomerate the likes of the Disney Company from producing a film like *Moana.*

Moana, which I use here as an illustration of an appropriating 'original' work, depicts a crude amalgamation of Polynesian cultures, having no Polynesian voices in empowered creative positions for its production (*Moana*). The film was received negatively by many native audiences for several reasons: portraying an actively worshiped god in Maui as an abrasive, brutish figure (Roy); depicting life in the South Pacific as an exoticized 'lazy paradise' (Grandinetti); playing into stereotypes of obesity (Roy); leveraging the film as a glorified travel brochure for Disney's resorts in Hawai'i, which price locals out of their own land (Ngata) (Murar); colonizing traditional Polynesian music (Armstrong); releasing 'brownface' costumes of Maui ("Disney Accused of 'Brownface' Over Moana Costume"); selling the very same sacred figure as a toy and plastering his visage on the planes of Hawaiian Airlines as part of a partnership ("Travelers Take Off On a Voyage to the Pacific with Hawaiian Airlines and Disney's 'Moana'"); misrepresenting Polynesian mythology to a worldwide audience (Herman); and several other offenses, which ultimately grossed more for Disney than the entirety of Samoa's annual GDP (Haring).

Moana is an original work and would thus avoid being subject to community authorization, or even relinquishing a fee for utilization, according to the exceptions listed in the Model Provisions. This sizable exemption minimizes bureaucratic resistance to the creation of 'original work,' a sure concession to the main criticism of Western powers that cultural property protections would disrupt innovation (Keating 263). It also adheres to Eurocentric epistemologies in its delineation of 'original' works. These works, utilizing folklore, are inherently intertextual, yet still lay claim to a definitive moment of genesis, the creation of

something new that is not a product of the same social process as the folkloric materials but individually inspired, immaculately conceived in a vacuum, derived from nothing, a manifestation begotten by a singular author.

This notion of alleged 'innovation' and its clear primacy in the Provisions echoes the concerns of Western state actors whenever the possibility of a protective instrument for folklore is raised. As Dominic Keating, Director of the Intellectual Property Attache Program of the U.S. Patent and Trademark Office, writes of the country's positioning against possible *sui generis* protective systems (like the Model Provisions) discussed in WIPO negotiations, "The most significant concerns with all three IGC Consolidated Texts relate to *sui generis* systems and disclosure requirements, due to their potential negative impact on intellectual property, innovation and creativity" (Keating 269). Contrary to Keating's argument, studies show that patents have little impact on a people's rate of invention and innovation, and instead largely function to block the entry of new enterprises into industries, creating oligopolies, and impeding the free exchange of ideas within scientific and other creative communities (*Biopiracy: the Plunder of Nature and Knowledge* 13-14).

The Riddle of Community

While the proposed legislation appears promising in its aspirations of providing entitlements to local communities underrepresented by extant IP law, operationalizing the *conceptually* straightforward Provisions inevitably confronts sobering logistical questions of implementation. Although copyright law's usual standard of individual authorship had by necessity been expanded to a concept of collectivity in the context of traditional culture, products or forms of folklore were required to be explicitly attributed to a specific collective and, indeed,

inextricable from that collective's cultural identity to establish the Lockean right of ownership commanding the logic of intellectual property. Several challenges entail, however, from mapping individual-oriented rights onto unincorporated collective bodies, and legislative efforts have largely glossed over these incongruities by making reference to 'community' as if it were a formulated and definitive entity and not a nebulous construct continually renegotiated in its performance.

The secretariats describe the Model Provisions as 'community oriented,' noting that "the artistic heritage of a community is a more restricted body of traditional values than the entire traditional artistic heritage of the nation" (16). While the Model Provisions corral all expressions of folklore to be protected within national jurisdiction, the Working Group also plainly recognizes folklore at a communal level and advocates for its localized management. The commentary continues to invoke notions of community-oriented arbitration in assessing questions of authenticity:

> As regards the question of what has to be considered as belonging to the folklore of a "community," one or two members of the Working Group suggested that the answer required a "consensus" of the community which would certify the "authenticity" of the expression of folklore. The proposed definition does not refer to such "consensus" of the community since making the application of the law subject in each case to thinking of the community, would render it necessary to make further provisions on how such consensus would have to be verified and at what point in time it must exist. The same would apply to the requirement of "authenticity," which would also need further interpretation … On the other hand, both the requirement of "consensus" and "authenticity" are implicitly in the requirement that the elements must be "characteristic," that is, showing the traditional cultural heritage: elements which become generally recognized as characteristic are, as a rule, authentic expressions of folklore, recognized as such by the tacit consensus of the community concerned (16).

If states were to set any kind of criteria requiring consensus from a community to identify products of folklore for protection, especially in a fixed, 'authentic' form, they would first need to formally delimit the community itself, and in order to so define a community, the nation must

address the challenge of defining membership. Membership within a community is not a binary status, but often a continually reconstituted performance with no singular barometer for locating an individual within an informal grouping ("The Judgment of Solomon: Global Protections for Tradition and the Problem of Community Ownership").

Several possible criteria are indicative of membership in a typical community: lineage and descent, religious affiliation, ideology, participation in communal affairs, locality, and practice of common customs, to name a few. Settler colonies such as the United States employ registries for indigenous communities to manage membership, but this invites its own set of quagmires when it becomes an absolute qualifier in determining inclusion and exclusion for individuals, as evidenced in Evans-Pritchard's writing on the fallout of the Portal case (Evans-Pritchard 294). While community has become a standard term in both heritage and cultural property discourses for its convenience as a designation, our conception of community must adapt to the reality of a globalized world in which space and time are not the delimiting factors they once were.

A developed understanding of the concept should refrain from further naturalizing the biologically defined community, as national registries might, or considering groups to be bound together in identity in the way that was once presupposed. Folklorist Dorothy Noyes forwards that voluntary or consent-based communities are the most important for the production of self-conscious identities. Noyes suggests a reconceptualization of the 'community' designation as it is used in legislation concerning collective rights, just as the Model Provisions do:

> Community is not a clearly bounded, objectively identifiable group of individuals. 'Community' is a convenient label for the work of collective representation and action that emerges from the heart of a dense, multiplex social network. Networks perform themselves as bounded groups to serve collective goals, including the stabilization of their own fluid life; and this autotelic work is increasingly the work of community in modernity. Individuals, to be sure, pressure others towards collective action for a wide

> range of private purposes, and the internal play of power shapes any performance of community ("The Judgment of Solomon" 27).

I tend to structurally diagram community and its substratums of membership as a series of concentric circles, with those social actors most invested and participatory in a community inhabiting its innermost rings, while those peripherally engaged fall towards the outer bands. These stratums are infinitely divisible, but as the circles proceed, participation becomes more tenuous and marginal, and in turn the circles become more porous as identification with the community becomes more prone to fluctuation, or engagement turns more episodic and ephemeral.

To mobilize community as an agent in the proposed legal operations of the MP, so that it might act in state-sanctioned managerial capacities, such an authorized collective may need to resemble a trade union in its construction more so than an informal, porous group bound by culture and self-identification. Boateng's findings on the disparity in state participation between kente weavers, an unofficial community of tradition bearers, and the musician's union in Ghana, bolster this line of thinking (101), as does ethnomusicologist Thomas Beardslee's literature on the unionization efforts of tradition bearers following the heritage designation of the Jemaa el-Fna marketplace (Hafstein and Skrydstrup 54). In both cases, collectives bound by their cultural production found themselves much more capable of wielding civic influence and mobilizing to influence government operations post-unionization. Of course, such a formalizing operation would bear dramatic effects upon a group's performance of their community, and, as in the case of the kente producers, it may be antithetical to a community's identity and practice to restructure itself in such a way.

Beyond the challenge of formally defining communities in order to empower them as administrators of their own cultural property, bureaucratizing cultural property may also severely affect intracommunal dynamics – a reality to which Noyes also attests. In heritage regimes, institutionalization has had detrimental effects on communities by centralizing authority and marginalizing disempowered members, removing the productive intracommunal tensions caused by natural differentiation, which continually evolve and renegotiate group identity ("Learning to Live With ICH: Diagnosis and Treatment" 154). While the commentary does not advocate for a centralized power structure, proposing a more democratic process, a key concern forwarded by Noyes remains relevant: "...the reification of tradition as community-managed heritage tends to undermine one of the most important uses of local tradition, the collective negotiation of intracommunity conflict…" ("The Wisdom of Solomon" 29). The notion of 'consensus' from a community as a means of verifying 'authenticity' mistakenly conflates authenticity with a particular fixed form, a prerequisite of standard intellectual property instruments. Such a process also appears to neglect the organic differentiation of a community as a heterogenous collective, often performing within and interacting with a larger pluralistic society, an aspect which will naturally produce different conceptions of what forms or variants of cultural production are 'correct' or 'authentic.' These discrepancies inherent to intracommunity dynamism problematize notions of 'consensus' as a requirement of verifying folkloric forms to attribute to a group.

Communal tensions are not only tenable, but, within an egalitarian power structure, necessary to cultural advancement. The folklore of a given group shifts and divides into variants according to these tensions and advancements. By authorizing selective, fixed forms of folklore, this process of continual renegotiation and progression is impeded so long as preconceived forms are privileged. Fixing authenticity to a form, whether by likely unachievable consensus

determined by an arbitrarily delimited community or some other means, will invariably present challenges to the Provisions' stated aversion to fossilizing a culture's living folklore by hampering its natural development.

The arbitrary determinants of authenticity, heritage and community pose some of the most perplexing challenges to operationalizing the legal protection of cultural property; the Model Provisions, outside of the commentary's limited acknowledgments of the unresolved logistical implications of the legislation, being deferential to a fault, do not take it upon themselves to solve these practical riddles of implementation bound in theoretical issues of un-relativizing nebulous criterion of authenticity and community. As Evans-Pritchard writes, "our criteria for authenticity, however usefully they are categorized, boil down to something subjective: ultimately, the authenticity of a piece of 'traditional folk art' is an ascribed quality, which depends on who is looking at it, in what context, and for what purpose" (Evans-Pritchard 293). This is likely why the Working Group largely sidesteps over-involving matters of community membership by centering aspects of performance context and commercial interest as the key determining factors in the evaluation of utilizations.

A Modern Problem

Modernization has long been a corollary to the establishment of globally recognized intellectual property rights (IPRs) for folklore and cultural property. The language of the Tunis Model Law and the Model Provisions make clear that the enclosure of folklore is a concession for 'developing' countries among the member states of WIPO and UNESCO (Model Provisions 3) (Tunis Model Law 3). This trend continues today with the TRIPs agreement, which will be detailed in the upcoming chapter, as its signatory states to come into even more systematic

compliance with its standardization of intellectual property law than ever before, but this was true of the Berne Convention as well.

When India and other nations lobbied for folklore protections during the revisions to the Berne Convention, such protections remained conditional; a state must first accept the sweeping alterations to their national legal codes and come into full compliance with the system of intellectual property law authored by the Convention (among other international agreements) in order to be granted these protections, which were never actualized ("Collective Creation" 16-17). The mere prospect of legal safeguards has historically been leveraged to recruit largely non-Western states into the Eurocentric modernizing project, with international standard setting treaties like TRIPS or the Berne Convention operating as modernizing technologies. For a postcolonial nation's cultural production to pursue any form of legal integrity that state must first accept a blanketing Western jurisprudence.

The modern colonial project, I argue, assumes the form of these international regulatory regimes, which often draw impositional force from global economic institutions including the World Bank, which might withdraw or refuse support for states failing to meet standards of compliance (Boateng 103), and by international powers, like the World Trade Organization today, utilizing the sanctions regime of the international trade order to globalize the intellectual property framework of the West (Sunder 128). By coercing states to conform to the Western legal apparatus and the epistemology that it embodies, states are conscripted into the Eurocentric state of 'modernity.' This is why, as Boateng writes, "the task of unthinking [intellectual property] law's dominant concepts of authorship and alienability of culture cannot be undertaken in isolation from that of un-thinking European and North American colonization and imperialism in all their guises and present-day manifestations" (14).

Capitalist, white, heteropatriarchal, rationalist, and liberal orientations characterize this conception of modernity (Escobar). Philosopher Achille Mbembe functionally synonymizes modernization and colonization: ""Modernity" is in reality just another name for the European project of unlimited expansion undertaken in the final years of the eighteenth century" (Mbembe 54). Arturo Escobar forwards foundational tenets to Latin American social theory that corroborate Mbembe's reframing of the term: "the reinterpretation of modernity as "modernity/coloniality" from the very beginning … and the concept of Eurocentrism as a pillar of the entire modern/colonial framework, and of knowledge in particular" (Escobar 85). The Provisions and analogous instruments, which have been continuously proposed and litigated over the years, have thus far been a proverbial carrot on a stick, a tantalizing prospect to secure compliance with Western regimes while amounting to little, as 'developed' powers continue this modernizing process in the bureaucratic channels of the global trade market.

IGC secretary and Director of WIPO's Traditional Knowledge division, Wend B Wendland, betrays one aspect of why this colonial methodology may find such success in a recently released *WIPO Magazine* article on IGC negotiations: "Finally, these issues do not yet seem to stir the hearts of ordinary citizens. There is little pressure from the public and civil society for a speedy conclusion to the negotiation" ("International Negotiations on Indigenous Knowledge to Resume at WIPO"). The operations of intellectual property regimes do not resonate beyond their legislative forums; even as cases of appropriation generate a regular current of public controversy, the mechanics of intellectual property law are much more invisible. The partitions of public domain and private property have become normalized over decades of Western powers imprinting Eurocentric conceptions of subjectivity and authorship. The granularities of international jurisprudence do not provoke righteous outrage or mobilize

citizens in mass, particularly Western citizens, after generations of indoctrination in the ways of the 'modern' world.

The narrative of the developing/developed, traditional/modern binary continues to naturalize the cultural production of many traditional, non-industrial, and poor communities, even as qualities of diversity and multiculturalism are celebrated in the Western world. The dominant culture of 'modern nations' would not detect the inherent liberalism that shapes the global intellectual property regime and its monoculture of authorship. Foucault's characterizes the Modern Age by the same anthropocentrism – placing the figure of 'man' at the center, as the subject, of all knowledge – that defines liberalism and the Western conception of modernization (Escobar 86) (Foucault). Legislative instruments for the protection of cultural property remain hostage to participation in Western modernity, as does the opportunity for meaningful participation in the global economy.

Western laws, including the intellectual property apparatus, are, as Boateng writes, "technologies of modernity" (18). This mode of assimilation operates in the mechanical gears of a nation's legal system, where it is least bombastic and confronting, but most efficient at monopolizing the plurality of the world – a phenomena Cesaire termed European reductionism: "that system of thought, or rather instinctive tendency, on the part of an eminent and prestigious civilization to take advantage of its prestige by creating a vacuum around it that abusively reduces the notion of the universal to its own dimensions, that is to think the universal only on the basis of its own postulations and through its own categories" (quoted in Mbembe 157).

In the late twentieth and twenty first centuries, the forceful diffusion of Eurocentric intellectual property structures has formalized and reified the colonial wave of modernization. The Working Group may have authored the Model Provisions with charitable intention, but the

Eurocentric epistemology that frames the model legislation, centering the very same Western binaries that shaped the beginnings of folklore scholarship (i.e. traditional/modern, developed/developing) and is informed by the archaic notions of cultural evolutionism, limits the Provisions to little more than another modernizing technology, all the more for the outcome that they were never adopted by WIPO or UNESCO's member states.

The Case of Ghana

In 1985, Ghana implemented several reforms to its copyright system; among the major revisions was the addition of protections for Ghanian folklore. The state government drew upon the 1982 Model Provisions in drafting its policy for these protections. Boateng writes that "The initial choice, in the 1985 law, was to consider the creators of folklore as ethnic communities and unidentified individuals and vest the rights in the state and in perpetuity" (10). Since the state's independence in 1957, Ghana's leadership has actively pursued developing a national cultural identity, and this directive has extended to the promotion of 'Ghanian folklore' by the state. The nation's first president, Dr. Kwame Nkrumah, encouraged Ghanian artists to utilize and reconstruct African folk culture by integrating its materials into their work, which Nkrumah alleged had been weaponized against African society by colonial forces (S Collins 181). Folklore's prominence in Ghanian culture was thus, to a significant degree, by state design, as the Independence movement championed this production as a banner of a singular cultural nationalism intended to unify Ghanaians of diverse ethnic, cultural, and political backgrounds in service of a broader anti-colonial movement of reclamation.

Having drawn from the Model Provisions, Ghana's 1985 legislation aimed to regulate foreign appropriation by instituting a fee for commercial reproductions by non-citizens and

prohibiting the importation and sale of foreign copies of works in Ghana utilizing Ghanian folklore, The enactment provides insight into an actualized construction of the Working Group's creation, and perhaps a glimpse into what ratification of the Model Provisions might have looked like.

Ghanian copyright policy did not heed the Provisions' inclination towards community-based conferment of property rights, opting instead to vest all such rights to the state in perpetuity. While this might appear a drastic deviation from the distributive model of the Working Group, the Model Provisions' deference to state comfortably accommodates this interpretation and mode of operationalization by the state. Boateng characterizes the 1985 law: "in a variation on the author-owner division, and even though the language of the law described this arrangement as custodianship rather than ownership, this solution made the state the effective owner of local cultural production that fit the legal definition of folklore" (11).

This approach, no doubt shaped in part by Ghana's interest in developing a unified, national culture, offered no sub-national community entitlements. The sweeping conferment to the state also brought into relief the politics of authorship that further complicate false binaries of individual versus collective creation. The 1985 legislation was met with criticism in part because, according to several Ghanian commentators, there were many instances in which an individual creator of a folklore product accorded to the state was known and identifiable (Boateng 97).

Even though, as Solomon writes, "The values, rights, and philosophies of indigenous peoples place greater emphasis on responsibilities to mother nature and one another rather than on a strictly 'rights' dominated system" (219), this does not suggest an absence of individual claims of authorship and invention within a traditional community, indigenous or otherwise.

Endogenous cultural products, likewise, are not required to be strictly anonymous in origins to qualify as folklore; individual innovation may be, and often is, acknowledged and valued within traditional communities in conjunction with collective modes and processes of creation (Boateng 38).

Paul Simon's utilization of highlife music in his *Rhythm of the Saints* album demonstrates the issues engendered by Ghana's absolute claim to everything legally defined as 'folklore' according to the 1985 legislation. Simon sent a $16,000 royalty payment to the Ghana Copyright Administration after including the traditional song Yaa Amponsah in the album, intending it for Kwame Asare, or Jacob Sam, believed to be the song's composer (J. Collins). Because Asare had died in the decades prior, and the song's melody bore links to other traditional styles, the National Commission on Culture, headed by Nkrumah, had designated Yaa Amponash an anonymous work of folklore. Simon's money ultimately funded the National Folklore Board (Boateng 94); after prompting the Bolivian letter that is credited with initializing UNESCO and WIPO exploration of intangible cultural heritage safeguards, Simon once again emerges, curiously, as a critical actor in the formation of international cultural property and heritage operations.

Ghana has thus utilized the Provisions to develop folklore protections that are both a means of dispossession of Ghanian citizens and one of reclamation from external appropriators. As Boateng writes, "Ghana's legal protection lost its emancipatory promise as it effectively wrote the individuals and communities that produce folklore out of the law" (Boateng 11). This dynamic only intensifies over the proceeding decades, as I will address in the chapter to follow. Though this framework overlooks the community-oriented conception of artistic heritage found within the Provisions, it also completely satisfies the compromised, unaggressive ambitions of

the MPs because of the non-committal policy and optionalized paths of implementation proposed by the Working Group.

Yet, even if traditional communities were granted collective ownership rights tantamount to IPRs by means of this legislation, there are few indications that the majority of these groups would implement them or even be sufficiently versed in their operations. As I noted in the previous chapter, the privatizing structures of intellectual property rights are not conducive to the management of endogenous production by communities who are not founded upon Western principles of liberalism. When Boateng conducted ethnographic research in Ghana, speaking with producers of kente cloth and adinkra designs, means of privatizing their 'original' designs were already available to these tradition bearers.

Ghana's 1973 Textile Designs Registration Decree allowed individuals to register original designs to secure copyright-adjacent protections for these creations (Textile Designs Registration Decree). Nevertheless, kente and adinkra producers took little interest in registering their designs. The majority of Boateng's interlocutors were not familiar with the intellectual property system of the state or how to turn it to their advantage, and among those that were, a refrain to register stemmed from a fear of appropriating a commonly held resource (53). Most felt that they were participating in a system of creation that drew from both an ancestral tradition of creation and a community of artists continuing today. These dynamics of authorship mirror what Aragon writes of Indonesian tradition bearers: "The erasure of [community] contributions, the legal fiction of original authorship in copyright law, generally is not sought in Indonesian communities… Rather, producers tend to couch their contributions within what they see as a more important authority: the ancestral canon" (16).

Boateng juxtaposes the Lockean conception of the singular author to that which she found in her research: “While one can point to similarities in authorship in the two contexts, the strategies of authorization within them are completely different. In one system, authorization is based on the name of the individual cultural producer. In the other, authorization rests on the work of other cultural producers, including those who have died, and also on institutions of power as well as on the medium of cloth itself” (54). These artists operate within, contribute to, and borrow from a ‘specialized commons’ composed of tradition bearers, defined by criteria of authenticity (i.e., crafting process, locality, and physical material) and knowledge. Asserting individual claims of authorship and enfencing this production by means of individual property devices would destabilize a community built upon collective cooperative management and folklore’s characteristic dynamic of traditionality and variation, fracturing the commons.

This sensibility of authorization within a specialized commons is not unique to the so called ‘developing’ world or the non-West. One can observe the same cultural practices of custodianship and decentralization, and the same relationship or marginalized communities to intellectual property systems, in the tradition of blues music in the United States during the 20th century. Artists routinely borrowed songs or pulled from a vernacular inventory to reshape components of its traditional songs into new creations and variants; as English scholar Robert Springer writes, “Folk blues performers recreated most of their songs by amalgamating traditional lines or stanzas with self-composed or improvised ones…blues, it seems, had always operated in this fashion, renewing and adapting the tradition incrementally” (Springer 35).

This cultural production of blues as an intertextual and social form that regularly dovetailed originality with traditionality left community members with an understanding of artistic rights that was not conducive to copyright law. These rural performers were often

ignorant of property rights under federal law, and exploitation by record label executives was frequent (Springer 37). Intellectual property regimes extract from the poor and entitle the powerful and capitalistic in the ‘developed’ United States just as it does in the non-Western, traditional world.

Among the other properties by which the intellectual property regime confers subjectivity upon select individuals and not others, class is a consistent classifying factor; capital, in part, dictates accessibility to intellectual property rights. One delegate of Russia remarked upon this disparity during a WIPO meeting: "the main reason most folklore is not legally protected is that the majority of holders are poor and poorly educated; they don't realize that they are holders of intellectual property and don't know how to go about protecting it" (“Politics of Origins” 305). James Boyle looked to address these inequities (as Sunder writes of Boyle, “he bemoaned the distributive effects of such intellectual property laws”) in his call for a critical social theory of the information society that would account for these issues (Sunder 130). Nevertheless, the collective ownership model of the specialized commons is widespread, and it not adequately articulated how the Model Provisions will effectively retain this model in the case of authorizing a designated ‘competent authority,’ an institution, the state itself, or a “designated representative body” of those among the community.

In the case of the kente and adinkra designs, the state has leveraged these resources in continuing to establish its government-scripted national identity: “the Ghanaian state exercises power in its use of the formal mechanism of the law to reinforce one set of meanings of adinkra and kente, namely, that they are national rather than ethnic culture. In the contests over meaning, it is clear that the state has superior power in its ability to institutionalize certain definitions” (Boateng 15).

But, for all the state's power, it can only accomplish so much with national legislation. Here Ghana once again embodies a fatal flaw of the Provisions: its jurisdiction. As economics professor and former Director General of the Research and Information System for Developing Countries in New Delhi, India, Biswajit Dhar, writes of India's own national policies, "India is deeply aware that its efforts at protecting genetic resources and traditional knowledge at the domestic level will go unrewarded if a complementary legal regime at the international level is not established" (Dhar 261). Given the colonial relations at the root of the appropriation movement, a substantive solution to this system of exploitation requires an international treaty; national legislation is largely ineffective without a larger global framework in the manner of the Berne Convention or the TRIPS agreement of today, which will be discussed in Chapter Four. In some cases, national efforts are plainly counterproductive in their dispossession of communities, as can be seen in both Ghana and Indonesia.

The commentary prepared by the secretariats acknowledges this truth, and suggests a lack of consensus among the Working Group:

> Actual reciprocity in the relations of two or more countries already protecting their national folklore may sometimes be established and declared more easily than mutual protection by means of concluding and ratifying international treaties. However, a number of experts stressed that international measures are an indispensable means of extending the protection of expressions of folklore of a given country beyond the borders of that country…On the question of international regulation, some experts expressed the opinion that, while they are in favor of considering the possibility of adoption of international regulation, priority should be given to regulation at national and regional levels (29).

The Working Group foregoes any efforts to draft international policy, arguing that the Model Provisions should ultimately "pave the way for subregional, regional and international protection" (29). While national legislation may be of benefit in settler colony states – if such a state were ever to opt into such policy – they are generally unproductive. State regulations would

not, and have not, prevented a Chinese manufacturer from globally marketing industrially produced kente cloth (Boateng 148); or an American yoga studio from claiming intellectual property rights over traditional Ayurvedic knowledge and resources (Fish 195); or Eli Lilly & Co. from reaping the indigenously cultivated rosy periwinkle of Madagascar, appropriating the medical knowledge of local shamans, and developing the genetic resource into a drug for the treatment of Hodgkin's disease valued at $100 million annually, none of which returns to the economically vulnerable state (Sunder 132); or a US company like Pureworld Botanicals from patenting the composition of and production process for an extract of maca, an Andean root that has been cultivated by local indigenous communities for centuries as a food supplement (which Pureworld Botanicals now markets as a 'natural Viagra) (International Institute for Environment and Development 5).

These examples go beyond the nebulous scope of 'expressions of folklore,' but the principle remains in all forms of cultural property, and modern policy is as likely to prioritize genetic resources and traditional knowledge as expressions of folklore (or traditional cultural expressions, as they are categorized today). I previously noted the case of Fine Art America utilizing historical paintings of Māori tribal chiefs for lavish shower curtains as an example of what might *yet* be protected under the Provisions in light of the exception for any 'original' work, but in truth these images would not be any better sheltered from the kleptic grasp of a foreign-based corporation without mutual agreement, and the United States has consistently used its trade agreements with other countries to *de*regulate what little international protections exist even further (International Institute for Environment and Development 3). There is no cause for optimism that a colonial force founded in Eurocentric policy would honor such Provisions unless mandated by international treaty. National provisions are thus doomed to inadequacy; this is

perhaps best evidenced by the fact that the 1985 Ghanian copyright laws concerning folklore, which were intended to capitalize on a booming world music genre that liberally appropriated Ghanian music, was invoked on only three occasions following its passage (Ludewig 13).

As Ghana has continued to incorporate Western-style national laws, it has become further implicated within the larger framework of modernity (Boateng 14). Rather than develop alternative models to better subjectify traditional communities and authorize endogenous cultural production, Ghana is consigned by international agreements and institutions of the global economy to continue its march of 'development.' The state was required to implement several programs of economic and structural adjustment programs to receive assistance from the World Bank and International Monetary Fund. As Boateng writes, "Such programs have been a key means of exporting U.S. neoliberalism to the Third World" (103).

Ghana's heavily qualified actualization of the Provisions' base premises do not conclusively demonstrate the inefficacy of the Working Group's draft, but the insights that may be gleamed do not inspire confidence in the MPs' ability to frame a variegated system of law and subjectivity. The Provisions' attempt to design a simulacrum of conventional Western-style intellectual property law fitted to the dimensions of folklore or 'expressions' thereof, as a corrective to the prejudices of extant IP law, is tantamount to extinguishing a fire with the same tinder by which it first ignited. Addressing modernization with a technology of modernization is the original sin of the Provisions, its dooming folly. Ghana passed revised copyright laws in 2005, updating the existing provisions that established the state's entitlement to its inventory of 'national' folklore (Copyright Act 2005). This modified legislation further disqualifies collective models of authorship and disentitles traditional communities while fulfilling the nationalist interests of the state (Boateng 11). I will chart the trajectory of Ghana's folklore laws, and of the

development of national and international mechanisms for cultural property, in the following chapter.

CHAPTER IV

THERE AND BACK AGAIN

Having summarily reviewed both the theoretical and actualized legislation of past decades, I will now turn to the contemporary state of cultural property discourse and praxis as they can be found in international forums, state regimes, and local contestations. As established in Chapter Two, the primary international forum for drafting protections for endogenous cultural production is the World Intellectual Property Organization (WIPO), a body of the UN, within which the Intergovernmental Committee (IGC) houses all discussions pertaining to Traditional Cultural Expressions (TCEs), Traditional Knowledge (TK), and Genetic Resources (GRs). In order to gain meaningful purchase of the current state of cultural property operations, the IGC must be the first site of inquiry. This chapter will explore why the development of international instruments for hard-law protections of cultural property is in a state of atrophy and consider other methods of protection being implemented around the world by nations, communities, non-governmental organizations (NGOs), and other actors and institutions of note.

WIPO established the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore in 2000 to provide a designated venue for further discussion of potential instruments for the protection of cultural property ("The Work Underway at the World Intellectual Property Organization" 217). In its earliest years, the IGC occupied itself with the "analysis and exchange of national experiences with the aim of achieving a better understanding of the interface between IP and GRs, TK, and TCEs" (Robinson et al. 3). From 2009 and continuing into the present day – proceedings having been limited in 2019 and 2020 by the COVID-19 pandemic – the IGC has followed a mandate from WIPO members to

undertake text-based negotiations to reach an agreement on an international legal instrument, or multiple instruments, for the protection of TK, TCEs, and GRs ("Intergovernmental Committee"). These negotiations are now in their thirteenth year, and with the mandate renewed through 2023, there is no apparent end in sight (Report on the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore 2021). The committee maintains, among other drafted texts, working documents for each of the three categories for which they account, with the intention of ultimately revising these consolidated texts into broadly accepted draft provisions to be forwarded to the larger WIPO body ("Intergovernmental Committee").

The group of delegations have made minor advancements concerning these consolidated texts, particularly concerning specific issues including scope and term of protection, beneficiaries, and rights granted, among other dimensions in need of addressing for any theoretical instrument (Robinson et al. 3). Nevertheless, the glacial pace of development has drawn criticism from several state actors and observers. A group of current and former members of the International Centre for Trade and Sustainable Development summarize this concern in a recent book examining the IGC:

> if the IGC continues to inch along at its current pace or fails to deliver, it may confirm the opinion of some critics of the process, that the negotiations were forum shifted into WIPO to maintain a status quo in the intellectual property system – managing developing country and Indigenous representative expectations against an ever higher ratchet of IP minimum standards through other forums or processes like regional trade agreements (RTAs) and bilateral free trade agreements (FTAs) (Robinson et al. 4).

The state of the movement towards reified legislation appears alarmingly indistinguishable from that during the days of the Model Provisions four decades prior; if the project towards realizing globally implemented, legally binding provisions has shifted at all in position, it is only further from actualization, despite being more economically and culturally imperative than ever before.

Many fundamental elements impede substantial progress within the IGC, and the years of circuitous negotiations have compounded these base challenges. Several issues that plagued the ‘82 Model Provisions continue to interfere with the development of effective policy. Any prospective policy devised by the IGC would still be an operation of the state actors (Robinson et al. 7-8), and there remains a failure to authorize communities as opposed to further entitling government regimes. The role of indigenous communities within IGC negotiations makes this abundantly clear. Indigenous representatives have advocated for the recognition of their respective culture’s customary laws in any system of TK and TCE protection, which would bypass the challenges of fixing a Eurocentric regime with additional policy rooted in Western epistemology (Solomon 223).

To define customary law, we may adopt the definition of ‘folk law,’ a synonymous term, forwarded by Alan Dundes and Alison Dundes Renteln: “Folk law is a socially defined group’s orally transmitted traditional body of obligations and prohibitions, sanctioned or required by that group, binding upon individuals or subsets of individuals (e.g., families, clans) under pain of punishment or forfeiture” (xiii). As Oguamanam points out, indigenous communities often have developed systems of customary law complete with alternative modes of authorship and ownership:

> For so long, ILCs and categories of the West's "others" are portrayed as if they have no approximation of intellectual property and, of course, the public domain. Nothing is further from the truth. For those who care to be respectful enough and who seek to understand, it is evident that the customary laws and practices of ILCs animate a robust jurisprudence on intellectual property and contingent concepts, including the public domain (317).

Jason Baird Jackson speaks to the impropriety of standard IP law and the utility of customary law in safeguarding indigenous expressions. Jackson has spent extended time in Oklahoma among indigenous communities. During one stay, the folklorist recorded a

performance of the Woodland Indian stomp dance. In the case of the Woodland dance, adherence to international law, namely the WIPO Performances and Phonograms Treaty, would theoretically prohibit any recording of the stomp dance, a matter typically determined by the local ceremonial chief ("Boasian Ethnography" 46). Jackson muses on the ninety million dollars in fines he might have theoretically incurred if persecuted to the fullest extent. As the Woodland Indian community incorporates recent technologies into its performance, the example brings into relief the ironies of such policy accomplishing the opposite of their intended effect by punishing the documentation, conservation and advancement of folkloric performance and expression, calling into question the practicality of a "one-size-fits-all," global system of intellectual property law (47).

Jackson posits a situation in which a tribe like the Woodland Indian community may seek to publish a recording of their performance, only to be roundly denied for not obtaining the adequate formalized permissions from each individual performer who participated in what is a loosely organized traditional performance that does not neatly delineate between performer and audience. The case supplies a telling microcosm of the dissonance that results from a monolithic intellectual property regime. Jackson finds little value to current the interventions of IP systems, and even its Western counter-movements:

> All around the world, local peoples, their practices, and the distinctive IP systems in which they are still imbedded, are pressed in upon from two sides. Both the Euro-American public domain being defended by the Free Culture movement and the strengthened and harmonized IP system promoted by WIPO and WTO offer themselves up as solutions to the problems faced by indigenous and other so-called traditional communities, but both encroach upon and destabilize societies that might otherwise wish to be left alone (48).

While certain state delegations have, at times, lent support to this proposal of recognizing customary law at times, industrial nations including the United States, Canada, and Japan have

firmly opposed this idea, and only within the past few years have the draft articles made any reference to customary law in bracketed text (Solomon 223); as recently as 2016 there was no such reference at all, so this may be considered progress (The Protection of Traditional Cultural Expressions: Draft Articles 2019).

One reason this notion has gained such limited traction over the years is that indigenous people attending the IGC are only recognized as 'observers,' as the negotiations are undertaken by the states. Observers may speak, but they are not a part of informal sessions or drafting the key texts. Maui Solomon, a New Zealand barrister, writes that "The IGC meetings have been characterised by indigenous peoples and member states talking past one another" (220). Solomon offers a valuable perspective, having participated in IGC sessions as an indigenous observer. He notes that there have been several "walk-outs" by groups representing indigenous peoples throughout the IGC process, as their comments and submissions have routinely been "dumbed down" into defanged, non-binding policies or entirely ignored (221). As Jackson writes, "One part of WIPO is listening, with one ear at least, to carefully crafted position statements by the American Folklore Society, by other NGOs, and, most prominently, by indigenous actors themselves, while another, more powerful, part of the body has already acceded to the demands of multinational media interests protecting profits against pirates in the global market" ("Boasian Ethnography" 47). The World Trade Organization (WTO), to be discussed presently, only furthers the tradition of acquiescence to corporate interests set by WIPO ("The Future of Food" 719).

Indigenous groups have reason to feel dismissed in IGC proceedings; the US and other "developed" nations have opposed funding indigenous peoples' participation in IGC meetings by allocation of WIPO's core budget, despite claiming to support such participation. Instead, this

participation is budgeted through a Voluntary Fund, but this fund has not been sufficiently filled to achieve these purposes (Solomon 227). I turn once more to Solomon as he articulates the disillusionment that has followed in the wake of WIPO's Fact Finding Mission:

> The Fact Finding Mission undertaken in 1998-99 raised the hopes of indigenous people around the world that their voices would at last be heard and the concerns they had been expressing for decades about the rapacious exploitation of their knowledge and natural resources would be controlled under new and innovative mechanisms … Sadly, after sixteen years of effort and cost in attending these meetings, indigenous peoples appear to be no further ahead in achieving these hoped for aims and aspirations (227).

While the language of the provisions has evolved slightly – "folklore" being supplanted by the less connoted 'traditional cultural expressions' and reference to "developing nations" replaced by an emphasis upon "indigenous peoples and local communities" – little else has advanced from the material forwarded by the Model Provisions (Overview of Policy Objectives and Core Principles). The scope has expanded beyond folklore, or TCEs, to a more comprehensive conception of traditional cultural production, if still limited. Just as the 1982 Provisions were heavily bracketed to optionalize much of its substantive policy (a capitulation to states in opposition to aggressive policy authorizing its communities with ownership rights – 'ownership' being a term which the Provisions entirely avoid), the IGC's draft articles are bogged in bracketed language indicating disagreement over the vast majority of its content (Solomon 220), including even base definitions, after thirteen years of negotiations since the 2009 mandate (Traditional Cultural Expressions: Draft Articles 4).

American legal scholar and director of the IP Attache Program at the US Patent and Trademark Office, Dominic Keating, confirms the heavily contested state of the consolidated texts, a result of *demandeur* (seeking to reform current international standards and regulations) and non-*demandeur* (trying to protect the status quo) countries both ceding little ground: "After more than five years of formal negotiations, the IGC consolidated Texts leave little or no room

for agreement between WIPO members. They contain hundreds of brackets, representing the divergent positions of Member States" (271). Just as in the Model Provisions, the IGC draft documents are replete with multiple alternatives for each article; the 2019 draft articles for the protection of TCEs include three alternative passages for a matter as fundamental as the statement of its objectives (Traditional Cultural Expressions: Draft Articles 6). The delegation of India, at a recent meeting, insisted that the IGC stop "moving in circles" (Solomon 226), but the only matter that colonial, industrialized forces, 'developing nations,' and observers representing indigenous peoples have reached consensus on is the stagnant, sorry state of the IGC's negotiations, as the draft articles continue to slowly endure a death by a thousand brackets.

This is the result of an entrenched negotiation that must arrive at multilateral agreement – or, as Wendland terms it in his March 2022 update on the IGC negotiations: "The "nothing is agreed until everything is agreed" approach means that reaching consensus in the IGC is enormously challenging" ("International Negotiations"). While Keating passively describes the fettered condition of the current texts as a reasoning for abandoning the negotiations altogether, Oguamanam argues that the United States and other non-*demandeur* countries have tactically bogged down the talks, deliberately impeding any meaningful advancement:

> The United States habitually adopts a negotiation strategy that tends to fluster delegates by injecting draft texts with terms and phrases often less rigorously explored. From the perspective of a participant observer, one notes that this approach often diverts energy into definitional debates over terms in the texts in a manner that has proven inefficient, diversionary, obstructive and ultimately counterproductive. Lacking in any specificity, all of these categories are inflammable and constitute sites for direct conflict between customary laws and practices of ILCs and colonial intellectual property rights at national levels (317).

These seemingly unsporting negotiation strategies are part of the problem, but the agendas of *demandeur* countries breed further concerns. Indigenous groups have been invited to speak at IGC meetings and advocated for the implementation of customary law, and though the interests

of these groups may align with *demandeur* countries in their opposition to the privileging of Eurocentric modes of authorship and property, several of these states, in line with Ghana's folklore legislation, continue to pursue models of state ownership over cultural property congruent to the 'national folklore' option forwarded by the Provisions.

Historically, the African group of states has challenged the notion that indigenous and traditional communities be the main beneficiaries of cultural property legislation or be regarded as the primary stakeholders of such cultural production. Just as in Ghana, the coalition of African states stake their claim to national culture and heritage in arguing that state governments maintain control of any legal instrument for the protection of traditional cultural expressions and knowledge. Indigenous representatives have not received this position well, citing the often tense relations between federal regimes and its minority communities ("On the Work Underway at WIPO" 219).

Living with TRIPS

Beyond the internal obstacles to successful IGC negotiations are several external hurdles. Current cultural property discourse concerning IPRs must be framed by the World Trade Organization and the international treaty observed by its members: the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). TRIPS was agreed to in 1994 and set into action the following year. It has become the most important device for regulating intellectual property at the international level (Boateng 10). The agreement, which furthered the expansion and global codification of Eurocentric intellectual property law, finalized a decades-long project of industrial states to convert international IP regulation into a trade issue, allowing these states to further leverage the threat of trade sanctions and exclusion from the global economy to coerce signatory states into complying with an even more robust system of intellectual property law

(Sunder 128). To this end, the agreement formalized the hegemony of industrial powers, as Boateng describes:

> Another feature of TRIPS that is particularly significant for Third World nations has to do with the nature of decision making within the WTO. Unlike the relatively democratic one-nation-one-vote system used in the United Nations, decision making in the WTO is tied to economic power in a system of "linkage bargaining." In this system, developing countries are granted certain concessions in international trade in exchange for consenting to agreements proposed by industrialized nations (156).

TRIPS has emerged as, thus far, the most engrossing and dominant evolution of the colonial modernizing project as it operates within the global intellectual property regime and weaponizes the global economy by detaining privileges of access and support. It has facilitated the distribution of neoliberalism around the world (Boateng 18).

The agreement upheld and elaborated upon expansions of intellectual property law in several areas, including the patentability of microorganisms, computer software, and pharmaceutical data, among other information-age-rooted domains (Agreement on Trade Related Aspects of Intellectual Property Rights) (Boateng 155). The global treaty does not cite traditional knowledge as a source of intellectual property, or make any mention of it at all. This omission, paired with the reified globalization patenting animal and plant materials, was interpreted by critics as formally legitimizing the exploitative practice of biopiracy (Oguamanam 310). TRIPS, unlike former WIPO agreements, which occurred within the United Nations, is legally binding and enforceable, allowing industrial nations to fully police the piracy of materials sheltered within the domain of intellectual property (Boateng 9).

The drafting of the TRIPS agreement, which, alongside the establishment of the World Trade Organization, supplanted the General Agreement on Tariffs and Trades (GATT), comprised a negotiation process notably defined by the heavy-handed influence of pharmaceutical, agricultural, and high tech industries and the immense pressure applied to

'developing' countries to sign the agreement (Borowiak 519). To this end, Article 27.1 of TRIPS states that an innovation must be viable to industrial application for intellectual property rights to be awarded, invalidating all modes of cultural innovation that do not conform to pipelines of industry (*Biopiracy* 10). As Sunder writes of these non-Western countries, in which the TRIPS Agreement monumentally increased the strength and scope of intellectual property law, "Since they had been pressured into signing TRIPS during the Uruguay Round of WTO negotiations, countries such as Brazil and India had argued that strong intellectual property rights helped the West but would devastate the rest" (126).

The Agreement provided a ten-year window for 'developing' countries to bring their respective legal systems into full compliance with the intellectual property laws of TRIPS. Several states resisted this 'modernizing' project, formed in neoliberal doctrines; some, such as India, delayed adopting the TRIPS framework and its Western style intellectual property rights for as long as they could (Sunder 126-27); as Hafstein writes, "This agreement [TRIPS] left many states feeling that they got the short end of the stick. A widespread disillusionment with the intellectual property system followed in its wake." The Agreement multilaterally reified in one fell swoop the Eurocentric consecration of individual rights; TRIPS' preamble asserts that IPRs are recognized only as private rights (TRIPS 320). Shiva notes that this limiting definition "excludes all kinds of knowledge, ideas, and innovations that take place in the 'intellectual commons' – in villages among farmers, in forests among tribespeople, and even in universities among scientists. TRIPS is therefore a mechanism for the privatization of the intellectual commons and a deintellectualization of civil society" (*Biopiracy* 10). TRIPS is the defining legislation of the second enclosure movement, and will likely continue to dictate the continued segregation and partitioning of cultural production, knowledge, and resources across the world.

Converting international regulation of intellectual property rights into trade negotiations dislocated IPR negotiations from the World Intellectual Property Organization and the greater UN, with the World Trade Organization superseding it (Robinson et al. 4). Despite this, discourse concerning a pluralistic redistribution of intellectual property rights remains largely confined to WIPO. WIPO's Intergovernmental Committee resulted from a compromise between 'developed' and 'developing' countries to provide a dedicated forum for continuing discussions over traditional cultural property ("The Politics of Origins: Collective Creation Revisited" 301). Whatever agreements or consolidated texts emerge from the IGC, if its mission of negotiation were ever to be realized, may be moot if they are not ultimately accepted within the World Trade Organization, as WIPO is no longer the international regulator of intellectual property in the same capacity it once was prior to the ascendance of TRIPS.

The designated forum for cultural property being relegated to a WIPO committee is one indicator of the antagonism with which demands for cultural property protections are being met by economically powerful, "developed" nations. As legal scholar Ruth L. Okediji writes, "WIPO is neither formally charged nor structurally designed to accomplish the kind of linkage bargains now associated with the WTO" (Okediji 73). Because of this, and because TRIPS is equipped with dispute settlement mechanisms and sanctions to address cases of misappropriation or erroneous patents, critics and representatives for 'developing' countries argue the WTO is the more appropriate forum for these negotiations, particularly for the management of genetic resources and traditional knowledge, as the TRIPS council of the WTO are required to review key articles of the agreement covering the intellectual property status of plant and animal materials and their utilizations in assorted pharmaceutical, biotechnological, and agricultural industries (Robinson et al. 4).

As Shiva writes, “The whole notion of TRIPs has been shaped by the objectives and interests of trade and transnational corporations. Through the instrument of TRIPs, transnational corporations have posed a potential threat to the biological and intellectual heritage of our diverse communities by appropriating and privatizing their knowledge” (“Comparative Perspectives Symposium: Bioprospecting/ Biopiracy Bioprospecting as Sophisticated Biopiracy” 309). The Indigenous Peoples’ Statement on TRIPS, signed by a collective of indigenous peoples’ organizations, NGOs, and advocate groups, and published on the United Nations Development Program’s website, anticipated a destructive pattern of exploitation in the wake of the agreement:

> It [The TRIPS Agreement] will lead to the appropriation of our traditional medicinal plants and seeds and our indigenous knowledge on health, agriculture and biodiversity conservation. It will undermine food security, since the diversity and agricultural production on which our communities depend would be eroded and would be controlled by individual, private and foreign interests. In addition, the TRIPS Agreement will substantially weaken our access to and control over genetic and biological resources; plunder our resources and territories; and contribute to the deterioration of our quality of life (No to Patenting of Life! Indigenous Peoples' Statement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the WTO Agreement)

While the Agreement continues to oversee the globalization of Eurocentric systems, acting as the preeminent interface of modernization, it has managed to contain cultural property discourse while sweeping these negotiations to the margins, where it is of little consequence and continues to make little progress, effectively holding hopes of international protections for traditional cultural production hostage, jailed deeply within a larger colonial construct.

Establishing a binding international instrument for the protection of any materials within the IGC's purview faces several hurdles beyond the committee’s internal stagnation and the imposing framework of an overpowering TRIPS agreement. While TRIPS allowed industrial nations to institute a multilateral intellectual property regime and regulate it forcefully, bilateral

free trade agreements (FTAs) synchronously shape intellectual property rights between nations. Through the Office of the United States Representative (USTR), the US has continued to bolster international IP protections by means of these bilateral agreements ("The "Good Old Days" of TRIPS 342). FTAs allow a nation like the United States to leverage their positioning in the global economy to disproportionately influence textual agreements between nations, often requiring the establishment of criminal sanctions for infringements upon intellectual property rights and additional protections to those agreed to in TRIPS. As Scafidi writes, "the USTR seeks to supplant ambiguous provisions in TRIPS with concrete substantive minima in FTAs" (342-43).

For example, the ability to develop strong national legislation for the protection of traditional knowledge systems in Peru was severely undermined in recent years by the state's FTA with the US. According to one report by the International Institute for Environment and Development, the agreement's "exclusion of any kind of provision to ensure that no patents are granted in the US without the authorization of traditional knowledge holders (the result of strong lobbying in the US by the biotech and pharmaceutical industries) leaves the door wide open for a vigorous scaling-up of biopiracy in the Andes" (3). Industrial privatization of genetic resources by a corporate entity in the US or elsewhere could jeopardize the food security of Peru's indigenous Andean population. Industrial nations continue their catering to corporate interests by obstructing the implementation of national protective laws – already limited in scope and force by TRIPS – in 'developing' countries by piling additional proscriptions and obligations onto their intellectual property systems through FTAs.

Ghana: Checking In

In 2005, Ghana revised its intellectual property laws to come into full compliance with the international requirements set by the TRIPS agreement. Trustees of Ghana's Folklore Board called for the 1985 folklore provisions to be reformed as part of this larger overhaul. And so, twenty years later, the state capitalized on the modernizing wave prompted by TRIPS to advance its campaign of harnessing folklore as part of a larger nation-building project (S Collins 178). The updated laws expanded Ghana's protection of folklore and its requirement of licensing fees for any commercial utilizations of folklore. Most notably, the 2005 Copyright Act gated folklore not only from potential foreign appropriators, but from national citizens (Copyright Act 2005). Where the former law had subjected commercial utilizations of folklore imported into the country to authorization, the 2005 law entrusted all folklore rights in trust to the President of the Republic and demanded royalties for anyone, national or foreign, to utilize an expression of folklore outside of its standard context (the law's use of the term 'expression of folklore' and its considerations for context still very much echoing the 1982 Model Provisions). This 'folklore tax' signified the state's interest in controlling the expression and conception of folklore not only from external exploitation but within its own state, and from its own citizens (Boateng 129). In doing so, the Act altered Ghanian's relationship to their folklore.

In the earliest years of the Republic, President Kwame Nkrumah recruited Ghanian playwrights, among other national artists, to incorporate Ghanian folklore into their work as part of both developing and promoting a sturdy national identity for the state. This cultural policy developed a rich tradition of theatre in the country, with multiple theatrical forms developing from the integration of folklore and its naturalistic modes of performance into the medium (S Collins 181-83). The 2005 policy, which dispossessed playwrights and other Ghanian artists of

their heritage, carried the greatest implications for these tradition bearers and manufacturers of the national culture. The state having demonstrably benefitted from their work engaging with folklore, the choice to police Ghanian artists producing for Ghanian audiences suggests a change in direction for the government, but legal expert Stephen Collins argues this is in fact a continuation of the state's enclosure of its staked national folkloric inventory:

> from the perspective of the state, the success of Ghana's theatre industry has contributed to the understanding of folklore as an important cultural asset with a considerable political and economic significance. So, rather than being anomalous, in fact, the protection of folklore against use by nationals in the 2005 Act can be read as a next, logical step, in the state's management of its cultural resources (13).

The state risks forcing a wedge between national playwrights, among other artists, and their heritage, such as the stories of Anansi, a popular figure of West African folklore, in their artistic production and cultural contributions moving forward.

The legislation prompts further concern over the development of state-operated protections for cultural property. For Ghanian citizens to use their own folklore with gainful intent – folklore which may derive from a more localized corpus such as the heritage of a community identifying by their region, ethnicity, religion, or some other criteria – those citizens must apply and pay a fee to use what is theirs, as it now amounts to state property. Similar issues have emerged in the wake of Indonesia's 2002 copyright law, which vested intellectual property rights over the state's folklore and other cultural property to the state. As Aragon writes,

> In the wake of the laws in public debates, a few local Indonesian leaders seized upon the idea that state units such as districts should copyright elements of 'their' local culture … As some observers have feared, the 2002 law is vague enough to suggest that state agents have the authority to make cultural property claims, which could usurp the existing informal authorities and modes of sharing among local producers (17).

State-centric legislation accomplishes little in the way of preventing international exploitation, lacking the scope to police appropriations abroad. Instead, these state provisions monopolize

cultural property domestically, specifically by means of Western modeled intellectual property frameworks, while failing to contain it globally; it imports the same centralizing operations into the commonwealth.

Guerrilla Tactics and Beyond

With the development cycle of a binding international instrument for cultural property currently in a state of suspension forty odd years going, and the reach of national IP legislation hamstrung by modernizing technologies like the TRIPS agreement, communities, activists, and nations have sought alternative remedies to level the field and, by piecemeal means, incrementally progress towards a variegated ontology of authorship and property – or, as Robinson *et alia* write, "To globalize diversity holistically" (8). The majority of these alternative approaches to reclamation are heterogenous in circumstance, localized to particular sites of dispute, and lack the broad applicability to serve as featured instruments of protection for cultural property at an international scale. The various social movements and methodologies that I will briefly note are to illustrate a few of the concurrent operations enjoying some measure of success around the world while IGC negotiations continue to meander unpromisingly and TRIPS looks to subordinate national IP systems for the foreseeable future.

Before reviewing, I will touch on one international mechanism and its potential for entitling traditional and underserved communities: the disclosure agreement, particularly as a provision of the Convention on Biological Diversity (CBD) and its supplementary agreement, the Nagoya Protocol. The Convention on Biological Diversity is a global multilateral treaty, much like TRIPS, first signed by member states of the UN in 1992. Its mission of sustainable development is tripartite: the conservation of biological diversity; the sustainable use of its properties; and the equitable sharing of benefits derived from genetic resources (Convention on

Biological Diversity). Today, the United States is the only UN member state to refuse ratification. India, a signatory of both TRIPS and the CBD, has petitioned the WTO on behalf of several countries of the so-called 'global south,' calling for TRIPS to be amended so that it aligns itself with the considerations and objectives of the CBD, but this harmonization has yet to occur ("The Future of Food" 718).The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, or simply the Nagoya Protocol on Access and Benefit Sharing (ABS), was initially signed in 2010 and enacted in 2014. The protocol obligates signatory countries to access genetic resources according to mutually agreed terms and with prior informed consent, among other stipulations of compliance (Nagoya Protocol).

Switzerland has called for an international structure, which might be enfolded into the Protocol, that would require patent applicants utilizing genetic resources or traditional knowledge to cite the source community on their application. Doing so would allow for the verification of the source community's consent prior to granting any patents and prompt the formation of contracts between parties to determine terms of benefit sharing. Any non-compliant patent holders, who might have failed to obtain prior consent or establish mutual terms of agreement, would then be subject to the revocation of their patent (Bauer 247-49). Dominic Keating, articulating the US perspective on such agreements, argues that a binding disclosure agreement would have "devastating impact on research and development in the field of biotechnology and pharmaceuticals due to uncertainties that they would introduce into patent protection" (270). The US would much prefer to keep these devastating effects incurred by patent uncertainties on the non-industrial side of these exchanges by maintaining the status quo.

Global instruments like the CBD and the Nagoya Protocol offer promising platforms of international treaties – already enacted – that are well suited for the expansion of hard-law protective devices for genetic resources and associated traditional medical knowledge. The IGC's recent consolidated texts for the protection of GRs incorporate a combination of approaches, including a disclosure requirement much like that previously described and several complementary defensive measures, including "databases, voluntary codes and guidelines for IP/patent offices, third party dispute mechanisms and due diligence regimes within patent offices under national laws to ensure compliance with relevant access and benefit-sharing (ABS) regimes" (Taking Stock of Progress and Making a Recommendation to the General Assembly 4).

Geographical indications (GIs) have continued to show promise for poor communities as well. Sunder writes of the growing consciousness of intellectual property devices among traditional peoples in India, as the state reluctantly transitioned their legislation to come into full compliance with TRIPS: "One hope is that Geographical Indications (GI) protection will allow local artisans to stay in their communities and fend for themselves, without having to renounce their traditional work for life in the overcrowded cities" (128). Most of these territory-based indications, which broaden the epistemology of the IP regime and recognize alternative forms of innovation and ownership, are still distributed amongst Western, 'developed' countries rather than alternative or traditional communities, but as they become more featured in communities across the world, awareness will continue to grow (Stevens 70). They are options worthy of continued engagement because of their promise for protecting the specialized commons surrounding cultural products like kente and adinkra designs, if limited in versatility and strength. As Stevens writes, the structure of geographical indications holds unique potential for unincorporated collectives:

> In the context of globalization, [GIs] have been touted as a means to counter the damaging impacts of neoliberal trade and to protect rural spaces and small producers from the homogenizing impact of industrial agriculture. By tying ip to a specific location (rather than to an individual or company), [GIs] contrast with the more neoliberal US logic of trademarks and branding and may provide a means for Davids to take on the Goliaths of twenty-first-century multinational food corporations (70).

Geographical indications and the defensive measures to follow constitute some of the alternative ways that disenfranchised communities, 'developing' nations, and anti-enclosure activists have found limited but effective means to reclaim contested grounds of ownership, protect inventories of cultural production, and negotiate meaningful concessions within IP regimes.

State regimes, too short of reach to police patent applications abroad, remain proactive by inventorying cultural property and developing databases, or digital libraries, which can be distributed to patent offices across the world so that they might not grant errant patents that plagiarize documented forms of heritage (Bauer et al. 251). India has created an extensive database in the wake of prolific attempts by foreign parties to patent Indian cultural products, most notably ayurvedic knowledge and cultivated genetic resources: The Traditional Knowledge Digital Library. Alison Fish outlines the purpose of this database: "The Indian government's expectation is that an application for a patent on an item already documented within the TKDL should be rejected on the grounds that it would fail to meet both the legal standards of innovation and nonobviousness" (Fish 200).

Countries often develop national surveys to achieve the level of cultural documentation required of such an inventory. Japan's Cultural Property Protection Law (Bunkazai Hogoho), for instance, conducted nationwide surveys to assemble an inventory of the country's traditional forms of performative arts. The surveys themselves proved beneficial in leading to the establishment of preservation societies and revitalizing local communities' relations to their own traditional folk arts, albeit in a metacultural, heritagizing form (Thornbury 211-12). While such

comprehensive surveys of intangible heritage are a practical means of cultural documentation, developing these results into databases encounters the reoccurring reductive process of converting cultural property into data, of intellectualizing, ossifying, and categorizing cultural forms that must be considered holistically to be understood, and which are continually subject to a dynamic process of change and redefinition within a community. As Sitya Reddy notes, "Cultural documentation—whether it is the translation of a text, the creation of a database, or the attribution of collective authorship in drug discovery—makes the assumption that intangible heritage can be isolated, objectified, and then managed through modern management techniques" (Reddy 165). The pitfalls of this assumption were demonstrated by Bunkazai Hogoho. Anthropologist Barbara E. Thornberry writes of the late-stage effects Japan's cultural property law: "The law's very success in establishing the notion of folk performing arts as fixed cultural properties may itself make their survival more difficult by discouraging fresh approaches that might attract newcomers" (Thornberry 5).

India was also compelled to develop a digital yoga library after enterprises across the world sought to privatize various forms and components of the South Asian tradition. As Alison Fish writes, "different gurus, schools, and corporations have, in the last several years, registered thousands of IP claims on yoga-related goods and services. Figures from United States IP agencies, the U.S. Patent and Trademark Office and the U.S. Copyright Office, indicate that there are 2,315 trademarks on yoga, 150 yoga-related copyrights, and 135 patents on yoga accessories presently registered in this country alone" (Fish 192). While the Indian government is not seeking to privatize yoga or ayurvedic knowledge as its own, it has worked fruitfully to prevent its privatization by others, with the aid of advocate institutions and organizations.

For example, the Art of Living Foundation, fearing that their yogic forms may become privatized by some party who may then block their access to these techniques moving forward, applied a counter method inspired by copyleft strategies developed within open-source communities. The Foundation registered its yogic practices as their own intellectual property in order to proactively claim the materials before a competitor might have done the same. Rather than seek to privatize it, the Foundation patented these forms to preemptively negate anyone else, ensuring its continued open access. Fish refers to this technique as a reverse-patent, and it is one means of anticipating and impeding privatizing efforts (Fish 199).

As noted, it borrows from the tactics of the copyleft movement, which, in essence, is a counterculture, and an alternative ownership model, to the intellectual property regime's dominant values of individualism, romantic conceptions of authorship, and Lockean notions of intellectual property. In the United States, the movement has been championed by open source software communities who cooperatively write and share code with one another as part of a digital commons (Boateng 178) (Fish 199). Copyleft authors utilize licenses like the GPU General Public License (GPL) to produce a common-ownership model with their productions. As media and communications expert David M. Berry writes, the General Public License

> grants generous freedoms to users of the software and source code, providing that any further software built from this source code is also licensed under the same agreement. This is known as 'copyleft' licensing. These licences can be understood as a mechanism for social ordering, in that they help constrain and stabilise the interactions of the developers involved in FLOSS [free/libre software and open source software] development (Berry 18).

In constructing digital libraries and employing copyleft techniques like reverse-copyrights and reverse-patents, communities can carve out a vibrant commons, specialized or delimited by its own barriers to entry, that does not rely upon the unconsented disentitlement of groups who practice non-individualist modes of production and ownership.

Returning to the case of yoga – converting cultural property into a database of officialized designated forms brings detrimental and reductive effects to the very traditions its intended to preserve. Fish remarks upon this essentializing and selective process in the case of India's digital library:

> The library will contain a few thousand postures and their explications, a limited number when compared with the overall total. For example, members of the Bihar School of Yoga claim to use tens of thousands of asanas in their style of practice. The choice of which asanas are included and which traditions of yoga are represented in the digital library is a decision of inclusion and exclusion. Thus, these decisions are also political choices that can determine what is thereafter considered authentic yogic knowledge within both local and transnational communities of practice (201).

Digital libraries invite many of the same political hazards and fossilizing effects as cultural heritage operations, which are much more dominant today than cultural property operations.

Another means of resistance to industrial extraction and monopolization is found in mirroring the rights-based language of the intellectual property regime. This discursive approach has been a significant component of the efforts of nongovernmental organizations (NGOs) and activists to pressure TRIPS for provisions that acknowledge the 'rights' of unincorporated groups. Farmers have adopted the rhetoric in advocating for exemptions from the enclosure of seeds and recognition of farmers' contributions to biodiversity and genetic resources. As Borowiak explains, "Over the past few years, "farmers' rights" have become particularly important focal points in the effort to pressure for change at the WTO. A wide variety of NGOs and Third World farmers have built coalitional ties around concerns over "farmers' rights," "indigenous rights," and biodiversity" (533). Through these efforts, 'farmers' rights' have become folded into the national TRIPS discourse, and "an effective sui generis plant variety protection regime has been made compatible with explicit acknowledgment of the contributions of farmers" (534).

The success of this campaign is, in part, owed to the participation of activist NGOs in support of indigenous, poor, or otherwise marginalized farmers; mobilizing external parties to act in the interest of the groups oppressed by the modern intellectual property regime is essential to generating a larger movement of resistance, one capable of penetrating national TRIPS discourse and challenging policy. Raising public awareness of the Eurocentric system that is the global intellectual property regime and its ongoing operations of extraction is an enterprise that would prove beneficial to destabilizing the current state of things.

Educational campaigns promoting the use of intellectual property mechanisms by traditional communities have occurred for some time with very limited success, and these missions are for the purpose of integrating others into a still monolithic system and continuing the modernizing project (Moahi 100-01). Raising awareness within the Western, 'developed' world of the discriminatory and colonial performance of the IP regime and unshrouding these structures that have historically been invisible, imprudently granted by Western dominant cultures, might to be a more worthwhile strategy. Generating internal resistance within non-*demandeur* countries would apply meaningful pressure to state actors in concert with the external demands of *demandeur* countries.

To optimize these external pressures, priority should be given to organizing and forming coalitional ties. WTO member nations agreed to provide the 'least-developed' member nations with a ten-year window to come into full compliance with the TRIPS agreement, an outcome which legal scholar Susan Scafidi determines a "victory of collective bargaining power" ("The Good Old Days of TRIPS" 342). The ability to assert collective influence is unavailable in the negotiation of free trade agreements, and so it should be leveraged in international trade negotiations to the fullest extent. Boateng provides an additional example: "Within the

international regulatory order, Third World nations have been most effective when acting in regional or other groups. For example, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources' 2009 agreement on traditional knowledge protection was reached with the leadership of the African group of nations rather than individual" (158).

While the IGC negotiations continue to meander unpromisingly, and while the TRIPS agreement proceeds to subordinate national intellectual property systems and suppress the development of meaningful *sui generis* systems of cultural property protection, victories and strategies of a smaller scale can be found in the margins. None of these resources can achieve sweeping reform or fundamentally alter the TRIPS agreement into a more pluralistic treaty, but if guerrilla methodologies are producing victories for marginalized groups, providing agency to communities that have long been the object of intellectual property law but never the subject, and yielding tangible dividends, then efforts are better placed in these localized disputes than in the echo chambers of international forums.

CHAPTER V

CONCLUSIONS

Despite the noble ambitions of attempting to redeem a monolithic global regime and acknowledging the exploitative practices thereof, the Model Provisions are a technology of modernization that fail to ultimately rise to the necessary scope of international treaty. The structure, language, and concessions of the Provisions are symptomatic of the same Eurocentric epistemology that underpins the standing regime and its systemic discriminations. Ratification of the Provisions would have resulted in the further enclosure of expressions of folklore by state actors, allowing countries to house a national inventory of folklore under their administration, dispossessing already marginalized communities and enabling a nationalist regulatory system for expressions of folklore. The Provisions' acquiescence to Western priorities of innovation and original productions prevents even appropriative works within the state from being subject to authorization unless they are strict imitations or reproductions of traditional expressions; as long as a work can claim to be original despite its annexation of folkloric materials, it is exempt from any obligations to source communities. For these reasons and more, the Provisions are not meaningful pluralizing legislation. Actualized folklore legislation, such as the copyright laws of Ghana in 1985, which drew from the Provisions, confirms this determination.

And so, we turn to the state of operations today. Cultural property discourse at the international level has been relegated to the Intergovernmental Committee (IGC) of the World Intellectual Property Organization (WIPO), who engage in a Sisyphean undertaking, negotiating for multilateral resolution amongst unbending member states, rehashing the same positions each year over the tired pleas of indigenous representatives. If a miraculous consensus were ever to emerge from these talks, it may be of little consequence, as the global IP regulatory system has

departed WIPO for the World Trade Organization (WTO) with the advent of TRIPS; what truly matters now is what happens there.

While efforts for substantive international protection of cultural property have spent the past four decades on a treadmill, exerting great effort to make no forward progress, the colonial project of globalized modernization has advanced with tempestuous force. The TRIPS agreement unambiguously catered to corporate, industrial interests and denied the ontology of unincorporated collective property rights. The treaty has compelled nations of the global south to comply with further articulated standards than ever before, forcefully and systemically imposing principles of neoliberalism across the world. With the WTO having successfully shelved cultural property discussions within the IGC, bureaucratic obstacles have continued to precipitate and codify while the development of a legal instrument for the regulation of cultural property remains little more than a phantom, a tool of assimilation to occupy the efforts of state actors who are compelled to accept the premise and implementation of Lockean intellectual property rights for a seat at the negotiating table. As long as operators are forced to maneuver within inflexible Eurocentric systems and epistemologies, *demandeur* countries are unlikely to materialize anything more than conciliatory pockets of exemption or benefit sharing intended more to placate than to pluralize. The IGC cannot be expected to finally subjectify the historically 'othered' peoples of the IP regime, to earn agency for the victims of this system of extraction and create a multidirectional, equitable system of exchange.

The modernizing systems of the IP regime sink into a state's operations like the curved teeth of carnivore; once bitten, resistance only deepens the purchase of the bite. The Model Provisions, written to rectify the exploitation of 'developing' countries, only to manifest as a modernizing technology, demonstrate this reality. Four decades of resistance since the Model

Provisions find the signatory nations of TRIPS more entrenched in Western modalities than ever before. This is why, particularly after successfully converting intellectual property standards into a trade issue, the global IP regime is one of the greatest weapons of colonialism. It is also why I argue that concerned parties should not and cannot wait for WIPO's work to accomplish substantive reformation. NGOs and activists, and the IGC as well, would allocate their resources more productively by supporting informational campaigns, in the Western, 'developed' world especially, to bring this invisible machinery into the light and mobilize the populace. The IGC's forum might not be a space for meaningful negotiation, but by shifting away from this thirteen year stalemate the committee might find success in continuing to hold ad hoc meetings of experts to develop ways to more effectively influence the WTO for the revision of TRIPS through the collective bargaining of state-coalitions; to support indigenous groups and other collectives employing guerrilla methodologies to win localized battles for ownership along the margins; and to utilize UN resources for the dissemination of information elucidating the discriminatory, monopolistic, colonial state of the global intellectual property regime as it is today, championed by industrial powers, and the United States more aggressively and obstinately than any other (Oguamanam 315) – so that the general public knows in which direction to train their criticism. These projects of outreach, organization, mobilization, and community support will pay greater dividends than reconvening each year to host the same rhetorical tennis match to its inevitable draw.

This is a contest of the Information Age, and the greatest means of resistance is information. Disseminating knowledge of the hegemonic structure of the IP regime is pivotal to mobilizing public opposition and applying pressure to the WTO. Committees of experts, state actors, and indigenous representatives like the IGC can continue to be productive by revising its

agenda towards outreach and away from doomed negotiations with obstinate parties. Accepting the current state of things is not a viable option; developing a variegated system of intellectual property, first by challenging and overhauling the present Eurocentric regime, is imperative to decolonization. Intellectual property law, as it stands, is a colonial technology; dismantling its framework to architect a new, holistic alternative is an undervalued but essential component to destabilizing the Westernizing project and emancipating the diverse epistemologies of the world. By charting the trajectory of pluralizing efforts over the past forty years, I hope that this project helps to reanimate, if not radicalize, cultural property discussions to strive towards developing new methods of provincializing Eurocentric law and epistemology, as current projects have languished.

APPENDIX:

MODEL PROVISIONS FOR NATIONAL LAWS ON THE PROTECTION OF EXPRESSIONS OF FOLKLORE AGAINST ILLICIT EXPLOITATION AND OTHER PREJUDICIAL ACTIONS (1982)

United Nations Educational, Scientific
and Cultural Organization

Organisation des Nations Unies pour
l'éducation, la science et la culture

Organización de las Naciones Unidas
para la Educación, la Ciencia y la Cultura

World Intellectual Property
Organization

Organisation Mondiale de la
Propriété Intellectuelle

Organización Mundial de la
Propiedad Intelectual

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

DISPOSITIONS TYPES DE LEGISLATION NATIONALE SUR LA PROTECTION DES EXPRESSIONS DU FOLKLORE CONTRE LEUR EXPLOITATION ILLICITE ET AUTRES ACTIONS DOMMAGEABLES

DISPOSICIONES TIPO PARA LEYES NACIONALES SOBRE LA PROTECCION DE LAS EXPRESIONES DEL FOLKLORE CONTRA LA EXPLOTACION ILICITA Y OTRAS ACCIONES LESIVAS

1985

MODEL PROVISIONS

FOR NATIONAL LAWS

ON THE PROTECTION

OF EXPRESSIONS OF FOLKLORE

AGAINST ILLICIT EXPLOITATION

AND OTHER PREJUDICIAL ACTIONS

Published by the United Nations Educational, Scientific and Cultural Organization (Unesco), Paris

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y por

la Organización Mundial de la Propiedad Intelectual (OMPI), Ginebra

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

with a

COMMENTARY

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

I.

INTRODUCTORY OBSERVATIONS

Need for the Legal Protection of Expressions of Folklore

1. Folklore is an important cultural heritage of every nation and is still developing--albeit frequently in contemporary forms--even in modern communities all over the world. It is of particular importance to developing countries which more and more recognize folklore as a basis of their cultural identity and as a most important means of self-expression of their peoples both within their own communities and in their relationship to the world around them. Folklore is to these countries increasingly important from the point of view of their social identity, too. Particularly in developing countries, folklore is a living, functional tradition, rather than a mere souvenir of the past.

2. The accelerating development of technology, especially in the fields of sound and audiovisual recording, broadcasting, cable television and cinematography may lead to improper exploitation of the cultural heritage of the nation. Expressions of folklore are being commercialized by such means on a world-wide scale without due respect for the cultural or economic interests of the communities in which they originate and without conceding any share in the returns from such exploitations of folklore to the peoples who are the authors of their folklore. In connection with their commercialization, expressions of folklore are often distorted in order to correspond to what is believed to be better for marketing them.

3. In the industrialized countries, expressions of folklore are generally considered to belong to the public domain. This approach explains why, at least so far, industrialized countries generally did not establish a legal protection of the manifold national or other community interest related to the utilization of folklore.

4. During the last decade or two, however, it became obvious that--in order to foster folklore as a source of creative expressions--special legal solutions must be found both nationally and at the international level for the protection of folklore. Such protection should be against any improper utilization of expressions of folklore, including the general practice of making profit by commercially exploiting such expressions outside their originating communities without any recompense to such communities.

Attempts to Protect Expressions of Folklore Under Copyright Law

5. The first attempts to explicitly regulate the use of creations of folklore were made in the framework of several copyright laws (Tunisia, 1967; Bolivia, 1968 (in respect of musical folklore only); Chile, 1970; Morocco, 1970; Algeria, 1973; Senegal, 1973; Kenya, 1975; Mali, 1977; Burundi, 1978; Ivory Coast, 1978; Guinea, 1980; Tunis Model Law on Copyright for Developing Countries, 1976) and in an international Treaty (the Bangui text of 1977 of the Convention concerning the African Intellectual Property Organization, hereinafter referred to as "the OAPI Convention"). All these texts consider works of folklore as part of the cultural heritage of the nation ("traditional heritage," "cultural patrimony"; in Chile, "cultural public domain" the use of which is subject to payment).

6. The meaning of folklore as covered by those texts is understood, however, in different ways. An important copyright-type common element in the definition according to the said laws (except the Tunis Model Law that contains no definition) is that folklore must have been created by authors of unknown identity but presumably being or having been nationals of the country. The OAPI Convention mentions creation by "communities" rather than authors, which delimitates creations of folklore from works protected by conventional copyright. The Tunis Model Law defines folklore using both of these alternatives, and considers it as meaning creations "by authors presumed to be nationals of the country concerned, or by ethnic communities."

7. According to the Law of Morocco, folklore comprises all unpublished works of the kind, whereas the Laws of Algeria and Tunisia do not restrict the scope of folklore to unpublished works. The Law of Senegal explicitly understands the notion of folklore as comprising both literary and artistic works. The OAPI Convention and the Tunis Model Law provide that folklore comprises scientific works too. Most of the statutes in question recognize "works inspired by folklore" as a distinct category of works whose use for commercial purposes requires the approval of a competent body.

8. The "works" of folklore are protected under the said texts against fixation for profit-making unless such fixation has been expressly authorized. The Law of Senegal requires prior authorization also for public performance of folklore with gainful intent. The Tunis Model Law suggests the same kind of protection as the usual works under copyright benefit from.

9. An attempt to protect expressions of folklore by means of copyright law has also been undertaken at the international level in the Diplomatic Conference of Stockholm in 1967 for the revision of the Berne Convention. The

Main Committee for the revision of the substantive provisions of the Berne Convention set up a special Working Group to elaborate relevant suggestions and to decide "what would be the most suitable place in the Convention for a provision dealing with works of folklore." The proposal of the Working Group was adopted unanimously, with six abstentions (Records of the Intellectual Property Conference of Stockholm (1967), Vol.II. Summary Minutes, Main Committee I, 964 to 981 and 1505 to 1515). As a result, Article 15(4) of the Stockholm (1967) and Paris (1971) Acts of the Berne Convention contains the following provision: "(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union. (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General [of WIPO] by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate declaration to all other countries of the Union." It is interesting to note that the provision, as adopted, does not refer to folklore and that it certainly embraces also works which are not part of folklore. It is only the legislative history of the provision that indicates that folklore was (also) intended to be covered.

10. In any case and at least so far, legal protection of folklore by copyright laws and treaties does not appear to have been particularly effective or expedient. In particular as regards the provisions in the Berne Convention, no notification has been deposited with the Director General of WIPO as yet concerning designation of a national authority to protect in countries of the Berne Union the rights in works of authors of unknown identity. Thus it would seem that the measures taken so far in the field of copyright are not sufficient to control the commercial use of folklore, and one has the impression that copyright law is, after all, not the right kind of law for protecting expressions of folklore. This might be so because whereas an expression of folklore is the result of an impersonal, continuous and slow process of creative activity exercised in a given community by consecutive imitation, works protected by copyright must, traditionally, bear a decisive mark of individual originality. Traditional creations of a community, such as the so-called folk tales, songs, music, dances, designs or patterns, are generally much older than the duration of copyright so that, for this reason alone, a copyright-type protection, limited to the life of the author and a relatively short period thereafter, does not offer to folklore a long enough protection.

Indirect Protection by Means of Neighboring Rights

11. Another existing legal means which may be used for the protection of expressions of folklore is the protection of the so-called neighboring rights. Protecting performers as regards their performances or producers of phonograms or broadcasting organizations as far as their fixations or broadcasts are concerned means--where such performances, fixations or broadcasts are performances, fixations or broadcasts of expressions of folklore--an indirect protection of the expressions of folklore themselves.

12. Such indirect possibility of protecting folklore should be made use of, and developing countries are well advised if, for this reason too, they adopt laws protecting the rights of performers, producers of phonograms and broad-

casting organizations. Adherence to the Rome Convention of 1961 for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations and to the Convention of 1971 for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms serves similar purpose. In order to avoid any misunderstanding as regards the protection of performers who perform or recite, respectively, expressions of folklore such as folk songs, folk tales, folk music, folk dances or folk plays, it is advisable to make it clear by means of an explicit provision in any law protecting performers of literary or artistic works that the performance of expressions of folklore shall be regarded as a performance of a literary or artistic work.

13. However, neighboring rights cannot fully satisfy the need for legal protection against improper use of creations of folklore since they cannot prevent the copying of expressions of folklore outside performances. Furthermore, the limited duration of the protection of neighboring rights does not fit folklore for the same reasons as the limited duration of copyright does not fit it.

14. For all these reasons, it appears to be necessary to establish, as regards intellectual property aspects of expressions of folklore, a special (sui generis) type of law for an adequate protection against unauthorized exploitation.

Search for an Adequate System of the Intellectual Property Aspects of the Protection of Expressions of Folklore

15. On April 24, 1973, the Government of Bolivia sent a memorandum to the Director General of Unesco requesting that that Organization examine the opportunity of drafting an international instrument on the protection of folklore in the form of a protocol to be attached to the Universal Copyright Convention.

16. Following that request, and in pursuance of the decision of the Intergovernmental Committee of the Universal Copyright Convention in December 1973, the Unesco Secretariat made a study on the desirability of providing for the protection of folklore on an international scale which was submitted to that Committee and the Executive Committee of the Berne Union at their 1975 sessions. The Committees referred the whole problem to the Cultural Sector of Unesco in order that it might undertake an exhaustive study of all questions inherent in the protection of folklore. In view of the links that such protection could have with copyright, the Committees also decided that the report on the results of that work should be submitted to their next sessions, where they would reexamine the question. In 1977, the Director-General of Unesco convened a Committee of Experts on the Legal Protection of Folklore (Tunis, July 11 to 15, 1977), which reached the consensus that it was necessary to submit folklore protection to a complete examination of all the problems posed thereby.

17. As recognized by the Executive Committee of the Berne Union, and the Intergovernmental Committee of the Universal Copyright Convention, at their 1977 sessions, on the basis of the approach on this subject reached by the Committee of Experts mentioned before, the problem has many aspects, and it comprises questions of identification, material conservation, preservation and reactivation, as well as sociological, psychological, ethnological, politico-

historical and other aspects. All these aspects are interdependent and call for a global study on the protection of folklore which is being dealt with on an interdisciplinary basis within the framework of an overall and integrated approach, by Unesco. Nevertheless, special efforts should be made to find solutions to the problem of the intellectual property aspects of the legal protection of expressions of folklore, as proposed by the International Bureau of WIPO and decided by the Executive Committee of the Berne Union and the Intergovernmental Committee of the Universal Copyright Convention at their sessions in February 1979.

18. In accordance with the decisions of the respective Governing Bodies of Unesco and WIPO, the Secretariat of Unesco and the International Bureau of WIPO convened a Working Group (referred to hereinafter as "the Working Group") at Geneva, from January 7 to 9, 1980, to study a draft of Model Provisions intended for national legislation as well as international measures for the protection of works of folklore. The Working Group was attended by 16 experts from different countries invited in a personal capacity by the Directors General of Unesco and WIPO.

19. The working papers available to the Working Group consisted of the following documents:

(i) "Model Provisions for National Laws on the Protection of Creations of Folklore and a Commentary on those Model Provisions" (document UNESCO/WIPO/WG.I/FOLK/2 and 2 Add.) prepared by the International Bureau of WIPO;

(ii) "Study on the International Regulations of Intellectual Property Aspects of Folklore Protection" (document UNESCO/WIPO/WG.I/FOLK/3) prepared by the Secretariat of Unesco.

20. After considering the said working documents, the Working Group agreed that: (i) adequate legal protection of folklore was desirable; (ii) such legal protection could be promoted at the national level by model provisions for legislation; (iii) such model provisions should be so elaborated as to be applicable both in countries where no relevant legislation was in force and in countries where existing legislation could be further developed; (iv) the said model provisions should also allow for protection by means of copyright and neighboring rights where such form of protection could apply and (v) the model provisions for national laws should pave the way for sub-regional, regional and international protection of creations of folklore.

21. The Working Group recommended, in respect of the model provisions for national laws on the protection of creations of folklore, that the Secretariats should prepare a revised draft and commentary thereon, taking into consideration all the interventions made in the Working Group, and that such a draft with its commentary should be presented for further consideration at a subsequent meeting. (Report of the Working Group, document UNESCO/WIPO/WG.I/FOLK/5, paragraph 21.)

22. Accordingly, the Secretariats prepared a revised draft entitled "Revised Model Provisions for National Laws on the Protection of Expressions of Folklore," and a Commentary thereon (documents UNESCO/WIPO/WG.II/FOLK/2 and 3), which were submitted to the Working Group convened by Unesco and WIPO for a second meeting at Paris, from February 9 to 13, 1981. The Working Group discussed the proposed model provisions, proposed several amendments, including new sections, to them. In conclusion, the Working Group adopted what was called "Model Provisions for National Laws on the Protection of

Expressions of Folklore" (Annex I to document UNESCO/WIPO/WG.II/FOLK/4), in order to be presented for further consideration to a Committee of Governmental Experts, along with a Commentary to be prepared by the Secretariats.

23. In the meantime, Unesco convened a Committee of Governmental Experts on the Safeguarding of Folklore, at Paris, from February 22 to 26, 1982. That Committee adopted 30 recommendations, addressed to Unesco or the States or both, concerning definition, identification, conservation and preservation of folklore. As regards utilization of folklore, it was recommended that, with regard to the work currently being conducted jointly by Unesco and WIPO on the "intellectual property" aspects of folklore protection, those two organizations continue their work in that area.

24. In pursuance of Resolution 5/01 adopted by the General Conference of Unesco at is twenty-first session (Belgrade, September-October 1980) and the decision taken by the Governing Bodies of WIPO at their November 1981 sessions, the Directors General of Unesco and WIPO convened a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore (hereinafter referred to as "the Committee"), which met at WIPO headquarters in Geneva from June 28 to July 2, 1982. The Committee discussed the Model Provisions mentioned in paragraph 22, along with the relevant Commentary prepared thereon by the Secretariats (document UNESCO/WIPO/FOLK/CGE/I/4) and adopted what is called "Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions" (hereinafter referred to as "the Model Provisions"). The Committee also requested the Secretariats to prepare a completed version of the Commentary on the Model Provisions, taking into consideration a number of observations and suggestions made by one or more experts of the Committee. The Model Provisions adopted by the Committee and the commentary prepared thereon by the Secretariats are contained in Parts II and III, respectively.

II.

THE MODEL PROVISIONS

25. The Model Provisions read as follows:

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

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

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

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

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

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

The following provisions shall be given effect:]

SECTION 1

Principle of Protection

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

SECTION 2

Protected Expressions of Folklore

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

(i) verbal expressions, such as folk tales, folk poetry and riddles;

(ii) musical expressions, such as folk songs and instrumental music;

(iii) expressions by action, such as folk dances, plays and artistic forms or rituals;

whether or not reduced to a material form; and

(iv) tangible expressions, such as:

(a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes;

(b) musical instruments;

[(c) architectural forms].

SECTION 3

Utilizations Subject to Authorization

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

(i) any publication, reproduction and any distribution of copies of expressions of folklore;

(ii) any public recitation or performance, any transmission by wireless means or by wire, and any other form of communication to the public, of expressions of folklore.

SECTION 4

Exceptions

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

(i) utilization for purposes of education;

(ii) utilization by way of illustration in the original work of an author or authors, provided that the extent of such utilization is compatible with fair practice;

(iii) borrowing of expressions of folklore for creating an original work of an author or authors;

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

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

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

SECTION 5

Acknowledgement of Source

1. In all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, by mentioning the community and/or geographic place from where the expression utilized has been derived.

2. The provisions of paragraph 1 shall not apply to utilizations referred to in Section 4, paragraphs 1(iii) and 2.

SECTION 6

Offences

1. Any person who willfully [or negligently] does not comply with the provisions of Section 5, paragraph 1, shall be liable to ...

2. Any person who, without the authorization of the [competent authority referred to in Section 9, paragraph 1,][community concerned] willfully [or negligently] utilizes an expression of folklore in violation of the provisions of Section 3, shall be liable to ....

3. Any person willfully deceiving others in respect of the source of artefacts or subject matters of performances or recitations made available to the public by him in any direct or indirect manner, presenting such artefacts or subject matters as expressions of folklore of a certain community, from where, in fact, they have not been derived, shall be punishable by ....

4. Any person who publicly uses, in any direct or indirect manner, expressions of folklore willfully distorting the same in a way prejudicial to the cultural interests of the community concerned, shall be punishable by ....

SECTION 7

Seizure or Other Actions

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

SECTION 8

Civil Remedies

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

SECTION 9

Authorities

[1.] For the purpose of this [law], the expression "competent authority" means ...

[2. For the purpose of this [law], the expression "supervisory authority" means ...]

SECTION 10

Authorization

1. Applications for individual or blanket authorization of any utilization of expressions of folklore subject to authorization under this [law] shall be made [in writing] to the [competent authority][community concerned].

2. Where the [competent authority][community concerned] grants authorization, it may fix the amount of and collect fees [corresponding to a tariff [established][approved] by the supervisory authority.] The fees collected shall be used for the purpose of promoting or safeguarding national [culture] [folklore].

[3. Appeals against the decisions of the competent authority may be made by the person applying for the authorization and/or the representative of the interested community.]

SECTION 11

Jurisdiction

[1. Appeals against the decisions of the [competent authority] [supervisory authority] are admissible to the Court of ...]
[2.] In case of any offence under Section 6, the Court of ... has jurisdiction.

SECTION 12

Relation to Other Forms of Protection

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

SECTION 13

Interpretation

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

SECTION 14

Protection of Expression of Folklore of Foreign Countries

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

(i) subject to reciprocity, or

(ii) on the basis of international treaties or other agreements."

14.

III.

COMMENTARY ON THE MODEL PROVISIONS

The Legal Nature of the Model Provisions

26. Although the Model Provisions are provisions for a law, the term "law" appears in square brackets in order to make it clear that they do not necessarily have to form a separate law, but may constitute, for example, a chapter of an intellectual property code, and do not have to be a statute passed by the legislative body, but may be a decree or decree law, for example. The Model Provisions were designed with the intention of leaving enough room for national legislations to adopting the type of provisions best corresponding to the conditions existing in a given country.

Title of the Model Provisions

27. In view of the wide scope of the protection of folklore, the title of the Model Provisions was decided on so as to adequately reflect their particular subject, namely the intellectual-property-type protection of expressions of folklore against illicit exploitation and other prejudicial actions. A rather detailed definition of the subject in the title itself is also necessary to avoid possible confusion with other documents which may be drawn up on the various other aspects of the protection of folklore.

The Preamble

28. The Sections of the Model Provisions are preceded by a Preamble (the recitals) which give the reasons for establishing legal protection of expressions of folklore. This Preamble is proposed in square brackets, in view of the fact that recitals are not usual in the statutes of many countries. The Preamble is intended to summarize the main reasons for the proposed protection and its purpose. It is also intended to reflect a basic requirement, underlying the Model Provisions, namely the necessity of maintaining an appropriate balance between protection against abuses of expressions of folklore, on the one hand, and freedom and encouragement of its further development and dissemination, on the other.

Summary of the Provisions

29. The Model Provisions consist of 14 Sections. The principle of protection is stated in Section 1. Section 2 defines "expressions of folklore." Section 3 specifies the utilizations which are subject to authorization, whereas Section 4 sets out the exceptions to the need for authorization. Section 5 determines the way in which the source of the expression of folklore utilized must be indicated. Sections 6 to 8 deal with offenses, sanctions and related measures. Section 9 determines the "competent" and "supervisory" authorities. Section 10 lays down the procedure for requesting and granting the required authorization. Section 11 establishes the jurisdiction of courts. Section 12 expressly maintains copyright and other possible forms of

applicable protection. Section 13 provides for the unhindered use and development of expressions of folklore where such use or development is "normal." Section 14 determines the conditions under which expressions of folklore originating from a community in a foreign country are protected.

Principle of Protection (Section 1)

30. This Section stipulates that the subject of protection is any expression of folklore developed and maintained in the country granting the protection. This Section also refers to the acts against which expressions of folklore are protected. They are "illicit exploitation" and "other prejudicial actions." Any utilization in violation of the provisions of Section 3 (unless it is within the scope of the exceptions mentioned in Section 4) would be illicit exploitation. Similarly, non-compliance within the provisions of Section 5, paragraph 1 (subject to Section 4, paragraphs 1(iii) and 2) and commission of the acts described in Section 6, paragraphs 3 and 4 would constitute other prejudicial actions which are illicit even if they occur in connection with an authorized utilization or with a utilization that does not require authorization. It goes without saying that the protection is granted under the jurisdiction of the country concerned and applies both to nationals and foreigners.

Protected Expressions of Folklore (Section 2)

31. The Model Provisions do not offer any definition of the notion of "folklore." The reason is to avoid possible conflict with relevant definitions which are or may be contained in other documents or legal instruments concerning the protection of folklore. However, for the purposes of the Model Provisions, Section 2 defines the term "expressions of folklore" in line with the findings of the Committee of Governmental Experts on the Safeguarding of Folklore, which met in Paris in February 1982 under the auspices of Unesco. "Expressions of folklore" are understood as productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community.

32. The use of the words "expressions" and "productions" rather than "works" is intended to underline the fact that the provisions are sui generis, rather than of copyright, since "works" are the subject matter of copyright. Naturally, the expressions of folklore may, and--in fact--most of the time do, have the same artistic form as "works."

33. The definition of the term "expression of folklore," adopted for the purposes of the Model Provisions, does not speak of the "cultural heritage of the nation" referred to in the Preamble. It is focussed on artistic heritage, on the one hand, and is community oriented, on the other. Artistic heritage is a particular domain within the more extensive realm of cultural heritage and the Model Provisions are intended to center around the protection of expressions of the traditional artistic heritage rather than to extend also to other forms of cultural heritage. Furthermore, the artistic heritage of communities is a more restricted body of traditional values than the entire traditional artistic heritage of the nation. "Traditional artistic heritage developed and maintained by a community" is understood as representing a special part of the "cultural heritage of the nation."

34. The fact that only "artistic" heritage is being considered, means that, among other things, traditional beliefs, scientific views (e.g. traditional cosmogony), substance of legends (e.g. commonly known course of life of traditional heroes like King Arthur and his knights) or merely practical traditions as such, separated from possible traditional artistic forms of their expression, do not fall within the scope of the proposed definition of "expressions of folklore." On the other hand, "artistic" heritage is understood in the widest sense of the term and covers any traditional heritage appealing to the aesthetic sense of man. Verbal expressions, which would qualify as literature if created individually by an author, musical expressions, expressions by action and tangible expressions may all consist of characteristic elements of the traditional artistic heritage and qualify as protected expressions of folklore.

35. The notion of expressions of folklore of a community covers both the expressions originating in the community concerned and those originating elsewhere but having been adopted, further developed or maintained through generations by that community. It is irrelevant whether an actual expression, consisting of characteristic elements of the traditional artistic heritage, has been developed by the collective creativity of a community or by an individual reflecting the traditional artistic expectations of the community.

36. "Characteristic elements" of the traditional artistic heritage, of which the production must consist in order to qualify as a protected "expression of folklore," means in the given context that the element must be generally recognized as representing a distinct traditional heritage of a community. As regards the question of what has to be considered as belonging to the folklore of a "community," one or two members of the Working Group suggested that the answer required a "consensus" of the community which would certify the "authenticity" of the expression of folklore. The proposed definition does not refer to such "consensus" of the community since making the application of the law subject in each case to the thinking of the community, would render it necessary to make further provisions on how such consensus would have to be verified and at what point in time it must exist. The same would apply to the requirement of "authenticity," which would also need further interpretation. On the other hand, both the requirement of "consensus" and "authenticity" are implicit in the requirement that the elements must be "characteristic," that is, showing the traditional cultural heritage: elements which become generally recognized as characteristic are, as a rule, authentic expressions of folklore, recognized as such by the tacit consensus of the community concerned.

37. An illustrative enumeration of the most typical kinds of expression of folklore is added to the definition. They are subdivided into four groups depending on the form of the "expression," namely expression by words ("verbal"), expressions by musical sounds ("musical"), expressions "by action" (of the human body) and expressions incorporated in a material object ("tangible expressions"). Each must consist of characteristic elements taken from the totality of the traditional artistic heritage. The first three kinds of expression need not be "reduced to material form," that is to say, the words need not be written down, the music need not exist in the form of musical notation and the bodily action--for example, dance--need not exist in a written choreographic notation. On the other hand, tangible expressions must be incorporated in a permanent material, such as stone, wood, textile, gold, etc. The provision also gives examples of each of the four forms of expression. They are, for the first, "folk tales, folk poetry and riddles,"

for the second, "folk songs and instrumental music," for the third, "folk dances, plays and artistic forms of rituals," and for the fourth, "drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes; musical instruments; architectural forms." The last-named appears in square brackets to show the hesitation which accompanied its inclusion.

38. Traditional sites of folklore events do not generally qualify as expressions of folklore since they are not usually productions consisting of characteristic elements of the traditional artistic heritage of a community, but only places where expressions of folklore are performed regularly. Certain folklore events, however, may be regarded as protectible artistic expressions by action--kinds of ritual--if they do not represent merely a traditional framework for the utilization of various expressions of folkore to be protected separately.

39. Identification of expressions of folklore originating in and developed by a community could be achieved by keeping an inventory of them. However, such an inventory being related to conservation of folklore, its regulation does not fall within the scope of the Model Provisions. Whenever a competent authority is in doubt whether a given expression is an expression of folklore, it should consult all available sources, including existing catalogues, other records, expert opinion, witnesses and the views of elders of a community.

Utilizations Subject to Authorization (Section 3)

40. The idea of making certain forms of utilization of traditional expressions of folklore subject to authorization is not unfamiliar to creative communities in many countries. Two examples will illustrate this point. In Australia, Peter Banki reported to the Australian Copyright Council on October 3, 1978, that a "permission mechanism is well established among tribal Aboriginals in the Northern Territory" (Report to the Australian Copyright Council, October 30, 1978, p.7). In 1976, claims were made by Australian Aboriginal tribal elders that photographs contained in a book of anthropological studies depicted subjects that had secret and sacred significance to their community and alleged that no proper permission had been given to publish them. As far as Africa is concerned, Professor J.H. Kwabena Nketia (from Ghana) reported that "because of the close identification of groups with folklore a sense of collective ownership of sets of material and repertoire is often generated among such groups ..." and "... members of a community may regard folklore traditions in the public domain as their heritage ... Furthermore, in Africa, this sense of ownership is tied up with the notion of 'performing rights' which tends to be more of an ethical issue than a purely legal one ..." and "Akan oral traditions make references to instances in the past in which some chiefs sought permission from other chiefs to 'copy' their instruments of music ..." or "... in Ghana, there are chiefly designs and patterns associated with specific royal houses ... as well as patterns with various verbal interpretations that are restricted in respect of ... use" (African Traditions of Folklore, INTERGU Yearbook, 1979; pp. 225-227).

41. The following questions were considered to be potentially relevant in deciding what kinds of utilization of expressions of folklore should be subject to authorization: whether there is gainful intent; whether the utilization is made by members or non-members of the community from which the expression utilized comes; whether the utilization occurs outside the

traditional or customary context or not. In conclusion, it was agreed that utilizations made both with gainful intent and outside their traditional or customary context should be subject to authorization. This means, among other things, that an utilization—even with gainful intent--within the traditional or customary context is not subject to authorization. On the other hand, an utilization, even by members of the community of origin of the expression, requires authorization if it is made outside that context and with gainful intent.

42. "Traditional context" is understood as the way of using an expression of folklore in its proper artistic framework based on continuous usage by the community. For instance, to use a ritual dance in its traditional context means to perform it in the actual framework of the rite. On the other hand, the term "customary context" refers rather to the utilization of expressions of folklore in accordance with the practices of everyday life of the community, such as for instance usual ways of selling copies of tangible expressions of folklore by local craftsmen.

43. The Section under consideration then specifies the acts of utilization which require authorization where such circumstances exist. In doing so, it distinguishes between the case in which copies of the expressions are involved and the case in which copies of such expressions are not necessarily involved. In the first case, the acts requiring authorization are publication, reproduction and distribution; in the second case, the acts requiring authorization are public recitation, public performance, transmission by wireless means or by wire and "any other form of communication to the public."

44. "Publication" is understood in the broadest sense of the term, so as to cover any form of making available to the public the original, a copy or copies of an expression of folklore reduced to material form. For the purposes of the Model Provisions, publication covers exhibition, sale or hire alike of one or more copies of tangible expressions of folklore. Reproduction and distribution of expressions of folklore have been made subject to authorization as separate acts, not merely as components of publication. For instance, reproduction of an expression of folklore, with gainful intent and outside its traditional or customary context, is also subject to authorization if made in a single copy for a given buyer or for the purpose of communication to the public at a distance in immaterial form. The notion of reproduction also covers recording of sounds, images or both. Distribution is mentioned separately in view of the possible distribution with gainful intent of existing copies of expressions of folklore not intended for distribution at all or not by the person who made them.

45. The Model Provisions would not prevent indigenous communities from using their traditional cultural heritage in traditional and customary ways and in developing it by continuous imitation. Keeping alive traditional popular art is closely linked with the reproduction, recitation or performance, in a stylistically varying presentation, of traditional expressions in the originating community. An unrestricted requirement for authorization to adapt, arrange, reproduce, recite or perform such creations could place a barrier in the way of the natural evolution of folklore and could not be enforced in societies in which folklore is a part of everyday life. Thus, the Model Provisions allow any member of a community to freely reproduce or perform expressions of the folklore of his own community within their traditional or customary context, irrespective of whether he does it with or without gainful

intent and even if done by means of modern technology, if such technology has been accepted by the community as one of the means of the evolution of its living folklore. During the deliberations on this point, some experts suggested that a difference should be made between utilization by means of modern technology and utilization in traditional ways. In conclusion, however, such distinction was discarded in order to facilitate the evolution of living folklore.

46. The Model Provisions would not hinder uses of expressions of folklore without gainful intent for legitimate purposes outside their traditional or customary context. Thus, for instance, the making of copies for the purpose of conservation, research or for archives would not be hampered by the Model Provisions.

47. However, certain obligations exist even where the utilization of expressions of folklore does not require any authorization. These are dealt with in Section 5, paragraph 1, and Section 6, paragraphs 3 and 4.

48. During the deliberations of the Committee, the advantages of preliminary authorization of certain kinds of use of expressions of folklore were weighed against the feasibility of a system of mere checks on their utilization. In this latter case, the exploitation of expressions of folklore would remain free, provided it did not constitute an offense specified by law or did not otherwise prove prejudicial to the legitimate interests of the community in which they had been developed and maintained. However, a system of mere subsequent checks entails serious disadvantages from the point of view of both the users of expressions of folklore and the communities and other entities or individuals having protected interests in the expressions used. A prospective user of an expression of folklore may not always be sure whether the intended use would conflict with legitimate interests. This circumstance would necessitate a system of previous clearance, which would require the regulation of a series of substantive and administrative problems, in order to minimize the factor of uncertainty involved. On the other hand, the entities supervising the utilization of expressions of folklore and safeguarding all related interests would remain without any system of forewarning and could intervene only when the harm had been done and denounced. Under a system of subsequent checks, special difficulties would be met in countries where remuneration for commercial use of expressions of folklore is held just and reasonable. In conclusion, the experts adopted a combined system of authorization and sanctions. The advantages of such a combined system may be demonstrated by the particular case of utilizing secret expressions of folklore. The requirement of previous authorization may help to prevent the use of such expressions, at least for commercial purposes, and subsequent sanctions would become necessary only in cases where authorization was not required by law or where the requirement had been disregarded.

49. In Section 3, reference is also made to the entity entitled to authorize intended utilizations of expressions of folklore. The Model Provisions alternatively refer to "competent authority" and "community concerned," avoiding the term "owner" of the expression concerned. They do not deal with questions of ownership of expressions of folklore since this aspect of the problem may be regulated in different ways from one country to another. In some countries, expressions of folklore may be regarded as the property of the nation, in other countries, the sense of ownership of the traditional artistic heritage may have been more strongly developed in the communities concerned themselves. Who should be entitled to authorize the utilization of expressions of folklore depends very much on the situation as regards ownership of them and necessarily varies according to different legislations on the subject. Countries where aboriginal or other traditional communities are

recognized as owners fully entitled to dispose of their folklore and where such communities are sufficiently organized to administer the utilization of the expressions of their folklore, such uses may be subject to authorization by the community itself, which would grant permission to prospective users in a manner similar to authorization given by authors, as a rule, at full discretion. In other countries, where the traditional artistic heritage of a community is basically considered as a part of the cultural heritage of the nation, or where the communities concerned are not prepared to adequately administer the use of their expressions of folklore themselves, "competent authorities" may be designated, to give the necessary authorizations in form of decisions under public law. Questions relating to the determination of competent authorities and the process of authorization are dealt with below in more detail in connection with Sections 9 and 10 of the Model Provisions.

Exceptions (Section 4)

50. The Model Provisions set out four cases in which there is no need to obtain authorization.

51. The first is the case of utilization for purposes of education. In this case, there is no need for authorization even if the expression of folklore is made accessible against payment, as is the case when selling text books, or offering teaching against tuition fees. Such free utilization of expressions of folklore is allowed for all and any educational purposes and is not restricted--as is the case in some copyright laws for protected works--to utilization "by way of illustration" in the course of teaching.

52. The second case which requires no authorization is that in which the utilization is "by way of illustration" in the original work of an author provided that such utilization is compatible with fair practice. The limits of fair practice could best be determined by applying the same standards that exist in the country in connection with the free use of authors' works protected by copyright. Unlike most copyright laws, however, the Model Provisions do not confine the use by way of illustration to utilization "for purposes of teaching."

53. The third case in which utilization requires no authorization is that in which expressions of folklore are "borrowed" for creating an original work of an author. This important exception serves the purpose of allowing the free development of individual creativity inspired by folklore. The Model Provisions should not and do not hinder in any way the birth of original works based on expressions of folklore, be it the field of visual arts, as e.g. some wooden sculptures of Barlach, or music, as e.g. a number of compositions of Bartok; or literature, like innumerable adaptations of folk tales.

54. The fourth case in which no authorization is required is that of "incidental utilization." In order to elucidate the meaning of "incidental utilization," paragraph 2 mentions in particular (not in an exhaustive manner) the most typical cases considered as incidental utilization: utilization in connection with reporting on current events and utilization of images where the expression of folklore is an object permanently located in a public place.

55. Some members of the Committee suggested that there be a reference in the Model Provisions to copyright law to the effect that, in all cases where the latter allowed free use of works, the use of expressions of folklore should

also be free. Other members suggested that the Model Provisions should take over the typical free use provisions of copyright laws. However, neither of the suggestions was chosen since many cases of free use in respect of works protected by copyright are irrelevant to the proposed sui generis protection of expressions of folklore, as for example reproduction in the press or communication to the public of any political speech or speech delivered during legal proceedings. It seemed to be more appropriate to adapt to the utilization of expressions of folklore those provisions of copyright laws which were relevant to folklore. This does not mean, however, that national legislations could not also apply other limitations adopted under the copyright law of the country insofar as they were consistent with the special system for protecting expressions of folklore.

Acknowledgement of Source (Section 5)

56. In order to strengthen the links between the originating community and its expressions of folklore, and also as a means of facilitating control over the use of such expressions, the Section under consideration requires that in all printed publications, and in connection with any communication to the public, of an expression of folklore its source must be indicated by mentioning in an appropriate manner the community and/or the geographic place from which the expression utilized has been derived. The words "source" and "derived" have been used with regard to the fact that it may often be difficult to determine where the given expression of folklore actually originated, in particular in cases where the originating community extends over the territory of more than one country, or where the community adopted, maintained or further developed an expression originating, in the ultimate analysis, from elsewhere.

57. This requirement would only apply in cases where the source of the expression of folklore is "identifiable," that is to say, where its user can be expected to know where such expression comes from or from which community it derives.

58. Acknowledgement of the source of the expression is not required in two cases where it would be unreasonable to insist on it: in connection with incidental utilizations and where expressions of folklore are adapted for creating an original work of an author.

59. Omission of acknowledgement of the source in cases where acknowledgement is required is subject to a fine (see Section 6).

60. Complying with the requirement of acknowledgement of the source of an expression of folklore used does not give exemption from the obligation under copyright to also indicate authorship whenever the expression of folklore has been derived in an original form, created by an individual reflecting the traditional artistic expectations of the community in a way which entitles that individual to copyright protection as well.

Offenses (Section 6)

61. Paragraph 1 deals with non-compliance with the requirement of acknowledgement of the source of the expression of folklore. Paragraph 2 deals with the unauthorized utilization of an expression of folklore, where authorization is required. It is understood that the offense of using an expression without authorization is also constituted by uses going beyond the limits or that are contrary to the conditions of an authorization obtained. Paragraphs 3 and 4 provide for two special cases, namely deception of the public and distortion of the expression of folklore. The first consists essentially in "passing off," that is, the creation of the impression that what is involved is an expression of folklore derived from a given community when, in fact, such is not the case. The other offense can be constituted by any kind of public utilization distorting the expression of folklore, in any direct or indirect manner "prejudicial to the cultural interests of the community concerned." The term "distorting" covers any act of distortion or mutilation or other derogatory action in relation to the expression of folklore published, reproduced, distributed, performed or otherwise communicated to the public by the culprit.

62. Naturally, two, three or all four of the said offenses may be committed cumulatively.

63. All four kinds of offenses are conditional on willful action. However, as regards non-compliance with the requirement of acknowledgement of source and the need to obtain authorization to use the expression of folklore, the Model Provisions also allow (in square brackets) for punishment of acts committed negligently. This takes account of the nature of the offenses concerned and the difficulties involved in proving willfulness in cases of omission.

64. The sanctions for each type of offense established by the Model Provisions should be determined in accordance with the penal law of the country concerned. The two main types of possible punishments appear to be fine and imprisonment. Which of these sanctions should apply, what kinds of other punishments could be provided for and whether the sanctions should be applicable separately or also in conjunction, depends on the nature of the offense, the importance of the interests to be protected and the solutions already adopted in the country for similar offenses. The minimum and maximum amounts of fines or terms of imprisonment would likewise depend on the actual practice of each country. Consequently, the Model Provisions do not suggest any kind of relevant solution.

65. It is to be noted that the protection afforded by the Model Provisions is not limited in time. This is one of the interesting differences between the Model Provisions and copyright laws. Protection not limited in time is justified by the fact that the protection of the expression of folklore is not for the benefit of individual creators but a community whose existence is not limited in time. However, whether an action can be brought before a court without regard to the time elapsed since the date of the infringement or offense was committed, is another question. Since statutes of limitation generally exist for both penal and civil sanctions, in the applicable national law, the Model Provisions do not contain any rule of prescription. It is to be assumed that in this context, the general rules of the statute of limitations or prescriptions for penal sanctions (as well as possible related civil action) will also be applicable to offenses under the Model Provisions.

Seizure and Other Actions (Section 7)

66. This Section applies in the case of any violation of the law to both objects and receipts.

67. "Object" is understood as meaning "any object which was made in violation of this [law]," for example, copies of written expressions of folklore, phonograph records of musical expressions of folklore, videocassettes of a folklore dance performance, copies of drawings, etc., belonging to folklore, provided they were made in violation of Section 3--that is to say, simply stated, without authorization and with gainful intent--or of Section 5, that is to say, simply stated, where objects are published, etc., without indicating their origin in an appropriate manner, or of Section 6, paragraphs 3 and 4, that is to say, in a manner deceiving the public in respect of their source or distorting the expression of folklore they embody.

68. The "receipts" are "receipts of the person violating it [that is to say, violating the law]"; typical examples are the receipts of the seller of any infringing object and the receipts of the organizer of an infringing public performance.

69. Such objects and receipts are subject, according to one alternative, to "seizure," and according to another alternative, to "applicable actions and remedies." Such actions or remedies might, for example, consist of prohibition of stocking, importing and exporting. It should be noted that seizure and other similar actions are not necessarily considered under the Model Provisions as confined to sanctions under penal law. They may be provided as well in other branches of the law, including the law on civil procedure. Seizure would take place in accordance with the legislation of each country.

70. The Model Provisions do not provide for seizure of implements used for perpetrating the violation of the law since such measure is not generally adopted in other fields of protection of intellectual property. It should be noted, however, that a sanction of that kind is not alien to the copyright law of quite a few countries and it would not be contrary to either the spirit or the wording of the Model Provisions also to extend seizure or other similar action to implements used mainly or solely for unlawful utilization of expressions of folklore. Such articles may be, for example, plates, matrices, films or copying devices, sound or video recorders and various other tools.

Civil Remedies (Section 8)

71. This Section emphasizes that the penal sanctions provided for in Section 6 are no substitute for damages or other civil remedies; on the contrary, Section 6 is without prejudice to the availability of such remedies. Such remedies typically include compensation for any damage caused by the unlawful utilization of the expression of folklore, such as the loss of fees normally requested for proper authorization. They also include compensation for any harm done to the reputation of the community concerned on account of the distortion of the expression of folklore.

Authorities (Section 9)

72. Section 3 subjects certain utilizations of expressions of folklore to authorization by either a "competent authority" or, alternatively, according to the choice of each country, the "community concerned" as such. Section 9 provides for the designation of the competent authority, if that alternative was preferred by the legislator. The same Section also provides, in a second paragraph in square brackets, for designation of a "supervisory authority," if this should become necessary owing to the adoption of certain subsequent provisions suggested alternatively as regards activities to be carried out by such an authority. "Authority" is to be understood as any person or body entitled to carry out functions specified in the Model Provisions.

73. According to those provisions, the tasks of the competent authority are (provided such an authority has been designated) to grant authorizations for certain kinds of utilization of expressions of folklore (Section 3), to receive applications for authorization of utilizations (Section 10, paragraph 1), decide on them (Section 10, paragraph 2) and, where authorization is granted, to fix and collect a fee--where required--(Section 10, paragraph 2). The Model Provisions also provide that any decision of the competent authority is appealable (Section 10, paragraph 3, and Section 11, paragraph 1).

74. As far as the supervisory authority is concerned, the Model Provisions offer the possibility (in square brackets) of providing in the law that the supervisory authority shall establish a tariff of the fees payable for authorizations of utilizations, or shall approve such tariff (without indication in the Model Provisions as to who will, in such case, propose the tariff, although it was understood by the experts that, in such a case, the competent authority would propose the tariff)(Section 10, paragraph 2), and that the supervisory authority's decision may be appealed to a court (Section 11, paragraph 1).

75. The aim of the Section under consideration (Section 19) is that the legislator (or other body issuing the provisions) should specify their identity, if it is wished to designate such authorities. Which authority or authorities will be designated in a given country, will largely depend on the legal system existing in that country.

76. A possible solution would be to set up a special authority for the purpose of dealing with the tasks laid down in the Model Provisions and to designate a ministry, for example, the Ministry of Culture, as the supervisory authority. As far as the competent authority is concerned it could be the Ministry of Culture or Arts, any public institution for matters related to folklore, authors' society or similar institution. A representative body of the community concerned could likewise be designated, even where, for whatever reason, the legislator had preferred not to recognize the community itself, in its capacity of owner of its expressions of folklore, as being entitled to directly authorize utilizations of such expressions.

77. If the legislator decided that the community itself--rather than the "competent authority"--was entitled to permit or prevent utilizations of its expressions of folklore subject to authorization, the community would act in its capacity of owner of the expressions concerned and would be free to decide how to proceed. There would be no supervisory authority to control how the

community exercises its relevant rights. However, the experts were of the opinion that if it was not the community as such, but a designated representative body thereof, which was entitled by legislation to give the necessary authorization, such a body would qualify as a competent authority, subject to the relevant procedural rules laid down in the Model Provisions.

78. It is also conceivable that instead of one authority, specially set up for the purpose, one or more institutions, already existing or newly established, could be designated as competent authorities.

79. It would seem eminently useful and logical if representatives of the various folklore communities of the country were to be associated and given an important role in the work of any competent authority or authorities. Furthermore, representatives of cultural and ethnological institutions, including museums, having experience in certain aspects of the protection of folklore, could likewise be associated in the work of the competent authority or authorities.

Authorization (Section 10)

80. Paragraph 1 implies that an authorization required under Section 3 must be preceded by, and be the consequence of, an "application" submitted to the competent authority or the community concerned. By placing the words "in writing" within square brackets, the Model Provisions invite reflection on the question whether oral applications should be allowed. The paragraph permits the authorization to be "individual" or "blanket," the first meaning an ad hoc authorization, the second intended for customary utilizers such as cultural institutions, theatres, ballet groups and broadcasting and television organizations. In this latter context, national legislators may also consider the applicability of systems of non-voluntary licensing possibly existing in the country concerning utilization of works protected by copyright, with special regard to certain kinds of uses by broadcasting organizations and cable systems.

81. The Model Provisions do not give any guidance as regards the information any application for authorization has to contain. An appropriate regulation on applications to be submitted to the competent authority or the community concerned can be issued by each State in accordance with the conditions existing in the State concerned. It is advisable to require the following data, indispensable to enable the competent authority or the community concerned to make its decision: (i) information concerning the prospective user of the expression of folklore, in particular his name, professional activity and address; (ii) information concerning the expression to be used, properly identifying it by mentioning also its source; (iii) information as regards the intended utilization, which should comprise, in the case of intended reproduction, the proposed number of copies and territory of distribution of the reproduced copies; as regards recitals, performances and other communications to the public, the nature and number of them, as well as the territory to be covered by the authorization. Naturally, it will be easier to comply with such requirements if applications are required to be submitted in writing.

82. The Model Provisions do not contain provisions concerning the process of granting the authorization. However, it is advisable that the decision should be required, by a decree implementing the law, within a certain number of days, 15 or 30 days having been put forward by several experts. The period should be long enough to give sufficient time for the examination of the application, but short enough not to hamper envisaged utilizations of expressions of folklore. If the competent authority or community concerned does not communicate the decision--in writing--to the applicant within the applicable period, the authorization applied for should be regarded as granted.

83. It should be required that, if the application is rejected, the rejection should be accompanied by the reasons therefor. Such reasons may, inter alia, stem from the proposed kind of utilization, for example, if the use of artistic forms of a religious ritual is intended in the framework of a night club show.

84. Paragraph 2 allows, but does not make mandatory, the collecting of fees for authorizations. Presumably, where a fee is fixed, the authorization will be effective only on condition of payment. Authorizations may be granted free of the obligation of paying a fee. Even in such cases, the system of authorization is justified since it may prevent such utilizations as would distort the expressions of folklore or otherwise be unworthy of their dignity. Where fees are charged, they must be fixed according to a tariff established or approved--as already mentioned--by the supervisory authority.

85. Paragraph 2 also deals with the purpose for which the collected fees must be used. It contains some alternatives. It offers a choice between the promoting or safeguarding of national culture or of national folklore. Naturally, national folklore is part of national culture, but national culture concerns a greater number of potential beneficiaries than national folklore. It is advisable, in any case, to secure by decree that a certain percentage of any fee collected--if it is a competent authority which is designated--is to go to that community from which the expression of folklore for the utilization of which the fee was paid originates. The relevant decree may allow, in such case, the competent authority to retain part of the collected fees to cover the costs of administering the authorization system. Where there is no competent authority designated and the authorization is given and the collection of the fees is carried out by the community itself, it seems obvious that the employment of the collected fees should also be decided by the community. The State should secure its share of such revenues, if at all, by imposing on them taxes or by providing for other appropriate measures.

86. Paragraph 3 provides that any decision of the competent authority is appealable. It specifies that the appeal may be made by the applicant (typically, where the authorization is denied) and by "the representative of the interested community" (typically, where the authorization is granted). The paragraph is put in square brackets since it does not apply where the authorization is granted by the community concerned. The decisions of such community are not subject to appeal.

Jurisdiction (Section 11)

87. The aim of paragraph 1 is that the legislator (or other body issuing the provision) should specify a court which will be competent to hear appeals against decisions of the authority concerned. Which court will, in any given country, be specified, will largely depend on the existing court system of that country. The fact that the expressions "competent authority" and "supervisory authority" appear within square brackets seems to indicate that, in the second case, a system may be adopted in which an appeal against a decision of the competent authority must be submitted to the supervisory authority and that appeal to the court is possible only from a decision of the supervisory authority. Naturally, paragraph 1 only applies where the making of decisions falls within the competence of an "authority" and is not within the power of the community concerned. If it is the concerned community which is entitled to make decisions as regards utilization of its expressions of folklore, paragraph 1 is inapplicable and paragraph 2 remains the only provision of Section 11.

88. The aim of paragraph 2 is that the legislator (or other body issuing the provision) should specify a court which will be competent for the procedures laid down under Section 6. Which court will, in any given country, be specified, will largely depend on the existing court system of that country.

Relation to Other Forms of Protection (Section 12)

89. This Section is intended, in essence, to provide that, if anything that is protected by the Model Provisions (because it is an expression of folklore) is also protectible under other laws and international treaties (because it is also something other than an expression of folklore), it will also be protected under such laws and treaties. In other words, in such cases, the protection offered by the law (or decree, etc.) of the country containing provisions corresponding to those of the Model Provisions would be concurrent with the protection offered by other laws of the country or by treaties to which the country is a party.

90. A few examples of such other laws are the following:

(i) the copyright law, which would apply if the expression of folklore is also a "work," as understood in copyright law, as e.g. in cases where an individual develops an expression of folklore so that it reflects the traditional artistic expectations of the community concerned (so that it becomes part of the body of expressions of folklore of that community) by having, at the same time, sufficient originality given to it by its author (so that it also qualifies as a work of authorship);

(ii) the law protecting performers, which would apply to performers who perform expressions of folklore, particularly actors, dancers and musicians playing in plays constituting expressions of folklore, dancing folk dances or singing or playing folk songs or instrumental folk music. As already mentioned in paragraph 12, it is advisable to secure the link between the protection of expressions of folklore and their performance also by making it clear in any law protecting performers of literary and artistic works that the performance of expressions of folklore are to be regarded as a performance of such works;

(iii) the law protecting producers of phonograms which contain, for example, the recordings of performances of recitals of folk tales, folk poetry, folk songs, instrumental folk music or folk plays;

(iv) the law protecting broadcasting organizations, which broadcast an expression of folklore;

(v) the law protecting industrial property, which would apply, for example, if the expression of the folklore is used as an industrial design, a mark or an appellation of origin, or when the use of an expression of folklore is the object of unfair competition;

(vi) the law protecting cultural heritage, which would apply for the protection of, for example, architectural expressions of folklore in forms like groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in landscape, are of outstanding universal value from the point of view of history, art or science; and

(vii) certain laws aimed at the preservation of moving images which would apply for the protection of, for example, cinematographic, television or videographic productions of expressions of folklore, such protection being in addition to that provided for by the copyright legislation.

91. Examples for international treaties or other forms of protection referred to by this Section, are (i) the Berne Convention, with special regard to its Article 15(4) which provides protection for "unpublished works where the identity of the author is unknown," as explained in greater detail in paragraph 9; (ii) the Universal Copyright Convention; (iii) the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (iv) the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms; (v) the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite; (vi) the Paris Convention for the Protection of Industrial Property; (vii) the Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods; (viii) the various special agreements concluded under the aegis of the Paris Union; (ix) the Convention concerning the Protection of the World Cultural and Natural Heritage, adopted by the General Conference of Unesco in 1972, which recognizes that the duty of ensuring protection of the cultural and natural heritage belongs primarily to the State and recommends that States take appropriate measures to this end; (x) the "Recommendation for the Safeguarding and Preservation of Moving Images," adopted by the General Conference of Unesco in 1980, which considers that moving images are an expression of the cultural identity of the peoples and form an integral part of the cultural heritage of the nations, and which invites States to take all necessary steps to safeguard and preserve effectively this heritage.

Interpretation (Section 13)

92. This Section emphasizes a principle underlying the whole system of sui generis protection of expressions of folklore: this protection should in no way hinder the normal use and development of expressions of folklore. What is probably meant in the first place is that the community by which and in which certain expressions of folklore have developed should be free to use this, their "traditional artistic heritage" (Section 2), and to develop it, without the need for authorizations provided for in Section 3. It was also agreed by the experts that no use of an expression of folklore within the community which has developed and maintained it should be qualified as distorting the same if the community identifies itself with the present-day use of that expression and its consequent modification.

Protection of Expressions of Folklore of Foreign Countries (Section 14)

93. The Model Provisions should pave the way for subregional, regional and international protection. It is of paramount importance to protect expressions of folklore against illicit commercialization and distortion beyond the frontiers of the country in which they originate. Regional and international protection of expressions of folklore serves to protect expressions of folklore against illicit use that takes place abroad. On the other hand, national legislation on the protection of expressions of folklore also provides the best basis for protecting the expressions of folklore of communities belonging to foreign countries. By appropriate extension of their applicability under the principle of national treatment, national provisions may provide the substance of regional or international protection.

94. In order to further such a process, the Model Provisions provide for their application as regards expressions of folklore of foreign origin either subject to reciprocity or on the basis of international treaties. Actual reciprocity in the relations of two or more countries already protecting their national folklore may sometimes be established and declared more easily than mutual protection by means of concluding and ratifying international treaties. However, a number of experts stressed that international measures are an indispensable means of extending the protection of expressions of folklore of a given country beyond the borders of that country. In this context, the possibility of developing existing intergovernmental cultural or other appropriate agreements, so as to cover also reciprocal protection of expressions of folklore, should likewise be considered. On the question of international regulation, some experts expressed the opinion that, while they are in favor of considering the possibility of adoption of international regulation, priority should be given to regulation at national and regional levels.

Transitional Provisions

95. The Model Provisions do not contain transitional rules. However, each country which adopts a law along the lines of the Model Provisions would need to enact such rules, with regard to utilizations of expressions of folklore subject to authorization under the new law but lawfully commenced before its entry into force. The legislator will have to choose one of three basic solutions: (i) retroactivity of the law, which means that such utilizations of expressions of folklore would also become subject to authorization as have been lawfully commenced earlier but continued after the entry into force of the law, as for instance series of performances or distribution of copies of an expression of folklore; (ii) non-retroactivity of the law, which means that only those utilizations would come under the law that had not been commenced before its entry into force; and (iii) an intermediate solution: utilizations which became subject to authorization under the law but were commenced without authorization before its entry into force should be brought to an end before the expiry of a certain period if no relevant authorization was obtained by the user in the meantime.

* * *

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