Dick Whittington and Creativity: From Trade to Folklore, From Folklore to Trade

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THE DICK WHITTINGTON STORY: ITS INFLUENCES & ITS IMPACTS

DICK WHITTINGTON AND CREATIVITY: FROM TRADE TO FOLKLORE, FROM FOLKLORE TO TRADE

Susanna Frederick Fischer†

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I. INTRODUCTION

One of the most famous examples of folklore in the English speaking world is the Dick Whittington story of a young lad who made his fortune with the help of his cat.\(^1\) This folk tale is based on the life of a medieval English merchant, Sir Richard Whittington. The real Richard Whittington made his fortune from trade in luxury cloth. The story of his life became folklore, and that folklore has in turn given rise to more trade, this time in new creative works.

The extent of intellectual property protection for stories, legends, and other types of folklore\(^2\) has become an increasingly contentious

\(^1\) This essay was written as part of a celebration to commemorate the 400th anniversary of the first recorded play based on the Dick Whittington folk tale. It is an expanded version of a presentation delivered on July 25, 2005 in Gloucester, England, at a conference entitled “The Power of Stories: Intersections of Law, Culture, and Literature” jointly sponsored by Texas Wesleyan University School of Law, University of Gloucestershire, Central Gloucester Initiative, and the City of Gloucester. I would like to thank Frank Snyder and Susan Ayres for organizing such a wonderful event, Marin Ashton and Diane Phillips for hospitality provided to me and my family in Gloucester, and all my fellow conference attendees for making the event such an interesting experience and providing me with a wealth of constructive feedback on my conference presentation. Special thanks are due to Megan Richardson and Edward Phillips for their particularly helpful suggestions. I am also grateful to my husband, Erik Thomas Mueller, and my son, Matthew Edward Mueller, for their support and companionship at the Gloucester conference.

\(^2\) 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, 48 AM. U.L. REV. 769, 777 (1999) (pointing out that some people have used “folklore” in a disparaging way to connote materials from what they have termed “barbarous” or “uncivilized” areas of the world); Symposium, Global Intellectual Property Rights: Boundaries of Access and Enforcement, 12 FORDHAM INT’L. PROP. MEDIA & ENT. L.J. 675, 756–57 (2002) (noting various objections by representatives of developing countries to the use of the term “folklore”). No such pejorative meaning is intended to be read into my use of the term “folklore” in this essay. I have chosen to use the term “folklore” because it remains in widespread use in current World Intellectual Property Organization (WIPO) discussions, and I do not think there is a universally accepted alternative term. Although WIPO now uses the term “traditional cultural expressions” interchangeably with “expressions of folklore,” I chose not to use “traditional cultural expressions” because I think “folklore”
international trade and policy issue. Creative works, often based on folklore, have become increasingly lucrative products in the global economy. As long as these derivative works are sufficiently original, most legal systems around the world provide copyright protection for many types of them, including books and films based on folk tales and legends. Such copyright protection usually lasts for decades after the creation or publication of a derivative work, even though it often extends only to new creative additions to a work of folklore and not to the underlying folklore itself. But much intangible folklore, like stories passed down orally from one generation to another as living heritage, receives little or no intellectual property protection in many national legal systems, especially in industrialized western countries. There is no international convention in effect that directly provides for intellectual property rights for folklore. Many people, especially those living in developing countries and members of indigenous communities, have grown increasingly dissatisfied with the current state of intellectual property protection for folklore at both the national and international levels.

Proponents of greater intellectual property protection for folklore have two main concerns. The first is to ensure that indigenous com-

3. See Stephen E. Siwek, Int’l Intellectual Prop. Alliance, Copyright Industries in the U.S. Economy, iii, iv, vi (2004), available at http://www.iipa.com/pdf/2004_SIWEK_FULL.pdf (reporting that foreign sales and exports of the core U.S. copyright industries—industries whose primary purpose is to produce or distribute copyrighted materials—in 2002 were $89.2 billion, which surpassed many other major industry sectors including the automobile and agricultural sectors, and also stating that the percentage of U.S. GDP for the copyright industries grew 46.3% more than the rest of the economy between 1997 and 2002); U.K. Trade and Investment, Information Sheet, Creative Industries 2 (2003), http://www.invest.uktradeinvest.gov.uk/Uploads/InfoSheets/CreativeIndNov03.pdf (stating that the gross value added (the major component of gross domestic product) of the creative industries in the United Kingdom grew by an average of 8% between 1997 and 2001, compared to 2.6% for the whole economy and that exports from the creative industries contributed U.S. $18.1 billion to the balance of trade, growing 15% per annum between 1997 and 2001, as compared to 4% growth for goods and services as a whole). See Canadian Minister of Industry, Copyright Act Section 92 Report, Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act i (2002), available at http://strategis.ic.gc.ca/pics/rp/section92eng.pdf (stating that in Canada, the percentage of GDP for the copyright industries in 2000 was 7.4%, totaling an estimated U.S. $65.9 billion, and these industries, which grew at a rate double that of the rest of the economy between 1992 and 2000, were the third most significant contributor to Canada’s economic growth in 2002). Copyright industries also have great economic significance in many less developed countries. See International Intellectual Property Alliance, Initial Survey of the Contribution of the Copyright Industries to Economic Development 9–10 (2005), http://www.iipa.com/pdf/2005_Apr27_Economic_Development_Survey.pdf (reporting statistics showing that the copyright industries amounted to more than 5% of GDP in India, Argentina, Brazil, Mexico, Taiwan, and Uruguay at various dates in the 1990s).

4. See infra Part III.
communities and other developers of folklore share equitably in the economic profits generated by folkloric works, especially those used as the basis for valuable new creative works like the Disney film Mulan. The second is to maintain respect for traditional culture and protect it from loss or distortion outside of its traditional context. Both concerns are related to the desire to close the global development divide. National governments, regional bodies, and international organizations have increasingly responded to growing pressure to provide stronger legal protections for folklore, including stories and folktales. Over the past few decades, accelerating over the last few years, there has been a marked global trend at the national and international levels toward implementing intellectual property protections for folklore. For stories, this protection takes the form of copyright law and sui generis legal regimes. But many countries, especially in the industrialized west, are currently opposed to providing enhanced intellectual property protection for folklore in their laws or through new multinational treaties or conventions.

In this essay, I consider whether such increased intellectual property protection for stories and folktales is the wisest policy course. While accepting the validity of the two major concerns that underpin the effort to implement greater intellectual property protection, I argue here that greater intellectual property protections risk serious harm to innovation and creativity by narrowing the public domain and are not the best means to achieve these desired ends. To make my argument, I will draw on the Dick Whittington story as both an example of a folktale in danger of overprotection by expanded intellectual property regimes and also as an analogy to the legal treatment of folklore over the past several decades.

Part II focuses on the Dick Whittington story as an example of folklore that has spawned a wealth of creative works. It traces how the life of a real historical figure, Sir Richard Whittington, became a folktale. Just as the real Richard Whittington's money still funds many charities, for hundreds of years the folktale based on his life has served as the basis for many new creative works, especially children's books and pantomimes.

The remainder of the essay draws parallels between the Dick Whittington folktale and the legal protection of folk stories at the national,
regional, and international level. Part III shows how traditional western copyright law doctrines bar protection for many folk stories handed down orally from generation to generation like Dick Whittington. Part IV delineates early efforts from the late 1960s to early 1980s to establish stronger national and international intellectual property protections for folklore despite the doctrinal problems posed by traditional copyright law. These efforts culminated in joint UNESCO-WIPO Model Provisions, which, although not law themselves, were designed to be incorporated into national laws to give sui generis intellectual property protection to folk stories and other kinds of folklore. Part V shows how these efforts did not succeed in broadly implementing intellectual property protections for folklore in national laws across the globe, although the Model Provisions did influence some jurisdictions, including a majority of African countries, to incorporate greater intellectual property protections for folk stories and other expressions of folklore into their laws. Part VI describes the latest attempts to set up an international regime for intellectual property protection for folklore, which is currently under discussion in a World Intellectual Property Organization (WIPO) committee as well as, to a more limited extent, in the World Trade Organization (WTO). Part VII contends that implementing specific intellectual property protections such as the current draft principles and objectives under consideration in WIPO are not clearly a happy ending for folklore because of the impossibility of determining what is protectable and the serious danger of hindering future creativity and artistic development. The essay concludes by advocating a cautious approach to the problem that will better respect the importance of a robust public domain and the importance of encouraging future cultural development.

II. THE REAL RICHARD WHITTINGTON AND THE ORIGINS OF THE DICK WHITTINGTON STORY

It is not surprising that Richard Whittington’s life became a folk tale because it really did have legendary aspects. Richard Whittington was not only a self-made man who succeeded in acquiring great wealth and status. Unlike many other successful medieval merchants who are now forgotten, he used his wealth to benefit society both during his lifetime and after his death. This combination of wealth and philanthropy fascinated people. After Richard Whittington's death, stories continued to circulate about his life.

The exact year of Richard Whittington’s birth is unknown, but it probably occurred sometime around 1350. This was a very turbulent time in British history. England was embroiled in the Hundred Years’

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War with France (ca. 1337–1453).\textsuperscript{10} An outbreak of bubonic plague, the notorious “Black Death,” broke out in England in 1348 and raged across the country, killing around one third of the population.\textsuperscript{11} Many other calamitous events followed the Black Death, including further epidemics of disease, population decline, economic crisis, increased crime, peasant rebellion, and political instability.\textsuperscript{12}

Unlike his mythical counterpart Dick, Richard Whittington did not begin his life in abject poverty but was born into a landed gentry family in the medieval middle class between the nobility and the peasantry.\textsuperscript{13} Richard Whittington was the third son of Sir William Whittington, the owner of a very modest manor at Pauntley, Gloucestershire, which was probably Richard Whittington’s birthplace.\textsuperscript{14} The Whittington family had limited means when Richard Whittington was a child. One reason for this was the King’s outlawry of William Whittington for not responding to a plea of debt brought against him by a


\textsuperscript{13} See Lysons, supra note 9, at 12–13; Roy Porter, London: A Social History 31 (1995). In the fourteenth century, society was generally comprised of three estates: clergy, knights, and peasants. See Diana Childress, Chaucer’s England 17 (2000). But by the late fourteenth century, this traditional hierarchy began to break down as a result of increased social mobility, especially for wealthy merchants. See id. at 43.

\textsuperscript{14} Caroline M. Barron, Richard Whittington: The Man Behind the Myth, in Studies in London History: Presented to Philip Edmund Jones 198 (A.E.J. Hollaender & William Kellaway eds., 1969) (stating that Richard Whittington was born at Pauntley, although noting that his father also owned some property in Hertfordshire); Lysons, supra note 9, at 9–13 (pointing out that there were several claimed birthplaces for Richard Whittington, but concluding that he was born at Pauntley). See also Alastair Sawday’s Special Places to Stay, Bed and Breakfast for Garden Lovers (Nicola Crosse ed., 3d ed. 2005) (stating that the manor house at Pauntley is still standing as of the time of writing and presently serves as a bed and breakfast called Pauntley Court); Press Release, Gloucester City Council, Turn Again—to Gloucester (Jan. 20, 2005), http://www.gloucester.gov.uk/libraries/templates/page.asp?URN=3095 (stating that the Whittington family apparently also owned St. Nicholas House in Gloucester, site of the Dick Whittington pub today).
clerk. William Whittington was still an outlaw when he died a few days later. To remove this encumbrance from the estate required the payment of a large fee. Another charge on the estate after William Whittington’s death was the jointure upon the Pauntley estate held by Richard Whittington’s mother, Lady Joan Whittington. These financial burdens likely made the estate incapable of supporting Richard Whittington as a younger son. Subject to the jointure, William Whittington’s lands passed entirely to Richard Whittington’s eldest brother William, according to the rules of primogeniture of the time. When William died without heirs, these rules caused the property to descend to the middle brother, Robert. Almost certainly lacking in financial resources after the death of his father, Richard Whittington went to London to seek work. It is very possible that he actually walked there just as his counterpart Dick Whittington famously did in the folk story.

In London, Richard Whittington became a very successful cloth mercer, or medieval cloth merchant, reflecting a more general historical trend of increased social mobility. He made the modern equivalent of millions of dollars by selling silk, velvet, cloth of gold, and other luxury fabrics, first to various nobles and eventually to the royal household. Richard II (1377–1400) made his first known purchase of cloth from Richard Whittington in 1389, the same year that the young king announced that he was now of full age and would rule as monarch. Richard II liked fine clothes, and he spent lavishly

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15. Barron, supra note 14, at 199; see also Lysons, supra note 9, at 18 (admitting that the author does not know the reason for Sir William’s outlawry).
16. Lysons, supra note 9, at 18.
17. Id.
18. Barron, supra note 14, at 199; Lysons, supra note 9, at 18.
20. Lysons, supra note 9, at 13.
21. Barron, supra note 14, at 199 (stating that the first record of Richard Whittington in London was in 1379); see also Lysons, supra note 9, at 18 (stating that Richard Whittington’s mother remarried shortly after her first husband’s death, possibly motivating Richard Whittington to relocate to London in order to avoid living in the home of his new stepfather).
22. Lysons, supra note 9, at 19 (doubting that Richard Whittington could have afforded his own horse, and stating that coaches did not come into existence until Elizabethan times); Childress, supra note 13, at 6 (stating that the most common forms of transportation at the time were by foot or horseback). See also BBC Gloucestershire, The Dick Whittington Adventure, http://www.bbc.co.uk/gloucestershire/content/articles/2005/05/20/dick_whittington_progress_feature.shtml (last visited Sept. 13, 2005) (showing a reenactment by Mark Cummings of BBC Radio Gloucester, in the late spring of 2005, of Dick Whittington’s trip from London to Gloucester by foot, horse, and boat; it took nine days); Dick Whittington Walks Again, http://www.gloucesterconference.com/dick_whittington_1.htm (last visited Sept. 13, 2005) (displaying photos of the walk).
23. See Childress, supra note 13, at 43 (discussing the threat social mobility posed to traditional society).
24. See Barron, supra note 14, at 200; see also Griffiths, supra note 11, at 191.
on Richard Whittington’s wares. Royal records for the period 1392–1394 show that Richard Whittington’s mercy amounted to more than a quarter of the expenditures of Richard II’s Great Wardrobe department.

Such profligate spending contributed to the royal court’s deteriorating financial situation, which Richard Whittington saw as a new business opportunity. In 1388 he launched a new enterprise as a royal financier. It seems quite likely that he did not decide to lend money to Richard II for financial gain because usury was then illegal, and there is every indication that Richard Whittington was extremely morally upstanding. Rather, his goal seems to have been to attain greater power and influence. He certainly achieved this aim even if his loans did not fully alleviate the king’s financial or other woes. When Richard II was deposed in 1399, he still owed Richard Whittington approximately £1000.

Richard Whittington attained powerful positions during the reigns of Richard II and both of his successors. After receiving his first large loan from Richard Whittington, Richard II chose him to replace the Mayor of London, who had died in office. He was elected Mayor in the following year and won reelection two more times, in 1406 and 1419. He served on the council of King Henry IV (1399–1413), who apparently did not begrudge his loyalty to Richard II. During the reigns of Henry IV and his successor Henry V (1413–1422), Richard Whittington served on a number of special royal commissions.

25. See Griffiths, supra note 11, at 192 (stating that Richard II was extravagant toward his friends); see generally NIGEL SAUL, RICHARD II (1997).
27. See SAUL, supra note 25, at 259 (describing Richard’s spending habits). See also WILLIAM SHAKESPEARE, KING RICHARD II act 1, sc. 4 (“And, for our coffers, with too great a court And liberal largess are grown somewhat light.”).
29. Id. at 203, 219–20, 254.
30. Id. at 203–04.
31. Id. at 200.
32. Id. at 205, 210–11; Caroline M. Barron, The Quarrel of Richard II with London 1392–7, in THE REIGN OF RICHARD II: ESSAYS IN HONOUR OF MAY MCKISACK 173, 198 (F.R.H. DuBoülay & Caroline M. Barron eds., 1971) (stating the king had never previously appointed a mayor). The current job title, “Lord Mayor of London,” which features in the folk tale, was not yet in use when Richard Whittington was alive. At that time, the governments of the City of London and Westminster were separate. The fifteenth century Mayor of London was only mayor of the City of London and was based in the Guildhall, which remains the seat of the Corporation of London today. See Museum of London, http://www.museumoflondon.org.uk/MOLsite/learning/features_facts/viking_1.html (last visited Sept. 13, 2005).
33. LYSONS, supra note 9, at 50–51; Barron, supra note 14, at 212–13 (stating that among his efforts as Mayor were battles against illegal fish weirs in the Thames and regulation of beer prices).
34. Barron, supra note 14, at 216.
35. Id. at 216–17.

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continued to lend money to both Henry IV and Henry V, presumably to maintain his influence and status. Richard Whittington also continued to sell cloth to the royal household, including fabric for the wedding trousseaus of two of Henry IV’s daughters. He was prominent in the leadership of the politically prominent Mercers’ Company, one of the guilds that originated in the medieval period to serve the interests of merchants and served as its master in 1395–1396, 1401–1402, and 1408–1409. During this period, he became actively involved in the export trade in wool, and in exchange for his large loans to the crown, he obtained permission to export wool without having to pay customs duties on it.

Richard Whittington died a wealthy man in 1423, predeceased by his wife Alice Fitzwarren, who came from a landowning gentry family that owned property in many southwestern English counties (Gloucestershire, Somerset, Wiltshire, and Dorset). He never remarried and probably never had any children, or if he did, none who survived him. Apparently formal and somewhat chilly in manner, he seems not to have made any close friends after the death of his great patron and probable friend, Richard II, who was also cold and remote in manner. Richard Whittington’s will did not make any specific bequests to friends or family members, but provided for the vast portion of his estate to be left to charity. The document states that “the remainder of all my possessions, wherever they may be, after the pay-

36. Id. at 206.
37. See Lysons, supra note 9, at 62–63.
38. Barron, supra note 14, at 201; see also Lysons, supra note 9, at 87 (showing a copy of the order of payment to Richard Whittington for pearls and cloth of gold for Princess Philippa’s wedding).
39. Barron, supra note 14, at 215. See 1 G.M. Trevelyan, Illustrated English Social History 80 (David McKay Co. 1969) (1942) (stating that the Mercers’ Company was one of the major merchant companies, with many of its members playing leading roles in local government, including serving as a large number of London’s mayors and alderman); The Mercers’ Company, http://www.mercers.co.uk/ (last visited Sept. 13, 2005) (Livery Company of the City of London).
40. Barton, supra note 14, at 207–09.
42. Barron, supra note 14, at 233.
43. See id. at 230, 233–34; see also Saul, supra note 25, at 454 (stating that Richard was cold and remote).
ment of my debts has been given priority and my bequests have been fulfilled, I leave to my executors to dispose of in works of charity for [the good of] my soul, such as they would wish me to do for their souls if our situation were reversed." There is some evidence that during his lifetime Richard Whittington also gave generously for charitable causes.\textsuperscript{45}

Richard Whittington’s executors used the proceeds of his estate, which probably amounted to around £7,000 (the equivalent of about seven million dollars today), to fund a number of charitable enterprises, some of which continue to benefit the poor nearly six centuries later.\textsuperscript{46} These enterprises included the foundation of a College of Priests associated with the parish church and St. Michael Paternoster Royal, where Richard Whittington and his wife Alice were buried.\textsuperscript{47} The executors also used Richard Whittington’s money to reconstruct Newgate Gaol, to build a gate to St. Bartholomew’s hospital, to establish a library at the Guildhall, and to build a public lavatory, known as “Whittington’s Longhouse.”\textsuperscript{48} The most enduring charity funded with Richard Whittington’s money is an almshouse set up in 1424 by his executors, apparently acting on his deathbed instructions.\textsuperscript{49} The preamble to the Ordinances for Whittington’s Almshouse provides that

:\textsuperscript{45} IMRAY, supra note 41, at 1 n.4 (citing the Preamble to the foundation ordinances for Whittington’s Almshouse, reproduced in their earliest English version in app. 1 at 109–21) [hereinafter Foundation Ordinances].

:\textsuperscript{46} Id. at 24 (asserting that the value of the estate was around £7,000 at the time); see also London Bridge Museum & Educational Trust website, http://www.oldlondonbridge.com/mrcrs.shtml (last visited Sept. 13, 2005) (stating the value of Richard Whittington’s estate was around £5,000 and that this was the modern equivalent of five million pounds).

:\textsuperscript{47} IMRAY, supra note 41, at 6, 9, app. I. The College of Priests was dissolved in 1548, during the Reformation. Id. at 44. See also The City of London Churches, http://www.cityoflondonchurches.com/stmichaelpaternosterroyal.htm (last visited Sept. 13, 2005) (stating that the church has a stained glass window displaying Dick Whittington with his cat); Worshipful Company of Farriers, http://www.wcf.org.uk/links.html (last visited Sept. 13, 2005) (stating that the Great Fire of London destroyed the Church of St. Michael Paternoster Royal, which was rebuilt by Sir Christopher Wren); Barron, supra note 14, at 235 (stating that excavations in 1949 to locate the tomb of Richard and Alice Whittington proved unsuccessful).

:\textsuperscript{48} IMRAY, supra note 41, at 6; London Metropolitan Archives, City Communities, A Medieval Public Convenience, http://www.corpoflondon.gov.uk/Corporation/Ima_learning/schoolmate/City/sm_city_stories_detail.asp?ID=316 (last visited Sept. 14, 2005). The tides of the Thames flushed Whittington’s longhouse, which was quite large, having 64 seats for women and 64 for men. After the Great Fire of London of 1666 destroyed it, it was rebuilt on a smaller scale. For some plans, see London Topographical Society, Whittington’s Longhouse; Four Fifteen Century London Plans, 23 London Topographical Rec. (1972).

:\textsuperscript{49} See Foundation Ordinances in IMRAY, supra note 41, at 109. The copy of the Preamble to the foundation ordinances for Whittington’s Almshouse made for the Mercers’ Company in 1442 included a famous illustration of Whittington on his deathbed, surrounded by his executors as well as thirteen beneficiaries of his charity, presumably the residents of the Almshouse. Id. at 56 (reproducing the illustration of
the almshouse is to house thirteen of those "poure persones whiche grevous penurie and cruelle fortune have oppressd and be not of power to gete their lyvyng either by craft or by eny other bodily la-
bour"; in other words, the deserving poor.50

Typical of the medieval period in which Richard Whittington lived, an important purpose motivating Richard Whittington’s posthumous charitable bequests was the welfare of his soul after his death.51 The thirteen poor people housed in the almshouse had to spend a consid-
erable amount of their time praying for the souls of Richard Whitting-
ton, his wife, parents, patrons, and others to whom he was indebted “in any manner wise” during his lifetime.52 At least once a day, where possible, they were required to stand in a circle around the tomb of Richard and Alice Whittington and recite a psalm and several prayers.53 But the trust that Richard Whittington’s executors set up was less religious in nature than typical foundations by medieval bene-
factors, and later served as an important model for other London merchants in the sixteenth and seventeenth centuries.54

As a result of the foresight of Richard’s executors in setting up an endowment for the almshouse and investing it well, the almshouse still survives today, though it has moved several times. Now known as Whittington College, since 1966 it has been located in East Grinstead, Sussex, where it provides 56 homes for elderly ladies and couples.55 Richard Whittington’s Charity is now amalgamated with Lady Mico’s Almshouse Charity.56 Its main objective is to administer the alms-
houses at Whittington College, as well as almshouses in Felbridge, Surrey, and at Stepney in the London borough of Tower Hamlets. The Charity also makes payments to needy individuals and institutions, as well as to support community welfare, elderly, education, and the

Richard Whittington on his death bed; see also LYSONS, supra note 9, at 68–70 (re-
producing the same illustration).

50. Foundation Ordinances in IMRAY, supra note 41, at 109. In keeping with the attitude that only the deserving poor should receive charity, the foundation ordi-
nances for Whittington’s Almshouse provided that lepers and those suffering from other incurable illnesses or madness were not permitted to reside in the Almshouse. Id. at 118. Nor could the Almshouse residents engage in misbehavior such as habitual drunkenness, gluttony, frequenting taverns, or wandering the streets without a good reason. Id. at 119.

51. See IMRAY, supra note 41, at 3, 6.
52. See Foundation Ordinances in id. at 115.
53. Id. at 116 (stating that the required psalm is called “De Profundis,” Psalm 129, which is often recited at funerals).
54. See IMRAY, supra note 41, at 3.
55. Id. at 106; The Mercers’ Company, The Charity of Sir Richard Whittington, http://www.mercers.co.uk/netbuildpro/process/223/TheCharityofSirRichardWhitting-
56. The Mercers’ Company, supra note 55 (stating that this amalgamated entity is known as the Charity of Sir Richard Whittington (charity number 1087167) and is regulated by a Scheme of the Charity Commission dated April 2001).
handicapped and disabled.\textsuperscript{57} For the fiscal year ending September 30, 2003, it distributed over £500,000 to a variety of charitable causes, as well as, in conjunction with another charity, over £1 million to support almshouses.\textsuperscript{58}

Richard Whittington’s generous philanthropy and self-made wealth were undoubtedly a source of fascination to the general public in his day, just as that of Bill Gates and Richard Branson is of great interest to people today. There must have been much curiosity about how Richard Whittington succeeded in amassing such a large fortune. But the largely illiterate, medieval peasantry had little access to written sources of information.\textsuperscript{59} Many people had to rely on oral communications, such as storytelling. At some unknown date in the sixteenth century, a story began to circulate about a young boy named Dick Whittington who walked to London and became rich and powerful with his cat’s help.\textsuperscript{60}

Some aspects of this Dick Whittington folk story were certainly historically accurate, such as Richard Whittington’s Gloucestershire origins and the name of his wife, Alice Fitzwarren.\textsuperscript{61} The truth of other elements is less clear and probably impossible to ascertain on the surviving evidence. For example, although there is no extant direct evidence that Dick Whittington ever owned a cat that helped him to attain wealth and status, there is some circumstantial evidence supporting this, so it cannot be definitively established as fictional.\textsuperscript{62} The historical truth of Richard Whittington’s poverty is also impossible to


\textsuperscript{58} See Gervase Mathew, The Court of Richard II 102 (1968) (stating that unlike the peasantry, the burgesses were literate and articulate).

\textsuperscript{59} Barron, supra note 14, at 197 (asserting, without providing evidence, that the tale of Dick Whittington and his cat first appeared in the late sixteenth century).

\textsuperscript{60} See id. at 233 (stating that Dick Whittington’s wife was Alice “Fitzwaryn”); Lysons, supra note 9, at 73.

\textsuperscript{61} See, e.g., Lysons, supra note 9, at 27–48 (arriving at the conclusion that a cat did help Richard Whittington make a large fortune based on the “ancient and generally received tradition,” the scarcity of domestic cats during this period of history, the existence of other similar stories of fortunes made with the help of cats, and pictorial and sculptural representations of Richard Whittington with a cat that Lysons believed to have been created not very long after his death); cf. Steve Johansen, Professor, Lewis & Clark Law Sch., Did Richard Whittington Even Own a Cat?: The Ethics of Telling Stories to Unwitting Clients, Presentation at the University of Gloucestershire, Gloucester Conference: The Power of Stories: Intersections of Law, Culture, & Literature (July 25, 2005) (contending that Richard Whittington’s business success was likely not assisted by a cat, but rather by his family connections with the wealthy and powerful). Oliver Goldsmith would have approved of Johansen’s argument because Johansen complained that the Dick Whittington story would be more appropriate for children without the cat. See F.J. Harvey Darton, Children’s Books in England: Five Centuries of Social Life 96 (Brian Alderson ed., 3d ed. rev., British Library 1999) (1932) (stating that Oliver Goldsmith “proposed that Whittington should be deprived of his cat”)
assess with certainty. Although he was the scion of a landed gentry family, his family was not wealthy; and because he inherited no land on the death of his father, he may have been financially very badly off at that time. 63 Whether Richard Whittington actually walked from Gloucester to London is also not possible to say with certainty on the existing evidence, although it is certainly possible. 64

Regardless of the truth of the Dick Whittington folktale, it flourished. In 1605, Thomas Heywood published a play on the life of Elizabeth I that had a scene introducing Richard Whittington, as well as various other good citizens, and referring to the story that Whittington "raised himself by venture of a cat." 65 From the late seventeenth to early nineteenth centuries, the Dick Whittington folktale became very well known through the inclusion of different versions of it in chapbooks. 66 These were wildly popular cheap books sold by traveling peddlers across England to children and poorly educated adults. 67 Many different versions of the Dick Whittington story are still on sale in modern bookstores. 68 In 1668, Samuel Pepys wrote in his diary, "To Southwark Fair, very dirty, and there saw the puppet show of Whittington, which was pretty to see . . . ." 69 By the eighteenth or early nineteenth century, the Dick Whittington story also became the basis for pantomimes, 70 which frequently added new characters like King Rat. The Dick Whittington story continues to generate many new creative works. Pantomimes based on the Dick Whittington story are extremely popular in the United Kingdom today, especially during

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63. See supra notes 13-22 and accompanying text.
64. See supra note 22 and accompanying text.
65. THOMAS HEYWOOD, IF YOU KNOW NOT ME, YOU KNOW NO BODIE: OR, THE TROUBLES OF QUEENE ELIZABETH act. 1, sc. 1 (1605); see also LYSONS, supra note 9, at 37-38.
66. See DARTON, supra note 62, at 81.
67. See generally id. at 68-81 (discussing chapbooks).
70. See R.J. BROADBENT, A HISTORY OF PANTOMIME 206 (Benjamin Blom, Inc. 1964) (1901), available at http://www.gutenberg.org/files/13469/13469-h/13469-h.htm (stating that a pantomime based on the Dick Whittington story was performed in the eighteenth century); BBC Local Legends, Oh yes he was! Oh no he wasn't!, http://www.bbc.co.uk/legacies/myths_legends/england/london/article_3.shtml (last visited Sept. 14, 2005) (stating that the first recorded performance of a pantomime based on the Dick Whittington story was Harlequin Whittington at Covent Garden in 1814).

As long as the authors of such adaptations do not copy original elements of other adaptations of the Dick Whittington story, they can use the underlying folk tale without risking liability under the copyright laws of the United Kingdom or the United States. The next section draws on one version of the Dick Whittington story to show how traditional Anglo-American copyright doctrine operates to bar protection for many folk stories like Dick Whittington.

III. A Parentless State: A Problem for Dick Whittington and for Copyright Protection for Folk Tales

Once upon a time a boy named Dick Whittington lived in Gloucester. Dick had no mother and no father to look after him. He was very poor and often had to go to sleep hungry. After hearing people talk about a great city, London, where the streets were paved in gold, Dick decided to go there to seek his fortune.

At the beginning of the folk tale, Dick Whittington’s major problem was his parentless state. As an orphan, he lacked financial support and status in society. A similar difficulty exists for folk tales like the Dick Whittington story. Such a tale can be viewed as lacking parents in the sense it has no identifiable individual authors or group of individual authors, but is rather the product of community development over many years. This parentless state creates serious problems for protecting folk tales under intellectual property law. The primary type of intellectual property protection for stories is copyright law.


73. See infra Part III.

74. The author of this essay created the version of the Dick Whittington folktale that appears in this essay.

75. See generally ROBERT P. MERGES, ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE (3d ed. 2003). Some other types of intellectual property law or related laws protect certain elements or aspects of some stories in some jurisdictions. For instance, trademark law protects titles or characters where they serve as source-identifying symbols for goods or services used in commerce, trade secrets that have economic value and that are not generally known can be protected, and unfair competition may protect against certain misrepresentations about products or ser-
Most copyright regimes provide protection for original literary, artistic, dramatic, or musical works based on folk stories like the Dick Whittington story, provided they have identifiable authors.\textsuperscript{76} But under traditional Anglo-American copyright doctrine, many underlying folk tales have no, or only very weak, copyright protection.\textsuperscript{77}

When modern western copyright law originated in early eighteenth-century England, it protected individual and identifiable authors of books, not collaborative creators of folk stories.\textsuperscript{78} The first modern copyright statute, the Statute of Anne (1710), gave authors "the sole Liberty of printing or reprinting" their books or of assigning these rights for a limited period.\textsuperscript{79} After this period expired, the works would fall into the public domain to be freely used by anyone. Modern United Kingdom and American copyright doctrine is still premised on the romantic notion of the individual author as genius-


\textsuperscript{77} See Farley, supra note 5, at 29–35; Peter Jaszi, On the Author Effect: Contemporary Copyright and Collective Creativity, 10 Cardozo Arts & Ent. L.J. 293, 302 (1992); Kuruk, supra note 2, at 796; von Lewinski, supra note 76, at 757–59.

\textsuperscript{78} See Lyman Ray Patterson, The Statute of Anne: Copyright Misconstrued, 3 Harv. J. on Legis. 223, 224 (1966) (stating that the Statute of Anne specifically gave rights to "authors" and "proprietors" of books, but because it granted authors only economic rights and provided that they could assign them away, Patterson believes the Statute of Anne was enacted primarily to benefit publishers); Jaszi, supra note 77, at 296 (contending that the Statute of Anne was the product of lobbying by printers and booksellers); L. Ray Patterson & Craig Joyce, Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution, 52 Emory L.J. 909, 923 (2003) (pointing out that the Statute of Anne benefited the public by destroying the perpetual monopoly over book publishing that the 1662 Licensing Acts had given to the Stationers Guild and ensuring that works would fall into the public domain after a finite period).

\textsuperscript{79} Act for the Encouragement of Learning, 1710, 8 Ann., c. 19 § 2 (U.K.). Under the Statute of Anne, the period of copyright protection was short compared to that granted by most current national copyright laws.
creator that clearly undergirds the Statute of Anne. The copyright statute currently in force in the United Kingdom, the Copyright, Designs and Patents Act 1988 (CDPA), provides that an author is generally the first owner of copyright in a work. This statute defines an "author" as "the person who creates" a work. This definition reveals that the drafters of the statute must have perceived an author as an individual identifiable person. The current United States federal copyright act protects "original works of authorship fixed in any tangible medium of expression." Although this statute leaves "authorship" undefined, it is predicated on the assumption that authors are identifiable individuals. The major copyright law treaty, the Berne Convention, provides that its protection for literary and artistic works extends to "authors," who must be individuals and identifiable. Most countries in the world are members of the Berne Convention.

Although most western copyright regimes protect works of joint authors, this protection does not extend to collective or collaborative works that were not created by individuals who are identified or capable of being identified. For example, the current United States copyright statute defines a protectable "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole." To be treated as a joint author under United States copyright law requires individually meeting the standard for authorship by making an independently copyrightable contribution. Additionally,

80. See Farley, supra note 5, at 29–35; Jaszi, supra note 77, at 295–98, 302; Peter Jaszi, Toward a Theory of Copyright: The Metamorphoses of "Authorship", 1991 Duke L.J. 455, 466, 469–70, 501–02 (discussing the constructed idea of "authorship" from literary and artistic culture to copyright law); Martha Woodmansee, On the Author Effect: Recovering Collectivity, 10 Cardozo Arts & Ent. L.J. 279, 280 (1992).
84. See Angela R. Riley, Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities, 18 Cardozo Arts & Ent. L.J. 175, 190–91 (2000); Jaszi, supra note 80, at 466, 494, 501–02.
85. See Berne Convention, supra note 76, art. 3; von Lewinski, supra note 76, at 752.
87. 17 U.S.C. § 101. See also id. § 201(1) ("[T]he authors of a joint work are coowners of copyright in the work.").
there is a stringent requirement of mutual intent, that is, that the parties "entertain in their minds the concept of joint authorship." Many collaborative contributions to works of folklore would not meet this high standard. Moreover, the fact that the term of protection for a joint work is measured from the death of the last surviving joint author indicates that joint authors must be individuals and cannot be communities creating a work collectively. The United Kingdom CDPA also protects joint works subject to a similar duration provision and requires that each author contribute a significant part of the skill and labor that the copyright protects. In the case of a literary work like a story, a joint author must contribute to the written expression of the work. The Berne Convention has a similar duration provision for joint works. Consequently, the traditional doctrine of joint works cannot be viewed as an exception to the identifiable author requirement that would operate to extend copyright protection to works of folklore where the authors are not identifiable or capable of being identified.

Nor does the protection given by many western copyright systems to anonymous works create a broad extension of protection to collective works of folklore. For example, the current United States copyright statute clearly contemplates that the "anonymous" and "pseudonymous" works to which it extends protection are the works of identifiable individuals, not collective community products. The statute defines an "anonymous work" as "a work on the copies or phonorecords of which no natural person is identified as author." But the anonymous works protected by the statute do not include collaborative works developed over time by unidentifiable community members. This is clear from the provision providing for a change in the duration of copyright protection if an anonymous author's identity becomes known. This provision clearly manifests an underlying re-

89. Childress, 945 F.2d at 508; Thomson, 147 F.3d at 201 (citing Childress, 945 F.2d at 508).
90. See Farley, supra note 5, at 33–34.
91. 17 U.S.C. § 302(b) (providing that copyright protection for joint works lasts for 70 years after the death of the last surviving author).
92. Copyright, Designs and Patents Act, 1988, c. 48, § 12 (U.K.). For pre-1989 works, see id. sched. 1 ¶ 12(2) which applies a life plus 50 term rather than life plus 70.
94. See, e.g., Tate v. Thomas, (1921) 1 Ch. 503, 513 (Eng.).
95. Berne Convention, supra note 76, art. 7bis.
96. The Copyright, Designs and Patents Act does provide for one potential exception to this for certain unpublished literary, dramatic, artistic, or musical works of folklore created in other Berne Union countries. See Copyright, Designs and Patents Act § 169 (U.K.); 1 Kevin Garnett et al., Copinger & Skone James on Copyright § 3-168 (14th ed. 1999).
98. Id. § 302(c) (providing that in such a situation the copyright term will no longer be measured from the year of first publication or creation of the work but will change to 70 years after the author's death).

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requirement that an anonymous author be an identifiable individual. The United Kingdom CDPA also protects "works of unknown authorship," and makes clear that the protection for anonymous works does not extend to collaborative community works where the authors are not capable of being identified. Like the United States copyright statute, the United Kingdom CDPA provides for a similar shift in the copyright term where unknown authors become known. The Berne Convention has a similar provision. The lack of an individual author or group of individual authors is just one of several doctrinal barriers to copyright protection for folklore under many traditional western copyright regimes. Other doctrines that may bar protection for many works of folklore are the limited duration of copyright protection, the fixation requirement, and the originality requirement.

The traditional Anglo-American conception of copyright is a limited monopoly, granted only for a limited period of time. The Statute of Anne provided for a copyright term of fourteen years after a book's publication, and this term was renewable for another fourteen years if the author was still living. The United States Constitution bars Congress from enacting perpetual copyright protection. The current United States Copyright Act provides that the basic term of copyright protection is the life of the author plus seventy years. The United Kingdom CDPA protects literary, dramatic, musical, or artistic works for the life of the author plus fifty years. All Berne Convention member states must grant a minimum basic term of copyright protection of life of the author plus fifty years. These terms are certainly usually very long—well over a century for many works.

99. See id.
100. See Copyright, Designs and Patents Act § 9(4) (U.K.). The exception to this section is stated in section 169. See id. § 169; supra note 96.
102. Berne Convention, supra note 76, art. 7(3) (shifting the minimum term of protection from 50 years after publication to life of the author plus 50 if the author reveals his or her identity during the original term).
103. Act for the Encouragement of Learning, 1710, 8 Ann., c. 19, § 2 (Eng.) (providing that this term applied only to new books, and that books already printed as of April 10, 1710 were protected for twenty-one years after that date).
107. Berne Convention, supra note 76, arts. 7(1), 7(3), 7(6).
108. In Eldred v. Ashcroft, 537 U.S. 186 (2003), the U.S. Supreme Court rejected a constitutional challenge to the Sonny Bono Copyright Term Extension Act, which had basically added 20 years to the copyright term. Id. at 194. Those who believe the term of copyright protection in the United States is too long are now fighting on the legislative front. See Public Domain Enhancement Act, H.R. 2601, 108th Cong. (2003) (supporting the introduction of new legislation to move "orphaned" copy-
But, they are not long enough to protect folk stories created hundreds of years ago, like the Dick Whittington folktale.

The fixation requirement is another barrier to protection for many folk tales like the Dick Whittington story. Some western copyright systems, including that of the United States, require that works be "fixed in any tangible medium of expression" as a prerequisite for copyright protection. The Berne Convention permits its members to implement a fixation requirement, although it does not make this mandatory. The current United States copyright statute has a broad fixation requirement for all types of works. It defines "fixed" as "when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." A story will be fixed when it is written down on paper or spoken into a tape recorder. The United Kingdom CDPA has a more limited fixation requirement that only applies to some works, but these include literary works like stories. An unwritten folk tale created and developed orally through storytelling would not satisfy the fixation requirement.

Such a folk story might also run afoul of the traditional copyright requirement that works be sufficiently original. Although the Berne Convention does not specifically provide for originality as a prerequisite for protection, most member states have an originality and independent creation requirement. For example, both the United States and United Kingdom have originality requirements. The United States Copyright Act limits copyright protection to "original

righted works into the public domain by providing for the forfeiting of copyright unless a renewal fee is paid after the work has been protected by copyright for fifty years). House Bill 2601 was introduced in the House of Representatives in 2003 but never made it out of the Judiciary Committee. H.R. 2601. See also Public Domain Enhancement Act, H.R. 2408, 109th Cong. (2005) (showing a similar bill currently under consideration by the Judiciary Committee at the time of writing). Proponents have also sought to persuade the Copyright Office that legislation to protect orphaned works is needed. See Copyright Office Notice of Inquiry, 70 Fed. Reg. 3739 (Jan. 26, 2005) (announcing a study to examine the issue of orphan works). The Copyright Office solicited initial and reply comments from interested parties and held roundtable discussions in the summer of 2005 in Washington D.C. and Berkeley, CA. See Copyright Office Notice of Public Roundtables, 70 Fed. Reg. 39,341 (July 7, 2005); U.S. Copyright Office, Orphan Works, available at http://www.copyright.gov/orphan/.


110. Berne Convention, supra note 76, art. 2(2); see also 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE § 2(1)(a) (Melville B. Nimmer & Paul Edward Geller eds., 2004) (stating that some European countries, such as France, do not have a fixation requirement for copyright protection).


works of authorship.” The Supreme Court has stated that originality is the “sine qua non of copyright.” The statute does not define originality, but courts have held that to be original does not require that a work be novel or a work of artistic genius. Originality does not require novelty, only independent creation and some minimal “creative spark,” even if “crude, humble or obvious.” A work based on a preexisting work must have some distinguishable variation from the prior work that is more than merely trivial. Even though the Supreme Court has described the originality requirement as “not particularly stringent,” many works of folklore that develop incrementally over time based on preexisting works may not meet the originality requirement. Even if they do, only the new aspects will be protected and not the preexisting work. United Kingdom copyright law also requires stories to be “original” to be protected. As under United States law, neither novelty nor artistic merit is necessary. All that is required is the independent creation of a work through the exercise of sufficient skill, labor, or judgment. As the English Court of Appeal has recently stated, a work “may be complete rubbish and utterly worthless, but copyright protection may be available for it, just as it is for the great masterpieces of imaginative literature, art and music.”

Because current United States copyright law does not grant copyright protection to “sweat of the brow,” or hard work expended in creating a work unless there is some minimal level of creativity, simply writing down an oral folk story will not be enough to obtain copyright rights in the folk story itself, although a particular selection or arrangement of folk stories in an anthology could be copyrightable as a

114. 17 U.S.C. § 102(a). This requirement was enacted in the 1976 Act to reflect prior judicial construction of the Constitutional limitation of federal copyright protection to the “writings” of “authors” in U.S. CONST. art. I, § 8, cl. 8. See I MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.01 (2005) (stating that this construction was based on the reasoning that originality followed from the limitation to authors because “an author is ‘the beginner . . . or first mover of anything . . . creator, originator,’ it follows that a work is not the product of an author unless the work is original.”).


117. Feist, 499 U.S. at 345, 359.
118. NIMMER & NIMMER, supra note 114, § 2.01[A].
119. Feist, 499 U.S. at 358.
120. See Farley, supra note 5, at 20–22.
122. Copyright, Designs and Patents Act, 1988, c. 48, § 1(1)(a) (U.K.) (protecting only “original” musical, dramatic, and artistic works).
compilation. The position in the United Kingdom and other Commonwealth countries may be different because copyright can protect skill and labor, but even under this slightly different originality test, writing down a folk story would still not result in the grant of broad copyright rights in that story. In 1989, Lord Oliver stated obiter, in the Privy Council decision in Interlego A.G. v. Tyco Industries Inc., that originality requires something more than the effort expended to make an exact or literal copy like a tracing or an enlargement of a photograph from a positive print. But in the early twentieth century case of Walter v. Lane, the House of Lords found that a verbatim shorthand report for a newspaper of a political speech was entitled to copyright protection because the reporter had expended skill and labor to accurately take down the words. However, since the speech was in the public domain, any other newspaper reporter was also free to make her own shorthand report of it. Although Walter v. Lane was decided before the originality requirement had been put into statute (in the Copyright Act of 1911), later English and Australian decisions have held it to be good law. Very recently, in Sawkins v. Hyperion Records Ltd., the English Court of Appeal followed the approach of Walter in dismissing an appeal brought by the producer and seller of sound recordings against a judgment of copyright infringement in several performing editions of works of a seventeenth-century composer, Michel-Richard de Lalande, that a modern musicologist had prepared. The musicologist had not composed or arranged any music himself, but had attempted to accurately reproduce the Lalande works, which required considerable scholarship and interpretation. Since Lalande died in the eighteenth century, his musical works had long been in the public domain, but the Court of Appeal found the performing editions, completed in 2001 and thus still within the term of copyright protection, were sufficiently original to be protected by copyright because of the skill, effort, and labor that the musicologist

126. LADDIE ET AL., supra note 76, § 3.52, at 80 (2000) (stating that a person who writes down a folk song gets copyright in their transcript of the song but not in the song itself because others continue to be free to make their own transcripts of the song).
129. Id. at 549, 551.
130. See Univ. of London Press, Ltd. v. Univ. of London Tutorial Press, Ltd., (1916) 2 Ch. 601, 606 (Eng.); see also GARNETT ET AL., supra note 96, § 3-86.
133. Id. at 641.
had invested in making them. But the copyright in the performing editions did not include copyright in Lalande’s musical works, and would not prevent other musicologists from copying those works themselves or making their own performing editions.

The cumulative result of the authorship, duration, fixation, and originality doctrines in the United States and the United Kingdom, as well as in many other western copyright regimes, is that many folk stories, like the Dick Whittington folk tale, have no or only very thin copyright protection. Although some tribal and customary laws protect community-generated oral folklore, the protection of such customary law is weak because the customary norms of a traditional society can only bind members of that society, not outsiders, and many members of indigenous communities are increasingly less respectful of these norms.

IV. LIKE MR FITZWARREN’S EFFORTS TO PROTECT DICK, ATTEMPTS TO STRENGTHEN INTELLECTUAL PROPERTY PROTECTION FOR FOLKLORE

When Dick arrived in London, footsore and weary after walking all the way from Gloucester, he searched in vain for a street paved in gold. Utterly exhausted, he fell asleep on the steps of a grand house belonging to a wealthy merchant, Mr. Fitzwarren. Dick’s random choice of a resting place was a lucky one. Mr. Fitzwarren was a good-hearted and generous man who gave Dick a room in his home as well as a job as a scullery boy. Mr. Fitzwarren always treated Dick kindly.

Like Mr. Fitzwarren’s efforts to look after Dick and treat him well, from the late 1960s to the early 1980s, there were quite a few legal initiatives on the national and international level to implement stronger legal protections for folk stories and other types of folklore than traditional western copyright law or tribal/customary law provided. These efforts included a late 1960s revision to the major international copyright treaty, the Berne Convention. From the late 1960s through the 1970s, several countries, mainly in the developing world, enacted national copyright laws that gave specific protection to works of folklore notwithstanding the difficulties posed by traditional copyright doctrine. Additionally, in the early 1980s, the United Nations Educational, Scientific and Cultural Organization (UNESCO) and

134. Id. at 644, 647–48, 650–51, 654.
135. Id. at 643.
136. See Kuruk, supra note 2, at 780–88.
WIPO\textsuperscript{138} drafted Model Provisions designed to overcome doctrinal barriers to protection in copyright law through the implementation of \textit{sui generis} intellectual property protection for folklore into national laws. Some countries, particularly in the developing world, have used the Model Provisions as the basis for enacting more extensive intellectual property laws protecting folklore. This trend has been especially pronounced in Africa, where the majority of countries have implemented, or are in the process of implementing, national laws giving copyright or \textit{sui generis} protection to unpublished folk stories handed down orally from generation to generation.

A. 1960s Revision to the Berne Convention: Article 15(4)

As previously discussed, when the Berne Convention was originally concluded in 1886, it only protected works created by identifiable authors, thus excluding many folk tales and other folkloric works from protection.\textsuperscript{139} But by the late 1960s, some developing countries successfully exerted pressure to revise the treaty to give additional protection to works of folklore. At the Stockholm Diplomatic Conference for the revision of the Berne Convention in 1967, the Indian delegation proposed adding “works of folklore” to the list of protected literary and artistic works in Article 2(1) of the Berne


\textsuperscript{139} See von Lewinski, supra note 76, at 752; see generally Berne Convention, supra note 76.
Convention. The proposal encountered successful opposition, especially from the Australian delegation, which argued that it would undermine the basic structure of the Berne Convention that was set up to protect identifiable authors. A special Working Group on Folklore, set up after the Indian proposal failed, came up with a more successful alternate proposal that resulted in the addition of a new Article 15(4) to the treaty. This provides:

(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 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. The new Article 15(4) does not include the term “folklore” because it was considered too difficult to define, but applies to all works that are unpublished and whose author(s) is unidentified. There is clear evidence in the legislative history, however, that the purpose of adding this new provision was to protect folklore in particular. Nevertheless, Article 15(4)’s new protection was quite weak because it left it up to individual countries to make a designation of an official representative for the author of works of folklore. Only one country, India, has ever made such a designation.

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141. Id. Summary Minutes of Main Committee I, 11th Meeting ¶¶ 967, 987, at 876–77.

142. Id. Summary Minutes of Main Committee I, 21st Meeting ¶ 1515, at 918. The new Article 15(4) was added to the Stockholm (1967) and Paris (1971) versions of the Berne Convention.

143. Berne Convention, supra note 76, art. 15(4).

144. See WIPO Stockholm Records, supra note 140, Report on the Work of Main Committee I ¶ 252, at 1173.

145. See id. ("It is clear, however, that the main field of application of this regulation will coincide with those productions which are generally described as folklore."); see also id. Summary Minutes of Main Committee I, 21st Meeting ¶¶ 1505.2, 1509.2, at 917–18.


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B. National Copyright Legislation in the 1960s and 1970s

In the 1960s and 1970s, a few countries, mostly in the developing world, enacted copyright laws specifically extending protection to collective and collaborative works of folklore. These included Tunisia (1966), Bolivia (1968), Chile (1970), Iran (1970), Morocco (1970), Algeria (1973), Senegal (1973), Kenya (1975), Mali (1977), and Burundi (1978). These laws attempted to circumvent the doctrinal problem of a lack of an identifiable individual author by treating the national government as the author, based on the rationale that folklore is part of the national cultural heritage. These laws applied a *domaine public payant* system, under which users of folklore had to make payments to the national government, like royalty payments to authors. The majority of these laws required the approval of a government body to use folklore in derivative works that adapted folklore for commercial purposes or to fix folklore for commercial purposes. These laws did not uniformly define the folklore they protected. For


149. Id.
150. See id. ¶¶ 7–8.
example, they differed as to whether such folklore was limited only to unpublished works. They also used different terminology as to what was protected, including: "folklore," "works of folklore," and "expressions of folklore." These laws had a number of weaknesses, both substantive and practical. Some of these national laws were vague as to what folklore they protected. For example, the laws of Chile, Mali, and Tunisia simply indicated that they were protecting the common national heritage without attempting to define folklore. These national laws did not specifically state how they overcame the traditional copyright barrier of a copyright term that was limited in duration, although some observers interpreted their protection to folklore as unlimited in time. These laws' domaine public payant system was also subject to criticism for failing to ensure that payments for use of folklore went to the communities that had created it. Some jurisdictions did not make their copyright protections of folklore effective in practice. For example, the Kenyan statute included a provision that empowered the Attorney General to make regulations setting out terms and conditions governing specified uses of folklore other than by national public entities for non-commercial purposes or importation of foreign works that embodied folklore. But these regulations were never made. Most jurisdictions did not endorse the approach of these national laws, and continued to follow the traditional western author-centric copyright model that provided no protection to folklore that was not the product of an identifiable individual author or group of such authors. Traditional creations by communities, such as folktales, were left without protection. Traditional duration requirements left older folkloric works created by identifiable individual authors without pro-

151. See id. ¶ 7 (stating, for example, that Moroccan law only protected unpublished works of folklore whereas the laws of Tunisia and Algeria did not contain such a restriction); see also Copyright Act, (1966) (Kenya), supra note 147, Cap. 130 § 18(4) (restricting works of folklore to literary and artistic works).


153. See id. ¶ 5. In contrast, the laws of Algeria and Morocco limited themselves to literary and artistic works with unknown authors where there was a reasonable basis that they were nationals of the legislating country. See id. ¶ 6. Other national laws included additional elements differentiating folklore from other literary and artistic works, such as that they were traditional cultural heritage passed on from generation to generation. See id. ¶ 7.

154. See id. ¶ 14.

155. See id. ¶ 19.

156. Copyright Act, (1966) (Kenya), supra note 147, Cap. 130 § 18(3).

tection, and traditional fixation requirements did not protect stories that were not written down.

C. Efforts to Protect Folklore at the International Level
Culminating in the 1982 Model Provisions

By the early 1970s, some developing countries also came to the view that there was a need for stronger international protection of folklore. In 1973, Bolivia put pressure on UNESCO to draft an international instrument to protect folklore. 158 In 1976, a Committee of Governmental Experts convened in Tunisia and, with the help of WIPO and UNESCO, adopted a model copyright law providing protection for works of national folklore that radically altered some traditional Anglo-American copyright doctrines. 159 This Tunis Model Law gave perpetual ownership type protection to such works and did not require them to be fixed to receive protection. 160

After the creation of the Tunis Model Law, UNESCO convened a Committee of Experts on the Legal Protection of Folklore in Tunis in the summer of 1977. 161 This Committee agreed that there should be a more comprehensive assessment of the problems of protecting folklore. 162 UNESCO and WIPO then convened a Working Group of sixteen invited experts that met in Geneva in January of 1980 to consider a draft of a model law designed to be used in national legislation to better protect folklore. 163 The Working Group agreed that adequate legal protection for folklore was desirable. 164 It supported the use of model provisions that could be incorporated into national laws, viewing these as a first step to regional and international protections for folklore. 165 The Working Group's amended draft of the model law was considered by a Committee of Government Experts convened by UNESCO and WIPO, which adopted the "Model Provisions for Na-


159. See Tunis Model Law on Copyright for Developing Countries, WIPO Doc. 812 (E) (1976).

160. Id. §§ 1(5bis), 6. There is both an Anglo-Saxon and a Roman version of the Tunis Model Law. See id. Basic Features of the Model Law, ¶ 4. The Roman version did not require fixation for any works, while the Anglo-Saxon version made an exception to the fixation requirement for works of folklore. See also id. Commentary, ¶ 12. 161. Model Provisions, supra note 147, Part I ¶ 16.

162. Id.

163. Id. Part I ¶¶ 18–19 (stating that the draft model law, Model Provisions for National Laws on the Protection of Creations of Folklore and a Commentary on those Model Provisions, are available at UNESCO/WIPO/WG.I/FOLK/2).

164. Id. Part I ¶ 20.

165. Id. (agreeing that the model law should be drafted so as to be applicable in countries both with and without relevant legislation).
tional Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions” (Model Provisions) in 1982.166

Certainly recognizing the doctrinal difficulties with protecting folklore under copyright law, the drafters of the Model Provisions preferred a sui generis type of protection. They chose to use the term “expressions of folklore” in the Model Provisions rather than the more typical copyright law term “works of folklore” in order to make clear that the protection was sui generis, not copyright.167 Under the Model Provisions, certain utilizations of expressions of folklore, with both gainful intent and outside their traditional or customary context, generally require authorization of a “competent authority,” or if a particular country prefers, the “community concerned.”168 These uses include various public disseminations of expressions of folklore, including publication and reproduction of copies, as well as communication to the public by performance, recitation, and broadcast.169 A country can also give authority to a supervisory body to set a tariff of fees payable for authorized utilizations of expressions of folklore.170 The choice of supervisory or competent authority, including possibly a representative body for a community, is left to the individual country.171

By implementing this authorization requirement, the Model Provisions sought to strike a balance that would ensure traditional communities could continue to use and develop their traditional cultural heritage in traditional and customary ways, and that expressions of folklore could be preserved by archivists or studied by researchers.172 The Model Provisions exempt some utilizations from the authorization requirement: utilizations for educational purposes; utilizations “by way of illustration” in the original works of an author; utilizations by “borrowing” expressions of folklore for creating an original work of authorship; and “incidental utilizations,” including reporting on current events and displaying expressions of folklore in museums visited by the public.173 These exceptions are also directed toward striking the right balance between protecting folklore against abuse and ensuring that it could be used for socially beneficial purposes, such as

166. Id. Part I ¶¶ 22, 24.
167. See id. Part II § 2, Part III ¶ 37.
168. See id. Part II § 3, Part III ¶ 40-41, 49; id. Part II §§ 10(3), 11(1), Part III ¶ 86 (providing for appeals of decisions of a competent authority where there is one); id. Part II § 10(1), Part III ¶¶ 80-81 (providing that application must be made to a competent authority but leaving it to an individual country to decide whether such application can be oral or written).
169. Id. Part II § 3, Part III ¶¶ 43-44.
170. Id. Part II §§ 9(2), 10(2), Part III ¶ 74.
171. Id. Part III ¶¶ 75-76, 78-79.
172. Id. Part III ¶¶ 45-46.
173. Id. Part II § 4.

https://scholarship.law.tamu.edu/txwes-lr/vol12/iss1/3
DOI: 10.37419/TWLR.V12.I1.2
education and the free development of individual creativity inspired by folklore.\textsuperscript{174}

The Model Provisions also manifest a concern for giving communities the means for greater control over uses of their expressions of folklore. Even where a use of an expression of folklore does not require authorization, the Model Provisions provide that in many cases, it will require an acknowledgment of the source of the expression of folklore.\textsuperscript{175} Where an expression of folklore is used in a printed publication or otherwise communicated to the public, mention must be made of "the community and/or geographic place from where the expression utilized has been derived."\textsuperscript{176} No acknowledgment of source is required where there is an "incidental use" of an expression of folklore or where it is borrowed to create a new original work of authorship.\textsuperscript{177} Nor will an acknowledgment of source be required if it is impossible for a user to know the geographic place or community that was the source of the expression of folklore.\textsuperscript{178} The Model Provisions further provide that they do not obviate the need for permission under copyright law if an expression of folklore being used is protected by copyright law.\textsuperscript{179}

The Model Provisions also provide that willful, and possibly negligent, failure to comply with its requirements for acknowledging a source shall be a criminal offense.\textsuperscript{180} Violating the authorization requirements is also a criminal offense under the Model Provisions.\textsuperscript{181} Additionally, they provide that willfully deceiving the public about the source of expressions of folklore or willfully distorting any expression of folklore in the course of a public use in a manner that is prejudicial to the cultural interests of the community concerned shall be a criminal offense.\textsuperscript{182} The Model Provisions leave it up to the particular country to determine what sanctions should be imposed for these offenses, though the accompanying commentary indicates that fines and imprisonment would be the main possible sanctions.\textsuperscript{183} As for the offense of use without authorization, civil remedies may also be awarded for violations of the source acknowledgment provisions.\textsuperscript{184}

Unlike traditional western copyright laws, the Model Provisions provide for an unlimited term of protection for expressions of folk-
The Commentary to the Model Provisions gives the reason for this as being that the beneficiaries of the protection are not individuals with a finite lifespan but a community. It also states, however, that the unlimited duration of protection does not exclude application of a country's ordinary statute of limitations.

The Model Provisions do not fully explain the concept of protectable folklore. Protection under the Model Provisions is limited to "artistic heritage" developed by a community and does not extend to the entire cultural heritage of a nation. This can include "verbal expressions, such as folk tales, folk poetry and riddles . . . ." The Commentary to the Model Provisions states that one example of traditional cultural heritage that would not fall into the narrower "artistic heritage" category is the "substance of legends," giving as a specific example the "commonly known course of life of traditional heroes like King Arthur and his knights." However, a verbal expression "which would qualify as literature if created individually by an author," a musical expression, or an "expression[ ] by action and [a] tangible expression[ ]" could qualify for protection as an expression of folklore if it were a "characteristic element" of a particular community's traditional artistic heritage. Unlike traditional copyright protection, the Model Provisions do not require that expressions of folklore be fixed in order to be protected.

The extent to which the Model Provisions would protect the Dick Whittington folktale as an "expression of folklore" is not entirely clear from the confusing and vague discussion of artistic heritage in the Commentary to the Model Provisions. The Commentary does not explain how it is to be determined whether a particular verbal expression qualifies as representing a distinct traditional heritage of a community. It appears from the Commentary that the general subject matter of the Dick Whittington story would not be protected as an expression of folklore, but that a verbal expression of that subject matter would be protected. The Model Provisions state that an example of a "verbal expression" is a "folk tale." But, they do not specify any test or method for separating what is a protectable expression in a folk tale from the unprotectable substance of the legend. It seems that the Model Provisions are attempting to set up something like the

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185. See id. Part III ¶ 65.
186. Id.
187. Id.
188. Id. Part II § 2, Part III ¶ 33.
189. Id. Part II § 2(i).
190. Id. Part III ¶ 34 (stating that scientific views and traditional beliefs would not fit into the artistic heritage category either).
191. Id. Part III ¶ 34.
192. See id. Part III ¶ 37.
193. See id. Part III ¶ 36.
194. Id. Part II § 2(i).
idea-expression dichotomy in United States copyright law. But, they do not make clear how an unprotectable idea is to be separated from a protectable expression, especially when it cannot be determined which elements of a folktale, like the Dick Whittington story, are really historical facts. The Model Provisions do not require that a competent authority or community keep an inventory of its folklore.

D. Implementation of the Model Provisions into National Laws

Some countries, particularly in the developing world, have used the Model Provisions as the basis for enacting more extensive intellectual property laws protecting folklore. A majority of African countries have either implemented or are in the process of implementing copyright or sui generis intellectual property protections for folk stories and other types of folklore into their national laws. Many of these laws are based on the Model Provisions. One example is a recent copyright and neighboring rights statute enacted in the United Republic of Tanzania.

Under the Copyright and Neighbouring Rights Act of 1999, Tanzania gives intellectual property protection to “expressions of folklore developed and maintained in the United Republic of Tanzania.” Following the Model Provisions, Tanzania also extends such protection to foreign expressions of folklore under a national treatment rule requiring that the jurisdiction where the foreign expression of folklore originated give protection equivalent to that of Tanzania.

The Tanzanian statute defines the scope of protected folklore very similarly to the Model Provisions. It also protects “expressions of folklore,” which it defines using almost identical language to that of the Model Provisions, as productions “consisting of characteristic elements of the traditional artistic heritage developed and maintained over generations by a community or by individuals reflecting the

195. *See Copyright Act, 17 U.S.C. § 102(b) (2000)* ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."). *See also Nimmer & Nimmer, supra* note 114, §§ 13.03[A][1], 13.03[B][2][a].


197. Id. Part III ¶ 39.


199. Id. § 3(2).

traditional artistic expectations of their community.” The examples of expressions of folklore supplied in the Tanzanian statute are also very similar to the Model Provisions in that they are stated to be non-exclusive and include folk tales, folk poetry, riddles, folk songs, instrumental folk music, folk dances, plays, artistic forms of rituals, productions of folk art in drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, wood work, metal ware, jewelry, baskets, costumes, and traditional musical instruments.

The Tanzanian law also closely follows the Model Provisions in making certain uses of expressions of folklore subject to authorization of a competent authority, the National Arts Council. These include the reproduction and distribution of copies or communication to the public by, for example, broadcasting, performing, or public recitation where the folklore is used both “with gainful intent and outside their traditional and customary context.” The Tanzanian exceptions to this authorization requirement are virtually identical to those in the Model Provisions, including: uses of expressions of folklore for educational purposes, as illustrations in original works (as long as this is “compatible with fair practice”), “borrowing” expressions of folklore for use in original derivative works, and certain incidental uses, such as in news reports or in museum displays open to the public. The Model Provisions leave the determination of whether such authorization has to be in writing to the national government implementing them. The Tanzanian law requires that such an application be in writing. Tracking discretionary wording in the Model Provisions, the Tanzanian statute provides for payment of authorization fees that correspond to a tariff set by the National Arts Council which is to be used to promote or safeguard national culture.


202. Compare Tanzanian Copyright and Neighbouring Rights Act, supra note 198, § 24, with Model Provisions, supra note 147, Part II § 2. The only examples given in the Model Provisions that are not also included in the Tanzanian statute are needlework, textiles, carpets, and architectural forms. According to the Commentary to the Model Provisions, “architectural forms” were included with hesitation and are therefore surrounded by square brackets. Model Provisions, supra note 147, Part III ¶ 37.

203. Tanzanian Copyright and Neighbouring Rights Act, supra note 198, § 25. The Tanzanian wording differs slightly from that of the Model Provisions. For example, the Tanzanian statute makes “any application” of expressions of folklore subject to the authorization requirement, whereas the Model Provisions use the word “publication.” Compare Tanzanian Copyright and Neighbouring Rights Act, supra note 198, §§ 25, 29, with Model Provisions, supra note 147, Part II § 3.

204. Compare Tanzanian Copyright and Neighbouring Rights Act, supra note 198, § 26, with Model Provisions, supra note 147, Part II § 4.


206. Tanzanian Copyright and Neighbouring Rights Act, supra note 198, § 28(a).

207. See id. § 28(b); Model Provisions, supra note 147, Part II § 10(2).
Like the Model Provisions, the Tanzanian statute also requires an acknowledgment of source, akin to a moral right of attribution, in certain situations. Also similar to the Model Provisions, the Tanzanian law requires users of expressions of folklore like folk tales to indicate their source by "mentioning the community and/or geographic place from which the expression utilized has been derived" in "all printed publications, and in connection with any communications to the public."\(^{208}\)

The Model Provisions leave it up to national governments to determine applicable sanctions.\(^{209}\) Under the Tanzanian statute, violations are subject to terms of imprisonment and fines, which can be hefty.\(^{210}\) Unauthorized importation, distribution, reproduction, or adaptation of expressions of folklore are subject to a fine of up to 10 million shillings or imprisonment of up to ten years.\(^{211}\) The offense of using expressions of folklore that "willfully distort[ ] the same in a way prejudicial to the cultural interests of the community concerned" is punishable with a fine of up to five million shillings or imprisonment of up to three years.\(^{212}\) A person found guilty of willfully violating the attribution requirement is also subject to the same term of imprisonment or fine.\(^{213}\)

Other African nations have enacted, or are in the process of enacting, enhanced legal protections for folklore that either specifically include folk stories or are broadly expressed enough to include folk stories. These include Algeria,\(^{214}\) Angola,\(^{215}\) Benin,\(^{216}\) Botswana.\(^{217}\)

\(^{208}\) Compare [Tanzanian Copyright and Neighbouring Rights Act, supra note 198, § 27, with Model Provisions, supra note 147, Part II § 5.]

\(^{209}\) See Model Provisions, supra note 147, Part III § 64.

\(^{210}\) See [Tanzanian Copyright and Neighbouring Rights Act, supra note 198, § 42. Exactly which sanctions apply to which offenses is somewhat unclear due to some clearly erroneous section numbers cross-referenced in this provision. See id.]

\(^{211}\) Id. § 42(2).

\(^{212}\) Id. § 42(6).

\(^{213}\) Id. § 42(5).


\(^{216}\) See Law No. 84-008 on the Protection of Copyright (1984) (Benin).


231. See Senegal Copyright Act No. 73-52 (1973) (Sen.), supra note 147 (as amended).

and Zimbabwe. Most of these laws are based, to varying degrees, on the Model Provisions and implement a kind of sui generis protection into their copyright statutes as a neighboring right. But a few jurisdictions, such as Angola and the Seychelles, have stretched traditional copyright doctrine to extend perpetual copyright protection to unwritten folk tales and some other unwritten works of folklore handed down from generation to generation. The most recent Kenyan copyright statute has a provision authorizing the minister responsible for copyright to regulate specified uses of folklore except use by a national public entity for non-commercial purposes, as well as the importation of foreign-made works that embody certain works of folklore, including folk stories, created within Kenya by unknown authors, handed down between the generations, and which constitute a "basic element of the traditional cultural heritage of Kenya." But no such regulations have yet been promulgated.

V. LIKE RATS, CRUEL COLLEAGUES, AND POVERTY: DIFFICULTIES FOR INTELLECTUAL PROPERTY PROTECTION FOR FOLKLORE

Despite Mr. Fitzwarren's kindness, Dick's problems were far from over in his new London home. His room was infested with rats that ran across his bed at night, making it impossible for him to get a good night's sleep. Dick's immediate supervisor, Mr. Fitzwarren's cook, was a cruel man who made Dick's life miserable. And Dick was still very poor.

Just as Dick's difficulties were not over even after Mr. Fitzwarren gave him a home, significant obstacles still faced those seeking to increase intellectual property protection for folk tales and other kinds of folklore even after the creation of the Model Provisions. The lack of clarity in the Model Provisions about what aspects of a folk story they protect is not their only weakness. Even proponents of stronger protection for folklore have expressed additional reasons for dissatisfac-

235. Angola Law on Authors' Rights, supra note 215, arts. 6(m), 8, 15 (providing that copyright in folklore vests in the State); id. art. 21 (providing for perpetual copyright protection for folklore); Copyright Act (Sey.), supra note 232, § 2 (defining "folklore"); id. § 4(1)(b) (exempting Seychelles folklore from the fixation requirement); id. § 7 (providing that copyright in Seychelles folklore vests in the government).
tion with the Model Provisions. One concern is that the Model Provisions are not broad enough and that they should extend not only to folklore but also other types of traditional knowledge, such as traditional medicine or agricultural knowledge. Another criticism of the Model Provisions is that they are not powerful enough because they do not provide for exclusive ownership rights for folklore and are not broad enough to protect, for example, against digital use of folk stories. Still another is that the more than twenty year old Model Provisions are now out of date, especially given the significant technological, legal, social, and cultural developments since that time.

Of even greater practical significance is the fact that the Model Provisions are not law and thus not themselves capable of enforcement unless they have been implemented into national law. Even though as discussed above, some countries have been willing to implement protections based on the Model Provisions into their national laws, a recent WIPO study found that “it appears that there are few countries in which it may be said that such provisions are actively utilized and functioning effectively in practice.” Additionally, many countries in the developed world have been far less willing to implement or use these types of protections.

Some take the view that specific intellectual property protections for intangible works of folklore, like the sui generis protections in the Model Provisions, are not necessary or desirable. Many industrialized western nations, such as the United States and the United Kingdom, do not provide comprehensive intellectual property protection for intangible works of folklore such as folk tales that, like the Dick Whittington story, were created years ago by an unknown author and transmitted orally from generation to generation. The United States has enacted a few highly specific provisions protecting specific types of folklore against disparagement or counterfeiting, such as the Indian Arts and Crafts Act that seeks to ensure the authenticity of Indian artifacts that are marketed as “Indian made.” Section 2(a) of the Lanham Act permits the United States Patent and Trademark Office to refuse registration of trademarks that falsely suggest a con-


238. Id. at 13.

239. See WIPO Final Report on National Experiences, supra note 146, ¶ 132, at 43.

240. Id. ¶ 149, at 52 (finding, in a WIPO study using questionnaires, that 23 countries of 64 respondents (36%) had specific legal protection for expression of folklore, but many of these were not actively used or functioning effectively in practice).


nection with an indigenous tribe or beliefs held by that tribe. But neither of these specific laws would give protection to folk stories. The United Kingdom CDPA has a provision, section 169, providing that where a Berne Union country has designated a competent body to represent the interests of unknown authors of certain unpublished works of folklore, including folk tales under Article 15(4) of the Berne Convention, the United Kingdom, through a designation by Her Majesty's Order in Council, may recognize the power of that body to enforce copyright in the work. In practice, this exception will almost never apply because only India has ever made such a designation under the Berne Convention and no United Kingdom Order in Council has yet been made.

Some countries' laws explicitly bar folklore from receiving copyright protection, although they may still permit protection for original derivative works based on folklore. An example is the Republic of Armenia's Law on Copyright and Related Rights. Other countries that exclude folklore from copyright protection are: Azerbaijan, Belarus, Bosnia-Herzegovina, Bulgaria, Estonia, Kazakh-

246. GARNETT ET AL., supra note 96, § 3-168.
249. See Law of the Republic of Belarus, No. 370-XIII, Copyright and Contiguous Rights (1996) (amended in 2003 by Law No. 183-Z) (Belr.), available at http://www.cipr.org/legal_reference/countries/belarus/Copyright_Belarus_ENG.pdf (stating that Art. 8 excludes works of "folk arts, authors of which are not known" from protection, while Art. 4 defines author as "an individual, by whose creative labour the work has been created").
250. See Law on Copyright and Related Rights in Bosnia and Herzegovina art. 9 (2002) (Bosn. & Herz.), available at http://portal.unesco.org/culture/en/file_download.php/e9377582007e2e06d997493b12377f83law_on_copyright.pdf ("The use of folk literature and art creations for the purpose of a literary, artistic or scientific arrangement shall be free."); id. art. 14 (specifying that the person who creates the literary, artistic, or scientific arrangement from the folk work shall be treated as the author under the law).
251. See Law on Copyright and Neighbouring Rights, State Gazette No. 56/1993 (1993) (amended in 2002 by Law No. 77/2002) (Bulg.), available at http://portal.unesco.org/culture/en/file_download.php/ed48c7a3ff11ff815de79335c198ec91bLaw_on_copyright+.pdf (stating that art. 4(3) excludes "works of folklore" from copyright protection, although art. 3(1)(5) somewhat confusingly protects "works of fine art, including works of applied art, design and folklore artistic crafts," while art. 3(2) protects translations and adaptations of folklore, as well as musical arrangements of folklore).
Jurisdictions that do not provide specific protections for expressions of folklore apparently do so for two main reasons. The first is the belief that existing intellectual property rights provide adequate protection to folklore. The second is the view that it is inappropriate or unnecessary to protect expressions of folklore because they are part of the national cultural heritage and should be in the public domain for use by everyone.

The first reason, the perceived adequacy of existing intellectual property laws, has motivated many industrialized western countries not to implement specific intellectual property protections for folklore. These include Australia, Canada, the Czech Republic, Germany, Japan, Norway, Portugal, Switzerland, and the United States of America. According to this rationale, folktales are adequately protected by copyright law because they are not entirely excluded from protection. A folk story is protected in a copyright system applying traditional western copyright doctrines if an individual author created the story, it was sufficiently original, and it had not yet fallen into the public domain.


260. Id.

261. Id.

262. Id. § 125, at 40.

263. Id. § 125 n.123, at 40.
lic domain by reason of expiration of the copyright term, and it was fixed in some tangible medium of expression.264

Countries that have stated the second rationale, inappropriateness of protection, as a reason for their reluctance to provide specific legal protections for folklore also include quite a few developed countries, including Australia, Belgium, Canada, the Czech Republic, Italy, Netherlands, the Russian Federation, and Japan.265 The Russian Federation has stated that “[c]ultural heritage is universal property, therefore prohibition of its use is inappropriate since elements of traditional knowledge and culture are interwoven into everyday life in all places.”266 Not only developed countries have been persuaded by these two rationales: one or both of them have also motivated some lesser developed countries, including Honduras, Kyrgyzstan, Vietnam, and Gambia.267

As the Model Provisions have failed to spur universal specific national sui generis intellectual property protections for folklore, many people, especially from developing countries and indigenous communities, have grown increasingly concerned about exploitation of folk stories and other forms of folklore outside of their traditional cultures. One example is Disney’s use of an ancient Chinese folktale, the “Ballad of Mulan,” in the animated 1998 film, Mulan.268 The film received considerable criticism for distorting the original folk story and Chinese history,269 as well as racial stereotyping.270 For example, Weimin Mo and Wenju Shen, two professors of education who are originally from China, have charged that the “Disney bulldozer rolls over the Chinese culture” because the filmmakers “lacked the sense of an organic cultural context.”271 Mo and Shen consider the motive for Mulan’s decision to go to war in the Disney film, to “be true to herself,” as a fundamental misrepresentation of Chinese culture because the original “Ballad of Mulan” was a celebration of Mulan’s Confucian filial piety and self-sacrifice.272 They point out other cultural inaccuracies in the film, such as the false portrayal of cross-dressing as taboo in Chinese culture; the use of music purporting to be Chinese but not

264. See supra Part III.
266. Id. ¶ 129, at 42.
267. Id. ¶¶ 125 & n.123, 129 & n.137, at 40, 42.
268. The “Ballad of Mulan” is a yuefu poem, a type of Chinese folk song that originated in the Northern Wei dynasty (386–534 AD). It tells the story of a heroic woman, Mulan, who served in her father’s stead in the fight to protect China’s indigenous Han people against invaders.
271. Mo & Shen, supra note 269, at 135, 137.
272. Id. at 131–32.
using the traditional Chinese pentatonic scale; the depiction of Mulan in supposedly traditional Chinese makeup, which in fact appears Japanese; the inaccurate depiction of the work of Chinese matchmakers; and the depiction of a cricket as a symbol of good luck. According to Mo and Shen, Disney “rob[bed] the story of its soul and in its place they put jokes, songs, and scary effects.” Such concerns have put increasing pressure on international organizations to develop stronger protections for folklore at the international level.

Indigenous peoples have expressed their concerns about protecting folklore and traditional knowledge from commercial exploitation in a number of declarations. These include the Mataatua Declaration (1993) and the Beijing Declaration of Indigenous Women (1995). The Mataatua Declaration called on state, national, and international agencies to recognize that existing intellectual property laws are insufficient for the protection of indigenous peoples’ cultural and intellectual property rights. The Declaration also recommended the development of a stronger intellectual property rights regime that would protect collective works, provide a “multi-generational coverage span,” provide retroactive protection, and protect against debase- ment of items that were culturally significant. The Beijing Declaration of Indigenous Women demanded that “our inalienable rights to our intellectual and cultural heritage be recognized and respected” and also demanded that “the western concept and practice of intellectual property rights as defined by the TRIPS in GATT, not be applied to Indigenous peoples [sic] communities and territories.” These declarations did not specifically refer to folk stories, but were worded broadly enough to encompass them as well as many other kinds of folklore and traditional culture.

VI. THE RECIPE FOR OVERCOMING DIFFICULTIES: HARD WORK, LUCK, AND PATRONAGE

Resourcefulness, luck, and the kindness of his benefactor led to Dick’s success in overcoming his difficulties. One day Dick earned a small sum of money shining a rich gentleman’s shoes. He spent it on a cat that chased away all the rats in his room. This hard work

273. Id. at 133–37.
274. Id. at 137.
277. Mataatua Declaration, supra note 275, at §§ 2.3, 2.5.
and canny purchase solved the problem of the rats, so Dick could finally sleep at night. The kind-hearted Mr. Fitzwarren then set a chain of events in motion that ended Dick’s other problems too. One day Mr. Fitzwarren called all of his servants together and offered them an opportunity to make some money of their own. One of the merchant’s ships was about to depart for the Indies on a trading mission. Mr. Fitzwarren told his servants that they could send something on the ship to be traded. Dick only had one possession that could be sent, his cat. With a heavy heart, he gave it to Mr. Fitzwarren. Meanwhile, Cook continued to make Dick’s life miserable. One day Dick could bear the situation no longer, and ran away from Mr. Fitzwarren’s home. Reaching the edge of the city at Highgate Hill, he heard Bow Bells chime “Turn again, Whittington, thrice Lord Mayor of London.” Amazed and awed, Dick obeyed the command of the bells, and returned to Mr. Fitzwarren’s home. When he arrived, he was greeted with the news that the King of Barbery had purchased his cat for a huge sum of money because he was desperate to rid his palace of mice. Dick was suddenly a wealthy man.

If proponents of increased folklore protection are to succeed in their efforts to obtain greater folklore protection on the international level, they will need great effort, patronage, and a large measure of luck, just as Dick Whittington needed these things to overcome his difficulties. This section’s examination of the current efforts to set up an international regime providing specific intellectual property protection for folklore and other kinds of traditional knowledge will demonstrate that hard work has not been lacking. A form of patronage can be said to exist in that WIPO has set up an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore to try to establish the necessary international consensus for an international intellectual property agreement for the protection of folklore and other kinds of traditional knowledge. Some WTO members are also trying to revise the TRIPS Agreement to incorporate protection of traditional knowledge. But, it is too early to know whether those in favor of greater international legal protections for folklore will have the requisite luck to succeed in negotiating an international instrument protecting folk stories and other kinds of folklore.

279. See St. Mary-le-Bow & United Parishes, The Bells, http://www.stmarylebow.co.uk/ (follow “The Bells” hyperlink) (last visited Sept. 27, 2005) (explaining that Bow Bells are the bells of the Church of St. Mary-le-Bow in Cheapside, London). Legend has it that only a person born “within the sound of Bow Bells” is “a true Londoner or Cockney.” Id.

In December 1984, WIPO and UNESCO convened a Group of Experts to consider a draft treaty based on the Model Provisions.\textsuperscript{280} Although the participants recognized that globalization and technological developments were increasing the use of folklore across geographical boundaries and considered this development to be problematic, they generally shared the view that it was premature to establish an international treaty.\textsuperscript{281} They saw two main problems. First, there were insufficient sources for identifying the expressions of folklore that would be protected. Second, there was no mechanism to determine how national laws should deal with expressions of folklore that were traditionally used in more than one country.\textsuperscript{282}

In 1996, WIPO adopted an international treaty that provided some protection for performances of folk tales and other types of folklore. The WIPO Performances and Phonograms Treaty (WPPT) explicitly protected performances of “expressions of folklore” in general, unlike the earlier Rome Convention which had only protected performances of folklore qualifying as literary or artistic works.\textsuperscript{283} The WPPT did not give general protection to folk tales and other forms of folklore themselves, just to performances of them. But at the diplomatic conference at which the WPPT was adopted, the WIPO Committee of Experts on a Possible Protocol to the Berne Convention and the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms adopted the recommendation that “provision should be made for the organization of an international forum in order to explore issues concerning the preservation and protection of expressions of folklore, intellectual property aspects of folklore, and the harmonization of the different

\textsuperscript{280} WIPO Final Report on National Experiences, \textit{supra} note 146, §§ 22, 24, at 11 (the draft treaty based on the Model Provisions is annexed to the WIPO \textit{Final Report on National Experiences} at Annex IV and is also reprinted in 19(2) UNESCO Copyright Bulletin 34 (1985)).

\textsuperscript{281} Id. § 23, at 11.

\textsuperscript{282} Id.

\textsuperscript{283} WPPT, \textit{supra} note 138, at art. 2(a) (defining “performers”). The WPPT provides that any WIPO member state may become a treaty party, as well as certain intra-governmental organizations and the European Union. \textit{Id.} art. 26. See also WPPT, http://www.wipo.int/treaties/en/documents/word/s-wppt.doc (last visited Sept. 27, 2005) (listing the 51 contracting parties to the WPPT as of Sept. 2, 2005). \textit{But see} International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations art. 3(a), Oct. 26, 1961, 496 U.N.T.S. 43, \textit{available at} http://www.wipo.int/treaties/en/ip/rome/pdf/trtdocs_wo024.pdf [hereinafter Rome Convention] (defining “performers” as those performing in “literary or artistic works”). The choice of these standard terms used in many copyright laws leads to the conclusion that many performances of collaborative works of folklore developed over time by unidentifiable authors would not qualify for protection. \textit{See id.}
regional interests." The Nigerian delegation suggested that UNESCO should also be involved in this international forum.

In the next year, UNESCO and WIPO held a joint World Forum on the Protection of Folklore in Phuket, Thailand, which took place from April 8 to 10, 1997. Around 180 participants from some fifty countries attended this forum to discuss preservation and conservation of folklore, economic exploitation of expressions of folklore, legal protection for folklore in national legislation, and international protection for expressions of folklore. The majority of participants adopted a Plan of Action stating that there was a need for international legal protection for folklore and that such protection should strike a balance between the community owning the folklore and users of the folklore. The Plan of Action also noted that the "participants from the Governments of the United States of America and the United Kingdom expressly stated that they could not associate themselves with [it]."

In 1997, WIPO hired a new director general, Kamil Idris, from the developing country of Sudan. Starting in the next year, WIPO included many activities on protection for folklore and other kinds of traditional cultural expressions and knowledge into its program and biannual budget. Initially, WIPO took what it described as an "exploratory approach" to the intellectual property aspects of protecting folklore. In 1998 and 1999, WIPO carried out nine fact-finding missions to twenty-eight countries across the globe. These missions

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284. WIPO Forum on Intellectual Property, supra note 152, ¶ 74 (citation omitted).
285. Id. ¶ 75.
286. Id. ¶ 77.
287. Id. ¶ 78.
289. Id. ¶ 30 n.14, at 12.
293. Id. (noting these fact-finding missions were to the South Pacific, Southern and Eastern Africa, South Asia, North America, Central America, West Africa, the Arab countries, South America, and the Caribbean).
were designed to systematically assess the intellectual property needs and expectations of the holders of traditional knowledge and folklore.\textsuperscript{294} WIPO published a final report on these fact-finding missions, revised to incorporate comments, in April 2001 (FFM Report).\textsuperscript{295} The FFM Report states that the fact-finding missions revealed that traditional knowledge holders and their representatives had two primary grounds for wanting better protection of folklore and traditional knowledge: (1) the desire for "positive protection" to ensure that they profited economically from their cultural expressions; and, (2) the desire for "defensive protection" to control and prevent harm to traditional cultures through the commercial exploitation of folklore.\textsuperscript{296} The FFM Report also identified needs and expectations relevant to folklore, including better clarity on what folklore is to be protected; the identification and documentation of folklore; the study of how customary law applies to folklore and would interact with intellectual property standards; training for folklore holders and government officials; the development of national protections for expressions of folklore followed by regional and international protections; the alteration of intellectual property standards to ensure that traditional culture is not abused or mistreated; and economic valuation of folklore.\textsuperscript{297}

In 1999, WIPO, in conjunction with UNESCO, organized four regional consultations on the protection of "expressions of folklore," held in Africa, Asia, the Middle East, Latin America, and the Caribbean.\textsuperscript{298} At these consultations, national representatives of WIPO member states discussed WIPO's work on protection of folklore. In general, the recommendations of these regional conferences were that WIPO should increase its work to protect folklore and should focus on: (1) the need to develop \textit{sui generis} protection through national law, international treaty, or international guidelines; (2) the need to identify and document expressions of folklore and develop national standards for such documentation; and (3) the need to study a regional approach to protecting rights in expressions of folklore that have been traditionally developed or used by more than one country.\textsuperscript{299} The Asia/Pacific and Arab regional consultations recom
mended the Model Provisions serve as a starting point for developing folklore protection. Most of the regional consultations also suggested that WIPO and UNESCO set up a Standing Committee on Traditional Knowledge and Folklore to work on establishing legal protections for folklore, as well as traditional knowledge.

B. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: 2000–2005

WIPO accepted that there should be a forum for discussion to develop the necessary consensus between member states to set up an international regime of folklore protection. The WIPO General Assembly established the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (hereinafter “Intergovernmental Committee”) in October 2000, and its first session was held from April 30 to May 3, 2001. The Intergovernmental Committee’s members are WIPO member states, as well as inter-governmental, international, and regional non-governmental organizations who are accredited as observers. That
there are over 100 such accredited observers shows the very high level of interest in this subject.\textsuperscript{305}

At the first session of the Intergovernmental Committee, many delegations expressed support for three tasks: (1) updating the Model Provisions; (2) improving protection for handicrafts; and (3) working to establish an international system of \emph{sui generis} protection for expressions of folklore.\textsuperscript{306} But other delegations, especially developed countries including Australia, Canada, and the United States, expressed concerns that some of these tasks were premature.\textsuperscript{307} For example, at this first session, the United States delegation expressed the view that it was inadvisable to set up an international regime for the protection of traditional knowledge and folklore before many members had incorporated such protections into national law and had gained experience from their effects.\textsuperscript{308} It also opined that intellectual property law was not the best fit for the protection of traditional knowledge because intellectual property law was a forward-looking mechanism designed to create incentives for production of creative works and inventions. The United States delegation also pointed out that intellectual property laws, even newer ones like database protection and integrated circuit protection, only protected known creators with a known creation date and gave protection lasting for a limited duration within defined parameters.\textsuperscript{309} While the United States recognized the importance of the concerns of indigenous and local communities in seeking to protect traditional knowledge and folklore, its position was that these concerns, which included self-determination, health, justice, cultural heritage, and land issues, were not within WIPO's area of expertise and were not really intellectual property issues.\textsuperscript{310} Despite such concerns, the Intergovernmental Committee's co-chair summarized the discussions by stating that there was some support for the tasks and that the issue seemed to be how work should proceed on the tasks, rather than whether it should proceed.\textsuperscript{311}

The WIPO Secretariat responded to a number of delegation requests for more information on the experiences of different countries with the legal protection of folklore by preparing and distributing a

\textsuperscript{305} See \textit{id}.
\textsuperscript{307} See \textit{id}. ¶¶ 160, 163, 165–66, 168 (summarizing statements from the Delegations of Australia, Norway, Sweden, Canada, and the United States).
\textsuperscript{308} \textit{id}. ¶ 49.
\textsuperscript{309} \textit{id}.
\textsuperscript{310} \textit{id}.
\textsuperscript{311} \textit{id}. ¶¶ 175–76.
questionnaire on national experiences. By January 31, 2002, the WIPO Secretariat had received sixty-four responses to the questionnaire. The Intergovernmental Committee considered these responses at its third session in June 2002.

Of the sixty-four respondents to the WIPO questionnaire, twenty-three (36%) had national laws providing specific intellectual property protection for folklore. Most of these provided such protection under copyright laws. These copyright laws varied as to the extent of protection given to folklore. Some of these national laws, such as those of Barbados, Indonesia, and Iran, specifically included expressions of folklore as copyrightable works but did not make many changes to their copyright laws for such expressions of folklore, other than giving them perpetual copyright protection. Other jurisdictions, including Burkino Faso, Ghana, Kenya, Namibia, Mozambique, Mexico, Senegal, Sri Lanka, Togo, and the United Republic of Tanzania, had laws based, to varying degrees, on the Model Provisions. A few countries—Croatia, Panama, Philippines, and Vietnam—gave sui generis intellectual property protection to expressions of folklore.

More than half of the respondents indicated that their nations did not provide specific legal protection for folklore. These countries included the United States, Zimbabwe, Jamaica, Australia, Belgium, Canada, Italy, Netherlands, and Japan. Various reasons for this were provided. These reasons could be grouped into three main categories: (1) existing intellectual property rights provided sufficient protection; (2) specific legal protections for folklore were not appropriate or requested; and (3) such protections were under consideration or pending enactment.

312. See id. ¶ 175.
313. WIPO Final Report on National Experiences, supra note 146, ¶ 6, at 7.
315. WIPO Final Report on National Experiences, supra note 146, ¶¶ 116, 149, at 36, 52.
316. Id. ¶ 118, at 36.
317. Id. ¶ 119, at 36.
The WIPO Final Report concluded that "there are few countries in which it may be said that such provisions [giving specific legal protection for expressions of folklore] are actively utilized and functioning effectively in practice."320 The Intergovernmental Committee could not identify a single reason for this but concluded that there was a need to strengthen and employ more effective implementation of such national legislative protections.321 It also concluded that there was a need for greater awareness and training for indigenous peoples and communities in using and understanding existing intellectual property laws to protect folklore and traditional knowledge.322 There was also a need to study when non-intellectual property measures, such as cultural property laws, could adequately protect folklore.323 The WIPO Final Report proposed that WIPO should, subject to budgetary constraints, provide legal and technical assistance to more effectively implement legislative provisions protecting folklore (the "First Proposed Task").324 It also proposed that WIPO should work on updating and improving the Model Provisions in light of the technological changes since the 1980s (the "Second Proposed Task").325

The WIPO Final Report also reported that many respondents had expressed a need for an international agreement for the protection of expressions of folklore, although some respondents, such as the United States, took the view that it was premature to develop such an agreement.326 The Final Report proposed that the Intergovernmental Committee should "examine elements of possible measures, mechanisms or frameworks for the functional extra-territorial protection of expressions of folklore" (the "Third Proposed Task").327 This should include examining Article 15(4) of the Berne Convention and practical limitations on its use, as well as the practical application of the Bangui Agreement, an African regional agreement with fifteen members that provides protection to expressions of folklore through a domaine public payant system.328 Finally, the WIPO Final Report provided that there was a need for additional information on how customary laws operate to regulate the ownership, control, and management of expressions of folklore and how such laws could be effectively recognized and enforced as part of a larger global system of legal protection for expressions of folklore.329 It proposed a practical case

320. Id. ¶ 149, at 52.
321. Id. ¶¶ 150–53, at 53.
322. Id. ¶ 153(ii), at 54.
323. Id. ¶ 153(iv), at 54–55.
324. Id. ¶¶ 153–54, 156, at 55.
325. Id. ¶¶ 157–62, at 56.
326. Id. ¶ 163, at 57; id. Annex I, at 37 & n.422–23.
327. Id. ¶ 168, at 59.
328. Id. ¶ 165, at 57–58.
329. Id. ¶¶ 169–70, at 59.
study of the relationship between customary laws and intellectual property laws (the "Fourth Proposed Task").

At the third session of the Intergovernmental Committee, held in June 2002, there was discussion of all four of these proposed tasks. A number of developing countries, including the United States, Canada, Switzerland, and Australia only supported the First and Fourth Proposed Tasks, not the Second and Third. The Chair concluded that the Intergovernmental Committee had only adopted and approved the First and Fourth Proposed Tasks. Egypt requested, however, that the Second and Third Proposed Tasks not be barred from examination in the future, and the Chair agreed.

The Intergovernmental Committee continued to develop and consider materials on national experiences with legal protections for folklore. At its fourth session, held in December 2002, the Intergovernmental Committee considered a number of case studies, presentations, and other information on this subject, including a systematic analysis of national experiences. The Intergovernmental Committee focused its work on the First and Fourth Proposed Tasks, and did not make any decisions about the Second or Third Proposed Tasks. But it was laying the groundwork for future discussions on an international agreement for legal protection of folklore, as well as creating a resource for WIPO to provide legal and technical assistance for the strengthening and effective implementation of national protections of folklore. This work continued at the fifth session of the Intergovernmental Committee, held in July 2003. At this session, the Intergovernmental Committee discussed an updated version of the systematic analysis of national experiences, as well as a comparison of existing *sui generis* protection for expressions of folklore and an up-

330. *Id.* ¶ 171, at 60.
332. *Id.* ¶¶ 271, 273, 278, 281.
333. *Id.* ¶ 303–04.
335. *Id.* ¶ 92.
date on technical cooperation on the legal protection of traditional expressions of folklore.\textsuperscript{337}

At its more recent meetings, the Intergovernmental Committee started to work on the development of policy objectives and core principles for the protection of folklore. At its sixth session, held in March 2004, the Intergovernmental Committee considered a document on legal and policy options and decided to develop an overview of policy objectives and core principles.\textsuperscript{338} The Intergovernmental Committee requested the Secretariat prepare a draft overview of these policy objectives and core principles, as well as an outline of the policy options and legal mechanisms for the protection of expressions of folklore that included some brief analysis of the policy and practical implications of each option.\textsuperscript{339} At its seventh session in November 2004, the Intergovernmental Committee examined this draft overview of policy objectives and core principles.\textsuperscript{340} The Intergovernmental Committee also reviewed the Secretariat’s outline of the policy options and legal mechanisms for protection of expressions of folk-


\textsuperscript{339} See id.

lore.\textsuperscript{341} Additionally, the Intergovernmental Committee noted the detailed comments and drafting suggestions that had already been made on the draft objectives and core principles and called for further comments to be provided prior to February 25, 2005.\textsuperscript{342} The Committee also asked the Secretariat to produce a revised draft for consideration at the next session.\textsuperscript{343} At its most recent session, the eighth session, held in early June 2005, the Committee considered this revised draft.\textsuperscript{344} It did not make any decisions on the draft objectives and core principles but simply noted the diversity of viewpoints expressed on the issues.\textsuperscript{345}

\section*{C. The Current Draft Revised Objectives and Principles Under Consideration at the Most Recent WIPO Intergovernmental Committee Session in June 2005}

The draft Revised Objectives and Principles under consideration at the eighth session includes substantive standards that could form the content of new international standards providing for protection against misappropriation or misuse of expressions of folklore without necessarily providing for distinct property rights (though not preventing those from being included later).\textsuperscript{346} Some participants expressed the view that the Intergovernmental Committee is not taking the right approach to protection. For example, the United States delegation opined that the Intergovernmental Committee’s use of the term “protection” is too narrow and should also include the concepts of preservation, conservation, and promotion of expressions of folklore.\textsuperscript{347} Other members disagree, believing that these can be left to other intergovernmental and non-governmental efforts.\textsuperscript{348} Another view of

\begin{footnotesize}

\textsuperscript{342} Id. \textsuperscript{¶} 100.

\textsuperscript{343} Id.


\textsuperscript{345} See id. \textsuperscript{¶} 163.


\textsuperscript{347} Id. \textsuperscript{¶} 16, at 5.

\textsuperscript{348} See id. \textsuperscript{¶} 17, at 5.
\end{footnotesize}
the draft is that it fails to give strong enough protections to expressions of folklore.\textsuperscript{349} However, its substantive standards are broader in many respects than those of the Model Provisions, including the scope of the expressions of folklore that are protected and the extent of protection for at least certain kinds of them.

For example, although both the draft and Model Provisions protect “expressions of folklore,” not just folklore,\textsuperscript{350} and neither require fixation, the draft does not limit the scope of its protection to “traditional artistic heritage developed and maintained by a community,” as the Model Provisions do.\textsuperscript{351} Instead, the draft extends protection more broadly to traditional cultural expressions of folklore (these terms are used synonymously in the draft) with sufficient links to a community’s cultural and social heritage.\textsuperscript{352} The draft describes this link requirement using the adjective “characteristic” that the Model Provisions also use to describe the requisite link with “artistic heritage.”\textsuperscript{353} The commentary to the draft indicates that to have such a link, an expression of folklore must be passed through at least two generations.\textsuperscript{354} But assuming this is the case, the removal of the “artistic heritage” limit would protect a much broader array of folk stories than the Model Provisions. The Model Provisions draw a distinction between a protectable artistic form of expression of a legend and an unprotectable underlying legend.\textsuperscript{355} The draft, in contrast, does not make this distinction, instead specifically stating that stories, epics, and legends are protectable expressions of folklore.\textsuperscript{356}

The extent of protection is also broader under the draft than the Model Provisions, at least for some expressions of folklore. Unlike the Model Provisions, the draft provides for different “layers” of protection for different kinds of expressions of folklore. Those which are “of particular cultural or spiritual value or significant to a community” can be registered, and if so, require prior informed consent for certain uses.\textsuperscript{357} Such uses include various public disseminations of the expression of folklore, the exercise of intellectual property rights over

\textsuperscript{349} See Eighth Session Draft Report, supra note 344, ¶ 100, at 53 (statement of the representative of the Saami Council).

\textsuperscript{350} See Eighth Session Revised Objectives and Principles, supra note 346, ¶ 1, at 2 (using the phrase “traditional cultural expressions” synonymously with “expressions of folklore”).

\textsuperscript{351} See id. Annex art. I, at 11 (defining protected works in the Eighth Session Revised Objectives and Principles draft).

\textsuperscript{352} Id.

\textsuperscript{353} Id.; Model Provisions, supra note 147, Part II ¶ 2.

\textsuperscript{354} Eighth Session Revised Objectives and Principles, supra note 346, Annex at 13 (discussing the intended purpose and meaning of the term “characteristic”).

\textsuperscript{355} See Model Provisions, supra note 147, Part III ¶ 34.

\textsuperscript{356} See Eighth Session Revised Objectives and Principles, supra note 346, Annex art. I(a)(i), at 11.

\textsuperscript{357} Id. Annex arts. III, VII, at 19, 32–33 (noting that such registration or notification is optional).

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the expression of folklore, uses of the expression of folklore that do not acknowledge the source community, and distortion or modification or other derogatory actions of the expression of folklore.\textsuperscript{358} This is stronger protection than that given by the Model Provisions because it effectively grants a right of adaptation for registered or notified expressions of folklore of particular cultural or spiritual value.\textsuperscript{359} Certain performances that qualify as expressions of folklore are also given this strong protection, provided that they are notified or registered.\textsuperscript{360} There is a slightly different level of protection in the draft for secret expressions of folklore, which would have a right of first dissemination.\textsuperscript{361} The Model Provisions do not have this type of protection.

The draft gives folklore that is not registered or notified a lower level of protection. Uses of such folklore do not require prior consent under the draft, but the way in which they are used would be regulated. In particular, there should be "adequate and effective legal and practical measures" to ensure that certain moral rights are respected, including a right of attribution requiring identification of the community that is the source of an expression of folklore, as well as an integrity right to prevent distortion, mutilation, or other modification or derogatory action in relation to an expression of folklore.\textsuperscript{362} There should also be similar legal measures to prevent certain types of unfair competition, such as falsely suggesting a link with traditional cultural expression of a particular community.\textsuperscript{363}

This lower level of protection under the draft is still broader, in certain respects, than the scope of protection under the Model Provisions. Although the Model Provisions require authorization for certain uses of any expressions of folklore that qualify for protection, the draft only requires authorization for registered or notified expressions of folklore. Additionally, the Model Provisions have much more extensive exceptions from protection. They exclude many adaptations of an expression of folklore (both "utilization by way of illustration in the original work of an author or authors, provided that the extent of such utilization is compatible with fair practice"; and "borrowing of expressions of folklore for creating an original work of an author or authors").\textsuperscript{364} But the draft does not contain similar exceptions for adaptations.\textsuperscript{365}

The scope of the draft's protection is narrower than the Model Provisions in a few respects. For example, unlike the Model Provisions,
the draft requires some level of creativity for expressions of folklore to be protected.\textsuperscript{366} This need not be individual creativity, but could include communal creativity.\textsuperscript{367} The test to be applied to determine whether a work is sufficiently creative is not specified in the draft. Most copyright laws, however, have a very low creativity requirement, and it is likely that this low standard would be mirrored by national law should this requirement of the draft ever be implemented in an international instrument. Additionally, while the protection under the Model Provisions is not limited in time,\textsuperscript{368} the draft limits the term of protection in the following ways: (1) registered or notified expressions of folklore are given the higher level of protection only so long as they remain registered or notified; (2) secret expressions of folklore are given the special level of protection only so long as they remain secret; and (3) other expressions of folklore are protected only so long as they meet the criteria for protection under Article I.\textsuperscript{369} Thus, the commentary to the draft describes the term of protection as not indefinite, but only "potentially indefinite."\textsuperscript{370}

The draft seeks to apply what it terms "an intermediate solution" to one issue relating to the public domain—the extent of retroactivity of protection. The draft’s treatment of this issue, in reality, is weighted against the public domain. A westerner applying traditional copyright concepts to expressions of folklore created hundreds of years ago would generally conclude that these have fallen into the public domain due to the expiration of the copyright term. But many indigenous peoples think otherwise. They believe that if customary law protected expressions of folklore, they would never have fallen into the public domain.\textsuperscript{371} The commentary to the draft states that it seeks to implement a compromise between these two viewpoints by providing that

continuing acts in respect of traditional cultural expressions/expressions of folklore that [ ] commenced prior to the coming into force of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, should be brought into conformity with the provisions within a reasonable period of time after they enter into force, subject to respect for rights previously acquired by third parties.\textsuperscript{372}

But this supposed compromise is really not much of a compromise because it effectively destroys the public domain, albeit after some unspecified period of time.

\textsuperscript{366} See id. Annex art. I(a)(iv)(aa), at 11.
\textsuperscript{367} Id. Annex art. I, at 11-12.
\textsuperscript{368} Model Provisions, supra note 147, Part III ¶ 65.
\textsuperscript{369} Eighth Session Revised Objectives and Principles, supra note 346, Annex art. VI, at 29.
\textsuperscript{370} See id. Annex at 30.
\textsuperscript{371} See id. Annex at 40.
\textsuperscript{372} See id. Annex art. IX, at 39.
Not just the substantive standards in the revised draft remain undecided. The Intergovernmental Committee also has yet to decide what kind of international instrument would be appropriate for expression of the substantive elements of protection upon which they may agree. Possibilities include an international convention or treaty, a protocol or special agreement to an existing convention (such as that contemplated by Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, 1971), a statement or declaration, a recommendation, a set of guidelines or model provisions, or an authoritative interpretation of existing conventions. A legally binding instrument like a convention could also be phased in gradually, starting with a nonbinding agreement. The Intergovernmental Committee also has not decided whether additional input on the draft principles and objectives should be permitted and encouraged from the holders of traditional knowledge and other experts. Further, the Intergovernmental Committee must still determine whether it will endorse the current draft approach of stating broad principles which leave to member states the decision as to what legal mechanisms are to be used to implement the provisions.

D. **Efforts in the World Trade Organization to Amend TRIPS to Implement Specific Intellectual Property Protections for Folklore and Traditional Knowledge: 2001-2005**

WIPO is not the only international organization that has served as a forum for efforts to negotiate stronger international protections for folklore and other kinds of traditional knowledge. Some WTO members, mainly developing countries, have recently sought to do this by negotiating revisions of the TRIPS Agreement. The TRIPS Agreement part of the Uruguay Round of the General Agreements on Tariffs and Trade (GATT) made intellectual property protections part of the world trade system. The TRIPS Agreement requires WTO members to implement minimum intellectual property standards and enforcement procedures into their national laws. If they fail to do

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373. *Id.* ¶ 13, at 4.
374. *See id.* ¶ 14, at 5.
379. *See id.* arts. 9-61.
so, they can be disciplined by the WTO Dispute Settlement Body, which can award trade sanctions, among other things. Even though TRIPS does contain some provisions providing for delayed implementation of its required minimum intellectual property standards for developing and least-developed countries, many people in these countries are unhappy about being required to implement new western-style intellectual property protections into their national legal systems, not to mention the possibility of trade sanctions for noncompliance.\textsuperscript{380} They are also concerned that the existing intellectual property system of TRIPS fails to give adequate protection to folklore and traditional knowledge.

The concerns of developing countries have been center stage at the most recent round of WTO trade negotiations, the Doha Round. In November 2001, the WTO members adopted the Ministerial Declaration that gave rise to a new round of trade negotiations. As part of the Declaration, Ministers instructed the TRIPS Council to “examine, \textit{inter alia}, the relationship between the TRIPS Agreement and \ldots the protection of traditional knowledge and folklore.” The Ministerial Declaration further advised that, “[i]n undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.”\textsuperscript{381}

In March 2002, the TRIPS Council asked the WTO Secretariat to prepare a paper on the protection of traditional knowledge and folklore. This paper, completed in August 2002, summarized the points made by delegations in the TRIPS Council regarding the protection of

\textsuperscript{380} See \textit{id.} arts. 65–66.

\textsuperscript{381} WTO, Ministerial Declaration of 14 November 2001, ¶ 19, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002), available at http://www.wto.org/english/tratop_e/minist_e/min01_e/mindec1_e.pdf. Paragraph 19 refers to Article 7 of the TRIPS Agreement, headed “Objectives,” which provides:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

TRIPS, \textit{supra} note 378, art. 7.

Paragraph 19 refers also to Article 8 of the TRIPS Agreement, headed “Principles,” which provides:

Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

TRIPS, \textit{supra} note 378, art. 8.
traditional knowledge and folklore.\textsuperscript{382} It noted that there were two main categories of concern behind the effort to revise TRIPS to protect traditional knowledge and folklore: (1) concern that traditional knowledge was being used without authorization and without sharing of the economic benefits from such use with the source communities; (2) concern that intellectual property rights were being granted for traditional knowledge to people other than the indigenous peoples or communities who had originated such traditional knowledge.\textsuperscript{383} It also noted that there had been very little discussion of folklore, such as folk stories, in the TRIPS Council; most of the discussion had concerned other types of traditional knowledge.\textsuperscript{384}

Doubts have been expressed as to whether the WTO is the appropriate forum for the development of protections for traditional knowledge and folklore, especially given the work being done in WIPO.\textsuperscript{385} Those objecting to the WTO as such a forum have argued, \textit{inter alia}: (1) that WIPO’s efforts should not be duplicated; (2) that indigenous communities are involved in WIPO; (3) that it is premature to negotiate such protections in the WTO until some international consensus has been reached on basic standards and principles; and finally, (4) that traditional knowledge and folklore does not involve trade, so WIPO is a better forum than the WTO. Others have contended, however, that the issue should be discussed in all relevant international organizations, because among other things, it is a problem that comes out of the TRIPS Agreement. Graham Dutfield has rather cynically suggested that developing countries are using the issue of traditional knowledge and folklore as a weapon to obtain trade concessions unrelated to TRIPS and to slow down their compliance with the hated western intellectual property standards that TRIPS requires.\textsuperscript{386}

Whatever the motivation, since the Doha Declaration, WTO members have continued to circulate discussion documents on protections for traditional knowledge and folklore. Most of these have focused almost exclusively on traditional knowledge and patent rights, rather than folklore such as folk songs that would not be patentable.\textsuperscript{387} This is because Article 27(3)(b) of TRIPS, the subject of review, deals with the patentability or non-patentability of plant and animal inventions and the protection of plant varieties, and does not currently make any provision for folklore.\textsuperscript{388}

\begin{flushleft}
\textsuperscript{382} WTO Protection of Folklore, \textit{supra} note 377, ¶ 1.
\textsuperscript{383} Id. ¶ 7.
\textsuperscript{384} See id. ¶ 5.
\textsuperscript{386} Dutfield, supra note 291, at 274.
\textsuperscript{387} See TRIPS, supra note 378, art. 27(3)(b).
\textsuperscript{388} See id.
\end{flushleft}
E. UNESCO’s Initiatives to Protect Folklore

UNESCO has enacted several conventions that give some protection to cultural property and folklore, but these do not provide for specific intellectual property protections. For example, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property attempts to protect “cultural property,” or property designated by member states as being culturally significant on religious or secular grounds, from being stolen or wrongfully appropriated.389 The 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage provides protection for certain cultural sites, including works of monumental sculpture and painting that are included on a World Heritage List.390

UNESCO has also worked to safeguard intangible folklore, including oral expressions like folk stories. In 1989, UNESCO issued a recommendation advocating international cooperation in identifying, inventorying, conserving, preserving, widely disseminating (without distorting), and protecting folklore.391 UNESCO also has several programs designed to accomplish the preservation and protection of traditional forms of culture, including recording traditional music and honoring particularly significant forms of traditional culture, such as oral literature, games, dances, and rituals.392

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391. UNESCO Records of the General Conference, Oct. 17–Nov. 16, 1989, Twenty Fifth Session Resolutions, Annex I(B), UNESCO Doc. 25 C/Resolution 7.1, available at http://unesdoc.unesco.org/images/0008/000846/084696Eb.pdf. UNESCO defines “folklore” as “reflecting the expectations of a community so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.” Id. In 1990, UNÉSCO, in conjunction with the Smithsonian Institution, held an International Conference to assess the implementation of the Recommendation.

In 2003, UNESCO adopted the Convention for the Safeguarding of the Intangible Cultural Heritage (2003 Convention), which provides for member states to prepare national inventories of the intangible cultural heritage, including oral traditions and expressions and performing arts. It also calls for the establishment of an intergovernmental committee to safeguard intangible cultural heritage and to draw up a Representative List of the International Cultural Heritage of Humanity and a List of International Cultural Heritage in Need of Urgent Safeguarding.\(^393\) The 2003 Convention emphasizes the link between cultural heritage and sustainable development. It also provides for the adoption of "appropriate legal . . . measures" to ensure that there is access to intangible cultural heritage while simultaneously respecting "customary practices governing access to specific aspects of such heritage."\(^394\) This Convention consists of only 15 members, and it will not go into force until three months after the 30th ratification.\(^395\)

The 2003 Convention does not directly address intellectual property rights or other forms of legal protection of groups or communities, but rather, states that its provisions will not affect the rights and obligations of States Parties deriving from any international instrument related to intellectual property rights. To ensure this is so, UNESCO intends to closely cooperate with WIPO as it works on the possibility of creating an international instrument dealing with, among other things, intellectual property rights in the field of folklore and intangible cultural heritage.

**VII. A Happy Ending for Folklore?**

*Dick's story had a happy ending. He married Mr. Fitzwarren's daughter Alice. Just as the bells had predicted, he became Lord Mayor of London three times, and lived happily ever after.*

To some people with an interest in the controversy over the extent of legal protection for folklore, an international instrument providing for specific intellectual property protection for folklore would be a happy ending. Paul Kuruk, for example, has advocated a binding international agreement to protect folklore through a *sui generis* intellectual property regime even though he considered it unrealistic to expect such an agreement to be successfully concluded in the mid-1990s. As a stepping stone towards such an international agreement,
Kuruk has argued for an African regional agreement that would regulate the use of folklore outside of the region through a regional enforcement agency. 396

I do not share Kuruk’s opinion that specific intellectual property protection for folk stories that have been handed down orally from generation to generation is necessarily a happy ending. I see two significant difficulties with providing specific intellectual property protections for folk stories that go beyond any protection already afforded by existing copyright laws. These difficulties are: (1) the impossibility of determining what is protected, and (2) the likely harm to creativity and innovation.

A. The Impossibility of Determining What is Protected

As Daniel Gervais has pointed out, folklore (such as folk tales) is not fully inventoried and documented; therefore, intellectual property protection for it would protect an undocumented right. 397 Gervais admits that this may create legal uncertainty and unpredictability over what is protected. 398 I am also concerned that there are serious evidentiary barriers to establishing whether folk stories, or aspects of folk stories, are able to be protected. Overprotection could also likely result.

For example, as noted in Section II’s analysis of Richard Whittington’s life, there is clearly insufficient extant evidence to determine whether many aspects of the Dick Whittington story were historical fact or fiction. It is extremely unlikely that we will ever discover whether Dick Whittington really had a cat that helped him to become wealthy, or whether Dick Whittington really walked all the way to London from Gloucester. Because we cannot be sure of the historical accuracy of the folk tale, we should not simply make the assumption that it is fictional folklore. The folk tale is equally likely to be largely factual in nature and if so, should be in the public domain for everyone to draw upon.

Another kind of evidentiary problem for protecting folk stories like Dick Whittington is the difficulty of determining which aspects of the folk story really were originated by a particular community. This is a practical impossibility in the case of the Dick Whittington folk tale because so many other communities have very similar stories, also originating in the mists of time. There are Breton, Norwegian, and Russian folk stories about a boy who becomes wealthy through the assistance of a cat. 399 There is a somewhat similar Tuscan tale about a Genoese merchant who obtained great wealth after presenting two

396. Kuruk, supra note 2, at 841-43, 848-49.
397. See Gervais, supra note 385, at 164.
398. Id.
cats to the king. There also exists a slightly different Persian story about a widow who becomes wealthy by selling her cat, thus making her sons wealthy enough to become traders and ultimately pirates.

B. Harm to the Public Domain

As discussed in Section II, the Dick Whittington folk tale has generated an outpouring of subsequent creative works based on it, including books, puppet shows, and pantomimes. New creative works continue to be generated hundreds of years later. National laws strengthening the protection of folklore, such as the standards proposed in the Model Provisions and currently under discussion in WIPO, pose a threat to this creativity. Many authors will not be in a financial position to pay to license a work like Dick Whittington, even if they intend to sell the derivative work. Requiring even a simple authorization may deter usage of a folk tale as a source for a subsequent work.

Even traditional societies may be harmed by authorization requirements if they were to become applicable. Christine Haight Farley has noted that sui generis protection could risk damage to the public domain by “freezing” cultural development and making it more difficult for traditional artists and story tellers to create new works based on traditional culture. This “freezing” would be a problem whether or not protection is made retroactive.

VIII. Conclusion

This essay has traced the fortunes of efforts to implement specific legal protection for folk stories like the Dick Whittington story and other forms of folklore since they began in the late 1960s up to the present time. Although these fortunes, like Dick Whittington’s, have waxed and waned over time, there has recently been a growing trend, particularly in developing countries, of implementing specific copyright or sui generis protections for folk tales and other kinds of folklore. There have also been growing efforts to implement stronger international standards of protection for folklore through some type of international agreement. Two major international organizations, WIPO and WTO, have recently been willing to serve as fora for international discussions over whether stronger specific protections for folk stories and other types of folklore and traditional knowledge should be implemented at the global level. A number of developing countries strongly advocate changing the international intellectual property system to incorporate such protections. But this essay has argued that, for folk stories at least, this outcome may be undesirable.

400. See Broadbent, supra note 70, at 207.
401. See id. at 209.
402. Farley, supra note 5, at 55–56.
There are at least two reasons why this is so: (1) the impossibility of accurately determining whether folk stories are the creative product of a particular community or factual stories; and (2) the harm to the public domain, creativity, and innovation that protection would likely cause.

In light of these dangers, a happier ending for folklore would be to take a very cautious approach to the question of whether specific intellectual property protections should be implemented at the international level. As the United States delegation has repeatedly pointed out in meetings of the WIPO Intergovernmental Committee, there is still only limited experience with how such protections work in practice at a national level. The international community should wait until that experience can be gained. In the meantime, the focus of international discussions on the protection for folklore should be to continue efforts to train indigenous peoples and communities to use current intellectual property laws to protect their works and also to further efforts to preserve intangible cultural heritage, such as those initiated by UNESCO. This cautious approach may be unpalatable to many indigenous groups and communities who believe that their culture is being plundered and distorted by greedy western corporations. But, moving too quickly to protect folk stories risks serious damage to the development of new cultural works. It is worth bearing in mind a statement submitted by the Holy See to the First Session of the WIPO Intergovernmental Committee: “The raison d’être of intellectual property protection systems is the promotion of literary, scientific or artistic production and inventive activity for the sake of the common good.”