INTERNATIONAL ARTS LAW UPDATE

PATRICK J O'KEEFE[1]

Traditional Culture and Folklore

[143] Mention has already been made in this section of the *Media & Arts Law Review*[2] of work being undertaken in UNESCO on protection of traditional culture and folklore. The 31st General Conference of the organization decided that 'this question should be regulated by means of an international convention' and invited the Director-General 'to submit to it at its 32nd session a report on the situation calling for standard-setting and on the possible scope of such standard-setting, together with a preliminary draft international convention'. It should be noted that a large number of States had expressly indicated during debate in Commission IV that they did not consider explicit mention of an international convention should be made at that time but rather a general phrase such as 'international standard-setting instrument'. In UNESCO parlance this could mean a recommendation, a declaration or some other kind of 'soft law'. There appears to be a general impression that the rush to an international convention on this topic is unwise: particularly as many of its aspects are not yet agreed. For example, there is not even a satisfactory definition. Moreover, to prepare an international convention before the 32nd General Conference is an immense task taking into account the time needed for preparation and distribution of documents. There will be little time available for consultation with non-governmental organizations which have vital interests in questions of protection of traditional culture and folklore. One hopes that any document presented to the 32nd General Conference is indeed preliminary and not one expected to be adopted *instanter*.

Droit de Suite

Mention has also been made of developments in the European Union regarding moves to introduce a Directive on droit de suite and the passion and debate this had aroused.[3] The European Parliament finally reached an agreement on 2 July 2001; the Council of Ministers adopted the Directive on 19 July and it was published in the *Journal Official* on 13 October 2001 thus taking legal effect among the member States. Its full

---

[1] Consultant, Paris.
[2] (2000) 5 *Media & Arts Law Review* 123.
[3] Ibid.

title is the 'Directive on the Resale Right for the Benefit of the Author of an [144] Original Work of Art'. It is to be brought into force by Member States before 1 January 2006. Provision is made for regular reporting on its operation, particular attention being paid 'to the competitiveness of the market in modern and contemporary art in the Community, especially as regards the position of the Community in relation to relevant markets that do not apply the resale right and the fostering of artistic creativity and the management procedures in the Member States' (art 11). The first report is due 1 January 2009 and then every four years thereafter. It will be interesting to see the extent to which there is compliance with these procedures in light of the relative lack of compliance with those flowing from the Community's other major Directive affecting the art market – that dealing with returns.[4]

Certain general principles emerged from the long debate over this Directive. For example, harmonization of laws on the resale right in the Member States' legal systems are to go only to those domestic provisions that have the most direct impact on the functioning of the internal market. This was necessary in order to provide justification for the harmonization within the rules of the European Union. Individual Member States are to be responsible for regulating the exercise of the resale right, particularly the way it is managed. The use of a collecting society is seen as only one way of doing this and it is specifically stated that these must 'operate in a transparent and efficient manner' (para 28). On a much more general note, the Introduction to the Directive recognizes that few States outside the Union recognize the resale right. According to para 7, it follows logically that, in order to maintain its competitive advantage, the Union must open negotiations to make art 14*ter* of the Berne Convention compulsory; that is, other States would be required to introduce the resale right.

The term of protection of the resale right is the same as that for copyright within the European Union; that is, 70 years. It is to apply to all original works of art (see below) 'which, on 1 January 2006, are still protected by the legislation of the Member States

[4] *Directive 93/7/EEC on the Return of Cultural Objects Unlawfully Removed from the Territory of a Member State*. States made reports late or not at all and it was difficult to compare the information being given.

in the field of copyright or meet the criteria for protection under the provisions of this Directive at that date' (art 10).

Operative aspects of the Directive itself are significant. For example, the resale right is inalienable and cannot be waived. It applies to sales of original works of art subsequent to the transfer by the author but only if an art market professional is involved (art 1). One problem with this Directive is the looseness of its definitions. An 'art market professional' is a salesroom, art gallery or 'in general, any dealers in works of art'. Whether a person is a dealer may be a difficult question to decide and there is little guidance in existing law. Similarly with 'original work of art': a concept which has involved considerable discussion particularly as regards works produced in multiples and the degree of participation by the artist. The Directive states only that it covers copies 'which have been made in limited numbers by the artist himself or under his authority' and the copies will normally have been 'numbered, signed or otherwise duly authorised by the artist' (art 2). One problem is that no indication is given of the degree of involvement necessary by the artist to create an original work. For example, the artist may authorize a print to be made by someone but be in no way personally involved in its actual production. That may seem sufficient for it to be considered an original work under the Directive but would it generally be so regarded? Similar issues could arise for sculptures and photographs. All this leaves wide scope for interpretation and dispute unless States are much more precise in their implementing legislation.

Member States are entitled to set the minimum price for transactions to which the resale right applies but this cannot be more that EUR3000. The basic structure of the amount payable is then as follows (art 4):

- 4 per cent for the portion of the sale price up to EUR50,000 (Member States may make this 5 per cent if they wish);
- 3 per cent for the portion of the sale price from EUR50,000.01 to EUR200,000; [145]
- 1 per cent for the portion of the sale price from EUR200,000.01 to EUR350,000;

- 0.5 per cent for the portion of the sale price from EUR350,000.01 to EUR500,000;
- 0.25 per cent for the portion of the sale price exceeding EUR500,000.

There is a cap on the total amount payable of EUR12,500. The Directive does not specifically state that if the sale price exceeds the minimum amount then the amount payable is based on the difference between the minimum and the total sum paid. However, this seems to be implicit in the terms of art 4. For example, it specifies that if a State wants to set a minimum lower than EUR3000 it must also set a rate for ‘the portion of the sale price up to EUR3000’. This would mean that, if a State sets the minimum at EUR3000, nothing would be payable if a painting was sold for EUR2999 but on a sale at EUR3001 an amount of EUR120.04 would be. That result would seem most peculiar and is an issue States will have to take into account in implementing the Directive. Overall, unless a State sets a very low minimum, art of a more decorative nature will not be affected by the resale right. The prices are net of tax.

Inheritance was also a controversial issue. In the end it was decided that royalties should be paid to those entitled under the author after his death (art 6). Precisely who benefits will thus depend on local inheritance laws. However, Member States who do not now apply a resale right will have until 1 January 2010 before they must extend this benefit to heirs. This period may be extended by a further two years ‘if necessary to enable the economic operators in that Member State to adapt gradually to the resale right system whilst maintaining their economic viability’. This is obviously directed at the situation of the United Kingdom which argued that its art market would be severely affected by introduction of the resale right. However, it is difficult to see what exactly dealers and auctioneers in that country will be able to do apart from putting off the day of reckoning.

Nationals of third States and their heirs are only entitled to the resale right on a basis of reciprocity unless they have their ‘habitual residence’ in a Member State which decides to give them such right (art 7). In other words, unless an Australian artist lives in the Union, he or she will only enjoy this right on sales in the European Union if

nationals of Union Member States have similar protection in Australia. The Commission is to publish a list of States that are regarded as providing reciprocity.

For three years after the resale, authors and their heirs are to have the right to obtain information from any art market professional 'that may be necessary in order to secure payment of royalties in respect of the resale'. Consequently, auctioneers and dealers will have to be able to provide not only the price at which a work of art was sold but also the name and contact details of the seller. Considering the secrecy surrounding many transactions in the art market, this would necessitate significant changes in relationships between the seller and the intermediary. It will be interesting to see if Member States, particularly the United Kingdom, will try to use art 1(4) to avoid this. Under that Article, a State may provide that the art market professional pays the royalty rather than the seller. There would not seem to be anything against limiting this arrangement to the three years that the art market professional is liable to provide information. The seller and the professional could then make arrangements among themselves for payment. For example, a sum equal to the royalty could be paid into a trust account for a period of three years after which it would be released to the seller; it being accepted that if no action is taken by the artist or on his or her behalf in those three years then it is unlikely that the sale will be tracked down.

[146] **World Bank and Indigenous Peoples**

The World Bank Group is one of the world's largest sources of development assistance. In the course of this it becomes involved in projects impacting on indigenous peoples. To provide guidance to Bank staff and others involved, Operational Directive 4.20 was issued in September 1991. A revision of the Bank's policies towards indigenous peoples began in 1998 with worldwide consultation on an Approach Paper followed by internal Bank discussions. At the same time, the Bank is converting its policies from Operational Directive format into Operational Policies distinguishing between mandatory policy and procedure and advisory good practice.

In the period July 2001 to 15 February 2002, the views of borrower governments, indigenous organizations, non-governmental organizations, academics and development institutions were sought on a document entitled *Draft Operational Policies (OP 4.10): Indigenous Peoples*. The results of such consultations together

with more than 100 written comments are now being assessed in making the final draft of the policy.

Who are indigenous peoples? Determining this is controversial. OP 4.10 does not attempt a universal definition. Rather, it looks to whether a group in a particular geographic area has some of what it calls 'distinctive characteristics' such as:

- close attachment to ancestral territories and the natural resources in them;
- presence of customary social and political institutions;
- economic systems primarily oriented to subsistence production;
- an indigenous language, often different from the predominant language; and
- self-identification and identification by others as members of a distinct cultural group.

These are not assigned any priority. Groups who have left their communities of origin and moved to urban areas and/or migrated to obtain wage labor do not qualify as indigenous peoples for the purpose of OP 4.10.

Operational Directive 4.20 made only tangential reference to issues concerning the cultural heritage of indigenous peoples. For example, it stated that one aspect of the Bank's objective towards indigenous peoples was the fostering of cultural uniqueness. Development plans had to be culturally appropriate and local patterns of social organization, religious beliefs and resource use should be taken into account in the design of such a plan.

OP 4.10 goes a little further. For example, it recognizes that the 'economies, identities and forms of social organization of indigenous peoples are often closely tied to land, water and other natural resources' (para 12). Because of this, the borrower in a Bank assisted project must ensure that the people concerned continue to have access to natural resources vital to the sustainability of their culture. Moreover, in the design of the project, the borrower must give particular attention to 'the cultural, religious and sacred values that these groups attribute to their lands and resources' and to 'their customary use of the natural resources vital to their cultures and ways of life'

(para 13). These provisions are useful for indigenous peoples and must be read in conjunction with the Bank *Operational Policy Note on Safeguarding Cultural Property in Bank-Assisted Projects* (OPN 11.03). Nevertheless, they are a long way from providing specific safeguards on issues dealt with in the Draft United Nations *Declaration on the Rights of Indigenous Peoples* and the Mataatua *Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*.

More worrying is para 16 which reads: 'When a Bank-assisted project envisions the commercial use of cultural resources of indigenous groups, including their knowledge, Bank policy requires that such groups agree to and derive benefits from the use of such resources'. It is not clear what involvement of the group is necessary in deciding to use this knowledge. It would be unacceptable for a borrower to come up with a project for commercial use of such knowledge and the indigenous group then be compelled to agree to its use even if benefits were derived.

[147] The importance of indigenous knowledge is stressed in para 21: 'The knowledge and cultures of indigenous peoples are resources vital to their survival and to sustainable development'. OP 4.10 indicates that the Bank may provide assistance to the borrower to enhance those resources 'including through the strengthening of intellectual property rights'. Unfortunately, studies over the past few years have shown that existing intellectual property rights such as copyright and patent procedures are often inappropriate for protection of indigenous knowledge and culture. Indeed, it is hoped that the current work in UNESCO on traditional culture and folklore will provide guidance on the nature of effective protection.