Copyright Bulletin

Vol. XXXVI, No. 2, 2002

Doctrine

News and information

DOCTRINE

African customary law and the protection of folklore

Paul Kuruk*

Contents

* Professor, University of Ghana, LL.B. (Hons.); Temple University School of Law, LL.M.; Stanford Law School, J.S.D.; Professor of Law, Cumberland School of Law at Samford University, Birmingham, Alabama; Executive Director, Centre for Indigenous Knowledge Systems of the Institute for African Development (INADEV), Accra, Ghana.

Portions of this article were previously published as part of a comprehensive treatment of the national, regional and international arrangements for the protection of African folklore. See Paul Kuruk, 'Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States', *American University Law Review*, Vol. 48, No. 769, 1999.

Introduction

References to folklore in African copyright legislation tend to emphasize its communal aspects. Ghanaian law for instance, defines it 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'.[1] Similarly, Nigerian law describes 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.'[2]

From these statutory definitions, it is evident that the scope of rights in folklore can be determined only with reference to the customary practices of specific communities. Unfortunately, current literature on the subject focuses disproportionately on technical difficulties with protecting folklore under intellectual property laws and glosses over other critical issues such as the nature of communal rights in folklore, why they are binding and how they are enforced traditionally. Understanding the strengths and weaknesses of folklore rights at the community level is essential to an appreciation of how the rights would be treated later under the statutory regimes which purport to enforce such rights in the same manner they are recognized at the community level. It is the objective of this article to remedy the noted defects in existing literature and to improve our understanding of the traditional system of rights in folklore.

Because folklore encompasses the uncodified practices of different communities, it forms part of the customary law of such communities and quite naturally will be subject to that system of law. Consistent with the focus of the article, Section 1 describes customary law, explains why it is binding and

describes the types of rights recognized under customary law as folklore. Presenting customary law in an historical perspective, Section 2 discusses the current status of customary law in the dual legal systems that emerged in Africa following the introduction of foreign law during the colonial era. After a discussion in Section 3 about the need to protect folklore and how that can be effected either through use of the traditional judicial process or through a courts system comprising the general courts and the statutory customary courts, difficulties with these enforcement methods are assessed in Section Four. The article recommends increased documentation of rights in folklore as well as flexibility in the methods of ascertaining and applying such rights as useful strategies for improving the protection of folklore.

The nature of customary law

General description

Customary law consists of the indigenous customs of traditional communities.[3] Every ethnic group in Africa has evolved its own discrete customary legal system of rules that are binding on its members. Unlike ordinary social habits and observances, the rules carry along with them local sanctions for their breach. For the most part, the rules are unwritten, though efforts are now being made to compile them in written form.

Customary laws are not uniform across ethnic groups. Differences in the customary laws of ethnic groups can be traced to various factors such as language, proximity, origin, history, social structure and economy. For example, the customary law system of an ethnic group in one town may be different from the customary law system of the ethnic group in a neighbouring town even though the two ethnic groups speak the same language. Thus, among the Kusasi language group in Ghana to which the present author belongs, it is possible to identify component ethnic groups such as the Agolle and the Toende, each with its separate customary law system. Generally, the customary law rules among ethnic groups speaking a common language tend to be similar, but the rather significant differences that can sometimes exist make it misleading to speak of a uniform customary law rule applicable to all members of the language group.

Customary law is not static.4 It is dynamic and its rules change from time to time to reflect changing social and economic conditions. As noted in one judicial decision, ‘one of the most striking features of native custom is its flexibility; it appears to have been always subject to motives of expediency, and it shows unquestionable adaptability to altered circumstances without entirely losing its character.’[5] Like any system of unwritten law, customary law has a capacity to adapt itself to new and altered facts and circumstances as well as to changes in the

economic, political and social environment.[6] Thus, it has adjusted to such influences as the introduction of European and other foreign legal systems in Africa, urbanization and the growth of a money economy. This dynamism of customary law is illustrated in customary law rules about land ownership where it is now possible to own land individually unlike earlier times where land belonged to the family as a group and no individual could own a piece of land absolutely or sell it.

Rights to folklore under customary law

Descriptions of the amorphous term 'folklore'[7] tend to emphasize its diverse nature[8] as consisting of, for example, the 'traditional customs, tales, sayings, or art forms preserved among a people.'[9] In this sense, it applies not only to ideas, or words, but also to physical objects.[10] Its oral nature,[11] group features[12] and mode of transmission through generations of people[13] are other equally important identifying characteristics.

Types of folklore identified in African statutes include poetry, riddles, songs and instrumental music, dances and plays, productions of art in drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, handicrafts, costumes, and indigenous textiles.[14] African community leaders have described folklore as including dispute-settlement processes and systems of governance, hairstyling techniques, traditional methods of preparing food, spices and drinks, meat-cutting techniques, languages, and historical sites.[15] Other examples cited are medicinal uses of plants and environmental and biodiversity conservation-related knowledge, such as knowledge of grass species, grazing and animal tracking systems, weather patterns, and knowledge relating to the preservation and use of natural and genetic resources. Finally, folklore is said to include farming and agricultural methods, traditional birthing methods, hunting skills, divine worship and spiritual aspects of healing.[16]

Customary law rules have evolved regarding production and use of these forms of folklore. Generally, rights to folklore are vested in particular segements of African communities and exercised under carefully circumscribed conditions. For instance, with regard to song, the recitation of *oriki*, a praise singing poetry among the Yoruba in Nigeria, is restricted to certain families.[17] 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.[18] In some communities, precise rules govern who can make, or play certain musical instruments, at what time and for what reasons they are played. Thus, the great national drums of the Lozi which are beaten only for war, or in national emergencies, are kept under the watchful eyes of a special council of elders.[19] Each Baganda king in Uganda has a select group of drummers

who play special drums to ensure the permanency of his office.[20] Among the Bahima of Uganda, only women keep harps while the Banyankole authorize only women to make harps which they use at home.[21] Among the Baganda, fifes are owned by and played mainly by herd boys.[22] In Nigeria, certain musical instruments are dedicated to the use of particular cults.[23]

Similar rules apply to crafts. Among the Tonga of Zimbabwe, crafts are subject to the sexual division of labour, with wood and metals assigned to men, the making of pots, baskets and mats to women.[24] Within this broad division, there is a further specialization, for not all men and women are skilled in the art assigned to their sex. Only those who have been instructed by an ancestral spirit are considered to have the right to work at a particular craft. In many cases, just a few specialists are needed to supply the demand of the community in wooden dishes, stools, drums, axes or spear blades. For example, in small communities, two or three women are authorized to make pots or baskets and may trade their surplus articles in a casual fashion with their neighbours. Significantly, they do not produce deliberately for the market. 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.[25] Among the Baganda, the Heart Clan makes ornate basketry only in Budu.[26]

The making of Banyoro pottery, which is known for its excellent quality, is reserved to a distinct class separate from the ordinary peasants.[27] In Nigeria, the Dakakari people have given exclusive rights to women to make funerary sculpture.[28] With respect to textiles, the chief of the Ashantis in Ghana is the trustee of the interests in all fabric designs, which he either reserves for himself or allow prominent royals or dignitaries to copy them for their use.[29]

Rights are also recognized in herbal medicine which is practised widely in African communities. Among the Baganda, for example, each clan has its medicine-men who through their skill and cunning, have gained an insight into character, and also into certain arts, which they use to their advantage. Medicine-men make fetishes frequently moulded into different shapes. Like the medicine-men, there are rainmakers who claim to possess mystical powers or secret knowledge.[30]

All these rights in folklore resemble modern intellectual property rights.[31] Rights sounding in copyright may be found in some traditional music, folk songs and tales, dances, paintings, sculptures, drawings, and designs on crafts, including pots, clothes, leather, wood, and calabashes. Also, marks on agricultural implements, clothing, and on works of art may serve identification functions akin to the role played by trademarks. For example, signs woven into certain clothes could denote their origin or the identity of the producers. Sophisticated technology rights evident in mining activity, canoe-building, construction of musical instruments, cloth-weaving devices, and practice of herbal medicine are also

reminiscent of patents. As is to be expected, these folklore rights are binding on members of the community under customary law. The bases of liability for breach of these rights are discussed in the next section.

Principles of liability under customary law

To understand why customary law rights such as those in folklore are binding, it is necessary to examine more closely the nature and significance of the social and political structure in tribal societies. The social organization of traditional societies is based on a strong pattern of kinship groups with the lineage as their basic constituent.[32] The lineage forms the foundation of a wide social group called the clan. A system of interclan linkages in turn constitutes the tribe made up of people belonging to different lineages but speaking the same language with the same traditions.[33]

Within each group there is a leader selected on the basis of seniority, who is accountable to the leader of the next higher group.[34] Thus, the leader of a nuclear family of two parents and their children, would be accountable to the leader of the lineage, who in turn is accountable to the clan leader, and then to the tribal leader, who usually is the chief. The leader controls farmland and other property of the group, arbitrates disputes and imposes punishment to control the behaviour of group members. In this regard, the powers of chiefs and lineage elders can be quite extensive.[35] In addition, they exercise added moral and ritual authority based on a perceived mystical association with the tribe's ancestors.[36]

Group relations are normative, and give rise to a series of well-defined rights and obligations, belonging to and owing to members of the group.[37] Kinship rights and obligations are specific when the individual is interacting with members of his lineage, but they become more general as the degree of kinship widens. Observance of all traditional norms, is secured through a system of sanctions that may vary according to the degree of kinship.[38] The form of punishment can range from censure, to fines, to ostracism or even expulsion from the group.

Several bases for the application of African customary law sanctions have been identified including religious and magical beliefs, notions of collective responsibility, and fears of ridicule and ostracism.[39] The religious sanction is premissed on the view of the clan as a continuous entity consisting of both the living and the dead who are equally concerned about the due observance of the law. The fear that ancestral spirits would unfailingly punish offenders ensures compliance with society's rules. Where the offence has already been committed, legal compensation is urged to avoid the spiritual retribution that could befall the offender. Magical sanctions are similar to the religious sanctions in that they are believed also to apply automatically after breaches of taboo. Thus, invoking a public magic ritual or even making a threat of witchcraft can create such a strong

fear of retribution to secure reparation from a recalcitrant offender. Because of the magical belief that funerary rites are necessary for a peaceful transition to the world beyond, the threat of non-performance of funerary rites for offenders could act as a powerful sanction to ensure compliance with customary law.[40]

Under the concept of collective responsibility, all clansmen are responsible for the actions of other clansmen and are required to protect them. The concept is important to the system of punishment in several ways. To begin with, it serves to deter unnecessary wrongdoing because of the inherent belief that any offense committed by clansmen would be avenged against any member of the clan. In addition, it increases the deterrent effect of expulsion as a form of punishment since an offender who has been expelled can no longer count on the support and protection of his ethnic group. Finally, the sanctions of ridicule and ostracism are premissed on the importance African society attaches to status. Although less effective than the preceding sanctions, the effect of public ridicule and ostracism is to deny the victim his status and so that he is no longer in a position to participate in communal activities till his offence has been purged and his status restored.

All these sanctions would be useful in securing compliance with the customary law rules on folklore. For instance, among the Tonga, commercial production of pottery is frowned upon on the magical belief that the pots intended for sale would break during the firing process.[41] Also, the fear of being laughed at may cause a man to reconsider flouting a folklore right reserved to women.[42] Furthermore, since sacred objects tend to be associated with ancestral worship, the desecration or unauthorized use of such items can be checked through fears of the inevitable infliction of religious ancestral retribution upon the offender. Similar considerations apply to the practice of traditional medicine, which is believed to be reserved only to individuals chosen by the ancestors. Because punishment will not be limited to the individual but could also apply to his children, spouse, relatives and even clansmen under the notion of collective responsibility, a party would not deliberately set out to ignore rules regarding use of a sacred object considered part of folklore.

The status of customary law in the African legal system

Statutory customary courts: a colonial legacy

From time immemorial customary law was the principal system of law in African communities. However, this exclusivity was broken in the nineteenth century when European colonialists introduced their own metropolitan law and system of courts into their colonies, but retained so much of customary law and the African judicial process that they did not deem contrary to basic justice or morality. The

result of the imposition of colonial rule, therefore, was to produce a dual or parallel system of courts and laws in African countries.

In the colonies, dualism was reflected on the one hand, by the establishment of Western type courts presided over by expatriate magistrates and judges whose jurisdiction extended over all persons in criminal and civil matters. These courts, hereinafter referred to as 'general courts', applied European law and local statutes based on European statutes. A second group of courts was established composed of either traditional chiefs or local elders. Depending on the colony the latter courts were referred to as 'African courts,' 'native courts,' 'native authority courts,' 'primary courts,' 'local courts' or 'people's courts.' These courts had jurisdiction only over Africans and for the most part, applied the customary law prevailing in the area of the jurisdiction of the court. They were supervised by administrative officers, who also had control over the appointment and dismissal of the court members. Attorneys were not allowed to appear before these courts or tribunals.

In this article, this second group of courts will be referred to as 'statutory customary courts*í* to denote that they were created by statute. However, it must be pointed out that their creation did not mean the abolition of the traditional adjudication systems in place before the advent of colonialism. The statutory customary courts only formalized selected aspects of the traditional systems that suited the practical purposes of the colonial administration. While not recognized at an official level, the traditional adjudication systems left intact by the colonial administration continued to be used by the parties as they wished. These traditional adjudication systems, which are described later, will be referred to as 'non-statutory adjudication systems' to distinguish them from the statutory customary courts.[43]

It should also be noted while the statutory customary courts were created mainly to apply customary law, their jurisdiction in this area, even at a formal level, was not exclusive. Provision was also made for the general courts to determine and apply customary law when it was raised in legal proceedings. At first, customary law[44] and the general courts developed separately with no connection between them. However, towards the end of the colonial period, an integration of the dual courts system was initiated by conferring supervisory jurisdiction on the general courts over statutory customary court proceedings. There was also a gradual change of personnel of the statutory customary courts from the traditional chiefs and elders to young lay magistrates who were given some basic training in law. Some of the procedures at the general courts were also slowly introduced into the statutory customary courts.

These broad features in the development of the dual legal system can be illustrated with reference to the evolution of the legal system in Ghana. Pre-colonial law in Ghana was essentially customary in character, having its source in the practices and customs of the people. During the colonial era, the colonial

administration continued to recognize customary law, but also passed local laws in addition to the existing English law it incorporated into the colony. Reflecting this dichotomy in the types of law, the colonial administration in Ghana divided formal judicial power between two systems of courts, one administering the customary law of the bulk of the African population and the other applying received English law and the recently developed national law adopted by the local legislature. English law was administered by the subordinate courts, the High Court and the Court of Appeal, all of which are referred to in this article as general courts. The practice and procedure followed by these courts was in substantial conformity with the law and practice observed in English courts.

Customary law was administered in Ghana mainly through the native courts, which the colonial governor was empowered to create.[45] Appointment to membership of a native court was not based on a person's position or status in the community, though the governor for the most part selected chiefs and elders. Special training of the appointees was not required, but it was generally assumed that they were conversant with the customary law practices of their respective areas. Personal jurisdiction of the native courts was based on ethnicity while subject-matter jurisdiction was limited to civil claims under native customary law and certain customary offences.

The system of native courts was retained after Ghana's independence in 1957. However, under the Local Courts Act of 1958, the native courts were renamed 'local courts', a nationally uniform system of local courts was established without the hierarchy of grades formerly used, and an effort was made to eliminate the racial criterion for jurisdiction over persons which had applied in native courts.[46] The new Act also reflected an effort to maintain a higher quality of operation in the local courts through standards of efficiency for appointment as a court officer and the periodic inspection of court records.

Ghana's experience with local courts is not unique. Similar institutions are found in other parts of Africa. For instance, throughout Malawi's colonial history, jurisdiction over Africans in cases involving issues of customary law and in simple criminal cases was left to be determined by the traditional courts.[47] Unlike Ghana, Malawi maintains a clear hierarchy of traditional courts consisting of different grades of traditional courts at the lowest level, then district traditional courts, district traditional appeal courts, regional traditional courts and the National Traditional Appeal Court. All these traditional courts exercise both civil and criminal jurisdiction except the regional traditional courts, which have original criminal jurisdiction only. Generally, the jurisdiction of traditional courts is exercised in cases where the parties are Africans, but the minister in charge of traditional courts may extend the jurisdiction of any traditional court to include non-Africans. The hearing of a civil case is conducted in accordance with the customary law prevailing in the area of the court's jurisdiction.[48]

In the case of Zambia, the Native Courts Ordinance of 1939 initially governed

its native court system.[49] The governor during the colonial period had the exclusive authority to establish native courts upon which were conferred jurisdiction in civil matters involving Africans. The courts also exercised criminal jurisdiction where the accused was an African, except in cases where a non-African could be called as a witness and or where the governor had directed that any party not be subject to the jurisdiction of native courts. The practice and procedure of the courts were determined by customary law and their records subject to review by the Commissioner of Native Courts. In 1966, Zambia's native courts were reorganized and renamed 'local courts'with limited civil and criminal jurisdiction. The Judicial Service Commission now appoints members of the local courts whose decisions can be appealed to the subordinate courts and then to the High Court and finally to the Supreme Court. Supervision of the work of the court is ensured through advisers and officers appointed for this purpose.[50]

The current status of customary law

Three basic approaches can be identified regarding the place of customary law in the legal systems of post-independence Africa. The English-speaking countries have retained much of the dual legal structures created during colonial rule while attempting to reform and adapt customary law to notions of English law. On their part, the French- and Portuguese-speaking countries have pursued an integrationist course by trying to absorb customary law into the general law. Only in Ethiopia and Tunisia have some radical measures been adopted to abolish legislatively carefully selected aspects of customary law. However, regardless of the approach adopted, in no African country is customary law totally disregarded, or proscribed. It continues to be recognized and enforced, albeit to a different degree depending on the jurisdiction.

National constitutions and statutes authorize it as a major source of law to be determined and applied in legal proceedings when it is raised by the parties. For instance, the Constitution of the Fourth Republic of Ghana describes the laws of Ghana to include the 'common law' which in turn comprises the rules of customary law.[51] Under the same constitution, customary law refers to rules of law that by custom are applicable to particular communities in Ghana.[52] Since it is part of the national law, customary law will be enforced in judicial proceedings. This status of customary law is especially useful to folklore, which essentially is a body of rights derived from customs and practices of members of a given community. The enforcement mechanisms available under customary law and which are relevant to the protection of folklore are elaborated upon in the next section.

Protecting folklore under customary law

The case for protection

In pre-colonial times, works of folklore were produced and used within the local community. Large-scale production of folklore was not required and the limited production was generally enough to satisfy the needs of the community. For the most part, there was little if any commercial exploitation of folklore. However, that is no longer the case today where advanced technological processes and increased interest in traditional culture by foreigners have led to exploitation of folklore at a level never before seen.

Arts and crafts are now sold openly in retail markets while indigenous dance and music are copied by record companies and performing groups, and presented as original compositions or choreography. Some individuals and companies also formerly register folklore themes under trademark law as a way of preventing others from using them. Ethnobotanists backed by pharmaceutical companies and governments have invaded tropical areas to tap into the local knowledge of the medicinal value of plants which in turn could be used to develop drugs for sale. On their part, research scientists collaborate with indigenous farmers to obtain local crop varieties to improve seeds under so-called biodiversity programmes.

Associated with these forms of commercialization of folklore is a serious concern that traditional societies may be short-changed or even harmed during the process. Such harm is reflected in issues regarding compensation, expropriation, degradation, misrepresentation and general control over the use of folklore. With respect to compensation, it has been determined that in many cases where traditional art or knowledge is exploited, the communities derive hardly any economic benefits. Where the communities are compensated, the benefits often pale in comparison with the huge profits made by the exploiters.

Regarding expropriation, traditional communities may be harmed by forms of exploitation that lead to the permanent loss of irreplaceable property to museums and art galleries. There is expropriation when valuable pieces of folklore are removed from the traditional communities and sent overseas. It is hardly surprising that there is more African art in major Western cities such as New York, London and Paris than in African cities. While some of these items may have been sold or given away by traditional elders, in other cases, the items were probably forcibly removed, particularly during the colonial era.

As to the degradation of cultural items, such harm may occur where the items are displayed outside their traditional setting and for purposes different from those for which they were originally created or where religious artefacts are sold as mere decorative art. Limitations on the use of the works of folklore to special occasions and rituals are not likely to be respected when such works are commercialized. Thus, a sacred object of an indigenous group would be used

openly and irreverently in the West. Even where African dances are copied and performed abroad, there is a denigration of African culture to the extent that the 'non-African actors cannot lend the gestures that communicate warmth specific to Africa.'[57] As one writer laments: 'It 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 songs often take the form of . . . banal impersonal shows devoid of the characteristics peculiar to . . . folk dances. . . . As for the garishly-coloured costumes worn by the dancers, they are a travesty of the originals.'[58]

Related to issues of degradation is the harm caused by misrepresenting works of folklore as regards to quality and the values they depict. Mass-produced items sold as traditional crafts can raise authentication problems to the extent they do not have the same attributes as the traditional items. Moreover, folklore expresses important values in traditional societies, which the mass-produced items cannot possibly have since they did not originate in those societies. Thus, 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.'[59] Finally, control issues are implicated where consent of the elders in the community is not sought prior to the exploitation of a work of folklore.

It is critical to protect folklore from these harmful consequences, particularly in light of the obvious significance of folklore to life in traditional societies. Folk songs and tales are used to build African character because of their frequent references to morality and integrity. As one writer put it, folktales developed in part from the 'need to impress on men the moral truth that wickedness and cruelty would in the long run meet their due reward.'[60] from its entertainment value, music serves as a means of recording history by preserving information about important past events. It is used in rituals and festivities and plays various roles including as a palliative in healing, as part of war preparation, and as a means criticizing or checking governmental abuses. 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.[61]

Enforcement mechanisms for customary law relevant to folklore

Elders or chiefs in traditional societies can respond to some of the adverse consequences of the commercial exploitation of folklore by utilizing the enforcement mechanisms available under customary law. This can be accomplished at one of two levels. The first is the non-statutory adjudication systems of chiefs and elders left intact but not officially recognized by the colonial

and post-independence governments. The second involves the institution of judicial proceedings in national courts which would ascertain and apply the relevant customary law rules. As explained earlier, the second mechanism comprises the general courts and the statutory customary courts established by statute as part of the dual legal structures in Africa. Therefore, a party aggrieved, for example, by the unauthorized use of folklore involving the sale of a sacred object could refer the matter for resolution to either the community elders and chief on the one hand, or to the general courts or statutory customary courts on the other (assuming the necessary jurisdictional foundation is satisfied). The scope of enforcement available under each of these two principal methods is described below.

Non-statutory adjudication systems

The non-statutory adjudication procedures under customary law vary depending on whether the society is centralized or not. In centralized societies, elaborate administrative machinery exists and the constituent units of the society tend to be bound together by common interests and loyalty to a political superior, usually the chief or king.[62] Non-centralized societies on the other hand, have no one single authority enjoying a concentration of political, judicial or military power capable of controlling by direct decrees the activities of members of the group and the judicial system tends to depend mainly on the authority of lineage elders derived from their seniority in the group.[63]

With regards to the commencement of legal proceedings in centralized societies, the aggrieved party typically complains to a neutral elder such as the head of the family or lineage, where both parties to a dispute belong to the same household or lineage.[64] The elder then sends for the other party to appear before him to be told of the case against him. If the dispute involves two lineage heads or two subchiefs, a third is normally contacted to resolve the problem. The matter can be referred to a local chief at the initiative of the third elder or by the disputants themselves, especially where the refusal of one of the disputants to submit to adjudication could adversely affect relationships between them and their respective families. The local chief then has a clear duty to report the matter to the paramount chief or king. Societies without chiefs also recognize dispute resolution through individual lineage elders in the first instance subject to further appeals to an ad hoc council of elders constituting various family or lineage heads of the local community.

At any hearing that is part of the customary judicial process, the principal method of obtaining evidence is to call human witnesses.[65] The complainant usually states his case first and could substantiate important allegations by calling witnesses. His presentation is then followed by that of the defendant's who may also call his own witnesses. The parties and their witnesses could be asked

questions by the elders to clarify issues or to focus the proceedings on the relevant issues. Members of the audience with useful information can also be heard. In centralized societies, the proceedings are characterized by a great deal of formality, but tend to be more casual in societies without chiefs.

After listening to the parties and witnesses, the elders or chief would render their verdict. The losing party could be censured or fined. Where compensation is ordered, the amounts assessed are generally flexible and take into account factors including the capacity of the guilty party to pay as well as the victim's willingness to accept a lower or substituted assessment.[66] In serious cases, the offender may be ostracized or expelled from the society.

If the losing party refuses to comply with the judgement by not paying the fine or making restitution as ordered, the chief and appointed officials in centralized societies have clear responsibilities to enforce the judgement.[67] Less centralized methods of enforcement are found in societies without chiefs. Among the Ibos, for example, recalcitrant offenders may be brought to book by an ad hoc group of young men authorized by the elders for this purpose. The Fanti of Ghana and the Yoruba of Nigeria have a system of self-help whereby the creditor can place the debtor or his house under surveillance and create such a nuisance as would compel the debtor to pay up to avoid continued embarrassment.[68]

Pressure to comply with a judgement can come from family members, friends and other members of the community concerned about the effects of non-enforcement on the family and the community itself. The forms of pressure that could be applied against a recalcitrant offender have 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. Neighbouring 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.[69]

Application of customary law by the general courts and the statutory customary courts

The practice and procedures of the general courts, and to a limited extent, of the statutory customary courts, are patterned along those of Western-type courts. These courts therefore have power to compel appearance of parties, conduct hearings in accordance with specified court rules and enforce their decisions as provided by law.[70] However, examination of these courts' powers falls outside the scope of this article. Instead, we focus on two central issues concerning how those courts ascertain customary law and go about applying it in cases before them.

Ascertainment of customary law

With respect to the ascertainment of customary law, the members of statutory customary courts are presumed to know the customary law and be able to apply it on the basis of their own knowledge, although a party relying on a particular custom is also free to call witnesses to prove it. However, the judges in the general courts are not presumed to be familiar with customary law and are prevented from relying on such personal knowledge as their prior experience might provide. As a rule, the party relying on customary law is required to establish an adequate basis by allegation and proof for the court's application of customary law. As held by the West African Court of Appeal in the landmark case of *Angu* v. *Attah*, 'where a party intends to set up and rely upon a native law and custom it must be specifically alleged and pleaded.'[71]

After proper pleading, customary law can be 'proved in the first instance by calling witnesses acquainted with the native customs.'[72] Such proof may come from chiefs, linguists, assessors or others who could be qualified as experts on customary law. Customary law could also be proved by referring to books or manuscripts recognized as legal authorities,[73] or to reports from statutory customary courts on questions referred to them. Moreover, statutes, declarations or case law would also be accepted in proving customary law.

Recognizing that the determination of customary law as fact by the introduction of evidence is inconvenient and time-consuming as well as productive of uncertainty, the *Angu* v. *Attah* case has also suggested the possibility of dispensing with evidence when 'the particular customs have, by frequent proof in the courts, become so notorious that the courts take judicial notice of them.'[74] This case therefore opened the door for the ascertainment of customary law as a question of law through the taking of judicial notice of well established rules of customary law by the general courts and the statutory customary courts.

Validity of customary law. Once ascertained, customary law is to be applied by the courts subject to the following conditions.[75] The first is that the customary law rule is not repugnant to natural justice, equity and good conscience; and the second is that it is not incompatible either directly or by implication with any law for the time being in force.[76] While no detailed description of the repugnancy

clause has been provided, several courts have taken the position that the clause is intended to invalidate 'barbarous' or uncivilized customs. Thus, in *Re Effiong Okon Ata* the court held that a custom whereby the former owner of a slave was entitled to administer the personal property of the slave after the slave's death failed the repugnancy test.[77] In applying the repugnancy test, it is not within the province of the courts to modify an uncivilized custom and apply the modified version of the custom.[78]

The test of incompatibility has generally been limited to laws specifically enacted by the local legislature but in theory, it could apply to received Western law as well.[79] A rule of customary law on a subject-matter is incompatible with a local statute if the statute is manifestly intended to govern that subject-matter to the exclusion of customary law.[80] There is direct incompatibility where the statute states expressly its objective to abolish or modify the customary law rule. However, where the co-existence of a rule of customary law and the statute is not inconsistent with the manifest object of the statute, it is clear no issue of incompatibility is raised. But where, notwithstanding the fact that the statute does not expressly abolish or modify a customary law rule, the co-existence of both is inconsistent with the manifest object of the statute, it is plausible to argue against the enforcement of the customary law rule on grounds of implicit incompatibility. In every case, it is a question of construction whether a statute on a particular matter abolishes or modifies the customary law on the matter or is intended to co-exist with the customary law.[81]

Thus, in proceedings before the general courts or statutory customary courts, where a right to folklore is at issue, the courts would ascertain the existence of such a right by calling for proof of the right which will then be enforced if it is found not to incompatible with statute.

Problems with protecting folklore under customary law

Non-statutory adjudication systems

From the discussion in Section 2, it is apparent that customary law protection of folklore relies on norms and sanctions that seem to make sense only to members of ethnic groups. 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 of folklore.[82] Since many of the individuals engaged in the unauthorized use of folklore are foreigners,[83] they may not have the incentive to respect the norms in the interest of the general community. Where those individuals using folklore are outside the relevant community, fear of sanctions as a factor in securing

compliance is simply nonexistent due to the elders' lack of jurisdiction, and the lack of common, communal and ritual interests.

Even with respect to indigenous collaborators residing in the community, who should be bound by the norms, socio-economic 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,[84] and as a gesture of generosity emanating from abundant resources.[85] The advent of the modern state, however, has dispensed with the need for mutual co-operation to protect the community.[86] 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.[87] As a result, considerations of communal interests seem to have given way to individualistic notions with their attendant commercialism.[88] 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 folklore interests.

General courts and statutory customary courts

Judicial enforcement of customary law is authorized as we have seen in cases falling within the jurisdiction of courts created by statute. Statutory customary courts have been set up specifically to determine and apply only customary law, while the general courts could determine and apply customary law in addition to the general law. African copyright statutes are part of the general law and the provisions in such statutes referring to folklore will therefore fall within the jurisdiction of the general courts. It should be clear, however, that even without the specific statutory references, rights in folklore would still be protected through the general courts or statutory customary courts simply because they are customary law practices. In this sense, the statutory references constitute merely an additional but not the only basis for enforcing folklore in the court system.

An advantage of judicial enforcement is its complementarity to the authority of elders and chiefs which is part of the non-statutory adjudication systems, particularly in cases where such authority is flouted. Thus, parties could be compelled to appear before the general courts and statutory customary courts, and judgements against them enforced through sanctions specified by law. However, certain problems in the judicial ascertainment and application of customary law limit its effectiveness in the protection of folklore.

First, is a concern that the practice of measuring the validity of customary law under English law notions of repugnancy could render irrelevant the customary

law rules on folklore. The incompatibility test is problematic where the intention to abolish or modify a particular customary law rule is not clearly expressed in a statute. This is precisely the case in intellectual property matters where the African copyright laws typically refer to the protection of folklore but do not state whether such protection is to be guided by the criteria outlined in the statutes. Given the obvious similarities between intellectual property and folklore, it may be tempting to measure rights to folklore against the statutory criteria. In so doing, one may unfairly deny recognition of a claim to folklore under the incompatibility test because, for example, the unlimited period of protection available under customary law is inconsistent with the finite periods recognized for intellectual property. However, it is palpably wrong to use intellectual property criteria to invalidate customary law rules because folklore is so inconsistent with intellectual property law that prescribing an incompatibility test by reference to intellectual property statutes means the virtual abolition of rights in folklore. Such a destructive effect could not have been the intent of the legislature, especially as African governments have historically recognized customary law and have accommodated it under their legal systems.

Second, the effectiveness of the general courts and statutory customary courts could be circumscribed by jurisdictional problems since powers of these courts tend to be defined in terms of ethnicity, territoriality and nationality. For example, the statutory customary courts have no jurisdiction over local persons who have embraced Western ways of life. Also, both courts lack personal jurisdiction where potential defendants leave the country. Even where the defendants are resident in the country, the courts are able to resolve claims against parties who have moved out of the courts' respective local spheres of influence. Interestingly, due to the implications of nationality, the courts may sometimes lack jurisdiction even over some defendants that would be subject to the non-statutory adjudication process. For instance, because African boundaries drawn during the colonial era often cut through tribal communities, the courts would be unable to determine an issue involving a party who has moved across the border to join kinsmen in a neighbouring country, but such a jurisdictional problem is unlikely to occur under the non-statutory adjudication systems since the authority of the elders or chiefs transcends nationality and would extend to the whole social unit including portions of it located in another country.

Third, evidence of a continuing weakening of the status of customary law in modern legal systems constitutes a problem because as customary law becomes less important as a source of law, it also loses its effectiveness as a method of protecting folklore. The whittling away of customary law can be attributed to various factors including the lack of official recognition of non-statutory adjudicating systems, government assumption of control over aspects of customary law through statutory customary courts, the codification of customary law, the subjection of customary law to tests of repugnancy and incompatibility, the

general assumption that Western law is superior, and the abandonment of teaching of customary law in educational institutions.[89] In some countries, no serious effort has been made to study and implement customary law, relegating it to the unenviable status of the 'nearly forgotten source of law.'[90] Customary law would remain an effective method of protecting folklore only in so far as it is recognized and applied in the legal system through the general courts and statutory customary courts. Consequently, unless concrete remedial steps are taken to enhance the status of customary law, the benefits of its application to folklore will be lost.

Besides these general issues, there are more specific problems having to do with how the courts identify and apply customary law in cases before them. To begin with, the general courts and to some extent, the statutory customary courts, would be confronted with a fundamental definitional question regarding the size of the group whose practices ought to be taken into account in ascertaining the applicable customary law rules on folklore. 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 cultural traits,'[91] significant variances in customary law could exist based on the size of the group that is the subject of focus such as the lineage, clan, tribe or language group. For instance, a problem with the view of customary law as a question of law is the tendency to assume that customary law rules are uniform in an apparently homogeneous group[92] and to ignore significant differences in customary practices among sections of a tribe where a customary rule is defined broadly in terms of the tribe. Thus, the absence of an acceptable definition for the social group relevant to the formation of folklore rights would continue to frustrate efforts to identify and enforce those rights.

At a general level, the unwritten character of customary law contributes significantly to problems with ascertaining and enforcing it in the general courts and statutory customary courts. Because it is transmitted orally from generation to generation, customary law contains a margin of error that makes it impossible to achieve the same level of clarity and precision frequently sought in Western legal concepts.[93] This imprecision and uncertainty in customary law rules is compounded by the different goals of traditional adjudication systems where the emphasis is on negotiation[94] leading to compromise and reconciliation of the parties, rather than the rigid application of rules to facts.

Because customary law is largely imprecise and the application of rules not important, it is not surprising that it is applied flexibly in non-statutory adjudication systems[95] where only arbitrary distinctions are drawn between legal rules and other types of social conduct. For, the typical non-statutory adjudication system will not hesitate to invoke social norms to supply the criterion of right and reasonable behavior nor will it hesitate to rebuke or condemn the offender on the basis of such non-legal rules. Due to this mixture of legal and non-legal rules in non-statutory adjudication systems, the general courts and the statutory customary

courts should exercise caution when called upon to apply as customary law all rules claimed to have been derived from non-statutory adjudication systems. Failure by the general courts and the statutory customary courts to discriminate between custom having the force of law and that which lacks that force[96] inevitably results in errors as to what constitutes customary law.[97]

In this context, it is important to note that research into the activities of the statutory customary courts has called into serious question whether those courts even actually apply 'customary law' as such.[98] This is consistent with the findings of another researcher that 'actual court cases were not concerned with the identity of rules and that courts did not develop a rule-orientation of their own initiative.'[99]

The particular methods relied upon by the general courts and the statutory customary courts in ascertaining customary law are also prone to error. As noted by Cliff Thompson, what little is known about customary law from the judgements of the state courts is potentially suspect because the judges who are expert in dealing with custom are outnumbered by those who, through no fault of their own, have neither experience nor training in either the nature or substance of customary law. The potentiality of error is increased by the surprising fact that there are no official guidelines for determining customary rules. Where relevant anthropological research is available, a court may use it, but otherwise the methods of determination vary considerably, particularly in the lower courts. Within a single province there may be one district judge who relies on the evidence of tribal elders, another who depends on the advice of his clerk because he happens to be a member of the tribal group concerned, and yet another who strictly applies his predecessor's memorandum on the local customs. Because some of these judicial techniques are of doubtful merit, there is an urgent need for a study leading to the drafting of minimum standards for the methods by which courts determine the substance of customary law.[100]

Contrary to expectations, members of statutory customary courts may not have deep knowledge of the relevant customary law rules in their areas of jurisdiction, especially where diverse practices are found among sections of an apparently homogenous tribe. There is therefore the danger that the rule applied by a member of a statutory customary court on the basis of his personal knowledge may not accurately reflect the rule of the particular locality. Where witnesses are used, there would be the usual problems of misrepresentation through witness bias, ignorance, corruption, tendency to idealize the law, (and therefore present what ought to be and not what is, the law) or failure to appreciate that traditional law may have been modified by subsequent practice and court decisions.[101] Where chiefs are relied upon to declare customary law, problems of accuracy may exist because chiefs concurrently exercise executive and judicial powers and it may be difficult to know whether the declared law is one that reflects actual practice or rather what the chief would rather see as the law. Additionally, chiefs often tend to be behind their communities in terms of the

current legal thought and practice, and this may also result in problems of divergencies. [102]

With respect to proof through case law, no clear doctrine has emerged regarding the effect of previous judicial decisions on customary law. Where the cases are treated as authority, problems may arise over the relative status of case law and customary practice, particularly in the general courts.[103] Reliance on codified legislation on customary law is also problematic since codification freezes customary law in time and its rules would become less customary, fossilized and far removed from experience and the comprehension of the people. This is all the more likely since the process of legislative amendment or adjustment to the changing needs of society is notoriously slow.[104]

Similar problems arise with proof of customary law through judicial notice. Although useful as a convenient and clear method of ascertaining customary law, judicial notice could impede the development of customary law and divorce it from the ongoing life of the community. Therefore, strict adherence to case law and codified customary law in the general courts and to some extent, in the statutory customary courts would only lead to gaps between customary law as practised by the people and what is administered by the courts. At a more theoretical level, a related problem with ascertaining customary law through case law or codified law is that the basis of the application of customary law changes. For, customary law is based on the fact that it is habitually obeyed by those subject to it, but once codified or settled by judicial decision, its binding force then depends on the statute or the doctrine of precedent.[105]

Given the different objectives anthropologists and lawyers appear to have when they examine social practices,[106] some concerns may also be raised about the use of anthropological works by general courts and the statutory customary courts. While the lawyer may be concerned about the binding nature of customary law, and therefore with rules that can be enforced by the courts, that is not the central part of the work of the anthropologist. Therefore, not every practice referred to in an anthropological work rises to the level of customary law and indiscriminating use of such work would sometimes lead to error. The problem with the statement of normative rules by anthropologists is not that they are erroneous per se. Indeed, they are accurate as representing what the anthropologists were told by the people they studied. The error however, is in failing to recognize that the asserted rules are often subject to important qualifications not noted by those consulted.[107] Even where anthropological works identify proper legal rules, they may be viewed as too authoritative and treated as a type of legislation with the same ossification problem noted in connection with codified customary law.[108]

Rules compiled through interviews of members of traditional communities are sometimes unreliable as customary law since the interviews are often directed towards obtaining abstract rules which fail to show the function of the rules in the social system. Besides, the interviews could yield distorted views of customary

practices due to individual opinions and pre-conceptions of the interviewer or the person being interviewed.[109] In contrast, rules obtained through observation of actual cases of the non-statutory adjudication systems are more reliable than interviews as the cases tend to be more accurate and comprehensive, show what kinds of problem actually arise for resolution, and also provide an insight into procedural aspects of customary law. However, reliance on observed traditional cases alone may not be practical, as it may be necessary to follow the activities of the traditional adjudication systems for years before a picture of the law emerges. Even then, there may be gaps in knowledge where customary law matters of interest have not come up for resolution.[110] Legal textbooks are by far the preferred sources of customary law as they separate the 'wheat of legal principles from chaff of cultural and economic irrelevancies,'[111] are more precise in formulation of legal rules than anthropological works, evaluate principles, lack authority and therefore are more flexible than statutes. However, as no known textbooks have been prepared on the subject, this method of ascertaining folklore is currently not available to the courts.

Conclusion

This article has established the basic principles of liability under customary law and shown the relevance of customary law to the protection of folklore. Customary law has adapted to the colonial experience and is today an important component of the legal system in post-independence Africa. Although folklore can be enforced under customary law through the non-statutory adjudication process, on the one hand, or by the general courts and statutory courts, on the other, the former method has been shown to be limited by its reliance on sanctions that are meaningful only to members of the community. While the general courts and the statutory customary courts offer a useful complement to the non-statutory adjudication process, they may also be affected by jurisdictional problems. In addition, the standards followed by the courts in ascertaining customary law and measuring its validity could lead to the enforcement of rights in folklore that are out of step with current practices in the community

Despite these limitations, disuse of customary law in protecting folklore is not recommended. Indeed, such a move would be highly impractical or even illogical as it is the customary practices that define what constitutes folklore in the first place. This inextricable link between folklore and customary law is emphasized in the statutory definitions of folklore noted at the beginning of this article. Rather than discourage the use of customary law, the approach preferred here is to improve on the current methods of ascertaining and applying rules relating to folklore.

The courts should continue to require proof by witnesses and take judicial

notice of the rules of folklore as warranted. Complementing this, however, should be efforts to identify rules governing the use of items of folklore and to compile them in a database that would be available to the public, including the courts. Such documentation of the types of folklore found in different communities would facilitate the application of customary law rules by making it easier to associate the types of folklore with certain traditional communities. However, to avoid the problem of freezing customary law, departures by courts from the recorded rules should be permitted where the evidence suggests that the recorded rule has changed. Furthermore, in deciding whether to enforce a customary law rule, a court should not test its validity with reference to intellectual property statutes unless such statutes expressly abolish or modify the relevant right of folklore.

Notes

1. Ghana, Copyright Law, P.N.D.C.L. 110, (1985), Art. 53.
2. Nigeria, Copyright Act, Cap. 68. (1988), Art. 28(5).
3. Akintunde O. Obilade, *The Nigerian Legal System*, p. 83, 1979.
4. E. Cotran and N.N. Rubin, *Readings in African Law*, p. xix, 1970.
5. *Lewis* v. *Bankole*, 1, *Nigerian Law Reports* Vol. 81, pp. 100–01, 1908.
6. Cotran and Rubin, op. cit., p. xx.
7. 'Definitions of Folklore', *Journal of Folklore Research*, pp. 255, 263; reprinted from (M. Leach (ed.) *Funk and Wagnall's Standard Dictionary of Folklore, Mythology and Legend*,1959 (referred to hereinafter as Definitions).
8. 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 Botkin, in Definitions, pp. 256–7.
9. *Webster's Ninth New Collegiate Dictionary*, p. 479, 1987.
10. As Archer Taylor (Definitions, p. 263) 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 [?marches], jests, legends, cumulative tales, exempla, fables, etiological tales), ballads, lyric folk song, children's songs, charms, proverbs and riddles.'
11. According to William Bascom (Definitions, p. 258), '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'.

12. For example, Theodor Gastor (Definitions, p. 258) 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.'
13. According to Botkin (Definitions, p. 256), '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.' See also Niedzielska, 'Intellectual Property Aspects of Folklore Protection, (*Copyright*, No. 339, 1980, p. 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.'
14. Nigeria, Copyright Act, Cap. 68, (1988), Art. 28(5).
15. World Intellectual Property Organization, *Intellectual Property Needs and Expectations of Traditional Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998–1999*), p. 98, WIPO, 2000.
16. Ibid., p. 174.
17. Bankole Sodipo, *Piracy and Counterfeiting: GATT, TRIPS and Developing Countries*, 1997, p. 44, citing B. Kingslake, 'Musical Memories of Nigeria', *Journal of International Library of African Music*, Vol. 1, No. 20, 1957.
18. E. Colson and M. Gluckman, *Seven Tribes of Central Africa*, p. 39, 1968.
19. Ibid., p. 47.
20. John Roxscoe, *The Baganda: An Account of their Native Customs and Beliefs*, pp. 25–37, 1965.
21. John Roscoe, The *Northern Bantu*, p. 140, 1966.
22. Roscoe, *The Baganda*, op. cit., pp. 25–37.
23. Sodipo, op. cit., p. 46.
24. Colson and Gluckman, op. cit., pp. 103–05.
25. Roscoe, *The Northern Bantu*, op. cit., p. 80.
26. Roscoe, *The Baganda*, op. cit., pp 410–12.
27. Roscoe, *The Northern Bantu*, op. cit., pp. 78–9.
28. Sodipo, op. cit., p. 43.
29. Betty Nah-Akuyea Mould-Iddrissu, 'Industrial Designs: The Ghanaian Experience', *Managing Intellectual Property*, April–May 1991, p. 29.
30. Roscoe, *The Baganda*, op. cit., pp. 277–8.
31. Paul Kuruk, 'Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States', 48 *American University Law Review*, Vol. 48, 1999, pp. 782–4.
32. Meyer Fortes, *Dynamics of Clanship among the Tallensi*, pp. 30–8, 1945.
33. Meyer Fortes, *Web of Clanship among the Tallensi*, p. 5, 1967; see also, Colson and Gluckman, op. cit., p. 72.

34. Ibid., p. 224.
35. For a description of the powers of the lineage head and chief among the Bemba, see Colson and Gluckman, op. cit., pp. 32, 169–70; for a discussion on the authority of the chief of the Ashantis, see K. A. Busia, *The Position of the Chief in the Modern Political System of the Ashanti*, p. 13, 1968 ; see also, generally, Lloyd Fallers, 'The Predicament of the Modern African Chief: An Instance from Uganda', *American Anthropologist* , Vol . 57, 1955. p. 290.
36. Colson and Gluckman, op. cit., pp. 169.
37. Writing about the significance of lineage membership to a kinsman, Fortes (*Dynamics . . .*, op. cit., p. 135) notes: 'It is a fact that marks him off from a great many people who may 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.'
38. Ibid.
39. See, generally, J. H. Driberg, 'The African Conception of Law', *Journal of Comparative Legislation and International Law*, pp. 230–46 1934.
40. Ibid.
41. Colson and Gluckman, op. cit., p. 104.
42. Among the Tonga of Zimbabwe the right to make pots is assigned to women. See ibid., pp. 103–5.
43. Cotran and Rubin, op. cit., p. xxi.
44. W. B. Harvey, 'The Evolution of Ghana Law Since Independence', in H. W. Baade and R. O. Everett (eds.), *African Law*, 1963.
45. For a history of the system of native courts in Ghana, see A. Allott, *Essays in African Law*, pp. 99–116, 1960.
46. Harvey, op. cit., p. 51.
47. B. Wanda, 'The Role of Traditional Courts in Malawi', in P. Takirambudde (ed.), *The Individual under African Law*, p. 76, 1982.
48. Ibid., pp. 81–2.
49. See, generally, Muna Ndulo, 'Customary Law and the Zambian Legal System', in ibid., p. 121.
50. Ibid.
51. Constitution of the Fourth Republic of Ghana (Promulgation Law), P.N.D.C.L. 282, (1992), Art. 11(2).
52. Ibid., Art. 11(3).
53. Babacar Ndoye, 'Protection of Expressions of Folklore in Senegal', *Copyright Monthly Review of the World Intellectual Property Organization*, Vol. 25, 1989, pp. 374,–5; David Sassoon, 'The Antiquities of Nepal', *Cultural Survival Quarterly*, Summer 1991, pp. 47–8.
54. Some individuals have tried to register as trademarks names such as '*kente'*, a common cloth produced in West Africa.
55. Companies involved in collecting expeditions include Merck, Sharp, Dohme and Monsanto. See Jack Koppenburg, Jr, 'No Hunting! Biodiversity, Indigenous Rights, and Scientific Poaching', *Cultural Survival Quarterly*, Summer 1991, pp.14–15.
56. Kuruk, op. cit., p. 772.

57. Ndoye, op. cit., p. 376.
58. E. P. Gavrilov, 'The Legal Protection of Works of Folklore', *Copyright, Monthly Review of the World Intellectual Property Organization*, Vol. 20, 1984, pp. 76, 79.
59. Alan Jabbour, 'Folklore Protection and National Patrimony: Developments and Dilemmas in the Legal Protections of Folklore', *Copyright Bulletin*, Vol. 17, No. 1, 1983, pp. 10, 11.
60. Roscoe, *The Baganda*, op. cit., p. 460.
61. See Mould-Iddrissu, op. cit., pp. 29–30.
62. M. Fortes and E. E. Pritchard, *African Political Systems*, p. 5, 1940.
63. Ibid.
64. See, generally, T. Olawale Elias, *The Nature of African Customary Law*, p. 217, 1956.
65. Ibid., p. 244.
66. For instance, this may be the acceptance of six goats instead of a cow: see ibid., p. 261.
67. Ibid., p. 263.
68. Writing about the significance of this right of self-help, Elias, (op. cit., p 264) noted: 'Until a final settlement is made, the debtor is under a legal liability to feed and accommodate his unwanted guest, who enjoys an unlimited licence to interrupt his conversations with third parties, to obstruct his work or movement as and when he likes, and to plague him in every way. All this might be dispensed with if, on arrival at the unfortunate debtor's house, the creditor descries anything of value he can seize either in partial or in total satisfaction of the debt. If only a proportional abatement is thereby secured, the creditor is entitled to distrain on any other article of property or to resort to the tactics described, in an effort to obtain satisfaction for the balance.'
69. Sodipo , op. cit., pp. 43–4.
70. See, generally, Obilade (op. cit., pp. 169–269) who describes the structure, powers and applicable rules of procedure in the different court systems in Nigeria.
71. *Angu* v. *Attah*, Privy Council Decisions, 1874–1928, 43 (1916).
72. Ibid.
73. Courts Ordinance, Cap. 4, Laws of the Gold Coast (1951), Section 87(2).
74. *Angu v. Attah*, op. cit.
75. C. Ogwurike, *Concept of Law in English-speaking Africa*, p. 68, 1979.
76. Some statutes have identified public policy as another ground for invalidating a rule of customary law. However, only a few reported cases make references to public policy in relation to customary law and even then rather tangentially. For example, in discussing the possible existence of a Yoruba custom of legitimation by acknowledgement of paternity, one court held only that if such a custom encouraged promiscuity it would be contrary to public policy. *Re Adadevoh*,, 13 West African Court of Appeal Reports, 304 (1951). The court in that case did not refer to any statute authorizing the application of the test of public policy, but appeared to have considered the test on the basis if the common law.
77. *Re Effiong Okon Ata*, *Nigeria Law Reports*, Vol 10, 1930, p. 65.
78. As one court noted, 'The Court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character it must be rejected as repugnant to natural justice, equity and good conscience.' See *Eshugbayi Eleko* v. *Officer Administering the Government of Nigeria*, Appeal Cases, 662, 673 (1931).

79. The term 'any law in force' has been held to refer to rules of the common law which include other classes of the received English law such as equity and statutes: see Obilade, op. cit., p. 106.
80. See *Salau* v. *Aderibigbe, Western Nigeria Law Reports*, p. 80, 1963.
81. Obilade, op. cit., p. 109.
82. See notes 53–62 above and accompanying text (which discusses the numerous unauthorized uses and commercial exploitation of these works).
83. This term is used broadly to refer to citizens who are not members of the particular ethnic group to which the folklore rights are relevant.
84. See Gaim Kibreab (*Reflections on the African Refugee Problem: A Critical Analysis of some Basic Assumptions*, p. 68, 1983) who explains 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.
85. See ibid. 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.
86. See ibid. The modern African state, with its developed system of defence in the form of large standing armies and efficient police units, provides adequate security for the community, making mutual co-operation for defence unnecessary.
87. For a discussion on evolving concepts of land ownership in response to social and economic changes, see Samuel K. B. Asante, 'Interests in Land in the Customary Law of Ghana: A New Appraisal' *Yale L. J*, Vol. 74, 1965, pp. 848, 857.
88. Ibid.
89. C. Anyangwe, 'The Whittling Away of African Indigenous Legal and Judicial System', *Zambia Law Journal*, 1998, p. l 46.
90. The inferior status of customary law in Sudan is attributed to competition from the Islamic religion, which is considered to be the personal law of the majority of the population. See Cliff F. Thompson, 'The Sources of Law in the New Nations of Africa: A Case Study from the Sudan', in (Thomas W. Hutchinson (ed.), *Africa and the Law: Developing Legal Systems in African Commonwealth Countries*, pp. 148–9,1966.
91. Fernando Santos Granero, 'Commentary to Michael Brown's *Can Culture be Copyrighted*?' *Current Anthropology*, Vol. 39, 1998, p. 214.
92. T. O. Elias, 'The Problem of Reducing Customary Laws to Writing', in Alison Dundes Renteln and Alan Dundes, (eds.), *Folk Law*, p. 319, 1994.
93. T. W. Bennett and T. Vermeulen, 'Codification of Customary Law', *Journal of African Law* Vol 24, 1980, p. 206.
94. Sally F. Moore, *Social Facts and Fabrications: Customary Law on Kilimanjaro 1880–1980*, p. 39, 1981.
95. According to Sally Moore (ibid.), 'There is a widespread assumption outside of anthropology that preindustrial peoples are somehow more rigid about their oral rules than postindustrial ones are about their written laws. That is simply not so. Among peoples such as the Chagga, the flexibility of many supposedly rule-governed arrangements was and is a basic fact of life even as it is among ourselves. In all legal systems there is a tension between standardization through rules of general application

and the negotiability and discretionary arrangement of specific affairs. Further, many rules that are stated as if they were universally "applied" are in practice selectively used. Choices about these matters exist in some form in all societies. This plasticity is no less present in a system of oral customary law than in written law. Certainly some rules are much more frequently followed than others, but in the absence of statistical data comparing rules with practices, there is no reason to be literal about rule statements. They must not be read as invariable practices in any society, nor as representing the way the system "works".'

96. A. N. Allott, 'The Judicial Ascertainment of Customary Law', in Dundes Renteln and Dundes, op. cit., pp. 295, 297.
97. Bennett and Vermeulen, op. cit., p. 214.
98. The following comments by Martin Chanock (*Law, Custom and Social Order*, p. 65, 1985) reveal the basis for such scepticism: 'Bohmer's study of the lower courts of Upper Volta, which was based on an acceptance of definitions of African law of Allott and Elias which stress that there was "indeed law", separable and distinct in African societies, was unable to observe the use of it by the customary courts, which did not appear to apply it. Judges and assessors, she found, were ignorant of it and thought such knowledge to be irrelevant, disputes were solved by what seemed 'fair' in the circumstances'. This was not necessarily based on idyllic reconciliation: community values projected from the audience could be oppressive, so could judicial homilies, and scorned women litigants were led sobbing from the courtroom. Van Binsbergen, observing the post-colonial 'law' of the Nkoya in Zambia, concludes that courts and rules were peripheral to the judicial process and the settlement of conflict in those areas in which customary law is supposed by lawyers to apply. Regarding inheritance, he wrote, there was not a set of rules but a set of expectations and no formal redressive action could be taken if they were not met. The relatives are left with their resentment and are likely to turn to sorcery for revenge. Action outside of a court arena might be taken by the headman to prevent this but he would be concerned not with rules and justice, or rights and obligations, but with the dulling of animosities. Conflict was regarded "not as a matter of right or wrong against abstract, unalterable criteria of formulated rules of behaviour, but as a direct threat to group unity . . . the awareness of continually being on the edge of disruption.'
99. Ibid., p. 66.
100. Thompson, op. cit., p. 151.
101. Allott, op. cit., pp. 299–300.
102. Elias, op. cit., p. 334.
103. Allott (op. cit., p. 312) notes that it is in magistrate courts that questions of precedent are likely to arise.
104. Elias, op. cit., p. 326.
105. Allott, op. cit., p. 309.
106. According to A. N. Allott ('Methods of Legal Research', Dundes Renteln, and Dundes, op. cit., pp. 285, 286), the aim of the anthropologist is wide, to record custom as one of the various phenomena of social life in the tribe or people under investigation. He seeks to show the social purpose of customary rules, and how they fit into the structure of behaviour. The aim of the lawyer on the other hand, is much narrower and it is to record only those rules of custom or usage that are either

enforced in the courts or are of a kind that the courts would enforce. Appreciation of the part these rules play in the social structure is therefore irrelevant, or at most only needed as background knowledge, or for the better elucidation of the meaning of these rules.

107. Moore (op. cit., pp. 39–40) explains this problem as follows: 'There is no doubt that rule statements which sound exact are often made by the peoples anthropologists study. When Gutmann reports rules . . . he was surely not misrepresenting what his Chagga informants told him. Old ethnographies are full of legal rules stated as practices. For example Gutmann tells us that among the Chagga the *wergild* for the homicide of a man was seven steer and seven goats. . . . But despite that apparently exact statement, anthropological knowledge of the way such matters work in practice suggests that matters were much more indefinite. What is meant by a steer? Were castrated male animals the only acceptable payment? Or was whatever Chagga term was used simply generic for cattle? Were cows ever used in payment? Could substitutions be made? And the age and sex of the goats? And what about the timing of payment – all at once, some immediately after the death, some later? Some perhaps never? What might lead to adjustment in the amount or kind of payment? And what happened if payment were delayed? Might a creditor choose to accept a few goats now rather than a calf later on? Negotiations were always necessary to answer these questions despite seemingly 'exact' rules. The same kind of variability is often inherent in systems of bridewealth payment. The rules are 'exact' but actual instances do not necessarily conform. Institutionalized forms of negotiation are standard adjuncts of these types of rules, demonstrating their inexactitude in practice.'
108. Elias, op. cit., p. 328.
109. Simon Roberts, 'The Recording of Customary Law: Some Problems of Method', in Dundes Renteln and Dundes, op. cit., pp. 331, 333.
110. Ibid., p. 335.
111. Elias, *supra* note 93, at 328.

Protection of folklore by copyright – a contradiction in terms*

A. O. Amegatcher (COSGA)**

Contents

Historical background of protection

Since 1970 a number of African countries, including Ghana, have adopted the protection of folklore as part of their intellectual property law. In the main they have been influenced by the efforts of United Nations Educational, Scientific and

* This article was first presented as a working document discussed by the Legal and Legislative Committee of the International Confederation of the Societies of Authors and Composers-CISAC-held on 17–18 May 2001 in Lausanne, Switzerland.

** The author is a former Head of the Copyright Office of Ghana.

Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO), which organized a series of meetings concerning the legal protection of folklore in the 1980s. These meetings resulted in the adoption of the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions, which was adopted in 1982. In 1989 the General Conference of UNESCO at its twenty-fifth session approved the 'Recommendation on the Safeguarding of Traditional Cultures and Folklore', providing for measures that may be taken by States for the identification, conservation, reservation and dissemination of folklore.

Since these early attempts , international efforts to protect folklore have continued. Thus in 1997, a landmark meeting of the World Forum on the Protection of Folklore, convened by WIPO and UNESCO, was held in Phuket, Thailand. It was followed by a series of consultations held by the two organizations in all regions of the world in the course of 1999.

The parameters

The term 'folklore' seems to have acquired some pejorative connotations[1] rendering it unpopular with many Third World countries, particularly those from Latin America. For this reason, at the World Forum on the Protection of Folklore, the more acceptable terminology 'The Indigenous Cultural and Intellectual Property,' coined by Dr Erica-Irene Daes, Special Rapporteur of the Sub-commission on Prevention of Discrimination and Protection of Minorities seems to have caught on.[2] Folklore is therefore discussed these days as part of the concept of traditional knowledge. However, that concept is a bit too broad for the purposes of copyright, since it embraces traditional knowledge of plants and animals in medical treatment and, indeed, what should be classified under patent law and biodiversity rights.[3]

The quest for the protection of folklore as part of the world intellectual property system or in national copyright legislation has been spearheaded by countries of the Third World. However, folklore is not an African or a Third World phenomenon *per se*. The study of folklore started in Europe and the word 'folklore' was coined in 1846 to replace the term, 'popular antiquities'. Some of the best known forms of folklore before the concept was formalized included tales of ancient Greece, Arthurian legends, fabliaux and their English equivalents, the story of Reynard the Fox with animals as the principal characters, not to mention the early Norse sagas. More importantly, the works of eighteenth-century pioneers, including the collection of folk songs by the philosopher Johann Herder and of folk tales by the Brothers Grimm served as an inspiration for others to carry out a systematic identification and study of folklore. The reason why so much premium is put on folklore in Third World countries seems to be that the

history and culture of many of them were until quite recently orally transmitted. These countries cannot therefore afford to marginalize their own culture. More importantly there is a perception that conscious attempts are being made by others to appropriate and distort Third World folklore.[4]

The Ghanaian situation

The Yaa Amponsah case

The protection of folklore has brought some positive results to Ghana. In 1990, the Ghana Copyright Office, which used to run the Copyright Society of Ghana (COSGA), received a letter from Paul Simon Music in New York. In the letter, Paul Simon offered to pay the rights for the use of 'Yaa Amponsah', a popular tune in Ghana in a new recording to be known as the *Spirit of Voices*. This request came in handy. In our effort to build up a CAE list or the musical repertoire controlled by COSGA, we published a story in which we ascribed the authorship of the work to Jacob Sam, one of our earliest recording artists, who died about 1950, citing as our authority the biography of Ephraim Amu, a well known Ghanaian composer and music teacher.

When the offer came, we looked at it critically and came to the conclusion that it was folklore. As Professor John Collins, a musicologist at the School of Performing Arts at the University of Ghana was to put it later in his book, *Highlife Time*, 'Yaa Amponsah' was Ghana's most popular highlife song and its melody rhythm are for Ghanaians what the twelve-bar blues are for African Americans. This is a standard musical pattern on which many differing lyrics are added.[5] Indeed, a British historian of Ghana and a keen music-lover, W. E. F. Ward had enthused upon hearing the tune in the mid-1920s. Consequently he had written an article which appeared in both the *Gold Coast Review* and the *Music Times* in London.

Nowhere in this detailed, article – in which the tune was scored – was it ascribed to any particular person.[6] The link to Mr Sam comes from the fact that he had performed it with others in a record manufactured in 1928. This also did not indicate who the author was. Certainly Sam was not mentioned as the composer.

The current copyright law PNDC Law 110 defines folklore as the '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'.[7] Obviously, 'Yaa Amponsah' qualified as a work of an unidentified author and was consequently folklore.[8] With this legal hurdle out of the way, the Copyright Office, as representative of the Ghanaian Government was able to sign an agreement with Paul Simon Music. For this Ghana received what in local terms was a handsome advance payment. The Copyright Office was able

to sign the contract because the Copyright law of 1985 of Ghana in its Article 5 stipulates that '(1) Works of Ghanaian folklore are hereby protected by Copyright. (2) The rights of authors under this Law in such folklore are hereby vested in the Republic of Ghana as if the Republic were the original creator of the works.'

COSGA as the sole society managing Ghanaian works abroad was joined as a co-signatory. Since this auspicious beginning a Bill submitted to the Ghanaian Parliament in 2000 proposed to establish, formally, a Folklore Board to manage Ghanaian folklore. The establishment of the board is in accordance with the UNESCO/WIPO Model law and responds to the idea that folklore is communal property which must be managed by 'a competent body'. The role assigned to the board is to:

(a) administer, monitor and register works of Ghanaian folklore on behalf of the Republic; (b) maintain a register of works of Ghanaian folklore at the Copyright Office; (c) preserve and monitor the use of folklore works in Ghana; (d) provide members of the public with information and advice on matters relating to folklore; (e) promote activities which will increase public awareness on the activities of the Board; and (f) promote activities for the dissemination of folklore works at home and abroad.

Where a non-Ghanaian citizen intends to use Ghanaian folklore for any purpose other than under the principle of permitted use, he should apply to the Board for permission.

Similarly if a Ghanaian citizen wants to use folklore for commercial purposes he is expected to pay such sums as the Board may determine. Any sum of money accruing from the use of folklore is expected to be paid into a bank to be used for the preservation and promotion of Ghanaian folklore and indigenous art. This is very much in accordance with the scenario envisaged at the international level.

The reaction of Ghanaian artistes and musicians

Since the introduction of protection for Ghanaian folklore, opposition to the idea has grown among some Ghanaian authors and artistes. In written comments on the Copyright Bill, artistes calling themselves the Committee on Misgivings of Music Industry Practitioners (CMMIP) claimed that

it is unfair that Ghanaians are not exempted from paying for the use of Ghanaian folklore which is a heritage collectively bequeathed to all Ghanaians by their forebears. The Committee is therefore vehemently opposed to Ghanaians paying any fees or getting permission to use Ghanaian folklore as stipulated under this section. What the proposed Bill is saying, in effect is that a Ghanaian weaver must seek permission and pay to weave kente[9] or a writer to use Kweku Ananse[10] stories in screen plays.

The same point was made much earlier by Professor John Collins in an article entitled 'Folklore, Some Problems of Copyright': 'Although the idea of the Ghanaian government owning the copyright in folklore is a sensible one, in the light of the possible First World exploitation of Third Word Cultural traditions, the idea of permission and a fee for Ghanaian poses serious risks. . . . 'Fees on Ghanaian for their use of folklore may damage the local popular performing arts based on this folklore. This could firstly lead to an ever increasing adoption of foreign music by Ghanaian artists already under the influence of the imported music of the "spinners".'[11]

Contradictions and differences

Copyright by nature is a property right conferred on individuals or a clearly identified entity. The protection is given to enable the owner enjoy exclusive rights in respect of his literary, artistic, musical and other creations and for him to derive appropriate monetary rewards from their exploitation. This actually encourages creativity in the same manner as a system based on private enterprise does to the economy.

Communal ownership

Folklore, on the other hand, is not created by a known person[12] and hence it is ascribed to a cultural or an ethnic community. It is in the nature of communal property to be enjoyed by any person belonging to the particular community. The problem is how in the modern context is the community to assert its proprietary right, and how it is to develop it an age where people are becoming more and more individualistic.[13] This is why the setting up of 'a competent body' arises. It is however obvious that such a body will not be a traditional body whose authority would be sanctioned by immemorial custom and usage. Therefore under certain circumstances people may find its powers arbitrary and an impediment to creativity.

The diversity of indigenous or traditional peoples

At this juncture we might wish to point out that perhaps the view of indigenous people in matters of copyright and authorship is far from uniform, in that it does not necessarily transcend cultural diversities across the different continents and oceans. It is obvious that the Inuits of Canada, the Australian Aborigines or the indigenous people of Africa and Latin America may have certain things in

common. But it is equally obvious that they have different experiences and often operate from completely different environments.[14] According to Professor Michael Blakeney,

> If the beliefs and practices of Australian Indigenous Peoples are any guide, authorship may reside in pre-human creator ancestors, such as the Wandjina of the Kimberley region. Authorship, is replaced by a concept of interpretation through initiation. Ownership, yields to a concept of custodianship of dreamings, or legends. Alienation, is contradicted by the concept of immutable communal property. Exploitation is subject to cultural restraints and taboos. Incentivisation also has to yield to concerns about spiritual adulteration.[15]

Ghanaians and perhaps most West Africans would not see intellectual property or copyright this way. As explained by the present author in his 'Letter from Ghana',[16] before the impact of Western culture and particularly the passing of the of the United Kingdom Copyright Act of 1911, Ghanaians did not see the creation of a literary, musical or artistic work as generating any property rights. This is because their own notions of property were very basic and did not include intangible things like stock and shares. They lived in a subsistence economy in which individual ownership of chattels was recognized. On the other hand, land that was acquired through conquest or by inheritance belonged to the community and had to be transmitted to the generation yet unborn. In the meantime each member of the community might enjoy the usufruct thereof by appropriating any portion not occupied by another member of the community.

In the course of the past century, Ghanaian courts have recognized this usufructuary title as a right that can be alienated by an original subject of the community – even to non- subjects, without reference to the community. In recent times this right has ripened into a full-blown freehold – leaving the vestiges of communal ownership only in the form of the allodial or supreme title. It is against this background that we must view the reaction of the Committee on Misgivings of Music Industry Practitioners (CMMIP). They are already used to individual ownership of property. It therefore seems to be anachronistic to apply the theory of communal ownership to something that they have been using all along as of right for their creative activities. In this connection, the members of the CMMIP are not unmindful of the great work of the Nigerian composer, Showande who created the symphonic music, entitled, *West African Suite*, from West African tunes, or the works of Bela Bartók and Zoltan Kodály, the Hungarian composers which owe much to their research into Hungarian folklore.

Identification

One difficulty arising out of the application of notions of copyright to folklore is identification. The ethnic communities of Ghana are not all exclusive to Ghana. The country shares many of its folklore traditions with its neighbours. It is often difficult to prove whether a particular folklore belongs to Ghana exclusively or not. The problem is vividly illustrated by Kofi Ghanaba, a well-known Ghanaian musical personality and drummer in connection with the song, 'That Happy Feeling' for which he earns royalties. He recorded it in the United States in the 1950s in an album entitled, *Africa Speaks America Answers.* In his article entitled 'The Poaching World of Music' Kofi Ghanaba, formerly Guy Warren, said :

> In my world of music everyone poaches . . . the big composer and the small ones. I myself have always held the view that in music nothing is original . . . When I was Director of Radio Station ELBC, (Liberia) . . . I once auditioned a musician who played a tune similar to 'That Happy Feeling'. . . . No one will know the true origin of this tune in a world which has existed for four hundred thousand million years. I simply took my mother's tune, gave it my form which was welcomed by the world, because it belongs to human history.'[17]

He said in his visit to Eastern and Southern Africa he heard similar tunes to 'That Happy Feelings'. In South Africa it was called 'Sugar Bush.'

National treatment

The concept of national treatment is fundamental to intellectual property protection. Therefore if folklore is to be treated under copyright law, then logically there can be no discrimination against nationals of other countries who are parties to the TRIPS Agreement or the various UNESCO/WIPO administered treaties. This is more so since we have already pointed out that folklore exists in all countries including the developed ones.

Right of integrity

The movement towards the protection of folklore has been premissed on the need to protect the integrity of folk materials. We have found, however, that some folk tunes do not become a hit in their original form. They have to be popularized like true copyright works with the market in view. Such arrangements might constitute a kind of tampering with the integrity of the work. Therefore the dilemma is that if the integrity of the folk material is kept, it might only be of interest to the folklorist or the ethnomusicologist and not to the publisher and the record

producer of popular songs. Yet what we want in our countries is the use of our works to bring in more royalties.

What happens with music has been happening in the visual arts. It is the inspiration that great artists of the twentieth century such as Picasso, Braque, Matisse and others drew from African sources for their work that African art has attained world status.

Conclusion

Therefore copyright is not the answer for either folklore or traditional knowledge. The more the question is studied the more it is clear that what people really want is an omnibus protection for traditional knowledge, embracing many things which may qualify as patent, copyright or bio-diversity taken on their own, but which may not meet the existing rules of intellectual property conventions. What is needed therefore is a flexible, liberal *sui generis* protection.

In this connection Dr Bleszynski of the Polish Society of Authors and Composers (ZAIKS) has suggested that folklore should be protected by a right similar to database right.[18] The present author is in agreement with that suggestion since such a protection will dispose of most of the objections he has raised against protecting folklore by copyright.

It removes the question of folklore from the mould of copyright and it is given its own free style. For example, it is generally admitted that the compilation of a database requires labour and skill. Since folklore does not exist in a state of nature but has to be identified and classified by a competent authority in the various countries, it is fair that any person who wants to access it should pay for it . In this connection objection by nationals that they should not pay for using their country's folklore can be upheld only if they use the said material from their own knowledge and sources unrelated to the national database on folklore. However if they draw their source from the national register , then they must pay for it, since without the said source they could not have obtained the material. It follows that the non- national must also pay for accessing the folklore material. In this way the principle of national treatment is preserved.

The question of attribution or documentation is rendered less problematic because compilation necessarily will involve identification. It may well be that two different countries may claim the same piece of folklore or variation of the same material. In that case the duty to acknowledge the source and to pay the necessary fees will be owed to the particular source where the material was taken.

In this connection the problem of moral rights and maintenance of the integrity of a particular work can be enforced in the course of granting licence to use the particular folklore work. In the same vein authorisation can be given for adaptations which will not be objectionable to the competent authority.

Notes

1. According to the *Encyclopedia Britannica*, folk art 'may be considered to encompass the traditional, typically anonymous arts produced by members of a non-ruling, relatively non- affluent, often rural and uneducated stratum of industrial society. As expressions of community life, it should be contrasted with the academic or self-conscious or cosmopolitan expressions that constitute the fine arts and decorative arts of the elite.'
2. For a more detailed study see the paper by Professor Michael Blakeney of Queen Mary and Westfield College, London, published by WIPO as part of the Round Table on Traditional Knowledge in November, 1999.
3. The heritage of indigenous peoples also includes objects, knowledge and literary or artistic works which may be created in the future based upon its heritage**.** [It] includes all movable cultural property as defined by the relevant conventions of UNESCO, all kinds of literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry; all kinds of scientific, agricultural, technical and ecological knowledge, including medicines and the rational use of flora and fauna; human remains; immovable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of indigenous peoples' heritage on film, photographs.
4. The chief complaint by Third World countries is summarized in the following words of Atencio López, President of the Napguana Association in Panama: 'Persons who have no connection with our peoples write, record and sell songs, legends and tales for commercial purposes with no concern for the copyright of the peoples affected. As a first step it is urgently necessary to put an end to this appropriation, which is virtually legalized in many countries, and for the governing body of intellectual property, namely WIPO itself, to introduce an international legal standard for the preservation of indigenous knowledge.' See WIPO, *Initiative for the Protection of Traditional Knowledge Indigenous People and Local Communities,* Geneva, WIPO, July 1998.
5. John Collins (*Highlife Time*, 1st ed., Chapter 2, first paragraph) goes on to say that the song is traditionally associated with 'a class of music that is usually known as 'guitar band' music which had its origins in the West African cross rhythmic 'two finger' technique of plucking indigenous harp-lutes' like the *kora* and the Liberian *Luu.*
6. One would have expected that the learned author would have named the author of the music which had so moved him, if the composer was known.
7. S.5 PNDC Law 110. .
8. This is all the more so because for copyright to subsist in a work it must be written down or otherwise reduced to material form. Thus the Supreme Court of Ghana rejected claims made by a plaintiff in twelve songs in *CFAO* v. *Archibold* (1964 GLR 718 at 730) because 'it seems plain beyond argument, doubt or dispute that copyright implies the subsistence of a manuscript of written matter, and in the case of musical composition or musical work the subsistence of a manuscript of an air, tune, harmony, melody, or music.' At no time had anybody made any claims on behalf of Mr Sam and had supported it with the evidence required by the law.
9. A traditional textile design native to Ghana and some of its neighbours.
10. A Ghanaian folk tale in which the *ananse* (spider) plays a central role.

11. *Ghana Copyright News*, January 1991–December, 1992, p. 18.
12. This view is not shared by a group of Ghanaian academics: Professors Anyidoho, Kwesi Yankah, Dr Owusu Brempong and S. G.Asiamah who consider the position of the Ghana law outdated because 'individual creativity is a recognized fact in current approaches to folklore' (See *Ghana Copyright News*, No. 4, 1992/3). The point is that the law recognizes derivative works and would accept any distinct contribution derived from what was originally folklore. See the point of view of Joseph Wambugu Githaiga below.
13. According to Joseph Wambugu Githaiga, intellectual property rights 'are a means of maintaining and developing group identity rather than furthering individual economic pursuits, they are therefore communal in nature. Therefore any use or alienation of indigenous heritage must be sanctioned by the community as a whole or by its traditional custodians acting with the mandate of the community, and must be on such terms as imposed by the group'. See *E Law – Murdoch University Electronic Journal of Law*, Vol. 5, No. 2, June, 1998. Similarly, according to P. Tennant, 'the close identification of indigenous folklore with community life has as its corollary the notion of overriding community control of intellectual and creative works so that to impart total control to the individual creators of these works is seen as undermining part of the foundations of that community. This means that an individual's creative work attains a place and is attributed with some meaning within the indigenous culture that it is somehow co-extensive with'. See P. Tennant, 'Aboriginal Rights and the Penner Report', in Menno Boldt and J. Anthony Long (eds.), *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*', pp. 321–32, Toronto, University of Toronto Press, 1985.
14. We may mention the fact that the way outside invaders dealt with them differed from place to place. While in some places they were driven into reserves or were otherwise assimilated into European-style nations created on their soil, in other places they were merely administered and allowed to keep their customs which they developed under colonial rule until events made it possible for them to become nations in their own right.
15. Round Table on Traditional Knowledge, WIPO, November,1999.
16. A. O.Amegatcher 'Letter from Ghana', Geneva, WIPO, June 1990 edition.
17. Kofi Ghanaba, 'The Poaching World of Music', *Ghanaian Times* 13 August 1993, and reproduced in Ghana in *Copyright News*, No. 4, 1992/3 p. 5.
18. Intervention during discussion of this paper on 18 May 2001.

NEWS AND INFORMATION

Copyright Agreements in the Russian Federation

E. P. Gavrilov*

Contents

* The author is the head of the department of civil law disciplines of the Institute for International Trade and Law (Moscow), lecturer at the Russian Intellectual Property Institute, Doctor of Law, and professor.

Introduction

The Russian Federation's principle regulatory instrument governing copyright is the Law of the Russian Federation of 9 July 1993, 'On Copyright and Neighbouring Rights' (hereinafter referred to as 'the Law'). Article 2 of the Law classifies copyright legislation under civil law. This is highly important, since it means that copyright law, and in particular copyright agreements, are subject to the basic provisions of the Russian Federation's civil legislation, including those contained in the Civil Code of the Russian Federation (hereinafter referred to as 'the Civil Code').[1] The following sections of the Civil Code directly govern copyright agreements: 'Transactions' (Articles 153–181), and the general section of 'Law of Contracts' (Articles 307–453).

The Russian Federation is a federative state.[2] That means that the power to legislate resides with both the Federation as a whole and with its individual constituent entities (which are known by various appelations: region, republic, district, territory, etc.; 89 in all). However, pursuant to Article 71.o) of the Constitution of the Russian Federation, civil law and the 'legal regulation of intellectual property' are placed under federal jurisdiction. For that reason, issues pertaining to civil law and intellectual property cannot and should not be governed by regional legislation. Thus, the constituent entities of the Russian Federation have no legislative authority over copyright agreements.

The Law contains special provisions that govern the general terms of copyright agreements (Articles 13, 14, 30–34, 45–46).

Freedom of contract

The principle of freedom of civil law contract is enshrined in Article 421 of the Civil Code of the Russian Federation and is fully applicable to copyright agreements. That means that each party decides of its own free will whether or not to enter into a contractual relationship. If a party elects to enter into a contractual relationship, that party is at liberty to select a contracting party and to define the

terms of the agreement (term, nature and scope of rights arising from the agreement, etc.). The terms of a copyright agreement are at the discretion of the contracting parties unless established by a compulsory legislative provision.

The principle of freedom of contract with regard to copyright agreements is also manifested in the fact that contracting parties have the right to enter into a mixed agreement, that is, an agreement that combined elements from various agreements. Mixed agreements are quite common in practice. Copyright provisions are often included in purchase and sale agreements, lease agreements, subcontracting agreements, etc. In such cases, the contractual provisions related to copyright are governed by the copyright legislation, while all other provisions are governed by the rules applicable to agreements of the type in question.

Former statutory formats for copyright agreements

Until 3 August 1992, a number of different statutory copyright agreements were in use in the Russian Federation (and formerly in the USSR). The terms of the said statutory copyright agreements (more than twenty such agreements existed) applied automatically to all copyright-related contractual relationships, even when a specific agreement between parties omitted a particular provision of the statutory agreement.

The terms of the statutory copyright agreements were, however, subject to amendment at the discretion of the parties (in individual agreements), but only if amended in such a way as not to impair the situation for the author in comparison with the terms of the statutory agreement. Any contractual provision that deviated from the statutory terms in such a way as to impair the situation of the author was deemed null and void and automatically replaced by the statutory provision. Thus, the statutory contractual provisions were essentially compulsory.[3]

The statutory copyright agreements became defunct with the introduction on 3 August 1992, of the legislative act ‘Fundamental Principles of Civil Legislation of the Union of Soviet Socialist Republics and of the Union Republics’ (adopted by the Supreme Soviet of the USSR on 31 May 1991).

Notwithstanding that, however, the statutory contractual provisions continued to receive widespread application in practice. Since they are now no longer compulsory, they are considered to be ordinary contractual provisions that the parties to an agreement have undertaken to observe.

Contract and law

The Russian legislation contains a large number of provisions governing the content and form of civil law agreements in general, and copyright agreements in

particular. These provisions may be divided into two types – peremptory and elective. Elective provisions may be adjusted or even completely omitted from individual agreements. Peremptory provisions, on the other hand, must be included.

Russian attorneys tend to observe the following unwritten rules when drafting copyright agreements: peremptory provisions are not written into or referred to in agreements and elective provisions are only included if the parties have agreed to adjust or abandon them.

That approach is reasonable since it is assumed that the parties are familiar with the applicable legislation and undertake to observe it. For that reason, Russian copyright agreements tend to be rather short, usually no more than two or three pages, which is not usually the case in foreign contractual practice.

An agreement that is inconsistent with the legislative provisions is either de facto null and void (Article 168 of the Civil Code), or may be contested as null and void on the grounds that it was concluded through misrepresentation (Article 178 of the Civil Code) or deception (Article 179 of the Civil Code).

Such null-and-void agreements do arise in practice: cases arise whereby the parties to an agreement believe a work that forms the subject of that agreement to be protected by copyright when in fact it is not.

Article 180 of the Civil Code provides for the possibility of deeming an agreement partially invalid. This means that specific provisions of an agreement may be considered invalid without compromising the validity of the agreement as a whole if it may be reasonably assumed that the agreement would have been concluded even if the invalid sections had been omitted.

The content of a copyright agreement

A copyright agreement involves one party providing (transferring, assigning) a second party the right to use a work. A copyright agreement specifies the work to which the copyright is attached and the nature of the rights transferred under the agreement.

The Law on Copyright designates the parties to a copyright agreement as 'the author' and 'the user' (Article 30). Those designations are not entirely accurate since the author of a work does not always act as a party to a copyright agreement. An author's agent or other party designated by an author may enter into such agreements on the author's behalf.

Copyright agreements are referred to in the Russian language using the adjective '*avtorskiy*' (author) not because they are concluded by '*avtory*' (authors), but because they govern the disposition of rights that are normally vested in an author. The transferring party is referred to in keeping with international practice as the 'licensor', while the beneficiary is referred to as the 'licensee'.

Interpreting copyright agreements

Article 431 of the Civil Code governs the approach that should be taken to interpreting copyright agreements. The said Article contains two sections. Section 1 establishes that courts should interpret the terms of agreements on the basis of the literal meaning of the words and expressions used therein. Any ambiguous terms contained in an agreement should be resolved by comparison with other terms of that agreement and with the overall sense of the agreement as a whole. Should that prove insufficient, Section 2 of Article 431 of the Civil Code establishes that the court should seek to establish the true common intent of the parties in the context of the purpose of the agreement. Any relevant circumstances accompanying the conclusion of the agreement, including discussions or correspondence predating the agreement or actions taken by the parties, including subsequent actions and customary business practices, should be taken into consideration by the court. In certain cases, the parties to an agreement may stipulate that any prior correspondence or negotiations are null and void: in such cases no reference is made to such circumstances when interpreting an agreement.

Assignment of economic rights under copyright agreements

Pursuant to the first paragraph of Article 30.1 of the Law, 'the economic rights referred to in Article 16 hereof may only be assigned via the instrument of a copyright agreement, with the exception of the instances envisaged by Articles 18–26 hereof'.

Article 16 of the Law concerns the economic rights of the author, also referred to as the right to make use of a work. Article 16.2 of the Law contains an exhaustive list of those rights, of which there are ten: reproduction rights; distribution rights; import rights; public exhibition rights; public performance rights; analogue broadcasting rights; cable broadcasting rights; translation rights; transformation rights; and the right to implement design, architectural and other projects.

It is widely held in the Russian Federation that translation and transformation rights should always be accompanied by another copyright power in copyright agreements as they cannot be exercised alone. All other economic rights of an author may be assigned by copyright agreement individually or in various combinations. It is also possible partially to assign a copyright power or to assign all of the rights listed in Article 16.2 of the Law.

Thus, Article 30.1 of the Law establishes that the purpose of a copyright agreement is to assign economic rights to the use of a work and to stipulate the obligations of the user.

The clarity of the wording of Article 30.1 should put an end to the long

debate that took place in Soviet and Russian academic circles regarding the nature of copyright agreements. One side of the debate (B. S. Antimonov, E. A. Fleischits, and the now thriving V. A. Dozortsev) held that authors merely permitted the use of their works via copyright agreements (the permission theory) and that all copyright powers remained vested in them. The other side (including the author of this article) held that the author assigns a portion of the copyright powers arising from a work.[4]

Agreements that do not envisage the assignment of the economic rights of an author are not copyright agreements, even if they are so entitled. Examples include agreements on the publication of a work at the author's expense. Such agreements tend to be typical subcontracting agreements: the author reimburses the publisher the cost of publishing the work (e.g. a book) and subsequently takes possession of the entire print run.

Assignment of exclusive and non-exclusive rights

The Law establishes that economic rights of an author may be assigned by copyright agreement on an exclusive or non-exclusive basis. The nature of the assigned rights determines the legal position of the licensee (beneficiary, user). Licensees acquiring exclusive copyright over a work have the right to use that work themselves (within the scope established by the copyright agreement) and to permit or prohibit the use of the work by third parties.

Third parties refers here both to entities which are not party to the agreement and to the licensee's contracting party, who has assigned exclusive copyright (the licensor). A licensee obtaining exclusive copyright over a work enjoys the right to prohibit other parties from using that work, even if no specific provision is made to that effect in the copyright agreement. However, exceptions to the exclusivity of the assigned copyright may be established by agreement between the parties. Such exceptions are applicable only if specifically established by agreement and only to the extent stipulated.

Exclusive copyright agreements sometimes contain additional provisions to the effect that the licensee enjoys the right to defend the acquired rights in the event of breach of copyright. Such additional provision is superfluous from the legal point of view, since an entity vested with exclusive rights always enjoys the right to protect those rights. Moreover, the Supreme Arbitration Court of the Russian Federation has ruled that 'any provision included in an agreement on the assignment of exclusive rights that seeks to restrict the assignee's right to protect the assigned rights is at variance with the law'.[5]

The licensee (user) in an agreement governing the assignment of non-exclusive rights may use the work to which the copyright attaches in the manner envisaged by the agreement, but may not permit or prohibit other parties from

using the work. The right to prohibit the use of the work by third parties in such cases is vested in the licensor alone.

Thus, Article 30.1 of the Law refers to two types of copyright agreements – exclusive and non-exclusive – a distinction which is basically consistent with practice.

It is important to note, however, that an agreement may assign one set of economic rights on an exclusive basis, and another on a non-exclusive basis. It is also possible to assign copyright on an exclusive basis for a specified duration, following which the licensee exercises non-exclusive copyright over the work. Such agreements do not fit in with the above classification of copyright agreements.

Special rights of authors who have assigned exclusive economic rights

Entities that assign exclusive copyright no longer enjoy the right to prohibit third parties, including those in breach of copyright, from using the work in question.[6] Nevertheless, the Law protects the right of the author of a work to prohibit the illegal use thereof, even in cases where exclusive copyright has been assigned 'provided that the entity to which exclusive copyright has been assigned has neglected to protect that copyright' (second paragraph of Article 30.2). This constitutes the special personal right of the author to protect his/her economic rights, and like other personal rights, it may not be assigned and does not transfer (by inheritance, for example). Furthermore, it is a restricted right: the author may seek to prevent the breach of copyright but may not seek compensation for damages. It may only be exercised by the author if the entity in which exclusive copyright is vested has neglected to launch judicial proceedings. That means in practice that the author must inform the entity in which exclusive copyright is vested of the breach of copyright and requests that entity to launch judicial proceedings within a reasonable time frame. The author may only seek a court order prohibiting the illegal use of the work following the expiration of that period.

Presumption of non-exclusivity

Article 30.4 of the Law establishes that assigned copyright powers are assumed to be non-exclusive unless otherwise stipulated in the copyright agreement. Thus, significantly, the Law formalizes the assumption that copyright agreements are non-exclusive. Rights assigned under a copyright agreement may be specifically designated as exclusive: for example, 'the author (or other entity in which

copyright is vested) assigns exclusive copyright . . .'. In certain circumstances, however, it may be necessary to analyse specific provisions of a copyright agreement in order to determine the nature of the assigned rights. In one specific case, the Supreme Arbitration Court of the Russian Federation noted that although 'the agreement does not employ the expression "exclusive right" to designate the subject of agreement', that 'does not constitute grounds for deeming the assigned rights to be non-exclusive . . . since in the text of the agreement it is stated that the author shall assign the partnership the right to publish and distribute the stories contained in the collection for a period of four years. Accordingly, the author does not have the right to use the work in the two manners described above, or to permit third parties to make such use of the work'. The Supreme Arbitration Court ruled therefore that the copyright agreement envisaged the assignment of copyright on an exclusive basis.[7]

The right to distribute copies of a work

The right to distribute copies of a work was initially treated as a component of the right to reproduce a work. However, the distribution of a work may not coincide in terms of time and place with the reproduction of that work. For that reason, the new Russian legislation on copyright classifies the right to distribute copies of a work as a separate economic right.

Notwithstanding, however, many copyright agreements only stipulate the right to reproduce a work, omitting any reference to distribution rights. In such cases, the parties to the agreement tacitly agree that the work is to be reproduced for subsequent distribution, with the result that distribution rights are also covered by the agreement. If distribution rights are envisaged by the sense of an agreement, the act of distribution must take place during the term of and within the territory stipulated by the agreement.

In another arbitration dispute it was established that distribution rights were not envisaged by the copyright agreement. In December, 1999, the limited-liability company Glossa (the purchaser) and the limited-liability company University Book House (the vendor) concluded a purchase and sale agreement under which the vendor transferred to the purchaser original master copies of two works of literature (books). The purchaser acquired the right to print up to 10,000 copies of each work and undertook to surrender 3,000 copies of each work to the vendor together with the master copies. The vendor furthermore undertook to pay the Purchaser the sum of 6,000 roubles (approximately $193). The agreement dealt with the issue of copyright in the following manner. The vendor assigned to the purchaser the non-exclusive right to publish the works. Moreover, the vendor undertook to refrain from republishing the same works for a period of four months following the conclusion of the agreement, and from assigning the right to

republish to third parties. The agreement contained no direct reference to the right to distribute the works.

The vendor, having discovered that the works published by the purchaser were on sale in retail outlets in Moscow in January 2001 without the vendor's approval, petitioned the Moscow Arbitration Court to prohibit the purchaser from selling the books and to confiscate the related revenue in favour of the vendor. The Arbitration Court established that the plaintiff had not assigned distribution rights to the respondent and on 31 May 2001 ruled in favour of the plaintiff, awarding the plaintiff 603,000 roubles (more than $20,000). The respondent's appeals were rejected by the appeals instance of the Moscow Arbitration Court in a ruling of 23 July 2001, and by the Federal Arbitration Court for the Moscow District in a ruling of 26 September 2001, and the original ruling was left intact.[8]

The scope of rights assigned under copyright agreements

The legislation contains no specific provisions on this issue. The parties to an agreement may elect to make one or several rights the subject of a copyright agreement. Specific rights may be envisaged either in general terms (e.g. 'the right to publish a work in the form of a book with a print run of 1,000 copies') or in more specific terms ('the right to publish a work in the form of a paperback book in several print runs', etc.).

Article 31.2.1 of the Law establishes the general assumptions on the scope of the assigned rights as follows: 'Any rights related to the use of a work that are not directly assigned by a copyright agreement shall be deemed to be non-assigned'. This means that the scope of the rights assigned under a copyright agreement is deemed to be restricted. This presumption applies equally to entire rights and to components thereof. The general principle to be followed when determining the scope of the rights assigned under a copyright agreement is as follows: if a right (or component thereof) is not directly envisaged in the copyright agreement, then that right (or component thereof) does not fall within the scope of the sense of the agreement.

Copyright remuneration

While the concept of the assignment of copyright for no consideration gives rise to theoretical problems, in practice authors often assign rights to contracting parties free of charge. Ordinarily, certain rights are assigned for no consideration and others are assigned for a fee. The assignment of copyright for no consideration is not at variance with the principles of civil and copyright law. Naturally, the fact that certain rights are assigned for no consideration must be

directly stated in the agreement, as otherwise the assumption of consideration in civil law agreement comes into play (Article 423 of the Civil Code).

Article 31.3 of the Law establishes that copyright fees should constitute a percentage of the revenue yielded by the use of the work. Russian law is similar in this regard to European law (France, Germany and some other countries). That method of determining the copyright fee is not used however 'if it is impossible owing to the nature of the work or the manner in which it is used'. We are not aware of any cases where an author has tried to revise the amount of the fee after the copyright agreement has been signed on the grounds that the fee could have been established as a percentage of the revenue yielded.

Another provision on copyright remuneration that receives widespread application is as follows: 'If a copyright agreement on the publication or other reproduction of a work establishes the copyright fee as a fixed amount [rather than a percentage of the revenue], then the agreement must stipulate the maximum number of copies of the work to be produced' (Article 31.3.3 of the Law). Since in practice copyright fees are often established as a fixed amount and the print run (for books, magazines, compact discs) is not stated, authors (and other copyright holders) enjoy considerable success demonstrating that such agreements allow for one print run only, and that any subsequent print runs must be covered by a separate agreement. Thus, initial copyright agreements do not accord the right to perform additional print runs. The issue is resolved in the same way when an agreement establishes the maximum print run and a fixed fee: the production of copies of a work beyond the maximum print run is deemed to constitute extra-contractual use of that work.

Reassignment of rights acquired by copyright agreement

A party acquiring copyright by agreement may only reassign that copyright (fully or partially) to third parties if direct provision is made to that effect in the copyright agreement (Article 31.4 of the Law). For that reason, copyright agreements often include a clause stipulating that the rights assigned under the agreement 'may be reassigned to third parties' The vendor's consent to a subsequent reassignment of copyright may be obtained in the form of a separate (additional) agreement. If a purchaser has acquired exclusive copyright without the right to reassign that copyright, then neither the vendor nor the purchaser may unilaterally permit a third party to use the work.

Arbitration practice is based on the principle that if a party that has acquired copyright without reassignment rights nevertheless reassigns that copyright to a third party, the copyright agreement with the third party and any subsequent agreements are deemed null and void.[9]

Copyright agreements for works not yet produced

On the one hand, the Russian legislation prohibits the conclusion of copyright agreements with regard to works that an author may produce in the future (Article 31.5 of the Law). On the other hand, the Law permits the conclusion of agreements that commit an author to produce a work as described in the agreement (Article 33 of the Law). These two provisions of the Law are not in fact mutually exclusive.

The Law prohibits transactions involving works that an author may produce in the future. It is therefore no longer possible to conclude copyright agreements similar to that concluded by Anton Chekhov in Tsarist Russia, under which the writer assigned the rights to all of his future works, including plays, to his publisher.[10]

There are however two exceptions to that rule: The first concerns commission agreements, which must describe the future work as exactly and concretely as possible: length, type, genre, title, etc. Thus, the object of agreement may be a work that exists only as an idea in the author's mind, a work that has not yet been committed to paper. If the requirements on the exact and concrete description of the commissioned work are observed, the subject of agreement may even be several works and the agreement may run for an extended period of time. The second exception concerns 'professional' works (Article 14 of the Law). An employment agreement between an employer and an employee may include copyright provision enabling the employer to use the 'professional' works to be produced in the future by the employee. An agreement of this type is valid even if it omits an exact and concrete description of the future works. If no special provision is made with regard to copyright on future 'professional' works, then the principle established by Article 14.2 of the Law is applied: all economic rights regarding the use of professional works vest in the employer. Moreover, no obligation arises to pay an additional fee in consideration of those rights apart from the usual salary.

A licensee's obligation to use a work

Copyright agreements assign licensees the right to use a work. The parties to copyright agreements usually make the copyright fee conditional on the actual use of the work and the extent of that use. That gives rise to the issue of whether or not a licensee is obliged to use a work. In certain situations the licensor may insist on the licensee using the work for other reasons: a desire to see a work published, prestige, publicity, etc. Judicial practice is based on the principle that if no direct provision is made concerning a licensee's obligation to use a work, then the licensee is not obliged to use that work.

The Supreme Arbitration Court of the Russian Federation formulated that principle with regard to exclusive copyright agreements only.[11] Nevertheless, in practice, the principle is applied also to non-exclusive copyright agreements. The Supreme Arbitration Court ruled as follows:

> The Law 'On Copyright Law . . . places no obligation [on the licensee] to use a work in any of the ways established by Article 16.2 of the Law. Provision to that effect may however be included in copyright agreements if the parties deem it necessary. The Court has established that [the present] copyright agreement contains no provision compelling the licensee to use the work …Therefore, the court of first instance had no grounds on which to uphold the petition [to compel the licensee to use the work].

Courts of general jurisdiction also proceed on the basis of the principle that the law contains no provision compelling a licensee to use a work to which copyright has been obtained by agreement.

Agreement formats

The Law contains three specific provisions related to the format of copyright agreements (Article 32): (a) copyright agreements must be executed in writing; (b) copyright agreements governing the use of works in the periodical press may be concluded orally; and (c) copyright agreements arising in connection with the sale of computer programs and databases and the provision of public access to such computer programs and databases follow a special format, one of which involves incorporating standard copyright terms into each copy of the computer program or database in question.

In practice, copyright agreements are usually executed in writing (except in media situations). An agreement may take the form of a single document, or even a correspondence between the parties that demonstrates that the wishes of the parties coincide.

If an oral agreement has been made in place of a required written agreement, the agreement between the parties remains valid notwithstanding. However, in the event of a dispute, the parties have no right to call witnesses to the existence or terms of the agreement in support of their respective cases. They can, nevertheless, cite written and other evidence (author's signature on a manuscript, signature on a fee receipt, correspondence, etc.) (Article 162.2).

In cases where an agreement has been concluded orally (even if a written agreement was required, or if the agreement relates to the use of a work in journalistic situations where oral agreements are permitted), it is assumed that the agreement is non-exclusive and governs a once-off use of the work.

For that reason, a number of Russian newspapers are now beginning to insist

on written agreements, for one thing because they want to be sure that the work governed by the agreement has never been published before (where oral agreements are used, authors often make their work available to several publications at once), and also because they want to be able to reuse the work (many publications sell on articles that they have already published for publication in electronic format).

Particularly worthy of attention are copyright agreements arising from the sale of computer programs and databases and from the provision of public access to such programs and databases. The Law envisages a special format for such agreements – 'file wrapper licences'. These licences are not, in fact, widely used in the Russian Federation. We are not aware of any disputes arising in the Russian Federation with regard to copyright agreements taking the form of file wrapper licences. In our view, this type of agreement constitutes a purchase-sale or lease agreement rather than a copyright agreement. Nevertheless, the purchased (or leased) item must be used in compliance with the legislation. Just as an entity purchasing one copy of a book does not acquire the right to copy that book, so an entity purchasing the right to one copy of a computer program does not acquire the right to copy or decompile that program. The Russian legislative provisions on file wrapper licences were clearly borrowed from United States legislation without any critical analysis thereof.

Agreements between co-authors and other copyright co-owners

Agreements between co-authors usually accord one of the co-authors the right to sign copyright agreements and contain provisions on how authors' fees should be shared. Agreements between co-authors do not constitute copyright agreements since they contain no provisions on the assignment of copyright. However, agreements between co-authors that envisage one co-author assigning copyright to another do constitute copyright agreements. Similar rules apply to agreements between co-successors and other copyright co-owners.

Breach of copyright

Should one party to a copyright agreement breach the terms thereof, that party becomes liable under the terms established by Chapter 25 of the Civil Code and Article 34 of the Law on Copyright. The general rule is that the party in breach of copyright compensates the other party for any damages incurred, which damages are assessed in accordance with Article 15 of the Civil Code. Damages are usually made up of two components – real damages and lost earnings – and must be

compensated in full. However, if a commission agreement has been concluded and the author fails to produce a work consistent with the terms of the agreement, then his/her liability is limited to compensating for real damages (the author is not obliged to compensate for lost earnings) (Article 34.2 of the Law). An agreement may envisage the payment of a forfeit (fine, penalty) (Article 330 of the Civil Code). In such cases, the defaulting party is unconditionally required to pay the forfeit. Compensation for damages may also be exacted provided the injured party can prove the extent of the damages incurred. The ratio between damages and penalties is governed by Article 394 of the Civil Code. Penalties may be exacted in excess of the damages incurred if provision to that effect is made in the agreement.

Injured parties may also seek financial compensation for moral damages (Articles 151, 1099–1101 of the Civil Code) if personal, non-economic rights have been violated (right to recognition as the author of a work, misrepresentation of the author's identity, distortion of the work). Article 49 of the Law establishes that holders of exclusive copyright may forgo damages in favour of fixed compensation in the amount of 50,000 times the statutory minimum wage (currently 100 roubles; 50,000 times the statutory minimum wage is therefore equal to 5 million roubles, or $170,000). In cases where a fixed compensation amount is sought, there is no need to provide documentary evidence of the extent of the damages incurred. That makes the fixed compensation option a highly effective instrument for combating copyright abuse. The issue of whether or not compensation may be awarded to one party against another party within the framework of a copyright agreement is treated in different ways by the Russian Federation's higher courts. The Supreme Arbitration Court considers that 'liability established pursuant to Article 49 of the Law Concerning Copyright and Neighbouring Rights' shall not be applicable to relations between parties arising from neglect to comply with obligations undertaken under copyright agreements'.[12] The Supreme Court of the Russian Federation, meanwhile, ruled that the opinion expressed by a lower court 'to the effect that the terms of Article 49 of the Law of the Russian Federation Concerning Copyright and Neighbouring Rights may only be applied to non-agreement based relations' is erroneous.[13]

The Supreme Arbitration Court's point of view on this issue would appear to be more reasonable.

Notes

1. The Civil Code is a lengthy federal law that has been ratified section by section. Section I of the Civil Code (Articles 1-453) entered into force as of 1 January 1995; Section II (Articles 454-1109) entered into force as of March 1, 1996; Section III,

which is dedicated to the law of succession and international private law, is currently undergoing pre-ratification readings at the State Duma.

2. Article 1 of the Constitution of the Russian Federation, adopted by national referendum on 12 December 1993.
3. For further information see E. P. Gavrilov, *Soviet Copyright Law. Basic Provisions. Development Trends*, pp. 211–16, Moscow, 1984.
4. The permission theory was a basic tenet of Soviet copyright law. It is assumed to have its origins in the Austro-German theory of *Einräumung* – the delineation of copyright by agreement without the transfer of copyright powers to the contracting party. Russian copyright law is now closer to the French doctrine: moral rights may not be assigned by agreement; economic rights may.
5. Paragraph 7 of Information Letter No. 47 of the Presidium of the Supreme Arbitration Court of the Russian Federation of September 28, 1999, 'Overview of Procedural Practice Regarding Disputes Linked with the Application of the Law of the Russian Federation 'On Copyright and Related Rights' – hereinafter referred to as 'the Information Letter'.
6. Breaches of copyright are referred to in the Law On Copyright as '*kontrafaktsiya*' (from the equivalent French term). Russian publications frequently refer to such breaches as '*piratstvo*', and to the perpetrators as '*piraty*' (from the equivalent English terms). The term '*piratstvo*' also appears in academic literature.
7. Information Letter No. 47, paragraph 6. The Supreme Arbitration Court was criticized for this opinion by the Russian Authors' Association (RAA). The Association's legal counsel, I. Silonov, in an article entitled 'Supreme Arbitration Court – You Are Wrong!' which appeared on page 8 of *Domashniy Advokat*, No. 2, 2000, argued that in this case the provisions of the agreement that prohibited the author from using the work and from allowing third parties to use the work should have been deemed null and void by force of the fact that they were inconsistent with Article 30.3 of the Law. This criticism is unfounded. Furthermore, it is inadmissible to address the country's supreme judicial body in such familiar terms, even if that body has made an error.
8. Disputes between organizations are resolved by arbitration courts in the Russian Federation. An arbitration court's initial ruling enters into force within one month of its issuance, provided that no appeal is filed during that month. Appeal rulings (which leave an initial ruling intact or otherwise resolve a dispute) enter into force forthwith. A cassation petition may be filed up to one month following the entry into force of a ruling. Very often, it takes only six months for a dispute may pass through all three instances of the arbitration court. That was what happened in this case.
9. Information Letter No. 47, paragraph 10.
10. It is well known that while Chekhov was placed under great strain by the agreement, he never terminated it. Researchers differ in their opinions as to whether or not the terms of the agreement were crushing or unfair with regard to the writer. The current Russian legislation recognizes agreements with crushing terms as contestable, and prohibits agreements on the advance sale of rights to future works. Such agreements are deemed null and void in Russian law.
11. Information Letter No. 47, paragraph 8.
12. Information Letter No. 47, paragraph 11.
13. *Bulletin of the Supreme Court of the Russian Federation*, 2001, issue 7, p. 9.

Recent jurisprudence in Benin: Copyright – authorship of the work – pre-existence – plagiarism – penalties

Hervé G. Adoukonou*

Case: Akpovi H. Athanase/Kidjo Angélique

District Court of Cotonou, First Civil Division, 8 April 1998

Considering that, pursuant to Article 59 of the Code of Civil Procedure, the competent court shall be that located in the place where the prejudice was suffered;

That in the present case it is in Benin, domicile of Athanase Houévègnon Akpovi, that the prejudice was suffered;

That the Court of Cotonou has jurisdiction;

Considering that the author of an intellectual work shall enjoy, by the mere fact of its creation, an exclusive incorporeal property right in the work, enforceable against all persons;

That the title of an intellectual work, in so far as it is original in character, shall be protected in the same way as the work itself;

That, even where such a work is no longer protected no one may use, modify or adapt this title to distinguish a work of the same kind or of a different kind if such use is liable to create confusion;

That the author shall enjoy the right to respect for his or her name, authorship and work, this right being perpetual, inalienable and imprescriptible;

Considering that the evidence contained in the case-file establishes that the musical works entitled *Anidjo Makou* and *Gnonnou Non Kpassou Dogbe* were created, composed and realized by Mr Athanase Houévègnon Akpovi;

That these two works were filed and registered, under numbers 7500031911 and 7500032011, with the Société Française des Auteurs et Compositeurs et des Éditeurs de Musique (SACEM);

That, from that time forward, these two works shall be considered original and shall, in consequence, be protected by an exclusive incorporeal property right,

* Juris Doctor, Lawyer, Barreau du Gers (Auch).

enforceable against all persons;

Considering that during the hearing it was established that the words of the aforementioned works were reproduced in full by Ms Angélique Kidjo respectively in her musical works entitled *Alindjo* and *Yonnoun*;

That she justifies her acts by the fact that she took these words from folklore which falls within the public domain;

That folklore belongs *ab origine* to the national heritage;

Nevertheless, considering that even if the words used in the musical works entitled *Anidjo Makou* and *Gnonnou Non Kpassou Dogbe* are derived from Beninese folklore;

It is also true that such musical works do not lose their original character in so far as they were composed and realized by the author, who registered and filed them on a date previous to that of the incriminated musical works of Ms Angélique Kidjo;

That, furthermore, as provided for under Beninese Law No. 84-008 of 15 March 1984, any other author who wishes to take inspiration from the same folklore may not reproduce in full the original or derivative work of the first author on the grounds that he or she has been inspired by folklore;

That any author making use of folklore must make a prior declaration to the Beninese Copyright Office (BUBEDRA), which would have verified that the work to be used as a source of inspiration fell within the public domain, with a view to preventing the plagiarizing of works belonging to other authors;

That by so plagiarizing the musical works of Mr Houévègnon Athanase Akpovi without the consent of the latter, and having previously failed to fulfil the procedures relating to the performance and adaptation of works belonging to others, Ms Angélique Kidjo has violated the provisions of Law No. 84-008 of 15 March 1984 and has therefore infringed the copyright of Mr Houévègnon Athanase Akpovi;

Considering that the person responsible for any act prejudicial to another is bound to make reparations for that act;

That Ms Angélique Kidjo has caused prejudice to the intellectual property right of Mr Houévègnon Athanase Akpovi pertaining to the aforementioned works and has in consequence caused him definite material and moral damage;

That, accordingly, the requests of Mr Houévègnon Athanase Akpovi should be granted and Ms Angélique Kidjo should be ordered to make reparations for the damage suffered by the appellant as a result of her act;

Considering that the Beninese Copyright Office (BUBEDRA), before which the case was brought immediately, undertook various actions to reach an amicable settlement to the dispute, as proved by numerous documents in the case-file;

That at no time during the hearing was any evidence adduced which demonstrated that this body had contributed to the defendant's plagiarism of the disputed

works of the appellant;
That the principal mission of BUBEDRA is the defence and protection of the rights of the artists affiliated to it; when a dispute between two or more authors is brought before it, BUBEDRA cannot do more than seek to reach an amicable settlement;
Considering nevertheless that, it has been established that both the musical works *Anidjo Makou* and *Gnonnou Non Kpassou Dogbe* of Mr Houévègnon Athanase Akpovi and the musical works *Alindjo* and *Yonnoun* were registered and filed with SACEM;
That BUBEDRA is, consequently, not in a position to determine the original character of these works;
That, accordingly, BUBEDRA cannot be held liable and is therefore exonerated;
Considering that the various musical works in question are known to have been respectively declared to and filed with SACEM;
That, accordingly, SACEM alone is in a position to determine the original character of the works in question;
Considering, nevertheless that, as provided for under the General Statutes of SACEM, every author who is a member of this society undertakes to declare any work of which he or she is the creator and to guarantee that these works do not involve any infringement, plagiarism or illicit appropriation;
That this society may not under any circumstances be held responsible for false statements made on the declaration form;
That Ms Angélique Kidjo, by modifying and changing the titles of the various musical works which she plagiarized, contrived to escape the vigilance of SACEM;
That, accordingly, SACEM cannot be held liable and shall be exonerated.

For the above reasons

After hearing in public the parties to a civil case of the first instance, the Court:
finds Mr Houévègnon Athanase Akpovi to be the author and composer of the works *Anidjo Makou*, registered under SACEM No. 75 000 31911, and *Gnonnou Non Kpassou Dogbe*, registered under SACEM No. 75 000 32011;
finds that these works were reproduced by Ms Angélique Kidjo without the consent of Mr Houévègnon Athanase Akpovi;
finds that this situation has caused Mr Houévègnon Athanase Akpovi material and moral prejudice;
orders that the declaration forms be reworded in such a way that Mr Houévègon Athanase Akpovi is credited as the author of the works *Anidjo Makou* and *Gnonnou Non Kpassou Dogbe*, respectively, reproduced by Ms Angélique Kidjo under the titles *Alindjo* and *Yonnoun*;

orders Ms Angélique Kidjo to pay to Mr Houévègnon Akpovi his share of the royalties already received by her in respect of the titles in question, up to the day of this judgement;
orders that the situation between Mr Akpovi and Ms Kidjo be regularized in conformity with the rules of SACEM and BUDEDRA, from the date of this judgement;
declares that BUDEDRA and SACEM are not liable and are exonerated;
declares that no action may be brought against SACEM and BUBEDRA;
orders Ms Angélique Kidjo to pay expenses.

Commentary

I. The determination of the ownership of the intellectual property rights pertaining to two musical works is at the core of the dispute settled by this judgement of 8 April 1998 by the District Court of Cotonou (First Civil Division). In 1991 Mr Houévègnon Athanase Akpovi discovered that the two works in question had been reproduced by Ms Angélique Kidjo under the titles *Alindjo* and *Yonnoun* on a compact disc entitled *Parakou* and a cassette No. KOP 026, OMD 520 made by the defendant and distributed both in France and in Benin, without any authorization having been given by the appellant, or even any contact made with him, much less BUBEDRA.

II. A Beninese author and composer, Mr Houévègnon Athanase Akpovi, recorded a 45 rpm record registered with SACEM under reference numbers 7500031911 and 7500032011 (*Anidjo Makou* and *Gnonnou Non Kpassou Dogbe*). Mr Akpovi also accuses the defendant of wrongfully claiming ownership of the works in question judging by the information given on the aforementioned materials. Mr Akpovi claims that the act was a flagrant violation of the provisions of Law No. 84-008 of 15 March 1984 on the protection of copyright in Benin and has caused him to suffer very serious damage. He claims that these titles, which are original works, are and continue to be, in so far as they are intellectual works, legally protected under Articles 1, 3, 4, 5, 6 et seq. of the aforementioned law. Furthermore, his claims are supported by BUBEDRA which, in reviewing the case brought before it, found that plagiarism had indeed occurred. However, Mr Akpovi deplores the failure of BUBEDRA, of which he is a member, to defend his interests. Moreover, SACEM, of which the author and composer is also a member, although informed by BUBEDRA of the act of plagiarism, maintained the same attitude as the latter.

III. The Court first ruled out the objection to territorial jurisdiction raised by the defendant. Ms Kidjo claimed that the case should have been heard in France, where she resides. The Court noted that in this particular case the prejudice was suffered in Benin, where Mr Akpovi resides. Under the Code of Civil Procedure,

in cases involving offences, the competent court is that located in the place where the prejudicial act occurred or the court 'in the jurisdiction of which the prejudice was suffered'.[1] Furthermore, the reproduction of the work of an author, without the latter's authorization, constitutes an offence of infringement, and in this particular case, the illicit appropriation of a musical work.[2] According to case-law on infringement, the prejudicial act occurs in the place where the disputed products are sold.[3] Therefore, the defendant had no grounds on which to question the jurisdiction of the Court of Cotonou since the compact disc and the cassette containing the disputed works which were produced were indeed for sale on the Beninese market and principally in Cotonou. Furthermore, the fact that the case was brought before a court in Benin certainly does not preclude the competence of a French court with regard to the works illicitly appropriated and sold on French territory. There too, the substantive grounds on which the defendant based her case would certainly not have convinced a French court.

IV. As regards the substance, the defendant put forward two arguments: (a) the allegedly plagiarized works are not original works because they are part of Beninese folklore and do not therefore possess the original character constituting the basic element of copyright; and (b) no damage (associated with the alleged plagiarism) has been caused since the alleged damage arose from a fault which was itself non-existent because the claim was excluded from the scope of the French copyright regime administered by SACEM, and placed instead within the purview of the Beninese copyright regime overseen by BUBEDRA.[4] The question of ownership of the rights arises only where the creations of the appellant are recognized as protected works. The Court based its findings principally on the original character of the titles of the disputed works to avoid entering into the complex issue of the Beninese cultural heritage from which the works were said to be derived.[5] It recognized the original nature of the two titles and, accordingly, the right to copyright protection. Indeed, in addition to the similarity recognized by BUBEDRA between both the melodies and the lyrics of the works in question,[6] there is also the question of the titles. The Court accordingly based its findings on the fact that the musical works entitled *Anidjo Makou* and *Gnonnou Non Kpassou Dogbe* were not only created, composed and realized by Mr Akpovi but also filed and registered with SACEM, under the official reference numbers 7500031911 and 7500032011, prior to the works of Ms Kidjo. The pre-existing registration of the titles therefore bestows on the first works their originality and vests in them an exclusive, incorporeal property right enforceable against all persons. The concept of pre-existence appears to be invoked more often in relation to drawings and models than to copyright since copyright protection is already conferred on a work by the mere fact of its creation, irrespective of any other formality including the filing of the title of a work with a collective copyright administration body. Nonetheless, pre-existence is still pertinent to the present case because authorship vests, unless proved otherwise, in the person under whose name the work is

disclosed.[7] In the present case, the disputed works were first disclosed, to SACEM, by the appellant, many years before Ms Kidjo. The Court then found Ms Angélique Kidjo guilty of infringement on the grounds that 'the words of the aforementioned works were reproduced in full', respectively in the second musical works *Alindjo* and *Yonnoun.* Contrary to the position of the infringer, who claimed that these works fall within the public domain because they belong to the national heritage, the Court in addition recognized the original character of these works by virtue of their composition and realization by their author who had registered them prior to the date on which the musical works of Ms Kidjo had been registered. Ms Kidjo could only win her case by proving that identical musical compositions had existed before those of the appellant. Furthermore, according to case law, it is incumbent on the defendant accused of infringement to prove pre-existence.[8] It therefore fell to Ms Kidjo to demonstrate that the works fell within the public domain[9] or to prove the existence of an earlier realization of the works by a composer other than Mr Akpovi. The defendant was unable to do so. A work meets the criterion of originality if no musical pre-existence can be found.[10] With regard to the argument that no fault existed because the works belonged to the national heritage, a precedent in case law recognizes that *borrowing from folklore does not necessarily exclude all originality*.[11] This is confirmed by the literature. For example, D. Lipszyc states that 'the ideas used in the work can be old ones and the work nevertheless be original since, we repeat, copyright allows intellectual creation to be based on pre-existing elements'.[12] Thus, according to doctrine, in order for a work not to be considered a copy or an imitation of another work, it is sufficient for that work to be distinct from works which precede it. As explained by R. Oman: 'modern variations of each folklore work, once fixed, could qualify as a derivative work, and new arrangements of traditional music and rhythms could qualify for copyright protection'.[13] The allegations of the defendant are therefore not supported by either case-law or academic opinion. Even if they were inspired by Beninese folklore, the musical works created by Mr Akpovi are still original as long as they are not a slavish copy of pre-existing works. This is, in fact, the precise fault the appellant found with regard to Ms Kidjo's works *Alindjo* and *Yonnoun*. In any event, even if Ms Kidjo had found the inspiration for her work in Beninese folklore, she would not have been exempt from fulfilling the requisite formalities under Law No. 84-008 of 15 March 1984 on the protection of copyright in Benin. First, the adaptation of folklore or of elements taken from folklore must be declared to the body set up for the management and defence of copyright (BUBEDRA).[14] Secondly, the representation or public performance or the direct or indirect fixation of folklore or of elements borrowed from folklore, with a view to exploitation for profit, requires prior authorization by BUBEDRA, against payment of a fee. . . .[15] This requirement is also necessary to enable BUBEDRA to verify, at the prior declaration stage, whether the work to be adapted actually falls within the public

domain. In addition, the exploitation of a work of folklore is subject to payment of a fee the proceeds of which are devoted to cultural and social purposes of benefit to authors.[16] Lastly, according to Article 10 of Law No. 84-008 of 15 March 1984 on the protection of copyright in Benin, authors, even if they wish to use the same folklore, may not reproduce in full the original or derivative work of a previous author on the grounds that they have been inspired by folklore. Even if the present case were assumed to involve the adaptation of a work falling in the public domain, the required prior declaration was not made by Ms Kidjo to BUBEDRA. In consequence, the Court had no difficulty in defining the nature of the offences committed by Ms Kidjo, who violated the provisions of Law No. 84-008 of 15 March 1984 on the protection of copyright in Benin, in particular those relating to respect for moral rights, prior declaration and payment of a fee the proceeds of which would be paid to BUBEDRA.

V. The judgement therefore penalizes the failure to secure prior authorization from the author and composer Mr Akpovi. The Court found Ms Kidjo guilty of violating the author's rights (moral and economic) of Mr Akpovi and ordered the defendant to make reparations for the prejudice suffered, pursuant to Article 1382 of the Civil Code. With regard to BUBEDRA and SACEM, appearing before the Court at the request of the appellant, the former was exonerated on grounds of having demonstrated due diligence, namely, having proposed an amicable settlement. Furthermore, the Court exonerated BUBEDRA of responsibility especially since the musical works '*Anidjo Makou* and *Gnonnou Non Kpassou Dogbe* by Mr Akpovi, as well as the musical works *Alindjo* and *Yonnou* by Ms Kidjo, were all registered and filed with SACEM, so that BUBEDRA was not in a position to verify the originality of the works. While recognizing that SACEM alone could have ascertained the originality of the disputed works, the Court nevertheless declared it free of liability and exonerated it, having regard to its General Statutes under which 'all authors who are members of SACEM pledge to declare all works of which they are the creator and to guarantee that such works involve no infringement, plagiarism or illicit appropriation'. Is this single stipulation sufficient to justify the fact that SACEM failed to take the necessary measures to defend the creations of one of its members when in fact, by joining SACEM, authors have the right to expect that this body will defend their rights? In reality, SACEM was faced with a dilemma: either to defend Mr Akpovi, who was obviously not well known in France, or to defend Ms Kidjo, who was very well known. In either case, SACEM would have had to make a case against one of its members. The solution chosen – a wait-and-see policy – suggests faulty behaviour on the part of SACEM; nevertheless this type of fault does not fall within the competence of a court hearing a case on infringement. Lastly, the judgement ordered that the declaration forms were to be reworded to compensate for the moral prejudice suffered by Mr Houévègnon Athanase Akpovi. The Court also ordered that the situation between Mr Akpovi

and Ms Angélique Kidjo should be regularized to conform with the rules of SACEM and BUBEDRA. The judgement failed, however, to include a decision with regard to the designation of an expert to assess the monetary prejudice suffered by Mr Akpovi, despite the request to that effect made to the Court by the appellant. The question may now be raised as to how the financial prejudice suffered by the author can be assessed. It is also surprising that BUBEDRA, called before the District Court of Cotonou by the appellant in relation to a case for which this body first attempted to arrange an amicable settlement between the parties, did not request the Court to order the defendant to pay in full the fee due in respect of the adaptation of the works. It should be noted that the defendant appealed against this judgement before the Court of Appeals of Cotonou, which confirmed the judgement of the District Court by Decree No. 71/2nd CCMS/2000 of 17 May 2000.

Notes

1. Article 2, paragraph 2 of the French Code of Civil Procedure, 29th version, 1 January 1958, still in effect in Benin.
2. Article 3 B. 4) of Act No. 84–008 of 15 March 1984 relating to the protection of copyright in Benin, corresponding to article L335–2 of the French Code of Intellectual Property.
3. Paris, 15 June 1982, *Gazette du Palais*, 1982.2, Summary, p. 378, or Paris, 25 April 1978, *Gazette du Palais*, 1978.2, p. 448.
4. With regard to the attribution of authorship to the creator, the law of the country of origin has no effect in France on the possibility of bringing action in that country for violation of a moral right, on the basis of the principle whereby an author enjoys moral rights by the mere fact of his creation. These rules are binding. See Chap. 1, 28 May 1991: D 1993.197 Note Raynard; RIDA, July 1991, pp. 197 and 161, observ. Kérever; JCP 1991. II.21 731, commentary Françon; JCP ed. E 1991. II 220, commentary Ginsburg and Sirinelli; *Gazette du Palais* 1989.2.741; JDI 1992. 3, commentary Edelman.
5. Nevertheless, legal scholarship does not deny the originality of works derived from folklore and refutes the theory according to which the traditional art, music and literature of indigenous people are not the creation of individual authors but the product of successive contributions of many generations of creators. According to R. Oman, ‘modern copyright has strong legal protection for joint works, corporate authorship and contributions to a composite work and these concepts will inform our discussion of the protection of folklore. See R. Oman, ‘Folkloric treasures: the next copyright frontier?’, *Newsletter* 15, No. 4, 1997, p. 3, American Bar Association, Section of Intellectual Property Law.
6. In this regard, BUBEDRA, the sole agency competent in this domain and acting as expert, told the Tribunal that ‘it is difficult to see how works belonging to different

authors, whether they are original, derivative or arranged, can resemble each other nearly word for word'.

7. Article 4(1), paragraph 2 of the Law No. 84–008 of 15 March 1984 on the protection of copyright in Benin and article L 113–1 of the French Code of Intellectual Property.
8. First Civil Division, 11 October 1989: *RIDA*, July 1990, p. 325.
9. In this regard, the defendant's recourse, with a view to enlightening the Court, to museum curators, dignitaries and other professionals working in the field of Beninese culture did not convince the Court, which greatly preferred the expert opinion provided by BUBEDRA.
10. TGI Paris, 29 June 1986: *Cahiers du Droit d'Auteur*, February 1988, p. 29.
11. First Civil Division, 1 July 1970; Dalloz, 1970, p. 734, note B. Edelman.
12. Delia Lipszyc, *Copyright and Neighbouring Rights*, p.74, Paris, UNESCO Publishing, 1997.
13. Oman, op.cit., p. 3.
14. Article 10, Law No. 84–008 of 15 March 1984 on the protection of copyright.
15. Ibid.
16. Article 46, Law No. 84–008 of 15 March 1984 on the protection of copyright.