

保護民俗創作以對抗非法利用 及其他損害行為之條約草案¹

Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions

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The Preamble

The Contracting States,

Considering that expressions of folk-lore, developed and maintained by communities of various countries or by individuals reflecting the expectations of those communities, represent an important part of the living cultural heritage of mankind,

Considering that modern technology facilitates the commercialization of expressions of folklore beyond the frontiers of the countries in which they originate,

Considering that such commercialization of expressions of folklore may lead to the improper exploitation and distortion of the cultural heritage

in-

volved,

Considering that the international re-gulation of the protection of expressions of folklore against illicit exploitation and other prejudicial actions has thus become indispensable as a means of promoting their further development, authentic maintenance and dissemination, without prejudice to legitimate interests in having access to them,

Considering that expressions of folk-lore constituting manifestations of intellectual creativity deserve legal protection in a manner analogous to that provided for works protected by copy-right, have agreed as follows:

¹ 按原住民族傳統文化遺產之保護為國內各界近來關心之議題，目前行政院審議中之「原住民族發展法」草案第二十條就此亦擬有規範，拙作「原住民族智慧財產權之保護」(刊載「智慧財產」月刊八十八年十二月第一頁至第二十三頁)發表後，部分先進洽詢該文中所述及聯合國教科文組織(UNESCO)及世界智慧財產權組織(WIPO)聯合成立之專家委員會於一九八四年之「保護民俗創作以對抗非法利用及其他損害行為之條約草案」文本，

爰自聯合國教科文組織網站取得該草案英文本 (<http://www.unesco.org/webworld/com/compendium/4401.html>)，並不揣淺陋，予以中譯後方便各界參閱。

前言

締約國

認為由不同國家之各族群或足以反映該等族群期望之個人所展現及延續的民俗創作代表了人類生活文化遺產之重要部分。

認為現代科技使得民俗創作之商業化跨越其源起國家之疆界。

認為此種民俗創作之商業化可能導致相關文化遺產之不當利用與破壞。

認為有關保護民俗創作以對抗非法利用及其他損害行為之國際規範從而將是促進民俗創作進一步發展、持續長存與發揚，而又不致於損害一般人接觸民俗創作之法定利益之不可或缺的方法。

認為構成智慧創作的民俗創作應如同著作被以著作權保護一般的方式予以法律保護。

爰一致同意如下約定：

Article 1 Protected Expressions of Folklore

For the purposes of this Treaty, "expressions of folklore" mean productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a

community, or by individuals reflecting the traditional artistic expectations of their community, in particular:

- (i) verbal expressions, such as folk tales, folk poetry and riddles;
- (ii) musical expressions, such as folk songs and instrumental music;
- (iii) expressions by action, such as folk dances, plays and artistic forms or rituals, whether or not reduced to a material form; and
- (iv) tangible expressions, such as
 - (a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needle-work, textiles, carpets, costumes;
 - (b) musical instruments;
 - (c) architectural forms."

第一條 受保護之民俗創作

本條約所稱之「民俗創作」係指由一族群，或足以反映其族群傳統藝術期望之個人，所展現及延續具有傳統藝術遺產之特性所構成之產物，特別是：

- (i) 口述的表達，例如民俗傳說、民俗詩歌及謎語；
- (ii) 音樂的表達，例如民謠、民俗樂器演奏；
- (iii) 動作的表達，例如民俗舞蹈、表演及藝術形態或儀式，不問是否以實質形式展現者；以及
- (iv) 有體形式的表達，例如：
 - (a) 民俗藝術之產物，特別是圖形、繪畫、雕刻、塑像、陶藝、鑲嵌、木作、金屬創作、珠寶飾物、籃編、刺繡紡作、飾毯、服飾；
 - (b) 樂器
 - (c) 建築形態。

Article 2 National Treatment

Each Contracting State shall accord the same protection to expressions of folklore originating in other Contracting States as it accords to expressions of folklore originating in its own territory, subject to the protection specifically guaranteed, and the exceptions specifically provided for, by this Treaty."

第二條 國民待遇

各締約國應賦予源起於其他締約國之民俗創作與源起於自己領域內之民俗創作相同之保護，但以本條約所特別明定之保護及其例外為限。

Article 3 Competent Authorities

1. Each Contracting State shall designate one or more competent authorities (hereinafter referred to as "the competent authority") which shall administer the protection, under this Treaty, of expressions of folklore and to ask for the enforcement of the protection in other Contracting States of such expressions originating in its own territory.
2. Each Contracting State shall, at the time of depositing its instrument of ratification, acceptance or accession, notify the Secretary-General of the United Nations, by means of a written declaration, of all designations made in accordance with paragraph (1) and giving full information concerning the rights and obligations of the authority thus designated. Any subsequent changes in the designation, or in the said rights and obligations, shall be promptly notified in like manner."

第三條 負責機關

1. 各締約國應指定一個或多個負責機關(以下稱「負責機關」)以處理本條約所定對於民俗創作之保護，及要求其他締約國就源起於自己領域內之民俗創作加以保護。

2. 各締約國於提出加入本條約之批准文件、接受或加入本條約時，應以書面通知聯合國秘書長有關依第(1)項指定之所有負責機關，並提供有關各該機關之權限與義務等充分資訊，其隨後有關各該機關之指定、權限與義務有任何變動者，亦應以相同方式為通知。

Article 4 Utilizations Subject to Authorization

1. The following utilization of the expressions of folklore shall require written authorization by the competent authority of the Contracting State in which the expression of folklore originated, if the utilization is intended to be made for profit in another Contracting State:
 - (i) the publication, reproduction, distribution or importation, for the purpose of distribution to the public, of reproductions or recordings of recitations or performances of expressions of folklore;
 - (ii) the public recitation or performance of expressions of folklore, as well as any transmission to the public by wireless means, by wire, or by any other means, of expressions of folklore or of their recitations or

performances, whether live or recorded.

2. Each Contracting State shall, at any time of depositing its instrument of ratification, acceptance or accession, notify the Secretary-General of the United Nations, by means of a written declaration, of the kinds the main characteristics and the source of the artistic expressions of folklore originating in its territory the utilization of which is subject to the written authorization of its competent authority. Subsequent changes shall be notified in like manner.

第四條 應獲得授權之利用

1. 對於民俗創作所進行之下列利用，如係為在其他締約國內之營利者，應獲得該民俗創作所源起之締約國中負責機關之書面授權：
 - (i) 為向公眾散布、或為重製、或為就民俗創作之吟唱或表演而錄製等目的，所為之發行、重製、散布或進口；
 - (ii) 就民俗創作為公開吟唱或表演，以及以無線、有線或其他任何方式，將民俗創作或其現場或錄製之吟唱或表演對公眾所為的任何傳輸。
2. 各締約國於提出加入本條約之批准文件、接受或加入本條約時，應以書面

通知聯合國秘書長有關源起於其領域內而其利用須獲得負責機關書面授權之民俗藝術創作之主要特徵與來源，其隨後之

變動亦應以相同方式為通知。

Article 5 Request and Grant of Authorization

1. The application for authorization under article 4 shall be submitted by the prospective utilizer of the expression of folklore (hereinafter referred to as "the applicant"), [through the competent authority of the Contracting State of which the utilizer is a national or where he or it has his or its habitual residence or headquarters] to the competent authority of the Contracting State in which the expression of folklore originates, duly in advance; the application shall unequivocally specify, in written form, the expression of folklore intended to be used, its source, as well as the nature and extent of the intended utilization.
2. The authorization shall be given in written form without undue delay; it may be made conditional upon the payment of an equitable remuneration whose amount, in the

absence of agreement, shall be fixed by the competent authority of the Contracting State in which the expression of the folklore originates. No application shall be refused, except where the intended use would be prejudicial to the honour or dignity of the originating country or community. Any refusal shall be justified in writing."

第五章 授權之要求與授予

1. 第四條之授權申請應由各該利用民俗創作之人(以下稱申請人)【透過利用人所屬本國之締約國負責機關，或其居所或主事務所所在地之締約國負責機關】，於利用前之適當時間，向該民俗創作所源起之締約國中之負責機關提出。其申請應以書面形式明確地敘明所欲利用之民俗創作、其來源、使用性質及範圍。
2. 授權應以書面為之，並不得不當地牽延。授權得附條件要求支付經過協議約定，或協議不成時由該民俗創作所源起之締約國中負責機關所定合理金額之使用報酬。任何申請，除其使用將有損於民俗創作源起國家或族群之名譽與尊嚴外，不得拒絕。任何授權申請之拒絕均應以書面說明之。

Article 6 Exceptions

1. The provisions of Article 4 shall not apply where the utilization is:

- (i) for purposes of education;
- (ii) for creating an original literary or artistic work.

2. Furthermore, the provisions of Article 4 shall not apply where the utilization is incidental. Incidental utilization includes, in particular:

- (i) utilization of any expression of folklore that can be seen or heard in the course of a current event for the purposes of reporting on that current event by means of photography, broadcasting or sound or visual recording, provided that the extent of such utilization is justified by the informatory purpose;
- (ii) utilization of objects containing the expressions folklore which are permanently located in a place where they can be viewed by the public, if the utilization consists in including their image in a photograph, in a film or in a television broadcast."

第六條 例外規定

1. 第四條規定不適用於下列利用行為：

- (i) 為教育目的；

(ii) 為創作一具有原創性的文學或藝術著作。

2. 第四條規定亦不適用於隨意可能產生的利用行為，特別是下列利用行為：

- (i) 以攝影、廣播或錄音、錄影方式對於時事為報導之目的時，在該時事中所見所聞之任何民俗創作之利用，但以該利用之範圍合於資訊傳播之目的者為限。
- (ii) 於利用某一標的，而其含有永久設置於公眾得以接觸之場所中之民俗創作，且其利用係將該民俗創作之影像附隨於攝影、影片或電視播出者。

Article 7 Acknowledgement of Source

1. In all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, by mentioning the community and/or geographic place in which it has originated.

2. The provisions of paragraph (1) shall not apply in the case of creation of original works inspired by expressions of folklore or in the case of the incidental use of expressions of folklore."

第七條 註明來源

1. 對於任何可以確認的民俗創作，於印製發行或對公眾為任何傳播時，應以適當之方式註明其源起之族群以及/或其地理位置。
2. 第(1)項之規定於自民俗創作獲致靈感而創作，或對於民俗創作隨意可能產生的利用行為不適用之。

Article 8 Offenses

Each Contracting State shall punish by penal sanctions any act of

- (i) wilful or negligent non-compliance with the requirement obtaining authorization under Article 4;
- (ii) wilful or negligent noncompliance with the requirement of acknowledgement of source according to Article 7;
- (iii) wilful deception of others in respect of the origin of expressions of folklore;
- (iv) wilful distortion, in any direct or indirect manner, of an expression of folklore in a way prejudicial to the honour, dignity or cultural interests of the community in which it originates.

第八條 違反之處罰

各締約國對於下列行為應予刑事處罰：

- (i) 故意或過失未依第四條規定獲得授權者；
- (ii) 故意或過失未依第七條規定註明來源者；
- (iii) 故意欺瞞他人有關民俗創作之源起者；
- (iv) 故意以直接或間接有損於民俗創作源起國家或族群之名譽、尊嚴與文化之方式曲解民俗創作者。

Article 9 Seizure

Each Contracting State shall provide for the possibility of the seizure of any object which was made or imported in a way constituting an offence under this Treaty and any returns from such offenses."

第九條 沒收

各締約國對於任何以違反本條約方式製造或進口之物應有加以沒收或就其違反為退回之規定。

Article 10 Civil remedies

Each Contracting State shall provide for the possibility of claiming damages or other civil remedies where the utilization was made without the required authorization or payment or in any other manner causing economic harm to the State or community in

which the utilized expression of folklore has originated."

第十條 民事救濟

各締約國對於應獲得授權而未獲得授權，或應支付使用報酬而未支付即進行利用，或其利用方式造成所利用民俗創作源起國家或族群經濟上之損害之利用行為，應有得要求損害救濟或其他民事救濟之規定。

Article 11 Relations to Other Forms of Protection

This Treaty shall in no way limit or prejudice any protection applicable to expressions of folklore under national laws or any international treaty protecting copyright, the rights of performers, producers of phonograms and broadcasting organizations, or industrial property, nor shall it in any way prejudice other forms of protection provided for the safeguard and preservation of folklore."

第十一條 與其他保護之關係

本條約對於保護著作權，表演人、錄音物製作人、廣播機構或工業財產之權利之各國國內法或任何國際公約所定適用於民俗創作之保護，無任何限制或減損，對於有關民俗之保障與保存之其他保護方式亦無減損。

Article 12 Deposit and Signature of the Treaty

This Treaty shall be deposited with the Secretary General of the United Nations and shall be open until... for signature by any State that is [a member of the United Nations, any of the Specialized Agencies brought into relationship with the United Nations, or the International Atomic Energy Agency, or is a party to the Statute of the International Court of Justice] [a party to the Berne Convention for the Protection of Literary and Artistic Works or the Universal Copyright Convention]".

第十二條 本條約之保存與簽署
條約保存於聯合國秘書長處，並開放至_____以供任何【聯合國會員國、其任何特定組織與聯合國或國際原子能機構有關之國家、或屬於國際法庭成員之國家】【保護文學與藝術著作之伯恩公約或世界著作權公約之締約國】簽署。

Article 13 Entry into Force of the Treaty

1. This Treaty shall be subject to ratification or acceptance by the signatory States. It shall be open for

acces-sion by any State covered by Article 12.

2. Instruments of ratification, accep-tance or accession shall be deposi-ted with the SecretaryGeneral of the United Nations. The Treaty shall enter into force three months after the deposit of the fifth ins-trument of ratification, acceptance of accession.
3. For each State ratifying, accepting or acceding to this Treaty after the deposit of the fifth instrument of ratification, acceptance or acces-sion, the Treaty shall enter into force three months after the date of the deposit of the respective instru-ment with the Secretary-General of the United Nations.
4. It is understood that at the time a State becomes bound by this Trea-ty, it will be in a position in accord-ance with its domestic law to give effect to the provisions of the Treaty."

第十三條 條約之生效

1. 本條約應經簽約國之批准及接受，並應開放供第十二條所定國家加入。
2. 批准、接受或加入本條約之文件

應提出於聯合國秘書長。本條約於第五份批准、接受或加入本條約之文件提出後三個月生效。

3. 對於在第五份批准、接受或加入本條約之文件提出後始批准、接受或加入本條約之各國，應自各該國家將其各該文件提出於聯合國秘書長之日起後三個月生效。
4. 各締約國瞭解，當其受本條約拘束時，其國內法將已有效地符合本條約之規定。

Article 14 Denunciation of the Treaty

Any Contracting State may de-nounce this Treaty. Denunciation sha-ll take effect 12 months after the date on which the Secretary-General of the United Nations has received the relevant declaration."

第十四條 退約

任何締約國得退出本條約，其退出本條約應於聯合國秘書長收到其相關聲明十二個月後生效。

Article 15 Notifications by the Sec-retary-General of the United Nations

1. The Secretary-General of the Uni-ted Nations shall promptly notify the Director-General of the Uni-ted

Nations Educational, Scientific and Cultural Organization and the Director-General of the World Intellectual Property Organization of:

- (a) signatures of this Treaty;
 - (b) the deposit of instruments of ratification, acceptance or accession;
 - (c) the date of entry into force of this Treaty;
 - (d) notifications and declarations received from Contracting States under this Treaty.
2. The Directors General of the United Nations Educational, Scientific and Cultural Organization and the World Intellectual Property Organization shall promptly communicate to the Contracting States any notification received from the Secretary-General of the United Nations."

第十五條 聯合國秘書長之通知

- 1. 聯合國秘書長應就下列事項儘速通知聯合國教育、科學、文化組織理事長及世界智慧財產權組織理事長：
- (a) 本條約之簽署；
- (b) 批准、接受或加入本條約文件之提出；
- (c) 本條約之生效日

(d) 收到締約國依本條約所為之通知或聲明。

- 2. 聯合國教育、科學、文化組織理事長及世界智慧財產權組織理事長應就聯合國秘書長所為之通知儘速傳達予其締約國。

Article 16 Languages of the Treaty

- 1. This Treaty shall be signed in a single copy in...[specify the language(s)], [all texts being equally authentic].
- 2. Official texts of this Treaty shall be established, after its having entered into force, jointly by the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director-General of the World Intellectual Property Organization, in consultation with the interested Governments, in...[specify the languages]."

第十六條 條約語文

- 1. 本條約應以【特定語言文字】之單一文本簽署，【各該條約文本應同一作準】。
- 2. 本條約之官方文本應由聯合國教育、科學、文化組織理事長及世界智慧財產權組織理事長，於本條約生效後，

諮詢【就該語文】有相關利害關係政
府後建立之。
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(譯者現為本局著作權組科長)