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INTELLECTUAL PROPERTY, TRADITIONAL KNOWLEDGE AND
GENETIC RESOURCES

THE PROTECTION OF FOLKLORE ACCORDING TO THE BULGARIAN
COPYRIGHT AND RELATED RIGHTS ACT

*Document prepared by Dr. Emil Losev, Head, Copyright Division,
Ministry of Culture, Sofia*

1. The protection of folklore has manifold dimensions and is concerned with its preservation, conservation, revival and so on. This issue can be solved by various scientific, technical, administrative and legal techniques. As for the scope of protection, obviously it may be at the global, international level or at the regional or national levels.
2. Further in this text, we shall concentrate only on the legal aspect of folklore protection in terms of intellectual property rights, and in this connection we shall try to throw some light on the possibilities available at the national level.
3. Bulgaria is a small country, and its awareness of the need to protect folklore legally should include recognition of the national cultural identity, not to mention its historical role in the destiny of the Bulgarian people and in its modern culture, on the one hand, but on the other hand this issue is faced with a legal trend common to many countries, regarding intellectual property rights. According to that trend the products of folklore creativity are not protected as such, because they are not considered copyrightable subject matter. The solutions suggested by the Bulgarian Copyright and Neighboring Rights Act are essentially modelled on legal practice in this field. The Act does however include a number of provisions that at first glance suggest a broader protection of folklore compared with that available in many other countries.

A. PRINCIPLE

4. Under Art. 4.3, “expressions of folklore are not subject matter of copyright.”

B. TERMINOLOGY

5. The Bulgarian Copyright and Neighboring Rights Act deliberately and aptly uses the term “expressions of folklore” in order to distinguish the results of folklore creativity from the products of the author’s creativity - the author’s own works.

C. THE “INCOMPATIBILITY” OF FOLKLORE AND COPYRIGHT

6. Formal, logical reasons are given in Art. 3 of the Bulgarian Copyright and Neighboring Rights Act for the exclusion of expressions of folklore from the list of subject matter protected by copyright:
 - C.1. From the viewpoint of their authorship these works are impersonal, in other words the principle of non-identification applies to them. Their anonymity is unconditional (absolute) in contrast to the conditional (relative) anonymity provided for in Art. 7 of the Act, which presupposes the possibility of revealing the personality of the author and recognizing his authorship.
 - C.2. From the viewpoint of their existence in time, these works are termless. From time immemorial, they have been transmitted from generation to generation, and obviously this excludes the possibility of determining any initial starting point of their creation, and accordingly any term for their protection. Faced with these two negative elements (impersonality and timelessness), copyright legislation is unable to protect works (such as expressions of folklore) when they have no author and no definite reference point for their material existence.

D. INDIRECT PROTECTION OF THE EXPRESSIONS OF FOLKLORE

D.1. Explicit (indirect) protection

7. The unpromising prospects afforded by the Bulgarian Copyright and Neighboring Rights Act in terms of direct protection of expressions of folklore does not mean that there is no indirect possibility of such protection. For example, the Act first expressly envisages two possible indirect solutions in its Arts. 3.2.1 and 3.2.2:

D.1.1. Art. 3.2.1 concerns the protection of translations and adaptations of expressions of folklore.

D.1.2. Art. 3.2.2 concerns the protection of the arrangements of musical expressions of folklore.

D.1.3. It is worth pointing out that, although almost all copyright laws contemplate translations, adaptations and orchestrations as copyrightable derivative works, few of them expressly state that expressions of folklore are in this category as well, although in fact that is self-evident. Of course, in this case not only the derivative works are protected but also the incorporated expressions of folklore on the basis of which the new works were created.

8. The second thing is that the recent amendments to the Bulgarian Copyright and Neighboring Rights Act on May 6, 2000, include the definition of performing artists in Art. 74 as “those who perform expressions of folklore,” and that is consistent with the WIPO Performances and Phonograms Treaty (Art. 2.a).

E. IMPLICIT INDIRECT PROTECTION

9. The Bulgarian Copyright and Neighboring Rights Act includes texts which, while the implicit protection of expressions of folklore does not exist, could be applicable to their indirect protection.

E.1. Such is the case of Art. 3.2.3, which provides for the authors’ rights in collective works that include two or more works or materials of a given kind. Expressions of folklore could be regarded as such materials.

E.2. It seems to us that the material folklore products also could be protected as subject matter of the applied art, and especially folk art and craft (Art. 3.1.5 of the Act). Here the emphasis is on both the traditional and the artistic elements of one of the branches of folklore.

E.3. Finally, the recent amendment of the Bulgarian Copyright and Neighboring Rights Act included a new text in Art. 34a on the economic rights in unpublished works that are in the public domain. It has been borrowed from Council Directive 93/98/ EEC Harmonizing the Terms of Protection of Copyright and Certain Related Rights, and affords another possibility for the protection of expressions of folklore that are in the public domain *ab initio*.

10. In addition to these provisions for the indirect protection of expressions of folklore in the Copyright and Neighboring Rights Act, there is also a possibility for them to be protected by civil law, via the institution of what is known as unjust “enrichment” (Art. 45 of the Contract and Obligations Act). This should be discussed separately, however.

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