

AFRICAN FOLKLORE:
THE ROLE OF COPYRIGHT

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I. Introduction

When the Committee of African Experts to Study a Draft Model Copyright Law met at Paris in 1965, the representatives of Congo (Brazzaville), Ghana, Guinea, Ivory Coast, Liberia, Morocco, and Nigeria recommended a Model Law of thirty-three articles, setting forth special protections for the traditional African heritage known as folklore.¹ Their objective was to promote a system whereby they might reserve for their countries alone the economic exploitation of national folklore, or at least limit the extent of such exploitation by foreigners. However, since that meeting, several African nations have promulgated new copyright legislation,² and only one--Tunisia--has included similar protections in its new copyright law.³

Similarly, the 1967 Stockholm revision of the Berne Convention for the Protection of Literary and Artistic Works concentrated not on the increased protection of African assets, but on decreased protection for the works of the developed countries, in a protocol which may never be effectively ratified.⁴ Whether or not a sufficient number of Berne Convention members ratify the protocol to make it workable, it would be desirable to proceed at once with programs designed to enable developing African nations to maximize their positive asset--folklore.

¹"Draft Model Copyright Law," Copyright Bulletin, Vol. XVIII, No. 19 (Unesco, 1965), Article 6.

²E.g., Kenya, Rhodesia, Tanzania, and Tunisia.

³See Law no. 66-12 of February 14, 1966, of Tunisia, Article 6, as amended by Law no. 67-3 of January 4, 1967.

⁴Berne Convention for the Protection of Literary and Artistic Works, as revised at Stockholm on July 14, 1967: Protocol Regarding Developing Countries, Article 1 (BIRPI, Section G1, p. 34, 1967).

II. Background

An examination of the past successes of various African nations, both at the national and international levels, suggests solutions which may be integrated into a legislative program for the future.

One small African country--Lesotho--has enjoyed nearly a century of thriving national literature. As early as 1893, Azariel E. Sekese, a Bantu author, produced a collection of traditional tales; his best known work, The Meeting of the Birds, appeared in 1928.⁵ A later author, Thomas Mofolo, wrote Chaka in 1910, and it has been translated into three major languages (English, 1931; French, 1940; and German, 1953).⁶ Between 1910 and 1964, forty-two Lesotho authors produced sixty-one books,⁷ an impressive number for an otherwise poorly endowed country of less than one million inhabitants. The reasons for this success include a wise Chief who kept his tribes unified throughout the period of colonization, and a national pride in culture inspired by Paris Evangelical missionaries.⁸ The less fortunate experiences of other African countries cannot be erased now, but Lesotho's success provides an incentive for African countries presently desiring a successful national literature.

Nigeria can also be cited as a country with a market for both English and vernacular versions of traditional tales and folklore. English writers borrow extensively and successfully from traditional Yorubu myths, as Amos Tutuola illustrates in The Palm Wine Drinkard, My Life in the Bush of Ghosts, Simbi and the Satyr of the Dark Jungle, The Brave African Huntress, and The Feather Woman of the Jungle. In a review of the last-mentioned work, Wole Soyinka alleges that Tutuola took many of his themes from an indigenous vernacular novelist, D. O. Fagunwa, whose Ogboju Ode is a best seller.⁹ Undoubtedly it can be

⁵Gerard, "Literature of Lesotho," Africa Report, October, 1966, p. 69.

⁶Ibid.

⁷Ibid., p. 68.

⁸Ibid.

⁹H. Kitchen, A Handbook of African Affairs (African-American Institute, 1964), pp. 286, 287.

profitable for many African countries to encourage both English and vernacular versions of their folklore.

For countries that have not spontaneously produced a national literature various kinds of encouragement are available. Rhodesia's solution was to set up the Rhodesia Literature Bureau in 1954. Although little information can be found concerning the actual operations of the Bureau, it appears that novelists are substantially aided by the co-operation of English, South African and Rhodesian publishers.¹⁰ Three years after the establishment of the Bureau, the first Shona novelette appeared--Fesa, by Solomon M. Mutswairo--and in the past ten years, eighteen Shona and seven Ndebele authors have produced thirty-one books, twenty-two in Shona and nine in Ndebele.¹¹ Other African nations could facilitate the publication of vernacular works through similar programs.

A broader program of encouragement is illustrated by the Franklin Book Programs, Inc. A non-profit, educational organization, FBP assisted indigenous Nigerian publishers in improving their local industry with financial aid from the Ford Foundation and a USAID contract. The program continued successfully from 1964 to 1968, when the civil war made its continuation impractical.¹² FBP helped to train publishing personnel, to choose the most publishable manuscripts and to carry out necessary legal and professional arrangements.¹³ Although the project aimed primarily at increasing the market and production of English educational and scientific materials, the conclusions reached by the project workers are applicable to the problem under discussion. In particular, the need

¹⁰Gerard, "African Literature in Rhodesia," Africa Report, May, 1968, p. 41.

¹¹Ibid.

¹²A Book Development Project in Nigeria 1964-1968, Final Report Submitted to The Ford Foundation by Franklin Book Programs, Inc., 432 Park Avenue South, New York, New York 10016, p. 1.

¹³Armstrong, "Book Publishing in Nigeria; Industry with a Future," Africa Report, April, 1966, p. 56.

for financial incentive for young Nigerian writers is emphasized:

This encouragement could be in the form of annual awards in various categories of writing, and grants which would permit promising young writers to start or continue manuscripts with especial value for Nigeria. This is particularly important in a society where for many years creative people will have to earn their living by holding down a daily job in probably a more pedestrian occupation.¹⁴

Other suggestions of the FBP program in Nigeria include the establishment of a National Book Development Council to provide training facilities at all stages of the publishing industry and to promote the international flow of books.¹⁵ At the sales level, FBP advises promotion by the organization of book festivals, book fairs, national book weeks and book exhibitions.¹⁶

Whether or not Nigeria has followed these suggestions is unknown at present, but again Tunisia showed itself to be progressive by setting up a program of state incentive on May 6, 1968.¹⁷ Under the 1968 Tunisian Decree, incentive awards are provided for all Tunisian authors in the following categories: original works, manuscript studies, translations and literary adaptations. In addition, a further award is granted in proportion to the number of published copies of a given work, thus promoting wider dissemination. Incentive awards are also paid to editors and publishers of the public and private sectors. Finally, annual prizes are offered for the best work in the categories of research, novels, and poetry anthologies, and another prize is granted for the best edition of the

¹⁴Franklin Book Programs, cited in footnote 12 supra, p. 146.

¹⁵Ibid., p. 134.

¹⁶Ibid., p. 162.

¹⁷See Decree no. 68-117 of May 6, 1968, promulgating a program of State encouragement of literary production: Official Journal of Tunisia of May 10, 1968, p. 482.

year.¹⁸ In order to encourage folkloric works, Tunisia could offer similarly categorized awards and prizes for works in the vernacular.

Folklore, of course, is not limited to the book medium; probably most Americans, if asked about the traditional heritage of the African countries, would first think of African music and dance, which are available primarily through the media of records and films. Numerous American and other foreign researchers and entrepreneurs go to Africa to film and record the musical and choreographic accomplishments of Africans. The problem lies in whether or not these foreigners properly compensate the individuals and their countries for the privilege of filming and recording their art. It is rumored that some anthropologists manage to use the music and dance they find for little or nothing. In contrast, the large entrepreneur can and should be more generous.

In 1967, for example, the American Broadcasting Company sent a large number of cameramen and technicians to Africa for ten months to film a political and cultural special on Africa. According to Mr. James Fleming of ABC,¹⁹ two million dollars were spent in the countries visited during that period. Some of the money was spent for the room and board of the producers and workers, but the bulk of the money went to individual Africans and tribes who consented to being filmed and recorded for the four-hour special. Other Africans were hired as aides to do odd jobs. Negotiations with the various tribes usually resulted in lump sum payments to chiefs in return for a general release on copyright and infringement matters. In some instances, it was necessary to pay the tribe for the sacrifice of a lamb. Although the actual accounts of the operation are not available, the arrangement appears to have been both fair and profitable for the African nations. The developing countries could be assured of fair treatment and economic success if an international commission were established to ascertain standards and to review negotiations.

¹⁸Ibid., Articles 1-10.

¹⁹The information about the ABC Television Special on Africa was related to me by Mr. James Fleming in a January, 1969, telephone conversation.

Already many African nations organize dance companies to tour the world, and records and films produced in Africa are being circulated in New York, London and Paris.²⁰ Such production is presently reserved for only the better developed nations; however, with the help of international regulation, all African countries could share their cultural heritage in return for well-deserved economic rewards.

III. The Future

The African nations, most of whom have had independence less than a decade, are doing a reasonably good job of updating their copyright legislation. With the exception of Tunisia, which has a new 1966 Copyright Act,²¹ the francophonic African nations still apply the 1957 Copyright Law of France;²² but thirteen of these nations have ratified the Berne Convention Brussels text of 1948.²³ The English-speaking countries have progressed in the opposite direction. While some of them evidently still apply the 1911 or 1956 Copyright Acts of the United Kingdom,²⁴ many of them have new legislation based on

²⁰See, e.g., Ousmane Sembene's Black Girl and Borom Sarret, Senegalese movies making their United States Premiere at the New Yorker Theater, January, 1969.

²¹See footnote 3 supra.

²²Law no. 57-296 of March 11, 1957 [1957] J.O.R.F. 2723, as applied to the overseas territories by Decrees nos. 58-447 and 448 of April 19, 1958 [1958] J.O.R.F. April 25, 1958; the countries include Algeria, Cameroon, Central African Republic, Chad, Dahomey, Gabon, Ivory Coast, Malagasy Republic, Mali, Niger, Senegal, Togo and Upper Volta.

²³The thirteen members of the Berne Convention, 1948 text, are Cameroon, Congo (Brazzaville), Congo (Kinshasa), Dahomey, Gabon, Ivory Coast, Malagasy Republic, Mali, Morocco, Niger, Senegal, Tunisia and Upper Volta.

²⁴E.g., Botswana, Gambia, Lesotho, Nigeria and Swaziland.

British law but tailored for African needs.²⁵ However, only six English-speaking countries have ratified the Universal Copyright Convention,²⁶ and only one has joined the Berne Convention.²⁷

If adopted, the progressive provisions of the Draft Model Copyright Law drawn up by the Committee of African Experts²⁸ would have a salutary effect on the copyright protections of the whole African continent. The Model Law serves as an excellent example for those countries with no post-independence on point; and those parts of the Model Law dealing with special protection for African folklore should be incorporated into the copyright laws recently adopted by the other African countries.

Under the Model Law, "works inspired by folklore," i.e., those "composed ... with the aid of elements which belong to the traditional African heritage,"²⁹ would be copyrightable.³⁰ In addition, they would receive special protections so that their exploitation might benefit the African nations first and foremost and not be abused by non-Africans.³¹

Notwithstanding a total or partial cession of the copyright in a work inspired by folklore, ... the author thereof shall retain the right to authorize uses of such work in the country in which the present Act is applicable.³²

²⁵See Ghana, Act No. 85/61 of November 8, 1961; Uganda, Act No. 12/64 of June 22, 1964; Zambia, Act No. 14/65 of February 4, 1965; Malawi, Act No. 38/65 of April 13, 1965; Sierra Leone, Act No. 62/65 of May 5, 1965; Kenya, Act No. 3/66 of February 24, 1966; Tanzania, Act No. 61/66 of December 14, 1966; and Rhodesia, Act No. 60/66 (as cited in Copyright Laws and Treaties of the World [Unesco, 1956] with latest supplements).

²⁶Ghana, Kenya, Liberia, Malawi, Nigeria and Zambia.

²⁷South Africa.

²⁸See footnote 1, supra.

²⁹Ibid., Article 6.

³⁰Ibid., Article 1(13).

³¹Ibid., Commentary to Article 6, p. 35.

³²Ibid., Article 6.

This means, for example, that foreign producers of phonograms who recorded works of folklore in Africa and obtained cession of copyright therein would not receive royalties from African broadcasting organizations for uses made by these organizations of such works.³³

The Model Law provides for inter-African co-operation in the enforcement of these protections, by treaty or by special agreement, since the majority of the African countries have similar problems and should unite in their attempts to develop the valuable asset of folklore.³⁴

A year after the drafting of this Model Law, Tunisia promulgated its 1966 Copyright Law, incorporating and improving upon these protective provisions for folklore. The Tunisian law provides that "the direct or indirect fixation of such folklore, with a view to its exploitation with gainful intent, requires an authorization from the Department in charge of Cultural Affairs...."³⁵ The Department then charges a reasonable fee for such fixation thus enriching the nation whenever its cultural heritage is exploited. In the same vein, a work inspired by folklore cannot be totally or partially assigned without the approval of the Department in charge of Cultural Affairs.³⁶ Although these provisions seem contrary to all common law notions of public domain, the regulation is reasonable and justifiable when read in conjunction with the needs of developing countries. The more easily these countries are able to exploit their assets the sooner they will become economically independent countries.

The difficulty of enforcement must be considered: what weight do the provisions of the Model Law and of the Tunisian law have, if nationals of foreign countries, notably of non-African countries, refuse to observe these limitations on the exploitation of folklore? To all appearances, neither the Brussels text of the Berne Convention, nor the as yet unratified Stockholm text of same

³³Ibid., Commentary to Article 6, p. 35.

³⁴Ibid., Commentary to Article 6, p. 36.

³⁵Law no. 66-12, cited in footnote 3, supra, Art. 6(2)

³⁶Ibid., Article 6(3).

nor the Universal Copyright Convention, would give effect to the higher degree of protection offered under the folklore provisions.³⁷ Article 15(4) of the Stockholm text³⁸ attempts to provide special protection for unpublished folklore of a Berne Convention member, upon the application of a country; but "it would presumably not require a country to protect foreign works that it would consider in its own public domain."³⁹ Furthermore, it does not even speak to the situation where original works have been inspired with the aid of folkloric elements, but would only protect unpublished folklore.

Since it is unrealistic to expect nationals of non-African countries to submit voluntarily to these folkloric protections, there must be devised a new and effective international agreement which will allow developing countries to reap maximum economic benefit from their folklore. The reluctance of developed countries to ratify the 1967 Stockholm Protocol Regarding Developing Countries stands as a warning, yet the two proposals are vastly different. Whereas the developed countries may reasonably believe that they should have exclusive power

³⁷See Articles 4-6 of the Brussels Act, 1948; Article 5 of the Stockholm Act, 1967; and Article II of the Universal Copyright Convention.

³⁸Article 15: (4)(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 who 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.

³⁹Barbara A. Ringer, "The Stockholm Conference of 1967," Copyright Society Bulletin, Vol. 14 (1967), pp. 424, 425.

of dissemination over their own works, they should recognize the property right on the part of African nations to their national folklore. Psychologically, the developed countries need not feel cheated out of money ordinarily due them--they would merely have to comply with certain economic regulations before using elements of African folklore. To be sure, some entrepreneurs may have to spend more money in order to film and record African culture, but they may also be received by the African people and chiefs with more enthusiasm and co-operation. In any case, the proposal is worth a trial.

First, each African nation desiring to control the exploitation of its folklore should have a Department or Ministry of Cultural Affairs specifically empowered to authorize and license the use of national folklore. A provision similar to Article 6 of the Tunisian law would be ideal.

Second, before or at the next meeting of the Berne Convention members, the representatives of all interested countries, developed and developing, should be asked to attend a special meeting for the purpose of drafting an international agreement and establishing an international commission for the protection of the folklore of Africa. Undoubtedly, the agreement on an effective solution would be reached only after long negotiations and discussions; but certain non-negotiable policies must be included for the agreement to be truly effective and beneficial to the developing countries.

(1) Even if the African nations are empowered to refuse authorizations and licenses arbitrarily, once they have given permission to nationals and/or non-nationals they must be held to the uniform application of certain economic standards, in order to prevent abuse of such power and to lessen competition among the various nations for the "best price."

(2) At the same time, for the most effective development of the African nations, a certain bias should be introduced in favor of exploitation by nationals and of local production. Thus the fee charged for an authorization may be 25 to 40% less for nationals than for non-nationals. In addition, a surcharge may be imposed if the authorized exploiter chooses to publish, print or record the work in

a foreign country rather than give the local publishers the work. This surcharge would be applied to nationals and non-nationals alike when not patronizing the local industries.

(3) A time limit of ten or twenty-five years might be written in to provide for a re-evaluation of the economic status of the developing countries at a timely date.

(4) A review board or tribunal of experts should be established to hear complaints and assure fair dealing on the part of all concerned.

(5) For administrative expedience, the authorizations and payments should be dealt with on a country-to-country basis. Each African country must therefore set up the necessary department. Standards, complaints and re-evaluation of the program, on the other hand, would be handled more effectively on an international level.

IV. Conclusion

It is possible that many countries will ratify such a program as outlined above. The developed countries may not feel as threatened by this program as by the 1967 Stockholm Protocol. Furthermore, the program can be effective even if only the major exploitation-oriented countries participate--e.g., the United States, Great Britain, France, etc.--since the smaller countries are less inclined to travel to Africa to write, film and record the folklore.

Meanwhile, at the national level, the African nations should establish programs to encourage and inspire their nationals to create, perform and produce works based on folklore. They have too few assets to be able to neglect one of their most attractive ones--folklore.