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THE PROTECTION OF TRADITIONAL KNOWLEDGE

ADDENDUM TO COLLATION OF WRITTEN COMMENTS ON THE LIST OF
ISSUES

Document prepared by the Secretariat

1. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee') decided at its tenth session on an intersessional commentary process concerning the List of Issues relating to traditional knowledge established by the Committee. The Annex to document WIPO/GRTKF/IC/11/5(a) entitled "Collation of Written Comments on the List of Issues" contains those comments received by the WIPO Secretariat up to April 30, 2007, in line with the intersessional commentary process. The Annex to document WIPO/GRTKF/IC/11/5(a) Add. contains additional comments received after the publication of the first collation in document WIPO/GRTKF/IC/11/5(a).

2. The Annex to the present document contains the comments of Norway that were inadvertently omitted from WIPO/GRTKF/IC/11/5(a), and additional comments received from the Arts Law Center after the publication of the two first collations.

3. The Committee is invited to review and discuss the comments collated in the Annex in addition to those circulated with documents WIPO/GRTKF/IC/11/5 (a) and WIPO/GRTKF/IC/11/5 (a) Add.

[Annex follows]

ANNEX

COMMENTS RECEIVED ON
THE LIST OF ISSUES CONCERNING PROTECTION OF
TRADITIONAL KNOWLEDGE

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I. DEFINITION OF TRADITIONAL KNOWLEDGE (TK) THAT SHOULD BE PROTECTED.

Norway

Traditional Knowledge is knowledge that is generated, preserved and transmitted in a traditional and intergenerational context, which is distinctively associated with a community which preserves and transmits it between generations and is an integral to the cultural identity of the community which is recognized as holding the knowledge.

The ordinary meaning of the terms in light of the object and purpose, and discussions in the IGC, as well as the documents provided for the sessions of the IGC provide an extensive basis for the understanding of what knowledge that should be protected. A firm definition cannot be established and would jeopardize the need for national flexibility.

Arts Law Centre of Australia

Arts Law notes that clarification of the definition of “Traditional Knowledge” is the threshold issue that must be settled before confirmation of the other agreed list of Issues on Traditional Knowledge.

While Arts Law recognizes that Traditional Knowledge is inseparable from Traditional Cultural Expressions which are the product and embodiment of Traditional Knowledge, Arts Law supports the definition of “Traditional Knowledge” provided in Article 3(2) of the Substantive Provisions of the Policy Objectives and Core Principles on Traditional Knowledge.

Arts Law notes that the definition of “traditional” and “indigenous” must be examined and clarified if necessary.

II. WHO SHOULD BENEFIT FROM ANY SUCH PROTECTION OR WHO HOLD THE RIGHTS TO PROTECTABLE TK?

Norway

The beneficiaries should be the community that has generated, preserved and transmitted the traditional knowledge and which still continues to do so, and in which the knowledge is transmitted in a traditional and inter generational context. Local customs may provide guidance when identifying the appropriate beneficiaries and who is entitled to represent the collective group, e.g. an organization for the beneficiaries or similar.

Arts Law Centre

Arts Law agrees in principle with Articles 4 (Eligibility for Protection) and 5 (Beneficiaries of Protection) of the Substantive Provisions of the Policy Objectives and Core Principles on Traditional Knowledge.

However, Arts Law notes that further clarity on terms including: “indigenous peoples”, “traditional” and “other cultural communities” is necessary in order that these principles be effectively implemented.

Eligibility under Article 4

In relation to, Arts Law is concerned that protection requires “traditional knowledge” to satisfy sub-clauses (i), (ii) **and** (iii) in order to gain protection. This is of particular concern in relation to sub-clauses (ii).

Sub-clause (ii) requires that the traditional knowledge is “distinctively associated with traditional or indigenous community or people that preserves and transmits it between generations”. This requirement of “distinctiveness” may limit protection for many Australian indigenous people in light of the widespread social dislocation which characterizes such people. This has given rise to instances where multiple communities claim custodianship of particular traditional knowledge.

Furthermore, the historic social dislocation of indigenous people in Australia and the subsequent dilution of TK which has resulted from such history may also jeopardize the likelihood of protection under this Article.

Beneficiaries of Protection under Article 5

Arts Law supports the notion that beneficiaries of protection should be the traditional holders of that traditional knowledge, i.e. the indigenous peoples who have a connection with that traditional knowledge.

Arts Law also supports the principle that entitlement to protection takes into account customary protocols, understandings, laws and practices of those communities.

There should be a presumption in favor of the Indigenous community claiming to be the custodians of the TK and the onus should be on others to disprove the connection.

III. WHAT OBJECTIVE IS SOUGHT TO BE ACHIEVED THROUGH ACCORDING INTELLECTUAL PROPERTY PROTECTION (ECONOMIC RIGHTS, MORAL RIGHTS)?

Norway

In Norway's opinion the main objectives of protection in regard of traditional knowledge are:

- to prevent misappropriation
- preclude the granting of unauthorized IP rights

Furthermore, protection should seek to:

- ensure prior informed consent and exchanges based on mutually agreed terms
- promote equitable benefit-sharing
- promote conservation and sustainable use

By providing protection one also secures recognition and respect of the intrinsic value of traditional knowledge.

The rationale behind Norway's view is further elaborated in document WIPO/GRTKF/IC/9/12 paragraphs 21 – 24.

Arts Law Centre

Arts Law notes that the IGC mandate to set out measures aimed at preventing misappropriation of TK by granting intellectual property rights is an overarching objective of this inquiry. Accordingly, Arts Law agrees with views proposed by Brazil that the grant of Intellectual property rights related to traditional knowledge is “contingent upon compliance with the requirements of prior informed consent and the benefit-sharing, by demanding that IP applications disclose evidence to that effect”.

Arts Law also supports the principles espoused in Articles 6 (Fair and equitable benefit-sharing and recognition of knowledge holders) and 7 ((Principle of Prior Informed Consent) of the Substantive Provisions of the Policy Objectives and Core Principles on Traditional Knowledge.

IV. WHAT FORMS OF BEHAVIOR IN RELATION TO THE PROTECTABLE TK SHOULD BE CONSIDERED UNACCEPTABLE/ILLEGAL?

Norway

Adequate and effective protection should be given against misappropriation and unfair use such as use against honest practices in cultural, industrial or commercial matters.

Beneficiaries should in particular be provided with effective means to ensure:

- that the principle of prior informed consent applies to access to traditional knowledge,
- benefits arising from certain uses are fairly and equitably shared,
- all acts of such a nature as to create confusion by any means whatsoever with the origin are repressed, and
- all acts of such a nature that would be offensive for the holder are repressed.

In document WIPO/GRTKF/IC/9/12 paragraph 38 Norway proposed a draft recommendation to this effect.

Arts Law Centre

Arts Law supports the notion that any act that impairs the recognition or exercise of the rights held by communities over their traditional knowledge or traditional cultural expressions are unacceptable and should be protected against under international conventions and domestic laws which enshrine such conventions in legislation. To this end, Arts Law supports the tenets of Article 1 (Protection Against Misappropriation) of the Policy Objectives and Core Principles on Traditional Knowledge.

However, Arts Law is concerned that there must be a settled definition of the elements of “misappropriation”, without which there is a likelihood of divergence of opinion as to what amounts to a transgression.

Furthermore, Arts Law is concerned that Article 1, clause 2 defines “misappropriation” the acquisition of traditional knowledge by “unfair or illicit means”, in light of the fact that the notion of “fairness” may be open to dispute. In Arts Law’s view, “misappropriation” should be defined as “acquisition, appropriation or utilization without the consent of the traditional knowledge holders.”

V. SHOULD THERE BE ANY EXCEPTIONS OR LIMITATIONS TO RIGHTS
ATTACHING TO PROTECTABLE TK?

Norway

Taking inspiration from traditional intellectual property rights law, limitations on the protection of traditional knowledge should be examined. In particular the possibility for non-commercial and respectful use, including use in education and research, should be considered. Further limitations in the public interest might also be appropriate.

Arts Law Centre

Article 8(1) (Exceptions and Limitations) is an appropriate starting point for a discussion of the principles which might limit any protection of traditional knowledge.

Arts Law suggests that the use of traditional knowledge by third parties should not have a detrimental environmental, economic or cultural effect on the traditional or indigenous community.

Arts Law notes that Article 8(2) which provides a fair use exception from the principles of prior informed consent for knowledge already available to the general public would allow for the continued work of academic, research and cultural institutions dealing with traditional knowledge. However, Arts Law suggests that the provision should be further qualified to provide that any use of the traditional knowledge that is generally available to the public, does not cause harm to the custodians of that knowledge. This requirement should be in addition to the principle of equitable compensation.

VI. FOR HOW LONG SHOULD PROTECTION BE ACCORDED?

Norway

Protection should be provided for as long as the criteria for protection are fulfilled, and thus not necessarily be limited in time.

Arts Law Centre

Arts Law agrees that unlike certain intellectual property protection, the duration of protection should exist for as long as the knowledge is eligible to be protected. Accordingly, the provisions of Article 9(1) (Duration of Protection) are the appropriate starting point for the key issues surrounding duration.

VII. TO WHAT EXTENT DO EXISTING IPRS ALREADY AFFORD PROTECTION?
WHAT GAPS NEED TO BE FILLED?

Norway

Existing IPRs (as i.e. regulated in treaties under the auspices of WIPO) already provides varying degrees of protection, depending on the circumstances. The conditions for patentability will for instance prevent that someone is granted a patent on an invention that does not involve the necessary inventive step compared to existing publicly known traditional knowledge.

However, the specific characteristics and needs in relation to the protection of traditional knowledge are not necessarily appropriately addressed in the traditional IPR systems. Furthermore, the protection accorded is fragmented and varies between different jurisdictions and does not recognize the value of traditional knowledge as such.

Arts Law Centre

Existing Australian law protect traditional knowledge to an even lesser extent than they protect traditional cultural expressions. Indeed protection afforded to traditional knowledge under Australian law generally takes the form of protection of TCEs. These protections operate under the following types of laws:

- Copyright
- Moral Rights
- Trademark
- Performer's Rights
- Consumer Protection and Trade Practices
- Passing Off
- Trade secrets
- Confidentiality
- Heritage Protection

It is for this reason that Arts Law is of the view that traditional knowledge and traditional cultural expressions are inseparable.

Given the limited protections available to TCEs under Australian law, Arts Law supports the introduction of principles which recognise:

- communal ownership/custodianship of traditional knowledge;
- traditional knowledge that is not reduced to a material form;
- duration of protection that is perpetual.

Recognition of any of these principles will increase the scope of protection to a significant extent.

VIII. WHAT SANCTIONS OR PENALTIES SHOULD APPLY TO BEHAVIOR OR ACTS
CONSIDERED TO BE UNACCEPTABLE/ILLEGAL?

Norway

Appropriate and effective sanctions should be provided for in national law depending upon the infringement in question. Part III of the Trips Agreement provides guidance in this respect.

Arts Law Centre

As mentioned in Issue 5 above, Arts Law supports the tenets espoused in Article 8(1). Criminal and civil sanctions should be introduced to domestic law to address these transgressions.

IX. WHICH ISSUES SHOULD BE DEALT WITH INTERNATIONALLY AND WHICH NATIONALLY, OR WHAT DIVISION SHOULD BE MADE BETWEEN INTERNATIONAL REGULATION AND NATIONAL REGULATION?

Norway

The core elements should be dealt with internationally, thus providing a minimum standard of protection. However, the need for flexibility should also be recognized. One system of protection does not necessarily fit all and different concerns locally or related to the specific subject matter should also be taken into account.

Arts Law Centre

As mentioned above, there are limits to the protection afforded to TK under existing Australian domestic law. An international framework, whether that take the form of a treaty or a convention of universal principles which Australia would implement into its domestic laws.

X. HOW SHOULD FOREIGN RIGHTS HOLDERS/BENEFICIARIES BE TREATED?

Norway

With regard to the custodian's economic and moral rights, as provided for in accordance with the proposed recommendation set out in document WIPO/GRTKF/IC/9/12 paragraph 38 national treatment and MFN should be granted, with the possibility for reciprocity provisions

Arts Law Centre

The principle of national treatment should apply. Arts law agrees that the provisions set forth in article 14 provide a useful basis for answering this question.

[End of Annex and of document]