EXPRESSIONS OF FOLKLORE IN CONTEMPORARY NIGERIAN COPYRIGHT SYSTEM, INTERNATIONAL INSTRUMENTS AND NATIONAL TREATMENT

Noel N. Udeoji[*]

Abstract

Folklore is an important aspect of Nigerian culture and heritage, encompassing a wide range of expressions such as folktales, proverbs, traditional music, dance, and crafts, etc. These expressions are deeply rooted in the history and traditions of various Nigerian communities and have been passed down through generations. However, the protection and preservation of folklore have become a major concern, hence provisions against unregulated use enacted in our laws. As a member of World Intellectual Property Organization (WIPO) administering the ratified Berne Convention and the Trade Related Aspects of Intellectual Property Rights Agreement (TRIPs), the principle of national treatment set down in these conventions becomes an obligation. In effect, this means that any group of nationals wishing to engage, for commercial purposes, with their own cultural heritage requires, before use, the consent and approval of the Nigeria copyright Commission. This may on one hand be justified as necessary compliance with the principles of national treatment in that through international obligations, indigenous laws of member states should treat both their nationals and non-nationals equally and alike. In this work, using doctrinal research methodology, we shall discuss various expressions of folklore and its protection in contemporary Nigerian society under the Copyright Act of 2022, in relation with the Ghanaian law. We shall, through an analysis of the obligations set down in these conventions, also examine the obligations under international instruments, interrogates this position in relation to Nigeria cultural industries.

Keyword: *Expressions of Folklore, Copyright System, International Instruments, National Treatment*

[*] Noel N. Udeoji, PhD Intellectual Property Law, BL., FICMC, MCArb, Lecturer I, Department of Public Law, Nnamdi Azikiwe University, Awka,, nn.udeoji@unizik.edu.ng, udeojinoel@yahoo.com (+234-803-324-0300)

Introduction

Nigeria is a signatory to various international copyright treaties, including the Berne Convention for the Protection of Literary and Artistic Works and the WIPO Copyright Treaty. These international instruments recognize the importance of protecting traditional cultural expressions and require member states to incorporate provisions for their protection in their national laws.

Folklore forms an integral part of the cultural heritage of a nation and it is an essential means of social identity, particularly for a developing country like Nigeria.[1] The Nigeria Copyright Act provides that the rights to exploit and control the use of folklore belong to the communities that created them, rather than individual creators. This is an important recognition of the communal nature of folklore and ensures that the benefits of exploiting these works are indirectly shared among members of the community. By giving communities the legal tools to protect and benefit from their folklore, the Act promotes cultural diversity and inclusivity while also stimulating creativity and innovation in Nigerian society. In recent times, there has been an increase in the commercial exploitation of folklore by entrepreneurs who have no connection whatsoever with the communities to which the folklore belongs. In most cases, the communities who are the custodians of the expression of folklore do not enjoy the economic benefits from such unauthorized exploitation by persons not belonging to the communities.[2] Often times, the folklore were been used in ways that insults, degrades and spiritually offend the sensibility of the community; and the consent requirement of the Nigerian Copyright Commission (NCC), shows little respect or regards to the custodians of the folklore in the commercialization process.

In view of the gravity of this problem, the World Intellectual Property Organization (WIPO), the United Nations Educational Scientific and Cultural Organization (UNESCO) and several countries like Nigeria enacted several laws like the Copyright Law of 1970 (Amended in 1992 and 1999) which attempted to finalize solutions through a suitable legal mechanism for the protection of expression of folklore which the current

1 KC Ying, 'Protection of Expressions of Folklore/Traditional Cultural Expressions: To What Extent is Copyright Law the Solution?' <https://www.academia.edu/14096589/protection_of_expressions_of_folklore_Traditional_cultural_Expressions_To _What_Extent_is_Copyright_Law_the_Solution> accessed 12 March, 2024

2 Ibid

one in Nigeria is enshrined in the Copyright Act of 2022.[3]

Meaning of Expression of Folklore

The definition of 'folklore' is indeed subjective. Folklore may be viewed to be defined as the traditional beliefs, customs, and stories of a community, passed through the generations by word of mouth. The Tunis Model Law defines folklore as creations made by authors who are believed to be nationals of the country concerned, or by ethnic communities. The Law of Morocco defines folklore as "all unpublished works of the kind".

Expression of Folklore was also defined under section 2 of the Model Provision (UNESCO)[4] as "production consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community or by individuals reflecting the traditional artistic expectations of such community." Folklore may therefore be gleaned as any literary, artistic or scientific expression of traditional culture, in whatever form such expression may be expressed or recorded, which includes wide range of expressions such as myths, legends, folktales, songs, dances, and crafts that are passed down through generations within a community.

Let us look into the 'expression of folklore' in contemporary Nigeria copyright system. The Copyright Act of 2022 defined it under section 74(5) 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…"* Paragraphs (a) – (d) of the same section 74(5) provides the means through which folklore can be expressed, to include:

a. Folklore, folk poetry and folk riddles;

b. Folk songs and instrumental folk music;

c. Folk dances and folk plays; and

d. Productions of folk arts in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewellery, handicrafts, costumes and indigenous textiles.

[3] Nigeria Copyright Act 2022, sections, 74 to 76

[4] The protection of traditional cultural expression/expression of folklore. Updated draft outline of policy options and legal mechanism WIPO Geneva (9th session)

Furthermore, the protection of expression of folklore is discussed distinctively from the concept of traditional knowledge. The term 'traditional knowledge' is sometimes used in a narrow sense as embracing technical know-how such as medical or ecological knowledge. Sometimes, it is interpreted broadly to refer to both technical know-how and traditional experiences like expression of folklore. Nevertheless, Separate consideration of the Protection of expression of folklore is preferred to that as such legal protection can be viewed within the context of cultural policies. Besides, discussion on traditional knowledge is likely to lead to the realm of patent law and biodiversity rights while expression of folklore are usually discussed in the environments of copyrights.[5]

In its latest Draft Articles, published in 2019, the WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) defines Traditional Cultural Expressions as: "any forms in which traditional culture practices and knowledge are expressed, [appear or are manifested] [the result of intellectual activity, experiences, or insights] by indigenous [peoples], local communities and/or [other beneficiaries] in or from a traditional context, and may be dynamic and evolving and comprise verbal forms, musical forms, expressions by movement, tangible or intangible forms of expression, or combinations thereof."[6] Whereas the Ghana Copyright Act 2005, states: 'Folklore' means the literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which are created, preserved and developed by ethnic communities of Ghana or by an unidentified Ghanaian author, and includes kente and adinkra designs, where the author of the designs are [sic] not known, and any similar work designated under this Act to be works of folklore.[7]

General Treatment Principles for Folklore in Nigeria

The Nigerian Copyright Act of 2022 lays down certain general principles for the treatment of folklore in the country. These include:

a. Non-Appropriation: The Act prohibits the appropriation of traditional cultural expressions when made either for commercial purpose or

5 D Oriakhogba and IA Olubiyi, *Intellectual Property Law in Nigeria* (Lagos: Independent Publisher, 2021) p 25.

6 WIPO, The Protection of Traditional Cultural Expressions: Draft Articles Facilitators' Rev. (2019). Available at <https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_40/facilitators_text_on_tces.pdf> accessed 16 June 2021

7 Section 76.

outside their traditional or customary context[8] without the prior consent of the community or group(s) through the Commission who are the keepers of the expressions. This means that any use of folklore must be done with necessary consent.[9]

b. Moral Rights: The Act recognizes by way of fair dealing for private and domestic use, the moral rights of the creators of folklore, such as the right, if made public, to be identified as the source and creator of the work,[10] and the right to object to any distortion, mutilation, or other modification of the work in a manner prejudicial to the honour, dignity, or cultural interest of the originating community.[11]

c. Protection against Misrepresentation: The Act prohibits the use of traditional cultural expressions in a manner that is likely to be detrimental to the cultural heritage of a community or to be considered degrading.[12]

Expressions of Folklore in Contemporary Nigeria[13]

a. Folktales: Folktales are a popular form of folklore in Nigeria and are often used to pass down moral lessons and traditional knowledge. Today, folktales are still told in villages and towns but have also been adapted to modern forms such as children's books and animations.

b. Proverbs: Proverbs are short, witty sayings that convey traditional wisdom and are a common form of folklore in Nigerian culture. They are used in everyday conversations and are often used to teach children important values and beliefs.

c. Traditional Music: Music is an integral part of Nigerian culture, with various genres unique to different ethnic groups. Traditional music is often used to tell stories, and many contemporary Nigerian musicians draw inspiration from traditional music in their works.

d. Dance: Dance is an important aspect of Nigerian culture and is often used in traditional festivals and celebrations. Many traditional dances have been passed down through generations and are still performed in modern times.

---

8 Nigeria Copyright Act 2022, sections 74(1) (c), 74(3).
9 Ibid, section 75
10 Ibid section 74(2) (a)
11 Ibid section 76(1) (c)
12 Ibid section 76(1) (b)
13 Ibid, section 74(5) (a) – (d) few examples illustrated.

e. Crafts: Nigerian heritage is rich in various forms of traditional crafts, such as pottery, weaving, and woodcarving. These crafts are still practiced today and are often used to promote cultural tourism in the country.

Characteristics of Expression of Folklore

In common with the subject matter of most forms of Intellectual Property (IP) protection, and unlike unique cultural objects, expression of folklore are reproducible, and susceptible to copying, adaptation and commercial exploitation. Yet, unlike many forms of conventional IP, and whether or not they are created by individuals or communities, many expressions of folklore derive their significance and worth from community recognition and identification, and not individual's mark of originality. In addition, although reproducible, unauthorized copies of expressions of folklore/traditional cultures will often not be regarded as authentic from a community perspective, although outsiders may not know this. So, expression of folklore usually possess the following characteristics:

a. Generally, they are collectively held by a community

b. They are handed down from generation to generation either by verbal transmission or by imitation

c. The continuously utilized, circulated, evolved and developed within the community for so many years

d. They are made by author unknown or by community or by individuals who have authority within their community to do so[14]

The Copyright Act 2022 protects expression of folklore against the production, communication to the public by performance, broadcasting, distribution by cable or other means; adaptation, translation and other transformations where such expression are made either for commercial purposes or outside the traditional of customer context. The Copyright Act is not alone in this approach. For instance, article 5(1) (xii), Annex Vii to the Bangui agreement, on the creation of an African Intellectual Property Organization protects the expression of folklore and works derived from it.

In Nigeria, The Nigerian Copyright Commission (NCC) is vested with the power to authorize the exploitation of the expression of folklore in Nigeria by third parties. However, The NCC powers are limited by stipulated

[14] Protective Folklore under Modern Intellectual Property Regime. A reprisal of the tension between individual and communal right in Africa and the United States, (1999) *American University Law Review*

exceptions such as fair dealing, educational use, and use for illustration, incidental uses and borrowing of expression of folklore for creating an original work.[15] The Copyright Act 2022 requires the Community of Origin of a folklore to be duly acknowledged in all printed materials that the folklore is being utilized, especially where such printed materials is being communicated to the public. It should be noted that the section 75 of the Act provides punishment for infringement which includes remedies such as damages, injunctions and other remedies that may be granted by the court at such suit. There is a provision for criminal sanctions which includes a fine not less than ₦100,000- or One-year imprisonment or both in the case of an individual and a fine not less than ₦2,000,000 in the case of a Corporate Entity.

Expression of Folklore in Contemporary Nigerian Copyright System

A quick one, on the issue of the criminal liability by way of fine, the fine has remained the same for individuals since the Copyright law of 1988 that was repealed by the contemporary Copyright law and only the sanction for corporate bodies was increased to the tune of ₦2000000 which is a welcome development but however in all sincerity, we should know that this fine can be paid comfortably. And it should as well be noted that this law also creates a loophole for foreign companies to exploit, owing to the facts that using the current exchange rate the fine is a thousand dollars plus, that is the price of an iPhone 15 pro. So, we suggest that the fine should be looked into in the next amendment. Now let us see how we have benefited from the contemporary law.

We shall classify the contemporary Nigerian copyright system as a rise for the following reasons

a. Cultural Integrity[16]

Indigenous communities are very concerned with their continued distinct existence of their culture which should be free from unnecessary interference. Indeed, their sense of identity and self-respect are bounded up with their group cultures. Hence, it is important for the community to have the rights of control over the use and expression of their folklore which are sacred in nature. The following statement may to a certain degree reflect this view point:

---

15 D Oriakhogba and IA Olubiyi (fn 5) p 25

16 K Jayangknla 'The protection of the expression of folklore and copyright law' <https://www.academia.edu/3423284/The_Protection_of_the_Expression_of_Folklore_and_Copyright_Law> Accessed 12 March 2024

> We have many particular things which we hold internal to our cultures. These things are spiritual in nature…..They are ours and they are not for sale…such matters are our "secrets", the things which binds us together in our identities as distinct people. It is not that we never make outsiders aware of our secret, but we-not-they decides what, how much and to what purpose this knowledge is to be put. That is essential to our cultural Integrity and thus to our survival as people[17]

And our current Copyright law has deemed it fit to recognize and cover these cultural aspects of our folklore by the current law on expression of folklore.

b. Avoiding Unjust Enrichment of the Outsiders[18]

The existing Copyright Act has effectively addressed the issue of avoiding unjust enrichment of outsiders by instituting a comprehensive set of regulations and legal parameters. By delineating clear guidelines, the legislation ensures that creators, be they artists, authors, or innovators, are granted due recognition and fair compensation for their intellectual property. Simultaneously, the Act strikes a delicate balance, safeguarding the interests of the public by allowing for reasonable use and access to creative works. This nuanced approach fosters a harmonious equilibrium, discouraging undue exploitation while promoting a vibrant and accessible cultural landscape.

c. Prevention of Economic Harm on the Communities [19]

The prevailing Copyright Act also plays a crucial role in preventing economic harm on communities. By safeguarding the exclusive rights of creators and intellectual property owners, the legislation contributes to the sustenance and prosperity of local economies. This protection fosters an environment where creative industries can thrive, leading to job creation, economic growth, and the overall well-being of communities. Moreover, by discouraging unauthorized use and exploitation of creative works, the Act ensures that the economic benefits generated from these endeavours remain within the communities that contribute to and support artistic and innovative

---

17 The Nigerian Copyright Act 2022

18 LT Khaw, 'Copyright Law in Malaysia' [2004](31) *Journal of Malaysian and Comparative Law* < https://ejournal.um.edu.my/index.php/JMCL/article/view/16261> Accessed 12 March 2024

19 Ibid.

endeavours.

d. Prevention of misappropriation of folklore [20]

The contemporary Copyright Act also serves as a crucial instrument in preventing the misappropriation of folklore. Recognizing the cultural significance and heritage embedded in traditional stories, customs, and expressions, the legislation provides a protective framework. This helps ensure that the richness of folklore is not exploited or misused without due acknowledgment and consent from the communities that hold these cultural assets.

By offering legal mechanisms to safeguard folklore, the Copyright Act contributes to the preservation of cultural diversity and heritage. It establishes a foundation for respecting the intellectual and cultural contributions of communities, discouraging unauthorized use that could lead to the dilution or distortion of traditional knowledge. In this way, the Act acts as a guardian of cultural integrity, fostering a more equitable and respectful approach to the representation and utilization of folklore within a global context.

e. Empowering Communities[21]

The legal framework established by the Copyright Act not only prevents the misappropriation of folklore but also empowers communities by facilitating equitable benefits. This is achieved through provisions that encourage collaborative and intercultural engagement. By recognizing the value of folklore as shared cultural heritage, the law encourages the fair and respectful use of traditional knowledge, fostering a dynamic environment where indigenous and cultural communities can engage in mutually beneficial partnerships.

Through mechanisms such as licensing agreements and fair compensation practices, the Act promotes a balance that enables indigenous communities to actively participate in decision-making processes regarding the utilization of their folklore. This empowerment extends beyond mere protection to creating opportunities for communities to leverage their cultural assets for economic, educational, and social development. In doing so, the Copyright Act becomes a catalyst for fostering cultural exchange, understanding, and sustainable development within and between diverse communities.

---

[20] Ibid.

[21] Paper prepared by the international bureau of WIPO

f. Safeguarding of Traditional Cultures

The Copyright Act plays a pivotal role in the safeguarding of traditional cultures by providing a legal framework that recognizes and protects the unique expressions and creations of these cultures. Through its provisions, the law ensures that traditional knowledge, folklore, and cultural heritage are shielded from unauthorized use or appropriation.

By granting creators and communities the rights to control the use of their cultural expressions, the Copyright Act actively contributes to the preservation of traditional cultures. This safeguarding extends beyond mere protection to the promotion of cultural diversity and the transmission of ancestral knowledge from one generation to another. In essence, the Act serves as a guardian, fostering a climate where traditional cultures can thrive, evolve, and continue to contribute to the rich tapestry of human heritage.

g. Enhancing certainty, transparency and mutual confidence

The prevailing Copyright Act has significantly advanced the realms of certainty, transparency, mutual respect, and understanding between indigenous and non-indigenous communities. Its far-reaching impact is particularly evident in the meticulous delineation of grounds for the replication of folklore, as expounded in the second subsection of section 74, encompassing paragraphs A to E.

This legal framework not only establishes clear guidelines but also fosters an environment where both indigenous and non-indigenous communities can navigate the intricate landscape of cultural exchange with confidence. By providing a structured approach to the reproduction of folklore for academic purposes and beyond, the law instills a sense of certainty, ensuring that such activities are conducted within defined parameters. This, in turn, promotes transparency, as stakeholders are equipped with a comprehensive understanding of the conditions under which cultural expressions can be shared and utilized.[22]

Essentials in Expression of Folklore in Ghana

Rights in Ghanaian folklore are held by the office of the president in perpetuity. So, under the law, the term of protection for folklore never expires, it will never fall into the public domain and will never be free to use either for Ghanaians or non-Ghanaians. In effect, this means that any Ghanaian national wishing to engage with their own cultural heritage in

[22] The Copyright Act 2022

order to develop a new commercial work, must register intent and pay an undetermined fee to the Copyright Office prior to use.[23]

The significance of folklore in the development of Ghana's post-independence cultural industries cannot be overstated. Ghana's first President, Kwame Nkrumah, made it clear in speeches and policies that the role of Ghana's artists was to develop Ghana's post-colonial cultural identity by drawing back on its pre-colonial folklore.[24] His position was supported by some of the architects of Ghana's modern cultural industries, such as Kwabena Nketia[25] in music and Efua Sutherland in theatre.[26] From the late 1950s onwards, Ghana's artists have routinely made use of traditional cultural expressions in their work, developing specific musical genres such as Highlife and Hiplife, and theatre genres such as Anansesem and Abibigoro, all of which fuse modern and traditional artistic forms. Hence, the implications of this legislation and its application are particularly problematic for those working in Ghana's creative industries who habitually reimagine and rework Ghanaian folklore for modern audiences.[27]

One of the more famous cases concerned Paul Simon's *Rhythm of the Saints* (1990). Track nine, *Spirit Voices*, took the rhythm and melody from the Ghanaian Highlife song *Yaa Amponsah*, a song about a beautiful dancer recorded by Kwame Asare and the Kumasi Trio in 1928. Simon believed the song was in copyright and so contacted the Ghanaian Embassy in New York who advised him to send the initial $16,000 royalty payment to the Ghana Copyright Office.[28] The Office came under the National Commission on Culture, whose Director Mohammed ben Abdallah,

---

23 S Collins, ''Who Owns Ananse? The Tangled Web of Folklore and Copyright in Ghana" (2016) 30 (2) *Journal of African Cultural Studies*: 178 -91

24 S Obeng, *Selected Speeches of Kwame Nkrumah*, (Afram Publishing, Accra 1997) 131.

25 T Wiggins & JH Kwabena Nketia, ''An Interview with JH Kwabena Nketia: Perspectives on Tradition and Modernity" (2005) 14 (1) *Ethnomusicology Forum*: 57 -81

26 July Robert, Robert July notes that ''under Nkrumah, independent Ghana soon bristled with agencies concerned with formulating a national cultural policy – an arts council, youth organizations and broadcasting facilities, ministries of education and culture, and eventually an Institute of African Studies based in the university at Legon", in *An African Voice: The Role of the Humanities in African Independence*, (Duke University Press, Durham 1987) 181.

27 A Adams & E Sutherland-Addy (eds), *The Legacy of Efua Sutherland: Pan-African Cultural Activism*, (Ayebia Clarke Publishing, Banbury, UK 2007); Boateng B, *The Copyright Thing Doesn't Work Here*, (University of Minnesota Press, Minneapolis 2011).

28 S Collins, ''The Commoditisation of Culture: Folklore, Playwriting and Copyright in Ghana", in *PhD Thesis*, (University of Glasgow, 2015) 169.

organized a committee of experts to investigate whether the song did in fact belong to Asare. The committee found that there had been known versions of the song that predated Asare's recording by at least ten years. As the composer of the original version of the song was unknown, it was decided that *Yaa Amponsah* was a work of folklore and so the money provided by Simon, and all subsequent royalties, reverted to the state as the rights holder.[29] Collins notes that the monies raised directly supported the running of the National Folklore Board.[30] This is, indeed, the case. As the monies raised funded the building of the Board's offices in the affluent Cantonments area of Accra.

The importance of national treatment is also emphasized in the 1994 Trade Related Aspects of Intellectual Property Rights Agreement (TRIPs), which Ricketson and Ginsburg describe as 'the steel in the spine' of international copyright law.[31] As Alan Story notes: *"If a country wants to become a member of the 153-member (August 2009) World Trade Organization and become active in world trade, it must also sign the other leading international agreement regulating copyright, the 1994 TRIPs Agreement […] By signing up to the TRIPs Agreement a country also agrees to abide by Articles 1 to 21 of the Berne Convention"*.[32]

Does extension of protection for folklore to nationals a consequence of international obligations or a domestic choice. Hence, first, it is useful to clarify how national treatment applies to the Berne Convention before going on to consider whether folklore is protected under the Berne Convention

National Treatment[33]

National treatment ('mutual recognition')[34] is 'a rule of non-discrimination'[35] that was developed as a means of guaranteeing that

29 Ibid
30 Ibid
31 A Ricketson & J Ginsburg, *International Copyright and Neighbouring Rights*, (Oxford University Press, 2006) 162
32 A Story, *An Alternative Primer on National and International Copyright Law in the Global South: Eighteen Questions and Answers*, (Copy/South Research Group, Canterbury 2009) 46.
33 https://www.elgaronline.com/view/journals/qmjip/12-1/qmjip.2022.01.01.xml
34 WIPO, 'Submission by the African Group: Objectives, Principles and Elements of an International Instrument, or Instruments, on Intellectual Property in Relation to Genetic Resources and on the Protection of Traditional Knowledge and Folklore' (2004). Available at: <http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_6/wipo_grtkf_ic_6_12.pdf> accessed 3 April 2020
35 P Goldstein & B Hugenholtz, *International Copyright*, (Oxford University Press, Oxford 2010) 99

'authors' rights were also recognized in foreign countries'.[36] National treatment was incorporated into the original 1886 Berne Convention[37] and, according to WIPO, forms 'the cornerstone of international IP law'.[38] Article 5 of the Convention provides that:

> (1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention', and that 'protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.' The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) provides that each WTO Member 'shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property' (Art 3). Another related mechanism for affording access to a national system is 'assimilation' to an eligible nationality by virtue of residence. For example, the Berne Convention (Art 3(2)) provides that 'authors who are not nationals of one of the countries of the [Berne] Union but who have their habitual residence in one of them shall, for the purposes of this Convention, be assimilated to nationals of that country.[39]

WIPO describes how national treatment works in the following terms: Works originating in one of the contracting States (that is, works the author of which is a national of such a State or works which were first published in such a State) must be given the same protection in each of the other

---

[36] Lewinski S , *International Copyright Law and Policy* , (Oxford University Press, Oxford 2008) 2

[37] Both the Berne Convention and the UCC 'integrated the principle of *lex loci protectionis*' or the 'principle of the country of protection' as opposed to 'the principle of the country of origin' (or mutual reciprocity). Lewinski Ibid, 7

[38] WIPO, 'Practical Means of Giving Effect to the International Dimension of the Committee's Work' (2005) 16. Available at: <http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_6.pdf> accessed 9 May 2018

[39] According to commentary on the Convention, this paragraph 'covers the special case of stateless persons and refugees'. See also Article 3 of the Paris Convention for a similar 'assimilation' mechanism.

contracting States as the latter grants to the works of its own nationals.[40]

The beneficiaries of national treatment are either nationals of one of the countries of the Berne Union, or those who have their habitual residence in one of the countries of the Union.[41] Article 5(1) of the Berne Convention provides that, with respect to protected works outside their country of origin: '[a]uthors shall enjoy … the rights which th[e] respective laws [of Berne Union members] do now or may hereafter grant to their nationals'.[42] Hence, under the principle, authors' rights are guaranteed now and in the future in all countries of the Union. Moreover, as Ricketson and Ginsberg suggest, national treatment is not subject to formalities but, like copyright, is automatically applied to every eligible work created by a citizen of a member of the Union.[43]

The advantage of national treatment as a mechanism, as Bruneis notes, is that 'national courts have only to apply their own laws'.[44] Ricketson and Ginsburg point out that Article 5(3) of the Berne Convention makes explicit that the protection of works within their country of origin is 'governed by domestic law, with no requirement that the "rights specially granted" by the Convention also be accorded to these works'.[45] Thus, if an author from one country seeks to enforce protection for their work in a second state, then the domestic copyright laws of the second country will apply, not the terms set down in the Berne Convention. The only exception to national treatment is 'the duration of protection where the rule of comparison of terms applies'.[46]

National Treatment and the Berne Convention

The principle of national treatment extends to works protected under the Berne Convention. Ricketson and Ginsburg note that this refers to works 'enumerated in article 2(1), as well as those dealt with in the other

40 'Treaties and Contracting Parties: Berne Convention'. Available at: <http://www.wipo.int/treaties/en/ip/berne/summary_berne.html> accessed 22 February 2021.

41 It also applies to authors who are not nationals of one of these countries, for works first published in one of those countries (or simultaneously in a country outside the Union and a country of the Union). Lewinski (fn 36) at 2

42 R Brauneis, 'National Treatment in Copyright and Related Rights: How Much Work Does it Do?' (2013) *GW Law Faculty Publications & Other Works*. Available at: <http://scholarship.law.gwu.edu/faculty_publications/810> accessed 5 May 2018

43 Ricketson and Ginsberg (fn 31) at 309–10

44 Brauneis (fn 42) at 810

45 Ricketson and Ginsberg (fn 31) at 310

46 Ibid 303

paragraphs of article 2'.[47] Article 2(1) sets down protection for 'literary and artistic works', which include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.[48]

Ricketson and Ginsburg note that the words 'such as', which precede the enumeration 'indicate that it is not an exhaustive list',[49] and that 'articles 2 and 2bis[50] leave considerable discretion to Union States to determine what shall be protected under the head of literary and artistic works'.[51]

However, they also note that the list of works enumerated in Article 2(1) 'is extensive and comprises the principal categories of works historically recognized under the vast majority of national copyright laws'.[52] Therefore, though there may be slight variances between jurisdictions concerning what qualifies as a literary and artistic work, national treatment only extends as far as those works that are conventionally understood to be copyrightable. They add that the 'mandatory nature of this requirement has always been strongly maintained, and not disputed by any Union member'.[53] With the

47 Ibid at 408–9

48 Berne Convention, Paris Act 1971, Art 2(1)

49 Ricketson and Ginsberg (fn 31) at 409

50 Berne Convention, Paris Act 1971, Art 2*bis*: (1) It shall be a matter for legislation in the countries of the Union to exclude, wholly or in part, from the protection provided by the preceding Article political speeches and speeches delivered in the course of legal proceedings; (2) It shall also be a matter for legislation in the countries of the Union to determine the conditions under which lectures, addresses and other works of the same nature which are delivered in public may be reproduced by the press, broadcast, communicated to the public by wire and made the subject of public communication as envisaged in Article 11*bis* (1) of this Convention, when such use is justified by the informatory purpose; (3) Nevertheless, the author shall enjoy the exclusive right of making a collection of his works mentioned in the preceding paragraphs

51 Ricketson and Ginsberg (fn 31) at 312

52 Ibid at 408

53 Ibid at 409

principle of national treatment and its applicability to Berne firmly established – which would appear to support Amegatcher's position, the next question becomes whether or not folklore is considered copyrightable under the Berne Convention.

Protection for Folklore in the Berne Convention

The first attempt to include folklore in the Berne Convention was made as part of the 1967 Stockholm Revisions of the Berne Convention. Prior to the 1967 Stockholm Revisions, neither of the two global copyright conventions: the Berne Convention, administered by the World Intellectual Property Organization (WIPO), nor the UCC[54] administered by UNESCO,[55] made any provision for the protection of folklore.[56] Indeed, by 1967 only two

[54] UNESCO was established in 1945 and took the Universal Declaration of Human Rights (in which was enshrined a right to 'the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author') as the basis for the creation of a new international copyright regime. See Ricketson and Ginsberg (fn 31) at 1183, note 8. In 1952 UNESCO established the UCC to which both America and the USSR became signatories along with 'the majority of Berne members'. Ricketson and Ginsberg (fn 31) at 121. The UCC differed from the Berne Convention in several key ways, such as moral rights and the term of protection, and was seen generally as less strict. According to Lewinski, following the introduction of TRIPs and the now virtual global coverage of the Berne Convention, the UCC 'no longer finds application today'. Lewinski (n 36) at 7.

[55] UNESCO had made one previous attempt to provide protection for folklore through copyright. The 1964 UNESCO Draft Model Copyright Law is noted as 'a follow-up to the recommendation of the African Study Meeting on Copyright (Brazzaville)'. The Draft Model Law is aimed solely at developing copyright in Africa and suggests that works of folklore in Africa are exclusively musical. Article 6 defines a work of folklore as 'a musical work with or without text composed by any author specified in Article 31 below with the aid of elements which belong to the African cultural heritage'. Therefore, UNESCO's initial attempt to protect a work of folklore through copyright excluded any works that were not musical. However, the Commentary to Article 6(b) does begin to usefully deconstruct the concept of folklore and demonstrates the efforts being made to understand the nature of works in need of protection. The Commentary suggests that there are 'two general types of folklore: (1) folklore orally handed down from generation to generation [and] (2) folklore which has been transformed into contemporary arrangements where one or several persons may qualify as authors'. UNESCO, *Draft Model Copyright Law*, 1964, 1 (2012) Available at: <http://unesdoc.unesco.org/images/0018/001854/185485eb.pdf> accessed 10 June 2019.

[56] Janet Blake does suggest that the UCC could provide 'indirect protection [for folklore] in Art.1 (Each Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings and sculpture)'.

states – Mexico[57] and Papua New Guinea[58] – had made any attempt to protect national heritage, including folklore, or works deriving from it, through statute; only Mexico had done so through its copyright legislation.

The Stockholm Diplomatic Conference was the fourth Revision Conference of the Berne Convention since its establishment in 1887. The Records of the Conference note that following a proposal by the Indian Delegation, a Working Group was established to 'consider the question of folklore'.[59] Hence, protection for folklore was explicitly considered as part of the revisions process.

Though the Working Group considered the option of including 'works of folklore' in Article 2(1) of the Berne Convention as a protected work',[60] they instead proposed the insertion of a new Article. In order to qualify for protection under the new Article, works would be required to satisfy the following conditions:

---

57 Mexico adopted a Copyright Statute in 1956 'in which works deriving from the public domain (like folklore) were to become registered with a Copyright Directorate'. Also, according to the Report on the 4th Session of the IGC, the 1922 Bolivian copyright law contained a section relating to protection of folklore and traditional crafts but little actual experience existed with attempts to extend this protection to folklore. See: WIPO, 'Report on the 4th Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore' (2002) at 25. Available at: <http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_4/wipo_grtkf_ic_4_15.pdf> accessed 3 March 2016

58 Papua New Guinea National Cultural Property (Preservation) Act, 1965. The Act defines National Cultural Property as 'any property, movable or immovable, of particular importance to the cultural heritage of the country, and in particular (but without limiting the generality of the foregoing) includ[ing] – (*a*) any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of any of the peoples of the country, past or present; and (*b*) any mineral specimen or fossil or mammal remains of scientific or historic interest to the country; and (*c*) any other collection, object or thing, or any collection, object or thing of a class, declared to be national cultural property under Section 4; and (*d*) any collection of national cultural property' (Article 1(1)). Available at: <faolex.fao.org/docs/texts/png65547.doc> accessed 7 September 2017.

59 S Bergstrom (Rapporteur), 'Records of the Intellectual Property Conference of Stockholm, June 11 to July 14, 1967 Volume II'. Available at: <http://global.oup.com/booksites/content/9780198259466/15550029> accessed 5 March 2019

60 M Anderson, ''Claiming the Glass Slipper: The Protection of Folklore as Traditional Knowledge" (2010) 1 (2) *Case Western Reserve Journal of Law, Technology and the Internet*: 148 at 152 The proposal to include works of folklore in Art 2(1) was made by the Indian delegation.

(i) the work is unpublished;

(ii) the author is unknown;

(iii) there is every ground to presume that the author is a national of a country of the Union;[61]

If these three conditions were fulfilled, the Working Group recommended that 'the legislation of that country may designate a competent authority to represent the author'.[62] The insertion of Article 15(4) into the Berne Convention was accepted by the Committee, and the Report states that 'it is clear […] that the main field of application of this regulation will coincide with those productions generally described as folklore'.[63]

However, as Barbara Ringer, Assistant Register of Copyrights in the Library of Congress observed at the time, the fact that the Berne Convention requires unanimity of the votes cast for any revision to the substantive text, can lead to 'some deliberately vague or ambiguous language […] and some compromises'.[64]

This is in evidence in the wording of Article 15(4), as the most immediate issue raised by the Article is the absence of the word 'folklore' to denote the object of protection. The Report notes that the Article does not mention the word 'folklore' because it was 'considered to be extremely difficult to define'.[65] So, though the protection of folklore was considered, and to some extent included in the Berne Convention, it was not actually named as the object of protection.

Article 15(4)

Despite the lack of explicit reference to the intended object of protection, when the Stockholm Revisions Conference concluded on 14 June 1967, Article 15(4) was included in the changes to the Convention. The Article reads:

(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent

61 Bergstrom (fn 51) at 307.
62 Ibid at 307
63 Ibid at 308
64 B Ringer, "The Stockholm Intellectual Property Conference of 1967" (1966–1967) 14 *Bulletin of the Copyright Society of the U.S.A*: 426
65 Bergstrom (fn 51) at 307

> authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.
>
> (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

Subsection (a) provides protection for anonymous or pseudonymous works (such as folklore) where the author is presumed to be a national of a country of the Berne Union. Under subsection (b), the designated authority is charged with liaising with the Director General of WIPO, thereby developing a network of communication regarding the protection of folklore between WIPO and Member States. The inclusion of Article 15(4) attests to WIPO's position since the late 1950s that not only should folklore be protected through copyright, but also that a regulatory instrument which could be applied across all Member States was both possible and desirable. However, Ringer noted at the time that 'the practical effect of this provision is by no means clear'.[66]

Agnes Lucas-Schloetter suggests that though Article 15(4) was 'the first regulation concerning intellectual property rights applicable to folklore at the international level',[67] in terms of providing protection for folklore it is largely 'redundant'.[68] The reason for this is that the Article commits Member States to very little. As Lucas-Schloetter explains: for the Article to have any effect 'Member States must enact domestic legislation that protects folklore. Only if a state's national copyright legislation includes folklore can the state seek international copyright protection under the Berne Convention.[69] If, for example, a state decides that folklore belongs to the public domain, Article 15(4) (a) does not compel them to provide protection for folklore in their copyright statute, nor does it compel them to recognize folklore as a protected category in another Member State. Moreover, even if a state does protect folklore, Lucas-Schloetter suggests that the adoption of Article 15(4) (b) is 'optional […] in the sense that the

66 Ringer (fn 64) at 425.

67 A Lucas-Schloetter, "Folklore", in S Von Lewinski (ed), *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore*, (Kluwer Law International, the Netherlands 2008) 350.

68 Lucas-Schloetter (fn 67) 352.

69 Ibid.

countries of the Union are at liberty to designate a competent authority responsible for protecting their own folklore or not'.[70] Writing in 2002, the Ghanaian copyright academic Paul Kuruk stated that 'to date, no state has notified the WIPO about the creation of any such competent bodies'.[71] Though, in fact India has registered a competent authority with WIPO, it remains the only Member State to have done so.[61] Hence, it is clear that the Article gained very little traction with Member States as a means of protecting their national folklore.

As well as not defining the object of protection or compelling Member States to protect folklore, a further problem identified with the Stockholm Revisions is that no term of protection is specified. As Lucas-Schloetter suggests: if a work or collection of folklore is published 'the rules for anonymous and pseudonymous works must apply by analogy that is to say that a period of 50 years starting from publication must apply'.[72] However, as Janet Blake notes, one of the defining factors of folklore is that 'by its very nature, [it] has been developed over generations'.[73] This being the case, the application of a limited term of protection to such work is counterintuitive as once the term of protection has expired the work or expression of folklore would be subject to exploitation despite the fact it continues to be maintained and developed by the authoring community. In spite of these shortcomings identified in the Stockholm Revisions,[74] the 1971 Paris Revisions of the Berne Convention[75] retained Article 15(4) verbatim.[76]

Beyond the Stockholm Revisions

Following two revisions of the Berne Convention a number of problems remained. Significantly, folklore, as the intended object of protection, had neither been named nor defined. Added to this, Member States were not obliged to protect folklore or register a competent authority for regulating the protection of folklore with WIPO. If protection is afforded by a Member

70 Ibid.

71 P Kuruk, "African Customary Law and the Protection of Folklore" (2002) 36 (2) *Copyright Bulletin*: 45

72 Lucas-Schloetter (n 67)

73 Blake (n 56) at 14

74 Ringer (n 64)

75 Compliance with the Paris Act Appendix is 'required as a condition of adherence to the World Trade Organization ('WTO') under the 1994 TRIPs Agreement as well as under the WIPO Copyright Treaty ('WCT'), regardless of whether the country in question is a Berne member'. Ricketson and Ginsberg (n 31) at 881

76 Berne Convention, Stockholm Act, 1967, Art 15(4)

State to unpublished anonymous works the form of that protection, in terms of the designated rights holder, the term of protection and whether that protection is afforded to rights holders in all Member States, is unclear.

As such, in 1967 folklore was not considered by the Member States of the Berne Union to fit comfortably amongst works historically recognized as productions in the literary, artistic or scientific domain. This was also the case in the Paris Revisions of 1971 when the provision for the protection of anonymous or pseudonymous works was retained. Accordingly, it is arguable that folklore is *not* included as a listed work under Article 2(1) and Ricketson and Ginsburg suggest that 'an unlisted work's potential status in theory as a "literary or artistic work" for the purposes of article 2(1) has meant very little, if anything, in practice'.[77] Indeed, they point out that 'even though article 2(1)'s broad language reaches "every production … whatever may be the mode or form of its expression", and even though the ensuing list is illustrative, not limitative, 'enumeration' remains the only sure guarantee of protection under the Convention'.[78] Accordingly, though folklore is the apparent subject of Article 15(4), the fact that it is not enumerated in Article 2(1) and was not considered to be a production in the literary, artistic or scientific domain by the Paris Revisions conference, is a significant impediment to the argument that folklore is a category protected under the Berne Convention and so subject to national treatment.

WIPO continues to pursue the establishment of international standards of protection of folklore through copyright in the form of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (2001–present). It remains possible that the ultimate conclusion to these negotiations will be the inclusion of folklore, or Traditional Cultural Expressions (TCEs), as an enumerated work, which would then establish associated obligations of national treatment. Moreover, it is arguable that folklore is already on a trajectory towards enumeration. As Ricketson and Ginsburg observe, the admission of a new category to the list of protected works has usually been preceded by a long negotiation.[79] Prior to a new work's inclusion 'some kind of conditional or lesser level of Conventional protection has been first accorded before "list" status has been achieved at a later revision'.[80] Thus, as the negotiations to include folklore as a protected category demonstrate, having gone through a series of formative stages for protection, folklore

77 Ricketson and Ginsberg (n 31) at 409
78 Ibid at 410
79 Ibid
80 Ibid at 409

could at some time in the future progress to 'list' status.

Though it is clearly possible that national treatment may at some time extend to folklore, it is difficult to conclude that it does at this time under the requirements set down in the Berne Convention. As Ricketson and Ginsburg observe: '[t]he only mechanism provided by the Convention to achieve uniformity among Union members on [national treatment] is by a revision conference which amends article 2 so as to include the work in question'.[81]

As it cannot be concluded that folklore is protected under the Berne Convention, and so national treatment does not apply to the protection of folklore via Berne, it is useful to clarify whether TRIPs could be regarded as providing the basis in international law to extend to nationals of member states, particularly Ghana, on the need to register intent and pay a fee for the use of her folklore.

Trips

Though the question of whether folklore is an enumerated work is significant in terms of the Berne Convention, in terms of the TRIPs Agreement, Goldstein and Hugenholtz point out that Article 3(1) of TRIPs 'ties its national treatment obligation to "the protection of intellectual property"',[82] rather than to a list of enumerated works. So, folklore may fall under the ambit of TRIPs and so trigger the national treatment obligation. Though Goldstein and Hugenholtz acknowledge that TRIPs Article 3(1)[83] does not require Member States to treat foreigners and nationals identically, 'it does require that treatment be "no less favourable"'.[84]

The definition of the object of national treatment as 'intellectual property' rather than 'literary and artistic works' is, Goldstein and Hugenholtz

81 Ibid at 410

82 Goldstein and Hugenholtz (n 35) at 105

83 Agreement on Trade-Related Aspects of Intellectual Property: 'Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS'. Art 3(1)

84 Goldstein and Hugenholtz (n 35) at 106

suggest, 'more likely to encompass borderline literary and artistic works than is the Berne Convention'.[85] However, they suggest that the language of the TRIPs Agreement and the Berne Convention 'fails definitively to resolve a chronic quandary: whether new classes of subject matter fall within the national treatment obligation'.[86] Accordingly, though folklore, as a borderline literary and artistic work, may trigger obligations to observe national treatment to Member States under TRIPs, this is far from settled.

Though folklore as a category of copyrightable works is not clearly subject to national treatment under either the Berne Convention or the TRIPs Agreement, it is perhaps possible to argue that there is space within the definitions of enumerated works to allow for folklore. As Ricketson and Ginsburg suggest: 'enumeration of work in article 2(1) does not conclude matters',[87] because none of the enumerated terms in the Berne Convention are defined. As such, the meanings of terms such as 'books' and 'drawings' 'are left to be determined by national law'.[88] Although they suggest that substantial divergence between states is unlikely as 'states usually enter international arrangements only if they share a common set of assumptions about the goals that they wish to achieve with their treaty partners',[89] it can be argued that across Africa there is at least a general agreement that folklore should be protected. However, currently at the international level, it is not.

In reality, the lack of enumeration leaves a significant gap in the law that reveals an assumed standard for international protection and reciprocity where no such standard exists. To explore this further: in his essay 'Protection of African Folklore by Copyright Law: Questions that are raised in Practice', Laurier Yvon Ngombe presents a hypothetical scenario in order to demonstrate how the principle of national treatment protects folklore against misuse by non-nationals: a person living in Gabon reproduces on Gabonese territory a folkloric song from Burkina Faso, and that exploitation of this work is not authorized. The competent Gabonese authority (or in case of inertia of the Gabonese authority, the Burkinabe authority) would be able to lay the matter before a Gabonese court. As Burkina Faso and Gabon include works of folklore among protected works, the question of whether the work in dispute is protected or not will not be raised regardless of the applicable law […] [I]n the case of infringement of copyright in folklore

85 Ibid
86 Ibid
87 Ricketson and Ginsberg (n 31) at 411
88 Ibid
89 Ibid

that occurs in a country where the protection of folklore is not secured under copyright law … we may first cite article 15(4) of the Berne Convention, which refers to the country of origin. Applying this rule, in a case of infringement even in a country that does not protect works of folklore, protection would be assured.[90]

Though Ngombe's scenario demonstrates how national treatment *could* work, currently this is not the case. Both Burkina Faso and Gabon are members of the *Organisation Africaine de la Propriete Intellectuelle* (OAPI), which is affiliated with WIPO and has a membership of largely Francophone African states.[91] OAPI administers the Bangui Agreement, under which the Burkinabe authorities would only have the ability to prosecute the Gabonese artist if they were to try to sell or expose for sale copies of the work in Burkina Faso under the terms set down in Burkina Faso's own copyright law. They would not be able to call upon Article 15(4) of the Berne Convention and protection would not be assured in a country that does not provide protection for folklore.

Ngombe's suggestion that protection would be assured 'even in a country that does not protect works of folklore' is not supported; indeed, as Ricketson and Ginsburg note, the only way to achieve this scenario would be if Union country A decides that a new category of work [such as folklore] is a literary or artistic work entitled to protection under its own law, [then] *it is bound* to accord the same protection to authors from other Union countries under the principle of national treatment, with all the consequences that this entails with respect to such matters as duration and scope of rights. However, this can only be a unilateral national judgement, and there is no onus on other Union countries to adopt a similar position.[92]

To illustrate this point: the USA includes sound recordings as a category of literary and artistic work but they are not listed under Article 2(1) of the Berne Convention.[93] Consequently, the USA must afford protection for non-nationals under the same terms as those it extends to its nationals.

---

90 LY Ngombe, ''Protection of African Folklore by Copyright Law: Questions that are Raised in Practice" (2003–2004) 51 *Journal of the Copyright Society of the U.S.A*: 442

91 Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Gabon, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Senegal and Togo.

92 Ricketson and Ginsberg (fn 31) at 410 (emphasis added).

93 Goldstein and Hugenholtz discussed whether the inclusion of sound recordings as an enumerated work within the US Copyright Act (U.S. Copyright Act, 1976, s 102(a) (7) obligates the US to extend protection to nationals of other countries even though such works are not listed in Art 2(1) of the Berne Convention. Goldstein and Hugenholtz, *International Copyright* (n 35) at 101–2.

Hence, if a state decides to list folklore *as a new category* of literary or artistic work then it would be compelled to treat foreign rights holders of folklore similarly. What is important is whether folklore is listed as a literary or artistic work. As noted previously, under Ghana's 2005 Copyright Act folklore is not listed under section 1 'works eligible for copyright', but separately under s 4(1). As such, in Ghana, folklore is not protected as a literary or artistic work but as a separate category to which the obligations of national treatment do not automatically apply. In the West African sub-region, this is also true of Burkina Faso,[94] Cote d'Ivoire,[95] Niger,[96] Nigeria[97] and The Gambia.[98]

Conclusion

As Nigeria even Ghana, are signatories to the Berne Convention and the TRIPs Agreement, protection of expressions of folklore must always comply with the minimum standards of protection set down in the Berne Convention. The obligations placed on Member States by the principle of national treatment and its importance as a cornerstone of international copyright is not clear that it extends to folklore. In order for folklore to be free to use for nationals it would also have to be free to use for non-nationals, risking the kind of exploitative practice the law explicitly seeks to avoid. Meanwhile, protection and preservation of folklore are crucial for maintaining the cultural heritage of Nigeria. The 2022 Copyright Act and international instruments provide a legal framework for the protection of traditional cultural expressions, including folklore. It is essential for the Nigerian government and society as a whole to appreciate the value of folklore and members of its indigenous community, and take measures to safeguard and promote its continued existence for future generations. Not minding the observations on punishment requirement as stipulated under sections 75 and 76 of the 2022 Copyright Act, to avoid unjust enrichment of the outsiders, prevention of economic harm on the communities, prevention of misappropriation of folklore, empowering communities, safeguarding of traditional cultures, enhancing certainty, transparency and mutual

94 Burkina Faso, 2012: 'The following shall also be protected as works: – […] expressions of folklore', Art 7

95 Cote d'Ivoire, 1996, s 12

96 Niger, Decree No. 93-027 of March 30, 1993 on Copyright, Related Rights and Expressions of Folklore: 'The following shall also be protected as works (ii) works and expressions of folklore (iii) collections of works, expressions of folklore [which] owing to the selection and arrangement of their components, are original', Art 5(1)(3)

97 Nigeria Copyright Act, 1988, s 31 (Repealed Act), section 74 under the Nigeria Copyright Act, 2022

98 The Gambia Copyright Act, 2004, s 8

confidence and many more, it is within the threshold of international instruments.