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**PROTECTING FOLKLORE UNDER MODERN  
INTELLECTUAL PROPERTY REGIMES: A  
REAPPRAISAL OF THE TENSIONS  
BETWEEN INDIVIDUAL AND COMMUNAL  
RIGHTS IN AFRICA AND THE UNITED  
STATES**

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## INTRODUCTION

Advanced technological processes have facilitated the commercial exploitation of works of art, craft, and knowledge<sup>1</sup> of traditional societies on a scale that is unprecedented.<sup>2</sup> One can find openly displayed in many malls in the United States numerous art and other objects imported from traditional communities stretching from Africa to the Americas and Australia.<sup>3</sup> In addition, there is evidence of indigenous music and dance being sampled by record companies and performance groups, which are presented to the public as

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1. Commercially relevant traditional knowledge includes:

[the] location of local mineral and wild plant resources, domesticated plants with interesting genetic properties, musical instruments producing evocative sounds, new ingredients for cosmetics, new foods and spices, art designs and their potential use on all manner of salable products, mythic elements and stories, and sites for tour organizers.

Tom Greaves, *IPR: A Current Survey*, in *INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES: A SOURCEBOOK* 3-4 (Tom Greaves ed., 1994) [hereinafter *SOURCEBOOK*].

2. *See id.* at 13 (warning that rapidly developing technology poses the most serious threat to intellectual property protection because it increasingly allows slight alterations or parallel materials to be used to emulate the original idea).

3. *See, e.g.*, Babacar Ndoeye, *Protection of Expressions of Folklore in Senegal*, 25 *COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG.* 374, 375 (1989) [hereinafter 25 *COPYRIGHT MONTHLY REVIEW*] (decrying that there is more African art in cities like as New York than in African cities); David Sassoon, *The Antiquities of Nepal*, *CULTURAL SURVIVAL Q.*, Summer 1991, at 47, 48 (discussing the pervasive theft of antiquities from Nepal for sale or display in the United States).

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original compositions or choreography.<sup>4</sup> Monopolistic tendencies are also evident in the acts of individuals and companies who formally register folkloric themes,<sup>5</sup> sometimes incorporating them into advertising and commercial propaganda, as a way of preventing others from using them.<sup>6</sup> Furthermore, pharmaceutical companies<sup>7</sup> and even government agencies<sup>8</sup> regularly finance expeditions into remote traditional areas<sup>9</sup> in the hopes of tapping into local knowledge of the medicinal value of plants<sup>10</sup> that could in turn be

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4. Babacar Ndoye, a former director of the Copyright Office of Senegal, cites as an example the secret of an African folklore group's European performance by a composer who arranged and registered the recording as his original work. The work was a phenomenal success, but all profits went to the composer without any compensation to the community from which the folklore originated. See Ndoye, *supra* note 3, at 376 (asserting the necessity for stringent protections of expressions of folklore in light of current technological capabilities).

5. It is not uncommon to find individuals in the United States who have registered the names of common objects, such as the "kente" cloth produced in West Africa, as trademarks.

6. See Antonio Chaves, *The Brazilian Folklore and Its Protection*, 16 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 125, 126 (1980) [hereinafter 16 COPYRIGHT MONTHLY REVIEW] (noting that by the time Brazilian copyright efforts began, folklore was studied, compiled, and published by "more advanced" mostly European countries).

7. Major corporations involved in collecting expeditions include Merck, Sharp, Dohme, and Monsanto. See Jack Kloppenburg, Jr., *No Hunting! Biodiversity, Indigenous Rights, and Scientific Poaching*, CULTURAL SURVIVAL Q., Summer 1991, at 14, 15 (noting that companies' "chemical prospecting" can yield high profits when those chemicals are manufactured into prescriptions and other medicines); see also Steven R. King, *The Source of Our Cures*, CULTURAL SURVIVAL Q., Summer 1991, at 19 (describing Shaman Pharmaceuticals' compensation approach to the use of plant-derived medicines originally discovered by indigenous people).

8. The National Cancer Institute in the United States ("NCI") maintains extensive plant collection programs in Cameroon, the Central African Republic, Gabon, Ghana, Madagascar and Tanzania. See Gordon M. Cragg et al., *Policies for International Collaboration and Compensation in Drug Discovery and Development at the United States National Cancer Institute: The NCI Letter of Collection*, in SOURCEBOOK, *supra* note 1, at 83, 87 (noting that plant collection programs entail contracts between NCI and local organizations for collection, taxonomy, packaging and shipment of botanical samples to the United States).

9. Medicinal plant research has focused on tropical rain forests because a significant portion of Western prescription drugs are known to have been made from substances found in those areas. See *Cures from the Forest*, CULTURAL SURVIVAL Q., Summer 1991, at 53 (noting that 50% of Western prescription drugs were manufactured from substances originally discovered in tropical rain forests). The discovery of plant-derived cancer drugs such as *vinblastine* and *vincristine* from Madagascar's periwinkle led to the U.S. National Cancer Institute's creation of a systematic program of testing plants for anticancer activity. See Cragg et al., *supra* note 8, at 85 (noting that between 1960 and 1982 approximately 35,000 plant samples were collected under the auspices of NCI and the U.S. Department of Agriculture).

10. The scientific basis for the presence of medically useful compounds in plants is undisputed:

Evolution has been selecting plants whose metabolism generates compounds with adaptive value; for instance, a bitter-tasting plant is less likely to be eaten by herbivorous animals (the same with a pepperish one, an allergenic one, a bad-smelling one, and so on). These compounds are, therefore, active on biological systems. The bioactivity of such compounds might eventually have therapeutic value; the chemical compounds will be absorbed by the body and interact with its receptors as any Western drug. There is no magic or folklore; Western-trained pharmacologists have no problem in accepting the fact that some plants that produce certain chemicals are, indeed, medicines.

Elaine Elizabethsky, *Folklore, Tradition, or Know-How?*, CULTURAL SURVIVAL Q., Summer 1991, at 9,

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used to develop drugs for sale.<sup>11</sup> In addition, research scientists collaborate with indigenous farmers to obtain local crop varieties to improve seeds under so-called biodiversity programs.<sup>12</sup>

Associated with these forms of folklore commercialization is a serious concern that traditional societies may be short-changed or even harmed during the process.<sup>13</sup> In many cases where traditional art or knowledge is exploited, the communities derive either no economic benefits,<sup>14</sup> or if they do gain something, such benefits often pale in comparison to the huge profits made by the exploiters.<sup>15</sup> In addition, traditional communities are harmed by forms of exploitation, which can lead to the permanent loss of irreplaceable property to museums and art houses.<sup>16</sup> These communities are also harmed by uses that degrade cultural items to the extent the items are displayed outside their traditional setting<sup>17</sup> and for purposes

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9. Elizabetsky argues that because the benefits derived from plant sources are inarguably indigenous knowledge, such benefits should be legally protected. *See id.* at 10.

11. Approximately three-quarters of the plant sources used for the manufacture of prescription drugs come to the notice of researchers because of their uses in traditional medicine. *See* Kloppenburg, *supra* note 7, at 15 (noting that Western collection strategies pay close attention to indigenous medical practice).

12. *See generally* Stephen B. Brush, *A Non-Market Approach to Protecting Biological Resources*, in SOURCEBOOK, *supra* note 1, at 131, 133 (asserting that this collection practice will only be affected slightly by laws which protect intellectual property rights and offering an alternative method of protection through emphasis on indigenous farmers' rights).

13. *See* Michael F. Brown, *Can Culture be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 193, 204-06 (1998) (criticizing legal regimes designed to protect against cultural appropriation as inappropriate and politically unviable methods which ignore the idea of free public access to information).

14. Failure to compensate indigenous communities adequately may be due to the deliberate refusal of the exploiters to pay, or where they are willing to pay, difficulties in identifying the proper owners to whom payment is to be made. *See* Janet McGowan & Iroka Udeinya, *Collecting Traditional Medicines in Nigeria: A Proposal for IPR Compensation*, in SOURCEBOOK, *supra* note 1, at 57, 59 (describing the difficulties in compensating indigenous peoples for their traditional knowledge, due in part to the fact that multiple communities share the same knowledge). It is not uncommon for exploiters to refrain from making payments so as not to offend local cultural sensitivities. *See* Greaves, *supra* note 1, at 4 n.5 ("Various traditional ethical systems resist financial transactions with nature's gifts.").

15. For example, after the discovery of the tumor fighting capabilities of Madagascar's periwinkle, the plant was patented and sold, netting the company approximately \$100 million, 88% of which was profit to the company. *See* A.B. Cunningham, *Indigenous Knowledge and Biodiversity: Global Commons or Regional Heritage?*, CULTURAL SURVIVAL Q., Summer 1991, at 4, 6.

16. Permanent loss can occur when valuable pieces of folklore are expropriated from the traditional communities and sent overseas. *See* Ndoye, *supra* note 3, at 375 (decrying the removal of objects which represent cultural heritage because "civilizations are mortal") (citation omitted). It is hardly surprising that there is more African art in major Western cities than in African cities. *See id.* While some of these items may have been sold or given away by traditional elders, in many cases, it is likely that the items were forcibly removed, particularly during the colonial era. *See id.* (arguing that colonists recognized the "vitality" of African culture as evidenced by their systematic dispersal of African art).

17. *See* Sassoon, *supra* note 3, at 49 (describing the degradation of religious objects, such as a Nepalese torana which depicts a Hindu god and is intended for display above a temple doorway, but instead hangs at the doorway of a New York City art gallery).

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different from those for which they were originally created.<sup>18</sup> For instance, this occurs when religious artifacts are sold as mere decorative art.<sup>19</sup> There is further harm where commercial copies of cultural works misrepresent communal values,<sup>20</sup> are of inferior quality,<sup>21</sup> or are made from different materials.<sup>22</sup>

These considerations have fueled the push for effective legal protection of folklore<sup>23</sup> to give traditional communities<sup>24</sup> and national governments greater control<sup>25</sup> over the use of folkloric works to

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18. Limitations on the use of the works of folklore to special occasions and rituals are not likely to be respected where such works are removed from their original culture. *See id.* at 49 (noting that some objects of indigenous culture are only displayed at certain times of the year, or only on particular days, and therefore have special significance to that culture). For examples of the special uses for works of folklore, see *infra* text accompanying notes 66-115.

Thus, a sacred-secret object of an indigenous group could be used openly in the West. *See* Alan Jabbour, *Folklore Protection and National Patrimony: Developments and Dilemmas in the Legal Protections of Folklore*, 17 COPYRIGHT BULL. (No. 1) 10, 11 (1983) (giving examples of the Western publication of sacred dances whose particulars are intended to be known by only a select few). Even where African dances are copied and performed abroad, there is denigration of African culture to the extent that the “non-African actors cannot lend the gestures that communicative [sic] warmth specific to Africa.” *See* Ndoye, *supra* note 3, at 376 (arguing that copying by foreigners renders moot African states’ efforts to promote African culture abroad).

As one writer laments:

[I]t is possible to encounter ‘groups and soloists who unscrupulously modernize works of folklore by arranging them in a new manner, by giving folk songs added rhythm and volume at the expense of their melodic character . . . . Performances of folk dances often take the form of ‘banal, impersonal shows devoid of the characteristics peculiar to . . . folk dances . . . . As for the garishly-colored costumes worn by the dancers, they are a travesty of the originals.

E.P. Gavrilov, *The Legal Protection of Works of Folklore*, 20 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 76, 79 (1984).

19. *See* Sassoon, *supra* note 3, at 47, 49 (noting with frustration that artifacts are not displayed in galleries for their religious significance but rather as “peripheral luxuries of [Western] culture”).

20. *Cf.* Susan Lobo, *The Fabric of Life: Repatriating the Sacred Coroma Textiles*, CULTURAL SURVIVAL Q., Summer 1991, at 40, 41 (“Removed from the context of the community, the textile is the object of differing often conflicting ideologies that define its intrinsic nature.”).

21. *See* Sandra Lee Pinel & Michael J. Evans, *Tribal Sovereignty and the Control of Knowledge*, in SOURCEBOOK, *supra* note 1 at 41, 47 (asserting that commercial copies are inferior in quality because they use a less labor intensive production method and lower quality materials).

22. Mass-produced items sold as traditional craft raise authentication problems to the extent they do not have the same attributes as the traditional items. *See id.* at 47 (explaining that mass production often requires the use of different material, and creates products of inferior quality to traditionally-produced crafts). Also, the large scale production of traditional items has come to be viewed as “a cultural and psychological threat to the authentic practitioners of traditional arts and to the traditional groups whose values those arts express.” *See* Jabbour, *supra* note 18, at 11.

23. *See* Brown, *supra* note 13, at 193 (arguing that what legal protections exist are ineffective and have the adverse effect of limiting the free flow of information “essential to liberal democracy”).

24. Traditional communities may lose control over their works when consent of the elders in the community is not sought prior to the exploitation of a work of folklore. *See* Pinel & Evans, *supra* note 21, at 44 (discussing Native American tribes’ assertion of tribal sovereignty to control the use and dissemination of culturally based knowledge by and to outside researchers as a means of protecting the intellectual property rights of the tribe).

25. The state as the repository of folklore loses control when cultural artifacts are mass-

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enhance revenues.<sup>26</sup> On a broader level, nationalist aspirations<sup>27</sup> and the need to preserve folklore from the onslaught of foreign cultures<sup>28</sup> also play a role. For other advocates, the case for protecting folklore is based on a principle of direct reciprocity.<sup>29</sup> These proponents

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produced abroad without permission, with adverse consequences for state tourism policies and cultural promotion programs abroad. See Ndoye, *supra* note 3, at 376 (asserting that the unauthorized reproduction of African ballets abroad reduces the demand for performances by authentic African cultural troupes).

26. See Gavrilov, *supra* note 18, at 79-80 (“[L]egal protection for folklore will make it possible to derive earnings from the performances abroad of folklore works.”).

27. As a reaction to the colonial practice of denigrating African values while praising the virtues of Western culture, African nationalists typically advocated African cultural unity in their fight for independence. See Ndoye, *supra* note 3, at 375 (noting that the first grass-roots movements in the fight for independence focused on defining African culture; such efforts included panafricanism). Even after independence, the need remained to promote African culture to stave off the continuing subtle denigration of the culture. See Isaac G. Kalumbu, *Copyright and the Safeguarding of Folklore*, RESOUND: Q. ARCHIVES TRADITIONAL MUSIC, Jan-Apr. 1992 (proposing that the continued use of colonizers’ social customs by African leaders led to later generations’ emulation of foreign practices rather than African traditions). This was all the more critical given the importance of folklore to national development, the promotion of national unity, and the assertion of national cultural values. See Ndoye, *supra* note 3, at 376 (asserting that folklore is a nation’s common heritage linking a nation’s various components and providing a reference for national identity). As one commentator has observed:

Folklore is essentially characterized as a work whose expressions merge within the cultural identity and which must be rigorously protected both to ensure the continued existence of that cultural identity and to prevent its being appropriated by ethnic groups. The basic aim of [legal protection] was to prevent any possible development of ethnic chauvinism incompatible with our national unity.

*Id.* at 377.

Not surprisingly, African states have emerged with a sense of creative and artistic identity and view folklore as a means of asserting their political and cultural identity. See *id.* at 375 (asserting that “folklore acts as a mirror” in which a cultural identity can be discerned). African states therefore consider the protection of folklore to be a priority. See *id.* (focusing on Senegal’s efforts at folklore protection).

28. For example, a World Intellectual Property Organization (“WIPO”) Committee report notes that “the threatened loss and disappearance of certain elements of folklore, particularly in the face of modern communication technologies which facilitate the importation of foreign cultures, [replace] local cultural traditions and promot[e] the hegemony of imported cultures.” See REPORT OF THE SECOND COMMITTEE OF GOVERNMENTAL EXPERTS ON THE SAFEGUARDING OF FOLKLORE [hereinafter REPORT OF THE SECOND COMMITTEE], reprinted in 19 COPYRIGHT BULL. (No. 2) 39, 41 (1985) (emphasizing the need to protect and preserve folklore from the risks of distortion or being forgotten). This has prompted the United Nations Educational, Scientific, and Cultural Organization (“UNESCO”) to call for the implementation of appropriate educational programs to preserve folklore and prevent it from “being uselessly sacrificed for new elements which have nothing comparable to offer, and stimulating the techniques and knowledge which each said culture is able to offer to the world.” See Chaves, *supra* note 6, at 126 (quoting a recommendation by UNESCO presented at the International Folklore Congress on Aug. 22, 1974).

29. Some see a need to redress an imbalance in the current state of affairs where developing countries are being pressured to grant intellectual property protection to rights important to the developed nations such as patents, trademarks, and copyrights, and yet the developed nations have failed to provide protection to folklore. Cf. Greaves, *supra* note 1, at 7 (noting that the United States has “aggressively pressured” other countries to enforce its approach to protecting intellectual property); Daniela Soleri et al., *Gifts from the Creator: Intellectual Property Rights and Folk Crop Varieties*, in SOURCEBOOK, *supra* note 1, at 21, 23 (noting Western industrial nations’ pressure on Third World countries to create and enforce laws which protect intellectual property rights). As explained in this Article, folklore consists of intangible

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argue that folklore associated with developing nations should be placed on the same footing as the intellectual property rights of the developed nations,<sup>30</sup> which are effectively “imposed” on the rest of the global community under the new GATT arrangements.<sup>31</sup>

This Article examines the adequacy of the current legal framework for protecting African folklore both inside and outside the African continent. Part I describes the nature of folklore and its significance in traditional communities. In addition, Part I explains how rights in folklore are created and enforced according to a society of customary law. Part II examines the protection of folklore under national laws, distinguishing between laws that contain specific references to folklore and those that do not. Part II also assesses the extent to which folklore can be protected, if at all, under general intellectual property laws, or under current African law. Part III discusses the relevance of two African regional arrangements to the protection of folklore. Part IV describes various international initiatives, including attempts to provide model national laws on folklore. As the United States is a lucrative market for African folklore, Part V analyzes the

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rights closely resembling modern intellectual property. *See infra* notes 81-89 (comparing copyrights, trademarks, and patents to indigenous demarcations or other identifying characteristics of folklore). Thus, the argument can be made that protection of foreign intellectual property rights in developing countries justifies reciprocal treatment of folklore.

30. *See* REPORT OF THE GROUP OF EXPERTS ON THE INTERNATIONAL PROTECTION OF EXPRESSIONS OF FOLKLORE BY INTELLECTUAL PROPERTY [hereinafter REPORT OF THE GROUP OF EXPERTS], *reprinted in* 19 COPYRIGHT BULL. (No. 2) 21, 25 (1985) (noting the meeting participants' recommendations that treatment of folklore should be consistent with developing countries' treatment of foreign copyrights).

31. During the period leading up to the adoption of the new GATT arrangements, the United States consistently pressured developing countries, especially those in Asia, to adopt and enforce strong intellectual property regimes. *See generally* Frederick M. Abbott, *Protecting First World Assets in the Third World: Intellectual Property Negotiations in the GATT Multilateral Framework*, 22 VAND. J. TRANSNAT'L L. 689, 695-99 (1989) (reviewing U.S. and other industrialized nations' concerns about technology transfer and developing countries' refusal to recognize that the GATT encompasses intellectual property). For a discussion of the intellectual property issues as they affect developing nations, see generally Mohammed Lawal Ahmadu & Izzat Ullah, *The International Patent System: Some Legal Implications for Developing Countries*, 8 LESOTHO L.J. 68, 68 (1992); Carlos Alberto Primo Braga, *The Economics of Intellectual Property Rights and the GATT: A View from the South* 22 VAND. J. TRANSNAT'L L. 243, 245-63 (1989) (exploring the economics of intellectual property rights protection from the point of view of less developed countries); Oliver Morrissey & Yogesh Rai, *The GATT Agreement on Trade-Related Investment Measures: Implications for Developing Countries and their Relationship with Transnational Corporations*, 31 J. DEV. STUD. 702 (1995) (addressing lesser developed countries' abilities to enhance and strengthen their trading positions with transnational corporations); J.H. Reichman, *Intellectual Property in International Trade: Opportunities and Risks of a GATT Connection*, 22 VAND. J. TRANSNAT'L L. 747, 827-82 (1989) (identifying areas for potential compromise between private and public entities regarding intellectual property); Gabriel E. Larrea Richerand, *GATT, Intellectual Property Rights and the Developing Countries*, 25 COPYRIGHT BULL. (No. 3) 4 (1991) (discussing recent proposals for improved protection of intellectual property); Ulrich Uchtenhagen, *The GATT Negotiations Concerning Copyright and Intellectual Property Protection*, 21 INT'L. REV. INDUS. PROP. L. & COPYRIGHT 765, 768-82 (1990) (providing an overview of why and how intellectual property issues should be addressed in GATT negotiations).

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protection of folklore under U.S. laws and explores some current issues in the quest for greater recognition of intellectual property rights in the cultural property of indigenous peoples.

This Article concludes that it is inherently difficult to protect folklore under modern intellectual property laws which tend to be prompted by concerns irrelevant to folklore. Accordingly, this Article, after reviewing laws and policies complementary to folklore protection, proposes *sui generis* arrangements for folklore in Part VI. Taking into account the disparate treatment of folklore in the laws of African countries on the one hand, and those of the developed nations on the other, this Article recommends a regional solution instead of an international one.<sup>32</sup> Specifically, it envisages the creation of a new regional agency that would improve the existing framework of protection by providing uniformity and consistency in the dissemination of information about protected works, the articulation of African claims to folklore, and the institution of infringement actions over the use of folklore.<sup>33</sup> This agency would also be responsible for processing requests and distributing compensation in connection with the use of folklore.<sup>34</sup>

## I. FOLKLORE UNDER TRADITIONAL SYSTEMS

### A. Nature of Folklore

Descriptions of the amorphous term “folklore”<sup>35</sup> tend to emphasize its diverse nature,<sup>36</sup> consisting of, for example, the “traditional customs, tales, sayings, or art forms preserved among a people.”<sup>37</sup> In

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32. See *infra* Part VI.C.

33. See *infra* Part VI.C.

34. See *infra* text accompanying notes 547-56 (asserting that compensation schemes should be broadened to include more innovative arrangements which are the responsibility of contracting states).

35. For numerous definitions of the term “folklore” and what folklore includes, see *Definitions of Folklore*, FUNK AND WAGNALLS STANDARD DICTIONARY OF FOLKLORE, MYTHOLOGY AND LEGEND 255-64 (Maria Leach ed., 1959) [hereinafter *DICTIONARY OF FOLKLORE*] (providing 21 different definitions of the term “folklore”).

36. Regarding the diversity of folklore, one writer notes:

The great bulk and central core of folklore consists not so much in folk songs and stories (although these are more obvious in their appeal as colorful and characteristic) as in the customs and beliefs attending the ‘periods of emotional stress in the life of an individual in relation to the group-birth, graduation, coming of age, marriage, burial’ . . . . Another considerable and important phase of folklore is made up of the mass delusions and hallucinations of myths . . . and the apocrypha of hero-worship, with its legends . . . .”

See B.A. Botkin, *Definitions of Folklore*, in *DICTIONARY OF FOLKLORE*, *supra* note 35, at 256-57 (discussing oral cultures and “handed-down” folklore as opposed to folklore maintained through print).

37. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 479 (1984).

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this sense, the term applies not only to ideas, or words, but also to physical objects.<sup>38</sup> Its oral nature,<sup>39</sup> group features,<sup>40</sup> and mode of transmission through generations of people<sup>41</sup> are other equally important identifying characteristics. To avoid a pejorative connotation to practices common to marginal groups or lower strata of society,<sup>42</sup> the term “folk life”<sup>43</sup> is sometimes preferred.

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38. Archer Taylor explains:

The folklore of physical objects includes the shapes and uses of tools, costumes, and the forms of villages and houses. The folklore of gestures and games occupies a position intermediate between the folklore of physical objects and the folklore of ideas. Typical ideas transmitted as folklore are manifested in the customs associated with birth, marriage, and death, with the lesser events of life, with remedies for illnesses and wounds, with agriculture, the trades, and the professions, and with religious life . . . . Verbal folklore includes . . . tales of various kinds (marchen, jests, legends, cumulative tales, exempla, fables, etiological tales), ballads, lyric folk song, children’s songs, charms, proverbs and riddles.

Archer Taylor, *Definitions of Folklore*, in *DICTIONARY OF FOLKLORE*, *supra* note 35, at 263 (categorizing different types of folklore according to the means by which they are communicated).

39. According to William Bascom, “the term folklore has come to mean myths, legends, folk tales, proverbs, riddles, verse, and a variety of other forms of artistic expression whose medium is the spoken word.” William R. Bascom, *Definitions of Folklore*, in *DICTIONARY OF FOLKLORE*, *supra* note 35, at 256 (defining folklore in part as a “verbal art”).

40. For example, Theodor Gastor notes:

Folklore is that part of a people’s culture which is preserved, consciously or unconsciously, in beliefs and practices, customs and observances of general currency; in myths, legends, and tales of common acceptance; and in arts and crafts which express the temper and genius of a group rather than of an individual. Because it is a repository of popular traditions and an integral element of the popular “climate,” folklore serves as a constant source and frame of reference for more formal literature and art; but it is distinct therefrom in that it is essentially of the people, by the people, and for the people.

Theodor H. Gastor, *Definitions of Folklore*, in *DICTIONARY OF FOLKLORE*, *supra* note 35, at 258.

41. According to B.A. Botkin, “what distinguishes folklore from the rest of culture is the preponderance of the handed-down over the learned element and the prepotency that the popular imagination derives from and gives to custom and tradition.” Botkin, *supra* note 36, at 256 (describing the process of passing down folklore as “creative remembrance” in that folk tellers remember as much as they forget or corrupt); *see also* Marie Niedzielska, *The Intellectual Property Aspects of Folklore Protection*, 16 *COPYRIGHT MONTHLY REVIEW*, *supra* note 6, at 339, 340 (stating that folklore is “passed by word of mouth, from memory or visually, from generation to generation within a specific social group which is at once its user and carrier”).

42. Consider for instance, the statement that “[t]he materials of folklore are for the most part the materials of social anthropology that have been collected from the barbarous and ‘uncivilized’ regions of the world, as well as from the rural and illiterate peoples of the ‘civilized’ countries.” Aurelio M. Espinoza, *Definitions of Folklore*, in *DICTIONARY OF FOLKLORE*, *supra* note 35, at 257. Similarly, another writer refers to folklore as:

The entire body of ancient popular beliefs, customs, and traditions, which have survived among the less educated elements of civilized societies today. It thus includes fairy tales, myths, and legends, superstitions, festival rites, traditional games, folk songs, popular sayings, arts, crafts, folk dance and the like.

John L. Mish, *Definitions of Folklore*, in *DICTIONARY OF FOLKLORE*, *supra* note 35, at 261. Yet another author refers to it as “the accumulated knowledge of a homogenous unsophisticated people, tied together not only by common physical bonds, but also by emotional ones which color their every expression, giving it unity and individual distinction.” MacEdward Leach, *Definitions of Folklore*, in *DICTIONARY OF FOLKLORE*, *supra* note 35, at 261 (concluding that folklore is re-created from its original individual source but becomes a group product through

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Legal definitions underscore the importance of communal rights to folklore. For instance, Ghanaian legislation defines folklore as “all literary, artistic and scientific work belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic communities of Ghana or by unidentified Ghanaian authors, and any such works designated under this Law to be works of Ghanaian folklore.”<sup>44</sup>

Nigerian law similarly defines folklore as:

a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means.<sup>45</sup>

Identical definitions can be found in the laws of the Republic of Congo,<sup>46</sup> Burundi,<sup>47</sup> Mali,<sup>48</sup> Cameroon,<sup>49</sup> Central African Republic<sup>50</sup>

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repetition).

43. The concept of folk life is much wider than folklore. See George Herzog, *Definitions of Folklore*, in *DICTIONARY OF FOLKLORE*, *supra* note 35, at 259 (contrasting “folk life” with “folklore”, which usually denotes only the countryside rather than urban areas). As George Herzog explains:

‘folk life’, more familiar in Europe and Latin America, covers the entire culture of a ‘folk’ group, usually a rural group whose mode of life is rather different from that of its urban counterpart. Such a wide expansion of meaning, stemming from a special ‘folk’ concept, has not been applied in the study of ‘primitive’ or preliterate societies.

*Id.* at 259.

44. Copyright Law (Ghana) § 53 (Mar. 21, 1985), *reprinted in* 21 *COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG.* 423, 435 (1985) [hereinafter 21 *COPYRIGHT MONTHLY REVIEW*].

45. Copyright Decree (Nigeria) § 28(5) (Dec. 19, 1988), *reprinted in* 25 *COPYRIGHT: MONTHLY REV.*, *supra* note 3, at Nigeria, text 1-01, page 1, 8.

46. Under the laws of Congo, folklore is defined as “all literary and artistic productions created on the national territory by authors presumed to be Congolese nationals or by Congolese ethnic communities, passed from generation to generation and constituting one of the basic elements of the national traditional cultural heritage.” Law on Copyright and Neighboring Rights (Congo) art. 15 (July 7, 1982), *reprinted in* 19 *COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG.* 201, 201 (1983) [hereinafter 19 *COPYRIGHT MONTHLY REVIEW*].

47. Under the laws of Burundi, folklore is defined as “all literary, artistic and scientific works created on the national territory by authors presumed to be nationals of Burundi, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage.” Decree-Law Regulating the Rights of Authors and Intellectual Property (Burundi) art. 4 (May 4, 1978), *reprinted in* 16 *COPYRIGHT MONTHLY REVIEW*, *supra* note 6, at 120, 120-21.

48. Under the laws of Mali, folklore is defined as “any work composed on the basis of elements borrowed from the national heritage of the Republic of Mali.” Ordinance Concerning Literary and Artistic Property (Mali) art. 8 (July 1, 1977), *reprinted in* 16 *COPYRIGHT MONTHLY REVIEW*, *supra* note 6, at 180, 182.

49. Under the laws of Cameroon, folklore is defined as “all literary, artistic and scientific works produced by various communities and which, passed from one generation to another.” Law No. 82-18 to Regulate Copyright (Cameroon) § 4(viii) (Nov. 26, 1982), *reprinted in* 19 *COPYRIGHT MONTHLY REVIEW*, *supra* note 46, at 360, 360-61.

50. Folklore is defined under the laws of the Central African Republic as “all literary and artistic productions created by the national communities, passed on from generation to

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and Senegal.<sup>51</sup>

Examples of folklore provided in the statutes include poetry, riddles, songs, instrumental music, dances, and plays, productions of art in drawings, paintings, carvings, sculptures, pottery, terra cotta, mosaic, woodwork, metalware, jewelry, handicrafts, costumes, and indigenous textiles.<sup>52</sup> However, while the statutory illustrations appear to exclude plant varieties grown by farmers, and plant extracts developed by local medicine men, those items certainly qualify as works of folklore to the extent that these techniques embody scientific techniques<sup>53</sup> passed down through generations in the community. The knowledge they embody is priceless and, once lost, cannot be recovered.<sup>54</sup> Widespread abuses in the exploitation of such types of traditional knowledge<sup>55</sup> certainly justify their inclusion in any

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generation and constituting one of the basic elements of the traditional cultural heritage." Ordinance No. 85-002 on Copyright (Central African Republic) art. 9 (Jan. 5, 1985), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 158, 160.

51. Senegalese law defines folklore as "all literary and artistic works created by authors presumed to be of Senegalese nationality, passed from generation to generation and constituting one of the basic elements of the Senegalese traditional cultural heritage." Law on the Protection of Copyright (Senegal) art. 9 (Dec. 4, 1973), *reprinted in* 10 COPYRIGHT: MONTHLY REV. WORLD INTEL. PROP. ORG. 211, 212-13 (1974) [hereinafter 10 COPYRIGHT MONTHLY REVIEW].

52. *See, e.g.*, Copyright Decree (Nigeria) § 28(5) (Dec. 19, 1988), *reprinted in* 25 COPYRIGHT MONTHLY REVIEW, *supra* note 3, at Nigeria, text 1-01, pages 8-9 (listing the ways in which folklore is created).

53. The skills and procedures employed in the use of plants for traditional medicinal purposes have been described as follows:

Traditional remedies, although based on natural products, are not found in "nature" as such; they are products of human knowledge. To transform a plant into a medicine, one has to know the correct species, its location, the proper time of collection (some plants are poisonous in certain seasons), the part to be used, how to prepare it (fresh, dried, cut in small pieces, smashed), the solvent to be used (cold, warm, or boiling water; alcohol, addition of salt, etc.), the way to prepare it (time and conditions to be left on the solvent), and finally, posology (route of administration, dosage). Needless to say, curers have to diagnose and select the right medicine for the right patients.

Elizabetsky, *supra* note 10, at 10-11 (questioning why we easily give credit to pharmacists or physicians for their know-how and only refer to indigenous knowledge as "tradition," "folklore," or just "knowledge?").

54. *See id.* (stating that once this knowledge is lost, trying to recover it would be "like searching for a needle in a haystack").

55. *See supra* notes 7-12 and accompanying text (noting how pharmaceutical companies and government agencies often exploit the knowledge of local farmers in hopes of obtaining knowledge of the medicinal value of indigenous plants). To check against these abuses, traditional farmers are demanding greater safeguards of their rights to:

(a) grow folk varieties and market folk variety seeds and food products, (b) be compensated when folk varieties, folk variety genes, folk variety food products and names are used or marketed by others, and (c) have a say in the manipulation and other uses of folk varieties by outsiders, which may violate the cultural and religious values with which folk varieties are often deeply imbued.

Soleri et al., *supra* note 29, at 24 (discussing the concern indigenous farmers have of protecting their intellectual property rights).

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protective legal regime.<sup>56</sup>

To complete the survey, it is important to note briefly the significance of folklore to life in traditional societies. Because of their frequent references to morality and integrity, folksongs and tales are used to build African character.<sup>57</sup> Apart from its entertainment value, music serves as a means of recording history by preserving information about important past events.<sup>58</sup> Music also plays vital roles in rituals and festivities:<sup>59</sup> as a palliative in healing,<sup>60</sup> as part of war preparation,<sup>61</sup> and as a means for criticizing or checking governmental abuses.<sup>62</sup> Dance and drama are also linked to rituals and religious festivities, while designs on African fabrics and art may depict religious, social or cultural concepts.<sup>63</sup>

### *B. Protection Under Customary Law*

Because folklore encompasses non-statutory practices of different communities, rights in folklore may fall under the protections of the customary law.<sup>64</sup> Generally, such rights are recognized under social

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56. As Daniela Soleri and David Cleveland explain:

To those supporting farmers' intellectual property rights in their folk varieties, the effort and knowledge of indigenous farmers involved in creating and maintaining folk varieties implies the need for recognition on an equal footing with that of plant breeders and molecular biologists. They see the communal effort in developing folk varieties as an integrated part of making a living over generations to be as legitimate as the individual efforts of scientists in formal, segregated work settings in the laboratory or field plot.

Soleri et al., *supra* note 29, at 24.

57. Folktales developed in part from the "need to impress on men the moral truth that wickedness and cruelty would in the long run meet with their due reward." JOHN ROSCOE, *THE BAGANDA: AN ACCOUNT OF THEIR NATIVE CUSTOMS AND BELIEFS* 460 (1965) (discussing the origin and use of folklore in Uganda).

58. See BANKOLE SODIPO, *PIRACY AND COUNTERFEITING: GATT, TRIPS AND DEVELOPING COUNTRIES* 38 (1997).

59. As John Roscoe noted:

Among the musical instruments of the Baganda, drums must be given the first place. The drum was indeed put to a multitude of uses, quite apart from music; it was the instrument which announced both joy and sorrow, it was used to let people know of the happy event of the birth of children, and it announced the mourning for the dead. It gave the alarm for war, and announced the return of the triumphant warriors who had conquered in war. It had its place in the most solemn and in the most joyous ceremonies of the nation.

See ROSCOE, *supra* note 57, at 25.

60. Music plays this role by preparing the mind for occult healing acts. See SODIPO, *supra* note 58, at 38.

61. See ROSCOE, *supra* note 57, at 25.

62. See SODIPO, *supra* note 58, at 38 (discussing music as a tool for social commentary).

63. See Betty Nah-Akuyea Mould-Iddrisu, *Industrial Designs: The Ghanaian Experience*, *MANAGING INTEL. PROP.*, Apr.-May 1991, at 28, 29-30 (explaining that the Ashanti's early form of intellectual property rights arose because of the cultural significance of African cloths; each and every design had a name which connoted either a religious, social or cultural event).

64. Customary law constitutes a major source of law in Africa. See, e.g., A.E.W. PARK, *THE SOURCES OF NIGERIAN LAW* 65 (1963) (stating that in Nigeria, most activities are conducted in

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criteria depending upon the degree of the kinship, age, sex, title or role of individuals in the society, and are enforced either by sanctions based on common interests or a system of magical or religious beliefs.<sup>65</sup> For a clear understanding of the nature of traditional rights in folklore, it is necessary to examine more closely the nature and significance of the social structure in tribal societies.

### 1. *Social groups and rights in folklore*

The social organization of traditional societies is based on a strong pattern of kinship groups with lineage as their basic constituent.<sup>66</sup> The lineage forms the foundation of a wide social group called the clan.<sup>67</sup> A system of interclan linkages in turn results in a tribe made up of people belonging to different lineages but speaking the same language with the same traditions.<sup>68</sup>

Within each group is a leader, selected on the basis of seniority,<sup>69</sup> who is accountable to the leader of the next higher group.<sup>70</sup> Thus, the leader of a nuclear family, consisting of two parents and their children, would be accountable to the leader of the lineage, who in turn is accountable to the leader of the clan, who is accountable to the leader of the tribe, who is usually the chief.<sup>71</sup> The leader controls farmland and other property of the group, arbitrates disputes, and imposes punishment to control the behavior of group members.<sup>72</sup> In this regard, the powers of chiefs and lineage elders can be quite extensive.<sup>73</sup> In addition, they exercise added moral and ritual

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accordance with customary law). Customary law is generally defined to include the non-codified practices of the different ethnic communities. *See, e.g.*, GHANA CONST. art. 11(3) (1993 Republican Constitution of Ghana) (defining customary law as “the rules of law which by custom are applicable to particular communities in Ghana”). These practices are recognized in judicial proceedings, and where applicable, given as much weight as the written law. *See* MAX GLUCKMAN, IDEAS AND PROCEDURES IN AFRICAN CUSTOMARY LAW 22-33 (1969) (discussing the tension between the new court personnel from outside the community and traditional personnel selected from among the community who are familiar with the court and its informal customs and the emerging codification of customary law).

65. *See generally* SODIPO, *supra* note 58, at 43-47 (describing the use of religion and magic in protecting works and property rights).

66. *See* MEYER FORTES, DYNAMICS OF CLANSHIP AMONG THE TALLENSI 30-38 (1945).

67. *See id.* at 224.

68. *See* MEYER FORTES, THE WEB OF KINSHIP AMONG THE TALLENSI 5 (1967); *see also* ELIZABETH COLSON & MAX GLUCKMAN, SEVEN TRIBES OF BRITISH CENTRAL AFRICA 72 (1968) (discussing the relationships and web of kinship among the Lozi tribe of Northwestern Rhodesia).

69. *See* FORTES, *supra* note 66, at 224 (“[S]eniority commands deference at all times.”).

70. *See id.* at 225 (stating that there is a hierarchy of the segments corresponding to the hierarchy of lineage heads).

71. *See* SODIPO, *supra* note 58, at 43 (describing the system of social stratification).

72. *See* COLSON & GLUCKMAN, *supra* note 68, at 170.

73. For a description of the powers of the lineage head and chief among the Bemba tribe, *see id.* at 32, 169-70 (describing some of the chief's powers, which include acting as head of the

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authority based on a perceived mystical association with the tribes' ancestors.<sup>74</sup>

In interacting with each other, it is normal for individuals to associate on the basis of age, sex, role or status in the society. Thus, children of a certain age frequently play or herd cattle together,<sup>75</sup> guilds of craftsmen exist in certain industries,<sup>76</sup> and exclusive male and female associations are common. Group relations are normative, and give rise to a series of well-defined rights and obligations, belonging and owing to members of the group.<sup>77</sup> Kinship rights and obligations are specific when the individual is interacting with members of his lineage,<sup>78</sup> but become more general as the degree of kinship widens.<sup>79</sup> Only members of the specific group are authorized to carry out its functions and non-members are prohibited from carrying on activities reserved for members.<sup>80</sup>

These norms are relevant to the recognition of folklore rights, which closely resemble modern intellectual property rights. Rights sounding in copyright may be found in some traditional music, folk songs, tales, dances, paintings, sculptures, drawings, and designs on

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tribe's rough equivalent to a supreme court and his role as commander of warrior bands). For a discussion on the authority of the chief of the Ashanti and his obligations to tribal elders, see KOFI ABREFA BUSIA, *THE POSITION OF THE CHIEF IN THE MODERN POLITICAL SYSTEM OF THE ASHANTI* 13-16 (1968); Lloyd Fallers, *The Predicament of the Modern African Chief: An Instance from Uganda* 57 *AM. ANTHROPOLOGIST* 290 (1955) (explaining the diverse roles of the modern African chief).

74. See COLSON & GLUCKMAN, *supra* note 68, at 169 (noting that the chief's authority is sanctioned by the belief that the chief descended from the original tribe).

75. When a group of boys are out herding cattle, the oldest of them is usually put in charge. See FORTES, *supra* note 66, at 224. As to the types of age groups that may be formed, see COLSON & GLUCKMAN, *supra* note 68, at 269-78 (discussing how the Nyak Yusa tribe lives in villages based on their age group such that people of the same age live together their entire lives).

76. Such associations are common in the soap-making, blacksmithery, ceramics, carving, and textiles industries. For instance, it has been noted that the Lozi develop friendships both among themselves and with smiths, hunters, and other professionals from other tribes and that they "tend to extend the scope and duration of transitory associations to make them multiplex and permanent relationships . . ." See COLSON & GLUCKMAN, *supra* note 68, at 84.

77. Writing about the significance of lineage membership to a kinsman, Myers Fortes notes that:

It is a fact that marks him off from a great many people who come into his range of contact. It determines, for example, whom he may or may not marry, what social roles he may or may not exercise, who will support him in his troubles, where he will make his farms, and especially which named ancestors ritually accessible at certain definite, material shrines govern his life.

FORTES, *supra* note 66, at 135.

78. See *id.* at 134-35.

79. See *id.* at 137 ("Through clan membership one belongs to a community, defined not by specific rights and duties based on the spiritual jurisdiction of one's own ancestors, but principally by common values and common ritual interests.").

80. See SODIPO, *supra* note 58, at 43 (discussing how only certain members of the community could produce certain works and how it was taboo for non-members to take part in those activities).

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crafts.<sup>81</sup> Marks on agricultural implements,<sup>82</sup> clothes,<sup>83</sup> and on works of art<sup>84</sup> may serve identification functions akin to the role played by trademarks. Additionally, sophisticated technology rights evident in mining activity,<sup>85</sup> canoe building,<sup>86</sup> construction of musical instruments<sup>87</sup> and cloth-weaving devices,<sup>88</sup> and the practice of herbal medicine<sup>89</sup> are reminiscent of patents.

Folklore rights are vested in particular segments of the community

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81. Designs are commonly made on pots, clothes, leather, wood, and calabashes. *See id.* at 38 (describing how designs on these crafts were common and how these activities would probably have been protected under current copyright laws).

82. *See id.* at 39.

83. Signs woven into certain clothes denote their origin or the identity of the producers. Thus, it is possible to distinguish *Kano* cloth by its deep blue/indigo characteristics. Also, depending on the designs and materials used, cloths could have political, ritual or social significance. Special cloths are used to decorate shrines, to bury the dead, for coronations of chiefs, or to signify status in society. *See id.* at 40.

84. Inscriptions on works of art in brass, bronze, gold, clay or wood can provide clues to the origins of the work. For example, as noted by Bankole Sodipo, "works of art from the Nok region [of Nigeria] often had two holes made in the head, while those from Ife had two or more heads at the top of the work." *Id.* at 40. It is also common for some products or paintings to bear

the insignia of cults, designating that to which the owners or wearers belonged: for example, the left fist with a thumb concealed over the right fist for the Ogboni, the 16 birds in a circle around a central bird for the Osanyin, the double-headed axe and gourd rattle of Sango [the god of thunder].

*Id.* Pottery and handicraft could also be identified by various characteristics. The type of pottery at a deceased's grave often depicts the class of society to which he belonged. *See id.* at 40.

85. For descriptions of traditional mining processes, see ROSCOE, *supra* note 57, at 378-83 (describing the history and work of traditional mining processes); JOHN ROSCOE, *THE NORTHERN BANTU* 74-76 (1966) (commenting on iron working and smithing). In Northern Zimbabwe, iron-smelting is carried on mainly by the Lunda and is rarely found among the Bembe. *See* COLSON & GLUCKMAN, *supra* note 68, at 167 (noting that the Bembe are warriors who do not create skilled handicrafts to trade or sell). The Kpelle people in Liberia are renowned for their advanced metallurgical technology. *See* Gordon C. Thomasson, *Liberia's Seeds of Knowledge*, *CULTURAL SURVIVAL Q.*, Summer 1991, at 23, 25 (describing Kpelle metallurgical technology as "sophisticated, quite distinctive, and clearly not derived from neighbors, captives, or slaves").

86. Among the Baganda, canoe building involves unique methods and is mainly carried out by members of the Lung-fish clan who also are the general workers of wood. *See* ROSCOE, *supra* note 57, at 383, 406.

87. Some traditional musical instruments are so novel they could be patented. *See id.* at 25-37. It is possible to find differences in the construction of the various musical instruments. For example, the strings of the Basoga harp are horizontal whereas those of the Baganda are vertical. *See id.* at 34.

88. Looms used in the weaving of cloth can vary in shape and size from one community to the other. *See* SODIPO, *supra* note 58, at 41.

89. Herbal medicine is practiced widely in African communities. Among the Baganda, for example, "each clan had its medicine-men, who through their skill and cunning, gained an insight into character, and also into certain arts which they use to the best advantage." ROSCOE, *supra* note 57, at 277-78 (discussing the role of medicine men).

Like the medicine-men, there are rainmakers who claim to possess mystical powers or secret knowledge. *See* ROSCOE, *supra* note 85, at 181-82 (believing that they have magical powers, rainmakers have induced others to have faith in their powers).

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and are exercised under carefully circumscribed conditions.<sup>90</sup> For instance, with regard to song, the recitation of *oriki*, a praise-singing poetry among the Yoruba in Nigeria, was preserved exclusively for certain families.<sup>91</sup> Among the Lozi in Zimbabwe, each traditional leader has his own praise songs containing both historical lore and proverbial wisdom that are recited on important occasions by a select group of bandsmen.<sup>92</sup>

Precise rules also govern who can make or play certain musical instruments, and at what time and for what reasons they are played.<sup>93</sup> Thus, the great national drums of the Lozi which are beaten only for war, or in national emergencies, are under the watchful eye of a special council of elders.<sup>94</sup> Each Baganda king in Uganda has a select group of drummers who play special drums to ensure the permanency of his office.<sup>95</sup> Among the Bahima of Uganda, only women keep harps, which they use at home.<sup>96</sup> Among the Baganda, fifes are owned and played mainly by herd boys.<sup>97</sup> In Nigeria, certain musical instruments are dedicated to particular cults.<sup>98</sup>

Similar rules apply to crafts. Among the Tonga of Zimbabwe, crafts are subject to a sexual division of labor with wood and metals assigned to men and the making of pots, baskets, and mats to women.<sup>99</sup> Within this broad division, there is a further specialization, because not all men and women are skilled in the art assigned to their sex.<sup>100</sup> Elizabeth Colson and Max Gluckman write that “only those who have been instructed by an ancestral spirit are considered

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90. See SODIPO, *supra* note 58, at 43 (discussing how some practices are restricted to certain sections of the community).

91. See *id.* at 43 & n.202 (citing Revd. B. Kingslake, *Musical Memories of Nigeria*, 1 J. INT'L LIBR. AFR. MUSIC 20 (1957)) (discussing how certain works could only be performed by certain segments of the community).

92. See COLSON & GLUCKMAN, *supra* note 68, at 39 (discussing the praise songs as an example of the esteem the Lozi exhibit towards their leaders).

93. See ROSCOE, *supra* note 85, at 189 (noting that for the Bagesu the drum is used for public dances, while the harp accompanies songs in the house, but is not used publicly). Similarly, the Bagesu have very strict gender roles for the dances. See *id.*

94. See *id.* at 47 (explaining the cultural significance between the national drums and the King's personal drums).

95. See ROSCOE, *supra* note 57, at 25-33 (detailing the creation of the drums and their cultural significance).

96. See ROSCOE, *supra* note 85, at 140.

97. See ROSCOE, *supra* note 57, at 35-37 (outlining the many uses of the fife in Baganda culture).

98. See SODIPO, *supra* note 58, at 46 n.216 (noting that “the drum, bata, was dedicated to the worship of Sango”).

99. See COLSON & GLUCKMAN, *supra* note 68, at 103-05. In contrast to the Tonga, basketry among the Ngoni is a man's craft and is usually conducted at the end of the rainy season. See *id.* at 220.

100. See *id.* at 103-04 (discussing the need for specialization).

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to have the right to work at a particular craft . . . .”<sup>101</sup> In many cases, only a few specialists are needed to supply the community’s demand for wooden dishes, stools, drums, axes or spear blades.<sup>102</sup> Usually two or three women are authorized to make pots or baskets and may trade their surplus articles in a casual fashion with their neighbors.<sup>103</sup> Similarly, among the Banyoro of Uganda, baskets are made by women belonging to the agricultural clans, who supply the rest of the community, including the pastoral peoples, with any baskets they require.<sup>104</sup> Among the Baganda, the Heart Clan makes ornate basketry only in Budu.<sup>105</sup>

The making of Banyoro pottery, which is known for its excellent quality, is reserved to a distinct class separate from the ordinary peasants.<sup>106</sup> In Nigeria, the Dakakari people have given exclusive rights to women to make grave sculpture.<sup>107</sup> With respect to cloth-making, the chief of the Ashanti in Ghana is the trustee of interests in all designs in fabrics, which he would either reserve for himself or allow prominent royals or dignitaries to copy for their use.<sup>108</sup>

Observance of these norms with regard to folklore, as is the case for all traditional norms, is secured through a system of sanctions that may vary according to the degree of kinship.<sup>109</sup> On the lineage level, the norms are absolutely binding, with the sanction usually being the common ritual dependence of members of the lineage on their ancestors,<sup>110</sup> who, it is believed, will, without fail, punish violators of the norms.<sup>111</sup> When norms take on such mystical connotations they are seen as taboos<sup>112</sup> and can be particularly effective in controlling

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101. *Id.* at 103.

102. *See id.* at 104 (noting that this work is done casually and in their spare time, but that they make enough to fill the need of the neighborhood).

103. *See id.* (“[T]hey do not produce deliberately for a market. A potter, indeed is prevented from filling contracts by the belief that a promised pot will break during the firing.”).

104. *See* ROSCOE, *supra* note 85, at 80 (discussing the fact that these baskets were extensively used by agricultural peoples and not pastoral clans).

105. *See* ROSCOE, *supra* note 57, at 410-12 (explaining that the fancy baskets made from a cane-like material were quite fragile and intended only for display).

106. *See* ROSCOE, *supra* note 85, at 78-79 (explaining that for these individuals pottery is their chief employment).

107. *See* SODIPO, *supra* note 58, at 43 (noting that all women could make domestic pottery, but only women of particular families were allowed to make grave sculpture).

108. *See* Mould-Iddrisu, *supra* note 63, at 29 (describing the apparent “copyright” the Ashanti chief holds over new fabric designs).

109. *See* FORTES, *supra* note 66, at 135.

110. *See id.* (“The lineage as a social entity is founded on moral and ritual imperatives.”).

111. *See* FORTES, *supra* note 68, at 235 (noting that when the parents die, their spirits emerge as the paramount sanction of moral conduct for their children by inflicting punishment for wrongdoing).

112. A taboo has been defined as:

a system, engendered by superstitious belief, by which certain objects and persons are set aside as sacred or accursed. It may also be described as a political, social or

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human behavior.<sup>113</sup> Observance of the norms by wider social groups, however, is motivated not necessarily by the same ideas of spiritual jurisdiction, but rather by the common interests and ritual values that may be found among clans in the tribe.<sup>114</sup> The sanctions, often determined by the leaders of the constituent groups, could range from censure, to fines, to ostracism, or even expulsion from the group.<sup>115</sup>

## 2. *Effectiveness of customary law protection*

From the preceding discussion, it is apparent that customary law protection of folklore relies on norms and sanctions which seem to make sense only to members of the groups.<sup>116</sup> Within the groups, there is pressure to recognize and respect the rights and privileges associated with folklore in the common interests of members of the community. Inherent in this system, however, is a defect that may limit the usefulness of customary law in tackling the problems of unauthorized uses.<sup>117</sup> Since many of the individuals engaged in the

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religious prohibition webbed in superstition. It is believed that failure to observe it brings the anger and curses of the gods against the offender or even against the whole community. This is the sanction of taboo.

SODIPO, *supra* note 58, at 42 (quoting MASON BEGHO, LAW AND CULTURE IN THE NIGERIAN AND ROMAN WORLD 99 (1971)).

113. *See id.* ("In some places, it instills a greater fear in the minds of men than the fear of going to prison when a criminal offence is committed.")

114. *See* FORTES, *supra* note 66, at 137 (indicating that clanship bonds are derived from a much broader line of ancestry than lineage bonds).

115. The system of punishment has been explained as follows:

The breach of a tradition could be punished by the head of the family, or clan, or by members of an age group. Erring members could be disciplined by the head of the larger family, who might order a fine of items like local gin, goats, etc., or a sacrifice. Pressure would be brought to bear on any offender who failed to pay his fine or who repeated the offence. His wife would plead with him to avoid the long-term repercussions (bad luck) which would ensue for his immediate family. The offender's wife would be coerced by members of her original larger family to press her husband to conform. Other members of the larger family might also coerce an offender into paying his fines, to avoid repercussions on their family.

Further disobedience could lead to the family being ostracized by the larger family, or by the entire community. This was often the worst kind of punishment. The community would not buy from him or sell to him or members of his immediate family. If he was still obdurate (depending on the offence), he could either be banished from the community or he would leave of his own accord because he would not be able to bear the shame. Such exit usually must be for a distant community, neighboring communities would probably know that the newcomer was an offender from another community. He would then be seen either as bringing ill luck, or as a danger to the new community since he might be disobedient and cause an upset in the new community.

SODIPO, *supra* note 58, at 43-44.

116. *See id.* at 42 ("Indeed, what made traditional society unique was the reliance on traditional norms for the ordering of behavior.")

117. *See supra* notes 3-22 and accompanying text (discussing the numerous unauthorized uses and commercial exploitation of these works).

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unauthorized use of folklore are foreigners,<sup>118</sup> they may not have the incentive to respect the norms in the interest of the general community. Where those individuals using folklore are outside of the relevant community, fear of sanctions as a factor in securing compliance is simply non-existent due to the elders' lack of jurisdiction, and the lack of common communal, and ritual interest.<sup>119</sup>

Even with respect to indigenous collaborators residing in the community, who should be bound by the norms, socioeconomic factors seem to have eroded the significance of norms otherwise applicable to them. Initially, the simple nature and small size of traditional societies made it possible to accommodate a system of specialists providing for other members without any commercial motives largely out of necessity,<sup>120</sup> and as a gesture of generosity emanating from abundant resources.<sup>121</sup> The advent of the modern state, however, has dispensed with the need for mutual cooperation to protect the community.<sup>122</sup> In some areas, notions of collective ownership have been contaminated by concepts of private ownership and of production for profit as resources became scarce and the competition for them keen.<sup>123</sup> As a result, considerations of communal interests seem to have given way to individualistic notions with their attendant commercialism.<sup>124</sup> This modern individualism explains why customary law norms may not be quite as significant in traditional societies as they used to be and why some indigenous people are now willing partners in the unauthorized transfer of the community's folkloric interests.

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118. This term is used broadly to refer not only to non-citizens of the country, but also to citizens who are not members of the particular ethnic group to which the folkloric rights are relevant.

119. See Soleri et al., *supra* note 29, at 22 (noting that U.S. guidelines for collecting folk varieties call only for respect of the local farmer and do not mention requesting permission or any form of recognition compensation).

120. See GAIM KIBREAB, REFLECTIONS ON THE AFRICAN REFUGEE PROBLEM: A CRITICAL ANALYSIS OF SOME BASIC ASSUMPTIONS 68 (1983) (explaining that people in traditional societies found it necessary to unite to protect life and property, and to overcome problems caused by natural forces over which they had little control because of their poorly developed productive forces).

121. See *id.* (discussing the fact that the absence of private ownership of the basic means of production and the concomitant absence of any profit motives in the primarily low-subsistence level economies that existed made it possible for visitors to be accommodated materially).

122. See *id.* The modern African state, with its developed system of defense in the form of large standing armies and efficient police units, provides adequate security for the community, making mutual cooperation for defense unnecessary. See *id.*

123. See Samuel K.B. Asante, *Interests in Land in the Customary Law of Ghana: A New Appraisal*, 74 YALE L.J. 848, 857 (1965) (discussing evolving concepts of land ownership in response to social and economic changes).

124. See *id.*

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Because of these limitations of customary law, it is imperative to identify alternative methods of protecting folklore. The next section considers attempts to protect folklore under general intellectual property laws of African countries and under regional and international law.

## II. PROTECTION UNDER NATIONAL INTELLECTUAL PROPERTY LAWS

### A. Provisions That Do Not Reference Folklore

#### 1. Scope of protection

African countries recognize and protect intellectual property rights in copyrights, patents, and trademarks. In Ghana,<sup>125</sup> copyright protection extends to literary works, artistic works, musical works, sound recordings, broadcasts, cinematographic works, choreographic works, derivative works, and program-carrying signals.<sup>126</sup> To be eligible for copyright, the work must be original, in writing, or otherwise reduced to material form, and created by a citizen or resident of Ghana.<sup>127</sup> The work must also have been first published in Ghana, or if first published outside Ghana, published in Ghana within thirty days of its publication outside Ghana.<sup>128</sup>

Protection is granted, in the case of individuals, during the life of the author and extends fifty years after his death.<sup>129</sup> For corporate bodies, the applicable period is fifty years from the date on which the work was made public.<sup>130</sup> An author has the exclusive right to reproduce, translate, or adapt the work;<sup>131</sup> has the sole right to claim authorship of the work and can demand that his name or pseudonym

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125. Ghanaian law is discussed here because it is representative of laws in other parts of Africa.

126. See Copyright Law (Ghana) § 2 (Mar. 21, 1985), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 423, 423-24.

127. See *id.* § 2(2), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 424 (listing factors which make a work eligible for copyright).

128. See *id.* § 2(2)(c), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 424 (explaining that the work should be of a type that Ghana is obligated under an international treaty to grant protection). The artistic quality of the work, the purpose of the author in creating it, or the manner or form of its expression are irrelevant to the question of eligibility. See *id.*, *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 424.

129. See *id.* § 10(1), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 425. For works involving joint authorship, the copyright is protected during the life of the last surviving author and 50 years after his death. See *id.* § 10(2), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 425.

130. See *id.* § 11, *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 425 (stating that the term of protection shall be 50 years when owned by a public corporation or other corporate body).

131. See *id.* § 6(1), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 424.

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be mentioned in any use of his work.<sup>132</sup> In addition, he can alter the work<sup>133</sup> and object to any distortion of the work, which harms his reputation or discredits the work.<sup>134</sup> Private use,<sup>135</sup> quotations in other works,<sup>136</sup> and use in pedagogy,<sup>137</sup> however, are permitted uses of the copyrighted work not requiring the consent of the author.

It is an infringement of copyright to reproduce,<sup>138</sup> sell, or exhibit in public for commercial purposes, any work without the copyright owner's authorization.<sup>139</sup> It also constitutes infringement to use the work in a manner that adversely affects the reputation of the author.<sup>140</sup> Civil remedies for copyright infringement include injunctive relief,<sup>141</sup> damages<sup>142</sup> and actions to inspect or remove the copyright infringing materials.<sup>143</sup> Criminal penalties such as a jail term,<sup>144</sup> payment of compensation and forfeiture of all infringing materials<sup>145</sup> may also be imposed.<sup>146</sup>

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132. *See id.* § 6(2) (a), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 424.

133. *See id.* § 6(2) (c), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 424.

134. *See id.* § 6(2) (b), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 424.

135. *See id.* § 18(1) (a), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 426 (allowing an individual to use the copyrighted materials).

136. For this to apply, the work from which the quotations are taken must have been made public and the source and the name of the author of quotations must be identified in the other work. *See id.* § 18(1) (b), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 426. The quotation must be compatible with fair practice and should not exceed what is justified for the purpose of the work in which the quotation is used. *See id.* § 18(2), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 426.

137. Copyrighted work may be used for illustrative purposes in publications, broadcasts or sound or visual recordings for teaching in educational institutions, or for professional training or public education. *See id.* § 18(1) (c), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 426. However, such use must be compatible with fair practice and the source of the work used and the name of the author must be identified in the relevant publication, broadcast, or recording. *See id.* § 18(3), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 426.

138. The statute is quite broad and covers acts which "reproduce, duplicate, extract, imitate, or import into Ghana otherwise than for . . . private use or permit or cause to be reproduced, duplicated, extracted, imitated, or imported into Ghana otherwise than for . . . private use." *Id.* § 43(1) (a), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 433.

139. *See id.* § 43(1), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 433.

140. *See id.* § 43(2), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 433.

141. *See id.* § 44(1) (a), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 433.

142. *See id.* § 44(1) (b), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 433. The civil remedies are not mutually exclusive; the grant of an injunction cannot bar a claim for damages. *See id.* § 44(3), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 433.

143. *See id.* § 44(2), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 433.

144. A conviction carries a fine or a maximum jail term of two years. *See id.* § 46(2), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 434.

145. *See id.* § 48(a)-(b), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 434 (stating additional measures to compensate victims of copyright violations).

146. If the defendant is a corporation, criminal responsibility attaches to every director or secretary of the corporation. If it is a partnership, then all partners will be held accountable. No individual officer or partner would be liable, however, if the offense he is charged with is committed by another person without his consent and the officer or partner exercised all due diligence under the circumstances to prevent the commission of the act. *See id.* § 47, *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 434.

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In regard to patent protection, an invention is patentable in Nigeria<sup>147</sup> if it is new, results from inventive activity,<sup>148</sup> and is capable of industrial application.<sup>149</sup> The general right to a patent is vested in the inventor, who is the first person that may file a patent application.<sup>150</sup> Benefits conferred under a patent include the right to preclude other persons from using the patent, or applying the process in, making, importing, selling or using the product, or stocking it for the purpose of sale or use.<sup>151</sup> Patents are generally valid for 20 years from the application filing date.<sup>152</sup>

A patent infringement action<sup>153</sup> may be brought by the patentee or design owner,<sup>154</sup> or even by a licensee when the patentee or design owner refuses to heed the written request of the licensee to file suit.<sup>155</sup> Remedies for infringement include damages, injunction or accounts.<sup>156</sup>

In addition to copyright and patent, Nigerian legislation protects registered trademarks. Registration of a trademark in relation to goods entitles the registrant to exclusive rights of use over the trademark<sup>157</sup> and to initiate infringement actions.<sup>158</sup> Infringement

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147. Nigerian law is discussed here because it is representative of laws in other parts of Africa.

148. The Nigerian Patents and Designs Act provides that: "An invention results from inventive activity if it does not obviously follow from the state of the art, either as to the method, the application, the combination of methods, or the product, which it concerns, or as to the industrial result it produces." Patents and Designs Decree (Nigeria) § 1(2)(b) (1970), *reprinted in* 12 INDUS. PROP.: MONTHLY REV. WORLD INTELL. PROP. ORG. 147, 148 (1973) [hereinafter 12 INDUSTRIAL PROPERTY].

149. *See id.* § 1(1), *reprinted in* 12 INDUSTRIAL PROPERTY, *supra* note 148, at 147. Improvements on patented inventions are also patentable if they meet the same criteria. *See id.* § 1(1)(b), *reprinted in* 12 INDUSTRIAL PROPERTY, *supra* note 148, at 147-48.

150. *See id.* § 2(1), *reprinted in* 12 INDUSTRIAL PROPERTY, *supra* note 148, at 148 (discussing the order of priority for patent rights).

151. *See id.* § 6(1), *reprinted in* 12 INDUSTRIAL PROPERTY, *supra* note 148, at 149 (discussing the rights of patentees conferred by the legislation).

152. *See id.* § 7(1), *reprinted in* 12 INDUSTRIAL PROPERTY, *supra* note 148, at 150.

153. It constitutes patent infringement for a person, without license from the patentee or design owner, to do any act that is precluded under the Act. *See id.* § 25(1), *reprinted in* 12 INDUSTRIAL PROPERTY, *supra* note 148, at 154 (defining infringement of patent rights).

154. *See id.* § 25(2), *reprinted in* 12 INDUSTRIAL PROPERTY, *supra* note 148, at 154.

155. *See id.* § 25(4), *reprinted in* 12 INDUSTRIAL PROPERTY, *supra* note 148, at 154-55. In infringement proceedings, where a process patent has been granted for the manufacture of a new product and the same product is manufactured by a person other than the patentee, in the absence of proof to the contrary, the product will be presumed to have been manufactured by that process. *See id.* § 25(3), *reprinted in* 12 INDUSTRIAL PROPERTY, *supra* note 148, at 154 (outlining the burden of proof in patent infringement actions).

156. *See id.* § 25(2), *reprinted in* 12 INDUSTRIAL PROPERTY, *supra* note 148, at 154.

157. *See* Trade Marks Act (Nigeria), CAP 436, § 5 (1967) (on file with the author).

158. A trademark is infringed if a person other than the owner or registered user uses an identical mark or one so nearly identical as to result in deception or confusion. *See id.* § 5(2). (describing acts that constitute trademark infringement). There is also trademark infringement if the mark is used upon goods or for advertising purposes in such a way that the mark imports a reference to one who has the actual trademark rights, either as an owner or a registered user.

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actions may not be initiated for unregistered trademarks.<sup>159</sup> Registration is for a seven-year renewable term.<sup>160</sup>

To qualify for registration, a mark must be distinctive.<sup>161</sup> It may consist of, for example, the name of a company, individual, or firm, or invented word or words.<sup>162</sup> The mark must also distinguish the goods of the owner of the trademark from the goods of others.<sup>163</sup> However, names that deceive or refer to scandalous matters,<sup>164</sup> names of commonly used chemical substances,<sup>165</sup> and marks that are identical to trademarks already registered to another person, or that so closely resemble such trademarks as to be likely to deceive or cause confusion, are prohibited from registration.<sup>166</sup>

## 2. *Problems with protecting folklore under general intellectual property laws*

Extending these statutory rights and remedies to folklore would significantly improve the protection available under customary law. It would mean that rights to folkloric works could be enforced within national boundaries instead of under the limited jurisdictional confines of the local community. The national court system would also complement the authority of elders and other group leaders and strengthen prohibitions and conventions regarding the use of folklore. Traditional communities would have greater control over the use of their works and be able to demand compensation. Infringing parties, including those who alter or desecrate works of folklore, would be subject to criminal and civil sanctions<sup>167</sup> instead of the mystical opprobrium that may be unenforceable under a strict

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*See id.* § 5(2) (b) (describing improper uses of trademarks).

159. *See id.* § 3 (stating that proceedings cannot be filed, nor damages recovered, for the infringement of unregistered trademarks).

160. *See id.* § 23.

161. The Act defines “distinctive” as

adapted, in relation to the goods in respect of which a trademark is registered or proposed to be registered, to distinguish goods with which the proprietor of the trademark is or may be connected in the course of trade from goods in the case of which no such connection subsists, either generally or, where the trademark is registered or proposed to be registered subject to limitations, in relation to use within the extent of the registration.

*Id.* § 9(2).

162. *See id.* § 9(1) (listing the “essential particulars” required for registration of a trademark).

163. *See id.* § 10(1).

164. *See id.* § 11.

165. *See id.* § 12(1).

166. *See id.* § 13(1).

167. *See* Copyright Law (Ghana) §§ 44, 46 (Mar. 21, 1985), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 423, 433-34 (providing for injunctions, the recovery of damages, and criminal fines).

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customary law regime.<sup>168</sup>

It has been suggested that aspects of folklore that could be regulated under copyright laws include the traditional paintings, sculptures, designs and drawings as artistic works;<sup>169</sup> dramas, dances, and folktales as literary works;<sup>170</sup> and folk songs as musical works.<sup>171</sup> This may be justified on account of the similarities between folklore and other works protected under copyright law. For example, in both copyright and folklore the author uses creativity in the works' formation and utilizes similar means in exploiting them.<sup>172</sup>

Building on this, advocates further suggest that to avoid creating duplicative agencies to administer both types of works, it would simplify matters to charge existing author societies with the responsibility for protecting folklore.<sup>173</sup>

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168. See FORTES, *supra* note 68, at 235-36.

169. The term "artistic work" in Ghana refers to "paintings, drawings, etchings, lithographs, woodcuts, engravings or prints." Copyright Law (Ghana) § 53(a), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 435. It also includes "maps, plans or diagrams; sculpture; works of architecture in the form of buildings or models." See *id.* § 53(c)-(e), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 435. Finally, folklore includes "works of applied art, whether handicraft or produced on an industrial scale." See *id.* § 53(f), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 435.

170. In Ghana, the term "literary work" includes stories, poetical works, and plays. See *id.* § 53, *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 435.

171. See SODIPO, *supra* note 58, at 39-41. The term "musical works" in Ghana refers to, "any musical work irrespective of its musical quality and words composed for musical accompaniment." Copyright Law (Ghana) § 53, *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 435.

172. As one writer notes:

Like any subject of copyright, (scientific, literary and artistic works), folklore is the result of a creative process. Folklore takes the same form as any subject of copyright, that is, the form of a work. Strictly speaking, folk songs can be regarded as a variation on the kind of song that is protected by copyright, while folk art productions can be assimilated to decorative art, etc. So with regard to their form of expression, works of folklore are comparable to the works protected by copyright. With respect to their content, of course, folk productions do differ from authors' works, but the distinction has no bearing on the provision of legal protection. The public use of works of folklore and works protected by copyright takes place according to identical processes: publication of folk tales and folk songs, public performance or television broadcasting of folk dances, reproduction and sale of folk art productions, etc. It is impossible to visualize any use of works of folklore that does not have a counterpart in the field of copyright. Finally, works of folklore have to be protected against alteration, as in the case of all works in the copyright field.

Gavrilov, *supra* note 18, at 78.

173. Gavrilov further notes:

There are a number of uses of works protected by copyright where the authors assert their rights through the agency of authors' societies. This generally happens in the case of public performance or radio or television broadcasting of songs or other short works, the production of copies of sound recordings, the reproduction of works of art in magazines and books and also some other uses of works for mass distribution. The authors' societies collect the royalties payable from the users, and handle their distribution to the authors; they also issue the authorizations for the use of works and ensure the observance of moral rights, namely the right of authorship of the work and the right to respect for the work. Inasmuch as works of folklore are used by the same

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Advocates for the expansion of intellectual property law to folklore also believe that clothing designs, sophisticated marks on agricultural implements, and carvings could be protected as trademarks while the technology processes in cloth-weaving, metal-working, constructing musical instruments, and the practice of herbal medicine could be patented.<sup>174</sup> In general, given the fate of similar endeavors in other areas,<sup>175</sup> these advocates consider it to be far more effective in the long run to protect folklore under existing intellectual property laws, than attempt to fashion new laws specifically for that purpose.<sup>176</sup>

As a practical matter, however, it may be difficult to protect these rights under the general provisions of statutory law. There are inherent difficulties in fitting folklore into certain accepted notions of intellectual property relating to ownership, originality, duration, fixation, inventiveness and uniqueness.<sup>177</sup> First, one would be confronted immediately with a fundamental problem of inappropriate categorization. As Farhana Yamin and Darrell Posey have observed:

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

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means as works protected by copyright, their protection would require the existence of bodies comparable to authors' societies. Instead of setting up "parallel" bodies, it would be preferable to assign the responsibility for protecting works of folklore to existing authors' societies.

*Id.* at 78-79.

174. See SODIPO, *supra* note 58, at 43-47.

175. See Kalumbu, *supra* note 27 (noting that African governments have failed to develop adequate policies to protect certain aspects of the cultural heritage).

176. Gavrilov explains as follows:

[A]t the international level, it is far easier to incorporate the legal protection of works of folklore in the existing copyright conventions than it is to set up separate machinery for the purpose. Experience has shown that if certain results of creative activity whose protection is difficult to accommodate in the available legal categories that already enjoy protection, and therefore constitute a category apart, the introduction of their protection at the international level is postponed for a long time or even never achieved. For instance, type faces were made distinct from industrial designs, with the result that the Vienna Agreement for the Protection of Type Faces and their International Deposit, which was concluded in 1973, is still not in force. Another example is that of the legal protection of software and computer programs. On the basis of the assumption that that subject matter should not be protected either by copyright or by the law of patents (inventions), it was recommended that special legislation should be drafted. That legislation has already been drawn up on the basis of elements drawn from copyright and from patent law, but a national law has yet to be enacted specifically for the protection of software and computer programs. In the meantime the trend towards rejecting the idea of protection on the basis of copyright and patent has continued to grow.

Gavrilov, *supra* note 18, at 79.

177. See Greaves, *supra* note 1, at 8-10 (discussing the problems of applying intellectual property laws to the cultural heritage of indigenous peoples).

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religious, cultural, business, intellectual and physical property are not as distinct or mutually exclusive. For example, 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. Concepts such as business reputation and goodwill are also difficult to apply.<sup>178</sup>

Moreover, the statutes assume that protection would be accorded in most cases to the creator of protected works. Intellectual property laws reflect a bias in favor of individuals who are said to own rights in the protected works.<sup>179</sup> Because different concepts of ownership rights apply in traditional schemes,<sup>180</sup> folklore may not fall within the purview of intellectual property law.<sup>181</sup>

In traditional societies, ownership refers to the rights of all members of the community in subject-matter originally acquired by ancestors which cannot be transferred unilaterally by any member of the group, including the head leader.<sup>182</sup> Writing about the communal rights in land among the Tallensi of Northern Ghana, Meyer Fortes observes that:

To say that land is owned by a lineage is equivalent to saying that it is generally acquired by right of inheritance. All males of the lineage have the right to inherit lineage land, but at any given time control over it is vested in the head of the lineage, by right of seniority . . . . He is bound to provide fairly for the wants of those who share the labor of farming with him. Tallensi formulate this obligation in terms of reciprocity within the productive unit, which they regard as a matter of natural justice and moral duty . . . . In accordance

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178. Farhana Yamin & Darrell Addison Posey, *Indigenous Peoples, Biotechnology and Intellectual Property Rights*, 2 REV. EUR. COMMUNITY & INT'L ENVTL. L. 141, 142 (1993).

179. For example, Nigerian law provides that:

the right to a patent in respect of an invention is vested in the statutory inventor, that is to say, the person, who, whether or not he is the true inventor, is the first to file, or validly to claim a foreign priority for, a patent application in respect of the invention.

Patents and Designs Decree (Nigeria) § 2(1) (1970), *reprinted in* 12 INDUSTRIAL PROPERTY, *supra* note 148, at 147, 148.

180. For a discussion of concepts of ownership in traditional societies, see Colvin Golvan, *Aboriginal Art and the Protection of Indigenous Cultural Rights*, 7 EURO. INTELL. PROP. REV. 227, 227 (1992) (discussing the anonymous creation of aboriginal artwork and the non-celebratory nature of aboriginal artists); Anthony Seeger, *Ethnomusicology and Music Law*, 36 J. SOC'Y FOR ETHNOMUSICOLOGY 345 (1992).

181. See Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?*, 30 CONN. L. REV. 1, 4 (1997) ("Application of intellectual property laws, whose underlying logic is to facilitate dissemination, is fundamentally inappropriate to prevent sacred indigenous images from circulation and re-use.")

182. See FORTES, *supra* note 66, at 178 (explaining common ownership of land by a lineage).

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with this obligation a lineage head always consults his dependents about the disposal of land, crops, or other patrimonial property . . . . To pledge it is a slur on them; to sell it a sacrilege. ‘It will kill (*de kura kum*)’— the offended ancestors will cause deaths in the family of the seller . . . .<sup>183</sup>

Traditional societies support collective efforts and discourage private efforts motivated by selfish considerations without regard to communal interests.<sup>184</sup> This idea that rights belong to on going communities in traditional societies conflicts with the objective of modern intellectual property law, which encourages private initiative and provides rewards for individual rights.<sup>185</sup> Consequently, modern intellectual property provisions would be difficult to apply generally in the case of communal ownership of legal rights, which so far appear to have received scant attention in the property rules enunciated under common and civil law.<sup>186</sup>

In addition to these general problems of categorization and ownership,<sup>187</sup> customary law rights may not even meet the specified

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183. *Id.*

184. See ROSCOE, *supra* note 85, at 231-32 (describing the inheritance system of the Northern Bantu as based on fairness, where property goes to those most qualified to manage it for the benefit of the community).

185. The justification for using intellectual property to support a system of rewards is as follows:

A society thrives on progress. Creative people provide the innovations that generate progress. To foster creativity, creators must foresee the prospect of benefiting materially from their works. Within Eighteenth Century capitalism this meant (and still means) vesting creators with the rights of monopoly ownership in exchange for placing the information in the public domain. That monopoly remains in force for only a finite period of time, however, so as not to unduly impede further progress and price competition that comes when the innovation is available for all to use. Patents and copyrights, then, reward the innovator sufficiently to encourage creativity, but then lapse so that further development by others, and economic competitiveness, can supplant the temporary monopoly.

Greaves, *supra* note 1, at 8-9.

186. See Golvan, *supra* note 180, at 229-30 (arguing that more legal protection of Aboriginal art and culture is needed).

187. The issues may be summed up as follows:

Indigenous groups have made it quite clear that the concept of “property,” and especially individual property, is alien and antithetical to their collective values. They have repeatedly explained how many (but not all) songs, drawings, ceremonies, plants, animals, and designs are inalienable and, therefore, can never be property. And they point out that individuals who use or display them are the “holders,” “trustees,” or “stewards” for communities, lineages, ancestors, gender groups, future generations, or even spirits. Furthermore, indigenous peoples have been explicit in showing that “intellectual” aspects of culture cannot be separated from “physical,” “natural,” or “spiritual” elements because culture is an extension of nature (and vice versa). Thus “intellectual property” is doubly inappropriate in that it excludes plants, animals, and knowledge about them (seeds, soils, minerals, and management practices, etc.)—all of which are inextricable elements of a society’s “intellect.”

Darrell Addison Posey, *Michael F. Brown’s Can Culture Be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 193, 211 (1998) (commentary) (refuting Brown’s claim that indigenous groups’ concerns with patents and copyrights are “romatici[zed]”).

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statutory criteria. Generally, copyright law requires protected works to be original. As provided in the Ghanaian legislation: a “work is not eligible for copyright unless . . . it is original in character.”<sup>188</sup> For purposes of that law, a work is original “if it is the product of the independent efforts of the author.”<sup>189</sup>

In this sense, the traditional rights susceptible to copyright protection would be excluded since their originality would be difficult to establish. For example, there may be a problem identifying an individual who could claim authorship given the passage of folklore through generations of people in the community.<sup>190</sup> It is obvious that while an individual may have indeed created a particular work of folklore, it would eventually have been acquired and used by the society at large and gradually, with the passage of time, have lost its individualistic traits.<sup>191</sup> For example, “all aspects of folklore, probably originally the product of individuals, are taken by the folk and put through a process of re-creation, which through constant variations and repetition become a group product.”<sup>192</sup> For this reason, it would prove a daunting task to identify the first creator of a work of folklore. Even if an author could be located for a variant of folklore, it may still be difficult to establish the “independent efforts” of such an author sufficient to justify copyright protection as the work would invariably have been built on and be substantially similar to existing works of folklore.<sup>193</sup>

Another requirement to grant copyright protection to a work is that it must have been “written down, recorded or otherwise reduced to material form.”<sup>194</sup> Certain rights in folklore such as songs and dance are unlikely to satisfy this fixation requirement inasmuch as they are largely verbal and have not been written down or recorded.<sup>195</sup>

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188. Copyright Law (Ghana) § 2(2)(a) (Mar. 21, 1985), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 423, 424.

189. *Id.* § 2(4), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 424.

190. See Kamal Puri, *Cultural Ownership and Intellectual Property Rights Post-Mabo: Putting Ideas into Action*, 9 INTELL. PROP. J. 293, 307-08 (1995) (explaining that Aboriginal folklore derives from complex relationships between generations of people and their land).

191. See Mamie Harmon, *Definitions of Folklore*, in DICTIONARY OF FOLKLORE, *supra* note 35, at 258-59 (stating that folklore is defined by the ways in which it is transmitted, such that the work of an individual can become folklore as it is acquired as the symbol of a group and passed through generations).

192. Leach, *supra* note 42, at 261.

193. See Farley, *supra* note 181, at 22 (discussing the difficulty in copyrighting indigenous artwork because of its similarity to previous works and finding the alternative of “thin” copyright unsatisfactory because only the changes to an indigenous piece are protected).

194. Copyright Law (Ghana) § 2(2)(b) (Mar. 21, 1985), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 423, 424.

195. See Botkin, *supra* note 36, at 256 (discussing “purely oral culture[s]” in which folklore is passed through generations without ever being fixed or frozen in a particular form).

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As for patents, inventions are patentable in Ghana if they are “new, involve[] . . . an inventive step and . . . [are] industrially applicable.”<sup>196</sup> Ghanaian patent law explains that “an invention is new if it is not anticipated by prior art.”<sup>197</sup> The statute then describes “prior art” as including “[e]verything made available to the public anywhere in the world by means of written disclosure (including drawings and other illustrations) or by oral disclosure, use, exhibition or other non-written means . . . .”<sup>198</sup> The criterion of inventiveness is met if the invention “would not have been obvious to a person skilled in the art to which the invention pertains . . . .”<sup>199</sup> The invention is industrially applicable “if, according to its nature, it can be made or used in the technological sense, in any kind of industry including agriculture, fishery and services.”<sup>200</sup>

Although some traditional methods are capable of a technological use<sup>201</sup> and therefore are likely to meet statutory criteria pertaining to industrial application, they may be excluded on grounds that they are already available to the public and do not constitute inventive steps as they have been passed down through generations.<sup>202</sup> As folklore is never invented, but simply evolves, it may be excluded from patent law.<sup>203</sup>

Trademarks in Nigeria are entitled to registration if they are unique and are capable of distinguishing between similar goods that are produced by different proprietors.<sup>204</sup> Protecting traditional marks under Nigerian statutory law, however, would be difficult because the use of these marks in commerce has not developed to any level of

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196. Patent Law (Ghana), P.N.D.C.L. 332, § 2 (1992) (on file with the author).

197. *Id.* § 3(1).

198. *Id.* § 3(2).

199. *Id.* § 4(1).

200. *Id.* § 5.

201. See *supra* note 174 and accompanying text (discussing the potential of patent law to protect the processes of weaving, metal-working, constructing musical instruments, and using herbs for medicinal purposes).

202. See *supra* note 41 and accompanying text (describing folklore as that which is passed down through generations of folk and evolves with every step).

203. Mamie Harmon notes:

Folklore . . . may crop up in any subject, any group or individual, any time, any place. It might be thought of as comprising that information, those skills, concepts, products, etc., which one acquires almost inevitably by virtue of the circumstances to which he is born. It is not so much deliberately sought (like learning) as absorbed. It is not deliberately invented; rather it develops. It is present in the environment, is accepted, used, transformed, transmitted, or forgotten, without arbitrary impetus from individual minds.

Harmon, *supra* note 191, at 258.

204. See Trade Marks Act (Nigeria), CAP 436, § 10(1) (1967) (on file with the author) (“In order for a trade mark [sic] to be registrable . . . it must be capable . . . of distinguishing goods with which the proprietor of the trademark is or may be connected in the course of trade from goods . . . [with] no such connection.”).

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sophistication, partly due to the nature of the market.<sup>205</sup> Therefore, local producers probably would not be concerned with inserting identifying marks to distinguish their goods from those made by others; and as a result any marks on their goods would not be sufficiently unique to qualify for protection under Nigerian trademark law.

Moreover, modern intellectual property rights are not of unlimited duration. For example, in Nigeria patents are generally granted for twenty years,<sup>206</sup> in Ghana copyrights last for the life of an author plus fifty years,<sup>207</sup> and in most African countries trademarks are recognized for various renewable terms.<sup>208</sup> In contrast, a work of folklore could exist for centuries before it is abandoned or “forgotten,”<sup>209</sup> and thus, it is impossible to limit its protection to the finite regimes of intellectual property. Even if folkloric works did not have such longevity, it would be difficult to establish a framework for determining an appropriate protection period because the slowly-evolving nature of folklore makes it impossible to determine precisely when a work of folklore was first created. Furthermore, as explained above, folklore’s communal origin precludes the identification of any one individual by whose life a protection term could be determined.<sup>210</sup>

Finally, many important folkloric rights may even be excluded from protection under existing intellectual property laws. Ghanaian law, for example, excludes from patentability all “plant or animal varieties or essentially biological processes for the production of plants or animals, other than microbiological processes and the products of such processes.”<sup>211</sup> The Ghanaian legislation also excludes from patent law protection all “methods of treatment of the human or animal body by surgery or therapy, as well as diagnostic methods.”<sup>212</sup>

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205. In traditional societies, goods were purchased directly from producers, who sold them through their family or through middlemen or at particular markets. *See* SODIPO, *supra* note 58, at 41.

206. *See* Patents and Designs Act (Nigeria) § 7(1) (1970), *reprinted in* 12 INDUSTRIAL PROPERTY, *supra* note 148, at 147, 150 (“[A] patent shall expire at the end of the twentieth year from the date of the filing of the . . . application.”).

207. *See* Copyright Law (Ghana) § 10(1) (Mar. 21, 1985), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 423, 425.

208. In Nigeria, the relevant term is seven years. *See* Trade Marks Act (Nigeria), CAP 436, § 23(1) (on file with the author).

209. *See* Harmon, *supra* note 191, at 258 (describing how folklore that is transmitted orally can, over time, fade from the collective memory of a group or society).

210. *See* Puri, *supra* note 190, at 307-08 (noting that folklore evolves over many generations); *supra* notes 179-93 and accompanying text (discussing the difficulty of identifying the creator of a work of folklore).

211. Patent Law (Ghana), P.N.D.C.L. 332, § 1(3)(b) (1992) (on file with the author).

212. *Id.* § 1(3)(d) (noting that the products used in surgery or other diagnostic methods

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If these provisions were construed narrowly, they would effectively exclude from protection any plant varieties developed by traditional communities, as well as aspects of their herbal medical practice.<sup>213</sup>

## *B. Laws Referring to Folklore*

### *1. Scope of protection*

To improve the protection of folklore recognized under customary law, some African copyright legislation specifically references folklore. Ghanaian copyright law, for example, provides that the copyrights of authors of folklore vest in the government as if the government were the creator of the works.<sup>214</sup> Thus, one cannot use Ghanaian folklore for purposes other than those statutorily authorized<sup>215</sup> without applying to the Secretary, and paying a fee.<sup>216</sup> It is a criminal offense for a person, without the permission of the Secretary, “to import . . . , sell, offer . . . for sale or distribute in Ghana . . . copies of . . . works made outside Ghana [of] works of Ghanaian folklore or translations, adaptations, or arrangements of Ghanaian folklore.”<sup>217</sup> A conviction may result in a substantial fine, a two-year jail term or both.<sup>218</sup> The Secretary also is authorized to adopt regulations regarding the designation of particular practices as Ghanaian folklore.<sup>219</sup>

Nigerian copyright law protects expressions of folklore “against reproduction, communication to the public by performance, broadcasting, [or] distribution by cable.”<sup>220</sup> In addition, it protects adaptations, translations and other transformations of such folklore, when such expressions are made either for commercial purposes, or outside their traditional or customary context.<sup>221</sup> The right to

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may be protected under patent law while the methods themselves may not be protected).

213. See *supra* notes 53-56 (categorizing certain tribal plant varieties and herbal medicines as folklore).

214. See Copyright Law (Ghana) § 5(2) (Mar. 21, 1985), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 423, 424.

215. See *supra* notes 135-37 and accompanying text (finding that permission of the author is not required to quote the work, use it privately, or use it in pedagogy).

216. The Secretary is the Ghanaian Government’s Minister for Information. See Copyright Law (Ghana) § 53, *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 434. The fees that the Secretary collects are deposited into a fund to be used to promote institutions that work for the benefit of authors, performers, and translators. See *id.* § 5(4), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 424.

217. *Id.* § 46(1) (a)-(b), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 434.

218. See *id.* § 46(2), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 434.

219. See *id.* § 52(2) (a) (i), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 435.

220. Copyright Decree (Nigeria) § 28(1) (Dec. 19, 1988), *reprinted in* 25 COPYRIGHT MONTHLY REVIEW, *supra* note 3, at Nigeria, text 1-01, page 1, 8.

221. See *id.*, *reprinted in* 25 COPYRIGHT MONTHLY REVIEW, *supra* note 3, at Nigeria, text 1-01,

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authorize any of the aforementioned acts vests in the Nigerian Copyright Council.<sup>222</sup>

Nigerian folklore may be used without authorization for private or educational purposes,<sup>223</sup> as well as for illustrative purposes in other original works.<sup>224</sup> Whenever folklore is referred to, whether in printed publications or in communications to the public, the law requires identification of the source of the folklore by reference to the community or place from where the folklore is derived.<sup>225</sup> Uses of folklore other than as permitted and without the consent of the Nigerian Copyright Council will subject the user to liability to the Council in damages, injunctions, or any other remedies that the court deems appropriate.<sup>226</sup>

Congolese copyright law protects folklore without a time limitation.<sup>227</sup> In Congo, a society known as the “Body of Authors” is responsible for collecting royalties, representing the interests of authors, and overseeing the use of folklore,<sup>228</sup> which is regarded as part of the national heritage.<sup>229</sup> Prior to any public performance, reproduction, or adaptation of folklore for commercial purposes, permission must be sought from the society.<sup>230</sup> The society charges users of folklore a fee to support cultural and social objectives that

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page 8.

222. *See id.* § 28(4), *reprinted in* 25 COPYRIGHT MONTHLY REVIEW, *supra* note 3, at Nigeria, text 1-01, page 8. The Nigerian Copyright Council is a corporate body “responsible for all matters affecting copyright in Nigeria,” including advising the government on international copyright treaties and conventions, informing the public about copyright issues and maintaining records of authors and their works. *See id.* § 30, *reprinted in* 25 COPYRIGHT MONTHLY REVIEW, *supra* note 3, at Nigeria, text 1-01, page 9.

223. *See id.* § 28(2)(a)-(b), *reprinted in* 25 COPYRIGHT MONTHLY REVIEW, *supra* note 3, at Nigeria, text 1-01, page 8. If the folklore is used publicly, then it must be “accompanied by an acknowledgement of the title of the work and its source.” *See id.* § 28(2)(a), *reprinted in* 25 COPYRIGHT MONTHLY REVIEW, *supra* note 3, at Nigeria, text 1-01, page 8.

224. When folklore is used for such illustrative purposes, however, the utilization must be compatible with fair practice. *See id.* § 28(2)(d), *reprinted in* 25 COPYRIGHT MONTHLY REVIEW, *supra* note 3, at Nigeria, text 1-01, page 8. The statute also provides, without explanation, that expressions of folklore are not protected against “incidental uses.” *See id.* § 28(2)(e), *reprinted in* 25 COPYRIGHT MONTHLY REVIEW, *supra* note 3, at Nigeria, text 1-01, page 8.

225. *See id.* § 28(3), *reprinted in* 25 COPYRIGHT MONTHLY REVIEW, *supra* note 3, at Nigeria, text 1-01, page 8.

226. *See id.* § 29, *reprinted in* 25 COPYRIGHT MONTHLY REVIEW, *supra* note 3, at Nigeria, text 1-01, page 9.

227. *See* Law on Copyright and Neighboring Rights (Congo) art. 16 (July 7, 1982), *reprinted in* 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 201, 202.

228. *See id.* arts. 68-69, *reprinted in* 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 244 (stating that the “Body of Authors” is answerable to the Ministry of Culture and acts as the intermediary between the author and users of literary and artistic works with respect to the grant of authorizations and the collection of royalties).

229. *See id.* art. 15, *reprinted in* 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 202 (noting that folklore is one of the basic elements of Congo’s cultural heritage).

230. *See id.* art. 18, *reprinted in* 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 202 (requiring prior authorization for uses that generate profit).

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benefit Congolese authors.<sup>231</sup> Penalties can be assessed against persons who fail to obtain the required authorization.<sup>232</sup> Although public agencies are exempted from the obligation to obtain prior authorization to use folklore for non-profit activities, they nevertheless must notify the collecting society before using the material.<sup>233</sup>

Congolese copyright law prohibits the import or distribution of copies of works of national folklore made abroad without the permission of the Body of Authors.<sup>234</sup> Under a provision that applies generally to copyright, fines may be imposed for the unlawful export, import or reproduction in Congo of works published in Congo or abroad.<sup>235</sup> The collecting society is authorized to take legal action to prevent the improper exploitation of national folklore and has the power to institute infringement proceedings, to obtain seizure orders, or issue injunctions.<sup>236</sup>

In Mali, folklore is also considered part of the country's heritage.<sup>237</sup> With the exception of public entities, all persons seeking to use folklore for profit must obtain prior authorization from the Minister of Arts and Culture who may impose a fee for such use.<sup>238</sup> In addition, the law prohibits the total or partial assignment of copyrights or exclusive licenses in "works derived from folklore"<sup>239</sup> without the approval of the Minister.<sup>240</sup> Significantly, the law also places in the public domain and charges a user fee for all "works whose authors are unknown, including the songs, legends, dances, and other manifestations of the common cultural heritage."<sup>241</sup> This

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231. *See id.* arts. 17-18, *reprinted in* 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 202.

232. *See id.* art. 78, *reprinted in* 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 245 (describing a fine as "twice the due fees").

233. *See id.* art. 19, *reprinted in* 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 203.

234. *See id.* art. 20, *reprinted in* 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 203.

235. *See id.* art. 77, *reprinted in* 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 245.

236. *See id.* arts. 70-72, *reprinted in* 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 244. Under Congolese law, the Court of First Instance can order a seizure of any unauthorized reproductions of protected works as well as revenues therefrom. *See id.* art. 71, *reprinted in* 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 244. Examples of injunctive relief include suspending the manufacture, reproduction, or performance of works of folklore. *See id.*, *reprinted in* 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 244.

237. Ordinance Concerning Literary and Artistic Property (Mali) art. 8 (July 1, 1977), *reprinted in* 16 COPYRIGHT MONTHLY REVIEW, *supra* note 6, at 180, 182.

238. *See id.* art. 8, *reprinted in* 16 COPYRIGHT MONTHLY REVIEW, *supra* note 6, at 182.

239. The term "work derived from folklore" means any work composed on the basis of elements borrowed from the national heritage of the Republic of Mali. *See id.*, *reprinted in* 16 COPYRIGHT MONTHLY REVIEW, *supra* note 6, at 182.

240. *See id.*, *reprinted in* 16 COPYRIGHT MONTHLY REVIEW, *supra* note 6, at 182.

241. *Id.* art. 9, *reprinted in* 16 COPYRIGHT MONTHLY REVIEW, *supra* note 6, at 182. The statute authorizes the Ministers of Arts and Culture and of Finance to charge fees for use of works deemed to be in the public domain. *See id.*, *reprinted in* 16 COPYRIGHT MONTHLY REVIEW, *supra* note 6, at 182 (noting that works belonging "to the common cultural heritage," or public

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definition could include folklore.

Cameroonian law similarly extends copyright protection to “works derived from folklore.”<sup>242</sup> Before any commercial exploitation of folklore may occur, users must seek permission from the National Copyright Corporation (“Corporation”), which was created to represent the interests of authors and to regulate the use of folklore in Cameroon.<sup>243</sup> The Corporation is authorized to recruit agents throughout the country to assist in bringing infringement actions against unlawful users of protected works.<sup>244</sup>

In the Central African Republic, the Central African Copyright Office must authorize the commercial exploitation of folklore.<sup>245</sup> It is a criminal offense to exploit a work of folklore without prior authorization.<sup>246</sup> Fees collected from the use of folklore are allocated between the author and the copyright office under a precise formula.<sup>247</sup> The copyright office tends to use its share of the fees for cultural and welfare purposes.<sup>248</sup> Notably, Central African Republic law exempts folklore from the fifty-year term of protection that generally applies to other copyrightable works.<sup>249</sup>

Senegalese copyright law is remarkably similar to the Central African Republic’s law because it requires prior authorization from the Copyright Office to use folklore, and it charges folklore users a fee.<sup>250</sup> Senegal also criminalizes the importation of works into

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domain, include works by unknown authors, owners who waived copyright protection, foreign authors not residing in Mali, deceased authors without heirs, and authors whose term of protection has expired).

242. See Law No. 82-18 to Regulate Copyright (Cameroon) § 6(c) (Nov. 26, 1982), *reprinted in* 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 360, 360-61. “Work derived from folklore” refers to “work based on facts and ideas borrowed from the traditional cultural heritage of the country.” *Id.* § 4(vii), *reprinted in* 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 360.

243. See *id.* §§ 51, 55(1)-(2), *reprinted in* 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 365-66. The National Copyright Corporation in Cameroon may condition its approval on the payment of appropriate fees. See *id.* § 55(2), *reprinted in* 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 366.

244. See *id.* § 56, *reprinted in* 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 366.

245. Ordinance No. 85-002 on Copyright (Central African Republic) art. 9 (Jan. 5, 1985), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 158, 160.

246. See *id.* art. 46, *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 164.

247. For folklore compilations, the fees are split equally between the compiler and the Central African Copyright Office, but for folklore adaptations, 75% of the fees are distributed to the author of the adapted works and 25% to the Central African Copyright Office. See *id.* art. 9, *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 160.

248. See *id.*, *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 160.

249. See *id.* art. 41(1), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 163.

250. See Law on the Protection of Copyright (Senegal) art. 9 (Dec. 4, 1973), *reprinted in* 10 COPYRIGHT MONTHLY REVIEW, *supra* note 51, at 211, 212. The fees are split equally between the compiler and the Senegalese Copyright Office, but for uses of adaptations of folklore, 75% of the fees are distributed to the author of the adapted works and 25% to the Senegalese Copyright Office. See *id.*, *reprinted in* 10 COPYRIGHT MONTHLY REVIEW, *supra* note 51, at 212.

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Senegal that violate its copyright law.<sup>251</sup> Because folklore is protected under the copyright law as part of its national cultural heritage,<sup>252</sup> a provision that criminalizes the import of all works that violate the copyright law should be helpful to the protection of folklore.<sup>253</sup>

## 2. *Problems with references to folklore in copyright laws*

Despite descriptions of the term “folklore,”<sup>254</sup> the statutory references in African legislation suffer from certain definitional deficiencies. One problem concerns the absence of criteria for determining the size of the social group relevant to the formation of a work of folklore.<sup>255</sup> For example, in addition to the practices of tribal groups, would folklore also encompass practices found amongst lineages, the smaller social groups of tribes? When does a work fail to qualify as folklore because the creating group is too small? This definitional problem exists because social groups rarely have clear-cut boundaries and may involve a “gradient of more or less inclusive groups that live in a certain region, have similar histories, and share many cultural traits.”<sup>256</sup>

A related problem is the nature of the practices required to classify a particular work as folklore. African legislation specifically referencing folklore provides no guidance as to how widespread a cultural practice must be to constitute folklore. Furthermore, the legislation does not consider whether modifications to a pre-existing cultural practice could be regarded as a new work, thereby providing

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251. See *id.* art. 46, reprinted in 10 COPYRIGHT MONTHLY REVIEW, *supra* note 51, at 217.

252. See *id.* art. 9, reprinted in 10 COPYRIGHT MONTHLY REVIEW, *supra* note 51, at 212 (defining folklore and “works inspired by folklore” as part of the country’s national cultural heritage).

253. See Ndoye, *supra* note 3, at 377 (discussing the interrelationship between Senegalese copyright law and the Senegalese criminal law).

254. See Copyright Law (Ghana) § 53 (Mar. 21, 1985), reprinted in 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 423, 435; Copyright Decree (Nigeria) § 28(5) (Dec. 19, 1988), reprinted in 25 COPYRIGHT MONTHLY REVIEW, *supra* note 3, at Nigeria, text 1-01, page 1, 8; *supra* notes 44-45 and accompanying text (defining folklore in Ghana and Nigeria).

255. See Fernando Santos Granero, *Michael F. Brown’s Can Culture be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 214, 214 (1998) (commentary) (explaining Brown’s observations regarding the difficulty of measuring a cultural group within a specified boundary and explaining that this problem is further compounded by influential interactions with other groups).

256. *Id.* Writing about Latin America, Granero notes:

[T]he Aguaruna people of the Upper Mayo River studied by Brown are a somewhat distinct offshoot of the Aguaruna of the Marañon River, who in turn have relationships of alliance and hostility with a number of other Jibaro-speaking peoples on both sides of the Peruvian-Ecuadorian frontier. Whose culture should we copyright? That of the Upper Mayo Aguaruna, that of the Aguaruna as a whole, that of the Aguaruna and the Huambisa, who are now organized in a common ethnic federation, or that of the Jibaro as a whole?

*Id.*

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the persons responsible for the modifications with individual intellectual property rights.<sup>257</sup>

Notions of nationality and territoriality are prominent in stating rights to folklore, and they further compound the definitional deficiencies in African copyright legislation. The borders of African states typically cut through many ethnic communities; therefore, basing the protection of folklore on concepts of nationality poses unique problems with identifying the proper communities to control the national and foreign use of the folklore.<sup>258</sup>

For instance, with regard to national control, Ghanaian copyright legislation criminalizes the importation of copies of works made outside Ghana incorporating Ghanaian folklore.<sup>259</sup> However, given that the Ewe community is straddled across both sides of the Ghana-Togo border,<sup>260</sup> could work produced in Togo using the folklore of the Togolese Ewes that is also common to the Ghanaian Ewes criminally violate the Ghanaian law? Are Togolese Ewes for purposes of Ghanaian legislation excluded as a legitimate ethnic community in any analysis of a work of folklore? If a court narrowly defines the ethnic community in terms of only Ghanaian Ewes, it is likely to disallow proof of competing Togolese claims in the work of folklore,<sup>261</sup> which may lead to an unfair conviction. Without clear proof of the inappropriate use of techniques specific to Ghana, there is simply no justification for penalizing the importation of an item legitimately produced elsewhere that happens to resemble a Ghanaian product. To avoid this absurd result, a provision must be

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257. Granero further writes:

Although cultural forms may be collectively constructed, cultural products are always the output of particular individuals. In fact, among Amerindian peoples an individual's high prestige is very much dependent upon masterful production, whether of a basket, a dugout, a garden, a song, or a mythical narration. Cultures are not merely replicated ad infinitum by their bearers but constantly enriched by the latter's creative acts. Thus, if it were possible to copyright cultures, who would reap the profit from the marketing of specific products, the collectivity or the individual?

*Id.*

258. An anthropologist explains the dilemma as follows:

Now, if there is a lesson that we have learned from anthropology, it is the impossibility of conceiving cultures as bounded territorial wholes defined by sets of substantive attributes. Who will decide, then, and how, that a specific social grouping does or does not qualify as a genuine native minority, ethnic nation, folkloric community, or whatever you choose to name the culturally unique potential beneficiaries of a special regime of collective intellectual property rights?

Phillepe Descola, *Michael F. Brown's Can Culture be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 208, 209 (1998) (commentary).

259. See Copyright Law (Ghana) § 46(1)-(2), reprinted in 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 434.

260. See ANDREW OFOE AMEGATCHER, GHANAIAN LAW OF COPYRIGHT 23 (1996).

261. Evidentiary difficulties pertaining to proof of custom in other countries may also lead the court to discount claims of similarities in the making of works of folklore. See *id.*

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made to exempt from criminalization imported works that are made in bordering countries using folklore similar to that of a particular country.

Related to this problem is the question of control of the use of works of folklore abroad when those works are also common to ethnic groups spanning several countries.<sup>262</sup> For example, *kente* cloth, which is widely used in the United States for making garments, ties, caps, bags, stoles, etc., is produced by the Ashanti, Ewe and Nzima communities found in Ghana, the Ivory Coast and Togo.<sup>263</sup> While it is obvious that those communities have valid claims with respect to the use of their *kente* pieces abroad, it is unclear how and to what degree the relevant national governments are justified in asserting rights on behalf of their respective nationals.<sup>264</sup>

An equally important consideration is whether African copyright legislation that fails to provide appropriate exemptions for folklore may result in charging members of the ethnic community from which the folklore originates a fee to use their own folklore.<sup>265</sup> In fact, by requiring users to obtain permission from the relevant copyright agency prior to any commercial use of folklore, the African statutes appear to impinge on the rights of the traditional communities to commercialize those rights—rights which may have existed to a limited degree in the past.<sup>266</sup>

The statutes are also subject to criticism for excluding ethnic communities from arrangements for sharing revenues derived from either the use of folklore or from the damages received in infringement actions.<sup>267</sup> In Ghana, for example, any such fees are used to promote institutions for the benefit of authors, performers and translators.<sup>268</sup> In Nigeria, however, the legislation does not specify any methods for disposing of revenues or damage awards.<sup>269</sup> Using the funds collected for national cultural and social objectives,

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262. *See id.*

263. *See id.*

264. *See id.*

265. *See id.*

266. *See* COLSON & GLUCKMAN, *supra* note 68, at 104 (describing the commercial transactions of the Plateau Tonga communities who traditionally were able to participate in “a small casual trade in handicrafts within the village and within neighbourhoods of villages”).

267. *See* Copyright Law (Ghana) § 5(4) (Mar. 21, 1985), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 423, 424 (stating that funds received from folklore shall be paid to a fund established by the Secretary); Copyright Decree (Nigeria) § 15 (Dec. 19, 1988), *reprinted in* 25 COPYRIGHT MONTHLY REVIEW, *supra* note 3, at Nigeria, text 1-01, page 1, 5.

268. *See* Copyright Law (Ghana) § 25(d), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 430; *see also supra* note 216 (explaining that fees collected by the Secretary go to institutions working for the benefit of authors, performers, and translators).

269. *See* Copyright Decree (Nigeria) § 15(1), *reprinted in* 25 COPYRIGHT MONTHLY REVIEW, *supra* note 3, at Nigeria, text 1-01, page 5.

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or for a narrow group of authors, seems unfair to traditional communities that have even greater claims to the folklore.

Moreover, the legislation does not provide guidance regarding the adequacy of the fees charged for the use of folklore or the methods used to determine the value of each item of folklore.<sup>270</sup> Additionally, the African legislation does not provide alternative forms of compensation (such as a share of royalties or profits) for certain types of folklore like plant varieties<sup>271</sup> or medicinal plants<sup>272</sup> where the returns to research groups or pharmaceutical companies from exploiting this folklore can be astronomical.<sup>273</sup> In any event, in the face of a disturbingly low number of foreign requests for permission to use African folklore,<sup>274</sup> the revenue-raising potential of folklore continues to be bleak under these laws, to the obvious detriment of traditional communities.

### III. PROTECTION UNDER REGIONAL ARRANGEMENTS

There are two regional arrangements in Africa that deal with intellectual property matters: a group somewhat misleadingly referred to as the Industrial Property Organization for English-speaking Africa (“ESARIPO”);<sup>275</sup> and a group of French-speaking countries known as the African Intellectual Property Organization (“OAPI”).<sup>276</sup>

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270. For a discussion on the adequacy of compensation for use of folklore, see generally McGowan & Udeinya, *supra* note 14, at 59. McGowan and Udeinya describe a project in Nigeria to collect traditional medicinal plants and discuss the up-front payments, royalties and distribution of such proceeds. *See id.* at 59, 63-65.

271. The international seed industry is said to account for over U.S. \$15 billion per year, much of that derived from “genetic materials from crop varieties ‘selected, nurtured, improved and developed by innovative Third World farmers for hundreds, even thousands of years.’” Darrell Addison Posey, *Intellectual Property Rights: What is the Position of Ethnobiology?*, 10 J. ETHNOBIOLOGY 93, 97 (1990).

272. *See id.* (“The annual world market value of medicines derived from medicinal plants discovered by indigenous peoples is estimated at U.S. \$43 billion.”).

273. *See* Elizabetsky, *supra* note 10, at 11-12 (describing the vast amount of money made in industrial nations by transferring biotic products from Third World countries).

274. For example, American musician Paul Simon requested permission to use a popular local tune *Yaa Amponsah* as the basis for a track in his album, *The Rhythm of the Saints*. In 1990, he signed an agreement with the copyright office granting him permission to use the popular local tune. This request, however, is the only request to use folklore on record in Ghana. *See* AMEGATCHER, *supra* note 260, at 22.

275. *See* Protocol on Patents and Industrial Designs Within the Framework of the Industrial Property Organization for English-Speaking Africa (ESARPIO) (Dec. 10, 1982) [hereinafter Protocol], *reprinted in* 22 INDUS. PROP.: MONTHLY REV. WORLD INTELL. PROP. ORG., Multilateral Treaties, text 1-008, page 001 [hereinafter 22 INDUSTRIAL PROPERTY]. It is erroneous to view membership in the organization as restricted only to English-speaking African countries because membership is actually open to all members of the United Nations Economic Commission for Africa. *See* J.H. Ntaggoba, *Contribution of ESARIPO to the Development of Industrial Property Laws in the SADCC Group Countries*, 2 LESOTHO L.J. 155, 155 (1986).

276. *See* African Intellectual Property Organization, *discussed in* B. Cazenave, *The African*

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### A. ESARIPO

Created in 1976<sup>277</sup> to harmonize the industrial property activities of its members,<sup>278</sup> ESARIPO has adopted a protocol which authorizes its Secretariat to grant patents, register industrial designs and administer the patents and industrial designs on behalf of its members.<sup>279</sup> An application for a patent or registration of an industrial design is usually made by an interested party at the industrial property office of a member state and promptly communicated to the Secretariat.<sup>280</sup>

The Secretariat initially examines the application for compliance with the formal requirements and then determines the appropriate filing date for it.<sup>281</sup> If an application conforms with the requirements, then that fact is communicated to each designated state;<sup>282</sup> however, if the application fails to conform to the requirements, the applicant may change the application within a limited time period.<sup>283</sup> If the

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*Intellectual Property Organization (OAPI) from Libreville to Bangui*, 19 INDUS. PROP.: MONTHLY REV. WORLD INTELL. PROP. ORG. 291, 291 (1980) [hereinafter OAPI] (providing a detailed analysis of the OAPI terms).

277. The idea to form a regional arrangement for handling intellectual property issues was conceived in October 1972 when participants at a World Intellectual Property Organization ("WIPO") conference in Nairobi, Kenya endorsed a proposal of the Economic Commission for Africa ("ECA") "to convene a meeting of Registrars-general and Heads of the Industrial Property Offices in the English-speaking countries." See Ntagoba, *supra* note 275, at 155-56 (explaining the historical background of ESARIPO). The ECA and WIPO met in Addis Ababa, Ethiopia in June 1974, and drafted the preliminary terms of the Agreement on the Creation of an Industrial Property Organization for English-speaking Africa. See *id.* at 156. Following other reviews, the final draft was signed by accredited representatives from Ghana, Kenya, Mauritius, Somalia, Uganda, and Zambia. See *id.* at 157. After ratification by Ghana, Kenya, and Zambia, and accession to the Agreement by Gambia and Malawi, it became operational on February 15, 1978. See *id.* Botswana, Lesotho, Swaziland, Sierra Leone, Somalia, Sudan, Uganda, Tanzania, and Zimbabwe have since joined the arrangement. See *id.* at 157.

278. The objectives of the Organization include "the establishment of such common services or organs as may be necessary or desirable for the co-ordination, harmonization and development of the industrial property activities affecting its members." Protocol, *supra* note 275, at Preamble, reprinted in 22 INDUSTRIAL PROPERTY, *supra* note 275, at Multinational Treaties, text 1-008, page 001.

279. See Protocol, *supra* note 275, § 1, reprinted in 22 INDUSTRIAL PROPERTY, *supra* note 275, at Multilateral Treaties, text 1-008, page 001.

280. See *id.* § 2(1)-(2), reprinted in 22 INDUSTRIAL PROPERTY, *supra* note 275, at Multilateral Treaties, text 1-008, page 001.

281. See *id.* §§ 3(2)(a), 4(2)(a), reprinted in 22 INDUSTRIAL PROPERTY, *supra* note 275, at Multilateral Treaties, text 1-008, page 002. Each application must identify the applicant and the Contracting States in which the rights are to be enforced as well as include a payment of the appropriate fees. See *id.* § 3(1)(iii)-(iv), reprinted in 22 INDUSTRIAL PROPERTY, *supra* note 275, at Multilateral Treaties, text 1-008, page 002. For patents, the application should also describe the invention, state a claim, provide an abstract, and include drawings where necessary. See *id.* § 3(1)(ii), reprinted in 22 INDUSTRIAL PROPERTY, *supra* note 275, at Multilateral Treaties, text 1-008, page 002. For industrial designs, the application should include a reproduction of the industrial design. See *id.* § 4(1)(ii), reprinted in 22 INDUSTRIAL PROPERTY, *supra* note 275, at Multilateral Treaties, text 1-008, page 003.

282. See *id.* §§ 3(2)(c), 4(2)(c), reprinted in 22 INDUSTRIAL PROPERTY, *supra* note 275, at Multilateral Treaties, text 1-008, pages 002, 003.

283. See *id.* §§ 3(2)(b), 4(2)(b), reprinted in 22 INDUSTRIAL PROPERTY, *supra* note 275, at

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application is for a patent, the Secretariat also conducts a substantive examination of the application to determine whether it satisfies the patentability criteria that inventions be “new, . . . involve an inventive step . . . and be industrially applicable.”<sup>284</sup> The Protocol provides no explicit criteria for determining the registrability of industrial designs. However, because a state can reject the registration of an industrial design on the ground that it is not “new,” it may be assumed that to qualify for registration under the ESARIPO framework, an industrial design must be at least new.<sup>285</sup>

When the Secretariat informs a designated state about its receipt of a conforming application for registration of an industrial design, or its decision to grant a patent, the state must, within six months of the notice, object to the registration of the design<sup>286</sup> or grant of the patent.<sup>287</sup> If no objection is lodged, the requested right becomes effective automatically in its territory after the six-month period.<sup>288</sup> The patents so granted are subject to the laws in each designated state “on compulsory licenses, forfeiture or the use of patented inventions in the public interest.”<sup>289</sup> Registered industrial designs

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Multilateral Treaties, text 1-008, pages 002, 003.

284. *See id.* § 3(3), 3(9), *reprinted in* 22 INDUSTRIAL PROPERTY, *supra* note 275, at Multilateral Treaties, text 1-008, page 002.

285. *See id.* §§ 4(2)(c), 4(3)-(4), *reprinted in* 22 INDUSTRIAL PROPERTY, *supra* note 275, at Multilateral Treaties, text 1-008, page 003 (discussing the reasons that a State may reject the registration of an industrial design). Under the Protocol, an invention is considered “new” when:

[I]t is not anticipated by prior art. Everything made available to the public anywhere in the world by means of written disclosure (including drawings and other illustrations) or by use or exhibition shall be considered prior art provided that such making available occurred before the date of filing of the application or, if priority is claimed, before the priority date validly claimed in respect thereof and further provided that a disclosure of the invention at an official or officially recognized exhibition shall not be taken into consideration if it occurred not more than six months before the date of filing of the application or, if priority is claimed, before the priority date validly claimed in respect thereof.

*Id.* § 3(9), *reprinted in* 22 INDUSTRIAL PROPERTY, *supra* note 275, at Multilateral Treaties, text 1-008, page 002.

286. *See id.* § 3(5), *reprinted in* 22 INDUSTRIAL PROPERTY, *supra* note 275, at Multilateral Treaties, text 1-008, page 002. The grounds for objection are “that the industrial design is not new; that, because of the nature of the industrial design, it cannot be registered or a registration has no effect under the national law of that State; or that, in the case of a textile design, it is the subject of a special register.” *Id.* § 4(3), *reprinted in* 22 INDUSTRIAL PROPERTY, *supra* note 275, at Multilateral Treaties, text 1-008, page 003.

287. *See id.* § 3(6), *reprinted in* 22 INDUSTRIAL PROPERTY, *supra* note 275, at Multilateral Treaties, text 1-008, page 002. Grounds for objecting are “that the invention is not patentable in accordance with the provisions of this Protocol, or that, because of the nature of the invention, a patent cannot be registered or granted or has no effect under the national law of that State.” *Id.* §§ 3(6)(i)-(iii), *reprinted in* 22 INDUSTRIAL PROPERTY, *supra* note 275, at Multilateral Treaties, text 1-008, page 002.

288. *See id.* §§ 3(7), 4(4), *reprinted in* 22 INDUSTRIAL PROPERTY, *supra* note 275, at Multilateral Treaties, text 1-008, pages 002, 003.

289. *Id.* §§ 3(11), 4(7), *reprinted in* 22 INDUSTRIAL PROPERTY, *supra* note 275, at Multilateral

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must follow “applicable national law on compulsory licenses or the use of registered designs in the public interest.”<sup>290</sup>

It is apparent from the above description that the ESARIPO framework would be of limited use in the protection of folklore. First, it deals with patents and industrial designs, but not copyright—an area in which the bulk of intellectual property right claims to folklore may be asserted.<sup>291</sup> Second, the ESARIPO’s criteria with respect to patents are the same as those found in national laws, and are therefore subject to the same limitations on protecting folklore discussed earlier.<sup>292</sup> Finally, as the Protocol deals with industrial designs without providing any clear criteria, it is difficult to determine whether any aspects of folklore, such as clothing designs, would qualify for protection under that system.

### B. OAPI

OAPI was created in Libreville, the capital of Gabon, in 1962 by a number of French-speaking African states to administer shared intellectual property matters.<sup>293</sup> The Libreville Agreement has since been replaced by another agreement signed in 1977 in Bangui, the capital of the Central African Republic.<sup>294</sup> Unlike ESARIPO, OAPI administers detailed schemes pertaining not only to patents, but also to trademarks and copyrights.<sup>295</sup>

Patent applications may be made directly to the national OAPI office by an individual domiciled in an OAPI member state, or through an agent in a member state if the individual is not domiciled in a member state.<sup>296</sup> An invention qualifies for protection under the OAPI framework if it is novel, involves an inventive step, and is

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Treaties, text 1-008, pages 002, 003.

290. *Id.* § 4(7), reprinted in 22 INDUSTRIAL PROPERTY, *supra* note 275, at Multilateral Treaties, text 1-008, page 003.

291. *See* Gavrilov, *supra* note 18, at 78.

292. *See supra* notes 177-213 and accompanying text (discussing the difficulty with applying the intellectual property rights criteria of categorization, ownership, originality, inventiveness, and distinguishable characteristics to folklore).

293. *See* OAPI, *supra* note 276, at 291 (providing an overview of the Libreville Agreement signed in 1962 and the Bangui Agreement that was based on the Libreville Agreement). The States that were party to the Agreements include: Benin (formerly Dahomey), Burkina Faso (formerly Upper Volta) Cameroon, Central African Republic, Chad, Congo, Cote d’Ivoire, Gabon, Madagascar, Mauritania, Niger, and Senegal. *See id.* Madagascar has since withdrawn from the Libreville Agreement; Mali and Togo have joined. *See id.* at 291, 293 (noting that Mali joined the later Bangui Agreement while Togo acceded to the Libreville Agreement).

294. *See id.*

295. *See id.* at 297-99 (discussing OAPI’s trademark provisions); *id.* at 304-06 (discussing OAPI’s copyright provisions).

296. *See id.* at 295 (citing Article 11 of the Bangui Agreement which describes the elements of a patent application).

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industrially applicable.<sup>297</sup>

A patent owner has the right, subject to the defense of personal possession,<sup>298</sup> to prohibit third parties from exploiting the invention.<sup>299</sup> The OAPI arrangement is unique because the twenty-year term of patent protection is divided into three periods with the last two periods subject to compulsory licensing.<sup>300</sup> Remedies for infringement actions may be of either a criminal or civil nature, and may include a criminal prosecution of the suspected infringer, as well as issuance of a seizure order.<sup>301</sup>

Any party may register a trade or service mark with OAPI.<sup>302</sup> The right to the mark is determined by registration and not by use.<sup>303</sup> To qualify for registration, the mark must be sufficiently distinctive, must consist exclusively of generic or descriptive signs, and must not be likely to deceive the public.<sup>304</sup> Protection is granted for renewal every ten years.<sup>305</sup> The same remedies available in patent infringement actions can be sought in infringement actions involving trademarks or service marks.<sup>306</sup>

Special provisions apply to designs and trade names. A design is registrable if it is new and independent of any technical characteristic.<sup>307</sup> In general, a name can take any form, although names that are deemed to be contrary to public policy, morality or are likely to deceive the public are prohibited.<sup>308</sup> The owner of a

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297. *See id.* at 293 (noting the similarities between the conditions required to obtain a patent under the Bangui Agreement and those generally required to obtain a patent under European laws). Patent protection is denied to computer programs and biological processes, but is recognized for pharmaceutical products. *See id.* (citing Article 5 of the Bangui Agreement).

298. *See id.* at 294 (citing Article 1(2) and Annex I of the Bangui Agreement) (discussing the rights of patent owners). The concept of personal possession is a carryover from French law and allows the party who had possession of the invention prior to the patent application to continue to use the patent for his own benefit. *See id.*

299. *See id.* ("Prohibition relates to the making, importing, offering for sale, selling and use of the patented product, or the stocking of the product for one of those purposes.")

300. *See id.* A compulsory license is a license granted pursuant to national copyright legislation to allow parties to make use of copyrighted material without the explicit permission of the copyright owner, on payment of a specified royalty. *See* BLACK'S LAW DICTIONARY 288 (6th ed. 1990).

301. *See* OAPI, *supra* note 276, at 295 (describing Articles 58-68 of the Bangui Agreement).

302. *See id.* at 297 (discussing Article 9 of the Bangui Agreement).

303. *See id.* (explaining that trademark protection affords legal security to both the owner of the mark as well as third parties).

304. *See id.*

305. *See id.* at 298 (noting that the renewal term has been reduced from 20 years to 10 years).

306. *See id.* (describing Article 3 of the Bangui Agreement).

307. *See id.* at 300.

308. *See id.* at 301. The right to a trade name belongs to any owner of a trade, industrial craft or agricultural enterprise located in a member state. *See id.* (citing Article I of the Bangui Agreement). Under the framework, foreign trade names will not qualify for protection unless

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trade name may seek injunctive relief and damages for acts deemed prejudicial to his right in his trade name, but he may not seek the type of seizure order available in infringement actions concerning patents, trademarks or designs.<sup>309</sup>

With regard to copyright protection, there is no need to file with OAPI as the right vests automatically with the author.<sup>310</sup> Copyright is recognized during the life of the author and fifty years after his death.<sup>311</sup> Infringement actions may be brought by authors or by copyright societies acting on behalf of their members.<sup>312</sup>

Unlike ESARIPO, the OAPI arrangement contains special provisions relating to folklore. In OAPI, folklore is defined as works that are “created by the national ethnic communities in member states which are passed from generation to generation.”<sup>313</sup> Works of folklore are considered part of the national heritage and their exploitation is conditioned on notice to the appropriate state agency.<sup>314</sup> Fees collected for such exploitation are to be used for social or cultural purposes.<sup>315</sup>

In addition, a number of provisions are devoted to protection of the national heritage, which in addition to folklore, includes architectural works, sites and all objects of archaeological, historical, literary, artistic or scientific importance.<sup>316</sup> The OAPI Agreement requires each member state to compile a list of national heritage property within six months of the adoption of the Bangui Arrangement.<sup>317</sup> Property identified in the list is protected from disposal of any kind or exploitation for profit without authorization.<sup>318</sup> Owners, holders, and occupiers of national heritage property would be informed about their property’s status, and would

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the owner also owned a business in a member state. This requirement may be circumvented, however, by simply filing the name as a trademark. *See id.*

309. *See id.*

310. *See id.* at 304. Copyrighted works may be used without the author’s permission for private use, quotations, reporting and pedagogical purposes. *See id.* at 305.

311. *See id.* When the copyright term expires, the work falls into the public domain. *See id.* Any party wishing to exploit works in the public domain must pay a fee to a designated national agency. *See id.* The funds so collected are designated for the government to be used for social or educational purposes. *See id.*

312. *See id.* Seizure orders entitling authors to revenue from the unauthorized use of their copyrighted works may be sought in an infringement action. After a seizure order has been granted, however, the applicant must file a court claim within a month or else he will lose all rights he had gained through the seizure action. *See id.*

313. *Id.* at 304 (citing Article 8 of the Bangui Agreement).

314. *See id.*

315. *See id.* (noting that principles of French copyright law “include[] attributes of an intellectual nature and not an economic nature”).

316. *See id.* at 306 (citing Article 45 of the Bangui Agreement).

317. *See id.* Under the statute, the period could be extended to 18 months. *See id.*

318. *See id.*

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be required to notify the relevant government agency of any plans to alter or sell the property.<sup>319</sup> At its own expense, the state may choose to restore any national heritage property.<sup>320</sup> When this occurs, the owner may not object to the restoration work, and must permit agents of the government access to the property.<sup>321</sup> The property owner, however, would be reimbursed for any losses suffered during the possession of the property by the government.<sup>322</sup>

On the whole, the OAPI arrangement provides a better regime for protecting folklore than the arrangement under ESARIPO. It contains provisions dealing specifically with copyright and includes criteria for determining the registrability of designs. However, to the extent that its criteria for protecting intellectual property rights mirror national intellectual property legislation, it also suffers from the same deficiencies noted above regarding national intellectual property laws.<sup>323</sup>

Nevertheless, a welcome development in the OAPI arrangement is its reference to folklore. The list of national heritage property that OAPI requires each state to create could potentially improve the protection of folklore if the states include on their lists all relevant items of folklore. It is doubtful, however, that any OAPI country has compiled such a comprehensive list to date. Even if sincere efforts have been made to generate such a list, there is always the possibility that it may not be exhaustive, either because of logistical reasons or simply because some works of folklore are not deemed to be of “archeological, historical, literary, artistic or scientific importance.”<sup>324</sup>

#### IV. INTERNATIONAL INITIATIVES ON FOLKLORE

##### A. *Berne Convention*

Conspicuously absent from the early international instruments on intellectual property are any references to folklore, perhaps because the general public availability of such works made protection concerns moot.<sup>325</sup> A revision of the Berne Convention in 1967,

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319. *See id.* The agency must be notified at least 15 days prior to any proposed sale or transfer of listed property so that it has the option of blocking the sale or transfer of the property if deemed necessary. *See id.*

320. *See id.*

321. *See id.*

322. *See id.* (describing such losses in terms of occupancy rights).

323. *See supra* notes 177-213 and accompanying text (discussing the difficulties of extending intellectual property laws to protect folklore).

324. *See* OAPI, *supra* 276, at 306 (discussing Article 45 of the Bangui Agreement).

325. As some Brazilian officials explained:

[Folklore] did not normally form part of copyright codes. This they attributed to the

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however, added a provision of potentially useful application to folklore. Under the amendment, contracting states may designate competent bodies to represent unknown authors of unpublished works and notify the World Intellectual Property Organization (“WIPO”) about the authority of such bodies.<sup>326</sup> Conceivably, a state could take advantage of this provision and use it to create an organization with the authority to protect expressions of folklore.

It is doubtful, however, whether the provision can actually be used in relation to folklore. First, because folklore is not mentioned in the amendment to the Berne Convention, it is not altogether clear how the amendment applies to folklore.<sup>327</sup> Second, it may be difficult to apply the amendment to folklore, which usually involves communal rights, because the amendment is phrased in terms of individual rights.<sup>328</sup> Third, to date, no state has notified the WIPO about the creation of any such competent bodies.<sup>329</sup>

### *B. Development of National Model Laws*

The next major development in the international legal protection of folklore was the preparation by the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) and WIPO of the Tunis Model Copyright Law (“Tunis Model Law”) in 1976. The Tunis Model Law was intended to be used as a guideline in drafting national copyright legislation.<sup>330</sup> The Tunis Model Law protects

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fact that, in the last century, when the protection of copyright became a question of international interest, the more advanced countries, particularly in Europe, had already collected, studied and disclosed their national folklore in scientific publications and certain of them had even gone so far as to draw up folklore atlases containing all the relevant data and analyses. It would therefore have been inconceivable for anyone to have the audacity to claim authorship of literary and musical works which were universally known as being a collective folk work.

Chaves, *supra* note 6, at 126.

326. Article 15(4) of the 1967 Berne Convention now provides:

(a) In the case of the 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 so designated.

Berne Convention of September 9, 1886 for the Protection of Literary and Artistic Works, art. 15(4), 828 U.N.T.S. 221, 249 [hereinafter Berne Convention].

327. See Janice G. Weiner, *Protection of Folklore: A Political and Legal Challenge*, 18 INT’L REV. INDUS. PROP. L. & COPYRIGHT 56, 88 (1987).

328. See Farley, *supra* note 181, at 43 n.166 (citing SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986, at 313 (1987)).

329. See Puri, *supra* note 190, at 306-07.

330. See TUNIS MODEL LAW ON COPYRIGHT (1976), *reprinted in* 12 COPYRIGHT: MONTHLY REV.

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folklore and works derived therefrom as original works for an indefinite period<sup>331</sup> whether or not the expression of folklore is fixed in a material form.<sup>332</sup> The Model Law also creates moral and economic rights to be administered by a competent authority established by the state.<sup>333</sup> Fees collected by this authority in exchange for the use of folklore would be used to benefit authors and performers and to protect and disseminate national folklore.<sup>334</sup>

The Tunis Model law appears to have met the expectations of its proponents as it may have influenced quite significantly the copyright laws of a number of African countries including Burundi,<sup>335</sup> Cameroon,<sup>336</sup> Ghana,<sup>337</sup> Guinea,<sup>338</sup> the Ivory Coast,<sup>339</sup> Mali<sup>340</sup> and Congo.<sup>341</sup> Its relevance to protecting folklore is reflected by the fact that countries such as Algeria,<sup>342</sup> Kenya,<sup>343</sup> Senegal<sup>344</sup> and Tunisia<sup>345</sup> had

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WORLD INTELL. PROP. ORG. 165, 165 (1976) [hereinafter 12 COPYRIGHT MONTHLY REVIEW] (stating that purpose of the Model Law was to promote international dissemination and protection of copyrighted works); Farley, *supra* note 181, at 43 (explaining that the model law was intended to provide a model for developing countries to create copyright legislation).

331. See TUNIS MODEL LAW ON COPYRIGHT, §§ 2(1)(iii), 6(2), *reprinted in* 12 COPYRIGHT MONTHLY REVIEW, *supra* note 330, at 168, 171.

332. See *id.* § 1(5), *reprinted in* 12 COPYRIGHT MONTHLY REVIEW, *supra* note 330, at 167. The drafters of the Tunis Model Law offered the following justification for exempting folklore from the fixation requirement:

[T]he fixation requirement cannot possibly apply to works of folklore: such works form part of the cultural heritage of peoples and their very nature lies in their being handed on from generation to generation orally or in the form of dances whose steps have never been recorded; the fixation requirement might, therefore, destroy the protection of folklore . . . . Consequently, . . . the authors of the Model Law have made an exception to the fixation rule, particularly since, if this rule were sustained, the copyright in such works might well belong to the person who takes the initiative of fixing them.

Farley, *supra* note 181, at 44.

333. See TUNIS MODEL LAW ON COPYRIGHT § 5, *reprinted in* 12 COPYRIGHT MONTHLY REVIEW, *supra* note 330, at 170 (discussing moral rights of authors); *id.* § 4, *reprinted in* 12 COPYRIGHT MONTHLY REVIEW, *supra* note 330, at 167 (outlining economic rights related to protected works); *id.* § 6 cmt. (explaining that moral and economic rights will be exercised by the competent state authority); see also § 18(iii) (defining the competent state authority).

334. See *id.* § 14 cmt., *reprinted in* 12 COPYRIGHT MONTHLY REVIEW, *supra* note 330, at 177.

335. See Decree-Law Regulating the Rights of Authors and Intellectual Property (Burundi) (May 4, 1978), *reprinted in* 16 COPYRIGHT MONTHLY REVIEW, *supra* note 6, at 120.

336. See Law No. 82-18 to Regulate Copyright (Cameroon) § 6(c) (Nov. 26, 1982), *reprinted in* 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 360.

337. See Copyright Law (Ghana) (Mar. 21, 1985), *reprinted in* 21 COPYRIGHT MONTHLY REVIEW, *supra* note 44, at 423.

338. See Law Adopting Provisions on Copyright and Neighboring Rights (Revolutionary People's Republic of Guinea) (Aug. 9, 1980), *reprinted in* 17 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 199 (1981) [hereinafter 17 COPYRIGHT MONTHLY REVIEW].

339. See Law on the Protection of Intellectual Works (Ivory Coast), No. 78-634 (July 28, 1978), *reprinted in* 15 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 191 (1979).

340. See Ordinance Concerning Literary and Artistic Property (Mali) (July 12, 1977), *reprinted in* 16 COPYRIGHT MONTHLY REVIEW, *supra* note 6, at 180.

341. See Law on Copyright and Neighboring Rights (Congo) (July 7, 1982), *reprinted in* 19 COPYRIGHT MONTHLY REVIEW, *supra* note 46, at 201 (1983).

342. See Copyright Ordinance (Algeria) (Apr. 3, 1973), *reprinted in* 9 COPYRIGHT: MONTHLY

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adopted laws similar to the Model Law before it was prepared.

Since 1973, UNESCO has worked in earnest on issues related to the protection of folklore. In conjunction with WIPO, it organized a Committee of Experts to draw up model provisions for national laws on the protection of folklore according to principles similar to those of intellectual property law.<sup>346</sup> In 1982, the Committee of Experts released the final text of its Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (“Model Provisions”).<sup>347</sup>

The Model Provisions employ the terms “expressions” or “productions” instead of “works” to distinguish between its unique protection of folklore and ordinary copyright laws.<sup>348</sup> Items protected under the Model Provisions are defined as “productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community . . . or by individuals reflecting the expectations of such a community . . . .”<sup>349</sup> Under these provisions, protection is extended to folklore whether it is expressed verbally,<sup>350</sup> musically,<sup>351</sup> by action,<sup>352</sup> or in tangible form.<sup>353</sup>

Due to the fact that in many countries the rights to folklore vest in the state,<sup>354</sup> the Model Provisions avoid the concept of ownership,

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REV. WORLD INTELL. PROP. ORG. 201 (1973).

343. See The Copyright (Amendment) Act (Kenya) (May 9, 1975), *reprinted in* 11 COPYRIGHT: MONTHLY REV. WORLD INTELL. PROP. ORG. 224 (1975).

344. See Law on the Protection of Copyright (Senegal) (Dec. 4, 1973), *reprinted in* 10 COPYRIGHT MONTHLY REVIEW, *supra* note 51, at 211.

345. See Law Relating to Literary and Artistic Property (Tunisia) (Jan. 4, 1967), *reprinted in* COPYRIGHT LAWS AND TREATIES OF THE WORLD 2 (Supp. 1967).

346. See Report of the Working Group on the Intellectual Property Aspects of Folklore Protection (Feb. 9-13, 1981), *reprinted in* 15 COPYRIGHT BULL. (No. 2) 19, 19-23 (1981).

347. See COMMITTEE OF GOVERNMENTAL EXPERTS ON THE INTELLECTUAL PROPERTY ASPECTS OF THE PROTECTION OF EXPRESSIONS OF FOLKLORE, MODEL PROVISIONS FOR NATIONAL LAWS ON THE PROTECTION OF EXPRESSIONS OF FOLKLORE AGAINST ILLICIT EXPLOITATION AND OTHER PREJUDICIAL ACTIONS (1982) [hereinafter MODEL PROVISIONS], *reprinted in* 16 COPYRIGHT BULL. (No. 1/2) 62 (1982).

348. See Yamin & Posey, *supra* note 178, at 145 (noting that the terms in the Model Provisions are *sui generis*).

349. MODEL PROVISIONS, *supra* note 347, § 2, *reprinted in* 16 COPYRIGHT BULL. (No. 1/2), at 62.

350. Examples of protected verbal expressions include “folk tales, folk poetry and riddles.” *See id.*, *reprinted in* 16 COPYRIGHT BULL. (No. 1/2), at 62.

351. Examples of protected musical expressions include folk songs and instrumental music. *See id.*, *reprinted in* 16 COPYRIGHT BULL. (No. 1/2), at 62.

352. Examples of protected expressions of action include “folk dances, plays and artistic forms or rituals; whether or not reduced to a material form.” *See id.*, *reprinted in* 16 COPYRIGHT BULL. (No. 1/2), at 62.

353. This category of “tangible forms” includes productions of folk art such as: “drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes, musical instruments [and] architectural forms.” *Id.*, *reprinted in* 16 COPYRIGHT BULL. (No. 1/2), at 62.

354. See Darrell Addison Posey, *Effecting International Change*, CULTURAL SURVIVAL Q.,

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preferring instead to identify a “competent authority” as the main repository of rights to folklore.<sup>355</sup> Accordingly, where protected expressions of folklore are to be used for profit outside their traditional or customary context, prior approval must be obtained from this authority.<sup>356</sup> Permission, however, would not be required where the use of folklore is for educational purposes, is incorporated in the original work of an author, or is incidental.<sup>357</sup> Applications to use an expression of folklore must be made in writing to the authority, which may impose fees for such use with the understanding that the revenues collected will be used either to promote or safeguard national folklore.<sup>358</sup>

The Model Provisions require that the origin of the folklore be acknowledged in printed publications and other communications to the public by mentioning the community or geographic place from where the expression was derived.<sup>359</sup> The requirement, however, does not apply to creations of original works inspired by expressions of folklore or to incidental uses of expressions of folklore.<sup>360</sup>

The Model provisions allow criminal penalties to be imposed for: failing to obtain the required written consent prior to use of protected folklore; failing to acknowledge the source of folklore; misrepresenting the origin of expressions of folklore; and distorting works of folklore in any manner considered prejudicial to the honor, dignity, or cultural interests of the community from which it originates.<sup>361</sup> In addition, objects made in violation of the Model Provisions and any profits made therefrom can be seized.<sup>362</sup> These remedies may be imposed along with damages and other civil remedies.<sup>363</sup>

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Summer 1991, at 29, 31 (noting that some countries consider the State to be the legal owner of folkloric traditions).

355. See MODEL PROVISIONS, *supra* note 347, § 9, reprinted in 16 COPYRIGHT BULL. (No. 1/2) 64 (1982).

356. See *id.* § 3, reprinted in 16 COPYRIGHT BULL. (No. 1/2), at 63. This approval provision applies to: “(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.” See *id.*, reprinted in 16 COPYRIGHT BULL. (No. 1/2), at 63.

357. See *id.* § 4, reprinted in 16 COPYRIGHT BULL. (No. 1/2), at 63. Incidental use is defined as: (1) an expression of folklore utilized in reporting on a current event; or (2) an object containing an expression of folklore placed on permanent public display. See *id.*, reprinted in 16 COPYRIGHT BULL. (No. 1/2), at 63.

358. See *id.* § 10(1)-(2), reprinted in 16 COPYRIGHT BULL. (No. 1/2), at 64.

359. See *id.* § 5(1), reprinted in 16 COPYRIGHT BULL. (No. 1/2), at 63.

360. See *id.*, reprinted in 16 COPYRIGHT BULL. (No. 1/2), at 63.

361. See *id.* § 6(1)-(4), reprinted in 16 COPYRIGHT BULL. (No. 1/2), at 63-64.

362. See *id.* § 7, reprinted in 16 COPYRIGHT BULL. (No. 1/2), at 64.

363. See *id.* § 8, reprinted in 16 COPYRIGHT BULL. (No. 1/2), at 64 (noting that the imposition of criminal penalties or a seizure does not affect eligibility for civil relief).

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In general, expressions of foreign folklore would be protected based on reciprocity agreements among countries adopting the Model Provisions, or based on other international agreements.<sup>364</sup> Regrettably, while the Model Provisions contain useful features, to date, they have not been adopted by any country,<sup>365</sup> and therefore, are without much legal significance.

### C. Efforts to Develop an International Instrument

After promulgating the Model Provisions, the Committee of Experts proceeded to draft an international treaty on folklore<sup>366</sup> that closely tracks the Model Provisions in terms of its definition of subject-matter,<sup>367</sup> remedies for unauthorized use,<sup>368</sup> and acknowledgement of the sources of folklore.<sup>369</sup> Under the Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (“Draft Treaty”), each contracting state would designate a competent authority to administer the protection of expressions of folklore within the state.<sup>370</sup> This authority would request that other states protect expressions originating in the contracting states’ own territory.<sup>371</sup> Written permission of that authority would be required prior to permitting commercial uses of folklore in other contracting states.<sup>372</sup> To

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364. See *id.* § 14(i)-(ii), reprinted in 16 COPYRIGHT BULL. (No. 1/2), at 65 (discussing the protection afforded the expression of folklore developed and maintained in a foreign country).

365. See Darrell Addison Posey, *International Agreements and Intellectual Property Right Protection for Indigenous Peoples*, in SOURCEBOOK, *supra* note 1, at 223, 231 (discussing the renewal of international interest in the basic issues adopted by the Model Provisions).

366. Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1984) [hereinafter Draft Treaty], reprinted in 19 COPYRIGHT BULL. (No. 2) 34 (1985).

367. See *id.* art. 1, reprinted in 19 COPYRIGHT BULL. (No. 2), at 34 (setting forth a definition of protected expressions of folklore that is identical to the definition found in section 2 of the Model Provisions).

368. For example, the same criminal penalties, seizure, and damage relief provisions found in Articles 8-10 of the Draft Treaty are also contained in sections 6-8 of the Model Provisions. Compare *id.* arts. 8-10, reprinted in 19 COPYRIGHT BULL. (No. 2), at 37 (discussing the ability of each contracting state to seize or claim damages for non-compliance), with *supra* notes 361-63 and accompanying text (discussing the penalty provisions contained in Model Provisions). Unlike the Model Provisions, however, the Draft Treaty imposes civil penalties for any use of folklore that causes “economic harm to the State or community in which the utilized expression of folklore has originated.” See Draft Treaty, *supra* note 366, art. 10, reprinted in 19 COPYRIGHT BULL. (No. 2), at 37.

369. See Draft Treaty, *supra* note 366, art. 7, reprinted in 19 COPYRIGHT BULL. (No. 2), at 36 (stating a guideline that is identical to section 5 of the Model Provisions).

370. See *id.* art. 3(1), reprinted in 19 COPYRIGHT BULL. (No. 2), at 35.

371. See *id.*, reprinted in 19 COPYRIGHT BULL. (No. 2), at 35.

372. Permission would be required in connection with “the publication, reproduction, distribution or importation, for purpose of distribution to the public, of reproductions or recordings of recitations or performances of expressions of folklore; [or for] the public recitation or performance of expressions of folklore,” as well as any public broadcast of

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facilitate the implementation of this provision, the state-appointed authority is required to provide information pertaining to the main characteristics and the source of expressions of folklore originating in its territory.<sup>373</sup>

The request to use an expression of folklore would be made to the competent authority in the state in which the expression of folklore originates.<sup>374</sup> With few exceptions, authorization is expected to be automatic and expeditious, but it may be conditioned on the payment of adequate compensation fixed by the competent authority in the absence of agreement.<sup>375</sup> Permission is not required from the competent body where the use of folklore is for educational purposes, for creating original literary or artistic works, or for incidental use.<sup>376</sup> The Draft Treaty further provides for national treatment of foreign works of folklore.<sup>377</sup>

Like the Model Provisions, the Draft Treaty has no legal significance because it has not been adopted by any state.<sup>378</sup> Getting states to adopt these instruments has been challenging, and may even be impossible.<sup>379</sup> Opposition to a legally binding international instrument has been based on grounds of practicality and principle. While some countries are simply not convinced there is a need to protect folklore internationally,<sup>380</sup> other states see the need for international action, but would prefer the matter be addressed in a non-binding declaration rather than a binding treaty.<sup>381</sup> The general perception is that it is simply premature to establish an international treaty at a time when (1) insufficient evidence is available regarding the success of protecting expressions of folklore at the national

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expressions of folklore. *See id.* art. 4(1), *reprinted in* 19 COPYRIGHT BULL. (No. 2), at 35.

373. *See id.* art. 4(2), *reprinted in* 19 COPYRIGHT BULL. (No. 2), at 35.

374. *See id.* art. 5(1), *reprinted in* 19 COPYRIGHT BULL. (No. 2), at 36 (describing the process for requesting and granting authorization).

375. *See id.* art. 5(2), *reprinted in* 19 COPYRIGHT BULL. (No. 2), at 36. A request to use a folklore expression may be denied where the intended use would be prejudicial to the honor or dignity of the originating country or community. The competent authority is required to justify in writing, any decision to deny a request. *See id.*, *reprinted in* 19 COPYRIGHT BULL. (No. 2), at 36.

376. *See id.* arts. 6(1) (i)-(ii), 6(2), *reprinted in* 19 COPYRIGHT BULL. (No. 2), at 36.

377. *See id.* art. 2, *reprinted in* 19 COPYRIGHT BULL. (No. 2), at 35 (recommending equal protection for folklore among the Contracting States regardless of where the expression originates).

378. *See* Posey, *supra* note 354, at 31.

379. *See* REPORT OF THE SECOND COMMITTEE, *supra* note 28, *reprinted in* 19 COPYRIGHT BULL. (No. 2) 39, 41 (1985) (describing the discussion by delegations of the UNESCO Member States which emphasized the need for a treaty to protect folklore, but also expressed reservations about such a treaty).

380. *See id.*, *reprinted in* 19 COPYRIGHT BULL. (No. 2), at 41 (reporting that two delegations were opposed to adopting any international instrument).

381. *See id.*, *reprinted in* 19 COPYRIGHT BULL. (No. 2), at 41.

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level<sup>382</sup> and (2) no workable dispute resolution mechanisms have been designed.<sup>383</sup> As the Committee of Experts appeared to recognize, no state would enter into an obligation under an international convention protecting foreign expressions of folklore if it did not know which expressions of other member states' folklore really should be protected.<sup>384</sup> Moreover, for some of the developed nations with significant numbers of indigenous people such as the United States, there is a general reluctance to commit to arrangements that may be perceived as an implicit recognition of the claims of indigenous people to sovereignty with regard to certain property.<sup>385</sup>

## V. PROTECTION OF FOLKLORE IN THE UNITED STATES

Because there is, at this time, no binding international instrument pertaining to the protection of folklore, it is useful to examine whether laws in countries outside the African continent would afford any protection to works of folklore illegally taken out of Africa or mass-produced abroad without proper authorization. An examination of intellectual property laws in the United States is appropriate because large quantities of African folklore are found and sold here.<sup>386</sup>

### A. *Intellectual Property Laws of the United States*

Copyright protection in the United States extends to original works of authorship fixed in any tangible medium of expression.<sup>387</sup> Qualified works include literary works, musical works, dramatic works, choreographic works, pictorial, graphic, and sculptural works, motion pictures and audiovisual works, sound recordings and architectural works.<sup>388</sup> While the domicile or nationality of an author

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382. For example, there is no evidence that any state has adopted the Model Provisions for National Laws on the Protection of Expressions of Works of Folklore Against Illicit Exploitation and Other Prejudicial actions. See REPORT OF THE GROUP OF EXPERTS, *supra* note 30, reprinted in 19 COPYRIGHT BULL. (No. 2) 21, 23 (1985).

383. See Posey, *supra* note 354, at 31 (citing the Group of Experts' 1984 reason for concluding that an international treaty was premature).

384. See REPORT OF THE SECOND COMMITTEE, *supra* note 28, reprinted in 19 COPYRIGHT BULL. (No. 2), at 42 (identifying concerns regarding the definition and scope of protected folklore).

385. For a discussion of how issues of sovereignty are raised by Indian tribes' claims to their cultural heritage, see generally Pinel & Evans, *supra* note 21, at 43-53.

386. Cf. Sassoon, *supra* note 3, at 47, 49 (discussing a group of Westerners who live in Nepal and engage primarily in the smuggling of antiquities and relating the story of when the author entered a New York art gallery and saw a seventeenth-century *torana* from Nepal).

387. See Copyright Act of 1976, 17 U.S.C. § 102(a) (1994) (outlining categories of original works afforded copyright protection).

388. See *id.*

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is irrelevant to the protection of unpublished works in the United States,<sup>389</sup> it may be important with respect to published works.<sup>390</sup>

Under U.S. copyright law, an author has exclusive rights<sup>391</sup> to reproduce, distribute, perform, display, or make derivative works from copyrighted works.<sup>392</sup> In addition, authors of works of visual art have certain rights of attribution and integrity and can prevent the mutilation or distortion of the copyrighted work deemed to prejudice the honor or reputation of the author.<sup>393</sup>

Inventions are patentable if they are novel, useful<sup>394</sup> and non-obvious.<sup>395</sup> Protection is granted for a nonrenewable term of twenty years, after which the invention falls into the public domain and can be used by anyone.<sup>396</sup>

For a trademark to qualify for registration under the Lanham Act, the mark must be distinctive.<sup>397</sup> The Act prohibits registration of any “immoral, deceptive, or scandalous matter . . . which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into

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389. *See id.* § 104(a) (stating that unpublished works listed in 17 U.S.C. §§ 102-103 are protected by copyright laws regardless of the nationality or domicile of the author).

390. *See id.* § 104(b). Under section 104(b), published works covered under 17 U.S.C. §§ 102-103 are protected if “one or more of the authors is a national or domiciliary of the United States,” or national or domiciliary of a foreign nation that has a copyright treaty with the United States, or a stateless person domiciled anywhere, on the date of first publication. *See id.* § 104(b)(1). Copyright protection also applies if the work is published first in the United States or any foreign nation that is a party to the Universal Copyright Convention on the date of first publication; if the work is first published by the United Nations or any of its agencies or the Organization of American States; if the work is covered under the Berne Convention; or if the work falls within the scope of a Presidential Proclamation. *See id.* § 104(b)(2)-(5).

391. *See* 17 U.S.C. § 106 (1994 & Supp. I 1995). The exclusive rights of the author in a copyrighted work are qualified by the doctrine of fair use. *See id.* § 107. The fair use doctrine permits use of a copyrighted work without the author’s permission for such purposes as criticism, comment, news reporting, teaching, scholarship, or research. *See id.*

392. *See id.* § 106 (describing the exclusive rights of copyright owners, subject to the limitations in 17 U.S.C. §§ 106-120 (1994 & Supp. I 1995)).

393. *See* 17 U.S.C. § 106A (1994). These rights enable the author of the work of visual art to claim authorship of the work, to prevent the use of his name as author of any visual work he did not create, or to prevent the use of his name as the author of visual work in the event of distortion or mutilation or other modification which would be prejudicial to his honor or reputation. *See id.* § 106A(a).

394. *See* Patent Act, 35 U.S.C. § 101 (1994) (“[W]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.”).

395. *See id.* § 103(a) (Supp. I 1995) (requiring that subject matter differences between the current and prior art be obvious “to a person having ordinary skill in the art to which the subject matter pertains” at the time of invention).

396. *See id.* § 154(a)(2).

397. As provided in the statute: “No trade-mark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration . . .” Lanham Act, 15 U.S.C. § 1052 (1994 & Supp. I 1995).

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contempt, or disrepute.”<sup>398</sup>

Depending on the intellectual property right involved, the remedies for infringement range from injunctive relief,<sup>399</sup> to seizure and forfeiture,<sup>400</sup> accounting for profits,<sup>401</sup> damages,<sup>402</sup> attorney’s fees,<sup>403</sup> and costs.<sup>404</sup>

The intellectual property legislation in the United States does not specifically address the protection of folklore.<sup>405</sup> The regulation of folklore, if at all, is achieved under the general copyright concepts of rights to derivative and public domain works.<sup>406</sup> After collecting and compiling works of folk art in the nineteenth century, the United States has extended copyright protection to such compilations or works derived therefrom,<sup>407</sup> but only to the extent the writing,

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398. *Id.* § 1052(a) (Supp. I 1995).

399. *See id.* § 1116 (allowing courts to grant injunctions to prevent trademark violations); 17 U.S.C. § 502 (1994) (providing that any court with jurisdiction of a civil action arising under title 17 may grant temporary and final injunctions reasonable for prevention or restraint of a copyright infringement); 35 U.S.C. § 283 (1994) (giving courts the authority to grant injunctions to prevent patent violations).

400. *See* 17 U.S.C. §§ 503, 509 (1994). Section 503(a) allows a court to impound all works and copies claimed to be in violation of copyright and all items used to create such reproductions while an action is pending. *See id.* § 503(a). A court may order the destruction of these items as part of a final judgment under 503(b). *See id.* § 503(b). Section 509 allows the Treasury Department or any agent authorized by the Attorney General to seize all phonorecords, including motion pictures and other audiovisual works, and copies in violation of section 506(a), and the items are forfeited by the possessor. *See id.* § 509.

401. *See* 15 U.S.C. § 1117(a) (1994 & Supp. I 1995) (awarding damages for trademark violations as calculated by the defendant’s profits, plus the plaintiff’s damages and any costs of the action, the total not to exceed three times the actual damages); 17 U.S.C. § 504(a) (1994) (providing that a copyright infringer is liable for either the actual damages suffered by the owner plus any profits made or statutory damages as awarded by the court).

402. *See* 15 U.S.C. § 1117(b) (1994) (assessing damages at three times the profits or damages “unless the court finds extenuating circumstances”); 17 U.S.C. § 504(b) (1994) (finding the copyright owner entitled to actual damages as a result of the infringement plus any profits derived therefrom); 35 U.S.C. § 284 (1984) (explaining that damages to cover the patent infringement should not be less than a “reasonable royalty for the use made by the infringer” with interests and costs and that the court may elect to increase damages up to three times the assessed amount).

403. *See* 15 U.S.C. § 1117(b) (allowing attorney fees to be awarded in trademark cases violating section 1114(1)(a) or 36 U.S.C. § 380 (1994) where counterfeit is intentional); 17 U.S.C. § 505 (1994) (stating that the court has discretion in copyright cases to “allow the recovery of full costs by or against any party other than the United States or an officer thereof . . . [and] may also award a reasonable attorney’s fee to the prevailing party as part of the costs.”); 35 U.S.C. § 285 (1994) (awarding attorney fees in “exceptional cases” for patent violations).

404. *See* 15 U.S.C. § 1117(a) (including the cost of the action as part of the damage calculation in a trademark dispute); 35 U.S.C. § 284 (instructing courts to include costs as part of a damage award in patent cases).

405. *See* Barbara Friedman Klarman, *Copyright and Folk Music*, 12 BULL. OF THE COPYRIGHT SOC’Y USA 277, 282 (1965) (suggesting that the absence of a specific reference to folk art in copyright statutes indicates a failure to acknowledge the special issues of folk art and folk music).

406. *See* Weiner, *supra* note 327, at 73 (describing copyright protection of folklore in Western countries as being firmly established as part of the public domain).

407. *See id.*

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selection or arrangement reflects an individual and independent creation.<sup>408</sup> The collective nature of folk art made it impossible to recognize individual rights in folk art,<sup>409</sup> which has remained in the public domain due to problems of fixation, time of creation, and identity of its authors.<sup>410</sup> Therefore, one may properly conclude that in the United States, folklore is “free for everyone to use and/or distort, a concept which is not conducive to its protection.”<sup>411</sup>

### *B. Indigenous Peoples and Intellectual Property Rights*

The debate about the legal protection of folklore in the United States has largely taken the form of arguments about the right of indigenous people to protect aspects of their culture.<sup>412</sup> For example, Native American Indian knowledge, once marginalized, has become commercially attractive in recent years.<sup>413</sup> However, because such commercialism has also taken a toll on indigenous culture, it has become necessary to control the exploitation of indigenous knowledge.<sup>414</sup> Intellectual property law has been the leading area for positing claims to protect indigenous peoples from the devastating consequences that attend such commercialism.<sup>415</sup> The issues may be framed as follows:

Indigenous societies find themselves poked, probed and examined as never before. The very cultural heritage that gives indigenous peoples their identity, now far more than in the past, is under real or potential assault from those who would gather it up, strip away its honored meanings, convert it to a product, and sell it. Each time that happens the heritage itself dies a little, and with it its people.

Indigenous communities, indigenous leaders, and

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408. See 17 U.S.C. § 103(b) (1994) (explaining that copyright protection extends only to that part of the work which is distinguishable from any “pre-existing material”).

409. See Chaves, *supra* note 6, at 126 (commenting that during the nineteenth century when copyright became an international issue, many Western countries “collected, studied, and disclosed” their folklore in scientific publications such that no one could claim authorship of the body of work “universally known as being a collective folk work”).

410. See Weiner, *supra* note 327, at 75 (noting that folk songs and folklore in the United States are in the public domain because the origins of concepts and ideas are of unknown authorship).

411. *Id.*

412. See generally Pinel & Evans, *supra* note 21, at 43 (discussing how tribal sovereignty helps to define cultural knowledge and allows Native Americans to establish and enforce intellectual property rights).

413. See Greaves, *supra* note 1, at ix.

414. See Farley, *supra* note 181, at 4-5 (discussing the importance of accurately rendering Aboriginal designs given that such designs are the principal means by which Aboriginal culture is passed from generation to generation).

415. See *id.* at 13 (explaining that indigenous people use intellectual property laws “as a shield to prevent further intrusions into their already pillaged culture”).

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advocates for indigenous rights have sought ways to gain some control in a rapidly worsening situation. At bottom, intellectual property rights consist of efforts to assert access to, and control over, cultural knowledge and to things produced through its application. The most urgent reason to establish that control is to preserve meaning and due honor for elements of cultural knowledge and to insure that these traditional universes, and their peoples, maintain their vitality. Subsidiary . . . goals are to manage the degree and process by which parts of that cultural knowledge are shared with outsiders, and in some instances, to be justly compensated for it.<sup>416</sup>

Without making any changes to its intellectual property laws, the United States government has responded in piece-meal fashion to some of these concerns. For instance, it has addressed the issue of misrepresentation of Indian artifacts,<sup>417</sup> by passing in 1935 the Native American Arts and Crafts Act to assure the authenticity of Indian artifacts.<sup>418</sup> The law created the Indian Arts and Crafts Board with responsibility for issuing certification marks that will be registered in the Patent and Trademark Office.<sup>419</sup> Under the Act, civil and criminal penalties would be imposed on individuals caught counterfeiting the Board's marks or misrepresenting items as Indian-made.<sup>420</sup>

Despite its laudable goals, the legislation has not been effective. So far, no person has been prosecuted under the Act and the Department of the Interior has yet to adopt implementing regulations despite the sixty-year history of the Act.<sup>421</sup> In any event, the Act is unduly narrow in scope and would not apply in cases where indigenous crafts are copied but not represented as Indian crafts.<sup>422</sup>

Another significant legal development in connection with the rights of indigenous people in cultural property was the passage in

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416. Greaves, *supra* note 1, at ix.

417. It is not uncommon in the United States to find art and craft produced by non-Indians being marketed as genuine "Indian" products. See Farley, *supra* note 181, at 50 (describing how indigenous art must compete with cheaper, imported imitations).

418. See 25 U.S.C. § 305 (1994).

419. See *id.* § 305(a)(g)(3) (giving the Board power to register trademarks with the Patent and Trademark Office without charge).

420. A 1994 amendment has imposed a maximum fine of \$1,000,000 for first-time counterfeiters and individuals and \$5,000,000 for subsequent violations by those other than individuals. See 18 U.S.C. § 1158 (1994).

421. See Leonard D. Duboff, *500 Years After Columbus: Protecting Native American Culture*, 11 CARDOZO ARTS & ENT. L.J. 43, 57 (1992) (indicating that in addition to the failure to prosecute under the Act, the Interior Department has never created regulations to implement amendments and no money was budgeted for the Board's "expanded duties"); Farley, *supra* note 181, at 51 (describing the Act's impotence).

422. See Farley, *supra* note 181, at 51-52.

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1990 of the Native American Graves Protection and Repatriation Act<sup>423</sup> authorizing the return by museums of human remains and objects taken from Indian graves.<sup>424</sup> Under the statute, persons requesting such repatriation must demonstrate direct descent in the case of human remains,<sup>425</sup> and prior ownership in the case of objects.<sup>426</sup> Predictably, the law has had a profound effect on the debate about the rights of Indians to their cultural property and has emboldened them to seek return of numerous items,<sup>427</sup> including those that may be perceived as falling beyond the scope of the Act.<sup>428</sup>

The two laws surveyed contain only limited solutions and do not by any means address the more fundamental difficulties of protecting folklore<sup>429</sup> under broad intellectual property criteria.<sup>430</sup> The United States government has yet to come out with a broad legislative solution that strikes an adequate balance between the claims of the indigenous people and the traditional goals of intellectual property law.<sup>431</sup>

Opposition to the development of strong intellectual property rights in cultural property has come from various groups.<sup>432</sup> A leading

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423. 25 U.S.C. §§ 3001-3013 (1994).

424. For a discussion of the significance of this legislation, see Duboff, *supra* note 421, at 44 (stating that the Act signifies a change in Congress towards more sensitivity to Native American culture).

425. *See* 25 U.S.C. § 3005(a)(1) (directing Federal Agencies and museums to return human remains upon the request of a "known lineal descendent").

426. *See id.* § 3005(a)(5) (stating that "sacred objects and objects of cultural patrimony" must be returned when requested by a "direct lineal descendant," a tribe or organization with proof of prior ownership or control by the tribe or a member).

427. *See* Brown, *supra* note 13, at 194.

428. *See infra* note 542 and accompanying text (noting that the boundaries of the law are not clear and that the Act has paved the way for broader assertions of control as illustrated recently by the Hopi Tribe, which claimed an interest in "all published or unpublished field data . . . including notes, drawings, and photographs, particularly those dealing with religious matters").

429. This is especially true for those rights that are not analogous to copyright but, rather sound in trademarks and patents and therefore, cannot be protected under the limited public domain concept applicable to copyrights.

430. For a discussion on the application of intellectual property concepts to indigenous culture, see generally Candace S. Greene & Thomas D. Drescher, *The Tipi with Battle Pictures: The Kiowa Tradition of Intangible Property Rights*, 84 TRADEMARK REP. 418, 423-33 (1994) (describing tribal legalities concerning intangible property rights possessed by the Tipi Indians ranging from beaded patterns on moccasins to warriors' right to control "representations" of their accomplishments).

431. *See* Brown, *supra* note 13, at 195 (arguing that the debate over cultural property rights is too narrow, fostering "bumper-sticker slogans" over a broader debate which recognizes the difficulty in protecting indigenous populations while allowing a free flow of information). The lack of effective solutions has been attributed to the "politically marginal status of many of the indigenous peoples." *Id.*

432. Predictably, these groups include parties who benefit the most from the current unregulated regime, such as the pharmaceutical industry and seed companies. Also included are anthropologists and ethnobiologists who fear a forced change in profession and subsequent results such as reduced income. Under a strong intellectual property regime, anthropologists

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skeptic, Professor Michael Brown, has dismissed calls for greater intellectual property protection for indigenous property as part of “a polemical romanticism that produces memorable bumper-sticker slogans (“Give the natives their culture back!”)” without due regard to the need to maintain the “flow of information . . . .”<sup>433</sup> He defends his position with arguments based on free speech, and the need for continued access to information, especially information considered to be in the public domain.<sup>434</sup>

Brown argues that allowing indigenous communities to maintain a shroud of secrecy with regard to the use of certain cultural items would be an affront to the cherished “political ideals of liberal democracy.”<sup>435</sup> Brown further argues that enabling indigenous communities to recover information already in the possession of museums would impede the use of material now subject to general exploitation.<sup>436</sup> He also sees free speech implications in

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and ethnobiologists would now have to share with the indigenous peoples, a portion of their incomes from books, articles, and films about native peoples. *See* Posey, *supra* note 271, at 95.

433. Brown, *supra* note 13, at 195 (criticizing characterizations of intangible cultural property by anthropologists, legal scholars, and indigenous activists).

434. *See id.* at 206 (stating that it is “time to temper demands for comprehensive copyrighting of native cultures” with the need to have works in the public domain).

435. *See id.* at 198. Professor Brown further notes that:

In the United States, secrecy has long been regarded as inherently inimical to democratic process and to personal freedom. There are, of course, circumstances in which secrecy is warranted: in matters of national security, in deliberations on sensitive administrative or legislative matters, in certain kinds of law-enforcement activities, and so forth. We also recognize that institutionalized secrecy nearly always leads to abuses of power. For this reason, we have implemented a wide range of “sunshine laws” that require government officials to conduct deliberations in public and to make administrative documents available to citizens on demand. There is also a strong presumption that once information enters the public domain, it should stay there. Secrecy, in other words, is inherently threatening to democratic process and to the public good except in a sharply circumscribed range of situations. We demand that our educational, religious, and political institutions practice openness whenever possible. Although archives routinely impose restrictions on access—when, for instance, they abide by a donor’s request that documents be closed to researchers for a stated period, usually to protect the privacy of living individuals—I know of no cases in which U.S. public repositories deny access to archived materials on the basis of a potential user’s ethnicity, gender, age, or religious affiliation. Such selective restrictions would surely qualify as a form of illegal discrimination.

*Id.* at 198.

436. In this context, Professor Brown notes:

Native values and the American legal system are especially prone to collision over the question of *retroactive* secrecy, the disposition of information that was obtained in the past and has long resided in the public domain. There are few precedents for the removal of information from the public domain in response to the demands of third parties asserting a right to determine when, where, and by whom this information is accessed. Yet this is exactly what some Indian tribes are asking American museums and archives to do. There is no getting around it: in this case, indigenous beliefs about knowledge of the sacred conflict directly with the majority’s commitment to the sacredness of public knowledge.

*Id.*

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recommendations for laws prohibiting the unauthorized use of indigenous art and symbols by outsiders.<sup>437</sup>

Professor Brown's framing of the debate in terms of rights of private property and absolute rights of access has been challenged as unduly narrow in scope and reflective of an essentially Eurocentric perspective<sup>438</sup> without regard to the equally important relationships that traditional communities have in their folklore such as trust and obligations to relatives and ancestors.<sup>439</sup> In any event, the rigid dichotomy between rights of property and rights of access that he assumes, is unwarranted even under Western norms.<sup>440</sup>

In addition, while free speech issues are relevant to the debate,<sup>441</sup> they should not necessarily trump interests in protecting folklore as Professor Brown suggests. Traditionally, the law has sought to redress wrongs which carry free speech implications by balancing the competing interests without presumptively favoring free speech.<sup>442</sup>

Therefore, to the extent folklore also suffers from injuries that implicate free speech,<sup>443</sup> a balancing act is required rather than an

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437. His argument is as follows:

[O]ne begins to wonder where the legal prohibition of religious "trivialization" or sacrilege might lead. Would citizens therefore be subject to [a] civil and criminal penalty if they trivialized *any* religious symbols? Would indigenous peoples themselves be subject to reciprocal fine or arrest if they manipulated Christian imagery for their own purposes? One can easily imagine conservative evangelical groups taking offense at the use of Christian symbols by members of the Native American Church during peyote meetings. In the American context, certainly, legal efforts to prevent parodic or creative appropriations of religious symbols would present a serious challenge to the First Amendment.

*Id.* at 199.

438. See Rosemary J. Coombe, *Michael F. Brown's Can Culture be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 207, 207-08 (1998) (commentary).

439. Coombe explains that:

Peoples have other relationships to cultural forms—trust, secrecy, guardianship, stewardship, initiation, sacralization—and obligations to relatives, ancestors, spirits, and future generations which make models of access and ownership appear extremely impoverished. Such knowledge is not adequately understood as information, nor may its circulation be properly understood as speech.

*Id.* at 208.

440. Coombe further notes:

Western notions of property are themselves not nearly as narrow as this dichotomy between exclusivity of possession and an unrestricted public commons would suggest. Western juridical traditions recognize relations of trust (express and constructive), fiduciary obligation, implicit license, breach of confidence, stewardship, and local observances of negotiated customs and ethics.

*Id.*

441. For example, free speech issues are implicated in "efforts to prevent parodic or creative appropriations of religious symbols" as part of the legal protection of folklore. See Brown, *supra* note 13, at 199.

442. See Coombe, *supra* note 438, at 208 ("First Amendment concerns are indeed raised and interests in freedom expression balanced, but speech rights have never been recognized as absolutely trumping claims based upon injuries effected by expressive activities.").

443. See *supra* notes 3-22 and accompanying text (discussing examples of authentication,

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automatic preclusion of the claims in folklore when they appear to conflict with free speech concerns.

*C. Protecting African Folklore Under U.S. Law*

Issues concerning intellectual property rights and indigenous communities are being debated and hopefully will lead to a satisfactory resolution in favor of the indigenous peoples. In the meantime, the most pressing issue from the perspective of a legal practitioner concerned with the unauthorized use of African folklore in the United States is how to secure adequate protection in the U.S. legal system for the legitimate interest of traditional communities in their folklore.

Regrettably, intellectual property rights are largely territorial.<sup>444</sup> Therefore, parties asserting rights to folklore in American courts on behalf of African communities would need to demonstrate rights recognized under U.S. law. This will not be easy given the difficulties of protecting folklore under general intellectual property criteria relating to ownership, originality, duration, inventiveness, fixation and uniqueness.<sup>445</sup>

But can the direct intervention of African governments make a difference? While African governments are certainly authorized to litigate abroad on matters pertaining to folklore,<sup>446</sup> to the extent the governments' claims to folklore are not based on treaty obligations of the United States, they will face the same evidentiary burdens as individuals in U.S. courts; the propriety of their claims to folklore would not automatically be assumed.

Although parties to the Berne Convention,<sup>447</sup> the Paris Convention<sup>448</sup> and the Universal Copyright Convention<sup>449</sup> have agreed

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misrepresentation, and debasement of cultural values in the exploitation of folklore, which implicate free speech issues to the extent that exploiters can claim that their acts of misrepresentation or debasement were done in the exercise of their constitutional rights).

444. See RALPH H. FOLSOM ET AL., *INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSEBOOK* 721 (3d ed. 1995) (finding that because intellectual property rights are granted according to national law, the exclusive rights are territorial in nature).

445. See *supra* notes 177-213 and accompanying text (discussing the difficulty of fitting folklore into the current intellectual property criteria).

446. See Law on Copyright and Neighboring Rights (Congo) art. 70 (July 7, 1982), *reprinted in* 19 *COPYRIGHT MONTHLY REVIEW*, *supra* note 46, at 201, 244 (authorizing the national agency responsible for folklore to "take legal action to defend the interests that are its statutory responsibility, particularly as regards any litigation directly or indirectly concerning the reproduction or communication to the public of works covered by this law").

447. See Berne Convention, *supra* note 326, art. 5, 828 U.N.T.S. at 231-32 (providing that states must grant protection to the works of authors from member countries equivalent to the rights granted to their own nationals).

448. See Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, art. 2, 21 U.S.T. 1583, 1631 [hereinafter Paris Convention] (granting to "[n]ationals of any country of

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to provide national treatment to intellectual property rights recognized by other contracting states, these obligations pertain to non-discrimination and do not require states to recognize foreign intellectual property rights not available to their own citizens.<sup>450</sup> Thus, if an African government, as the repository of folklore, were to seek protection in the United States of a work of folklore on the basis of these international instruments, it is not likely to succeed since the United States does not protect works of folklore to the same degree that the African states do.<sup>451</sup> Under those circumstances, the United States will not be expected to enforce the heightened intellectual property regime available in Africa.

Accordingly, without specific arrangements worked out with the U.S. government for special treatment of African folklore, it will likely be impossible to protect African folklore in U.S. courts. In the concluding parts of this Article, I discuss the importance of a proposed regional institution designed to handle such negotiations.<sup>452</sup>

## VI. A CONSIDERATION OF SOME ALTERNATIVES

The preceding sections discussed significant problems with protecting folklore under customary law, national legislation, regional and international laws. For instance, customary law protection is limited by its reliance on voluntary compliance with sanctions based on a system of religious beliefs that do not make sense to the foreign user of folklore.<sup>453</sup> Protection under general national legislation and regional arrangements is complicated by the inability to fit folklore into the statutory criteria of individual

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the Union" the same protection and remedies against infringement that nationals would receive from their own country).

449. See Universal Copyright Convention, July 24, 1971, art. 2, 25 U.S.T. 1341, 1345, 943 U.N.T.S. 178, 195 [hereinafter Universal Copyright Convention] (providing that each state shall provide protection to published and unpublished works of nationals of each contracting state equivalent to that granted to its own nationals).

450. See Universal Copyright Convention, *supra* note 449, art. 2, 25 U.S.T. at 1345, 943 U.N.T.S. at 195 ("For the purpose of this Convention any Contracting State may, by domestic legislation, assimilate to its own nationals any person domiciled in that State."); Berne Convention, *supra* note 326, art. 3, 828 U.N.T.S. at 231 ("Authors who are not nationals of one of the countries of the Union but who have their habitual residence in one of them shall, for the purposes of this Convention, be assimilated to nationals of that country."); Paris Convention, *supra* note 448, art. 3 (providing that "[n]ationals of countries outside the Union who are domiciled . . . in the territory of one of the countries of the Union shall be treated in the same manner as nationals of the countries of the Union").

451. See *supra* Part V (discussing the protection of folklore under U.S. laws).

452. See *infra* notes 536-44 and accompanying text (proposing the creation of a specialized agency concerned with the protection of folklore and discussing its parameters of operation).

453. See *supra* notes 118-19 and accompanying text (discussing the problems with applying customary law to foreign users of folklore).

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ownership, originality, duration, fixation and inventiveness.<sup>454</sup> Furthermore, there is as of yet no binding international arrangement protecting works of folklore.<sup>455</sup>

Suggestions for improving this unsatisfactory legal regime have ranged from radical revisions of modern intellectual property laws,<sup>456</sup> to the complementary use of laws and policies that do not deal specifically with folklore, such as moral rights, public domain and *domaine public payant*, unfair competition laws, and trade secrets.<sup>457</sup> Others propose resorting to general principles of contract law, human rights and other miscellaneous provisions affecting indigenous peoples.<sup>458</sup> The following sections analyze the implications of these proposals.

### A. *Complementary Laws and Policies*

#### 1. *Moral rights*

Scholars urge the recognition of moral rights in folklore as the solution to problems of distortion, misrepresentation, and authenticity that frequently accompany the unauthorized use of folklore.<sup>459</sup> The moral rights of divulgence, paternity and integrity<sup>460</sup> would be especially useful in protecting folklore from being “published without . . . authorization, published without attribution, reproduced in poor quality, reproduced only partially causing the message to be distorted, or put to a use which would be inappropriate to the nature of the original work.”<sup>461</sup> For this reason, it is not

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454. See *supra* notes 177-213 and accompanying text (discussing the difficulty of fitting folklore into the current intellectual property criteria).

455. See *supra* Part IV.C (discussing various attempts at developing an international agreement protecting folklore).

456. See Greaves, *supra* note 1, at 9 (explaining that some favor the development of a new legal instrument which would, for example, establish ownership and control that is society-wide rather than individualized and that would also confer an unending monopoly of ownership).

457. See *infra* Part VI.A.1-4 (discussing the complementary nature of moral rights, public domain and *domaine public payant*, unfair competition laws, and trade secrets laws toward the protection of folklore).

458. See *infra* Part VI.A.5-7 (discussing the advantages and disadvantages of contract law, human rights norms, and international measures in protecting folklore as it relates to indigenous peoples).

459. See Puri, *supra* note 190, at 332-34 (advocating the use of moral rights to prevent “debasement, mutilation or destruction” of aboriginal folklore which receives no protection when displayed or reproduced, especially in countries with Anglo-Saxon legal systems, which are more concerned with economic rights).

460. The right of divulgence refers to the right of the author to determine if and when his work will be made public. See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8[D][05], at 58 (1978). The right of paternity insures acknowledgement of authorship and the right of integrity gives the author the right to object to any distortion, alteration, or other derogation of his work. See FOLSOM ET AL., *supra* note 444, at 728.

461. Farley, *supra* note 181, at 48 (discussing the inalienable moral rights of divulgence,

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surprising that moral rights have been extended to folklore in both the Model Provisions<sup>462</sup> and the Draft Treaty.<sup>463</sup> Where moral rights are incorporated in national copyright legislation referring to folklore, they would apply automatically to works of folklore in those countries.

However, moral rights would be difficult to enforce in the case of folklore because they suffer from the same limitations as other concepts of modern intellectual property law.<sup>464</sup> Like intellectual property laws, moral rights are concerned with protecting the reputation or other interest of the individual rather than that of the community, and would also be subject to termination after a definite period.<sup>465</sup> As a result, moral rights would be difficult to establish when community harm is alleged in connection with the unauthorized use of folklore passed down through many generations.

## 2. *Public domain and domaine public* payant

Others see a potential benefit to restrictions regarding the use of works in the public domain.<sup>466</sup> Because works in the public domain may only be used as the basis of derivative works so long as the use does not violate the essence of the work,<sup>467</sup> it is suggested that these

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paternity, and integrity and how they can protect indigenous artists).

462. See MODEL PROVISIONS, *supra* note 347, §§ 5-6, *reprinted in* 16 COPYRIGHT BULL. (No. 1/2) 62, 63-64 (1982) (indicating that expressions of folklore should be acknowledged and outlining the accompanying offenses committed when they are not).

463. See Draft Treaty, *supra* note 366, arts. 7-8, *reprinted in* 19 COPYRIGHT BULL. (No. 2) 34, 36-37 (1985) (identifying expressions of folklore and the penal sanctions which accompany a violation).

464. See Farley, *supra* note 181, at 48 (suggesting that moral rights, like copyright, are focused on individual authors and therefore may not address the harm done to a community).

465. See *id.* at 48-49 (finding that protection is terminated upon the authors' death or a pre-determined time frame which is not consistent with a community's perpetual interest in the work).

466. In Angola, modification of a work in the public domain is permitted if the author is identified, a reader can distinguish the modifications from the original, and the work as modified is not prejudicial to his reputation. In the Ivory Coast, written permission must be obtained from assignees or beneficiaries prior to use of works in the public domain. See *Study of Comparative Copyright Law: Protection of Works in the Public Domain*, 15 COPYRIGHT BULL. (No. 2) 30, 32 (1981) (discussing legislation in specific countries which permit the modification or adaptation of a work in the public domain when certain conditions are met).

467. Explaining the need for restrictions on the use of public domain works, UNESCO's Special Committee of Governmental Experts on Safeguarding of Works in the Public domain notes that:

[W]hile the use of a work in the public domain is free . . . this freedom should not permit the distortion of a work or the suppression of the name of its author. Freedom should be taken to mean that reproduction, performance, translation or adaptation are permitted without the consent of anybody, but on condition that the essence of the work is not distorted or lost. Freedom does not include the right to destroy the work or impair its nature.

*Safeguarding of Works in the Public Domain*, 23 COPYRIGHT BULL. (No. 2) 25 (1989) (discussing the Special Committee of Governmental Experts' final text of the Draft Recommendation of

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restrictions, like moral rights, could be used to prohibit the distortion of works of folklore.<sup>468</sup> However, depending on how the term “public domain” is defined,<sup>469</sup> this form of protection may not be available to folklore. Where the public domain concept is premised on eligibility for copyright protection, it may not apply to folklore given the difficulties of protecting folklore under general copyright laws.<sup>470</sup> Furthermore, the UNESCO Committee looking into the protection of works in the public domain adopted the position that while the term “works in the public domain” would extend to all intellectual works constituting national and international cultural heritage, works of folklore were specifically excluded.<sup>471</sup>

Of greater significance is the related concept of *domaine public payant*, which refers to a system where the works of unidentified authors can be exploited subject to the payment of fees to the state.<sup>472</sup> As we have seen, a common feature of African copyright legislation is that works of folklore are typically considered part of the national heritage and protected as such without any concerns as to whether they satisfy copyright criteria.<sup>473</sup> The vesting of rights to folklore in the state under these laws solves the problems of identifying legal persons to assert rights relating to folklore. This is not a complete solution, however, as the traditional community does not share in the fees collected by the state.<sup>474</sup>

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Safeguarding of Works in the Public Domain to the General Conference of UNESCO).

468. See Farley, *supra* note 181, at 49 n.203.

469. Consider for example, the following description:

The term “works [in the public domain] means ‘the world’s inheritance of books, works of art and monuments of history and science . . . and generally speaking, all intellectual works as defined by the international conventions and national copyright legislation. It is also worth while [sic] to point out that this definition would also include works that have not benefited from copyright protection but would have done so had it existed or had they been eligible for such protection.

REPORT OF THE SECOND COMMITTEE, *supra* note 28, reprinted in 19 COPYRIGHT BULL. (No. 2) 45 (1985).

470. See Farley, *supra* note 181, at 49 (asserting that folklore will have the same difficulties under public domain protection with regard to fixation requirements and originality as it does with copyright law).

471. See *Committee of Governmental Experts on the Safeguarding of Works in the Public Domain*, 17 COPYRIGHT BULL. (No. 3) 25, 30 (1983) (stating that the term ‘works in the public domain’ “should not be interpreted to include the works of folklore”).

472. See Edwin R. Harvey, *The Domaine Public Payant in Comparative Law with Special Reference to Argentina*, 28 COPYRIGHT BULL. (No. 4) 29 (1994) (providing a comparative review of the concept of *domaine public payant*).

473. See *supra* Part II.B.1 (referring to how African countries’ copyright legislation protects folklore).

474. See *supra* notes 267-69 and accompanying text (criticizing existing African statutes for their failure to allocate fees collected from the use of folklore or from damages to traditional communities).

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### 3. *Unfair competition laws*

Since they prohibit deceptive practices in marketing, unfair competition laws may be relevant to the protection of folklore to the extent that such laws challenge the sale of fake copies of works of folklore. Although unfair competition laws exist in Africa,<sup>475</sup> of far greater importance for the protection of African folklore abroad are the laws of developed nations where copies of African folklore often are mass-produced and passed off as authentic African products. In the United States, for example, the relevant laws would include the Lanham Act's prohibition on the use of goods with false designations of origin, or with false descriptions or representations,<sup>476</sup> the Federal Trade Commission Act's definition of unfair and deceptive practices affecting commerce to be unlawful,<sup>477</sup> and the Uniform Deceptive Trade Practices Act's provision of injunctive relief and award of costs<sup>478</sup> against deceptive trade practices.<sup>479</sup>

However, protecting folklore under those laws may not be feasible due to the generally narrow scope of the prohibited acts.<sup>480</sup> For example, while a misrepresented work of folklore would seem to fall

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475. For example, in Kenya the relevant laws are the Trade Descriptions Act of 1979, 15 Laws of Kenya, ch. 505 (1980), and the Restrictive Trade Practices, Monopolies and Price Control Act of 1989, 15 Laws of Kenya (rev. ed. 1990).

The Trade Descriptions Act prohibits the misdescription of goods and services as an unfair trade practice. Under the Act, a "trade description" includes

any indication, direct or indirect . . . of any of the following goods: (a) identity, quantity, size or gauge; (b) method of manufacture, production, processing or reconditioning; (c) composition; (d) fitness, purpose, strength, behavior or accuracy; (e) any physical characteristics not included in the preceding paragraphs; (f) testing by any person and results thereof; (g) approval by any person or conformity with a type approved by any person; (h) place or date of manufacture, production, processing or reconditioning; (i) person by whom manufactured, produced, processed or reconditioned; (j) other history including previous ownership or use. . . .

Trade Descriptions Act of 1979, *supra* § 8(1). For a general discussion of some African unfair competition laws, see LAW LIBRARY, LIBRARY OF CONGRESS, REPORT FOR CONGRESS: COUNTERFEIT (COPYCAT) GOODS UNDER INTERNATIONAL LAW AND THE LAWS OF SELECTED FOREIGN NATIONS (1996).

476. *See* 15 U.S.C. § 1325(a) (1994) (prohibiting the use of misleading information regarding the origin of goods or services).

477. *See* Federal Trade Commission Act, 15 U.S.C. § 45(a) (1994) (empowering the Commission to prevent unfair methods of competition).

478. These remedies are in addition to those that would be available under the common law or laws of particular states for the same conduct. *See* UNIF. DECEPTIVE TRADE PRACTICES ACT § 2, 7A U.L.A. 281, 304-05 (1999).

479. The Act states:

A person engages in a deceptive trade practice when . . . he: 1) passes off goods or services as those of another, or 2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services . . . .

*Id.* § 2, 7A U.L.A. at 285.

480. *See supra* notes 477-79 and accompanying text (discussing the scope of the U.S. laws related to unfair competition).

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within the category of prohibited practices in the Federal Trade Commission Act, the definition of unlawfulness in the Act leaves much to be desired.<sup>481</sup> More fundamentally, because unfair competition laws are concerned with misrepresentations relating to commercial goods or services,<sup>482</sup> they may not be useful in the protection of some types of folklore not meeting this criterion, such as ritual and dance.

#### 4. *Trade secrets*

Trade secrets law has been recommended for protecting folklore “that has special spiritual significance and has been revealed only to properly initiated clan members.”<sup>483</sup> To constitute misappropriation of trade secrets in this context, it must be shown that the particular piece of folklore is a trade secret<sup>484</sup> and that the exploiter knew or had reason to know it was transferred improperly.<sup>485</sup> Although it may not be difficult to demonstrate the secret nature of certain types of folklore, the necessary state of mind of the exploiter may be difficult to establish where the items of folklore are sold openly.<sup>486</sup>

#### 5. *Contract law*

Contractual arrangements are suggested for the protection of

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481. Under the Federal Trade Commission Act, an unfair act or practice is defined as one that “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” Federal Trade Commission Act, 15 U.S.C. § 45(n). As applied to works of folklore, the interests of the authentic owners of the folkloric works—foreigners making claims not supportable under general intellectual property laws of the United States—would likely be given short shrift when compared to the average American consumer’s interest in the rare products.

482. See UNIF. DECEPTIVE TRADE PRACTICES ACT § 2, 7A U.L.A. at 285-88 (describing activities relating to “goods and services” that are prohibited as deceptive trade practices).

483. Farley, *supra* note 181, at 53 (finding that trade secret law could protect folklore as it protects collective rights).

484. The Uniform Trade Secrets Act defines a trade secret as:

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that:

- (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

UNIF. TRADE SECRETS ACT § 1(4) (amended 1985), 14 U.L.A. 437, 438 (1990).

485. See *id.* § 1(2), 14 U.L.A. at 438 (finding misappropriations to mean “acquisition of a trade secret of another person who knows or has reason to know that the trade secret was acquired by improper means”).

486. See Farley, *supra* note 181, at 53-54 (arguing that trade secret law may not be a viable option for protecting folklore because the exploiters are often not aware of the folklore’s sacred nature and thus do not have the necessary intent).

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folklore because of the distinct advantages they provide.<sup>487</sup> For example, unlike intellectual property rights, contractual rights can vest in a group, and be of extended duration. It is therefore not surprising to find an increase in the use of contracts to regulate the use of aspects of traditional knowledge. For example, the National Cancer Institute (“NCI”) in the United States has developed a standard form which it uses as the basis for its agreements with African organizations participating in its plant collection programs.<sup>488</sup> Under those agreements, the NCI typically undertakes to “ensure that royalties and other forms of compensation [are] provided to the [source] country organization and to individuals of that country, as appropriate, in an amount to be negotiated with NCI in consultation with the host country organization.”<sup>489</sup> Compensation for this purpose is interpreted broadly to include “training, institution building and information transfer.”<sup>490</sup>

The use of commercial contracts to effectuate the transfer of indigenous knowledge, however, appears to have been applied mainly to plant varieties and is hardly mentioned in the literature in connection with other types of folklore.<sup>491</sup> A major limitation of the contractual arrangements is that “local communities in general, and indigenous peoples in particular, are benefited only if the government or non-government organization so desires.”<sup>492</sup> In addition, traditional communities balk at the use of these intermediaries.<sup>493</sup> Moreover, the potential for abuse remains even under the contractual arrangements, prompting the Organization of African Unity to caution against the open conduct of herbal medicine research for fear of enabling multinational companies to develop drugs for later sale to developing nations at prohibitive prices.<sup>494</sup> Accordingly, the use of contracts to regulate the use of

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487. See Cunningham, *supra* note 15, at 6-7 (discussing the benefits of contractual arrangements for the protection of indigenous knowledge while demonstrating the possible drawbacks of such arrangements).

488. See Cragg et al., *supra* note 8, at 86-87 (describing the terms of the form contracts between the NCI and source countries in Africa for the collection of plant samples). The organizations that have agreed to the contracts include the Center National de Recherches Pharmaceutiques in Madagascar, the Institute of Traditional Medicine in Tanzania, the Zimbabwe National Traditional Healers Association, and the University of Ghana. See *id.* at 90.

489. *Id.* at 96.

490. Posey, *supra* note 365, at 239 (citations omitted).

491. See generally SOURCEBOOK, *supra* note 1, at 62-65, 230 (discussing the use of contractual arrangements for certain types of indigenous knowledge, such as medicinal plant use, while neglecting other indigenous knowledge such as folklore).

492. Posey, *supra* note 365, at 239.

493. See *id.* (noting that indigenous peoples no longer desire to work with intermediaries).

494. See Joseph Hanlon, *When the Scientist Meets the Medicine Man*, 279 NATURE 284, 284 (1979) (describing the Organization of African Unity’s recommendations of secrecy in herbal

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traditional knowledge does not appear to hold much promise.

### 6. *Human rights*

The 1948 Universal Declaration of Human Rights,<sup>495</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>496</sup> as well as the International Covenant on Civil and Political Rights<sup>497</sup> guarantee fundamental rights relating to, *inter alia*, labor, culture, privacy, and property.<sup>498</sup> To the extent these instruments portray intellectual property rights as human rights,<sup>499</sup> they may be used for the protection of traditional societies' cultural property interests.

The Universal Declaration of Human Rights provides for the protection of the moral and material interests resulting from any scientific, literary or artistic production<sup>500</sup> and for the right to own collective property and not to be deprived of that property.<sup>501</sup> In addition, the Declaration guarantees the right to just and favorable remuneration for work<sup>502</sup> and mandates equal protection for all under the law.<sup>503</sup> Similarly, both the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights establish the right of self-determination.<sup>504</sup>

All these provisions are relevant to the claims of traditional communities inasmuch as they recognize collective rights, may be used to require compensation for work relating to traditional

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medicine research to prevent multinational corporations from receiving patents on new drugs and re-selling them at a premium).

495. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

496. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 4.

497. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 172.

498. *See generally id.* at 174-79 (listing the essential civic and political rights to be protected by the signatories); International Covenant on Economic, Social and Cultural Rights, *supra* note 496, at 6-9 (setting forth economic, social, and cultural protections guaranteed by the signatory states); Universal Declaration of Human Rights, *supra* note 495, at 71-79 (guaranteeing rights based on considerations such as labor, culture, privacy and property).

499. *See Yamin & Posey, supra* note 178, at 143 (discussing the manner in which the Universal Declaration and the International Covenants can be used to protect discrimination against traditional peoples' intellectual property rights).

500. *See* Universal Declaration of Human Rights, *supra* note 495, art. 27(2), at 76 ("Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.").

501. *See id.* art. 17, at 74 (announcing the right to own property alone or in associations with others and the right not to be deprived of that property).

502. *See id.* art. 23, at 75.

503. *See id.* art. 7, at 73 ("All are equal before the law and are entitled without any discrimination to equal protection of the law.").

504. *See* International Covenant on Civil and Political Rights, *supra* note 497, art. 1, at 173 ("All peoples have the right of self-determination."); International Covenant on Economic, Social and Cultural Rights, *supra* note 496, art. 1, at 5 (same).

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knowledge, and prohibit discriminatory tendencies reflected in the deliberate failure to protect folklore.<sup>505</sup> In addition, provisions on self-determination could be used by certain minority groups who are also fighting for political independence to support their right to control and dispose of their cultural resources, including plants that may be of commercial interest.<sup>506</sup> Nevertheless, the human rights provisions remain of limited utility in the protection of folklore because they are directed mainly toward state governments and establish no clear basis for application to transnational corporations and individuals engaged in the unauthorized use of folklore.<sup>507</sup>

### 7. *International measures relating to indigenous peoples*

The International Labor Organization (“ILO”) and the United Nations Economic and Social Council (“ECOSOC”) are the two leading international institutions to produce work dealing specifically with indigenous peoples.<sup>508</sup> The ILO’s Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries (“Convention 169”) guarantees the right of indigenous peoples to decide their own development priorities and to control their own economic, social and cultural development.<sup>509</sup> The Convention requires states to adopt special measures to safeguard the persons, institutions, property, culture and environment of indigenous peoples<sup>510</sup> and to respect “the special importance of the cultures and spiritual values of the peoples concerned of their relationship with their lands or territories . . . which they occupy or otherwise use, and in particular the collective aspects of this relationship.”<sup>511</sup>

Because of the importance of collectivity to the transmission, use and protection of traditional knowledge, the reference to collectivity in Convention 169 may provide grounds “for indigenous peoples to argue that national and international intellectual property laws which

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505. See Posey, *supra* note 365, at 228-29 (discussing the manner in which human rights can protect indigenous folklore).

506. Yamin & Posey, *supra* note 178, at 143 (describing how the right of self determination can be used to reinforce the rights of indigenous peoples to maintain control over their natural wealth).

507. See Posey, *supra* note 365, at 228.

508. See *id.* at 229 (describing the United Nations Economic and Social Council’s work dealing with the discrimination of indigenous peoples); Yamin & Posey, *supra* note 178, at 143-44 (noting that the ILO Convention 169 is the only United Nations Convention discussing indigenous peoples).

509. See Yamin & Posey, *supra* note 178, at 144.

510. See *id.* at 144.

511. International Labour Organisation, Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, art 13(1), *reprinted in* 28 I.L.M. 1382, 1387 (entered into force Sept. 5, 1991).

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do not respect this collective aspect are not in accordance with the provisions of Convention 169.<sup>512</sup> It does not appear, however, that the Convention has, in fact, been used for this purpose. Indeed, the Convention was not even mentioned in a report of the UN Secretary General dealing specifically with intellectual property rights and indigenous peoples.<sup>513</sup>

In 1982 ECOSOC created a Working Group on Indigenous Populations which has since worked toward the preparation of a Universal Declaration on the Rights of Indigenous Peoples.<sup>514</sup> The most recent draft provides:

Indigenous peoples have the right to special measures for protection, as intellectual property, of their traditional cultural manifestations, such as literature, designs, visual and performing art, seeds, genetic resources, medicines and knowledge of the useful properties of fauna and flora.<sup>515</sup>

Obviously, the adoption of this provision in the final draft would assist indigenous people in their demands for legal infrastructure to enable them to benefit from the exploitation of their folklore.<sup>516</sup> For the time being however, as a draft, it is devoid of any legal significance.

### *B. Sui Generis Arrangements and Issues of Politics*

The argument for adopting a separate instrument for folklore rests on the incontrovertible fact that folklore is *sui generis*; despite similarities with intellectual property rights, folklore is created, owned and utilized differently.<sup>517</sup> Unlike intellectual property, folklore is designed not to confer economic benefits to individual creators, but is intended for common exploitation.<sup>518</sup> Consequently, it does not make sense to try to fit folklore within the rigidities of

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512. Yamin & Posey, *supra* note 178, at 144.

513. See Posey, *supra* note 365, at 228 (stating that the Secretary General's Concise Report on Intellectual Property Rights and Indigenous People did not mention Convention 169).

514. For an account of the activities of the Working Group in relation to the rights of indigenous peoples, see Gudmundur Alfredsson, *International Discussion of the Concerns of Indigenous Peoples: The United Nations and the Rights of Indigenous Peoples*, 30 CURRENT ANTHROPOLOGY 255, 255-56 (1989); Andree Lawrey, *Contemporary Efforts to Guarantee Indigenous Rights Under International Law*, 23 VAND. J. TRANSNAT'L L. 703, 720-22 (1990).

515. Draft Declaration on the Rights of Indigenous Peoples, U.N. ESCOR, 44th Sess., at 8, U.N. Doc. E/CN.4/Sub. 2/1992/28 (1992).

516. See Yamin & Posey, *supra* note 178, at 146 (noting that the Draft Declaration on the Rights of Indigenous Peoples may provide the mechanism by which traditional people can benefit from their collective knowledge).

517. See Gastor, *supra* note 40, at 258 (describing the various aspects of folklore which differentiate it from ordinary intellectual property).

518. Cf. Harmon, *supra* note 191, at 259 (discussing the "group characteristics" of folklore and its lack of individuality).

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national intellectual property law. If the uniqueness of folklore cannot be successfully accommodated under modern intellectual property concepts,<sup>519</sup> then perhaps, it is expedient to consider new legal arrangements to give effect to the traditional community's fundamental right to protect its interests from undue exploitation.<sup>520</sup> Relegating the protection of folklore to the fine distinctions of modern intellectual property concepts would, perhaps, serve no purpose other than the imposition of western cultural norms on traditional communities.<sup>521</sup>

If developing countries have gradually accepted the wisdom of enforcing the intellectual property interests of the developed nations despite significant cost to their economies,<sup>522</sup> it is only fair that the developed nations reciprocate with respect to matters of great concern to the developing nations.<sup>523</sup> On this basis, the developed nations should undertake to protect folklore even where they do not derive immediate benefits or suffer any harms. While new

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519. See *supra* notes 177-213 (discussing the difficulties in trying to fit folklore within traditional intellectual property law).

520. See David J. Stephenson, *A Legal Paradigm for Protecting Traditional Knowledge*, in SOURCEBOOK, *supra* note 1, at 181 n.1 (discussing the failure of western conceptualizations of intellectual property laws as applied to the property rights of indigenous peoples). For example, Greaves writes:

[W]hat is needed is a *new legal instrument*—instrument of the Twenty-first Century, that confers ownership and control of indigenous culture on those who practice it; an ownership and control that is society-wide rather than individual; that applies to what is already in the public domain; that, like ownership of property, confers an unending, monopoly ownership; and which is intended not to ensure progress, but to better enable indigenous societies to preserve and benefit from what is theirs.

Greaves, *supra* note 1, at 9.

521. As Greaves poignantly argues:

IPR [intellectual property rights] entails looking for legal vehicles in Western law that could be used by indigenous societies and their advocates to establish their rights of cultural ownership. IPR is not for everyone. IPR is housed in *Western* law and in its system of courts, judges and lawyers. Advocacy of IPR assumes that indigenous societies or their advocates will use those Western institutions to secure and defend their rights. Many indigenous persons are uncomfortable with that. Why should an indigenous society, with its own concepts of property and civility, adopt the assumptions, rules and institutions of the dominant society in order to claim its rights? The pursuit of intellectual property rights forces indigenous people to play the dominant society's game. Today many refuse.

Greaves, *supra* note 1, at 5-6.

522. See Amy R. Edge, Note, *Preventing Software Piracy Through Regional Trade Agreements: The Mexican Example*, 20 N.C. J. INT'L L. & COM. REG. 175, 190 (1994) (illustrating several economic reasons for developing countries' lack of incentive to create more strict intellectual property laws including the cost of creation and enforcement of law and the loss of low cost access to expensive foreign products); Samantha D. Slotkin, Note, *Trademark Piracy in Latin America: A Case Study of Reebok International Ltd.*, 18 LOY. L.A. INT'L & COMP. L.J. 671, 674 (1996) (discussing developing countries' unwillingness to expand intellectual property protection out of a need for internal development and fear of multinational monopolies).

523. Cf. Slotkin, *supra* note 522, at 694 (claiming that the best way to curb trademark piracy is an international registration program).

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arrangements on folklore would mean a departure from some established intellectual property concepts, at least for African countries it would not be as radical as feared since they already have made significant inroads in the protection of folklore.<sup>524</sup>

In devising global solutions for protecting folklore, however, it is important to clarify the serious confusion that exists in the literature: the tendency to frame the debate about the protection of folklore in terms of the rights of “indigenous peoples” where that term is taken to refer only to certain minority groups in the Americas and Australia.<sup>525</sup> Under this framework, the claims of traditional communities in other parts of the world, such as Africa, are dismissed as unworthy of serious international attention because they are perceived as the claims of “village peoples” or rural farmers.<sup>526</sup> The following passage from Tom Greaves is illustrative:

A . . . worrisome problem is to recognize that indigenous societies are not alone among peoples who perceive themselves under threat. The so-called “village peoples,” the rural farmers inhabiting the rural areas of most Third World countries, are also demanding separate recognition and international status. They, too, are under assault, have cultural knowledge of potential or demonstrated economic value, and are seeking a voice apart from pronouncements made by others in the national capital. Their role at the UNCED conference in Brazil of June, 1992, is just one indication of their rising ethnic self-consciousness. As we pursue IPR [intellectual property rights] for indigenous peoples, we should anticipate a demand from organized villager groups for inclusion, and their demand has considerable persuasive force. Yet, widening IPR’s special privilege to these groups may weaken the IPR prospects for indigenous societies, who include among their political assets the fact that they are usually seen by members of the dominant society as small, beleaguered, and for whom benefits can be accorded without significantly affecting the quality of life for members of the dominant society. When rural agricultural peoples are included, anxiety will rise that the dominant society’s life way may be disrupted.<sup>527</sup>

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524. See *supra* Parts III.A-B (discussing the regional arrangements in Africa that deal with intellectual property concerns).

525. See Descola, *supra* note 258, at 208 (noting that the debate over indigenous intellectual property rights only discusses indigenous peoples of the Americas and Australia); Greaves, *supra* note 1, at 10-11 (discussing the emergence of intellectual property rights in the Americas, while neglecting to speak of the indigenous peoples of Africa).

526. Cf. Descola, *supra* note 258, at 208-09.

527. Greaves, *supra* note 1, at 11-12.

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This view is unfortunate. The author does not articulate a cogent reason why folkloric rights of the so-called indigenous peoples are more deserving of international attention than those of groups in other regions. Works from other communities such as Africa are subject to the same unauthorized and exploitative uses as those of the “indigenous peoples.” If the author’s fear of enlarging the group entitled to protection is to avoid scaring the majority in the developed societies, it is unclear how such fear is automatically minimized when the demand for protection is made only by “indigenous peoples” in the developed countries.

This Article submits that a developed country’s government is less likely to be threatened by the recognition of the folkloric rights of a tribal group in a foreign country than it would by the recognition of claims by an “indigenous” group within its nation to control aspects of culture closely resembling independence from the government. For this reason, it would be erroneous to attribute the reluctance to recognize folkloric rights internationally to the inclusion in the debate of the demands of villager groups in developing countries.

Greaves’ view reflects a failure to recognize that the term “indigenous peoples,” often artificially differentiates between the folkloric concerns of those people and traditional communities in other parts of the world.<sup>528</sup> Specifically, it evidences a failure to understand that while other traditional communities demand greater protection for folklore, they do not see the issues in terms of a quest for political power.

What is most revealing about the excerpt from Greaves is the implicit recognition that political considerations may influence solutions to the problem of folklore in some parts of the world. It is evident that in the Americas and Australia for example, the Indian and Aboriginal populations, respectively, are minority groups fighting for political independence.<sup>529</sup> Because these indigenous peoples

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528. According to Descola:

[T]he debate has been mainly restricted up to now to native peoples of the Americas and Australia, that is, to cultural and linguistic autochthonous minorities that are clearly identifiable within nations settled by Europeans. In the course of their struggles for land, dignity, and the recognition of their cultural uniqueness, these minorities have often obtained special or derogatory legal statutes (concerning land tenure, civic duties, or personal rights) which contribute to setting them apart, socially and spatially, from ordinary citizens and render them more conspicuous as distinct subsets of the national communities. But such visibility is not the norm everywhere in the world, and advocates of “differentialism” should perhaps pay more attention to the fact that cultural diversity is not only an internal phenomenon typical of great melting-pot nations but also a feature of the whole wide world.

Descola, *supra* note 258, at 208-09.

529. *See id.* (stating that native peoples of the Americas and Australia have been wrongfully

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assert their rights to control the use of traditional knowledge while at the same time demanding greater sovereignty, the debate about the protection of their folkloric rights tends to be meshed into a broader political debate.<sup>530</sup> It is then assumed, quite erroneously, of course, that any call for the international protection of folklore, regardless of the particular community involved, has political connotations.

This is not the case in Africa. Most Africans belong to tribes and have roots in traditional communities, whether they live in villages or cities. The lowest rural shepherd boy is no more a traditionalist than is the President of the country living in the state capital. Also, tribal groups are as much a part of the national government as any group could possibly be. As such, they are not minority groups fighting for political power. That central governments in Africa are not threatened politically may explain why they have readily acknowledged in legislation the entitlement of traditional groups to their folklore.<sup>531</sup> Consequently political considerations as understood by Greaves are irrelevant to the debate about protecting folklore in Africa.

### C. Regional Solutions

The disparate treatment of folklore by developed and developing countries suggests that a regional approach as opposed to a more encompassing global treaty has a greater chance of success. To this end, African countries that already recognize and protect folklore could be urged to adopt a binding regional arrangement to regulate the use of folklore outside the region, where the most lucrative uses of folklore are found. Complementing the regional arrangement should be aggressive efforts at the state level to safeguard folklore through measures involving the identification,<sup>532</sup> conservation,<sup>533</sup>

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deemed more worthy of international attention because of their many struggles for land and respect).

530. In the United States, American Indian tribal governments enjoy a measure of autonomy from the central government which is reflected in their right to pass laws governing conduct within the Indian reservations. See Pinel & Evans, *supra* note 21, at 43-44 ("Native American tribes are using the principle of tribal sovereignty to define and control the use of culturally based knowledge to exercise their intellectual property rights."). Perhaps, it is more politically expedient for them to assert greater control of native cultural knowledge on the basis of this limited sovereignty than to depend on the benevolent acts of the central government which could be perceived as weakening their political independence.

531. See *supra* notes 44-51 and accompanying text.

532. To facilitate the identification of folklore, it will be necessary to create a register of institutions concerned with folklore and set up identification and recording systems for the collection, transcription, and cataloguing of folklore. See REPORT OF THE SECOND COMMITTEE, *supra* note 28, reprinted in 19 COPYRIGHT BULL. (No. 2) 39, 45 (1985) (recommending identification procedures in order to protect folklore).

533. Measures for conserving culture include establishing networks of archives to store

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preservation,<sup>534</sup> and dissemination<sup>535</sup> of folklore.

It will be necessary to create a special agency to coordinate protection measures in the region. This Article proposes that the agency be composed of representatives of national agencies concerned with the protection of folklore. An entirely new group of persons devoted exclusively to protecting works of folklore is preferred over OAPI and ESARIPO not only because the staff of those organizations may already be over-extended, but to underscore the distinctiveness of folklore from intellectual property law.

The regional arrangement should require national implementing legislation to enable the enforcement in national courts of rights recognized in the regional treaty. To this effect, a provision obligating contracting states to protect expressions of folklore originating in other contracting states would be desirable. As much as possible, the regulation of the use of folklore within each country should continue to be left to the respective national agencies. Therefore, the regional agency need not be concerned with the specifics of authorizing the use of folklore within the boundaries of member states.

However, the regional agency would play a critical role in the exploitation of African folklore abroad where, without the benefit of a complementing international treaty, protection of folklore continues to be weak. The proposed agency would play the role of a focused and specialized channel for articulating, asserting, and defending rights to African folklore. Another role for the agency would be to act as the conduit for processing requests to use folklore received from interested parties abroad, which would then be channeled to the relevant state or states. Assigning responsibility for these matters to the regional agency would be far more effective than leaving them to the national agencies whose scattered efforts cannot provide the same unified front that a regional agency can provide.

A prime objective of the regional agency would be to work with

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information and documents; creating museums to exhibit folklore; establishing an index of all institutions and persons holding items of folklore and training collectors, archivists, documentalists and other specialists in the conservation of folklore. *See id.*, reprinted in 19 COPYRIGHT BULL. (No. 2), at 45.

534. To preserve folklore from the detrimental effects of foreign cultures, it may be necessary to recommend the study of folklore in educational institutions, guarantee the right of the various ethnic groups and national communities to their own folklore and set up appropriate organizations such as Arts Councils, which would be open to various interest groups. *See generally id.*, reprinted in 19 COPYRIGHT BULL. (No. 2), at 41-45.

535. Dissemination is enhanced by organizing national folklore events such as fairs, festivals, films and exhibitions as well as publishing and facilitating meetings and exchanges between individuals, groups and institutions concerned with folklore. *See id.*, reprinted in 19 COPYRIGHT BULL. (No. 2), at 41-45.

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governments of developed nations to devise a method for recognizing rights in African folklore.<sup>536</sup> The aim here should not necessarily be to get those governments to pass new legislation providing for rights to folklore under domestic legislation. Rather, the governments should be urged to facilitate the enforcement of claims to folklore by agreeing to accept that appropriate determinations by the regional agency (or relevant national agencies) create very strong presumptions of the existence of folkloric rights for purposes of litigation in the developed nations. Such an arrangement would obviate the need to test the asserted claims of folklore under the strict intellectual property criteria of the developed nations.

According some deference to the claims of traditional community leaders in the manner suggested would not be unusual as U.S. courts have regularly deferred to the decisions of foreign institutions on matters such as the validity of customary law marriages.<sup>537</sup> In addition, recent U.S. legislation authorizing the return by museums of sacred objects taken from the graves of American Indians<sup>538</sup> demonstrates the U.S. government's receptivity to credible assertions by indigenous people of rights to their cultural property.<sup>539</sup> Indeed, following the government's lead, some private museums have adopted even more liberal policies regarding the return of illegally acquired Native American property.<sup>540</sup>

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536. The regional agency might want to look at the proposal in Australia regarding ownership of Aboriginal folklore for potential methods of dealing with African folklore. *See infra* notes 549-52 and accompanying text (discussing the distinctions between the "customary user" and the "traditional owner" of folklore as a means of resolving the tension between the concepts of ownership in modern intellectual property laws and those in traditional societies).

537. For example, in *Francisco Vanguardia Batiller v. Immigration and Naturalization Service*, 1996 WL 384872, at \*1 (9th. Cir. July 9, 1996) (unpublished disposition), the Ninth Circuit Court of Appeals, in denying a request for continuance of a hearing to allow additional research on a document admitted to prove a marriage in the Philippines, held that with regards to documents relating to foreign marriages, "the Court does not normally go behind the . . . validity of such documents." Accordingly, the Court of Appeals gave "great weight to that official record of the Philippines in the absence of countervailing evidence."

538. *See generally* The Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. §§ 3001-3013 (1994) (addressing ownership or control over Native American cultural items).

539. Under the statute, persons who request repatriation of human remains and ritual objects, must substantiate direct descent, or in the case of objects, prior ownership. *See id.* § 3005(a)(5).

540. *See, e.g.,* Brown, *supra* note 13, at 194 (suggesting that "[the legislation] establishes a legal framework for repatriating human remains and ritual objects to Indian tribes that request them . . . The implementation of this legislation . . . has now become a routine part of museum practice."). One example is the National Museum of the American Indian of the Smithsonian Institution. *See* Lobo, *supra* note 20, at 44-45. The Smithsonian's policy establishes broad parameters of cultural materials that will be considered for repatriation, including "communally owned Native American property, objects acquired illegally, and ceremonial and religious objects 'needed by Native American religious leaders for the practice of traditional Native

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The Native American Graves Protection and Repatriation Act's requirement of proof of prior ownership as a condition for the repatriation of cultural objects is a much easier burden than is required to show entitlement to intellectual property rights.<sup>541</sup> One effect of this legislation has been to unleash a huge wave of demands by Indian tribes to museums for the return of cultural property which has varied from "notes, drawings, [and] photographs dealing with religious matters"<sup>542</sup> in the case of the Hopi tribe, to "all images, text, ceremonies, music, songs, stories, symbols, beliefs, customs, ideas and other spiritual objects and concepts" in the case of the Apache tribe.<sup>543</sup> These developments coincided with the well-publicized success of the representatives of the Coroma people in Bolivia who came to San Francisco to demand the repatriation of sacred communal property stolen from them in the late 1970s.<sup>544</sup>

Thus, the climate is favorable for the consideration of special arrangements regarding the recognition and enforcement of African folklore in the United States. Replacing the need to show entitlement under general intellectual property law with the relatively light burden of tracing ownership as allowed under the Native American Graves Protection and Repatriation Act would go a long way to enhance the protection of African culture. Such an arrangement would be especially important with respect to items illegally taken out of the African continent or religious artifacts whose use as decorative art is offensive to traditional norms. The experience of the United States with the Asian countries prior to the adoption of the present GATT provision on intellectual property demonstrates the feasibility of governments working out special arrangements to protect the intellectual property rights of their citizens.<sup>545</sup> There is no reason why the same cannot be achieved with

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American religions." *Id.* at 44. In addition, the policy is to be carried out in accordance with applicable treaties and international agreements and the Museum agrees to abide by the principles of the UNESCO Convention and the American Indian Religious Freedom Act in its acquisition policies. *See id.* at 45.

541. As we have seen, U.S. intellectual property law requires proof that the work is original and fixed in a tangible medium to obtain copyrights; that the object is novel, useful, and non-obvious for patents; and that the product is distinctive in the case of trademarks. *See supra* notes 387-98 and accompanying text (discussing statutes pertaining to copyright, patent, and trademark regulations).

542. *See Brown, supra* note 13, at 194 (quoting a letter written by Hopi Tribe Chairman and CEO Vernon Maseyesvo to several museums about Hopi interests in field data regarding the tribe).

543. *See id.*

544. *See id.* (referring to "similar manifestos" from other tribes in South America and other parts of the world).

545. *See supra* note 31 and accompanying text (discussing how the United States pressured developing countries to adopt and enforce strong intellectual property rights).

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respect to the protection of African folklore.

To be able to discharge its responsibilities effectively, the proposed regional agency should, with the help of the national representatives, compile a compendium of works of African folklore indicating where particular types of protected works are found and any restrictions that may exist regarding their commercial exploitation. Providing such information to public libraries and interested parties in the United States would go a long way toward reducing cases of unauthorized use that stem from simple ignorance about the protected nature of the works or the identity of their owners. This information would also simplify the process of obtaining prior authorization for use of protected works.

Some of the problems noted earlier in connection with national intellectual property legislation<sup>546</sup> could be addressed under a regional arrangement. For example, regarding the issue of rights of folklore originating in different states, a provision could be added authorizing representatives of the affected countries to agree on an equitable method of splitting the fees collected. If this proves unworkable, the matter could be settled through arbitration or through a dispute settlement mechanism established under the auspices of the regional agency.

Contracting states should be required to ensure that proceeds for the use of works of folklore—whether collected by the national agency for uses of folklore within the nation, or forwarded to the states by the regional agency for uses abroad—are allocated to traditional communities and not to state institutions or societies of authors. This calls for a satisfactory resolution of the extremely difficult questions of defining the size of those communities<sup>547</sup> and identifying the proper representatives<sup>548</sup> to receive the funds. In view of the complex and varied practices involved, however, it may not be feasible to state clear and uniform rules of ownership, or entitlement to compensation for the use of folklore in traditional communities. This matter should therefore be left to the states. However, guidelines on the subject must be required from the national agencies. At the very minimum, these guidelines should be capable of identifying clan or tribal leaders to receive payments on behalf of

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546. See *supra* notes 177-213 and accompanying text (identifying problems in using general intellectual property laws to protect folklore).

547. For a description of the ambiguity in defining membership in and boundaries between indigenous groups, see Brush, *supra* note 12, at 136.

548. See Donald Tuzin, *Michael F. Brown's Can Culture be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 217, 217 (1998) (commentary) (addressing the dilemmas of selecting individuals to represent exploited cultural groups).

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other community members in accordance with custom.

In this regard, it may be instructive to consider the proposal in Australia<sup>549</sup> to draw a distinction between the customary user<sup>550</sup> and the traditional owner,<sup>551</sup> of Aboriginal folklore as a way of tackling the tensions between the concepts of ownership inherent in modern intellectual property laws and traditional rights. Under the Australian scheme, a traditional owner would not necessarily be a customary user, and vice versa. Thus members of a traditional community could exercise general rights to folklore, while not necessarily being treated as the owners thereof. This approach is attractive because it would permit a more readily identifiable and limited group of persons to exercise certain rights of ownership in the more conventional sense; such as authorizing and receiving compensation for the use of folklore.<sup>552</sup>

With regard to compensation, this Article recommends that it should not be restricted solely to the payment of fees determined in advance, but could, depending on the type of folklore, be broadened to incorporate more innovative arrangements involving in-kind, up-front payments and future sourcing,<sup>553</sup> royalties<sup>554</sup> and profits<sup>555</sup> to

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549. In view of its significance as an integral part of Australian culture, serious thought has always been given to the protection of Aboriginal folklore; particularly from unauthorized uses which either violate the secret-sacred nature of folklore or prevent adequate compensation to the Aborigines. In 1981, the Working Party looking into the matter came out with a number of recommendations, including the creation of a Commissioner for Aboriginal Folklore and an assisting Advisory Folklore Board. See Robin A.I. Bell, *Protection of Folklore: The Australian Experience*, 19 COPYRIGHT BULL. (No. 2) 4, 12-13 (1985). Under the proposals, any destruction, mutilation, or export of items of folklore that resulted in permanent loss to the Aborigines of their cultural property would result in stiff criminal penalties. See Weiner, *supra* note 327, at 83. This is important for protecting secret-sacred works as their use has often been restricted by custom. Outside of a recommended clearance procedure when doubt exists as to the secret-sacredness of an object, the proposed scheme does not require prior approval regarding the use of folklore. See *id.* at 82. Significantly, the proposals specify no time limits for the rights in folklore, therefore, the protection of folklore would continue for an unlimited duration. Despite various beneficial and innovative features, however, the Working Party's proposals have yet to be incorporated into law. Instead, the protection of folklore in Australia continues to be based on general intellectual property laws, trade laws, and recent radical judicial activism. For a discussion of recent cases involving the protection of aboriginal art such as the Milpurrurru, Yumbulul, Bulun and Mabo cases, see generally Golvan, *supra* note 180, at 227 (recounting the story of Aboriginal painter John Bulun Bulun).

550. The proposals defined a customary user as "any Aboriginal person or group living subject to Aboriginal custom and entitled by that custom to create works derived from the item of Aboriginal folklore in question." See Weiner, *supra* note 327, at 81.

551. The Working Party's report defined a traditional owner as "the traditional or customary Aboriginal owner of the item or another Aborigine or group of Aborigines in whom the custody or protection of the item is entrusted by and in accordance with Aboriginal custom or tradition." See *id.*

552. Under the proposals, it is the responsibility of the traditional owner or user to inform the Commissioner for Aboriginal Folklore about the arrangements concerning commercial uses of folklore. The Commissioner would then negotiate an acceptable fee with the user which is then distributed equitably to the traditional owners. See *id.* at 82.

553. For example, an international team of researchers in South-East Nigeria seeking to

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benefit communities corresponding to the different stages involved in collecting and exploiting folklore.<sup>556</sup> To avoid placing all the initiative for this in the hands of the national agencies, the active participation of the local groups, when identified, would have to be sought.

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collect and experiment on plants and traditional medicines for possible use in the treatment of diseases, devised the following approach:

Five percent of project funds (\$25,000) would be set aside for in-kind, up-front support to the villages and towns in which the team directly worked. This would ma[k]e sure each community received a concrete, immediate benefit from working with the team, since it was unlikely that a commercially valuable drug would result from the team's research. If a plant medicine were promising and more plants were needed, the team would buy all future plant supplies from the communities which originally gave the plant, creating another source of income for the communities.

If a commercial drug were discovered and developed, the team also would require the drug manufacturer to purchase future plant supplies from the project region, so long as consistent and sufficient plant supplies were provided. If a plant was endangered, or not enough were available, the team agreed to work with communities to solve these problems by farming the plant, changes in harvesting techniques, or by addressing any broader causes, such as deforestation, which caused the shortage.

McGowan & Udeinya, *supra* note 14, at 64.

554. Continuing their report, the team of researchers also noted:

Royalties could be earned in several ways. The size of the royalty would depend on what the team sold to a drug company and the success of the drug sales. If the team simply sold a dried plant sample to a drug company, it could expect to receive the standard royalty share of 1 to 2% of the sales of any commercial drug developed from this sample. If the team sold an extract from a plant, the expected royalty would be larger, potentially 3 to 5% of sales. If the team sold a chemical compound and the compound were promising, the team could get a greater royalty, ranging from 5 to 15%. The amount would depend on how much testing the team had done and what disease the drug was for—a cure for AIDS would be worth more than one for athlete's foot.

Of this 25% royalty share for local communities, half would go to the Local Government area from which the plant was collected and half would go to the village or town where the plant was collected. This 50-50 split between the Local Governments and the villages was a compromise between two goals—to reward individual, local innovation and collective, traditional knowledge—and all the different suggestions about who to pay. We decided this after a long, circular debate over who should receive royalties—individuals, families, villages, Local Governments, the entire project area, local non-profits and so on. Unfortunately we made good, logical arguments in support of every position.

*Id.*

555. The report further noted:

The team also dedicated 5% of all commercial drug profits (if a drug were created) to projects in southeastern Nigeria which promoted rural health, traditional medicines, biodiversity conservation and sustainable economic development. This 5% requirement meant any drug company that sold the drug had to agree to turn over 5% of its profits to benefit the project area. This 5% requirement would be part of the licensing contract between the team and the drug company. The drug company also had to make the drug available, at cost, to all Nigerians afflicted with the disease helped by the drug. This guaranteed that all Nigerians benefited from the biodiversity and community knowledge in their country.

*Id.* at 65.

556. *See generally* King, *supra* note 7, at 71 (suggesting that the question is not whether indigenous people should benefit from their knowledge but how to provide these benefits most fairly and effectively).

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Through regular meetings with the national agencies, local groups could be encouraged to articulate their concerns, and devise suitable compensation arrangements. This is important because without also transforming the traditional communities into effective pressure groups through financial or other support, they may not enjoy the full benefits of their rights in folklore.<sup>557</sup> To avoid all doubt, this discussion regarding compensation should not be taken as urging indirectly the participation by traditional communities in market economics.<sup>558</sup> It is up to them to decide whether to commercialize folklore. The concern of this Article is to ensure that if they decide to do so, adequate compensation schemes are in place.

#### CONCLUSION

This Article has discussed significant problems with protecting folklore under modern intellectual property laws. Despite similarities with intellectual property, folklore has been shown to be *sui generis*. It is created in a gradual fashion for use by traditional communities which eventually own it. Unlike modern intellectual property, folklore does not confer short-term rights to individuals. Instead, it recognizes group rights which can exist in perpetuity. Accordingly, this Article has endorsed the adoption of separate legal arrangements to accommodate the uniqueness of folklore.

Although the adoption of a binding international instrument would markedly improve the global protection of folklore, this Article has noted the reluctance among developed nations to join in such an effort. At the same time, however, the Article has discerned much enthusiasm among the African nations for specific legal provisions regarding folklore. Given the present circumstances, the Article therefore recommends a regional solution rather than an international one. To ensure vigorous and uniform protection of folklore outside the African region, such as in the United States, this Article recommends the creation of a regional agency with authority to institute infringement actions abroad and to serve as the conduit for processing requests to use folklore as well as distributing compensation collected for the use of folklore.

Hopefully, the lessons learned from a successful implementation of

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557. See Yamin & Posey, *supra* note 178, at 143 (noting the practical problem of the lack of indigenous peoples' financial and technical means by which they could be able to benefit from their intellectual property rights).

558. See Posey, *supra* note 271, at 97 (arguing that native peoples should be justly compensated for their "knowledge" through guarantees of intellectual property rights, however, this is not to say that native peoples should involve themselves in "market economics").

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the proposed regional arrangement in Africa will encourage other members of the international community, who have thus far had a lukewarm attitude toward the protection of folklore, to take the issue more seriously and to join in efforts to adopt a binding international arrangement on the protection of folklore.