

QUESTIONNAIRE ON NATIONAL EXPERIENCES WITH THE LEGAL
PROTECTION OF EXPRESSIONS OF FOLKLORE

RESPONSE OF CHINA

Contact Details

Name: Mr. SHI Zongyuan
Title: Commissioner
Office/Organization: National Copyright Administration of China
Member State: China
Telephone: 0086-10-65276930
Facsimile: 0086-10-65280038

I. Application of the Model Provisions as a Whole

Question I. 1: Which Government ministry (ies), department(s), agency(ies) and office(s) in your country deals with questions concerning the legal protection of expressions of folklore?

Response:

- The National Copyright Administration of China (NCAC)

Question I. 2: Are the Model Provisions available in (one of) the official languages of your country?

Response:

- Yes. The Model Provisions are available in Chinese.

Question I. 3: Do “expressions of folklore”, either as described in the Model Provisions, or as the term is understood in your country, receive specific legal protection as intellectual property* in your national laws or regulations (whether the laws or regulations are related to intellectual property or not)?

Response: Yes

No

If yes:

(i) Please provide information on the relevant laws and regulations, such as their full titles, the relevant sections or paragraphs, dates of coming into force and the name and details of the Ministry, department, agency or office responsible for administering the laws and regulations. *Please provide the WIPO Secretariat with copies of the laws and regulations.*

Response:

- The Full title is “Regulations on the Protection of Works of Folklore of China (Draft Soliciting Opinion) (January 3 1997).” The Regulations have 24 articles in all, and has not come into force. NCAC should be responsible for administering the Regulations.

* The questionnaire concerns national experiences with the legal protection of expressions of folklore as intellectual property. This means specific legal protection of an intellectual property nature for expressions of folklore. Such protection may, but need not be, provided for in a State’s intellectual property laws. It may be provided for by *sui generis* (of its own kind) legislation, or as part of a law dealing with national cultural heritage, for example. The questionnaire is, therefore, not concerned with indirect, or incidental, protection for expressions of folklore, such as may be provided in certain cases by copyright, related rights or industrial property laws. It is also not concerned with the identification, preservation, promotion and dissemination of folklore, save to the extent that these may be relevant to the legal protection of expressions of folklore as intellectual property.

(ii) Are the relevant laws and regulations based, at least to some degree, upon the Model Provisions?

Response: Yes

No

II. *Application of the Principal Provisions of the Model Provisions*

(a) Basic principles taken into account for the elaboration of the Model Provisions

Question II. 1: What are the principles underlying the protection of folklore in your national laws or regulations?

Response:

There are three principles underlying the protection of folklore in our national regulations:

- for the purpose of developing and protecting the creation and dissemination of the folklore of China;
- for the purpose of preventing the illicit exploitation and other prejudicial actions described;
- for necessity of maintaining a proper balance between protection against abuses of folklore and encouragement of further development and dissemination of folklore.

Question II. 2: Do you have any comments on the principles taken into account in elaborating the Model Provisions? Do you believe that the principles are still viable? Are there any additional principles that should be taken into account in the any further development of the Model Provisions?

Response:

- We think the principles of the Model Provision are practicable, workable and still viable. We don't have any additional principles that should be taken into account in the Model Provisions.

(b) Protected expressions of folklore

Question II. 4: Is a term other than “expressions of folklore” used in your national laws or regulations to describe the kind of subject matter referred to in Section 2 of the Model Provisions? If yes:

- (i) What is the term?
- (ii) What subject matter does it cover?
- (iii) Why was that term selected?
- (iv) What subject matter would the term “expressions of folklore” cover in your country?

Response:

(i) The term is “works of folklore.”

(ii) According to the Regulations of Article 2, the subject matter refers to as “works of folklore”, regardless of whether the works have been fixed in tangible form, cover the following literary, artistic and scientific works where the author is unknown, but where there is every ground to presume that he or she is a national of China:

(1) verbal expressions, such as folk tales, legends, folk poetry, common proverbs and the librettos or scripts of ballad singers, etc.

(2) musical expressions, such as folk songs and national instrumental music, etc.;

(3) expressions by action, such as folk dance, folk operas, folk quyi (folk art forms including ballad singing, story telling, comic dialogues, clapper talks, cross talks, etc.), folk customs and rituals;

(4) tangible expressions, such as

a) production of folk art, especially drawings, paintings, murals (frescos), carvings, sculptures, pottery, mosaic, metalware, weavings and knittings, embroidery, ornaments and decorations, costume ornaments and designs, moulds of traditional arts and crafts and musical instruments;

b) artistic forms of folk architecture.

Question II. 7: Are there “expressions of folklore” or other examples or forms of traditional culture and knowledge which the Model Provisions do not protect, and which you believe ought to be protected?

Response:

- No

Question II.8: Please provide any additional information, comments or practical experiences on the scope of protected expressions of folklore.

Response:

- We don't have any additional information, comments or practical experiences on that.

(c) Acts against which expressions of folklore are protected

Question II. 9: Please provide information on the nature of the protection granted in respect of expressions of folklore in your laws or regulations. For example, which acts require authorization? Are the rights granted exclusive rights?

Response:

- We provide that two utilizations require authorization. One is any reproduction and distribution of a work of folklore; another is any public performance and broadcast of a work of folklore. The rights are granted exclusive rights.
- We provide that other acts don't require authorization, but one must pay remuneration. Firstly, broadcast of a work by wireless or cable means; secondly, distribution of a published work of that has been produced in the form of phonogram.
-The rights are exclusive rights.

Question II. 10: Which principles are used in your laws and regulations to determine which utilizations require authorization (for example, in Section 3 of the Model Provisions, the principles are whether or not there is gainful intent, and whether or not the utilization occurs outside the traditional or customary context.)

Response:

- When a work of folklore is utilized with gainful intent and outside its traditional or customary context, the authorization is required.

Question II. 13: Is the protection afforded by your laws and regulations limited in time?

Response: Yes

No

Question II. 14: Please provide information on the exceptions, if any, to the rights referred to immediately above in your laws or regulations. Are they regarded as adequate from the view point of both the custodians of folklore and users in your country?

Response:

- In the regulations, exceptions are regulated as following:
- Article 5 In the following cases, a work of folklore may be utilized without permission from, but with payment of remuneration to, in accordance with Article 10, the copyright owner, provided that the origin and the provider of the work utilized are clearly indicated in an appropriate manner:
- (i) broadcast of a work of folklore by wireless or cable means:
 - (ii) distribution of a published work of folklore that has been produced in the form of phonogram.
- Article 6 In the following cases, a work of folklore may be utilized without permission from, and without payment of remuneration to the copyright owner, provided that the origin and the provider if the work utilized are indicated in an appropriate manner:
- (i) use of a work of folklore for teaching and academic purposes, provided that the use shall not exceed the normal scope of teaching and academic activities;
 - (ii) appropriate quotation from a work of folklore in one's own work for purposes of introduction to, or comments on, a work;
 - (iii) borrowing of a work of folklore for creating an original work;
 - (iv) the unavoidable inclusion of work of folklore in new items in newspapers, periodicals, radio and television broadcasting;
 - (v) reproduction of a work of folklore in its collection by a library archive, art gallery of similar institution, for the purposes of the display, or preservation of a copy, of the work;
 - (vi) use of a work of folklore by the community which has created the work within the traditional or customary context with commercial or non-commercial intent;
 - (vii) copying drawing, photographing or video recording of a work of folklore located or on display in an outdoor public place;
 - (viii) use of work of folklore specifically for the invalids with non-commercial intent
- Yes. We think that they are regarded as adequate from the view point of both the custodians of folklore and users in our country.

Question II.17: Are expressions of folklore regarded in your country as:

Response:

- (i) The “property” of the country as a whole (as part of the national cultural heritage)?
- (ii) As the “property” of indigenous or other local communities within your country?
- (iii) As the “property” of individual artists whose works are based upon folkloric traditions?
- (iv) Neither (i), (ii) or (iii). Please provide further information.

Question II. 19: Does your law establish a “competent authority” and/or “supervisory authority” as referred to in Sections 9 and 10 of the Model Provisions?

Please provide information on the powers, funding, mandates, composition, responsibilities, functions and activities of such bodies in your country.

Please describe the procedure for obtaining authorizations to use expressions of folklore.

Are any fees payable for utilizations of folklore, and, if so, how are they determined and to which purposes are the fees applied (for example, for promotion of national culture)?

Response:

- We establish a competent authority and supervisory authority.
- The Ministry of Culture and the culture administration department of the local People’s Government are competent authority. Their main function is to give authorization, which includes to receive applications for authorization of the utilization and to decide on the scope of the utilization to be authorized.
- National Copyright Administration of China is the supervisory department for the protection of works of works of folklore. Its main functions shall be to approve the tariffs payable for the authorization of utilization of works of works of folklore and to supervise the distribution and exploitation of the fees collected.
- Anyone who utilized a work of folklore shall pay a fee to the competent cultural authority. The fee shall be no less than 7% of the profit made from the utilization of a work of folklore, and shall be used mainly for the following purposes: first, to support and assist the work of national folklore organizations, folklore artists, folklore research institutions, folklore museums, exhibition halls and archives; second, to subsidize the community creating and spreading folklore to carry out meaningful activities on traditional folklore; third, to protect and disseminate Chinese folklore works.

(e) Sanctions, remedies and jurisdiction

Question II. 21: Which remedies and sanctions are provided for in your national laws and regulations?

Response:

Anyone who violates the provisions of the Regulations, shall be subjected by the competent cultural authority to such administrative sanctions as warning, imposition of a fine, or confiscation of unlawful income from the violation.

Question II. 23: Are there instances in which expressions of folklore have received protection in your country by indirect means, such as under related rights?

Response: Yes

No

Question II. 25: Have there been instances in which folklore originating in your country has been exploited or otherwise utilized in a foreign country?

Response: Yes

No

Question II. 26: Do you believe that an international agreement for the protection of expressions of folklore is necessary?

Response: Yes

 No

Question II. 27: If yes, do you believe that the Model Provisions could serve as an adequate starting point for the development of such an agreement?

Response: Yes

 No

[End of response of China]